

I TE TIRITI O WAITANGI

WAI 3300

WAI 3308

KEI RARO I TE MANA

o te Tiriti o Waitangi Act 1975

Ā

I TE TAKE

o Tomokia ngā Tatau o Matangireia
Constitutional Kaupapa Inquiry (Wai
3300)

MEMORANDUM OF COUNSEL ON BEHALF OF INTERESTED PARTIES IN
RESPONSE TO MEMORANDUM-DIRECTIONS DATED 26 FEBRUARY 2024

Date: 25 March 2024

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. This Memorandum of Counsel is filed by counsel on behalf of the following claimants:
 - a. David Hawea, for and on behalf of the Hawea whānau and Te Whānau a Kai iwi (Wai 892);
 - b. Jasmine Cotter-Williams, for and on behalf of her whānau and Ngāti Taimanawaiti iwi (Wai 2063);
 - c. Stephanie August, for and on behalf of the late Robert Charles William James Farrar and her whānau (Wai 3096);
 - d. Robert Gabel, for and on behalf of Ngāti Tara of Ngāti Kahu (Wai 1886);
 - e. April Grace, for and on behalf of her whānau, Ngā Wahapū o Te Rarawa, Ngāti Whātua and Ngāpuhi Nui Tonu (Wai 2206);
 - f. Annette Hale, for and on behalf of the Wikotu whānau of Te Upokorehe (Wai 2743);
 - g. Te Enga Harris and Lee Harris, for and on behalf of the Wiremu Hemi Harris and Meri Ōtene whānau, and on behalf of members of Ngāti Rangī, Ngāti Here, Ngāi Tūpoto, Ngāti Hōhaitoko, Ngāti Kōpuru, Te Rarawa and Ngāti Uenuku (Wai 1531);
 - h. Tasilofa Huirama, for and on behalf of the Huirama whānau and members of Ngāti Ueoneone and Ngāti Tautahi of Ngāpuhi (Wai 2890);
 - i. Te Urunga Evelyn Aroha Kereopa, for and on behalf of the Kereopa whānau and members of Te Ihingārangi, hapū of Ngāti Maniapoto (Wai 762);
 - j. Richard Nathan, for and on behalf of the Mangakahia Hapū Claims Collective (Wai 861);

- k. Diane Marie Paekau for and on behalf of her whanau and members of Ngāti Hounuku, Ngāti Houa, Ngāti Poua, Ngāti Mahuta, Ngāti Te Ata and Ngāti Whātua (Wai 3131);
- l. John Pikari, for and on behalf of the descendants of Hone Karahina and members of the hapū of Te Uri o Hua and Ngāti Torehina (Wai 2394);
- m. Rueben Taipari Porter, for and on behalf of the hapū of Ahipara (Wai 1968);
- n. Audrey Okeroa Rogers, for and on behalf of her whānau and members of Ngāti Koheriki (Wai 2869);
- o. Jane Stevens, for and on behalf of her whānau and Ngāi Tahu iwi (Wai 2671);
- p. Violet Eva Walker, for and on behalf of her whānau and members of Ngāti Rangi o Waiapu ki Tawhiti and Ngāti Kahu ki Whangaroa (Wai 2382);
- q. Kahura James Watene and Elizabeth Watene, for and on behalf of Ngāi Tukōkō and Ngāti Moe of Rangitāne me Ngāti Kahungunu (Wai 2778); and
- r. Michael Williams and Jessica Williams, for and on behalf of their whānau, and members of Ngaitūpango, hapū of Ngāpuhi (Wai 2838).

(the “interested parties”)

BACKGROUND

1. On 25 January 2024, Judge Reeves referred a number of applications (or parts thereof) for urgent hearing viz a viz the Treaty Principles Bill (“**Bill**”) to the Wai 3300 Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa inquiry.¹

¹ Waitangi Tribunal, *Memorandum-Directions of the Deputy Chairperson*, dated 25 January 2024, Wai 3300 #2.5.6, at [12].

2. On 5 February 2024, Chief Judge Fox directed the Crown and any interested parties to respond to the applications for an urgent hearing by midday, 9 February 2024.² Applicants were also directed to file submissions in reply to those of the Crown and interested parties by midday, 16 February 2024.³
3. On 26 February 2024, having reviewed submissions from the Crown and interested parties and submissions in reply from the Applicants, Chief Judge Fox set down a hearing for Monday, 8 April 2024, to decide the applications for urgency.⁴ Her Honour emphasised the purpose of the upcoming hearing is:⁵

...to establish whether there are sufficient grounds to grant the applications for urgency and to direct an inquiry into whether Crown actions and policy developed to review legislative enactments, referring to the principles of the Treaty of Waitangi and/or progressing the Treaty Principles Bill are actions or policy in breach of the principles of the Treaty of Waitangi. The decision of the Waitangi Tribunal will need to assess whether the applications for urgency are in accord with the Tribunal's criteria for urgency.

4. To assist with determining the applications for urgency, her Honour invited the Crown to file the following information by 18 March 2024:⁶
 - a. All written policy proposals drafted by Ministry of Justice officials relating to the review of enactments that reference “the principles of the Treaty/Tiriti of Waitangi and/or the principles of the Treaty of Waitangi Bill” and/or “the text of the Treaty drafted by direction of the Associate Minister D Seymour”;
 - b. Any minutes of discussions held by Associate Minister D Seymour with officials to progress the matters listed in (a) above;
 - c. Any documents the Associate Minister D Seymour has given officials setting out advice given to him from other sources relating to the review of enactments referring to the principles of the Treaty

² Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox*, dated 5 February 2024, Wai 3300, #2.5.7, at [4].

³ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox*, dated 5 February 2024, Wai 3300, #2.5.7, at [5].

⁴ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox*, dated 26 February, Wai 3300, #2.5.10, at [28].

⁵ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox*, dated 26 February, Wai 3300, #2.5.10, at [29].

⁶ Waitangi Tribunal, *Hearing to decide applications for urgency timeline*, dated 26 February, Wai 3300, #2.5.10(b).

of Waitangi and to any proposed Bill and directing the officials to follow that advice;

- d. Any Cabinet Committee, or Cabinet papers pertaining to those matters listed at (a) and (b) above.
5. Her Honour provided further timetabling in anticipation of the hearing, with Applicants directed to file any submissions and response evidence to the Crown documents by Monday, 25 March 2024.⁷
6. On 18 March 2024, the Crown filed a Memorandum of Counsel (“**Crown MOC**”) in response to her Honour’s Memorandum of Directions dated 26 February 2024, requesting the production of documents.⁸
7. In that Memorandum, the Crown provided the Tribunal with a briefing related to the review of enactments which reference ‘the principles of the Treaty/Te Tiriti o Waitangi’. The Crown noted no other written policy proposals falling within the terms of her Honour’s directions were in existence.⁹ However, five documents related to the Bill that fell within the terms of her Honour’s request were withheld by the Crown, under section 70 of the Evidence Act 2006, on the basis that they are ‘highly sensitive’ (“five documents”).¹⁰

Interested Party Participation

8. On 19 January 2024, counsel for the interested parties sought interested party status and requested inclusion at any judicial conferences or other proceedings concerning the Wai 3308 claim.¹¹
9. Counsel makes these submissions on behalf of the interested parties in response to the Memorandum-Directions dated 26 February 2024 by Chief Judge Dr Fox. The purpose of these submissions is to support the

⁷ Waitangi Tribunal, *Hearing to decide applications for urgency timeline*, dated 26 February, Wai 3300, #2.5.10(b).

⁸ L Theron, J Watson, *Memorandum of Counsel in response to Memorandum-Directions dated 26 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13.

⁹ L Theron, J Watson, *Memorandum of Counsel in response to Memorandum-Directions dated 26 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at 16.

¹⁰ L Theron, J Watson, *Memorandum of Counsel in response to Memorandum-Directions dated 26 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at 3.

¹¹ D C F Naden, H J Fletcher, *Joint Memorandum of Counsel Regarding Ngāi te Rangi Coalition Government Urgent Claim*, dated 19 January 2024, Wai 3308, #3.1.21, at [57].

applications for urgency and to respond to the Crown's withholding of the five documents.

URGENT HEARING APPLICATION

Urgency Criteria

10. The criteria for the granting of urgent inquiries by the Waitangi Tribunal is set out in the Guide to Practice and Procedure of the Waitangi Tribunal. In determining an urgent application, the Tribunal must consider several factors. Those of particular importance are set out below:¹²
 - a. The claimants can demonstrate that they are suffering, or are likely to suffer significant and irreversible prejudice as a result of current or pending Crown actions or policies;
 - b. There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
 - c. The claimants can demonstrate that they are ready to proceed urgently to hearing, generally without further research.
11. The Tribunal may also consider other factors, including whether the claim or claims challenge an important current or pending Crown action or policy.¹³

Crown opposition to urgency

12. The Crown is opposed to an urgent inquiry on the following grounds.
13. First, the Crown has argued that the claims are premature because the Bill is at a 'preliminary stage in the policy process'.¹⁴ In particular:¹⁵

[T]he ultimate content of the Bill is not known. It follows that an urgent inquiry would have an uncertain subject matter, and would proceed on a contingent or hypothetical basis. This would inevitably constrain the

¹² Waitangi Tribunal, Guide to Practice and Procedure of the Waitangi Tribunal (August 2023), at 3.28.

¹³ Waitangi Tribunal, Guide to Practice and Procedure of the Waitangi Tribunal (August 2023), at 3.29.

¹⁴ L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [4].

¹⁵ J Watson and G Seeley, *Memorandum of Counsel in Response to Application for Urgent Inquiry*, dated 22 December 2023, Wai 3308, #3.1.6, at [13.1].

assistance counsel can provide to the Tribunal, and has consequences for the utility of any Tribunal report.

14. The Crown's second argument, which is related to the first, is that 'there are no decisions yet as to the procedure to be followed for the reform proposed, including engagement with iwi/hapū and Māori communities.'¹⁶
15. Third, the Crown argues that even if the content and process were known, the Bill raises wide-ranging and significant issues 'more appropriately addressed in their broader constitutional and historical setting'. The Crown contemplates the Constitutional Kaupapa Inquiry as a better vehicle for addressing and examining the issues in their broader context.¹⁷
16. The Crown has also raised the principle of comity/non-interference in the Parliamentary process as a factor for consideration by the Tribunal in its determination of the urgency applications.¹⁸

Interested parties' position

Sufficient action taken by the Crown

17. Despite assertions by the Crown that policy development related to the Bill is at a preliminary stage, counsel submit the Crown has taken sufficient steps to action commitments set out in the Coalition Agreement to 'introduce a Bill based on existing ACT policy and support it to the Select Committee as soon as practicable'.¹⁹
18. As discussed above, it is these actions and omissions the urgency inquiry should be primarily concerned with, not the ultimate formulation of the Treaty Principles Bill (if any).

¹⁶ J Watson and G Seeley, *Memorandum of Counsel in Response to Application for Urgent Inquiry*, dated 22 December 2023, Wai 3308, #3.1.6, at [13.2].

¹⁷ J Watson and G Seeley, *Memorandum of Counsel in Response to Application for Urgent Inquiry*, dated 22 December 2023, Wai 3308, #3.1.6, at [13.3].

¹⁸ G Melvin and G Seeley, Crown Memorandum in Response, dated 9 February 2024, Wai 3300, at [5.2].

¹⁹ New Zealand National Party & ACT New Zealand, *Coalition Agreement*, dated 24 November 2024, at 9, accessed at <https://assets.nationbuilder.com/nationalparty/pages/18466/attachments/original/1700778592/National_ACT_Agreement.pdf?1700778592>

19. The 'existing ACT policy' referred to ascribes new meaning to the articles of te Tiriti and proposes to use the new meaning as the basis for three new Treaty principles. In particular:²⁰

Article 1: kawanatanga katoa o o ratau whenua

The New Zealand Government has the right to govern all New Zealanders

Article 2: ki nga tangata katoa o Nu Tirani 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: a ratou nga tikanga katoa rite tahi

All New Zealanders are equal under the law with the same rights and duties.

It is noted that ACT's proposal,²¹ is utterly inconsistent with the English translation of the articles of Te Tiriti;²² the body of Waitangi Tribunal jurisprudence developed over the past 50 years,²³ other judicial interpretations of Te Tiriti, the historical context in which the Treaty was signed, and Māori understandings of the meaning and effect of the Treaty.²⁴

20. Documents withheld by the Crown pursuant to s 70 of the Evidence Act 2006 would undoubtedly reveal more about the development of the Bill. Notwithstanding this, it is evident the Crown has taken steps to adopt and pursue the coalition commitment between National and ACT.²⁵
21. By its own admission, the Crown has actively pursued the Coalition Agreement. For example:

²⁰ Act New Zealand, *The Treaty Articles*, accessed at < <https://www.treaty.nz/>>.

²¹ Act New Zealand, *The Treaty Articles*, accessed at < <https://www.treaty.nz/>>.

²² Waitangi Tribunal, *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, (Wai 1040, 2014), at 527.

²³ Waitangi Tribunal, *He Whakaputanga me te Tiriti*, page 529.

²⁴ C Orange, *The Treaty of Waitangi* (1987, Bridget Williams Books Limited, Wellington), at 36.

²⁵ Counsel make further submissions on the grounds relied on by the Crown to withhold these documents later in this Memorandum.

- a. Crown officials have met with Associate Minister Seymour to discuss policy proposals related to the Bill;²⁶
 - b. Crown officials have prepared briefings containing policy proposals related to the Bill;²⁷
 - c. Papers have been provided to Cabinet related to the Bill and 2024 legislative programme;²⁸
 - d. Crown officials have set indicative timeframes for the introduction of the Bill to Cabinet, seeking public consultation, and introducing the Bill to the House.²⁹
22. It is noted that none of the indicative timeframes provided by the Crown include provision for early and extensive consultation with Māori regarding the Bill.
23. Information available in the public realm supplements the interested parties' contention that the Crown is actively pursuing the development of the Bill based on ACT policy.
24. On or around 19 January 2024, an extract from a draft Crown memorandum was leaked from the Ministry of Justice and publicly circulated ("**leaked document**").³⁰ The leaked document confirms the Crown has undertaken policy analysis concerning the Bill. It further confirms the Crown is aware of the 'highly contentious' nature of the Bill due to 'both the fundamental

²⁶L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [17.1].

²⁷L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [17.3].

²⁸L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [17.2].

²⁹L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [31].

³⁰Radio New Zealand, Government confirms leaked document was a ministry Treaty Principles bill memo, dated 19 January 2024, accessed at < <https://www.rnz.co.nz/news/political/507090/government-confirms-leaked-document-was-a-ministry-treaty-principles-bill-memo>>.

constitutional nature of the subject matter and the lack of consultation with the public on the policy development prior to the select committee.’³¹

25. On 26 February 2024, Hon David Seymour was appointed Associate Minister (Treaty Principles Bill) shortly after the leaked document was released.³² The Associate Minister’s appointment evidences a clear intention on the Crown’s part to implement the Bill.
26. The Tribunal is asked to consider the Crown’s actions in furthering the Bill in the wider context of recent and relevant decision-making by the Coalition Government. In particular, we refer to the enactment of legislation to disestablish Te Aka Whai Ora.³³ This legislation was passed under urgency by Parliament without consultation with Māori.³⁴
27. It is demonstrated above that the Bill’s development by the Crown is sufficiently manifested to justify the grant of urgency sought.

No alternative remedies

28. The Constitutional Kaupapa Inquiry (Wai 3300) (“**Constitutional inquiry**”) is still very much in the early planning phase. The Bill will have been made into law by the time the Constitutional inquiry is ready for hearing. In these circumstances, the Constitutional inquiry does not provide an alternative remedy.

³¹ Radio New Zealand, Government confirms leaked document was a ministry Treaty Principles bill memo, dated 19 January 2024, accessed at <<https://www.rnz.co.nz/news/political/507090/government-confirms-leaked-document-was-a-ministry-treaty-principles-bill-memo>>.

³² New Zealand Government, *New Associate Minister and Under-Secretary portfolio allocations*, dated 26 January, accessed at <<https://www.beehive.govt.nz/release/new-associate-minister-and-under-secretary-portfolio-allocations>>.

³³ Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024, Schedule 1.

³⁴ The Crown acknowledged that no formal consultation was planned or occurred by the Crown before Cabinet confirmed the decision to disestablish Te Aka Whai Ora. The Crown further acknowledged that that Crown deciding to make this decision without consultation can be expected to result in a finding that Treaty principles have been breached and that prejudice has resulted. See G Melvin, *Memorandum of Counsel for the Crown in Response to Tribunal Directions*, dated 19 January 2024, Wai 3307, #3.1.39, at [12].

Principle of comity / non-interference

29. The Crown relies on the principle of comity/non-interference to deny the grant of urgency sought.³⁵ The inference here is that activity by the Crown to develop the Bill is beyond the Tribunal's purview.
30. Counsel note that s 6(6) of the Treaty of Waitangi Act 1975 excludes the Tribunal from considering 'any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8.'³⁶ In response, Counsel refer to the Court of Appeal decision of *Attorney General v Mair*.³⁷ In obiter, his Honour Justice Baragwanath considered a 'narrow interpretation' should be given to section 6(6) of the Treaty of Waitangi Act 1975, whereby 'all conduct' of the Crown 'both as the Executive and the Legislature' other than what falls within the language of the section 6(6) exception is within the Tribunal's jurisdiction.³⁸ His Honour expanded on the point as follows:³⁹

It is contrary to settled principles of Crown dealing with indigenous peoples for legislation to be read up against them and their interests. Parliament has chosen to limit the constraint on the Tribunal's jurisdiction only to specific interference with its own processes; apart from that the Tribunal is empowered to examine all prior conduct. There is no reason to make any assumption to the contrary.

Since Parliament has authorised the Tribunal to review statutes it must a fortiori countenance review of all Legislative and Executive conduct short of the bills referred to in s 6(6).

In considering purpose there is no need for comparative examination. While there is good reason for it, it is the case that New Zealand courts are now alone in the free world in not claiming the power to set aside legislation as unconstitutional.

31. The Tribunal adopted the same narrow construction in their decision to grant an urgent inquiry into the disestablishment of Te Aka Whai Ora.⁴⁰ Counsel

³⁵ G Melvin and G Seeley, *Crown Memorandum in Response*, dated 9 February 2024, Wai 3300, at [5.2].

³⁶ Treaty of Waitangi Act 1975, section 6(6).

³⁷ *Attorney General v Mair* [2009] NZCA 625.

³⁸ *Attorney General v Mair* [2009] NZCA 625, at [158]

³⁹ *Attorney General v Mair* [2009] NZCA 625, at [161] - [163].

⁴⁰ Waitangi Tribunal, *Memorandum-Directions of Judge D Stone on the Te Aka Whai Ora Urgent Application*, Wai 3307, #2.5.6, at [12]-[14].

submit there is no reason to suggest the same approach should not be taken here. Until the Bill is introduced to the House of Representatives, all conduct of the Crown leading up to the introduction of the Bill is within the jurisdiction of the Tribunal.

32. Counsel further submit that the Tribunal plays a fundamental role in safeguarding the integrity of the Treaty as part of the fabric of Aotearoa's constitutional framework and recognising Māori rights thereunder. As the late Paul Temm QC poignantly observed, the Tribunal acts as a sort of 'conscience of the nation'.⁴¹
33. Ousting the Tribunal's jurisdiction to inquire into Crown conduct antedating the introduction of Bill would, in the words of his Honour Justice Baragwanath, 'take us even further from what elsewhere is considered necessary to protect the constitutional rights from the very kind of loss...Māori have been vulnerable'.⁴² For these reasons, the interested parties submit the Tribunal must have the power to, at the very least, remind the Crown that it should not act with unbridled power to subvert Māori rights and interests guaranteed by the Treaty.

Lack of consultation

34. The interested parties submit that the Crown's actions in furthering the Bill constitute a flagrant breach of its obligation to consult with Māori.⁴³
35. The Waitangi Tribunal has found that the Crown's duty to consult stems directly from the principles of te Tiriti, including partnership, active protection, equity, and options.⁴⁴ A failure to consult with Māori is an affront to Māori.⁴⁵
36. In the *Napier Hospital* Report, the Tribunal found that for consultation to be Treaty compliant, "sufficient time" must be allowed and "genuine effort" made.⁴⁶ It is imperative that the Crown take "serious account" of views put

⁴¹ P Temm, *The Waitangi Tribunal: Conscience of the Nation* (1989).

⁴² *Attorney General v Mair* [2009] NZCA 625, at [163].

⁴³ Waitangi Tribunal, *Te Urewera* (Wai 894, 2017), vol 8, at 3773.

⁴⁴ Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Acy 2011 Inquiry Stage 1 Report* (Wai 2660, 2020), at 51; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 67.

⁴⁵ Waitangi Tribunal *Turanga Tangata Turanga Whenua* (2004), Wellington, Vol.1 page113.

⁴⁶ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 71.

forward.⁴⁷ It is not sufficient for the Crown to merely consult as a guide to “simply explain the proposals.”⁴⁸ It is important for the Crown to be prepared to alter its original proposal after having consulted with the community.

37. Consultation and negotiation are to be conducted in a spirit of partnership.⁴⁹ The Te Arawhiti ‘Crown Engagement with Māori’ summary document sets out how the Crown should engage with Māori. In instances where Māori interests may be significantly affected, a Partner/Co-design model is recommended:⁵⁰

The Crown and Māori will partner to determine the issue/problem, to design the process and develop solutions. The Crown and Māori will make joint decisions.

38. The interested parties submit that the Crown has failed to engage with Māori on the development of the Bill.⁵¹ Furthermore, the Crown has not followed its own policy guidelines on partnering with Māori to develop solutions that meet the needs of both treaty partners. T
39. The Crown may contend that the release of a draft exposure of the Bill will provide the interested parties with the opportunity to adequately consult with the Crown about the Bill. In response, it is noted that provision of a draft exposure of the Bill is a mere proposal at present. It may or may not eventuate. Furthermore, the interested parties are unwilling to await an exposure draft given the manner in which the legislation that disestablished Te Aka Whai Ora was introduced into Parliament by the Crown.⁵²

⁴⁷ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 71.

⁴⁸ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 71.

⁴⁹ Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wai 414, 1998), at 234.

⁵⁰ Engagement_Summary_011018 (tearawhiti.govt.nz) accessed 25/03/24.

⁵¹ L Theron, J Watson, *Memorandum of Counsel in response to Memorandum-Directions dated 26 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13.

⁵² L Theron, J Watson, *Memorandum of Counsel in response to Memorandum-Directions dated 26 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13 at [31.3].

Irreversible prejudice

40. Irrespective of the ultimate formulation of the Bill, the proposed changes to te Tiriti o Waitangi will cause significant and irreversible prejudice to the interested parties. In particular:
- a. The Bill will give the Crown the ability to exercise kawanatanga over the interested parties in circumstances where the Crown was not authorised to administer kawanatanga over the interested parties te Tiriti was signed in 1840;
 - b. The Bill will change the meaning of 'tino rangatiratanga' in Article II of te Tiriti from sovereignty to 'chieftainship and thereby eliminate the interested parties' sovereign status;
 - c. The Bill will eliminate te Tiriti as a source of protection of the interested parties' customary rights and interests;
 - d. The meaning and effect of te Tiriti o Waitangi will be substantially changed in circumstances where the interested parties are vehemently opposed to any such change;
 - e. Māori-Crown relations will be irreparably harmed;

SECTION 70 EVIDENCE ACT 2006

Competing public interests

41. Section 70 of the Evidence Act 2006 provides the Tribunal with the discretion to direct that the five documents are not disclosed. However, this discretion may only be exercised where the Tribunal considers the public interest in disclosing the five documents is outweighed by the public interest in withholding the five documents.

42. As noted in Crown MOC,⁵³ s 70 was considered in *Dotcom v Attorney-General*.⁵⁴ The Court of Appeal confirmed that the:⁵⁵

...courts have always held that they may balance a protected interest in non-disclosure against the public interest in disclosure'. Section 70 confirms that. It requires that competing public interests be balanced, indicating that there is no presumption for or against disclosure. Ex parte Wiley is sometimes cited for the proposition that harm from disclosure must be "substantial" if it is to justify withholding information. We take that to signify that the countervailing public interest in disclosure is always given weight in the balancing exercise.

43. Given the absence of guidance in s 70 on how to approach the public interest balancing exercise required under this provision, it is submitted that the Tribunal's starting point should be that:

- a. there is no presumption for or against disclosure of the five documents;
- b. the harm from disclosure of the five documents must be substantial to justify withholding; and
- c. the countervailing public interest in disclosure is always given weight in the balancing exercise.

44. The Crown's public interest reasons for withholding the five documents rely on the need to:

- a. Preserve the confidentiality of information in the early stages of the policy process when sensitivities are high;⁵⁶ and

⁵³ L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13.

⁵⁴ *Dotcom v Attorney General* [2019] NZCA 412.

⁵⁵ *Dotcom v Attorney General* [2019] NZCA 412, at [28]-[29]

⁵⁶ L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [10].

- b. Maintain free and frank expression of opinion by or between Ministers of the Crown and officers/employees of any public service agency.⁵⁷
45. Counsel for the Crown argue that requiring the production of the five documents in the context of ongoing policy development would have a chilling effect and other implications for the processes of Government. Notably however, Crown counsel do not explain what the chilling effect is or what the other implications are. This most pivotal of submissions by the Crown amounts to no more than a mere assertion.
46. The Crown also takes the position that the five documents should not be released unless there are powerful countervailing factors.⁵⁸ The Court of Appeal held that the harm from disclosure must be substantial to justify withholding. It is submitted that the onus is on the Crown to show substantial harm to justify withholding of the five documents. The Crown's position appears to differ from the Court of Appeal. The Crown's view is that the five documents should be withheld unless there are powerful countervailing factors for disclosure, placing the onus of proof, it appears, on the claimants and interested parties. The interested parties, and we expect the claimants, do not accept this view or onus.
47. Section 70 requires the Crown's claim for non-disclosure to state the grounds with sufficient precision to permit evaluation.⁵⁹
48. The Waitangi Tribunal may inspect the information if it thinks it is necessary to evaluate the s 70 claim and undertake the balancing exercise. There is no presumption under s 70 that the power to inspect will be sparingly exercised. There may be cases where the Waitangi Tribunal considers the Crown claim is plainly well-founded, or information plainly unnecessary to the proceeding where inspection would serve no purpose.⁶⁰

⁵⁷ L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [19] to [21].

⁵⁸ L Theron and J Watson, *Memorandum of Counsel in Response to Memorandum-Directions dated 24 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13, at [21].

⁵⁹ *Kim Dotcom v Attorney-General* [2019] NZCA at 412.

⁶⁰ *Kim Dotcom v Attorney-General* [2019] NZCA 412, at [25].

49. It is submitted that the Crown has not made out the grounds for non-disclosure. Again, the Crown refers to the context of ongoing policy processes; that disclosure of the five documents would have an obvious chilling effect or other implications. The interested parties submit this does not provide the Tribunal with sufficient precision to enable it to undertake the necessary balancing exercise.
50. In evaluating the competing public interests, the Court's lack of knowledge and expertise has been cited in cases where national security and international relations are relied on to justify non-disclosure.⁶¹ It is submitted, however, that in this instance the Waitangi Tribunal is the appropriate judicial body to evaluate competing public interests regarding the principles of the Treaty/Te Tiriti of Waitangi and the Bill.
51. The Crown also refers to the bases for withholding information that are set out in s 9(2)(g)(i) of the Official Information Act 1982 ("**OIA**") (free and frank expression of opinion) and the Ombudsman's guidelines.⁶² However, as with s 70, s 9(2)(g)(i) of the OIA also requires a competing public interest balancing exercise to be undertaken. As discussed, the Crown has failed to provide substantive grounds in the public interest for not disclosing the five documents.

Limited disclosure to Waitangi Tribunal and/or counsel

52. The confidentiality of public service advice to Ministers was considered in *Fletcher Timber Ltd v Attorney-General*.⁶³ The Court was unanimous in making an order that the documents in issue be produced for inspection. This was the case even though a claim of immunity was made by the Minister of Forests in the form of two certificates.⁶⁴

⁶¹ *Kim Dotcom v Attorney-General* [2019] NZCA 412, at [30].

⁶² L Theron, J Watson, *Memorandum of Counsel in response to Memorandum-Directions dated 26 February 2024*, dated 18 March 2024, Wai 3300, #3.1.13.

⁶³ *Fletcher Timber Limited Ltd v Attorney-General* [1984] 1 NZLR 290. In this case, the ministerial advice related to information on a decision, made by the government at that time, to advertise additional timber cutting rights on the west coast. The government did not advertise the additional cutting rights. This persuaded the appellant to sell its timber supplying business to minimise loss. The government then changed its mind and was prepared to increase the existing allocation. Multiple memoranda and communications between Ministers and public officials were prepared. Public interest immunity was relied on for non-disclosure of this information.

⁶⁴ *Fletcher Timber Limited Ltd v Attorney-General* [1984] 1 NZLR 290 Judgement of Woodhouse P at p.3

53. The Court of Appeal in this decision succinctly described the documents in issue as “communications either between senior officials and Ministers of the Crown and Cabinet, or between Ministers and the Prime Minister, between Ministers and Cabinet, between Ministers and third parties and memoranda of Cabinet Committees”.⁶⁵

54. Woodhouse P in *Fletcher Timber Ltd* held:⁶⁶

Where there may be uncertainty or doubt as to where the balance of interest lies a judge is entitled to and will inspect the documents in order to resolve the doubt. It will be done not as a kind of independent precursory process of its own but as part of the whole process of weighing the competing public interests – in the one area the degree of confidentiality needed for the public documents and in the other the demands of fairness and justice.

55. It is submitted that the documents in issue in *Fletcher Timber Ltd* are similar in nature to the five documents the Crown in this Inquiry seek to withhold. They are communications between Ministers and between Ministers and public officials. The Crown in *Fletcher Timber Ltd* also relied on free and frank expression of opinion, and on the change of policy from no restrictions on the commercial logging of indigenous timber to the preservation of forests, creation of reserves and the implementation of selective logging. Notwithstanding these grounds, the Court of Appeal were unanimous in making an order for the documents to be produced and inspected.

56. It is respectfully submitted that the Tribunal undertake the necessary public interests balancing exercise required under s 70 before considering whether to direct the withholding of the five documents. It is further submitted that, in undertaking the required balancing exercise, it is open to the Tribunal to direct that the five documents are produced in full to the Tribunal to inspect and evaluate. The Tribunal would then be in a better position to make an informed decision under s70.

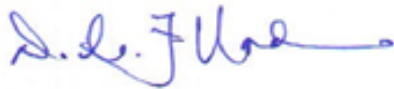
⁶⁵ *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (Judgement of Woodhouse P at p.3).

⁶⁶ *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (Judgement of Woodhouse P at p.11).

REVIEW OF ENACTMENTS REFERENCING THE TREATY/TE TIRITI

57. Counsel note the Crown also intends to undertake a review of enactments referencing the principles of the Treaty/Te Tiriti in accordance with the commitments set out in the National/New Zealand First Coalition Agreement.⁶⁷ Notwithstanding the limited information available in relation to the Crown's proposed review, the interested parties repeat the submissions set out in paragraphs 34-40.
58. The proposed review is seen by the interested parties as a further attempt by the Crown to undermine the status of te Tiriti. It adds to the interested parties' concerns about the fate of te Tiriti o Waitangi.
59. Accordingly, counsel seek leave to file submissions should there be further developments with the Crown's review proposal.

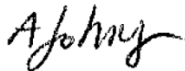
DATED at Auckland this 25th day of March 2024.



Darrell Naden
Counsel Acting



Victoria Tumai
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Ashley Johns
Counsel Acting



Rebecca Wihongi
Counsel Acting

⁶⁷ New Zealand National Party & New Zealand First, *Coalition Agreement*, dated 24 November 2023, at 10, accessed at <https://drive.google.com/viewerng/viewer?url=https://assets.nationbuilder.com/nzfirst/pages/4462/attachments/original/1700784896/National_NZF_Coalition_Agreement_signed_24_Nov_2023.pdf?1700784896%2520>.