

CHAPTER 5

TREATY PRINCIPLES

5.1 INTRODUCTION

This claim is concerned with the urgent matter of the funding of tertiary education institutions known as wananga. While earlier Tribunal reports have expressed views about Maori and education, this is the first claim in which the Tribunal has dealt with tertiary education.

Education is a lifelong process. It is, in some respects, difficult to separate the concept and role of tertiary education from those of compulsory education. Education is a social good. Education equips us with basic tools that are necessary for us to function as a society. It is difficult to imagine a functional modern society that lacks the benefits of reading, mathematics, history, science, or geography. The basics of these subjects are taught in all our schools. Up to a certain age, some subjects, such as English and mathematics, are compulsory. These forms of knowledge are seen by the State as being basic needs for each individual within our society. All children up to the age of 16 must receive a minimum amount of education. The Crown clearly has an obligation to see that all its people are properly educated in order that they may carry out their political and social obligations as citizens.

Maori have always regarded education as an important vehicle for improving their quality of life. Education is one of the primary vehicles for the improvement and development of Maori. The development of wananga, tikanga Maori based TEIS, is seen as a natural extension of kohanga reo, kura kaupapa, and whare kura. Maori have actively engaged with European education since its first introduction in New Zealand. Largely missing from this vision has been the significant partnership input that Maori could have provided in education if only their aspirations had earlier been recognised and catered for. That Maori continue to be so heavily represented in negative educational statistics and low tertiary participation rates should be a matter of grave concern for both the Government and New Zealand society.

5.2 THE TREATY OF WAITANGI

The claimants contend that the failure by the Crown to provide sufficient funding to wananga breaches all three articles of the Treaty of Waitangi.

The preamble to the Treaty sets out the intentions of the Crown towards Maori. The English text states that the Queen was 'anxious to protect their just Rights and

Property and to secure to them the enjoyment of Peace and Good Order'. It goes on further to state that Her Majesty was:

desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects.

It is in the preamble that we receive our understanding of the spirit in which the chiefs who signed the Treaty entered the agreement.

5.3 PARTNERSHIP

The Treaty created a reciprocal relationship between Maori and the Crown. It gave the Crown both the right to govern and the obligation to protect, while guaranteeing to Maori their rights and property and giving them all the rights and obligations of British subjects. Of particular importance to Maori was that it gave them equality of status in the partnership created by the Treaty.

The Waitangi Tribunal has repeatedly commented on the partnership created between Maori and the Crown by the Treaty. For the purposes of this report, we cite the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*:

This principle [of partnership] was firmly established by the Court of Appeal in the *New Zealand Maori Council* case where it was authoritatively laid down that the Treaty signifies a partnership and requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.

While the needs of both cultures must be provided for and compromise may be necessary in some cases to achieve this objective, the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.¹

The claimants have argued that it is the right of Maori under the Treaty to be able to choose to be educated, at the tertiary level, in a Maori controlled and directed environment. The claimants believe that the Treaty partnership gives them the right to receive establishment funding.

The Crown submitted that it has already acknowledged the Treaty obligation by recognising the three wananga as TEIS. The Tribunal notes that this was an important step by the Crown – one that recognises the singular importance of matauranga Maori, tikanga Maori, and ahuatanga Maori to New Zealand education and to society as a whole. The Crown should be applauded for recognising wananga as TEIS on the same level as mainstream universities, polytechnics, and colleges of education. In doing this, the Crown has expressed goodwill towards its Treaty partner. We believe that the Crown has shown a measure of commitment to wananga Maori and the

1. Waitangi Tribunal, *Preliminary Report of the Waitangi Tribunal on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993, p 33

Treaty in its exercise of kawanatanga. However, this commitment has been qualified by the failure to provide wananga with capital establishment funding.

Recognition as TEIS has not afforded wananga the security that they desired. Under the amendments made to the Education Act 1989 by the Education Amendment Act 1990, wananga were both recognised as a category of TEI and, at the same time, denied access to establishment funding as TEIS. A question arises for the Tribunal as to whether recognition of wananga as TEIS is a sufficient commitment to the Treaty by the Crown. In our clear opinion, it is not.

It is abundantly clear to the Tribunal that the equality of partnership has yet to be achieved. In no small measure, this claim provides a real opportunity for the Crown as Treaty partner to acknowledge and remedy part of the shortfall in its meeting of Maori expectations, aspirations, and rights in education, as reflected in this claim.

Wananga are statutorily charged with the task of maintaining, disseminating, and advancing matauranga Maori. In the view of the Tribunal, the principle of partnership places a responsibility upon the Crown to support wananga adequately enough to ensure that they are not prejudiced in their ability to carry out a Crown-appointed task.

5.4 ARTICLE 1: KAWANATANGA – GOOD GOVERNANCE

The cession, under article 1 of the Treaty of Waitangi, of sovereignty, or what Maori clearly understood from the Maori version to be kawanatanga, or governance, gave to the Crown the power to legislate for all matters relating to ‘Peace and Good Order’.²

The Crown has argued that at the heart of this claim lies an issue over the right of the Crown to exercise its kawanatanga as it sees fit. As Crown counsel correctly pointed out, the allocation of limited resources is an issue that is ultimately one for the Government of the day to exercise its kawanatanga over for the benefit of all New Zealanders.

The claimants do not dispute this. The broad question is whether the Crown has exercised its right to govern with due recognition of its Treaty partner’s rights and the Treaty guarantees. The rights and responsibilities of the Crown to govern were upheld by the Judicial Committee of the Privy Council in *New Zealand Maori Council v Attorney-General* (the broadcasting assets case), where Lord Woolf, delivering the judgment of their lordships, accepted the reciprocal nature of the rights and duties ensuing from the Treaty.³ In return for being recognised by Maori as the legitimate Government of the whole nation, the Crown undertook duties of protection. The Tribunal has examined the findings of this case in its 1994 *Maori Electoral Option Report*, quoting this passage:

The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown’s obligation. It does not

2. See Waitangi Tribunal, *Kiwifruit Marketing Report 1995*, Wellington, Brooker’s Ltd, 1995, sec 4.5

3. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the Government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.⁴

Counsel for Te Whare Wananga o Awanuiarangi submitted that wananga represent for many Maori a desirable option for tertiary education. Counsel also submitted that wananga have had the effect of increasing the participation in tertiary education of Maori, particularly those people who would not normally participate, and that wananga have the power to create further substantial increases in Maori participation. On that basis, Awanuiarangi submitted that providing funding for wananga is a sound exercise of kawanatanga.

The Crown has admitted that it needs to do further work in order to establish a proper relationship with wananga. In the passage quoted above from its broadcasting assets judgment, the Privy Council stressed that, if 'a taonga is in a vulnerable state, this has to be taken into account . . . and may well require the Crown to take especially vigorous action for its protection'.⁵ The Tribunal believes that vigorous action by the Crown is indeed necessary in order to aid wananga by providing them with a meaningful and sound capital base. The future educational needs of many New Zealanders are at risk.

5.5 ARTICLE 2: RANGATIRATANGA

Article 2 of the Treaty guarantees to Maori their rangatiratanga over all they possess for as long as they wish to retain it. Rangatiratanga has been examined in many Tribunal reports, but for the purpose of this claim we cite the *Report on the Muriwhenua Fishing Claim*:

4. *New Zealand Maori Council v Attorney-General*, p 517; Waitangi Tribunal, *Maori Electoral Option Report*, Wellington, Brooker's Ltd, 1994, sec 3.4

5. *New Zealand Maori Council v Attorney-General*, p 517

‘Te tino rangatiratanga o 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 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 [over] persons within the kinship group and their access to tribal resources.⁶

As we have already stated, the Treaty guarantees to Maori all that they possess for so long as they choose to retain it. However, when the Crown first became involved in the provision of education for Maori, it thought of education only in English terms, and the possibility that there was a partnership right of Maori to be educated on their terms was totally ignored. There is clear evidence that the speaking of Maori in schools was often banned, and those caught speaking Maori were likely to be punished.⁷ Despite the explicit Treaty guarantees to Maori over all they possessed and valued, matauranga Maori was systematically dismissed and erased by the English-derived education system as being worthless. This was seen by Pakeha as being a natural process of ‘civilising’ Maori, a clear example of ethnocentric thinking, which was concerned with the assimilation of Maori into the European way of life. Past legislative actions of the Crown have effectively resulted in a raupatu over matauranga Maori. It cannot be denied that the process has resulted in tragic damage to Maori society.

Wananga hope to increase the participation of Maori in tertiary education. Modern wananga are also attempting to reclaim and revitalise te reo and matauranga Maori. It is clear to the Tribunal that the three claimant wananga have demonstrated rangatiratanga in the inception and creation of their institutions. If we may paraphrase the words of Charles Royal, it is clear to us that all three wananga have taken on the responsibility to govern themselves and have accepted the responsibility of improving the lives of their students and associated communities.⁸ Wananga began as Maori initiatives designed to maintain and extend matauranga for the benefit of the living and those yet to be born. In the case of Te Wananga o Raukawa, it was realised that, unless something was done to revitalise matauranga Maori, the tribal base would be threatened socially, culturally, economically, and spiritually.

Rangatiratanga involves, at the very least, a concept of tribal self-management. The wananga that have been recognised as TEIS have all developed out of the efforts of Maori iwi groups to provide tertiary education to, in the first instance, their own people; in the second instance, Maori students; and, in the third instance, anyone

6. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec 10.3.2

7. See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker’s Ltd, 1993, sec 3.2

8. Document A44, secs 4.1.1, 4.1.5

who wishes to embrace this particular form of education. As such, the efforts of these tribal groups to create and sustain TEIS is a vital exercise of rangatiratanga.

The establishment of wananga as TEIS recognised by the State represents an attempt to engage actively with the Crown in the exercise of rangatiratanga in the management of new forms of tribal and Maori education. The Crown's Treaty obligation is to foster, support, and assist these efforts. In doing so, the Crown needs to ensure that wananga are able to remain accountable to, and involved in, the communities that created them.

The claimants contend that the Crown's failure to provide establishment funding for necessary infrastructure restricts their ability to exercise their rangatiratanga. Further to this, and as this chapter has already stated, wananga are statutorily compelled to have regard to teaching and research that maintains and advances matauranga Maori. We believe that, in not financially establishing wananga, the Crown has restricted their rangatiratanga, and thus their ability to carry out an obligation both to their own iwi and to the Crown as a TEI.

5.6 IS WANANGA A TAONGA?

Wananga is an ancient process of learning that encompasses te reo and matauranga Maori. Wananga embodies a set of standards and values. As a verb, 'to wananga' is to make use of matauranga Maori in all its forms in order to teach and learn. It is clear that te reo Maori and matauranga Maori are taonga. Wananga is given life by these taonga, and in the reciprocal nature of the Maori world, wananga also serves to give life to te reo and matauranga. Each is dependent on the others to nurture, sustain, and develop. Wananga as a system of learning, and a repository of matauranga Maori, is a taonga in its own right, but it does not exist in isolation from te reo and matauranga Maori. Modern institutions claiming status as wananga and calling themselves wananga need to demonstrate that they recognise and incorporate the set of standards and values embodied by wananga. Whether they do will in the end be judged by the communities they serve.

As the Tribunal noted in the *Report on the Muriwheuna Fishing Claim*, distortions can occur when Maori concepts are translated into Western terms.⁹ 'Wananga' has suffered this fate. It appears to the Tribunal that the Government has taken a narrow translation of the word 'wananga' to mean a Maori form of university. Mainstream universities adopting the Maori term and calling themselves 'whare wananga' reinforce this incorrect application. The use of the word 'university' is protected by legislation. The Tribunal finds it ironic that a wananga, a tikanga Maori based TEI, cannot call itself a 'university', yet a mainstream university based on tikanga Pakeha can call itself a 'whare wananga'. The Tribunal believes that the Government has a Treaty obligation actively to protect the integrity of the set of values and standards that wananga embodies.

9. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, sec 10.3.2

The Tribunal suggests that one way that the Government could carry out its Treaty obligation would be to revisit the way that the New Zealand Qualifications Authority audits modern wananga. Audits should be carried out by people with the expertise to measure and judge the set of standards and values embodied in wananga.

5.7 ACTIVE PROTECTION

In assuming the right to govern, the Crown took upon itself the duty actively to protect Maori interests. The Tribunal has stressed this in various reports and the Court of Appeal endorsed this view in 1987.¹⁰ That decision was later qualified by the broadcasting assets judgment. However, for the purposes of this claim, the Tribunal believes that vigorous action is necessary on the part of the Crown in order to protect the wananga, institutions devoted to the protection of te reo and matauranga Maori and taonga in their own right.

In 1993, the Tribunal issued the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*. That Tribunal found that:

Article 2 of the Treaty requires the Crown actively to protect the claimants' respective interests in both the benefit and enjoyment of their taonga and the mana or authority to exercise control over them. Failure to afford such protection constitutes a breach of Treaty principles.

The degree of protection given to the claimants' taonga will depend on the nature and value of the resource. The value to be attached to their taonga is essentially a matter for the claimants to determine. Such value is not confined to, or restricted by, traditional uses of the taonga. It will include present day usage and such potential usage as may be thought appropriate by those having rangatiratanga over the taonga. In the case of a highly valued, rare and irreplaceable taonga of great spiritual and physical importance, . . . the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected.¹¹

The claimants have argued that wananga are a taonga. Wananga is essentially a process of education in a Maori context. This Maori context places primary significance on matauranga Maori and te reo Maori. Despite Maori initiatives to halt the decline of te reo Maori, the language is still in a perilous state. If wananga Maori fail through a lack of establishment funding and resourcing, then the Crown will have failed an institution that devotes a significant proportion of its activities to protecting and revitalising te reo Maori, a taonga that the Crown has admitted is in need of special protection. It might be argued that other TEIs have Maori studies departments that provide this protection. While this may be true to a certain extent, te reo Maori and matauranga Maori are not central tenets to the activities of mainstream universities and polytechnics in the way they are to wananga. Wananga are statutorily

10. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA)

11. *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, pp 33–34

compelled to have regard to teaching and research that maintains ahuatanga Maori and tikanga Maori. In this regard, they are unique.

There can be no doubt that te reo Maori and matauranga Maori are highly valued and irreplaceable taonga for New Zealand. These taonga exist nowhere else. The Crown has a duty actively to protect these taonga. The Tribunal believes that wananga Maori are a modern application of an ancient process that was responsible for the protection, maintenance, and advancement of these taonga and that the Crown should move actively to ensure their viability and survival. The Tribunal is compelled to stress, in the strongest possible terms, its belief that if wananga fail because of undercapitalisation, then the Crown has done a disservice, not only to Maori but to New Zealand society as a whole.

To expect wananga to shoulder all the responsibilities of TEIS without giving them the same pre-1990 benefits of capital funding is unfair. To imply that the 1990 policy change abolishing capital establishment funding is not a Treaty issue is incorrect. Every legislative action of the Crown that affects Maori is a Treaty issue, whether the legislation makes explicit mention of the Treaty or not. The Tribunal notes, however, that the Crown, most responsibly, has acknowledged that the 1990 policy change has operated so as to place an unfair burden upon wananga. The Tribunal finds that the vision of wananga, to re-establish te reo Maori and matauranga Maori and to revitalise the aspirations of Maori people, has been prejudiced by a lack of substantial capital funding as a direct result of the new funding policy created by the provisions introduced by the Education Amendment Act 1990.

To state that missing out on capital establishment funding was ‘an unfortunate side effect’ of policy change, as suggested by Mr Catherwood, is proof to the Tribunal that the full implications of the place and the role of the Treaty of Waitangi in tertiary education were not fully realised or considered when the law was amended. It is clear to the Tribunal that the Crown was obviously expecting Maori institutions to apply for TEI status under the 1990 amendments, hence the inclusion of the wananga class of TEI. However, it is apparent to the Tribunal that the Crown was simply not prepared to pay for any establishment funding that such new institutions might require. We note, however, that the Government nevertheless saw fit to provide the Manawatu College of Education and Manawatu Polytechnic with what, the Tribunal finds, was significant additional capital funding in 1996. We query whether the Crown has applied its own policy with consistency, let alone with full consideration of its Treaty obligations.

We note further, in this respect, the question of whether the Ministry had a responsibility to consult with Maori prior to the enactment of the Education Amendment Act 1990 over the impact that it might have on Maori tertiary education. There was no consultation with iwi or the claimants about the proposed far-reaching changes to the long-established capital funding policy, which have had such a dramatic negative impact on wananga.

In regard to the New Zealand School of Dance and Drama, the Crown moved actively to protect a PTE, an institution that Mr Catherwood, in response to questioning, stated was an organisation with which the Crown had a ‘special

relationship'. In 1993, Cabinet agreed to provide a capital injection of \$1.913 million to the school. The Tribunal notes, of course, that the Crown has a special relationship with its Treaty partner that it should not lose sight of.

The Tribunal finds that the Crown is under an obligation actively to protect Maori rights. This includes the right to participate in a tertiary education in a Maori paradigm, which at this time is provided only by wananga.

5.8 ARTICLE 3: ORITETANGA (CITIZENSHIP)

Article 3 of the English version of the Treaty of Waitangi states:

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

Article 3 raises a problem of interpretation, which can be viewed in two ways. First, the traditional view of article 3 is that, in granting 'royal protection' and the rights and privileges of British subjects to Maori, this article was intended to bestow and protect Maori rights as British subjects only and to extinguish traditional Maori rights. Article 3 has often been used as a validation of Crown policy that sought to extinguish Maori tradition. This Tribunal does not share this view. While the Treaty did confirm new rights to Maori – 'the Rights and Privileges of British Subjects' – it did not deny Maori the right to be Maori.

Nowhere within the Treaty is there any suggestion, explicit or implicit, which states that Maori must abandon their rights, culture, traditions, knowledge, or world view. It is the view of this Tribunal that the Treaty confirmed to Maori their right to continue to live under their own customs and traditions, while at the same time bestowing upon them additional rights as British subjects. The two sets of rights are far from mutually exclusive.

The claimants argued that Maori have been disadvantaged, in educational terms, owing to the policies of the past, which have in turn resulted in adverse social and economic effects. It was submitted to the Tribunal that the Treaty was being breached at two levels with regard to wananga. First, wananga, as institutions that protect the maintenance of te reo and tikanga Maori, were clearly disadvantaged by the policy change that denied them capital establishment funding. Secondly, the hundreds of students who attend these wananga receive an education that is inadequately supported by resources. The claimants submitted that, if this situation is allowed to continue, it can be predicted that Maori students will develop a negative view of their institutions and the rolls of wananga will remain static, drop, or become loaded with poor achievers, resulting in a reduction of funding and available courses. The final result may well be that good staff, both full-time and kaiawhina, will leave, the capital costs will not be able to be maintained, and the wananga will be forced to close, thus denying New Zealanders the option of a tertiary education in a Maori context.

The Ministry of Education has stated that it wants to offer New Zealanders choice in education. In 1988, the Muriwhenua fisheries Tribunal discussed the principle of options and found that:

The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people . . . it was not intended that the partner's choices could be forced.¹²

If wananga close because of a lack of establishment funding, then the tertiary education options available to all New Zealanders will have been limited. If wananga fail through undercapitalisation, those who have chosen wananga will be forced to look elsewhere.

The Tribunal believes that the Crown has acted responsibly and in good faith towards Maori by statutorily recognising wananga and by charging them with the task of offering tertiary education in a Maori context. In doing this, the Crown has recognised both the right of its Treaty partner and the right of all New Zealanders to choose a Maori-controlled tertiary education.

We believe, however, that the Crown has not provided adequate protection to wananga, which have great potential to work with the Crown to help raise the development and aspirations of all New Zealanders. The Crown has stated that it wants to offer choice in tertiary education to all New Zealanders, but if the wananga fail, the Tribunal believes that there will be no real choice, for Maori or non-Maori, within the tertiary system at this time.

12. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, sec 10.5.4