

**IN THE WAITANGI TRIBUNAL
I TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI**

**Wai 3300
Wai 58
Wai 1312
Wai 1684**

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)

And

In the Matter of a claim by Patricia Tauroa and Robyn Tauroa on behalf of ngā hapū o Whangaroa (Wai 58)

And

In the Matter of a claim by the late Karanga Pourewa, Hinemoa Pourewa, the late Tarzan Hori, and William Hori on behalf of themselves and the descendants of Whakaki and Te Hapū o Ngāti Kawau (Wai 1312)

continued ...

SUBMISSIONS IN REPLY TO THE CROWN'S CLOSING SUBMISSIONS

Dated 15 July 2024

Mahony Horner Lawyers

Counsel: Dr Bryan Gilling / Henry Foubister

PO Box 24515

Wellington 6142

04 974 4028 / 04 974 4206

bryan.gilling@mhlaw.co.nz / henry.foubister@mhlaw.co.nz

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Waitangi Tribunal

15 Jul 24

Ministry of Justice
WELLINGTON

TAU002/8 - 1249898

And

In the Matter

of a claim by Doreen Puru, Anna Kahukura Hotere, the late Louie Katene, Emma Torckler, and William Puru on behalf of themselves, Te Hoia, Ngāti Rangimatamomoe and Ngāti Rangimatakaka (Wai 1684)

MAY IT PLEASE THE TRIBUNAL

1. These submissions are filed in reply to the Crown’s closing submissions and are filed on behalf of the following interested parties, in respect of the urgent hearing into the proposed Treaty Principles Bill (**Bill**) and statutory review of enactments with references to the principles of the Treaty of Waitangi (**statutory review**) (**Inquiry** or **Urgent Hearing**):
 - a. **Wai 58**, a claim by Patricia Tauroa and Robyn Tauroa on behalf of ngā hapū o Whangaroa;
 - b. **Wai 1312**, a claim by the late Karanga Pourewa, Hinemoa Pourewa, the late Tarzan Hori, and William Hori on behalf of themselves and the descendants of Whakaki and Te Hapū o Ngāti Kawau; and
 - c. **Wai 1684**, a claim by Doreen Puru, Anna Kahukura Hotere, the late Louie Katene, Emma Torckler, and William Puru on behalf of themselves, Te Hoia, Ngāti Rangimatamomoe and Ngāti Rangimatakaka.

(Interested Parties)**BACKGROUND**

2. Following appropriate consideration of the matter, on 10 April 2024, Her Honour, Chief Judge Dr C L Fox confirmed that the various applications filed with the Waitangi Tribunal for an urgent inquiry into the Bill and statutory review had been granted and that a hearing on both issues would take place from 9 – 10 May 2024.¹
3. On 17 April 2024, Her Honour confirmed the status of the three claims listed above as interested parties in this Inquiry.²
4. Following the Urgent Hearing, on 22 May 2024, Counsel filed our closing

¹ Decision on applications for urgency (Wai 3300, #2.5.018, 10 April 2024).

² Memorandum-Directions of Chief Judge Dr C L Fox regarding interested party status (Wai 3300, #2.5.022, 17 April 2024) at [6].

submissions on behalf of the Interested Parties.³ Those submissions primarily focused on the Bill, rather than the statutory review, and emphasised the following points in relation to the Bill:

- a. The Bill represents a significant departure from the longstanding and widely upheld principles of te Tiriti;⁴
 - b. The Crown is acting in breach of multiple principles of Te Tiriti o Waitangi in progressing the Bill;⁵
 - c. The Bill does have, and will continue to have, a prejudicial impact on Māori so long as it is on the Crown's legislative agenda;⁶
 - d. The Tribunal must work on the very real assumption that the Bill will pass Parliament and become law;⁷
 - e. The Crown has failed to partner, engage, or consult with Māori on the Bill;⁸
 - f. The Crown is acting outside of its authority in even suggesting it will introduce the Bill; and⁹
 - g. The deliberate and nonsensical mistranslation of kupu Māori for the Crown's own benefit is gross and tantamount to a breach of the principle of active protection and is not within the letter of Te Ture mō Te Reo Māori 2016.¹⁰
5. Counsel take this opportunity to further tautoko the closing submissions of all other claimant counsel in the inquiry, especially where they are made by lead counsel and relate to the significance and extent of the prejudice that is being and will be faced by Māori, the significance of this kaupapa, and the

³ Closing Submissions in relation to the urgent inquiry into the proposed Treaty of Waitangi Principles Bill and associated policies (Wai 3300, #3.3.16, 22 May 2024).

⁴ At [4].

⁵ At [75] – [163].

⁶ At [70] – [74].

⁷ At [56] – [63].

⁸ At [80] – [122].

⁹ At [161].

¹⁰ At [139] – [143].

need for clear and decisive recommendations from the Tribunal.

6. On 9 July 2024, the Crown finally filed its closing submissions, more than a month and a half after all claimant counsel filed their closing submissions.¹¹ The reason for this delay was the result of the Crown promising to, and then failing to, provide a Cabinet paper relating to the Bill as the paper is still “subject to Ministerial consultation”.¹² We note that this Cabinet paper was first set to go to Cabinet in early May 2024. Now, in mid-July, there is still uncertainty as to when Cabinet will finally consider the paper.
7. Regardless of whether the Cabinet paper is available or not, as we said in our closing submissions, Counsel consider that there is sufficient evidence before the Tribunal for it to make a finding that the Crown is acting in breach of its obligations under te Tiriti o Waitangi in progressing the Bill.¹³

THE CROWN’S CLOSING SUBMISSIONS

8. Similar to the approach taken in our closing submissions, these reply submissions will focus mainly on the Crown’s submissions in relation to the Bill and, given the expedited nature of these proceedings, will only reply to the most notable of the Crown’s submissions.
9. For the purposes of these reply closings, Counsel observe the following points submitted by the Crown in its closings:
 - a. The Crown is being as helpful as possible;¹⁴
 - b. The statutory review and the Bill are “political commitments”;¹⁵
 - c. The Bill does not alter the text or meaning of te Tiriti o Waitangi;¹⁶
 - d. Treaty Principles are engaged; and

¹¹ Closings Submissions of the Crown (Wai 3300, #3.3.23, 9 July 2024).

¹² Memorandum of Counsel for the Crown updating on the timing of the Cabinet paper (Wai 3300, #3.2.24, 13 June 2024).

¹³ Wai 3300, #3.3.16, above n 3, at [46].

¹⁴ Wai 3300, #3.3.23, above n 11, at [4].

¹⁵ Wai 3300, #3.3.23, above n 11, at [12] – [17].

¹⁶ Wai 3300, #3.3.23, above n 11, at [32].

- e. The exact content and implications of the Bill are not yet known.¹⁷
10. Counsel provide our response immediately below.

COUNSEL RESPONSE TO THE CROWN'S CLOSING SUBMISSIONS

The Crown is Being as Helpful as Possible

11. The Crown objects to the notion, expressed by the Presiding Officer, that it is being unhelpful in this inquiry, instead asserting that the Crown is being as helpful as possible.¹⁸ While the latter may be true of Crown Counsel and the witnesses they called, the Crown itself has seemingly refused to meaningfully engage in this process. While we acknowledge that Crown Counsel and its witnesses are only working within the parameters set by the Crown, Counsel submit that since the very beginning of this inquiry, the Crown has been hostile to it.¹⁹ Just as a matter of context and for example, throughout this inquiry the Crown has:
- a. opposed the need for an urgent inquiry;²⁰
 - b. wrongfully, in our view, refused to provide the Presiding Officer documents that had been reasonably requested and that were within scope of the Inquiry;²¹
 - c. threatened to judicially review the Presiding Officer;²²
 - d. failed to provide the draft Cabinet paper to the Tribunal;²³
 - e. failed to provide an estimate on when the Cabinet paper will be available;²⁴ and

¹⁷ Wai 3300, #3.3.23, above n 11, at [44].

¹⁸ Wai 3300, #3.3.23, above n 11, at [4]; see also Affidavit of Rajesh Chhana in response to directions dated 3 July 2024 (Wai 3300, #3.3.23, 9 July 2024) at [10].

¹⁹ See, for example, Draft transcript for the hearing to determine urgent applications held at the Waitangi Tribunal Offices Wellington on Monday 8 April 2024 (Wai 3300, #4.1.002, 12 April 2024) at [89].

²⁰ Crown Memorandum in Response (Wai 3300, #3.1.3, 9 February 2024).

²¹ Memorandum of Counsel for the Crown in response to memorandum-directions dated 26 February 2024 (Wai 3300, #3.1.13, 18 March 2024)

²² Wai 3300, #4.1.002, above n 19, at [17].

²³ Memorandum-Directions of Chief Judge Dr C L Fox regarding Crown closing submissions (Wai 3300, #2.6.9, 3 July 2024) at [4] – [5].

²⁴ Wai 3300, #2.6.9, above n 23, at [4] – [5].

- f. has had its Ministers make public statements denigrating the Tribunal and this Inquiry, likely in breach of the Cabinet manual and of the constitutional principles of separation of powers and comity.²⁵
12. Therefore, it is our respectful submissions that throughout this Inquiry process, the Crown itself has not been helpful.

The Statutory Review and the Bill are “Political Commitments”

13. The Crown has said repeatedly that the Bill and the statutory review are “political commitments” that were made prior to the government being formed and sworn in.²⁶ It is unclear exactly what point the Crown is making here, as the Bill and the statutory review are most certainly Crown policy, regardless of their respective origins.
14. This exact point was recently adjudicated on in *Skerrett-White v Minister for Children* where the Court of Appeal held that the Coalition Government’s then-proposed repeal of s 7AA of the Oranga Tamariki Act 1989 was a Crown policy, despite its genesis being in an agreement made prior to the formation of the Government.²⁷ Simply, the Court of Appeal said: “The repeal is a Crown policy, whatever its genesis. It is the fact the Government intends to proceed with it that makes it a valid subject for an inquiry by the Tribunal.”²⁸ The same must be said in terms of the Bill and the statutory review, in our submission, as they are exactly analogous.
15. Outside the judgment of the Court of Appeal, there is also the fact that these ‘political commitments’ were given further weight on 28 November 2023 when Cabinet approved and endorsed the two coalition agreements.²⁹ It is at this stage, in our submissions, that what may have previously been

²⁵ See, for example, Jamie Ensor “David Seymour accuses Waitangi Tribunal of meddling after it makes confidential Treaty Principles docs public” (21 May 2024) Newshub <www.newshub.co.nz/home/politics/2024/05/david-seymour-accuses-waitangi-tribunal-of-meddling-after-it-makes-confidential-treaty-principles-docs-public.html>.

²⁶ Wai 3300, #3.3.23, above n 11, at [12].

²⁷ *Skerrett-White v Minister for Children* [2024] NZCA 160 at [103].

²⁸ At [103].

²⁹ See Cabinet Office Circular “National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements” (25 March 2024) CO 24/2 (Wai 3300, #6.2.6) at [3].

‘political commitments’ were explicitly crystalised.

16. It is also clear in Counsel’s view that the Crown intends to implement all these ‘political commitments’ as the Cabinet Office circular in March 2024 directs all Ministers, Parliamentary Under-Secretaries, chief executives, and their respective offices “to be familiar with” the coalition agreements and “to ensure that they have processes in place to implement them”.³⁰
17. So, again, it is unclear to Counsel why the Crown has tried to make this distinction in its closing submissions, as the Bill and the statutory review are clearly Crown policy, and have been for the life of the Coalition Government.
18. Finally on this point, the Crown submits that the Tribunal’s analysis in its forthcoming report may be better directed at addressing “how Government might pursue the policies to which it has committed in a Treaty-consistent manner.”³¹ While we leave this for the Tribunal to address, we would suggest that a good starting point would be for all Ministers to have an informed understanding of the history of He Whakaputanga, te Tiriti o Waitangi, and the principles of te Tiriti.
19. Further, largely, we submit that the Bill, and anything resembling it, cannot be done in a Treaty-consistency manner as the Bill is in itself an attack on te Tiriti and the principles derived from it. To achieve what the Bill sets out to do is to desecrate the kawenata tapū that is te Tiriti o Waitangi. In no way, in our submission, can that be Treaty-consistent.

The Bill Does Not Alter the Text or Meaning of te Tiriti o Waitangi

20. The Crown notes the evidence of Mr Kibblewhite at the Hearing where he had said that Associate Minister Seymour had agreed that the Bill does not alter the text or meaning of Te Tiriti.³²
21. In our submission, this evidence and the argument built on it, does not make sense. Associate Minister Seymour is in no way qualified to judge whether

³⁰ Cabinet Office Circular “National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements” (25 March 2024) CO 24/2 (Wai 3300, #6.2.6) at [4.3].

³¹ Wai 3300, #3.3.23, above n 11, at [46].

³² Wai 3300, #3.3.23, above n 11, at [32].

his proposed translations of kupu Māori alter the meaning of te Tiriti. So, in our submission, his “agreement” that this is the case is of no probative value. This Tribunal heard throughout the course of this Inquiry from both tangata whenua and expert witnesses how the Bill would fundamentally change the meaning and the interpretation of te Tiriti.³³

22. Further, the meaning of te Tiriti is exactly bound up with the principles it embodies and that emanate from it and the process by which it was created. The very fact that Associate Minister Seymour is proposing his three incomprehensible “principles” amounts to an attempt to alter the meaning of te Tiriti as it has been interpreted by countless Māori tohunga, lawyers, courts, politicians, and governments over a period of a half-century, or even eighteen decades. The principles that the Associate Minister supports are barely connected to what either te Tiriti or the Treaty actually say, let alone the hugely detailed analysis of both te Tiriti and the Treaty provided by, for example, the Court of Appeal in the *Lands* case or the Tribunal in its Te Raki Stage One report, that elucidated the meaning of Te Tiriti.³⁴
23. Therefore, it remains unclear as to why the Associate Minister would make this statement as he must know that the Bill represents a huge departure from the current meaning and interpretation of te Tiriti and its principles as, after all, that is precisely why he wants to progress the Bill in the first place.

Treaty Principles are Engaged

24. The Crown acknowledges in its closing submissions that “there is a strong Māori interest in the issues raised” and that “Treaty principles are squarely engaged.”³⁵ Counsel submitted in our closing submissions that there are multiple Tiriti principles, as well as duties, that are relevant in this inquiry, including:³⁶

- a. Partnership;

³³ See, for example, Kōrero Taunaki a Natalie Ramarihia Coates (Wai 3300, #A006, 30 April 2024) at [61] – [82].

³⁴ See, *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641; Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014).

³⁵ Wai 3300, #3.3.23, above n 11, at [37].

³⁶ Wai 3300, #3.3.16, above n 3, at [75] – [163].

- b. Active Protection;
 - c. Tino Rangatiratanga; and
 - d. Kāwanatanga.
25. Yet, the only principle that the Crown specifically acknowledges is engaged in the present circumstances is the principle of partnership. The Crown recognises both that the principle of partnership includes an obligation on both parties to act reasonably and in good faith towards each other and also that the Crown must be sufficiently informed in its decision making.³⁷ The Crown also says that, generally, the Crown will be required to consult with Māori on “truly major” issues affecting Māori.³⁸ “
26. What – the Interested Parties ask – could be more “truly major” an issue between the Crown and Māori than the evisceration of te Tiriti?”
27. It was our submission in our closings that the Crown’s obligations in relation to the Bill and statutory review go far beyond consultation. However, as we dealt with issue substantially in our closings, we do not take this point any further here, other than to say that the Crown should be engaging in co-design and empowerment, given the heightened interests of Māori, in accordance with its own engagement strategy.³⁹
28. Nonetheless, the Crown then submits that because the Bill and the statutory review are in the early stages of their policy proposals, decisions have not been made about consultation.⁴⁰ There are several issues with this statement.
29. First of all, we note that the wording of “decisions have not yet been made about consultation” could imply that specific and targeted consultation with Māori may not even be agreed to, which in itself is worrisome.
30. Secondly, consultation, as per *Wellington International Airport v Air New*

³⁷ Wai 3300, #3.3.23, above n 11, at [38].

³⁸ Wai 3300, #3.3.23, above n 11, at [38].

³⁹ See, for example, *Te Arawhiti Guidelines for Engagement with Māori* (Wai 3300, #6.2.8, filed 7 May 2024).

⁴⁰ Wai 3300, #3.3.23, above n 11, at [39].

Zealand, must take place *prior* to decision making.⁴¹ It is Counsel's view that the appropriate time for consultation with Māori, which again we stress is not the appropriate framework here, would have been prior to the matter going to Cabinet. There is nothing limiting the Crown engaging with Māori, or anyone, at an early stage of a proposal. In fact, that leads to the next point.

31. The Crown has said that it is too early to engage with Māori and that no decisions have been made on consultation. Yet, there has been a decision made by the Associate Minister that the Ministry of Justice can engage with constitutional experts on the development of the exposure draft.⁴² The Crown cannot have it both ways. It cannot say in one breath that it is too early to consult with Māori on the Bill, and then in the next breath engage with constitutional experts regarding the exposure draft. Put bluntly, public servants and anonymous constitutional experts can engage with the Ministry of Justice, but Māori, who are the Tiriti partner, will just have to wait until a decision is made by Cabinet on whether or not they will have the opportunity to be involved in the process at all.
32. In fact, in our submission, the turning of an idea into a policy, and then the development of a policy into a coalition agreement as a cornerstone of a new government, and then the implementation of that policy by way of a draft bill, are all times at which consultation with Māori would have been more appropriate, rather than leaving it to be a mere add-on to face a *fait accompli* after a completed bill has taken on its own life, which is the Coalition Government's strategy.
33. The last point Counsel make in relation to Treaty principles is we note that, throughout the Crown's closings, the only principle of te Tiriti that is referred to is the principle of partnership. Whilst it is one of the most important, if not the central principle of te Tiriti, we note that even with the extra time that the Crown has had to file its closing submissions, it does not raise any objection or rebuttal to counsel, both Claimant and Interested

⁴¹ *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 (CA); see also *Wellington International Airport Ltd v Waka Kotahi New Zealand Transport Agency* [2022] NZHC 954 at [44] – [45].

⁴² Wai 3300, #3.3.23, above n 11, at [32.4].

Parties, referring to and asserting breach of other Tiriti principles. Even where the Crown does raise the principle of partnership, it does not make the submission that it has not been breached.

34. In our submission, the Crown has implicitly accepted that it has acted in breach of multiple principles of Te Tiriti o Waitangi as they have provided no rebuttal or challenge to those submissions. That being the case, Counsel therefore respectfully submit that it is open to the Tribunal to accept those Claimant and Interested Party submissions as made out and make findings and recommendations accordingly.

The Exact Content and Implications of the Bill are Not Yet Known

35. One of the Crown's key points throughout this Inquiry is that the content and implications of the Bill are not yet known. This is reiterated in the Crown's closing submissions.⁴³
36. As we did in our closing submissions, we further submit that while the Bill itself, as a document, may not yet be finalised, there is a high level of certainty as to what the Bill will contain, or at least what its effect will be on Māori particularly and on wider society more generally.
37. While the Ministry of Justice understands that the ACT Party principles are a starting point, there is no doubt in Counsel's mind that the Bill will, in some way, contain the misguided and illiterate Treaty 'principles' that the ACT Party campaigned on in the last general election. After all, that is the 'political commitment' this Government has agreed to.
38. We consider it extremely unlikely that the ACT Party policy will change, especially because the ACT Party recently set up a website to promote its interpretation of te Tiriti.⁴⁴
39. Therefore, it is again our submissions that the Tribunal can act with certainty as to what the Bill will contain, or at least what its effect will be.

⁴³ Wai 3300, #3.3.23, above n 11, at [44].

⁴⁴ See www.treaty.nz.

CONCLUSION

40. Counsel conclude these reply submissions in the same way we concluded our closing submissions, by emphasising the significance of this inquiry and the magnitude of the issue at hand. The Tribunal very much has before it the opportunity to act as a check on the exercise of unruly executive power which has resulted in numerous and blatant breaches of te Tiriti o Waitangi. The ramifications of what is being proposed, in terms of the Bill and the statutory review are immense and cannot be understated.
41. As we said in our closing submissions, we consider that there is ample evidence before the Tribunal to make findings that principles of te Tiriti have been breached. However, we acknowledge that the forthcoming Cabinet paper will aid the Tribunal in its deliberations. We would therefore respectfully suggest that the Tribunal consider releasing an interim report on the evidence that it has before it currently, with a final report being released once the Cabinet paper is filed.

Dated at Wellington this 15th day of July 2024



Dr B D Gilling and H T G Foubister
Counsel for the Interested Parties