

I TE RŌPU WHAKAMANA
I TE TIRITI O WAITANGI

WAI 3300
WAI 682
WAI 1464
WAI 1546

KEI RARO I TE MANA o te ture o te Tiriti o Waitangi 1975

I TE TAKE O te pakirehua, Tomokia ngā tatau o Matangireia -
the Constitutional Kaupapa Inquiry (Wai 3300)

Ā

I TE TAKE O he kereme na Rewiti Paraone, Kevin Prime and
Erima Henare, Pita Tipene and Waihoroi
Shortland mo Te Rūnanga o Ngāti Hine mo ngā
uri o Torongare me Hauhau (Wai 682)

Ā

I TE TAKE O he kerēme nā Te Riwhi Whao Reti rātou ko Hau
Hereora, ko Romana Tarau, ko Karen Herbert, ko
Edward Cook, ko Pearl Reti mō Te Kapotai (Wai
1464/1546)

HE MANATŪ RŌIA

I tēnei rā, i te rā 25 o Māehe 2024



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RECEIVED

Waitangi Tribunal

25 Mar 24

Ministry of Justice
WELLINGTON

TĒNĀ, I TE TARAIPUUNARA:

Introduction

1. This Memorandum of Counsel (“MOC”) is filed on behalf of Te Rūnanga o Ngāti Hine (“Ngāti Hine”) and Te Kapotai (“Te Kapotai”) (“the claimants”) and:
 - (a) addresses the claimants’ participation in an inquiry into the Treaty Principles Bill; and
 - (b) responds to the memorandum and documents filed by the Crown on 18 March 2024.¹

Claimants’ participation in an inquiry into the Treaty Principles Bill

2. By way of Memorandum-Directions dated 26 February 2024, her Honour Chief Judge Caren Fox directed a hearing would be held on Monday, 8 April 2024 to determine the following applications for an urgent hearing into the Coalition Government’s proposed Treaty Principles Bill:²
 - (a) An application for an urgent hearing from Nora Rameka on behalf of Te Rūnanga o Ngāti Rehia;³
 - (b) An application for an urgent hearing from the Ngāi Te Rangi Coalition Government Urgent claim;⁴ and

¹ Wai 3300, #3.1.13, *Memorandum of counsel for the Crown in response to memorandum-directions dated 26 February 2024* [18 March 2024].

² Wai 3300, #2.5.010, *Memorandum-Directions of Chief Judge DR C L Fox* [26 February 2024] at [28].

³ Wai 3308, #1.1.1 & #2.5.5.

⁴ Wai 3308, #1.1.1 & #3.1.1.

- (c) Six statements of claim and accompanying applications seeking an urgent hearing from Phoenix Law on behalf of Wai numbers 3316,⁵ 3317,⁶ 3318,⁷ 3319,⁸ 3320,⁹ and 3321.¹⁰

(“Directions”)

3. The claimants have filed amended statements of claim in the Wai 3300 – Constitutional Inquiry.¹¹ The claimants suggested priority hearing of the issues relating to the Treaty Principles Bill but noted that if an urgent inquiry is granted, they seek to participate as full applicants/participants.
4. Counsel note that this request still stands and was also noted in Ngāti Hine’s memorandum in the Wai 3308 - Ngāi Te Rangī Coalition Government urgent claim which addressed the pathway for hearing claims relating to the Treaty Principles Bill and the use of Te Reo Māori in the public sector.¹²
5. Ngāti Hine submitted that the Treaty Principles Bill could be more effectively and efficiently inquired into as a priority issue in the Wai 3300 - Constitutional Inquiry but noted that whichever pathway was decided upon, they sought to participate as full applicants/participants and would amend their claim if the Tribunal decided to take both issues to urgent hearing.
6. Counsel also note the following documents filed by the claimants in this regard:
 - (a) Memorandum filed by Ngāti Hine on 13 December 2023¹³ notifying that Ngāti Hine sought to participate in urgent inquiries into claims not covered by a kaupapa inquiry and would file an

⁵ Wai 3316, #1.1.1 & #3.1.1.

⁶ Wai 3317, #1.1.1 & #3.1.1.

⁷ Wai 3318, #1.1.1 & #3.1.1.

⁸ Wai 3319, #1.1.1 & #3.1.1.

⁹ Wai 3320, #1.1.1 & #3.1.1.

¹⁰ Wai 3321, #1.1.1 & #3.1.1.

¹¹ Wai 3300, *Amended Statement of Claim* [9 February 2024]; Wai 3300, *Second Amended Statement of Claim* [19 January 2024].

¹² Wai 3308, *Memorandum of Counsel* [21 December 2023] at [4]-[6].

¹³ Wai 3307, #3.1.4, He Manatū Rōia [13 o Hakihea 2023].

amended claim in light of policies listed in the Coalition Government's agreement and 100/day plan, including the policy to introduce a Treaty Principles Bill;¹⁴

- (b) Memorandum filed by Te Kapotai on 13 December 2023 supporting Ngāti Hine's memorandum and notifying parties that they too would file an amended claim in light of Crown policies listed in the Coalition Government's agreement and 100/day plan;¹⁵
- (c) Memorandum filed by Ngāti Hine on 19 January 2024 seeking prioritisation of the issues relating to the Treaty Principles Bill,¹⁶ and
- (d) Memorandum filed by Te Kapotai on 9 February 2024 supporting Ngāti Hine's memorandum of 19 January 2024 and seeking to "participate as full applicant for all issues that are heard in the constitution inquiry".¹⁷

- 7. Should the Tribunal grant an urgent inquiry, counsel respectfully seek a direction that the claimants are included as applicants in line with their claims filed in the Wai 3300 - Constitutional inquiry.

Response to Crown Memorandum and documents

- 8. Counsel make the following submissions in response to the Crown's memorandum and documents filed on 18 March 2024.¹⁸

Documents withheld by the Crown

- 9. The Crown identified the following five documents within the scope of documents requested by the Tribunal:

¹⁴ Wai 3307, #3.1.4, He Manatū Rōia [13 o Hakihea 2023] at (2)(a)(i).

¹⁵ Wai 3307, #3.1.4, He Manatū Rōia [13 o Hakihea 2023].

¹⁶ Wai 3300, He Manatū Rōia [19 January 2024].

¹⁷ Wai 3300, He Manatū Rōia [9 February 2024].

¹⁸ Wai 3300, #3.1.13, *Memorandum of counsel for the Crown in response to memorandum-directions dated 26 February 2024* [18 March 2024].

- (a) Two sets of meeting notes from a meeting with Associate Minister Seymour (“Notes”);
 - (b) A paper provided by Minister Goldsmith to Cabinet regarding the Bill and the 2024 legislative programme (“Legislative Bid”);
and
 - (c) Two briefings which contain policy proposals on this topic, dated 14 December 2023 and 12 March 2024 (“Briefing/s”).
10. Of these documents, the December 2023 Briefing has been provided to the Tribunal only and the rest have been withheld on grounds of confidentiality and sensitivity.
11. The Crown relies on the Official Information Act and Section 70 of the Evidence Act 2006 which provides:¹⁹
- A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.
12. Counsel submit that remaining documents should be provided to the Tribunal. Per Section 70 of the Evidence Act, it is for the Tribunal to determine whether the public interest in disclosing the information outweighs the public interest in withholding the information.
13. Counsel also do not consider that sufficient rationale/grounds have been made out by the Crown to trigger withholding the documents for reasons of public interest.
14. The Waitangi Tribunal’s Guide to the practice and procedure of the Waitangi Tribunal states:²⁰

¹⁹ Wai 3300, #3.1.13, *Memorandum of counsel for the Crown in response to memorandum-directins dated 26 February 2024* [18 March 2024] at [10].

²⁰ Waitangi Tribunal, *Guide to the practice and procedure of the Waitangi Tribunal* (August 2023) at [5.28]-[5.30].

- 5.28 If there are issues of confidentiality and/or privilege identified by the Tribunal or in dispute between the Crown and claimants, the Tribunal may inspect the documents to determine their relevance and whether the relevant grounds for confidentiality and/or privilege are made out. Inspection by the Tribunal will only occur where good reasons exist to suggest that the privilege or confidentiality claim is not properly made.
- 5.29 Following inspection, if the Tribunal considers the grounds for confidentiality and/or privilege are made out, the Tribunal will inform parties that the grounds are made out and that the disputed material should not be released.
- 5.30 If the grounds for confidentiality and/or privilege are not made out, in whole or in part, the Tribunal will issue a direction accordingly for the disclosure of the documents, with any applicable conditions. Parties may be invited to submit on the conditions attached to the disclosure of the documents.
15. Accordingly, it is not for the Crown alone to determine confidentiality or matters of public interest and withhold documents.
16. Counsel suggest the Crown provide the Tribunal with all documents so the Tribunal can assess whether the public interest in releasing the documents outweighs the public interest in withholding the documents and determine whether the grounds for confidentiality are made out.
17. In terms of public interest, the claimants say that the seriousness of the Treaty Principles Bill to the claimants and its potential impacts to the claimants favour the release of the documents.
18. Withholding documents from the claimants only adds to the lack of transparency being experienced by the claimants, particularly if decisions around withholding documents and confidentiality are not made independently.
19. Unless the Tribunal finds otherwise, as a matter of fair process the claimants must have an opportunity to respond to documents before the Tribunal so the Tribunal has all the information before it when determining whether the grounds for urgency are met.

20. Counsel repeats the submissions around independence in respect of the Notes being withheld by the Crown. The Crown submits there is little if any countervailing interest in releasing the Notes because “as well as potential issues of reliability/accuracy arising from their informal nature, the Notes disclose limited information relevant to the claims filed with the Tribunal and no information about the timing of the Bill”.²¹ The claimants say it is for the Tribunal and the claimants to determine relevance.

Documents provided by the Crown

21. The Crown has provided a briefing paper from Te Arawhiti which:
- (a) confirms that Te Arawhiti has commenced their review of the enactments that reference “the principles of the Treaty/Tiriti of Waitangi”;
 - (b) identifies 40 Acts and five Bills that reference the Treaty principles;²² and
 - (c) recommends a direction for Te Arawhiti to provide further advice on options to progress the workstream.²³
22. This workstream coupled with the Treaty Principles Bill is concerning to the claimants. The enactments identified will be impacted by the Treaty Principles Bill as it will set the standard to be applied in each of the enactments. As a result, the rights of Māori under te Tiriti will be uniformly undermined across the legislative framework of Aotearoa.
23. The reasons above support an urgent or priority inquiry.

²¹ Wai 3300, #3.1.13, *Memorandum of counsel for the Crown in response to memorandum-directions dated 26 February 2024* [18 March 2024] at [22].

²² Te Arawhiti Briefing Paper (4 December 2023) at [2].

²³ Te Arawhiti Briefing Paper (4 December 2023) at [23].

Timeframes

24. The Crown confirms that, while timing is subject to change, the Government is working toward:²⁴
 - (a) seeking Cabinet approval of policy proposals in May 2024;
 - (b) an exposure draft of the Bill being released publicly for consultation in July 2024; and
 - (c) introducing the Treaty Principles Bill in mid-November 2024.
25. The claimants submit that these timeframes support an urgent or priority hearing being carried out and reported on prior to November 2024.
26. Such timing would allow the Crown the benefit of the Tribunal's findings and recommendations before the Treaty Principles Bill is introduced. It would also ensure the Crown is informed of its Tiriti obligations when carrying out its review of the enactments that reference the treaty.
27. Without an urgent or priority hearing, the status quo remains where the claimants Tiriti rights are being examined, undermined and overridden by the Crown.
28. Counsel will be available to speak to these matters further at the hearing on 8 April 2024.

I TĒNEI RĀ, i Whāngarei, te rā 25 o Māehe 2024



Dr Season-Mary Downs / Chelsea Terei-Tipene / Majka Cherrington
Counsel for the claimants

²⁴ Wai 3300, #3.1.13, *Memorandum of counsel for the Crown in response to memorandum-directins dated 26 February 2024* [18 March 2024] at [31].