

IN THE WAITANGI TRIBUNAL

WAI 3300  
WAI 3342  
WAI 1194  
WAI 1212  
WAI 2494  
WAI 2872

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

Tomokia ngā tatau o Matangireia (WAI 3300) – the Urgent Inquiry into the Proposed Treaty of Waitangi Principles Bill

AND

IN THE MATTER OF

a claim by **Pita Tipene, Moana Maniapoto, Dr George Laking, Dr Veronica Tawhai, Donna Kerridge and India Logan-Riley** on behalf of **Ngā Toki Whakarururanga (WAI 3342)**

AND

IN THE MATTER OF

a claim by **Colleen Skerrett-White, Timitepo Hohepa, and Te Ariki Derek Morehu** on behalf of **Ngāti Te Rangiuuora** who are supported by **Ngāti Pikiāo (WAI 1194 and WAI 1212)**

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**BRIEF OF EVIDENCE OF MAX DAVID NOBLE HARRIS**

Dated this 1<sup>st</sup> day of May 2024

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RECEIVED

Waitangi Tribunal

**2 May 24**

Ministry of Justice  
WELLINGTON

**AND**

**IN THE MATTER OF**

a claim by **Donna Awatere-Huata** of Ngāti Porou, Ngāti Whakaue and Ngāti Hine, on behalf of herself and all Māori (WAI 2494)

**AND**

**IN THE MATTER OF**

a claim by **Dr Leonie Pihama, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira** and **Te Ringahuiā Hata** (WAI 2872)

## **MAY IT PLEASE THE TRIBUNAL**

### **Introduction**

- 1 My full name is Max David Noble Harris. I'm a Pākehā barrister, based at Thorndon Chambers, and previously have worked as a legal academic and policy advisor. I live in Onehunga, Tāmaki Makaurau Auckland.

### **Background and experience**

- 2 I am a barrister and door tenant at Thorndon Chambers. I have also given occasional lectures at the University of Auckland and other universities. I am a Quondam Fellow at All Souls College, the University of Oxford, and remain associated with the University of Oxford Faculty of Law by virtue of that connection.
- 3 I have a DPhil (PhD) in constitutional law, in particular the law of executive power, from the University of Oxford, which was supervised by Professor Paul Craig. Prior to that I completed a BCL (Bachelor of Civil Law or Law Master's) from the University of Oxford, with Distinction, and a Master of Public Policy. At the University of Oxford I taught courses on 'Philosophy of Human Rights' and 'Law and Public Policy'. I was awarded an Examination Fellowship at All Souls College. I was a New Zealand Rhodes Scholar in 2012. Earlier I clerked for Chief Justice Sian Elias at the Supreme Court of New Zealand and completed a BA/LLB(Hons.) at the University of Auckland.
- 4 My academic work has been published in a range of journals and I have presented at conferences and symposia in the United Kingdom, United States, Australia, New Zealand, Estonia, and Slovakia. Significant parts of my work have addressed aspects of Te Tiriti o Waitangi. My undergraduate dissertation discussed the legal dimensions of Te Tiriti o Waitangi at length and was published in the New Zealand Universities Law Review. I have been published on four occasions in the Māori Law

Review. I have spoken in the media on Te Tiriti o Waitangi, including on One News and Te Ao with Moana.

- 5 In my legal work, I have worked on cases in the Court of Appeal on the legal impact of Te Tiriti o Waitangi, and have appeared in the Court of Appeal, High Court, and Coroners Court. I have provided expert written advice on public sector compliance with Te Tiriti o Waitangi, on s 20 of the New Zealand Bill of Rights Act 1990, and various other points relating to the legal effect of Te Tiriti o Waitangi.
- 6 In late 2021 I received a two-year research grant from the Borrin Foundation and JR McKenzie Trust, along with a research team, on taking forward aspects of the Matike Mai constitutional document, which involved engaging with Te Tiriti o Waitangi as a constitutional foundation. I received a grant from the New Zealand Law Foundation for research contributing to my book, *The New Zealand Project* (2017), which also addressed Te Tiriti o Waitangi. I am regularly contracted by Bridget Williams Books as an expert reviewer, in particular for books with a Te Tiriti o Waitangi / Treaty of Waitangi dimension. I have previously provided expert evidence to the Waitangi Tribunal on one occasion.
- 7 My areas of expertise include: executive power; Te Tiriti o Waitangi and the New Zealand's constitution; human rights law; and the relationship between law, politics, and policy, including in relation to Te Tiriti o Waitangi.
- 8 I have endeavoured to set out matters in this brief that are within my area of expertise. I have read the code of conduct for expert witnesses set out in Schedule 4 of the New Zealand High Court Rules. I agree to comply with it. I acknowledge that the short timeframes involved in this urgent inquiry mean that the analysis that follows is more compressed than it might be with more time available; with more time I would also have sought to elaborate on references listed here.

- 9 I have been asked to provide my expert views on the ‘Statement of Issues’ as put forward. The issues raised focus on Crown policies and processes pertaining to the Treaty Principles Bill and the ‘Treaty Clause Review’. In an endeavour to assist the Tribunal, I set out the functions and powers of the Tribunal as a matter of context. I then discuss the relevant Tribunal reports and case law, extracting insights from both. Following this preliminary analysis, I set out how the Tribunal might approach the policies under consideration here: how they do not succeed on their own terms and how they violate Te Tiriti o Waitangi/the Treaty of Waitangi and its principles. I note how the Tribunal might assess prejudice and recommendations.

**Context: functions and powers of the Tribunal**

10. It is important context for determining whether particular Crown actions in introducing a Bill and reviewing Treaty of Waitangi principles clauses are consistent with Te Tiriti o Waitangi and its principles to set out the functions and powers of the Waitangi Tribunal. These are familiar to the Tribunal but they are set out here to underscore the breadth of the Tribunal’s jurisdiction and the flexibility of its powers, which are of course subject to some legal limits.
11. The Treaty of Waitangi Act 1975 established the Waitangi Tribunal. Its Long Title states that it is an Act “to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty”. The reference to “observance ... of the principles” indicates the Tribunal has a role in upholding the principles in practice: ensuring they are *observed*.
12. The Preamble notes that a treaty was entered into in 1840, that there is a difference between the texts in the English language and Māori

language, and that it is “desirable” to have a tribunal to make recommendations, and “for that purpose ... to determine” the “meaning and effect” of Te Tiriti, among other things. The Tribunal, in other words, will determine what Te Tiriti means and requires in different contexts.

13. The Act binds the Crown in s 3. Section 4 sets out details of the Waitangi Tribunal: its makeup, the considerations relevant to appointments, and the role of the Ministry of Justice in supporting the Tribunal.
14. Section 5 describes the Tribunal’s functions. These are “to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal” under s 6; to make recommendations in specific circumstances under s 5(1)(aa)-(ad); and “to examine and report on, in accordance with section 8, any proposed legislation referred to the Tribunal under that section”. This confirms that the Tribunal may examine and report on “proposed legislation” in the manner elaborated in s 8. Section 5(2) states that “[i]n 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.” Schedule 1 incorporates the two texts of the Treaty.<sup>1</sup> The reference to “exclusive authority” indicates that it is only the Tribunal that shall determine the meaning and effect of the Treaty, at least for the purposes of the Act.
15. Section 6 provides for broad jurisdiction for the Tribunal. Where any Māori claims that he or she, or any group of Māori, is or is likely to be prejudicially affected by “any ordinance”, “any Act” (whether or not still in force”, “any regulations” or other statutory instrument”, “any

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<sup>1</sup> This gives Te Tiriti o Waitangi and the Treaty of Waitangi legal force, at least in relation to the provisions of the Act.

policy or practice (whether or not still in force) adopted by or on behalf of the Crown”, or “by any policy or practice proposed to be adopted by or on behalf of the Crown”, or “any act done or omitted” and the claim is that any of the above are inconsistent with the principles of the Treaty, the claim may be submitted to the Tribunal. It is clear that policies or practices that are “proposed” or acts or omissions “proposed” are amenable to consideration by the Tribunal under certain circumstances.

16. The Tribunal has a statutory duty to inquire into a claim submitted of this kind, under s 6(2), unless the claim is submitted contrary to s 6AA(1) or s 7 applies. Section 6AA(1) prohibits a historical Treaty claim after 1 September 2008, and s 7 allows the Tribunal a discretion not to inquire into a claim if its subject matter is trivial, the claim is frivolous or vexatious or not made in good faith, or there is an adequate remedy or right of appeal “other than the right to petition the House of Representatives or to make a complaint to the Ombudsman” that it would be reasonable to exercise. The Tribunal therefore cannot conclude that an adequate remedy is petitioning the House of Representatives or submitting to select committee (or engaging in other ways with draft legislation). The Tribunal can defer an inquiry under s 6 for sufficient reason. The discretion to refuse to hear a claim is limited.
17. Returning to s 6, the Tribunal can make recommendations that action be taken to compensate or remove prejudice or prevent persons from being affected in the future if a claim is well-founded: s 6(3). The recommendation can be general or specific: s 6(4). There are limits to recommendations: in particular, the Tribunal cannot recommend the return to Māori ownership of private land or the acquisition by the Crown of any private land. The section does not confer any jurisdiction on the Tribunal in respect of a Bill introduced into the House of Representatives unless the Bill has been referred to the Tribunal under s 8. Jurisdiction is excluded in relation to commercial fisheries, and the

jurisdiction of the Tribunal is subject to enactments listed in Schedule 3. Schedule 3 lists settlement legislation.

18. The Tribunal can state a case for the Māori Appellate Court or Māori Land Court, including in relation to Māori customs or usage: s 6A.
19. Section 8 allows proposed legislation to be referred to the Tribunal by resolution of the House or any Minister of the Crown (in the case of proposed regulations).
20. Section 9 preserves the right of a person to petition the House of Representatives and does not limit the jurisdiction of committees or bodies set up by the House.
21. Schedule 2 (which follows the incorporation of the texts of the Treaty and Te Tiriti) deals with the machinery and operations of the Tribunal. Clause 5A gives the Tribunal the power to commission research and to receive reports in evidence. Section 6 is a broad provision that allows the Tribunal to receive “as evidence any statement, document, information, or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it, whether the same would, apart from this section, be legally admissible evidence or not.” Subject to this subclause, the Evidence Act 2006 applies.
22. Under cl 8, the Tribunal is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908; all provisions of that Act are said to apply except ss 11 and 12, which relate to costs. Clause 8(2) allows the Chairperson of the Tribunal to issue summonses requiring the attendance of witnesses or the production of documents, and to do “any other act preliminary or incidental to the hearing of any matter by the Tribunal.”
23. The Commissions of Inquiry Act 1908 should be referred to give this cross-reference in Schedule 2. Section 4C gives the Commission broad powers of investigation, including to inspect and examine any papers,

documents, records or things; to require any person to produce documents in their possession or under their control; and to require any person to furnish information or particulars required. Section 4D provides for a power to summon witnesses.

24. In sum, the Tribunal has broad powers and functions. Its jurisdiction is wide: where any Māori claims that he or she (or any group of Māori) is or is likely to be prejudicially affected by “any” law or statutory instrument, “any policy or practice” including ones “proposed to be adopted by or on behalf of the Crown” or “any act done or omitted” or “proposed to be done or omitted”, a claim can be submitted if the claim is that any of the above is inconsistent with the principles of the Treaty. The Tribunal must inquire into every claim unless it is a historical claim submitted after 2008 or it is trivial, frivolous or vexatious or not in good faith, or there is an adequate remedy or right of appeal. In other words, there is a legislative instruction to consider a claim. The Tribunal must consider whether the claim is “well-founded” (under s 6(3)) and then can make recommendations in general or specific terms.
25. Such a view of the Tribunal’s jurisdiction and approach is confirmed by the scholarship. Geoff Melvin notes: “the Tribunal is able to inquire into matters that in most cases are non-justiciable before the ordinary courts.”<sup>2</sup> Melvin notes that the Tribunal has concluded that it can determine the legality of Crown action, even if its ultimate task is to determine whether matters before it are consistent with Treaty principles.<sup>3</sup> Put another way, the Tribunal consider other touchstones of legality, even if its primary focus is consistency with Treaty principles. Melvin also elaborates on what it means for a claim to be well-founded under s 6(3). He notes that it requires showing that two elements exist: first, a matter complained about must be found to have prejudicially affected, or be likely to prejudicially affect, a claimant or

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<sup>2</sup> Geoff Melvin, ‘The Jurisdiction of the Waitangi Tribunal’, in Janine Hayward and Nicola R When (eds) *The Waitangi Tribunal* 23 at 28.

<sup>3</sup> *Ibid*, at 31.

group; or second, a matter must be inconsistent with the principles of the Treaty of Waitangi.<sup>4</sup>

### **Further insights from analogous Tribunal inquiries**

26. The Tribunal has on a number of occasions reviewed Crown policy in anticipation of potential prejudice or possible inconsistency with Te Tiriti principles. It is useful to review these Tribunal reports and references to orient the approach in this case. When these reports are reviewed, it becomes clear that the inquiry here is far from landmark or groundbreaking, and instead can draw on a well-established body of Tribunal practices and precepts.
27. A selection of relevant Tribunal reports is considered below under eleven subheadings; these seem to raise comparable issues to the present claim, to differing degrees. Constraints imposed by the urgent nature of this inquiry (with its attendant deadlines) as well as the desire to be helpful to the Tribunal (and to pinpoint salient past references in Tribunal reports) prevent a more comprehensive summary. The reports are addressed chronologically.
28. I begin with analysis of Tribunal reports – because these also deal with questions of jurisdiction and function of the Tribunal – before turning to case law on Te Tiriti o Waitangi, which has a more general focus.
29. The reports are particularly useful in cataloguing what counts as prejudice; how a Tribunal has approached analysing policy that may be in development while an inquiry is ongoing; what approach the Tribunal has taken to breach of legal and policy norms, in addition to breaches of Te Tiriti o Waitangi and its principles; how Tribunals have found that a claim is well founded; and what recommendations the

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<sup>4</sup> Ibid, at 31.

Tribunal has made to the substance and process of policy implicating Te Tiriti and its principles.

(i) Kaituna River Report (1984)

30. In the *Kaituna River Report*, it was said by the Tribunal: “Our statutory authority is to make a finding as to whether *any action of the Crown* ... is inconsistent with the *principles* of the Treaty.”<sup>5</sup> This was described as a “wide power” that “enables” the Tribunal “to look beyond strict legalities so that” the Tribunal in a proper case can “identify where the spirit of the Treaty is not being given due recognition”.<sup>6</sup> The Tribunal confirms later in the same report that the Act has “another far-reaching effect” beyond giving the Treaty of Waitangi legal force and providing for statutory rights. It said: “Any ‘policy of the Crown’ that prejudicially affects a Māori gives rise to the right to make a claim”, including the policy to keep an Act in force.<sup>7</sup> This is indicative of a broad interpretation being given to the concept of a “policy”.
31. The Tribunal goes onto add that “it seems necessarily to follow that ... any proposed policy of the Crown must be measured against the principles of the Treaty”, rendering the Treaty a “constitutional instrument”.<sup>8</sup> The Tribunal notes in the report: “it would seem prudent for those responsible for legislation to recognise the danger inherent in drafting statutes or regulations without measuring such instruments against the principles in the Treaty”.<sup>9</sup> It is evident that in the process of drafting legislation, the principles of Treaty are to be borne in mind. Confirming this point, the Tribunal said: the Treaty is “not something

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<sup>5</sup> Waitangi Tribunal, *Report of the Waitangi Tribunal on the Katuna River Claim (Wai 4)* (Department of Justice, Wellington, 1984) at [5.11] (emphasis added in first italicisation; second italicisation is in the original).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, at [6.3].

<sup>8</sup> *Ibid.*, at [6.4].

<sup>9</sup> *Ibid.*

to be taken lightly by those responsible for introducing new legislation”.<sup>10</sup>

32. In that report the Tribunal was able to find prejudice in anticipation of the pipeline being implemented. It was the pipeline *proposal* that was under assessment, and the Tribunal found that it was the result of an action, policy or practice by or on behalf of the Crown; and that it would prejudicially affect the claimants or was likely to affect the claimants, because it would contravene their spiritual or cultural values (including by reducing the quality and quantity of their fisheries, and by rendering the catch of fisheries unacceptable and rendering plant and other resources less suitable for traditional purposes).<sup>11</sup> It found the proposal to be inconsistent with the principles of the Treaty, because of anticipated interference with taonga, and that there were practicable alternatives.<sup>12</sup> The Tribunal also found that the Water and Soil Conservation Act 1967 prejudicially affected the claimants by failing to make provision for the Treaty of Waitangi, and failing to implement and recognise its provisions.<sup>13</sup> The Ministry of Works and Development responsible for administering the legislation said it would recommend an amendment to legislation to remedy this omission.<sup>14</sup> The Tribunal accordingly recommended that the pipeline proposal be abandoned and that legislation be amended.<sup>15</sup>

(ii) Muriwhenua Interim Report (1986)

33. In the *Muriwhenua Interim Report*, the Waitangi Tribunal sent an interim update to the Minister of Māori Affairs while it was starting an inquiry into claims from five northerly tribes.<sup>16</sup> The claimants submitted that the relief sought would be prejudiced by the enactment

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<sup>10</sup> Ibid, at [6.5].

<sup>11</sup> Ibid, at 30–31.

<sup>12</sup> Ibid, at 31.

<sup>13</sup> Ibid, at 32.

<sup>14</sup> Ibid, at 32.

<sup>15</sup> Ibid, at 33.

<sup>16</sup> *Muriwhenua Interim Report*, letter to Minister of Māori Affairs, 8 December 1986.

of the State-Owned Enterprises Bill, which was making its way through the House and was to pass to its Third Reading the following week. The Tribunal noted that s 8 of the Treaty of Waitangi Act, enabling proposed legislation to be reviewed by referral of the House, does not “derogate from the jurisdiction in section 6 to review policies or practices proposed to be adopted by the Crown, on the claim of ‘any Māori’ likely to be prejudicially affected.”<sup>17</sup> In other words, the Tribunal confirmed that it could review proposed legislation, even when not referred by the House of Representatives, under s 6, where proposed legislation represented policies or practices proposed to be adopted by the Crown, on the claim of any Māori likely to be prejudicially affected.

34. The Tribunal considered that the claimants were likely to be prejudicially affected.<sup>18</sup> Land to be transferred would no longer be Crown land, and so the transfer would serve to prevent the return of Crown land. The Tribunal cited the preamble of the Treaty, which said of Māori that the Crown is “anxious to protect their just rights and property”.<sup>19</sup> The Tribunal went on: “The element of protection was ... a most compelling reason for the execution of the Treaty.”<sup>20</sup> The Tribunal found: “The honour of the Crown is at stake. We think it inconsistent with the principles of the Treaty of Waitangi that that particular relationship of the Māori and the Crown should in any way be diminished, or even threatened with compromise.”<sup>21</sup>

(iii) Muriwhenua Fishing Report (1988)

35. In the *Muriwhenua Fishing Report*, some broad statements may be relevant to the present inquiry. It was noted that the Treaty’s “drafters

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<sup>17</sup> Ibid, at 1.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, at 2.

<sup>20</sup> Ibid, at 3.

<sup>21</sup> Ibid, at 3.

were basically concerned that settlement should be founded on just lines.”<sup>22</sup> The Tribunal added: “The Treaty became ... a noble compact of mutual pledges, but we severely reduce its status to read it as the definition of rights rather than the source of them.”<sup>23</sup> The Treaty was “a declaration of honourable intent.”<sup>24</sup> It is not appropriate to reduce its status, and the Treaty’s status as a source of rights must be clearly understood. The Tribunal noted that the Treaty’s terms and underlying concepts are both significant.<sup>25</sup>

36. The Tribunal also said, in conclusion, that rather than there being “adherence to the broad principle that two people might exist together” there has been “rather a gradual ousting of one by the other”.<sup>26</sup> The Tribunal found multiple acts that were inconsistent with the principles of the Treaty, and concluded that there was prejudicial effect in the way that claimant tribes were involved in protracted and expensive proceedings and negotiations; in loss of access to fishing; in loss of income, jobs, trade, and opportunities; and in severe impact on communities.<sup>27</sup> Accordingly, the Tribunal held the Muriwhenua fishing claim to be well founded.

(iv) Allocation of Radio Frequencies Report (1990)

37. The *Allocation of Radio Frequencies Report* is also pertinent to this inquiry, given that it involved an urgent inquiry into a proposed policy move and potential prejudice arising from it.<sup>28</sup> The Tribunal recommended the suspension of the operation of the radio frequency

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<sup>22</sup> Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) (Department of Justice, Wellington, 1988), 213.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid, at 214.

<sup>26</sup> Ibid, at 225.

<sup>27</sup> Ibid, at 229.

<sup>28</sup> Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, Wai 150) (Brooker and Friend, Wellington, 1990).

tender. Part of the claim was that the Treaty did not provide authority for the Crown to “determine, define or limit” the radio frequencies that may be used by Māori in the exercise of their rangatiratanga over tikanga Māori.<sup>29</sup> It was also claimed that the control exercised by the Crown over broadcasting undermined rangatiratanga, and that the failure to negotiate an agreement with Māori was in breach of the Treaty and prejudicial to Māori interests.<sup>30</sup>

38. The Tribunal found that Māori were entitled to fair and equitable access to radio frequencies, with consideration given to the state of the Māori language.<sup>31</sup> More time was needed for consultation. The Tribunal also noted that consultation would have to recognise “that Māori are not a homogeneous group and that the Treaty talks of tribes rather than an amorphous body now called ‘Māoridom’”.<sup>32</sup>

(v) Te Whānau a Waipareira (1998)

39. In this inquiry it was claimed that the Crown, through the Community Funding Agency of the Department of Social Welfare, had failed to deal with Te Whānau a Waipareira (including in relation to resourcing) in a manner consistent with tino rangatiratanga.<sup>33</sup> The Tribunal report clarified numerous points relevant to the present inquiry. The Treaty was said to be directed “to all Māori, not just to tribes”; the Treaty was “directed to the protection of Māori interests generally” rather than a narrow class of property interests; “rangatiratanga” is not limited to tribes in the way it embraces autonomous action and management; and

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<sup>29</sup> Ibid, at 9.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid, at 43.

<sup>32</sup> Ibid, at 44.

<sup>33</sup> Waitangi Tribunal, *Te Whanau o Waipareira Report (Wai 414)* (GP Publications, Wellington, 1998).

“partnership” is a concept that defines how Māori and the Crown should relate to each other.<sup>34</sup>

40. The key principles at stake in the claim were rangatiratanga, protection, and partnership.<sup>35</sup> One important question was “whether the policies and practices at issue in this claim enhance the solidarity and integrity of Māori communities and empower the people, or whether they divide and rule them.”<sup>36</sup> Partnership “recognises” the “separate status” of Māori and the Crown, but identifies “enduring obligations” owed “to each other”, and “defines appropriate conduct in their dealings, to act towards each other with the utmost good faith”.<sup>37</sup>
41. In determining whether these principles had been violated, the Tribunal found: “it is neither empowering of Māori communities nor enhancing of their rangatiratanga for others to decide what is best for them, what they need, or how those needs will be met.”<sup>38</sup> The Tribunal went on to say: “it denigrates their status and robs them of their dignity, and yet that is effectively what the policy prescribes.”<sup>39</sup>

(vi) Foreshore and Seabed Report (2004)

42. The urgent inquiry into Crown policy for the foreshore and seabed has parallels with the present claim. The government of the time responded to a Court of Appeal decision with a foreshore and seabed policy in August 2003 that “elicited a storm of protest from Māori”.<sup>40</sup> The Government planned hui to consult Māori, but the policy was not changed in its essentials.

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<sup>34</sup> Ibid, at xxiv.

<sup>35</sup> Ibid, at 214.

<sup>36</sup> Ibid, at 215.

<sup>37</sup> Ibid, at 216.

<sup>38</sup> Ibid, at 221.

<sup>39</sup> Ibid.

<sup>40</sup> Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy (Wai 1071)* (SecuraCopy, Wellington, 2004) xii.

43. The Tribunal found that it could not agree with Crown assertions about how the policy might benefit Māori.<sup>41</sup> The Tribunal found that it removed rights.<sup>42</sup> The policy breached the principles of the Treaty but “beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state”, including the rule of law, fairness, and non-discrimination.<sup>43</sup> The Tribunal made clear that it could have regard to these wider norms of domestic and international law. Those serious breaches were said to give rise to serious prejudice.<sup>44</sup> Such prejudice included putting Māori in a class that was inferior to other citizens, leaving Māori with “complete uncertainty about where they stand” with undermined bargaining power, and taking away “opportunity and mana” alongside “fewer and lesser rights”.<sup>45</sup> The Tribunal recommended that the Government “go back to the drawing board ... and engage with Māori in proper negotiations about the way forward”,<sup>46</sup> and also offered other pragmatic options.
44. The Tribunal commented that much of the thinking about race relations that had arisen out of the foreshore and seabed saga “seems to us to have been negative”.<sup>47</sup> The approach taken by the Tribunal in analysing the policy in terms of the principles of the Treaty of Waitangi was to “look first at the reasons the Government has put forward for introducing a comprehensive policy”.<sup>48</sup> The Tribunal then turned “to the policy itself” and considered “whether it is a good policy, either on its own terms, or in terms of wider norms to which policies must have reference if they are to be seen as good – including domestic and international human rights norms”, before turning to the principles of

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<sup>41</sup> Ibid, at xiii.

<sup>42</sup> Ibid, at xiii–xiv.

<sup>43</sup> Ibid, at xiv.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid, at xv.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid, at 81.

the Treaty.<sup>49</sup> The Tribunal was guided in particular by the touchstone of fairness.<sup>50</sup> It was noted by the Crown that there was only a policy framework, with much detail to be developed.<sup>51</sup>

45. The Tribunal considered and rejected the views that uncertainty, access, or alienability were good rationales for the policy.<sup>52</sup> The Tribunal then considered negative implications of the policy for the rule of law and fairness, and noted that there were many uncertainties in the Crown’s own policy.<sup>53</sup> The policy did not succeed even on its own terms. Further, the policy was expropriatory and the Crown did not have compelling reasons to justify such expropriation.<sup>54</sup>

46. The Tribunal then found that the Crown violated article 2 of the Treaty of Waitangi through historical assumptions of ownership of the foreshore and seabed, and removing the capacity for Māori to determine their rights.<sup>55</sup> There was no overriding justification for violating Te Tiriti o Waitangi or the Treaty.<sup>56</sup> Principles of reciprocity and partnership had been violated, as had the duty for the Crown to make informed decisions on matters affecting Māori.<sup>57</sup> The Crown failed to uphold the principle of active protection,<sup>58</sup> including due to “the extreme haste of the Crown’s consultation” and “its apparent unwillingness to make real or significant changes to its policy in response to Māori concerns.”<sup>59</sup> The principles of equity and options were also violated, and redress would not be an adequate response.<sup>60</sup>

The upshot of all this was that there were three forms of prejudice:

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<sup>49</sup> Ibid, at 81.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid, at 88.

<sup>52</sup> Ibid, at 90–96.

<sup>53</sup> Ibid, at 97–107.

<sup>54</sup> Ibid, at 121.

<sup>55</sup> Ibid, at 127–128.

<sup>56</sup> Ibid, at 128–129.

<sup>57</sup> Ibid, at 130–131.

<sup>58</sup> Ibid, at 132–133.

<sup>59</sup> Ibid, at 133.

<sup>60</sup> Ibid, at 134–136.

Māori citizenship was devalued; Māori were made powerless through uncertainty; and Māori faced a loss of mana and property rights.<sup>61</sup> Judge Wainwright concluded by saying, “Whatever happens, we hope for an outcome that is faithful to the vision of the Treaty: two peoples living together in one nation, sharing authority and resources with fundamental respect for each other.”<sup>62</sup>

(vii) *Ko Aotearoa Tēnei (2011)*

47. *Ko Aotearoa Tēnei* is a sprawling, magisterial work – but its comments on how the lack of Māori authority over important decision-making can constitute prejudice are especially relevant. In relation to mātauranga Māori, the Tribunal concluded that the “very lack of decision-making power is a cause of prejudice”.<sup>63</sup> The Tribunal went on: “the absence of a decisive Māori voice in such matters [relating to the export of taonga tūturu] is a breach of the Treaty and by definition prejudicial on its own.”<sup>64</sup> In broader comments in the conclusion, the Tribunal said: “Over the 171 years since the Treaty of Waitangi was signed ... the Crown has largely supported and promoted one of our two founding cultures at the expense of the other.”<sup>65</sup>

(viii) *The Report on the Trans-Pacific Partnership Agreement (2016)*

48. The report on the Trans-Pacific Partnership Agreement (“**TPPA**”) was an urgent inquiry, heard in March 2016, following the release of the text of the TPPA in November 2015. The Tribunal found no breach of the principles of Te Tiriti o Waitangi or the Treaty of Waitangi in the substance of the Treaty exception in the TPPA. But the Tribunal did address, ahead of the ratification of the TPPA, what input would be

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<sup>61</sup> *Ibid*, at 136–138.

<sup>62</sup> *Ibid*, at 144.

<sup>63</sup> Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi (Wai 262)* (Legislation Direct, Wellington, 2011) 204.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid*, at 245.

required from Māori. The Tribunal’s main concerns were “the status of Māori as Treaty partners as opposed to general stakeholders; the transparency of the Crown in its decision-making; and the process by which the Crown informs itself of Māori interests.”<sup>66</sup> The Tribunal noted that it had a concern in particular “that the Crown has misjudged or mischaracterised the nature, extent, and relative strength of Māori interests put in issue under the TPPA”.<sup>67</sup>

(ix) The Haumarū COVID-19 Priority Report (2021)

49. The Tribunal’s report on COVID-19 is cited for several reasons, including the fact that it involved assessment of COVID-19 strategy as it was being developed and implemented by the Crown. It related to the Crown’s vaccination strategy and COVID-19 Protection Framework. In this report, the first Treaty principle listed as significant was tino rangatiratanga, showing the Tribunal’s willingness to regard this as a relevant Treaty principle as well as part of the text of Te Tiriti o Waitangi.<sup>68</sup> It was noted that the Crown “must actively protect tino rangatiratanga”, a fusion of two principles that had sometimes been framed separately: active protection and tino rangatiratanga.<sup>69</sup>
50. The Tribunal also invoked partnership, noting that “[t]he requirement for the Crown to partner with Māori in developing and implementing policy is especially relevant where Māori are expressly seeking an effective role in this process.”<sup>70</sup> The Tribunal observed that an arrangement “requires constant evaluation to ensure it continues to meet Treaty obligations”: an arrangement that “initially appears Treaty-consistent” may not prove to be Treaty-consistent in practice,

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<sup>66</sup> Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement (Wai 2522)* (Legislation Direct, Lower Hutt, 2016) 39.

<sup>67</sup> *Ibid.*, at 40.

<sup>68</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report (Wai 2575)* (Waitangi Tribunal, Wellington, 2021, pre-publication version listed online) 43.

<sup>69</sup> *Ibid.*, at 44.

<sup>70</sup> *Ibid.*

requiring reconsideration and modification.<sup>71</sup> The Tribunal here draws on Treaty-consistency as a general standard, and is not limited to considering Treaty principles.

51. The Tribunal referred to the principle of equity (tied to article 3 of Te Tiriti o Waitangi), active protection (including the obligation for the Crown to be well informed, and to continue to inform itself),<sup>72</sup> and options.<sup>73</sup> In its conclusions, the Tribunal found immediate and lasting prejudice arising from Treaty breaches, including from the lack of adequate protection for Māori arising out of the move to the COVID-19 Protection Framework.<sup>74</sup> The Tribunal recommended further funding, resourcing, data, and support to Māori service providers and communities.<sup>75</sup> It also recommended that future engagement between Māori and the Crown should reflect a set of principles, including giving effect to tino rangatiratanga and being broadly representative of Māori.<sup>76</sup>

(x) He Pāharakeke, He Rito: Whakakīkīnga Whārurua: Oranga Tamariki Urgent Inquiry (2021)

52. The urgent inquiry into Oranga Tamariki in 2021 examined the disparity between Māori and non-Māori outcomes under Oranga Tamariki and its predecessors, whether recent changes (including changes being implemented at the time of the report's publication) would change the disparity, and what other changes were required.<sup>77</sup>

53. When outlining its approach, the Tribunal emphasised the importance of tino rangatiratanga over kāinga under article 2 of Te Tiriti o

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid, at 45.

<sup>73</sup> Ibid, at 44–46.

<sup>74</sup> Ibid, at 106.

<sup>75</sup> Ibid, at 110.

<sup>76</sup> Ibid, at 114.

<sup>77</sup> Waitangi Tribunal, *He Pāharakeke, He Rito: Whakakīkīnga Whārurua: Oranga Tamariki Urgent Inquiry (Wai 2915)* (Legislation Direct, Lower Hutt, 2021) xiv.

Waitangi.<sup>78</sup> The Tribunal said: “*Continuity of chiefly authority over not just land and resources, but also the people is directly guaranteed in the Māori text of te Tiriti/the Treaty.*”<sup>79</sup> The Tribunal also said: “This is nothing less than a guarantee of the right to continue to organise and live as Māori.”<sup>80</sup> Relevantly for present purposes, the Tribunal identified the failure to honour tino rangatiratanga over kāinga as representing “more than just a failure to honour uphold ... [but] also a breach born of hostility to the promise itself.”<sup>81</sup> The Tribunal stated that efforts to assimilate Māori to “the Pākehā way ... is perhaps the most fundamental and pervasive breach of te Tiriti/the Treaty and its principles”.<sup>82</sup>

54. The Tribunal recorded the importance of the principle of partnership, which requires that “neither partner could act in a manner that fundamentally affects the other’s spheres of influence without their consent, unless there were exceptional circumstances.”<sup>83</sup> The Tribunal also referred to active protection: the need for the Crown “to use its power of kāwanatanga to actively protect the Māori rights and interests guaranteed under articles 2 and 3 of te Tiriti/the Treaty.”<sup>84</sup> The principle, the Tribunal added, “is active protection, not passive or reactive protection”.<sup>85</sup> The Tribunal also observed that principles of equity, options, and redress applied.<sup>86</sup>

55. The Tribunal found a clear breach of active protection in the neglect of the *Puao-te-Ata-tu* report and the allowance for it to wither.<sup>87</sup> It also found that the failure to support kaupapa Māori solutions represented a

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<sup>78</sup> Ibid, at 12.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid, at 19.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid, at 20.

<sup>86</sup> Ibid, at 21–25.

<sup>87</sup> Ibid, at 106.

breach of the principle of options.<sup>88</sup> These twin breaches were tied to a more fundamental breach of the article 2 guarantee of tino rangatiratanga over kāinga.<sup>89</sup> The Tribunal also commented on changes since 2017, noting that they were unlikely to be sufficient to realise the promises found in te Tiriti/the Treaty and its principles.<sup>90</sup>

(xi) The Oranga Tamariki (Section 7AA) Urgent Inquiry Report (2024)

56. As this expert brief was being finalised the Tribunal issued its urgent inquiry report into the proposed repeal of s 7AA of the Oranga Tamariki Act.<sup>91</sup> While this Tribunal may be well familiar with that report, it is worth underscoring several passages of especial pertinence to this claim. No findings or recommendations were made in the report. Three matters were raised in advance of a Bill being introduced: that implementation of a coalition agreement commitment could lead to disregard for Treaty obligations, that actual harm would be caused by repeal of s 7AA, and that an alternative approach was available under the Act.<sup>92</sup> The Tribunal noted, in developing these points: “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.”<sup>93</sup> The Tribunal added that the decision to repeal s 7A “is not based on an empirical public policy case”.<sup>94</sup>

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<sup>88</sup> Ibid, at 107.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid, at 149.

<sup>91</sup> Waitangi Tribunal, *The Oranga Tamariki (Section 7AA) Urgent Inquiry Report (Wai 3350)* (Waitangi Tribunal, Wellington, 2024, pre-publication version).

<sup>92</sup> Ibid, at 2.

<sup>93</sup> Ibid, at 13.

<sup>94</sup> Ibid.

## Case law relevant to the present inquiry

57. Jurisprudence on Te Tiriti o Waitangi/the Treaty of Waitangi and its principles will be familiar to the Tribunal. No attempt is made to recount all of it here. Instead, in what follows some select passages are extracted from key decisions that are of particular relevance to this case. Later sections of this brief elaborate on that relevance.
58. The *Lands* case, as is now well known, concerned the transfer of land to state-owned enterprises and the consistency of that transfer with the principles of the Treaty of Waitangi.<sup>95</sup> The State-Owned Enterprises Bill had been amended after the already discussed interim report of the Waitangi Tribunal. The judgment pays rereading.
59. President Cooke accepted submissions that “the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty.”<sup>96</sup> In interpreting the provision requiring the Crown to act in accordance with Treaty principles, Cooke P said there is a “duty of the Court to check ... whether that restriction has been observed”,<sup>97</sup> to ensure that the declaration made by Parliament about the Treaty is not “a dead letter”.<sup>98</sup>
60. What matters in interpreting the principles of the Treaty is “the spirit”, said Cooke P.<sup>99</sup> His Honour added: “The Treaty signified a partnership between the races.”<sup>100</sup> A key part of Cooke P’s judgment is his statement that: “The transfer of Crown lands to State enterprises is such a major change that, although the Government is clearly entitled to

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<sup>95</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>96</sup> *Ibid*, at 655–656.

<sup>97</sup> *Ibid*, at 660.

<sup>98</sup> *Ibid*, at 661.

<sup>99</sup> *Ibid*, at 663.

<sup>100</sup> *Ibid*, at 664.

decide on such a policy, as a reasonable Treaty partner it should take the Māori race into its confidence regarding the manner of implementation of the policy.”<sup>101</sup> Put another way, major changes that implicate the Treaty partnership will require Māori to be taken into the confidence of the Crown, at the very least. In fashioning a way forward, Cooke P also said: “The parties owe each other co-operation.”<sup>102</sup> He also closed his judgment by saying the duty of Treaty partners “to acts towards each other reasonably and with the utmost good faith” is “no light one”. It is “infinitely more than a formality” if “a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.”<sup>103</sup>

61. Richardson J noted: “The way ahead calls for careful research, for rational positive dialogue and, above all, for generosity of spirit.”<sup>104</sup> His Honour goes on to confirm the duties of reasonableness and good faith owed by the Crown and Māori to each other “within their respective spheres”.<sup>105</sup> He also cites the preamble of the Treaty, with its reference to the Crown’s being “anxious to protect” the “just Rights and Property” of Māori.<sup>106</sup> Richardson P endorsed the utility of the concept of the honour of the Crown: “Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important.”<sup>107</sup> He said: “It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country”.<sup>108</sup>
62. Relevant comments are also made in the judgments of Somers J, Casey J, and Bisson J. In commenting on the principles, Somers J stated: “The principles of the Treaty must I think be the same today as they were

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<sup>101</sup> Ibid, at 665.

<sup>102</sup> Ibid, at 666.

<sup>103</sup> Ibid, at 667.

<sup>104</sup> Ibid, at 673.

<sup>105</sup> Ibid, at 681.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid, at 682.

<sup>108</sup> Ibid.

when it was signed in 1840. What has changed are the circumstances to which those principles are to apply.”<sup>109</sup> Casey J indicated that he would interpret principles to mean “the Treaty’s actual terms understood in the light of the fundamental concepts underlying them.”<sup>110</sup> He added that reference to Treaty principles “calls for an assessment of the relationships the parties hoped to create by and reflect in that document, and an inquiry into the benefits and obligations involved in applying its language in today’s changed conditions and expectations in light of that relationship.”<sup>111</sup>

63. Justice Bisson noted: “The principles of the Treaty of Waitangi were the foundation for the future relationship between the Crown and the Māori race.”<sup>112</sup> Justice Bisson also observed: “The passages I have quoted ... enable the principles of the Treaty to be distilled from an analysis of the text of the Treaty.”<sup>113</sup> What is striking about all these references is the way the principles of Te Tiriti o Waitangi / the Treaty of Waitangi are regarded as having a historical and textual grounding: the principles reflect the hopes and expectations of the parties signing Te Tiriti / the Treaty in 1840.
64. In *Te Rūnanga o Muriwhenua v Attorney-General*, the Court of Appeal also considered a dispute that had been reviewed by the Waitangi Tribunal, relating to fishing rights.<sup>114</sup> President Cooke, giving the judgment of the Court, said: “The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.”<sup>115</sup>
65. More recently, the courts have developed jurisprudence on Treaty principles and the place of Te Tiriti o Waitangi in the common law. No

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<sup>109</sup> Ibid, at 692.

<sup>110</sup> Ibid, at 702.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid, at 714.

<sup>113</sup> Ibid, at 715.

<sup>114</sup> [1990] 2 NZLR 641.

<sup>115</sup> For further authoritative statements of principle on Te Tiriti o Waitangi and its principles, see of course *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA).

attempt is made at a comprehensive overview here. The Supreme Court confirmed in *Ngāti Whātua Ōrākei Trust v Attorney-General* that the fact that the subject-matter of a claim is broadly before Parliament is not a reason for courts to refuse to consider questions of law arising.<sup>116</sup> As Elias CJ said in that case, writing separately: “Until Parliament changes the law, the courts must be open to citizens who seek to have their existing legal interests and rights determined.”<sup>117</sup> Her Honour referred to s 27 of the New Zealand Bill of Rights Act 1990 and noted that “[p]arliamentary freedom of debate ... is unaffected by the judicial responsibility to hear and determine rights and interests protected by law.”<sup>118</sup> In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, the Supreme Court held unanimously: “An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.”<sup>119</sup> There was also direct reference made by the Court to “the guarantee in art 2 of the Treaty of tino rangatiratanga”.<sup>120</sup>

66. Two recent High Court decisions warrant comment. In *Ngāti Whātua Ōrākei Trust v Attorney-General*, Palmer J recounted orthodox discussions of Treaty principles.<sup>121</sup> He cited authoritatively *New Zealand Māori Council v Attorney-General* for the proposition that it was “clear beyond argument” that good faith owed by the parties under the Treaty extends to “consultation on truly major issues.”<sup>122</sup> His Honour said that the duty of active protection applies “to the exercise of tikanga, just as it extends to the exercise of rangatiranga.”<sup>123</sup> Justice Palmer quoted the oft-cited comment of Chilwell J in *Huakina Development Trust v Waikato Valley Authority* to the effect that the

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<sup>116</sup> [2018] NZSC 84, [2019] 1 NZLR 116.

<sup>117</sup> At [119].

<sup>118</sup> *Ibid.*

<sup>119</sup> [2021] NZSC 127, [2021] 1 NZLR 801 at [8].

<sup>120</sup> *Ibid.*, at [154]; see also fn 287.

<sup>121</sup> [2022] NZHC 843, [2022] 3 NZLR 601.

<sup>122</sup> At [585] of his judgment, citing the passage in the case at 152.

<sup>123</sup> *Ibid.*, at [586].

Treaty is part of the “fabric of New Zealand society”,<sup>124</sup> and the comment made by Gallen and Goddard JJ in *Barton-Prescott v Director General of Social Welfare* that the general application of the Treaty “must colour all matters to which it has relevance”.<sup>125</sup>

67. Even more recently, in *Hart v Director-General of Conservation*, Cooke J noted that an agreement by the Department of Conservation to take jawbones into its custodial possession was an exercise of kāwanatanga powers (in Treaty terms), while claims that each iwi made to the jawbones involved the exercise of rangatiratanga under art 2 of the Treaty (referred to directly by his Honour).<sup>126</sup> The Court found that entitlement to the jawbones was to be answered by a tikanga-consistent process, and it was “not for the Crown to adjudicate on these matters unless it can be shown to be consistent with the principles of art 2 of the Treaty.”<sup>127</sup> The Court also found that it would not be an “appropriate function of the Crown” to make a decision about allocating the taonga.<sup>128</sup> In essence, the Court attempted to delineate the spheres of authority marked out by articles 1 and 2 of Te Tiriti o Waitangi, referring to the terms of Te Tiriti directly. Both Palmer and Cooke JJ, the judges in these High Court decisions, have since been appointed to the Court of Appeal.

### **The policies under consideration**

68. In issue in this claim are the Treaty Principles Bill and the Treaty clause review, including the policy process related to each area of Crown action. Both are plainly policies or acts, done by or on behalf of the Crown. There appears to be no available claim that the Tribunal’s inquiry should be limited by any matters of jurisdiction. It is also clear

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<sup>124</sup> At [590]; the case is reported at [1987] 2 NZLR 188 (HC) and the passage cited is at 210.

<sup>125</sup> *Ibid*, citing [1997] 3 NZLR 179 (HC) at 184.

<sup>126</sup> *Hart v Director-General of Conservation* [2023] NZHC 1011 at [109].

<sup>127</sup> *Ibid*, at [119].

<sup>128</sup> *Ibid*, at [120].

that the Tribunal has been well capable of reviewing policy while in the course of development in the past.

69. The Tribunal’s inquiry into the Treaty Principles Bill and the Treaty Clause Review is affected by the breadth and depth of material in the public domain. There is a difficult dilemma, which can lead to flashpoints around the provision of evidence: the Crown can limit the evidence that is shared in a manner that restricts the inquiry. In general, it is not clear that the Crown should be allowed to benefit from such choices.
70. The Treaty Principles Bill can be analysed on the basis of the coalition agreement, past ACT Party statements, and uncontested material in the public domain about policy developments.
71. In the Coalition Agreement between the National Party and the ACT Party, made public in November 2023, the parties committed to: “Introduce a Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable.”<sup>129</sup>
72. The ACT Party had set out its aims in relation to the Treaty Principles Bill in an October 2022 press release. This is of particular relevance because of the explicit reference to “existing ACT policy” in the coalition agreement. ACT’s Justice spokesperson Nicole McKee said in an October 2022 release: “Nobody should get an extra say because of who their great grandparents were. Nobody should have to be treated differently because of who they are.”<sup>130</sup> This press release set out the “principles of the Treaty” that the ACT Party would define in its proposed legislation, those being “The New Zealand Government has the right to govern New Zealand”, “The New Zealand Government will

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<sup>129</sup> See [https://assets.nationbuilder.com/nationalparty/pages/18466/attachments/original/1700778592/National\\_ACT\\_Agreement.pdf?1700778592](https://assets.nationbuilder.com/nationalparty/pages/18466/attachments/original/1700778592/National_ACT_Agreement.pdf?1700778592) at 9.

<sup>130</sup> See <https://www.act.org.nz/defining-the-treaty-principles> (last accessed 30 April 2024).

protect all New Zealanders’ authority over their land and other property”, and “All New Zealanders are equal under the law, with the same rights and duties.”<sup>131</sup> A strong theme of other quotations in the press release was equality and the claim that moves by the previous Labour-led government undermined equality. The ACT Party also referred to co-governance.

73. A Ministry of Justice document on the Treaty Principles Bill was procured by the media in January 2024. Its veracity was not questioned. It referred to three “new principles based on the Articles of the Treaty”, which were slightly different (but closely related) to the ACT Party’s 2022 press release.<sup>132</sup> The first was “the New Zealand government the right to govern all New Zealanders”, the second that “the New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property”, and the third that “all New Zealanders are equal under the law with the same rights and duties”. Reference was made to some text from Te Tiriti o Waitangi. The Ministry advice said: “Legislative action is needed because the principles are not defined in legislation”.<sup>133</sup> It added: “Their importance requires there be certainty and clarity about their meaning.”<sup>134</sup> The same document noted the lack of consultation of Māori over the Bill’s contents.

74. It is perhaps also of contextual (though lesser) relevance that the ACT Party set up a website about the Bill, which gave some reasons for why the Bill was being introduced.<sup>135</sup> In answer to the question, “What problem are you trying to solve?”, the website noted that an approach to Treaty principles focused on “partnership” had led to argument that there are “two types of people” in New Zealand with different rights, resulting in co-governance and racial quotas on which – the website

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<sup>131</sup> Ibid.

<sup>132</sup> See <https://www.1news.co.nz/2024/01/19/leaked-ministry-doc-warns-bill-could-break-spirit-and-text-of-treaty/>.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> See <https://www.treaty.nz/>.

claimed – “New Zealanders were never consulted”.<sup>136</sup> It added that ACT “believes the Treaty promises what it says.”<sup>137</sup>

75. The content of the Treaty clause review that the Government has committed to undertake also has to be assessed on the basis of this Government’s coalition agreement and some quite limited other releases.
76. The coalition agreement between the National Party and New Zealand First said that “the Coalition Government will reverse measures taken in recent years which have eroded the principle of equal citizenship.”<sup>138</sup> It then said “specifically we will” and listed a series of further commitments.<sup>139</sup> The final bullet point is a commitment to: “Conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) 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.”<sup>140</sup>
77. New Zealand First Minister of Regional Development Minister Shane Jones was then quoted as saying: “If you look at the sentiment in the coalition agreement, it should come as no surprise to anyone that there is not and will not be any more generic open-ended Treaty clauses.”<sup>141</sup> He added: “A generic ill-defined clause would have fed years of litigation and for those reasons we were not prepared to support a generic clause.”<sup>142</sup> The Minister went on to say: “We are not willing to perpetuate the situation where environmental legislation is a platform

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<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

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See

[https://assets.nationbuilder.com/nationalparty/pages/18466/attachments/original/1700778597/NZFirst\\_Agreement\\_2.pdf?1700778597](https://assets.nationbuilder.com/nationalparty/pages/18466/attachments/original/1700778597/NZFirst_Agreement_2.pdf?1700778597) at 10 (last accessed 1 May 2024).

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> See <https://www.nzfirst.nz/shane-jones-no-more-treaty-clause-mission-creep> (last accessed 1 May 2024).

<sup>142</sup> Ibid.

to argue all manner of constitutional/indigenous rights doctrinaire ambitions.”<sup>143</sup> Making the same point in different words, Minister Jones said, “we want to avoid a situation on Treaty matters where the rule of law is replaced by the rule of lawyers.”<sup>144</sup>

### **Why the policies are not successful on their own terms**

78. The Tribunal may have access to more policy development material than is publicly available at the time of writing this brief. Nevertheless it is possible to endeavour to reconstruct the rationales for the Treaty Principles Bill and the Treaty clause review. It would be open to the Tribunal to ask whether these policies or acts of the Crown succeed even on their own terms, against the standards set by the Crown itself. This was the approach taken in the Waitangi Tribunal report into foreshore and seabed issues: to begin with reasons given by the government itself.<sup>145</sup> One difficulty in this instance is that comments have largely been made by political parties rather than the Crown. I assume in what follows that the Crown rationales for taking forward the Treaty Principles Bill and the Treaty clause review will draw from, or relate to, rationales given by the ACT Party and NZ First representatives, respectively. (I draw on political party representatives’ comments to attempt to be as exhaustive as possible in considering potential rationales.)
79. Three possible rationales have been given for the Treaty Principles Bill: equality, certainty, and addressing a lack of consultation. The equality rationale asserts that people are being treated differently because of who they are, and that clarifying the Treaty Principles Bill would address this. The claim here seems to be that the guarantee of tino rangatiratanga undermines equality. There are several reasons why this argument lacks merit. First, New Zealand law acknowledges that

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> See above n 78.

sometimes people need to be treated differently in order to achieve equality: see, for example, s 19(2) of the New Zealand Bill of Rights Act 1990. Second, different rights and obligations do exist in New Zealand because of promises made or the positions people are in: people make contracts, assuming greater obligations; people owe duties of care because of proximity to others; or people owe fiduciary duties because of particular relationships. Te Tiriti o Waitangi is a foundational commitment that produces particular rights and obligations. Third, no argument is given as to why some flattened-out conception of equality should trump tino rangatiratanga. All constitutional democracies have foundational commitments; Te Tiriti o Waitangi, and tino rangatiratanga, is one such commitment in this country, which has also taken legal form.

80. It is also suggested that the Treaty Principles Bill is needed to provide certainty and clarity, since the Treaty principles are not defined in legislation. This is unsuccessful as an argument for the Bill, for at least three reasons. First, the principles have been defined by the courts, in policy documents, and by the Tribunal. There is no particular need for them to exist in legislative form. Second, no argument has been given as to why certainty and clarity are the supreme values here. To take an extreme example to make the point, a Bill saying, ‘there will be no Treaty principles henceforth’ would provide certainty and clarity – but may not be justified. It is not clear why certainty and clarity should take precedence over fidelity to the text and meaning of Te Tiriti o Waitangi. At present, a balance is also struck between certainty and clarity, on the one hand, and flexibility that allows general principles to apply to circumstances as they arise. Third, courts are unlikely to view the Treaty Principles Bill as exhausting the meaning of Treaty principles if the Bill does become an Act. Courts are likely to fit these principles into the broader framework of the law, meaning the Bill cannot achieve perfect predictability in the force to be given to the Treaty Principles.

81. Finally, it has been suggested that there has been a lack of consultation over the implementation of tino rangatiratanga guarantees, resulting (according to the ACT Party) in division. The implication is that a rationale for the Treaty Principles Bill is that it gives a kind of democratic legitimacy for Treaty principles that they do not have: the Bill fills a gap in consultation that was needed. This argument lacks persuasive force. First, multiple pieces of legislation – including the Treaty of Waitangi Act 1975, and later legislation pertaining to conservation, the environment, state-owned enterprises, Crown minerals, public health, and the exclusive economic zone – have been the subject of extensive consultation and deliberation prior to inserting general Treaty principles clauses into law. Second, there has been a notable absence of consultation or public engagement over the Treaty Principles Bill as yet. This may change, but it would be regrettable if a Bill claiming to fill a consultation gap singularly fails in undertaking democratic engagement over its contents.
82. There are thinner materials in the public domain on the review of Treaty clauses, and the materials that do exist tend to be statements by political party representatives rather than policy development materials. Notwithstanding this paucity of background, at least three overlapping and interconnected rationales appear to have been invoked: uncertainty, litigation risk, and the need to address the assumption of power by lawyers.
83. References to “ill-defined” and “open-ended” Treaty clauses suggest that resolving uncertainty is also a rationale for the Treaty clause review. Three points illustrate how this cannot be a sound rationale. First, as a matter of perspective, open-ended phrases and terms abound in the law: terms such as reasonable, proportionate, or appropriate. This is the stuff of the common law: it is acknowledged that judges can sensitively apply such open-ended terms in context to achieve just results. If it were the case that every open-ended phrase created a problem of uncertainty requiring parliamentary intervention,

Parliament would be overrun with legislative demands. Second, not all Treaty clauses are open-ended, with some legislative references specifically setting out what is required to achieve Treaty compliance in context.<sup>146</sup> Third, the courts have developed significant jurisprudence on what differently word Treaty clauses require in practice, as already discussed in this brief. Fourth, some level of open-endedness may even be desirable, to encourage decision-makers to do their own reflection on Treaty principles in context.<sup>147</sup>

84. The rationales that open-ended Treaty clauses could lead to excessive litigation, and could result in rule by lawyers and the usurpation of legislative power, are overblown and unfounded. Litigation arises out of genuine disputes and the Crown must surely accept that there is a place for it at some times and in some places. There is no empirical evidence that litigation has become excessive, much less that this is due to Treaty clauses. Indeed, litigation may provide the very clarity and certainty that members of the Crown say is desirable. As for rule by lawyers, New Zealand continues to be a legal system underpinned by parliamentary sovereignty. Parliament can override legal decisions by passing legislation. The taking of cases to clarify uncertainties in the law does not challenge these underpinning principles. Lawyers and judges assist in ensuring that individual pieces of legislation fit together in a coherent system of law, which can help to realise the ideal of the rule of law.<sup>148</sup> That process should not be denigrated.

85. It might be said, in relation to the review of Treaty principles clauses, that a review could test whether these rationales are sound: whether indeed Treaty principles clauses have created undesirable uncertainty,

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<sup>146</sup> See, for example, s 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

<sup>147</sup> See, by analogy, discussion of why open-ended references to the rule of law can guide practical reasoning in a useful way in: Jeremy Waldron, 'Vagueness and the Guidance of Action' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in Law* (Oxford University Press, Oxford 2011) 58–82.

<sup>148</sup> As discussed in: Joseph Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, Oxford, 1994) 370 at 375–376.

given rise to litigation risk, or transferred power inappropriately to lawyers and judges. But if there are logical lacunae in the premises of these arguments, as has been demonstrated, then a review is a waste of precious public resources. Moreover, a review that is made public may give undue credibility to these claims, elevating speculative or unevidenced assertions to the status of credible considerations.

86. It would be open for the Tribunal to find that the case for these acts or policies of the Crown has not yet been made out on the Crown's own terms.

**Other legal and policy shortcomings of these policies**

87. Other expert contributions in this inquiry will canvass additional problems with the Treaty Principles Bill and the proposed Treaty clause review, aside from whether the rationales of these moves are sound and aside from consistency with Te Tiriti o Waitangi and its principles.

88. It is enough to say here that it would be open for the Tribunal to consider whether the Treaty Principles Bill and Treaty clause review are sound policy from the perspective of general public policy norms and domestic and international law, an approach also adopted in the Tribunal report on the foreshore and seabed.<sup>149</sup>

89. The Cabinet Manual may be one relevant source of norms. The 2023 Cabinet Manual notes that the Treaty of Waitangi is a major source of the constitution, that it “may indicate limits in our polity on majority decision-making”, and that the “law sometimes accords a special recognition to Māori rights and interests”.<sup>150</sup> This may be relevant to a claim that tino rangatiratanga unjustifiably limits equality, and is also a signal of the Treaty's undoubted importance within New Zealand's constitution.

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<sup>149</sup> See above n 43.

<sup>150</sup> Cabinet Office / Department of Prime Minister and Cabinet, *Cabinet Manual 2023* (Cabinet Office / Department of Prime Minister and Cabinet, Wellington, 2023) at 2.

90. Also of relevance are the obligations set out in s 14 of the Public Service Act 2020, headed ‘Crown’s relationships with Māori’. Section 14(1) states that: “The role of the public service includes supporting the Crown in its relationships with Māori under the Treaty of Waitangi (te Tiriti o Waitangi)”. This means, among other things, that in the process of policy development, Crown-Māori relationships under Te Tiriti o Waitangi / the Treaty of Waitangi need to be at the very least a significant consideration in work that is done advancing an executive agenda.
91. The United Nations Declaration on the Rights of Indigenous Peoples, while not given direct legislative expression, has been invoked by the courts<sup>151</sup> and forms part of the salient context for the Crown acts or policies, given New Zealand’s endorsement of the Declaration. The Tribunal might have regard to the reference in that Declaration to “the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties ... with States”, or the reference to the fact “Indigenous peoples have the right to the recognition, observance and enforcement of treaties ... concluded with States ... and to have States honour and respect such treaties” in Article 37(1).<sup>152</sup>
92. There are other values that have been given affirmation by authoritative legal bodies and figures with which the Treaty Principles Bill and the Treaty review clause may be thought to be inconsistent. One is social cohesion. The Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, while arising in its own particular context, gave particular weight and thought to this value, noting: “Social cohesion is desirable for many reasons, one of which is that it is critical to preventing the development of harmful radicalising

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<sup>151</sup> See e.g. *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [12] per Elias CJ.

<sup>152</sup> See preamble and Article 37(1) at [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf) (last accessed 1 May 2024).

ideologies and downstream violent extremism.”<sup>153</sup> Another value of note that may warrant consideration is respect for minority rights, enshrined in s 20 of the New Zealand Bill of Rights Act 1990.

**These policies’ consistency with Te Tiriti o Waitangi and its principles**

93. It is for the Tribunal to consider the merits of various submissions, provided by counsel for the parties. I endeavour here to gesture towards the *structure, availability, and orientation* of arguments about the consistency of these Crown policies or acts with Te Tiriti o Waitangi and its principles, in the hope that this is of assistance to the Tribunal as it seeks to organise its lines of inquiry and the areas of contention.
94. It seems tenable for there to be a claim that the Treaty Principles Bill is a breach of the principle of active protection. The Crown has a positive obligation to take steps to actively protect Māori interests.<sup>154</sup> The Bill in its current form does more than simply fail to actively protect interests that may emanate from tino rangatiratanga. The Bill does worse. It extinguishes the tino rangatiratanga for Māori that is the basis for Māori interests to be expressed. It takes a literal translation, omitting context, to claim disingenuously that Te Tiriti o Waitangi protected the chieftainship of all New Zealanders. The absurdity of that claim is almost evident as soon as it is expressed in words. Multiple qualified historians have publicly acknowledged that tino rangatiratanga under article 2 of Te Tiriti o Waitangi was a guarantee of Māori rights, with contextual indicators confirming this interpretation. Active protection would involve a safeguarding of Māori interests, among which tino rangatiranga is one of the most fundamental. It is true that this principle has sometimes been subject to what is reasonably practicable; but the Crown has not yet voiced any

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<sup>153</sup> Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, *Ko tō tātou kāinga tēnei* (2020) at [5.1].

<sup>154</sup> As noted in Damen Ward, Kevin Hille, and Carwyn Jones, *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, New Zealand, 2023) at 24.

concern grounded in practicability to justify extinguishing such a central part of Te Tiriti o Waitangi itself.

95. It also seems likely the principle of active protection is relevant to the Treaty clause review. The coalition agreement is (at best) non-specific and possibly (at worst) casual, even flippant, about what will be done to Treaty principles in legislation. It refers to the possibility of replacing references with specific words, or repealing references altogether. This is relevant as it sets the direction and intent for the review. It suggests no process of safeguarding or protecting existing Māori interests, or any concern for downgrading the protection of Māori interests. Without an express backstop in this process that ensures Māori interests are not weakened, including by a sidewind, the principle of active protection would appear to be in jeopardy.
96. The principle of good faith and duty to be reasonably informed are plainly pertinent. Any attempt to distort article 2 of Te Tiriti o Waitangi, and to present this distortion as a translation of Te Tiriti, is not easily justified as being in good faith. It is self-evidently ill-informed, and for the Crown to proceed with this proposed distortion without informing itself of the wide-ranging historical material confirming it to be a distortion would appear to be a violation of Te Tiriti o Waitangi and its principles. The same duties require proper self-informing of the nature and effect of existing Treaty clauses.
97. The duty of good faith, often framed as a duty of utmost good faith, is no light duty and also requires consultation on “truly major issues”.<sup>155</sup> There can be little doubt that redefinition of Te Tiriti, and possible expunging of Treaty clauses from the statute-book, are truly major moves. Such moves cannot be made without wide-ranging consultation and engagement appropriate to the relationship of partnership. That consultation and engagement should acknowledge that Māori are not a

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<sup>155</sup> See above n 122.

homogeneous bloc.<sup>156</sup> The absence of any stated plan for consultation and engagement is itself a flaw in the Crown's acts or policies so far. An undertaking that such consultation and engagement will follow could assure those affected, especially Māori, that no changes would be made without scope for input and deliberation. No such undertaking has yet been forthcoming.

98. Tino rangatiratanga, as a principle and part of the text of Te Tiriti, is manifestly implicated by both the Treaty Principles Bill and the Treaty clause review. The redefinition of tino rangatiratanga as chieftainship for all New Zealanders is almost definitionally contradictory of tino rangatiratanga as a principle. It denies Māori voice in the present and potentially in the future, across a range of policies and legislation. It removes from Māori the right to continue to organise and live as Māori.<sup>157</sup> The Treaty clause review, meanwhile, must set out an approach and process to considering the views of Māori if it is to honour tino rangatiratanga.
99. It is not often that a direct breach of the preamble of Te Tiriti o Waitangi is alleged. The preamble reflects a Crown posture of being anxious to protect the just rights and property of Māori. This inquiry may be an instance where the Treaty Principles Bill and the Treaty clause review can be said to efface that very starting point. There is no concern in protecting the just rights and property of Māori in a Bill that takes away the anchoring concept for the just rights and property of Māori: tino rangatiratanga. A Treaty clause review that envisages repealing Treaty references, with no clear intention to maintain existing Māori protections, contradicts the Crown commitment to be vigilant about the just rights and property of Māori. The Tribunal is well able to consider the meaning and effect of the preamble, as part of its statutory role of determining the meaning and effect of the Treaty.

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<sup>156</sup> See above n 32.

<sup>157</sup> See above n 80.

100. Both the Treaty Principles Bill and, to a lesser extent, the Treaty clause review are constitutional in scope and effect. They aim to alter the overall place of Te Tiriti o Waitangi in New Zealand’s legal and political order. Against that backdrop, there may also be in this inquiry an example of what might be called a *structural* breach of Te Tiriti o Waitangi and its principles. These acts and policies of the Crown constitute, to recall the Tribunal’s earlier words, hostility to the promise itself in Te Tiriti o Waitangi:<sup>158</sup> an animus to the original exchange of undertakings and their form.
101. Relatedly, the Treaty Principles Bill and the Treaty clause review contort the very concept of the Treaty principles that is meant to be the touchstone for the Tribunal. One policy or act of the Crown’s, the Treaty Principles Bill, reinterprets and redefines the principles in a way that shows no fidelity or respect for the original treaty. The other policy or act of the Crown seeks to eliminate or whittle down the Treaty principles as they appear across the statute book. One policy or act drills deep into the foundations of New Zealand’s constitutional order to tamper with those foundations. The other policy or act spreads a net across the landscape and aims to drag and catch all references to the principles, so that they can be lifted off that landscape. It is worth returning to Casey J’s words about what the principles are: an account of the Treaty’s “terms understood in the light of the fundamental concepts underlying them”; precepts that call for an assessment of the relationships the parties hoped to create by and reflect in Te Tiriti o Waitangi.<sup>159</sup> It can hardly be said that Treaty or Te Tiriti relationship are being assessed, let alone respected, where one side is unilaterally seeking to redefine the terms of the Treaty. Where proposed principles lose any plausible or defensible connection to the terms of the text the Crown cannot be said to upholding the principles at all.

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<sup>158</sup> See above n 81.

<sup>159</sup> See above n 110–111.

102. The long-term impact on relationships under Te Tiriti o Waitangi should not be underestimated, though it is difficult to forecast these impacts with any precision. These Crown acts or policies, in particular the Treaty Principles Bill, threaten to disfigure or rupture the relationship between the Crown and Māori with deeply damaging consequences. Once the relationship has been marked by moments of deep dishonour, it may not be easily repaired for some time. The Treaty Principles Bill and Treaty review clause could set back the foundational relationships of Aotearoa New Zealand for decades.
103. These negative consequences could clearly be regarded as Te Tiriti-relevant prejudice of the kind that the Tribunal has found in past inquiries. The prejudice could be summarised as prejudice to the tino rangatiratanga of Māori (through the removal of the protection of that very tino rangatiratanga in the Treaty Principles Bill), prejudice through over-reach by the kāwanatanga (in attempting to redefine the principles and terms of Te Tiriti o Waitangi), and prejudice through insufficient engagement and consultation. Crown policies or acts here aim to reduce the status of Te Tiriti itself,<sup>160</sup> robbing Māori of dignity,<sup>161</sup> and leaving Māori in a position of uncertain standing (including in relation to their tino rangatiratanga).<sup>162</sup> The Tribunal could tenably find that the claims are well-founded on these bases.
104. Recommendations made by the Tribunal can reflect the depth of the threat to Te Tiriti o Waitangi and its principles posed by the Treaty Principles Bill and the Treaty clause review.
105. It would be open to the Tribunal to call for the Treaty Principles Bill, or the Treaty clause review, to be abandoned – and the Tribunal has called for projects or policy steps to be immediately halted in the past. It would be open for the Tribunal to call for the Crown to return to the

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<sup>160</sup> See fns 23–24.

<sup>161</sup> See fn 39.

<sup>162</sup> See fn 45.

drawing board with both policies or acts:<sup>163</sup> to recommend, for example, that the content of the Treaty Principles Bill be reconsidered, and that the Crown consider alternative ways it might improve certainty without distorting the meaning of Te Tiriti o Waitangi and its principles. The Crown could also consider how the terms of a review of Treaty clauses might ensure that there is no retrogression of protection of Māori interests, and how any review might be done in a way that upholds the mana of rangatiratanga and Te Tiriti o Waitangi itself.

106. The Tribunal has sometimes offered constructive alternative paths in previous reports, and might suggest more incremental recommendations, perhaps in addition to urging the halting of these policies or acts in their current form. The Tribunal could recommend, for example, that the Crown set out a Te Tiriti-consistent plan of engagement with Māori on the Treaty Principles Bill and the Treaty clause review. The Tribunal could state that any Treaty Principles Bill purporting to interpret the terms of Te Tiriti / the Treaty must be accurate in how it represents those terms.

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<sup>163</sup> See fn 46.

## **Conclusion**

107. The honour of the Crown must be more than empty words. And the Treaty or Te Tiriti must be more than a dead letter. These constitutional instruments and concepts are only sustained through constant vigilance and review by responsible bodies such as the Waitangi Tribunal. Such constitutional instruments and concepts are eroded where the Crown does not take appropriate care in policy and legislative moves. The Tribunal should not hesitate in this case to state the harms that could be caused by the policies and acts in issue. The foregoing analysis has endeavoured to provide some assistance in considering those harms.

A handwritten signature in black ink, appearing to read 'Max Harris', written in a cursive style.

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**Max Harris**