IN THE WAITANGI TRIBUNAL

WAI 3300

WAI 3351

IN THE MATTER The Treaty of Waitangi Act 1975

AND

IN THE MATTER Tomokia ngā tatau o Matangireia (Wai 3300)

AND

IN THE MATTER The Treaty Principles Urgent Inquiry

CLOSING SUBMISSIONS

DATED 21 MAY 2024

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MAY IT PLEASE THE TRIBUNAL:

1. On 1 May 2024, counsel sought leave to file these brief closing submissions on behalf of Lady Tureiti Moxon (**claimant**), who sought interested party status in a memorandum dated 19 April 2024.

Principles can only reflect what was agreed

2. Long past are the days when the Crown or Courts could try to reconcile Te Tiriti (in Māori, discussed and agreed with Māori) and The Treaty (in English, not discussed or agreed) and create principles that fit comfortably with a presumption of absolute Crown control.

3. The reality check from this Tribunal was a decade ago in *He Whakaputanga me te Tiriti*.[1] It said what is key is what both parties actually agreed to:

> "We have concluded that in February 1840 the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā. …
>
> Though Britain intended to obtain the sole right to make and enforce law over Māori as well as Pākehā, Hobson did not explain this. Rather, in keeping with his instructions, he emphasised that Britain's intention was to control Pākehā in order to protect Māori . The detail of how this relationship was to work in practice, especially where the Māori and Pākehā populations intermingled, remained to be negotiated over time. It is clear that at no stage, however, did rangatira who signed te Tiriti in February 1840 surrender ultimate authority to the British.
>
> While some may see our conclusions as radical, they are not. In truth, our report represents continuity rather than dramatic change. Leading scholars – both Māori and Pākehā – have been expressing similar views for a generation or more. When all of the evidence is considered, including the texts as they were explained to rangatira, the debates at Waitangi and Mangungu, and the wider historical context, we cannot see how other conclusions can be reached." [2]

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[1] Waitangi Tribunal, *He Whakaputanga me te Tiriti* (Wai 1040, 2014)

[2] Waitangi Tribunal, *He Whakaputanga me te Tiriti* (Wai 1040, 2014) at page xxii. Despite coming from the Northland Inquiry, *He Whakaputanga me te Tiriti* is the authority on what was agreed between Māori and the Crown generally. There is no

4. In *Tino Rangatiratanga me te Kāwanatanga* the Tribunal translated this into principles and was explicit: principles can only reflect what was actually agreed.[3] Chapter two charts all of the principles jurisprudence of the Waitangi Tribunal to come to this obvious conclusion. As such the primary principles are in the name of the report: Tino Rangatiratanga and Kāwanatanga. The Tribunal is clear that Māori authority in its sphere is equal to Crown authority in its sphere – Kāwanatanga is not a superior authority 'qualified' by tino rangatiratanga.[4] The Crown cannot unilaterally decide what the sphere of tino rangatiratanga encompasses; that is for Māori to negotiate with the Crown in accordance with the principle of partnership.

5. In our submission, *Tino Rangatiratanga me te Kaawanatanga* demonstrates the principles interact together as follows:

   5.1 Tino rangatiratanga and Kaawanatanga set out each party's rights and obligations as agreed when te Tiriti was signed;

   5.2 Partnership provides the framework for how the parties will negotiate what the spheres of tino rangatiratanga and kāwanatanga encompass, and how the spheres will co-exist; and

   5.3 The remaining principles are largely clarification. They are required because the Crown has not honoured the principles of Tino Rangatiratanga, Kaawanatanga and Partnership and therefore further direction is required. They clarify aspects of

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evidence to suggest that other Maaori might have had a totally different understanding of what was being agreed. A totally different understanding would be very unlikely, given that the Tribunal observed that a Māori world view (not just a Raki Māori world view) as compared to a British world view, shaped the understanding of te Raki Maaori right from first interactions with British - see for example Chapter 2.

[3] Waitangi Tribunal, *Tino Rangatiratanga me te Kaawanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2023).

[4] Above n 3 at page 4 and 59-60.

those three principles, or give an indication how to move from breach of those three principles to compliance.[5] .

6. In our submission, there is acceptance in the higher Courts of Māori tino rangatiratanga, in line with *Te Whakaputanga me te Tiriti* and *Tino Rangatiratanga me te Kāwanatanga*. For example in the Supreme Court, Justice Glazebrook, in the landmark Ellis case applying tikanga said that there is a presumption that statutes are to be interpreted consistently with Te Tiriti, and cited tino rangatiratanga alone as the source for the argument that statutes should be interpreted consistently with tikanga:

> Legislation and tikanga
> [98] The first point is that the application of tikanga in the common law can be limited or excluded by statute, although this requires an unambiguous statutory provision. This does not give the full picture, however. It is generally accepted that there is a presumption that statutes are to be interpreted consistently with Te Tiriti as far as possible. Because the tino rangatiratanga guarantee in Article Two is generally taken to import Maaori rights to live by and benefit from tikanga, it has been argued that it follows that statutes should be interpreted consistently with tikanga as far as possible.[6]

7. Likewise in two judicial reviews challenging the Ministry of Health refusal to give Covid vaccination data about Māori to Te Pou Matakana, the High Court was not fazed by parties referring to the principle of tino rangatiratanga.[7]

8. The reference to the principle of tino rangatiratanga relied upon in the judicial reviews was from the Crown's own documents.[8]

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[5] The Tribunal in *Tino Rangatiratanga me te Kaawanatanga* said as much for the principle of active protection, and this applies equally to the others.
[6] Ellis v R SC 49/2019 [2022] NZSC 114 at [98]
[7] *Te Pou Matakana Limited v Attorney-General (No.1)* [2021] NZHC 2942 [1 November 2021] and *Te Pou Matakana Limited v Attorney-General (No. 2)* [2021] NZHC 3319 [6 December 2021].
[8] *Te Pou Matakana Limited v Attorney-General (No.1)* [2021] NZHC 2942 [1 November 2021] at [113] and refers to the following: "COVID-19: Supporting the vaccine rollout" Ministry of Health <www.health.govt.nz> and at [114] with reference to the following material: "COVID-19: Who we're working with" Ministry of Health <www.health.govt.nz> .

Misinformation not Principles

9. It is submitted that, as set out above, the common understanding of the Waitangi Tribunal, Courts and Crown regarding the principles and the fact that they can only reflect what was agreed is well settled, more than at any other time in our history.

10. Calling anything that goes against what was agreed between Māori and the Crown "Treaty principles" can only be described as misinformation.

11. To enshrine such misinformation in legislation or policy is prejudicial to Māori.

Māori will suffer prejudice

12. Lady Moxon was one of the lead claimants (Wai 1315) in Stage One of the Wai 2575 Health Inquiry that led to the Hauora Report. On 1 May 2024 counsel filed a copy of her brief of evidence from that inquiry. The brief showed the negative consequences that flowed from just one Ministry removing all references to the Treaty or its principles in 2006. This sparked a years long process of the Ministry of Health and Waikato District Health Board (DHB) undermining Māori Providers. The undermining included:

    12.1 DHB decision-making powers no longer having to consider Te Tiriti because it was made invisible to them;

    12.2 Unilaterally reducing what it would pay Māori Providers to do the same work going forward;

    12.3 Forcing Māori Providers to compete with wealthy, large non-Māori Providers for contracts;

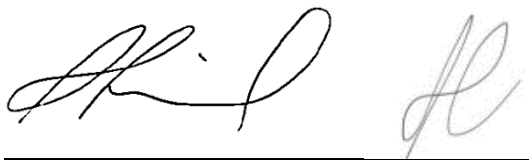
    12.4 Ending contracts with Māori Providers to deliver services to Māori and giving them to non-Māori Providers instead.

13. The Tribunal in the Hauora report found that Māori face racism in the Health system[9] but that Māori Providers are the benchmark for the entire Primary Health Sector.[10] Therefore the loss of contracts from Māori Providers directly translates to worse health outcomes for Māori, measurable in early death and unnecessary suffering.

CONCLUSION

14. As the evidence of the claimant showed, simply making Te Tiriti invisible in one Ministry caused significant prejudice to Māori. We can expect legislation or policy that enshrines misinformation about Te Tiriti and actively promotes the application of that misinformation to cut across the Crown's obligations to Māori will cause exponentially greater harm.

Date: 21 May 2024



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[9] *Hauora* Report 2023, page 151, "All parties variously agreed that the severity and persistence of health inequity Maaori continue to experience indicates that the health system is institutionally racist and that this, including the personal racism and stereotyping that occur in the primary care sector, particularly impacts on Maaori.

[10] *Hauora* Report 2023, page 156, "Crown witnesses nonetheless agreed with the *claimants* that Maaori primary health organisations and providers are innovative and have achieved impressive improvements in Maaori health outcomes despite the limitations of the primary health care system. They broadly agreed that these organisations should be considered benchmarks for the approaches and performance of the rest of the sector.