BEFORE THE WAITANGI TRIBUNAL

WAI 3470
WAI 3342

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Tetahi tono nā **Eru Kapa-Kingi, Te Rawhitiroa Bosch, Anahera Mana-Tupara, Nyze Manuel, Kiri Tamihere-Waititi me Hohepa Thompson** mō ngā tāngata Māori i raro i te tāwharau o "Toitū Te Tiriti" **(WAI 3440)**

AND

IN THE MATTER OF Tētahi tono nā **Pita Tipene, Moana Maniapoto, George Laking, Veronica Tawhai, Donna Kerridge** and **India Logan Riley** mō **Ngā Toki Whakarururanga (WAI 3342)**

BRIEF OF EVIDENCE ELIZABETH JANE KELSEY

Dated on this 5th day of May 2025

ANNETTE SYKES & Co.
barristers & solicitors
Barristers & Solicitors
8 – Unit 1 Marguerita Street
Rotorua, 3010
Phone: 07-460-0433
Counsel Acting: Annette Sykes / Maia Te Hira
Email: asykes@annettesykes.com / maia@annettesykes.com

Introduction

1. My name is Elizabeth Jane Kelsey. I am a Professor Emeritus of the Faculty of Law at the University of Auckland. I hold a Bachelor of Laws (First Class Honours) from Victoria University of Wellington, postgraduate law degrees from Oxford University and the University of Cambridge, and a PhD in Law from the University of Auckland. I was appointed to the Faculty of Law at Auckland University in 1979 as a lecturer, was awarded a personal chair in law in 1997, and retired in December 2021.

2. Throughout my career I have researched and taught on three main areas: Te Tiriti o Waitangi/the Treaty of Waitangi and decolonisation; contemporary law and policy; and international economic regulation.

3. I have presented evidence to a number of Waitangi Tribunal inquiries, including *He Maungo Rongoa: Report on Central North Island Claims* Stage One (Wai 1200) (also submitted in support of the claimants in *Te Waka Kaiora* (Wai 262)); *Wānanga Capital Establishment Inquiry* (Wai 718); *National Fresh Water and Geothermal Resources Inquiry* (Wai 2358); *Te Paparahi o Te Raki* Stage Two (Wai 1400); *Te Rau o te Tika* (Wai 3060); *Climate Change Inquiry* (Wai 3325); and *Tomokia nga tatau o Matangireia – Constitutional Kaupapa Inquiry* (Wai 3300). I was the independent expert for the claimants throughout the *Trans-Pacific Partnership Agreement Inquiry* (Wai 2522).

4. My academic teaching, research, publications, and policy advice to governments internationally examined the neoliberal model of "good regulatory practice" for policy making and legislation, and its incorporation into international trade agreements to which the New Zealand state is a party.

5. This work includes research and publications on previous iterations of the Regulatory Standards Bill, also known as the Regulatory Responsibility Bill. I made submissions on those previous versions and on the consultation document on the current proposed Bill.

6. In February 2010, I was invited to participate in a symposium on the Regulatory Responsibility Bill at Te Herenga Waka - Victoria University of Wellington, which was published in a special issue of the *Policy Quarterly* on the Bill in 2010.

7. I received a Marsden Fund grant in 2010 to research New Zealand's neoliberal policies, which included an extensive review of government documentation on the proposed Bills. The role of the Bill as part of the agenda of institutional and economic constitutionalism was discussed in my book *The Fire Economy. New Zealand's Reckoning*, Bridget Williams Books, 2015.

8. I am also a technical advisor to Ngā Toki Whakarururanga.

9. I have read the code of conduct for expert witnesses in the High Court Rules 2016 and agree to abide by it.

Background

10. Annexed to the Memorandum of Counsel dated 28 February 2025 filed by Ngā Toki Whakarururanga to respond to the Wai 3440 application and seeking participation as an interested party in the inquiry,[1] was an Official Information Act ("**OIA**") request I made to Minister for Regulation David Seymour relating to the proposed Bill.[2] I have attached this response at Appendix "**A**" in the Bundle of Appendices ("**BOA**") to this Brief of Evidence. [3]

11. This Brief of Evidence provides further information relating to that original OIA request.

Tribunal Statement of Issues[4]

12. I have also read the Tribunal Statement of Issues ("**TSOI**") for this Wai 3470 Regulatory Standards Bill Urgent Inquiry. This Brief of Evidence addresses issues 1(d), 2 and 3 of the TSOI. Namely:

    12.1 Is the Crown's policy, and the process it has undertaken, in relation to the Regulatory Standards Bill consistent with te Tiriti o Waitangi and its priniciples?

        12.1.1 To what extent, if at all, are the Crown's laws, policies, actions and omissions in relation to the Regulatory Standards Bill inconsistent with te Tiriti o Waitangi and its principles?

    12.2 To what extent, if any, are Māori suffering or likely to suffer prejudice as a result of the Crown's policy and process in relation to the Regulatory Standards Bill?

    12.3 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 Regulatory Standards Bill?

[1] Wai 3440, #3.1.4 *Memorandum of Counsel responding to Wai 3440 application and seeking interested party status* dated 28 February 2025.
[2] Wai 3440, #3.1.4(a) attached as Appendix "D".
[3] Attached as Appendix "A" in the Bundle of Appendices ("BOA").
[4] Wai 3470, #1.4.1 *Tribunal Statement of Issues* dated 2 May 2025.

Context of this evidence

13. This Brief of Evidence should be read alongside the Memorandum of Counsel dated 28 February 2025.[5] The Memorandum particularly focused on the prejudice to the claimants and other Māori from the potential inclusion of a regulatory takings doctrine that would import into domestic law protections for private property rights, very broadly defined, similar to protections in international trade and investment agreements and their enforcement via investor-state dispute settlement (ISDS).

14. It also dispelled claims that this Bill would somehow benefit Māori.

15. Of particular concern is the potential for the regulatory takings doctrine to have a chilling effect on the advice of officials and decisions of policy makers if it is internalised to their processes, as the consultation document clearly intends. This notion of regulatory chill was a matter on which I gave extensive evidence in the Wai 2522 inquiry in relation to ISDS and on which the Tribunal concurred.

16. The implications for Māori are clear: under this Bill, a red flag would fly for any policies or measures to comply with the Crown's Tiriti obligations that have the potential to impact negatively on an extremely broad range of private property interests in case they triggered the regulatory takings doctrine.

17. It is unclear how a legal challenge might occur, but the lack of detail is not material. The intention here is very clear. Making regulatory takings a core factor for policy and regulatory advice and decisions is clearly intended to deter governments from making decisions that might fall within its scope.

18. The Memorandum quoted in some detail from OIA documents that I had received relating to the proposed Bill, which showed a leading advocate for the Bill had been lobbying the officials to ensure a strong version of regulatory takings was included. This affidavit provides additional information arising from that OIA request and identifies additional prejudice.

Official Information Act requests

19. From November 2024 to now, I have engaged in back-and-forth OIA request email correspondence with Minister Seymour and through his office. I attach these emails in the BOA under Appendix "**B**".

20. I first made the following OIA request on this matter to Minister Seymour on 12

[5] Wai 3440, #3.1.4, above n 1.

November 2024:[6]

I am seeking under the Official Information Act for all documents and communications prepared for, by or to your office relating to the Coalition Agreement policy to pass a Regulatory Standards Act or legislation to similar effect as soon as possible.

21. The Minister's office replied on 19 November 2024, referring me to a range of documents released the previous day by the Ministry for Regulation and noting that the Ministry planned to release further key briefings. They invited me to narrow the scope of my request if I required further information. They would treat that as a new OIA request.[7]

22. On 5 December 2024 I advised the Minister's office that I had worked through the public documents, noting that there were extensive redactions, and made specific requests for:[8]

    22.1 communications with and advice to the Minister regarding engagement with Māori and the Crown's Tiriti obligations (beyond the annex);

    22.2 who has been engaged with in the targeted engagement to date and who the Minister proposes to engage with in a subsequent targeted process;

    22.3 noting the Cabinet paper proposes the Minister will report back to the Committee by February 2025, the proposed timeline from there to the intended passage of legislation;

    22.4 papers and advice from within and outside government relating to the private property right and regulatory takings rule;

    22.5 advice from the Treasury; and

    22.6 advice from the Ministry of Foreign Affairs and Trade relating to international trade and investment treaties (I recognised that this would require additional consultation and take longer).

23. On 18 February 2025 the Minister's office sent me a response to that request.[9] That response appended one email to an official of the Ministry from a Capital Economics email address, the entity of which Dr Bryce Wilkinson, the original drafter of the Regulatory Responsibility Bill, is the director.[10] It attached a paper

[6] See pages 6-9 of the BOA.
[7] See page 8 of the BOA.
[8] See pages 7-9 of the BOA.
[9] See Appendix "B" page 7 of the BOA.
[10] See Appendix "C" at pages 11-13 of the BOA.

from Professor Richard Epstein promoting the regulatory takings doctrine and an AI-generated response to potential questions about the paper.[11]

24. The same day I wrote back to the Minister as follows:[12]

Regarding Item 1, the request relating to communications with and advice to the Minister regarding engagement with Māori and Crown Tiriti obligations. Given documents received in a number of other recent policy matters, I cannot believe that there are no emails or other communications and advice aside from the public documents. Please revisit this request with urgency and provide emails and other communications, including draft ministerial papers etc prepared by officials. I will review the rest shortly.

25. On 17 March 2025 the Minister's office sent the following response to my letter of dissatisfaction of 18 February 2025:[13]

I have reviewed my decision on your request received on 12 November 2024. Two briefings in scope of your original request have been brought to my attention, which were previously missed due to an administrative error. I sincerely apologise for not having previously considered these. The two further documents that are in scope are briefings that were prepared by the Treasury.

26. One of those documents, "Crown Law Advice on a Regulatory Standards Bill" was withheld entirely on the grounds of legal professional privilege. Part of the other document entitled "Short-term measures in advance of the Regulatory Standards Bill" was redacted for the same reason.

27. Attached at Appendix "E" is the Treasury's report on "Short-term measures in advance of the Regulatory Standards Bill" dated 22 March 2024.[14]

28. It indicates that elements of the proposed Regulatory Standards Bill policy, based on the 2021 version of the Regulatory Standards Bill (a Member's Bill in the name of David Seymour MP that was voted down at first reading in the Parliament), may already be being implemented through a parallel process.

29. The recommendations for action made to the Minister in the Executive Summary of that paper were to:[15]

---

[11] The full text of 'Towards a Regulatory Constitution' by Professor Richard Epstein is at Appendix "C", pages 14-61 of the BOA. The full AI-generated response to questions about the paper are in Appendix "C" at pages 61-76 of the BOA.
[12] See Appendix "A" at pages 6-7 of the BOA.
[13] See Appendix "D" at page 77 of the BOA.
[14] See Appendix "E" at pages 79-92 of the BOA.
[15] See Appendix "E" at pages 80-81 of the BOA.

(a) note that, in parallel to policy work on the Regulatory Standards Bill (RSB), there is an opportunity to undertake some short-term measures to support regulatory quality;

(b) note that this briefing recommends some initial short-term and straightforward measures, and that officials will provide advice on additional short-term measures as policy work on the RSB progresses and as the new Ministry for Regulation scales up its operations and resourcing.

(c) agree for officials to progress work on the following short-term measures over the next three months: …

c. For the Ministry for Regulation to draw on some of the principles of the RSB (and other indicators of good regulatory quality) in establishing terms of reference for sector reviews and for evaluating new regulatory proposals.

30. The full Treasury report made it clear that these short-term measures would draw on the 2021 version of the Bill:[16]

[3]. Following discussion with your office, this report also maps the components of the 2021 RSB against existing systems and processes in order to support the identification of short-term measures.

31. There is no specific reference to Te Tiriti o Waitangi anywhere in the Treasury document. It is, of course, unclear whether the redacted legal advice in paragraph [4] on page 9[17] might have related to that.

32. Given that this "short-term measures" Treasury document was from March 2024 and it suggested a three-month preparatory period, it appears that elements of the Regulatory Standards Bill, based on ACT's 2021 version, are already being implemented.

33. I also note that the paper refers to additional obligations beyond those currently operative in Aotearoa New Zealand arising from its recent free trade agreement with the European Union. That was to be the subject of a separate paper, so I am unclear what Treasury considers those to be and how they impact on addressing te Tiriti in regulatory processes and decisions.

[16] See Appendix "E" at page 82 of the BOA.
[17] See Appendix "E" at page 87 of the BOA.

Complaints to the Ombudsman

34. On 28 February 2025, I lodged a complaint regarding this response with the Office of the Ombudsman and asked for urgency. The Ombudsman's Office reports in its letter to me of 28 April 2025 that it had engaged with the Minister's office,[18] which resulted in the release of the two further documents provided to me on 17 March 2025.

35. Following the release of those two documents, the Ombudsman asked if that satisfied my complaint. On 17 March 2025 I forwarded that response from the Minister to the Office of the Ombudsman, noting that:

This is the cover letter and attachment. I note that there is not any further information even relating to the short-term measures referred to in that attachment. It is hard to believe there were no further communications just on that.

36. I made it clear that I did not accept that there were no relevant communications or emails, as I had requested.[19]

37. After the Waitangi Tribunal's decision to grant urgency for this inquiry I followed up with the Ombudsman on 29 April 2025, expressing concern that I had heard nothing further regarding the complaint and asking what was happening.[20]

38. In a letter dated 28 April 2025, sent to me after my email on 29 April 2025,[21] the Ombudsman's office informed me they had written to Minister Seymour to commence an investigation and asked to meet with the Minister's staff. They had communicated my request for urgency.

39. This OIA process has now been dragged out by the Minister and his office for almost six months. It appears to me that the Minister has been taking a minimalist approach to my request, delaying responses and providing piecemeal information.

40. It is unclear how much longer the Ombudsman's formal investigation may take and whether there is any chance that further information will become available to inform the Tribunal inquiry. It seems very likely that it will not, but I will maintain a vigilant approach to the Ombudsman's review.

41. Based on the information available it is clear to me, as an expert in this field, that

[18] See Appendix "F" at pages 93-94 of the BOA.
[19] See Appendix "G" at pages 96-99 of the BOA.
[20] See Appendix "G" at pages 96-99 of the BOA.
[21] See Appendix "F" at pages of the BOA.

allowing the Regulatory Standards Bill to proceed would breach the Crown's obligations under te Tiriti o Waitangi.

42. My evidence has focused on the regulatory takings issue as one example of Tiriti breach and prejudice. However, merely excluding that element from the proposed Bill would not remedy the broader breaches. The exclusion of Māori from effective influence over this process, the exclusion of Te Tiriti and rangatiratanga from the Bill itself, and the assertion of exclusive rights by the Crown in excess of the principle of kāwanatanga, all constitute fundamental breaches of Tiriti principles. The extensive redactions in the Tiriti assessment can, by implication, be taken to confirm the assessment of breach.

43. To conclude, there is more than enough evidence to date that the intention is to override or exclude consideration of te Tiriti in the regulatory process. Both the process and substance of the Bill that seeks to do so are fundamentally flawed from a Tiriti perspective. It should not be allowed to proceed.

_____

Elizabeth Jane Kelsey

DATED at Auckland, this 5th day of May 2025