

# NGĀ TOKI WHAKARURURANGA

## TE TIRITI O WAITANGI & INTER-NATIONAL TREATY MAKING

### #5. THE CROWN'S SECRET REVIEW OF TREATY MAKING <sup>1</sup>

As part of Ngā Toki Whakarururanga's mandate to bring a te Tiriti o Waitangi lens to the international trade and investment space, we have commissioned a series of working papers on the constitutional power to make international treaties. The full paper *Mana and Constitutional Transformation of Treaty Making* can be accessed at [ngatoki.nz/kaupapa/rangatiratanga-and-constitutional/](https://ngatoki.nz/kaupapa/rangatiratanga-and-constitutional/)

Māori have repeatedly challenged the Crown's claim to exclusive treaty-making authority and their own exclusion from international negotiations and decisions, whether on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) or international trade and investment agreements, such as the Multilateral Agreement on Investment (MAI) in the late 1990s and the Trans-Pacific Partnership Agreement (TPPA) in the 2010s.

As Moana Jackson made clear in his evidence before the Waitangi Tribunal in the TPPA (Wai 2522) inquiry the right to treat was fundamental to their mana, and rangatira would, and could, never have ceded that power to the Crown.<sup>2</sup> The Waitangi Tribunal in the Wai 1040 inquiry *Te Paparahi o te Raki* affirmed that rangatira did not cede their mana or sovereignty to Queen Victoria in the international sphere:

*... the rangatira may well have consented to the Crown protecting them from foreign threats and representing them in international affairs where necessary. If so, however, the intention of signatory rangatira was that **Britain would protect their independence, not that they would relinquish their sovereignty.***<sup>3</sup>

It is not just Māori who oppose the executive's unaccountable power over treaties. Over the past three decades repeated challenges to the "democratic deficit" of treaty making have even come from within the Crown: reports from the Clerk of the House of Parliament in 1996 and

<sup>1</sup> [www.ngatoki.nz](https://www.ngatoki.nz), August 2025

<sup>2</sup> Brief of Evidence of Moana Jackson to the Waitangi Tribunal Inquiry into the Trans-Pacific Partnership Agreement, Urgency hearing, Wai 2522, 26 February 2016. Available at: <https://ngatoki.nz/wp-content/uploads/2024/04/Moana-J-Wai-2522.pdf>

<sup>3</sup> Waitangi Tribunal, *He Whakaputanga me Te Tiriti. The Report on Stage 1 of the Te Paparahi o te Raki Inquiry*, Wai 1040, 2014 at p.xxii

the New Zealand Law Commission in 1997, Members Bills from Green MP Keith Locke in 2003 (supported by the ACT party), from ACT MP Ken Shirley and from Fletcher Tabuteau MP from NZ First, petitions and successful court action over the secrecy of the TPPA. Through all of this, the Crown – Cabinet, parties in government and MFAT officials – have resisted change.

Most recently, the Trade for All Advisory Board, established in November 2018 by Labour’s trade minister in the wake of the TPPA protests, endorsed a “triple bottom line” approach to trade policy of social, economic and environmental objectives, and partnership with Māori under Te Tiriti o Waitangi/The Treaty of Waitangi. It recommended various improvements to transparency and participation in negotiations and called for Parliament to establish an expert select committee on treaties.

In an internal briefing, MFAT’s legal officials acknowledged that the “*so-called ‘democratic deficit’*” had “*not gone away*” and has particular resonance with Māori over rights under the Treaty of Waitangi.

Persistent calls from Māori, civil society, and even Members of Parliament and Crown entities to conduct fundamental reviews of the treaty-making process eventually saw the Minister of Foreign Affairs Nanaia Mahuta instruct the Ministry of Foreign Affairs and Trade (MFAT) in March 2021 to report back to her and other relevant ministers on the “issues relating to New Zealand’s treaty making process”.

This had the potential to be a fundamental review of international treaty making, including the Tiriti relationship. Instead, it was reduced to an assessment of whether the current system works for the Crown, whether they should consider any changes, if so what those might be – without questioning the Cabinet’s exclusive treaty making authority.

That review of the international treaty-making process was conducted in secret by MFAT between 2021 and 2023. Its existence was discovered incidentally from documents received under an initial Official Information Act (OIA) request in June 2024.<sup>4</sup> It took about 8 months of requests and reconsiderations to gain enough information to piece together what was, and was not, considered during the review. It also revealed a Cabinet paper was signed off by the Minister in 2023 but never presented to Cabinet.

It remains unclear why this process was shrouded in secrecy, but it is obvious from the documents that the officials knew what they proposed fell far short of what had been recommended, let alone what Māori expected from a Tiriti compliant process.

## **A brief timeline**

**August 2019:** Minister for Māori Development Nanaia Mahuta, who was also the Minister for Foreign Affairs, established *Te Pae Tawhiti* under Te Puni Kokiri (TPK) to implement the decade-old Waitangi Tribunal report on the Wai 262 claim.<sup>5</sup> Kete 3 of *Te Pae Tawhiti* centred

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<sup>4</sup> For full references to documents quoted here, see the “The Crown’s Secret Review of the International Treaty Making Process 2021-2023” at [www.ngatoki.nz/kaupapa/rangatiratanga-and-constitutional](http://www.ngatoki.nz/kaupapa/rangatiratanga-and-constitutional). All emphasis is added.

<sup>5</sup> ‘Te Pae Tawhiti’, Te Puni Kokiri. Available at: <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/te-pae-tawhiti>

on the international sphere, to consider how the Crown should work with Māori as its Tiriti partner when negotiating international instruments. Officials from MFAT basically took it over and TPK struggled, and failed, to secure concrete changes that could make a significant difference for Māori to the treaty-making process.

**November 2019:** The Trade for All Advisory Board (TFAAB) reported to the Minister of Trade with a number of reform recommendations.<sup>6</sup> Cabinet deferred action on the key elements of international treaty making and domestic review and accountability.

**March 2021:** Following the TFAAB report, MFAT was initially instructed to report back to the Minister of Foreign Affairs and other relevant ministers by the end of March 2022 on the issues relating to New Zealand's treaty making process.

**Mid-July 2022:** Minister Mahuta directed officials to prepare a Cabinet Paper, with

*... a constructive and pragmatic package of changes that can be implemented via Executive action, Cabinet decision, through the Standing Orders review and completed within the current parliamentary term.*

**18 November 2022:** The Cabinet paper was signed off by Minister Mahuta. Despite acknowledging the existing process had come under scrutiny in recent years, including the TFAAB (2019), Wai 262 (2011) and Wai 2522 (2016-2021) reports, and the three-yearly Review of Standing Orders in 2020, the paper claimed to be taking “*the opportunity to **pro-actively** address related recommendations and issues from the Waitangi Tribunal*”. It proposed “*pragmatic*” and “*important incremental improvements to the existing process*” that would not fundamentally alter the Executive's prerogative for foreign affairs, “*which would require a first principles review of current constitutional settings*”. Nor would it or seek to address all the recommendations of the Trade for All Advisory Board.

**14 December 2022:** The paper was to go to Cabinet's Economic Development Committee and to Cabinet a week later. The paper never reached the Cabinet, presumably because of political sensitivities within the Labour government over Māori and Tiriti policies by 2023.

**August 2023:** The Foreign Affairs Defence and Trade committee rejected a recommendation by the Standing Orders Committee for a limited review of the parliamentary process for examining treaties, following advice from MFAT's lawyers that the process is “fit for purpose” and does not need reform. They did not disclose that MFAT had spent two years conducting a review of the process and developing the Cabinet paper behind closed doors.

**August 2024:** The deeply flawed power for the Cabinet to make international treaties in secret and without any effective accountability therefore remains unchanged. The Standing Orders Committee has included examination of international treaties in its terms of reference for its review of Standing Orders this Parliamentary term.

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<sup>6</sup> Report of the Trade for All Advisory Board, November 2019. <https://www.mfat.govt.nz/assets/OIA/OIA-2025/OIA-29907-Trade-for-All-Advisory-Board-Report-5-February-2025.pdf>

## Te Tiriti o Waitangi and constitutional authority out of scope

From the start, the Crown prerogative was not to be questioned. The officials knew that claimants in recent Waitangi Tribunal inquiries have insisted that the Wai 1040 finding that there was no cession of sovereignty applies to international treaty making, and that the blanket assertion of Crown sovereignty and prerogative is illegitimate and breaches Te Tiriti. The Constitutional Kaupapa inquiry review of the Crown's claim to an exclusive prerogative was hanging over them.

Faced with this, the Crown was absolutely determined to close off any space to raise constitutional issues during its review, in particular the relationship of rangatiratanga and kāwanatanga under Te Tiriti. It is unclear whether this was a political directive, a red line for the MFAT officials, or both.

A submission setting out three options to respond to the TFAAB recommendations was prepared by MFAT in late March 2022:

Option 1: Maintain status quo (~~Do nothing more~~);

Option 2: A staged approach of a package of adjustments with further changes considered over time, with targeted consultation;

Option 3: Conduct a first principles review of New Zealand's treaty making process with a full public consultation process.

MFAT recommended Option 2 as

*best balancing the need to address the recommendations and improve outcomes of the international treaty process for Māori and the public, **while avoiding the need to consider proposals that would require significant constitutional change, which could be challenging to navigate.***

Blunt feedback from TPK described that position as a “missed opportunity” to approach the problem in a “holistic way” based on learnings from recent developments. There was a “lack of policy rationale” for the options offered, which themselves were vague, and it was unclear why MFAT preferred Option 2.

The Cabinet paper in November 2022 simply asserted that

*[historically] treaty making is part of the Executive's foreign affairs prerogative. **The foreign affairs prerogative is a core part of the Crown's kwanatanga under Te Tiriti o Waitangi as acknowledged in the Wai 262 and Wai 1040 reports. To substantively change this prerogative would be a significant constitutional step.***

A proposed stocktake of current approaches to treaty making said it would not address constitutional questions regarding treaty-making powers, because the Crown was not of a mind to do so:

*In light of the Cabinet mandate, our intention would be to stay within the framework of the existing constitutional balance of power for treaty making, including the maintenance of executive control to determine foreign policy. **There has been no indication that the Government is interested [in] significant constitutional reform,** nor has the Foreign Affairs, Defence and Trade Committee (FADTC) suggested a change of this nature is warranted. In addition there are good practical and conceptual reasons for the executive to retain the power to enter in to treaties.*

In other words, the Crown would not question its own exclusive powers to negotiate and enter into treaties through executive branch of government.

Likewise, the Cabinet Paper in November 2022 said the changes proposed

*... do not seek to displace, or substantially change, the scope of that prerogative. In particular the paper **does not seek to address fundamental issues of constitutional balance of the Executive's role in negotiating and concluding treaties with Māori interests as Tiriti partner.** This would require a first principles review which I am not proposing at this time.*

The briefing accompanying the paper reiterated the “risks” noted in earlier documents that

*... this process may elicit calls from civil society and others to **go further and provide a greater role for Parliament ... It is also likely that the changes proposed in this paper will not fully meet the expectations of some Tiriti partners who advocate for systemic constitutional change.***

## **No seat at the table**

The TFAAB Report had recommended the government

*review, in conjunction with stakeholders, the composition of delegations to trade rounds, to ensure appropriate representation from outside Government, including Māori as its Tiriti/Treaty partner.<sup>7</sup>*

The final Cabinet report said its proposals aimed to allow for greater Māori and stakeholder participation in the international treaty making process, “*including participation in international delegations, where appropriate*”. The actual proposal included a revised template when Ministers seek a negotiating mandate for a new treaty which required them to *advise Cabinet on the composition of the delegation*, including on Māori as Tiriti partner (and consider if they would seek the consent of the other parties to the release of the text during negotiations). Further, *recognition of Māori as Tiriti partner for consideration as part of international delegations* would be added to the Cabinet Office circular on procedures for including non-official representatives on official delegations to international meetings.

An internal comment from a Māori official described Māori participation in delegations as

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<sup>7</sup> FTAAB Report, at p.21

*an important point, and we see value in this happening in appropriate situations. It is a common request for Māori to participate in trade negotiations (to have a seat at the table) – something that needs careful consideration. I'm comfortable, however, that what's in the paper does not commit the government or officials to a certain position, but rather for officials to develop processes including for Ministers to advise Cabinet on delegate composition.*

Again, the Crown would determine what, if any, Māori involvement there was. And again, there has apparently been no change as a result of the review.

## **The 2001 “Strategy for Engagement with Māori on International Treaties”**

A further casualty of the review was a recommendation from several tribunals and the FTAAB to revisit the Strategy for Engagement with Māori on International Treaties adopted by Cabinet back in 2001. The Strategy had been prepared by MFAT in response to Māori objections over several international treaties in the late 1990s.

It was minimalist and totally controlled by the Crown. The Crown agency that is leading on a treaty is responsible to consult with Māori. A “sliding scale” approach to engagement leaves the Crown to decide what issues are important to Māori and what level of engagement is required, if any. All power lies with the Crown to recognise and prioritise Māori interests, decide what level of protection is required, what is “reasonable”, and how these weigh up against other interests. This assumes the Crown understands what the issues are, has the political will to raise them with Māori, and is prepared to act on what Māori identify as issues and solutions.

The 2001 Strategy was criticised in both the Wai 262 *Ko Aotearoa Tenei* and Wai 2522 TPPA reports, especially the Crown’s lack of understanding of what matters to Māori. The urgency report in Wai 2522 was especially critical of the Crown’s failure to identify the Tiriti issues:

*We do have a concern that the **Crown has misjudged or mischaracterised** the nature, extent, and relative strength of Māori interests put in issue under the TPPA. ... Claimants can and do point to a number of matters that go to the heart of the Crown-Māori relationship, and Māori Treaty interests, [which are] matters of high importance to Māori, and any potential adverse impact under the TPPA would be likely to cause significant prejudice.<sup>8</sup>*

*... It seems to us that, **contrary to the findings of the Wai 262 Tribunal, the Crown did not seek or provide a realistic opportunity for Māori to identify their interests in the TPPA as a Treaty partner. The secrecy or confidentiality of the development of Crown policy in relation to the TPPA and its negotiating positions compounded this difficulty, and is likely to have been a factor in low levels of engagement between the Crown and Māori (whether initiated by either party) prior to the lodging of these claims.<sup>9</sup>***

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<sup>8</sup> Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement. Urgency Inquiry*, Wai 2522, 2016 at p.54

<sup>9</sup> *Ibid*, pp. 54-55

In the Wai 2522 Tribunal's view, it had become clear "*that the Crown has not shown that it has understood the nature and extent of Māori interests affected by the TPPA.*"<sup>10</sup> However, despite reaching that conclusion, the Tribunal followed a similar path to the Wai 262 report and retreated into the zone of 'reasonableness', remarking that

*... engagement with Māori is not always going to be perfect. But, as we have said, Māori are not just another interest group; Māori are the Crown's Treaty partner and their interests are always entitled to active protection, to the extent reasonable in all the circumstances.*<sup>11</sup>

That fallback was critically important and saw the Tribunal adopt the 'balancing' approach from the Wai 262 report that vests all power in the Crown, including decisions on appropriate engagement, and allows Māori interests to be subordinated to a general national interest.<sup>12</sup>

## **The Crown's justification for executive power**

The officials offered five main justifications for maintaining the status quo:

- ***The need to speak with one voice:*** But there is no reason why that voice should only be the Crown's, rather than a federal or dualist state as Te Tiriti envisaged. It also assumes there would not be agreement between the Crown and Māori, so the Crown's voice must prevail;
- ***Not revealing negotiating positions:*** That argument could apply to all international treaties, but only trade and investment treaties tend to be kept secret. Such secrecy would be untenable for national legislation even though trade treaties can impose significant constraints on domestic options, including Te Tiriti. In reality, previous agreements provide clear indications of the government's position. On the flip side, public pressure domestically is often used by other countries to strengthen their negotiators' hands.
- ***Flexibility to respond to urgent issues,*** without explaining why some process for jointly making rapid decisions cannot be achieved;
- ***Confidence of other states that New Zealand can deliver;*** yet other countries seem to achieve that confidence with much more complex political systems that balance between domestic constitutional obligations with their international objectives; and
- ***Targeted approaches given New Zealand's limited ability to influence multilateral negotiations;*** this again assumes the Crown should be the sole judge of appropriate compromises and outcomes that reflect its priorities.

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<sup>10</sup> Ibid, p.6

<sup>11</sup> Ibid p.12

<sup>12</sup> Ibid p.57

These assertions remained unchallenged because the Crown was talking to itself. Excluding any consideration of constitutional matters, especially te Tiriti, and conducting this review in secret, ensured that the flaws in this rationale would not be exposed.

## **Other countries have more accountability**

Officials told ministers that in New Zealand, “as in most countries”, the power to negotiate and enter into treaties rests with the Executive branch. That is manifestly not true. The European Union, the United States, South Africa, many Asian and Latin American countries have constitutional processes that require approval by legislatures, often through complex, multi-layered processes. While New Zealand’s system is a legacy of British colonialism, a number of former colonies have also abandoned the absolute Crown prerogative with no effective review.

Thirty years ago, the Australian Parliament created a specialist international treaty committee with powers to conduct inquiries during the course of negotiations. In February 2020 the Joint Standing Committee on Trade and Investment Growth reviewed the Australian government’s approach to trade and investment negotiations. An interim 78-page report was released in February 2024 which recommended, *inter alia*, the establishment of a legislative framework for negotiating trade and investment agreements that covered both the process of negotiations and the content of agreements. The final report in April 2024 *Strengthening Australia’s approach to trade negotiations* ran to 141 pages, and focused on assessing the national interest:<sup>13</sup>

*While trade brings substantial benefits to many Australians, it has the potential to have widespread impacts across the economy, society, and the environment, with some experiencing costs and being disadvantaged. Further, an important element of the national interest is to ensure that trade commitments do not unduly weaken domestic policy objectives or the ability of the Australian Government to make decisions in the interests of its citizens.*

Hence, impact assessments “*should consider the implications of Australia’s trade commitments in areas such as health, gender, labour, and human rights as well as for regional communities and First Nations people.*”

## **No engagement with Māori - or anyone**

The officials recognised that power to make international treaties is a matter of fundamental importance to Māori, yet Māori (outside the Crown) were excluded from this process. There was no proposal for the review to consult with Māori (or others). A paper in December 2021 “acknowledged” that some engagement beyond government departments was likely to be necessary, “*but this can be calibrated as necessary over time*”. It never happened.

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<sup>13</sup> “Strengthening Australia’s approach to trade negotiations”, Parliament of Australia, April 2024, Available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Joint\\_Standing\\_Committee\\_on\\_Trade\\_and\\_Investment\\_Growth/Approachtotrade/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Joint_Standing_Committee_on_Trade_and_Investment_Growth/Approachtotrade/Report)

Towards the end of the process, a Māori advisor in MFAT observed that the draft Cabinet Paper “is essentially a paper on consultation” and “wondered if Māori had been consulted, and, if not, whether there was scope to do so.” But MFAT kept it secret even from Māori entities it was obliged to engage with over the process for negotiating trade and investment treaties, such as Ngā Toki Whakarururanga under the Mediation Agreement in the Wai 2522 claim.

In effect, the Crown only consulted itself, with MFAT determining what made the final cut in the Cabinet paper.

## **Te Puni Kokiri, Te Pae Tawhiti and Interagency responses**

MFAT developed an initial paper for the Minister, which it put out for inter-agency consultation from late February 2022 to a “select group of agencies”, including TPK and Te Arawhiti. A draft Cabinet paper was then prepared by MFAT and circulated to other Crown agencies for comment on 8 November 2022.

An early paper to MFAT’s Strategy and Policy Committee summarised its take on the inter-related *Te Pae Tawhiti* review:

*There have been increasing calls to improve Government’s engagement with Māori during the negotiation of international treaties, including through the Wai 262 and Wai 2522 Inquiries by the Waitangi Tribunal which have been critical of the Crown’s engagement and made related recommendations for action. As part of the Government’s approach to addressing issues raised in Wai 262 it has agreed through te Pae Tawhiti to consider how the Crown should work with Māori as its treaty partner to identify Māori interests, and the nature and strength of those interests, when negotiating international instruments. The scope of this work includes the implementation of the 2001 Strategy [for Engagement with Māori on International Treaties] also in the context of broader questions of how the Government should engage with Māori when representing New Zealand and how Māori should be represented in international fora. The development of Māori Crown engagement frameworks by Te Arawhiti also informs the contact through a more contemporary interpretation of how the Treaty of Waitangi partnership is represented in Crown and Māori decision-making.*

Although TPK was formally the lead agency for the review of international instruments and forums under Kete 3 of *Te Pae Tawhiti*, officials from MFAT said their “constitutional” responsibility to lead work on international treaties meant it might be expected to lead that process too. Te Pae Tawhiti continued in parallel while the Cabinet paper was being finalised, but this work stream was essentially run by MFAT.

Documents eventually released under the OIA showed that MFAT sought to shut down TPK’s calls for a more immediate and concrete review of the 2001 Crown Engagement strategy with Māori, presumably because it would have opened the door to constitutional debates that threatened the Crown’s absolute control of the treaty making process. TPK’s response to the

inter-agency consultation on the draft Cabinet paper pressed for a substantive review of this twenty year-old strategy, and

*... strengthening the commitment towards the redesign of the 2001 Strategy mahi and Te Puni Kokiri's role. As discussed previously, we consider that the redesign of the 2001 Strategy should be the main priority, with the redesigned Strategy implemented by mid next year. The timing would align with the end of the first phase of te Pae Tawhiti work programme. This view is formed from the need to promptly address the ad hoc and inconsistent approaches to Māori involvement in international mahi across government by driving a strategic approach.*

Rather than simply “improving implementation” of the 2001 Strategy, TPK proposed to work jointly with MFAT to redesign the Strategy, as aligned with the Te Pae Tawhiti work stream, and consider extending it to major non-binding instruments (such as the UNDRIP).

MFAT insisted it was more appropriate to review the Strategy after the current proposals had been implemented. The Cabinet paper proposed a stocktake of policy practice in international engagement, including how the 2001 Strategy was being implemented and taking into account any Cabinet decisions on Te Pae Tawhiti. The wording potentially deferred the review of the 2001 Strategy indefinitely:

*In addition, when the wider proposals in the paper are implemented, and a renewed picture of the broader international treaty-making process is clear, I consider that **the ongoing role of the 2001 Strategy and its fitness for purpose should be considered**. [extra emphasis added] Any comprehensive review of the 2001 Strategy will necessarily involve Māori as Tiriti partner, consideration of the outcomes of the Standing Orders Review, and a recognition of changes and improvements in Government practice since 2001. This will require careful consideration to ensure an appropriate engagement process is followed and relevant interests appropriately considered.*

A review of the 2001 Strategy proposed by TPK would necessarily involve Māori as Tiriti partner

*... and is likely (and reasonably so) to engage with constitutional issues about the Government's role in negotiating, concluding and implementing international treaties. **This type of discussion is beyond the scope of what this paper seeks to achieve at this time.***

Because the Cabinet Paper was never adopted, the 2001 Strategy is unchanged and nowhere nearer being reviewed, let alone any “appropriate engagement” with the “relevant interests”.

Of the other agencies, Te Arawhiti supported “improved procedural requirements for engagement with Māori and mandating assessment of Treaty interests through NIAs”, but also wanted the paper

*... to explore options for accountability mechanisms to ensure these interests are effectively recognised (i.e. reporting to iwi and Māori organisations, and Parliament's Māori affairs select committee – as identified by the WT in Ko Aotearoa Tenei).*

The Ministry of Justice suggested “*a stronger explanation on the treaty implications. It's invoked a few times and there's reference to Tribunal reports. Those reports, I understand, comment on why the issue is an important one*”.

None of this happened.

## **The Cabinet paper was never presented**

The original submission to inform the Cabinet paper was signed off by Minister Mahuta in July 2022. In late November 2022 the Minister approved the Cabinet paper, but her office had not yet identified a Cabinet Committee to slot it into. The final Cabinet paper proposed submission to Cabinet Economic Development Committee on 14 December and Cabinet on 19 December 2022. The paper then went into limbo, “*effectively in holding mode pending political decision ...*”.

The underlying reason for the delay, according to various sources, was an aversion within the Labour Cabinet and the parliamentary party to new Māori initiatives, given the backlash over Te Tiriti o Waitangi in relation to the He Puapua report for a work plan on the UNDRIP and the “Three Waters” review that recognised Māori rights in relation to water, which Minister Mahuta was also leading.

## **The Select Committee also rejected a review**

The Standing Orders Committee conducts a review of Standing Orders during the later stage of every Parliament. These reforms on treaty making were meant to feed into that review, as they relate to the parliamentary process. Nothing ever reached the Committee from MFAT or Cabinet. However, the issue came before the committee through a private submission.

The Standing Orders Committee report in August 2023 endorsed an inquiry “*into international treaty processes, including both how treaties are made and the parliamentary procedure for examining them*”. However, it gave responsibility for the review to the Foreign Affairs, Defence and Trade (FADT) Committee being reviewed. That Committee convened in late 2023 under the new Coalition Government to consider the recommendation. It did not seek independent advice on terms of reference, did not seek any submissions from outside the Crown, and did not initiate an inquiry.

MFAT's briefing paper to the Committee was barely three substantive pages, mostly describing the existing process. Oral evidence from MFAT's legal officials was scheduled for 20 minutes, but was over in seven. Asked by one committee member: “Fundamentally, is the process

broken?”, the official replied that MFAT’s view is that it “works well” and is “fit for purpose”. That was enough for the committee members to decide no review was needed.<sup>14</sup>

There was no disclosure to the committee that MFAT had spent more than two years working on reforms to the process, following the reports of the FTAAB and Waitangi Tribunal.

In stark contrast to the 141 page report of the Australian Joint Standing Committee on Treaties, released before the FADT Committee’s report, was just over two substantive pages and said:

*We initiated a briefing to consider this matter, with a view to familiarising ourselves with the issues and identifying the scope and terms of a possible inquiry. In the course of our consideration, we have determined that a full inquiry on the matter is not necessary at this time. However, as set out in this report, we are mindful of the concerns that led to the recommendation in the Review of Standing Orders 2023, and will keep this issue in mind during the term of Parliament. ...<sup>15</sup>*

The FADT Committee claimed to have considered the processes used by the Australia, Canadian and United Kingdom Parliaments, and how they compared with New Zealand’s, and the reports of those countries’ parliamentary committees on the treaty making process. If it did, it clearly did not take them on board.

Not only did the committee not review the matter at all. It adopted a practice that routinely allocated 5 minutes for individuals, and 10 minutes for groups, to speak to their submissions on long and complex international treaties reported to it for review pursuant to Standing Orders.

The terms of reference set by the Standing Orders Committee for its review in the 2023-2026 parliamentary term explicitly includes the international treaty examination process.

## **A shameful saga**

As a result of stalling and backsliding by various parts of the Crown, Aotearoa retains a system devised in the late 1990s. International trade and investment treaties were a shadow of their recent selves. Waitangi Tribunal’s had yet to hold that there was no cession of sovereignty and recommend reform the process. The democratic deficit was growing, but nowhere near the fever pitch of recent years.

By keeping its review secret and excluding any review of the Crown’s claim to prerogative, the gatekeepers at MFAT effectively protected the executive’s absolute autonomy to do whatever it wants in the international arena and keep it a Tiriti-free zone.

The challenge now sits with the Waitangi Tribunal’s Constitutional Kaupapa inquiry, alongside pressure points such as standing orders reviews, to expose the Crown’s self-serving lack of accountability.

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<sup>14</sup> Oral evidence of MFAT to Foreign Affairs Defence and Trade Committee. Available at: <https://vimeo.com/941746411> at approx 28 minutes.

<sup>15</sup> Foreign Affairs, Defence and Trade Committee, “Briefing on the International treaty examination process”, 54<sup>th</sup> Parliament, May 2024.