

IN THE WAITANGI TRIBUNAL

WAI 3300

KEI RARO I TE MANA O

te ture o te Tiriti o Waitangi Act 1975

Ā

I TE TAKE O

te pakirehua o Tomokia ngā tatou o  
Matengireia / the Constitutional  
Kaupapa Inquiry (Wai 3300)

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MEMORANDUM OF COUNSEL RESPONDING TO TRIBUNAL MEMORANDUM-  
DIRECTIONS DATED 28 NOVEMBER 2024

Dated: Thursday 12 December 2024

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Waitangi Tribunal

13 Dec 24

Ministry of Justice  
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## TĒNĀ, E TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

### INTRODUCTION

1. This joint memorandum of counsel is filed on behalf of the following interested parties:
  - a. Jasmine Cotter-Williams, for and on behalf of her whānau and Ngāti Taimanawaiti iwi (Wai 2063);
  - b. Stephanie August, for and on behalf of the late Robert Charles William James Farrar and her whānau (Wai 3096);
  - c. Robert Gabel, for and on behalf of Ngāti Tara of Ngāti Kahu (Wai 1886);
  - d. April Grace, for and on behalf of her whānau, Ngā Wahapū o Te Rarawa, Ngāti Whātua and Ngāpuhi Nui Tonu (Wai 2206);
  - e. Annette Hale, for and on behalf of the late James Toopi Kokere Wikotu and the Wikotu whanau (Wai 2743);
  - f. Te Enga Harris and Lee Harris, for and on behalf of the Wiremu Hemi Harris and Meri Ōtene whānau, and on behalf of members of Ngāti Rangī, Ngāti Here, Ngāi Tūpoto, Ngāti Hōhaitoko, Ngāti Kōpuru, Te Rarawa and Ngāti Uenuku (Wai 1531);
  - g. Tasilofa Huirama, for and on behalf of the Huirama whānau and members of Ngāti Ueoneone and Ngāti Tautahi of Ngāpuhi (Wai 2890);
  - h. Te Urunga Evelyn Aroha Kereopa, for and on behalf of Te Urunga Aroha Kereopa and the late Rangī Harry Kereopa and their whānau (Wai 762);
  - i. Richard Nathan, for and on behalf of the Mangakahia Hapū Claims Collective (Wai 861);

- j. Diane Marie Paekau for and on behalf of her whanau and members of Ngāti Hounuku, Ngāti Houa, Ngāti Poua, Ngāti Mahuta, Ngāti Te Ata and Ngāti Whātua (Wai 3104);
- k. John Pikari, for and on behalf of the descendants of Hone Karahina and members of the hapū of Te Uri o Hua and Ngāti Torehina (Wai 2394);
- l. Rueben Taipari Porter, for and on behalf of the hapū of Ahipara (Wai 1968);
- m. Audrey Okeroa Rogers, for and on behalf of her whānau and members of Ngāti Koheriki (Wai 2869);
- n. Jane Stevens, for and on behalf of her whānau and Ngāi Tahu iwi (Wai 2671);
- o. Violet Eva Walker, for and on behalf of her whānau and members of Ngāti Rangi o Waiapu ki Tawhiti and Ngāti Kahu ki Whangaroa (Wai 2382);
- p. Kahura James Watene and Elizabeth Watene, for and on behalf of Ngāi Tukōkō and Ngāti Moe of Rangitāne me Ngāti Kahungunu (Wai 2778); and
- q. Michael Williams and Jessica Williams, for and on behalf of their whānau, and members of Ngaitūpango, hapū of Ngāpuhi (Wai 2838).

(together, the “**interested parties**”)

2. On 8 October 2024, her Honour Chief Judge, Dr C L Fox, directed the Crown to provide an update on the status of the Treaty clauses review and all relevant documents relating to the review by **5 pm, Wednesday 13 November 2024**. Her Honour also directed the Crown to file relevant documents as they are produced.<sup>1</sup>

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<sup>1</sup> Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox regarding the Treaty Clause Review dated 8 Whiringa-ā-rangi 2024*, Wai 3300, #2.6.32, at [5].

3. The Crown subsequently filed a memorandum of counsel on 13 November 2024 (“**Crown memorandum**”), whereby Crown counsel:
  - a. Advised no further decisions had been made regarding next steps for the review programme since Cabinet’s decision of 9 September 2024 (and noted further Cabinet decisions on the next steps were anticipated in the new year);<sup>2</sup>
  - b. Made observations related to the difficulty the Crown would face in complying with the Tribunal’s direction to file documents as they are produced and sought clarity on the nature and scope of the inquiry;<sup>3</sup>
  - c. Noted the review timeframe does not generate the same urgent concerns as the Treaty Principles Bill work; completion of work is not imminent; public consultation is proposed before decisions on specific provisions are made; and there is an ongoing wider Constitutional Kaupapa Inquiry;<sup>4</sup>
  - d. Suggested the Tribunal consider how an inquiry is best directed/structured, which would inform relevant and appropriate disclosure.<sup>5</sup>
  
4. On 28 November 2024, her Honour Chief Judge, Dr C L Fox, invited claimants to respond to the Crown memorandum of 13 November 2024 by **5 pm, Thursday 12 December 2024**.<sup>6</sup> Accordingly, this memorandum provides the interested parties’ response to the matters raised in the Crown memorandum.

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<sup>2</sup> G Allen, A Turvey and L Ewing, *Memorandum of Counsel for the Crown* dated 13 November 2024, Wai 3300, 3.2.143, at [4].

<sup>3</sup> G Allen, A Turvey and L Ewing, *Memorandum of Counsel for the Crown* dated 13 November 2024, Wai 3300, 3.2.143, at [5] and [6].

<sup>4</sup> G Allen, A Turvey and L Ewing, *Memorandum of Counsel for the Crown* dated 13 November 2024, Wai 3300, 3.2.143, at [7].

<sup>5</sup> G Allen, A Turvey and L Ewing, *Memorandum of Counsel for the Crown* dated 13 November 2024, Wai 3300, 3.2.143, at [8].

<sup>6</sup> Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox regarding the Treaty Clause Review* dated 28 Whiringa-ā-rangi 2024, Wai 3300, #2.6.37.

## Executive summary

5. The interested parties express grave concern with the Crown’s proposed legislative review of the relevant statutory provisions (“**Treaty clauses review**”). They fear incurring significant and irreversible prejudice should references to the Treaty principles in the relevant statutory provisions (“**treaty clauses**”) be weakened or removed altogether. If there is to be a Treaty clauses review, it is appropriate that the interested parties be given ample opportunity to contribute thereto. But far from acting in the spirit of a true partnership and involving the interested parties, the Crown has unilaterally determined the purpose and scope of the Treaty clauses review. Given these regrettable developments and the Crown’s roguish conduct in the last year or so across other spheres of the Māori-Crown relationship, the interested parties urge the Waitangi Tribunal to proceed to hearing on the matters at hand.

## NGĀ MĀTĀPONO REPORT

6. The interested parties support the submissions set out in the Joint Memorandum of Counsel of today’s date filed by Phoenix Law (“**joint memorandum**”) wherein the Crown is urged to conduct its Treaty clauses review in accordance with the Tribunal’s findings in *Ngā Mātāpono: The Principles* (“**Ngā Mātāpono**”).<sup>7</sup>

## Te Tiriti breaches perpetuated

7. On 28 August 2024, the Cabinet Social Outcomes Committee (“**Social Outcomes Committee**”) made various decisions on the purpose, scope and Ministerial responsibility for coordinating the Treaty clauses review.<sup>8</sup> Cabinet confirmed the said decisions on 9 September 2024.<sup>9</sup>
8. Counsel submit the Crown has determined the purpose and scope of the Treaty clauses review without Māori input and in the face of admonition from

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<sup>7</sup> Waitangi Tribunal, *Ngā Mātāpono The Principles, The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown’s Treaty Principles Bill and Treaty Clause Review Policies* (Wai 3300, 2024).

<sup>8</sup> Cabinet Social Outcomes Committee, *Minute of Decision* dated 28 August 2024, Wai 3300, #A30.

<sup>9</sup> Cabinet, *Minute of Decision* dated 9 September 2024, Wai 3300, #A3

the Tribunal that any such conduct would “reinforce and compound” the existing te Tiriti breaches.<sup>10</sup> It is submitted that the Crown’s unilateral determination of the review’s purpose and scope culminates in a flagrant disregard of the Crown’s obligations under te Tiriti.

9. The Cabinet paper submitted to the Social Outcomes Committee for consideration (“**Cabinet paper**”) also omits reference to any proposed consultation with Māori in relation to the preparation of “detailed arrangements on the governance for the review, a framework for agencies to assess references to Treaty principles in the legislation they administer, options for timeframes and priority for the review.”<sup>11</sup> Consultation with Māori is to be “bespoke for each specific provision.” However, for all intents and purposes, it appears that consultation with the interested parties will not ensue until after the Crown has defined the review’s parameters.<sup>12</sup> This is too late. The Crown’s misconduct in this respect amplifies the risk to the interested parties of significant and irreversible prejudice. The Treaty clauses review should be discontinued with.

## INADEQUATE CONSULTATION

10. Although it is recorded in the Cabinet paper that the Minister of Justice intends to consult with Māori before making policy decisions regarding each of the treaty clauses,<sup>13</sup> the Minister has also stated that there is “uncertainty about what engagement or consultation mean or do not mean” and that the Treaty clauses review presents “an opportunity to bring much better clarity”.<sup>14</sup> The interested parties do not accept that there is uncertainty over the meaning of consultation. The Tribunal’s jurisprudence on the topic alone

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<sup>10</sup> Waitangi Tribunal, *Ngā Mātāpono The Principles, The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown’s Treaty Principles Bill and Treaty Clause Review Policies* (Wai 3300, 2024), at 183.

<sup>11</sup> Hon Paul Goldsmith, *Cabinet paper: Review of legislation including reference to the principles of the Treaty of Waitangi: purpose and scope of review*, Wai 3300, #A30, at [30].

<sup>12</sup> Hon Paul Goldsmith, *Cabinet paper: Review of legislation including reference to the principles of the Treaty of Waitangi: purpose and scope of review*, Wai 3300, #A30, at [28].

<sup>13</sup> Hon Paul Goldsmith, *Cabinet paper: Review of legislation including reference to the principles of the Treaty of Waitangi: purpose and scope of review*, Wai 3300, #A30, at [28], [29], and [32].

<sup>14</sup> Hon Paul Goldsmith, *Cabinet paper: Review of legislation including reference to the principles of the Treaty of Waitangi: purpose and scope of review*, Wai 3300, #A30, at [16].

is significant and long-held.<sup>15</sup> But more to the present point: if the meaning of consultation is not clear to the Minister of Justice, the Crown is without the wearwithall to conduct a te Tiriti compliant consultation process. Perhaps in these circumstances the Crown will attempt to define the meaning of consultation for the purposes of consulting with the interested parties. Any ad hoc attempt by the Crown to do so will be highly inappropriate and strenuously objected to by the interested parties.

11. The interested parties' concerns with any Ministerial consultation process that may ensue are compounded by the absence of meaningful consultation with Māori to date about the Treaty clauses review and by the Crown's diminished capacity to consult with Māori. In the latter respect, we refer the Tribunal to Cabinet's recent decision to amend the respective roles of Te Arawhiti and Te Puni Kōkiri vis-à-vis the Māori-Crown relationship.<sup>16</sup>
12. It was decided (in principle) that Te Arawhiti would no longer be responsible for the following key functions:<sup>17</sup>
  - 7.1 Building the Crown's capacity to engage with iwi, hapū, whānau, and Maori, and to become a better Treaty partner; and
  - 7.2 Being a strategic advisor to Cabinet, Ministers, and the Public Service to enable good policy decisions that uphold Māori rights and interests, except as they relate to Treaty settlement and Takutai Moana matters.

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<sup>15</sup> See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, at 683, *Wellington International Airport v Waka Kotahi* [2022] NZHC 954, at [44]–[45]; see also *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA), at 675–683, Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wai 414, 1998), at 224, Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 66-74.

<sup>16</sup> Cabinet, *Minute of Decision: Clarifying Agency Functions*, dated 12 August 2024, accessed at <<https://www.publicservice.govt.nz/assets/DirectoryFile/Clarifying-agency-functions.pdf>>.

<sup>17</sup> Cabinet, *Minute of Decision: Clarifying Agency Functions*, dated 12 August 2024, at [7], accessed at <<https://www.publicservice.govt.nz/assets/DirectoryFile/Clarifying-agency-functions.pdf>>.

13. Instead, Te Puni Kōkiri will take on the following roles even though that office's relevant functions do not provide it with the same consultative capacity:<sup>18</sup>
- 5.2 Monitoring and liaising with departments that provide services to or for Māori to ensure adequacy (including the extent to which they have the required capability to engage with Māori), and identifying where better public services can be delivered through reducing duplication);
  - 5.3 Advising the Government and public service on the distinct rights, interests, and responsibilities of Iwi/hapū and of Māori.
14. The prospect of Te Puni Kōkiri monitoring the adequacy of Crown consultation causes anguish to the interested parties, causing the already beleaguered Crown consultation process to become even more unappealing to them. Additionally, the role that Te Arawhiti will play in the Treaty clauses review, if any, remains unclear. In these circumstances, the Waitangi Tribunal is asked to respond to these matters and disclose any updated consultation guidelines to the interested parties.

## **INQUIRY SCOPE**

15. It is submitted that the entirety of the Crown's Treaty clauses review programme should be within the inquiry's scope. For the avoidance of doubt, this includes:
- a. The Crown's proposed overarching framework, governance strategy, and process for developing and implementing the Treaty clauses review;
  - b. The proposed policy process in relation to the review of each specific Treaty clause subject to the Treaty clauses review,

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<sup>18</sup> Cabinet, *Minute of Decision: Clarifying Agency Functions*, dated 12 August 2024, at [5], accessed at <<https://www.publicservice.govt.nz/assets/DirectoryFile/Clarifying-agency-functions.pdf>>.



including the Crown's approach to consultation with Māori and other stakeholders; and

- c. The outcomes of the Treaty clauses review in relation to each specific clause subject to review, including proposed legislative amendments.
16. As we have indicated already, the Crown's consultation process to date, or the lack thereof, should also be inquired into as well.
  17. Furthermore, in the event that the Tribunal should inquire into the Treaty clauses review, it is submitted that the inquiry scope be broadened to include an evaluation of the Treaty clauses' compliance with te Tiriti principles. It is submitted that some of the Treaty clauses are non-compliant. Section 8 of the RMA is one of these:

### **8 Treaty of Waitangi**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

18. The s 8 direction to decision-makers to "take into account" the principles of the Treaty of Waitangi has long been the subject of criticism. We refer to the Whanganui River Tribunal in this regard:<sup>19</sup>

Before leaving this topic, we would not wish it to be thought that we consider the regional council to have acted otherwise than in good faith. It has been faced with the impossible task of reconciling the statutory mandate conferred on it by the Resource Management Act with the meaningful recognition and implementation of the Treaty rights of Whanganui Māori. The Crown has failed to provide that the statutory powers must be exercised in a manner consistent with the Treaty rights of

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<sup>19</sup> Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999), at 322 and 323.

Atihaunui. Until such time as that is done, regional councils and other authorities exercising powers and functions under the Act will lack the requisite authority and obligation to actively and effectively to recognise and implement Māori Treaty rights in and over their rivers. As the Act stands at present, the Whanganui iwi, although consulted by the regional council, has no power of decision over its tupuna awa. In short, it is simply another 'submitter' before a series of decision-making bodies and courts, with no assurance that its Treaty rights will be implemented.

And then:<sup>20</sup>

The Resource Management Act would need further amendment, first and foremost because it does not reflect the Crown's Treaty obligations. It needs to provide that, in achieving the purpose of the Act, all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources, shall act in a manner that is consistent with, and gives effect to the principles of the Treaty of Waitangi.

19. Other Treaty clauses give the interested parties cause for concern in the manner complained of. Some examples are set out below. There are numerous others:
  - a. Section 4 Local Government Act 2002—"...the Crown's responsibility **to take appropriate account of** the principles of the Treaty of Waitangi;
  - b. Section 9(2)(d) Education and Training Act 2020—"...**to acknowledge the** principles of Te Tiriti o Waitangi";
  - c. Clause (c) of the preamble, Environment Act 1986—"An Act to ensure that, in the management of natural and physical resources, full and balanced **account is taken of**—(iii) the principles of the Treaty of Waitangi; and

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<sup>20</sup> Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999), at 344.

- d. Section 4 Crown Minerals Act 1991—“All persons exercising functions and powers under this Act shall **have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)**.”

(emphasis added)

20. The Crown is not the only party to this inquiry with complaints about the Treaty clauses. The Waitangi Tribunal is urged to take the opportunity that has arisen for it to review the Treaty clauses’ te Tiriti compliance.
21. The Tribunal is urged to inquire into the aforementioned matters with alacrity, particularly with respect to the purpose and scope of the Treaty clauses review, its governance, the overarching framework for agencies to assess references for the Treaty, timing and prioritisation, and the proposed consultation processes. Further, Crown decision-making on these matters is imminent. Those Crown decisions threaten to cause significant prejudice to the interested parties and further rupture the Māori-Crown relationship. It is submitted that the wider Constitutional Kaupapa Inquiry is not an appropriate alternative forum for hearing the interested parties’ complaints given that that inquiry will not address the immediate issues at hand before there is substantive and/or or legislative change.

#### **FURTHER DOCUMENTATION**

22. The submissions set out in the joint memorandum filed by Phoenix Law with respect to confidentiality and the provision of further documentation are supported. It is added that despite acknowledging the Tribunal’s direction to provide an update on the Treaty clauses review and “all documents to date”, the Crown sought clarification on the inquiry’s scope instead although submissions were made on perceived difficulties with filing “relevant documents as they are produced.”<sup>21</sup>
23. We note that the Ministry of Justice is leading preliminary work for the Treaty clauses review and this work will occur in the short term, with further Cabinet

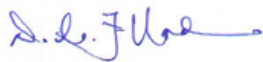
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<sup>21</sup> G Allen, A Turvey and L Ewing, *Memorandum of Counsel for the Crown* dated 13 November 2024, Wai 3300, 3.2.143, at [5]-[9].

decisions anticipated in the new year. That having been said, over three and a half months have passed since the Cabinet paper was considered by the Cabinet Social Outcomes Committee on 28 August 2024, and so officials' advice and documentation concerning "detailed arrangements on the governance for the review, a framework for agencies to assess references to Treaty principles, and options for timeframes and priorities"<sup>22</sup> has likely been generated. Therefore, the Crown should disclose the generated material to date in accordance with the aforementioned Tribunal direction.

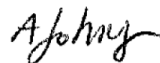
24. With respect to further ongoing discovery, it is noted that the policy process for the Treaty clause review "could prioritise specific provisions or be phased to prioritise legislation under broader review or according to its application."<sup>23</sup> In the event the Treaty clauses review is phased, counsel suggests that the filing of further discovery could be similarly phased, commencing with the discovery related to prioritised Treaty clause reviews. However, counsel reserve the opportunity to file further submissions on this proposed process following receipt of all disclosure generated to date and any further evidence filed by the Crown.

**DATED at Tāmaki Makaurau this 12<sup>th</sup> day of December 2024**



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Darrell Naden  
**Counsel Acting**



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Ashley Johns  
**Counsel Acting**

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<sup>22</sup> Hon Paul Goldsmith, *Cabinet paper: Review of legislation including reference to the principles of the Treaty of Waitangi: purpose and scope of review*, Wai 3300, #A30, at [30].

<sup>23</sup> Hon Paul Goldsmith, *Cabinet paper: Review of legislation including reference to the principles of the Treaty of Waitangi: purpose and scope of review*, Wai 3300, #A30, at [33].