I TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI **WAI 3470**
BEFORE THE WAITANGI TRIBUNAL **WAI 3440**

I TE TAKE O IN THE MATTER OF	the Treaty of Waitangi Act 1975
Ā AND	
I TE TAKE O IN THE MATTER OF	the Regulatory Standards Bill Urgent Inquiry (Wai 3470)
E PĀ ANA KI CONCERNING	Tētahi tono nā Eru Kapa-Kingi, Te Rawhitiroa Bosch, Anahera Mana-Tupara, Nyze Manuel, Kiri Tamihere-Waititi and Hohepa Thompson mō ngā tāngata Māori i raro i te tāwharau o "Toitū Te Tiriti"

BRIEF OF EVIDENCE OF PROFESSOR ANDREW GEDDIS

Dated 7 Haratua 2025

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I, **Andrew Geddis**, University Professor, of Otago, state that:

INTRODUCTION

1. I am a Professor in te Kaupeka Tātai Ture-the Faculty of Law at Ōtākou Whakaihu Waka-the University of Otago. I have been a faculty member at that institution since 2000. I am the author of a number of texts, book chapters, and peer reviewed journal articles on a wide range of matters relating to the law and practice of Aotearoa New Zealand's constitutional arrangements.

2. I have previously been appointed to advisory positions on the Legislation Advisory Committee, an external panel of the Legislation Design and Advisory Committee (**LDAC**), and the Independent Electoral Review. I also have provided advice on request to the Privileges Committee of the House of Representatives. My curriculum vitae is provided in the Document Bank as **Document AG1**.

3. I have read and agree to comply with the Code of Conduct for Expert Witnesses set out at Schedule 4 of the High Court Rules 2016.

4. I have previously given evidence to the Tribunal in this inquiry in relation to the Treaty Principles Bill (**TPB**) (Wai 3300 #A19). I refer to aspects of this previous evidence in this brief.

5. At the outset, I note that this evidence has been provided under unavoidable time pressure due to the urgent nature of this inquiry alongside ongoing teaching responsibilities. This time-sensitivity means that I largely have eschewed including citations in my evidence for all but direct quotes.

CONTEXT OF EVIDENCE

6. I have been asked to give expert evidence to the Tribunal on the constitutional implications of the proposed Regulatory Standards Bill ("**RSB or Bill**"), as set out in the four consultation documents (collectively the "**Consultation Documents**") provided by the Ministry for Regulation ("**Ministry**") for the public consultation process. Copies of these documents are provided in the document bank as **Documents JB2 – JB5**.

7. I have read the evidence of Professor Jonathan Boston. I agree with his comments in relation to the difficulties in assessing the totality of the RSB proposal due to there being no draft bill being provided and the dispersal of the proposal throughout the Consultation Documents. I have accordingly referred to and used a marked-up copy of the 2021 version of the Bill with all of the changes specifically noted in the Consultation Documents that is provided in the document bank as **Document JB6**.

8. I also note that there are specific provisions from the 2021 Bill highlighted by Professor Boston that are of constitutional significance that are not specifically mentioned in the Consultation Documents, namely:

   (a) the referendum requirement for the Bill to come into force[1] (**Referendum Provisions**); and

   (b) the 10-year waiting period before the RSB can be retrospectively applied to existing legislation[2] (**Retrospective Application Provisions**).

9. I will comment further on these provisions later in my brief.

10. I also note that the Crown has commented in its memoranda filed to date that there have not yet been any final policy decisions made by Cabinet with respect to the RSB at the time of writing this brief.

11. This evidence is accordingly provided on the basis of the Consultation Documents, the Coalition Agreement between the National Party and the ACT Party[3] ("**ACT Coalition Agreement**") and the other documentation I refer to in this brief that is available at the time of writing.

12. These documents form the government's current policy for the RSB as it was consulted on with the public in late 2024 / early 2025. A copy of the ACT Coalition Agreement is provided in the Document Bank as **AG2**.

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[1] See the Schedule of the Regulatory Standards Bill 2021 (**RSB 2021**), **Document JB6**.
[2] See Clause 10 of the RSB 2021, **Document JB6**.
[3] A copy of the ACT Coalition Agreement is provided in the Document Bank as **Document AG2**.

13. Finally, I note that at the time of preparing this brief of evidence, the government has announced that the RSB will be introduced this quarter, that is anytime between now and 30 June 2025[4].

SCOPE OF EVIDENCE

14. My evidence covers the following matters:

    (a) Constitutional aspects of the RSB including the Referendum Provisions and Retrospective Application Provisions, including why I agree that the Bill will create what some academic commentators have called a "regulatory constitution";

    (b) The place of Te Tiriti o Waitangi 1840 (**Te Tiriti**) / The Treaty of Waitangi 1840 (**Treaty**) in Aotearoa New Zealand's constitution which draws on my previous evidence to the Tribunal on the TPB;

    (c) Potential impacts of the RSB on Aotearoa's current constitutional arrangements, specifically with respect to Te Tiriti / the Treaty and how it will alter the constitutional relationship between Māori and the Crown if passed in this form; and

    (d) The Ministry of Regulation's public consultation process on the RSB, and the adequacy of such consultation in the context of the constitutional importance of the RSB when compared to other consultation processes on matters of constitutional significance.

SECTION 1: A "REGULATORY CONSTITUTION"

15. As noted by Professor Boston in his brief, academic commentators have emphasised the "constitutional importance"[5] of previous iterations of the RSB. Indeed, a strong supporter of the proposal in its previous form has specifically characterised it as intended to implement a "regulatory constitution"[6]. This analysis is shared by leading Bill of Rights academic

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[4] Crown Memorandum, 7 April 2025, Wai 3470, #3.1.22.
[5] Richard Ekins and Chye-Ching Huang "Reckless Lawmaking and Regulatory Responsibility" (2011) 3 NZLR 407, **Document JB11**.
[6] Roger Kerr "A 'Regulatory Constitution' for New Zealand?" (2010) 26 Policy 8 at 8, **Document AG3**.

Professor Paul Rishworth KC, asking whether a previous version of the Bill amounts to a "second Bill of Rights for New Zealand?"[7].

16. I agree with these comments in terms of the constitutional significance of the RSB as currently proposed. The RSB will, in effect, create a regulatory constitution for New Zealand by creating a partially entrenched legislative framework with which all new (and eventually all existing) legislation is expected to comply, unless an exemption is granted. The RSB framework is designed to impose limits within which Parliament may properly legislate and is therefore, by definition, constitutional in nature.

17. I note that the set of "good law-making" principles (**RSB Principles**) to be enacted in the RSB provided in the Consultation Documents[8] represent a somewhat partial selection of potential regulatory considerations. I think that Professor Boston's characterisation of them as aligned to the Act Party's libertarian ideals is a fair one. I will not comment in detail on these principles, however I have read the brief of evidence of Professor Boston which examines these principles in greater depth, and I agree in general with the conclusions that he has reached. A full copy of the RSB Principles as proposed in the Discussion Document is provided in the **Document Bank as AG4**.

18. I comment briefly on the following points regarding the RSB Principles from the Discussion Document in terms of their constitutional significance:

    (a) The Discussion Document states that the "principles are selective rather than comprehensive – for instance, they do not cover all the principles set out in the *Legislation Guidelines*" and instead "focus primarily on the effect of legislation on existing interests and liberties and good law-making process".[9] The immediately relevant principles set out in the *Legislation Guidelines* that have been left out of the RSB are of course those principles relating to Te Tiriti / The Treaty or the Principles of the Treaty. The deliberate omission of Te Tiriti / The Treaty or the

[7] Paul Rishworth "A second Bill of Rights for New Zealand?" (2010) 6(2) PQ 3, **Document JB10(c)**.
[8] "Have your say on the proposed Regulatory Standards Bill" – Ministry for Regulation November 2024 (**Discussion Document**), at 20 – see **Document JB2**.
[9] Discussion Document at 20.

Principles of the Treaty from the RSB[10] is constitutionally significant and I will comment further on this later in my brief.

(b) Some of the RSB Principles "reflect new formulations of legal principles".[11] In particular, I note the "new formulation" of the "Rule of Law" set out on page 21 of the Discussion Document that states:[12]

> ***Rule of law***
> *• The importance of maintaining consistency with the following aspects of the rule of law:*
> - *the law should be clear and accessible*
> - *the law should not adversely affect rights and liberties, or impose obligations, retrospectively*
> - *every person is equal before the law*
> - *there should be an independent, impartial judiciary*
> - *issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion.*

(c) Purporting to define aspects of the Rule of Law statutorily is an ambitious and constitutionally significant undertaking. This is because the Rule of Law is a contested concept that is subject to various interpretations.[13] It also is not a stable concept, being subject to evolution and refinement over time. For example, the United Nations increasingly references the "Environmental Rule of Law" in its assessment of global governing practices.[14] As such, purporting to capture what this concept "really means" in a neutral, universally applicable manner is a very difficult (if not outright impossible) task.

(d) As Professor Boston observes in his brief, creating a specific formulation of this fundamental constitutional principle and

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[10] See Discussion Document at 21.
[11] Discussion Document at 20.
[12] Discussion Document at 21.
[13] Academic literature on the rule of law is too voluminous to cite in full here. For a good general introduction to the principle and its various interpretations see Brian Tamahana, *The Rule of Law: History, Politics, Theory* (CUP, 2004).
[14] See, e.g., United Nations Environment Program, "Environmental Rule of Law" https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0, **Document AG5**.

applying it as a gateway through which all future regulation must pass without a thorough and robust consultation process as to what should be included in such a definition—or whether any such principle should even be codified at all—is problematic. This is particularly the case when the proposed definition of the Rule of Law includes matters that are not found in other contemporary accounts of the Rule of Law, while excluding matters that are to be found there.

(e) For example, the third sub-principle states that "every person is equal before the law". However, the influential recent account of the Rule of Law expounded by Lord Bingham addresses this matter in a more nuanced fashion: "The laws of the land should apply equally to all, *save to the extent that objective differences justify differentiation*".[15] The RSB's proposal to equate the Rule of Law with strictly formal equality of treatment may cause it to be applied in order to remove legislative clauses that provide different provisions for Māori, particularly Treaty provisions. However, as Lord Bingham's qualification to the principle recognises, there are often good reasons where differential treatment under the law not only is justifiable but actually morally required. As noted by the Human Rights Commission:[16]

> *Formal equality is equal treatment before the law. It reflects the Aristotelian notion that, to ensure consistent treatment, like should be treated alike. However, equal treatment does not always ensure equal outcomes, because past or ongoing discrimination can mean that equal treatment simply reinforces existing inequalities. To achieve substantive equality – that is, equality of outcomes – some groups will need to be treated differently. It follows that not all different treatment will be considered discriminatory.*

From a constitutional law perspective, enacting a specific interpretation of the Rule of Law that would entrench a requirement for formal equality, whilst simultaneously omitting any reference to Te Tiriti / The Treaty that might otherwise impose obligations to consider substantive equality for Māori is

[15] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) at ch 5 (emphasis added).
[16] Te Kāhui Tika Tangata / Human Rights Commission, "Equality and Freedom from Discrimination" <https://tikatangata.org.nz/human-rights-in-aotearoa/equality-and-freedom-from-discrimination>, **Document AG6**.

concerning. New Zealand has a long history of colonisation that has led to numerous well-researched inequalities for Māori in health, economics and many other sectors. The elision of formal equality with the Rule of Law is, in my opinion, a constitutionally significant legislative provision that could seriously undermine the ongoing recognition and inclusion of Te Tiriti / The Treaty and the principles of the Treaty in New Zealand statutes.

(f) Furthermore, the RSB's second proposed design principle—"Legislation should not unduly diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person"—creates real problems in interpretation and application. The use of broad and undefined wording such as "unduly diminish", "liberty" and "freedom of choice or action" in terms of what is protected by this principle invites dispute. And, the breadth of this principle effectively covers everything contained within the New Zealand Bill of Rights 1990, raising real questions about the consultation document's claim that "even though there is some overlap with rights set out in the BORA, the proposed Bill would not cover all of these rights."

(g) The combination of these principles could therefore have a chilling effect on Parliament who may shy away from legislation that may later invite challenge. This illustrates just one aspect of how the proposed principles set out in the RSB could have constitutional ramifications, through acting as a fetter on Parliament.

19. Potentially the most significant constitutional aspect of the RSB for the purposes of this inquiry is that the Bill excludes any mention of Te Tiriti / The Treaty, while at the same time seeking to establish a compliance framework for all future legislation / regulation that largely reflects the Act Party's particular formulation of what "good law-making" is. In many respects this means that the Bill is as constitutionally significant as the Treaty Principles Bill was, in that it is seeking to exclude Te Tiriti / The

Treaty and the principles of the Treaty as developed by the Courts and this Tribunal from future law-making, and replace them with principles that will very likely require the exclusion of any future legislative provisions based on Te Tiriti / The Treaty that seek substantive equality for Māori.

20. The enactment of the RSB as currently proposed would therefore cause a fundamental constitutional shift from the current legislative landscape. We presently have 40 Acts that contain references to the principles of the Treaty of Waitangi, and 192 Acts that contain references to the Treaty of Waitangi. Over time, if the RSB were to be enacted and entrenched via a referendum mechanism as was proposed in the 2021 version of the Bill, this could eventually lead to the removal of every Treaty of Waitangi provision in every statute, with the exception of Treaty settlement legislation.

21. I note that a key difference between the Treaty Principles Bill and the RSB is that the coalition government has committed to passing the RSB in some form under the ACT Coalition Agreement. This means that the alterations to the constitutional arrangements between the Crown and Māori that could result from the RSB are not merely speculative as they were with the Treaty Principles Bill, the constitutional shifts are happening in the very near future once the bill is passed, which could be by the end of 2025. I will comment further on what I believe these alterations to the Crown / Māori constitutional relationship will be later in Section Three of this brief.

SECTION 2: THE PLACE OF TE TIRITI IN AOTEAROA NEW ZEALAND'S CONSTITUTION

22. I will not discuss this issue in great detail as it is one on which I expect the Tribunal requires little evidence. My comments instead repeat a distinction I drew in my evidence to the Tomokia ngā tatau o Matangireia - the Constitutional Kaupapa Inquiry (Wai 3330). In that evidence, I distinguished between the formal legal status of Te Tiriti/The Treaty and attendant direct enforceability through judicial proceedings, and the legitimating role that it plays within Aotearoa New Zealand's constitutional arrangement.

23. In particular, it is important to recognise the role that Te Tiriti/The Treaty plays in grounding the legitimacy or normative authority of Aotearoa New Zealand's constitutional order. This issue is not the same as that of Te Tiriti/The Treaty's formal legal status, or enforceability through the courts. Rather, Te Tiriti/The Treaty has been described as having a "status perceivable, whether or not enforceable, in law".[17] That status derives from the fact that all nations have a narrative about what they are and how they came to be. These stories we tell ourselves about who we are, and the way we got to be that way, are fundamental to how our forms of collective governance operate.

24. In constructing such a narrative for Aotearoa New Zealand, some account must be given for the imposition of Crown sovereignty over pre-existing forms of Māori governance. There really are only two accounts available. One is that there was a forceable imposition of Crown sovereignty by one people over another, using armed might and legal stratagems to effect material and cultural dispossession of Māori. The resulting imbalance in population numbers between tangata whenua and tangata tiriti then serves to perpetuate this imposition of sovereignty, in that contemporary governance mechanisms presume the "right" of majorities to determine collective decisions. In short, this account alleges that might made for right, with that right then being exercised by a dominant majority population according to its preferred outcomes.

25. This founding narrative is not a stable basis for a nation state such as Aotearoa New Zealand that purports to be committed a range of moral/political principles. For one thing, it contains no normative content; it provides no reason for anyone (and particularly Māori) to respect state institutions or to abide by their decisions above and beyond a threat of punishment for failing to do so. That is an inadequate basis for exercising coercive authority over society, both as a matter of legitimacy and practice. For another, this narrative saps legitimacy from the Aotearoa New Zealand state when it seeks to espouse values or principles on the global stage. A society that exists as the result of nothing more than the forceable dispossession and extinguishment of the rights of a pre-existing people has

[17] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC), at 206, **Document AG7**

no authority to speak on how other states ought to interact, much less govern themselves.

26. The alternative narrative is that Aotearoa New Zealand was founded on an accommodation between two "streams" of political authority – that of the Crown and that of Māori – in order to allow for the development of a new society where various peoples could co-exist in harmony with one another. This account need not deny that in fact settlers (with the backing of the Crown's authority) used armed might and legal stratagems to effect material and cultural dispossession of Māori. Indeed, it should uncover and acknowledge such histories so that they may be rectified. However, such actions represent a wrongful breach of the founding accommodation rather than a replacement of it.

27. In this narrative, Te Tiriti/The Treaty has a role somewhat similar to the US Declaration of Independence, even if the content of the two documents is radically different. Both were intended to be statements of intent for a new political entity (the colony of New Zealand; the nation of the United States). While these statements may not have formal, direct legal standing, they serve as an ongoing collective commitment as to how the new entity will function. The principles that they affirm animate understandings as to what is a proper, or legitimate, form of governance. Deviations from this collective commitment, or breaches of these understandings, are then recognised as being a form of governing misfunction which ought to be corrected.

28. The manner in which Te Tiriti/The Treaty has been incorporated into the formal laws of Aotearoa New Zealand is then secondary to its normative function as a basis for the entry of Crown authority into Aotearoa New Zealand. However, inclusion of "the principles of the Treaty" in various legislative instruments does provide (an admittedly incomplete) recognition of that function:

    (i): The very fact that such inclusion has occurred reflects an acceptance that the collective commitment represented by Te Tiriti/The Treaty remains central to the governance of Aotearoa New Zealand;

(ii): Those principles must be informed by that collective commitment – their meaning and must grow out of the vision that Te Tiriti/The Treaty represents.

SECTION 3: RSB IMPACTS ON AOTEAROA NEW ZEALAND'S CONSTITUTIONAL ARRANGEMENTS

29. As indicated above, if passed in the form that was publicly consulted on in late 2024 - early 2025, the RSB will have a range of impacts on Aotearoa New Zealand's "unwritten" constitutional arrangements, including impacts specifically on the constitutional Te Tiriti relationship between Māori and the Crown.

30. I made reference earlier to the Referendum Provisions that were contained in the 2021 version of the Bill that required a referendum to be conducted in order to determine if the Bill will come into force.[18] The Consultation Documents for the RSB are silent as to whether or not similar Referendum Provisions will be included in the legislation to be introduced to Parliament before 30 June 2025. As far as I am aware, the Crown has still not confirmed in this inquiry whether the Referendum Provisions will be included. This is a significant omission in terms of the public consultation process already undertaken because the potential for the semi-entrenchment of the RSB through the referendum process underlines the constitutional nature of the proposed legislation.

31. Absent any express entrenchment provision,[19] bringing an Act of Parliament into force by way of a referendum vote does not formally prevent a future parliament from amending or even repealing the legislation. However, it may create a constitutional expectation that a "like-for-like" process be adopted in regard to such changes. Any future government may therefore be potentially hamstrung from undertaking a simple repeal of the RSB based on legitimacy concerns that referendum-backed legislation should only be repealed if another referendum supports that repeal. The potential inclusion of the Referendum Provisions also supports the conclusion in Section One above that the RSB will create a new "regulatory

[18] See Clause 2 and the Schedule, Regulatory Standards Bill 2021 https://www.legislation.govt.nz/bill/member/2021/0027/latest/whole.html#LMS477235
[19] For example, the Electoral Act 1993, s 268.

constitution" as it marks this legislation out as requiring an additional procedural step to endorse (and, by implication, alter) its content.

32. Secondly, the Consultation Documents were not clear as to whether the Retrospective Application Provisions set out in clause 10 of the 2021 version of the RSB will be included in the RSB to be introduced by 30 June 2025. Those provisions require that:[20]

> *Wherever an enactment can be given a meaning that is compatible with the principles (after taking account of section 6(2)), that meaning is to be preferred to any other meaning.*
> *…*
> *Subsection (1) applies to an enactment made before the date on which this Act comes into force only after the tenth anniversary of that date.*

33. Avoiding the retrospective application of legislation is ironically one of the sub-principles of "good law-making" contained in the RSB under the new Rule of Law formulation[21], and yet clause 10, if it is to be included in the Bill, would do exactly that after a ten-year waiting period. The inclusion of the Retrospective Application clause is implied at pages 30-31 of the Discussion Document, with the only difference from the 2021 Bill being that a Regulatory Standards Board is proposed to take over the role of declaring whether existing legislation is inconsistent with the RSB principles, instead of the Courts taking this role.

34. The assessment of existing regulation is also traversed at pages 26-28 of the Discussion Document, noting that Treaty Settlement legislation would be excluded from such assessment.[22] This implies that other existing legislation containing Treaty provisions would not be excluded from the "consistency requirements" under the new RSB.

35. The constitutional ramifications of the Retrospective Application Provisions are therefore broad. If included in the same form as the 2021 Bill, the effect will be that after ten years, the principles contained in the RSB will assume the role of constitutionally superior law due to the requirement that "*wherever an enactment can be given a meaning that is compatible with*

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[20] See Clause 10, Regulatory Standards Bill 2021 https://www.legislation.govt.nz/bill/member/2021/0027/latest/whole.html#LMS477235
[21] Discussion Document at 21.
[22] Discussion Document at 27.

the principles (after taking account of section 6(2)), that meaning is to be preferred to any other meaning". This provision will arguably give the RSB Principles a higher status than the Principles of the Treaty of Waitangi currently have in terms of becoming an interpretative mechanism that *requires* the Courts to apply a preferred meaning that is compatible with the RSB Principles.

36. In constitutional law terms, this is a significant constitutional shift that has not been broadly consulted on or formulated in conjunction with Māori as Treaty partner.[23] I expect that this will create some resistance and conflict with Māori, as it will have a very similar effect to the Treaty Principles Bill in terms of undermining the current status and operation of the principles of the Treaty of Waitangi as an interpretive mechanism developed by this Tribunal and the Courts over the last half century.

37. Further, the RSB proposes that reviews of existing legislation can take place either through any member of the public making a complaint to the new Regulatory Standards Board,[24] or by Ministries reviewing their own existing legislation.[25] The Retrospective Application Provisions coupled with the formal equality requirement in the Rule of Law principle[26] would almost inevitably lead to findings that every Treaty clause in existing legislation (bar settlement legislation which will be excluded from review) is inconsistent with the RSB Principles as they will not be consistent with the RSB sub-principle that "*every person is equal before the law*".

38. Where an inconsistency finding is made by the responsible Ministry, two options are available for the agency and responsible Minister:[27]

    (a) an agency could commit to amendment of the regulation within a specified time (for instance, by adding it to a forward plan for regulatory amendments); or
    (b) the responsible Minister could make a statement justifying why they are choosing not to remedy these inconsistencies.

[23] See Preliminary Treaty Impact Analysis at 1 ("**Treaty Analysis**") (**Document JB4**).
[24] Discussion Document at 31.
[25] Discussion Document at 26-28.
[26] As explained earlier in Section 1.
[27] Discussion Document at 26.

39. Where an inconsistency finding is made by the Regulatory Standards Board, the responsible Minister would be required to respond to that finding, including justifying any decision not to address identified inconsistencies. The Crown may argue that the responsible Minister could therefore choose to justify the retention of Treaty clauses that are inevitably found to be inconsistent with the new RSB Rule of Law formulation. However, the creation of a superior legal framework that by default deems such clauses to be inconsistent with the RSB's definition of "good-law making" stacks the odds against the retention of the existing Treaty clauses, as well as any other non-Treaty based clauses that may be aimed at achieving substantive equality outcomes for Māori, or for any other minority groups in areas such as Health, Education and Housing.

40. In this manner, the RSB process for the review of existing legislation puts in place a constitutionally significant framework that will over time systematically advocate for the removal of every existing non-settlement Treaty clause in our statutory landscape. The imposition of the RSB framework as proposed will accordingly fundamentally alter the present constitutional arrangements between Māori and the Crown. I agree with the conclusions reached by Dr Carwyn Jones in his brief of evidence that the RSB as currently proposed would profoundly breach the Treaty Principles and Te Tiriti / The Treaty.

41. The omission of any detailed discussion of the retrospective effects of the RSB in the Consultation Documents is accordingly, highly significant.

SECTION 4: RSB CONSULTATION PROCESS

42. Finally, I make some brief comments on the consultation process for the RSB undertaken to date in terms of the adequacy of such consultation in the context of the constitutional importance of the RSB, when compared to other consultation processes on matters of such constitutional significance.

43. The public consultation process undertaken for the RSB is set out in detail in the Affidavit of Eru-Kapa Kingi filed in support of this Claim which I have read.[28]

44. As noted above, the RSB is constitutionally significant legislation that will fundamentally alter the Treaty relationship between Māori and the Crown. I would have expected in those circumstances that a significant level of direct engagement with Māori as Treaty partner would have occurred on the RSB proposal and during its development. Instead, the consultation approach taken by the Crown is summarised at paragraph [22] of a memorandum filed in this Inquiry on 4 March 2025 as follows:[29]

> *22. In this case, consultation has involved a combination of discussion documents and digital consultation tools.* ***It has not involved separate consultation with Māori.*** *The applicants have not identified the particular manner in which consultation should progress in the context of a proposal for a regulatory standards bill. Rather, they characterise the consultation process as prejudicial because of its timing, length and allegedly misleading nature.* [emphasis added]

45. In my opinion, a proposal with the level of constitutional significance that the RSB has, particularly with respect to the Māori / Crown relationship and to Te Tiriti would require at least some type of direct engagement and consultation with Māori as Treaty partner as a *bare minimum*. Te Tiriti is a bilateral agreement. One would therefore expect that any fundamental changes by one party would be discussed directly with the other party. The Crown freely admits that is has done no such consultation or direct engagement with Māori.

46. The RSB consultation process can be starkly contrasted with the comprehensive consultation process undertaken by the Iwi Chairs Forum Working Group for Constitutional Change between 2012 and 2015 that eventually produced the "*Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation*"[30]. 30 hui were initially proposed for the consultation process, but in the end a total of 252 hui were held all throughout Aotearoa New Zealand to ensure that deep and

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[28] Affidavit of Eru-Kapa Kingi, Wai 3440 #A1.
[29] Memorandum of Counsel for the Crown in response to Wai 3440 Claimant's Application for Urgency 4 March 2025, Wai 3440 #3.1.6.
[30] *Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* dated 26 July 2018 (**Matike Mai**). Copy included in the **Document Bank as AG8**.

meaningful engagement could be facilitated.[31] The Matike Mai Working Group had over 10,000 people attend and over 800 written submissions.[32]

47. Given the extreme and significant long-term effects that the RSB will have on Te Tiriti and the Crown / Māori relationship, I would have expected a number of hui and direct engagement opportunities with Māori to have been undertaken by the Crown as part of the RSB policy development phase. I also note in this respect the complaints by the Claimants that some of the Consultation Documents, in particular the Treaty Analysis are heavily redacted, which they say has prevented them from fully understanding the scope of the impacts of the RSB on Te Tiriti. There is merit in these complaints, as it is difficult to see how the Crown could have fulfilled its obligation to provide for direct engagement in good faith with Māori as Treaty partner on the constitutional ramifications of the RSB proposal when it undertook none.

48. I therefore agree with the conclusions of Dr Carwyn Jones that the Crown has failed to act in accordance with its obligations under the existing Treaty principles of Rangatiratanga, Kawanatanga, Partnership, Mutual Recognition and Respect, and Active Protection in relation to the consultation process. I have of course assumed that the Crown intended to comply with its existing Treaty obligations with respect to the consultation process for the RSB, when in fact it may not have intended to do so.

Dated this 7th day of May 2025

Professor Andrew Geddis

[31] Above.
[32] Potter, Helen (9 April 2018). "Constitutional Transformation and the Matike Mai Project: A Kōrero with Moana Jackson". Economic and Social Research Aotearoa.