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TE WHĀNAU O WAIPAREIRA AND NGĀI TAI KI TĀMAKI: TAVERN LANE DEVELOPMENT, PAPATOETOE, AUCKLAND – LEGALITY OF CONDITIONS OF SALE OF LAND BEING PROPOSED BY PANUKU

A. Context and Summary

1 A development is proposed for Papatoetoe, Auckland. The land for development is currently owned by Auckland Council ("**the Council**"). The proposed developer is Ngāi Tai Waipareira Housing Ltd ("**Ngāi Tai**"), an entity in which both Te Whānau o Waipareira and Ngāi Tai ki Tāmaki are interested, that was created and is controlled by Tāmaki Makaurau Māori and that exists to develop land in Auckland for the benefit of Tāmaki Makaurau Māori.

2 The Council, through one of its Council-controlled organisations ("**CCOs**"), Panuku Development Auckland ("**Panuku**"), is negotiating the sale of the Council land for the purposes of the development. Panuku is proposing the following conditions for the transfer of the Council's land to Ngāi Tai:

2.1 Ngāi Tai must pay a performance bond of up to $500,000 ("**Condition 1**").

2.2 There is to be no third party dispute option for that bond ("**Condition 2**").

2.3 No more than 30.9% of the development can be used for the provision of Social Housing, which is defined to include dwellings and units leased to tenants (including those over the age of 55) whose rents are subsidised by grants or rental subsidies from State or benevolent sources ("**Condition 3**").

3 I am instructed that, from Ngāi Tai's perspective, the practical effect of all three Conditions is to adversely affect the economics of any development of the Council land. Condition 1 requires it to commit more project capital upfront. Condition 2 makes that capital vulnerable to be called on at any time, irrespective of how (un)justified the call for it is. And Condition 3 restricts Ngāi Tai's ability to sell development housing units off the plans to social housing providers, including (but not limited to) Housing NZ, at an early stage of the development process, so as to assist Ngāi Tai with project finance for the housing development.

4 I am further instructed that, from Ngāi Tai's perspective, Condition 3 has adverse social and cultural impacts, over and above the adverse economic impacts just noted. In particular, it operates to frustrate Ngāi Tai's desire to provide social housing support to vulnerable Tāmaki Makaurau Māori at the higher level that Ngāi Tai would like. Accordingly, Condition 3 does not improve and enhance the lives of communities in need. It also frustrates Ngāi Tai's desire to be a developer for social housing outcomes, for which profit margins at the levels private commercial developers may be accustomed to are not the barometer of success.

5 Against this background, I have been asked to assess whether there are any legal limits on the ability of Panuku to impose Conditions 1-3 on any transfer of the Council's land to Ngāi Tai for the purposes of housing development.

6 In summary it is my opinion that:

6.1 **Condition 1:** There is a strong legal argument for Ngāi Tai that Panuku, in its refusal to waive or at least to significantly reduce the commercial bond that is required for this development, is acting contrary to the principles of active protection and the right to development and, accordingly, contrary to the principles of Te Tiriti o Waitangi / The Treaty of Waitangi ("**Te Tiriti**") that Panuku (and the Council) has committed to comply with.

6.2 **Condition 2:** If, contrary to what is suggested by the information made available to me for the purposes of preparing this opinion, there is justification for Panuku requiring a performance bond (of up to $500,000), there is a strong legal argument for Ngāi Tai that Panuku, in its refusal to agree to an independent dispute resolution process in respect of any calls made on the bond, is acting contrary to the principles of active protection and the right to development and, accordingly, contrary to the principles of Te Tiriti that Panuku (and the Council) has committed to comply with.

6.3 **Condition 3:** There is a strong legal argument for Ngāi Tai that Panuku, in its position that not more than 30.9% of the development can be used for Social Housing (as that terms is defined in paragraph 2.3 above) is adopting

a position contrary to the prohibition on discrimination in section 53 of the Human Rights Act 1993 (and not justified under any of the exceptions to it).

7 I set out below my reasoning in support of the opinions just summarised.

B. Relevant legal framework

8 As the Council is acting through Panuku it is necessary to identify what, if any, legal limits there are on Panuku in the context of negotiating a development agreement with Ngāi Tai in respect of a transfer of currently Council-owned land.

9 The legal principles that relevantly govern Panuku's actions lie in three sources. They are the corporate responsibility documents of Panuku; (linking through from those documents) the principles of Te Tiriti as developed and applied in decisions by the courts and by the Waitangi Tribunal ("**the Tribunal**"); and non-discrimination provisions in the Human Rights Act. Accordingly:

9.1 My analysis begins in **Section B1** with a summary of Panuku's corporate responsibility documents. In the present context, these are relevant in two ways. First, they identify the objects and purposes which are to guide Panuku in its actions. Second, and closely related, they commit Panuku to comply with the principles of Te Tiriti in its actions affecting Māori.

9.2 That leads into **Section B2**, which summarises court and Tribunal decisions on Te Tiriti principles of 'active protection' and 'the right to development'.

9.3 Finally, **Section B3** considers the meaning and effect of section 53 of the Human Rights Act, which prohibits discrimination in the provision of land, housing, and other accommodation, and the exceptions to that prohibition.

10 Conditions 1 to 3 are then assessed in **Section C** against this legal framework.

(B1) Corporate responsibility documents of Panuku

11 Panuku as a CCO is governed by Part 5 of the Local Government Act 2002. In it section 59 sets out the "principal objectives" of CCOs. The first of those objectives is to "achieve the objectives of its shareholders… as specified in the statement of intent" (subsection (1)(a)). Panuku's current statement of intent is its Statement of Intent 2017-2020. This document identifies Panuku's strategic objectives as including to "facilitate… iwi… investment and collaboration into the sustainable redevelopment of brownfield urban locations".[1] Panuku's Statement of Intent 2017-2020 goes on to identify "Key projects and initiatives" for

[1] Statement of Intent 2017-2020, at p. 9.

"delivering on Māori outcomes". These include "Achieving better outcomes for and with Māori" and "Enabling Māori commercial development opportunities",[2] including through Panuku "Working in partnership with Māori to enable investment in commercial and housing opportunities",[3] and making a "Contribution to Māori outcomes" which is stated to include the outcome of "Significantly lift Māori social and economic wellbeing".[4]

12 Panuku has elaborated on these statement of intent obligations in its policy on "Māori Engagement".[5] This significant document relevantly:

12.1 Acknowledges "through the principles of Te Tiriti o Waitangi and the importance of land to Māori" that Panuku's "particular relationship" with Tāmaki Makaurau Māori is "one of partnership in management and development of this essential element".[6]

12.2 States that "Panuku recognises that through this collaborative partnership approach, Māori can contribute to the successful exercise of the Panuku mandate in four key areas", one being "Enabling commercial investment, including partnership in commercial and housing opportunities".[7]

12.3 Identifies amongst the "Strategic Context" in which Panuku operates the direction to CCOs in the Independent Māori Statutory Board (**IMSB**) Māori Plan for Tāmaki Makaurau to "contribute to… Effective Māori capacity" and the Auckland Plan objective for CCOs of "Transformational shift: significantly lift Māori social and economic wellbeing".[8]

12.4 States that Māori can contribute to the successful exercise of the Panuku mandate in ways that include "working towards joint strategic outcomes" and "enabling commercial initiatives and development partnerships".[9]

12.5 Identifies as the second of four "Panuku Engagement Goals and Actions":[10]

GOAL	OBJECTIVE	ACTION
2. Commercial	• Māori are informed and encouraged to	• Identify opportunities,

2 Statement of Intent 2017-2020, at p. 14.
3 Statement of Intent 2017-2020, at p. 14.
4 Statement of Intent 2017-2020, at p. 14.
5 Policy dated 28 October 2015.
6 At p. 1, section 2.
7 At p. 1, section 2.
8 At p. 2, section 4.
9 At p. 4, section 6.
10 At p. 6, section 6.

investment / partnership	participate in partnerships • Unlocking potential from Auckland's assets • Contribution Māori wellbeing and effective Māori capacity (IMSB Māori Plan objectives) • Developing strong Māori communities (council MRF [ie, Māori Responsiveness Framework] driver) • Enable Māori outcomes (council MRF driver)	developing strategic, proactive investor relationships • Individual MOUs between Panuku and iwi to highlight and guide individual relationships • Clarifying commercial investment pathway • Facilitating iwi partnerships in significant initiatives eg: Housing for Older People • Te Toa Takatini – Whai Painga programme, Whare for Life • Iwi investment fund

13 Panuku's September 2016 Corporate Responsibility Framework includes statements that are to a similar effect as those referred to above.[11]

14 Significantly, these strategic objectives are not merely procedural in nature, that is, they do not stop at imposing process-based obligations on Panuku to meaningfully consult with Māori. They go further than that, identifying an obligation on Panuku positively to assist Tāmaki Makaurau Māori to achieve **outcomes** that are beneficial to Tāmaki Makaurau Māori, including in financial / economic terms. That objective, reflected in the Panuku corporate responsibility documents that are referred to above, is consistent with how the Council says it "expects" its CCOs to contribute to and align with the Council's objectives and priorities. For example, the Council states in its CCO Accountability Policy, in Chapter 13.3 of the Long-term Plan 2015-2025, that it expects CCOs to contribute to achieving identified outcomes from the Auckland Plan, which relevantly include "A Māori identity that is Auckland's point of difference in the world".

15 In that context, the Council has also recognised that it has legal responsibilities to Māori under Te Tiriti, which it has described as "distinct from the Crown's [responsibilities] and fall[ing] within a local government Tāmaki Makaurau context".[12] The Council's "duties, obligations and commitments" to Tāmaki

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11 Refer to p. 15.

12 Auckland Council Significance and Engagement Policy (December 2014) at p. 5, section 1. To the same effect, the Auckland Council Governance Manual states at section 13.1(d) that "The council is committed to operating in a manner that recognises and respects the

Makaurau Māori are said by it to include to "contribute to Māori capacity" and to "enable and promote Māori well-being".[13] "[W]here appropriate" the Council also "aim[s] to achieve best practice in working with mana whenua as partners".[14]

16 Further, the IMSB in its Schedule of Issues of Significance to Māori in Tāmaki Makaurau and Māori Plan 2017 identifies under "Wairuatanga" that "Māori businesses are uniquely identifiable, visible and prosperous", and under "Kaitiakitanga" that "Māori businesses are improving and enhancing the quality of their people, asset and resource base".[15] The IMSB's "Issues of Significance" also include that "Māori are a critical and active part in the economic development of a more productive, high value economy for Auckland", with corresponding actions including "Review its procurement policy, strategy and processes to enable Māori businesses to participate in Auckland Council procurement opportunities, including labour inclusions, supplier diversity, direct contracting, and requests for proposals and tenders to ensure Māori outcomes are included".[16]

17 Finally it is relevant to Te Tiriti obligations that Panuku has undertaken to comply with that its company purposes include, in clause 3.1 of the constitution, to "encourage economic development".[17] According to clause 3.2 of the constitution, this may but need not involve Panuku making a profit.[18] Panuku's constitution can also be noted for clause 5.4, on "Treaty of Waitangi", stating:[19]

> The Company must comply with all applicable statutory and regulatory obligations relating to Māori and the Treaty of Waitangi, including those in the Local Government Act 2002.

(B2) Recognised principles of Te Tiriti

18 The corporate responsibility documents that are referred to in **Section B1** above make clear that Panuku needs to comply with Te Tiriti principles. They also

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significance of te Tiriti… To honour this commitment, the principles of te Tiriti / the Treaty should be used as a guide to inform the council's approach when making decisions about matters affecting Māori".

13 Auckland Council Significance and Engagement Policy (December 2014) at p. 8.
14 Auckland Council Significance and Engagement Policy (December 2014) at p. 9.
15 At p. 17, second and third table columns.
16 At p. 27.
17 Constitution of Panuku Development Auckland Ltd, at p. 4.
18 Constitution of Panuku Development Auckland Ltd, at p. 4.
19 Constitution of Panuku Development Auckland Ltd, at p. 5.

provide a degree of practical guidance on what Panuku (and the Council) sees as the purpose and outcomes of Te Tiriti consistent engagement with Māori.

19 The views, and commitments, of Panuku (and the Council) also need to be seen and understood in light of how the courts and the Tribunal have defined the scope and content of Te Tiriti obligations, and most relevantly 'the principle of active protection' and 'the right to development' – both of these being principles of Te Tiriti that have been recognised by the Council as relevant to its operations.[20]

20 Starting with the principle of active protection, this was described by the Court of Appeal in the *Lands/SOE Case* as a duty or obligation of "active protection of Māori people in the use of their lands and waters to the fullest extent [reasonably] practicable".[21] Of particular relevance to the aspirations, and rights, of Māori to economic development, the principle of active protection has been found by the Court of Appeal to support Ngāi Tahu having a period of protection from competition in the operation of its whale-watching business.[22] In a similar vein, the Tribunal has observed that the principle of active protection:[23]

> … may be interpreted as a positive and pro-active use of the discretion of the Crown toward the Māori partner in the Treaty of Waitangi to return Māori lands compulsorily taken, and no longer required for the purposes for which they were taken, **without requiring payment at market value**.
>
> (My bold emphasis.)

21 And further:

> … the Crown's duty of active protection extended not just to ensuring that Māori retained sufficient properties and taonga to participate in opportunities, but also to **ensuring that Māori were facilitated or assisted to do so**. …[24]
>
> ... In addition to the Crown's obligation to provide the means of fulfilling the principle of mutual benefit, the principle of redressing past treaty breaches is also relevant. **Where there is a need to redress past breaches, active development assistance from the Crown may form part of an appropriate remedy**. The *Māori Development Corporation Report* found in 1993, for example, that the Government's initiative in establishing the corporation in 1987 was consistent with the treaty, in that it was a recognition of the need for positive economic assistance for Māori and provided this assistance in the form of development banking services. This was seen as consistent with the Crown's duty of active protection inherent in the treaty. Where

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20 Refer for instance to Auckland Council Governance Manual at section 13.1(b).

21 *New Zealand Māori Council v Attorney-General [Lands/SOE Case]* [1987] 1 NZLR 641 (CA) at p. 664 (Cooke P).

22 *Ngāi Tahu Māori Trust Board v Director-General of Conservation [Whalewatching Case]* [1995] 3 NZLR 553 (CA), particularly at pp. 561-562 (Cooke P). Subsequently discussed and affirmed in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2017] NZCA 613, [2018] 2 NZLR 453, particularly at paras. [48]-[50].

23 *Te Maunga Railways Land Report* (Wai-315, 1 August 1994) at p. 67.

24 *He Maunga Rongo: Report on Central North Island Claims* (Wai-1200, 16 June 2008, Volume 3) at p. 894.

> Māori have lost properties and taonga and, as a result, have been unable to participate in the national economy, and where the disparity between the rate of economic progress of Māori compared with other New Zealanders can be attributed in some measure to breaches of the treaty, then **the Crown's promotion of Māori business is part of honouring its treaty obligations**. …[25]
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> … the principle of active protection requires the Crown to assist Māori today to develop their properties, where that is their wish. Such assistance should take the form of facilitating equal opportunities to develop, and in particular by removing obstacles to Māori development, such as title and governance problems, that have been created by past actions of the Crown (see part III of this report). It may, depending on circumstances, extend to other forms of positive assistance. …[26]
>
> (My bold emphasis.)

22 The Tribunal, in the *He Maunga Rongo* report (2008) that is quoted above, also addressed Te Tiriti right to development, relevantly finding that this right includes "positive assistance from the Crown where appropriate in the circumstances, which may include assistance to overcome unfair barriers to development, some of them of the Crown's making" and "the opportunity for Māori to participate in the development of Crown-owned (formerly Māori) or Crown-controlled property, resources, or industries in their rohe, and to participate at all levels".[27] So understood, the right to development supported findings by the Tribunal that:[28]

> … a reasonable treaty partner would consider modern tourism enterprises as opportunities where positive assistance is appropriate and required, in consultation with iwi and hapu. We accept that the Crown does not have an obligation to ensure that iwi and hapu are always commercially successful in these enterprises. We received ample evidence that iwi and hapu of this region do not expect to be especially 'fostered' in the tourism sector. They are willing to manage their own tourism businesses, for their own communities, and according to their needs and preferences. What they do require is positive assistance to enable them to overcome the barriers and constraints they continue to face in areas such as lending finance and governance structures, which prevent them from participating equal in the field with others in the tourism sector. This positive assistance may, in some cases, appropriately extend to preference where Crown lands and resources are being made available for tourism enterprises or where the Crown has a regulatory responsibility for the utilisation of public resources for tourism enterprises.

23 The Tribunal has more recently observed in the *Te Kāhui Maunga* report (2013):[29]

> At its most basic, acknowledging a treaty right to development is, in our view, about giving Māori a 'fair go', along with Pākehā . Like the CNI tribunal, we believe that it includes the following:
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> …

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25 *He Maunga Rongo* (above) at p. 910.
26 *He Maunga Rongo* (above) at p. 911.
27 *He Maunga Rongo* (above) at p. 912.
28 *He Maunga Rongo* (above) at pp. 1096-97.
29 *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai-1130, 2013, Volume 1) at p. 18.

- The right to positive assistance, where appropriate to the circumstances, including assistance to overcome unfair barriers to participation in development (especially barriers created by the Crown).

…

- The opportunity, after considering the relevant criteria, for Māori to participate in the development of Crown-owned or Crown-controlled property or resources or industries in their rohe, and to participate at all levels (such criteria include the existence of a customary right or an analogy to a customary right, the use of tribal taonga, and the need to redress past breaches or fulfil the promise of mutual benefit).

24 These Tribunal findings, and the position taken in its reports more generally, are consistent with the *Lands/SOE Case* proposition that the principles of Te Tiriti are intended to support and empower Māori in the use of their resources to the fullest extent reasonably practicable, extending to positive assistance where appropriate. What that requires, in any given practical setting, is very fact and context specific.

(B3) Section 53 of the Human Rights Act

25 Finally I turn to the statutory prohibition on discrimination in the provision of land, housing and other accommodation. It is contained in section 53 of the Human Rights Act, which provides as follows:

> **53 Land, housing, and other accommodation**
>
> (1) It shall be unlawful for any person, on his or her own behalf or on behalf or purported behalf of any principal,—
>
> (a) to refuse or fail to dispose of any estate or interest in land or any residential or business accommodation to any other person; or
>
> (b) to dispose of such an estate or interest or such accommodation to any person on less favourable terms and conditions than are or would be offered to other persons; or
>
> (c) to treat any person who is seeking to acquire or has acquired such an estate or interest or such accommodation differently from other persons in the same circumstances; or
>
> (d) to deny any person, directly or indirectly, the right to occupy any land or any residential or business accommodation; or
>
> (e) to terminate any estate or interest in land or the right of any person to occupy any land or any residential or business accommodation,—
>
> by reason of any of the prohibited grounds of discrimination.
>
> (2) It shall be unlawful for any person, on his or her own behalf or on behalf or purported behalf of any principal, to impose or seek to impose on any other person any term or condition which limits, by reference to any of the prohibited grounds of discrimination, the persons or class of persons who may be the licensees or invitees of the occupier of any land or any residential or business accommodation.

26 The combined effect of sections 53(1) and (2) is to prohibit the imposition of conditions that would allow land or accommodation to (not) be disposed of to groups defined by one or more of the grounds of unlawful discrimination. Those grounds are set out in section 21(1) of the Human Rights Act and relevantly

include age and employment status. "Employment status" is defined to mean being unemployed or being a recipient of a welfare benefit or an ACC entitlement.

27 The effect of section 53 of the Human Rights Act was considered in *Anderson*.[30] There the High Court held that a resource consent condition that restricted occupation of a townhouse to persons over the age of 55 years infringed the prohibition on age-based discrimination in section 53 and was unlawful.[31] The decision records that the age restriction was originally proposed to be registered as a restrictive covenant on the certificates of title associated with the townhouse, but that that did not occur. On the Court's reasoning, had that occurred the restrictive covenant is also likely to have been found to have infringed section 53.

28 While they do not appear to have been relevant in the *Anderson* decision, it can be noted that there are three specific exceptions to the prohibition on unlawful discrimination that is contained in section 53 of the Human Rights Act. They are in sections 54, 55 and 56 of that Act, and provide for exceptions in relation to shared residential accommodation; hostels and establishments (such as hospitals, clubs, schools, universities, religious institutions, and retirement villages) whose accommodation is restricted to a particular type of person, such as those of the same sex or in a particular age group; and for persons with particular disabilities.

C. My Legal Analysis

29 Against the legal framework that is summarised in **Section B** above, I turn to consider the legality of the three Conditions that Panuku has proposed in respect of the transfer of land to Ngāi Tai for the purposes of the development.

(C1) Condition 1: Requiring a performance bond of up to $500,000

30 I am instructed that the performance bond of up to $500,000 is at a level that would ordinarily be sought from a (non-Māori) commercial developer. That being so, it appears that Panuku has not considered whether no commercial bond is appropriate in circumstances where Ngāi Tai is the developer and it is seeking to develop the land as a Māori development entity and for the benefit of Tāmaki Makaurau Māori, both financially / economically and socially / culturally. In these circumstances, there is in my opinion a strong legal argument for Ngāi Tai that Panuku, in its refusal to waive or at least to significantly reduce the commercial bond for this development, is acting contrary to the principles of active protection and the right to development and, accordingly, contrary to principles of Te Tiriti that Panuku (and the Council) has committed to comply with. As noted above, Panuku has undertaken to pursue amongst its objectives

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30 *Anderson v FM Custodians Ltd* [2013] NZHC 2423, (2013) 15 NZCPR 123 (Duffy J).

31 See in particular at paras. [53]-[55].

"enabling" Māori commercial and housing opportunities, and through that achieving better economic and social "outcomes" for and with Tāmaki Makaurau Māori. These commitments cannot have been intended as mere window dressing, and as Māori safeguards courts would not allow them "to become a dead letter".[32] That is avoided by Panuku providing positive assistance to Ngāi Tai, by agreeing to forego a performance bond in the particular circumstances of this development.

(C2) Condition 2: No independent dispute resolution process

31 If, contrary to what is suggested by the information made available to me for the purposes of preparing this opinion, there is justification for Panuku requiring a performance bond (of up to $500,000), there is in my opinion a strong legal argument for Ngāi Tai that Panuku, in its refusal to agree that an independent dispute resolution process should exist to address any calls made on that bond, is acting contrary to the principles of active protection and the right to development and, accordingly, contrary to the principles of Te Tiriti that Panuku (and the Council) has committed to comply with. In addition to my reasoning in paragraph 30 above, which equally supports my opinion on Condition 2, I am instructed that Panuku has not explained why it is proposing to depart from what I understand to be the common practice of including independent dispute resolution processes in relation to commercial bonds in a development agreement. In my opinion, a court, in a Te Tiriti setting such as the present one, is likely to infer from the silence of Panuku on this point that it does not have any objectively good reason for the position that it is taking.[33] That is the inference that I too have drawn.

(C3) Condition 3: Limiting social housing to not more than 30.9%

32 There is in my opinion a strong legal argument for Ngāi Tai that Panuku, in its position that not more than 30.9% of the development can be used for Social Housing (as that terms is defined in paragraph 2.3 above), is adopting a position that infringes section 53 of the Human Rights Act, and that is not justified under any of the exceptions in sections 54, 55 and 56. This is on the basis that the Social Housing restriction is likely to have the effect (even if it is not its purpose) of preventing persons who are unemployed, who rely on welfare benefits or who rely on ACC entitlements, from being able to occupy houses in the development. My reasoning in support of this conclusion is that there is likely to be an overlap, perhaps significant, on the one hand between the growing number of people who are unemployed or in receipt of State welfare assistance of the kind just noted, and

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32 *Environmental Defence Society Inc v Mangonui District Council* [1989] 3 NZLR 257 (CA) at p. 261 (Cooke J). To similar effect is the more recent decision of the Supreme Court in respect of SOE obligations under Te Tiriti in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056, particularly at paras. [65]-[76] (Elias CJ and Arnold J).

33 See for instance *Ririnui* (above), particularly at paras. [105]-[106] (Elias CJ and Arnold J).

on the other hand the (also growing number of) people who rely to pay their rents on grants or rental subsidies from the State or private / voluntary sector sources.

D. Summary and conclusion

33 I have summarised my opinion in **Section A** above. Please do not hesitate to contact me if you have any questions about my opinion or its supporting reasons.

Yours sincerely

Matthew Smith