NGĀ TOKI WHAKARURURANGA

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Ngā Toki Whakarururanga was established through a Mediation Agreement with the Crown in 2021 to resolve the issues of engagement and secrecy in the Wai 2522 Waitangi Tribunal Inquiry into the Trans-Pacific Partnership Agreement (TPPA) and the subsequent Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

That formal Agreement mandates us to bring a Te Tiriti o Waitangi perspective to the trade-related policy space, so as to advance and protect Māori duties, responsibilities, rights and interests under Te Tiriti o Waitangi and set the bar for achieving trade policy, negotiations and agreements that are consistent with Te Tiriti.

This mandate necessarily involves the interface between domestic policy decisions and international trade and investment policy and agreements. Our kaihautū (governing body) and pūkenga (advisors) are drawn from different communities that are impacted on by these agreements.

In relation to this Bill, these issues particularly involve hua parakore production and verification, and production and practice of rongoā. Last year we conducted a number of activities related to genetic engineering (GE) and trade agreements under a Te Puni Kokiri funded project for Te Pae Tawhiti, including co-hosting a conference He Rongo Whenua with Te Waka Kaiora, and education on rongoā and trade agreements at the ACC Rongoā Māori conference. More recently, we have developed resources to enable hāpori Māori to understand and make submissions on this Bill, which were distributed at Waitangi. This submission utilises those resources.

Genetic Modification is a fundamental Tiriti issue

The very concept of rights or ownership over plant varieties denies Māori ways of seeing and engaging with the world – we do not own the plants, they are our brothers and sisters with their own rights and mana. A Tiriti-based starting point would put whakapapa, tikanga, mātauranga and kaitiakitanga at the heart of decisions, and vest the responsibility to safeguard them and the mana to make the necessary decisions in ngā rangatira and tohunga. These are not duties that can be partly performed. Failure to maintain effective protections will have enduring consequences for taonga species and the practices and benefits that depend on them, whether safe foods, regenerative farming or rongoā.

There are different views among Māori on precisely what a tikanga-based approach means. Some Māori see the technology as just technology and neither good or bad; what makes it bad is how it is used, by whom. Others draw the line at the technology itself, because it originates from a paradigm of patriarchal science founded on a reductionist mechanistic standpoint that perpetuates domination of 'man' over nature. These technologies sever Māori from being a part of nature and move to a realm that elevates humans over nature. This is complex and there are many layers to consider, as the Royal Commission on Genetic Engineering and Wai 262 recognised. That's why it is essential to have open, comprehensive Tiriti-based engagement on whether, and if so how, GE should be approached.

By now, Te Pae Tawhiti should have produced a Tiriti-compliant tikanga based approach to GE. Te Waka Kaiora pressed the GE issue in the Wai 262 claim and have continued to develop Hua Parakore seeds, food production and certification as an exemplar of rangatiratanga and kaitiakitanga. The previous government launched Te Pae Tawhiti to finally begin to implement the Wai 262 report, including changing the existing Hazardous Substances and New Organisms Act 1996 to meet Tiriti responsibilities. That didn't happen. Instead, this government is undoing everything it can on Te Tiriti.

Officials showed they know that GE strikes the heart of tikanga and whakapapa:

> *"Many Māori cultural practices are inextricably linked to the New Zealand environment and its flora and fauna. Traditional Māori concepts of kinship (whanaungatanga) that underpin these practices extend into the natural world, to both specific species (often referred to as taonga species) and places. These whanaungatanga relationships also create an obligation of kaitiakitanga, often translated as guardianship or stewardship. Whakapapa (genealogy) plays a critical role in obligations of kaitiakitanga, and therefore there is the potential for these relationships to be disrupted by the use and impact of gene technologies. This relationship with taonga species has been acknowledged by the Crown across multiple Treaty settlements." (pp. 33-34)*

The officials recognised that Māori have duties, and the Crown has obligations, affirmed in Te Tiriti relating to GE:

> *"The proposals also have impacts for Māori, as use of gene technology engages Māori rights and interests under te Tiriti o Waitangi / the Treaty of Waitangi. These include rights to exercise kaitiakitanga (often translated as guardianship) for specific species and places, and for equitable access and outcomes in areas such as health and economic development." (p.7)*

Yet this Bill denies any place for mātauranga, tikanga, whakapapa, kaitiakitanga, and rangatiratanga. It is the antithesis of those powers, values, responsibilities and processes: a risk-based approach that is concerned only with human health and environment impacts, to be assessed using techniques and standards sourced exclusively in western science, and to be determined by the Crown and its appointees. The model assumes that most GE technology, activity or product is safe or can be made safe by imposing conditions.

Trade agreements lock Aotearoa New Zealand into that model, especially through enforceable rules on Sanitary and Phytosanitary measures and Technical Barriers to Trade. Māori had no role in devising those rules, which already constrain rangatiratanga and kaitiakitanga. However, their impact has been limited by the adoption of a GE free approach in Aotearoa. Once GE is permitted in the manner proposed in this bill, recent litigation shows those rules will make it impossible to put GE back in the box and to deliver on Te Tiriti.

This Bill is a deliberate attack on Te Tiriti

The Regulatory Impact Statement (RIS) said the new GE regime should "appropriately consider Māori rights and interests under the Treaty of Waitangi". In practice, those rights and interests have been obliterated. Ministers instructions meant officials could not consider options that would best protect Te Tiriti:

> *"Given time and scope constraints, officials did not analyse a wide range of options on how to best protect Māori rights and interests."* (p.7)

Clause 4 asserts that the Bill recognises and respects the Crown's obligations under "the principles of the Treaty", as the Crown defines them, by

- establishing a Crown-appointed Māori Advisory Committee that has a broad range of functions, but no decision-making authority;
- requiring the Regulator of GE approvals to "have regard to" the Māori Advisory Committee's advice, including whether authorising an activity creates a risk to the environment that might "materially affect a kaitiaki relationship"; and
- include the identification of that adverse effect in a risk assessment of an activity that relates to a regulated GE organism, alongside other matters.

There is no instruction to the Registrar, Minister or anyone to comply with Te Tiriti o Waitangi or even the Crown's own Treaty principles.

Officials were very aware that the process and substance of this Bill would be seen to breach the Crown's Tiriti obligations, and expected many Māori to oppose the Bill as a breach of Te Tiriti:

> *"Engagement with Māori representatives has indicated that there may not be widespread agreement to a regulatory approach that removes oversight of modifications made to species of importance to Māori, including native flora, fauna, and taonga species as this may not uphold te Tiriti o Waitangi/ the Treaty of Waitangi obligations."[168]*

Ministers told the officials that Māori should not have any decision making role:

> *… ministers' preferred approach is that the Māori Advisory Committee under the proposed regime will not have a decision-making role. MBIE considers that this approach is unlikely to meet Māori aspirations for partnership in decision making in this area.* (p.7)

No engagement with Māori

The Crown did not engage with Māori over the intention to enable the release of GMOs. The Coalition Agreement just said it is going to happen.

> "*MBIE did not publicly consult on the proposed regulatory changes or engage broadly with Māori."* (p.8) *"No formal consultation or full engagement with Māori was undertaken to shape, test, inform, and refine proposals"* (p.10).

Officials admit that:

> "*More fulsome consultation may have:*
> • *enhanced policy development by identifying opportunities and concerns, and introducing addition perspectives and information at key points of the process, and enabled refinement and iteration of proposals, and*
> • *enabled increased or more comprehensive understanding and analysis of the diverse Māori interests, opportunities, and concerns on gene technology.*(p.10)

There was a "targeted engagement" to implement the pre-determined Coalition policy. The officials had several advisory groups (pp.123-127). A Technical Advisory Group, mainly of academics, included Associate Professor Maui Hudson, University of Waikato | Te Whare Wānanga o Waikato and Ariana Estoras (Director Māori Strategy, Research and Partnerships, AgResearch). There was a larger Industry Focus Group from the biotech, agriculture and other industry sectors.

A Māori Focus Group apparently met twice. It remains active until 31 December 2025. There was also one Māori researchers' hui, along with one-off engagements with a long list of mainly corporate and research "stakeholders". But, as MBIE explained, the Māori Focus Group's role was just to give advice.

> *"The Māori Focus Group supported MBIE to identify and understand Māori rights and interests for inclusion in the policy advice to Government. The group:*
>
> - *discussed and provided a range of advice, a Te ao Māori lens on areas such as taonga species of flora, fauna and animal species, commercial interests, and whānau.*
> - *provides advice and guidance to MBIE on the matters a new gene technology regulator might consider in order to safeguard and enable the interests of Māori.*
> - *advises on the process by which a new gene technology regulator might use to involve Māori in decisions that impact on their interests."*

It is clear that the Focus Group did not agree to the Bill. MBIE summarised a range of views from those Māori they did engage with:

> *"• Māori should have oversight of genetic modifications made to species of importance to them (including native flora, fauna, and taonga species).*
>
> *• There is interest in the opportunities gene technologies may provide in healthcare, conservation and economic development, and it was considered very important that, if restrictions on gene technologies are reduced, Māori can access and benefit from gene technologies and GMOs.*
>
> *• There need to be robust processes for decisions to release GMOs into the environment and post-release monitoring to ensure there are not flow-on effects to non-modified species.*
>
> *• A key interest raised in stakeholder consultation was around benefit sharing, which is not directly addressed by the proposals as it is typically considered in subsequent processes such as plant variety rights and patenting."* (p.8)

The RIS assessed almost every element of the Bill as negative for Māori

MBIE prepared a Regulatory Impact Statement on the Bill that developed recommendations on 7 aspects of the Bill:

A. **Meeting Treaty of Waitangi Obligations (**described above)
B. **The approach to regulation** (whether to regulate the processes used for genetic modification, or the product or outcome of the genetic modification, or a hybid of the two)
C. **The framework for granting authorisations** (how appropriate levels of authorisation will be defined for activities of differing risk levels)
D. **Factors to be weighed in decisions** (what matters are relevant for the regulation of gene technologies and GMOs)
E. **Process for assessments, decision-making and approvals** (the way the regulator makes assessments, seeks expert advice, includes around Māori rights and interests, and public input, and makes decisions)
F. **Decision making authority** (what level of independence or ministerial direction the regulator has)

G. **Where the regulator should be based** (where the regulator is hosted).

Officials assessed the options they recommended as negative for Māori and Te Tiriti for almost every one of these, compared to the status quo, not compared to what would be Tiriti compliant. The table below sets out the officials' assessment of whether their recommendations make the protection of Māori rights and interests better than the status quo, worse, or is neutral.

B. Regulatory approach – *The trigger for regulation is the risk to human health and the environment, whether that risk stems from the process itself or the outcome.*
Negative. "The regulator will be required to seek Māori advisory input, and to take this into account, for most gene technologies and activities. This option would exempt low-risk gene editing techniques from regulation, removing the ability for the regulator to seek Māori advisory input."(p.52)
C. Authorisations framework - *There will be 3 broad categories of GMO activities: laboratory/industrial use, environmental release, and clinical trials and medication applications. A range of risk-based authorisations (non-notifiable, notifiable, and several forms of licensed) will be available under each category. (This is a modified version of Australia's legislative framework)*
Positive: "The greater number of authorisation types, based on indicative risk, will increase the number of applications that would deliver benefits to Māori, including economically, environmentally and in health. Maintains ability for Māori input to be considered but trades off opportunities for Māori to provide input for individual activities."(p.67)
D. Decision-making factors – *The Regulator will base a decision about GMO activities on whether it is satisfied any risks to the health and safety of people and the environment can be managed to an acceptable level.*
Negative: "Provides less protection than the status quo given no requirement for the regulator to consider the principles of te Tiriti /the Treaty." (p.78)
E. Assessments, decision-making and approvals – ***The Regulator's assessments of risks to the environment and human health and safety in relation to licensed activities will take into account factors tailored to the category. Council's powers to restrict GMOs will be removed to enable a nationally consistent scheme. A Technical Advisory Committee will provide scientific and technical advice to the Regulator on request. The Māori Advisory Committee will advise the regulator on the existence of any kaitiaki relationship to species or places that may be adversely affected by the proposed GMO activity; that advice will be considered during decision-making, including any controls or limits on the licenses. The Committee could also advise who to consult further when managing risks to kaitiaki relationships. To streamline the licensing and approval processes the regulator will be able to undertake joint assessment processes with other New Zealand regulators and "leverage international expertise to accelerate assessments" taking into account the New Zealand context.***
Negative: "Decisions will need to take into account whether kaitiaki relationships are adversely affected, but not Treaty principles. Iwi, Hapū, and Māori organisations will no longer be able to engage with local authorities on the local release of GMOs." (p.92)
F. Decision making authority – *The Regulator will be a statutory officer who has access to expert advice and public input in line with the risk level of the decision they are called on to make. The Minister can give general policy directions to the Regulator if they believe it would have significant effects on the environment or human health and safety.*

Neutral: "A statutory officer as decision-maker is as able as a committee to protect Māori rights and interests. The Māori committee will have an advisory and not a veto or decision-making role, as per the status quo."

But the Ministers added powers of call-in and ministerial statements, not recommended by MBIE:

Negative: "Call-in power/General Policy directions could be used to discount the advice of the Māori Advisory Committee or to strengthen the protection given to Māori rights and interests. The level of protection is uncertain." (p.106)

The Bill weakens the already Tiriti non-compliant status quo

The officials' starting point was a weak committee process set up under the Plant Variety Rights Act (PVRA) to advise on applications to exploit plant varieties:

> *"The proposals alter the status quo by placing a duty on decision makers to manage adverse effects to Māori kaitiaki relationships with specific species, instead of requiring them to take into account Te Tiriti principles more generally. Given time and scope constraints, officials did not analyse a wide range of options on how to best protect Māori rights and interests. Nonetheless, officials consider that the Plant Variety Rights Act 2022 (PVR Act) provides an effective and transparent mechanism to take into account Māori interests in environmental risk management."*(p.7)

The PVR approach has been challenged as incompatible with rangatiratanga and kaitiakitanga responsibilities in the Waitangi Tribunal (Wai 2522) inquiry on TPPA, during the MBIE's process of developing the Bill, and in Parliament. Yet this Bill is an even weaker version of the PVRA:

> *"The PVR Act provides for a Māori Plant Varieties Committee that has defined decision making powers. However, ministers' preferred approach is that the Māori Advisory Committee under the proposed regime will not have a decision-making role. MBIE considers that this approach is unlikely to meet Māori aspirations for partnership in decision making in this area." (p.7)*

We note that Te Puni Kokiri objected that the Māori Advisory Committee limits the scope for Māori to uphold kaitiaki relationships and to directly benefit from these reforms. TPK wanted, at minimum, the Māori Committee and the Regulator to agree on how to address any detrimental impacts to the kaitiaki relationship and whether these can be mitigated. MBIE said this concern was overstated because a "well-performing regulator will seek agreed solutions as a matter of course". (p.38)

The Bill also walks back the flawed (HSNO) regime

The current HSNO Act 1966 is weak in Tiriti terms. It merely requires decision-makers to "take into account" the "principles" of te Tiriti o Waitangi/the Treaty of Waitangi and to "consider" the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga. That's just one of 5 factors to be considered and is often overridden by "scientific" considerations.

As the RIS acknowledges, the Wai 262 report in 2011 found the HSNO regime

> *"still did not sufficiently protect Māori interests regarding GMOs. Its primary concern was that Māori values appeared to be subordinate to scientific considerations in decision making because there had been no applications to its knowledge where Māori values alone had*

determined the outcome. It stated there should be circumstances in which this should occur for Māori interests to be accorded appropriate weight."

This Bill ignores that finding and would make the breach worse. The HSNO regime at least allows for Māori advisory input on all full assessments and there is a structure and process in place. Ministers have replaced that with a Māori Advisory Committee that is modelled on, but weaker than, the committee in the Plant Variety Rights Act.

The Māori Advisory Committee

Under the Bill, the Minister would appoint, and can remove, the committee's members, after consulting the (Crown's) Minister for Māori Development and Crown-appointed Registrar. That, of itself, is likely to act as a discipline on the strength of Committee members' advice.

The Committee's role is to give non-binding advice, including on:

- proposals for the Minister to exempt from the Act an organism or categories of organisms or gene technology and editing where it uses an indigenous species as host;
- whether an environmental risk posed by an activity might have material adverse effects on a kaitiaki relationship and conditions that might mitigate that effect;
- if asked by the Regulator, advise whether an environmental risk posed by an activity might have material adverse effects on a kaitiaki relationship, including whether to suspend, cancel or transfer a licence, prepare a new risk assessment of management plan, issue standards and forms, and the policies, processes and decisions of the Regulator; and
- develop engagement guidelines and advice to applicants and kaitiaki.

The Registrar just needs to "have regard to" that advice. And there is no requirement that the Regulator themself has any knowledge of or experience in tikanga, mātauranga, or Te Tiriti.

There are some things the Register must refer to the Committee. The Registrar must (under Clause 126) refer (a) a licensing application that requires a risk assessment or risk management plan, or (b) if the Registrar proposes to declare something a non-notifiable activity, a notifiable activity, or a pre-assessed activity (all forms of streamlining). But only where they would "authorise an activity in relation to a regulated organism that uses an indigenous species as a host organism". There is no recognition of intrinsic whakapapa issues that relate to all species. Again, the Registrar doesn't need to act on that advice.

The Committee itself can identify a kaitiaki relationship. An iwi, hapū, Māori individual, or Māori entity can also raise with the Committee their kaitiaki relationship with an indigenous species and how the activity will affect it. The Committee must assess that claim and suggest conditions that could mitigate that effect. In reality, this Bill is going to involve a lot more work for Māori, and specific kaitiaki, than the present HSNO regime. Knowledge and resources are already stretched under the existing processes. But there is no proposal here to resource kaitiaki, and seems to be no notification process to ensure they are even aware of applications.

The Committee assesses claims and advises the Registrar what to do. It decides whether there is evidence of a kaitiaki relationship, how serious the effect on that relationship might be, whether the applicant and kaitiaki have reached some agreement to mitigate the effect, and whether they both have acted in good faith. There is a presumption that conditions can be identified that will address any adverse effects. That, in turn, assumes that kaitiaki responsibilities can be accommodated

alongside GMOs. Where the Committee can't identify conditions, it can advise the Registrar not to proceed with the application or proposal.

Giving that power and responsibility to the committee denies the mana and rangatiratanga of the iwi or hapū whose kaitiakitanga is being affected and puts a huge responsibility on the Committee members. The Committee members are appointed by the Crown and are not accountable to te Ao Māori, let alone to those directly affected. In the end it's the Registrar, not the Committee, who decides. If the Registrar says no to an application, there can be various kinds of reviews and appeals. The Minister also has a "call-in" power that can override any positive Tiriti-based decision.

Te Puni Kokiri wanted stronger powers for the Committee, but still short of rangatiratanga:

> *"TPK has advised that changing the Māori committee to an advisory body limits the scope for Māori to uphold kaitiaki relationships and directly benefit from these reforms. TPK's advice is that Māori interests would be better provided for through strengthening the Māori Advisory Committee proposal to include a provision that, at minimum, requires the Committee and the regulator to agree to a way forward regarding any detrimental impacts to the kaitiaki relationship and whether these can be mitigated. MBIE … considers this concern is overstated in practice, given that the regulator will still have to take decisions consistent with its regulatory framework, and because a well-performing regulator will seek agreed solutions as a matter of course."* (p.38)

Impact on Hua Parakore and Rongoā is ignored

Officials recognise Organics and Māori as the two losers from the Bill. The RIS has an extensive discussion on how the Bill with impact negatively on the production and export of organics. "Key stakeholders" in the "targeted engagement" on the Bill included the *Organic Exporters Association of New Zealand Executive Board.* These large-scale organics exporters rejected the Bill. The Regulatory Impact Statement says:

> "*Organics sector representatives do not support moving to a more permissive regulatory approach and would prefer maintaining the status quo with no releases of GMOs to market."* (p.42)

But the organics producers advocated for the status quo, not an alternative tikanga approach:

> *"Organics producers have expressed support for the status quo because it effectively prohibits environmental GMO release, which guarantees New Zealand GE-free export status. Environmental release also raises concerns from organics producers and the viticulture sector, including questions about who has responsibility for avoiding contamination*" (p.82).

Under the proposed regime, GMOs will end up being released so contamination will need to be managed.

> *"Unquantified costs to organic/non-GMO primary producers: At present this sector operates without risk of inadvertent contamination to their products from GMOs, because under the status quo there have not been any environmental releases of GMO products that could cause such contamination. Under the proposal, it is expected that eventually GMO products will be released into the environment which would require new supply chain management approaches to avoid contamination of non-GMO products."* (p.6)

> *"Inadvertent contamination by nearby GMOs that have been released into the environment may put organic certification and resulting market access at risk.* (115) *…. unintentional contamination and trade risks can be managed through the conditions and limits used to manage environmental risks."* (p.74)
>
> *"This risk can be mitigated by establishing coexistence frameworks across the GMO and non-GMO supply chains."* (p.116) *… "New Zealand would also need to implement an assurance programme for organic products and develop supply chain separation programmes that prevent unintentional crossover."* (p.74) *…*
>
> *"Supply chain segregation is common in the primary sector (quality differences, varieties, export requirements). A similar approach could be used to keep GMO and non-GMOs separate but would take time to develop and may involve additional costs to implement. Australian industry has set up such framework for canola production, which took 3-4 years to establish."* (p.116) …
>
> *"These tools are used successfully internationally for GMOs, such as in Australia and North America, and are already used in New Zealand for the organics sector."* (p.74)

Repealing local government powers will remove localised controls.

> *"Organic producers have signalled that losing the GM-free status could negatively impact their businesses and have supported regional and district by-laws that restricting GMO release. They have indicated that more work will need to be done to set up appropriate coexistence frameworks."* (p.27)
>
> *"Removing the ability to locally restrict activity using the RMA may result in GMO field trials near organic, GE-free producers."* (p.86)

Organics producers have been told they will just have to find a way to co-exist with GMOs …

> *" Organic/GE-free primary producers are concerned at the impact for their markets of any potential environmental release of GMOs in New Zealand, and how GMO and non-GMO supply chains would coexist."* (p.8)… *"There would be a cost associated with implementing coexistence measures and additional assurance costs … in response to both exempt products of gene technology being present in the environment and licensed environmental releases of regulated products."* (pp.46, 49)

The RIS discusses organics purely in a western sense. There is no holistic understanding of how whakapapa, Hua Parakore production and verification, and organics are inter-connected in relation to GE, whether (to use their terms) as processes or outcomes. Nor is there any recognition that rongoā will be affected by the removal of the GE ban.

That reflects the reality that Hua Parakore producers and rongoā practitioners had no say in the policy process. There was no open engagement during the developing of this Bill that would have allowed them to intervene and assert their rangatiratanga. There was a Wai 262 representative on the broader Māori Focus Group, but that had only two meetings with officials.

There was zero recognition that rongoā will also be at risk from contamination. Contamination of native species with GM species will put the safety of rongoā Māori and Natural Health Products at risk. It is impossible to know what impact this contamination might have on the health and wellbeing of people and places. Western science does not even recognise that question. If this Bill proceeds it will undermine the ability of kaitiaki to protect the gene lines/whakapapa of taonga and the

mātauranga they afford our people in understanding the world, and put a huge burden on Māori to protect the 'bloodlines' of Indigenous flora and fauna. With no resourcing and no say in the decisions.

Implications of and for trade agreements

Ngā Toki Whakarururanga has actively engaged with the Ministry of Foreign Affairs and Trade over the current and potential impact of GE provisions in free trade agreements on Te Tiriti, hua parakore and rongoā.

During the negotiations for the Indo-Pacific Economic Framework (IPEF), Ngā Toki Whakarururanga prepared a position paper on GE that was circulated to the other negotiating states. That is appended to this submission as Annex 1.

We also made the following comments and recommendation in the Inclusive Trade Action Group review of the CPTPP, successor to the TPPA:

> *Ngā Toki Whakarururanga perceives real and present risks to Māori and Indigenous Peoples generally, from the current approach to the negotiation of free trade agreements, including the TPPA/CPTPP, that is almost exclusively commercially driven even though their scope is much broader. Our worldview and perspectives on these matters are crucial to bring a much needed and unique balance to these discussions and negotiations. That is why it is important for Māori and Indigenous Peoples to have a seat and a voice around the negotiating tables. This is what Te Tiriti promised Māori – tino rangatiratanga me o rātou taonga katoa.*
>
> *However, recognising the limitations of the ITAG Review to address these fundamental issues, we are recommending a number of interim steps towards Tiriti-compliance that we urge the Crown to take, and for the ITAG to support, through a revised Joint Declaration and Work Programme, and in the forthcoming review of the TPPA/CPTPP* itself.
>
> We **recommend** that the Crown: …
>
> *(a) seeks agreement from other ITAG Parties to conduct, as part of their Work Programme, an Indigenous-led investigation of the implications of CPTPP provisions relating to biotech and GMOs for the right of Māori and other Indigenous Peoples to exercise rights, interests, duties and responsibilities in relation to food, seeds, and the natural domain consistent with Te Tiriti o Waitangi and the UN Declaration, and to take action to ensure more effective protection for them during the review of the CPTPP itself;*

That analysis has not occurred. We are therefore very concerned that the proposed Bill will undermine the current flexibilities that exist in the CPTPP, because they are linked to the country's current laws on GE, and will further constrain our Tiriti rights and responsibilities.

There are additional risks that new free trade agreements will lock in GE. A change in domestic law is likely to be carried through into the Crown's negotiating position in future agreements as that is usually based on existing policy settings.

That risk is highest with the United States, whose recent US Canada Mexico Agreement (USMCA) imposes strict rules on allowing GE products. The US recently won a dispute against Mexico over a ban on GE corn for food, based purely on notions of risk assessment based on western science and standards, and which rejected on narrow trade discrimination grounds the Indigenous Peoples

exception in the USMCA, which is more extensive than the limited Treaty of Waitangi Exception that the Crown has included in trade agreements since 2001. A briefing on this dispute is attached as Annex 2.

We believe from public sources that similar rules on GE have been promoted by the US in the Indo-Pacific Economic Framework negotiations, which New Zealand participated in, and which are currently stalled. The outcome in the Mexico case shows the even more restrictive Treaty of Waitangi Exception is likely to fail if it is relied on to justify rolling back GE measures as part of honouring Te Tiriti.

For more detailed analysis, we cross-reference to the submission of Professor Emeritus Jane Kelsey, who is a pūkenga for Ngā Toki Whakarururanga.

Conclusion

This Bill is a fundamental, and deliberate, breach of the Crown's obligations under Te Tiriti o Waitangi, under which Māori were guaranteed their tino rangatiratanga o o ratou taonga kātoa, which includes the biological and genetic resources of indigenous flora and fauna and associated mātauranga.

Ngā Toki Whakarururanga submit that it is a serious breach of Te Tiriti o Waitangi to 'tamper' with the whakapapa/genetics and mauri of these taonga, which will have adverse impacts on the physical, cultural and spiritual well-being of Māori and te Taio o Aotearoa.

If the Bill is allowed the pass, it will have profound, and irreversible, impacts on these guaranteed rights and responsibilities and more specifically, the exercise of kaitiakitanga and tino rangatiratanga over these taonga. That includes the obligation and the corresponding right to protect, preserve, control, regulate, use, develop and/or transmit those taonga in their natural form unaffected by artificial genetic modification of those taonga, including tikanga-based practice of hua parakore and rongoā.

Ngā Toki Whakarururanga therefore opposes this Bill.

We wish to be heard in person by the select committee.

Pita Tipene
Co-convenor

Moana Maniapoto
Co-convenor

Annex 1:

NGĀ TOKI WHAKARURURANGA

POSITION PAPER ON PURE FOOD AND GENETIC MODIFICATION

IPEF – Bali Round, March 2023

Ngā Toki Whakarururanga brings a Te Tiriti o Waitangi perspective to the trade policy space, which requires the Government of Aotearoa New Zealand (the Crown) to uphold and actively protect Māori rights to exercise authority over our lands, waters, resources and all taonga, including the ecosystem, as well as Māori laws, beliefs and philosophies. That includes for IPEF.

CONTEXT

- Indigenous approaches to trade embody deeply interconnected relationships between people and with the natural world. We are connected to that world through whakapapa/genealogical relationships and have responsibilities to it as kaitiaki/custodians.
- Those responsibilities include avoiding risks to the natural and spiritual wellbeing of the ecosystems that keep our lives in balance and have sustained our communities for many generations, and the wellbeing of people themselves.
- International trade policy and agreements, including rules on agriculture, food and seeds, have direct and indirect impacts on these relationships and the rights and duties associated with them.

FOOD PRODUCTION AND GENETIC MODIFICATION

- We acknowledge the plurality of views across Te Ao Māori and for Indigenous Peoples globally.
- At the same time, important commonalities are recognised and protected in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). These include reliance of Indigenous Peoples on our traditional food sources and practices to maintain the cultural and spiritual vitality of our communities and the surrounding environments that sustain them.
- Indigenous food production practices also reject the use of toxic pesticides and other chemicals found in industrial agriculture, which cause respiratory disease, birth defects, adverse impacts to mental wellbeing, severe allergic reactions and other long term health impacts.
- Within our kaupapa, Ngā Toki Whakarururanga champions the rights of Māori and Indigenous Peoples to maintain and rebuild our food systems and restore *te mauri o te taiao* - the vitality of the environment including its ecosystems and biodiversity.
- Māori food and beverage producers with whom we work - small and large, community and commercial - combine their commitment to quality and innovation with the duty to maintain those values and practices. *Te Waka Kai Ora* has developed an Indigenous standard and certification system that is based on traditional values and processes for pure food produced without exposure to contaminants like Genetically Modified Organisms (GMOs).
- Genetic modification (GM) and the introduction of GMOs threaten Indigenous traditions and ways of life. Globally, many Indigenous Peoples oppose GM because it distorts the essence of being and because it poses risks to local ecosystems, including Indigenous and native plant species.
- These concerns are not just about contamination of food systems by GMOs and impacts on human health. Unknown long-term effects of GM on the environment and its biodiversity could interfere with the integrity of a native plant variety that may hold cultural significance which

undermines their cultural identity; and lead to the destruction of key food sources that are relied on by Indigenous Peoples and threaten traditional agricultural practices, cultural heritage and Indigenous livelihoods.

POTENTIAL IMPACTS OF IPEF

The IPEF negotiations pose a particular risk to Indigenous food systems across the region.

- IPEF chapters on agriculture and standards, and associated concepts of science, proof and risk to human, animal or plant life or health are likely to privilege a western worldview where all things in nature are commodities and open to manipulation so as to maximise profit and efficiencies, to the exclusion of Indigenous worldviews.
- The US is one of the world's largest biotech crop countries planting 71.5 million hectares in 2019[1] and its agritech and biotech corporations are powerful lobbyists who are demanding strong restrictions on governments' ability to regulate GM and GMOs.

Ngā Toki Whakarururanga believes these provisions would cut across the rights, interests, duties and responsibilities of Indigenous Peoples throughout the region.

Key issues for Indigenous beliefs, food systems and the environment that could arise from IPEF include:

- Risks of infringing Indigenous Peoples' right to development, right to preserve and protect species, right to the use and dispersal of species and the right to cultural and spiritual concepts associated with them, as recognised in the UNDRIP.
- Preventing or impeding the adoption of stronger recognition of Māori rights relating to traditional knowledge and the natural domain that are currently being considered through Te Pae Tawhiti, a process established to advance the protection of Māori rights under Te Tiriti o Waitangi.
- Overriding restrictions on GM and GMOs in Aotearoa New Zealand that currently enable an accommodation between Māori and western worldviews, creating new breaches of Te Tiriti.
- Standards that are based on western scientific approaches will deny Indigenous knowledge and require proof of narrow concepts of risk and harm to health to justify regulations and protections.
- Guaranteeing biotech and other agricorporations rights to lobby against existing and proposed law and policies that protect Indigenous peoples rights in the name of "good regulatory practices" or "transparency".
- Imports of products that have minimum levels of GM or other toxins, including seeds and other agricultural products, may contaminate domestic production, as has occurred in the US, with impacts on Indigenous plants, including those used in rongoā Māori (traditional remedies).

EFFECTIVE PROTECTIONS IN IPEF MUST …

- ensure that Parties retain their domestic policy space, including through a comprehensive carve-out to protect the rights, interests, responsibilities and duties of Indigenous Peoples;
- ensure that IPEF does not open the door to new rules on biotech and GM or empower biotech corporations to lobby for such changes and against existing laws;
- enable food to be produced for domestic use and export in ways that accord with Indigenous values, so as to support healthy and secure food for all;

[1] https://www.statista.com/statistics/271897/leading-countries-by-acreage-of-genetically-modified-crops/

- support increased resilience of Indigenous food systems and reduce dependence on imports in the agrifood sector, including fertilizers and chemical inputs;
- go beyond a precautionary principle to recognise knowledge, standards and risk assessments based on Indigenous Peoples' worldviews.

Annex 2:

NGĀ TOKI WHAKARURURANGA

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THE FAILURE OF AN INDIGENOUS PEOPLES EXCEPTION IN A US-MEXICO TRADE CASE ON GE CORN SHOWS THE TREATY OF WAITANGI EXCEPTION IS NO PROTECTION

For more than 30 years Māori have objected that free trade and investment agreements threaten their fundamental responsibilities and rights under te Tiriti o Waitangi. The Crown insists that a Treaty of Waitangi Exception it has included in those agreements since 2001 fully protects the policy space to meet its Treaty obligations.

Until now, there have not (as far as we know) been any trade disputes involving the Treaty Exception, or a similar provision in another country's agreement, to see who is right. Now we have the first. In 2023 the USA brought a trade dispute against Mexico under the United States Mexico Canada Agreement (USMCA) over trade in genetically engineered corn. Mexico said its 2023 decree banning the use of genetically engineered corn in tortillas or dough was in part to protect native corn from risks of transgenic contamination.

A trade dispute over genetic engineering epitomises the conflict between Western colonial capitalism and Indigenous Peoples' identity, values and worldviews and the protection of them through their own authority, knowledge and methodologies.

The Waitangi Tribunal addressed this conflict in the Wai 262 inquiry. The claimants asked the Tribunal to re-establish rangatiratanga over traditional knowledge, including responsibilities to protect tāonga species *per se* and their use for foods, rongoā , and examine the threats that GM poses to "indigenous flora and fauna and thus to Māori food systems, te taiao, tikanga Māori and ourselves more broadly". Genetic engineering itself - "the movement of genes within an organism and across special impacts on the mauri – the essential life force derived from the atua which all living things possess, wairua and whakapapa of that organism and its wider surrounding" - is a violation of tapū. "The role of kaitiaki is to protect and maintain the mauri of our flora and fauna whanaunga for future generations, including at the molecular level".

In this dispute, the Mexican government argued that native corn is central to cultural identity of Mexican Indigenous communities and their creation narrative: *"the fact of planting corn is linked to their own history, to their identity, to the way they conceive the world, to being part of a whole".* (Note that Indigenous Peoples themselves have no right to speak for themselves in this dispute between colonial states).

The panel of trade judges said the Indigenous worldview was outside their remit. Mexico's arguments were only relevant to the dispute if, and to the extent that, they could be brought within

the legal terms of the USMCA and the provisions the US had put in issue. The US complaint related to the "Sanitary and Physosanitary" rules of the USMCA, which expanded on the equivalent in the World Trade Organisation. So the legitimacy of restrictions on GM could only be viewed through a trade law lens. The purpose of those rules is to advance western capitalism by minimising restrictions on commerce in GM foods; the tools are limited to western science; and the criteria for assessing the risk posed by GM are the standards set by international bodies that are heavily influenced by powerful corporate interests, including biotech.

Mexico was found to have breached those rules. The panel of trade experts said the ban discriminated against US exports and was not supported by science.

This bring us to the Indigenous Peoples' Rights clause in the USMCA. Mexico argued that the breach of the trade rules was justified by the that exception. The wording in the USMCA is similar, but not identical, to the Treaty of Waitangi Exception:

- The USMCA protects a broader range of measures that breach a FTA; the Treaty Exception applies only to those that accord "more favourable treatment" to Māori.
- Conversely, the Treaty Exception refers to Crown obligations to Māori, including under the Treaty of Waitangi whose interpretation cannot be reviewed by a dispute panel.
- The USMCA refers to the state's "*legal* obligations" to Indigenous Peoples, which need to be proven. That would lead to all sorts of argument in relation to Te Tiriti, which a panel of trade experts should never be empowered to review.
- Both exceptions make the necessity of a measure to meet those obligations self-judging.
- But critically, they are both subject to a "chapeau" that negates the exception where the panel finds arbitrary or unjustified discrimination or a disguised restriction on trade in goods, services and investment.

Canadian First Nations had been optimistic that the USMCA clause was going to provide them with comprehensive protection, so Indigenous Peoples' rights could not be held hostage to trade or investment rules. Both Canada and Mexico publicly shared that optimism, with the Mexican government's fact sheet boldly interpreting the Article as stating that "legal obligations to Indigenous people cannot be defeated or interfered with by commitments under trade rules." That sounds just like the Crown, as its justification for continuing to roll out the same provision into each new agreement.

In arguing that Indigenous Peoples Rights exception applied, Mexico was still limited to the specific words of the text. Mexico pointed to extensive steps it had taken in domestic and international law, supported by judicial decisions, to recognise Indigenous Peoples' rights in relation to biodiversity and native corn, consistent with its constitution, and said it considered the decree was necessary to meet those obligations. These arguments were supported by a pro bono amicus curiae brief filed on 14 March 2024 by the Institute for Agricultural Trade Policy, the Rural Coalition and the Alianza Nacional de Campesinas. However, Indigenous Peoples did not have a seat at the table to argue for themselves.

Despite what they previously said about the Indigenous Peoples exception, both the US and Canada rejected the defence using narrow trade law arguments. The panel agreed that Mexico did have legal obligations to Indigenous Peoples to protect native corn, and accepted the necessity of the measure

to fulfil those obligations was self-judging. But it found there were discrimination and disguised trade restrictions because GE corn (mainly imported from the US) was treated differently from non-native non-GE corn (also grown domestically), when both could contaminate native corn. The fundamental difference for Indigenous Peoples between contamination by GE and non-GE was irrelevant.

Even if the exception had been framed to allow more expansive arguments, the panel of three trade/investment experts was neither competent nor appropriate to assess questions involving Indigenous responsibilities, rights, beliefs and knowledge. That requires experts in the relevant tikanga of the relevant Indigenous people. A monocultural decision making process that is seriously devoid of any Indigenous cultural context just deepens the systemic bias in the trade and investment regime.

The initial response from New Zealand trade officials is that this decision turns on the facts of Mexico's ban, and does not show that either the USMCA or Treaty Exception is itself flawed. But the evidence now weighs even more heavily against them.

In 2016 the Waitangi Tribunal concluded in the urgency hearing on the Trans-Pacific Partnership Agreement (TPPA) (Wai 2522) that the Treaty Exception was not perfect, but was "likely to provide a reasonable degree of protection for Māori interests". However, its later report on e-commerce found that the Treaty Exception, even when combined with a number of other policy space protections, did not provide adequate in relation to mātauranga in the digital space.

The Crown subsequently included additional protections in some, but not all, agreements for *digital* trade rules, but not for any other matters. As part of its mediation agreement with Ngā Toki Whakarururanga in 2020, the Crown promised to discuss what an alternative protection might look like, while not conceding the existing Exception is flawed. Those discussions have just begun.

The example of GM shows how deep these agreements can reach and how colonial capitalism prevails in agreements designed to serve them. At the very least a new approach needs to ensure that Māori responsibilities and rights under Te Tiriti, and the UN Declaration on the Rights of Indigenous Peoples, are comprehensively carved out from the scope of these agreements. But a Tiriti-compliant approach needs to go much further. It needs to embed rangatiratanga and tikanga in the concepts and objectives of trade agreements. Māori need to have a place, as of right, in deciding whether to negotiate, what to negotiate, with whom, what demands to make, what trade-offs are acceptable, and what protections are required.

29 January 2025