

**BEFORE THE WAITANGI TRIBUNAL**

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

**IN THE MATTER OF**

the Treaty of Waitangi Act 1975

**AND**

**IN THE MATTER OF**

Tomokia ngā tatau o Matangireia – the  
Constitutional Kaupapa Inquiry (**WAI 3300**)

**AND**

**IN THE MATTER OF**

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

**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**)

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**STATEMENT OF REPLY TO CROWN STATEMENT OF POSITION**

Dated on this 17<sup>th</sup> day of December 2024

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**ANNETTE  
SYKES & Co.**  
barristers & solicitors

8 – Unit 1 Marguerita Street  
Rotorua, 3010  
Phone: 07-460-0433

**Counsel Acting:** Annette Sykes / Maia Te Hira  
**Email:** [asykes@annettesykes.com](mailto:asykes@annettesykes.com) / [maia@annettesykes.com](mailto:maia@annettesykes.com)

**AND**

**IN THE MATTER OF**

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

**AND**

**IN THE MATTER OF**

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

## STATEMENT OF REPLY TO THE CROWN'S POSITION

### Introduction

1. The position remains that the Crown's actions and constitutional framework fail to align with He Whakaputanga o Te Rangatiranga o Nu Tireni, Te Tiriti o Waitangi and its principles, and the constitutional relationship of kāwanatanga and rangatiranga agreed between the Crown and Māori.
2. The Crown's Statement of Position<sup>1</sup> admits that its account of New Zealand's constitutional framework does not address challenges to constitutional arrangements and constitutional legitimacy in this inquiry.<sup>2</sup> Instead, it assumes the legitimacy of the Crown's unilateral assumption of power, and ignores the mana, rangatiranga, and tikanga that underpin a Tiriti-based constitutional authority in Aotearoa New Zealand. There is no attempt to justify the contradiction between the self-declared assumption of Crown sovereignty that informs its narrative and Te Tiriti and He Whakaputanga.
3. The Crown's reasoning relies on unsubstantiated assertions that, by implication, reinforce the Crown's authority. For example:
  - (i) Paragraph 7 assumes that Crown sovereignty and Te Tiriti o Waitangi can co-exist by reducing Te Tiriti to "a" founding document and "one of" the sources of New Zealand's constitution without attempting to explain how those other sources can be reconciled with Te Tiriti.<sup>3</sup>
  - (ii) Paragraph 8 subordinates Te Tiriti (which it refers to as "the Treaty") in the overarching polity by suggesting that it "affects, in various ways and to varying extents, how public power is exercised in New Zealand."<sup>4</sup> The Crown claims the right to determine what those ways are and the extent to which they affect public power. The examples it cites, such as Waitangi Tribunal jurisdiction and Treaty settlements, are those in which the Crown retains the ultimate authority.
4. Descriptions of "the Treaty" as "a developing social contract"<sup>5</sup> need to be contextualised by reference to the very different constitutional interpretations of Te Tiriti in the two sources referred to: the Waitangi Tribunal Motunui-Waitara

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<sup>1</sup> Wai 3300, #B14 *Statement of Position for the Crown* dated 25 November 2024.

<sup>2</sup> At [3] and [27].

<sup>3</sup> "The Treaty of Waitangi of Waitangi | Te Tiriti o Waitangi is a founding document of the government in New Zealand and one of the sources of New Zealand's constitution."

Wai 3300, #B14, at [7].

<sup>4</sup> Wai 3300, #B14, at [8].

<sup>5</sup> Waitangi Tribunal *The Motunui-Waitara Report* (Wai 6, 1983) at p 61, cited in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (ca), per Casey J at 715.

Report<sup>6</sup> and Casey J's judgement in *New Zealand Maori Council v Attorney-General*<sup>7</sup> (the "Lands" case).

5. In the *Motunui-Waitara* report, the Waitangi Tribunal said: "*The Maori [text] confirms to the Chiefs and the hapu, 'te tino rangatiratanga' of their lands etc. This could be taken to mean 'the highest chieftainship' or indeed 'the sovereignty of their lands.'*"<sup>8</sup>
6. By contrast, Casey J.'s reference to a "social contract" in the *Lands* case is situated within a notion of Crown sovereignty that rests with Crown's courts, the executive and the Parliament. The constitutional relationship of rangatiratanga and kāwanatanga is displaced in favour of a vague societal arrangement that ignores power relations and how these have been constructed, including the role of colonization and capitalism.
7. Likewise, the Crown's memorandum describes representative democracy, sourced in majority rule, as "the underlying principle of New Zealand's key constitutional conventions".<sup>9</sup> That ahistorical account ignores the roots of representative democracy and majority rule in colonial dispossession and breaches of Te Tiriti and He Whakaputanga: Māori were initially disenfranchised from representative democracy so as to ensure settler majority rule and then marginalised in Māori electorates, until they became a minority in the system of universal franchise.

### **Sir Kenneth Keith on the Constitution of New Zealand**

8. The extract from Sir Kenneth Keith cited from the Cabinet Manual reinforces the Crown's self-legitimising narrative.<sup>10</sup> His text on the Treaty remains unchanged from 2008, despite major developments in Tribunal jurisprudence, not least the finding in *Te Paparahi o te Raki*<sup>11</sup> that there was no cession of sovereignty by Ngāpuhi, or reiterations of mana motuhake, for example, in the *Te Urewera Inquiry*.<sup>12</sup>
9. Sir Kenneth also refers only to the Treaty of Waitangi. Te Tiriti o Waitangi is

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<sup>6</sup> Waitangi Tribunal *The Motunui-Waitara Report* (Wai 6, 1983).

<sup>7</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>8</sup> Waitangi Tribunal *The Motunui-Waitara Report* (Wai 6, 1983), at pp. 51-52.

<sup>9</sup> Wai 3300, #B14, at [11].

<sup>10</sup> 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.*

<sup>11</sup> 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.

<sup>12</sup> 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].

never discussed, let alone He Whakaputanga o te Rangatiratanga o Nu Tireni.

10. The three paragraphs in his commentary that make reference to “the Treaty of Waitangi” are vague and give no insight into how Te Tiriti influences state structures or how the Crown gives effect to the relationship of rangatiratanga to kāwanatanga (or not). For example, the text says:

(i) The Treaty “may” indicate limits in our polity on majority decision-making.<sup>13</sup> It does not indicate the nature of those limits, in what circumstances those limits might apply, and who decides.

(ii) “Māori rights and interests” under Article 2 are “sometimes” accorded a special recognition.<sup>14</sup> Again, it does not indicate what these rights and interests are, in what circumstances they may be recognized, and accorded by whom.

(iii) “In some situations autonomous Māori institutions have a role within the wider constitutional and political system”, but what kind of institutions, who decides, and how autonomous they are within a system of Crown sovereignty is not explained.<sup>15</sup>

(iv) “A balance has to be struck between majority power and minority right. ... Indeed, those with authority to make majority decisions often themselves recognize that their authority is limited by ... the Treaty of Waitangi”.<sup>16</sup> This assumes the Crown, having unilaterally claimed that authority, can legitimately determine what limits it will recognize, or not recognize.

11. The proposed Treaty Principles Bill 2024 clearly illustrates the ease with which the Crown can recognize vague limits on its authority, such as Treaty principles, then seek to eliminate them with the stroke of a legislative pen. The Bill also shows that the notion of a balance of power that provides checks and balances<sup>17</sup> is no safeguard for Māori, when political parties seeking to form a government and exercise power as the executive make political trade-offs that knowingly breach Te Tiriti o Waitangi.

12. The proposed Treaty Principles Bill also exposes the illusion that the public service is to “support constitutional and democratic government”<sup>18</sup> when the

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<sup>13</sup> Sir Kenneth Keith *On the Constitution of New Zealand: An introduction to the Foundations of the Current Form of Government*, in *the Cabinet Manual* (2023), at p 2.

<sup>14</sup> *Ibid.*, at p 2.

<sup>15</sup> *Ibid.*, at p 2.

<sup>16</sup> Sir Kenneth Keith *On the Constitution of New Zealand: An introduction to the Foundations of the Current Form of Government*, in *the Cabinet Manual* (2023), at p 5.

<sup>17</sup> Wai 3300, #B14, at [22].

<sup>18</sup> “Public servants meet these obligations in accordance with important principles and values such as political neutrality, fairness and integrity.” Sir Keith, *On the Constitution of New Zealand*, in *The Cabinet Manual* (2023), at p 4.

instruction to officials was to implement the Coalition Agreement,<sup>19</sup> even if it was constitutionally unsound and breached the Crown's Tiriti obligations.

### **International Sphere**

13. The Crown's assertion that "The Executive is responsible for negotiating international agreements/treaties"<sup>20</sup> denies the power of Māori to treat with other nations that is intrinsic to mana motuhake and rangatiratanga. There is no seat for independent Māori at the Crown's table. The claimants maintain that this power to treat in the international domain has never been, and can never be, ceded to another authority, just as mana could not be ceded within the domestic domain.
14. The explanation of the role of Parliament in relation to treaties is also simplistic and inaccurate, especially in relation to trade and investment treaties.<sup>21</sup> The Executive claims it can negotiate and ratify such agreements unilaterally as an exercise of Crown prerogative. By doing so the Crown adopts binding and enforceable legal obligations that have direct domestic effects, including constraints on future action by Parliament or a subsequent government. Sir Kenneth Keith concurs that more law is now made through international processes and the "powers of national governmental institutions are correspondingly reduced".<sup>22</sup> That can impact directly on the Crown's compliance with its Tiriti obligations and deny Māori the responsibilities, duties, rights and interests affirmed under Te Tiriti.
15. Parliament is rarely required to incorporate trade and investment treaties into statute, except to the limited extent that a treaty requires changes to existing law. Where Parliament does need to act, the executive can rely on its majority to ensure its passage.
16. Sir Kenneth Keith's remark that "Parliament has an opportunity to scrutinize and comment on the more significant international treaties before they are ratified by the executive"<sup>23</sup> ignores the often perfunctory nature of parliamentary scrutiny and does not address Parliament's lack of authority to change those agreements.
17. Other consequences of international treaties, including trade sanctions for breaches of agreements, and monetary awards in the case of breaches of

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<sup>19</sup> Waitangi Tribunal *Ngā Mātāpono - The Principles – the Interim Report of the Tomokia ngā Tatau o Matangireia – The Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies*, (Wai 3300, 2024).

<sup>20</sup> "The role of the Executive is to govern (or administer) the country." Wai 3300, #B14, at [15].

<sup>21</sup> "The role of the Executive is to govern (or administer) the country." Wai 3300, #B14, at [15].

<sup>22</sup> Sir Kenneth Keith 'On the Constitution of New Zealand: An introduction to the Foundations of the Current Form of Government', in the *Cabinet Manuel* (2023), at p 6.

<sup>23</sup> *Ibid.*, at p 6.

investment treaties, also operate outside of any parliamentary scrutiny, let alone any exercise of rangatiratanga.

18. Beyond trade and investment treaties, the Crown also claims the power to determine the status and impact of international treaties on Indigenous Peoples. The failure to reference the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in the list of human rights instruments in the Crown's memorandum<sup>24</sup> further highlights the neglect of Māori rights in the constitutional framework.

### **Conclusion**

19. The Crown's actions and constitutional framework emphasize the ongoing conflict between the Crown's self-declared sovereignty and fundamental Māori concepts such as mana, rangatiratanga, and tikanga. By espousing only Western ideas of sovereignty, the Crown ignores the central role of Te Tiriti and He Whakaputanga in New Zealand's governance and exposes how profoundly it breaches the foundational constitutional documents of Aotearoa New Zealand.
20. Until the Crown recognizes that Te Tiriti requires a constitutional relationship that gives effect to rangatiratanga as it performs its kāwanatanga responsibilities, it will continue to breach its obligations to Māori.

**DATED** at Rotorua this 17<sup>th</sup> day of December 2024.



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Annette Sykes



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Maia Te Hira

### **Counsel for the Claimants**

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<sup>24</sup> Wai 3300, #B14, at [20]