

BEFORE THE WAITANGI TRIBUNAL

**WAI 3300
WAI 1194
WAI 1212
WAI 3342
WAI 2494
WAI 2872**

IN THE MATTER OF

the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

Tomokia ngā tatau o Matangireia (WAI 3300)

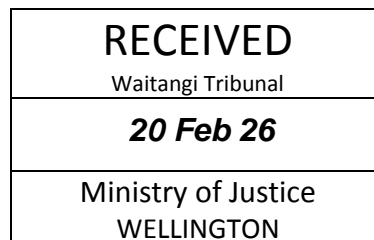
AND

IN THE MATTER OF

a claim by **Colleen Skerrett-White, Timitepo Hohepa, and Te Ariki Derek Morehu** on behalf of **Ngāti Te Rangiunuora** who are supported by **Ngāti Pikiao (Wai 1194 and Wai 1212)**

MEMORANDUM OF COUNSEL IN RESPONSE TO CROWN'S STATEMENT OF POSITION

Dated on this 20th day of February 2026



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AND

IN THE MATTER OF

a claim by **Pita Tipene, Moana Maniapoto, George Laking, Veronica Tawhai, Donna Kerridge and India Logan-Riley** on behalf of **Ngā Toki Whakarururanga (WAI 3342)**

AND

IN THE MATTER OF

a claim by **Donna Awatere-Huata** of Ngāti Porou, Ngāti Whakaue and Ngāti Hine, on behalf of herself and all Māori (**WAI 2494**)

AND

IN THE MATTER OF

a claim by **Dr Leonie Pihama, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira and Te Ringahuia Hata** (**WAI 2872**)

TĒNĀ E TE TARAIPUNARA:

Introduction

1. This Memorandum of Counsel is filed on behalf of the following claim and respective claimants:
 - 1.1 **Wai 1194/1212** – a claim by Colleen Skerrett-White, Timitapo Hohepa, and Te Ariki Derek Morehu on behalf of Ngāti Te Rangiuuora who are supported by Ngāti Pikiāo;
 - 1.2 **Wai 3342** – a claim by Pita Tipene, Moana Maniapoto, George Laking, Veronica Tawhai, Donna Kerridge and India Logan-Riley on behalf of Ngā Toki Whakarururanga;
 - 1.3 **Wai 2494** – a claim by Donna Awatere-Huata of Ngāti Porou, Ngāti Whakaue and Ngāti Hine, on behalf of herself and all Māori; and
 - 1.4 **Wai 2872** – a claim by Dr Leonie Pihama, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira and Te Ringahuia Hata.
- (“the Claimants”)

Background

2. On 13 February 2026, the Crown presented its statement of position for the wānanga ā rohe phase of Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry (Wai 3300) via AVL. Mr Andrew Kibblewhite, the Secretary for Justice, led the presentation for the Crown. He was supported by Caroline Greaney, Deputy Secretary, Policy and Tony Fisher, Pou Whirinaki at the Ministry of Justice, and Andrew Irwin, counsel for the Crown. Following presentations of the talking points filed with the Tribunal a series of questions was asked by the Tribunal Panel.
3. A draft transcript was distributed by the Registrar of the Waitangi Tribunal which synthesised those responses. Counsel has not had time to check the correctness of that transcript nor to assess the written record against the AVL record.
4. This response has been prepared in haste to meet the Waitangi Tribunal timeframes for response and has meant liaison with claimants has been limited. It is prepared on the expectation that there will be an opportunity for a more considered response as the Tribunal process and hearing planning is crystallised to ensure fairness is afforded to the claimants to counter several of the assertions of Te Tiriti/Treaty principle and constitutionality that have been highlighted while others have been completely ignored.

Response to Crown Statement of Position

5. One of the stark matters which arises is that the Crown does not address the difference between Te Tiriti o Waitangi and the Treaty of Waitangi, and treats the texts as interchangeable. Nor does it address the relationship between Te Tiriti and He Whakaputanga as continuity in understandings of tino rangatiratanga.
6. Te Tiriti is reduced to a historical artefact,¹ that is irrelevant to the principles the Crown says are the foundations of the constitution. This approach is the antithesis of settled jurisprudence on these matters.
7. The Crown's response to the following question of Grant Phillipson makes this explicit:²

"I was thinking how is the Treaty a source of any of those principles. They look to me more like it was the United Kingdom that was the source of those constitutional principles."

8. Answer, by Crown counsel Mr Irwin is also relevant:⁴

"[T]he Crown sees the Treaty as one of those critical steps in the way in which sovereignty, both sovereignty was applied in New Zealand. So, it is there that the founding point of government in New Zealand. And yes, I don't think that the Crown would pretend that the Treaty is the source or [sic] the constitutional principles that we have set out. ... So yes, I think you are right, the source of those principles stem from the Westminster British Parliamentary System. ... I think the Crown's position is that the Treaty was one of the steps by which the Crown sought Māori consent for British Government to occur in this country."

9. In other words, the Crown expects the Tribunal to set aside its findings in Wai 1040 and accept the Crown secured sovereignty without offering any argument to legitimate that.
10. The rejection of the findings in Wai 1040 is the starting point for the Crown's position. What follows is a bootstraps argument. Having assumed that the Crown has sovereignty without providing any justification for that assumption, the officials make it clear that it is for the Crown, meaning the Government, to decide what if any response to make to any finding that accords with Wai 1040 that there was no cession of sovereignty and consequent recommendations.

¹ Wai 3300, #B14(d) *Appendix D: Talking points for presentation of Crown statement of position, 12 Feb 26 at [13], Wai 3300, # 4.1.14 Draft transcript for the Wai 3300 - Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry Crown's presentation of its statement of position for the wānanga ā-rohe phase held via AVL on Friday 13 February 2026, 18 Feb 26 p.9 at line 12-15.*

² Wai 3300, #4.1.14 at p.35 line 1.

⁴ Wai 3300, #4.1.14 at lines 11-24.

11. The officials avoid addressing the core constitutional questions on the grounds that they have not sought instructions from Ministers [see talking points [8], Transcript p8]. They could have sought those instructions – although the current Coalition Government, as with previous Crown positions in Wai 1040, would simply reiterate what the officials have articulated as the unquestioned “established constitutional principles”, being the status quo.
12. Claims of a “dynamic, ongoing relationship ... with mutuality and reciprocity at its core” need to be seriously scrutinisedis pure fiction.⁶ So is the assertion that there is or has been Māori participation in wide constitutional arrangements through democratic institutions that “evolved” since 1840.⁷
13. The reality is a systemically biased process starting with the individual property and male franchise to the quarantine of Māori votes in Native seats to universal franchise once settlers were in a clear majority. Having denied the exercise of the constitutional authority of mana or rangatiratanga through what Moana Jackson refers to as the concepts, sites and specifics of power, these matters were the subject of some discussion by the claimant testimony for Wai 3395 where Professor Kelsey⁸ relying on affidavit evidence from the late Dr Moana Jackson highlighted how the Crown suppressed resistance to colonial rule, and marginalised Māori in the colonised structures of government.
14. The Crown claims there must be “broad support” for constitutional change. The Crown can only reach that position by distorting Article 3 to take precedence over Article 2 and ignoring Article 4, and all the evidence that supports the Wai 1040 tribunal’s interpretation.
15. The Crown has reconceptualised the Tribunal’s three themes of mana motuhake and tino rangatiratanga; kāwatanga and sovereignty; and dual governance to suit its own theory of the constitution, as sovereignty and legitimacy; Māori autonomy and self-government; and Parliamentary sovereignty and systems.⁹
16. Each of their “principles” is flawed. For example the Inquiry into the Treaty Principles Bill¹⁰ proposal questioned the assertion that everyone is equal before the law; because the law is not equal in concept, substantive effects, or practice.

⁶ Wai 3300, #B14(d) at [14].

⁷ Wai 3300, #B14(d) at [15].

⁸ Wai 3325, #A14(a) *Exhibits to the affidavit of Elizabeth Jane Kelsey dated 21 October 2024* Exhibit "A" - Wai 2522, excerpt of Document B9(a), Brief of Evidence of Moana Jackson as appended to his Second Brief of Evidence dated 17 October 2019.

⁹ Wai 3300, #B14(d) at [31]-[32].

¹⁰ Waitangi Tribunal *Tomokia Ngā Tatau o Matangireia – Interim Report of the Constitutional Kaupapa Inquiry Panel on the Crown’s Treaty Principles Bill and Treaty Clause Review Policies* (Wai 3300, 2024) at pp 165-166.

So how can equality within unequal law be equality? Hence the Tiriti principle of equity which has been developed in a series of cases relating to both treaty grievance and analysis of consequence of the uneven impact of Crown practice on communities.

17. Specifically in relation to our claimants' evidence on international treaty-making, the Crown's peremptory summary of the arguments in Talking Point [51] and Transcript p.19 lines 6-12, is utterly disingenuous. There is not even a pretence of engaging with the arguments. Pages 16, 41, 49 of the transcript are the particular discussions that illustrate this deliberate omission.
18. The Crown recognises that the Tribunal has incorporated this matter under the theme "rangatiratanga and kāwanatanga, focusing on constitutional power and process for international treaty-making."¹¹ Then it ignores the arguments and evidence from our claimants that address those questions. It reframed and downgrades them to matters of "adequate consultation", "free prior informed consent", delegations and veto when it is about the power to treat with other nations, especially in matters that have major domestic consequences for other duties, responsibilities, rights and interests protected under te Tiriti.¹²
19. It further selectively engaged the issue by referring only to the domestic legal effect¹³ ignores the extraterritorial enforcement and penalties that apply for non-compliance with international trade and investment treaties, including profound consequences for matters such as hua parakore, rongoā, taonga species and GMOs, culture and creatives, data sovereignty and many others.
20. The Crown's response to this inquiry generally, and the specific issues raised by our claimants, reflects its ongoing contempt for Te Tiriti me He Whakaputanga. The challenge for the Tribunal it to avoid trying to appease the Crown, especially in the current hostile and toxic environment, and remain true to its mandate, to the findings in Wai 1040, Te Rohe Potae, Te Urewera that Māori never ceded sovereignty and to the imperative to address that constitutional imbalance today.

Conclusion

21. The Crown is effectively saying that Article 2 must be read down in light of/alongside Article 3; that the Rule of Law is to be understood in the 'thin' (rather than the 'thick') sense of not sitting above and substantively limiting Parliamentary sovereignty. Furthermore, the doctrine of the Separation of

¹¹ Wai 3300, #B14(d) at [50], Wai 3300, # 4.1.14 at p.16 lines 3-5.

¹² Wai 3300, #B14(d) at [51], Wai 3300, # 4.1.14 at p.19 lines 6-12

¹³ Wai 3300, #B14(d) at [52.1],], Wai 3300, # 4.1.14 at p.16 lines15-17

Powers, as a constitutional concept is being watered down to effectively deny appropriate recognition of the limits and constraints Te Tiriti o Waitangi demands in the constitutional settings of this nation. There is an inevitability in that understanding as a result of our acceptance of representative democracy (ignoring for example the abuse of how that is operating to protect fundamental human rights and freedoms elsewhere as for example what is occurring in the U.S. A.) Even on this essentially Westminster approach representative democracy exists alongside constitutional values and principles that trump legislative supremacy by decision of the courts (see *Marbury v Madison*)¹⁴ not of the legislature. It is disappointing that the Crown has offered this statement of position as one that is meritorious and consistent with a fair construction and interpretation of Te Tiriti o Waitangi/The Treaty of Waitangi.

22. The Treaty principles are a thin thread that connects Te Tiriti o Waitangi as a constitutional document and the existing body of law and policy. The Principles of the Treaty of Waitangi Bill sought to cut that thread, because it would install a set of principles that do not reflect the content of Te Tiriti o Waitangi (or the Treaty of Waitangi).
23. If the approach contended for by the Crown is accepted it would leave Te Tiriti o Waitangi and existing law and policy disconnected, and adrift.
24. Existing law and policy in the parliamentary or Crown sphere would be left to move further and further away from honouring Te Tiriti o Waitangi. There is no good reason to cut that thread and cutting that thread would do great damage to Māori, to relationships between Māori and non-Māori, and to our constitutional framework.
25. Since the 1980s the concept of the “principles of the Treaty of Waitangi” has been consciously developed by the Crown in bad faith to redefine Te Tiriti o Waitangi/The Treaty of Waitangi so as to legitimise its unitary exercise of sovereignty. As highlighted by our claimants the device of the “Treaty principles” has become the principal means by which the Crown circumvents Te Tiriti o Waitangi, including the guidance it provides to Crown officials and agencies to perpetuate the violation of Te Tiriti.
26. The claimants urge the Tribunal not to fail them by succumbing to threats from the Crown and retreating from the tika position on the constitutional relationship of tino rangatiratanga and kāwanatanga adopted in recent inquiries. The stakes are far too high. If the breach of the principle of rangatiratanga and mutual

¹⁴ *Marbury v. Madison* 5 US (1 Cranch) 137, at pp 176–78 (1803) (also reported as 2 L. Ed. 60).

recognition and respect are legitimised by the Tribunal, it would create a precedent for the Crown to ignore Te Tiriti and its principles in any and all actions in the future that go to the very heart of Te Tiriti o Waitangi itself.

27. The key touchstone for the Tribunal is plainly Te Tiriti / the Treaty and its principles, but the Tribunal is also not bound to strict legalities and has looked at norms of sound policymaking, other legal standards, and whether policies achieve their own expressed rationales. The jurisdiction was the first to note the importance of tikanga maori as its own body of law in any interpretive exercise too.
28. Case law on Treaty principles makes clear that the concept of Treaty principles is tied to the Crown-Māori relationship. More recent decisions of the highest courts have shown a greater willingness to refer to the terms of Te Tiriti directly, and to consider how to delineate spheres of authority of Māori and the Crown.¹⁵
29. We conclude with commentary from the Te Rohe Potae Tribunal when it noted:¹⁶

We consider that the Treaty represented a coming together of two peoples, each with their respective cultural, legal, and political traditions. The Treaty therefore cannot be understood only on the basis of what British officials or the Crown believed it to mean in 1840 ; nor can it be understood solely in terms of its meaning and effect under English law at that time. The rangatira who signed the Treaty had pre-existing systems of law (tikanga) and authority (mana and tino rangatiratanga), which could be modified only with the free, informed consent of Māori communities. What Māori consented to depended on what they understood the Treaty to mean, and this inevitably reflected the explanations that were made to them in their own language, and which they interpreted through the lenses of their own assumptions about law and authority. The Treaty's meaning and effect can therefore be found in the common ground between Māori and British understandings – a common ground that provided for the Crown to exercise a new governing power, but one that did not interfere with the rights of Māori to continue to govern themselves in a manner consistent with their own mana and tikanga ; for the Crown's new power to be used in a manner that protected Māori interests ; and for the relationship to provide for mutual benefit to Māori and settlers alike. Inevitably, much remained to be negotiated, in particular about the potential overlaps and tensions between Crown and Māori spheres of influence. It is from these key elements of the Treaty transaction that we can derive principles that should be applied to the claims before us.

30. Thus, the kāwanatanga and rangatiratanga spheres provided for in the Treaty/ te Tiriti have led to singular and overlapping authorities. For Māori, the

¹⁵ Wai 3300, #A9(d) at [65-67].

¹⁶ Waitangi Tribunal, *Te Mana Whatu Ahuru*, (Wai 898, 2023) vol 1, p214

rangatiratanga sphere led to movements such as the Kiingitanga and Kotahitanga. For the Crown it led to the introduction of the Westminster form of government. At times both have depended on the other to progress the mutual benefit of all New Zealanders such as during the First and Second World Wars.¹⁸

31. The claimants seek definitive findings that:

31.1 The constitutional authority and responsibilities of Mana Motuhake and Tino Rangatiratanga in Te Tiriti o Waitangi – including in relation to laws, values, governance arrangements, political institutions and processes, economic systems, and treaty making, and the principles drawn from it – need to be exercised on equal terms with Kāwanatanga operating in its sphere of authority; and

31.2 Reiterate the findings in Te Raki Stage Two, Te Tiriti o Waitangi is an international treaty between two sovereignty states in which Māori did not cede their sovereignty, and which created a relationship of rangatiratanga and kāwanatanga within a unitary state.

DATED at Rotorua this 20th day of February 2026

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¹⁸ Waitangi Tribunal, *Nga Matapono* (Wai 3300, 2024), p 26.