From the desk of John Storey, Director, Legal Rights Program
jstorey@ipa.org.au

Institute of Public Affairs

28 April 2023

Russell Skelton
Director RMIT ABC Fact Check and RMIT Fact Lab
Professor Alec Cameron
Vice-Chancellor and President RMIT
GPO Box 2476
Melbourne VIC 3001

Email: Russell.skelton@rmit.edu.au vc@rmit.edu.au

Dear Mr Skelton and Professor Cameron

Response to incorrect RMIT ABC Fact Check article

This letter is in response to an article entitled "Does New Zealand's parliament really play second fiddle to a 'Māori Voice'?" which appeared in the RMIT ABC Fact Check weekly newsletter "Check Mate" on 14 April 2023 and published on the ABC website.

The article makes serious allegations that the Institute of Public Affairs' research is factually incorrect, and that, as a consequence, the IPA is spreading misinformation. These allegations are unsubstantiated and based on subjective opinion rather than objective fact.

The article also mentions a member of the IPA's executive team by name, Mr Daniel Wild. The false claims made in the article have the potential to materially damage Mr Wild's reputation. For this reason, and due to the other errors in the article explained below, the article must be immediately withdrawn.

There are three key issues with the article:

1. The article makes three central claims, all of which are incorrect and highly misleading. The central claims are that:

    a. the New Zealand parliament is not subservient to the Waitangi Tribunal;
    b. the Waitangi Tribunal is not a 'Māori Voice to Parliament'; and
    c. the Prime Minister has not pointed to the Waitangi Tribunal as a model for the Voice to Parliament.

    No evidence whatsoever is provided in the article to substantiate these claims, or to "debunk" the IPA's analysis.

…/2

2. The RMIT Fact Lab website states that the project "brings together the best of quality journalism and academic excellence", yet the article violates basic standards and norms of journalistic ethics and excellence.

3. The article mislabels the IPA as a 'lobby group' and misquotes the IPA as having referred to the New Zealand parliament as 'playing second fiddle'. These factual errors are particularly glaring when committed by an organisation purportedly checking the factual accuracy of statements.

Each of these matters is elaborated on further below.

As a result of the errors in the article:

- The RMIT ABC Fact Check must immediately withdraw the article and publish a written retraction and apology, and

- The RMIT Fact Lab must immediately cease all publications pending a full, transparent, and independent audit of its processes.

The bias and inaccuracy of the RMIT Fact Lab makes it appear as though the RMIT Fact Lab is an organisation campaigning for a "yes" vote at the upcoming referendum on the Voice to Parliament.

The article makes three central claims, all of which are incorrect and highly misleading

1. The New Zealand parliament is not subservient to the Waitangi Tribunal.

The primary claim made in the article is in response to the comments made by Daniel Wild, Deputy Executive Director of the IPA, during an interview broadcast on ABC Radio Perth, which are reproduced in full here:

> "The Waitangi Tribunal started off as a purely advisory body, exactly the same as our Voice to Parliament is supposed to do.
>
> "But as a result of a series of interpretations by [New Zealand's] High Court, [it] has become embedded into every single major policy decision in New Zealand and now actually has veto power over a number of major pieces of legislation which, in essence, has actually made the New Zealand Parliament subservient to the Māori Voice to Parliament."

In particular, the article focuses on the legal role of the Waitangi Tribunal in respect to the New Zealand government and whether it is "subservient". We note that no reference was made in the article to the extensive IPA research on this issue. It can be presumed that this research was either not read or no issue was found with its reasoning. The only issue raised was the phrase that the New Zealand parliament is "subservient" to the Waitangi Tribunal.

We direct you to the IPA's two extensive research papers referenced below and available on our website.[1] These papers contain 44 pages in total of legal analysis regarding New Zealand's Waitangi Tribunal and the similarities between its role and the proposed indigenous Voice in Australia. The research deals with a number of issues, including the growing scope of the Tribunal's powers, the consequences of its decisions, and the undesirable role it has played in polarising New Zealand's politics.

However, the aspect of the research relevant to the article is the legal role the Tribunal plays in respect to the New Zealand government. The IPA concluded that the decisions of the Tribunal have become binding, and that this has (amongst other things) been used to wield a veto power over certain New Zealand legislative changes (the issue of veto was raised in the RMIT ABC Fact Check article). We recommend our research be read in full, but how we reached this conclusion can be briefly summarised as follows:

- The Waitangi Tribunal was established 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.
- 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* case') 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 had 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. There is an exception in 'special circumstances' but it has never been exercised or tested in Court as to when such a circumstance might occur 'if ever'.

[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).

- 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, with the effect of, on these occasions, rendering the New Zealand Parliament subservient to the Tribunal, according to the ordinary definition of the word 'subservient' that is 'less important than something else.'
- 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 New Zealand government as 'subservient' to the Tribunal and stating that the Tribunal has a 'veto' over legislation in certain contexts are entirely fair and reasonable observations.

2. The Waitangi Tribunal is not a 'Māori Voice to Parliament'

The article takes issue with the term 'Māori Voice to Parliament' because it was a term coined by the IPA itself and because the Waitangi Tribunal is 'different' from the proposed Australian Voice to Parliament.

Regarding the use of the term 'Māori Voice', it is strange that nearly the entire RMIT ABC Fact Check article is devoted to asserting that the Waitangi Tribunal is simply an advisory body to the New Zealand government, yet the article then concludes that referring to it as a "Voice" is inappropriate. But 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 inappropriate to refer to a Māori advisory body as a 'Voice to Parliament' is not explained in the article.

Regarding the other differences referred to in the article, one is 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 difference, but in any event it is a distinction without a difference. The proposed Australian Voice will have the power to advise on anything, while the Waitangi Tribunal has the power to advise on complaints that are made, which can be made about anything. The scope of the Waitangi Tribunal to investigate 'claims' into all aspects of New Zealand politics, laws and culture is a key finding of our research.

Another supposed difference is that the Waitangi Tribunal has non-Māori members and sometimes is chaired by a non-Māori. But currently there is no proposed legislation on who will qualify for membership of the Australian Voice. How can a distinction in membership between the Waitangi Tribunal and the Australian Voice be the basis for 'fact checking' an allegation when it is unknown what the membership of the latter will be? It is possible that both indigenous and non-indigenous members will eventually be allowed on the Voice. In any event, the race of the members doesn't affect the legal powers of the body, which is the central issue raised by the article.

3. *The Prime Minister has not pointed to the Waitangi Tribunal as a model for the Voice to Parliament*

Another issue supposedly 'fact checked' in the article is that Prime Minister Anthony Albanese has not endorsed the Waitangi Tribunal as a model for the Voice despite him saying, in a tweet in February 2020, that "we can learn a lot from our mates across the ditch about reconciliation with First Nations people."

The Prime Minister has praised New Zealand as having 'led the way. It's time for Australia to follow.' In the same tweet he wrote "It's time to support the Uluru Statement from the Heart."

The IPA has researched where the New Zealand path leads. One of the pillars of the New Zealand experience of racial 'reconciliation' since the 1970's has been the Waitangi Tribunal. Co-governance and the other established racial policies in New Zealand today would be inconceivable without the role played by the Tribunal. To praise New Zealand race relations whilst not endorsing the Tribunal would be like praising the Australian legal system without

endorsing the High Court, or praising American democracy and not endorsing a written constitution. It is fundamental to that system.

Likewise, the Uluru Statement from the Heart has as its central pillar a Voice to Parliament. Someone who endorses the New Zealand experience of racial reconciliation (in which the Waitangi Tribunal plays a paramount role) as a means to promote the Uluru Statement from the Heart (in which the Voice to Parliament plays a paramount role) is clearly endorsing the Waitangi Tribunal.

The article violates basic standards and norms of journalistic ethics and excellence

The article fails to properly apply a rigorous process of factchecking, instead relying on the opinions of individuals in place of evidence or analysis. No attempt was made by RMIT ABC Fact Check to obtain comment from the IPA prior to publication of the article. These acts are a clear breach of basic journalistic practices.

The article never refers to any of the IPA's research or so much as mentions the *Lands Case*. Instead, in one instance the article refers to the Waitangi Tribunal's website. From a legal perspective, a decision of New Zealand's highest court has rather more weight that a website. Further, all the comments made by the so-called experts cited in the article all lack detail and legal substance.

Professor Richard Boast provides rhetorical criticisms but no substantive analysis. He says the IPA's comments are "absurd and completely unfounded" and "To say that the New Zealand legislature is subservient to the Waitangi Tribunal is nonsensical." He added: "It [the Waitangi Tribunal] has no veto power over legislation." It might have been useful if Professor Boast had read our research and commented on cases Wai 2478 and Wai 2417 referred to above and his views on how a Tribunal, that can have proposed legislative changes overturned, can't be said to wield a 'veto'. Professor Boast goes on to say that courts have "from time to time considered the status of the treaty itself in New Zealand public law", however the Tribunal's powers were "circumscribed by statute". Yet he doesn't reference the *Lands Case* or respond to the comments made by President Cooke in that case. It would indeed be an interesting legal issue if a New Zealand government attempted to abolish the Tribunal. It might be successful or might be overturned by a Court as a breach of the Treaty. Professor Boast is no more capable of answering that question than anyone else.

Professor Claire Charters says simply the IPA's comments are "incorrect" and "doesn't make sense" without any detailed explanation. Professor Dominic O'Sullivan said "It [the Tribunal] makes recommendations but they're not binding". He goes on "The recommendations obviously do have significant political implications, but it's for the government to deal with the politics." But he fails to reference the *Lands Case* or explain how that decision is wrong or what other interpretation should be applied to that judgement.

The only attempt in the RMIT ABC Fact Check article to rebut the IPA's comments are the opinions of individuals. No evidence was provided whatsoever, let alone comprehensive legal analysis comparable to the IPA's research. That such a flimsy basis could be relied upon for

'fact checking' a research institution established since 1943 puts into question the competence and legitimacy of the RMIT ABC Fact Check process.

Further, there are clear, obvious, and glaring errors in the article.

The article mislabels the IPA as a 'lobby group' and misquotes the IPA

The IPA considers referring to the Waitangi Tribunal as a 'Maori Voice' and to the New Zealand government as 'subservient' to the Tribunal are entirely fair and appropriate, based on our research. But if it is the use of rhetorical language that is being objected to, it is highly ironic that RMIT ABC Fact Check uses precisely such linguistic devices in its article.

The article starts by referring to the IPA as a 'conservative lobby group.' This is factually incorrect. The IPA is a public policy research organisation, not a lobbying organisation. This is a misleading, erroneous description that could have been detected with the most cursory investigations into the IPA.

The heading of the article states 'Does New Zealand's parliament really play second fiddle to a 'Maori Voice'?' This heading is misleading. The IPA have never used the term 'second fiddle' to describe the New Zealand government. A casual reader would think that the IPA had used such a term. It is factually incorrect, plain and simple.

Retraction, Apology and Audit

It is clear that none of the IPA's research on New Zealand and the Waitangi Tribunal, nor the comments made by Mr Wild referred to in the article, have been 'debunked'. In fact, the article contains no evidence or meaningful analysis whatsoever. The individuals quoted provide opinions but have not reinforced their opinions with cited evidence, even 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. No attempt was made to contact the IPA for comment before publication. The article contains clear factual errors in its description of the IPA and what we have apparently said. This article represents a gross breach of normal journalistic ethics and standards.

As a result:

- The RMIT ABC Fact Check must immediately withdraw the article and publish a written retraction and apology.
- The RMIT Fact Lab 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