IN THE WAITANGI TRIBUNAL

WAI 3300
WAI 2214

IN THE MATTER	of The Treaty of Waitangi Act 1975
AND	the Constitutional, Self-Government and Electoral System Kaupapa Inquiry
AND	the Wai 2214 claim by Margaret Mutu on behalf of herself, Te Rūnanga-a-Iwi o Ngāti Kahu Charitable Trust and Ngāti Kahu

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OPENING SUBMISSIONS

Dated this 30th day of April 2024

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MAY IT PLEASE THE TRIBUNAL

1. These Opening Submissions are filed on behalf of the Wai 2214 claim by Professor Margaret Mutu on behalf of Te Rūnanga-a-Iwi o Ngāti Kahu Charitable Trust and the iwi and hapū of Ngāti Kahu ("**Ngāti Kahu**").

Ngāti Kahu

2. Ngāti Kahu is one of the five iwi of the Te Hiku o te Ika region in the far north of the North Island. The iwi of Ngāti Kahu consists of 15 kāinga, hapū and marae. They hold mana whenua over their respective rohe through whakapapa.

3. The Wai 2214 claim was originally registered with the Waitangi Tribunal on 18 August 2008 and comprises both historical and contemporary allegations against the Crown for breaches of Te Tiriti and the Crown's duties to Ngāti Kahu in accordance with Te Tiriti and its principles. The Claim includes the impacts of Crown policy, practice, acts and omissions on Te Reo me ngā tikanga o Ngāti Kahu.

4. In the context of this inquiry, the Wai 2214 claim has issues relevant and pertinent to the issues at hand. In particular how the Treaty Principles Bill ("**the Bill**") impacts Ngāti Kahu's reliance on the Treaty principles in advancing their case already before the Tribunal in the Wai 45 Remedies Inquiry.

Evidence

5. Of particular benefit for this inquiry, Professor Mutu gives an intellectual assessment on the proposed new articles, and an analysis into tino rangatiratanga from her many years as an academic, advocate, teacher, activist, and most importantly, a rangatira of Ngāti Kahu.

6. Professor Mutu examines how the introduction of the Bill could potentially affect Ngāti Kahu, giving further detail into the Ngāti Kahu claims before the Waitangi Tribunal regarding Muriwhenua. Over 30 years of Treaty jurisprudence is at risk of being disregarded and maligned,

and more importantly to Ngāti Kahu, it would revert them back to square one. After such a long and arduous time spent on advancing their case, we submit that this would be a devastating and unfair outcome.

Treaty Principles

7. Although not an exhaustive list, Counsel consider the following principles as being relevant to this inquiry:

Partnership

(a) The Court of Appeal in *New Zealand Maori Council v Attorney-General* found that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties.[1] This was confirmed later in *Te Runanga o Wharekauri Rekohu v Attorney-General*, the Court of Appeal finding in that case the "Treaty created an enduring relationship of a fiduciary nature akin to partnership" and further that the fiduciary duty of good faith to Māori is an fundamental and overarching principle of the Treaty.[2]

Active protection

(b) The Treaty principle of active protection requires the Crown to make every reasonable effort to eliminate barriers to services that may contribute to inequitable outcomes. This requires additional resources in order to address the inequities that exist.[3]

Tino Rangatiratanga

(c) Article II of the Treaty guarantees Māori the right to exercise rangatiratanga over their lands and taonga katoa. This right is inherently the right to autonomy or self-government.[4] The Crown is therefore obliged to both consult with Māori when making

[1] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 per Cooke P at 664.
[2] *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 at 301, 305 – 306.
[3] Waitangi Tribunal Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575, 2019) at 35.
[4] Wai 262 Report page 15.

decisions that impact Māori, but also to ensure that Māori are placed within decision-making roles.

Equity

(d) The principle of equity arises from Article 3. By extending all rights and protection of British citizenship to Māori, the Crown also took on the obligation to ensure equality in practice, in that Pākehā interests were not prioritised to the disadvantage of Māori and where disadvantage occurred, the principle of equity would provide active intervention to restore balance.[5]

Custom

(e) The principle of custom requires that the Crown protect Māori property and custom, including their right to preservation of Māori custom and an ongoing, distinctive existence as a people.[6]

Submissions

8. One of the primary issues for Ngāti Kahu is whether or not the Coalition Government's coalition agreement, 100-day plan and subsequent conduct, undertakings and representations, to review the Treaty Principles constitutes a breach of Te Tiriti.

9. Based on our review of the confidential Crown documents so far, we submit that there is evidence the Coalition Government has received extensive advice against pursuing the Bill in the manner they have thus far.[7] Generally speaking, the advice to Ministers is to err on the side of caution, that the Bill will cause division amongst Māori and New Zealand society as a whole, and that the Bill will put undue pressure on the Māori-Crown relationship. However, the confidential Crown documents show

[5] Tino Rangatiratanga me Kāwanatanga, at page 52.
[6] *Taiaroa v Minister of Justice* (unreported decision, HC Wellington, CP 99/94, McGechan J, 29 August 1994 at p69.
[7] Ministry of Justice briefing to the Minister of Justice describing steps to develop a Treaty Principles Bill and timing options for developing the Bill, dated December at [9], [18], [20], [29] – [31], [34], [35] and [41] – [43]; Ministry of Justice briefing to Associate Minister of Justice seeking agreement to develop a Treaty of Waitangi Principles Bill and policy decisions on progressing preferred options for introduction of a Treaty Principles Bill, dated 12 March 2024 at [34] – [36] and [37] – [41].

that the Crown intends to maintain its trajectory towards introducing the Bill in spite of that advice.[8]

10. In fact, we submit that the Crown's proposed new Articles are an attempt to mischaracterise and twist the principles into something that clearly was not originally intended in Te Tiriti o Waitangi. For example, the new articles ascribe a new meaning to tino rangatiratanga. Under the new definition, rather than being an assertion of Māori authority and sovereignty, tino rangatiratanga will now be redefined as "all New Zealanders… chieftainship of their land and all their property".[9] We submit that the new articles misrepresent the true intention of the Ngāti Kahu rangatira that first signed Te Tiriti in 1840. To them, rangatiratanga was not something that could be taken or given away.

11. We submit that this proposal is a clear breach of the principles of partnership, consultation, and good faith, because it seeks to overwrite the articles of Te Tiriti, and therefore render the principles obsolete.

12. While the confidential documents show there is some scope for the new articles to be adjusted during the Bill's development process, they also confirm the new articles will be the basis for any Treaty Principles in the Bill.[10] We submit it is a breach on the terms above to commit to redefining the Treaty Principles using a set of articles as the basis which are contrary to the actual text of Te Tiriti.

13. The confidential Crown documents also reveal the Crown still intends to pursue a referendum on the principles.[11] We submit that not only would a referendum in this context be inappropriate, but it would also be a negligent use of public resources. Furthermore, to reduce 30 years of good faith Treaty jurisprudence advanced by Māori and the Crown into a single question, is in our submission artificial and this Tribunal should find the same to be a breach of Te Tiriti.

14. We also make the following additional submissions in regard to the Bill:

[8] Ministry of Justice briefing dated 12 March 2024, above n 7 at [4].
[9] At [11.2].
[10] At [12].
[11] At [4.3].

(a) It will create a failure by the Crown to act in good faith towards Ngāti Kau and Māori.

(b) No consultation with Ngāti Kahu or Māori has been undertaken by the Coalition Government. The lack of engagement with Ngāti Kahu about the proposed Bill is in breach of their tikanga, their tino rangatiratanga and in breach of the principle of partnership.

(c) The haste at which this government is operating, which includes ignoring good faith and consultation principles, demonstrates a lack of accountability.

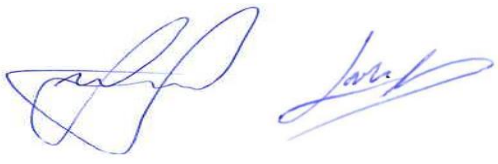
(d) The proposal to introduce the Bill is an exercise of kāwanatanga in a manner which was not contemplated under Te Tiriti and which flies in the face of the Te Tiriti guarantees.

(e) It will interfere with and distort the pre-established Treaty principles, which Ngāti Kahu would seek to rely upon as they seek to pursue remedies through the Waitangi Tribunal.

Conclusion

15. Counsel submit that any need to review the principles through either a referendum or new legislation is based on a false premise. The implication being that the principles need to be further defined or clarified, is merely a Crown tactic of manipulating the system for its own self-interest. As such, Ngāti Kahu oppose the Bill and oppose the referendum.

Dated at Auckland this 30th day of April 2024



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