

APPENDIX 'A'

TREATY PRINCIPLES AND DUTIES

1. In these closing submissions, the following principles are relevant to the issue of Te Reo Māori:
 - a. The Principle of Active Protection;
 - b. The Principle of Tino Rangatiratanga;
 - c. The Principle of Partnership;
 - d. The Principle of Equality; and
 - e. The Principle of Reciprocity.

The Principle of Active Protection

2. It is well established that the Crown owes a duty of active protection to Māori under Te Tiriti o Waitangi. This is the duty to protect Māori rights and interests arising from the plain meaning of Te Tiriti. In accordance with Article II of Te Tiriti and the principle of active protection, the Crown is required to actively protect taonga Māori.
3. When considering the Principle of Active protection, the case of *New Zealand Māori Council v Attorney-General* must be considered. In particular.⁴²⁵

‘the duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable’.

4. During the time this case was progressing within the Court, the Te Reo Māori inquiry had taken place. In 1987, the Te Reo Māori report was released where the Tribunal considered the Principle of Active Protection

⁴²⁵ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.

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and in particular, the use of the word “guarantee”. The point was made that the word denotes an active executive sense rather than a passive permissive sense, or in a phrase “affirmative action.”:⁴²⁶

“By these definitions therefore, the word (guarantee) means more than merely leaving the Māori people unhindered in their enjoyment of their language and culture. It requires active steps to be taken to ensure that the Māori people have and retain the full exclusive and undisturbed possession of their language and culture.”⁴²⁷

The situation could be different if the Treaty merely required the Crown to permit to the Māori people the full exclusive and undisturbed possession of the Taonga. Having so permitted, it could be argued that a policy of benign neglect amounted to compliance. “The word guarantee imposes an obligation to take active steps within the power of the guarantor, if it appears that the Māori people do not have or are losing, the full, exclusive and undisturbed possession of the Taonga.”⁴²⁸

5. In Counsels submission, the Crown has an obligation to “actively protect” rather than to merely “protect”. Since the release of the Te Reo report, the Tribunal has broadly applied this principle to ngā taonga katoa including Te Reo me ōnā tikanga, Māori culture and the like. The guarantee of taonga is described by the Waitangi Tribunal in the Muriwhenua Fishing Report as:⁴²⁹

“Te tino rangatiratanga o ratou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual

⁴²⁶ Waitangi Tribunal, *Te Reo Māori Report* (Wai 11, 1987) at 20.

⁴²⁷ Waitangi Tribunal, *Te Reo Māori Report* (Wai 11, 1987) at 20.

⁴²⁸ Waitangi Tribunal, *Te Reo Māori Report* (Wai 11, 1987) at 23.

⁴²⁹ Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1989) at 181; see pages 179-180 for a discussion of the concept of taonga.

source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.”

6. The Tribunal found in the Manukau Harbour Inquiry:⁴³⁰

“The Treaty of Waitangi obliges the Crown not only to recognise the Māori interests but actively to protect them . . .”.

7. In the Whaia Te Mana Motuhake report, the Tribunal found that:⁴³¹

“active protection requires honourable conduct by, and fair processes from, the Crown. Crown conduct that aims or serves to undermine tino rangatiratanga cannot be consistent with the principle of active protection.”

The Principle of Tino Rangatiratanga

8. Under Article II of Te Tiriti o Waitangi, the Crown guaranteed to Taihape Māori the ability to exercise their tino rangatiratanga over ōnā taonga katoa. This Tiriti principle acknowledges and protects “unqualified exercise of chieftainship and confirms and guarantees to Māori their property and other rights”.⁴³² Inherent in Māori autonomy is the recognition of the active protection of Taihape Māori customary law and institutions, and the right for Taihape Māori to determine their own decision-makers and land entitlements.⁴³³

⁴³⁰ Waitangi Tribunal, *Manukau Report* (Wai 8, 1985) at 70.

⁴³¹ Waitangi Tribunal, *Whaia te Mana Motuhake In Pursuit of Mana Motuhake* (Wai 2417, 2015) at 30.

⁴³² I. H. Kawharu, “Treaty of Waitangi - Kawharu Translation” (2011) Waitangi Tribunal – Te Rōpū Whakamana i te Tiriti o Waitangi. Retrieved from: <http://www.waitangitribunal.govt.nz/treaty/kawharustranslation.asp%3E>.

⁴³³ Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui* (Wai 785, 2008) at 4.

9. This necessarily limits the Crown's authority to govern⁴³⁴ and supports the principle of active protection which obliges the Crown to not only recognise Māori interests specified in the Treaty but to actively protect them.⁴³⁵
10. This was of fundamental importance to Māori, for they would not have entered into the Treaty if their tino rangatiratanga was not guaranteed.⁴³⁶

“The principle that the cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance.”

11. The principle that the Crown should actively protect te tino rangatiratanga is paramount to the claimants. This protection is not merely a simple acknowledgement of tribal autonomy and self-management, it also includes a requirement that the Crown actively protect and support the claimants in the exercise of their rangatiratanga.

The Principle of Partnership

12. The Principle of Partnership was first addressed in the Manukau report which stated that:⁴³⁷

“It is in the nature of an interest in partnership, the precise terms of which have yet to be worked out”.

13. After the release of this report, the jurisprudence on this principle has developed. Following the 1987 Lands case⁴³⁸, successive Tribunal panels have adopted Justice Cooke's findings and accepted that Te Tiriti created this Principle of Partnership. There has been a retrenchment from this position in recent times with significant findings by the Te Pāparahi o Te Raki Tribunal that Northern Māori neither ceded their sovereignty nor was such cession in the contemplation of an ordinary reading of He

⁴³⁴ Waitangi Tribunal, *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 74.

⁴³⁵ Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 69.

⁴³⁶ Waitangi Tribunal, *Turangi Township Report* (Wai 84, 1995) at 284.

⁴³⁷ Waitangi Tribunal, *Manukau Report* (Wai 8, 1985) at 70.

⁴³⁸ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Whakaputanga o Nga Hapū o Niu Tireni and Te Tiriti o Waitangi which are documents that must be read together for a proper understanding of the preamble to Te Tiriti.

14. The Tribunal considered the 1987 Lands case in the Orakei report. It stated that there are two essential elements, the first was that the Treaty signified a partnership between the races, and:⁴³⁹

“The second is the obligation which arises from, indeed is inherent in, this relationship for each partner to act towards the other as Cooke P puts it at 370, “with the utmost good faith which is the characteristic obligation of partnership.”

15. In the Wai 262 report, the Tribunal set out key principles which highlight the Crown’s Treaty obligation in the context of taonga Māori.⁴⁴⁰ The key principles are partnership, wise policy, adequate resources and Māori-speaking Government.

- a. Partnership:⁴⁴¹

“On the Crown’s part there must be a willingness to share a substantial measure of responsibility and control with its Treaty partner. in essence, the Crown must share enough control so that Māori own the vision, while at the same time ensuring its own logistical and financial support, and also research expertise, remain central to the effort. Partnership in the context of te reo should be a true joint venture.”

- b. Wise policy:⁴⁴²

“The state owes Māori two kāwanatanga duties: transparent policies forged in the partnership to which we have referred; and implementation programmes that are focused and highly

⁴³⁹ Waitangi Tribunal, *Orakei Report* (Wai 9, 1987) at 207.

⁴⁴⁰ Waitangi Tribunal, *Ko Aotearoa tēnei Report* (Wai 262, 2011) at 443 and 450.

⁴⁴¹ Waitangi Tribunal, *Ko Aotearoa tēnei Report* (Wai 262, 2011) at 450.

⁴⁴² Waitangi Tribunal, *Ko Aotearoa tēnei Report* (Wai 262, 2011) at 451-452.

functional. Te reo Māori deserves the best policies and programmes the Crown can devise”.

c. Adequate resources:⁴⁴³

“The survival and growth of the Māori language requires sufficient resources. Just what is sufficient depends on a reasonable assessment of the cost of implementing the reo policies developed in partnership between the Crown and Māori – no more, no less”.

d. Māori-speaking Government:⁴⁴⁴

“it is time to transform the theoretical right to engage with the Government in Māori into a practical reality.”

16. The Tribunal found in the Wai 262 inquiry that with reference to the four principles required of the Crown in modern Māori-language policy, the Crown had failed in respect of their duty to be a good partner; failed to provide adequate support and oxygen; failed to provide adequate priority to Te Reo in resourcing; and failed to become more Māori-speaking and thus reflect the aspirations of a growing number of the citizens it represents.⁴⁴⁵
17. It is Counsel’s submission that the findings discussed above be taken into account and be adopted by this Tribunal panel in relation to the failure of the Crown to protect Te Reo Māori for Taihape Māori and Te Reo of Taihape Māori.

The Principle of Equity

18. The obligations arising from kāwanatanga, partnership, reciprocity and active protection required the Crown to act fairly to both settlers and Māori – the interests of settlers could not be prioritised to the disadvantage of Māori.⁴⁴⁶ Where Māori have been disadvantaged, the principle of equity –

⁴⁴³ Waitangi Tribunal, *Ko Aotearoa tēnei Report* (Wai 262, 2011) at 452.

⁴⁴⁴ Waitangi Tribunal, *Ko Aotearoa tēnei Report* (Wai 262, 2011) at 451.

⁴⁴⁵ Waitangi Tribunal, *Ko Aotearoa tēnei Report* (Wai 262, 2011) at 470.

⁴⁴⁶ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2008) at 61-64.

in conjunction with the principles of active protection and redress – requires that active measures be taken to restore the balance.⁴⁴⁷

19. A further condition of the Treaty relationship is the Crown's duty to act with fairness and justice to all citizens. Article 3 of the Treaty confirms that Māori have all the rights and privileges of British subjects.⁴⁴⁸
20. The Tribunal has found that this article not only guarantees Māori freedom from discrimination but also obliges the Crown to positively promote equity.⁴⁴⁹
21. It is through article 3 that Māori, along with all other citizens, are placed under the protection of the Crown and are therefore assured equitable treatment from the Crown to ensure fairness and justice with other citizens.
22. This principle was articulated by the Tribunal in its pre-publication report, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 'the Crown could not favour settlers over Māori at an individual level, and nor could it favour settler interests over the interests of Māori communities'.⁴⁵⁰
23. Further, the Tribunal has found that the Treaty principle of equity obliges the Crown to 'meet a basic standard of good government', by acting in accordance with its own laws and ensuring that Māori rights and privileges as citizens have the protection of the law in practice.⁴⁵¹
24. To this end, in its inquiry into Te Rohe Pōtae claims, the Tribunal said that the Crown 'should be accountable for its actions in relation to Māori and subject to independent scrutiny'.⁴⁵²

⁴⁴⁷ Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui* (Wai 785, 2008) at 5.

⁴⁴⁸ Treaty of Waitangi Act 1975, sch 1, art 3.

⁴⁴⁹ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 48 and 62; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 133; Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wai 201, 2004) at 27; Waitangi Tribunal, *The Te Arawa Mandate Report* (Wai 1150, 2004) at 94; Waitangi Tribunal, *The Offender Assessment Policies Report* (Wai 1024, 2005) at 13 ; Waitangi Tribunal, *He Maunga Rongo, vol 2*, (Wai 1200, 2008) at 428.

⁴⁵⁰ Waitangi Tribunal, *Te Mana Whatu Ahuru – Pre-publication Version, Parts I and II*, (Wai 898, 2018) at 185.

⁴⁵¹ Waitangi Tribunal, *He Maunga Rongo, vol 2* (Wai 1200, 2008) at 428–429.

⁴⁵² Waitangi Tribunal, *Te Mana Whatu Ahuru – Pre-publication Version, Parts I and II* (Wai 898, 2018) at 189.

25. As was confirmed in the recent report of the Waitangi Tribunal into Health Services and Delivery the Hauora Report:⁴⁵³

In this way, the principle of equity is closely linked to the principle of active protection. Alongside the active protection of tino rangatiratanga is the Crown's obligation, when exercising its kāwanatanga, to protect actively the rights and interests of Māori as citizens. At its core, the principle of equity broadly guarantees freedom from discrimination, whether this discrimination is conscious or unconscious. Like active protection, for the Crown to satisfy its obligations under equity, it must not only reasonably ensure Māori do not suffer inequity but also actively inform itself of the occurrence of inequity.”

26. When considering Te Urewera claims, the Tribunal found that the principle of equity applies regardless of the cause of the disparity.⁴⁵⁴
27. In relation to health, the Tribunal noted in the Napier Hospital and Health Services Report that equity of health outcomes is ‘one of the expected benefits of the citizenship granted by the Treaty’. It also noted that achieving this long-term goal would be dependent on a broad range of State policies and services.⁴⁵⁵
28. The Tribunal has also explained that, when considering this principle, equity of service may differ from equality of outcome. A policy or a service that establishes equal standards of treatment or care across the whole population may still result in inequitable outcomes for Māori. This could be the case, for instance, if other barriers (such as cost, geography, or racism) prevent Māori from accessing services, treatment, or care.⁴⁵⁶
29. The Treaty principles of equity and active protection therefore require the Crown to make every reasonable effort to eliminate barriers to service that may contribute to inequitable health outcomes. This may require additional

⁴⁵³ Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2757, 2019) at 34.

⁴⁵⁴ Waitangi Tribunal, *Te Urewera*, vol 8 (Wai 894, 2017) at 3773.

⁴⁵⁵ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 64.

⁴⁵⁶ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 62.

resources, proportionate to address the inequities that exist. The Tribunal accordingly found in the Napier Hospital and Health Services Report that failing to remove such barriers would be inconsistent with the principle of equity.

The Principle of Reciprocity

30. As it is widely known and understood, the Principle of Reciprocity is considered to be the “essential bargain” or “solemn exchange” agreed to in the Treaty by Taihape Māori and the Crown: the exchange of kāwanatanga for the guarantee of tino rangatiratanga. For the Tribunal, this exchange lies at the core of the concept of partnership.
31. The Tribunal in the Wai 262 report considered this principle and its application to the obligations of the Crown in respect of Te Reo Māori issues. The Tribunal stated:⁴⁵⁷

“The kāwanatanga principle requires the exercise of good and responsible government by the Crown, in exchange for Māori acknowledging the Crown’s right to govern. This requires the Crown to formulate good, wise and efficient policy. In the case of te reo, its importance as a taonga and the sheer necessity for its protection to be secured through genuine partnership means the need for a genuinely Crown–Māori policy is especially urgent. The Crown must commit to working with Māori in ways that go beyond, say, a few consultation hui and a reference group. Only in this way can it be ensured that the policy is not only wise but the right one. This is an essential step; it would be a travesty to pour resources into a policy doomed to failure by its very lack of Māori support and ownership.”

The Principle of Options

32. The Tribunal has also identified the principle of options, which broadly determines that, as Treaty partners, Māori have ‘the right to choose their social and cultural path’.⁴⁵⁸

⁴⁵⁷ Waitangi Tribunal, *Ko Aotearoa tēnei Report* (Wai 262, 2011) at 451.

33. This right derives from the Treaty's guarantee to Māori of both tino rangatiratanga and the rights and privileges of British citizenship. The principle of options, therefore, follows on from the principles of partnership, active protection, and equity and protects Māori in their right to continue their way of life according to their indigenous traditions and worldview while participating in British society and culture, as they wish.⁴⁵⁹
34. It follows that, in its modern application, the principle of options requires that the Crown must adequately protect the availability and viability of Kaupapa Māori solutions in the social sector as well as so-called mainstream services in such a way that Māori are not disadvantaged by their choice.⁴⁶⁰
35. In terms of health services, the Crown has a Treaty duty to enable Māori to have available the options of Māori or mainstream providers as they wish, and that either or both of these pathways are ensured equitable protection by the Treaty. Both pathways should be sufficiently supported by the Crown, meaning that each option offers a genuine, well-supported choice for Māori.⁴⁶¹
36. The principle of options is jointly sustained by the principles of active protection, partnership, and equity. The Tribunal affirmed in the Napier Hospital and Health Services Report that ensuring the accommodation and incorporation of tikanga Māori in mainstream health services flows from the principle of active protection.⁴⁶²

⁴⁵⁸ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 65

⁴⁵⁹ Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 195; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 274; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 65; Waitangi Tribunal, *The Tarawera Forest Report* (Wai 411, 2003) at 28.

⁴⁶⁰ Waitangi Tribunal, *Matua Rautia: Report on the Kōhanga Reo Claim* (Wai 2336, 2012) 68.

⁴⁶¹ Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wai 785, 2007) at 6.

⁴⁶² Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 44, 57, 65 and 175.