

**TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI**

Wai 3300

**CONCERNING**

the Treaty of Waitangi Act 1975

**AND**

Tomokia ngā tatau o Matangireia  
– the Constitutional Kaupapa  
Inquiry

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**MEMORANDUM-DIRECTIONS OF CHIEF JUDGE DR C L FOX REGARDING  
THE TREATY CLAUSE REVIEW**

22 Kohitātea 2025

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## Purpose

1. This memorandum-directions seeks claimant counsel's response to Crown submissions in relation to the Treaty clause review.

## Procedural background

2. On 1 November 2024, the Tribunal received a memorandum filed by counsel for the Ngāti Hine Lands, Forests and Resources (Wai 682), the Te Kapotai and Ngāti Pare Hapū (Wai 1464), and the Waikare Inlet (Wai 1546) claims (Wai 3300, #3.2.119).
3. Counsel sought a direction that the Crown file any further documents relating to the review of legislation containing reference to 'the principles of the Treaty of Waitangi' and that disclosure in this respect be ongoing. Counsel further considered that the review be 'sufficiently progressed that the inquiry into the review can reconvene', and request that the 'inquiry into the Treaty clause review reconvene as a matter of priority'.
4. On 8 November 2024, I directed the Crown to provide an update on the status of the review and all relevant documents relating to the review by 13 November 2024. I also directed that the Crown continue to file relevant documents as they are produced (Wai 3300, #2.6.32).
5. On 13 November 2024, Crown counsel filed a memorandum seeking clarity as to the nature and scope of the inquiry given the size of the review programme, the number of agencies involved, and the likelihood of relevant documents attracting privilege or confidentiality that the Crown may wish to assert (Wai 3300, #3.2.156).
6. On 28 November 2024, I invited claimants to respond to the Crown memorandum by no later than 12 December 2024.

## Claimant submissions

*Tukau Law memorandum (Wai 3300, #3.2.155)*

7. On 12 December 2024, the Tribunal received a memorandum filed by Dr Season-Mary Downs, Chelsea Terei-Tipene, and Majka Cherrington on behalf of the Wai 682, Wai 1464 and Wai 1546 claimants.
8. Counsel submit the inquiry should continue to proceed with urgency due to the wide-ranging impacts and te Tiriti breaches the review will cause, and the Crown's ability to make quick legislative and policy decisions in respect of the review (Wai 3300, #3.2.155 at [4]).
9. Counsel further submit the Crown's decision to progress the Treaty Principles Bill against the findings and recommendations in *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 (Ngā Mātāpono – The Principles)* have left the claimants with little to no trust that the Crown will attempt to honour its te Tiriti obligations to Māori where the review is concerned (Wai 3300, #3.2.155 at [5]).
10. Counsel submit there has been no attempt from the Crown to engage with claimants on the recommendations made in *Ngā Mātāpono – The Principles* and that the public consultation process intended by the Crown is not Tiriti-compliant and does not alleviate the prejudice Māori will suffer as a result of the review. The claimants say there is no way of knowing the extent to which the Crown's wider policy objectives will influence its

decision to carry out public consultation, or whether Māori will be able to have any real impact on the outcome of such a process (Wai 3300, #3.2.155 at [6] – [7]).

11. The claimants do not accept the Crown's submission that completion of the work required by the review is 'not imminent' as they say the Crown has repeatedly maintained that it cannot provide assurances in relation to the timeframes for its policy and legislative decisions. Counsel submit the Crown's inability to do so has created significant time pressures which have inhibited the claimants' ability to fully participate in the inquiry (Wai 3300, #3.2.155 at [8] – [9]).
12. Counsel submit that lifting the urgency in which the Tribunal progresses this inquiry will compromise the claimants' participation and risk the Tribunal's ability to report on the issues in a timely way. Counsel further submit that an 'overly cautious approach should be taken to support and protect the claimants in this inquiry, and Māori more broadly', given the potential impacts of the review and the Crown's 'unilateral approach' to progress it. Such an approach, the claimants submit, will ensure that the Tribunal is able to carry out its inquiry in the most effective way (Wai 3300, #3.2.155 at [10] – [11]).
13. Counsel submit the circumstances outlined at [7] – [12] above support the need for transparency from the Crown and the Tribunal's direction that the Crown file documents relevant to the review as they are produced. Issues of privilege or confidentiality should be dealt with on a case-by-case basis as they have been through the course of the inquiry, and where confidentiality is sought by the Crown but opposed by claimants, the documents should be provided to the Tribunal to determine the nature and extent of the confidentiality sought (Wai 3300, #3.2.155 at [12] – [13]).
14. Counsel note the Crown's Cabinet Paper identifies several workstreams for the review that should be included as part of the Crown's disclosure, including (Wai 3300, #3.2.155 at [14]):
  - (a) any instructions and/or arrangements relating to the governance or oversight of the review;
  - (b) any options for timeframes and priorities for the review;
  - (c) any details or information regarding the implementation of the review, including any regulatory impact statements developed to date; and
  - (d) any engagement to date with Māori and/or other stakeholders.
15. Counsel suggest the Crown should file any documents relating to the review as directed by the Tribunal, as well as updated evidence explaining the Crown's process for the review and rationale for its approach. Counsel also seek an opportunity to file further submissions in respect of a process for the inquiry once they have had an opportunity to review the Crown's documents (Wai 3300, #3.2.155 at [15]).

*Phoenix Law joint memorandum (Wai 3300, 3.2.161)*

16. On 12 December 2024, the Tribunal received a joint memorandum filed by Janet Mason on behalf of the claimants, counsel, and interested parties at Annex A.
17. Counsel submits the findings of *Ngā Mātāpono – The Principles* remain operative and should inform any process going forward. Counsel submits that while the claimants' preference is that the review does not proceed any further, the engagement compliant with te Tiriti o Waitangi/the Treaty of Waitangi requires that the entire process of developing the review should involve Māori, and that a requirement for the Crown to file relevant

documents as they are produced ought to be a part of this process. Counsel seeks a direction to this effect (Wai 3300, 3.2.161 at [7] – [15]).

18. Counsel submits the review should remain part of an urgent hearing as the Crown's conduct puts Māori in a position where they are not appropriately engaged and must then respond urgently to Crown updates, often with truncated timelines (Wai 3300, 3.2.161 at [16]).
19. Counsel refers to the Crown's position that certain documentation would likely attract privilege or confidentiality that the Crown may wish to assert (Wai 3300, #3.2.143 at [5.4]). However, counsel also submits that where confidentiality applies it should do so on a similar basis to the Tribunal's earlier decisions regarding the Treaty Principles Bill (Wai 3300, 3.2.161 at [17] – [19]).
20. Counsel submits that the Crown's previously indicated that no further decisions have been made by the Minister of Justice omits reference to decision-making other than by the Minister of Justice. Accordingly, counsel seeks a direction that the Crown make full disclosure of the documents and decision-making proceeded and/or made by people other than the Minister of Justice (Wai 3300, 3.2.161 at [20]).
21. Counsel seeks a further direction that the Crown file an affidavit updating the Tribunal as to the status of the review and submit this affidavit should cover (Wai 3300, #3.2.161 at [21]):
  - (a) an update on decision-making to date, at all levels, including by the Minister and/or officials;
  - (b) what work the Crown is currently engaged in in relation to the review;
  - (c) the anticipated next steps for the review, including the expected timing of those steps;
  - (d) clarification on what the roles and responsibilities of the various Crown agencies will be;
  - (e) whether the review will result in an omnibus Bill, or individually deal with each te Tiriti reference in multiple Bills; and
  - (f) evidence of how officials have incorporated the *Ngā Mātāpono – The Principles* into their work on the review.

*Tamaki Legal joint memorandum (Wai 3300, #3.2.158)*

22. On 12 December 2024, the Tribunal received a joint memorandum filed by Darrell Naden and Ashley Johns on behalf of the interested parties at [1](a) – [1](q) of the memorandum.
23. The interested parties support the submissions set out in the Phoenix Law memorandum at [12] – [16] above and submit the Crown has determined the purpose and scope of the review without Māori input despite the Tribunal's findings in *Ngā Mātāpono – The Principles*. 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' (Wai 3300, #3.2.158 at [6] – [8]).
24. Counsel submit the entirety of the Crown's Treaty clause review programme should be within the scope of the inquiry as well as the Crown's consultation process to date. Counsel further submit the scope of the inquiry should be broadened to include an

evaluation of the Treaty clauses' compliance with te Tiriti principles (Wai 3300, #3.2.158 at [15] – [20]).

25. It is also submitted that the wider Constitutional kaupapa inquiry is not an appropriate alternative forum for hearing the interested parties' complaints as that inquiry will not address the immediate issues at hand 'before there is substantive and/or legislative change' (Wai 3300, #3.2.158 at [21]).
26. Counsel support the submissions set out in the joint memorandum filed by Phoenix Law at [12] above with respect to confidentiality and the provision of further documentation. Counsel submit the Crown should disclose the generated material to date in accordance with the Tribunal's direction and that, in the event the Treaty clause review is phased, discovery could be similarly phased (Wai 3300, #3.2.158 at [22] – [24]).

### **Crown response to claimant submissions**

#### *Invitation for Crown response*

27. On 17 December 2024, I invited the Crown to file submissions in reply to those at [7] – [26] above by no later than 14 January 2025. This was communicated via email from the Tribunal's Registrar.

#### *Crown memorandum (Wai 3300, #3.2.160)*

28. On 14 January 2024 the Tribunal received a memorandum filed by the Crown.
29. The Crown advises it has received *Ngā Mātāpono – The Principles*, including the recommendation that the review be put on hold pending its reconceptualization. The Crown advises that, as stated in Cabinet decisions provided on 16 September 2024, it will undertake the proposed policy review, however Cabinet decisions on next steps are yet to be made (Wai 3300, #3.2.160 at [13]).
30. The Crown submits the Tribunal's jurisdiction under s 6(1) of the Treaty of Waitangi Act 1975 relates to actual Crown action and policy or proposals for Crown action or policy and that it remains unclear what Crown actions or proposed actions remain unaddressed by the findings in *Ngā Mātāpono – The Principles* (Wai 3300, #3.2.160 at [11] – [12]). The Crown submits clarity from the claimants as to actual Crown action or actual Crown proposal to be inquired into is important not only to establish jurisdiction but also (Wai 3300, #3.2.160 at [14] & [21]):
  - (a) so that the Tribunal has a clear basis for approaching the inquiry including assessing whether the criteria for an urgent hearing are met;
  - (b) to allow the Crown to assess issues of relevance in the discharge of any disclosure obligations; and
  - (c) to support efficiency in the inquiry process, including to ensure that disclosure obligations do not unduly induce adversarial contests impeding the inquiry process.
31. Crown counsel further submit that, unless claimants identify the Crown action, policy, or proposal that remains to be inquired into, their proposal that the Tribunal adopt a precautionary approach invites the Tribunal to assume a role of supervising the Treaty clause review process and takes the Tribunal beyond its statutory function (Wai 3300, #3.2.160 at [16]).

32. With regard to the claimants' requests that the Tribunal direct the Crown to provide relevant documents 'as they are produced' and an affidavit on policy processes still to be decided by Ministers, the Crown submits that (Wai 3300, #3.2.160 at [17] – [20]):

- (a) Notwithstanding the Tribunal's information-gathering powers, such requests are in furtherance of the Tribunal's jurisdiction to inquire into actual, identified Crown actions or proposals. The Crown submit that the Official Information Act provides the basis for the provision of official governmental information on policy programmes where the Tribunal's jurisdiction and information-gathering powers are not engaged.
- (b) The request to provide Crown documents 'as they are produced' does not recognise that policy development is iterative and nor does it accommodate constitutional principles such as Cabinet confidentiality and collective responsibility, and would likely result in repeated, contested claims of confidentiality.

### **Joint memorandum of counsel seeking leave to file response**

33. On 21 January 2025, the Tribunal received a joint memorandum filed by Mr Naden and Ms Johns on behalf of claimant and interested party counsel listed in Appendix A of this memorandum (Wai 3300, #3.2.162 & #3.2.162(a)).

34. Counsel submit that the matters raised by the Crown warrant a response, and seek leave to file further submissions responding to the Crown's 14 January 2025 memorandum by 29 January 2025 (Wai 3300, #3.2.162 at [2]).

35. Counsel advise they will endeavour to co-ordinate and file joint submissions in the interests of efficiency and to avoid unnecessary duplication (Wai 3300, #3.2.162 at [3]).

### **Decision**

36. I now invite claimants to respond to the Crown memorandum of 14 January 2025 by no later than **5pm, Wednesday 29 January 2025**.

37. I thank counsel for their efforts to file joint submissions and encourage them to do so where possible to avoid unnecessary duplication.

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 22 o te Kohitātea 2025



Kaiwhakawā Mātua C L Fox  
Tumuaki

**TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI**