BEFORE THE WAITANGI TRIBUNAL **WAI 3300**
WAI 3342

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	Tomokia ngā tatau o Matangireia - the Constitutional Kaupapa Inquiry **(WAI 3300**)
AND	
IN THE MATTER OF	a claim by **Pita Tipene, Moana Maniapoto, George Laking, Veronica Tawhai, Donna Kerridge** and **India Logan-Riley** on behalf of **Ngā Toki Whakarururanga (WAI 3342)**

STATEMENT OF POSITION OF NGĀ TOKI WHAKARURURANGA

Dated on this 17th day of December 2024

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TĒNĀ E TE TARAIPIUNARA:

Introduction

1. This Statement of Position on Constitutionality is provided for the wānanga ā-rohe phase of Tomokia ngā tatau o Matangireia – the Constituional Kaupapa Inquiry (WAI 3300).

2. It is provided by the Wai 3342 Ngā Toki Whakarururanga claimants (**the Claimants**) in response to the directions of the Wai 3300 presiding officer, Her Honour, Chief Judge Dr C L Fox dated 1 October 2024,[1] the that the parties file statements of position on tikanga principles or principles of constitutionality prior to the wānanga.[2]

Ngā Toki Whakarururanga's Tiriti mandate

3. The following constitutional principles sourced in He Whakaputanga o te Rangatiratanga o Nu Tireni and Te Tiriti o Waitangi, as applied to international negotiations and agreements in the trade and investment space, broadly defined, form the basis of the claimants' arguments and evidence in this inquiry.

4. Ngā Toki Whakarururanga was established through a Mediation Agreement with the Crown in the Wai 2522 Waitangi Tribunal Inquiry on the Trans-Pacific Partnership Agreement.[3] Following a mandating process, Ngā Toki Whakarururanga adopted a Tiriti-based constitution that is guided by the **Moemoea:**

"He Whenua Rangatira"

(We are an independent and sovereign nation)

5. As a by-Māori, of-Māori, with-Māori and for-Māori entity, Ngā Toki Whakarururanga exists, and holds itself accountable, to empower ngā hapū and hapori to understand the implications, opportunities and risks that exist in

[1] Wai 3300, #2.6.19 *Memorandum-Directions of Chief Judge Dr C L Fox commencing wānanga ā-rohe phase dated* 1 Whiringa-ā-Nuku 2024.
[2] At [18].
[3] Mediation Agreement found at Appendix II of Waitangi Tribunal *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific* (Wai 2522, 2023) at p 205.

the international trade space, and associated agreements, and to support them in their interface with the Crown to protect their mana and exercise their own rangatiratanga to advance what they see as their collective wellbeing.

6. Ngā Toki Whakarururanga's principal kaupapa is:

Kia pūmau ki te kupu, tutuki noa ngā taonga tuku iho.

(To hold fast to the promise to advance and protect our legacies)

7. Our duty and responsibility is to protect and advance Māori rights according to Te Tiriti o Waitangi me He Whakaputanga.

8. Other kaupapa that form Ngā Toki Whakarururanga's mandate are to:

8.1 uphold He Whakaputanga o te Rangatiratanga o Nu Tireni me te Tiriti o Waitangi;

8.2 preserve mana tuku iho (mana inherited) and mana whakahaere (exercise of that inherited power to preserve and maintain hapū, mana and rangatiratanga);

8.3 recognise the responsibilities of rangatira as leaders to preserve and uphold the mana and rangatiratanga of their hapū and the responsibilities of the Crown to represent Tauiwi;

8.4 empower Māori to define, pursue and secure our own pathways to collective wellbeing and to protect and our rights, duties, interests and responsibilities in relation to ngā taonga tuku iho;

8.5 understand the importance of tikanga-based trading relationships to Māori peoples whanau, hapū and iwi and the significance of trade to the economy of Aotearoa New Zealand and the livelihoods and wellbeing of its people; and

8.6 achieve radical transformation through Māori leadership in trade-related spaces that sets the bar to ensure that Te Tiriti is embedded in trade policy, negotiations and agreements.

9. The Claimants point, in support, to the Crown's explicit recognition in the Mediation Agreement that:[4]

[4] Mediation Agreement at [3.1].

9.1 *"Te Tiriti o Waitangi/the Treaty of Waitangi is New Zealand's founding constitutional document. It affirms te tino rangatiratanga o ngā iwi me ngā hapū, and the kāwanatanga of the Crown. It established a continuing partnership between Māori and the Crown"*

10. The Crown further expressed its "wish to develop a mana-enhancing relationship that reflects Te Tiriti/Treaty principles of partnership, participation, protection and prosperity and acknowledges:[5]

10.1 Claimants' rangatiratanga and status as Tiriti/Treaty partners;[6]

11. Despite the common recognition of the constitutional status of Te Tiriti o Waitangi, and the relationship of rangatiratanga to kāwanatanga, the Crown continues to assert in its Statement of Position an exclusive, supreme, self-assigned Executive prerogative in the international domain.[7]

12. That purported exclusive authority is exercised in the negotiation, ratification and implementation of international trade and investment agreements in excess of the limited authority of kāwanatanga and in breach of the Crown's Tiriti obligations to recognise the rangatiratanga of Māori.

Mana Motuhake and Rangatiratanga

13. He Whakaputanga o te Rangatiratanga o Nu Tireni 1835 me Te Tiriti o Waitangi 1840, agreed to by the authorised representatives of the British Crown, were and remain the constitutional foundations of the state of Aotearoa New Zealand.

14. He Whakaputanga me Te Tiriti affirmed the pre-existing and enduring Mana Motuhake of Rangatira over te ao Māori on behalf of their hapū and guaranteed the continuance of their authority and responsibilities, termed their "tino rangatiratanga", and associated laws, values, governance arrangements, political institutions and processes, economic systems, and treaty making authority.

[5] Mediation Agreement at [3.2].
[6] Mediation Agreement at [3.2.1].
[7] Wai 3300, #B14 *Crown Statement of Position on Principles of Constitutionalism* dated 25 November 2024.

15. As the Waitangi Tribunal confirmed in *Te Paparahi o te Raki* (Wai 1040) ("**Te Raki**"), ngā Rangatira never ceded their mana, authority or sovereignty to the Crown.[8]

16. Other Tribunal inquiries confirm that iwi which did not sign Te Tiriti have not otherwise recognised the Crown's claim to sovereignty. The Report on *Te Urewera* ("**Te Urewera**") observed that Ngāi Tūhoe were:[9]

16.1 *"not alone in contesting the meaning of the Crown's sovereignty/kawanatanga and, particularly, how it should be tempered by the tino rangatiratanga retained by Māori generally, and by the mana motuhake retained by Tuhoe."*

Limited delegated authority of Kāwanatanga

17. As the Tribunal made clear in its report on Stage Two of *Te Raki*, under Te Tiriti o Waitangi, the Mana Motuhake and tino rangatiratanga of ngā Rangatira was to operate alongside, and in equal status to, the kāwanatanga authority of the newly arrived British Governor over his people. It stated that:[10]

17.1 *"The Rangatira who signed te Tiriti did not cede their sovereignty. That is they did not cede their authority to make and enforce law over their people or their territories. Rather they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal – equal while having different roles and different spheres of influence. In essence, Rangatira retained their authority over their hapū and territories, while Hobson was given authority to* control Pākehā."

18. The Tribunal was very clear that:[11]

18.1 ***"Kāwanatanga, the authority granted to the Crown was not a superior authority,*** *an overarching power, albeit "qualified" by the*

[8] Waitangi Tribunal *He Whakaputanga me te Tiriti. The Declaration and the Treaty. The Report on Stage One of the Te Paparahi o te Raki Inquiry,* (Wai 1040, 2014) at xxii.
[9] Waitangi Tribunal *Te Urewera Volume 1: Chapter 3: Te Tono Ture Tikanga a Tuhoe – The Treaty and the Tuhoe Constitutional Claim, 1840–65* (Wai 894, 2017) at p.134 at [3.2].
[10] Waitangi Tribunal *Tino Rangatiratanga me Te Kāwanatanga. The Report on Stage 2 of Te Paparahi o te Raki Inquiry* (Wai 1040, 2023) at p. xxiv.
[11] Waitangi Tribunal, *Tino Rangatiratanga me Te Kāwanatanga. The Report on Stage 2 of Te Paparahi o te Raki Inquiry* (Wai 1040), 2023 at p. 85.

right of Māori to exercise tino rangatiratanga. ***Rather, the Crown's authority was expressly limited … to its own sphere. Alongside and equal to it, was that of tino rangatiratanga.*** *… Negotiating and managing their respective spheres of authority, as well as shared spheres as the two populations intermingled, was the key issue for the treaty partners in the years after te Tiriti was signed.* ***The Crown could not unilaterally decide what Māori interests were or what the sphere of tino rangatiratanga encompassed; that was for [Māori] to negotiate with the Crown.*** *The Crown's duty was and is to engage actively with [Māori] on how it should recognise … tino rangatiratanga and, where agreed, give effect to it in New Zealand law. Partnership was and is the framework for governance in New Zealand; both parties must act honourably and in good faith."*

19. In relation to those who did not sign Te Tiriti, the Tribunal in *Te Urewera* likewise stressed that any co-existence cannot be unilaterally determined by the Crown but requires negotiation in good faith to reach a principled conclusion and tailored to the circumstances at hand. [12]

20. The Crown has continuously, systematically and deliberately failed to recognise or act within the clear limitations on the authority conferred on kāwanatanga, as the Tribunal recognised in its Report on Stage Two of *Te Raki*:[13]

    20.1 *"As the treaty relationship unfolded …, it was characterised by the Crown overstepping the bounds of kāwanatanga, in conjunction with continual erosion of Māori tino rangatiratanga."*

Constituent elements of tino rangatiratanga

21. In his evidence to several Waitangi Tribunal inquiries, Dr Moana Jackson examined the nature of the constitutional authority that rangatira, and Māori generally, exercised prior to and after they signed te Tiriti. Dr Jackson identified the constituent parts of mana or tino rangatiratanga, which he refers to as the "specifics of power", to include:

    21.1 **The power to define** - that is, the power to define the rights,

[12] *Te Urewera Report*, above n 9, at p 134.
[13] As summarised by the Tribunal in *Te Paparahi o te Raki* Stage 2 at p xxiv.

interests and place of both the collective and of individuals as mokopuna and as citizens;

21.2 **The power to protect** – that is, power to be kaitiaki, to manaaki and maintain the peace, and to protect everything and everyone within the polity through an ultimate authority to wage war when necessary;

21.3 **The power to decide** – that is, the power to make decisions about everything affecting the wellbeing of the people;

21.4 **The power to reconcile** – that is, the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo;

21.5 **The power to develop** – that is, the power to change in ways that are consistent with tikanga and conducive to the advancement of the people; and

21.6 **The power to treat** – that is, the power to negotiate and commit to formal collective agreements with other polities.

The Crown's assertion of sovereignty is illegitimate

22. The constitutional system outlined by the Crown in its Statement of Position,[14] and articulated by Sir Kenneth Keith in his annexed introduction to the Cabinet Manual,[15] asserts the sovereignty of the Crown, including prerogative powers of the Sovereign unilaterally vested in the King of England/New Zealand. It provides no justification for that assertion. The Claimants' critique of this position is set out in more detail in a separate Statement of Reply.[16]

23. The Westminster constitutional system is the product of a unilateral assertion of sovereignty on behalf of the then Queen of England in May 1840 and actions taken by the Crown subsequent to that.

24. The self-justification for that action was grounded in imperialist ideologies and colonial legal doctrine and international law concepts of statehood and

[14] Wai 3300, #B14 *Crown Statement of Position on Principles of Constitutionalism* dated 25 November 2024.
[15] Wai 3300, #B14(a) *Appendix A: The Rt Hon Sir Kenneth Keith, "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" (1990, updated 2008, 2017 and 2023)* dated 25 November 24.
[16] Filed with this Statement of Position.

sovereignty, which were developed by imperial powers to justify colonisation. In particular, the Catholic Church's Papal Bulls and the Christian Doctrine of Discovery granted the monarchies of Britain and Europe the right to conquer and claim lands, and to convert or kill the native inhabitants of those lands.[17]

25. This ideology was expressed explicitly in Aotearoa by the Crown through Hobson's Proclamation of Sovereignty in May 1840 that unilaterally claimed sovereignty over the North Island by the Treaty of Waitangi and the South Island by discovery. That was reinforced by the judgment in *Wi Parata v Bishop of Wellington*,[18] including the assertion that Māori were not civilised enough to enter a treaty with another state. The Crown has never renounced the Doctrine of Discovery.

26. The current articulation of the Crown's illegitimate claim to sovereignty is the New Zealand Constitution Act 1986. That legislative instrument vests power exclusively in the Crown's self-appointed institutions: a supreme Parliament, under the sovereignty of the British Monarch in the name of the King of New Zealand as Head of State; an Executive Cabinet appointed by the Head of State, from a Government elected through an individualised franchise; a judicial system presided over by His Majesty's Judges that operates according to common law doctrine and precedents; and a civil service that is responsible for the functioning of that system of government.

27. These colonial institutions have been used consistently, for almost two centuries since the Crown's unilateral assertion of sovereignty, to suppress the legitimate constitutional authority affirmed to Māori in Te Tiriti and the accompanying application of tikanga Māori. That has resulted in a constantly compounding loss of political, economic, and social power for Māori.

28. The Crown has remained silent in these proceedings about what it considers the source of legitimacy for its authority with reference to He Whakaputanga me Te Tiriti. That silence seeks to both ignore, and to capitalise on, a history of dishonour that breached the Crown's foundational commitments and obligations. The passage of time does not and cannot make legitimate the unilateral assumption of power in violation of the foundational treaty between sovereign treaty-making nations that permitted the Crown's presence here in

[17] Tina Ngata, *Kia Mau: Resisting Colonial Fictions,* Rebel Press, 2019, and Claimants' Statement of Claim, paragraphs [133] to [139].
[18] *Wi Parata v Bishop of Wellington,* (1877) 3 NZ Jur (NS) 72 (SC)

the first place.

Mana and Rangatiratanga include treaty making authority

29. The history of treaty making between hapū by Rangatira in the exercise of mana shows is outlined in the Second Brief of Evidence of Dr Moana Jackson on the Wai 2522 Record of Inquiry.[19] In Dr Jackson's words:[20]

    29.1 *"treaties and the power to treat did not suddenly fall out of the sky on unaware or ignorant Māori polities in 1840. ... The authority and understanding of treaties was an integral part of tikanga as law."*

30. The constitutional authority of ngā Rangatira to treat with other nations, whether they are other hapū, the English or other foreign nations, was and is an integral function of mana and responsibility of the exercise of tino rangatiratanga to be conducted according to tikanga Māori. Dr Jackson states that:[21]

    30.1 *"[The] tikanga-based concept of power that Iwi and Hapū have defined as mana, and which they have exercised as a unique, absolute and independent constitutional authority [includes] the notion of treaty making as an inherent and inalienable consequence of such authority."*

31. The very nature of mana as a taonga meant it could not be alienated to another authority. Dr Jackson also confirms that:[22]

    31.1 *"Mana was in fact absolutely inalienable. It was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna, and no matter how powerful rangatira might presume to be, they never possessed the authority nor had the right to give it away or subordinate it to some other entity."*

32. Because mana could not be ceded in tikanga or Māori legal terms, it is axiomatic that the authority and responsibility of Iwi and Hapū to treat could not be delegated or subordinated in a treaty to that of another polity and could not be ceded.

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[19] Wai 2522, #B9 *Second Brief of Evidence of Dr Moana Jackson* dated 17 October 2019.
[20] At [45].
[21] At [16].
[22] At [32].

33. Dr Jackson concluded that, if it was impossible, and indeed culturally incomprehensible, for one Hapū or Iwi to permit another to treat on its behalf, it is at best illogical to assume that Hapū or Iwi would allow the Crown to do so.

34. In sum, the Claimants' position is that the exercise of mana in *both* the domestic and international domains are intrinsic and inseparable elements of the rangatiratanga that the authorised representatives of the British Crown affirmed and guaranteed by in He Whakaputanga o te Rangatiratanga o Nu Tireni 1835 and Te Tiriti o Waitangi 1840.

The Crown's "treaty-making prerogative" is invalid

35. The Crown asserts an exclusive prerogative for the Executive to negotiate and enter into international negotiations and treaties as an integral part of its assumed sovereignty.[23] Again, the Crown's Statement of Position on Constitutionality provides no justification for that in relation to He Whakaputanga me Te Tiriti o Waitangi.

36. As a consequence of this pretended power, Māori have no right to exercise decision-making power or have a seat at the table when decisions are made on whether to negotiate a treaty, what to negotiate, with whom, what objectives to seek, what compromises to make, what exceptions to insist on and whether the process and deal are tika. The Crown controls the entire process in the name of Crown prerogative and Executive privilege.

37. This assertion, and the consequent exercise of a presumed prerogative, far exceeds the limits of the conferred constitutional authority of kāwanatanga.

38. This deprives the Claimants and other Māori of their right and ability to exercise self-determination over their own lives in a manner consistent with Tikanga Maori, and their laws, values, governance arrangements, political institutions and processes, economic systems, and mana, as guaranteed under Te Tiriti o Waitangi, and in the United Nations Declaration on the Rights of Indigenous Peoples.

39. In the words of Dr Jackson, the "*unilateral negotiation of international agreements that purport to bind everyone in this country*" is not a valid exercise of the kāwanatanga granted to the Crown in Te Tiriti o Waitangi.

[23] At [15].

This cannot have been the expectations of the Rangatira when they entered into Te Tiriti, and constitutes a fundamental breach of Te Tiriti.

Resolving the constitutional status of international Treaty-making

40. As Sir Kenneth Keith acknowledges:[24]

    40.1 *"More and more law is made through international processes. The powers of national governmental institutions are correspondingly reduced. This has important consequences for national and international constitutional processes."*

41. That expansion of scope, and corresponding reduction of powers of national government institutions, includes the ability of the Crown to meet its Tiriti obligations in its purported exercise of sovereignty.

42. The Waitangi Tribunal has never substantively considered the authority of international treaty making under Te Tiriti, and in particular not the making of contemporary trade and investment agreements that reach increasingly deep into the domestic domain.

43. The Tribunal's consideration of constitutional principles in the international sphere to date have been situated historically in the limited sphere of foreign policy at the time and in the context of signing Te Tiriti.

44. The report *Te Raki* Stage Two observed that "the rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary".[25] The Tribunal quoted from *Te Mana Whatu Ahuru* that te Rohe Pōtae signatories to Te Tiriti wanted "a governing power that could be used to control settlers and protect them from foreign threats",[26] which at the time was posed by Baron de Thierry from France.

45. The Tribunal in the Wai 2522 Inquiry on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**") declined to apply the conclusion of the *Te Raki* Stage One report that Māori signatories in the North did not cede sovereignty, noting its scope was limited to the largely historical

[24] Wai 3300, #A14(a) at p 6.
[25] *Te Paparahi o te Raki Stage Two Report* at p. 529.
[26] Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims Vol. 1* (Wai 898, 2023) at p. xlv.

claims and made no conclusions about the Crown's exercise of sovereignty today.[27] It also claimed that both the Stage One *Te Raki* and *Ko Aotearoa Tēnei* reports:[28]

45.1 *"acknowledge that kāwanatanga includes a protective and representative capacity in the conduct of international affairs."*

46. That is a fundamental misreading of the reference in *Te Raki* to the Crown's authority in international affairs. International affairs in 1840 related to levying war and high diplomacy, and the reference was confined to threats from foreign powers. That is consistent with He Whakaputanga, where the King of England was to provide protection against usurpation of the sovereignty of ngā Rangatira.

47. This is fundamentally different from contemporary trade and investment treaties, whose rules and enforcement mechanisms are directed as domestic policy and laws, and impact directly and indirectly the responsibilities and rights of Māori guaranteed in Te Tiriti.

48. The constitutional principles that should apply to contemporary international treaty making was not a matter addressed before the Tribunal in *Te Raki*.

49. Despite the above observations, the Tribunal in the Wai 2522 CPTPP report acknowledged that interpretation of this question properly lies with the Constitutional Kaupapa inquiry: [29]

49.1 *"Our concern remains that in this, our final report, we do not intrude into matters still under consideration in the Te Raki inquiry. We maintain the view that it is not appropriate in this final stage of inquiry to address broad constitutional questions concerning the Crown–Māori relationship in respect of international instruments, given the relatively limited evidence and range of parties before us. We also note that a kaupapa inquiry into the Constitution is pending."*

Constitutional Principle for Aotearoa New Zealand to speak with one voice

50. The Claimants understand the need for Aotearoa New Zealand to be

[27] Waitangi Tribunal *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522, 2023) at [2.3.2] at pp. 19 and 23.
[28] Above n 27, at pp 20-21.
[29] Above n 27, at p 22.

represented and to act as a single entity in the international space. But there is nothing that requires that entity to be the Crown.

51. The constitutional principle of unity in the international sphere requires a Tiriti-compliant form of constitutional governance within Aotearoa, which can then to speak as one in the international arena. That is the plurality that was envisaged in Te Tiriti o Waitangi.

52. That gives effect to reflect fundamental the constitutional relationship articulated by the Tribunal in its Report on *Te Raki* Stage 2:[30]

52.1 *"Today, the Crown has the power and capacity to recognise, respect and give effect to the treaty guarantee of rangatiratanga. It has had this power since it signed te Tiriti. Its duty to give effect to the guarantee of tino rangatiratanga is as important today as it was in 1840. That is the basis for te houruatanga, a partnership in which each party to the treaty recognises the authority of the other, and together they decide how each will exercise that authority on matters in which both have important interests."*

Conclusion

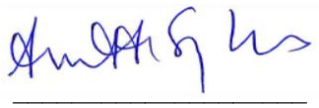
53. Ngā Toki Whakarururanga says that hapū, iwi and Māori generally have not been able to exercise tikanga and rangatiratanga, including the right to possess, manage, and develop lands and resources; manage their internal affairs; enter trade and economic alliances; and defend their rights and territories, independent of Crown interference.

54. It is more important than ever to recognise the fundamental constitutional principles outlined above, and to restate and reinstate the constitutional relations of rangatiratanga and kāwanatanga agreed in He Whakaputanga me Te Tiriti as the foundations of this nation, at a time when illegitimate exercises of unilateral power nationally and internationally seek to tear it apart.

55. The imposition of an extractive and exploitative capitalist economy has dispossessed and impoverished Māori, and excluded Māori from the right to exercise rangatiratanga and kaitiakitanga over taonga in a manner consistent with tikanga and mātauranga Māori.

[30] *Te Paparahi o te Raki Stage Two Report* at p 71.

DATED at Rotorua this 17th day of December 2024



Annette Sykes Maia Te Hira

Counsel for the Claimants

TO: The Registrar, Waitangi Tribunal, Wellington

AND TO: The Crown Law Office

AND TO: Claimant Counsel for the Claimants

This **STATEMENT OF POSITION** is filed by **ANNETTE SYKES** and **MAIA TE HIRA -** Counsel for the Claimants, of the firm Annette Sykes & Co. Ltd.

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Documents for service on the abovenamed Claimants may be left at the address for service or may be posted to the solicitor at Annette Sykes & Co., PO Box 734, Rotorua 3010.