TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Wai 3300

E PĀ ANA KI
CONCERNING

te Treaty of Waitangi Act 1975

Ā,
AND

Tomokia ngā tatau o Matangireia - Constitutional Kaupapa Inquiry

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HE PĀNUI WHAKAHAU A TE KAIWHAKAWĀ MATUA DR C L FOX

MEMORANDUM-DIRECTIONS OF CHIEF JUDGE DR C L FOX REGARDING JURISDICTIONAL ISSUES RAISED REGARDING THE TREATY CLAUSE REVIEW URGENCY

16 Whiringa-ā-nuku 2025

Hei tīmatanga kōrero / Introduction

1. This memorandum-direction addresses the Crown's Treaty clause review (TCR), specifically the jurisdictional issues raised by the Crown.

Te horopaki / Background

2. On 15 August 2024, the Tribunal released Part I of *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* (the Report). In that part, which includes chapters 1-5 of our report, we considered the development of the TCR policy through to the end of May 2024. We reserved our jurisdiction to report on the review further, should the TCR policy progress.[1]

3. On 16 September 2024, the Tribunal received the Crown filing of the Cabinet paper 'Review of legislation including reference to the principles of the Treaty of Waitangi: purpose and scope of review' as well as the associated Social Outcomes Committee minute and Cabinet minute. The Cabinet paper indicated that next steps in policy work surrounding the review was for officials to prepare advice on governance for the review, a framework for agencies to assess references to Treaty principles in legislation they administer, and options for timeframes and priorities for the review (Wai 3300, #A30, at 1-34).

4. At that time, Crown counsel maintained that the TCR process was at a 'very early stage', and that engagement with Māori was signalled to take place before decisions in relation to particular Treaty clauses were made (Wai 3300, #3.2.49).

5. On 8 November 2024, I directed the Crown to provide an update on the status of the Treaty clause review and file all relevant documents relating to the review by 13 November 2024. I also directed the Crown to continue to file relevant documents as they were produced (Wai 3300, #2.6.32).

6. On 13 November 2024, Crown counsel advised that no further decisions had been made regarding the Treaty clause review process, and that Cabinet was expected to take further decisions in 2025. Crown counsel also sought clarity as to the nature and scope of the inquiry, in light of the likelihood of relevant documents attracting privilege or confidentiality (Wai 3300, #3.2.143).

7. On 20 February 2025, after receiving a number of submissions on the matter from the claimants, as well as further submissions from the Crown, I directed the Crown to file a broad range of documents related to the Treaty clause review – including background papers, Ministerial briefings, and official notes of meetings pertaining to the review (Wai 3300, #2.6.43).

8. On 24 February 2025, the Tribunal received the Crown filing of an affidavit of Caroline Greaney, Deputy Secretary Policy, at the Ministry of Justice, along with three policy documents relating to the progression of the Treaty clause review. The Crown also provided a schedule of 31 further documents, which it sought to withhold on the basis of confidentiality and/or legal privilege. Crown counsel noted that Cabinet had not yet taken

[1] 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 189.

decisions on how the next stage of the review would be implemented (Wai 3300, #3.2.180, #B17, #B17(a) & #B17(b)).

9. On 7 May 2025, the Tribunal received a Crown memorandum where counsel advised that no Cabinet decisions had been made since September 2024 regarding the review process (Wai 3300, #3.2.244). On 6 May 2025, Crown counsel informed the Tribunal that Cabinet had taken decisions confirming the process for progressing the review. Crown counsel filed the Cabinet paper entitled 'Review of legislation including reference to the principles of the Treaty of Waitangi: scope and process refinements', and the associated Social Outcomes Committee and Cabinet minutes. Counsel advised that the Crown no longer seeks to withold certain information previously withheld (Wai 3300, #3.2.245 & #B25).

Crown memorandum of 27 May 2025

10. On 27 May 2025, the Tribunal received a Crown memorandum where counsel noted, inter-alia, their previous submissions regarding the 'jurisdictional basis' for the continuation of this urgent inquiry beyond the release of *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 Polices* (the Report) and the associated inquiry parameters. The Crown accordingly sought an opportunity to respond to claimant submissions filed on these points (Wai 3300, #3.2.246 at [9]).

Submissions received

11. On 3 June 2025, I directed that all counsel representing claimants and interested parties in this inquiry should file submissions, or further submissions by no later than 6 June 2025 (Wai 3300, #2.6.56) *inter-alia* on the Crown's submissions on the 'jurisdictional basis' for the continuation of this inquiry beyond the release of the Tribunal's August 2024 Report.
12. I also confirmed the Crown should file its response to any claimant submissions by no later than 10 June 2025.
13. The Tribunal received the following submissions as to jurisdictional issues are addressed below.

Ngā tāpaetanga o ngā Kaikēreme / Claimant submissions

Woodward Law memoranda

14. On 29 May 2025, the Tribunal received the submissions of Woodward Law on behalf of the Constitutional (New Zealand Māori Council) (Wai 3352) claim (Wai 3300, #3.2.248).
15. Counsel submits that, while the Crown's disclosure of 26 May 2025 will require assessment by claimant counsel and the Tribunal, it is their position that the Tribunal can now finalise its inquiry and final report on the papers without the need for an oral hearing (Wai 3300, #3.2.248 at [13]).
16. Counsel were of the view that the release of the documents provide sufficient information for the Tribunal to complete the final stage of the urgent inquiry. However, it would be appropriate for both claimant counsel and the Crown to make final submissions in light of the newly disclosed material (Wai 3300, #3.2.248 at [14]–[15]).
17. On 6 June 2025, counsel filed further submissions. They support the position of other claimant counsel regarding the Crown not offering any substantive arguments in their 14 January 2025 memorandum. Counsel refer back to their memorandum of 29 January 2025, which sufficiently deals with jurisdictional matters, which they summarise below (Wai 3300, #3.2.175 & #3.2.251 at [5]):

(a) the Report had determined a Treaty breach in developing policy to review Treaty clauses in legislation. The Tribunal recommendation was for the TCR to be put on hold until it could be reconceptualised through collaboration and co-design with Māori;

(b) the Crown is obliged to respond to the findings in the Report, and there is no evidence that the Crown has considered the Report with the necessary care, but has proceeded with the TCR;

(c) this has resulted in the Treaty breach continuing, therefore the claimants are entitled to seek findings from the Tribunal in respect of any further action taken that is not reasonably collaborative with Māori; and

(d) the Report is expressly 'interim' with the Tribunal reserving its jurisdiction to engage further should the TCR proceed as planned.

18. As to scope, counsel wish to clarify that all Acts with te Tiriti o Waitangi clauses being reviewed are included, irrespective of whether the review is happening as part of the TCR or another reform. Counsel submitted that it all amounts to the same action that prejudices Māori as the Crown reviews Treaty clauses without inclusion or codesign from Māori (Wai 3300, #3.2.251 at [6]).

19. Lastly, counsel diverge from the opinion of other counsel as to the necessity of hearing for the remaining evidence. In counsel's submissions, upon resolution of the Crown's confidential documents, there will be sufficient information to complete the final stage of the urgent inquiry on the papers (Wai 3300, #3.2.251 at [10] – [11]).

Joint memorandum of counsel

20. On 9 June 2025, the Tribunal received a joint memorandum of counsel filed by Kaupare Law on behalf of the Ngati Rehia Hapu (Wai 1341) / the Te Reo and Justice System (Rameka) (Wai 3077) claims, and the Constitutional (Matahaere) (Wai 3374) claim. The submissions are supported by other claimant and interested party counsel (Wai 3300, #3.2.252 & #3.2.252(a)).

Scope of inquiry

21. Counsel submit that the Crown is attempting to narrow the scope of the urgent inquiry into the TCR. Crown counsel has suggested that the 'Treaty clause review policy', which was the subject of the August 2024 Report, and is not inclusive of the legislation the Crown excludes from the 'review process' but is limited to the five statutes the Tribunal initially identified (Wai 3300, #3.2.252 at [9]).

22. In counsel's submissions, the Tribunal was not seeking to limit the scope of the inquiry to these five statues by identifying them. Such a narrow interpretation understates the commitment contained in the coalition agreement itself, which forms the basis of this inquiry, namely '…conduct a comprehensive review of all legislation…' (Wai 3300, #3.2.252 at [10]–[11]).[2]

23. The Tribunal refers to this commitment in its entirety when defining the 'Treaty clause review' in the Report. Therefore, counsel submit that the TCR for the purposes of this urgent inquiry 'unquestionably' comprises the initial five statutes as well as all other legislation containing reference to the principles of the Treaty (Wai 3300, #3.2.252 at [12]).

24. Further, counsel submit that unless the Crown can 'unequivocally confirm' that the pieces of legislation they seek to have excluded from the scope of this inquiry will not have its references to the Treaty reviewed, those statutes form part of the 'comprehensive review',

[2] New Zealand National Party and New Zealand First Party 'Coalition Agreement' (2023) at 10.

and are not excluded just because the Crown has separated the statues into different work programmes (Wai 3300, #3.2.252 at [13]).

‘Interim’ report

25. Claimant counsel emphasise that the Tribunal reserved its jurisdiction in respect of the Treaty Principles Bill and the TCR (Wai 3300, #3.2.252 at [15]):[3]

> ‘…to consider the issues again following the filing of the Cabinet paper and regulatory impact statement, and any further evidence or submissions that might be required in response to those documents […] to reconsider these issues should the Treaty Principles Bill be enacted and/or should the Treaty clause review proceed as planned and result in statutory amendments or repeals.’

26. Therefore, in their submissions, counsel state it is open for the Tribunal to continue its inquiry, on the same basis it was initiated; to assess the Crown’s actions in continuing with the TCR in light of the release of the relevant Cabinet Paper and Cabinet Minute, and any further evidence or submissions that might be required in response to those documents (Wai 3300, #3.2.252 at [16]).

27. This approach was adopted by this Tribunal in holding a second urgent hearing regarding the Treaty Principles Bill (Wai 3300, #3.2.252 at [17]).

Hearing

28. The claimants strongly urge the Tribunal to finish its urgent inquiry into the TCR. The claimants key concern is the preservation of the constitutional status and sanctity of these kawenata tapu, He Whakaputanga and te Tiriti o Waitangi, in particular, their ability to guarantee the claimants’ ability to exercise their tino rangatiratanga (Wai 3300, #3.2.252 at [25]).

29. Counsel indicated they will abide the Tribunal’s decision as to whether a hearing is necessary or whether the remainder of the inquiry be conducted on the papers, counsel are open to this (Wai 3300, #3.2.252 at [32]).

Phoenix Law memorandum

30. On 12 June 2025, the Tribunal received a memorandum of counsel from Phoenix Law responding to directions above, seeking leave to file out of time (Wai 3300, #3.2.255).

31. Counsel reiterated their submissions made on jurisdictional issues and scope to their previous memorandum filed 14 January 2025 (Wai 3300, #3.2.255 at [21]).

32. Counsel considers that the Crown has not made any substantive submissions as to the issues of jurisdiction, and that it is merely an attempt to stall the inquiry. Counsel consider that the scope of this inquiry includes all Acts with te Tiriti clauses that will be reviewed, regardless of which workflow different Acts are placed under by the Crown (Wai 3300, #3.2.255 at [24]–[28]).

33. Upon receipt of their submissions, I granted leave for the Crown, via e-mail, to file responses to these submissions by 16 June 2025.

Ngā tāpaetanga o te Karauna / Crown submissions

10 June 2025 memorandum

34. On 10 June 2025, the Tribunal received the reply submissions of the Crown (Wai 3300, #3.2.254).

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[3] Waitangi Tribunal, *Ngā Mātāpono – The Principles: The Interim Report* (Wai 3300, 2024) at 143.

35. The Crown reiterates its position that the Tribunal has comprehensively exercised its jurisdiction by inquiring into the claims that are the basis of this inquiry (Wai 3300, #3.2.254 at [1]).

Jurisdictional issues

36. Crown counsel submits that Cabinet decisions taken since the Report do not warrant further inquiry as they simply establish the processes/settings for implementing the previous decision to have a review (Wai 3300, #3.2.254 at [10]).
37. The Crown accordingly reiterates its position that the Tribunal has comprehensively exercised its jurisdiction having inquired into the claims that are the basis of this inquiry and, through the Report, having reported on them (Wai 3300, #3.2.254 at [11]).
38. Alternatively, the Crown submits that, should the urgent inquiry proceed, the scope of the inquiry should be (Wai 3300, #3.2.254 at [12]):
    (a) clearly defined by reference to matters raised in underlying claims that remain unresolved by the Tribunal's existing analysis and consequent recommendations; and
    (b) be reconcilable with the recommendatory character of the Tribunal's jurisdiction in this inquiry.
39. Counsel for the Crown also seek that these points be addressed by claimant counsel, as they have not been thus far. It does not identify any issue with the information provided or decisions made or link to any claim that remains to be addressed. Further, it presumes that the Tribunal's existing analysis and recommendations in the Report might deficiently respond to those issues, such that further Treaty analysis and further recommendations are now required (Wai 3300, #3.2.254 at [13]).

17 June 2025 memorandum

40. On 17 June 2025, counsel for the Crown filed its response to the memorandum of counsel filed by Phoenix Law (Wai 3300, #3.2.258).
41. Counsel for the Crown submit that the Tribunal 'effectively defined' the TCR when it directly linked its inquiry to the coalition agreement, and as such the Report is closely predicated upon the coalition agreement as the foundation driver for reform (Wai 3300, #3.2.258 at [8]).
42. Therefore, the Crown submits the Tribunal cannot continue this inquiry on an alternative basis which looks at 'any' reform potentially impacting 'any' Treaty clause (Wai 3300, #3.2.258 at [8]).
43. Specifically, the Crown notes the reform regarding the RMA, per their 6 May 2025 memorandum, involves the development of an entirely new legal regime for the management of natural resources. The question of how Treaty interests are provided for as part of that regime, the Crown submits, is not within scope of this inquiry (Wai 3300, #3.2.258 at [9]).
44. The Crown submits that any inquiry into those concerns should be on the papers and focused solely upon whatever ongoing Crown action or policy is said to implicate them (Wai 3300, #3.2.258 at [13]).
45. The Crown observes, however, that (Wai 3300, #3.2.258 at [13]):
    (a) decisions made since the Report simply establish process and further settings for advancing the review agreed to by Cabinet last September; and
    (b) claimants have not identified any issues with those processes and settings.

24 June 2025 memorandum-directions

46. On 24 June 2025, I advised parties that the Tribunal would address the submissions made on jurisdictional issues in the concluding chapter of the Report (Wai 3300, #2.6.59 at [12]). In retrospect, and due to the importance of this matter, I have determined that a separate decision is warranted.

Kōrerorero / Discussion

47. I refer again to our 15 August 2024 report *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*.

48. In this 'Interim' report we recommended that the TCR be put on hold while it is re-conceptualised through collaboration and co-design engagement with Māori. As the report was an interim report, we reserved our jurisdiction to consider the issues again following the filing of the Cabinet paper and regulatory impact statement, and any further evidence or submissions that might be required to respond to those documents. We also reserved our jurisdiction to reconsider the issues should the TCR proceed as planned and result in statutory amendments or repeals.[4]

49. Had we not reserved our jurisdiction to make further findings, we would have been *functus officio*. That is not the case here. That is because we clearly signalled that our jurisdiction remained and that our recommendations were interim pending the final resolution of all issues before us. I further note that we do not accept any submission that the Tribunal based its inquiry or findings on the Treaty clause review exclusively on the coalition agreement; it will be clear from chapter 5 of the interim report that the Tribunal also relied on agency briefings from Te Arawhiti and the Ministry of Justice as well as the Minister of Justice's decisions on 28 May 2025 as to the content of the forthcoming Cabinet paper. In addition, briefs of evidence and submissions from the Crown and claimants informed the Tribunal's interim report. Now that the Cabinet paper of August 2024 and the second Cabinet paper of May 2025 have been filed along with supporting documents, the Tribunal may complete its interim inquiry.

50. However, I do agree with Crown counsel that having removed certain statutes such as the Resource Management Act 1991, the Crown Minerals Act 1991 and the Conservation Act 1987 from the TCR policy process, the further review of those statutes is no longer a part of the TCR policy and that means those statutes fall outside the full scope of our inquiry.

51. Therefore, our final report will only address how these statutes were removed from the TCR policy process.

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[4] 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 189; 'Letter of Transmittal'.

Me tuku atu te Kairēhita i tētehi kape o tēnei whakahau ki ērā ki te rārangi whakamōhio mō Wai 3300, Tomokia ngā tatau o Matangireia – The Constitutional Kaupapa Inquiry.

The Registrar is to send a copy of this direction to all those on the distribution list for Wai 3300, Tomokia ngā tatau o Matangireia – The Constitutional Kaupapa Inquiry.

WHAKAPŪMAUTIA ki Te Whanganui-a-Tara i te 16 o te Whiringa-ā-nuku 2025

Kaiwhakawā Matua Dr C L Fox
Tiamana
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI