IN THE WAITANGI TRIBUNAL	**Wai 3300, Wai 3314, Wai 3330, Wai 3308, Wai 3077, Wai 682, Wai 3309, Wai 2959, Wai 3315, Wai 3324, Wai 3218, Wai 1194, Wai 1212, Wai 3319**
In the Matter	**of the Treaty of Waitangi Act 1975**
And in the Matter	**Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry (Wai 3300)**
And in the Matter	**a claim by Nicola Dally-Paki on behalf of her whānau, hapū, iwi, whānau whānui and whāngai (Wai 3319)**
And in the Matter	**a claim by Dr Rapata Wiri on behalf of his whānau, hapū, iwi, whānau whānui and whāngai (Wai 3330)**
And in the Matter	**a claim by Ms Merepeka Raukawa-Tait on behalf of her whānau, hapū, iwi, whānau whānui and whāngai (Wai 3314)**

OPENING SUBMISSIONS OF COUNSEL FOR NICOLA DALLY-PAKI WAI 3319, RAPATA WIRI WAI 3330, MEREPEKA RAUKAWA-TAIT WAI 3314 IN SUPPORT OF WAI 3300 THE CONSTITUTIONAL URGENT HEARING

DATED IN TOKOROA THIS 29th DAY OF APRIL 2024

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OPENING SUBMISSIONS OF COUNSEL FOR NICOLA DALLY-PAKI WAI 3319, RAPATA WIRI WAI 3330, MEREPEKA RAUKAWA-TAIT WAI 3314 IN SUPPORT OF WAI 3300 THE CONSTITUTIONAL URGENT HEARING

May it please the Tribunal

Introduction

1. We act for the following Claimants:

a. Nicola Dally-Paki Wai 3319;
b. Rapata Wiri Wai 3330; and
c. Merepeka Raukawa-Tait Wai 3314.

2. We submit the current or pending Crown actions and policies as they relate to a statutory review of all enactments containing references to the 'principles of the Treaty of Waitangi' and a proposed Treaty of Waitangi Principles Bill are in breach of the principles of the Treaty of Waitangi."[1]

3. The introduction of a proposed Treaty of Waitangi Principles Bill and a review of the Principles of the Treaty of Waitangi has been met with unprecedented opposition by Māori. Māori have expressed their opposition to the decisions made by the current Government. Claimant Wai 3319 states:

> "The current and pending Crown actions or policies as they relate to the review of all enactments to the "principles of the Treaty of Waitangi" and a proposed Treaty of Waitangi Principles bill is an abuse of power by the Crown."[2]

The Continual Failure by the Crown to Uphold Treaty of Waitangi Obligation

4. The introduction of a proposed Treaty of Waitangi Principles Bill will breach all Treaty of Waitangi principles. The question is whether the current or pending Crown actions or policies as they relate to the review of all enactments containing references to the "principles of the Treaty of Waitangi' and a proposed Treaty of Waitangi Principles Bill can be considered through acknowledgement of Māori, the fundamental principle of partnership and tino rangatiratanga. We submit the Crown consistently undermines these principles by failing to acknowledge and uphold their Treaty of Waitangi obligations.

5. In the case of New *Zealand Māori Council v Attorney-General*, Justice Cooke[3] discussed the principle of partnership. We say the Crown has failed to work with Māori as a partner in seeking the Treaty of Waitangi Principles Bill. The

[1] Wai 3300, #2.5.23, *Memorandum-Directions of Chief Judge DR C L Fox on Procedural Matters for Urgent Inquiry* [17 Paengawhāwhā 2024] at [7]
[2] Wai 3319 Amended Statement of Claim Filed 15 April 2024 at [6]
[3] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) per Richardson J at 673, referring to submissions from counsel David Baragwanath; see too Waitangi Tribunal Muriwhenua Fishing Report (Wai 22, 1988) at 212–213

Crown does not act cooperatively or in good faith. The Crown seeks to superimpose its epistemological worldview on Māori. Again, we submit this is a breach of the Treaty of Waitangi in the form of assimilation.

6. Reciprocity is another underpinning Treaty principle in the first and second articles. Kāwanatanga is assigned to the Crown, and the other the tino rangatiratanga of Māori parties.[4] The concept of 'partnership' is to be considered as the interwoven relationship the Crown and Māori have under Treaty of Waitangi. The proposal of a Treaty of Waitangi Principles Bill serves to undo decades of Treaty jurisprudence that have been developed by the Judiciary. It therefore is not a process where the Crown should seek to impose a referendum with a predictable outcome against Māori.

EVIDENCE

7. We submit that our Claimants have identified their position on the issues before the Tribunal in their Amended Statement of Claims. In summary:

a. Ms Dally-Paki states "The actions of the Coalition Government will breach the principles of the Treaty of Waitangi by failing to diminish Māori rights to sovereignty and self-governance, give adequate effect to the principles of te Tiriti in the legal system of Aotearoa, and leave Māori to speculate on what the reformed policies will be and how they will operate".[5]

b. Dr Wiri states "The Claimant says that in essence, the Coalition Government and the Crown have failed to treat Māori as a treaty partner. The Crown is abusing its power by introducing racist legislation under urgency. Accordingly, Māori voices are curtailed as Urgency bypasses any consultation the Crown should have with their Treaty partner".[6]

c. Ms Raukawa-Tait states "the Coalition Agreements signed between the New Zealand National Party and the ACT New Zealand and New Zealand First Party translated into a Treaty of Waitangi Principles Bill breaches the Treaty of Waitangi. The introduction of such a Bill will undermine the foundations in which tikanga and mātauranga Māori are recognised in law".[7]

Statement of Issues relating to the Treaty Principles bill

8. We submit the Crown's policy, and the process it has undertaken, in relation to the Treaty Principles Bill is inconsistent with the Treaty of Waitangi and its principles. The Crown owes a duty of care to Māori when it develops laws,

[4] Waitangi Tribunal Ngāi Tahu Sea Fisheries at [269]
[5] Wai 3319 Amended Statement of Claim Filed 15 April 2024 at [5]
[6] Wai 3330 Amended Statement of Claim Filed 15 April 2024 at [5]
[7] Wai 3314 Amended Statement of Claim Filed 15 April 2024 at [6]

policies, and practices. The Crown has failed to give rise to the obligations and duties they owe Māori under Treaty of Waitangi. Ms Dally-Paki states:

> "any enactments by the Crown to introduce a Treaty of Waitangi Principles Bill will unfairly prejudice Māori. Māori are a minority in Aotearoa and thereby our voice and votes will be constrained statistically. Ms Dally-Paki does not support the proposition of Act New Zealand Party to erase our history by the introduction of a Treaty Principles Bill.".[8]

Statement of Issues Relating to Treaty Clause Review

9. The Crown's policy and the process it has undertaken, to "conduct a comprehensive review of all legislation that includes "The Principles of the Treaty of Waitangi" and replace all such references with specific words relating to the relevance and application of the Treaty or repeal the references" is inconsistent with Treaty of Waitangi and its principles. Ms Dally-Paki states:[9]

> "the Coalition Government and the Crown have failed to treat Māori as a treaty partner. The Crown is abusing its power by introducing racist legislation under urgency. Accordingly, Māori voices are curtailed as Urgency bypasses any consultation the Crown should have with their Treaty partner."

Areas of Identified Treaty of Waitangi Breaches

Cabinet Manual Protocols

10. The New Zealand's Cabinet Manual points to Treaty of Waitangi o Waitangi as "a founding document of government in New Zealand",[10] and "ka tiakina" in the treaty is associated with governing responsibility. The Cabinet Manual is "a primary source of information on New Zealand's constitutional arrangements" and puts the treaty as "a founding document of government".[11] The Cabinet Manual identifies democracy, "constitutional monarchy", and "a parliamentary system of government" as main features, alongside increasing attention to the treaty[12].

11. The constitutional tension between the Treaty of Waitangi and the Government is that:[13]

> "A balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected

[8] Wai 3319 Amended Statement of Claim Filed 15 April 2024 at [7]
[9] Wai 3319 Amended Statement of Claim Filed 15 April 2024 at [8]
[10] K J Keith "On the constitution of New Zealand: an introduction to the foundations of the current form of government" in Department of the Prime Minister and Cabinet Cabinet Manual 2017 (Cabinet Office, Wellington, 2017) at [1]
[11] Keith, above n7, at [1]; Department of the Prime Minister and Cabinet, Cabinet Manual <dpmc.govt.nz>
[12] Keith, above n7, at [1].
[13] Keith, above n7, at [5].

> governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision-making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the Treaty of Waitangi, by international obligations and by ideas of fairness and justice".

12. The Cabinet Manual states:

> "The model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one another is appropriate".[14]

13. The actions of the Government contravene their obligations to act in good faith with their Treaty partners. As such, Palmer and Butler noted, "The Crown is a mask the Government puts on to disguise itself when it wants".[15] The Claimants state the Crown is acting in bad faith, by engaging in an avaricious power grab without any regard for the harm to be caused to Māori, nor any cognisance of, nor recognition of, the basic rights of Māori as set out in the Treaty of Waitangi.

14. We submit the recently released Waitangi Tribunal report into the Oranga Tamariki (Section 7AA) Urgent Inquiry stated:

> "Once Ministers are sworn in and the government is formed, the executive so constituted are responsible for meeting the Crown's obligations to Māori under the Treaty of Waitangi. It is a Treaty of Waitangi, not a proclamation of Waitangi, and the Crown does not have a unilateral right to redefine or breach its terms. The obligation is to honour the Treaty and act in good faith towards the Treaty partner" [16]

Treaty of Waitangi Bill and Treaty Principles Bill.

15. The relationship between the Crown and Māori is evident.[17] The Government of the day appears to subjugate these rights to the detriment of Māori and Māori are expected to acquiesce.

Separation of Power

16. Parliament's word starting point of the principles of statutory interpretation and the endpoint is its development by the Judiciary. We note Parliament cannot

[14] K J Keith "On the constitution of New Zealand: an introduction to the foundations of the current form of government" in Department of the Prime Minister and Cabinet Manual 2017 (Cabinet Office, Wellington, 2017) at [2]

[15] Geoffrey Palmer and Andrew Butler Towards Democratic Renewal (Victoria University Press, Wellington, 2018) at 58, and generally at 55–58

[16] Waitangi Tribunal Report into The Oranga Tamariki (Section 7AA) Urgent Inquiry Report at [1.6]

[17] Ruth Ross "Te Tiriti o Waitangi: texts and translations" (1972) 6 New Zealand Journal of History 129 at 140. See too Waitangi Tribunal Rēkohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands (Wai 64, 2001) at [262]

rely upon that legislation begins and ends with Parliament's enacted word. The doctrine of parliamentary sovereignty allows the Courts to interpret and apply legislation as they see fit. We submit the introduction of a proposed Treaty of Waitangi Principles Bill and a review of the 'principles of the treaty of Waitangi' that would exacerbate friction between the Judiciary and Parliament. The Judicial Review[18] heard at the Wellington High Court reflects the current relationship between the Judiciary and Parliament.

Treaty Jurisprudence

17. Tribunals and Courts addressing the principles of Treaty of Waitangi do so in a legislative framework which seek to remedy Māori against a failing Crown whereby there has been a breakdown of their relationship. Aotearoa has significantly progressed since *Wi Parata v The Bishop of Wellington*. The Supreme Court in *Ellis v R* [2022] NZSC unanimously recognised tikanga as the first law of Aotearoa.

18. The Crown must acknowledge that the Treaty of Waitangi jurisprudence does not evolve in a vacuum. Since 1840, Māori have consistently held the Crown accountable. The Crown-Māori relationship needs to move beyond grievance to a new era.[19] We submit the Crown's proposed actions will create new grievances for Māori. We have not seen any consultation or discussion regarding the impact of these proposals on Post Treaty Settlement Entities, Post Treaty settlement legislation or Treaty settlement yet to be concluded

Regulatory Impact Statements ("RIS")

19. The Prime Minister stated that Regulatory Impact Statements are:[20]

> a "huge waste of time for everybody to go off and create a regulatory impact statement" about policies concerning the new Government's 100-day plan.

20. RIS model the impact a change in legislation could have on a particular business sector or community group. Impacts on Māori are considered in the RIS assessment by foreshadowing how they may be affected by a change in legislation.

21. The Prime Minister has stated that:[21]

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[18] Minister for Children v The Waitangi Tribunal [2024] NZHC 931

[19] Waitangi Tribunal "Ko Aotearoa Tēnei: report on the Wai 262 claim released" (press release, 2 July 2011)

[20] Mark Quinlivan "Chris Hipkins says his Government never removed requirement for regulatory impact statements - except during COVID-19" 13 December 2023 Newshub <https://www.newshub.co.nz/home/politics/2023/12/chris-hipkins-says-his-government-never-removed-requirement-for-regulatory-impact-statements-except-during-covid-19.html>

[21] Jenna Lynch "Government decision to suspend policy process called 'reckless' by Grant Robertson, David Seymour says it wasn't very good" 11 December 2023 Newshub <https://www.newshub.co.nz/home/politics/2023/12/government-decision-to-suspend-policy-process-called-reckless-by-grant-robertson-david-seymour-says-it-wasn-t-very-good.html>

> "You've got people just working and churning, generating papers that are never going to be read and are not that relevant to the decision being taken,".

22. We note the Government ignored RIS advice on the removal of Section 7AA from the Oranga Tamariki Act 1989.[22] The Claimants and Māori alike are concerned that the Government ignores the RIS on the proposed Treaty of Waitangi Principles Bill.

Referendum on Treaty Principles Bill

23. The Coalition Government has proposed a referendum on the Treaty of Waitangi Principles Bill. The Claimants opposes and state:[23]

> "The Coalition Government and the Crown have failed to treat Māori as a treaty partner. The Crown is abusing its power by introducing racist legislation under urgency. Accordingly, Māori voices are curtailed as Urgency bypasses any consultation the Crown should have with their Treaty partner".

> "The Treaty of Waitangi has been watered down into a set of principles. Partnership seems to be the key principle, but the Treaty of Waitangi guaranteed us Māori a lot more than just principles. If Māori cannot get real recognition of this one principle, then Māori will be perpetually prejudiced".

24. We submit the Rangatira that signed Treaty of Waitangi cannot be proportionately represented today for a referendum to take place. Simply put, a referendum on any issue concerning Māori will have a disproportionately negative outcome for Māori.

CONCLUSION

25. Constitutionally, regardless of the intentions of the parties in 1840, tikanga Māori is inherent in the foundations of the treaty text, both in its terms and in its daily application through principles. The Crown is obligated to recognise their obligations under Treaty of Waitangi which is significant from a common law perspective. The Crown should adhere to and act in accordance with the Te Reo Treaty of Waitangi. Framing treaty undertakings in this way reinforces the Crown's commitments to Māori, identifying it as a caretaker alongside others responsible for mana, tino rangatiratanga, and the mauri of iwi and hapū, as outlined in Articles Two and Three.

[22] Wai 3350, #A33 CABINET PAPER at[36]
[23] Wai 3319 Amended Statement of Claim Filed 15 April 2024.

26. By introducing a proposed Treaty of Waitangi Principles Bill and a review of the principles of the "Treaty of Waitangi", the Crown will nullify any partnership and Tino Rangatiratanga Māori were guaranteed.

May it please the Tribunal these are Counsels opening submissions

Dated: 29th April 2024

Ārama Ngāpō
Counsel for Claimant