OFFICIAL

BEFORE THE WAITANGI TRIBUNAL **WAI 3325**
WAI 3395

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	the Climate Change Priority Inquiry **(WAI 3325**)
AND	
IN THE MATTER OF	a claim by **Pita Tipene, Moana Maniapoto, George Laking, India Logan-Riley, Donna Kerridge, Aroha Te Pareake Mead**, and **Maria Bargh** for and on behalf of **Ngā Toki Whakarururanga (WAI 3395)**

MEMORANDUM OF COUNSEL IN RESPONSE TO CROWN'S MEMORANDUM DATED 26 MARCH 2025

Dated on this 28th day of March 2025

RECEIVED
Waitangi Tribunal
28 Mar 25
Ministry of Justice
WELLINGTON

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TĒNĀ E TE TARAIPIUNARA:

Introduction

1. This Memorandum of Counsel is filed on behalf of the following claim and respective claimants:

    1.1 **Wai 3395** – a claim by Pita Tipene, Moana Maniapoto, George Laking, India Logan-Riley, Donna Kerridge, Aroha Te Pareake Mead, and Maria Bargh for and on behalf of Ngā Toki Whakarururanga.

    (the Claimants)

Summary

2. Counsel file this memorandum in response to:

    2.1 the Crown's memorandum dated 26 March 2025; and

    2.2 the Tribunal's emailed minute of 27 March 2025.

3. Counsel will address these matters further in written and oral submissions for hearing week two, but this memorandum is filed to formally set out the claimants' position.

4. The claimants are disappointed by the Crown's position. The Crown's belated attempt to challenge the inclusion of the evidence of Dr Jane Kelsey was rejected by the Tribunal in its memorandum directions of 19 March 2025. This most recent Crown memorandum appears to attempt to relitigate the appropriateness of Dr Kelsey's evidence, but instead by challenging the pleadings and agreed statement of issues: documents that have been long settled. It is not helpful or constructive for the Crown to continue to challenge and relitigate the matters being raised by the claimants, and it is not obviously acting with the utmost good faith.

Ngā Toki Whakarururanga and the Statement of Issues

5. Ngā Toki Whakarururanga's Statement of Claim, lodged on 8th July 2024, set out very clearly its mandate as a by-Māori, of-Māori, with-Māori and for-Māori entity, whose duty and responsibility is to protect and advance Māori responsibilities and rights according to Te Tiriti o Waitangi me He Whakaputanga o te Rangatiratanga o Nu Tireni, and to hold the Crown to account to meet its responsibilities under Te Tiriti and He Whakaputanga in the arena of trade policy, negotiations and agreements. That necessarily includes trade and investment agreements in relation to the climate emergency.

6. The Claimants say the Crown has breached its obligations under Te Tiriti o Waitangi, and principles derived from Te Tiriti of Rangatiratanga, Kāwanatanga, partnership, mutual recognition and respect, active protection and redress, in the negotiation, adoption, continuation and renewal of international trade and investment agreements as they relate to and impact on the climate emergency, with negative consequences for the physical, spiritual, cultural and socioeconomic wellbeing of Māori.

7. The Statement of Claim makes it clear that international trade and investment treaties are an integral part of the genre of international climate instruments and are critical to the interface between international treaties and domestic legislation and policies in assessing the Crown's compliance with its Tiriti obligations.

8. This falls squarely within the Tribunal's Statement of Issues, cited by the Crown in paragraph [7.3]:

> *"Has the Crown's conduct (including actions and omissions) in response to climate change been consistent with Tiriti/Treaty principles?"*

9. The three causes of action in the Statement of Claim [paragraph 7] are:

   9.1 the denial of Rangatiratanga in the international space, including free trade and investment agreements, to determine appropriate responses and solutions to the climate crisis;

   9.2 the Crown's promotion and adoption of concepts, legal and economic instruments, technologies and techniques, and practices in free trade agreements that reflect western worldviews and capitalist interests and are antithetical to tikanga, mātauranga and kaitiakitanga; and

   9.3 agreements that allow for investor-state dispute settlement (ISDS) enable foreign investors to enforce rights to protect assets and future profits from measures taken to mitigate the climate emergency, including compliance with te Tiriti o Waitangi, with an associated tangible risk of regulatory chill.

Professor Kelsey's Evidence

10. On 17 March 2025 the Crown sought to defer the hearing of evidence from the Claimants' expert witness Professor Emeritus Jane Kelsey until later in the Inquiry. The Tribunal declined to do so.

11. The Crown now belatedly seeks to negate Professor Emeritus Jane Kelsey evidence altogether, and by implication the claim from Nga Toki

Whakarururanga itself, on a ground that are individually and cumulatively baseless, contradictory and at times, risible.

12. The Crown argues that the question of Rangatiratanga in the international sphere of treaty-making should be left to the Constitutional Kaupapa inquiry Wai 3300. Constitutional issues are at the core of any Waitangi Tribunal inquiry as it assesses whether the Crown has breached the principles of Rangatiratanga, Kāwanatanga and Mutual Recognition and Respect.

13. To exclude consideration of the scope of Rangatiratanga and Kāwanatanga from claimants' arguments, and related evidence, as the Crown proposes, would prevent the Tribunal from inquiring into the most fundamental Tiriti principles that are at the heart of its statutory mandate. How can this Tribunal assess whether the Crown has breached those principles in relation to international agreements, whether climate change or trade and investment agreements, without considering the extent of and basis for the Crown's authority in relation to te Tiriti and He Whakaputanga?

14. Moreover, the Crown contradicts itself when arguing that the question of Rangatiratanga in the international sphere should be left to the Constitutional Kaupapa inquiry Wai 3300, whose themes include "international treaty making and rangatiratanga". The Crown cites in paragraph [12] the Presiding Officer of the Wai 3300 Tribunal explicitly leaving that question in relation to climate change to this Tribunal:

> *"The Presiding Office qualified the theme, noting that issues relating to climate change would not be considered in the Wai 3300 inquiry as they are being inquired into in the Climate Change Priority inquiry."*

15. The Crown then attempts in paragraph [17] to narrow the inquiry into international treaty-making and climate change to "climate change agreements or instruments", being the UNFCCC, Kyoto Protocol and the Paris Agreement, excluding those free trade and investment agreements that directly address and/or directly impact on climate change.

16. This links to the Crown's attempt to restrict the scope of the inquiry, and consequently exclude Professor Kelsey's evidence, by focusing on agreements that are "directly relevant to climate change". Its reasoning is circular, contradictory and implausible.

17. The Crown acknowledges in paragraph [18] the relevance of this evidence to the TSOI: "Has the Crown's conduct (including actions and omissions) in response

to climate change been consistent with Tiriti/Treaty principles?" It then seeks to distinguish the evidence as not being "directly" relevant to climate change. How are the *Agreement on Climate Change, Trade and Sustainability, the Indo-Pacific Economic Framework Clean Economy Agreement*, Article 19.6 "Trade and Climate change" in the *New Zealand European Union Free Trade Agreement*, Article 20.15 "Transition to a Low Emission and Resilient Economy" in the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, among others, not "directly" relevant to climate change?

18. In the next paragraph [19], the Crown says it is not seeking to exclude all trade-related evidence, although that is the direct consequence of limiting the evidence to the three "climate change agreements" it has nominated.

19. Despite that, the Crown says in paragraph [19] that it is not proposing to exclude all "trade-related" evidence. It gives no indication of which agreements it might consider relevant, given that it seeks to restrict the scope to the three "climate change agreements".

20. The Crown would then limit those "trade-related" matters in those unnamed agreements to exclude matters to the extent they were "traversed" in Wai 2522 [para 19]. The logical consequence of that approach would prevent claimants, or the crown, from citing, building on, or applying the arguments in, and findings of, previous Tribunal inquiries in a different context. That is an outrageous suggestion that would fundamentally fetter future Tribunal inquiries. The word "traversed" could even preclude any future tribunals from hearing arguments that were raised in previous agreements but not subject to findings.

21. In her evidence on ISDS, Professor Kelsey provides only the necessary general background for these Tribunal members to understand the nature and issues relating to ISDS. She cites Wai 2522 because the Tribunal's views on ISDS are directly relevant to climate change, including in relation to the chilling effect. She does not seek to re-examine those arguments with a view to securing a different analysis, but to apply the Tribunal's views to the context of the climate crisis.

22. The attempt to exclude Professor Kelsey's arguments and references to the Wai-2522 Third Stage report on the Treaty of Waitangi Exception is equally untenable.

23. As the Tribunal will see from Professor Kelsey's Speaking Notes, tabled on 27 March 2025, she is very clear that she is applying, not "relitigating", the Tribunal's analysis and findings in Wai 2522, especially in relation to ISDS, regulatory chill and the Treaty Exception in light of the climate crisis and more recent developments.

24. In relation to its arguments on engagement and secrecy in paragraphs [20.2] and [22], the Crown appears to fundamentally misunderstand the essence of Professor Kelsey's arguments on two levels:

24.1 The example of the IPEF Climate Change Agreement and the Critical Minerals Dialogue illustrates the failure of the Crown to implement the commitments to Māori and other Indigenous Peoples in the Climate Change and Supply Chains agreements of partnership and participation. That shows the token and cosmetic nature of references to Indigenous Peoples in relation to agreements that are recognised as highly relevant to them. It is not about the Mediation Agreement.

24.2 References in Professor Kelsey's evidence to lack of "genuine" and "meaningful" influence on the Crown's approach to negotiation of these agreements and their implementation go to the Crown's failure to provide active protection in those agreements, which is in issue. The argument here is not that the Crown has breached its obligations in the Mediation Agreement itself. That may be for another time.

25. As regards timeliness, the Crown has had since July last year to assess Ngā Toki Whakarururanga's Statement of Claim and Professor Kelsey's first and fullest affidavit on 21st October 2024. Subsequent affidavits are mainly updates of that original evidence.

26. The Crown suggests that Professor Kelsey might give evidence on these international issues on a "provisional" basis, without having provided any credible ground to support its application. The claimants vehemently reject such an approach.

27. The Tribunal needs to dismiss the Crown's attempt to exclude Professor Kelsey's evidence, and indeed the entire claim of Ngā Toki Whakarururanga, as singularly lacking merit.

DATED at Rotorua this 28th day of March 2025

Annette Sykes

Sam Vincent

Counsel for the Claimants