**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA259/2024**
**[2024] NZCA 160**

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| BETWEEN | COLLEEN SKERRET-WHITE, TIMITEPO HOHEPA AND TE ARIKI DEREK MOREHU FOR AND ON BEHALF OF THE HAPŪ OF NGĀTI TE RANGIUNOURA AND THE WIDER IWI OF NGĀTI PIKIAO<br>Appellants |
| AND | MINISTER FOR CHILDREN<br>First Respondent |
| | WAITANGI TRIBUNAL<br>Second Respondent |
| | DRUIS BARRETT FOR AND ON BEHALF OF TE ROPU WAHINE MAORI TOKO I TE ORA \| MAORI WOMEN'S WELFARE LEAGUE INCORPORATED, VERNA TE ROHE GATE, AND TE RŪNANGA O NGĀTI HINE<br>Third Respondents |
| AND | TE WHAKAKITENGA O WAIKATO INCORPORATED<br>Interested Party |

**CA261/2024**

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| BETWEEN | TE WHAKAKITENGA O WAIKATO INCORPORATED<br>Appellant |
| AND | MINISTER FOR CHILDREN<br>First Respondent |
| | WAITANGI TRIBUNAL<br>Second Respondent |
| | COLLEEN SKERRET-WHITE, TIMITEPO HOHEPA AND |

TE ARIKI DEREK MOREHU FOR AND ON BEHALF OF THE HAPŪ OF NGĀTI TE RANGIUNOURA AND THE WIDER IWI OF NGĀTI PIKIAO,
DRUIS BARRETT FOR AND ON BEHALF OF TE ROPU WAHINE MAORI TOKO I TE ORA | MAORI WOMEN'S WELFARE LEAGUE INCORPORATED,
VERNA TE ROHE GATE, AND
TE RŪNANGA O NGĀTI HINE
Third Respondents

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| Hearing: | 1–2 May 2024 (further submissions received 10 May) |
| Court: | Cooper P, French and Cooke JJ |
| Counsel: | M S Smith, H Z Yang and A T Sykes for Appellants in CA259/2024, and Colleen Skerret-White, Timitepo Hohepa and Te Ariki Derek Morehu for and on behalf of the Hapū of Ngāti Te Rangiunoura and the wider Iwi of Ngāti Pikiao in CA261/2024<br>J P Ferguson, M M E Wikaira, M A Hori Te Pa and R K Douglas for Appellants in CA261/2024, and Interested Party in CA259/2024<br>U R Jagose KC, J N E Varuhas and K E E Whiting for First Respondent in CA259/2024 and CA261/2024<br>M K Mahuika and W I Gucake for Second Respondent in CA259/2024 and CA261/2024<br>B R Arapere, A E Gordon and A L E Chesnutt for and Druis Barrett for and on behalf of Te Ropu Wahine Maori Toko i te Ora \| the Maori Women's Welfare League Inc in CA259/2024 and CA261/2024<br>J P Ferguson and C P Terei-Tipene for Te Rūnanga o Ngāti Hine in CA259/2024 and CA261/2024<br>No appearance for Verna Te Rohe Gate |
| Judgment: | 13 May 2024 at 1.00 pm |

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**JUDGMENT OF THE COURT**

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**A** **The appeals are formally allowed, but we make no other order having regard to the changed circumstances since the summons was issued.**

**B** **If there is any issue as to costs the parties may file memoranda within 10 working days. Our preliminary view is that costs in this Court should lie where they fall.**

**C Any issue as to costs in the High Court is to be dealt with in that Court in accordance with this judgment.**

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**REASONS OF THE COURT**

(Given by Cooper P)

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## Introduction

[1] These two appeals challenge a decision of the High Court made under the Judicial Review Procedure Act 2016 setting aside a summons to the Minister for Children to give evidence before the Waitangi Tribunal | Te Rōpū Whakamana i te Tiriti o Waitangi (the Tribunal) in the course of an inquiry it was undertaking pursuant to s 6(1)(c) of the Treaty of Waitangi Act 1975 (the Inquiry).

[2] For the reasons that we give, we have reached the following conclusions:

(a) The Tribunal has a role of constitutional importance. It has a statutory duty to inquire into the claims made to it under s 6(1) of the Treaty of

Waitangi Act that a Crown policy to enact legislation is inconsistent with the principles of the Treaty of Waitangi. The Act provides that, in fulfilling that duty, it has the powers of a commission of inquiry under the Commissions of Inquiry Act 1908, including the power under s 4D of that Act to summons a minister of the Crown to provide evidence to it for the purposes of its inquiry if the minister has relevant evidence.

(b) We agree with the High Court that the Minister had relevant evidence to give to the Tribunal. It was legitimate for the Tribunal to consider that the Minister might be able to provide more information both relevant and necessary to the Inquiry.

(c) When issuing the summons, the Tribunal was also appropriately sensitive to relevant issues, including collective Cabinet responsibility, the confidentiality of Cabinet discussions, and legal privilege. It also indicated it preferred that the Minister provided the requested information voluntarily.

(d) Contrary to the view of the High Court, we do not accept that the principle of comity necessarily applies to limit the power of the Tribunal. It is a principle that typically operates as between the judicial and legislative branches of government, which is a different context from that in which the Tribunal operates. The Tribunal is fulfilling a statutory duty, and s 6(6) of the Treaty of Waitangi Act identifies when its jurisdiction is limited by the proceedings of Parliament. Moreover, even if comity applies it applies to the Crown as well as the Tribunal, and such a duty would involve the Minister voluntarily providing the information that the Tribunal requested. That would also be consistent with the Crown's Treaty obligations.

(e) Since the Tribunal issued the summons, a number of events have taken place. The Minister has now provided a letter to the Tribunal responding to the questions it asked; officials have given evidence related to those matters; and the Tribunal has issued both an interim and

a full report. It also appears that the introduction of a Bill repealing s 7AA is imminent. These changed circumstances give rise to issues of mootness. However, even if the appeal were moot, that would not preclude the Court from deciding the appeal and issuing a fully reasoned decision, given the important public interests involved.

(f) Accordingly, for these reasons we are formally allowing the appeal, but make no further orders.

## Context

[3] The issues arise out of an inquiry on which the Tribunal has embarked into the Government's policy to repeal s 7AA of the Oranga Tamariki Act 1989.[1] That section provides:

> **7AA Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)**
>
> (1) The duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).
>
> (2) The chief executive must ensure that—
>
> (a) the policies and practices of the department that impact on the well-being of children and young persons have the objective of reducing disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department:
>
> (b) the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi:
>
> (c) the department seeks to develop strategic partnerships with iwi and Māori organisations, including iwi authorities, in order to—
>
> (i) provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori children, young persons, and

[1] For completeness, we regard the proposed repeal of s 7AA of the Oranga Tamariki Act 1989 as a policy (rather than a proposed policy), from the time Cabinet agreed to repeal that section: see below at [13].

their whānau who come to the attention of the department:

(ii) set expectations and targets to improve outcomes for Māori children and young persons who come to the attention of the department:

(iii) enable the robust, regular, and genuine exchange of information between the department and those organisations:

(iv) provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations:

(v) provide, and regularly review, guidance to persons discharging functions under this Act to support cultural competency as a best-practice feature of the department's workforce:

(vi) agree on any action both or all parties consider is appropriate.

(3) One or more iwi or Māori organisations may invite the chief executive to enter into a strategic partnership.

(4) The chief executive must consider and respond to any invitation.

(5) The chief executive must report to the public at least once a year on the measures taken by the chief executive to carry out the duties in subsections (2) and (4), including the impact of those measures in improving outcomes for Māori children and young persons who come to the attention of the department under this Act and the steps to be taken in the immediate future.

(6) A copy of each report under subsection (5) must be published on an Internet site maintained by the department.

[4] Three claims have been submitted to the Tribunal alleging that the intended repeal of the section, and the absence of consultation with Māori about it, are in breach of the Crown's obligations under the Treaty of Waitangi | te Tiriti o Waitangi.

[5] The claims were made by Verna Te Rohe Gate on behalf of Ngāti Pukenga and Ngā Potiki (Wai 3309); Druis Barrett on behalf of Te Ropu Wahine Maori Toko i te Ora | the Maori Women's Welfare League Inc, its members, and all wāhine Māori of Aotearoa New Zealand (Wai 2959); and Rewiti Paraone, Erima Henare, Pita Tipene, and Waihoroi Shortland on behalf of Te Rūnanga o Ngāti Hine (Wai 682). Leave was

granted by the Tribunal to 29 parties to participate as interested parties.[2] The Tribunal established a new record of inquiry in relation to the claim, namely "The Oranga Tamariki (Section 7AA) Urgent Inquiry" with the reference number Wai 3350.

[6] The issues raised in the Inquiry were encapsulated in the claim of Druis Barrett on behalf of the Maori Women's Welfare League, which has entered into a strategic partnership with Oranga Tamariki | Ministry for Children (Oranga Tamariki) under s 7AA(2)(c):

> 50. The repeal will increase the probability of negative outcomes for Māori children in care who comprise the majority of children in care.
>
> 51. It will eliminate the only statutory lever the Claimants have to hold Oranga Tamariki accountable for practising in a way that is consistent with the principles of te Tiriti o Waitangi.
>
> 52. Repealing section 7AA, without any indication of what will replace it or how actions undertaken in reliance of section 7AA will be addressed, exposes the vulnerability of strategic partners (and Māori) to unilateral changes in Oranga Tamariki policy or practices, and risks to Māori who are seeking to exercise rangatiratanga and/or seeking to act in partnership with the Crown.
>
> 53. The repeal of section 7AA will result in the removal of the primary legal mechanism in child protection legislation for recognising and providing a practical commitment to the Crown's obligations under te Tiriti o Waitangi.

[7] In order to understand the issues now before this Court, it is necessary to give an account of the process followed by the Tribunal in addressing the claims, and the judgment of the High Court which is under appeal.

*Narrative*

[8] On 26 March 2024, the Deputy Chairperson of the Tribunal, Judge Reeves, dealt with the three applications for urgent hearing of the claims relating to s 7AA. Urgency was sought on the basis that it was intended that a Bill would be introduced into the House of Representatives to repeal s 7AA in mid-May 2024. The Crown opposed the applications for urgency on the basis that an inquiry at this stage "would be premature and of limited utility due to the limited nature of the repeal and the lack

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2 Waitangi Tribunal *The Oranga Tamariki (Section 7AA) Urgent Inquiry Report — Pre-publication Version* (Wai 3350, 2024) [Interim Report] at 4.

of information as to the broader context." It was also said that the repeal is "a political commitment made by political parties in the process of forming a government and is not the product of a policy process by Crown officials". The Judge decided to grant urgency for the Inquiry on the basis of the undisputed absence of consultation about the repeal, and because she considered the claimants could demonstrate they would suffer current or future prejudice. She appointed Judge Doogan as Presiding Officer of the Tribunal panel for the purposes of the claims.

[9] On 27 March, the Tribunal Chairperson, Chief Judge Fox, confirmed the appointment of Judge Doogan as the Presiding Officer of the Tribunal panel, and appointed Kim Ngarimu and Tā William Te Rangiua (Pou) Temara as members of the panel.

[10] On 28 March, Judge Doogan issued a memorandum containing directions for the conduct of the Inquiry. The Judge noted there was insufficient time for an interlocutory or discovery process, but observed that was not necessary given the basis on which the Crown had opposed the application for urgency. He said that it followed from the Crown's stance that information central to the Inquiry was "held primarily at the political and not the departmental level" and it was from that source that information must be sought. On that basis, the Judge directed the Crown through the "responsible minister" to respond to questions that he set out as follows:[3]

> 8. With respect to the proposal to repeal section 7AA of the Oranga Tamariki Act –
>
> (a) What is the policy problem this addresses?
>
> (b) Could that policy objective be better advanced by way of amendment rather than repeal of s 7AA? If not, why not?
>
> (c) Has the Minister taken legal advice on the proposed repeal and its effects? If so, please provide.
>
> (d) Has the Minister taken policy advice on the proposed repeal and its effects? If so, please provide.
>
> (e) Oranga Tamariki's *Section 7AA Annual Report 2023* lists 10 strategic partnership agreements entered into pursuant to

[3] Footnote omitted. The memorandum referred to "the responsible minister (Minister Chhour, whose party (ACT) secured the commitment to repeal s 7AA)", but noted that if relevant information was held by other ministers or by officials, that should be provided.

section 7AA and notes a number of other relationships with Post Settlement Governance Entities and Māori Providers. Has the Crown consulted with its partners to these agreements about the proposed repeal of section 7AA? If not, does it intend to do so?

(f) For all agreements established under s 7AA, will they endure, or be replaced if s 7AA is repealed?

(g) Has the Crown consulted with Māori more generally on the proposed repeal of s 7AA? If not, does it intend to do so?

(h) What are the actual and predicted fiscal implications of a repeal of s 7AA in terms of investing in iwi and Māori Providers and service contract funding?

From this point, we refer to these questions as the "28 March Questions".

[11] Judge Doogan's memorandum also said it would assist if responses to the 28 March Questions could be provided "by way of a brief of evidence or affidavit from the Minister to be filed on or before Tuesday 9 April 2024". The memorandum also sought information from the Chief Executive of Oranga Tamariki by way of a brief of evidence or affidavit addressing a number of questions about the implications of repeal for work being or planned to be undertaken to meet the duties set out in s 7AA(2) and (4) of the Act, likely difficulties that would arise as a consequence of repeal in terms of continuity and coherence of existing policy and practice, and relationships established with Māori under strategic partnership agreements, Post-Settlement Governance Entities and Māori providers.

[12] A judicial conference took place on 3 April. The next day, the Judge issued a further memorandum of directions. He confirmed there would be a hearing on 12 April which would focus on hearing, clarifying and testing Crown evidence. The Judge noted that Crown counsel, Mr Barr, advised he was still awaiting instructions as to the availability of the Minister and the Chief Executive, but work was being carried out to collate the information requested. A paper had gone to Cabinet on 2 April and Mr Barr would "update the Tribunal and the parties on these matters on Friday 5 April". The Judge accordingly directed that Crown counsel file a memorandum by 4 pm on 5 April and made a number of other timetabling directions to ensure the hearing could proceed on 12 April, with the exchange of closing submissions between the Crown and claimants on 17 April and 22 April respectively.

[13] In his memorandum of 5 April, Mr Barr stated that the Crown did not intend to call the Minister as a witness. He also recorded there had been "developments in the policy processes", as a consequence of which Cabinet had agreed to the repeal of s 7AA. In accordance with "usual practice", Cabinet's decision was informed by Cabinet papers, which captured the underlying reason for the decision. These included a regulatory impact statement (the Regulatory Impact Statement). Mr Barr confirmed that the Cabinet papers would be produced as part of the Crown evidence, but to assist in the meantime he attached them to the memorandum.

[14] For present purposes it is relevant to note that the attached Cabinet paper, headed "Repeal of section 7AA of the Oranga Tamariki Act 1989", was signed by the Minister for Children, and recorded the fact that the Coalition Agreement between two political parties, The New Zealand National Party (National) and ACT New Zealand (ACT), included an agreement to remove s 7AA from the Act "to ensure better public services are delivered". The paper had an executive summary in which the Minister wrote:

> 3 My vision is to ensure that all children and young people are in loving and stable homes. Section 7AA of the Act was designed to strengthen accountability to improve outcomes for Māori children and young people. I believe that this section creates a conflict for Oranga Tamariki when making decisions in the best interests of the child or young person.
>
> 4 I propose to repeal section 7AA of the Act to make certain that Oranga Tamariki is entirely child-centric and is making decisions that ensure a child's wellbeing and best interests.
>
> 5 The repeal of section 7AA of the Act will not stop the consideration of cultural wellbeing of children and young people in the care of Oranga Tamariki, nor will it remove the general obligations to meet the Treaty of Waitangi principles applicable to all Crown agencies in regard to the development of policies, practices and services.
>
> 6 The Regulatory Impact Statement (RIS) that has been prepared by Oranga Tamariki does not support the repeal of section 7AA. The RIS advises that this change is unlikely to achieve the objective I am seeking.

[15] Under the heading "Analysis", the Minister acknowledged that the intent of s 7AA was to strengthen accountability to improve outcomes for Māori children, but she considered that, while well intentioned, there was "sufficient concern that

section 7AA is influencing Oranga Tamariki practice to the detriment of the safety of Māori children". The Minister recorded her concern that the section may have been used to justify decision-making in relation to care arrangements for Māori children which have not been safe or in the child's best interests. In her view, when the child was "primarily considered as an identity group, their individual needs are not prioritised". She continued:

> 14 There have been prominent individuals who criticised the role section 7AA may have had in several high-profile cases involving these changes to planned long-term care placements. They noted that this practice was traumatic and stressful for children and young people.

[16] In this part of the Cabinet paper, the Minister also noted also that s 7AA had likely led to unintended consequences, negatively impacting caregivers. She wrote that some caregivers had suggested that s 7AA had resulted in a requirement for culturally appropriate environments, which were valued more than children's welfare. Planned permanent care arrangements had been changed, resulting in Māori children being removed from safe and loving homes because the caregivers were deemed to be of "the wrong ethnicity". Further, she recorded that the repeal of the section would not prevent continuation of the existing Oranga Tamariki strategic partnerships with Māori, and it would not prevent Oranga Tamariki from entering into further strategic partnership agreements with iwi or Māori organisations.

[17] In his 5 April memorandum, Mr Barr advised that the Crown would call the Chief Executive, Mr Te Kani, and the two Deputy Chief Executives, Mr Grady and Ms Dickson. He gave four reasons for not calling the Minister:

(a) First, it was said that the 28 March Questions, set out at [10] above, were all canvassed in the Cabinet papers and Regulatory Impact Statement. Some of the matters would be the subject of evidence of the senior Oranga Tamariki officials who would be giving evidence.

Consequently, evidence from the Minister was not necessary to inform the Tribunal of the relevant information.

(b) Secondly, since the "Executive Crown" had now made the policy decision to repeal s 7AA through the Cabinet decision, the Cabinet paper and Regulatory Impact Statement constituted the record of the information placed before the executive, which would be placed before the Tribunal in accordance with the usual conventions.

(c) Thirdly, the Oranga Tamariki officials would be able to speak to the process that led to the finalisation of the Cabinet papers.

(d) Fourthly, in the circumstances, the Crown had concluded it should not depart from the orthodox approach of not calling ministers to give evidence before the courts, commissions or tribunals.[4]

[18] After conferring with the other members of the panel, the Judge issued a further memorandum of directions on 9 April. This recorded that the panel did not agree with the Crown that evidence from the Minister was "not necessary to inform the tribunal of the relevant information". The memorandum said that it would "greatly assist our inquiry" if the Minister was able to provide evidence not only in response to the 28 March Questions, set out at [10] above, but also to provide more detail as to the basis for the opinions recorded under the heading "Analysis" in the Cabinet paper.[5] The memorandum continued:

> In particular, it would assist us to understand how many instances the Minister is aware of where it is said that decisions were made concerning care arrangements for Māori children which were not safe or in the child's best interest due to the operation of section 7AA.

[19] The memorandum also stated that it would assist the Tribunal to understand the identities of the prominent individuals in the several high-profile cases referred to

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4 In a footnote, Mr Barr relied on three decisions: *Gill v Fulumua* CA19/78, 1 March 1978; *Hawkins v Davison* (1990) 3 PRNZ 700 (HC); and *Banks v Gourlie* HC Whangārei M36/97, 26 May 1997.

5 See [15] above.

by the Minister in the Cabinet paper,[6] and to know how many caregivers had informed the Minister of concerns about the operation of s 7AA. Those matters, and the reason why the section was considered to be the source of the problem, were not matters that officials could speak to. This reflected the fact that the Tribunal had read the departmental advice annexed to the Cabinet paper, which noted the limited nature of options considered because the policy was premised on the assumption that s 7AA was the cause of various instances of poor practice. Also recorded was that officials had noted the lack of robust empirical evidence to support that premise, and stated that departmental evidence demonstrated that the problem more likely stemmed from flaws in the practice of individual staff.

[20] In the memorandum, the Judge also noted that, pursuant to cl 8 of sch 2 of the Treaty of Waitangi Act, the Tribunal has the power to issue a summons requiring the attendance of a witness. He observed that the cases relied on by Crown counsel to support not calling ministers to give evidence concerned applications for judicial review in the High Court. The Judge considered those cases were distinguishable from the Tribunal's jurisdiction and the circumstances of the present inquiry. The memorandum concluded:[7]

> 13. We are nonetheless of the view that rather [than] issue a summons, we should invite the Minister to reconsider her position and provide evidence voluntarily.
>
> 14. We take this approach because it is the Minister and her cabinet colleagues that we must persuade if we have recommendations to make at the end of our inquiry. We would prefer constructive engagement voluntarily given as it is more likely to advance our inquiry and its outcomes.
>
> 15. We leave the matter on that basis and ask Crown counsel to take instructions and advise as to whether or not the Minister is prepared to provide evidence by close of [day] Wednesday 10 April 2024.

[21] On 10 April, a further memorandum of counsel for the Crown was filed, signed by Mr Varuhas. Mr Varuhas confirmed the Crown's prior position: that it would not call the Minister as a witness nor produce a written statement from her. In the spirit of candour and comity, the Crown had voluntarily disclosed relevant Cabinet and other

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6 See [15] above.
7 Footnotes omitted.

official material in its previous memorandum. The Tribunal should not issue a summons against the Minister to compel attendance or a written statement. It would be "highly unusual" for the Minister to be compelled to give evidence by the courts or a tribunal, and authority and constitutional practice is against doing so. The position was underpinned by basic constitutional principles and the circumstances of this case did not warrant departure from that well-established default position.

[22] In this memorandum, Mr Varuhas invoked authorities of this Court in which it has held that the ordinary practice in judicial review proceedings is not to call a minister to be cross-examined,[8] and submitted that this practice should be maintained. Admissibility and relevance are an insufficient basis to overcome "this orthodoxy" and compel a minister to give evidence. Rather, a "clear" case of necessity is required; a much more stringent test than mere relevance. In addition, Mr Varuhas referred to concerns arising from Cabinet confidentiality and collective ministerial responsibility. Those principles bind ministers and are prescribed in the Cabinet Manual. They are also reflected in the statutory oath that members of the Executive Council must give when taking office,[9] and in the grounds for withholding information under the Official Information Act 1982.[10]

[23] Mr Varuhas also claimed it was objectionable to probe the position of one minister, because it would undermine the doctrine of joint responsibility. He elaborated on these arguments by particular reference to statements in the Cabinet paper, underlining the fact that the repeal of the section was a coalition commitment, and the subject of a collective decision taken by the Government, acting through Cabinet, to proceed down that path. It was wrong in the circumstances to suppose that the policy had been single-handedly developed by the Minister and to treat her as the relevant decision-maker.

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8 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 554 per Cooke P; *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353–354; *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 656–658; *Attorney-General v Air New Zealand Ltd* (1991) 4 PRNZ 1 (CA) at 2; and *Gill v Fulumua*, above n 4.

9 Oaths and Declarations Act 1957, s 19(1).

10 See Official Information Act 1982, s 9(2)(f)–(g).

[24] Mr Varuhas concluded that the Crown would not file a witness brief of the Minister or call her as a witness. If the Tribunal proceeded to summons the Minister or direct her to file evidence, the Crown would "launch urgent judicial review proceedings in the High Court to set aside the summons or direction" and would also seek interim relief.

[25] Mr Varuhas' memorandum of 10 April resulted in a further memorandum of directions by Judge Doogan dated 11 April. In this, the Judge summarised the directions previously made. He noted the Crown position that the decision to repeal s 7AA was not based on an empirical public policy case, and that the Minister's concerns expressed in the Cabinet paper reflected a political or philosophical viewpoint not reducible to empirical analysis. He reiterated the Tribunal's view that it was entitled to ask the Minister for information. Its inquiry had to focus on the question of the Treaty consistency of the Government's decision to repeal the section. The Judge clarified that it was not expected that the Minister would breach Cabinet confidentiality, but that it appeared the Minister was "the primary mind behind this policy" and was in the best position to explain it to the Tribunal:

> 10. … As we see it, it would assist our inquiry to have the opportunity to hear from the Minister, to better understand the reasons for the policy, and, as appropriate, test both the philosophical and empirical premises for the policy against consistency with the Treaty and its principles.

[26] The Judge made these further observations:

> 11. Crown counsel may be correct that the Minister will not be able to add significant additional information from that already available to us from the documents, or otherwise available from the evidence to be given by the senior officials. We simply do not know at this point, but I believe we are entitled to ask. I accept that legal privilege remains a legitimate reason to withhold, unless the privilege is waived. The broad ranging questions we have asked of the Minister arise largely from the fact that this is an unusual policy development process in which officials appear to have had a purely instrumental role. In such circumstances their ability to speak for the Minister concerning the rationale for the policy is likely to be constrained.
>
> 12. While I believe we have the power to summons a Minister in a case such as this, whether we should do so is a different question. As I made clear in directions of 9 April 2024, the preferred approach was to invite the Minister to reconsider her position and provide evidence voluntarily …

[27] The Judge reiterated his view that the Minister held information relevant to the Inquiry, and questioned whether the Crown was correct to rely on the legal principles and constitutional conventions invoked. There was an important question as to the proper scope of the Tribunal's jurisdiction as a standing commission of inquiry which needed to be clarified and resolved if possible. A summons would be issued accordingly, requiring the Minister to give evidence in response to the questions raised in the directions of 28 March and 9 April 2024.

[28] The summons was then issued. It was signed by Judge Doogan as the Presiding Officer of the Tribunal. It was addressed to "Honourable Karen Louise Chhour, Minister of the Crown", and summonsed her to appear before the Tribunal in Wellington at 12 pm on 26 April 2024 "for the purpose of providing evidence in the subject-matter of the inquiry conducted by the Tribunal". The summons continued:[11]

> You are ordered to furnish the following information as evidence whether via an affidavit or brief of evidence to the extent the information is within your control or possession.
>
> The information produced with respect to the proposal to repeal section 7AA of the Oranga Tamariki Act 1989 should address the following–
>
> (a) What is the policy problem this addresses?
>
> (b) Could that policy objective be better advanced by way of amendment rather than repeal of section 7AA? If not, why not?
>
> (c) Has the Minister taken legal advice on the proposed repeal and its effects? If so, please provide.
>
> (d) Has the Minister taken policy advice on the proposed repeal and its effects? If so, please provide.
>
> (e) Oranga Tamariki's *Section 7AA Annual Report 2023* lists 10 strategic partnership agreements entered into pursuant to section 7AA and notes a number of other relationships with Post Settlement Governance Entities and Māori Providers. Has the Crown consulted with its partners to these agreements about the proposed repeal of section 7AA? If not, does it intend to do so?
>
> (f) For all agreements established under section 7AA, will they endure, or be replaced if section 7AA is repealed?

[11] Footnote omitted.

(g) Has the Crown consulted with Māori more generally on the proposed repeal of section 7AA? If not, does it intend to do so?

(h) What are the actual and predicted fiscal implications of a repeal of section 7AA in terms of investing in iwi and Māori Providers and service contract funding?

(i) In regards to the Cabinet paper can the Minister provide more detail as to the basis for the opinions recorded at paragraphs 12 to 17, and in particular;

a. How many instances the Minister is aware of where it is said that decisions were made concerning care arrangements for Māori children which were not safe or in the child's best interest due to the operation of section 7AA?

b. Who are the "prominent individuals" and what are the "several high profile cases" referred to at paragraph 14 of the Cabinet paper?

c. How many caregivers have informed the Minister of concerns about section 7AA as noted at paragraph 16 of the Cabinet paper?

We ask that the above is compiled with, in accordance with section 4D of the Commissions of Inquiry Act 1908 and clause 8(2) of the second schedule to the Treaty of Waitangi Act 1975.

[29] The hearing of the Inquiry took place the following day, on 12 April, in the absence of the Minister. The summons, as noted above, did not require her attendance before the Tribunal until 26 April.

[30] In the meantime, on 15 April 2024, the Minister commenced a proceeding against the Tribunal in the High Court, under the Judicial Review Procedure Act. Her claim alleged the issue of the summons was unlawful, being beyond the Tribunal's power, or otherwise contrary to law, for three reasons. It was said that:

(a) The evidence sought from the Minister was not clearly necessary for the Tribunal's inquiry, given the substantial body of evidence the Crown had already made available.

(b) The attempt to summons the Minister was contrary to the fundamental constitutional principle of comity between the branches of government.

(c) The summons constituted an additional breach of the principle of comity, or was otherwise unfair and onerous, because the evidence sought by the Tribunal would require the Minister to act contrary to the fundamental constitutional principles of collective ministerial responsibility and Cabinet confidentiality, or there was an undue risk of that.

[31] Relief was sought setting aside the summons. The High Court judgment was delivered on 24 April and is discussed below from [44]. Isac J granted the application for judicial review and set aside the summons.[12] The narrative to this point establishes the context for our consideration of whether the High Court was correct to set aside the summons. But we refer now to subsequent events because of their potential relevance to questions of mootness and relief.

[32] On 26 April, counsel for the Crown filed a further memorandum in the Tribunal. It attached a letter from the Minister of that date. After referring to the outcome in the High Court, the Minister said:

> 3. I wish to record that, in declining to appear to provide evidence, I considered that the record showed all there is to show in support of the Crown policy under inquiry. The important constitutional issues at stake have now been clarified in the Court proceeding.
>
> 4. Now that the High Court has ruled on this constitutional issue and the summons has been set aside, I wish to reassure the Tribunal that there is no further information I can materially add, taking into account evidence already before the Tribunal and which is known publicly, and the responsibilities imposed on me by Cabinet confidentiality and collective responsibility. I do so by addressing each of the questions that the Tribunal posed for me to answer.
>
> **Question (a): What is the policy problem this addresses?**
>
> 5. My Cabinet Paper and the associated Regulatory Impact Statement were the documents that I lodged with Cabinet for Cabinet's consideration.
>
> 6. I cannot speak to the reasoning of Cabinet, which is subject to collective Cabinet responsibility and is protected by Cabinet confidentiality.

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12 *Minister for Children v Waitangi Tribunal* [2024] NZHC 931 [High Court judgment].

**Question (b): Could that policy objective be better advanced by way of amendment rather than repeal of section 7AA? If not, why not?**

7. My Cabinet Paper and the associated Regulatory Impact Statement were the documents that I lodged with Cabinet for Cabinet's consideration.

8. I cannot speak to the reasoning of Cabinet, which is subject to collective Cabinet responsibility and is protected by Cabinet confidentiality.

**Question (c): Has the Minister taken legal advice on the proposed repeal and its effects? If so, please provide.**

9. I understand that the Crown has asserted its privilege in respect of any legal advice that I have been given on the proposed repeal and its effects.

**Question (d): Has the Minister taken policy advice on the proposed repeal and its effects? If so, please provide.**

10. I understand that senior officials from Oranga Tamariki have provided the Tribunal with the documents recording the policy advice that I have been given on the proposed repeal and its effects. I confirm that I read and considered each piece of this advice as it was provided.

**Question (e): Oranga Tamariki's Section 7AA Annual Report 2023 lists 10 strategic partnership agreements entered into pursuant to section 7AA and notes a number of other relationships with Post Settlement Governance Entities and Māori Providers. Has the Crown consulted with its partners to these agreements about the proposed repeal of section 7AA? If not, does it intend to do so?**

11. I understand that senior officials from Oranga Tamariki have provided the Tribunal with information about meetings that I had with various strategic partners and iwi representatives between January and early April this year and my wish for submissions to be made at the Select Committee stage of the passage of the Bill.

12. I intend to meet with the remaining strategic partners.

13. I have nothing further of substance that I can add to the information that is before the Tribunal.

**Question (f): For all agreements established under section 7AA, will they endure, or be replaced if section 7AA is repealed?**

14. I refer to paragraph 20 of the Cabinet Paper. I also understand that senior officials from Oranga Tamariki have testified as to the position of the Chief Executive of Oranga Tamariki in relation to the strategic partnerships and as to the views that I have expressed to the senior officials and to strategic partners.

15. I have nothing further that I can add to the information that is before the Tribunal.

**Question (g): Has the Crown consulted with Māori more generally on the proposed repeal of section 7AA? If not, does it intend to do so?**

16. I understand that senior officials from Oranga Tamariki have provided the Tribunal with information about meetings that I had with various strategic partners and iwi representatives between January and early April this year and my wish for submissions to be made at the Select Committee stage of the passage of the Bill.

17. I have nothing further of substance that I can add to the information that is before the Tribunal.

**Question (h): What are the actual and predicted fiscal implications of a repeal of section 7AA in terms of investing in iwi and Māori Providers and service contract funding?**

18. I understand that senior officials from Oranga Tamariki have provided the Tribunal with information as to the fiscal implications of a repeal of section 7AA in terms of investing in iwi and Māori Providers and service contract funding.

19. I have nothing further of substance that I can add to the information that is before the Tribunal.

**Question (i): In regards to the Cabinet paper can the Minister provide more detail as to the basis for the opinions recorded at paragraphs 12 to 17, and in particular;**

**a. How many instances the Minister is aware of where it is said that decisions were made concerning care arrangements for Māori children which were not safe or in the child's best interest due to the operation of section 7AA?**

20. At paragraph 13 of the Cabinet Paper, I stated:

*I am concerned that section 7AA may have been used to justify decision making in relation to care arrangements for Māori children which has not been safe or in the child's best interests. In my view, when a child is primarily considered as an identity group, their individual needs are not prioritised.*

21. My concern is based on the information that I referenced at paragraphs 14 and 16 of the Cabinet Paper, which I address in my responses below.

**b. Who are the "prominent individuals" and what are the "several high profile cases" referred to at paragraph 14 of the Cabinet paper?**

22. At paragraph 14 of the Cabinet Paper, I stated:

*There have been prominent individuals who criticised the role section 7AA may have had in several high-profile cases involving these changes to planned long-term care placements. They noted that*

*this practice was traumatic and stressful for children and young people.*

23. My Cabinet Paper did not name the prominent individuals or the high-profile cases to which paragraph 14 refers. However, the high profile cases are the ones that are well known publicly and which were referenced in the evidence.

**c. How many caregivers have informed the Minister of concerns about section 7AA as noted at paragraph 16 of the Cabinet paper?**

24. At paragraph 16 of the Cabinet Paper, I stated:

*Section 7AA has likely led to unintended consequences that have negatively impacted caregivers. Some caregivers have suggested that section 7AA has resulted in a requirement for culturally appropriate environments, which is valued more than children's welfare. In my view, some of the changes to planned permanent care arrangements that have occurred are examples of Māori children who were removed from safe and loving homes because the caregivers were deemed the wrong ethnicity.*

25. My Cabinet Paper did not specify how many caregivers informed me of concerns about s 7AA. It is not possible for me to recall the number. In my time as an opposition Member of Parliament, I spoke with a number of caregivers from time to time.

[33] On 24 April, appeals were filed in this Court by the appellants. At a conference on 26 April, a direction was made that the appeals be heard as a matter of urgency and, with the cooperation of all parties, the hearing was able to take place on 1 and 2 May.

[34] On 29 April 2024, prior to this Court hearing the appeal, the Tribunal released an interim report concerning the proposed repeal of s 7AA (the Interim Report).[13] In the Interim Report, the Tribunal identified that a "key problem" with the Government's decision to repeal s 7AA was that it had come about due to a belief or assumption that coalition agreements took precedence over the Crown's obligations to Māori under the Treaty of Waitangi.[14] Further, the Tribunal observed:[15]

> To the extent there is any evidence to support the idea that section 7AA is causing unsafe practice, it is entirely anecdotal. We have seen none. Crown counsel and Crown witnesses have confirmed that the government's decision to repeal section 7AA is not based on an empirical public policy case. The Minister's repeal proposal as approved by Cabinet is said to reflect a political or philosophical viewpoint not reducible to empirical analysis. Accordingly, officials were instructed to proceed in an instrumental way to

13 Interim Report, above n 2.
14 At 13.
15 At 13.

> give effect to the policy, representing as it does a commitment in the coalition agreement between the National party and ACT.

[35] It is also appropriate to note that on 10 May, when preparation of this judgment was well-advanced, the Tribunal issued *The Oranga Tamariki (Section 7AA) Urgent Inquiry Report* setting out its findings and recommendations (the Oranga Tamariki (Section 7AA) Report).[16] After dealing with the substance of the inquiry, it reserved leave for the parties to apply for further directions following the release of this Court's judgment.[17] We also record that presentation of a Bill providing for the repeal of s 7AA is now imminent.

**The Waitangi Tribunal**

[36] There is no doubt about the importance of the Tribunal in our constitutional arrangements. The Tribunal's significance was well captured by the Solicitor-General's submission to this Court that it "is a critical part of our constitutional architecture". And we agree with her further observation that the role it fulfils is an important way in which the Treaty is recognised as a major source of this country's constitutional makeup. The Tribunal is established under the Treaty of Waitangi Act which was, as its long title states:

> An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty

[37] Thus, it is to be noted that the legislature created the Tribunal for the express purpose of providing for the observance and confirmation of the principles of the Treaty. And it gave the Tribunal the power to make recommendations on claims relating to the practical application of the Treaty and to determine issues of inconsistency with the Treaty's principles. Consistently with this, the Tribunal's functions are broadly stated in s 5(1) of that Act, and are generally limited to making

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16 Waitangi Tribunal *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report — Pre-publication Version* (Wai 3350, 2024) [The Oranga Tamariki (Section 7AA) Report].

17 At 35.

recommendations.[18] In the present case, the Tribunal has been exercising the function set out in s 5(1)(a), namely "to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6".

[38] Section 6 of the Treaty of Waitangi Act empowers the Tribunal to consider claims, and relevantly provides as follows:

> **6 Jurisdiction of Tribunal to consider claims**
>
> (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> (a) by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after 6 February 1840; or
>
> (b) by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or
>
> (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.
>
> (2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—
>
> (a) the claim is submitted contrary to section 6AA(1); or
>
> (b) section 7 applies.
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the

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[18] Where a Bill before the House of Representatives is referred to the Tribunal by resolution of the House under s 8 of Treaty of Waitangi Act, the Tribunal makes a report as to whether, in its opinion, the provisions of the proposed legislation, or any one of them, are contrary with the principles of the Treaty: see s 8(1).

> circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.
>
> (4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.
>
> …
>
> (6) Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8.
>
> …

[39] It is common ground that the Tribunal's jurisdiction in respect of the present claims is that set out in s 6(1)(c), that is to consider claims that the policy to repeal s 7AA "adopted by or … proposed to be adopted by the Crown" is inconsistent with the principles of the Treaty. Similarly, it is accepted that once a Bill implementing the policy is introduced into the House, s 6(6) will bring the Tribunal's jurisdiction to an end, unless the House refers the Bill to the Tribunal under s 8(2)(a) or a fresh claim is made under s 6(1)(a) after the Bill becomes an Act.

[40] The Supreme Court has described the Tribunal's jurisdiction in relation to historical Treaty claims as unique in Aotearoa New Zealand's legal and constitutional framework.[19] This is not a historical Treaty claim, but the same words are apt to describe other aspects of the Tribunal's jurisdiction which require it to inquire into claims about whether policies proposed to be adopted by the Crown are inconsistent with the principles of the Treaty. The jurisdiction is given to the Tribunal, not the High Court. By virtue of s 5(2) of the Act, the Tribunal has, for the purposes of the Act, "exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts".[20] And under s 3, the Act binds the Crown.

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19 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [16] per Winkelmann CJ, Glazebrook and Williams JJ.

20 The Māori and English texts of the Treaty are set out in sch 1 of the Treaty of Waitangi Act.

[41] It is also important context here that the current Cabinet Manual continues to recognise the Treaty as one of the "major sources of the constitution", incorporating the words written by Sir Kenneth Keith emphasising its importance.[21]

[42] Under the Treaty of Waitangi Act, in respect of its proceedings, the Tribunal has a broad power to receive as evidence "any statement, document, information or matter which in the opinion of the Tribunal may assist it to deal effectively with the matters before it", whether the same would be legally admissible evidence or not.[22] The Tribunal has two relevant powers in respect of issuing a summons. First, cl 8(2)(b) of sch 2 of the Treaty of Waitangi Act empowers the Chairperson of the Tribunal, or the presiding officer at a sitting of the Tribunal, to "issue summonses requiring the attendance of witnesses before the Tribunal, or the production of documents". Secondly, s 4D of the Commissions of Inquiry Act contains a power to issue summons and provides as follows:

> **4D Power to summon witnesses**
>
> (1) For the purposes of the inquiry the Commission may of its own motion, or on application, issue in writing a summons requiring any person to attend at the time and place specified in the summons and to give evidence, and to produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the subject of the inquiry.
>
> (2) For the purposes of this Act, the power to issue summonses or to do any other act preliminary or incidental to the hearing of any matter by the Commission, may be exercised by the Commission or its Chairman, or by an officer of the Commission purporting to act by direction or with the authority of the Commission or its Chairman.

[43] The Tribunal remains subject to the Commissions of Inquiry Act, notwithstanding the enactment of the Inquires Act 2013.[23] In this case, the Tribunal has purported to exercise the power set out in s 4D of the 1908 Act. The issue before us is whether the High Court was right to set it aside.

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21 Cabinet Office *Cabinet Manuel 2023* at 2.

22 Treaty of Waitangi Act, sch 2 cl 6(1). The provisions in sch 2 have effect in relation to the Tribunal and its proceedings: see s 4(6).

23 See Inquiries Act 2013, s 38(2) and sch 1. Section 38(2)(b) provides that the Commissions of Inquiry Act continues to apply to any entity that was established under an enactment enacted before the commencement of this Act, including those listed in sch 1, and that derive power from the Commissions of Inquiry Act 1908. The Treaty of Waitangi Act is listed under sch 1.

**The High Court judgment**

[44] Isac J delivered an impressively comprehensive judgment in circumstances of considerable urgency.

[45] The Minister's application for review was advanced on two broad grounds. The first ground was directed to the statutory power under s 4D of the Commissions of Inquiry Act. As part of this argument, it was claimed the summons was unlawful because it purported to require the production of an affidavit, which it was said s 4D did not contemplate. If the terms of s 4D did contemplate the power to summons, that summons was only lawful if it required the provision of relevant evidence. As she contended the Crown had already provided all relevant material to the Tribunal, the summons was unlawful, as her evidence would not meet the threshold of relevance. Secondly, she argued the Tribunal's powers to issue a summons were constrained by the principle of legality and the fundamental constitutional principle of comity, which required that the Minister should only be compelled to give evidence if "clearly necessary". Given that the threshold of relevance was not met, neither was the more stringent test of clear necessity.

*First ground of review: Was the evidence required by the summons relevant?*

[46] Isac J did not accept the argument directed at the scope of s 4D.[24] He noted that cl 8(2) of sch 2 of the Treaty of Waitangi Act confers on the Tribunal a specific power to issue summonses. Further, under cl 8(2)(c), the Tribunal has the power to do "any other act preliminary or incidental to the hearing of any matter by the Tribunal".[25] Section 4D is the machinery provision available to require an affidavit or brief of evidence by a person summonsed.[26] Accordingly, he held that that there is nothing in the drafting of s 4D to suggest that commissions of inquiry generally are unable to require an affidavit or brief of evidence under summons.[27]

[47] The broader issue of relevance raised by the Minister was based on an argument that the Crown had already placed a significant body of material before

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24 High Court judgment, above n 12, at [37].
25 See also [35].
26 At [36].
27 At [36].

the Tribunal including the Cabinet paper, the Regulatory Impact Statement, the Cabinet minute of decision, related departmental papers, and affidavits and oral evidence of senior officials. It was said that material provided a detailed response to the Tribunal's questions and nothing that had been sought under summons would add materially to the information already available.

[48] The Judge accepted that to be lawful, a summons must relate to evidence relevant to the Tribunal's inquiry, but rejected the argument that the summons was unlawful because there was already other relevant evidence available to the Tribunal.[28] The Judge observed that evidence will be relevant if it has a tendency to prove or disprove a fact in issue,[29] and the fact that there is other relevant evidence available does not make it irrelevant.[30] He said:[31]

> The difficulty has arisen for the Minister in this case because despite the Tribunal's measured requests for an affidavit from her personally, she has preferred not to provide one. Given there is no challenge to the scope of the Tribunal's inquiry, in the absence of an affidavit recording that the Minister is unable to usefully add anything to the material already before the Tribunal, it cannot be said that the Minister's possible answers are irrelevant.

[49] However, the Judge considered that the Tribunal's focus on the Minister as the source of information at the "political level" might be misplaced.[32] The Minister's personal views, while potentially relevant to the Tribunal's inquiry, did not represent the totality of the executive Government. Without infringing the principles of confidentiality and collective responsibility, the Minister would be unable to speak to the decision of Cabinet, which was the relevant decision-maker.[33] In this context, the Judge considered the questions posed by the Tribunal were directed to the Crown more generally, and capable of response by witnesses other than the Minister. He concluded:[34]

> While I do not consider the Tribunal's focus on the Minister's personal involvement in the policy process renders the summons unlawful due to lack

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28 At [41].
29 Evidence Act 2006, s 7.
30 High Court judgment, above n 12, at [42].
31 At [42].
32 At [44].
33 At [45].
34 At [46].

> of relevance, it does have a bearing on the weight attaching to the constitutional requirements of comity, to which I will turn shortly.

[50] The Judge dismissed the Minister's first ground of review.

*Second ground of review: Was the summons unlawful because it infringed the principle of comity?*

[51] In addressing this ground, the Judge said that comity had been repeatedly recognised by the senior courts as an important constitutional principle in New Zealand.[35] For this proposition, he relied on a number of authorities: *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*; *Ngāti Mutunga O Wharekauri Asset Holding Co Ltd v Attorney-General*; *Make it 16 Inc v Attorney-General*; *Attorney-General v Taylor;* and *Wairarapa Moana Ki Pouākani Inc v Attorney-General.*[36] The Judge said that comity is "based on mutual restraint and respect between the branches of government" and designed to ensure that each can exercise their constitutional functions within their own spheres while recognising that overlap and resultant tension are inevitable. He accepted that most of the cases discussing the principle of comity do so in the context of the relationship between the legislative and judicial branches of government, but held that the principle was not limited to that one relationship.[37]

[52] The Judge recorded a submission by the Solicitor-General that a "high level of comity is required here due to the important constitutional function the Tribunal plays in New Zealand, akin to that between the judiciary and Parliament". The summons power had to be exercised in accordance with constitutional principles, like comity, unless they were expressly ousted. Comity created two implied limits on the power. First, in accordance with the authorities in the context of judicial review, ministers can only be summonsed if the evidence they can give is "clearly necessary": a more stringent test than mere relevance. The Minister's evidence was not "clearly necessary" as all the answers to the Tribunal's questions were provided through papers

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35 At [48].

36 At [48], n 52. See *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*, above n 19, at [47], citing *Ngāti Mutunga O Wharekauri Asset Holding Co Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1; *Make it 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [22] and [26]–[30]; *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24; and *Wairarapa Moana Ki Pouākani Inc v Attorney-General* [2023] NZHC 2086.

37 High Court judgment, above n 12, at [48].

and the evidence of Oranga Tamariki officials. Second, the summons could not, but did, put the Minister in a position of conflict with the constitutional principles of collective responsibility and Cabinet confidentiality.[38]

[53] The Judge accepted that the power of the Tribunal to issue a summons on a serving Minister may, in appropriate cases, be constrained by comity.[39] He held that although it was the task of the Tribunal to fearlessly investigate Treaty compliance by the executive Government, and its broad jurisdiction might call into question political judgements and preferences, these political judgements must be those of the Crown:[40]

> To the extent the genesis of the repeal policy is a product of political party autonomy and not that of executive action, it is beyond the reach of the Tribunal's investigation.

[54] The Judge accepted the submission of Mr Mahuika that comity is a two-way street. He considered the duty of candour on ministers is heightened in the context of the relationship between the Tribunal and the Crown, because of the principles of the Treaty and the duties of the Crown arising under it. This meant that the Tribunal was entitled to ask the questions it did of the Minister, and to expect her response. The Tribunal could not be criticised for resorting to a summons given its repeated and measured requests for the Minister's response. He wrote that as a member of the executive Government, "she might be expected to demonstrate the same respect and restraint she now seeks from the Tribunal", and that the difficulty in which she had found herself was, in his view, the "consequence of her own decision".[41]

[55] However, two considerations led the Judge to set aside the summons.[42] First, despite the fact that the Minister had not responded personally, the Crown had proactively made available a significant body of relevant material. Since the focus of the Tribunal was inevitably on the policies of the Crown and their consistency with the Treaty, the Minister's personal involvement in the development and promulgation

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38 At [51].
39 At [57].
40 At [58].
41 At [59].
42 At [60].

of the repeal proposal, in the period between her appointment as a minister and the Cabinet decision, could only be incidental to the real issue.[43]

[56] Second, in accordance with the cases he had referred to,[44] the normal remedy where a minister fails or refuses to provide evidence would be an adverse inference.[45] Typically, such inferences would strengthen the probative value of other evidence already available to the decision-maker.[46] While the Tribunal may not have had the benefit of the Minister's personal response to its questions, there was no suggestion that it would be impeded in its inquiry, or the rule of law undermined, if she was not compelled to give evidence.[47]

[57] These considerations led the Judge to conclude that the requirements of comity were heightened in this case. While it was not necessary to determine whether a test of "clear necessity" is appropriate in cases such as this, it was at least "a useful guide". Given his conclusions about the focus of the Inquiry, and the Tribunal's ability to proceed in the absence of evidence from the Minister (whether under summons or not), he did not consider it was clearly necessary for the Tribunal to require the Minister's attendance or for her to provide an affidavit under summons.[48]

[58] The Judge expressly stated his conclusion was not an endorsement of the Minister's approach to the Tribunal, nor a criticism of the Tribunal's decision. It was simply the result of applying the principle of comity in the circumstances of the case. The Judge observed:[49]

> Had I concluded that the lack of evidence would affect the Tribunal's ability to discharge its statutory functions, I would have dismissed the application for judicial review. It goes without saying, then, that the power of the Tribunal to summons a serving minister to attend and give evidence under compulsion, if clearly necessary, is very much alive.

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43 At [61].
44 See above at [51].
45 High Court judgment, above n 12, at [62].
46 At [62], citing *Perry Corporation v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA) at [153]–[154] per Gault P, Blanchard, Anderson and Glazebrook JJ.
47 High Court judgment, above n 12, at [62].
48 At [63].
49 At [64].

**Submissions on appeal**

[59] Mr Smith, who appeared for the appellants in CA259/2024, submitted the High Court erred by placing too much emphasis on the principle of comity which he submitted was not a justiciable legal rule and not, in itself, capable of constraining the scope of statutory powers. Referring to this Court's decision in *Attorney-General v Taylor*, he submitted that comity is a convention finding expression in various specific manifestations, such as in the Cabinet Manual, the Parliamentary Privilege Act 2014, Standing Orders of the House of Representatives and various judicial decisions.[50] Under s 11(a) of Parliamentary Privilege Act, courts may not receive evidence questioning the truth, motive, intention or good faith of anything forming part of parliamentary proceedings. Conversely, under Standing Order 116(1), Members of Parliament may not refer to matters awaiting or under adjudication in any court during proceedings in the House.[51]

[60] Mr Smith submitted that while restraint has traditionally been observed between Parliament and the judiciary, similar examples exist in relation to the executive. By way of illustration, he referred to the Cabinet Manual, which provides that ministers should not express certain views that could reflect adversely on individual judges, nor comment on the results of particular cases.[52] The observation of these rules is appropriately described as comity but, Mr Smith submitted, comity is not the reason for their existence. Rather, the convention of restraint serves to protect the separation of powers and, ultimately, the rule of law.

[61] Mr Smith noted that art 9 of the Bill of Rights 1688 (the Bill of Rights) provided that the freedom of speech, debate and proceedings in Parliament should not be questioned in any court or place outside of Parliament.[53] Over time, as the importance of judicial independence was recognised, the idea of mutual restraint on

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50 *Attorney-General v Taylor*, above n 36, at [73]–[74], citing Parliamentary Privilege Act 2014, s 14(1)(b); Cabinet Office *Cabinet Manual 2008* at [4.12]–[4.15]; Standing Orders of the House of Representatives 2014, SO 115–117; *British Railways Board v Pickin* [1974] AC 765 (HL) at 799 per Lord Simon of Glaisdale; *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330–331; and *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [98].

51 Standing Orders of the House of Representatives 2023.

52 Cabinet Office *Cabinet Manual 2023* at [4.13]–[4.14].

53 Specified to be part of New Zealand's law by the Imperial Laws Application Act 1988, s 3 and sch 1. See also ss 9–16 of the Parliamentary Privileges Act.

the part of both Parliament and the courts developed so that "collision" between the two institutions was avoided.[54] Mr Smith relied on the following observations of McGechan J in *Westco Lagan Ltd v Attorney-General*:[55]

> [98] However, the Courts have not restricted the matter to art 9 [of the Bill of Rights]. As *Pickin's* case and succeeding authority demonstrate, there is a wider principle in play. Its essence is that the Courts should not interfere so as to frustrate the powers of the House to enact legislation. Whether it is a matter of jurisdiction or practice, and I prefer the latter, there is a constitutional boundary to observe. Sometimes this principle is called "comity" as it reflects a reciprocal principle that Parliament should not intervene in the conduct of the Courts in relation to particular cases. The boundaries involved in non-interference in the conduct of Parliament are not determined on any fixed basis or by some bright line. The decision is a matter of [judgement] and common-sense. Boundaries may evolve and modify as times and circumstances dictate, as long as the underlying principle is kept in mind.

[62] He also referred to a passage in the book *New Zealand Constitution*: *An Analysis in Terms of Principles*, in which Professor Harris wrote of constitutional conventions as providing "rules that influence the behaviour of players in the constitutional system", distinguishing them from law that may be enforced by the courts.[56] They describe expectations of conduct, rather than enforceable rules. For the principle of comity to be enforceable there needs to be, Mr Smith submitted, a "legal hook" that is justiciable, such as s 11 of the Parliamentary Privilege Act or s 70 of the Evidence Act 2006.[57] Mr Smith submitted there was no authority that puts comity on the same footing as justiciable legal principles and rules such as, for example, the right to natural justice or legal professional privilege, enabling it to be relied on to challenge the exercise of statutory powers.

[63] Against that background, Mr Smith submitted that the proper approach to the issues in this case involves asking first whether the summons was within the scope of

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54 *Pickin v British Railways Board*, above n 46, at 800 per Lord Simon of Glainsdale.

55 *Westco Lagan Ltd v Attorney-General*, above n 50, at [98], referring to *Pickin v British Railways Board*, above n 46.

56 Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (2018, Thomson Reuters, Wellington) at [1.3.3].

57 Section 70 of the Evidence Act contains enforceable rules for giving effect to non-justiciable principles of Cabinet confidentiality and collective ministerial responsibility: see s 70(1). The power to direct that communications or information relating to matters of State must not be disclosed in a proceeding extends, by virtue of s 70(2) of the Evidence Act and s 9(2)(f) of the Official Information Act, to information which it is necessary to withhold to maintain constitutional conventions which protect collective and individual ministerial responsibility, and the confidentiality of advice tendered to ministers of the Crown and officials.

the Tribunal's broad ability to receive information that might assist it. In answering this question, the proper standard of review is, he submitted, irrationality. The second question is to ask what specific constitutional risks trigger a need for restraint by the Tribunal, or otherwise what aspect of the integrity of executive processes and powers might be undermined by the summons, and what independent "legal hooks" exist to protect those concerns.

[64] Mr Smith proceeded to address various arguments that justified the issue of the summons because the information sought was rationally relevant to the Inquiry and did not require the Minister to disclose the content of Cabinet discussions, or the views of any other members of Cabinet. He pointed out that the Tribunal was alive to the need to avoid the Minister being put in that position.[58]

[65] Mr Smith maintained that if restraint had any role to play it was, at most, a mandatory relevant consideration for the Tribunal. In this respect, various observations by the Tribunal as the process continued showed that it was alive to the need for restraint. Its preference was that the Minister should give evidence voluntarily and it only decided to issue the summons when it appeared the Minister would not do so. And, in issuing the summons, the Tribunal made it clear that it was "open to considering how that evidence should be provided (in person or in writing)".

[66] Mr Ferguson submitted for te Whakakitenga o Waikato Inc (the appellants in CA261/2024) that there was fundamental error in the approach of the Judge, who had treated the application for judicial review as a proceeding about the principle of comity. By focusing on that, the Judge had failed to give appropriate weight to the overall context in which the summons had been issued. That context was, Mr Ferguson submitted, the Tribunal's lawful authority to issue a summons in an inquiry into the repeal of a statutory provision designed to protect tamariki Māori in State care without proper clarity as to the Crown's reasons for adopting the policy. Mr Ferguson emphasised important aspects of the status, role and powers of the Tribunal, noting that it had been established and specifically empowered to inquire

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[58] The memorandum of directions of 11 April 2024, while commenting that the Minister appeared to have been able to persuade Cabinet to proceed with the proposal, also stated that "should not be taken to mean that we expect the Minister to breach Cabinet confidentiality".

into acts of both the legislature and the executive, including actual or proposed government policy. He submitted that, while its processes are "quasi-legal", the Tribunal is not part of the judiciary, and is not able to make binding legal decisions. It exercises an inquisitorial and not an adversarial function.

[67] Mr Ferguson submitted that the powers of the Tribunal mean that it operates at the interface of (and, at times, beyond) the separation between the branches of government. Its jurisdiction is wide in terms of what it may inquire into, but limited in the sense that it can only make recommendations. This means that the Tribunal must have an expansive jurisdiction to ascertain the motivations for Crown actions so as to ensure that it can make recommendations which are sound and persuasive with reference to the matters at issue. Further, the principles of the Treaty must inform the constitutional background in which the Tribunal makes decisions as much in the process of hearing inquiries as in the exercise of its recommendatory powers.

[68] Mr Ferguson submitted that the High Court's emphasis on comity was inappropriate, and had conflated the role of the Tribunal with that of the judiciary. The principle of comity was intended to prevent one branch of Government from unfairly limiting the operation of another, but the Tribunal could never prevent the executive from proceeding with a policy it wished to implement. It was wrong to place so much emphasis on comity in these circumstances.

[69] Ms Arapere appeared for Druis Barrett on behalf of the Maori Women's Welfare League, a strategic partner of Oranga Tamariki since 2020. She described the League as an organisation dedicated to upholding the mana of tamariki. Her submissions supported those of both appellants, but emphasised the Crown's obligations to Māori under te Tiriti o Waitangi, and that the evidence of the Minister, as sought by the Tribunal's summons, was relevant, and not incidental to, the Inquiry.

[70] The Solicitor-General made it clear that the Minister does not challenge the Tribunal's broad jurisdiction to inquire into the Treaty consistency of the policy to repeal s 7AA, nor its decision to pursue lines of inquiry. Nor was it argued that sitting ministers have general immunity from summons powers. Rather, the argument was

that, in the context of this case, the exercise of coercive power against a sitting minister was unlawful.

[71] Before dealing with the substance of those arguments, we note that Ms Jagose submitted that the appeal could be dismissed on three bases as a consequence of the events following the delivery of the High Court judgment, namely the Minister's letter and the publication of the Interim Report. The bases upon which the appeal could be dismissed were that: first, the appeal is moot and there is no wider basis to determine the appeal; second, the information requested in the summons is now clearly irrelevant; and, third, there has been a material change in circumstances such that the summons are no longer justified. We return to these issues later in the judgment. Our first task in relation to the appeal, as we apprehend it, is to decide whether the Tribunal was acting lawfully at the time it issued the summons; subsequent events are not directly relevant to that issue.[59]

[72] The Crown's principal argument on appeal is that the High Court was correct to hold that the scope of the summons power is limited by the principle of comity. Ms Jagose described that principle as a fundamental and well-established part of New Zealand's constitutional order, submitting that it was the "working hypothesis that underpins the relationship between constitutional actors, requiring reciprocal respect and restraint". It is frequently illustrated in constitutional practice, consistent across courts, the Tribunal itself and other commissions of inquiry, that ministers are not generally compelled to give evidence. Ms Jagose said that she knew of no case of a minister being summonsed.

[73] Isac J was correct, in Ms Jagose's submission, to find that the summons in this case should be set aside for inconsistency with the principle of comity. He was right that the "clear necessity" test provides an appropriate touchstone of legality in the context of compulsion of the Minister, as a manifestation of the comity principle, and that, in this case, it was not clearly necessary to compel the Minister to give evidence.[60]

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59 See *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [33], citing *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd*, above n 8, at 658; *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) at [46]; and *Palmerston North City Council v Dury* [2007] NZCA 521, [2008] NZRMA 90 at [62]–[63].

60 High Court judgment, above n 12, at [61]–[63].

It was highly salient that the Crown acted with due comity and respect for the Tribunal's urgency, voluntarily disclosing a large volume of evidence, including all relevant Crown documents along with written and oral evidence given by the most senior officials at Oranga Tamariki. This evidence had already provided the information ultimately sort in the summons. In such circumstances, for the Tribunal to take the rare and serious step of compelling the Minister to give evidence was to cross "a clear constitutional boundary".

[74] In particular, Ms Jagose submitted that the summons was also beyond the Tribunal's powers because it would require the Minister to transgress the fundamental principles of collective ministerial responsibility and Cabinet confidentiality, or pose an undue risk of doing so. It was wrong for the Tribunal to place a minister of the Crown in a position that would put them at odds with their obligations of confidentiality and collective responsibility. In this respect, it was submitted that Isac J was correct to conclude the Minister could not say anything more than the record shows about Cabinet's decision to adopt the policy to repeal s 7AA without infringing constitutional principles of confidentiality and collective responsibility.[61]

[75] Ms Jagose further submitted that the Judge was right to conclude that the Tribunal's focus on the Minister giving evidence was misplaced, given that the repeal of s 7AA was a coalition commitment, and that Cabinet was the responsible decision-maker, having made a collective decision to proceed with the repeal.[62]

[76] In one respect, the Crown's position differed from the approach taken by the High Court. While the Judge had correctly held that "relevance" is a precondition of a lawful summons,[63] he was wrong, it was submitted, to conclude the evidence sought by the summons was relevant.[64] Ms Jagose submitted the summons was unlawful not only for inconsistency with comity, but also because the material sought was not materially relevant, for the reason that it was already before the Tribunal. On this part of the case, we heard a detailed submission from Mr Varuhas who demonstrated the extent of the information that had been provided by the Crown.

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61 At [45].
62 At [43]–[46], [58] and [61].
63 At [41].
64 At [38]–[47].

[77] Before turning to our analysis of the issues, we mention here that Mr Mahuika appeared for the Tribunal in this Court, to abide the decision. We were grateful for his assistance.

**Issues for determination**

[78] In the coming analysis, we find that the summons issued by the Tribunal was lawful for three reasons:

(a) the Tribunal is empowered to issue summonses to witnesses;

(b) it was within the Tribunal's powers to issue the summons to the Minister; and

(c) the principle of comity does not operate to prevent the Tribunal asking for information that would, in its view, assist it to carry out of an inquiry.

**Analysis**

*Scope of the Waitangi Tribunal's power to issue summonses to witnesses*

[79] This case raises important issues concerning the relationships between the branches of government. Such is their importance, they cannot be properly considered without close regard to the context in which they arise, and that is where we start.

[80] Under cl 8(1) of sch 2 of the Treaty of Waitangi Act, the Tribunal is deemed to be a commission of inquiry under the Commissions of Inquiry Act, and with certain exceptions not relevant here,[65] all of the provisions of that Act apply accordingly. That means that, among other provisions, s 4D of the Commissions of Inquiry Act applies.

[81] The power conferred by s 4D is to be exercised "[f]or the purposes of the inquiry". This is further coloured by the section's express provision that the summons can also require the person summonsed to "produce any papers, documents, records

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[65] All provisions of the Commissions of Inquiry Act apply, subject to the provisions of the Treaty of Waitangi Act, except ss 11 and 12, which relate to costs.

or things … that are *relevant* to the subject of the inquiry".[66] We consider the drafting embraces a test of relevance: the summonsing power must be exercised to obtain relevant evidence necessary for the purpose of the inquiry.[67]

[82] The particular powers of the Tribunal, set out in cl 8(2) of sch 2 of the Treaty of Waitangi Act, largely duplicate the powers given by the application of s 4D of the Commissions of Inquiry Act. Under cl 8(2)(b) the Tribunal "may issue summonses requiring the attendance of witnesses before the Tribunal, or the production of documents". A requirement that the summons be issued for the purposes of the inquiry is plainly implicit. It is also relevant that under cl 6(1) of sch 2, the Tribunal "may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information or matter which in [its] opinion … may assist to deal effectually with the matters before it, whether or not … [the evidence would] otherwise be legally admissible". It is on that basis that the Tribunal received the Minister's letter dated 26 April 2024. A letter may plainly be received and considered for the purposes of an inquiry, subject of course to the Tribunal's power, if exercised, to require the letter to be formally produced by a witness who could be cross-examined (if the Tribunal permitted that to occur).

[83] The next consideration that must inform our approach is the nature of the Inquiry. The summons power is exercised as an ancillary step to assist the Tribunal in the conduct of the inquiry. We consider this is important context. The question of whether a summons has been lawfully issued is to be approached not simply by asking whether it is appropriate or inappropriate for a tribunal to issue a summons to a minister, with issues of comity or deference being addressed on the basis of theoretical considerations. Instead, the question is one that might receive a different answer according to the nature of the tribunal, the nature of the inquiry and the nature of the evidence the minister might give.

[84] In the present case, we think it is significant that the summons was issued by the Tribunal, a body with the constitutional importance acknowledged by the

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66 Emphasis added.

67 See *R v Baines* [1909] 1 KB 258 (HC); *Smallwood v Sparling* [1982] 2 SCR 686; and *Gill v Fulumua*, above n 4.

Solicitor-General in the words we have quoted above.[68] And it is not just a question of the great importance of the Tribunal's role, but the fact that it has been given, and issued the summons while fulfilling, a statutory duty to inquire into whether a policy of the Crown will prejudicially affect Māori claimants.[69] This is the work which Parliament (the Sovereign in right of New Zealand and the House of Representatives)[70] has not only authorised but required the Tribunal to undertake. We say "required" because of the statutory obligation in s 6(2) of Treaty of Waitangi Act that the Tribunal "must inquire into every claim submitted to it under subsection (1)".

[85] Two other characteristics of the Tribunal's jurisdiction should also be mentioned in this context. The first is the fact that the result of an inquiry under s 6(1)(c) of the Treaty of Waitangi Act is the making of general recommendations.[71] A recommendation by the Tribunal that an intended policy should not be incorporated into legislation is in no sense binding on Parliament.[72] And a decision by the Tribunal to issue a summons in the course of an inquiry, before any recommendation is made, can plainly have no implications for the exercise of Parliament's right to legislate as it chooses.

[86] The second characteristic worth emphasising is the fact that s 6(6) of the Treaty of Waitangi Act provides that nothing in s 6 confers any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives (unless the Bill is referred by the House). The parties accepted that the effect of this provision would be to prevent the Tribunal proceeding further with the inquiry once a Bill providing for the repeal of s 7AA is introduced. This further insulates the legislature from any impact of the Tribunal's recommendations.

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68 See above at [36].

69 Treaty of Waitangi Act, s 6(1)(c).

70 Constitution Act 1986, s 14(1).

71 Treaty of Waitangi Act, s 5(1)(a).

72 Waitangi Tribunal "Guide to the Practice and Procedure of the Waitangi Tribunal" (August 2023) at 3.57–3.59. General recommendations of the Tribunal do not bind the Crown or any other party. In certain instances, however, the Tribunal may recommend the return or resumption of certain lands, and such recommendations can become binding on the Crown, but those exceptions are not relevant to this case.

[87] These considerations bear on the issues that arise concerning the validity of the summons because they establish the context in which the power to issue it was exercised.

*The lawfulness of the issue of summons to the Minister*

[88] We now assess whether the summons in this case fell within the scope of the Tribunal's power to issue summonses.

[89] The nature and extent of the information sought in the summons must be assessed in light of the information available to the Tribunal at the time the summons was issued on 11 April.[73] It is axiomatic that the summons could not have been unlawfully issued on the basis that it sought information subsequently provided. In the circumstances of this case, the chronology is important. As has been discussed, the summons was issued at a time when the Crown had provided a substantial amount of information, including, in particular, the Cabinet paper and Regulatory Impact Statement. And, as noted earlier, this information was provided as an attachment to Mr Barr's memorandum of 5 April before the issue of the summons.

[90] On the information before the Tribunal at that stage, it knew that the repeal was to proceed on the basis of the Coalition Agreement between National and ACT. From the Cabinet paper prepared by the Minister, it knew that the Minister thought s 7AA was creating a conflict for Oranga Tamariki, and that the repeal of s 7AA would ensure Oranga Tamariki was "entirely child-centric" and was making decisions in the child's best interests. The Tribunal was also aware of the Minister's concerns that:

(a) the section may have been used to justify care arrangements for Māori children which had been unsafe or not in their best interests;

(b) "prominent individuals" had criticised the role s 7AA may have had in "several high-profile cases" involving changes to planned long-term

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73 See *Taylor v Chief Executive of Dept of Corrections*, above n 59, citing *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd*, above n 8, at 658; *Discount Brands Ltd v Northcote Mainstreet Inc*, above n 59, at [46]; and *Palmerston North City Council v Drury*, above n 59, at [62]–[63].

care placements which had been traumatic and stressful for the children and young people involved; and

(c) "[s]ome caregivers" thought that s 7AA had resulted in a requirement for a culturally appropriate environment, resulting in Māori children being removed from homes where they were safe and loved because the caregivers were thought to be of the "wrong ethnicity".

[91] At the same time, the Tribunal knew that the advice in the Regulatory Impact Statement (received by the Minister prior to finalising the Cabinet paper) stood in direct contrast to the opinions expressed in the Cabinet paper, and stated that repeal would be "unlikely to achieve" the objectives the Minister was seeking. The Tribunal was also aware from the Regulatory Impact Statement that the advice of officials did not recommend repeal. Although the Regulatory Impact Statement acknowledged that, in practice, some care decisions had not resulted in the best outcome for the child, it reiterated that there was "no evidence to suggest these changes [to care arrangements] were made in accordance with section 7AA".

[92] Mr Barr's 5 April memorandum had also told the Tribunal that the 28 March Questions were all canvassed in the Cabinet papers and the Regulatory Impact Statement. Some of the matters would be the subject of evidence of the three senior Oranga Tamariki officials who would be called to give evidence. It was after considering what was said in the memorandum, and the annexed documents, that the Tribunal issued a further memorandum of directions on 9 April saying it would be greatly assisted by the answers to the 28 March Questions. It raised in particular the issue of the number of instances the Minister was aware of where it was said that decisions were made concerning care arrangements for Māori children which were not safe nor in the best interests of the children "due to the operation of s 7AA". It also sought that the Minister provide the identity of the "prominent individuals" and information about the "several high-profile cases" to which the Minister had referred in the Cabinet paper.

[93] At the time the Tribunal issued that memorandum, it was aware that the departmental advice annexed to the Cabinet paper said the premise of the policy to

repeal s 7AA — that the section was the basis for various instances of poor practice — was a conclusion which lacked a "robust empirical evidential" footing. Further, the Tribunal was aware that officials had advised that a full or partial repeal of s 7AA would not address the policy problem, and they had recommended the section's retention, alongside a policy of continuing to strengthen practice and operational guidelines to fulfil the Government's policy objectives.

[94] It should also be recorded that the Regulatory Impact Statement directly addressed the consistency of the proposed repeal of s 7AA with the principles of the Treaty of Waitangi in the following passage:

> Repealing Section 7AA removes the duties imposed on Oranga Tamariki to recognise and provide a practical commitment to the principles of the Treaty. The repeal goes against evidence that highlights:
>
> - Section 7AA has led to strategic partnerships with iwi and Māori organisations to provide early support, which has prevented Māori from entering the Care and Protection system, improving long-term outcomes. This also reduces disparities between Māori and non-Māori in care and reduces disparities down the line.
> - The duty in section 7AA(2)(b) has supported tamariki and rangatahi Māori to connect with their culture and develop a positive sense of identity which protects against adversity and supports long-term well-being.
> - The introduction of section 7AA has also played a pivotal role in strengthening trust and relationships between Oranga Tamariki and Māori. Repealing section 7AA is not consistent with the Treaty of Waitangi.
>
> The principles outlined in section 7AA play an important role in reducing levels of inequity between Māori and non-Māori in care. While strategic partnerships would continue to drive down disparities in the absence of section 7AA, other statutory requirements, such as setting measures to reduce inequities and report publicly on progress in achieving these would be removed. Without replacing these accountabilities and reporting mechanisms after a repeal, work to reduce inequities may slow. This could have a material impact on the safety, stability, rights, needs and long-term well-being of children with whom we interact.

[95] When Mr Varuhas filed the Crown's further memorandum on 10 April, he confirmed the Crown's stance set out in the 5 April memorandum. So the Tribunal was left in the position where it was aware of the policy to repeal the section, aware that the officials were advising that the repeal of s 7AA was not sought to be justified on the basis of empirical evidence, saw various other issues arising from the proposed

repeal, and considered there would be better ways of achieving the policy outcomes the Government sought.

[96] It was in these circumstances that the Tribunal decided that it would be assisted in its Inquiry by the Minister's answers to the 28 March Questions. The content of the Cabinet papers, in our view, did not detract from the force of the opinion expressed by Judge Doogan in his 28 March memorandum that information central to the Inquiry would be held primarily at the "political and not the departmental level", and that information should be provided by the Minister. His memorandum also said that if relevant information was held by other Ministers or by officials, it should be provided. Some of the information was then provided by Mr Barr's 5 April memorandum and the attached Cabinet papers.

[97] The Tribunal maintained its view that the Minister should answer the 28 March Questions and sought that she provide further information, as summarised above. The memoranda of 9 April and 11 April maintained the position that more information was necessary, and that the Tribunal was entitled to ask for it. Upon that information not being voluntarily provided, the summons followed. Notwithstanding the provision of the Cabinet papers, we think it was understandable that the Tribunal thought it was the Minister who could best explain the reasons for the policy. As Judge Doogan noted, there had been an "unusual policy development process" in which the officials had apparently had a purely instrumental role. It is apparent why he took the view that, in the circumstances, their ability to speak for the Minister concerning the rationale for the policy was likely to be constrained. We note that, in asking that Minister to give evidence, the Tribunal was careful to acknowledge that legal privilege could be relied on (if it was not to be waived) and that Cabinet confidentiality would be respected.

[98] In some respects, information that the Tribunal had sought had been provided by the time the summons was issued. The policy problem sought to be addressed was defined in the Cabinet papers. The Regulatory Impact Statement had looked at whether the policy objective could be advanced by way of a partial rather than complete repeal of s 7AA, and the policy advice taken by the Minister was contained in the Cabinet papers. The Minister, in her Cabinet paper, had stated that strategic

partnerships with iwi and Māori organisations would continue in force, and repeal would not prevent further strategic partnership agreements being entered into with iwi or Māori organisations. It was also clear from the Regulatory Impact Statement that the Crown had not consulted generally with Māori. As to the actual and predicted fiscal implications, the Cabinet paper stated none had been identified as arising from the repeal. But the questions raised in paragraph (i) of the summons (see above at [28]) remained unanswered. It was legitimate for the Tribunal to consider that the Minister might be able to provide more information about those matters which appeared to be significant contributors to the policy of repeal.

[99] To that possibility, the Crown contended that no more evidence could be provided, as the policy being followed is not an empirical public policy case, but instead rests on a political or philosophical choice. That the policy to repeal was a political decision is, of course, a position the Crown is entitled to adopt. However, it should not foreclose the ability of the Tribunal to inquire into the issues raised — namely whether the policy would prejudicially affect Māori claimants as required under s 6(1) — and to seek an understanding of whether the policy choice made had a proper factual foundation.

[100] We do not find compelling the Crown's argument that the Tribunal could draw adverse inferences if the Minister did not give evidence. As noted, Isac J accepted this proposition, acknowledging it was an approach taken in cases involving judicial review of decisions where a minister fails or refuses to provide evidence.[74] But we do not think it is desirable that the Tribunal should be left in that position having regard to the importance of the Inquiry and the task Parliament requires the Tribunal to perform.

[101] Overall, we are satisfied that, at the time the summons was issued, the Tribunal could properly take the view that it would be assisted in the Inquiry by hearing evidence from the Minister. There was no suggestion that the Tribunal, in receiving the Minister's evidence, would have sought to put the Minister in the position of

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74 High Court judgment, above n 12, at [62].

breaching the confidentiality of Cabinet discussions or the privilege of legal advice she (or the Crown generally) had received.

[102] Nor do we think it would have any implications for the collective responsibility of Cabinet decisions. The Minister clearly had a key role in the development of the policy: the language she employed in the Cabinet paper establishes that to be the case, with her references to her "vision", her belief, her concerns, her view, her intention to improve the rights and responsibility of caregivers and so on. Were the Tribunal wanting to fully understand the reasons for the policy to repeal s 7AA, it seems clear that she was the relevant minister to ask.

[103] Further, we do not see it as germane that the policy was implementing something agreed in the Coalition Agreement. Isac J evidently thought this significant, observing "[t]o the extent the genesis of the repeal policy is a product of political party autonomy and not that of executive action, it is beyond the reach of the Tribunal's investigation".[75] But the Tribunal was not directing its attention to the Coalition Agreement or asking why the Agreement dealt with the repeal of s 7AA. It is inquiring into whether a policy of the Crown will prejudicially affect Māori claimants. The repeal is a Crown policy, whatever its genesis. It is the fact the Government intends to proceed with it that makes it a valid subject for an inquiry by the Tribunal.

*The implications of comity*

[104] Having arrived at that point, it is necessary to consider the Crown's argument that, for reasons of comity, the Minister should not have been compelled to give evidence by the issue of the summons because it was not "clearly necessary" to do so. Some general observations are appropriate.

[105] The principle of comity can be traced to art 9 of the Bill of Rights:

> **Freedom of speech**
>
> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament:

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75 At [58].

[106] In the course of assessing Parliamentary privilege, the Privy Council in *Prebble v Television New Zealand Ltd* stated that art 9 had been bolstered by a "long line of authority":[76]

> In addition to art 9 itself, there is a long line of authority which supports a wider principle, of which art 9 is merely one manifestation, viz, that the Courts and Parliament *are both astute to recognise their respective constitutional roles*. So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges … As Blackstone said in his commentaries …:
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> > ". . . the whole of the law and custom of parliament has its original from this one maxim, 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere'."

[107] In the New Zealand context, comity is typically formulated as operating between the judicial and legislative branches of government.[77] Section 4(1)(b) of the Parliamentary Privilege Act includes an express recognition of the principle of comity, stating that it:

> … requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges…

[108] Professor Joseph notes how, over the course of English constitutional history, the relationship between the courts and Parliament was vigorously contested, with clashes over privilege and contempt being "flashpoints" exposing the precarious relationship between institutions. He describes comity, mutual forbearance and restraint as the accommodation reached between these institutions: each organ must be "astute not to trench on the autonomy and sphere of action of the other".[78]

[109] The Tribunal is not easily located within the judicial branch. We note that Professor Joseph discusses commissions of inquiry under the heading "Executive

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76 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 7 (emphasis added).

77 See for example *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [104] per Elias CJ.

78 Philip Joseph *Joseph on Constitutional and Administrative Law* (online ed, Westlaw) at [17.14.4].

inquiries" in the chapter discussing "The Executive".[79] As noted earlier, the Tribunal is deemed to be a commission of inquiry under the Commissions of Inquiry Act.[80]

[110] The powers of the Tribunal, discussed above at [37], make it inherently unlikely that an action of the Tribunal could limit "freedom of speech and debates or proceedings in Parliament"; the mischief that art 9 of the Bill of Rights was directed to. On the contrary, in carrying out its powers to inquire and recommend, the Tribunal is doing as Parliament directed. It is not to be compared with a court issuing a judgment that might have an impact on the exercise of legislative powers. Moreover, s 6(6) may be seen as providing for how comity is to be applied in this setting. Accordingly, we do not consider the issue of "comity" arises on these facts, where the power to issue a summons was not divorced from the exercise of the Tribunal's substantive jurisdiction and has no proximate effect on the functions of the Parliament.

[111] Cases in which the issue of ministers giving evidence has arisen have generally been ones in which an applicant seeks to judicially review a minister's exercise of statutory powers. As one of a number of examples, the Crown referred us to this Court's judgment in *Minister of Energy v Petrocorp Exploration Ltd*, where the plaintiff sought to cross-examine the Minister of Energy on an affidavit he had produced.[81] Cooke P, writing for a court of five, referred to the need, in administrative law cases about ministerial powers, to maintain the sometimes delicate balance between a minister's role to decide or apply policy on their own view of the merits , a field into which the courts were not to trespass, and a court's duty to check that a minister had acted lawfully and reasonably in exercising the powers conferred by Parliament. He continued:[82]

> To ensure that both Ministers and the Courts carry out their true constitutional roles it is important that, when Ministerial decisions are challenged, the Courts should have reliable evidence of the reasons why the Minister acted as he or she did. While it is for the Minister to decide whether to make an affidavit, the value and desirability of an affidavit by the Minister personally has been stressed in this Court in a number of cases, most recently in *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* …

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79 See Joseph, above n 78, at [17.20] and [17.20.9].
80 Treaty of Waitangi Act, s 8.
81 *Minister of Energy v Petrocorp Exploration Ltd*, above n 8.
82 At 352, citing *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries*, above n 8, at 554–555, 561–562, and 567–568.

[112] The Court proceeded to speak of the danger that, although a minister has made a candid and sufficiently full affidavit, an adversary might wish to cross-examine them for irrelevant purposes, on matters of detail with which a minister could not be expected to be familiar, or to mount a merits-based attack.[83] The Court identified means by which that process might be controlled, including through imposing a requirement for leave to cross-examine.[84]

[113] That kind of case is very different from the present. Here, there is no issue about the lawfulness of a ministerial decision, and the summons was issued by the Tribunal itself for the purpose of furthering its Inquiry. It seems to us that the only issue that could arise is whether that step was necessary in order for the Tribunal to understand the policy of repeal and the reasons for it.

[114] It is not clear to us why the constitutional relationship between the Crown and the Tribunal should prevent the Tribunal from asking for information that would, in its view, assist it to carry out the Inquiry. The question of the relevance of evidence from the Minister was properly one for the Tribunal.[85]

[115] Even if comity did apply, the principle must involve obligations of both "actors": the Tribunal and the Crown. We consider the process followed in this case was characterised on both sides by the kind of cooperation and candour that was appropriate, given the nature of the Inquiry and its importance, together with the Crown's Treaty obligations.

[116] Mr Mahuika referred us to a number of occasions where ministers have personally provided evidence before the Tribunal. Examples included the Hon Christopher Finlayson, who gave evidence for the Crown in the Marine and Coastal Areas (Takutai Moana) Act 2011 Inquiry;[86] the Hon Nicolas Smith who provided an affidavit for the Crown in the Mokai School Inquiry;[87] and the

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83 At 352.
84 At 353.
85 See *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in Care of Faith-Based Institutions* [2024] NZCA 128 at [39]; and *Douglas v Pindling* [1996] AC 890 (PC) at 904.
86 See Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry* (Wai 2660, 2020).
87 See Waitangi Tribunal *The Mokai School Inquiry* (Wai 789, 2000).

Hon William Jeffries who wrote to the Tribunal for the Taranaki District Inquiry.[88] We infer from the Solicitor-General's submissions, that this evidence was given voluntarily.

[117] In the present case, an issue arose only when the Crown took the stance that it would not provide a response from the Minister. We can see no suggestion on the facts that the Tribunal did not genuinely form the view that it needed to hear from the Minister, and it was only when the Crown maintained its stance that the summons was issued. The Minister's failure to provide a statement meant that the Tribunal was denied information it sought. We do not see a corresponding adverse consequence for the Crown had the Minister agreed to respond to the Tribunal's questions.

**Disposition**

[118] We do not consider that it was right for the Judge to set aside the summons on the basis that "the requirements of comity are heightened in this case",[89] or to substitute his own view for that of the Tribunal as to whether a summons was necessary. Accordingly, we will allow the appeal.

[119] That conclusion would ordinarily lead to the consequence that the order of the High Court setting aside the summons be quashed. However, for a number of reasons, we make no further order. This is principally because of the events that have taken place since the issue of the summons.

[120] First, the date for the summons to be answered has passed and the introduction of legislation implementing the repeal of s 7AA is imminent.

[121] Secondly, since the summons was issued, the Tribunal has conducted an oral hearing in which, to the extent they could, officials explained the basis of the proposed repeal and its justification. This included:

(a) Evidence of Mr Grady, Deputy Chief Executive of Oranga Tamariki, as to what he understood was the "nub" of the Minister's concern:

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88 See Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996).
89 High Court judgment, above n 12, at [63].

> What I understand the Minister to believe is that the 7AA is guiding social work practice in terms of making decisions around placement where a tamariki has been placed in a caregiver placement and that placement is stable and safe and that 7AA is guiding the practice in the decision-making to move them from a stable caregiver placement to an unstable caregiver placement

(b) Evidence of Ms Dickson, Deputy Chief Executive, confirming that the Cabinet paper accurately captured the concerns that the Minister had outlined to her:

> I believe she had a sincerely held view that decisions that social workers – that she felt social workers were linking directly to 7AA were creating potential safety risks for children, so I do believe that is her sincerely held view, certainly from the conversations I've had with her.

[122] Thirdly, by her letter of 26 April, the Minister confirmed that the Tribunal's record "showed all there was to show in support of the Crown policy under inquiry". Further, she reassured the Tribunal that there is no further information she could materially add, taking into account evidence already before the Tribunal, and the responsibilities imposed on her by Cabinet confidentiality and collective responsibility.[90] She then responded to each of the questions that the Tribunal had posed in its summons. The Tribunal has received the letter into the record of the Inquiry.

[123] Finally, as noted above at [35], the Tribunal issued the Oranga Tamariki (Section 7AA) Report on 10 May.[91] The Tribunal indicated that this was the final report, save for any further inquiry processes that may be required following the release of our judgment.[92]

[124] These events give rise to the potential for this appeal to have been rendered moot by subsequent events as argued by the Solicitor-General. But we are satisfied that, even if that were so, the circumstances of this case mean there is a broader public interest to be addressed by our issuing a decision on the relevant issues.[93]

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90 The reservations about her responsibilities were ones she was well entitled to make.
91 The Oranga Tamariki (Section 7AA) Report, above n 16.
92 At viii.
93 *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 at [33]; and *Thornley v Ford* [2024] NZCA

**Result**

[125] The appeals are formally allowed, but we make no other order having regard to the changed circumstances since the summons was issued.

[126] If there is any issue as to costs the parties may file memoranda within 10 working days. Our preliminary view is that costs in this Court should lie where they fall.

[127] Any issue as to costs in the High Court is to be dealt with in that Court in accordance with this judgment.

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Whāia Legal, Wellington for Appellants in CA261/2024 & Interested Party in CA259/2024
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Ministry of Justice |Te Tāhū o te Ture for Second Respondent in CA259/2024 & 261/2024
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154. The Supreme Court in *Baker v Hodder*, at [33], stated that "a decision to hear a moot appeal should be made only in exceptional circumstances. These might be found in the circumstances of the particular case (for example, serious procedural unfairness at the first hearing) or *the broader public interest* (for example, where an important legal point is raised)" (emphasis added).