BEFORE THE WAITANGI TRIBUNAL **WAI 3300**
TBC

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	Tomokia ngā tatau o Matangireia (Wai 3300)
AND **IN THE MATTER OF**	a claim by **Pita Tipene, Moana Maniapoto, Donna Kerridge, George Laking, India Logan-Riley** and **Veronica Tawhai** for and on behalf of **Ngā Toki Whakarururanga (TBC)**

STATEMENT OF CLAIM
Dated at Rotorua, on this 2nd day of April 2024

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TĒNĀ E TE TARAIPIUNARA

THE CLAIMANTS

1. This Statement of Claim is filed on behalf of the following named persons on their own behalf or in their representative capacity:

    a) Pita Tipene, Moana Maniapoto, Donna Kerridge, George Laking, India Logan-Riley and Veronica Tawhai for and on behalf of Ngā Toki Whakarururanga.

2. For the purpose of this statement of claim all of the parties above will be referred to as "**the Claimants**".

3. The Claimants are Māori and meet the requirements for bringing a claim as set out under section 6 of the Treaty of Waitangi Act 1975.

4. The historical and contemporary acts and omissions of the Crown in failing to honour its constitutional obligations under He Whakaputanga o te Rangatiratanga o Nū Tīreni me Te Tiriti o Waitangi have prejudicially affected the Claimants, as particularised in this Statement of Claim.

5. The Crown has indicated that it intends to proceed imminently with a number of new Acts that constitute additional fundamental breaches of its obligations under Te Tiriti o Waitangi, as further particularised in this Statement of Claim.

6. The Claimants reserve the right to amend this Statement of Claim.

THE CLAIM

7. This Statement of Claim is filed on behalf Pita Tipene, Moana Maniapoto, Donna Kerridge, George Laking, India Logan-Riley and Veronica Tawhai for and on behalf of Ngā Toki Whakarururanga (Ngā Toki Whakarururanga).

8. This claim concerns the failure of the Crown to give effect to He Whakaputanga and Te Tiriti through the ongoing denial of hapū tino

rangatiratanga and the consequent unilateral design and implementation of institutions where the division of constitutional powers ignore Tikanga Māori guarantees of Mana Māori Motuhake to hapū and Māori generally.

THE CONTEXT

9. He Whakaputanga o te Rangatiratanga o Nu Tireni 1835 me Te Tiriti o Waitangi 1840 are the constitutional foundations of Aotearoa New Zealand agreed to by the authorised representatives of the British Crown. They affirmed the pre-existing and enduring Mana Motuhake of ngā Rangatira over te ao Māori on behalf of their hapū and guaranteed the continuance of their authority and responsibilities, termed their "tino rangatiratanga", and the associated laws, values, governance arrangements, political institutions and processes, economic systems, and treaty making authority. Under Te Tiriti o Waitangi, their tino rangatiratanga was to operate alongside, and in equal status to, the "kāwanatanga" authority of the newly arrived British Governor over his people.

10. The Crown has continuously, systematically and deliberately failed to honour its obligations under He Whakaputanga me Te Tiriti, and the principles derived therefrom.

11. The Waitangi Tribunal in *Te Paparahi o te Raki* (Wai 1040) ("**Te Raki**") Stage One found conclusively that the Rangatira who signed te Tiriti o Waitangi did not their cede sovereignty:[1]

> *The Rangatira who signed te Tiriti did not cede their sovereignty. That is they did not cede their authority to make and enforce law over their people or their territories. Rather they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In*

[1] Waitangi Tribunal, *He Whakaputanga me te Tiriti. The Declaration and the Treaty. The Report on Stage One of the Te Paparahi o te Raki Inquiry,* (Wai 1040), 2014, xxii

> *essence, Rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā.*[2]

12. The Report on Stage Two of the Inquiry reiterated the finding and added:

> *As the treaty relationship unfolded …, it was characterised by the Crown overstepping the bounds of kāwanatanga, in conjunction with continual erosion of Māori tino rangatiratanga.* [3]

13. The Tribunal also stated unambiguously that the Crown's claim to sovereignty is inconsistent with – in other words, is a breach of - Te Tiriti o Waitangi which the Rangatira signed:

> *It is evident to us that by proclaiming sovereignty over the northern island of New Zealand in May 1840 by virtue of 'cession' by the chiefs, the Crown acted inconsistently with the guarantees of te Tiriti as expressed in the te reo text*.[4]

14. That finding in relation to Te Raki Māori is equally applicable to the Claimants.

15. The Tribunal in *Te Raki* deferred what that finding means in Aotearoa New Zealand today to this Kaupapa inquiry into constitutional issues. We have now arrived at that moment. The Claimants are unwavering in their insistence that the rights, responsibilities, expectations and entitlements agreed to in Te Tiriti in 1840 are no different today. The Crown cannot seek to capitalise on its history of dishonour to justify its continued breach of those foundational obligations.

16. Pursuant to its functions and powers under the Treaty of Waitangi Act 1975, the Waitangi Tribunal is called upon in this Inquiry to examine the Crown's failure to honour its constitutional obligations to the Claimants and other Māori under Te Tiriti o Waitangi, and the principles derived therefrom, and to make practical recommendations on the constitutional transformation that is required to honour Te Tiriti o Waitangi today and into the future.

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[2] Waitangi Tribunal, *Tino Rangatiratanga me Te Kāwanatanga. The Report on Stage 2 of Te Paparahi o te Raki Inquiry* (Wai 1040), 2023, p.xxiv
[3] As summarised by the Tribunal in *Te Paparahi o te Raki* Stage 2, p.xxiv
[4] *Te Paparahi o te Raki* Stage 2, p.xxxvi

17. It is time for the Crown to deliver on its commitments in Te Tiriti. The Tribunal concluded in *Te Raki* (Stage 2) that:

> *Under the treaty, it has always been the Crown's duty to give effect to the guarantee of tino rangatiratanga contained in the plain meaning of article 2. That duty has been heightened by the Crown's progressive expansion of its own authority from 1840 in ways that have encroached on and often eroded that of Māori.*
>
> *Today, the Crown has the power and capacity to recognise, respect and give effect to the treaty guarantee of rangatiratanga. It has had this power since it signed te Tiriti. Its duty to give effect to the guarantee of tino rangatiratanga is as important today as it was in 1840. That is the basis for te houruatanga, a partnership in which each party to the treaty recognises the authority of the other, and together they decide how each will exercise that authority on matters in which both have important interests. ...*[5]

18. The claimants say that no matter could be more important than decisions over the constitutional relationships, powers and institutions that govern Aotearoa New Zealand, and the meaning to be given to the foundational principles that underpin that relationship set out in te Tiriti o Waitangi.

19. This is now a matter of urgency. The Tribunal is finally considering the constitutional form that te Tiriti o Waitangi should take in Aotearoa today just as the Crown proposes to undo the incremental steps that have brought it to this point. The Coalition Government elected in 2023 has adopted a policy platform that targets almost every initiative that Māori have secured over the past 50 years.[6] The agreement between the National Party and ACT New Zealand includes the introduction of legislation to the Parliament that would effectively write te Tiriti o Waitangi out of existence for the purposes of the Crown. That is no surprise to the Claimants. The Crown has systematically suppressed, resisted and subverted all previous attempts to see Te Tiriti honoured. But it cannot be allowed to succeed.

20. The Claimants urge the Tribunal not to fail them by succumbing to the pressure of threats to its continued existence and to its funding and

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[5] *Te Paparahi o te Raki* Stage 2, p.87

[6] Coalition Agreement. New Zealand National Party and ACT New Zealand, 54th Parliament, 24 November 2023; Coalition Agreement. New Zealand National Party and New Zealand First, 54th Parliament, 24 November 2023.

retreating from the tika position on the constitutional relationship of tino rangatiratanga and kāwanatanga adopted in recent inquiries. They, and other Māori, have waited too long for this Constitutional Kaupapa to be seriously addressed by the Crown.

CLAIM: CAUSES OF ACTION

21. The Claimants allege the following breaches of the principles of Te Tiriti o Waitangi by the Crown that have caused historical and ongoing prejudice to them and other Māori. These causes of action are framed at different levels of specificity and are intended to minimise duplication with claims relating to the Crown's acts and omissions raised by other claimants and in parallel Waitangi Tribunal inquiries:

    (i) **Cause of Action 1**: the rangatiratanga breach – the Crown has systematically, continually and deliberately breached its fundamental obligation to adopt and maintain the constitutional relationship of Rangatiratanga to Kāwanatanga agreed to in Te Tiriti o Waitangi.

    This has prejudiced the Claimants and other Māori by depriving them of the right and ability to exercise self-determination over their own lives in a manner consistent with Tikanga Maori including their laws, values, governance arrangements, political institutions and processes, economic systems, and treaty making authority as was guaranteed under Te Tiriti o Waitangi.

    (ii) **Cause of Action 2**: failing to honour Te Tiriti o Waitangi through use of the "principles of the Treaty" – the deliberate and systematic deployment by the Crown of the "principles of the Treaty" as a device to rewrite its obligations under Te Tiriti o Waitangi has resulted in systemic failure by the Crown to meet those obligations. The proposed introduction of the Treaty Principles Bill by the Coalition Government perpetuates that breach, both in its process and its content.

The device of the "principles of the Treaty" has prejudiced the Claimants and other Māori by perpetuating an approach by the legislature, government agencies and the judicial system that has denied them their self-determination, and the social, economic, cultural and further consequences of that. If the Treaty Principles Bill were to be passed, it would constitute a deliberate denial of te Tiriti o Waitangi itself and deepen those existing harms. Even if it is not passed, its introduction will have caused great emotional harm and fostered an environment in which such views are considered legitimate.

(iii) **Cause of Action 3**: undermining rangatiratanga through economic actions supported by the kāwanatanga – the imposition of an extractive and exploitative capitalist economy has dispossessed and impoverished Māori, and has excluded Māori from the right to exercise rangatiratanga and kaitiakitanga over taonga in a manner consistent with tikanga and mātauranga Māori, as evidenced in Treaty settlements, the Crown's "devolution" policies, and the Crown's deliberate extinguishment of hapū rights.

The prejudice this has caused to hapū, iwi and Māori generally has long been recognised by the Tribunal through inquiries dealing with land, water, fisheries, health, education, among many others. The prejudice is compounded by the current approach adopted by the Crown, including its Red Book settlement policies, the arbitrary and unilateral termination of services contracts under the Coalition Government's 100 Days Action Agenda, and the proposed passage of the Fast Track Approvals Bill.

(iv) **Cause of Action 4**: overreach of the kāwanatanga in the international sphere – the Crown's assumption of exclusive sovereign authority to make international trade and investment agreements, which impact on the responsibilities, duties, rights and interests of Māori under Te Tiriti o Waitangi, is sourced in imperialist ideologies used to justify colonisation and to deny the exercise of rangatiratanga over the

making of such treaties and over the matters these agreements impact negatively upon. The Crown claims the exclusive right to make such treaties, excluding Māori from a seat at the table on decisions that directly impact on their responsibilities, duties, rights and interests under te Tiriti.

Those potential prejudice caused by these agreements through the "chilling effect" on Crown actions to redress breaches of its Tiriti obligations has been acknowledged by several Tribunals, and risks being compounded by the current government's policies to grant foreign investors' rights under the Fast Track Approvals Bill.

RECOMMENDATIONS AND REDRESS

22. The Claimants seek definitive findings that:

    (i) The constitutional authority and responsibilities of Mana Motuhake and Tino Rangatiratanga, including in relation to laws, values, governance arrangements, political institutions and processes, economic systems, and treaty making are enduring to the present day, and need to be exercised on equal terms with the authority of Kāwanatanga; and

    (ii) the proposed actions, policies and legislation that form part of the Coalition Government agreements between the National Party and the ACT Party and the National Party and New Zealand First constitute a further egregious breach of the Crown's obligations under Te Tiriti o Waitangi, and the principles derived therefrom.

23. The fundamental grievance to be addressed in this Inquiry is colonisation itself, and the power structures it has established and maintained. The only tenable redress for a finding that the Crown has breached its constitutional obligations is constitutional transformation. The Tribunal's recommendations needs to lay the foundations for that transformation to begin.

24. The form that redress should take needs to build on the many initiatives taken by hapū, iwi, confederations and pan-Māori entities to exercise tino rangatiratanga ever since the Crown's unlawful unilateral assertion of sovereignty in 1840, and the constitutional debates that have occurred in recent years, including hui at Ngaruawahia in 1984 on Te Tiriti,[7] Hirangi in 1995 on the Fiscal Envelope,[8] at Paeroa in 2003 on the Seabed and Foreshore,[9] and most recently the national unity hui at Turangawaewae in January 2024, the resolutions of Ngāti Pikiao in preparation for that hui set out below, and speeches on Waitangi Day on 6 February 2024.

25. At the same time, the Tribunal needs to address the immediate and urgent threats to rangatiratanga posed by the current Coalition Government.

26. The Claimants seek the following recommendations:

    (i) a federalist constitutional framework that re-establishes te Tino Rangatiratanga as a recognised form of independent self-governance in Aotearoa New Zealand, to operate alongside Kāwanatanga, as states of equal standing within a unitary state that operates nationally and internationally, and convene a constitutional convention to bring this about;

    (ii) the immediate cessation of the Coalition Government's proposed actions, policies and legislation that constitute further breaches of its Tiriti obligations;

    (iii) a mechanism that re-empowers Māori to exercise equal authority in the international domain, including in the making of international trade and investment treaties;

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[7] Arapera Blank, Manuka Henare and Haare Williams, *He Korero Mo Waitangi 1984. He Tohu Aroha Ki Ngā Tupuna,* Runanga Ki Waitangi, Auckland, 1985

[8] Mason Durie, *Proceedings of a Hui Held at Hirangi Marae, Turangi,* 29 January 1995, 25(2) Victoria University of Wellington Law Review, July 1995,109-117

[9] Paeroa Declaration on the Foreshore and Seabed, Paeroa hui of Iwi and Hapu on Saturday, July 12, 2003

(iv) urgent revision of the Cabinet Manual, guidance to Government and Crown agencies, and other Crown documents to accurately represent the Crown's obligations and Māori rights, responsibilities, duties and interests under Te Tiriti o Waitangi; and

(v) annual reports to the Tribunal on the actions taken to implement these recommendations.

THE TRIBUNAL'S MANDATE AND METHODOLOGY

27. In addressing this claim, the Waitangi Tribunal must act pursuant to its legal mandate in the Treaty of Waitangi Act 1975 ("**The Act**"). The role of the Tribunal, set out primarily in sections 5 and 6 of the Act, involves inquiring into claims that the Crown's conduct, in relation to any ordinance or Act, or regulations, order, proclamation, notice, or other statutory instrument, or its policies or practices, or acts or omissions, was or is inconsistent with the principles of Te Tiriti/The Treaty.

28. As a Commission of Inquiry under section 9, the Tribunal is not fettered by precedent or common law doctrine in how it performs its responsibilities, although it may be subject to judicial review.

29. The Tribunal is exclusively responsible for determining the meaning of Te Tiriti/The Treaty for the purposes of claims under the Act. Under section 5(2):

> *In exercising any of its functions under this section the Tribunal shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.*

30. The Tribunal set this methodology out clearly in its report in *Te Raki* (Stage One). Noting it was bound to regard the treaty as comprising two texts, the Tribunal agreed with previous Tribunal reports that the Māori text was to be given special weight in establishing the meaning and effect.[10] Once it had considered the English text with an open mind, the Tribunal

[10] *Paparahi o te Raki Inquiry* Stage 1, p.522

considered itself under no obligation to find some middle ground meaning between the two versions. The Report remarked that, in addition to section 6, the centrality of the principles to the Tribunal's functions was emphasised in the preamble to the Act. The Tribunal then addressed the question of what its finding that there was no cession of sovereignty in Te Tiriti meant for the principles:

> *Given we conclude that Māori did not cede their sovereignty through te Tiriti, what implications arise for the principles of the treaty identified over the years by both this Tribunal and the courts? This is a matter on which counsel will no doubt make submissions in stage 2 of our inquiry … It suffices to reiterate here that, in February 1840, an agreement was made between Māori and the Crown, and we have set out its meaning and effect.* ***It is from that agreement that the treaty principles must inevitably flow****.*[11] (emphasis added)

31. The sequential continuity of Tribunal inquiries into the constitutional relationship between rangatiratanga and kāwanatanga logically requires the application of the same eight core principles identified in *Te Raki* to this inquiry:[12]

(i) *Te mātāpono o te tino rangatiranga me mana motuhake*

(ii) Te mātāpono o te kawanatanga/ the principle of kāwanatanga

(iii) *Te mātāpono o te houruatanga/the principle of partnership:*

(iv) Te mātāpono o te whakaaronui tētahi ki tētahi; the principle of mutual recognition and respect

(v) Te mātāpono o te mataporore moroki/ the principle of active protection

(vi) Te mātāpono o te whai hua Kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development

[11] *Paparahi o te Raki Inquiry* Stage 1, p.527
[12] *Paparahi o te Raki Inquiry* Stage 2, pp.52-53

(vii) Te mātapono o te mana taurite/the principle of equity

(viii) *Te mātapono o te whakatika/the principle of redress.*

32. These principles are enlarged upon in relation to the four specific causes of action below.

33. Section 5(1)(a) of the Treaty of Waitangi Act mandates the Tribunal to make recommendations on any claim submitted to it under Section 6. The Act refers to "recommendations on claims relating to the practical application of the Treaty" in the long title and relating to the "principles of the Treaty" in the Preamble. "Practical application" refers to the nexus between the claims and the Treaty. It is not a condition placed on the recommendations. The *Muriwhenua Fishing* Report made that point, following the *Waiheke* and *Orakei* reports, noting "that in making recommendations, there is no requirement that the Tribunal make only practical recommendations".[13] In determining its recommendations, this Tribunal therefore does not need to, and should not, limit itself to forms of constitutional transformation that some may consider not to be practical in the present context.

FIRST CAUSE OF ACTION: CROWN'S CONSTITUTION BREACHES TE TIRITI

34. The first Cause of Action is simple: the Crown has systematically, continually and deliberately breached its fundamental obligation to adopt and maintain the constitutional relationship of Rangatiratanga to Kawanatanga agreed to in Te Tiriti o Waitangi. This has deprived the Claimants and other Māori of the right and ability to exercise self-determination over their own lives in a manner consistent with the laws, values, governance arrangements, political institutions and processes, economic systems, and treaty making authority guaranteed them under Te Tiriti o Waitangi.

[13] *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), 1988, p.297

35. The formal constitutional system that operates within Aotearoa New Zealand is the product of the unlawful assumption of sovereignty by the then Queen of England in 1840: Parliamentary Sovereignty, under the British Monarch in the name of the King of New Zealand as Head of State, an Executive Cabinet appointed by the Head of State from a government elected through an individualised system of voting, a judicial system presided over by His Majesty's Judges that operates according to common law doctrine and precedents, and a civil service that is responsible for the functioning of that system of government. There have been halting and incomplete attempts to give effect to tino rangatiratanga since 1840; but in general tino rangatiratanga has been ignored, and initial failings to give effect to it have led to a compounding loss of political, economic, and social power over time.

36. The breach of te Tiriti principles articulated by the Tribunal in *Te Raki* is evident on its face:

(i) ***Te mātāpono o te tino rangatiranga:*** In te Tiriti, Rangatira, their hapū and iwi are guaranteed their rangatiratanga. Rangatira upheld the mana of hapū through the exercise of tikanga (law). The hapū is the source of their authority, and the requirements of whanauangatanga and manaakitanga are the bonds that hold communities together. Te Tiriti was derived from He Whakaputanga, which was an affirmation of that tino rangatiranga. According to the Tribunal in *Te Raki:*

> *Rangatira expected that, in accordance with te Tiriti, their authority would continue to be recognised, and respected and they would continue to exercise their rights and responsibilities to their hapū in accordance with tikanga*.[14]

(ii) ***Te mātāpono o te kawanatanga/ the principle of kāwanatanga****:* Through te Tiriti the Crown was granted the right to exercise authority over British subjects, and thereby would keep the peace and protect Māori interests. The Tribunal considered that Rangatira may

[14] *Paparahi o te Raki Inquiry* Stage 2, p.84

also have understood kāwanatanga as offering protection against foreign threats.

> *Māori expected that their authority in their sphere would be equal to that of the Crown in its sphere; and that questions of relative authority would be negotiated as they arose through discussion and agreement between the parties. The duty of the Crown was (and is) to foster tino rangatiratanga (Māori autonomy), not to undermine it, and to ensure its laws and policies were just, fair, and equitable, and would adequately give effect to treaty rights and guarantees, notably those affecting hapū autonomy and tikanga, and hapū retention and management of their lands and resources. In accordance with the principle of kāwanatanga, the Crown had a further duty to ensure that its treaty duties are not abrogated.*[15]

(iii) ***Te mātāpono o te houruatanga/the principle of partnership:*** This principle is sourced from the treaty agreement itself, with the partners moving forward together and beside each other. The Tribunal in *te Raki* was very clear that:

> *Kāwanatanga, the authority granted to the Crown was not a superior authority, an overarching power, albeit "qualified" by the right of Māori to exercise tino rangatiratanga. Rather, the Crown's authority was expressly limited … to its own sphere. Alongside and equal to it, was that of tino rangatiratanga. … Negotiating and managing their respective spheres of authority, as well as shared spheres as the two populations intermingled, was the key issue for the treaty partners in the years after te Tiriti was signed. The Crown could not unilaterally decide what Māori interests were or what the sphere of tino rangatiratanga encompassed; that was for [Māori] to negotiate with the Crown. The Crown's duty was and is to engage actively with [Māori] on how it should recognise … tino rangatiratanga and, where agreed, give effect to it in New Zealand law. Partnership was and is the framework for governance in New Zealand; both parties must act honourably and in good faith.*[16]

(iv) ***Te mātāpono o te whakaaronui tētahi ki tētahi; the principle of mutual recognition and respect.*** These are vital qualities in the treaty relationship. In their delivery, the Crown and Rangatira must each recognise and respect the values, laws, and institutions of the other.

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[15] *Paparahi o te Raki Inquiry* Stage 2, p.84
[16] *Paparahi o te Raki Inquiry* Stage 2, p. 85

The Tribunal in *Te Raki* observed that has been difficult for Māori when rangatiratanga has been repeatedly challenged and undermined.

> *"The Crown for its part must respect tikanga, which is at the heart of [Māori] values, law, and the Māori way of life, as are mana, whanaungatanga, mātauranga, and kaitiakitanga*."[17]

(v) ***Te mātāpono o te mataporore moroki/ the principle of active protection.*** This principle is widely (mis)understood and (mis)applied as requiring the Crown to take positive steps to ensure that Māori interests are protected. It is not compatible with te Tiriti, as it superimposes a hierarchical and paternalistic relationship on a relationship of equals. As the Tribunal observed: "the Crown cannot paternalistically protect what it has no authority over".[18]

The common usage by the Crown, and many previous Tribunals,

> *reflects a British articulation of the duty of protection they believed should characterise the Crown's relations with Māori as it assumed sovereignty and embarked on the colonisation of New Zealand.*

Rather than a principle that reflects the relationship of rangatiratanga and kāwanatanga in te Tiriti, the principle was seen in *Te Raki* as useful to remind the Crown of its obligations where its actions and omissions cause prejudice to Māori.

> *In this inquiry, despite the claimants' recognition of its importance, we are mindful of their reservations about the principle as reflecting a power imbalance, a duty undertaken by the imperial power when it assumed a superior authority, establishing its Government in New Zealand. Had the Crown observed its obligations under both texts of the treaty from 1840, particularly its commitment to recognition of tino rangatiratanga, the duty of active protection might not have assumed such importance. We consider that active protection is not a Crown duty arising from its sovereign authority. Rather, it requires the Crown to help restore balance to a relationship with [Māori] that had become unbalanced as the Crown assumed an*

[17] *Paparahi o te Raki Inquiry* Stage 2, p.85
[18] *Paparahi o te Raki Inquiry* Stage 2, p.81

authority far beyond the bounds understood .. when they signed te Tiriti.[19]

The Tribunal preferred to emphasise the principle of mutual recognition and respect as better reflecting the treaty-based partnership entered into. The Claimants agree.

SECOND CAUSE OF ACTION: THE CROWN'S TREATY PRINCIPLES BREACH TE TIRITI

37. The second Cause of Action is the active and deliberate distortion of te Tiriti o Waitangi through the device of the "principles of the treaty". That is reflected most recently in the Treaty Principles Bill proposed by the ACT Party[20] and whose introduction has been guaranteed by the Coalition Government.[21]

38. However, the proposed Bill cannot be seen in isolation. Forty years ago the Labour Government attempted a similar strategy it called the Principles for Crown Action on the Treaty of Waitangi.[22] That followed and built upon the judgments of the Court of Appeal in *New Zealand Māori Council v Attorney General* (the "**Lands case**") in 1987,[23] which defined a set of "treaty principles" that repudiated the constitutional foundations of te Tiriti o Waitangi as a kāwanatanga/rangatiratanga relationship of equals.

39. Since then, the Crown has devised several more iterations of "treaty principles" that misrepresent and seek to rewrite the Crown's obligations and Māori rights under Te Tiriti o Waitangi. The courts have evolved variations on the Court of Appeal's 1987 "principles", and the Waitangi

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[19] *Paparahi o te Raki Inquiry* Stage 2, p. 86
[20] Reported in Tommy de Silva, "Leaked Treaty bill will 'radically change' tone of tomorrow's hui, says Ngarewa-Packer", *Spinoff,* 19 January 2024, https://thespinoff.co.nz/atea/19-01-2024/leaked-treaty-bill-will-radically-change-tone-of-tomorrows-hui-says-ngarewa-packer?fbclid=IwAR1groiJcLv_BofoEr0wGvChDShRvU3wXrCBgzfmBwgbJQi8aTB34RBvEXg

[21] Coalition Agreement. New Zealand National Party and ACT New Zealand, 54th Parliament, 24 November 2023
[22] *Principles for Crown Action on the Treaty of Waitangi,* Justice Department, 1989
[23] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641

Tribunal, until recently, capitulated to the courts' interpretations. Crown agencies have written guidance based on those distortions, embedding them throughout the system of government.

The Courts

40. From the Court of Appeal's decision in the *Lands case* onwards, the Crown's courts have interpreted statutory references to the "principles of the Treaty" in a way that evades the constitutional reality that te Tiriti guarantees the continued exercise of tino rangatiratanga and severely restricts the mandate of kāwanatanga.

41. In the *Lands case,* the Court interpreted and applied a statutory reference to the "principles of the Treaty" in the State-owned Enterprises Act 1986. In summary, the Court's version of the "principles" was that the Crown acquired sovereignty, with the right to govern and make law and policy. In doing so, it accepted a responsibility to actively protect Māori interests so far as reasonably practicable; to make informed decisions about the implications for Māori, and to consult with Māori when it required further information; and to provide a process to remedy past breaches. In return, Māori were to be loyal to the Queen, recognise the authority of her government, and be reasonably cooperative.[24]

42. Four points about that case are relevant to this claim:

    (i) This version of Treaty principles largely replicates the English text. It avoids any engagement with the constitutional reality that the Rangatira retained, and absolutely did not cede, their mana and authority. That case remains the principal source and reference point in common law jurisprudence on the "principles of the Treaty". Some subsequent cases refined them further in favour of the Crown, while others made minor adjustments in favour of Māori. Variations on those principles have formed the

[24] Jane Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989,* Allen and Unwin, 1990, chapter 8.

basis of the "principles" subsequently utilised by the Government, the courts and the Waitangi Tribunal. If the source of those principles is inconsistent with te Tiriti, so are its derivatives.

(ii) The Court of Appeal had a choice about the methodology by which it interpreted the concept. It could have done as the Waitangi Tribunal did in *Te Raki* and derived the principles predominantly from te Tiriti. That would have been consistent with *contra proferentem.* Instead, it combined common law statutory interpretation and common law doctrine with an appeal to the "spirit of the Treaty". That "spirit" was not grounded in historical, conceptual or linguistic understanding of te Tiriti, let alone the "wairua" of te Tiriti at the time the Rangatira agreed to it.

(iii) The Crown's jurisprudence on the "principles" has been influenced by political pressures and prevailing ideology, responding to pressures that impugn the legitimacy of Crown sovereignty whilst retaining it intact. That was as true of the *Lands* case it was of *R v Symonds,*[25] *Wi Parata v Bishop of Wellington*[26] and *Te Heuheu Tukino v Aotea District Māori Land Board*[27] before it. Just three years earlier, in 1984, Court of Appeal President Robin Cooke had said during debates on a proposed Bill of Rights that: "*The Treaty of Waitangi hardly passes muster now as a satisfactory unifying document; at best, it is of very limited scope*."[28] Cooke P would later describe the shifts in Crown policy, legislation and jurisprudence from

[25] *R v Symonds* (1847) NZPCC 388
[26] *Wi Parata v Bishop of Wellington* (1877) 1877) 3 NZ Jur (NS) SC 72

[27] *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308
[28] Practicalities of a Bill of Rights" presented as the F. S. Dethbridge Memorial Address,13 October 1984.

before and after the *Lands* case as a "*subtle cultural repositioning*".[29]

(iv) Logically, the Crown's courts cannot impugn the Crown's own sovereignty. That is why recognition of tikanga as law in its own right, outside the parameters prescribed by the common law system, is an essential element of constitutional transformation.

Waitangi Tribunal

43. The Waitangi Tribunal itself has been influenced by and responsive to the Crown's attempts to use the "principles of the Treaty" to rewrite Te Tiriti. Over its almost 50 years, there have been three distinct phases of Tribunal jurisprudence. The reports on its initial inquiries said there was no cession of sovereignty by Māori. In the second phase, following the *Lands case*, the Tribunal incorporated the courts' version of the "principles" into its jurisprudence and referred to a cession of sovereignty. More recently, several Tribunal reports that have directly addressed the question, notably *Te Urewera, Te Rohe Potae,* and *Te Raki,* have confirmed that there was no cession of sovereignty and revised the principles accordingly, including by viewing tino rangatiratanga as a principle. Reverting to the methodology that sources the principles from the treaty, especially Te Tiriti, has been critical to that.

Phase 1: No cession of sovereignty

44. The first three Tribunal reports on the Motunui outfall,[30] Kaituna River[31] and Manukau Harbour[32] stressed the autonomous authority embodied in rangatiratanga and said explicitly that the functions of kawanatanga conferred by Te Tiriti were limited and less than a cession of sovereignty.

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[29] Cited in Jane Kelsey, 'Judicialisation of the Treaty: A subtle cultural repositioning', 10 *Australian Journal of Law and Society*, 1994, 131-164 at 137.
[30] *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6), 1983
[31] *Findings of the Waitangi Tribunal on the Kaituna Claim* (Wai 4), November 1984
[32] *Findings of the Waitangi Tribunal on the Manukau Claim* (Wai 8), July 1985

45. Methodologically, the Tribunal in the *Motunui* Report in 1983 started with the two texts of the Treaty. It observed that international law rules on interpretation of bilingual treaties and the *contra proferentem rule,* which indicated the Māori text should be the preferred source of understanding, were in accord with the Māori approach to look to the wairua rather than the literal words.[33] In his opening address Chief Judge Durie:

> "*asked if the Treaty should be interpreted through the eyes of the Māori people and not according to the English canons of construction, so that the participants might seek out the mauri or life force of the Treaty for the purposes of the inquiry*".[34]

46. Adopting this approach, the Tribunal concluded that: "*The Maori [text] confirms to the Chiefs and the hapu, 'te tino rangatiratanga' of their lands etc. This could be taken to mean 'the highest chieftainship' or indeed 'the sovereignty of their lands'."*[35] Implicit in tino rangatiratanga was the exercise of autonomous authority. The Treaty was not fossilised and provided the basis for future growth and development, but any variation on these terms would require the agreement of Maori.[36]

47. Historian Professor Keith Sorrenson observed that the Tribunal's interpretation:

> "*struck at the very heart of the long-standing Pakeha doctrine that the transfer of sovereignty in Article 1 provided the foundation for one system of law, British law*."[37]

48. The *Kaituna* Report in 1984 built on this and drew heavily on the evidence from (then) Professor Hugh Kawharu:[38]

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[33] *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6), 1983, pp.45-49
[34] Quoted in David V. Williams, "*Te Taha Māori* Recognised: A comment on the Waitangi Tribunal report, *Recent Law,* 1983, 378.
[35] *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6), 1983, pp.51-52
[36] *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6), 1983, pp.50-52
[37] M.P.K Sorrenson, "Towards a Radical Reinterpretation of New Zealand History", in H. Kawharu, *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi*, Oxford University Press, Auckland, 1989, p. 163.
[38] *Findings of the Waitangi Tribunal on the Kaituna Claim* (Wai 4), November 1984, pp 13-14

> *The major problem arising from the first Article turns on the issue of sovereignty, a system of power and authority (as would have been intended by the Colonial Office) that was wholly beyond the Māori experience, a network of institutions ultimately to comprise a legislature, judiciary and executive, all the paraphernalia for governing a Crown Colony.*
>
> *The Māori people's view on the other hand could only have been framed in terms of their own culture; in other words, what the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise the power over life and death. It is totally against the run of evidence to imagine that they would wittingly have divested themselves of all their spiritually sanctioned powers – most of which powers indeed they wanted protected. They would have believed that they were retaining their rangatiratanga intact apart from a license to kill or inflict material hurt on others, retaining all their customary rights and duties as trustees for their tribal groups.*

49. In practice, these reports had no constitutional consequences, as the Tribunal's jurisdiction was limited to 1975 and the claimants had sought, and received, quite limited recommendations.

50. The Tribunal revisited the discussion on interpretation of te Tiriti/the Treaty in the *Manukau* Report and confirmed the priority to be given to the Māori understanding at the time of signing.

51. However, the stakes had increased, both politically and in terms of the recommendations sought, and the Tribunal's interpretation was more contingent. It still found kāwanatanga was "*something less than the sovereignty (or absolute authority) ceded in the English text*" and meant "*the authority to make laws for the good order and security of the country but subject to an undertaking to protect particular Māori interests*". The Māori interest was "*in the nature of an interest in partnership the precise terms of which have yet to be worked out*".[39] In that context, the Tribunal talked of the "*spirit of the Treaty*" and "*the right to make laws*", but also that "*Māori Customary law is the antithesis of English Common Law which considers that harbours*

[39] *Findings of the Waitangi Tribunal on the Manukau Claim* (Wai 8), July 1985, p.94

belong to the Crown. The Māori people believe the Treaty of Waitangi promised them that Māori Customary law would prevail."[40]

52. Neither the report on *Te Reo Māori* nor the *Waiheke* claim discussed the constitutional dimensions of the Treaty, let alone sovereignty, in any depth. The *Waiheke* claim was the first in which the Tribunal members disagreed over the principles and the methodology for deriving them, with Judge Durie arguing that the oral debate was arguably more significant than the written words. Issued in June 1987, the report was released on the cusp of, and arguably influenced by, the *Lands case.*[41]

53. In sum, the Tribunal in its first phase operated genuinely as a Commission of Inquiry, drawing primarily on te Tiriti while interpreting the two texts, as the basis for the Treaty principles on which it would determine the claims. These reports either rejected or did not assert that the Crown had acquired sovereignty through te Tiriti/the Treaty.

Phase 2: The post-Lands case period

54. The Waitangi Tribunal in this second phase rapidly accommodated itself to the courts' interpretation of the "principles of the Treaty". In doing so, it subordinated its mandate as the exclusive arbiter of the meaning of te Tiriti/the Treaty, and the principles based on that interpretation, for the purposes of claims brought before it, as well as the legal freedom it enjoys as a Commission of Inquiry.

55. The *Orakei* claim was first heard in May and July 1985, but reported after the *Lands* case.[42] A newly constituted Tribunal, following amendment to the Act in 1985, no longer gave primacy to the Māori text. The Report qualified the position in the *Manukau* report that kāwanatanga was less than British sovereignty by the words "on its

[40] *Findings of the Waitangi Tribunal on the Manukau Claim* (Wai 8), July 1985, pp.48-49
[41] *Report of the Waitangi Tribunal on the Waiheke Island Claim (Wai 10),* 1987, pp. 36-37. The release was embargoed until the Court of Appeal had released its decision.
[42] *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9), November 1987

face".[43] The Tribunal added that such a finding on kāwanatanga did not invalidate the proclamation of sovereignty that followed[44] and that a "cession of sovereignty was implicit from surrounding circumstances".[45]

56. Subsequent reports on both the *Muriwhenua Fishing*[46] and *Mangonui Sewerage*[47] claims referred to a "cession of sovereignty", with the *Muriwhenua Fi*shing report downgrading tino rangatiranga to "tribal self-management" akin to local government.[48]

57. Over time, these "principles" displaced the texts as the main reference point for the Tribunal and tino rangatiratanga was reduced to a subordinate authority. Tribunal hearings became correspondingly more legalistic in substance, procedure and venue, more adversarial in the mode of inquiry, and more distant from the process or concepts of tikanga.

58. During this phase, the Waitangi Tribunal did what it has described other parts of the Crown doing: it reordered the constitutional relationship between the Crown and Iwi and Hapū under te Tiriti to overstate the authority conferred through kāwanatanga and deny the essence of tino rangatiratanga, through the construct of 'principles'. It follows that "principles of the Treaty" that are drawn principally from this era of Tribunal jurisprudence, will not themselves be Tiriti-compliant.

Phase 3: Recovering Rangatiratanga

59. The constitutional claims made by Ngāi Tūhoe and Ngāpuhi, directly posed the question of Mana Motuhake, tino rangatiratanga and Crown sovereignty. They, along with *Te Mana Whatu Ahuru* and the *Maniapoto Mandate* claim, shifted the Tribunal's jurisprudence into a

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[43] *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9), November 1987, p. 135
[44] *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9), November 1987, p. 189
[45] *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9), November 1987, p. 208
[46] *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), 1988, p.187
[47] *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim*, (Wai 17), 1988, pp. vii and 4
[48] *Report of the Waitangi Tribunal on the Muriwhenua Fishing Report* (Wai 22), 1988, p.187

third phase by refocusing on the Tribunal's statutory function and responsibilities and sourcing the principles principally in Te Tiriti.

60. Those reports began to rethink the distribution of power and responsibilities under te Tiriti and the Treaty, revisit the revisionist interpretations of Treaty principles derived from the 1980s' judicial decisions, and restore tino rangatiranga and tikanga Māori to the core of the Treaty's principles and Tribunal jurisprudence. This shift has not occurred in all recent Tribunal inquiries; however, none of those other reports had the constitutional question at their core.

61. As noted above, the Stage One report in *Te Raki* in 2014 concluded that the Rangatira did not cede their authority to make and enforce law over their people and within their territories and did not surrender the sole right to make and enforce law over Māori to the British. They agreed to share power and authority with the Crown as equals while performing different roles with different spheres of influence.[49] That interpretation was affirmed in the Stage Two report in 2022.[50]

62. The Report on *Te Urewera* in 2012 was clear that Tuhoe, having not signed Te Tiriti, maintained their unfettered mana Motuhake and raised similar challenges to Crown claims to sovereignty:

> *From the evidence, we consider that Tuhoe did not begin to recognise the Crown's sphere of operation in relation to themselves until the last three decades of the nineteenth century, and then only incrementally. ... This is not to say that Tuhoe have at any time shared the Crown's view of the extent of its own authority: manifestly, they have not. Nor are they alone in contesting the meaning of the Crown's sovereignty/kawanatanga and, particularly, how it should be tempered by the tino rangatiratanga retained by Māori generally, and by the mana motuhake retained by Tuhoe.*[51]

63. The Report also made it clear that any co-existence cannot be unilaterally determined by the Crown, but requires negotiation in good

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[49] *Paparahi o te Raki Inquiry* Stage 1*,* 2014, p.527
[50] *Paparahi o te Raki Inquiry* Stage 2*,* 2023, p.xxxvi
[51] *Report of the Waitangi Tribunal: Te Tono Ture Tikanga a Tuhoe – The Treaty and the Tuhoe Constitutional Claim, 1840–65* (Wai 894), Volume 1, p.134

faith to reach a principled conclusion and may vary according to the matter at hand:

> *`In their respective languages, the concepts of "sovereignty" on the one hand, and "tino rangatiratanga" or "mana motuhake" on the other, connote absolute authority, and so cannot co-exist in different people or institutions. Therefore, striking a practical balance between the Crown's authority and the authority of a particular iwi or other Māori group must be a matter for negotiation, conducted in the spirit of cooperation and tailored to the circumstances.*[52]

64. The *Maniapoto Mandate Inquiry* Report in 2019 said the Tribunal would follow previous Tribunal reports in confirming that the principle of partnership between kāwanatanga and tino rangatiratanga is at the centre of the Treaty relationship between Māori and the Crown.

> *The principles of partnership and reciprocity are inherently connected to article 2 of the Treaty and tino rangatiratanga. Tino rangatiratanga has been defined as "full authority" and grants the mana "not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner".*

65. This report also took a more nuanced approach to active protection*:*

> *In obtaining kawanatanga when signing the Treaty, the Crown also acquired a duty to actively protect the tino rangatiratanga of Māori. Similarly, the Crown's duty to act reasonably and in good faith "is not merely passive but extends to active protection … In mandating inquiries, the duty of active protection necessitates a process of genuine engagement with claimants in accordance with their tikanga.*[53]

66. The Tribunal's Report on *Te Mana Whatu Ahuru*[54] found that the Crown's representatives, in their negotiations with Te Rohe Pōtae in the 1880s,

> *acted at times with dishonest and misleading negotiation tactics and promises. The Crown failed to engage as a Treaty partner and did not acknowledge Te Rohe Pōtae Māori tino rangatiratanga. The Tribunal found that the Crown's significant breaches of the Treaty of Waitangi have caused serious damage to the mana and autonomy of*

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[52] *Report of the Waitangi Tribunal: Te Tono Ture Tikanga a Tuhoe – The Treaty and the Tuhoe Constitutional Claim, 1840–65* (Wai 894), Volume 1, p. 134
[53] *The Maniapoto Mandate Inquiry Report* (Wai 2858), 2019, pp. 14-15
[54] *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claim*, volume 1, Report Summary, 18 December 2023

> *the iwi and hapū of the district. … In summary, the Crown chose not to give practical effect to the Treaty principle of partnership in Te Rohe Pōtae from 1840 to 1900. It failed to recognise or provide for Te Rohe Pōtae Māori tino rangatiratanga before and during the negotiations collectively described as Te Ōhāki Tapu. This failure resulted in multiple breaches of the principles of the Treaty of Waitangi, and Te Rohe Pōtae Māori have suffered significant and long-lasting prejudice as a result.*

67. The Tribunal recommended the Crown

> *take immediate steps to act, in conjunction with the mandated settlement group or groups, to put in place means to give effect to their rangatiratanga. The Tribunal said that how this can be achieved will be for the claimants and Crown to decide. However, it recommended that, at a minimum, legislation must be enacted that recognises and affirms the rangatiratanga and the rights of autonomy and self-determination of Te Rohe Pōtae Māori. In the case of Ngāti Maniapoto, or their mandated representatives, the Tribunal recommended that legislation must take into account and give effect to Te Ōhāki Tapu, in a way that imposes an obligation on the Crown and its agencies to give effect to the right to mana whakahaere.*[55]

The Government

68. The Executive has made repeated attempts to redefine te Tiriti o Waitangi through the device of the "principles".

Principles for Crown Action on the Treaty of Waitangi

69. In 1989 the Labour Government constructed a set of treaty principles that reasserted the Crown's exclusive sovereignty. It used the euphemism of "Principles for Crown Action on the Treaty of Waitangi" to deny claims it was rewriting te Tiriti, just as the ACT-National-NZ First coalition is doing with the Treaty Principles Bill.

70. The rationale provided by that Government was also similar to ACT's justification for the Treaty Principles Bill. Deputy Prime Minister Geoffrey Palmer claimed the Treaty's meaning was unclear and political arguments about it had become "strident, confused and

[55] *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claim*, volume 1, Report Summary. 18 December 2023

downright absurd". This had raised fears about what the Treaty is about and raised Māori expectations about what it may achieve, with the casualty being "the reasonable middle ground".[56] So the Crown had developed principles for Crown action that "provides a clear articulation of the Crown's responsibilities and a clear delimitation of the Crown's obligations".[57]

71. These "Crown principles" were published with a commentary that drew selectively on the Court of Appeal, Waitangi Tribunal, Law Commission, international covenants and Magna Carta.

a) *"The Principle of Government [The Kawanatanga Principle]* The Government has the right to govern and make laws." The commentary described this as Crown sovereignty that was qualified only by the promise to accord Māori interests in the second article "appropriate priority".

b) *The Principle of Self-Management [The Rangatiratanga Principle]. The iwi have the right to organise as iwi, and to control their resources.* This subordinated managerial function applied only to resources Māori controlled at the time.

c) *The Principle of Equality. All New Zealanders are equal before the law*. Article 3 was said to have selected British common law as the basis for guaranteeing that legal equality.

d) *The Principle of Reasonable Co-operation. Both the Government and the iwi are obliged to accord each other reasonable cooperation on major issues of common concern.* This was said to require good faith, balance and common sense, the outcome of which would be "partnership".

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[56] Geoffrey Palmer, "The Treaty of Waitangi – principles for Crown action", (1989) 19 VUWLR 335, 336-337

[57] *Principles for Crown Action on the Treaty of Waitangi,* Justice Department, 1989

e) *The Principle of Redress*. *The Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur*.[58] The Crown's responsibility ended with the establishment of a process. Any redress was expected to take account of its practical impact.

72. At the 150th commemoration at Waitangi in February 1990 Archbishop Whakahuihui Vercoe concisely conveyed the widespread Māori response:

> *I have come to Waitangi to cry for the promises that you made and for the expectations of our tupunas made 150 years ago. … I want to say to the Government don't produce principles of the Treaty – the treaty is already there.*[59]

Crown policy and guidance on Te Tiriti

73. Over time, government agencies have developed a shorthand referred to as the "3 Ps" principles of the Treaty: partnership, participation and prosperity, which purport to be derived from the underlying tenets of the Treaty.[60] Many people working in government would have no basis for understanding that this is a misrepresentation, and hence a breach, of te Tiriti o Waitangi. As a result, the denial of rangatiratanga and the excesses of kāwanatanga are woven throughout the institutions of the Crown.

74. The Cabinet Office circular from October 2019 has a more detailed approach, agreed by the Cabinet, that "provides guidance on how the terms and concepts in the texts of the Treaty should be applied by government officials in undertaking their work".[61] The circular presents side-by-side the English text of the Treaty, the Tiriti text in te reo Māori, and a "back translation" of te Tiriti by Professor Sir Hugh Kawharu which, according to a footnote, "sets out to show how Māori would have understood the

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[58] Memorandum to Cabinet, "Principles for Crown Action on the Treaty of Waitangi" 19 May 1989

[59] Reported in "We have not honoured each other's promises", *New Zealand Herald,* 7 February 1990, cited in "From Flagpoles to Pinetrees", pp. 184-185.

[60] See. For example. https://www.schoolnews.co.nz/2016/11/te-tiriti-o-waitangi-living-the-values/

[61] Cabinet Office, "Te Tiriti o Waitangi/The Treaty of Waitangi Guidance", 22 October 2019, CO(19)5

meaning of the text they signed".[62] That "back translation" does not reflect the claimants' literal or contextual understanding of Te Tiriti, nor the Tribunal's understanding in *Te Raki*. According to the circular, "The Treaty creates a basis for civil government extending over all New Zealanders."

75. Those versions of the treaty are carried into specific agencies' Treaty guidelines and training materials. An example is the Ministry of Foreign Affairs and Trade (MFAT) guide to its staff: *Applying Te Tiriti o Waitangi at MFAT. Te Whakaū I Te Tiriti o Waitangi o te Manatū Aorere,* of September 2021. This refers to "three different and legitimate texts of the Treaty": (i) Te Tiriti o Waitangi" (which it says may also refer to the Māori language text or "Sir Hugh Kawharu's text"); (ii) "the Treaty of Waitangi", which it says can refer to the English text or "Sir Hugh Kawharu's text" or as shorthand for the "principles of the Treaty"; and (iii) "Professor Sir Hugh Kawharu's translation of the reo Māori text".[63]

76. The MFAT guide's "high-level" description of the treaty articles reads:

    - *The Government has the right to govern and the obligation of good governance for all New Zealanders;*
    - *Māori will have the right to make decisions over their own resources and tāonga;*
    - *The Crown has equal obligations to Māori as it has to all other New Zealand citizens*.[64]

77. The test it provides for weighing Tiriti rights with other affected interests in terms of active protection is that "*Māori interests are entitled to active protection to the extent reasonable in all the circumstances*".[65]

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[62] Cabinet Office, "Te Tiriti o Waitangi/The Treaty of Waitangi Guidance", 22 October 2019, CO(19)5, fn6
[63] MFAT, *Applying Te Tiriti o Waitangi at MFAT. Te Whakaū I Te Tiriti o Waitangi o te Manatū Aorere,* of September 2021, p.12
[64] MFAT, *Applying Te Tiriti o Waitangi at MFAT,* pp. 8-9
[65] MFAT, *Applying Te Tiriti o Waitangi at MFAT,* p.14

The Treaty Principles Bill

78. The Treaty Principles Bill proposed by the Coalition Government is the Crown's most pernicious attempt to rewrite te Tiriti o Waitangi through the device of "treaty principles". Both the process and the content are egregious breaches of the Crown's Tiriti obligations.

79. The Coalition Agreement between the National Party and the ACT Party has committed to

> ***H. Pro-Democracy***. *Upholding the principles of liberal democracy, including equal citizenship, parliamentary sovereignty, the rule of law and property rights, especially with respect to interpreting the Treaty of Waitangi."*[66]

and specifically to:

> *"Introduce a Treaty Principles Bill based on existing ACT policy and support it to a select committee was soon as practicable."*

80. The commitment to introduce this legislation was made through private negotiations between two political parties, without any reference to the Tiriti partner. The Crown has deliberately turned its back on its obligation to engage with Māori on a fundamental constitutional issue relating to te Tiriti. At the same time, it privileges the ACT Party's private advisers who drafted the Tiriti policy and Bill prior to the 2023 election. Those advisers' draft has been accepted by the government as a *fait accompli*. There could not be a more clear cut breach of the Crown's own "principles" of good faith and active protection, let alone principles sourced in Te Tiriti.

81. The Crown has compounded those breaches by refusing to provide disclosure of documents that are essential to the effective pursuit of this Tribunal Inquiry.[67] The legal objections to the Crown's approach have been set out in Memorandum of Counsel for the claimants and are not

[66] National, ACT and New Zealand First Coalition Government. Consultation and Operating Arrangements, CO(24)2.
[67]

repeated here. The Crown has also refused to supply related documents under the Official Information Act 1983 that were sought by Professor Kelsey, who is advising the Claimants. The details of those requests are set out in the first affidavit of Professor Kelsey. The claimants are left to rely on leaked documents and media reports for the details of the proposed Bill.[68]

82. A leaked memorandum from a Ministry of Justice adviser on the proposed Bill in itself makes the Claimants' case that both the process and the substance of the Bill breach the Crown's Tiriti obligations:

> *I expect the Bill may be highly contentious. This is due to both the fundamental constitutional nature of the subject matter and the lack of consultation with the public on the policy development prior to Select Committee.*[69]

83. The leaked Ministry of Justice document revealed the three articles of the Treaty in the ACT Party's proposed Bill:

> *Article 1: kawanatanga katoa o o ratou whenua - The New Zealand Government has the right to govern all New Zealanders.*
>
> *Article 2: ki nga tangata katoa on Nu Tireni te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa - the New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property.*
>
> *Article 3: o ratou nga tikanga katoa rite tahi - all New Zealanders are equal under the law with the same rights and duties.*

84. The one reported change from the original ACT draft bill shows a deliberate contempt for tino rangatiratanga. The original wording on Article 2 that "*the New Zealand Government will protect all New Zealanders authority over their land and all their property"* was altered to imply that all New Zealanders have "chieftainship" or rangatiratanga.

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[68] Reported in Tommy de Silva, "Leaked Treaty bill will 'radically change' tone of tomorrow's hui, says Ngarewa-Packer", *Spinoff,* 19 January 2024.
[69] Tommy de Silva, "Leaked Treaty bill".

85. The media report of the memorandum said an unnamed Ministry of Justice official advised that the bill risked conflicting with the

> *rights or interests of Māori under the Treaty because it is not derived from the spirit of the text of the Treaty …;*

that it is

> *"not supported by either the spirit of the Treaty or the text of the Treaty";*

and that

> *the bill may be seen as discriminatory and contrary to certain binding international standards such as the International Covenant on Economic, Social and Cultural Rights. … In addition, the bill removes an effective measure in our legal system to enforce the right of Māori to exercise self-determination, and cultural aspirations in the international standards and obligations above. … Developing a bill that purports to settle the Treaty principles without working with the Treaty partner could be seen as one partner (the Crown) attempting to define what the Treaty means and the obligations it creates.* [70]

86. These assaults on Te Tiriti o Waitangi and the mana of Ngā Iwi Māori cannot change the reality that Te Tiriti o Waitangi affirms te Tino Rangatiratanga o Ngā Hapū over taonga katoa and the obligation on the Crown to recognise and support the exercise of that authority, consistent with tikanga Māori, and the responsibilities of kaitiakitanga in relation to whakapapa, matauranga, te reo, culture, and other taonga.

87. If the legislation was passed, it would constitute a deliberate denial of te Tiriti o Waitangi itself, however that might be reframed by its proponents. This would be a direct assault on, and egregious breach of, te Tiriti on par with the declaration by Prendergast CJ in *Wi Parata v Bishop of Wellington*[71] that the treaty is a nullity.

88. Even if the legislation does not proceed past the select committee stage it will have caused great emotional harm and fostered an environment in

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[70] de Silva, "Leaked Treaty bill"

[71] *Wi Parata v Bishop of Wellington* (1877) 1877) 3 NZ Jur (NS) SC 72

which such views are considered legitimate. The Bill is an illustration of the harms that flow from overreach by the kāwanatanga, and neglect of tino rangatiratanga, that results in doing violence to Te Tiriti itself.

Remedies

89. The Constitutional Kaupapa claim must condemn this deliberate provocation that would directly, and through its consequences, create severe prejudice for the claimants and all other Māori.

90. The Tribunal must also address the underlying abuse of the concept of the "principles of the Treaty of Waitangi", by recommending that the Crown to withdraws current versions of the "principles" that misrepresent Te Tiriti, and promulgate analysis of Te Tiriti and guidance to Crown agencies that correctly reflect te Tiriti o Waitangi in te reo Rangatira as the version to which the Rangatira agreed and the Crown committed to honour.

91. The Tribunal should also take note of and endorse the resolutions adopted by Ngāti Pikiao at their hui on 7th January 2024 called in response to the Treaty Principles Bill, prior to the hui of national unity convened at Turangawaewae:

> ***Resolution 1:*** *Aotearoa belongs to hapū and iwi under our Tino Rangatiratanga and Mana Māori Motuhake*
>
> ***Resolution 2:*** *We direct all Māori MPs to oppose any legislation under this Government and any Government hereafter, which proposes to extinguish or redefine our intrinsic, enduring and inviolable duties, responsibilities, rights and interests as whanau, hapū, iwi.*
>
> ***Resolution 3:*** *Where Government seeks to interfere with guaranteed duties, responsibilities, rights and interests of Tino Rangatiratanga and Mana Māori Motuhake, the Government must disclose its proposals immediately to whanau, hapū and iwi, whose decision to accept or reject will be final.*
>
> ***Resolution 4:*** *The final decision on all matters arising from the protection of their ways of life, lands, forests, waters and waterways, and taonga kātoa rests exclusively with whanau, hapū and iwi.*
>
> ***Resolution 5:*** *The social, spiritual, economic and ecological wellbeing of our people and te Taiao is a fundamental and*

paramount responsibility of whanau, hapū and iwi that the Crown cannot and will not be allowed to further diminish. This recognises that responsibility for Māori rests with Māori.

Resolution 6: *We support all hapū who resort to the courts as a means to hold Government to its own standards of due process and the rule of law. This resolution is a recognition of the rangatiratanga of each hapū and iwi to pursue any issue that arises from breaches of the articles of Te Tiriti o Waitangi in the way they deem fit.*

Resolution 7: *In the event that the Government sphere continues to unilaterally attack the Tino Rangatiratanga and Mana Māori Motuhake of hapū and iwi, then Te Arawa will move to secede from the unitary imposed system of governance currently in operation and re-establish our own systems of government consistent with tikanga Māori, and affirmed in He Whakaputanga o Te Rangatiratanga o Nu Tireni and Te Tiriti o Waitangi.*

Resolution 8: *To activate this declaration as a living document, as well as in anticipation of re-establishing out own governance system separate to the Crown as outlined in Resolution Seven, we propose the establishment of a funded task force that will be responsible for the following:*

1. *Monitoring, Evaluating, and Providing intelligence on Government moves*
2. *Communicating and Co-ordinating hapu and iwi planning;*
3. *Managing campaigns to socialise our messages to tangata whenua and tauiwi;*
4. *PR and Media*
5. *Activism.*

THIRD CAUSE OF ACTION: CAPITALISM AND TINO RANGATIRATANGA

92. The Third Cause of Action is the imposition of capitalism in Aotearoa New Zealand from 1840 to the present day, as the most potent instrument for the denial of rangatiratanga and the imposition of Crown sovereignty, and the prejudice that has caused to Māori.

93. The colonial state's main instrument of dispossession was not the gun, it was capitalism backed by the state and its law. Historically, that was driven by absentee financialised speculation on Māori land that colonisers had no

rights to. When the speculators got into trouble the Crown bailed them out.[72] The colonial state used political exclusion and legal devices to execute the transfer of whenua, fisheries, forests and other taonga from Māori to itself, its colonists and foreigners. Over time, the Crown marginalised and then largely destroyed the Māori economy and made Māori dependent on a hostile form of capitalism.

94. The constitutional transformation sought by the Claimants is not purely political and legal. The economic system of capitalism that motivated and secured the colonisation of Aotearoa remains the principal source of alienation, disenfranchisement and poverty. Until tino rangatiritanga is restored, there cannot be an economy of reciprocity that embraces the values of kaitiakitanga, manaakitanga, and whanaungatanga and is informed by tikanga and mātauranga Māori. Equally, tino rangatiratanga cannot be restored without a transformation in the capitalist economic system based on commodification, monetisation, extraction and exploitation.

95. Many other claims have addressed historical breaches of the Crown's Tiriti obligations. This Cause of Action addresses contemporary extensions of the Crown's strategy to lock Māori into that repressive economic system. It focuses on three such mechanisms which the Crown alone determines and controls in denial of tino rangatiratanga: monetised Treaty settlements, Crown-controlled devolution of essential services, and international trade and investment agreements.

The relevant principles

96. Three Tiriti principles identified in *Te Raki* inform this Cause of Action:

(i) ***Te mātāpono o te whai hua Kotahi me te matatika mana whakahaere/the principle of mutual benefit and the right to development:*** Maori have the right to develop as a people and to

[72] Catherine Comyn, *The Financial Colonisation of Aotearoa,* Economic and Social Research Aotearoa,

develop the properties and resources guaranteed them by the treaty, including the right to engage with the new economy if they wished to do so. Māori were to contribute to and benefit from the economic development of the colony alongside settlers.[73]

(ii) ***Te mātapono o te mana taurite/the principle of equity:*** Māori were guaranteed equitable treatment and citizenship rights and privileges. The Tiriti guarantees of tino rangatiratanga and respect for tikanga requires the Crown to focus attention and resources to address the social, cultural and economic requirements and aspirations of Māori. The Crown cannot advance Pākeha interests at the expense of Māori. And it must address inequities experienced by Māori. This applies to Māori political and legal rights and to their property rights.[74]

(iii) ***Te mātapono o te whakatika/the principle of redress:*** Māori have the right to redress from their treaty partner, including financial and other compensation.[75] As with active protection, that right is framed as a subordinate principle that arises consequent on a breach.

Monetised Treaty settlements

97. The Crown has grudgingly acknowledged some of its past theft and repression. The redress provided is miniscule compared to the magnitude of cultural, spiritual, inter-generational and economic loss. The Crown alone dictates whether there will be redress, the quantum and its form. Most redress is monetarised, including to secure whenua and other taonga that the Crown already holds. Māori are forced to participate in the commodification and exploitation of te Ao Māori.

98. The clearest example is fisheries, with settlement taking the form of Individual Transferrable Quotas, which are private property rights to fish that can be leased, sold, or traded on an exchange. There are now some very wealthy iwi entities that earn large sums from commercial

[73] T *Te Paparahi o te Raki* Stage 2, p.86
[74] *Te Paparahi o te Raki* Stage 2, p.86
[75] *Te Paparahi o te Raki* Stage 2, p.87

exploitation of fisheries. That is very far from the original challenge to the Quota Management System for commodifying Tangaroa and denying small local Māori fishers a livelihood.

Fiscal Envelope and Hirangi Hui

99. The Fiscal Envelope 1995 brought the constitutional dimension of settlement policy to the fore. Cabinet had determined that a capped sum $1 billion for a limited range of "full and final" settlements of grievances over certain resources, which would end all Tiriti claims. The report of the Hirangi hui convened to debate its implications records concerns that the narrow constructs of the proposal:

> *may well be a blueprint to diminish the Treaty of Waitangi, not just to settle claims under the Treaty, and that is a prelude to eliminating Article II rights from future Treaty considerations. ... Significant opposition to the Proposal stems from the implicit discounting of the Māori version of the Treaty. Nowhere in the proposal are the roles and powers of the Government fettered by the authority of tino rangatiratanga contained in Article II of the Māori version of the Treaty. ... It is imperative that Māori know where the Government stands in relation to the Treaty of Waitangi to that a more reasoned evaluation of the Proposal can be made. Without an explicit Treaty policy the inescapable conclusion is that either there is no Treaty policy or the Government is determined to remove the Treaty as a significant factor in the nation's future growth and development.* [76]

100. The hui proposed an alternate approach of constitutional change:

> *Māori are not content to depend on the goodwill of successive Governments or to be exposed to inconsistent policies developed to suit the needs of Pakeha. Progress in one decade all too frequently must be revisited a decade later, Despite repeated calls for the Treaty of Waitangi to be entrenched as a constitutional document, it dangles precariously in front of government who have other agendas and often little sympathy for Māori aspirations. The Hui concluded that greater certainty was needed ... [and] it is an opportune time to develop a Constitutional Covenant based on the Treaty of Waitangi. Until that occurs, Māori identity and security will forever run the risk of being compromised. ... The common aim is to enable Māori policy to be formulated by Māori, legislation which impacts on Māori to be approved by Māori and Māori representatives on national bodies to be appointed by Māori. A Māori Parliament, and*

[76] Mason Durie, *Proceedings of a Hui Held at Hirangi Marae, Turangi,* 29 January 1995, 25(2) Victoria University of Wellington Law Review, July 1995,109-117 at 114-115

> *Māori House within Parliament, a Māori/Pakeha Senate and a National Māori assembly have all seriously been proposed."*

101. The Hui sought a commitment from the Crown for a constitutional review to be undertaken jointly to develop a New Zealand Constitution based on the Treaty of Waitangi and fully recognising the position of Māori as tangata whenua. Hui participants "*discounted the possibility of durable Treaty settlements without fresh Constitutional guarantees and a final break with colonial laws and processes*." That has not happened.

The Crown's unilateral settlement policy

102. As the Tribunal said in *Te Raki,* genuine redress requires negotiations between equals. Only that can genuinely address the systemic inequalities wrought by colonisation. That is part of constitutional transformation.

103. The Crown requires that redress is vested in a commercialised "Post-settlement Governance Entity" of which the Crown approves. The "Red Book", last published by Te Arawhiti in 2018,[77] says:

> *It is a matter for the claimant group to choose a governance entity that will serve their needs and reflect their tikanga. However, to fulfil its responsibilities to taxpayers and all members of a claimant group, the Crown has developed a set of principles against which proposed governance entities are assessed. If the proposed governance entity is consistent with these principles – which are normally included in the Deed of Settlement – the Crown is able to transfer settlement assets to the claimant group, once any settlement legislation is enacted.*

104. The Red Book describes a governance entity as

> *the body or entity that a claimant group chooses to represent members following a settlement. The governance entity also holds settlement assets and makes decisions on how these assets will be managed and how any benefits derived from these assets are used for the benefit of claimant group members. …*
>
> *Increasing numbers of claimant groups have found that private trusts, with subsidiary trusts or companies to manage the settlement*

[77] https://www.tearawhiti.govt.nz/assets/Treaty-Settlements/The-Red-Book/The-Red-Book-2018.pdf

assets, meet their post- settlement objectives. The Crown is also comfortable about transferring settlement redress to such entities.

105. The Crown retains control over the option:

> *The Crown cannot transfer the settlement redress to a claimant group until they have a governance entity that has been considered and ratified by the members of a claimant group. For this reason, the Crown requires claimant groups to have ratified and established their governance entity by the time the legislation implementing a settlement is introduced to Parliament.*

106. Constitutional transformation requires a model of redress that is genuine and mutually determined and restores the rights and responsibilities to exercise rangatiratanga in its fullest sense.

Devolution

107. The principle of "development" assumes that Māori retain control of the resources that drive their development and derive benefit from them, choosing the economic model as associated values they use to do so. Development in Aotearoa New Zealand has instead been framed by the Crown on a capitalist model within legal regimes instituted by the Crown through domestic and international law.

108. Capitalism, especially financialised capitalism, has intensified the extremes of wealth and poverty, and deprived Māori of many natural forms of maintaining collective wellbeing. Under the principle of equity, te Tiriti guarantees of tino rangatiratanga and respect for tikanga requires the Crown to focus attention and resources to address the social, cultural and economic requirements and aspirations of Māori. The Crown cannot advance Pākehā interests at the expense of Māori. And it must address inequities experienced by Māori.

109. In the 1980s Māori were promoting rangatiratanga-driven initiatives to resolve the wellbeing deficit confronting Māori in all aspects of life. That became subordinated through a model of "devolution" controlled by the colonial state. Under this model, the Crown decides the terms of any devolution model and who can deliver it and turns on and off the resources.

The Coalition Government has already done that unilaterally under its 100 Day Action Plan, with no engagement and seemingly no consideration of its Tiriti obligations.

110. The first report from the Waitangi Tribunal in its Kaupapa Inquiry into Māori Health, the *Hauora Report*, concluded that the principle of rangatiratanga means the right of Māori to organise in whatever way they choose – whānau, hapū, iwi or other form of organisation and to exercise autonomy and self-determination to the greatest extent must be recognised and protected.[78] The primary health care framework did not recognise and properly provide for tino rangatiratanga and mana motuhake of hauora Māori.[79]

111. Constitutional transformation to achieve equity would require genuine control over those decisions, the resources, the programmes and their delivery. Those are already being undermined by the Coalition Government's 100 Day Agenda.

Right to development and Fast Track Approvals Bill

112. The Crown has a long history of pre-empting Māori claims over resources by passing legislation or granting rights to corporations or private individuals without free prior informed consent, in direct violation of the principle of rangatiratanga and the right to development.

113. The long-running Pouākani people's claims over the bed and waters of the Waikato River is a clear example. The Crown granted Mighty River Power, now Mercury, titles to land while litigation was underway in relation to the bed of the Waikato River. The Crown likewise failed to provide compensation to Pouākani for taking and use of their land in constructing the Waikato River Hydro Scheme. These actions breached Pouākani's rights under Article 2 of Te Tiriti and the United Nations

[78] Waitangi Tribunal, *Health Services and Outcomes Inquiry. Hauora Report*, (Wai 2575), 2019, p.28
[79] *Health Services and Outcomes Inquiry,* xvii

Declaration on the Rights of Indigenous Peoples, and forced them into long and expensive litigation.

114. The Fast Track Approvals Bill that aims to speed up approvals for such projects risks compounding those breaches and preventing the Pouākani peoples from exercising their rangatiratanga and meeting their kaitiakitanga responsibilities in respect of the River. The Bill would vest power in just three ministers of the Crown to appoint expert panels and approve projects with few legal limits. They would be open to lobbying by wealthy corporate interests, supported by international trade and investment agreements (discussed below). There is no Treaty of Waitangi provision in this Bill that would require them to even consider the Tiriti implications of their decisions, or that would open those decisions to challenge. It is an example of how economic structures, embedded in capitalism, have undermined tino rangatiratanga.

115. The Tribunal should consider how various decisions, taken historically and implemented over time, have embedded an economic system that has itself jeopardised tino rangatiratanga. Decisions and structures can be isolated for analysis (including legislation that has embedded that economic system, such as the Public Finance Act 1989); analysis can be grounded in evidence compiled by experts; and those decisions and structures can be assessed for their impact on tino rangatiratanga, an exercise with which the Tribunal is familiar.

CAUSE OF ACTION 4: INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

116. International trade and investment agreements breach the principles of rangatiratanga, kāwanatanga, partnership, mutual recognition and respect, active protection, development, equity in three ways:

    (i) rules that benefit foreign states and their commercial interests can enable their abusive practices and prevent the adoption of safeguards for mātauranga and taonga from misuse;

(ii) the agreements perpetuate a market-driven model of capitalism as the only model for development; and

(iii) treaty making is conducted exclusively by the Crown, denying Māori the constitutional authority intrinsic to rangatiratanga of making international treaties.

Te Tiriti implications of trade and investment agreements

117. The principle of Rangatiratanga carries the responsibility to protect and nurture taonga kātoa in all their spiritual, cultural, social, ecological and economic dimensions for generations to come in a manner consistent with mātauranga Māori, kaitiakitanga and tikanga. That includes fundamental practices such as hua parakore and safe food systems and healing and rongoā; maintaining the integrity of whakapapa and mātauranga; defending te Taiao, including te whenua me te wai, against exploitation and degradation; protecting Māori cultural symbols, icons, images and practices from theft and denigration.

118. International trade and investment agreements can prevent the exercise of those duties and responsibilities. They create rights for commercial interests in foreign countries and in Aotearoa New Zealand. They are negotiated exclusively by the Crown, usually under conditions of secrecy. They are usually binding and enforceable in legal forums outside the country.

119. The Waitangi Tribunal has heard a number of claims relating to the actual or potential prejudice of international trade and/or investment agreements to Māori responsibilities, duties, rights and interests under Te Tiriti o Waitangi. They include *Ko Aotearoa Tēnei* (Wai 262), *National Fresh Water and Geothermal Resources Inquiry* (Wai 2358) and the *Trans-Pacific Partnership Agreement Inquiry* (Wai 2522). Those claims have dealt with international trade rules on private intellectual property rights over mātauranga Māori, controls over GMOs, plant varieties and rongoā, rights of foreign investors over privatised water, foreign control over Māori data, among others.

120. In several of these inquiries the Tribunal has recognised potential for prejudice, including the chilling effect on adoption of Tiriti-compliance policies and laws. In the Wai 2522 report on electronic commerce in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership found the Crown has breached its obligation of "active protection".[80]

121. The MFAT's deeply flawed understanding of the Crown's Tiriti obligations in *Applying Te Tiriti o Waitangi at MFAT. Te Whakaū i Te Tiriti o Waitangi o te Manatū Aorere*, outlined above, further illustrates why the Crown alone cannot be entrusted to exercise that authority.

122. The Claimants say the Crown's assertion of supreme and exclusive authority to negotiate such treaties exceeds its kāwanatanga authority and denies the exercise of rangatiratanga and is incompatible with Te Tiriti.

Crown's international authority under Te Tiriti

123. The Tribunal in *Te Raki* Stage Two observed that "the rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary".[81] The Tribunal quoted from *Te Mana Whatu Ahuru* that te Rohe Potae signatories to Te Tiriti wanted "a governing power that could be used to control settlers and protect them from foreign threats",[82] which at the time was posed by Baron de Thierry from France.[83]

124. The Tribunal in the Wai 2522 Inquiry on the Trans-Pacific Partnership Agreement declined to apply the conclusion of the Stage One report on *Te Raki* that Māori signatories in the North did not cede sovereignty, noting its scope was limited to the largely historical claims and made no conclusions about the Crown's exercise of sovereignty today.[84] It also claimed that both reports on *Te Raki "acknowledge that kāwanatanga*

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[80] *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522), 2021
[81] *Paparahi o te Raki Stage 2*, p. 529
[82] *Paparahi o Te Raki Stage 2*, p.44
[83] *Paparahi o Te Raki Stage 2*, p.57
[84] *Report on the Trans-Pacific Partnership Agreement. Stage One,* (Wai 2522), pp.7-8

includes a collective and representative capacity in the conduct of international affairs."[85]

125. That is a fundamental misreading of the reference in *Te Raki* to the Crown's authority in international affairs. International affairs in 1840 related to levying war and high diplomacy and the reference was clear to threats from foreign powers, consistent with the protection to be provided in *He Whakaputanga*. The contemporary forms of trade and investment treaties, whose rules and enforcement mechanisms are directed as domestic policy and laws, and impact directly and indirectly the responsibilities and rights of Māori guaranteed in Te Tiriti, was not a matter addressed before the Tribunal in *Te Raki*.

Treaty making as an exercise of Rangatiratanga

126. Trade and investment agreements impose increasingly broad constraints on domestic policy options within Aotearoa, including those involving fundamental Māori responsibilities, rights and interests under Te Tiriti. But Māori currently have no right to sit at the table when decisions are made on whether to negotiate, what to negotiate, with whom, what objectives to seek, what compromises to make, what exceptions to insist on and whether the deal is tika. The Crown controls the entire process as a matter of Crown prerogative and Executive privilege.

127. Dr Moana Jackson's brief of evidence in the Wai 2522 Inquiry identified the making of treaties as a fundamental and inalienable function of rangatiratanga:

> *... [The] tikanga-based concept of power that Iwi and Hapū have defined as mana, and which they have exercised as a unique, absolute and independent constitutional authority* [includes] *the notion of treaty making as an inherent and inalienable consequence of such authority"*.[86]

[85] *Report on the Comprehensive and Progressive Agreement*, pp.19 and 23
[86] Moana Jackson, Second Brief of Evidence, 17 October 2019, Wai 2522 #B9 and #B9(a), para 16

128. The constituent parts of mana or tino rangatiratanga, which Dr Jackson refers to as the specifics of power, include:

a. **The power to define** - that is, the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;

b. **The power to protect** – that is, power to be kaitiaki, to manaaki and maintain the peace, and to protect everything and everone within the polity through an ultimate authority to wage war when necessary;

c. **The power to decide** – that is, the power to make decisions about everything affecting the wellbeing of the people;

d. **The power to reconcile** – that is, the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo;

e. **The power to develop** – that is, the power to change in ways that are consistent with tikanga and conducive to the advancement of the people; and

f. **The power to treat** – that is, the power to negotiate and commit to formal collective agreements with other polities.

129. The exercise of treaty making authority throughout the history of Aotearoa shows that

> "*treaties and the power to treat did not suddenly fall out of the sky on unaware or ignorant Māori polities in 1840. ... The authority and understanding of treaties was an integral part of tikanga as law.*"

130. Because mana could not be ceded in tikanga or Māori legal terms, Dr Jackson says it is axiomatic that the authority and responsibility of Iwi and Hapū to treat could not be delegated or subordinated in a treaty to that of another polity and could not be ceded.

131. If it was impossible, and indeed culturally incomprehensible, for one Iwi to permit another to treat on its behalf, it is at best illogical to assume that Iwi would allow the Crown to do so. At worst, such an assumption is a breach of Te Tiriti. That led Dr Jackson to conclude that the "*unilateral negotiation of international agreements that purport to bind everyone in this country*" is not a valid exercise of the kāwanatanga granted to the Crown in Te Tiriti o Waitangi.

Imperialist origins of Crown's exclusive treaty making authority

132. In contrast to an understanding of treaty making sourced in tikanga and te Tiriti, the Crown treats international treaty making as an exercise of the Crown's prerogative to conduct foreign affairs and the traditional function of the Executive in the Westminster system.[87] While it could derive this treaty making authority from the English text, its source lies more deeply in colonial legal doctrine and international law concepts of statehood and sovereignty that were developed by imperial powers.

133. Dr Jackson and Tina Ngāta have traced this usurpation of mana and rangatiratanga to the Papal Bulls and the Doctrine of Discovery that provided an ideological rationale and legitimisation for imperial assumptions of power across the globe.[88]

> *The Doctrine of Discovery (also known as the Doctrine of Christian Discovery) is an international legal concept and Christian principle, that is borne out of a number of Catholic laws (called "papal bulls") originating out of the Vatican in the 15th and 16th centuries. It gave the monarchies of Britain and Europe the right to conquer and claim lands, and to convert or kill the native inhabitants of those lands. In 2019 it is 250 years since that process was carried out in Aotearoa New Zealand by James Cook.*[89]

134. In 2012 at the United Nations, Dr Jackson said:

> *. . . while the Doctrine of Discovery was always promoted in the first instance as an authority to claim land of Indigenous peoples, there were much broader assumptions implicit in the doctrine. For to open*

[87] Claire Nielson, 'The Executive Treaty-making Prerogative: A history and critique', (2007) 4 *New Zealand Yearbook of International Law* 173.
[88] Tina Ngata, *Kia Mau: Resisting Colonial Fictions,* Rebel Press, 2019.
[89] Tina Ngata, *Kia Mau,* p.51

> *up an Indigenous land to the gaze of the colonising 'other,' there is also in their view an opening up of everything that was in and of the land being claimed. Thus, if the Doctrine of Discovery suggested a right to take control of another nation's land, it necessarily also implied a right to take over the lives and authority of the people to whom the land belonged. It was in that sense, and remains to this day, a piece of genocidal legal magic that could, with the waving of a flag or the reciting of a proclamation, assert that the land allegedly being discovered henceforth belonged to someone else, and that the people of that land were necessarily subordinate to the colonisers.*[90]

135. The eleventh session of the United Nations Permanent Forum on Indigenous Peoples observed that

> *while such frameworks of domination and "conquest" were promoted as authority for land acquisition, they also encouraged despicable assumptions: that Indigenous peoples were "savages," "barbarians," "inferior" and "uncivilised," among other constructs the colonisers used to justify their subjugation, domination and exploitation of the lands, territories and resources of native peoples.*[91]

136. This ideology was expressed most explicitly in the judgement of *Wi Parata*, including that Māori were not civilised enough to enter into a treaty with another state.

137. Historical and contemporary international law doctrines of statehood and sovereignty are imperial constructs, building on the Doctrine of Discovery. Professor Anthony Anghie explains that "*colonialism was central to the constitution of international law and the sovereignty doctrine*",[92] and describes "*a history in which international law continuously disempowers the non-European world, even while sanctioning intervention within it"*.[93]

138. On the sovereignty doctrine, Anghie writes that:

> *Sovereignty was forged out of the confrontation between cultures and, at least in the colonial confrontation, the appropriation by one culture of the powerful terms "sovereignty" and "law". ... Sovereignty is formulated in such a way as to exclude the non-*

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[90] Quoted in Tina Ngata *Kia Mau* p.56
[91] Tina Ngata *Kia Mau* p.52
[92] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law,* Cambridge University Press, 2005, p. 310.
[93] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 312

European; following which, sovereignty can then be deployed to identify, locate, sanction and transform the uncivilized.[94]

139. That takes the form in New Zealand of a dualist approach to international treaties, where domestic and international law are distinct legal domains. International treaties become binding on the state once they are incorporated in domestic law. That notion underpinned the precedent established in *Hoani Te Heuheu Tukino v Aotea District Māori Land Board,*[95] which enabled the Crown to evade its responsibilities under Te Tiriti. It also divorces the domestic constitutional processes from those in the international domain. Constitutional transformation therefore needs to address both the international and domestic spheres.

Threats posed by Fast Track Bill and Investment Disputes

140. The investment chapters of a number of New Zealand's free trade agreements include guarantees to foreign investors against new policies, laws or decisions that adversely affect their commercial interests. These rights can be enforced directly against the central or local government responsible in offshore arbitral tribunals through Investor-State Dispute Settlement (ISDS), which have the powers to award extremely large damages awards including for foregone future profits with compound interest.

141. The UN Special Rapporteur on Human Rights reported in July 2023 a surge in ISDS disputes on climate action and human rights, with the fossil fuel and mining industries already winning over $100 billion in award, and threats of disputes having a major chilling effect on governments adoption of policies or laws that would restrain those extractive industries.[96]

142. The risks that investment protections and ISDS could be used to challenge Crown measures to comply with Tiriti obligations or redress Tiriti breaches have been addressed in several Tribunal inquiries.

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[94] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 311-312

[95] *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590

[96] United Nations, *Paying polluters: the catstrophic consequences of investor-State dispute settlement for climate and environment action and human rights,* 13 July 2023, A/78/186

143. After in-depth consideration in the *National Fresh Water and Geothermal Resources Inquiry* on the risk of that the threat of an investment claim by an overseas investors in a partially privatised state enterprise could deter the Crown from providing redress to Māori because it affected the value of their shares.[97] In that case the matter was set aside when the Tribunal accepted the "honour of the Crown" based on "good-faith pledges" from Ministers that they would not be deterred from providing appropriate rights recognition for Māori by anything that results from the sale of shares in the power-generating SOEs.

144. The chilling effect of an ISDS dispute was also argued in some depth in the urgency hearing on The Trans-Pacific Partnership (Wai 2522). While the Tribunal did not find a breach on the specific question relating to the Treaty of Waitangi exception it said:

> *Despite this finding, we do have concerns. The protections and rights to foreign investors under the TPPA are extensive. The rights foreign investors have to bring claims against the New Zealand Government in our view raise a serious question about the extent to which those claims, or the threat or apprehension of them, might have a chilling effect on the Crown's willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measures. This issue, and the appropriate text for a Treaty exception clause for future trade agreements are matters about which there should, in our view, be further dialogue between Māori and the Crown.*[98]

145. The Tribunal proposed that Māori and the Crown should develop of a protocol to deal with such disputes. The eventual protocol does not cover the matters proposed by the Tribunal.[99] Nor has the Treaty exception clause been changed.

146. Despite denying any risks for Māori under ISDS in two Tribunal inquiries, the previous government adopted a policy not to include ISDS in future free trade agreements. A number of earlier agreements still have investor protections that are enforceable through ISDS. These include agreements

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[97] Waitangi Tribunal, *National Fresh Water and Geothermal Resources Inquiry. Stage One,* Wai 2358), pp.91-92, 129-136
[98] *The Trans-Pacific Partnership Agreement, p*.x.
[99] https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/an-isds-protocol/

with Singapore, Malaysia, Japan, Indonesia and Canada that invest in Aotearoa New Zealand.

147. It is unclear whether the current Coalition Government would continue the moratorium on ISDS, especially as Minister Shane Jones has asked officials for advice on compensation for oil and gas companies if a future government reinstates the ban.[100] The intention of the Fast-Track Approvals Bill, with no reference to Te Tiriti or even the principles of the Treaty, is to minimise restrictions on such investors. These agreements, negotiated in secret without Māori at the table, could make those licenses impossible to reverse.

148. This Constitutional Kaupapa inquiry will enable the Tribunal to draw on historical and contemporary initiatives and proposals by Māori to address the Crown's continuous and deliberate denial of te tino rangatiratanga that it guaranteed would continue when it acknowledged He Whakaputanga and joined with ngā Rangatira in signing Te Tiriti o Waitangi, and to make recommendations to restore the relative role and authority of tino rangatiratanga and of kāwanatanga as agreed to in those foundational constitutional instruments into the future.

PREJUDICE

149. Ngā Toki Whakarururanga say the Crown has:

a. undermined their ability to exercise their tikanga and maintain their hapu rangatiratanga and mana Maori Motuhake; and

b. failed to implement he Whakaputanga me Te Tiriti in the design and implementation of institutions where the division of constitutional powers is fundamental to the promises of peace and good government which are central promises in the founding constitutional stones of modern New Zealand/Aotearoa.

[100] "Resources Minister Shane Jones has asked for advice on whether the Government could provide insurance for the regulatory averse oil & gas industry", *interest.co.nz,* 11 March 2024.

150. Ngā Toki Whakarururanga say that hapū, iwi and Maori generally have not been able to exercise tikanga and rangatiratanga, including the right to possess, manage, and develop lands and resources; manage their internal affairs; enter trade and economic alliances; and defend their rights and territories, independent of Crown interference.

151. Ngā Toki Whakarururanga say that hapū, iwi and Māori generally, will also suffer significant and irreversible prejudice as a result of the Coalition Government's policies. Such prejudice includes:

(a) An undermining of mana and rangatiratanga;

(b) Removal and/or diminishment of the rights of Māori under te Tiriti in legislation;

(c) Denigration of the rights and position of Māori in the institutional arrangements and constitutional division of power;

(d) The backtracking of the incremental progress which Māori have fought decades to achieve; and

(e) The denial of justice to Māori on an issue which so clearly undermines their rangatiratanga, mana, and partnership under te Tiriti.

152. The prejudicial impacts suffered by Ngā Toki Whakarururanga under this claim can be further explained through claimant and technical evidence.

RELIEF

153. The Claimants seek definitive findings that

(i) the constitutional authority and responsibilities of Mana Motuhake and Tino Rangatiratanga, including in relation to laws, values, governance arrangements, political institutions and

processes, economic systems, and treaty making are enduring to the present day, and need to be exercised on equal terms with the authority of Kāwanatanga; and

(ii) the proposed actions, policies and legislation that form part of the Coalition Government agreements between the National Party and the ACT Party and the National Party and New Zealand First constitute a further egregious breach of the Crown's obligations under Te Tiriti o Waitangi, and the principles derived therefrom.

154. Ngā Toki Whakarururanga are still in the process of considering any further relief they may seek in respect of this inquiry. However, as a starting point, they seek:

(a) An apology;

(b) Compensation; and

(c) A negotiation towards the full implementation of the Whakaputanga me te Tiriti.

155. Ngā Toki Whakarururanga will provide further detail to the relief sought once amended statements of claim, submissions, and evidence are filed.

AMENDMENT

156. Leave is sought by the claimants to further amend this statement of claim following the determination of the scope of this inquiry, the production of research, and the filing of evidence, submissions or other material that may come to light during the presentation of this claim. This includes the filing of further causes of action, particulars or specific allegations that are not included in this statement of claim.

DATED at Rotorua on this 2nd day of April 2024

Annette Sykes

Kalei Delamere-Ririnui

Counsel for the Claimants

TO: The Registrar, Waitangi Tribunal, Wellington
AND TO: The Crown Law Office
AND TO: Claimant Counsel for the Claimants

This **STATEMENT OF CLAIM** is filed by **ANNETTE SYKES** and **KALEI DELAMERE-RIRINUI** Counsel for the Claimants, of the firm Annette Sykes & Co. Ltd.

The address for service on the abovenamed Claimants is the offices of Annette Sykes & Co. Ltd 8 – Unit 1 Marguerita Street, Rotorua 3010.

Documents for service on the abovenamed Claimants may be left at the address for service or may be posted to the solicitor at Annette Sykes & Co., PO Box 734, Rotorua 3010.