

NGĀ TOKI WHAKARURURANGA

Co-convenors: Pita Tipene, Moana Maniapoto

SUBMISSION ON REGULATORY STANDARDS BILL

1. Ngā Toki Whakarururanga was established through a Mediation Agreement with the Crown in 2021 in the Wai 2522 Waitangi Tribunal Inquiry into the Trans-Pacific Partnership Agreement (TPPA).
2. That formal Agreement mandates us to bring a Te Tiriti o Waitangi perspective to the trade-related policy space, 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 o Waitangi.
3. This necessarily involves the interface between domestic policy decisions and international trade and investment policy and agreements, including in relation to the Regulatory Standards Bill.
4. We were an interested party in the Waitangi Tribunal's urgent inquiry into the Regulatory Standards Bill as part of Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry (WAI 3300), in which we are a full party.
5. Ngā Toki Whakarururanga endorses the findings of the Waitangi Tribunal made, before the Regulatory Standards Bill was released, that the Crown breached its Tiriti obligations in the process of developing the bill, and go further to condemn the substance of the now-released Bill as a fundamental breach of Te Tiriti o Waitangi.
6. This submission opposes the Regulatory Standards Bill on three grounds:
 - (i) The exclusion of Māori from policy development and decisions on this Bill;
 - (ii) The Bill's "principles" seek to eradicate te Tiriti o Waitangi from governance in Aotearoa;
 - (iii) The principle on "regulatory takings" will impose significant obstacles to future compliance with Te Tiriti and threaten to undo existing initiatives to advance Te Tiriti. It will embed protections for private property rights that are, in many respect, comparable to investor-state dispute settlement that the Crown, through current and previous governments, has opposed in international trade and investment agreements.

Exclusion of Māori

7. The Waitangi Tribunal has documented the determination of the Minister of Regulation David Seymour not to engage with Māori or address Te Tiriti o Waitangi in developing this Bill and the obstructive approach of the Crown to provision of documentation to Claimants and the Tribunal throughout the tribunal's proceeding.
8. In particular, Ngā Toki Whakarururanga adduced in evidence belated responses from Mr Seymour to Official Information Act requests that contained handwritten comments which

show his contempt for Te Tiriti, the Crown's obligations and tikanga Māori. These revealed that the Minister rejected recommendations from his own officials in the Ministry for Regulation for "early and ongoing engagement with Māori experts" and the minister's preference to engage with "kitanga" experts, which never occurred. The Tribunal cites from these documents in paragraphs 26 to 29 of its Report.

The Absence of te Tiriti from regulatory principles

9. Ngā Toki Whakarururanga was a full party to the urgent inquiry on the Treaty Principles Bill, also promoted by the ACT Party with an intention to eradicate Te Tiriti o Waitangi and the obligations of the Crown from the constitutional framework of Aotearoa.
10. Despite the defeat of the Treaty Principles Bill following massive protests and the findings of breach by the Waitangi Tribunal, the ACT Party is seeking to achieve the same objectives through the Regulatory Standards Bill, with the complicity of the National and New Zealand First parties.
11. As the Tribunal report shows, Mr Seymour again rejected advice from his own Ministry for Regulation, that the Bill include a principle of regulatory responsibility that "recognises the Treaty".
12. It would be utterly inconsistent for National and NZ First to have rejected the Treaty Principles Bill and then to support this Bill, just because National made a coalition agreement with the ACT Party behind closed doors so it could secure a three year term in government.

"Taking of property"

13. The second substantive ground for our intervention in the Waitangi Tribunal, and this submission, is that by introducing into legislation the protection of property from "regulatory takings", the Regulatory Standards Bill would introduce into domestic law an equivalent of Investor-State Dispute Settlement (ISDS), currently contained in a number of international trade and investment treaties to which New Zealand is a party.
14. Clause 8(c) reads:
Taking of property ...
(c) legislation should not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—
 - (i) there is a good justification for the taking or impairment; and*
 - (ii) fair compensation for the taking or impairment is provided to the owner; and*
 - (iii) the compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment.*
15. If the ACT Party was genuinely committed to the principle of not taking or impairing property without the concern of the owner and fair compensation, it would return land and resources it has stolen over the past 135 years and provide just compensation to hapū, instead of the miserly Treaty settlements the Crown has provided that amount to 2% or less of what has been stolen. But it has no intention of doing so. Nor would any other party in the Parliament pursuant to an "unjust taking" principle.

16. It cannot even hide behind the argument against retrospective legislation, given they have just done that on pay equity in the Equal Pay Amendment Act 2025. Instead, the Bill aims to protect the beneficiaries of Tiriti breaches, among others, and place a further obstacle in the way of Tiriti justice.
17. There is no definition of “property”, so no indication of its scope. We are concerned that this would include a very broad, indeterminate range of “private property”, including shares, patents on seeds, mining and forestry licenses, water rights, data and AI algorithms, infrastructure contracts, among many other concepts of “property” under western law that impinge on Māori responsibilities and rights under te Tiriti o Waitangi.
18. Likewise, there is no standard for assessing the level of “impairment” that would trigger the principle. This is a recipe for harassment, as this “principle” would be applied to future regulatory developments and requests for or self-initiated, reviews of existing regulation by the ministerial-appointed Regulatory Advisory Board.
19. The vagueness of these concepts increases uncertainty and heightens legal and fiscal risks.
20. As the Waitangi Tribunal has recognised in relation to ISDS, there is a strong potential chilling effect on decisions that would prejudice Māori in their ability to secure Tiriti-compliant laws and redress.
21. In the absence of any protection for te Tiriti, it also appears that the principle would expect Māori to compensate any property owners for impairment as a result of Tiriti settlements. That shows how nonsensical this is.
22. There are strong parallels to ISDS in international trade and investment agreements.
 - ISDS allows foreign investors to enforce special rights and protections written into those agreements in private offshore ad hoc arbitral tribunals. Those rights and protections include direct expropriation and indirect expropriation that is often also referred to as “regulatory expropriation”, very similar to what is proposed in this Bill.
 - The definition of property is non-exhaustive and includes extremely broad categories of the kind mentioned above.
 - The arbitrators are not judges, but private individuals, as with the proposed Regulatory Board, with potential and often actual conflicts of interest.
 - The damages that can be awarded go far beyond reimbursing the amount invested, and include foregone future profits with compound interest, punitive damages, as well as costs.
23. This process has been widely criticised internationally, not just for its arbitrariness and the extreme level of awards that have been made to investors, but also as a form of state-funded private risk insurance.
24. Since 2017, successive governments of Labour NZ First, Labour, and the current National, New Zealand First and ACT coalition have recognised there are a serious legal, fiscal and policy risks arising from ISDS and have maintained a policy of not including ISDS in new trade or investment agreements.
25. The argument that this Bill sets out non-binding principles that a government can ignore, confess that it has not complied and then proceed with its preferred legislation, is misleading.

26. We note that legal advice has been redacted from documents. However, our expert legal advice points to the potential for judicial review domestically and for failure to comply with these principles forming the basis for an ISDS dispute based on a breach of “fair and equitable treatment” and “legitimate expectations” of an investor. The shifts the investment risk from the investor onto the people of Aotearoa New Zealand.
27. There is a further risk that these possibilities, compounded by the vagueness of both the Bill and ISDS, will have a “chilling effect” on decisions and actions to meet the Crown’s Tiriti obligations. The Waitangi Tribunal in the Stage Three report in the Trans-Pacific Partnership Agreement (Wai 2522) Inquiry agreed there are risks associated with an ISDS that can impede the Crown’s compliance with its Tiriti obligations bligations.
28. Most, but not all, international treaties with ISDS that apply to New Zealand have a Treaty of Waitangi Exception, which while inadequate at least provides the basis for argument. Regulatory Standards Bill lacks even that inadequate protection.
29. That would create serious prejudice to Māori responsibilities and rights under Te Tiriti and contrary to the Crown’s obligations of active protection.

The Bill must be rejected

30. We note that, unlike the National-ACT coalition agreement on the Treaty Principles Bill, which committed only to its introduction, the commitment in paragraph 16 is to legislate the Bill:

*Legislate to improve the quality of regulation, ensuring that regulatory decisions are based on principles of good law-making and economic efficiency, **by passing the Regulatory Standards Act as soon as practicable.***
31. The Coalition Agreement between the National Party and New Zealand First says that “The New Zealand First Party agrees to support the ACT Party initiatives as outlined in the Coalition Agreement between National and ACT.”
32. If this select committee reports back in favour of this Bill, it will be complicit in these breaches of Te Tiriti and seen to endorse the contemptuous attitude of Mr Seymour, who at the same time is pretending that this Bill “aims to reduce the amount of unnecessary and poor-quality regulation by increasing transparency and making it clearer where legislation does not meet standards.”
33. It falls to the National and NZ First parties to join Labour, the Greens and Te Pāti Māori in rejecting this Bill in the select committee report, as happened with the previous version in 2009.

We wish to speak to this submission.

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17 June 2025