

NGĀ TOKI WHAKARURURANGA

Submission on the International treaty examination of the Free Trade Agreement between New Zealand and the European Union

To the Foreign Affairs, Defence and Trade Committee

This submission is made by Benjamin Morgan, on behalf of Ngā Toki Whakarururanga. The submission represents an independent assessment prepared by Ngā Toki Whakarururanga of the New Zealand and European Union Free Trade Agreement. Attached alongside this submission is the full independent assessment (Annex 1) and a PowerPoint summary (Annex 2).

A representative of Ngā Toki Whakarururanga wishes to appear, in person, before the committee to speak to this submission.

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FOREWORD

Tēna koe e kara,

E mihi atu ana ki a koe, mōu e whakaterere ana i ēnei kaupapa nui kia pūmau ngā ohakī o ngā tūpuna, i whakarerea mai i roto i Te Tiriti o Waitangi, He Whakaputanga me ēra atu o ngā kawenata.

Ngā Toki Whakarururanga has prepared this Te Tiriti o Waitangi assessment of the *Free Trade Agreement between the European Union and Aotearoa New Zealand* pursuant to our 2021 Mediation Agreement with the New Zealand Crown.¹

That Agreement arose from the Wai 2522 Inquiry into the *Trans-Pacific Partnership Agreement* (TPPA) and the subsequent *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP).

To ensure a consistent approach to such assessment, Ngā Toki Whakarururanga developed a template that applies a Te Tiriti o Waitangi lens to any free trade agreements (FTAs) that Aotearoa New Zealand negotiates, with specific reference to the four articles of Te Tiriti.

Despite our Mediation Agreement, the New Zealand Ministry of Foreign Affairs and Trade (MFAT) has commissioned a separate independent assessment of the impact of this FTA for Māori.

¹ The Mediation Agreement is also available on Ngā Toki Whakarururanga's [website](#) at. It is also published as Appendix II of the Waitangi Tribunal Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2021, published in 2023. https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_195473606/Report%20on%20the%20CPTPP%20W.pdf.

We have expressed our concerns that the Crown’s approach lacks full independence, is not sourced in Te Tiriti o Waitangi, and allows the Crown to “play theirs off against ours”. Further, the Crown’s terms of reference give priority to perceived economic gains to Māori exporters over the range of Tiriti-based issues and concerns that Ngā Toki Whakarururanga has brought to the Crown’s attention throughout the negotiations.

Nevertheless, in the spirit of cooperation, Ngā Toki Whakarururanga has provided the Crown’s chosen assessor with an advance copy of our Te Tiriti assessment as well as published it independently.

Our thanks to our pūkenga Carrie Stoddart Smith and Jane Kelsey for preparing this report and to our kaihautū and other pūkenga for their input and advice.

E mea ana te korero, ina tere ngā kapua, he hau kei muri.



Pita Tipene
Co-Convenor



Moana Maniapoto
Co-Convenor

INTRODUCTION

Ngā Toki Whakarururanga brings a Te Tiriti o Waitangi perspective to the trade-related policy space, to advance and protect Māori interests and set the bar for achieving trade policy, negotiations and agreements that are consistent with Te Tiriti o Waitangi. Ngā Toki Whakarururanga will not shrink from its mandated responsibility to set that threshold.

Consistent with that Kaupapa, this report provides an independent assessment of the *New Zealand European Union Free Trade Agreement* (NZ EU FTA) as measured against Māori rights, interests, duties and responsibilities, and the Crown’s obligations, under Te Tiriti o Waitangi.

BACKGROUND

Te Tiriti o Waitangi anticipates the Crown and Māori, in the exercise of kāwanatanga and rangatiratanga, work together as equals. This means that, in Aotearoa New Zealand (NZ), both rangatiratanga and kāwanatanga occupy the trade policy space when developing international relationships and agreements, setting the mandate for any negotiations, and at the negotiating table.

That requires trade and related policy objectives to uphold and actively protect Māori rights to exercise authority over our lands, waters, resources and all taonga, including the ecosystem in its holistic entirety, as well as Māori laws, beliefs, and philosophies.

Our Mediation Agreement recognises the Crown's obligation to ensure that Māori have genuine influence over trade policy and negotiations.

This makes it imperative that potential Te Tiriti implications are identified by Māori before a decision is taken to begin a negotiation and that these are effectively addressed before the text of an FTA is signed to avoid repeating existing, and committing further, breaches of Te Tiriti. Where Te Tiriti issues remain unresolved, such breaches could potentially remain in perpetuity.

The Crown has consistently cited the inclusion of a Treaty of Waitangi Exception clause in its FTAs since 2001 as fulfilling its Treaty obligations. However, that exception is widely recognised as inadequate to a) protect Māori rights and interests and b) to preserve the policy space required to address outstanding or ongoing Te Tiriti issues, given its intrinsic limitations and the far-reaching scope of contemporary FTAs.²

Risks to Māori rights, interests, duties, and responsibilities are heightened by the secrecy of FTA negotiations. The NZ EU FTA text did not become available to the public, including Māori, until it had been agreed by the parties.

Only a handful of advisers who had clearance and signed a Confidentiality Agreement could gain access to the draft text during the negotiations, and only once the European Union (EU) had agreed. That was arranged only in the last few months of the multi-year negotiation. Those advisers were sworn to secrecy, which prevented them from communicating with Māori who have specialist expertise to identify particular issues and remedies and/or those whose interests are affected by the text.

Now that the negotiations are concluded, the text has been made public. The parties will insist it cannot be changed, which undermines the public's democratic right to participate in the development of the FTA and breaches Māori rights to exercise rangatiratanga under Te Tiriti o Waitangi.

PURPOSE

Ngā Toki Whakarururanga's Mediation Agreement explicitly includes the responsibility for assessing the Te Tiriti-compliance of FTAs that have been negotiated by the Crown.

In the past, the National Interest Analyses (NIAs) prepared by MFAT have focused on the perceived economic benefits to Aotearoa New Zealand (NZ) with little consideration for the Crown's Te Tiriti o Waitangi obligations. This practice ignores the unique status of Māori as tangata whenua and the direct and indirect impacts that FTAs can (and in many cases do) have on the rights, interests, duties, and responsibilities of Māori under Te Tiriti o Waitangi.

This Tiriti assessment of the NZ EU FTA aims to hold the Crown, Cabinet Ministers, and all Members of Parliament (MPs) to account in terms of their Tiriti obligations before the Agreement is signed and seeks to empower Māori and others to participate on an informed basis in the debate on the Agreement, including at the select committee.

² For a detailed discussion see Amokura Kawharu, "The Treaty of Waitangi Exception in New Zealand's Trade Agreements" in John Borrows and Risa Schwartz eds., *Indigenous Peoples and International Trade*, Cambridge University Press, 2020, 274-294.

While this assessment acknowledges the Crown has made some positive changes to past practice and agreements, there are also some backward steps in this FTA. The Crown, led by MFAT, still have a long way to go to satisfy their obligations under Te Tiriti o Waitangi.

APPROACH

As mandated in our Mediation Agreement, Ngā Toki Whakarururanga has developed a template for a Tiriti o Waitangi assessment of the Crown's compliance with Te Tiriti o Waitangi as viewed through the lens of Te Ao Māori. As such, the NZ EU FTA is measured against two related reference points:

- (a) *The Crown's obligations and Māori rights under the four articles of Te Tiriti o Waitangi:*
- **Kāwanatanga** – Article 1: Government exercises authority over its own and any authority positively delegated by Māori, subject to the obligation to recognise rangatiratanga and ensure the protection of Māori rights, interests, duties, and responsibilities.
 - **Tino Rangatiratanga** - Article 2: Rangatira have unfettered ongoing power and responsibility to ensure the exercise of Māori authority collectively over their own affairs and resources in a manner consistent with tikanga Māori.
 - **Oritetanga** - Article 3: Māori and the Crown's people have parity and equity in rights and outcomes, meaning equal rights to define and pursue aspirations according to a people's fundamental principles, laws, and beliefs.
 - **He Whakapono** – Article 4: guarantees the active protection of philosophies, beliefs, faiths, and laws.
- (b) *The Tiriti-based Kaupapa of Ngā Toki Whakarururanga as set out in the Mediation Agreement with the Crown, which is to:*³
- **Preserve** *mana tukuiho* (mana inherited) and *mana whakahaere* (exercise of that inherited power to preserve and maintain hapu mana and rangatiratanga)
 - **Give effect** to Te Tiriti/the Treaty as a relationship of equals
 - **Ensure** the exercise of mana and tino rangatiratanga through effective participation in decision-making through collective, participatory, and accountable processes and shared authority in the international domain
 - **Recognise** the responsibilities of rangatira as leaders to preserve and uphold the mana and rangatiratanga of their hapu and the responsibilities of the Crown to represent Tauīwi

³ The Ngā Toki Whakarururanga kaupapa is informed by the kaupapa in the Mediation Agreement with the New Zealand Crown that recognises shared authority between Maori and the Crown in the international domain informed by tino rangatiratanga and kāwanatanga that has endured since the 1835 *He Whakaputanga o Nga Rangatira o Nga Hapu o Niu Tirenī* (1835) and *Te Tiriti o Waitangi* (1840). https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf.

- **Achieve** a new approach to trade policy and the negotiation of international trade agreements that gives effect to the Tiriti relationship and establishes mutual respect and collaboration between the parties
- **Acknowledge** the importance of tikanga-based trading relationships
- **Ensure** the full, timely and reciprocal sharing of information to achieve this Kaupapa.

STRUCTURE

This report is organised into seven parts that address the main, although not all, the relevant issues using the Te Tiriti assessment template:

PART 1: Te Tiriti o Waitangi and Rangatiratanga	Assesses whether the Crown has delivered on its commitments and obligations under Te Tiriti o Waitangi in the NZ EU FTA, including through the processes for negotiation and implementation.
PART 2: Māori Trade and Economic Cooperation Chapter	Analyses the perceived benefits to Indigenous Peoples in Aotearoa NZ and the EU from this chapter and any deficiencies, including in light of other similar arrangements.
PART 3: Mātauranga Māori: Knowledge and Culture	Examines how the NZ EU FTA addresses issues relating to intellectual property rights that impact on rangatiratanga and kaitiakitanga of taonga, including those raised in the Wai 262 inquiry and its implementation through Te Pae Tawhiti.
PART 4: Mātauranga Māori: Data Sovereignty and Digital Trade	Evaluates the obligations and protections in Chapter 12: Digital Trade and other chapters that impact on rangatiratanga and kaitiakitanga in the digital space, especially considering the Wai 2522 Report's findings of a breach in the CPTPP.
PART 5: Ngā Pakihi Māori (Māori Businesses, MSMEs and Producers)	Assesses the projections of gains from this FTA to Māori exporters, producers and MSMEs from improved market access and removing the barriers that persist in the trade environment.
PART 6: Kaimahi and Wāhine Māori	Evaluates the perceived benefits and opportunities arising from this agreement for Māori workers and women, including with reference to similar provisions in other recent FTAs.
PART 7: Te Taiao	Reviews the NZ EU FTA's concept of sustainability through the lens of Te Ao Māori and the Crown's obligations to protect and advance Māori rights, interests, duties and responsibilities in relation to the environment and the

	ecosystems, the climate crisis, and safe food and food sovereignty.
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OVERVIEW

In October 2015, the political leaders of Aotearoa NZ and the EU announced a process to negotiate a “deep, comprehensive, and high-quality” Free Trade Agreement.⁴ The negotiations were formally launched in July 2018 and concluded on 30 June 2022.

The joint scoping discussions from early 2016 to March 2017 were at a very general level.⁵ The summary scoping document notes the negotiating parties agreed to include a provision ensuring the New Zealand government could “fulfil its obligations under the Treaty of Waitangi”, which referred to the controversial Treaty of Waitangi Exception that New Zealand has rolled over unchanged in its FTAs since 2001.⁶

Māori appear to have had no direct input into the development of the Crown’s negotiating mandate⁷ and it is unclear what, if any, substantive engagement there was with Māori during the bulk of the negotiations.⁸

The Crown only engaged directly on the text with a range of Māori entities between March and June 2022, as it sought to develop a Political Declaration on Indigenous Peoples Trade that would later become a diluted Māori Trade and Economic chapter, both of which were unenforceable.⁹ Ngā Toki Whakarururanga and the Crown signed a Memorandum of Understanding (MoU) to co-design the Political Declaration. This was very late in the negotiations, when most of the FTA text had been finalised, and was limited to the Political Declaration. All engagement was on a strictly confidential basis involving a very few people who had no ability to consult other Māori who were directly affected.

Ngā Toki Whakarururanga provided detailed input on key areas of substance in the draft text with the goal of making it Te Tiriti-compliant and stressed the need for greater openness and for Māori to have an independent seat at the negotiating table.

⁴ <https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/EU-NZ-FTA-Scoping-Summary-and-Q-A-May-2017.pdf>

⁵ <https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/Maori-interests-in-the-EU-FTA.pdf>

⁶ For a detailed discussion see Amokura Kawharu, “The Treaty of Waitangi Exception in New Zealand’s Trade Agreements” in John Borrows and Risa Schwartz eds., *Indigenous Peoples and International Trade*, Cambridge University Press, 2020, 274-294.

⁷ <https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/EU-NZ-FTA-Scoping-Summary-and-Q-A-May-2017.pdf>

⁸ Concerns about these ongoing negotiations were raised during the Waitangi Tribunal inquiry into the Trans-Pacific Partnership Agreement (Wai 2522). and prior to the Mediation Agreement to establish Ngā Toki Whakarururanga in October 2020.

⁹ In addition to Ngā Toki Whakarururanga the Crown engaged with National Iwi Chairs Forum, Federation of Māori Authorities, and Te Taumata on various aspects of the FTA text.

Some parts of the NZ EU FTA provide stronger provisions than some of earlier FTAs, notably on digital issues, which in part reflects our belated input. Other chapters perpetuate or expand existing breaches of Te Tiriti obligations and potentially create new ones, for which the Crown relies on the inadequate Treaty of Waitangi Exception for protection.

Our assessment concludes that Crown still has a long way to go to become compliant with its obligations under Te Tiriti o Waitangi in the trade and trade related policy space on both process and substance. The following issues are especially problematic in the NZ EU FTA:

- Exclusion of Māori from the negotiating table and access to information that directly affects them.
- Ineffective protections for most Māori rights, interests, duties, and responsibilities throughout the text.
- Continued reliance on the flawed Treaty of Waitangi Exception.
- Trading off Māori rights and interests for, at most, minimal commercial benefits to businesses and workers, including Māori businesses and workers.
- Failure to secure equivalent benefits for Māori that are provided for EU producers.
- The lack of substantive commitments in chapters that might provide benefits to Māori, including by lack of enforceability, resourcing, and participation in decision-making.
- Exclusion of Māori from the core institutional mechanisms to implement the FTA.
- The EU's refusal to extend cooperation activities and protections to Indigenous Peoples within its territory, particularly Sámi.

For more information please refer to our [website](#), alongside the full assessment (Annex 1) and PowerPoint summary (Annex 2).