

# Briefing

## Advice about the Crown's response to Wai 3315 Smokefree Aotearoa urgent claim and application for an urgent hearing

**Date due to MO:** 2 February 2024      **Action required by:** 5 February 2024

**Security level:** IN CONFIDENCE      **Health Report number:** H2024035587

**To:** Hon. Casey Costello, Associate Minister of Health

**Copy to:** Hon. Dr Shane Reti, Minister of Health

**Consulted:** Health New Zealand:  Māori Health Authority:

### Contact for telephone discussion

Name	Position	Telephone
John Whaanga	Deputy Director-General, Māori Health	S9(2)(a)
Bernard Te Paa	GM Māori-Crown Relations, Māori Health	S9(2)(a)

### Minister's office to complete:

- Approved       Decline       Noted
- Needs change       Seen       Overtaken by events
- See Minister's Notes       Withdrawn

Comment:

# Advice about the Crown's response to Wai 3315 Smokefree Aotearoa urgent claim and application for an urgent hearing

---

**Security level:** IN CONFIDENCE      **Date:** 2 February 2024

---

**To:** Hon Casey Costello, Associate Minister of Health

---

## Purpose of report

1. This briefing informs you of the statement of claim (Wai 3315) lodged with the Waitangi Tribunal (the Tribunal) and the application for an urgent hearing concerning the Crown's intention to repeal the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (SERPA) and regulations.
2. This briefing also seeks your decision on your preferred option to respond to the application for an urgent hearing and the application for production of documents.

## Summary

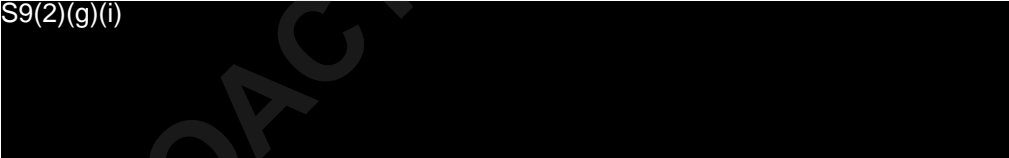
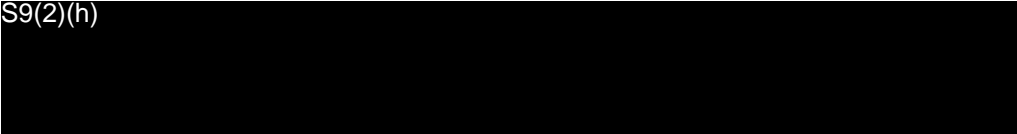
3. A claim has been lodged with the Tribunal seeking an urgent hearing that focuses on the proposed repeal amendments to the SERPA and related regulations.
4. The statement of claim alleges that the repeal of the amendments to SERPA and related regulations would prejudicially affect Māori and breaches the principles of the Treaty of Waitangi (the Treaty).
5. A memorandum-direction has been issued by the Presiding Officer directing the Crown to respond to the application for an urgent hearing and the application for production of documents. The Crown must submit its response no later than 5pm Wednesday 7 February 2024.

6. S9(2)(g)(i)

7.

## Recommendations

We recommend you:

- a) **Confirm** your preferred option for the Crown's response to the application for an urgent hearing as the recommended option of opposing the application. **Yes/No**
- b) **Note** that the Crown's response must be made no later than 5pm Wednesday 7 February 2024. **Noted**
- c) **Note** that failing to respond to the application for an urgent hearing by 5pm Wednesday 7 February 2024, the Waitangi Tribunal will proceed on the basis that the Crown abides or agrees with the application for an urgent hearing. **Noted**
- d) **Note** that officials are seeking an extension of the deadline for filing the Crown's response with the Waitangi Tribunal. **Noted**
- e) **Note** the allegations made by the claimants in the statement of claim that the repeal of SERPA and regulations will prejudicially affect Māori and breach the principles of the Treaty of Waitangi. **Noted**
- f) **Note** the relief sought by the claimants. **Noted**
- g) **Note** the claimants' application to the Waitangi Tribunal for the Crown to produce documents. **Noted**
- h) S9(2)(g)(i) **Yes/No**  

- i) **Note** that according to the claimants' application for production of documents, your office may be required to provide documentation of any correspondence between yourself and individuals or companies with the sale or production of tobacco regarding the reversal of amendments of SERPA and any ministerial diaries which reflect the fact of meetings between yourself and individuals or companies with the sale or production of tobacco. **Noted**
- j) S9(2)(h) **Noted**  


k)

S9(2)(h)

**Noted**

l)

**Noted**



Dr Diana Sarfati

**Director General of Health  
Ministry of Health**

Date: 02 February 2024

Hon. Casey Costello

**Associate Minister of Health**

Date:



John Whaanga

Deputy Director-General, Māori Health  
**Māori Health**

**Ministry of Health**

Date: 02 February 2024

# Advice about the Crown's response to Wai 3315 Smokefree Aotearoa urgent Claim and application for an urgent hearing

## Context

8. On 24 January 2024, the Tribunal received a claim from four claimants: Susan Taylor, Hone Harawira, Shane Bradbrook and Dr Amohia Boulton. The claimants seek an urgent hearing so that a report can be issued by the Tribunal and recommendations made before the Coalition Government's 100-day plan deadline of 8 March 2024.
9. On 31 January 2024, the same Presiding Officer for Wai 2575 Health Services and Outcomes Kaupapa Inquiry was appointed to this claim and has assessed and registered the claim as Wai 3315. The Tribunal Panel is the same panel that recommended investigating the establishment of a Māori Health Authority in the Wai 2575 Stage One Report *Hauora*.
10. The Ministry and interested parties have received notification of the claim and a memorandum-direction was issued by the Presiding Officer directed the Crown to respond to the application for an urgent hearing and the application for production of documents (**Appendix 1**).
11. The Crown's response is due no later than 5pm Wednesday 7 February 2024. Failing to meet this deadline means that the Tribunal will proceed on the basis that the Crown abides or agrees with the application for an urgent hearing.
12. Due to the short timeframes and considerable process needed to be undertaken, officials are seeking an extension to the deadline of filing the Crown's response with the Tribunal.

## Matters alleged by the claimants in the statement of claim

13. The statement of claim and application for an urgent hearing lodged with the Tribunal are attached as **Appendix 2**.
14. Claimants have alleged that the repeal of this legislation will prejudice all Māori, breach the Treaty and its principles and directly cause preventable disease and death within Māori communities. Specifically, the claimants have alleged that:
  - a. Māori will die as a result of the repeal
  - b. The chance to establish a world-first Smokefree Generation will be gone
  - c. A loss of critical and explicit requirements to give effect to the principles of the Treaty will be lost, and
  - d. The goal of a Smokefree Aotearoa by 2025 will in all likelihood be unattainable.
15. The statement of claim also alleges that the repeal of SERPA and regulations is inconsistent with the Treaty principles of tino rangatiratanga, partnership, equity, options, and active protection.

## Relief sought by claimants

16. Claimants seek the following relief, which may be further particularised through the presentation of evidence.
  - a. Decide this claim be heard urgently
  - b. Seek a preliminary finding that the Crown should not repeal SERPA until this claim can be heard and reported on
  - c. Recommend that SERPA is not repealed nor replaced, and
  - d. Recommend the claimants are funded to engage with this claim to ensure that there is an equality of arms in litigation against the Crown.

## Jurisdiction of the Tribunal

17. The Tribunal is a permanent commission of inquiry set up to investigate Māori claims relating to the Treaty. The Tribunal may inquire only into certain matters as set out in section 6 of the Treaty of Waitangi Act 1975.
18. Section 6 of the Treaty of Waitangi Act 1975 sets out the grounds for making a claim.
  - a. First, a claim must relate to one or more of the following matters:
    - i. an Act of Parliament, an ordinance, a regulation, or another statutory instrument; or
    - ii. a practice or policy adopted or proposed by or on behalf of the Crown; or
    - iii. an action or omission of or on behalf of, or proposed by or on behalf of, the Crown.
  - b. Secondly, the claimants must establish how the law, practice, policy, action, or omission of the Crown:
    - i. is or was inconsistent with the principles of the Treaty; and
    - ii. has prejudicially affected the claimants, or the group on whose behalf the claim was made.
19. Under section 8 of the Treaty of Waitangi Act 1975, the Tribunal also has the power to examine any proposed legislation referred to it by resolution of Parliament for whether, in the Tribunal's opinion, the provisions of the proposed legislation or any part of them are contrary to the principles of Treaty. Such a resolution would need to be supported by a majority of Members of Parliament.

## The Tribunal may grant an urgent hearing

20. In certain circumstances, the Tribunal may decide to urgently inquire into a claim, or a part of a claim. In considering an application for an urgent hearing, the Tribunal will look at a number of factors set out in the *Guide to the Practice and Procedure of the Waitangi Tribunal*, including whether:
  - a. 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
  - b. the claim challenges an important, current, or pending Crown action or policy

- c. there is an alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise (such as action in the general courts)
  - d. the claimants are ready to proceed urgently to a hearing.
21. The Tribunal considers applications for an urgent hearing very carefully and, before making a decision, will hear submissions from the claimants and from those affected by the application, including the Crown.
22. Due to the proposed reversal of amendments to the SERPA and regulations being included in the Coalition Government's 100-day plan, the Tribunal may grant an urgent hearing. This would allow the Tribunal to hear the claim, report any findings and make recommendations before an amendment Bill is introduced to the House of Representatives.

### **An application for production of documents has been filed with the Tribunal**

23. Claimants have applied to the Tribunal for a direction to be made requiring the Crown to produce documents (**Appendix 3**). The Presiding Officer has directed the Crown to respond to this application by 5pm Wednesday 7 February 2024.
24. The following documents have been requested under the application:
- a. Documentation showing when SERPA will be repealed
  - b. Documentation of evidence relied on to justify the repeal of SERPA
  - c. Documentation of what, if any, will replace SERPA
  - d. Documentation showing consideration of the Treaty of the planned repeal of SERPA
  - e. Any correspondence between individuals or companies with the sale or production of tobacco and Ministers of the Crown or officials regarding the repeal of SERPA, and
  - f. Any Ministerial diaries which reflect the fact of meetings between individuals or companies with the sale or production of tobacco and Ministers.
25. It is important to note that the Tribunal may issue a memorandum-direction for the Crown to produce documentation as described above and that failure to comply with the Tribunal's memorandum-direction is an offence.<sup>1</sup>

26. S9(2)(h)



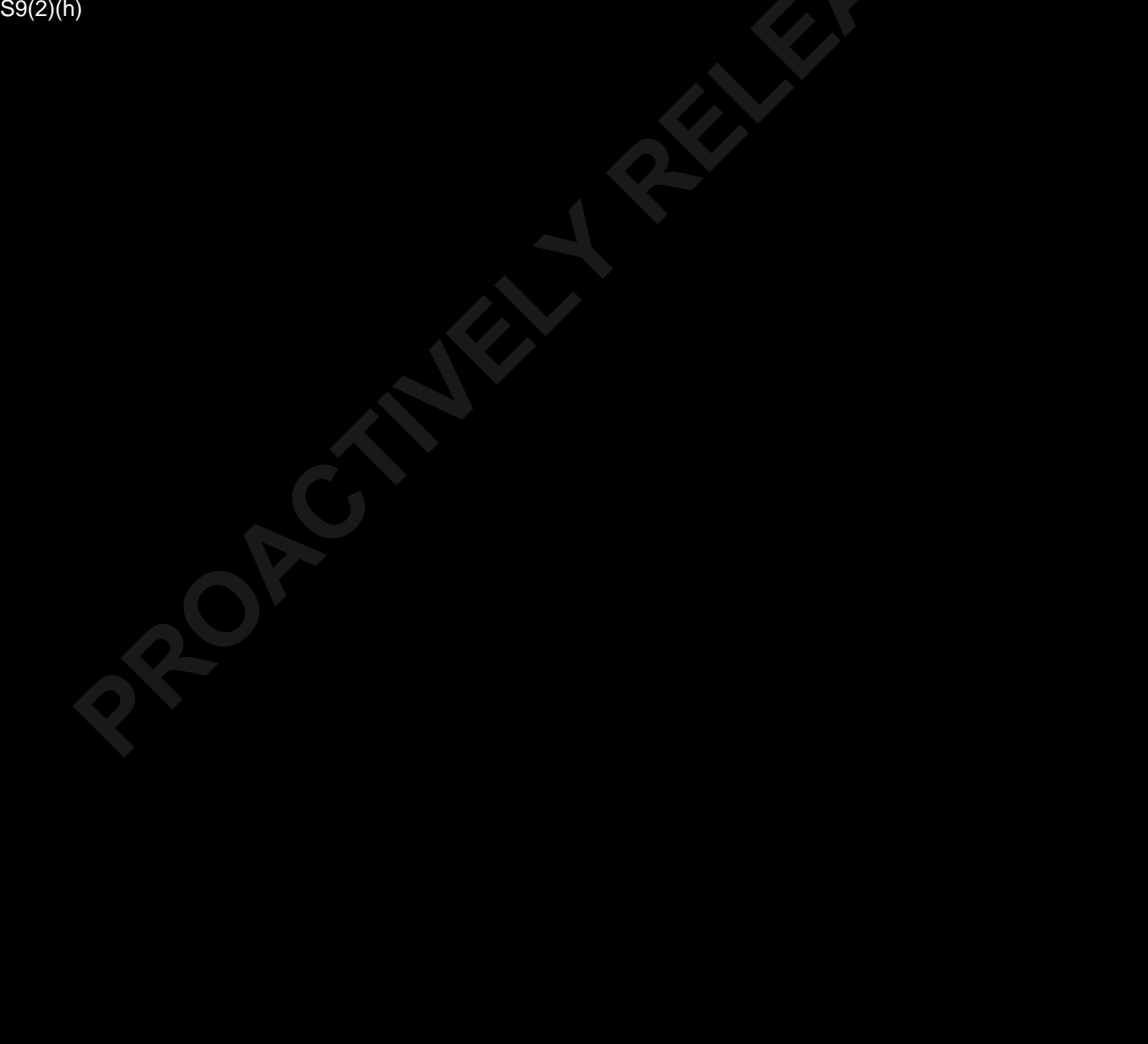
27. Documentation that may be considered for release to the Tribunal includes:
- a. H2023033250 Reversal of legislative changes to the smoked tobacco regulatory regime (dated 6 December 2023)

---

<sup>1</sup> Treaty of Waitangi Act 1975, sch 2 cl 8(2)(b); Commissions of Inquiry Act 1908, ss 4D(1), 9(1)(c).

- b. H2023033378 Cabinet paper cover briefing: Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 (dated 8 December 2023)
  - c. Cabinet paper: Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and associated regulations
  - d. Cabinet Minute CAB-23-MIN-0500
  - e. Ministerial correspondence between the Associate Minister of Health and any individuals or companies with the sale or production of tobacco, and
  - f. Ministerial diaries which reflect the fact of meetings between individuals or companies with the sale or production of tobacco and Ministers.
28. If the Crown intends to withhold any information within the scope of the applicant's request, it needs to provide reasoning in its response to the Tribunal. The reasoning could challenge the relevance of the documentation sought by claimants to the alleged breaches of the Treaty made by the claimants.

S9(2)(h)





## Further advice on the potential risks of breaching the principles of the Treaty of Waitangi and mitigations of these risks

35. **S9(2)(g)(i)** [REDACTED]  
[REDACTED] It is important to note that the nature and degree of risk for breaching the principles of the Treaty will depend on the final scope of legislative change that is pursued.
36. The principles of the Treaty that have been adopted in the health system and are alleged by the claimants to have been breached are:
- a. The principle of tino rangatiratanga, which provides for Māori self-determination and mana motuhake in the design, delivery, and monitoring of primary health care.
  - b. The principle of equity, which requires the Crown to commit to achieving equitable health outcomes for Māori.
  - c. The principle of active protection, which requires the Crown to act, to the fullest extent practicable, to achieve equitable health outcomes for Māori. This includes ensuring that it, its agents, and its Treaty partner are well informed on the extent, and nature, of both Māori health outcomes and efforts to achieve Māori health equity.
  - d. The principle of options, which requires the Crown to provide for and properly resource kaupapa Māori primary health services. Furthermore, the Crown is obliged to ensure that all primary health care services are provided in a culturally appropriate way that recognises and supports the expression of hauora Māori models of care.
  - e. The principle of partnership, which requires the Crown and Māori to work in partnership in the governance, design, delivery, and monitoring of primary health services. Māori must be co-designers, with the Crown, of the primary health system for Māori.
37. **S9(2)(h)** [REDACTED]

PROACTIVELY RELEASED

partnership with Māori would occur and that health agencies engage and work with Māori in exercising functions nationally and locally.

## **Mitigations to the risks of breaching the principles of the Treaty**

### *Intention of the Crown to give effect to the principles of the Treaty of Waitangi in the wider health system*

46. Section 6 of the Pae Ora Act provides for the Crown's intention to give effect to the principles of the Treaty. This section also requires the Minister and all health agencies to be guided by the health sector principles in section 7 of the Pae Ora Act, which among other things, are aimed at improving the health sector for Māori and improving Māori health outcomes.
47. Given the impact smoking has on Māori and the Crown's commitment under sections 6 and 7 of the Pae Ora Act, the Minister and health agencies must have specific consideration of Māori perspectives, and the impact those decisions will have on different Māori groups. In practice, this will require health agencies to consult with Māori before advising the Minister to recommend making any future policy decisions and regulations.
48. In addition to sections 6 and 7 of the Pae Ora Act, section 3AB(d) of the SERPA has been retained as this provision links to the Framework Convention on Tobacco Control (FCTC) obligations to provide for the regulation of the contents and emissions of tobacco products. The retained subsection requires the Minister of Health, before preparing regulations relating to requirements for smoked tobacco products, to consider the risks and benefits to Māori of regulating a constituent (including both users and non-users of smoked tobacco products).

### *Strategic system-level direction and guidance*


49. We understand the Coalition Government remains committed to achieving the Smokefree 2025 goal for all population groups with a focus on providing people with practical tools and support to help them quit.
50. The Coalition Government's commitment to achieving Smokefree 2025 can be reflected as part of setting the new Hauora Māori Strategy, which is intended to begin from 2025, and the Government's Policy Statement on Health. These key strategic documents can provide strategic system-level direction and guidance for the health system to ensure the needs of Māori are met, particularly in addressing health issues with smoking tobacco and related matters.

### *Health sector operational guidance and commitments*

51. To date, we understand the Government is committed to continuing existing funding that is in place for provision of effective stop smoking services and stop smoking and vaping social marketing campaigns.
52. The Coalition Government's commitment can be further reflected in the New Zealand Health Plan, Letters of Expectations, Statement of Intent and Statement of Performance Expectations. These key health sector documents will ensure that public health sector

agencies are implementing the Coalition Government's commitment to delivering effective health services to Māori and improving Māori health outcomes.

S9(2)(h)



### **Next steps**

55. The Ministry will await your confirmation of the proposed approach set out above to responding to the application of an urgent hearing for Wai 3315 and application for production of documents, which is due to the Tribunal no later than 5pm 7 February 2024.
56. The Ministry will provide you with any further advice you may request, and updates on the progress of the claim Wai 3315.

**ENDS.**

## Minister's Notes

PROACTIVELY RELEASED

**WAITANGI TRIBUNAL**

Wai 3315

**CONCERNING**

the Treaty of Waitangi Act 1975

**AND**

the Smokefree Aotearoa Urgent claim

**MEMORANDUM-DIRECTIONS OF JUDGE DAMIEN STONE**

1. On 29 January 2024, the Tribunal received a statement of claim and an application for an urgent hearing from Susan Taylor, Hone Harawira, Shane Bradbrook and Dr Amohia Boulton concerning the Crown's intention to repeal the Smokefree Environment and Regulated Products (Smokes Tobacco) Amendment Act 2022 ("SERPA") and regulations, as mentioned in the coalition Government's 100-day plan on 29 November 2023 (Wai 3315, #1.1.1, & #3.1.1).
2. On 31 January 2024, the Deputy Chairperson directed that the application for an urgent hearing by the Smokefree Aotearoa Urgent claim (Wai 3315) be referred for determination to myself, as the Presiding Officer of the Wai 2575 Health Services and Outcomes Kaupapa Inquiry, and panel members (Wai 3315, #2.5.1).
3. I agree with the applicant's proposed timeframe and thank them for their willingness to respond in a shortened timeframe.
4. I now direct the Crown and any interested parties to respond to the application for an urgent hearing by no later than **5 pm, Wednesday 7 February 2024**. The Crown is also to respond to the application for production of documents filed by the applicants (Wai 3315, #3.1.3).
5. I also direct the applicant to file submissions in reply to those of the Crown and interested parties by no later than **5 pm, Friday 9 February 2024**. This reply is to be confined to reply to what has been said in terms of paragraph [4] above. It is not a further opportunity nor is it proper to replead or repeat the claim. Assertions are not to be made, except on matters raised by the Crown or the opposing parties.

6. Failure to comply may result in the rejection of documents or delay in deciding whether or not to grant urgency.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel, and those on the notification list for Wai 3315, the Smokefree Aotearoa Urgent claim.

**DATED** at Wellington this 31<sup>st</sup> day of January.

A handwritten signature in black ink, appearing to read 'Damien Stone', written in a cursive style.

Judge Damien Stone

**WAITANGI TRIBUNAL**

PROACTIVELY RELEASED

**IN THE WAITANGI TRIBUNAL  
KEI MUA I TE TARAIPUUNARA**

**WAI**

**UNDER**

**The Treaty of Waitangi  
Act 1975**

**CONCERNING**

**A claim by Susan Taylor,  
Hone Harawira, Shane  
Bradbrook and Dr Amohia  
Boulton concerning the  
Smokefree Aotearoa 2025  
Action Plan and repeal of  
the Smokefree  
Environments and  
Regulated Products  
(Smoked Tobacco)  
Amendment Act 2022 and  
Regulations**

---

**STATEMENT OF CLAIM**

**The Smokefree Aotearoa Claim**

Dated: 29 January 2024

---

---

**Bryce Lyall and Hannah Swedlund**  
Barristers  
Room 2F Level 2  
Lopdell House  
418 Titirangi Road  
Titirangi  
Auckland 0642  
Ph: (09) 889 1835

**S9(2)(a)**



## Table of Contents

The Claimants .....	1
Summary of Claim .....	2
Background.....	2
Ngā Mātāpono o te Tiriti/ Principles.....	7
Te mātāpono o te tino rangatiratanga .....	7
Consultation .....	8
Te mātāpono o te mana taurite / Equity .....	9
Te mātāpono o te matapopore moroki / Active protection .....	10
Duty to Act in Good Faith. ....	11
Future Generations .....	11
International Obligations.....	11
Breaches of Te Tiriti and its Principles .....	13
Conclusion .....	15

PROACTIVELY RELEASED

## THE CLAIMANTS SAY:

### The Claimants

1. The Smokefree Aotearoa Claim is brought by the following claimants:
  - a. **Susan Taylor**, Ngāti Kahungunu ki te Wairarapa and Ngāti Raukawa ki te Tonga. Ms Taylor is the Director of T&T Consulting, and has been involved with tobacco control since 1999 working with organisations and providers at a local, regional, national, and international level. Additionally, Ms Taylor has been a tutor and facilitator for Rūnanga Whakapiki ake i te Hauora o Aotearoa-Health Promotion Forum NZ since 2007. Ms Taylor received the Dame Tariana Turia Award 2019 for her mahi concerning tobacco control, including smoking cessation programmes and political advocacy.
  - b. **Hone Pani Tāmami Wāka Nene Harawira**, Ngāti Hau, Ngāti Wai, Ngāti Hine, Te Aupōuri, Ngāpuhi, Ngāti Whātua. Mr Harawira is an activist and former member of Parliament for Te Taitokerau. He has tirelessly campaigned for a smokefree Aotearoa and was a member of the Māori Affairs Select Committee which in 2010 produced a suite of recommendations to guide Aotearoa towards the goal of becoming smokefree. Mr Harawira received the Dame Tariana Turia Award in 2017 for his efforts in reducing the impact of tobacco on indigenous populations within the Oceania region.
  - c. **Shane Bradbrook**, Ngāi Tāmanuhiri, Rongowhakaata, Te Aitanga a Māhaki me Ngāti Kahungunu. Mr Bradbrook has worked as an advocate for Māori health for over 23 years with a primary focus on removing tobacco addiction from Aotearoa and Iwi Māori. He was instigator and tobacco control leader, as Director of Te Reo Mārama, of the Māori Affairs Select Committee (“**MASC**”) Inquiry on the Tobacco Industry and, among many other actions, was integral to progressing and advancing the Smokefree Environments legislation. Mr

Bradbrook received the Nigel Gray Award for achievement in tobacco control in 2009.

- d. **Dr Amohia Boulton**, Ngāti Ranginui, Ngāi Te Rangi, Ngāti Pukenga, Ngāti Mutunga, and Te Āti Awa ki te Waka a Māui. Dr Boulton is the Research Director for Whakauae Research Services Ltd, a Technician for the National Iwi Chairs Forum, and a published researcher in applied health services and policy research, recognised particularly in the area of Whānau Ora research.

### Summary of Claim

2. The Crown intends to repeal the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (“**SERPA**”) and regulations. Repeal of this world leading legislation will prejudice all Māori, breach Te Tiriti o Waitangi and its principles, and directly cause preventable disease and death within Māori communities.

### Background

3. Smoking tobacco is the leading cause of preventable death and disease in Aotearoa New Zealand.<sup>1</sup>
4. Māori are significantly overrepresented in smoking statistics and suffer disproportionate illness and death as a result.<sup>2</sup>
5. Māori have advocated for structural changes to prevent the sale and supply of tobacco in Aotearoa for many years. By way of example:
  - a. In 2005 Hone Harawira submitted private member’s bill to ban the sale of tobacco in Aotearoa New Zealand.

---

<sup>1</sup> Smokefree “How does smoking harm us and what’s in a cigarette?” <<https://www.smokefree.org.nz/smoking-its-effects/health-effects>>.

<sup>2</sup> Overall, Māori are 3.3 times as likely to be current smokers than non-Māori, after adjusting for age and gender. Māori women in particular are four times more likely to be daily smokers than non-Māori women. See Ministry of Health “Annual Update of Key Results 2022/23: New Zealand Health Survey” (December 2023) <[www.health.govt.nz](http://www.health.govt.nz)>.

- b. In 2006 at the National Aotearoa Smokefree/Auahi Kore Conference Shane Bradbrook (then Director of Te Reo Marama) proposed kaupapa Tupeka Kore (Tobacco Free).
  - c. Between 2006-2010 there was ongoing advocacy for kaupapa Tupeka Kore from Māori rangatira within Government, notably from Dame Tariana Turia and Hone Harawira.
6. Given the urgency of the kaupapa, and in the face of Government inaction, in 2010 the Māori Affairs Select Committee took the initiative and held an inquiry into the tobacco industry and the effects of tobacco use among Māori.<sup>3</sup> The Select Committee Report led to a 2011 Government commitment towards a goal of being Smokefree.
  7. Despite this commitment, the claimants say that little change was observed. By 2016 progress towards Smokefree 2025 was considered inadequate by commentators, and “key interventions ha[d] not been implemented sufficiently”.<sup>4</sup>
  8. The Ministry of Health recognises that smoking disproportionately harms Māori, as is reflected in the *Smokefree Aotearoa Action Plan 2025* in 2021. This document is rightly alive to Te Ao Māori and the requirement to expand Māori decision making and leadership in this area.<sup>5</sup>
  9. Following years of campaigning, in particular by Māori activists, SERPA passed into law in 2022.<sup>6</sup> SERPA amended the Smokefree Environments and Regulated Products Act 1990.<sup>7</sup>

---

<sup>3</sup> See Māori Affairs *Select Committee Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Maori* (November 2010).

<sup>4</sup> Jude Ball and others “Is the NZ Government responding adequately to the Māori Affairs Select Committee’s 2010 recommendations on tobacco control? A brief review” (2016) 129 NZMJ 93.

<sup>5</sup> Ministry of Health *Smokefree Aotearoa 2025 Action Plan* (December 2021) at 11 and 16.

<sup>6</sup> Waatea News “Māori champions hailed as smoke-free bill moves ahead” (28 July 2022) WaateaNews.com <<https://waateanews.com/2022/07/28/maori-champions-hailed-as-smoke-free-bill-moves-ahead/>>.

<sup>7</sup> Section 3.

10. On the day that SERPA was passed the Crown announced: **“Thousands of lives and billions of dollars to be saved with smokefree bill passing”**.<sup>8</sup>
11. SERPA is world a leading approach to effectively ending smoking. While not representing all that Māori advocates sought, it was considered the bare minimum that was acceptable. It has since been emulated and debated in other jurisdictions.<sup>9</sup>
12. Recent studies have found that, compared to current measures, SERPA would avoid 8540 premature deaths to 2040 and would reduce all-cause mortality by 23% for wāhine Māori and 10% for tāne Māori. Over 3000 Māori lives would be saved.<sup>10</sup>
13. The purposes of SERPA are set out at s 5:

The purposes of this Act are—

(a) to provide for the regulation of smoked tobacco products—

(i) to reduce disparities in smoking rates and smoking-related illnesses between New Zealand population groups and, in particular, between Māori and other groups; and

(ii) to prevent the harmful effect of other people’s smoking on the health of others, and especially on young people and children; and

(iii) to significantly reduce the retail availability of smoked tobacco products; and

---

<sup>8</sup> New Zealand Government “Thousands of lives and billions of dollars to be saved with smokefree bill passing” (13 December 2022) Beehive.co.nz <<https://www.beehive.govt.nz/release/thousands-lives-and-billions-dollars-be-saved-smokefree-bill-passing>>.

<sup>9</sup> Stephanie Dubois “The U.K. and New Zealand want to ban the next generation from smoking at any age. Should Canada follow?” *CBC News* (online ed, Canada, 17 October 2023).

<sup>10</sup> See Driss Ait Ouakrim and others “Tobacco endgame intervention impacts on health gains and Māori: non-Māori health inequity: a simulation study of the Aotearoa/New Zealand Tobacco Action Plan” (2023) *Tobacco Control* (ahead of print) 1.

(iv) to prevent young people, and successive generations, from ever taking up smoking; and

(v) to reduce the appeal and addictiveness of smoked tobacco products; and

(vi) to restrict all forms of advertising and promotion; and

(b) to provide for the regulation of notifiable products in a way that seeks to minimise harm, especially harm to young people and children; and

(c) to give effect to certain obligations and commitments that New Zealand has as a party to the WHO Framework Convention on Tobacco Control, done at Geneva on 21 May 2003.

14. In line with those purposes SERPA:
- a. Would require approval for entry into the smoked tobacco and vaping products markets.<sup>11</sup>
  - b. Placed controls on the advertising, promotion, sale, and locations for sale and distribution of regulated products.<sup>12</sup>
  - c. Set out regulations concerning packaging and labelling.<sup>13</sup>
  - d. Reduced the amount of nicotine allowed in cigarettes to a non-addictive amount, with a testing regime put in place;<sup>14</sup>
  - e. Created a world-first ‘Smokefree Generation’, by prohibiting the sale of a smoked tobacco products to a person born on or after 1 January 2009.<sup>15</sup>
  - f. Contained s 3AB, which recorded explicit requirements to give effect to the principles of Te Tiriti o Waitangi. These included:

---

<sup>11</sup> Part 1B.

<sup>12</sup> Part 2.

<sup>13</sup> Part 3.

<sup>14</sup> Section 57I.

<sup>15</sup> Section 40A. This would take effect from 1 January 2027.

- i. A requirement to consult with the Māori Health Authority, each iwi-Māori partnership board, and any iwi or Māori with an interest in the application process before determining an application for approval of smoked tobacco retailer;<sup>16</sup>
- ii. A requirement that before determining the maximum number of smoked tobacco retailers in an area the Crown will consult with the Māori Health Authority; any iwi-Māori partnership board for all or part of the proposed area; any iwi whose rohe includes all or part of the proposed area; and any other Māori who the Director-General considers will be affected;<sup>17</sup>
- iii. A requirement the Crown have systems in place for the purposes of carrying out the consultation referred to above;<sup>18</sup>
- iv. A requirement that the Crown, through the Director General of Health, consult the Māori Health Authority before determining the iwi or other Māori to consult;<sup>19</sup>
- v. A requirement that the Minister, before preparing regulations relating to requirements for smoked tobacco products, must “consider the risks and benefits to Māori of regulating a constituent (including both users and non-users of smoked tobacco products)”.<sup>20</sup>

15. Much of the SERPA is yet to come into force, as it included staggered implementation of many of its key provisions.<sup>21</sup>

---

<sup>16</sup> Section 3AB(a).

<sup>17</sup> Section 3AB(b).

<sup>18</sup> Section 3AB(c).

<sup>19</sup> Section 3AB(c).

<sup>20</sup> Section 3AB(d).

<sup>21</sup> Schedule 1 Pt 3.

16. On 29 November 2023 the Prime Minister, on behalf of the coalition Government, announced a 100-day plan. Item 45 on that plan was to “Repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations”.<sup>22</sup>

### Ngā Mātāpono o te Tiriti/ Principles

#### *Te mātāpono o te tino rangatiratanga*

17. Tino rangatiratanga can include the freedom to be distinct peoples; the right of Māori to freely determine their destinies; and the right of Māori to exercise autonomy and self-government.<sup>23</sup>
18. In a hauora context, this means Māori must have self-determination and mana motuhake over the design, delivery, and monitoring of healthcare.<sup>24</sup>

Māori are guaranteed tino rangatiratanga rights in respect of hauora Māori, which encompasses Māori organisations and their models of care, and Māori people who need to access their services.

19. This understanding of equal authority was the origin of the principle of partnership.<sup>25</sup> Previous reports expressed that the principle of partnership meant the Crown has the overarching authority to govern, make and enforce law, qualified by the requirement to give effect to Treaty guarantees.
20. However, in *Tino Rangatira me te Kāwanatanga*, the Tribunal broke from this understanding and found that as Te Raki rangatira made no cession of sovereignty, the authority that was granted to the Crown was not superior to that held by rangatira. The Crown’s authority in Te Raki was expressly limited to its own sphere. Alongside it, and equal to it, was that of tino rangatiratanga.<sup>26</sup> This must apply in a hauora context.

---

<sup>22</sup> “Coalition Government 100 Day Plan” (29 November 2023).

<sup>23</sup> Waitangi Tribunal *Whaia te Mana Motuhake*, (Wai 2417, 2015) at 26.

<sup>24</sup> Waitangi Tribunal *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2021) at 43.

<sup>25</sup> Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga*: the Report on Stage Two of the Te Paparahi o Te Raki Inquiry Part 1 (Wai 1040, 2023) at 61.

<sup>26</sup> At 61.



21. The principle of partnership recognises that Māori have the right as a Treaty partner to choose how they organise themselves, and how or through what organisations they express their tino rangatiratanga.<sup>27</sup> The Crown has a requirement to partner with Māori, through said organisations, in the development and implementation of policy. This duty is heightened where there are disparities in health outcomes.<sup>28</sup>
22. The Tribunal has noted that, in the social policy context, a modern Treaty partnership envisions empowering Māori communities to be actively involved in policy decision-making in matters affecting these Māori communities, and that the Crown must consult at minimum, or provide resources to Māori organisations.<sup>29</sup>

*Consultation*

23. In a matter of particular significance to Māori the Crown has a duty to act reasonably, to make informed decisions, and to turn its mind to the future needs of Māori. This cannot be done without consultation.
24. Full discussion should take place with Māori before the Crown makes any decisions on matters that may impinge upon the rangatiratanga of a tribe or hapū in relation to its taonga.<sup>30</sup>
25. In the 2011 Petroleum Management of Resource Tribunal considered that sometimes consultation alone will not be enough:<sup>31</sup>

How is the protection of Māori interests to the fullest extent practicable to be achieved? Our answer is that, in an area of law as complex as petroleum resource management— where a number of important interests are involved, including Māori interests – the only way that the Crown can guarantee Treaty-compliant outcomes is by ensuring that all key decision-making processes

---

<sup>27</sup> Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28, in reliance on Waitangi Tribunal, *Te W'banau o Waipareira Report* (Wai 414, 1998).

<sup>28</sup> At 29.

<sup>29</sup> At 32.

<sup>30</sup> Waitangi Tribunal *Ahu Moana The Aquaculture and Marine Farming Report* (Wai 953, 2002) at 70.

<sup>31</sup> Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 150.

involve Māori participation of a kind that is appropriate to the decisions being made.

26. This was endorsed in the *Motiti: Report on the Te Mouhere o Motiti Inquiry*, where the Tribunal noted:<sup>32</sup>

In recent years, the Tribunal has increasingly emphasised the need for more equitable Crown-Māori engagement than that entailed by the duty to consult...

The Crown must afford Māori the opportunity to co-design policies and processes that affect them.

27. Further, the opportunity for co-design may not be enough. In the *He Kura Whenua Ka Rokobanga* report the Tribunal concluded that the:<sup>33</sup>

Full, free, and informed consent' of Māori is required when a legislative change substantially affects or even controls a matter squarely under their authority.

*Te mātaḗpono o te mana taurite / Equity*

28. This principle, found in Article 3 of Te Tiriti, guarantees Māori freedom from discrimination, and obliges the Crown to positively promote equity.<sup>34</sup> The principle of equity applies regardless of the causes of the disparity.<sup>35</sup> Given existing health inequalities, the Tribunal has found the principle of equity requires the Crown to make every reasonable effort to eliminate barriers to services that may contribute to inequitable health outcomes.<sup>36</sup>

29. Where disadvantage occurs or persists, active intervention is required to restore the balance.<sup>37</sup> For example, the Waitangi Tribunal has found that in situations of large disparity the Crown must urgently prioritise and

<sup>32</sup> Waitangi Tribunal *Motiti: Report on the Te Mouhere o Motiti Inquiry* (Wai 2521, 2022) at 21.

<sup>33</sup> Waitangi Tribunal *He Kura Whenua Ka Rokobanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 235.

<sup>34</sup> *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, above n 27, at 33.

<sup>35</sup> At 34.

<sup>36</sup> At 35.

<sup>37</sup> Waitangi Tribunal *Tino Rangatiratanga*, above n 25, at 64.

commit to reducing that disparity,<sup>38</sup> including taking affirmative action for Māori as a population group.<sup>39</sup>

*Te mātapono o te matapopore moroki / Active protection*

30. The Crown has a duty to actively protect its Tiriti partner, and Māori taonga.<sup>40</sup> Active protection flows from partnership, through the exchange of kāwanatanga and tino rangatiratanga.
31. Tribunal jurisprudence has concluded that the Treaty guarantee of tino rangatiratanga affords Māori, through their iwi, hapū, or other organisations of their choice, the right to decision-making power over their affairs, as far as practicable within the modern state.<sup>41</sup>
32. The Tribunal in the Napier Hospital Inquiry found that the principle of active protection requires the Crown to actively protect Māori health and wellbeing through the provision of health services.<sup>42</sup> The Crown must make health services that reasonably and adequately attempt to close gaps in health outcomes between Māori and non-Māori available.<sup>43</sup> It is reasonable in Treaty terms for the Crown to take positive steps to reduce these disparities.<sup>44</sup>
33. Health services must be culturally appropriate and respect tikanga Māori.<sup>45</sup> They must also provide for the particular needs of Māori – for example, the population has a greater proportion of people living in deprivation.<sup>46</sup>

---

<sup>38</sup> *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, above n 27 at 33. This was reaffirmed in Waitangi Tribunal *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Wai 2750, 2023) at 89.

<sup>39</sup> Waitangi Tribunal *The Napier Hospital and Health Services Report*, (Wai 692, 2001) at xxv and 54.

<sup>40</sup> Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 24.

<sup>41</sup> *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, above n 27 at 30.

<sup>42</sup> At 31.

<sup>43</sup> At 31.

<sup>44</sup> At 33.

<sup>45</sup> At 31.

<sup>46</sup> At 32.

*Options*

34. Broadly, the principle of options determines that as Treaty partners Māori have the right to choose their social and cultural path, while participating in British society and culture as they wish.
35. In practical terms, for health, the Crown is required to protect the availability and viability of kaupapa Māori solutions in the social sector as well as ‘mainstream’ services.<sup>47</sup>
36. This extends to supporting and resourcing Māori organisations involved in the design and implementation of healthcare policy.<sup>48</sup>

*Duty to Act in Good Faith.*

37. The Treaty duty of good faith should guide the relationship between Māori and the Crown. As Treaty partners, Māori and the Crown have an obligation to act reasonably and in the utmost good faith towards one another.<sup>49</sup>

*Future Generations*

38. The Crown has a duty to actively protect Māori, and future generations of Māori.

**International Obligations**

39. Aotearoa New Zealand is a party to the World Health Organization’s Framework Convention on Tobacco Control (“**FCTC**”).<sup>50</sup>
40. New Zealand activists are tied to the FCTC. They were responsible for proposing the wording of the Preamble, and Art 4(2)(c):

Strong political commitment is necessary to develop and support, at the national, regional and international levels, comprehensive multisectoral measures and coordinated responses, taking into consideration:

---

<sup>47</sup> At 35.

<sup>48</sup> At 36.

<sup>49</sup> Waitangi Tribunal *Te Mana Whatu Aburu: Report on Te Robe Pōtae Claims* (Wai 898, 2023) at 183.

<sup>50</sup> Ministry of Health “WHO Framework Convention on Tobacco Control” (22 August 2023) <[www.health.govt.nz](http://www.health.govt.nz)>.

The need to take measures to promote the participation of indigenous individuals and communities in the development, implementation and evaluation of tobacco control programmes that are socially and culturally appropriate to their needs and perspectives.

41. FCTC also asserts the importance of strategies to reduce both demand and supply and provides a framework for tobacco control measures to be implemented at the national level.<sup>51</sup>
42. Article 5 establishes general obligations on parties to the FCTC.<sup>52</sup> Relevantly, parties are required to develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes.<sup>53</sup> Towards this end, parties should:<sup>54</sup>

Establish or reinforce and finance a national coordinating mechanism or focal points for tobacco control and adopt and implement effective legislative, executive, administrative and/or other measures.

43. Article 5.3 of the FCTC sets out an obligation that:

In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect policies from the commercial and other vested interests of the tobacco industry in accordance with national law.

44. This includes requiring parties to observe complete transparency in dealings with the tobacco industry.<sup>55</sup>

---

<sup>51</sup> WHO Framework Convention of Tobacco Control Overview <[www.fctc.who.int](http://www.fctc.who.int)>.

<sup>52</sup> WHO Framework Convention on Tobacco Control HD 9130.6 (signed August 2003) art 5.

<sup>53</sup> Article 5(1).

<sup>54</sup> Article 5(2).

<sup>55</sup> Ministry of Health “Obligations under the WHO Framework Convention on Tobacco Control (FCTC): Article 5.3” (16 November 2023) <[www.health.govt.nz](http://www.health.govt.nz)>.

45. The FCTC heightens the obligation on the New Zealand government to promote Smokefree 2025 and either maintain or strengthen tobacco control measures.

### **Breaches of Te Tiriti and its Principles**

46. As a disproportionate number of Māori currently smoke, it is Māori who will benefit most from the outcomes under SERPA, and of the establishment of a Smokefree Generation.<sup>56</sup>
47. Māori will die as a direct result of SERPA being repealed.
48. Given the stark consequences the decision being made has for Māori the claimants had a legitimate expectation that the decision of whether to repeal SERPA would be made in accordance with tikanga and Te Tiriti o Waitangi and its principles. Particularly so when the Ministry of Health has stated clearly in the *Smokefree Action Plan 2025* that it:<sup>57</sup>

Has a responsibility to contribute to the Crown meeting its obligations under Te Tiriti o Waitangi. The principles of Te Tiriti, as articulated by the courts and the Waitangi Tribunal, provide the framework for how we will meet our obligations under Te Tiriti.

49. By repealing SERPA the Crown will, without consultation, eliminate all chance of a Smokefree Aotearoa by 2025.
50. Repeal of SERPA and its regulations is not based on evidence.<sup>58</sup> Rather, the Crown's priority appears to be to allow smoking to continue so that the excise tax collected can be directed towards other Crown priorities. In a very real sense, this is trading lives for tax cuts.<sup>59</sup> The arguments used in support of the repeal, known as “zombie arguments”, are well

---

<sup>56</sup> See Amohia Boulton “New Zealand’s decision to scrap anti-smoking legislation will do immeasurable harm” (2023) 383 BJM 2956.

<sup>57</sup> *Smokefree Aotearoa 2025 Action Plan*, above n 5, at 11.

<sup>58</sup> William Hewett “Smokefree laws: Luxon admits he doesn’t know how many lives could be lost by scrapping regulations” *NewsHub* (online ed, New Zealand, 4 December 2023).

<sup>59</sup> Mark Quinlivan “Nicola Willis admits scrapping smokefree laws will help fund tax cuts in Newshub Nation interview” *NewsHub* (online ed, New Zealand, 25 November 2023).

worn and easily refuted.<sup>60</sup> This breaches te Tiriti and its principles, in particular by failing to protect mātauranga Māori and generations to come.

51. On repeal of SERPA, the Crown no longer required to consult with Māori concerning an application process for approval of smoked tobacco retailers, the maximum number of approved retailers in any area. This loss of ability to have a say in how and where tobacco is sold breaches the principles of te Tiriti and the duty of consultation.
52. Rather than affording Māori the opportunity to co-design policies and processes that affect them, the Crown has utterly failed to consult on a replacement which will contribute to a reduction in smoking.<sup>61</sup> This failure breaches the principles of options, consultation, and active protection.
53. Through repeal of SERPA, coupled with the disestablishment of the Māori Health Authority, the Crown breaches Te Tiriti and its principles, its international obligations, and prejudices Māori. This repeal is also contrary to the purposes of the Crown's own Smokefree legislation and policies, and its international obligations.

### **Relief**

54. The claimants say that structural change is the only way that Māori will achieve equity. Māori have engaged in the Crown's processes for decades. SERPA was the outcome of that engagement—the product of evidence and common sense. To now repeal the product of that engagement in deference to political considerations is prejudicial. The claimants do not wish to see parts of SERPA saved while other parts are

---

<sup>60</sup> RNZ “National accused of regurgitating ‘zombie arguments’ against tobacco crackdown” (15 December 2022) <[<sup>61</sup> The Government appears to support further tobacco friendly initiatives, possibly including a freeze on excise tax: Guyon Espiner “Official documents suggest a NZ First minister wants to freeze excise tax on cigarettes - but she denies it” \*Radio New Zealand\* \(online ed, 25 January 2024\).](https://www.rnz.co.nz/news/political/480855/national-accused-of-regurgitating-zombie-arguments-against-tobacco-crackdown#:~:text=%22I%20think%20a%20lot%20of,they%20talk%20about%20personal%20choice>.”</a></p></div><div data-bbox=)

repealed. The claimants' firm view is that SERPA requires strengthening, rather than repeal.

55. The claimants therefore:
- a. Ask that this claim be heard with urgency.
  - b. Seek a preliminary finding that the Crown should not repeal SERPA until this claim can be heard and reported on.
  - c. Seek a finding that this claim is well founded.
  - d. Seek recommendations that:
    - i. SERPA is not repealed nor replaced.
    - ii. That the claimants are funded to engage with this claim to ensure that there is an equality of arms in litigation against the Crown.
    - iii. Any other recommendations that the Tribunal deems fit.

### Conclusion

56. The claimants respectfully reserve the right to amend this statement of claim as further information becomes available.

Dated: 29 January 2024



Bryce Lyall  
Counsel for the claimants



Hannah Swedlund

This statement of claim is filed Bryce Lyall, Barrister, on direct instructions. The address for service of the claimants is Lopdell House, Room 2F Level 2, 418 Titirangi Road, Auckland.

Documents for service on the claimants may be left at that address for service or may be:

- (a) Posted to PO Box 60649, Tirirangi, Auckland;
- or
- (b) Emailed to **S9(2)(a)**



**IN THE WAITANGI TRIBUNAL  
KEI MUA I TE TARAIPUNARA**

**WAI**

**UNDER**

**The Treaty of Waitangi  
Act 1975**

**AND**

**A claim by Susan Taylor,  
Hone Harawira, Shane  
Bradbrook and Dr Amohia  
Boulton concerning the  
Smokefree Aotearoa 2025  
Action Plan and repeal of  
the Smokefree  
Environments and  
Regulated Products  
(Smoked Tobacco)  
Amendment Act 2022 and  
Regulations**

---

**APPLICATION FOR AN URGENT HEARING**

**The Smokefree Aotearoa Claim**

Dated: 29 January 2024

---

---

**Bryce Lyall and Hannah Swedlund**  
Barristers  
Room 2F Level 2  
Lopdell House  
418 Titirangi Road  
Titirangi  
Auckland 0642  
Ph: (09) 889 1835

S9(2)(a)

## APPLICATION FOR URGENT WAITANGI TRIBUNAL INQUIRY

**TO:** The Registrar  
Waitangi Tribunal

**AND:** The Prime Minister  
The Attorney-General  
The Minister of Health  
Any other interested party

Take notice that the Claimants apply to the Waitangi Tribunal for an urgent hearing on their claim concerning repeal the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (“**SERPA**”) and regulations.

### Introduction

1. This application for an urgent hearing is filed on behalf of a group of longtime and respected anti-tobacco activists and researchers: Susan Taylor, Hone Harawira, Shane Bradbrook and Dr Amohia Boulton.
2. The claimants allege that the Crown has breached Te Tiriti o Waitangi and will continue to breach Te Tiriti through the planned repeal of the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (“**SERPA**”) and regulations.
3. This application is made in reliance of:
  - a. Te Tiriti o Waitangi 1840;
  - b. The Treaty of Waitangi Act 1975;
  - c. The Statement of Claim dated 29 January 2024;
  - d. The Affidavit of Shane Kawenata Bradbrook and Exhibits;
  - e. Submissions to be presented to the Waitangi Tribunal at hearing following a grant of urgency; and
  - f. An accompanying memorandum of counsel.

## Urgency Criteria

4. The *Guide to the Practice and Procedure of the Waitangi Tribunal* states that in deciding an urgency application, the Tribunal will have regard to a number of factors. Of particular importance is whether:<sup>1</sup>
  - a. 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;
  - b. There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise;
  - c. The claimants can demonstrate that they are ready to proceed urgently to a hearing, without the need of further research being filed.
5. Other relevant factors that the Tribunal may consider include whether:<sup>2</sup>
  - a. The claim or claims challenge an important current or pending Crown action or policy; and
  - b. Any other grounds justifying urgency have been made out.
6. We address these factors below.

### *Significant and Irreversible Prejudice*

7. As set out in the evidence filed by MR Bradbrook, the claimants and all Māori will suffer significant and irreversible prejudice in relation to the Crown's planned repeal of the SERPA.
8. Māori will die as a direct result of the repeal. The chance to establish a world-first Smokefree Generation will be gone. A key structural reform will be lost, and the goal of a Smokefree Aotearoa by 2025 will in all likelihood be unattainable.

---

<sup>1</sup> Waitangi Tribunal *Guide to the Practice and Procedure of the Waitangi Tribunal* (Waitangi Tribunal, 2023) at 13.

<sup>2</sup> At 13.

*Alternative Remedy*

9. The claimants have no alternative remedy. The decision to repeal SERPA was taken without consultation and announced unilaterally through the coalition Government's 100 Day Plan.
10. Correspondence from the claimants has been unanswered by the Crown.
11. There is no alternative remedy left to pursue.

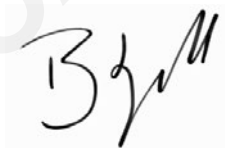
*Readiness to Proceed*

12. The claimants are ready to proceed without delay. No research is required prior to hearing.
13. Where further evidence may to be provided, this will be able to be provided within any timetable that the Tribunal may set down. It is not a cause for challenging the readiness of this application to proceed. The evidence filed to date is sufficient to prove the Tiriti breaches alleged.

**Conclusion**

14. We do not have confirmation of when the SERPA may be repealed. The claimants respectfully invite the Tribunal to make inquiries of the Crown as to the intended date.
15. The claimants ask that the Tribunal grant this application and hear the claim without delay.

Dated: 29 January 2024



Bryce Lyall  
Claimant Counsel



Hannah Swedlund

**IN THE WAITANGI TRIBUNAL  
KEI MUA I TE TARAIPUNARA**

**WAI**

**UNDER**

**The Treaty of Waitangi  
Act 1975**

**AND**

**A claim by Susan Taylor,  
Hone Harawira, Shane  
Bradbrook and Dr Amohia  
Boulton concerning the  
Smokefree Aotearoa 2025  
Action Plan and repeal of  
the Smokefree  
Environments and  
Regulated Products  
(Smoked Tobacco)  
Amendment Act 2022 and  
Regulations**

---

**APPLICATION FOR PRODUCTION OF DOCUMENTS**

Dated: 29 January 2024

---

---

**Bryce Lyall and Hannah Swedlund**  
Barristers  
Room 2F Level 2  
Lopdell House  
418 Titirangi Road  
Titirangi  
Auckland 0642  
Ph: (09) 889 1835

S9(2)(a)

## APPLICATION FOR PRODUCTION OF DOCUMENTS

**TO:** The Registrar  
Waitangi Tribunal

**AND:** The Prime Minister  
The Attorney-General  
The Minister of Health  
Any other interested party

### This document notifies you that:

1. The claimants apply to the Chairperson of the Waitangi Tribunal for a direction requiring production of the following documents from Prime Minister Christopher Luxon, Dr Shane Reti, Minister of Health, or relevant Associate Ministers or officials:
  - a. Documents showing when the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (“**SERPA**”) is to be repealed.
  - b. Documents showing the specific research or evidence relied on to justify repeal of SERPA.
  - c. Documents showing what, if any, replacement will be enacted for SERPA.
  - d. Documents showing any Treaty of Waitangi / Te Tiriti o Waitangi audit or consideration of the planned repeal of the SERPA, and of any replacement.
  - e. Any correspondence between individuals or companies concerned with the sale or production of tobacco and the Crown concerning repeal of SERPA.
  - f. Any minutes from meetings between individuals or companies concerned with the sale or production of tobacco and Ministers of the Crown or officials concerning repeal of SERPA.
  - g. Any Ministerial diaries which reflect the fact of meetings between individuals or companies concerned with the sale or production of tobacco and Ministers.

2. The grounds on which production of these documents are sought are:
  - a. The claimants filed an application for an urgent hearing concerning the repeal the SERPA.
  - b. The timely provision of relevant documents, or provision of incomplete or redacted documents, has been an ongoing issue in Waitangi Tribunal inquiries.<sup>1</sup>
  - c. The Waitangi Tribunal is deemed a Commission of Inquiry.<sup>2</sup> As a Commission of Inquiry, the Presiding Officer may issue directions for production of documents.<sup>3</sup>
  - d. The documents sought are directly relevant to allegations of Tiriti breach.
3. This application for production of documents is made in reliance on the Commissions of Inquiry Act 1908 s 4C and s 4D; and The Treaty of Waitangi Act 1975, sch 2 cl 8(2)(b).

Dated: 29 January 2024



Bryce Lyall  
Claimant Counsel



Hannah Swedlund

---

<sup>1</sup> See Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 3–4, Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 93–94, and Waitangi Tribunal *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Wai 2750, 2023) at 182.

<sup>2</sup> Treaty of Waitangi Act 1975, sch 2 cl(1).

<sup>3</sup> At sch 2 cl 8(2)(b), and Commissions of Inquiry Act 1908 s 4D.