

TE ROOPUU WHAKAMANA I TE TIRITI O WAITANGIWAI 3315
WAI 3324**E PAA ANA KI**
CONCERNING

Treaty of Waitangi Act 1975

AA
*AND*te tono pakirehua nonoi naa
Susan Taylor, Hone
Harawira, Shane Bradbrook
me Dr Amohia Boultonan application for an urgent
inquiry by Susan Taylor,
Hone Harawira, Shane
Bradbrook and Dr Amohia
Boulton**AA**
*AND*te tono pakirehua nonoi naa
Beverly Te Huia me Jean Te
Huia ngaa maangai moo te
Maaori katoa e paa ana ki te
puhipuhi paipaan application for an urgent
inquiry by Beverly Te Huia
and Jean Te Huia on behalf
of all Maaori affected by
smoking

**TE WHAKATAUNGA MOO TE TONO OHORATA E PAA ANA KI TE
*SMOKEFREE ENVIRONMENTS AND REGULATED PRODUCTS (SMOKED
TOBACCO) AMENDMENT ACT 2022 REPEAL***28 Peepuere 2024

Hei tiimatanga koorero / Introduction

1. This decision concerns the following two applications for urgent hearing:
 - a) the Smokefree Aotearoa urgent claim lodged by Susan Taylor, Hone Harawira, Shane Bradbrook and Dr Amohia Boulton (Wai 3315, #3.1.2).
 - b) the Smokefree Aotearoa (Te Huia) urgent claim lodged by Beverly Te Huia and Jean Te Huia on behalf of all Maaori affected by smoking (Wai 3324, #3.1.1).
2. Both applications allege breaches of the Treaty of Waitangi by the Crown arising from the Coalition Government, to repeal the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (the Act) and regulations, as indicated in its 100-day plan.

Ko te haatepe ture o te tono nei / Procedural History

3. On 24 January 2024, the Wai 3315 applicants filed an application for an urgent hearing, along with supporting affidavits (Wai 3315, #3.1.2, #3.1.1, #A1 & #A1(a)). Several parties have sought to be interested party status. A list of interested parties is *attached* in the first table of **Appendix A**. On 14 February 2024, the Crown filed their response opposing the application (Wai 3324, #3.1.3). On 15 February 2024, counsel for the applicants filed reply submissions to the Crown (Wai 3315, #3.1.18). The Wai 3315 applicants also seek an order for the Crown to produce documents relevant to the repeal of the Act.
4. On 2 February 2024, the Wai 3324 applicants filed their application for an urgent hearing (Wai 3324, #3.1.1). A list of interested parties to that application is *attached* in the second table of **Appendix A**. On 14 February 2024, the Crown filed their response opposing the application (Wai 3324, #3.1.3). On 15 February 2024, counsel for the applicants filed reply submissions (Wai 3324, #3.1.4).
5. The Deputy Chairperson referred both applications for determination by the Health Services and Outcomes Kaupapa Inquiry panel (Wai 3315, #2.5.1 at [4] & Wai 3324, #2.5.1 at [4]). Both applications will be jointly referred to hereon as 'the applications'.

Ngaa taapaetanga a te Kaitono / Applicants' submissions

6. The applicants are concerned the Coalition Government's decision to repeal the Act will lead to significant and irreversible prejudice towards Maaori, leading to further deaths. They say the decision results in the loss of opportunity to establish a world-first smokefree generation (Wai 3315, #3.1.2 at [7]-[8] & Wai 3324, #3.1.1 at [12]). They further argue Crown has an obligation to act in good faith towards its Tiriti partner and therefore repealing the Act should be delayed until the Tribunal hears and reports on the applications (Wai 3315, #3.1.1 at [10]). They request assurance from the Crown that the Act will not be repealed while the applications await a hearing (Wai 3315, #3.1.1 at [10]).
7. The applicants emphasise that the Coalition Government has not provided a clear rationale for repealing the Act. Rather, the Crown's priority appears to allow smoking to continue so that the excise tax collected can be directed towards Crown priorities (Wai 3315, #A1 at [24] & #1.1.1 at [50]). They contend this is trading lives for tax cuts, and will

lead to significant increased health disparities for Maaori (Wai 3315, #1.1.1 at [50] & Wai 3224, #1.1.1 at [39]).

8. The applicants submit that the repeal of the Act was made without consultation with Maaori, leaving them with no alternative remedy to pursue (Wai 3315, #3.1.2 at [9]-[11] & Wai 3224, #3.1.1 at [15]). They have attempted to correspond with the Crown, but received no response (Wai 3315, #3.1.2 at [10]). The applicants say they are ready to proceed urgently to hearing (Wai 3315, #3.1.2 at [12] & Wai 3224, #3.1.1 at [18]).

Ngaa taapaetanga a te Karauna / Crown's Submissions

9. The Crown opposes the application and submits that judicial consideration of matters closely connected with the Parliamentary process crosses the boundary separating the powers of the Courts and Parliament (Wai 3315, #3.1.17 at [18] & Wai 3324, #3.1.3 at [19]). The Crown adopts the reasoning in *Ngaati Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General*,¹ that sections 10(2)(b) and (c) of the Parliamentary Privilege Act 2014 confirms that the preparation of and introduction into the House of a Bill is a "proceeding in Parliament".² Therefore, an inquiry into the intention of the Bill and of Ministers in advancing it would be inconsistent with those provisions (Wai 3315, #3.1.17 at [24] & Wai 3324, #3.1.3 at [25]).
10. The Crown further submits that art. 9 of the Bill of Rights 1688 applies to the Tribunal (Wai 3315, #3.1.17 at [23] & Wai 3324, #3.1.3 at [24]), which promotes that freedom of speech and debates in Parliament should not be impeached or questioned outside of Parliament. Therefore, sections 9 and 11 of the Parliamentary Privilege Act 2014 apply to all courts and Tribunals (Wai 3315, #3.1.17 at [23] & Wai 3324, #3.1.3 at [24]).
11. The Crown believes that the Tribunal should wait for the legislative process to conclude before determining an inquiry (Wai 3315, #3.1.17 at [25] & Wai 3324, #3.1.3 at [26]). The Crown says the application would be better heard as part of the next phase of the Health Services and Outcomes Kaupapa inquiry, focused on mental health and addiction issues. (Wai 3315, #3.1.17 at [25] & Wai 3324, #3.1.3 at [26]). The Crown remains committed to attaining the smokefree objective 2025 for all population groups and opposes the request for production of information relating to tobacco sales. It intends to release relevant remaining documents by 28 February 2024 (Wai 3315, #3.1.17 at [28] and [35] & Wai 3324, #3.1.3 at [29]).

Ngaa taapaetanga whakahoki o te Kaitono / Applicant's submissions in reply

12. The applicants submit that the Crown fails to address the Waitangi Tribunal's urgency criteria, instead relying on non-interference principles (Wai 3315, #3.1.18 at [5]-[6]). Given this failure, and the evidence provided by Mr Bradbrook submit that the criteria is met (Wai 3315, #3.1.18 at [7]), they submit the structural adjustments within the Act are the only way to meet the Smokefree 2025 goal, with minimal loss of life and an equitable process (Wai 3315, #3.1.18 at [16]). Without the Act, there will be disproportionate number of

¹ [2020] NZCA 2, [2020] 3 NZLR at [22].
² At [22].

deaths among Maaori (Wai 3315, #3.1.18 at [17]). The Crown's submitted 'overall strategy for health' does not placate the need for an urgent hearing (Wai 3315, #3.1.18 at [17]).

13. The applicants submit that the Tribunal has broader specialist jurisdiction than the Courts regarding proposed legislation and policies (Wai 3315, #3.1.18 at [23]). Therefore, the Crown's position to prevent inquiries into legislative proposals contradicts Tribunal practice and would place an impermissible fetter on the Tribunal's jurisdiction (Wai 3315, #3.1.18 at [23]). Accordingly, ss 9 and 11 of the Parliamentary Privilege Act do not apply here as the Bill has not yet been introduced and therefore is not a 'proceeding' under art. 9 of the Bill of Rights 1868 (Wai 3324, #3.1.4 at [8]).
14. The applicants emphasise they do not seek urgency on a decision to legislate but rather are concerned about the prejudice that Maaori will suffer if the Act is repealed (Wai 3315, #3.1.18 at [26]). Therefore, the applications must be heard urgently to address the decision to repeal the Act without consultation (Wai 3315, #3.1.18 at [26]).
15. Finally, the applicants say that, while the Tribunal does not have the power to prevent the repeal of the Act, the Crown should be informed on the Tiriti implications of the proposed repeal (Wai 3315, #3.1.18 [35]). They argue that the Crown is aware that the repeal of the Act will lead to thousands of deaths, disproportionately among Maaori (Wai 3324, #3.1.4 [14]). This, they say, is prima facie evidence of significant and irreversible prejudice (Wai 3324, #3.1.4 [14]).

Te Paearu moo Ngaa Tono e rapu ana i te Whakaaroaro Ruku Taatari Ohotata a te Taraipiuara / Criteria for Applicants Seeking Urgent Inquiry

16. The Tribunal's *Guide to Practice and Procedure* outlines the following factors in determining an urgency application:
 - *The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;*
 - *There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise;*
 - *The claimants can demonstrate that they are ready to proceed urgently to a hearing;*
 - *The claim or claims challenge an important current or pending Crown action or policy;*
 - *An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and*
 - *Any other grounds justifying urgency have been made out.*

Kupu whakatau / Decision

17. We acknowledge that, if the repeal of the Act leads to an increase in smoking among Maaori, the potential prejudice is indeed grave. However, the policy implications of the impact of the legislation and the consequence of the repeal of the Act make it difficult to hold an efficient and robust urgent inquiry in such short timeframes, as suggested by the claimants. Unlike the applications before us regarding the disestablishment of Te Aka Whai Ora, where the Tribunal has an existing basis of knowledge and experience from the stage one inquiry to guide such a focused urgent inquiry, we have yet to inquire into matters of tobacco addiction.

18. Mental Health, Alcohol and Addiction are the focus of the next phase of the broader Health Services and Outcomes Kaupapa Inquiry, which will commence shortly after the expected completion of the current phase into disability issues later this year. Accordingly, there is a clear alternative remedy in these claims being heard in that phase of this inquiry, by which time the alternative policy measures to be adopted by the Crown to meet its 2025 smokefree goal will be clearer. Accordingly, we consider that it is appropriate to consider these claims as part of the next phase of our broader inquiry and the applications for urgency are declined. That said, the Crown is on notice that these matters are before the Tribunal and as a panel we will entertain hearing and reporting on these matters on a discrete priority basis in phase 2 of Stage 2 of the Health Services and Outcomes Kaupapa Inquiry.

19. I also acknowledge that while previous indications were that that repeal Bill would be introduced to the House by 8 March 2024, the repeal Bill is now before Parliament and our jurisdiction is limited for the time being pursuant to section 6(6) of the Treaty of Waitangi Act 1975.

Me tuku atu te Kaireehita i teetehi kape o teenei whakahau ki eeraa ki te raarangi whakamoohio moo 3315, te Smokefree Aotearoa Urgent Claim me Wai 3324, te Smokefree Aotearoa (Te Huia) Urgent Claim).

The Registrar is to send a copy of this direction to all those on the distribution list for 3315, the Smokefree Aotearoa Urgent Claim and Wai 3324, the Smokefree Aotearoa (Te Huia) Urgent Claim.

I HAINATIA ki Te Whanganui-a-tara i te 28 o te Peepuere 2024



Judge Damian Stone
Presiding Officer

WAITANGI TRIBUNAL



Tania Simpson
Tribunal Member

WAITANGI TRIBUNAL



Professor Linda Tuhiwai Smith
Tribunal Member

WAITANGI TRIBUNAL



Professor Tom Roa
Tribunal Member

WAITANGI TRIBUNAL



Professor Susy Frankel
Tribunal Member

WAITANGI TRIBUNAL