KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 3300**

IN THE MATTER OF **the Treaty of Waitangi Act 1975**

AND

IN THE MATTER OF **the Constitutional kaupapa inquiry**

CLOSING SUBMISSIONS OF THE CROWN

9 July 2024

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MAY IT PLEASE THE TRIBUNAL:

Introduction

1. The Crown acknowledges the submissions and evidence presented on behalf of claimants and interested parties in this inquiry, material which was prepared in very short timeframes and in the context of multiple urgent inquiries. The Crown again acknowledges the work of the Tribunal members and staff in accommodating this urgent matter at a time of intense activity.

2. This urgent inquiry is focused on whether the actions and policy of the Crown in respect of the proposed Treaty Principles Bill (the **proposed Bill**), and the review of enactments which refer to the principles of the Treaty of Waitangi (the **Review**), are in breach of the principles of the Treaty of Waitangi.

3. The two subjects of this inquiry are of particular significance to claimants and interested parties (and those they represent) and to the Tribunal. The Crown appreciates this, and has endeavoured to assist the Tribunal and claimants in this inquiry, including by putting forward senior officials to explain the policy process to date and current status of the proposed Bill and the Review.

4. The Crown has also provided further affidavits from Mr Rajesh Chhana, which explain that the exact date a Cabinet Paper concerning the proposed Bill will be lodged with the Cabinet Office is not yet known (but that the Crown can update the Tribunal after that Cabinet paper has been lodged, if that would assist the Tribunal) and respond to the Tribunal's questions about ongoing consultation on the draft Cabinet paper. The Crown notes that the Tribunal considers the Crown has been unhelpful in not providing precise timeframes.[1] The Crown has been as helpful as possible. The information that the Tribunal is seeking is not yet known by officials or the Minister. Ministerial consultation can be an open-ended process, can involve vigorous debate and can result in further work on the paper or a

[1] Wai 3300, #2.6.8 at [15], # 2.6.9 at [4].

proposal not proceeding at all. A Minister will need to be satisfied that a paper is ready to be collectively discussed to progress to Cabinet before concluding consultation and lodging the paper with the Cabinet office.

5. On 19 June, the Crown filed a memorandum of counsel providing a briefing to the Minister of Justice on the Review, which had been provided to the Minister after the hearing.

6. These closing submissions are structured as follows:

   6.1 procedural history;

   6.2 matters of context;

   6.3 the policy process concerning the proposed Bill and Review to date;

   6.4 the Treaty principles engaged; and

   6.5 matters relevant to the Tribunal's consideration of the issues raised in this inquiry.

Procedural history

7. Throughout December 2023 and January 2024, the Tribunal received several applications seeking urgent inquiries into whether certain commitments in (i) the Coalition Agreement between the New Zealand National Party (**National**) and the ACT Party and (ii) the Coalition Agreement between National and New Zealand First, breached the principles of the Treaty of Waitangi – namely, commitments to introduce a Treaty Principles Bill and to conduct a review of references to the principles of the Treaty in legislation.[2]

8. On 25 January 2024, the Deputy Chairperson referred urgency applications concerning the proposed Bill, to Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry panel.[3]

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[2] Wai 3308, #1.1.1 (Subsequently withdrawn on 6 March 2024, see Wai 3300 #3.1.12); Wai 3077, #1.1.1; Wai 3316, #1.1.1; Wai 3317, #1.1.1; Wai 3318, #1.1.1; Wai 3319, #1.1.1; Wai 3320, #1.1.1, Wai 3321, #1.1.1; Wai 1194, #1.1(c); Wai 1212 #1.1.1 (c).

[3] Wai 3300, #2.5.6.

9. On 26 February 2024, Chief Judge Fox determined that a hearing would be held to determine whether the criteria for urgency was met. This was held on 8 April 2024.[4]

10. On 10 April, the Chief Judge issued her decision on the applications for an urgent inquiry, determining that the grounds for urgency were made out. Reasons for this decision issued on 26 April 2024.[5]

11. The Tribunal's statement of issues was released on 23 April 2024. The substantive hearing took place on 9-10 May 2024.[6]

Matters of context

Provenance of the Review and the Proposed Bill

12. The Review and the proposed Bill are political commitments contained in agreements that now form the foundation of the current Government.

13. The Coalition Agreement between the National and ACT Parties included a commitment to "[i]ntroduce a Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable."[7]

14. The Coalition Agreement between National and New Zealand First included a commitment to "[c]onduct 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."[8]

15. The two agreements and the Cabinet Manual were endorsed by Cabinet on 28 November 2023 as the basis on which the Coalition Government will operate. Ministers and chief executives are to be familiar with the coalition agreements and ensure they have processes in place to implement them.[9]

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4 Wai 3300 #2.5.10 at [28].

5 Wai 3300 #2.5.18; #2.5.27.

6 Wai 3300, #1.4.2.

7 Coalition Agreement New Zealand National Party & ACT New Zealand, dated 24 November 2023, at p 9.

8 Coalition Agreement New Zealand National Party & New Zealand First Party, dated 24 November 2023, at p 10.

9 Cabinet Office Circular "National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements" (25 March 2024) CO 24(2) at [3]–[4].

16. The Crown accepts the position, stated in the Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report, that "once Ministers are sworn in and the government is formed, the executive so constituted are responsible for meeting the Crown's obligations to Māori under the Treaty of Waitangi".[10]

17. The provenance of the reforms is, however, relevant to the Tribunal's task of identifying any relevant Crown action "done or omitted" (or "proposed to be done or omitted")[11] and to appreciating the role of the public service.

Role of the public service, Ministers and Cabinet in the policy process

18. The relationship between the public service and Ministers is governed by statute (primarily the Public Service Act 2020 and the Public Finance Act 1989) and by constitutional conventions, many of which are recorded in the Cabinet Manual.

19. The purpose of the public service is to:[12]

    19.1 support constitutional and democratic government;

    19.2 enable both the current Government and successive governments to develop and implement their policies;

    19.3 deliver high-quality and efficient public services;

    19.4 support the Government to pursue the long-term public interest;

    19.5 facilitate active citizenship; and

    19.6 act in accordance with the law.

20. The Public Service Act sets out principles to guide the way in which the public service undertakes its work to achieve that purpose. These include giving free and frank advice to Ministers and acting in a politically neutral manner.[13]

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10 Waitangi Tribunal *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report* (Wai 3350, 2024) at 28.

11 Treaty of Waitangi Act 1975, s 6(1)(d).

12 Public Service Act 2020, s 11.

13 Public Service Act 2020, s 12.

21. The Act also stipulates a role for the public service in supporting the Crown in its relationships with Māori under the Treaty of Waitangi/te Tiriti o Waitangi.[14] The Act provides for chief executives (and other public sector leaders) to have responsibilities for (i) "developing and maintaining the capability of the public service to engage with Māori and to understand Māori perspectives" and (ii), ensuring that, in the area of employment, certain matters are recognised and requirements met (including recognition of the employment requirements of Māori).[15] In discharging these responsibilities, chief executives are responsible to the relevant Minister.[16]

22. Ministers consider the advice provided by the public service when making decisions on government policy. As Mr Kibblewhite and Mr Chhana explained:[17]

    22.1 Ministers decide the direction of, and the priorities for, the agencies for which they hold portfolio responsibilities. Agencies can also give advice on the direction and priorities of the portfolio.[18]

    22.2 Officials provide advice on policy issues. This process is typically iterative (especially on complex subjects) with officials' advice to Ministers for decisions informing further advice and decisions.[19]

    22.3 For policy decisions requiring Cabinet approval (including all significant decisions, including where public consultation is required, constitutional arrangements are affected, or new legislation is proposed) a Cabinet paper is drafted on behalf of the

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14 Public Service Act 2020, s 14.

15 Public Service Act 2020, s 14(1) and (2).

16 Public Service Act 2020, s 15.

17 Wai 3300 #4.1.6 at 127–129;159–160. See also the evidence of Ms Lil Anderson (Wai 3300, #4.1.6) at 22: "So, the important distinguishing feature between Ministers and officials is that Ministers decide the direction of their portfolios, they decide the priorities for their portfolios and Government decides the targets for the Government of the day. Agency's role is to provide free and frank advice about those targets and agreements and how to implement those and to provide options on how ministers may wish to proceed."

18 Wai 3300, #A23, Joint Brief of Evidence of Mr Kibblewhite and Mr Chhana at [15.1].

19 At [15.2].

Minister. This can be an iterative process, with the Minister reviewing multiple versions of the paper. Proposals can be subject to change and, in some circumstances, may not proceed to Cabinet. Cabinet papers must be submitted to Cabinet by the relevant Minister for discussion and collective agreement.[20]

22.4 Matters to be submitted to Cabinet can be subject to vigorous debate through Ministerial consultation and at Cabinet committee and Cabinet meetings. These discussions at Cabinet are informal and highly confidential. The convention of Cabinet confidentiality, as described in the Cabinet Manual, provides that, outside Cabinet-approved consultation procedures, Ministers and officials should disclose neither proposals likely to be considered at forthcoming meetings nor the content of discussions or the views of individuals Ministers.[21]

22.5 This confidentiality enables necessary debate to take place. Once Cabinet takes a decision, there is collective responsibility for it: Ministers must implement the resulting decision, irrespective of their position during the decision-making process.[22]

23. Within the public service, the roles of the Ministry of Justice are primarily to support the independence of the judiciary and the administration of the justice system and to advise the government of the day on New Zealand's justice and constitutional system.

24. The role of Te Arawhiti in the public service is to give advice to the government on key matters relating to the Treaty context, existing rights and interests, and appropriate levels of engagement with Māori.

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20 At [15.3].

21 Wai 3300, #A23 at [17]; Cabinet Manual at [5.23].

22 Wai 3300, #A23 at [17]; Cabinet Manual, [5.24] – [5.28].

Status of the proposed Bill and the Review

The Proposed Bill

25. The evidence of Andrew Kibblewhite (Secretary for Justice) and Rajesh Chhana (Deputy Secretary, Policy) outlined the policy work undertaken on the proposed Bill.

26. As that evidence explained:

    26.1 Because the proposed Bill raises issues of a constitutional nature, the Ministry of Justice is the lead agency. The Ministry leads all policy advice on the Bill, including through the provision of politically neutral, free and frank advice to Ministers on the policy development process.

    26.2 The Ministry provided a briefing to the Minister of Justice on the policy for the proposed Bill on 14 December 2023 (contained in Wai 3300, #A7). This briefing outlined: the steps required to develop the proposed Bill; the policy issues to be addressed; and associated risks and potential mitigations. It also addressed (amongst other things) the significance of Treaty principles in our current constitutional system and the prospects that a novel framing of Treaty principles may create further uncertainty and division and damage the Māori-Crown relationship.[23]

    26.3 The 14 December briefing also provided "timing options for developing the Bill". As Mr Chhana explained in evidence, "options may not have been the best word" to describe what may be better understood as "broad approaches", in relation to which a number of potential variations were available.[24]

    26.4 These approaches were as follows.

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[23] Wai 3300, #A7 at 10 ([29] – [30] of the briefing paper). Mr Kibblewhite explained that, seen in the context of the language of the public sector, this is "quite direct and strong advice" see Wai 3300, #4.1.006 at 128.

[24] Wai 3300, #4.1.006 at pp 114-115; Wai 3300 #A23(d) Questions in writing to Ministry of Justice Witnesses at [47].

26.4.1 *Option 1* — forego any external engagement so that the proposed Bill could be introduced by the end of May 2024 and complete Select Committee consideration by the end of 2024.

26.4.2 *Option 2* — limited targeted engagement with iwi and hapū as policy advice on the proposed Bill was developed. The Ministry recommended this approach given the importance of working with Treaty partners on a Bill of this nature and in light of what the Ministry understood to be timing imperatives contained in the coalition commitment. As explained at the hearing, the Ministry had understood through the wording of the coalition agreement and discussion with the Minister of Justice that the preference was introduction of the Bill in 2024.[25] The timing proposed for this option would mean introduction in September 2024, with Select Committee consideration complete by early 2025. The briefing noted this relatively modest engagement would not fully mitigate the lack of meaningful external engagement, particularly with the Crown's Treaty partner, which was identified in relation to *Option 1* as a potential failure to meet the Crown's Treaty obligations.

26.4.3 *Option 3* proposed a public engagement process on the basis of a discussion document that would seek broader views about how the Treaty principles could be reflected in legislation. This proposed process would

[25] Wai 3300, #4.1.006 at p. 116. Here, Mr Chhana stated: "I probably should add the extra bit of context, is that… because the commitment was the coalition agreement is to introduce a Bill as soon as practicable, and discussions with the Minister as soon as practicable, had the colour of introduction in 2024. So, in developing these illustrative timetables, we had that in mind…". And, later: "… we were demonstrating what little time there would be in terms of them taking out any engagement, hence in this particular illustration said well in that particular time it would be iwi chairs would be probably the most feasible option given the limited time that's available from February to April."

mean introduction of the Bill in 2025, with Select Committee consideration complete by late 2025.

27. The Prime Minister allocated the Associate Minister of Justice portfolio to Hon David Seymour on 25 January 2024. Responsibility for the proposed Bill was then allocated to the Associate Minister.

28. On 19 February 2024, the Minister of Justice, Hon Paul Goldsmith, lodged a Cabinet paper requesting that a Bill be included in the Government's legislative programme (informally known as a legislation bid).[26] This paper addressed the timing and priority for a Bill and sought agreement to include it in the Legislation Programme. It noted that the Bill was likely to engage the Treaty of Waitangi and its principles and that the Legislation Guidelines guidance on addressing Māori interests would be considered through the policy development process. It did not seek any decisions about policy or the content of the Bill. Nor did it signal that Bill drafting should commence. As is discussed below, the timeline contained in the legislation bid has been superseded.

29. After meeting with Minister Seymour on 21 February, the Ministry drafted another briefing, provided to Minister Seymour on 12 March 2024, seeking the Minister's decision about progressing his preferred option for the proposed Bill.[27]

30. Amongst other things, the 12 March briefing noted that Cabinet decisions were required on: the underlying policy and key features of the Bill; approving the release and drafting of an exposure draft; and whether the Bill's commencement would be subject to a binding referendum. The briefing noted that further Cabinet papers may be required: a second Cabinet paper to approve release of an exposure draft for public consultation and a third to seek approvals to make any changes to the exposure draft in light of feedback and to introduce the Bill.

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[26] Contained in Wai 3300 #A7. The Minister of Justice, Hon Paul Goldsmith kept responsibility for all legislation bids in the portfolio regardless of delegations to Associate Ministers.

[27] Contained in Wai 3300, #A7.

31. This briefing also:

    31.1 recorded the Ministry's understanding "that the principles in the ACT policy document are a starting point and there is scope to adjust them during the process to develop the Bill and following public consultation on the exposure draft";[28] and

    31.2 repeated the Ministry's earlier advice regarding both the novelty of the ACT policy document's description of Treaty principles and the risks of any policy development process not entailing consultation with iwi and hapū.

32. As Mr Kibblewhite noted at the hearing, in response to the March briefing, the Associate Minister:[29]

    32.1 confirmed his intention to seek Cabinet approval of the policy;

    32.2 agreed that the principles be applied so that they assist with the interpretation of Acts that directly refer to the principles;

    32.3 agreed that the Bill does not alter the text or meaning of Te Tiriti o Waitangi;

    32.4 authorised officials to engage with constitutional experts during the development of the exposure draft.

33. After Minister Seymour indicated his preferred approach on the matters raised in the 12 March briefing, the Ministry began work on a draft Cabinet paper, on behalf of the Associate Minister. The Ministry provided a draft Cabinet paper to Minister Seymour on 4 April. A revised draft was provided to the Minister on 19 April following feedback from the Minister and other agencies.

34. As Mr Chhana has explained in affidavits dated 22 May 2024 and 9 July 2024, the Associate Minister of Justice is currently consulting Ministers on

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28 Wai 3300, #A7 at 18 ([13] of the 12 March briefing).

29 Wai 3300 #4.1.006 at p 110-111. Mr Kibblewhite emphasised that although the Associate Minister had agreed to particular recommendations at a point in time, they were still subject to Cabinet discussion and decision-making. Therefore, despite the Associate Ministers decisions in relating to the 12 March briefing paper, the policy direction of the proposed Bill remains uncertain.

the draft Cabinet paper, and the paper has not yet been lodged with the Cabinet Office for consideration by a Cabinet Committee.[30] However, once the Cabinet paper has been lodged the Crown can update the Tribunal that this step has taken place and the likely date for Cabinet committee consideration of the paper.

The Review

35. Evidence from the Office for Māori Crown Relations – Te Arawhiti (**Te Arawhiti**) given by Ms Lilian (Lil) Anderson (Tumu Whakarae) and Mr Warren Fraser (Deputy Chief Executive, Strategy Policy and Legal) addressed the policy process associated with the Review to date.

36. As that evidence explained:

    36.1 Partly due to its role as chair of the Treaty Provisions Oversight Group (**TPOG**), on 4 December 2023 Te Arawhiti proactively provided a briefing to the Minister for Māori Crown Relations and the Minister for Treaty of Waitangi Negotiations. This briefing outlined an initial stocktake of references to Treaty principles in legislation.

    36.2 This briefing recommended that the Ministers (i) note the contents of the briefing in order to support Ministers' discussions about the review and (ii) direct Te Arawhiti to provide further advice on options to progress this work. The Minister for Treaty of Waitangi Negotiations agreed to this direction on 18 February 2024. The Minister for Māori Crown Relations considered but did not sign the briefing.

    36.3 On 10 April 2024 officials received oral confirmation that the Minister of Justice would lead the review, supported by the Ministry of Justice and with support from Te Arawhiti as the Chair of TPOG. Prior to this, weekly reports to the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Crown Relations

[30] Wai 3300, #A22, at [25], [37] – [38].

had identified several matters relevant to the progression of the Review.

36.1 The evidence provided by the Ministry prior to the hearing was that, following the transfer of the responsibility for the Review to the Ministry of Justice, the Ministry had not provided any advice to the Minister of Justice or received any direction from the Minister of Justice regarding the Review.

36.2 On 19 June the Crown filed a memorandum of counsel providing a briefing to the Minister of Justice on the Review. As set out in that memorandum, on 23 May 2024 the Ministry of Justice had provided a briefing to the Minister of Justice with advice on the purpose and scope of the review. This briefing was part of the usual policy process. Especially on complex subjects, this process is typically iterative with officials' advice to Ministers for decisions informing further advice and decisions. The briefing paper records the Minister's preferences, including his direction to the Ministry to prepare a paper for Cabinet consideration of: the scope and purpose of the review; aspects of the approach such as consultation expectations; and proposed oversight (including a Minister Oversight Group with relevant Ministers and coalition partners). As Mr Chhana states in his second affidavit, the Ministry is currently drafting the Cabinet paper and is working toward providing a draft Cabinet paper to the Minister of Justice for his consideration by the end of July.

36.3 As also set out in the Crown's evidence, the process of drafting a Cabinet paper can be iterative. Before a Cabinet paper is lodged, relevant agencies are typically consulted on drafts and Ministers review those and consult their Ministerial colleagues.[31]

[31] Wai 3300, #A23(e)(Affidavit) at [4] – [16]; and Wai 3300, #A23(BOE) at [15.3] – [15.6].

Treaty principles are engaged

37. The Crown accepts that there is a strong Māori interest in the issues raised by this urgent inquiry and, consistent with the evidence of Crown witnesses, Treaty principles are squarely engaged.[32]

38. This includes the principle of partnership, which imposes on the Treaty partners mutual obligations to act reasonably and in good faith.[33] The obligation to act reasonably and in good faith in turn requires the Crown to be sufficiently informed when making decisions that affect Māori.[34] While the Treaty principles do not give rise to an absolute, open-ended duty to consult, the Crown will generally be required to consult on "truly major" issues affecting Māori in order to meet its obligation to act in good faith.[35]

39. Due to the early stage of the policy proposals, decisions have not yet been made about consultation.

Matters relevant to the Tribunal's consideration of issues arising in this inquiry

40. This section outlines several matters relevant to the Tribunal's consideration of the issues raised in this inquiry.

41. First, the expert evidence in this inquiry raised a number of important and multifaceted themes (for instance relating to current electoral arrangements, parliamentary sovereignty, and related points). The Crown anticipates these issues may be more fully explored in the Constitutional Kaupapa Inquiry in circumstances where there is time available to assess these matters and to hear a broader range of views.

42. Secondly, as was apparent from the evidence of the experts who appeared before the Tribunal, how Treaty principles should be reflected in legislation, and indeed the legitimacy of the concept of Treaty principles,

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32 Wai 3300, #4.1.6 at 155.

33 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (Lands), at 664 per Cooke P.

34 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (Lands), at 683 per Richardson J.

35 *New Zealand Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 152.

are complex matters on which there are a range of views, and issues which the Tribunal may consider are worthy of serious attention.[36]

43. Thirdly, at this point in time, although preliminary policy work and advice has taken place (as outlined above), no Cabinet decisions have been made on the underlying policy or key features of the proposed Bill or on how the Review workstream will progress.

44. In short, at this point in time neither the exact content and implications of any proposed Bill nor the results of the Review are known. These matters are still subject to Cabinet decisions. Again, this suggests that the Tribunal's analysis is likely to have most utility when it focuses on what *is* known and on how the policies that are the subject of this inquiry might be progressed in a Treaty-compliant manner.

45. Fourthly, as outlined above, the proposed Bill and the Review have their genesis in Coalition Agreements which, following a General Election, form the basis of Government. The Government is under an obligation to pursue the commitments recorded in the Coalition Agreements which constitute the basis on which Government is formed. The public service must support the Government in doing so, including by providing free and frank advice on these proposals and the risks they may generate.

46. However, as noted above, the Crown acknowledges that once Ministers are sworn in and Government is formed, the Executive is responsible for meeting the Crown's Treaty obligations. Potential tensions between pursuit of policies which are at core of Government formation, and the application of the Treaty to those policies or proposed policies, lie at the heart of this inquiry. The Tribunal's analysis may be directed to addressing how Government might pursue the policies to which it has committed in a Treaty-consistent manner.

Conclusion

47. The Crown has considered the evidence and submissions of claimants and interested parties in this inquiry and acknowledges that there is significant

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36 Wai 3300, #A6, #A9, #A19.

concern about the proposed Bill and the Review. The Crown has not challenged the evidence of tangata whenua witnesses as to the prejudice which has arisen as a result of these issues. The Crown has attempted to assist the Tribunal through the evidence it has put forward from senior officials by seeking to update and respond to the Tribunal on progress with the policy proposals, and through these submissions.

9 July 2024

G Allan / L Theron / J Watson
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal

AND TO: Claimant Counsel