IN THE WAITANGI TRIBUNAL

Wai 3300 Wai 3316
Wai 3317 Wai 3318
Wai 3320 Wai 3321
Wai 3343

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Tomokia ngā tatau o Matangireia - the Constitutional Kaupapa Inquiry (Wai 3300)

BY Jane Mihingarangi Ruka, on behalf of the Grandmother Council of the Waitaha Nation, including the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka, and Ngāti Pakauwaka

(Continued…)

CLOSING SUBMISSIONS

Dated: 22 May 2024

Phoenix Law Limited
Barristers and Solicitors
200 Willis Street
PO Box 27400
Marion Square
Wellington 6141
Phone: (04) 384 1354
Email: mason@phoenixlaw.expert
and: johnson@phoenixlaw.expert
Counsel Acting: Janet Mason
Counsel Assisting: Nicholas Johnson

Apihaka Tamati Mack, on behalf of herself, and Ngātiawa Tōputōnga Tai Kapiti

Louisa Te Matekino Collier, Rihari Richard Takuira Dargaville, and Joseph Kingi, on behalf of themselves, and Ngāpuhi-nui-tonu

Moerangi Potiki, on behalf of Te Rūnanga o Ngāti Whakaue Incorporated, for and on behalf of Ngāti Whakaue ki Maketu Hapū

Sailor Morgan and Frances Goulton, on behalf of themselves, the Ngāti Ruamahue hapū, and Ngāti Kahu ki Whangaroa

Daniel Watson and Tūwharerangi Ruka, on behalf of the Grandfather Council of the Waitaha Nation, including the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka, and Ngāti Pakauwaka

Contents

MAY IT PLEASE THE TRIBUNAL:

I. Executive Summary

1. These closing submissions are:

a. filed on behalf of:

i. Jane Mihingarangi Ruka, on behalf of the Waitaha Executive Grandmother Council, which includes the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka, and Ngāti Pakauwaka (Wai 3316);

ii. Daniel Watson and Tūwharerangi Ruka, on behalf of themselves, and the Waitaha Executive Grandfather Council, which includes the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka, and Ngāti Pakauwaka (Wai 3343);

iii. Apihaka Tamati Mack, on behalf of herself, and Ngātiawa Tōputōnga Tai Kapiti (Wai 3321);

iv. Louisa Te Matekino Collier, Rihari Richard Takuira Dargaville, and Joseph Kingi, on behalf of themselves, and Ngāpuhi-nui-tonu (Wai 3320);

v. Moerangi Potiki, on behalf of Te Rūnanga o Ngāti Whakaue Incorporated, for and on behalf of Ngāti Whakaue ki Maketu Hapū (Wai 3318); and

vi. Sailor Morgan and Frances Goulton, on behalf of themselves, the Ngāti Ruamahue hapū, and Ngāti Kahu ki Whangaroa ("Wai 3317) (the parties at sub-paragraph 1.a.i to 1.a.vi all together called "the Claimants").

2. The Statement of Issues ("SoI"),[1] along with Claimants' summary of responses, is set out in **Annex A.**

3. The essence of the Claimants' case is that the drafting and introduction of the Treaty Principles Bill ("TP Bill"), and the Treaty Clauses Review ("the Review"), breach te Tiriti o Waitangi/the Treaty of Waitangi ("te Tiriti/the Treaty") and its principles

[1] *Appendix A: Tribunal Statement of Issues, (*Wai 3300, #1.4.2).

("the Principles") of Partnership, Tino Rangatiratanga, Active Protection, and Good Faith by:

a. attempting to unilaterally codify a textually and historically inaccurate version of the Principles in legislation, and impose that codified version on the Courts and the Tribunal;

b. intentionally "interpreting" te Tiriti o Waitangi in a manner derogatory of Te Reo and those who hold it dear to their hearts, to suit a purpose injurious to Māori peoples;

c. running afoul of its own legal and constitutional systems by attempting to supplant the interpretative judicial role of the Tribunal and the Courts in relation to te Tiriti/the Treaty, the document which sets out the constitutional basis, and is the source of authority, for the Parliament of New Zealand;

d. failing to engage with Māori and obtain their widespread approval in relation to the proposed "codification" of the Principles.

II. Structure

4. These submissions are structured in the following way:

a. Section III provides a background to the claim and an overview of the TP Bill and the Review;

b. Section IV sets out te Tiriti/the Treaty breaches;

c. Section V contains submissions on the prejudicial effect the Principles in the TP Bill has and will have; and

d. Section VI proposes recommendations and contains the relief sought by the Claimants.

III. Background

5. On 24 November 2023 a coalition government ("the Coalition") was formed between New Zealand First ("NZF"), Act Party ("Act"), and National Party ("National") Members of Parliament. Details of the agreements reached are recorded in two separate coalition agreements, one between National and Act ("Nat-Act

Agreement"), and one between National and NZF ("Nat-NZF Agreement"), (together called "the Agreements").[2]

6. On 28 November 2023, both Agreements were endorsed by Cabinet and now form the basis on which the Coalition operates.[3] The Coalition was sworn in to Parliament on 27 November 2023.

7. Included in the Nat-Act Agreement is a commitment to:

> Introduce a Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable.[4]

8. The Nat-NZF Coalition Agreement includes 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.[5]

9. Subsequent to the Cabinet endorsement, Te Arawhiti began preliminary stocktaking work on the Review. Clarity was then sought from the responsible ministers ("the Ministers"), namely the Minister for Māori Crown Relations ("MCRs"), and the Minister for Treaty of Waitangi Negotiations ("ToW Negs"), whether the work programme envisioned in the Nat-NZF Agreement concerning the Review would be undertaken by Te Arawhiti. Clarity was also sought as to the scope of the intended work programme, as it was clear from Cabinet's endorsement of the Agreements that resources would need to be allocated.[6]

10. The Ministers conferred with the Prime Minister's office, and other Ministers. It was orally confirmed to officials on 10 April 2024 that both work streams were to be allocated to the Ministry of Justice ("MoJ"). When questioned, officials stated that they were unsure of the rationale behind this decision, stating that there was a

---

[2] The Agreements have some similarities and some differences. The differences between them have caused some confusion. See Andrew Geddis "The coalition deals leave a lot to be fought over in the next three years" (24 November 2023): The Spinoff < https://thespinoff.co.nz/politics/24-11-2023/the-coalition-deals-leave-a-lot-to-be-fought-over-in-the-next-three>.

[3] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [52], Cabinet Office Circular, "National, ACT and New Zealand First Coalition Government Consultation and Operating Arrangements" (25 March 2024) (Wai 3300, #6.2.6).

[4] Coalition Agreement "New Zealand National Party & ACT New Zealand" (24 November 2023) at [9].

[5] Coalition Agreement "New Zealand National Party & New Zealand First" (24 November 2023) at [10].

[6] *Brief of Evidence of Lilian Marie Anderson and Warren David Fraser*, 6 May 2024 (Wai 3300, #A22) at [12], [14], [18]; and Notes of Evidence, *Lilian Anderson*, 9 May 2024, at 28.

discussion at a ministerial level.[7] However, they noted that the two most likely ministries for the kind of work envisioned were Te Arawhiti, on the basis that Te Arawhiti is responsible for MCRs, or the MoJ on the basis that it is responsible for the New Zealand Government's constitutional arrangements.[8]

11. On 25 January 2024 various applications for urgency in relation to the proposed TP Bill and the Review were referred to the Wai 3300 Inquiry Panel.[9] On 10 April 2024, the Tribunal granted the request for an urgent Inquiry regarding the Crown's actions and policies concerning the Review and the proposed TP Bill.[10]

Treaty Principles Bill

12. On 14 December 2023 a briefing paper ("the Dec Briefing") was presented to the Minister of Justice regarding options for developing the TP Bill. Officials suggested three options:

> *Option 1 (complete Select Committee by the end of 2024)*: forgo any external engagement so that a Bill can be introduced by the end of May 2024.
>
> *Option 2 (targeted engagement with iwi and hapū)*: limited engagement with iwi and hapū as we develop policy advice on the Bill.
>
> *Option 3 (public engagement)*: release a discussion document that would seek broader views about how the Treaty principles could be reflected in legislation.[11]

13. Option 2 was recommended by officials on the basis of:

> The importance of working with Treaty partners to develop a Bill and the objective of facilitating a national conversation.[12]

14. Officials stated that a failure to engage with Māori would be seen as "failing to meet the obligation under the Treaty to act reasonably, honourably, and in good faith."[13]

---

[7] Notes of Evidence, *Lilian Anderson*, 9 May 2024, at 24-25.
[8] *Brief of Evidence of Lilian Marie Anderson and Warren David Fraser*, 6 May 2024 (Wai 3300, #A22 at [23] and [33]), and Notes of Evidence, *Lilian Anderson*, 9 May 2024, at 25.
[9] *Memorandum-Directions of The Deputy Chairperson* (Wai 3300, #2.5.6).
[10] *Memorandum-Directions of Chief Judge Dr C L Fox* (Wai 3300, #2.5.18).
[11] *Principles of the Treaty of Waitangi Bill: Request for priority in the 2024 Legislation Programme* (Wai 3300, #A7) at 6.
[12] *Principles of the Treaty of Waitangi Bill: Request for priority in the 2024 Legislation Programme* (Wai 3300, # A7) at 6.
[13] *Principles of the Treaty of Waitangi Bill: Request for priority in the 2024 Legislation Programme* (Wai 3300, # A7) at [42].

The Dec Briefing made no reference to what a proper engagement process should look like. When questioned about why a proper engagement process was not recommended, officials stated that "iwi chairs would probably be the most feasible option given the limited time that's available",[14] and therefore officials did not set out a Tiriti/Treaty consistent option.

15. On 21 December 2023 the Minister of Justice's office confirmed that a decision had not been made concerning the options paper. Officials confirmed at the hearing that no decision had been made to date in regard to engagement with Māori.[15]

16. On 25 January 2024, MP David Seymour was appointed Associate Minister of Justice, and the lead for the proposed TP Bill was allocated to him. Associate Minister Seymour was provided with a briefing by officials.[16]

17. On 5 February 2024, Associate Minister Seymour's office advised of the Minister's preferences with regards to the Dec Briefing and requested that a timeline be developed. A revised timeline was approved.[17]

18. On 19 February 2024 the Minister of Justice lodged a legislation bid requesting that the TP Bill be included in the legislative programme.[18]

19. On 21 February 2024 officials met with Associate Minister Seymour to discuss his preferred approach to the TP Bill.[19]

20. On 12 March 2024 officials provided the Minister and Associate Minister of Justice a briefing regarding a timeline for the introduction of the TP Bill ("the March Briefing"). This Briefing noted:

- **a.** that an exposure draft should be released prior to the introduction of the TP Bill;
- **b.** that the TP Bill should be introduced and referred to select committee by the end of the year; and

[14] Notes of Evidence, *Rajesh Chhana,* 9 May 2024, at 116.
[15] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [29] and Notes of Evidence, *Lilian Anderson*, 9 May 2024, at 34.
[16] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [24]; and *Appendix A* (Wai 3300, #A23(a)).
[17] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [31] – [32].
[18] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [33].
[19] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [34].

c. that commencement of the TP Bill would be subject to a binding referendum. This was based on Associate Minister Seymour's previous advice as to his preferred approach.[20]

21. The March Briefing included proposed wording for the Principles, which had come from the Act Party policies, to be included in the TP Bill as follows:

> Article 1: "kawanatanga katoa o o ratou whenua" – the New Zealand Government has the right to govern all New Zealanders.
>
> Article 2 "ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa" – the New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property.
>
> Article 3: "a ratou nga tikanga katoa rite tahi" – all New Zealanders are equal under the law with the same rights and duties.[21]

22. Work on a Cabinet Paper ("the Cab Paper") for the TP Bill has begun. The details of that Cab Paper are confidential as it is still being drafted. Officials have indicated that the Cab Paper will likely be presented to Cabinet in late May. However, this date is indicative and subject to change.[22]

23. The March Briefing indicates that the TP Bill would go through three stages of Cabinet decision making:

a. Stage 1 (the current Cab Paper set to go before Cabinet):

i. approval of underlying policy and key features of the proposed TP Bill;

ii. agreement to release an exposure draft for public consultation;

iii. approval to issue drafting instructions to the Parliamentary Counsel Office ("PCO") to develop the exposure draft;

iv. agreement to the commencement of the proposed TP Bill being subject to a binding referendum;

b. Stage 2 (suggestive timeframe of June/early July 2024), a Cabinet Paper ("Cab Paper 2") seeking approval to release the exposure draft for public

[20] Wai 3300, #3.1.62 "Policy options for progressing a Principles of the Treaty of Waitangi Bill" at 17 – 24.
[21] Wai 3300, #3.1.62 at 18.
[22] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [36] – [41].

consultation, along with explanatory material, and taking the appropriate legal steps to do so;

c. Stage 3 (timeframe dependant on how much work might be required following the exposure draft. Assuming no substantial changes are required, this would be before the House rises at the end of 2024), a Cabinet Paper ("Cab Paper 3") seeking approval for any changes to the exposure draft Bill.[23]

24. Officials have stated that all timeframes are indicative and subject to change.[24]

The Review

25. The Review aims to replace all references to the Principles with specific words relating to the relevance and application of te Tiriti/the Treaty, for the references to be repealed altogether.[25]

26. Officials testified that the MoJ is yet to receive direction from their Minister on this matter.[26]

27. In December 2023, Te Arawhiti provided a briefing to the responsible Ministers, outlining an initial stocktake of references to the Principles in legislation.[27]

28. In February 2024, the Minister for ToW Negs agreed to direct Te Arawhiti to provide further advice on options to progress the Review.[28]

29. Te Arawhiti officials, during the end of March and the first week of April 2024, began developing their thinking on how the Review could proceed, and provided weekly reports to the Ministers for ToW Negs and MCRs outlining matters relevant to the progression of the Review.[29]

[23] Wai 3300, #3.1.62 at 17 – 18; Wai 3300, #A7 at 17-18.
[24] Notes of Evidence, *Rajesh Chhana,* 9 May 2024 at 121.
[25] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [47].
[26] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [48].
[27] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [18].
[28] *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana*, 6 May 2024 (Wai 3300 #A23) at [12].
[29] *Brief of Evidence of Lilian Marie Anderson and Warren David Fraser*, 6 May 2024 (Wai 3300, #A22) [24].

30. On 10 April 2024, the Minister of Justice was appointed as the lead for the Review, with support from Te Arawhiti, as the Chair of the Treaty Provisions Oversight Group ("TPOG").[30]

31. Officials were then informed that the lead role for the Review was now going to go to MoJ. Te Arawhiti ceased working on the Review and has not provided any further advice.[31]

32. The emergence of the Principles can be traced back to the Treaty of Waitangi Act 1975 ("ToW Act"), which was in turn informed by the Labour Party 1972 manifesto which committed the Party's MPs to examine practical ways to legally acknowledge te Tiriti/Treaty rights. This commitment was later reaffirmed in the 1984 Labour Party manifesto.[32] By 1986 te Tiriti/Treaty policy was being developed on the assumption that te Tiriti/Treaty could be accommodated within the Crown's existing powers and institutions.

33. Professor Kelsey testified that the interpretation of te Tiriti/Treaty and its Principles under s5(2) of the ToW Act evolved in three stages:

a. early Waitangi Tribunal reports, notably the *Motunui-Waitara, Manukau Harbour* and *Kaituna River* inquires, gave primacy to Te Tiriti o Waitangi when exercising that interpretive responsibility;

b. that correct interpretation was displaced by the interpretive approach to the "principles" adopted by the Court of Appeal in the "*Lands* case" in 1987;

c. a number of recent reports, notably *Te Raki Stage One*, the *Maniapoto Mandate Inquiry Report*, and the *Tuhoe Report* have reinstated the primacy accorded to Te Tiriti o Waitangi as a source of Treaty principles.[33]

IV. Breaches of te Tiriti/the Treaty

34. Aotearoa's constitutional system aims to ensure a separation of powers between the executive, legislative and judicial functions of government so as to ensure that there is not too heavy a concentration of power in one place. The importance of te Tiriti/the

[30] *Brief of Evidence of Lilian Marie Anderson and Warren David Fraser*, 6 May 2024 (Wai 3300, #A22) at [23].
[31] *Brief of Evidence of Lilian Marie Anderson and Warren David Fraser*, 6 May 2024 (Wai 3300, #A22) at [23] and [25].
[32] *Brief of Evidence of Elizabeth Jane Kelsey*, 29 April 2024 (Wai 3300, #A25), at [32].
[33] *Affidavit of Elizabeth Jane Kelsey*, 29 April 2024 (Wai 3300, #A15), at [14].

Treaty, and New Zealand's other international obligations has been increasingly acknowledged.[34] However, there is no formal entrenched constitution protecting te Tiriti/the Treaty, or any minority or basic human rights.

35. The principal substantive issue which the Claimants have with the proposed TP Bill is that Parliament should not be unilaterally determining what the Principles should be. Any principles should be developed by Māori **and** the Crown. Where there are differences, these should be referred to an adjudicative body whose form and processes are agreed to by Māori **and** the Crown.

36. Given the current New Zealand context whereby the Principles have been developed by the Courts and the Tribunal, their developing and evolving jurisprudence should form the basis for Māori and Crown joint efforts to "codify" the Principles in legislation.[35]

37. This has clearly not occurred. The Coalition intends to introduce a TP Bill which is based on a warped inconsistent "interpretation" of Te Tiriti. Its actions breach the Principles of Partnership, Active Protection, Tino Rangatiratanga and Good Faith. Māori have not been involved in developing the TP Bill, nor in the Review. Te Reo has been manipulated and disrespected. No Te Reo experts have been engaged to even undertake a basic assessment of whether the interpretations of the text of te Tiriti proposed in the TP Bill are plausible.

38. Te Tiriti/Treaty is the foundational constitutional document of New Zealand. It gave birth to this nation. It is the primary source of the Crown's authority. It is not democracy which gives the Crown the authority to exercise the power it wields. It is te Tiriti/the Treaty.

39. Any amendments to, or interpretations of te Tiriti/the Treaty, can only be made jointly by the two parties to it, not by one party acting unilaterally.

[34] Rt Hon Sir Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" (updated 2023) Office of the Governor General.
[35] Treaty of Waitangi Act 1975.

40. As Professor Andrew Geddis has stated:

> "...The Treaty Principles Bill represents an effort to legislate a legal fiction into fact. It purports to define "the principles of the Treaty" in a manner that does not accord with that actual text or meaning of Te Tiriti/The Treaty. It would direct those required to consider and apply "the principles of the Treaty", including the courts, to pretend that they are giving effect to Te Tiriti/The Treaty while actually applying a quite different (and antithetical) set of governing principles.
> ...
>
> This attempt to utilise Parliament's law-making authority to alter the as applied effect of Te Tiriti/The Treaty in Aotearoa New Zealand's constitution is problematic for at least three reasons. Taken together, they call into question the very authority of Parliament to enact the proposed Bill into law.
> ...
>
> First, the Treaty Principles Bill would involve the deliberate enactment as fact of a falsehood primarily designed to empower the executive to evade obligations incurred under Te Tiriti/The Treaty. Its utility – the purported value in the fiction created – would be to exempt the Crown from having to engage with Māori as a Treaty partner, in ways likely to disadvantage Māori and undermine tino rangatiratanga. And it achieves this purpose through the bad faith means of requiring those applying "the principles of the Treaty" to pretend that they are giving effect to that document, when in reality they are actualising a set of political values sourced from a quite different governing philosophy.
> ...
>
> Second, it represents an attempt by one of the parties to that agreement to define the as applied meaning of Te Tiriti/The Treaty by unilateral *diktat*. The Crown, operating through the institution of Parliament, would in-and-of itself determine what effect Te Tiriti/The Treaty is to have in the collective governance of Aotearoa New Zealand. Parliamentary law-making processes, even with a referendum to follow, do not represent a meaningful form of dialogue between Māori and the Crown as to what Te Tiriti/The Treaty ought to mean in contemporary Aotearoa New Zealand.
> ...
>
> Third, the intended effect of defining the as applied meaning of Te Tiriti/The Treaty through the Bill is to prevent the judiciary from having any role in adjudicating disputes over that issue. Rather than "the principles of the Treaty" being an avenue through which disagreements over how matters affecting Māori and the Crown can

be resolved by way of judgment, courts will instead be obligated to determine the matter in a prescribed fashion."[36]

41. A decision to trample on the agreed rights that te Tiriti/the Treaty established over 160 years ago should not be made easily. The TP Bill, as proposed, "is so far removed from what te Tiriti actually says that it is barely recognisable".[37]

42. Te Tiriti/the Treaty itself establishes a partnership relationship wherein the two parties agreed that Māori would retain chiefly authority.[38] In no way does it allow for one party to later, unilaterally, redefine the agreement. Te Tiriti/the Treaty was intended to mandate how the two parties would function as a new political entity, New Zealand.[39] Māori rights have been breached by the actions of the Crown.

43. Parliament's sovereignty is not accepted as unbounded, but fettered as its law making power sits within a broader constitutional arrangement.[40]

44. As a Te Tiriti/Treaty partner, the Crown is breaching its obligations by failing to involve Māori appropriately at any stage of this policy development. Professor Andrew Geddis described the unilateral diktat as a bad faith measure which allows the Executive to evade its obligations under te Tiriti/Treaty.[41]

45. The development of the TP Bill principles is a "novel"[42] interpretation of the Te Reo Articles, and shows a complete lack of Māori involvement. Aside from Dr Soutar's comment from the bench that it could have been written by AI,[43] Margeret Mutu, expert linguist, posited that the interpretation does a "gratuitous violence to the language" of the original Tiriti.[44]

46. The lack of any meaningful Te Reo input from any policy advisors or cultural linguists and experts shows there was minimal thought given to the protection of their kupu as a Taonga, which in fulfilling te Tiriti/Treaty obligations, ought to have been incorporated into any policy advice.

---

[36] *Brief of Evidence of Professor Andrew Geddis,* dated 29 April 2024, [30]–[34].
[37] *Brief of Evidence of Hone Pereki Sadler,* 30 April 2024, (Wai3300, #A4) at [5].
[38] Waitangi Tribunal *Tepapa o Te Raki He Whakaputanga me te Tiriti* Stage 1 inquiry at 528.
[39] *Brief of Evidence of Professor Andrew Geddis* (Wai3300, #A19) at [12].
[40] *Brief of Evidence of Professor Andrew Geddis* (Wai3300, #A19) at [18].
[41] *Brief of Evidence of Professor Andrew Geddis* (Wai3300, #A19) at [32].
[42] Wai 3300, #3.1.62 "Policy options for progressing a Principles of the Treaty of Waitangi Bill" at [13].
[43] Notes of Evidence, *Dr Monty Soutar,* 9 May 2024 at 207.
[44] Notes of Evidence, *Margeret Mutu,* 9 May 2024 at 208.

47. Hōne Sadler went further to state, in relation to the TP Bill, that the reciprocity that te Tiriti/Treaty envisaged is entirely lacking in this adaptation, takes the founding document completely out of its context, as well as disparages Ngāpuhi, who remain the sacred guardians of the document.[45]

48. This lack of active protection breaches the Crown's obligations in relation to Māori Taonga.[46]

49. If there are to be changes to te Tiriti/the Treaty, then both parties who signed it are to be involved. If there is a dispute, it should be referred to a fair and just Tikanga based adjudicative process, that both parties have agreed to.

V. Prejudice

50. By beginning work on the TP Bill without Māori, the Crown commits irreparable harm to Māori. It is a deliberate attempt to flex the Crown's muscle, to show Māori the extent of the power they hold and exercise over them.

51. The Agreement, and the Dec and March Briefings, confirm that the TP Bill is based on the Act party's policies.[47] Officials have stated that:

> As we understand it, the Bill is not intended to alter or amend the text or meaning of the Treaty/te Tiriti.[48]

However, the effect of the TP Bill will be to manipulate interpretations of te Tiriti/the Treaty.

52. While officials' comments about the TP Bill not changing te Tiriti/Treaty may be technically correct, in that the text itself will not be changed, the effect will be to override and replace existing Principles which have been drawn from the text of te Tiriti/the Treaty, and replace them with an entirely novel set of principles which bear no resemblance whatsoever to te Tiriti/Treaty.

53. As Professor Geddis stated:

---

[45] Notes of Evidence*, Hone Sadler,* 9 May 2024 at 78.
[46] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at [642].
[47] Wai 3300, #3.1.26 at 7; Wai 3300, #6.2.6.
[48] Wai 3300, #3.1.26 at 20

> Recognition of "the principles of the Treaty" cannot be separated from Te Tiriti/The Treaty itself as a document created and signed in a particular context and understood in a particular way.[49]

54. To use terminology in relation to the 'principles of the Treaty' is to suggest a link between the proposed principles and the text of te Tiriti. Having suggested a link, it would then be fictitious to provide a set of principles that do not align with te Tiriti.

55. Evidence was given by Mr Sadler and others that the proposed wording of the new 'principles' of te Tiriti/the Treaty cannot possibly have been taken from the original text. For example, Mr Sadler, a linguistic expert, stated during the hearing that "His [Associate Minister Seymour's] interpretation is not in tune with the intent of te Tiriti".[50] When giving oral evidence Mr Sadler stated:

> This cutting and pasting exercise of te Tiriti o Waitangi demeans, debases and trivialises our founding document as a nation, and disparages and denigrates Ngāpuhi. It really has no base, nor merit in academic or practical debate or discourse.[51]

56. Further, Mr Sadler drew specific attention to the stated purpose of the TP Bill principles, and then stated:

> > Act believes every child born in New Zealand deserves the same respect and dignity, including equality before the law.
> >
> > The Treaty Principles Bill would restore the mana of our founding document by ensuring it delivers what it originally promised in 1840: nga tikanga katoa rite tahi – the same rights and duties for all New Zealanders.
>
> The interpretation above is so far removed from what te Tiriti actually says that it is barely recognisable. The meaning of te Tiriti has already been inquired into in the Te Paparahi o Te Raki Inquiry.
>
> I agree with the interpretation of te Tiriti provided in the Report on Stage 1 of the Te Paparahi o Te Raki Inquiry, which found:
>
> > 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 a relationship: one in which they and Hobson were

[49] *Brief of Evidence of Bryce Aldridge,* 29 April 2024 (Wai 3300, #A18) at [14].
[50] Notes of Evidence, *Hone Sadler,* 9 May 2024 at 76.
[51] Notes of Evidence, *Hone Sadler,* 9 May 2024 at 78.

> 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.

57. It is clear from the previous work of the Waitangi Tribunal, through careful and considered investigation, as well as the expert evidence provided for this urgent inquiry, that the TP Bill's principles bear no resemblance whatsoever to the actual wording of te Tiriti. Those "principles" could not ever have legitimately been derived from that text. Indicative of the degree of deviation, Professor Mutu describes the TP Bill's principles as committing an "unspeakable violation" to the language of te Tiriti.[52]

58. The issue with providing a fiction relating to te Tiriti is that it is foundational to the exercise of legitimate authority by the New Zealand Government.[53]

59. The mere existence of the proposed TP Bill assumes that Parliament itself has the authority to alter the boundaries of its own authority. However, there are limits to the powers exercised by the Crown.

60. The act of introducing the TP Bill sends a clear message to Māori from the New Zealand Government that any rights Māori have under te Tiriti/Treaty are subject to the whims of government.

61. It has long been established in Western jurisprudence that there are limits on the exercise of governmental power. Governments do not have the authority to do whatever they please. The well-known obiter "some common law rights presumably lie so deep that even Parliament could not override them"[54] is one such example. Others include English case law stating that "The King has no prerogative but that which the law of the land allows him".[55] The powers of the New Zealand Government are sourced in te Tiriti/Treaty, and therefore the law cannot allow a rewriting of te Tiriti/Treaty by unilateral dictate.

---

[52] Notes of Evidence, *Professor Margaret Mutu,* 10 May 2024 at 208.
[53] Cabinet Office *Cabinet Manual* at [7.68].
[54] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.
[55] The Case of Proclamations [1610] EWHC KB J22; see also *Fitzgerald v Muldoon and Others* [1976] 2 NZLR 615.

62. The Review is also inherently prejudicial to Māori. While officials have stated that there is room for including more general clauses to te Tiriti in legislation,[56] this is contrary to the National-NZF Agreement, which states:

> 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.[57]

63. The term 'replace all such references with specific words' and 'or repeal the references' only leaves room to limit or remove references to te Tiriti/Treaty from legislation. This can only mean a diminishing of Māori rights under te Tiriti/Treaty.

64. The Office of the Minister for Justice drafted the *Principles of the Treaty of Waitangi Bill: Request for priority in the 2024 Legislation Programme*,[58] in which MoJ advisors considered the risk of undermining social cohesion and Māori-Crown relations.[59] The TP Bill and the Review is a blatant attempt to limit the rights and obligations created by te Tiriti/the Treaty. Such conduct will generate further division, and pose a threat to social cohesion by undermining trust between Māori and the Crown.[60]

65. Mr Kibblewhite, when asked about any social disruption, added that "based on the starting point yes," although not going into specifics, said "it's clear there will be some controversy."[61] Dr Max Harris expected "this could cause massive social disruption."[62]

66. Professor Jane Kelsey drew similarities with the protests of the 1980s to what will likely happen here, being that the Crown may well again be "confronted with a mobilisation of Māori."[63] She stated that to introduce the TP Bill would be "exceeding what is authorised in kāwanatanga and the principle of mutual respect".[64] The multiple harms which will flow from such disrespect will be felt in

[56] Wai 3300, #4.1.6 Notes of Evidence, *Examination of Lil Anderson by Dr Grant Phillipson* at 26, lines 7-13, and *Examination of Warren Fraser by Professor David Williams* at 36-37, lines 25-28, 1-7.
[57] Coalition Agreement "New Zealand National Party & New Zealand First" (24 November 2023) at [10].
[58] Wai 3300, #A7 #2.5.15.
[59] Wai 3300, #A7 #2.5.15, at 10, [28].
[60] Wai 3300, #A7, page 10, para 29–30.
[61] Notes of Evidence, *Andrew Kibblewhite*, 9 May 2024 at 101.
[62] Notes of Evidence*, Dr Max Harris,* 10 May 2024 at 231.
[63] Notes of Evidence, *Professor Jane Kelsey*, 10 May 2024 at 249.
[64] Notes of Evidence, *Professor Jane Kelsey*, 10 May 2024 at 248.

neighbourhood after neighbourhood, as a "direct assault on the fundamental foundations on which Aotearoa is built."[65] The prejudice that Māori are already experiencing will only be furthered by the message the Crown is sending through its development of the TP Bill. That is that Māori have no special place in Aotearoa.

67. She later went on to liken the coming crisis to earlier times "that's what really worries me that we as a country may live through those times again."[66] She spoke about the unleashing of unrest saying "it's not going to be something that can be put back in the box."[67]

68. Evelyn Kereopa shared a similar sentiment saying that it is "hard even to imagine a positive Māori/Crown relationship"[68] as all faith in the Crown has been decayed. Her voice, as Professor Williams pointed out, was to speak not for the Māori elite, or people that are regularly involved in protest action, but as a local of Taumaraunui who watches more and more Māori only having an interaction with the Crown through NZ Police. In Ms Kereopa's words, the lack of engagement with Māori for this Bill will only create more resentment and distrust in the Crown.[69]

69. Undermining social cohesion in such a way would cause significant prejudice not just to Māori-Crown relations, but to Māori throughout the motu.

70. In Briefs of Evidence, Dr Hope Tupara[70] explained how enacting the TP Bill would prejudice wahine Māori in particular, while Bryce Aldridge commented that it will be future generations who are most negatively impacted.[71]

71. The TP Bill and the Review ignore Māori tino rangatiratanga by excluding and ignoring them completely. The wording "all New Zealanders' authority over their land and other property"[72] "is a far cry from the chieftainship that "e tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa"[73] provided.

---

[65] Notes of Evidence, *Professor Jane Kelsey*, 10 May 2024 at 249.
[66] Notes of Evidence, *Professor Jane Kelsey*, 10 May 2024 at 254.
[67] Notes of Evidence, *Professor Jane Kelsey*, 10 May 2024 at 257.
[68] *Brief of Evidence of Te Urunga Evelyn Aroha Kereopa,* 29 April 2024 (Wai3300 #A16) at [39].
[69] *Brief of Evidence of Te Urunga Evelyn Aroha Kereopa,* 29 April 2024 (Wai3300 #A16) at [38].
[70] *Brief of Evidence of Dr Hope Tupara,* 29 April 2024 (Wai 3300, #A21) at [30].
[71] *Brief of Evidence of Bryce Aldridge,* 29 April 2024 (Wai 3300, #A18) at [27].
[72] Wai 3300, #3.1.62 "Developing a Principles of the Treaty of Waitangi Bill" at [11].
[73] Te Tiriti o Waitangi, (signed 6 February 1840) Ko te Tuarua.

72. The TP Bill goes a long way to "entrenching the view that tino rangatiratanga is inconsistent with equality."[74] Crown policies proposed in the TP Bill aim to reduce the status of te Tiriti/Treaty itself, robbing Māori of dignity, and leaving Māori in a position of uncertain standing.[75]

73. Counsel submits that the effect on Māori would be vast, in furthering the prejudice already experienced, denigrating the relationship of trust that has been advanced over the last 40 years and destabilising Māori rangatiratanga and their sense of place in Aotearoa.

VI. Recommendations Sought

74. The Claimants seek the following relief:

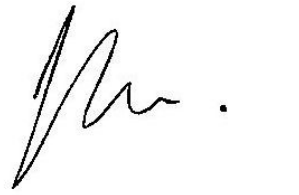
- **a.** a finding that the proposed unilateral changes to the Principles is unconstitutional, and in breach of te Tiriti/the Treaty;
- **b.** a finding that the creation of a legal fiction as to the Principles that does not reflect the actual wording of the text of Te Tiriti is unconstitutional, and in breach of te Tiriti/the Treaty;
- **c.** a finding that the Crown's pursuance of the TP Bill, and the Review breach te Tiriti/Treaty and its Principles because the development and application of the Principles is something that ought to be undertaken by an adjudicative body that both te Tiriti/Treaty parties agree to;
- **d.** a recommendation that the Crown cease all work on the TP Bill and the Review;
- **e.** a recommendation that the Crown engage with the Claimants and relevant Māori organisations, about the TP Bill and the Review, and should it wish to enact amendments to existing te Tiriti/the Treaty statutory clauses, and to the Principles, then the widespread approval of Māori, including the Claimants is required;

[74] Notes of Evidence, *Dr Max Harris,* 10 May 2024 at 233.
[75] Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998).

f. all costs incurred as a result of bringing this Claim; and,

g. such other remedies as are warranted.

Dated 22 May 2024



Janet Mason
Counsel Acting

Annex A: Statement of Issues

Treaty Principles Bill

1. Is the Crown's policy, and the process it has undertaken, in relation to the Treaty Principles Bill consistent with te Tiriti o Waitangi and its principles?

   [*Both the Policy and Process Undertaken are inconsistent with te Tiriti and its Principles.*]

   (a) What Treaty principles apply to the Crown's laws, policies, practices, actions and omissions in relation to the proposed Treaty Principles Bill?

   [*The Principles of Active Protection, Partnership, Tino Rangatiratanga, and Good Faith.*]

   (b) In the context of the proposed Treaty Principles Bill, what are the Crown's duties and obligations to Māori arising from those Treaty principles?

   [*The Crown has a legal duty to honour te Tiriti/Treaty. In the current context where te Tiriti/the Treaty has consistently been breached since 1840, and Māori have continued in a long insufferable process to undertake various actions to ensure Crown compliance with te Tiriti/the Treaty, the Crown has a duty to actively protect Māori interests. The Crown also has an obligation to act in good faith and partnership. The Crown should not be making any attempts to "codify" the Principles without the agreement of Māori.*]

   (c) What is required by the Crown to give effect to these Treaty principles in this context, including, in relation to engagement with Māori, and the process of developing the proposed Treaty Principles Bill?

   [*The Crown is required to engage with Māori about the wider constitutional breaches in relation to their not honouring te Tiriti, as well as engage with Māori should they have a desire to codify the Principles. They need broad Māori approval to do this.*]

   (d) To what extent, if at all, are the Crown's laws, policies, actions and omissions in relation to the Treaty Principles Bill inconsistent with te Tiriti o Waitangi and its principles, and the Crown's legislative obligations relating to te Tiriti and its principles?

   [*The Crown's actions are an egregious breach of te Tiriti and its Principles, because the Crown is attempting to eradicate the progress which has been made after years of protest by Māori, to push the Crown into beginning to acknowledge and s take its responsibilities under te Tiriti/the Treaty seriously.*]

2. To what extent are Māori suffering or likely to suffer prejudice as a result of the Crown's policy and process in relation to the Treaty Principles Bill?

   [*The prejudice that Māori are suffering comes from the manner in which all parts of the Crown, including the Executive and the Public Service, have publicly demonstrated that they have an enormous amount of power over Māori and have no qualms about abusing this power in an effort to oppress and subsume any progress made to honour te Triti/the Treaty.*]

3. What findings and/or recommendations should the Tribunal make about any prejudice suffered, or likely to be suffered, by Māori as a result of Crown conduct in relation to the Treaty Principles Bill?

   [*Please see paragraph 74 which contains the Claimant's recommendations.*]

Treaty Clause Review

4. Is the Crown's policy, and the process it has undertaken, 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", consistent with te Tiriti o Waitangi and its principles?

   [*No. The policy and process breach te Tiriti and its principles.*]

   (a) What Treaty principles apply to the Crown's policy to conduct a review of the Treaty clauses?

   [*As per 1(a) above.*]

   (b) In the context of the Crown's policy to conduct a review of Treaty clauses, what are the Crown's duties and obligations to Māori arising from those Treaty principles, including in relation to the Treaty principles of tino rangatiratanga and partnership?

   [*As per 1(b) above.*]

   (c) What is required by the Crown to give effect to these Treaty principles in this context, including in relation to engagement with Māori, and the process of conducting a review of Treaty clauses?

   [*As per 1(c) above.*]

   (d) To what extent, if at all, are the Crown's actions and omissions in relation to its policy to review Treaty clauses, and the process it has undertaken, inconsistent with te Tiriti o Waitangi and its principles?

   [*As per 1(d) above.*]

5. To what extent are Māori suffering, or likely to suffer prejudice, as a result of the Crown's policy and process to review Treaty clauses?

   [*As per 2 above.*]

6. What, if any, findings and/or recommendations should the Tribunal make in relation to any prejudice suffered, or likely to be suffered, by Māori as a result of the Crown's review of Treaty clauses.[76]

   [*As per 3 above.*]

[76] *Appendix A: Tribunal Statement of Issues, (*Wai 3300, #1.4.2).