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Institute of Public Affairs

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Dear Ms Atkinson

Response to incorrect and highly misleading AAP Fact Check article.

This letter is to respond to an article published by the AAP on April 19, 2023. The article is entitled "Voice comparisons with NZ tribunal are just wrong" and was published on the "Fact Check" page of the AAP's website.

The article makes serious allegations that the Institute of Public Affairs' research is factually incorrect, and that, as an implication, the IPA is spreading misinformation. Such false allegations have the potential to materially damage the reputation of the IPA. Assertions that an organisation's research has been "fact checked" and proven "false" should only be made and published based on the most rigorous research supported by clear and compelling evidence. No such research has been conducted. The allegations made by AAP are supported almost exclusively by unsubstantiated subjective opinion rather than objective fact, and other "evidence" provided to rebut the views of the IPA are either wrong or in fact wholeheartedly reinforce the IPA's research.

Even the most basic standards of competent journalism have not been met with this article.

As is demonstrated in more detail below, the statement that the Waitangi Tribunal has a "veto" over certain legislation is an entirely fair and reasonable description of the legal position and practice in New Zealand. It certainly is not proven "false" or "wrong" by the mere unsubstantiated opinions of other individuals, none of whom even mention or discuss the leading New Zealand authority on this exact topic. Indeed, the AAP article itself is contradictory as to the legal role and powers of the Waitangi Tribunal. The Tribunal is variously described as "a permanent commission of inquiry", as acting "like a court" and as "a judicial body". It is absurd for the AAP to assert the IPA's analysis of the Tribunal's powers have been "fact checked" when its own article cannot clearly describe its role and functions. Other claims made in the article are either similarly baseless, mere contrary opinions not evidence, or simply wrong.

As a result, the AAP must:

1. immediately withdraw the article and publish a written retraction and apology, and

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2. immediately cease all "fact check" publications pending a full, transparent and independent audit of its processes.

The apparent ideological bias of the AAP Fact Check team and the clear inaccuracies in this article makes it abundantly clear that the AAP is not a suitable organisation to be entrusted with "fact checking" information in respect to the proposed referendum to enshrine an indigenous Voice in the Australian Constitution. The AAP conducts itself more like an arm of the "yes" campaign for the referendum than an independent news organisation.

The assertions made in the article

The article makes one central assertion and four subsidiary assertions in support of this. These assertions are listed below:

1. The central assertion is that the claim that Waitangi Tribunal has a "veto power over certain legislation and government decisions" is "false";

2. That the Waitangi Tribunal is not a "Māori Voice to Parliament";

3. That the New Zealand government has legislated to stop a Tribunal decision taking effect;

4. That the Waitangi Tribunal cannot provide advice on proposed legislation unless requested by a minister or parliament;

5. That nonetheless there will be no veto in respect to the proposed Voice in Australia.

Each of these assertions is addressed below.

1. *The claim that the Waitangi Tribunal has a "veto power over certain legislation and government decisions" is "false".*

The AAP article states: "the claim the Waitangi Tribunal gives veto power to Maori [sic] is false. The tribunal can only make recommendations." Thus, the central issue is to do with the issue of "veto".

As a preliminary comment, it is a wholly inappropriate journalistic tactic to couch the opinions of the AAP's writers as "fact checking" that has proven their ideological opponents "false" when the topic is a contentious legal or political claim. This tactic is inappropriate because it artificially seeks to elevate the status of one side of a genuine, contested policy debate to the level of arbiter of truth. It correspondingly seeks to delegitimise the opposing opinion as not merely wrong, but dangerous because it represents the spreading of false misinformation. There is nothing wrong with the AAP or any commentator disagreeing with the IPA's legal and constitutional analysis. But to claim the AAP has "fact checked" and proven a falsehood to be "wrong" is an attempt to silence the other side. Any organisation committed to free and spirited debate should never use such blatantly manipulative practices.

"Fact checking" contentious legal and political claims is also inappropriate because it often misrepresents what might be a nuanced opinion as being false based on some narrow

legalistic criteria. Writer Samuel John has made the point in respect to fact checking the Voice eloquently as follows:

> *[O]ften facts have nothing to do with political debates and the relevant questions are about values and priorities and trade-offs.*
>
> *…*
>
> *Whether or not the voice will **literally** be a third chamber of Parliament or have a veto power is a secondary question to whether they will be a **de facto** third chamber with a **de facto** veto and, in any case, maybe it's just a bad idea conceptually in the first place?*

Therefore, a claim that the Voice will have a "veto" might mean the person making the claim believes that is the way the High Court of Australia will interpret its role in the future (a claim that can only ever be proven correct or false by future judgements of the High Court). Or it could mean that other legal mechanisms might be able to be deployed to frustrate the passing of legislation, and thus such legal tactics (or the threat of them) will help the Voice get its way. Or perhaps it means that the Voice will use its status as a body recognised in the Constitution to wield political and moral influence, and thus be able to prevent certain laws being passed.

True to the description provided by Samuel John, the AAP "factcheckers" have used the most pedantic and narrow view of "veto" in order to assert that the claims made by the IPA are technically false based on that narrow interpretation.

However, even based on the AAP's narrow interpretation of "veto", focusing only on strictly legal matters, the IPA's research irrefutably demonstrates that the Waitangi Tribunal has such legal powers and to describe the current legal position in New Zealand as the Tribunal having a veto is entirely fair and reasonable. Far from disproving this, the AAP article inadvertently proves the point.

The IPA has conducted extensive research on the issue of New Zealand's experience with indigenous reconciliation. Two of our research papers, containing 44 pages in total of legal analysis, looks at New Zealand's Waitangi Tribunal and the similarities between its role and the proposed indigenous Voice in Australia.[1] One of these research papers was referenced in the AAP article. However, it is clear that neither paper has been read by the AAP, and if the AAP had read the unreferenced paper, it is likely that the central error in the article would have been avoided. The fact is it is legally unquestionable that the Waitangi Tribunal has a degree of binding legal power that can be used as a veto.

We recommend our research be read in full, but how we reached this conclusion can be briefly summarised as follows:

- The Waitangi Tribunal was set up in 1975 initially as an advisory body, to investigate claims of breaches of the Treaty of Waitangi and make recommendations to the New Zealand government.

[1] John Storey "The Voice to Parliament – an analysis of the New Zealand experience and Australia's history of judicial activism" Institute of Public Affairs (December 2022) and John Storey "The New Zealand Māori Voice to Parliament and what we can expect for Australia" Institute of Public Affairs (February 2023).

- In 1987 the highest New Zealand court held in the decision of *New Zealand Māori Council v Attorney-General* (known as the "*Lands Case"* and sometimes the "New Zealand *Mabo* decision") that the Treaty of Waitangi was binding on the New Zealand government. This is comparable to how the Australian Constitution is binding on the Australian federal government.
- The Court laid down various "principles" for how the Treaty should be interpreted and applied in a modern context.
- One of those principles was the "right of redress". That is, if Māori have a legitimate grievance, they have a right to have that grievance redressed by the New Zealand government.
- Who determines if Māori have a legitimate grievance? According to the judgement of President of the Court of Appeal Robin Cooke (equivalent to Australia's Chief Justice of the High Court) the Waitangi Tribunal has this power:

  > *"If the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying … withholding it – which would be only in very special circumstances, if ever."*

- Thus, if the Tribunal finds there has been a breach of the Treaty, the government must redress it. It is true that the exact form of redress cannot be dictated by the Tribunal. But the government is not free to ignore or disagree with a finding of the Tribunal. Such a failure to redress a grievance would be a breach of the Treaty of Waitangi, which the New Zealand courts can now enforce against the government. There is an exception in "special circumstances" but that has never been exercised nor tested in court as to when such a circumstance might occur "if ever".
- On at least two occasions the Tribunal has found that proposed changes to legislation have been in breach of the Treaty, and the government has responded by abandoning those changes.
- In Wai 2478 (the Māori Land Act case) the claimants took issue with government proposals to reform legislation governing the administration of certain Māori land. The laws almost exclusively concerned Māori affairs, and as such the Tribunal held that attempting to amend the laws without Māori consent was a breach of the Treaty of Waitangi. It is worth citing the Tribunal in full:

  > *"In terms of Treaty standards, we agreed with the claimants that the 'free, full and informed consent' of Māori is required when a legislative change substantially affects or even controls a matter squarely under their authority… We found that the Crown will be in breach of Treaty principles if it does not ensure that there is properly informed, broad-based support for Te Ture Whenua Māori Bill to proceed. Māori landowners, and Māori whānau, hapū, and iwi generally, will be prejudiced if the 1993 Act is repealed against their wishes."*

- Similarly, In Wai 2417 (the Māori Community Development Act case), the Tribunal went even further and held that, in respect to a piece of legislation important to Māori,

any attempts to reform it must be initiated by Māori. The claimants had argued that: "the process for the reform of that Act should be self-determining and not Government-led. It is therefore for Māori to propose and Government to respond." The Tribunal agreed, holding that any reform to the Act must be Māori-led.

- **To reiterate, after these decisions, the New Zealand government abandoned attempts to reform laws**, fully complying with the *Lands Case* edict that if the Tribunal establishes a grievance, the government must respond. It is on this basis that the IPA formed its assessment that the Tribunal has exercised a veto power.
- Thus, it is clear that the role of the Waitangi Tribunal is more than simply advisory, despite the initial intention behind its establishment. The government must respond to decisions of the Tribunal that find a breach of the Treaty of Waitangi and offer redress to Māori. There has never been a material deviation from this Court ordered process. On at least two occasions the Tribunal has found amending laws would be a breach of the Treaty and could not be done without Māori consent, and the government duly dropped those changes.
- Thus, as a summary of these findings, describing the Tribunal as having a "veto" over legislation in certain contexts is an entirely fair and reasonable observation.

In contrast to the detailed legal analysis undertaken by the IPA, The AAP article never so much as mentions the *Lands Case*. The leading New Zealand court case that addresses the very issue raised in the article – the legal power of the Waitangi Tribunal – is not so much as mentioned by the AAP or any of the individuals cited in the article. Instead, the article simply quotes their unsubstantiated alternative opinions.

For example, Professor Michael Belgrave is cited as saying: "There is no veto, and legislation can certainly take place (be passed into law) without Māori consent" without providing any evidence or rebutting the specific claims in the IPA's research papers. Similarly, Professor Dominic O'Sullivan's comments: "I wouldn't even make a comparison [between the Voice and the Waitangi Tribunal] because they're so different," and "It's a false comparison" are simple assertions that are unsubstantiated and go unchallenged in the article. It might, for example, have been useful to put to them what their interpretation is of the *Lands Case*, why that decision is wrong, or how the IPA's analysis of it is erroneous.

If the AAP had actually sought the views of a constitutional expert (rather than historians and political scientists), sought considered legal opinions rather than catchy slogans, or perhaps even interviewed a legal jurist with an alternative viewpoint, then it is highly unlikely that the glaring omission of failing to mention the leading court case on the powers of the Waitangi Tribunal would not have been made.

As it is, to call this article a "fact check" that has proven a claim "false" is absurd.

2. *The Waitangi Tribunal is not a "Māori Voice to Parliament";*

The article states that the Waitangi Tribunal is not a "Māori Voice to Parliament". This is a strange assertion given that much of the article is devoted to asserting that the Waitangi Tribunal is simply an advisory body to the New Zealand government that makes recommendations. The assertion that the proposed Australian Voice to Parliament will be purely advisory is a central argument made by pro-Voice advocates. How it is appropriate to

refer to an Australian indigenous advisory body as a "Voice to Parliament" yet inaccurate to refer to a Māori advisory body as a "Voice to Parliament"?

Indeed, Mr Don Brash, a former New Zealand Opposition Leader has spoken as recently as April 10, 2023, comparing the Waitangi Tribunal to the proposed Australian Voice.[2]

The points referred to in the article to contrast it with the proposed Voice include that the Waitangi Tribunal acts more like a court responding to alleged breaches of the Treaty of Waitangi. In our research we fully acknowledge this distinction, but in any event it is a distinction without a difference. The proposed Australian Voice will have the power to advise on anything, the Waitangi Tribunal has the power to advise on complaints that are made, which can be made about anything. The enormous scope of the Waitangi Tribunal to investigate "claims" into all aspects of New Zealand politics, laws, and culture is a key finding or our research.

Another supposed difference mentioned in the article is that the Waitangi Tribunal has non-Māori members and members are appointed by the Governor-General. But currently there is no proposed legislation that sets out who will qualify for membership of the Australian Voice or how they will be appointed. This lack of detail has been a key criticism made by those opposed to the Voice. How can a distinction in membership between the Waitangi Tribunal and the Australian Voice be the basis for "fact checking" a claim when it is unknown what the membership of the later will be? It is possible that both indigenous and non-indigenous members will eventually be allowed on the Voice, or that appointments will be made by the Governor-General. In any event, the race of the members and their means of appointment do not affect the legal powers of the body, which is the central issue raised by the article.

3. *The New Zealand government has legislated to stop a Tribunal decision taking effect*

Dr Martin Fisher is cited as saying: "The Crown ignores a fair bit and adopts what suits its own policies and purposes" without providing any examples. Professor Margaret Mutu, when referring to the recommendations of the Tribunal, is quoted as saying "successive governments have ignored almost all of them". In this case, an example is cited of the government legislating to stop a tribunal order taking effect. The link to a news article provided reveals how shallow this claim is.

In the case referred to in the article, the Ngāti Kahungunu ki Wairarapa treaty settlement case, the Tribunal found that a parcel of land, which included a power station on it, should have been transferred to a local Māori community. The New Zealand government responded by declining the transfer, because of the location of the critical built asset. However, given the precedent in law that the Tribunal's recommendations cannot be ignored by the New Zealand government, the government offered alternative redress instead. Therefore, the NZ government apologised to the local Māori community on behalf of the Crown, paid $115 million in compensation, and transferred 27 other Crown-owned sites to the Māori Iwi population.

This case precisely illustrates the conclusions reached in the IPA's research. The Tribunal cannot simply be ignored by the New Zealand government. The Treaty of Waitangi

[2] Sky News Bolt Report, April 10 2023: https://www.skynews.com.au/opinion/andrew-bolt/new-zealands-version-of-the-voice-to-parliament-is-a-disaster/video/22d1ab270a44156a6c847cef4318707b

is binding on the government, one of its principles is the right of redress for Māori grievances, and the Tribunal can determine those grievances. The exact method of redressing the grievance cannot be dictated by the Tribunal (although the exact scope for the government to deviate from recommendations remains untested in the courts). But some form of redress is almost always made. This gives the Tribunal immense power, including a degree of political and legal power over the New Zealand parliament and government. This is precisely the sort of power many believe will be granted the Australian Voice, often summarised as the Voice having a "veto".

Thus, the only substantive case offered by AAP, or any of the individuals the AAP cite, as evidence that the Tribunal does not have a "veto" and the government can ignore it - the Ngāti Kahungunu ki Wairarapa treaty settlement case – almost perfectly illustrates the power the Tribunal wields and what it can extract from the government: apologies, millions of dollars, and the transfer of land.

To say this represents shoddy journalism would be an understatement.

4. *The Waitangi Tribunal cannot provide advice on proposed legislation unless requested by a minister or parliament*

This claim is abjectly false. The support for the claim is a link to the Waitangi Tribunal website which says:

> *The role of the Tribunal is set out in section 5 of the Treaty of Waitangi Act 1975 and includes:*
>
> - *inquiring into and making recommendations on well-founded claims*
> - *examining and reporting on proposed legislation, if it is referred to the Tribunal by the House of Representatives or a Minister of the Crown*
> - *making recommendations or determinations about certain Crown forest land, railways land, state-owned enterprise land, and land transferred to educational institutions.*

It is true that the Tribunal cannot unilaterally, off its own volition, advise on proposed legislation, unless the legislation has been referred to it by parliament or a minister in accordance with the second dot point above. But a Māori claimant is entitled to make a complaint to the Tribunal about proposed legislation. This has happened before, including the two cases referenced above. **In response to a claim, there is no limit to what the Tribunal may investigate**, and upon reaching a decision the Tribunal can make recommendations to government about proposed laws.

To assert that the Waitangi Tribunal cannot advise on proposed legislation except if requested to by parliament or a minister is simply false.

5. *Nonetheless there will be no veto in respect to the proposed Voice in Australia*

The article refers to several opinions by "experts" that argue the Voice will not have a veto. Obviously the exact interpretation of the powers of the Voice will be a matter for the High Court, as the High Court has exclusive jurisdiction to interpret the Constitution (a key reason for not enshrining such a body in the Constitution). Thus, no matter what the qualifications of

the “expert” concerned, they cannot prove a legal claim about the Constitution “false”. They can only express their opinion.

Further, a casual perusal of the submissions to the current Parliamentary inquiry on the Voice will highlight that there is a plurality of views on what the proposed wording to be inserted in the Constitution will mean. Many believe that the Voice will have far greater powers than is claimed by the government, or that this outcome will develop over time.

But in any event, the IPA’s claim in this instance was in the context of comments made by Prime Minister Anthony Albanese. He tweeted in February 2020, that “we can learn a lot from our mates across the ditch about reconciliation with First Nations people. New Zealand has led the way. It’s time for Australia to follow.”

The IPA has researched where the New Zealand path leads. One of the pillars of the New Zealand experience of racial “reconciliation” is the Waitangi Tribunal. Based on our legal analysis, the Tribunal has substantial legal powers including the power to veto legislation, which has been demonstrated in several cases. Thus, if Australia is to follow the New Zealand lead, the Voice too will have similar powers. The purpose of the research was to highlight what the effect on Australia would be if we follow the New Zealand path.

We suspect the entire motivation behind the AAP article is that the New Zealand experience is not, upon closer analysis, one that is likely to enamour Australian voters to support the Voice. From the “yes” case perspective, the less said about it the better. By “fact checking” opinions critical of New Zealand, the AAP is duly playing it role.

Retraction, Apology and Audit

It is clear that none of the IPA’s research on New Zealand and the Waitangi Tribunal has been proven “wrong” or “false”. The AAP article contains no material evidence or meaningful analysis whatsoever. The individuals quoted provide opinions but no evidence to back up their comments, egregiously failing to refer to the leading New Zealand court case that addresses the very issue raised in the article: the legal power of the Waitangi Tribunal. Of course, other commentators are free to disagree with the IPA’s analysis, but to call this article a “fact check” is plainly false and misleading.

Clearly no attempt was made to analyse the IPA’s research carefully. The article contains clear factual errors in its description of the Waitangi Tribunal. This article represents a gross breach of normal journalistic standards.

As a result:

1. AAP must immediately withdraw the article and publish a written retraction and apology.

2. AAP must immediately cease all publications pending a full, transparent and independent audit of its processes.

Regards,

John Storey
Director, Legal Rights Program
Institute of Public Affairs