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**TE REO MĀORI AS A LANGUAGE OF NEW ZEALAND LAW:
THE ATTAINMENT OF CIVIC STATUS**

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Abstract

In July 2011 the Waitangi Tribunal released Wai 262, its report on the indigenous flora and fauna claim. In the report, the Tribunal signalled “a deep-seated fear for the survival of te reo” and found that the language was in a state of “renewed decline”. To date, revitalisation initiatives have focussed largely on stemming language decline in the community. Comparatively little attention has been given to the need to develop te reo Māori in the civic life of the state; in particular, as a language of law and legal process. This dissertation argues that if te reo Māori is to survive in the 21st century, it must develop as a fully functional language of New Zealand law. This dissertation critiques the domestic and international instruments that protect the right to use te reo Māori in civic contexts, and identifies three developments that are necessary for te reo Māori to achieve full functionality as a legal language. The first is the provision of an unqualified right to use Māori in the law-making process. The second is the use of Māori in the substantive enactment of law. The third is a principled and consistent approach to drafting and interpreting Māori words and provisions in statutes.

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Subjects and Topics

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I Introduction

In July 2011, the Waitangi Tribunal released *Ko Aotearoa Tēnei*, its long anticipated report on the indigenous flora and fauna claim.¹ The report was, in the Tribunal's words, the first "whole of government inquiry",² and considered the extent to which the law adequately recognises the relationship between Māori and their culture, traditional knowledge and intellectual property. The broad scope of the claim was significant because it afforded the Tribunal an opportunity to consider the current state of te reo Māori and in particular, whether the efforts by both the Crown and Māori over the past 30 years have ensured the survival of the language. The Tribunal found that, despite the recommendations made 25 years earlier in the *Te Reo Māori Claim*, te reo Maori is in a state of renewed decline:³

...there must be a deep-seated fear for the survival of te reo. The number of speakers is down in the key younger age groups, and older speakers with the highest fluency – whose language comprises the unique tribal variations of te reo – are naturally declining in number. For all the rhetoric about forward progress, even the Crown's key witness conceded that there was still a need for 'life support'.

This dissertation argues that in order for te reo Māori to survive as a language of the 21st century, it must become a language of the civic realm; in particular, a language of New Zealand law and legal process. The term 'civic' loosely encapsulates a range of discourses in the public sphere, including national and international politics, business, economics and government. However, its core meaning relates to the rights and duties of citizenship according to the law.⁴ A civic language is the medium that enables the exercise of those rights, and includes access to government departments, public institutions, and courts.

¹ The original claim was lodged on 9 October 1991 by six claimants and their iwi. The claimants were Haana Murray (Ngāti Kuri), Hema Nui a Tawhaki Witana (Te Rarawa), Te Witi McMath (Ngāti Wai), Tama Poata (Ngāti Porou), Kataraina Rimene (Ngāti Kahungunu), and John Hippolite (Ngāti Koata).

² Waitangi Tribunal *Ko Aotearoa Tēnei – A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 2 at [xxv] [*Ko Aotearoa Tēnei*].

³ Ibid at [5.5.8].

⁴ Eerik Lagerspetz "On Language Rights" (1998) 1 ETMP 2, 181 at 183.

To date, little has been done to support the development of Māori as a civic language of New Zealand.⁵ With relatively few exceptions, English remains the language through which government policy is formulated and implemented, Bills debated and laws enacted in Parliament, as well as the language in which arguments are presented before, and judgments delivered by, New Zealand courts. Amongst the wider lay community, English is also the primary language of political and legal discourse. While there has been some public recognition of the legal status of te reo Māori as a taonga under art II of the Treaty of Waitangi (the Treaty), it remains largely excluded from, and underutilised within, the civic realm.

A Achieving civic status

Stephen May has identified two processes necessary for a language to achieve civic status within a state; legitimisation and institutionalisation. Legitimation refers to the formal recognition that a state affords to a language, “usually, by the constitutional and/or legislative benediction of official status”.⁶ However, formal legitimisation alone is not sufficient. For substantive legitimisation to occur, the state must also provide concomitant legal rights to enable and promote the use of the language in the public sphere in order for civic discourse to develop.⁷

One consequence of providing rights to use Māori is that adequate resources must be provided to sustain and protect the exercise of those rights. While te reo Māori has at times achieved official status for certain functions within colonial governance and administrative frameworks, the absence of a set of principled legal rights to secure such use, and the provision of resources to accompany such use, has prevented te reo Māori from gaining civic status in New Zealand.

⁵ Māmari Stephens and Phoebe Monk “A Language for Buying Biscuits? Māori as a Civic Language in the Modern New Zealand Parliament” (24 January 2012) Social Science Research Network <www.ssrn.com> at 2.

⁶ Stephen May “Language Education, Pluralism and Citizenship” in Nancy Hornberger (ed) 1 *Encyclopedia of Language and Education* (2nd ed, Springer, New York, 2008) 15 at 18.

⁷ *Ibid*, at 25.

The second process identified by May is institutionalisation, which refers to the normalisation of the language in a “wide range of social, cultural and linguistic domains or contexts both formal and informal”.⁸ Within the legal domain, institutionalisation refers to the process by which a language becomes adopted by a state as it carries out its law-making and administrative functions. This primarily includes the language in the public service and various government departments in its engagement with citizens. Historically, Māori was used extensively as an institutional language both before and after the signing of the Treaty of Waitangi. However, since 1910 the use of te reo Māori in government declined dramatically, and has largely been replaced by the mainstream use of English.⁹

While legitimisation and institutionalisation are necessary for a language to develop in the civic sphere, those criteria alone do not secure permanent civic status. The most widespread languages today are civic language because they are “functional” legal languages in the civic realm; that is, they are recognised and given effect to as languages of substantive law and legal process. This includes the language of statutes and court judgments, as well as the language of processes that lead to the creation and enactment of law; in Parliamentary debates, legislative drafting and in legal proceedings.

Te reo Māori was, historically, a functional legal language of the colonial state. The Treaty of Waitangi, land deeds between Māori and the Crown and wills were written in Māori. As such, the language initially had a high civic status. However, as the nineteenth century progressed, the language was seen as a barrier to civilisation by both Māori and non-Māori.¹⁰ In 1862, Hugh Carleton MP stated, “...civilisation cannot be attained through the medium of an uncivilised and imperfect language”.¹¹ This sentiment caused te reo Māori to become excluded from the civic realm.

⁸ Ibid, at 18.

⁹ Stephens and Monk, above n 5, at 1-2.

¹⁰ Ibid, at 4.

¹¹ Hugh Carleton “On Native Schools in Auckland” [1862] 1 AJHR E4 at 16.

B The argument of this thesis

This dissertation argues that if te reo Māori is to survive, Māori must become a fully functional legal language in civic society. Chapter Two explores why the development of te reo Māori as a civic language is important to New Zealand. It considers how te reo Māori has declined as a language of the civic realm, and argues that civic development is important for the long-term survival of the language in the 21st century.

Chapter Three critiques the existing body of national and international rights that protect the use of Māori in the civic contexts, and suggests that the Treaty of Waitangi provides an appropriate framework to protect the existing use of Māori in the community and support the future development of Māori as a civic language. Chapter Three also argues that the Treaty is a principled and coherent framework to achieve civic status.

Chapters Four, Five and Six make suggestions to facilitate the development of Māori as a functional legal language by building on the existing use of Māori in law. Three characteristics are identified which are necessary for any language to become “functional” in the legal system. Chapter Four explores the first development, which is an unqualified right to use Māori in the primary institutions in the civic realm; most importantly, in Parliament and the courts. Chapter Four argues that the Māori Language Act 1987 (MLA) should be amended to provide an unqualified right to use Māori in the courtroom.

Chapter Five explores the second characteristic of a functional legal language, which is the use of a language in legal instruments to produce substantive legal outcomes; in statutes and in documents that confer legal rights and obligations, such as contracts, deeds and wills. Chapter Five explores the discrepancies between the historical and contemporary uses of Māori in substantive law, and concludes that the language is rarely put to substantive legal effect when incorporated into statute, and interpreted and applied by judges.

Chapter Six discusses the third characteristic of a functional legal language, which is the existence of a consistent and principled process for legislative drafting and clear

principles for statutory interpretation of the language. Chapter Six argues that New Zealand should adopt a co-drafting approach to bilingual enactments, such as preambles to Treaty settlement legislation, to give equal status to the Māori text of any provision. To supplement equal status, Chapter Six argues for an amendment to the Interpretation Act 1999 to require judges to give equal weight to the Māori version of any statutory provision.

Chapter Seven discusses the courts' approach to the interpretation of single Māori words and phrases in legislation. Chapter Seven contends that tikanga Māori should play a greater role in determining the meaning of Māori words according to the principles of statutory interpretation, and argues for an amendment to the Interpretation Act 1999 to require all Māori words to be interpreted consistently with tikanga Māori.

II *Why Civic Development Is Important*

To provide context, this chapter considers the decline of te reo Māori from the civic realm. It then argues that, to date, language revitalisation has largely been focussed on stemming language decline in the community. This chapter contends that in addition to supporting community language revival of te reo Māori, the civic realm has an equally important role to play in ensuring long-term survival. Chapter Three identifies the Treaty of Waitangi as a coherent and principled framework to achieve this.

A *The period of decline*

The exclusion of te reo Māori from the civic realm can be considered in four stages. The first stage, from roughly 1835 to 1865, can be characterised as a period where te reo Māori had a high civic status.¹² This can largely be explained by the efforts of early colonial officials to institute English law in New Zealand by persuading Māori communities of its merits.¹³ While te reo Māori had no official legal status, it had a visible functional presence in the establishment of the colonial legal system, primarily through the Declaration of Independence and the Treaty of Waitangi which were written in both English and Māori. Deeds for the sale of land and wills were also commonly written in English and Māori during this period.

With the exception of Governor Grey, colonial governors sought to disseminate numerous types of legal information in te reo Māori through Māori newspapers and government publications like *Te Kāre o Niu Tīreni*. These included proclamations, ordinances, treatises and court judgments.¹⁴ While most of these early documents were distributed to Māori communities without any genuine commitment to encouraging bilingual civic discourse per se, discussion of official documents, such as the Treaty, nevertheless filtered into Māori-speaking communities, creating civic dialogue. There

¹² Stephens and Monk, above n 5, at 3.

¹³ For a detailed historical account, see Edwin Thomas Fletcher *A Rational Experiment: The Bringing of English Law to New Zealand* (MA (History) Thesis, University of Auckland, 1998) at 61-63, 131-147.

¹⁴ The Legal Māori Project, a research project run at Victoria University of Wellington, has amassed a substantial body of source texts that provides evidence for the range of sources for the historical period (pre-1910). Most of these texts are contained in the Legal Māori Archive, which is publicly available at <www.nzetc.org>.

are numerous examples of petitions to the Crown written in Māori before 1910, as well as letters between prominent Māori chiefs that demonstrate that te reo Māori had a high civic presence in the community.¹⁵

The second stage, from 1865 to 1900, saw te reo Māori gain formal legitimisation as a language of Parliament. From 1868, the Standing Orders of the House of Representatives (the House) required Bills and Acts to be translated into Māori.¹⁶ Although the Standing Orders of both Houses did not expressly permit addresses in Māori, the language itself was accommodated out of necessity. However, governments repeatedly failed to provide adequate resources to allow Māori Members to exercise the rights that followed from legitimisation. The printing of Bills and Acts in Māori, and their distribution to Māori communities, was irregular at best.¹⁷ In terms of the use of Māori in Parliament, there was a heavy expectation that Māori members would speak English and very little was provided in terms of translators to assist their understanding of the proceedings or the speeches of other members.¹⁸ Furthermore, there was no organised system of reporting Māori MP's speeches in Māori.

While formal legitimisation of te reo Māori in the legal system occurred, substantive legitimisation was lacking because it was predicated on the belief that Māori would eventually acquiesce to the use of English in their interactions with colonial officials and state institutions.¹⁹ The only mediums of political communication in Māori to the public during this period were *Te Kāhiti o Niu Tirenī* and Māori newspapers, many of which, such as *Te Hoa Māori*, *Te Puke ki Hikurangi* and *Te Kōpara*, continued well into the 20th century.

¹⁵ For a few examples, see Henere Te Herekau "Petitions re Māori Representation in Parliament" [1865] 1 AJHR G11. "Petition of 300 Maories of Hawkes Bay, Wairoa, Turanga and Taupo" [1873] 3 AJHR J6; Reha Aperahama "Aperahama Petition" [1877] 1 AJHR J3.

¹⁶ Standing Orders of the House of Representatives 1878, SO 355.

¹⁷ See Phil Parkinson "'Strangers in the House': The Māori Language in Government and the Māori Language in Parliament 1865-1900" (2001) 32 VUWLR at 1-3 and 39-40.

¹⁸ Ibid, at 14-15.

¹⁹ Stephens and Monk, above n 5, at 3.

The third stage, from approximately 1900 to 1975, was a period of dramatic decline in the civic status of te reo Māori. Legitimation declined as Māori was discouraged as a language in the House. In 1913, the Speaker of the House ruled that Māori MPs should speak in English if able to.²⁰ While initially Māori MPs strove to continue using te reo Māori in the House, by the 20th century it was deemed a largely ineffectual medium of Parliamentary discourse by politicians and even Māori MPs themselves.²¹ Māori newspapers gradually ceased as fluency amongst the Māori population declined, causing profits to shrink.²² Education in Māori, and speaking Māori at schools, was actively discouraged. Bruce Biggs has noted that fluency amongst Māori schoolchildren declined from 90 per cent in 1913 to 55 per cent in 1950, to a mere five per cent in 1975.²³ As a result of the normalisation of English, the use of Māori in the civic realm declined.

During fourth stage, from 1975 to the present, there was a gradual increase in the legitimation of te reo Māori as a language of the civic realm. This is largely due to the efforts of Māori groups, such as Ngā Tamatoa, who called for official recognition of te reo Māori. The establishment of educational institutions, such as Te Ataarangi and Te Whare Wānanga o Raukawa in the 1980s led to increased community awareness and engagement with te reo Māori and a realisation that official recognition was vital to its on-going survival. In 1986 the Waitangi Tribunal released Wai 11, the *Te Reo Māori Claim*, which found that there was an urgent need for “an Act that restores proper status to the Māori language as something valuable that we acknowledge to be valuable” and gives “the Māori language its rightful place in our community”.²⁴ The Tribunal’s inquiry influenced the passing of the Māori Language Act 1987, which gave Māori official

²⁰ (1 August 1913) 163 NZPD at 368.

²¹ Parkinson, above n 17, at 48.

²² Jenifer Curnow and others (eds) *Rere atu Taku Manu – Discovering History, Language and Politics in the Māori Language Newspapers* (Auckland University Press, Auckland, 2002) at 33.

²³ *Ko Aotearoa Tēnei*, above n 2, at [5.3.1].

²⁴ Waitangi Tribunal *Te Reo Māori Claim* (Wai 11, 1986) at [8.1.7] [*Te Reo Māori Claim*].

language status,²⁵ provided certain rights to use the language in legal proceedings²⁶ and established the Māori Language Commission.²⁷

Māori has also become legitimised as a language of Parliamentary debate. In 1985 the Standing Orders of Parliament recognised that Māori or English could be used during debates,²⁸ and in 1997 the Speaker ruled that any MP could speak in Māori as of right if an interpreter was provided.²⁹ There has also been an increase in the use of Māori words and passages in statutes, such as the Resource Management Act 1991 (RMA) and Treaty settlement statutes.³⁰ However, despite the recent increase in the status of te reo Māori, it has not yet emerged as a fully-fledged civic language. It is not, for example, an ordinary language of legal enactment, despite the “pepper-potting” of Māori words in various statutes.³¹ Nor is te reo Māori an ordinary language of New Zealand courts, despite regular use in the Māori Land Court and the Waitangi Tribunal.

B Community-based revitalisation

The predominant view in language revitalisation literature is that the most immediate need for reviving an endangered language is to increase the pool of native speakers and their communities.³² This view emphasises the importance of supporting initiatives that encourage the use of the language for everyday affairs in private domains; particularly in the home where intergenerational transmission occurs. As Chrisp argues, “the heart of minority language revitalisation is the normal, daily,

²⁵ Māori Language Act 1987, s 3.

²⁶ Section 4.

²⁷ Section 6.

²⁸ Standing Orders of the House of Representatives 1985, SO 151.

²⁹ (22 July 1997) 562 NZDP 3192.

³⁰ Ministry of Justice *He Hīnātore ki te Ao Māori* (March 2001) at iii.

³¹ The term “pepper-potting” was used by Catherine Iorns in a recent article in the Victoria University of Wellington Law Review on the use of “tangata whenua” and “mana whenua” in legislation. See Catherine Iorns- Magallanes “The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition” (2011) 42(2) VUWLR 259 at 262.

³² See Bernard Spolsky “Maori bilingual education and language revitalisation” (1989) 10(2) JMMD 89.

repetitive and intensely socialising and identity-forming functioning of home, family and neighbourhood”.³³ Furthermore, given limited government funding, developing Māori as a civic language, much less a functional language of law, is arguably an unaffordable luxury. As Fishman argues, “the haemorrhaging of the main arteries must be stopped first, well before major attention is devoted to poetry journals, to astrophysics and to the world of international power politics”.³⁴

This view reflects the focus on most revitalisation initiatives in New Zealand currently, which prioritises initiatives in the home and the community rather than in civic society as a whole. There is ample evidence to support this observation. The lion’s share of government expenditure is spent on community-based initiatives to revitalise the language. For example, out of the \$600 million spent between 2008 and 2009, \$502 million was spent on education, \$80 million on Māori broadcasting and \$5 million on arts and culture.³⁵ There is no indication of expenditure incurred for accommodating the use of Māori in public institutions or courts for example, which suggests that civic development is not a priority for language revitalisation.

Further, the Māori Language Strategy 2003 (the Strategy), which set 25 year targets for developing te reo Māori, largely ignores the civic realm. Goal 2 identifies government agencies as one of eight “key domains” in which, by 2028, te reo Māori will be in common use. This seems to reflect the recommendation of the Waitangi Tribunal in the *Te Reo Māori Claim* which emphasised the right to use Māori with any public department or body.³⁶ However, in a report in 2007 the Auditor-General identified that government agencies had chosen to ignore providing public services in Māori:³⁷

³³ Steven Chrisp “Home and Community Language Revitalisation” (1997) 3 NZSAL 1 at 5-6.

³⁴ Nancy Hornberger and Martin Putz (eds) *Language Loyalty, Language Planning and Language Revitalization – recent writings and reflections from Joshua A Fishman* (Cromwell Press, Clevedon, 2006) at 215.

³⁵ Te Paepae Motuhake and Te Puni Kōkiri *Te Arotakenga o te Rāngai Reo Māori me te Rautaki Reo Māori: Review of the Māori Language Sector and the Māori Language Strategy* (April 2011) at [57] [*Te Arotakenga o te Rāngai Reo Māori*]. Available at <www.tpk.govt.nz>.

³⁶ *Te Reo Māori Claim*, above n 24, at [8.2.8].

³⁷ Office of the Auditor-General *Implementing the Māori Language Strategy* (November 2007) at [3.4.4].

In some cases, agencies have chosen to prioritise activity in some of their areas of responsibility above activity in other areas. For example, Te Taura Whiri has done few of the planned activities related to providing public services in te reo Māori. Staff at Te Taura Whiri and Te Puni Kōkiri ...consider this a lower priority than their other responsibilities, because it makes a lesser contribution to language revitalisation than other activities.

In a follow up report in 2009, the Auditor-General identified an urgent need for Te Puni Kōkiri and other lead agencies to “give the [S]trategy more attention”.³⁸ There remains no coordinated framework to achieve any widespread use of Māori in government, nor is there any determined effort by government agencies to provide public services in Māori. As a result, very few government agencies have Māori language plans.³⁹

The emphasis on community-based revitalisation was reiterated by a 2011 review of the Māori Language Strategy. Te Paepae Motuhake, an independent panel of Māori language experts⁴⁰ and Te Puni Kōkiri suggested that priority funding be given to programmes that work with “*families and communities* that have made a commitment to te reo Māori”.⁴¹ The primary recommendation of the review was to ensure “significant numbers of Māori language speaking homes”, with the goal that 80 per cent of Māori will be speaking te reo Māori by 2050.⁴² No recommendation was made to support the use of Māori in the civic domain.

The emphasis on stemming language decline in the community is understandable given that if Māori does not survive in the home, legislating the right to use it, for any purpose, is meaningless. As Waite states, “[i]f Māori speakers are not committed to

³⁸ Office of the Auditor-General *Performance audits from 2007: Follow-up Report* (March 2009) at 20. The lead agencies are Te Puni Kōkiri, Te Taura Whiri i te reo Māori, the Ministry for Culture and Heritage, the Ministry of Education, Te Māngai Paaho and the National Library.

³⁹ *Ko Aoteroa Tēnei*, above n 2, at [5.5.6(2)(b)].

⁴⁰ Te Paepae Motuhake were appointed as an independent panel of seven Māori language experts representing the different dialectal regions of Aotearoa.

⁴¹ *Te Arotakenga o te Rāngai Reo Māori*, above n 35, at [82]. [Emphasis added].

⁴² *Ibid*, at [80].

using their language on a regular basis, in home and community settings, all other attempts at language revitalisation are mere rhetoric”.⁴³ This view is reinforced by calls from Māori to “whakahokia te reo i te mata o te pene, ki te mata o te arero”,⁴⁴ and to “whakahokia te reo ki te kainga”.⁴⁵ Similarly, Te Aho Matua, the curriculum for Māori-medium education, identifies the futility of legislative protections if the language is not used and cherished by Māori themselves.⁴⁶

He taonga te reo Māori i roto i te Tiriti o Waitangi, he reo tūturu hoki i roto i te Ture mō te Reo. Engari kāhore he painga o te Tiriti, o te Ture rānei, mehemea kāhore te reo i roto i te whatumanawa, i roto i te ngākau, i roto hoki i te māngai o te iwi Māori.

As Chrisp points out, while government institutions provide necessary support for the language, “they cannot generate language revitalisation by themselves”.⁴⁷ However, any long-term survival strategy must recognise the importance of the civic realm.

C Civic development

In addition to increasing the pool of native language speakers, it is also generally accepted that language revitalisation involves increasing the domains in which the language is used, and extending the vocabulary of the language where necessary.⁴⁸ While the efforts made to ensure intergenerational transmission of the language is maintained in homes, and therefore in communities, only through increasing the

⁴³ Jeffrey Waite *Aotearoa: Speaking for Ourselves* (Learning Media Ltd, Wellington, 1992) at 31.

⁴⁴ ‘Return the language from the pen to the tongue’. See interview with Dr Rangi Mataamua, Māori language expert (Te Pūmanawa o te Reo Māori, Marae Investigates, 23 July 2012).

⁴⁵ ‘Return the language to the home’. See *ibid.*

⁴⁶ ‘Māori is a taonga according to the Treaty of Waitangi, and it is also an official language according to the Māori Language Act. However, there is no substance in the Treaty, or the Act, if the language is not embedded in the hearts, minds and mouths of the Māori people.’ [Translated by author]. See “Official Version of Te Aho Matua o Ngā Kura Kaupapa Māori” (Friday 22nd February 2008) 32 *New Zealand Gazette* 733 at [2.3].

⁴⁷ Chrisp, above n 33, at 1.

⁴⁸ Jeffrey Waite, above n 43, at 30.

domains in which the language is applied functionally will the language survive. As Florian Coulmas argues:⁴⁹

Today the future of many languages is uncertain not only because their functional range is scaled down, but because they are never used for, and adapted to newly emerging functions which are associated with another language...Lack of functional expansion is thus a correlate and counterpart of scaled-down use. In conjunction, both contribute to diminishing the serviceability and utility value of many languages.

Supporting te reo Māori in private domains is necessary to stem the decline of the language. However, it does not ensure the language will survive in the long-term. Languages must also be visible in the civic realm to survive. As Kymlicka states:⁵⁰

...it is very difficult for languages to survive in modern industrialised societies unless they are used in public life. Given the spread of standardized education, the high demands for literacy in work, and widespread interaction with government agencies, any language which is not a public language becomes so marginalized that it is likely to survive only amongst a small elite, or in a ritualized form, not as a living and developing language underlying a flourishing culture.

In particular, five arguments support the need for civic development. Firstly, civic development is necessary because it increases the domains in which Māori can be used, thereby contributing to its survival. The Tribunal in 1986 accepted the evidence of Dr Richard Benton, who pointed out that “languages are learned and established most effectively through use in a wide variety of contexts”.⁵¹

⁴⁹ Florian Coulmas *Language and Economy* (Blackwell, Oxford, 1992) at 170.

⁵⁰ Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995) at 78.

⁵¹ *Te Reo Māori Claim*, above n 23, at [3.3.4].

Secondly, civic development is necessary because it causes the language to adapt to new domains, thus growing the functionality of the language itself. As Nelde argues:⁵²

[If] a language were to be completely barred from the relations with the authorities, it would in fact be neglected as such, for language is a means of public communication and cannot be reduced to the sphere of private relations alone...if a language is not given access to the political, legal or administrative sphere, it will gradually lose all its terminological potential in that field and become a 'handicapped' language, incapable of expressing every aspect of community life.

Thirdly, civic development has the effect of, in May's words, imbuing the language with "high status" by providing the Māori-speaking community with greater access to key areas of the public realm; politics, government, and the economy.⁵³ In the legal domain specifically, civic development will enable Māori to participate meaningfully in democratic processes. The Waitangi Tribunal in 2011 saw this as a necessary development for the language to survive, even suggesting that survival depended not only on accommodating the use of Māori in official contexts, but also on Māori become a language of the Crown itself:⁵⁴

To ensure the survival of the language, the Government's goal must be for a significant proportion of Māori people to be able to speak Māori in future. That goal must be supported by a plan for how these people will be able to engage with the State in te reo, which they will surely want to do. Any progress in the speaking of Māori by Māori, therefore, must be matched by the State – otherwise, the familiar pattern of supply falling well short of demand will be repeated...

Fourthly, civic development has the correlative benefit of allowing Māori to participate in public life without having to sacrifice their language and identity. This point was

⁵² Peter Nelde "Language Conflict" in Florian Coulmas (ed.) *The Handbook of Sociolinguistics* (1997, London, Blackwell) 285 at 300.

⁵³ Stephen May "Language Rights – Moving the debate forward" (2005) 9(3) *Journal of Sociolinguistics* 319 at 322-323.

⁵⁴ *Ko Aotearoa Tēnei*, above n 2, at [5.3.3(2)].

made by Stanley Callaghan, the Secretary for Justice, before the Waitangi Tribunal in 1986 in support of official recognition in the courtroom. Callaghan pointed out that:⁵⁵

While the present arrangements may provide for justice to be done in a strict, legalistic sense, a Maori may have an overwhelming sense of grievance and loss of dignity felt through being unable, because of fluency in English, to speak Maori in a court in his own land. That may give rise to such a deep-seated sense of injustice as to prejudice the standing of the courts in some Maori eyes.

Finally, many Māori feel that using the language in civic spheres is important to revitalisation. In a 2009 study of the attitudes and beliefs towards the language, 79 per cent of Māori (whether proficient in the language or not) agreed or strongly agreed that “it would be good if Government departments could conduct business in Māori if requested”.⁵⁶ In an earlier study on attitudes towards te reo Māori in the Whanganui region, a majority of proficient Māori speakers (66 per cent) thought it was important to be able to use Māori language in dealings with public institutions.⁵⁷

To facilitate this, there has been growing recognition of the importance of identifying and disseminating a standardised vocabulary to enable the use of Māori in government frameworks.⁵⁸ This work is already well underway. The Legal Māori Project at Victoria University of Wellington will publish a dictionary of legal Māori terms in early 2013. The aim is to address the need for an accessible vocabulary in legal contexts where one wishes to speak Māori, such as the Māori Land Court. To take another example, in 2005, the first Māori dictionary of business terms was published. A second

⁵⁵ *Te Reo Māori Claim*, above n 23, at [8.2.6].

⁵⁶ Te Puni Kōkiri *Survey of Attitudes, Values and Beliefs towards the Māori Language* (2009) at 19 available at <www.tpk.govt.nz>.

⁵⁷ Ian Christensen and others “Te Hoe Nuku Roa: Māori Language in the Manawatū Whanganui Region: Analysis and Discussion of Preliminary Findings” (1997) 2(2) *He Pūkenga Kōrero* 24 at 26.

⁵⁸ See Timoti Karetu “Tōku Māpihi Maurea o Tuawhakarere: Māori Language and Culture” in Bernard Kernot and Alistair McBride (eds) *Te Reo o te Tiriti Mai Rānō: The Treaty Is Always Speaking* (Victoria University of Wellington, Wellington, 1989). Karetu argues that: “while remaining wary of conforming forces, it is inevitable that some standardisation of terms is desirable, such as legal terms and terms for government departments” at 76.

edition was published in 2012.⁵⁹ There is therefore a demand to use Māori in contexts outside of the home which must be met if the language is to be useful and effective in modern society.

D Community revitalisation or civic development?

Benton has argued that “[w]ithout full official recognition, and concomitant measures in education, broadcasting, and public life generally, the future for the Māori language is bleak”.⁶⁰ This difficulty is exacerbated when language revitalisation is presented as a choice between developing Māori in the public *or* the private sphere, rather than seeing both as necessary and complementary to language survival. The former was reiterated recently by Hon Hekia Parata in a recent television interview:⁶¹

...it’s really important for us to have a clear concept of why we want te reo Māori. Do we want it to be a government language or an academic language, or do we want to celebrate our births, our christenings, our marriages, our 21sts...do we want to be able to hear it...in the sides of sportsfields, on sportsfields, on streets, at dances.

To survive te reo Māori needs to be a language for all of these things. As Stephens and Monk state, “...a large part of the battle for revitalisation of endangered indigenous languages must be to fight for such transformation within the civic as well as the private sphere”.⁶²

However, provision for the civic development of te reo Māori has been piecemeal. Firstly, there has been no substantial change to the legislative framework. In fact, the only substantial legislative development in the last 25 years has been the Maori Language Amendment Act 1991. This Act marginally expanded the settings where a

⁵⁹ Naomi Smith and Miriana Ikin *Taking Care of Business: Business Terms in Aotearoa: English-Māori Business Dictionary* (Aotahi Ltd, Te Kuiti, 2005).

⁶⁰ Richard Benton “From the Treaty of Waitangi to the Waitangi Tribunal” in Walker Hirsch (ed) *Living Languages: Bilingualism and Community Languages in New Zealand* (Heinemann, Auckland, 1987) 63 at 72.

⁶¹ Interview with Hon Hekia Parata, Minister of Education (Te Pūmanawa o te Reo Māori, Marae Investigates, 23 July 2012).

⁶² Stephens and Monk, above n 5, at 2.

person can exercise their right to speak Māori. The Act includes all courts, but only six of the 25 statutory authorities administered by the Ministry of Justice.⁶³

Secondly, although 25 years has elapsed since the MLA was passed, there is still a significant degree of legal uncertainty about the civic status of the language; in particular, what official recognition under the Act actually means.⁶⁴ It is not clear whether there exists a right to use Māori in official contexts not expressly provided for in the Act. For example, the MLA does not expressly protect the right to use Māori before Parliamentary select committees or local bodies. This is despite the clear preference in the *Te Reo Māori Claim* for an unqualified right to use Māori with any public institution.⁶⁵

Thirdly, even in contexts where the right to use Māori is provided for in the MLA and actively exercised, accommodation of the language is sporadic at best. Only recently has simultaneous translation been available during Waitangi Tribunal hearings,⁶⁶ and no such service is yet available in the Maori Land Court.⁶⁷ This fact prompted the Tribunal to observe that “[i]f such deterrents to the use of Māori are found in the Māori Land Court, the impediments to its free use elsewhere can only be imagined”.⁶⁸ Furthermore, the Māori Land Court Rules 2011 provide no right to use Māori in the courtroom.

In conclusion, the government’s focus on language development in the private domain, and the comparative lack of attention given to the public domain, has precluded Māori from developing civic status alongside English. If Māori is to become a language which is a functional part of New Zealand society, emphasis must be given to

⁶³ Maori Language Amendment Act 1991, s 3(2). See also Māmari Stephens “Taonga, Rights and Interests: Some Observations on Wai 262 and the Framework of Protections for the Māori Language” (2011) 42(2) VUWLR 241 at 251.

⁶⁴ See Māmari Stephens “Taonga, Rights and Interests: Some Observations on Wai 262 and the Framework of Protections for the Māori Language” (2011) 42(2) VUWLR 241 at 249.

⁶⁵ *Te Reo Māori Claim*, above n 23, at [8.2.8].

⁶⁶ *Ko Aotearoa Tēnei*, above n 2, at [5.5.6].

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

its development in the civic domain. The next section critiques the domestic and international rights framework in place that protects the right to use Māori in civic contexts. It concludes that the Treaty of Waitangi provides a principled and coherent framework to protect the existing use of Māori and to develop the language in the civic realm.

III *Legitimation: Is There An Effective Legal Framework?*

Section 3 of the Māori Language Act 1987 recognises Māori as an official language of New Zealand. However, for civic development to occur in a way that encourages the language to develop and secures the functionality of Māori in the legal system, the state must also provide sufficient body of rights to both enable and promote the use of Māori in the civic sphere;⁶⁹ that is, minority language rights must not only protect the use of minority languages within linguistic communities themselves, but must also extend to the interactions that occur between citizens and the state. The following paragraphs outline the general principles of minority language rights and then applies them to the New Zealand context.

A *'Community-use rights' and 'state-use rights'*

Minority language rights can generally be considered according to two related aspects.⁷⁰ Firstly, the right to use a minority language ensures that an individual is able to engage with his or her minority using the language of that minority (community use rights). Secondly, the right to language ensures that the minority language can be used by citizens when engaging with the state and its institutions (state use rights). As Charlotte Connell states, the efficacy of state use rights depends on the kind of status it is given in the legal system:⁷¹

...the status given to a minority language by the State not only affects how the language is viewed by the minority and society in general, but also affects the way minority groups participate effectively in the governance of the state (both as subjects and contributors of policies and the law).

Community use rights are important for civic discourse to develop because it ensures that ideas of governance and law are able to be discussed amongst the minority

⁶⁹ Stephen May *Language and Minority Rights – Ethnicity, Nationalism and the Politics of Language* (2nd ed, Routledge, New York, 2012) at 160-161.

⁷⁰ See Charlotte Connell "The Right to Language and Its Contemporary Significance for New Zealand" (LLM Dissertation, Victoria University of Wellington, 2006) at 2.

⁷¹ Ibid.

community free of interference from the state. Furthermore, community use rights support the intergenerational transmission of the language, ensuring its on-going survival.

However, state use rights are more important to civic language development for two reasons. Firstly, when citizens participate in a democratic or state-mandated process, such as presenting a submission before a select committee hearing or arguing a case before a court of law, and exercise their right to use a minority language when doing so, the institution is forced to make operational adjustments necessary to allow the language to function as part of its practice. Such institutional change can have the obvious benefit of encouraging those citizens to participate more in democratic processes of the state using their own language. This can be seen in Parliament, where the use of Māori has increased dramatically since the Standing Orders were amended in 1985 and interpreters made freely available.

Secondly, the emphasis placed on state institutions being open and accessible to the public (not only courts and tribunals but also government agencies) provides the impetus needed for civic discourse to spread throughout the wider community. For these reasons, this chapter focuses specifically on the right to use the minority language vis-à-vis the state.

B The relational aspect of the right to language

In contrast to other rights such as the right to freedom of religion or freedom of expression, the right to language is relational.⁷² This means that the right is exercised in association with another person or group and requires active assistance.⁷³ In relation to community use rights, the right to a minority language is a shared right and “presupposes the existence of a relatively large and stable linguistic community, (a “single context”)”⁷⁴ such that individuals that exercise that right within their community can be understood. This was affirmed by the Court of Appeal in *Quilter v Attorney*

⁷² Lagerspetz, above n 4, at 184.

⁷³ See *ibid*, at 183; and Connell, above n 70, at 14.

⁷⁴ Lagerspetz, above n 4, at 187.

General when Thomas J considered whether the right to language attaches to an individual or a minority group:⁷⁵

The notion that rights attach to the individual has its origin in the ideal of guaranteeing to individuals certain rights and freedoms against the power of the State. But this does not mean that a number of rights are not exercised in association with others...It is not unrealistic to recognise that the individual's "right" may be shared with others. Rights do not exist in isolation and many have a relational aspect to them. Whilst the right may apply to an individual, it is that individual's relationship to another person which gives rise to the right.

The principle that the right to language is exercised in association with another person and requires external assistance logically applies vis-à-vis the state. If a state chooses to recognise the right to use language in official contexts, it follows the state must develop mechanisms that ensure that citizens who use the language are understood. As Eerik Lagerspetz states, the right to language:⁷⁶

...implies the right to be understood – not universally, of course, but in contexts which are important to us as citizens, as full members of a political community. Basically, it is...a right to use one's own language in everyday affairs, in business life, in courts and bureaucracies, in culture and in politics...

Therefore, language rights vis-à-vis the state places a de-facto duty on the state to accommodate the use of the language in its own governmental and administrative frameworks. However, a state decides for itself *how* to accommodate the use of that language in official contexts by reference to legislation or policy. At one end the state might merely provide a *space* for citizens to use a minority language without assuming any legal obligation to become proficient in the language itself. On the other hand, not only might a state permit its citizens to use a minority language, but it might also endeavour to speak and use the language itself and adopt it as part of its ordinary business. Where a state sits on this spectrum depends on how the right to use a minority

⁷⁵ *Quilter v Attorney General* [1998] 1 NZLR 523 (CA) at 535-536.

⁷⁶ Lagerspetz, above n 4, at 184.

language is legitimised by the state, and how those rights and duties are operationalised within the legal system. These points are considered below in the New Zealand legal context.

C The right to use Māori in New Zealand

As a result of the increased awareness of the declining state of indigenous languages worldwide,⁷⁷ and the recognition that te reo Māori is a taonga to be protected under the Treaty of Waitangi, Māori is legitimised by a substantial body of domestic and international rights and obligations. The right to use Māori is found in four sources of law in New Zealand; the Bill of Rights Act (BORA), the International Covenant on Civil and Political Rights (ICCPR), the Māori Language Act 1987 and art II of the Treaty of Waitangi.

1 International law

Article 27 of the ICCPR provides the most authoritative protection for the use of a minority language at international law. It provides that:

In those States in which...linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

While the natural and ordinary meaning of ‘use’ in art 27 implies no restrictions on how the right is exercised, there are strong textual arguments that restrict the application of the right to the community and not the state. Firstly, the wording “shall not be *denied* the right...” suggests that art 27 is a negative right that does not impose positive obligations on the state to support the use of a minority language either in the minority community itself or in the state’s governmental frameworks. This view is supported by Manfred

⁷⁷ See Robert Dunbar “Minority Language Rights in International Law” (2001) 50 ICLQ 90. Dunbar notes at 90 that 90 per cent of the world’s minority languages could disappear by the end of the 21st century.

Nowak, who has argued that a positive duty “cannot be found in the text, the context, the purpose or the historical background” to the ICCPR.⁷⁸

However, there are contrary views on the nature of the obligation under art 27, in particular whether it imports positive or negative obligations. The dominant view, supported by various decisions of the Human Rights Committee, is that while art 27 is phrased negatively, the state must *ensure* the community’s ability to exercise the right. Thus, the Human Rights Committee has found that despite the negative wording of art 27:⁷⁹

...the article, nevertheless, does recognise the existence of a ‘right’ and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation...

This interpretation supports an argument that if a minority language is in a vulnerable state, as indeed the Waitangi Tribunal found in *Ko Aotearoa Tēnei*, art 27 requires the state to take positive measures to support the use of a language in the community itself. Admittedly, the Committee has not provided any suggestions or guidelines on what kind of measures might be required by a state under art 27.⁸⁰

Secondly, the right to use a minority language under art 27 is phrased as part of a wider right to enjoy one’s culture, suggesting that art 27 protects community use rights to language and not state use rights. This narrow interpretation is supported by a number of decisions the Human Rights Committee who have found that the focus of art 27 is to protect minority language use within a minority’s community, not in state legal proceedings *per se*.⁸¹ In *Diergaardt v Namibia*⁸² the applicants, who were members of the

⁷⁸ Manfred Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* (N P Engel, Kehl, 1993) at 504.

⁷⁹ Human Rights Committee *General Comment No 23 - The Rights of Minorities* (1994) CCPR/C/21/Rev.1/Add.5 at [6.1]-[6.2].

⁸⁰ Patrick Thornberry *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991) at 387.

⁸¹ See *Cadoret & Le Bihan v France* UN Human Rights Committee CCPR/C/41/D/323/1988, 11 April 1991; *Guesdon v France* UN Human Rights Committee CCPR/C/39/D/219/1986, 23 August 1990.

⁸² *Diergaardt et al v Namibia* UN Human Rights Committee CCPR/C/69/D/760/1997, 6 September 2000. For a critical review of the right to use minority language in official and administrative contexts see Alexander

Baster community of Namibia, alleged inter-alia a breach of art 27 on the basis that they were prevented from using their native language (Afrikaans) in a Namibian court. The majority rejected the argument that art 27 was violated, partly on the basis that art 27 protects the community use of a minority language; not its use within state courts.⁸³ Abdalfattah Amor stated that:⁸⁴

...the right to use one's mother tongue cannot take precedence, in relations with official institutions, over the official language of the country, which is, or which is intended to be, the language of all and the common denominator for all citizens. The State may impose the use of the common language on everyone; it is entitled to refuse to allow a few people to lay down the law.

Other international legal instruments restrict minority language rights to community use. Article 13(1) of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that "indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions..."⁸⁵ Interestingly, an early draft version of UNDRIP specifically protected "the right to maintain and use their own languages, including for administrative, judicial, and other relevant purposes".⁸⁶ This would have provided a greater degree of protection for the right to use an indigenous language when engaging the state. However, this provision was excluded in the final declaration likely out of concern for the resource implications on the state.

Morawa "Minority Languages and Public Administration – A Comment on Issues Raised in *Diergaardt et al v Namibia*" (1 September 2002) Social Science Research Network <www.ssrn.com>.

⁸³ Ibid, at [10.6].

⁸⁴ Ibid, at [4].

⁸⁵ *Declaration on the Rights of Indigenous Peoples* GA Res 47/135, Res A/Res/61/295 (2007) art 13(1) [UNDRIP].

⁸⁶ See Gudmundur Alfredsson "International Discussion of the Concerns of Indigenous Peoples – The United Nations and the Right of Indigenous Peoples" (1989) 30 *Current Anthropology* 255 at 258. See also Mary Talbot, Karen Atkinson and David Atkinson *Language and Power in the Modern World* (Edinburgh University Press, Edinburgh, 2003) at 302.

Where state-use rights are provided, they are usually substantially qualified. Article 14(3) of the ICCPR for example provides, as a minimum guarantee, that in criminal proceedings a person “shall be entitled...to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. This echoes the language used in UNDRIP, which provides that a state must “ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings”.⁸⁷ However, the wording suggests the right is triggered only in situations where an applicant cannot understand the nature of legal proceedings. As Robert Dunbar identified:⁸⁸

A major limitation with all of these provisions...is that the protection afforded only applies where the individual does not understand the language being employed and does not require the use of the victim’s language unless he understands no other...

The added difficulty in the New Zealand context is that most Māori can speak the de-facto language of the state, English, which makes it difficult to argue a procedural disadvantage. However, as pointed out by Dunbar, native language speakers who are not confident in English, but are nonetheless compelled to speak it, could possibly claim procedural unfairness.⁸⁹ While this is not highly likely in the New Zealand context, it is not inconceivable.

In conclusion, there is very little at international law to protect the right to use Māori in interactions with institutions of the state and therefore bring about civic development. The following section considers the right to use Māori in domestic law.

2 *Domestic law*

The Māori Affairs Act 1953 was the first piece of legislation to grant official recognition to te reo Māori. However, the Act did not actually confer any substantive

⁸⁷ UNDRIP, above n 85, art 13(2).

⁸⁸ Dunbar, above n 77, at 105.

⁸⁹ Ibid.

rights to citizens to use Māori, either within Māori communities themselves or in relation to the state. Section 77A(1) of the Act provided that:

Official recognition is hereby given to the Māori language of New Zealand in its various dialects and idioms as the ancestral tongue of that portion of the population of New Zealand of Māori descent.

Serious doubts about the effectiveness of this provision were expressed by the Waitangi Tribunal in 1986, who described it as “an empty provision” which “does no more than state the obvious...”⁹⁰ Furthermore, the rights that flowed from official recognition were loosely defined and practically ineffective. Section 77A(2) only empowered the Minister of Māori Affairs “to take such steps as he deems appropriate for the encouragement of the learning and use of the Māori language”. There was therefore no statutory duty requiring the state to accommodate the use of Māori in state institutions, courts or other official contexts. This view was upheld in *Mihaka v Police*.⁹¹ The appellant argued that s 77A(1) of the Act afforded him the right to have the trial proceedings conducted in Māori. However, the Supreme Court took the view that s 77A afforded no such right. Bisson J stated that:⁹²

The official recognition given by that section to the Māori language of New Zealand as the ancestral tongue of that portion of the population of Māori descent in no way confers on a person of Māori descent any right to require Court proceedings to be conducted in that language.

Relying on *R v Lee Kun*,⁹³ Bisson J found that the only instance where a language other than English would be used is where there is an injustice that arises from the applicant’s lack of proficiency in English, which was not an issue on the facts.

In support of the view that there was no legal right to request that trial proceedings be conducted in Māori, Bisson J made an obiter comment that:⁹⁴

⁹⁰ *Te Reo Māori Claim*, above n 23, at [8.1.1].

⁹¹ *Mihaka v Police* [1980] 1 NZLR 453 (SC).

⁹² *Ibid.*

⁹³ *R v Lee Kun* [1916] 1 KB 337.

English has been in fact the language of the Courts in England for centuries. In New Zealand, by the English Laws Act 1858, the laws of England as they existed on 14 January 1840 so far as applicable to the circumstances of the colony of New Zealand were taken to have been in force in New Zealand and after that day would continue to be applied in New Zealand in the administration of Justice.

Bisson J's interpretation of s 77A was upheld on appeal, where Richardson J commented that "...s 77A is quite limited in its terms" and found that:⁹⁵

There is no provision to that effect in that section or elsewhere in our laws and any extension of the official use of the Māori language is a matter for the legislature, not for the Courts.

The legislature intervened seven years later with the passing of the Māori Language Act 1987 (MLA), s 3 of which declares Māori to be an official language in New Zealand. As a result of the enactment of this Act, *Mihaka v Police* can no longer be considered good law. The domestic rights that supplement official status include 20 of BORA the Māori Language Act and Article II of the Treaty of Waitangi.

(a) Bill of Rights Act 1990

Section 20 of BORA provides that:

A person who belongs to [a]...linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

There has been very little case law on s 20, and no case law has explored the ambit of the right to language specifically.⁹⁶ However, the *White Paper* in 1985 envisaged a narrow right to use a minority language:⁹⁷

⁹⁴ *Mihaka v Police*, above n 91, at 459.

⁹⁵ *Mihaka v Police* [1980] 1 NZLR 460 (CA) at 464.

⁹⁶ For an analysis on s 20 of BORA and the scope of its protection of community use rights, see Connell, above n 71, at 9-10.

⁹⁷ Department of Justice *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington, 1985) at 5.

What [s 20] is aimed at is oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which go to the heart of their identity – their language, culture, and religion...[s 20] together with [s 15] not only guarantee the right of members of a minority group to practice etc their religion or belief individually and in private, but also in community with other members of the group and in public.

The preamble to BORA states that one of the Act's purposes is to "affirm New Zealand's commitment to the Covenant of International, Civil and Political Rights". That the wording of s 20 of BORA is consistent with the wording of art 27 of the ICCPR appears to support the argument that s 20 is a right that is aimed at protecting against state interference of an individual's use of their language. This approach was followed by the Court of Appeal in *Mendelsohn v Attorney-General*,⁹⁸ which, inter alia, considered whether s 20 of BORA imported a positive duty on the Attorney-General to intervene on behalf of a member of a religious community regarding the operation of a charitable trust. The Court found that:⁹⁹

...in their essence those provisions do not impose positive duties on the State, at least in any sense relevant to this case. Rather they affirm freedoms of the individual which the State is not to breach. The very nature of these rights and freedoms means that they are freedoms from state interference. These rights and freedoms are affirmed by s 2 against acts of the various branches of the State (referred to in s 3) including the executive branch. The freedoms in issue are in general within the category often referred to as negative freedoms...

While this approach has been criticised as being incompatible with the UN Committee's approach to art 27,¹⁰⁰ as well as the generous interpretation to be used when construing

⁹⁸ *Mendelsohn v Attorney-General* [1999] 2 NZLR 268 (CA).

⁹⁹ *Ibid*, at 273.

¹⁰⁰ See Connell, above n 70, at 19.

BORA rights as per *Ministry of Transport v Noort*,¹⁰¹ it remains to date the most definitive statement of law on the scope of s 20.

The community-use rights protected by BORA signify a commitment to the survival of Māori language generally, and as such protect the right for Māori communities to discuss legal and political matters amongst themselves. However, the scope of s 20 is directed primarily at protecting against future encroachment on the right to use Māori in contexts where Māori is currently spoken; namely, in Māori communities. As such, BORA and the ICCPR provide no protection for the use of Māori vis-à-vis the state. Therefore its ability to support the civic development of te reo Māori is limited.

(b) Treaty of Waitangi

Since the 1986 *Te Reo Māori Claim*, a growing body of Treaty jurisprudence has established a clear and principled framework to support the civic development of te reo Māori. Firstly, the Treaty protects the exercise of a general, pre-existing right to use Māori. This creates an active obligation on the Crown to take positive steps towards developing the language in civic spheres. Secondly, the Treaty confers on Māori an additional right to use te reo Māori when participating in democratic processes and engaging public institutions.

i. Te reo Māori is a taonga

The starting point for analysing Treaty-based protection of te reo Māori is the Waitangi Tribunal's finding in the *Manukau Harbour Claim* that "taonga" in art II could include objects of both tangible and intangible value.¹⁰² This enabled the Tribunal in the *Te Reo Māori Claim* to declare that, because the survival of the language was fundamental to the survival of the culture, te reo Māori was a taonga under art II of the Māori version, and was thus protected by the guarantee of tino rangatiratanga:¹⁰³

¹⁰¹ *Ministry of Transport v Noort (Police v Curran)* [1992] 3 NZLR 260 (CA) at 292.

¹⁰² Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at [8.3(3)].

¹⁰³ *Te Reo Māori Claim*, above 23, at [4.2.4].

When the question for decision is whether te reo Māori is a “taonga” which the Crown is obliged to recognise we conclude that there can be only one answer. It is plain that the language is an essential part of the culture and must be regarded as “a valued possession”.

The language’s status as a taonga has been translated into New Zealand’s legislative framework. Parliament reaffirmed the status of the language as a taonga in the preamble to the Māori Language Act 1987, a construction which the Crown accepted in the *New Zealand Māori Council v Attorney-General* (the *Broadcasting Assets* cases).¹⁰⁴ More recently, the Waitangi Tribunal in *Ko Aotearoa Tēnei* described te reo Māori as “a taonga of transcendental importance”.¹⁰⁵

ii. The Crown’s positive obligation to protect te reo Māori

It is well established that, by virtue of the language’s status as a taonga, art II imports positive obligations on the Crown to actively protect the Māori language. The Tribunal in the *Te Reo Māori Claim* accepted submissions that the English reference to “guarantee” in art II of the English version of the Treaty “denotes an active executive sense rather than a passive permissive sense, or in a phrase ‘affirmative action’...”¹⁰⁶ The Tribunal then found that:¹⁰⁷

...the word (guarantee) means more than merely leaving the Maori people unhindered in their enjoyment of their language and culture. It requires active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture...

¹⁰⁴ *New Zealand Māori Council v Attorney-General* HC Wellington CP942/88, 3 May 1991 at 17; *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA) at 578 per Cooke P; *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517. [*Broadcasting Assets* cases].

¹⁰⁵ *Ko Aotearoa Tēnei*, above n 2, at [5.5.1].

¹⁰⁶ *Te Reo Māori Claim*, above n 23, at [4.2.7].

¹⁰⁷ *Ibid*, at [4.2.8].

This obligation has been accepted by the Crown, and reaffirmed in case law. The Court of Appeal in the *Broadcasting Assets* cases observed that protection of the Māori language “was and is a fundamental Treaty commitment on the part of the Crown”.¹⁰⁸

To the extent that the Crown must protect the right to use Māori where the language is currently spoken, the Treaty obligation is consistent with s 20 of BORA and art 27 of the ICCPR. The Crown has accepted the obligation to protect te reo Māori in spheres where the language is currently used; particularly in the community and in education. However, in addition to protecting the existing use of te reo Māori, the duty of active protection is also prospective: it might require the Crown to take special measures to accommodate and develop the language in a new domain which is important to the survival of the language. As McGechan J found, the Crown’s obligation to safeguard the language extends “...not only to the avoidance of present damage, but so as to facilitate the *future revival and development* of the language”.¹⁰⁹ Indeed, the *Broadcasting Assets* cases illustrate the Crown was required to take action to accommodate the language in broadcasting, a domain in which the language had very little presence but was nevertheless important for its future survival. Given that the Tribunal in *Ko Aotearoa Tēnei* found that there was “a deep-seated fear for the survival of the language”,¹¹⁰ and the importance of the civic realm for survival, there is a strong Treaty-based argument that further action to support development of the language in the civic sphere is needed.

iii. The Crown’s duty to act in good faith, fairly and reasonably

The Treaty also provides some defined standards that the Crown must meet to discharge its obligation of active protection. McGechan J in the High Court found that the Crown must act with “utmost good faith, fairly, and reasonably”.¹¹¹ Cooke P in the

¹⁰⁸ *Broadcasting Assets* (CA), above n 104, at 587.

¹⁰⁹ *Broadcasting Assets* (HC), above n 104, at 21 [Emphasis added].

¹¹⁰ *Ko Aotearoa Tēnei*, above n 2, at [5.5.8].

¹¹¹ *Broadcasting Assets* (HC), above n 104, at 19.

Lands case, when discussing the Crown's duty to act "reasonably" and with the "utmost good faith" stated that:¹¹²

This duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.

On final appeal to the Privy Council, their Lordships upheld the existence of an active obligation on the Crown but were cautious to point out that the obligation was not unqualified:¹¹³

...the Crown...is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances...it is reasonable for the Crown to take change depending on the situation which exists at any particular time...in times of recession the Crown may be regarded as acting reasonably [by] not becoming involved in heavy expenditure in order to fulfil its obligations...

However, while economic considerations might constrain what is considered "reasonable", and therefore limit the scope of the Crown's duty at a particular point in time, the duty itself is not static. Their Lordships stated that:¹¹⁴

...if, as is the case with the Māori 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.

Therefore, the scope of the Crown's obligation also depends on current state of the language. This was affirmed in *Ko Aotearoa Tēnei*, where the Tribunal emphasised that, apart from cost, there are no countervailing interests that hinder the provision of support for te reo.¹¹⁵ Given that the Tribunal has stated unequivocally that the Crown needs to take urgent steps to demonstrate its commitment to the survival of te reo

¹¹² *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 667.

¹¹³ *Broadcasting Assets* (PC), above n 104, at 517.

¹¹⁴ *Ibid.*

¹¹⁵ *Ko Aotearoa Tēnei*, above n 2, at [5.5.4].

Māori, and the importance of the civic realm to the survival of the language, the scope the Crown's duty to support civic development is onerous.

iv. The right to use Māori in the civic realm

In addition to the Crown's positive obligation to protect the pre-existing right to use te reo Māori, the Treaty confers an additional right to use Māori when engaging the Crown and government institutions. In exchange for sovereignty, the Crown undertook a duty not only to grant Māori franchise, but also to accommodate, as equal citizens, the participation of Māori in New Zealand's democratic and legal processes. As art III states [with the author's emphasis]:

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini – Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani *ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.*

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.*

If the citizenship rights guaranteed by art III are read concurrently with the status of te reo Māori as a taonga guaranteed under art II, as well as the Crown's duty to undertake active protection of the language, it follows that if Māori choose to participate in a democratic or legal process, or wish to engage the Crown or government institutions, the Treaty also protects the right use the language when doing so. As the Tribunal in Wai 11 stated:¹¹⁶

The 'guarantee' in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place.

The rights guaranteed under art III and art II are not mutually exclusive, but are to be read consistently.

¹¹⁶ *Te Reo Māori Claim*, above n 23, at [1].

Furthermore, unlike the ICCPR and UNDRIP, which engage the right to a minority language insofar as the applicant needs to understand the nature of criminal proceedings, the Treaty-based right protects the right to *choose* to speak Māori. A procedural disadvantage is not, at least in the Tribunal's opinion, relevant to engaging the right to use Māori under the Treaty:¹¹⁷

...it is a denial of that protection for the Crown to refuse a Maori the right to use his language in the Courts especially when some persons who appear before the Courts may be able better to express themselves in Maori rather than English. We think it is no answer to say that if a person can speak and understand English justice will be done to him if the proceedings are conducted in English. That, to us, is not the point. The real point is whether the recognition and protection guaranteed to the language by the Treaty is denied if a Maori person is prohibited from using it when he wants to do so...

The right of an individual to choose to use Māori, despite proficiency in English, is crucial to civic development given the majority of Māori can speak English.

While the Crown has accepted it has a duty to actively protect te reo Māori, and has taken some steps to support its use in Māori-Crown interactions (through providing qualified rights to use Māori in court proceedings for example), in practice the Crown usually only provides a *space* for applicants to use Māori. Typically, when Māori is used in court, usually for hearing evidence, translations are necessary in order to ensure that all parties, including the judge, can understand. The only exception is the Māori Land Court, where statute requires that the appointment of judges is partly based on the candidate's knowledge of te reo Māori.¹¹⁸ New Tribunal members are not statutorily required to be proficient in te reo Māori, but many nevertheless are. However, Māori is not spoken by all judges of the Māori Land Court or members of the Waitangi Tribunal, and it is commonplace to rely on English translations to accommodate those who do not speak Māori.

¹¹⁷ Ibid, at [4.3.9].

¹¹⁸ Te Ture Whenua Māori 1993, s 7(2A) states that "A person must not be appointed a Judge unless the person is suitable, having regard to the person's knowledge and experience of te reo Maori, tikanga Maori, and the Treaty of Waitangi".

In response, the Tribunal in 2011 found that the Treaty imposed an expectation that the Crown develops proficiency in Māori and, in the Tribunal's opinion, ultimately become Māori-speaking. The Tribunal in Wai 262 observed that:¹¹⁹

...there is no reason why the Crown must be monolingual in English. In referring to the relationship between 'the Crown and Māori', it is important not to overlook the fact that the Crown represents Māori too – it is not a Pākehā institution, even if that has been its character for much of the past. As we said earlier...the Government must shift its mindset so it comes to see Māori not as external to itself but part of its very own make-up.

The Tribunal did not offer any analysis of the Treaty in making its observation, but rather appealed to common sense and the need for a general change in the Crown's attitude.

The Tribunal could, however, have added strength to the observation above by considering art II in light of the Crown's obligation to actively protect the language. Although the guarantee of tino rangatiratanga in art II does not entitle Māori to retain sovereign status,¹²⁰ it does grant Māori the right to distinct political representation in government; and therefore as a part of the Crown. In *Taiaroa v Minister of Justice*, McGechan J stated that the duty of good faith imports a positive obligation on the Crown to "protect and facilitate Māori representation".¹²¹ This was affirmed by the Tribunal in the *Māori Electoral Option Report*, which described Māori political representation under art III as "one of the most important rights, if not the most important included in this article".¹²² If the duty to protect and facilitate Māori representation is read concurrently with the duty to actively protect the language, the argument for the Crown itself to become Māori-speaking is stronger, at least to the extent that it enables those Māori representatives to speak Māori.

Admittedly, there are some limitations to the Treaty rights framework. Treaty rights are not absolute. The Tribunal in 1986 was careful not to suggest the Treaty guaranteed

¹¹⁹ *Ko Aotearoa Tēnei*, above n 2, at [5.5.6(2)(d)].

¹²⁰ See Waitangi Tribunal *Muriwhenua Fishing Claim* (Wai 22, 1988) at 187.

¹²¹ *Taiaroa v Minister of Justice* HC Wellington CP99/94, 29 August 1994 at 69.

¹²² Waitangi Tribunal *Maori Electoral Option Report* (Wai 413, 1994) at [3.5].

an absolute right to use Māori, stating that such a construction would incur undue government expenditure.¹²³ These concerns were also evident in the *Broadcasting Assets case*, where McGechan J cautioned that “[t]he Treaty is not founded on a bottomless Treasury”.¹²⁴ Moreover, the Crown’s duty is constrained by the obligation only to do what is “reasonable”. It might not be “reasonable” to pursue widespread civic development given the significant expensive it would incur given to fully educate public servants, judges and other Crown employees. Moreover, the orthodox role of the Waitangi Tribunal is to declare Treaty rights, not to exhaustively define or enforce them.¹²⁵ The Tribunal’s jurisdiction is largely non-binding,¹²⁶ and there is no legal obligation on the Crown to implement any of the Tribunal’s recommendations.

However, this does not mean that Treaty rights have no legal significance or effect. The process of identifying and declaring Treaty rights reveals a coherent and principled framework that imposes concomitant duties on the Crown and Māori.¹²⁷ Commentators have identified that Treaty rights share the same characteristics as other rights and require the same legal responses: they fetter the exercise of state power, have priority over other mere legal interests, and require substantive remedies when breached.¹²⁸ The Tribunal in the *Te Reo Māori Claim* considered that the Crown’s duty of protection was not absolute, but to be progressively realised.¹²⁹

To some extent, the Crown has accepted the need to progressively develop proficiency in Māori as part of its obligations as a partner to the Treaty. The Crown called extensive evidence in *Ko Aotearoa Tēnei* to demonstrate its commitment to bilingual initiatives in government institutions, such as developing proficiency

¹²³ *Te Reo Māori Claim*, above n 23, at [8.2.7].

¹²⁴ *Broadcasting Assets* (HC), above n 104, at 87.

¹²⁵ Stephens, “Taonga, Rights and Interests”, above n 64, at 247.

¹²⁶ See Treaty of Waitangi Act 1975, s 5.

¹²⁷ Stephens, “Taonga, Rights and Interests”, above n 64, at 247.

¹²⁸ See Ed Willis “Legal Recognition of Rights Derived from the Treaty of Waitangi” (2010) 8 NZJPIL 217.

¹²⁹ Stephens, “Taonga, Rights and Interests”, above n 64, at 246-247.

standards for public servants and translating key policy documents into Māori.¹³⁰ The Treaty framework therefore has moral influence on the Crown's attitude towards the language.

3 Conclusion

The conclusion of the Waitangi Tribunal in *Ko Aotearoa Tēnei* was that te reo Māori is in steady but alarming decline.¹³¹ This fact alone changes the nature of the Crown's obligation to te reo Māori. Although the duty of active protection is not inconsistent with the current policy of progressive realisation, the precarious state of the language places a greater legal onus on the Crown to take action to ensure the language's continued survival. In terms of how the Crown is to discharge its Treaty obligations, the *Broadcasting Assets* cases demonstrate that the Crown must support the language in new domains which are considered vital to the language's survival. Given the importance of the civic realm to the on-going survival of te reo Māori, the Treaty requires the Crown to support the civic development of te reo Māori.

As it stands however, the Crown's Treaty obligations are not reflected in New Zealand's current statutory regime. The Māori Language Act 1987, which provides circumscribed rights to use Māori in legal proceedings, is out-dated and does not provide the framework that is needed to enable civic development. Chapter Four considers the first development that is necessary for te reo Māori to attain civic status: the need for unqualified rights to use Māori in the law-making process; most importantly, in Parliament and the courts. Chapter Four argues that an amendment to the MLA is necessary in order to ensure that the right to use Māori in legal proceedings complies with the Crown's Treaty obligations, and is consistent with the right to use Māori in Parliament.

¹³⁰ See *Ko Aotearoa Tēnei*, above n 2, at [5.3.8].

¹³¹ *Ibid*, at [5.4.5].

IV *An Unqualified Right to Use Māori in the Law-Making Process*

A *Introduction*

If te reo Māori is to become a civic language, and in particular a functional language of New Zealand law, it must be used freely and effectively in the primary law-making institutions of the state; namely, in Parliament and the courts. Currently, such a development is hindered by the lack of a principled set of rights to use Māori across New Zealand's law-making institutions. Although the right to use Māori in Parliament is relatively unfettered, and often exercised, the right to use Māori in the courts is heavily qualified, and does not reflect the full extent of the Crown's Treaty obligations to protect the language outlined in the previous chapter.

This chapter considers the discrepancies in the right to use Māori in Parliament and the courts. It argues that the Māori Language Act 1987 should be amended to provide an unqualified right to use Māori during legal proceedings. Such an amendment would be consistent with the right to use Māori in Parliament, and would comply with the Crown's duty to actively protect te reo Māori.

B *Parliament*

In Parliament, the right to use Māori under the Standing Orders is freely and effectively exercised, causing the language to play an active role in the promulgation of laws. This is demonstrated by the steady increase in the use of Māori as a language of Parliamentary debate. From 1907 to 1985 te reo Māori was used only 34 times in the House.¹³² This increased between 1986 and 2009, where *Hansard* records at least 194 uses of Māori.¹³³ In 2011 alone te reo Māori was used on at least 55 occasions by 14 MPs, by both Māori and non-Māori, and for both ceremonial and substantive purposes in Parliament.¹³⁴ As a result of this increase, te reo Māori has developed into "a full-

¹³² Monk and Stephens, above n 5, at 14.

¹³³ *Ibid.*

¹³⁴ In order of frequency in the use of Māori, the MPs are Te Ururoa Flavell (20 uses), Hone Harawira (4 uses), Parekura Horomia (4 uses), Tau Henare (4 uses), Kelvin Davis (3 uses), Tariana Turia (3 uses), Pita

blooded language of Parliamentary debate”, even though it is not typically used for the full range of Parliamentary business, such as in select committee hearings.¹³⁵ Much of the increase in the use of Māori is attributable to the way in which the language is legitimised in Parliament.

Firstly, the source of the right to use Māori in Parliament stems from the Standing Orders, which were amended in 1985 to allow MPs to “address the Speaker in English or in Māori”.¹³⁶ Importantly, the right to address the Speaker in Māori can be exercised whether or not the MP speaks English, and does not depend on proving some kind of procedural or substantive disadvantage. This interpretation of the Standing Orders was confirmed in 1997, when the Speaker of the House ruled that:¹³⁷

When a member speaks in Māori that member does so as of right. Whatever time is allowed by the Standing Orders for that particular type of speech, the whole of that time may be used in Māori. Interpretation into English is for the benefit of members who do not understand Māori and it is in addition to the time for which the member is entitled to speak.

This aspect of the right under the Standing Orders is consistent with the Treaty-based right to use Māori and the Waitangi Tribunal’s emphasis in the *Te Reo Māori Claim* that Māori should be a language of individual preference.¹³⁸ Given that all Māori in the House can speak English, the right to *choose* to use Māori is crucial to civic development.

Secondly, provision is made in the House to ensure that the effective participation of those who exercise their right to speak Māori is not compromised. Since the introduction of simultaneous translation in 2010, the use of Māori during time-fixed debates is no longer constrained by the need for an English interpretation within the 30 minute

Sharples (2 uses), Shane Jones (2 uses), Nanaia Mahuta (2 uses), Mita Ririnui (1 use), Georgina Te Heuheu (1 use), Rahui Katene (1 use), Chris Tremain (1 use) and Hekia Parata (1 use).

¹³⁵ Monk and Stephens, above n 5, at 16.

¹³⁶ Standing Orders of the House of Representatives 1985, SO 151. This Standing Order is now known as Standing Order 105.

¹³⁷ (22 July 1997) 562 NZDP 3192.

¹³⁸ *Te Reo Māori Claim*, above n 23, at [4.3.9].

speaking time-frame. Before 2010, Speakers of the House ruled that interpretation was considered part of the debate and time was not extended.¹³⁹ This is important for civic development because it ensures that any MP who chooses to speak Māori can contribute equally during Parliamentary debates.

Thirdly, there are no substantive fetters to exercise the right to speak Māori in the House. Compliance with the Standing Orders occurs as a natural and ordinary part of Parliamentary procedure. An MP who chooses to speak Māori is not required to provide notice of their intention to speak Māori, although some do so out of courtesy to the House.¹⁴⁰ This is important to civic development because it ensures that the right to speak Māori can be exercised without any procedural barriers discouraging such use. As a result, te reo Māori is not only used regularly for pre-prepared speeches in the House, but is also increasingly used for unscripted matters related to Parliamentary procedure; for example, to raise points of order.¹⁴¹ This suggests that Māori is indeed developing as a fully-fledged language of Parliament.

Fourthly, Māori language speeches in the House are recorded and archived in *Hansard* in the same way as speeches in English. This was not the case historically. Although te reo Māori was tolerated in the House out of necessity after 1868, Māori MPs' speeches were translated into English before being recorded in *Hansard*. Since the MLA was passed, Māori has been recognised as an equally authoritative language for recording speeches in Parliament.

C The courts

The right to use Māori in the courts is governed by the MLA, the District Court Rules 2009 and the High Court Rules. Section 4(1) of the MLA provides that:

¹³⁹ (3 May 1999) 579 NZDP 18503.

¹⁴⁰ For a few examples see (18 October 1988) 493 NZDP 7394; (10 May 2000) 583 NZDP 2128; (20 September 2000) 587 NZDP 5696.

¹⁴¹ In 2011, Māori was used on at least six occasions to raise points of order or to ask questions during question time. (16 March 2011) 670 NZDP 17280; (4 August 2011) 674 NZDP 20330 (on three occasions); and (29 September 2011) 676 NZDP 21569.

4 Right to speak Maori in legal proceedings

- (1) In any legal proceedings, the following persons may speak Maori, whether or not they are able to understand or communicate in English or any other language:
- (a) any member of the court, tribunal, or other body before which the proceedings are being conducted:
 - (b) any party or witness:
 - (c) any counsel:
 - (d) any other person with leave of the presiding officer

Section 2 defines 'legal proceedings' as:

- (a) proceedings before any court or tribunal named in Schedule 1; and
- (b) proceedings before any Coroner; and
- (c) proceedings before —
 - (i) any commission of inquiry under the Commissions of Inquiry Act 1908; or
 - (ii) any tribunal or other body having, by or pursuant to any enactment, the powers or any of the powers of such a commission of inquiry that is required to inquire into and report upon any matter of particular interest to the Maori people or to any tribe or group of Maori people

Although Schedule 1 grants the right to speak Māori in all courts of law, the right only extends to four Tribunals and the Employment Relations Authority.¹⁴² The MLA does not provide any right to use Māori in other official contexts, such as when engaging government institutions or local government. This is in direct contrast to the view of the Waitangi Tribunal in the *Te Reo Māori Report*, which recommended the right to use Māori be extended to all public institutions.¹⁴³

Although te reo Māori is used regularly and actively encouraged in the Māori Land Court and in the Waitangi Tribunal, it has not attained any kind of institutional status in general courts or other government bodies. From 1987 to 2011, there have been only six instances where notices of intention to speak Māori were filed in the High Court and

¹⁴² The Waitangi Tribunal, The Employment Relations Authority (now known as the Employment Court), The Equal Opportunities Tribunal (now known as the Human Rights Review Tribunal), The Tenancy Tribunal, Planning Tribunals (now known as the Environment Court), Disputes Tribunals.

¹⁴³ *Te Reo Māori Claim*, above n 23, at [1].

District Court.¹⁴⁴ There have been no notices of intention to speak Māori in the Employment Court or the Human Rights Review Tribunal.¹⁴⁵ No records have been kept for the Employment Relations Authority, which suggests that Māori is used very infrequently, if at all, and it is estimated that the Environment Court receives only one or two notifications per year.¹⁴⁶ This suggests the MLA has had little or no real effect on the use of Māori in the courtroom.

To a large extent, the lack of use of te reo is explained by the narrow scope of the right. Firstly, it is well-known that the right to use Māori under the MLA is limited to spoken Māori (although this is also the case for the right under the Standing Orders). While there have been a number of calls to abolish the distinction between the right to use written and spoken Māori in the courts, no changes have been made. In 1989 the Human Rights Commission submitted to the Māori Affairs Select Committee and recommended that Māori language be permitted in written and spoken form and in all courts of law.¹⁴⁷ The Commission stated that it was “New Zealand’s legal and moral obligation, nationally and internationally, to take the necessary steps”.¹⁴⁸ Although such a distinction might be justified on public expenditure grounds, it is plainly inimical to civic development.

Secondly, unlike in Parliament, there are substantial procedural fetters to the right to use Māori in courts. Section 1.11(5) of the High Court Rules provides that if a person wishes to use Māori in court, he or she must file a notice of intention not less than 10 working days in advance of the hearing. The same provisions were enacted verbatim into the District Court Rules 2009,¹⁴⁹ for no other reason than to achieve consistency.¹⁵⁰

¹⁴⁴ Use of Te Reo Māori in Courts, 2 March 2011 (Obtained under Official Information Act 1982, Request to the Ministry of Justice) at 2.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Human Rights Commission *Submission to the Māori Affairs Select Committee on Amendments to the Māori Language Act 1987* (Wellington, 1989) at [1].

¹⁴⁸ Ibid, at [6.1].

¹⁴⁹ District Court Rules 2009, s 3.5.

¹⁵⁰ Use of Te Reo Māori in Courts, above n 144, at 3.

Even in the Māori Land Court, applicants who wish to use Māori must inform the registrar.¹⁵¹ These procedural fetters caused the Waitangi Tribunal in *Ko Aotearoa Tēnei* to point out that:¹⁵²

...it is no easier to use Māori in court than any other language besides English. In fact, foreign nationals are catered for by means of interpreters so they can actually communicate and understand proceedings, whereas the ability of Māori court participants to communicate in English is effectively excused by the provisions of the Maori Language Act.

Fetters of this nature discourage the use of Māori in court, preventing the language from attaining any kind of meaningful status in the courtroom.

Thirdly, there are significant qualifications for accessing translations of court proceedings in te reo Māori which depend on the applicant proving a substantive disadvantage. Section 1.12 of the High Court Rules provides that:

- (1) A person upon whom a document is served in any proceeding is entitled to receive a translation of the document into the Maori language if he or she-
...
(c) satisfies the Registrar that he or she is *unable to read the document* but could read it if it were translated into the Maori language.

The requirement that the applicant prove he or she cannot read the document unless it is translated into Māori has the same restrictive effect as the qualifications discussed in relation to art 14(3) of the ICCPR. These legislative qualifications contravene the Treaty-based right to use Māori, and are major impediments to civic development in the courtroom. These provisions were also added to the District Court Rules 2009 only to achieve consistency.¹⁵³

¹⁵¹ *Ko Aotearoa Tēnei*, above n 2, at [5.5.6(2)(a)].

¹⁵² *Ibid.*

¹⁵³ Use of Te Reo Māori in Courts, above n 144, at 3.

Fourthly, te reo Māori is not treated equally for the purpose of recording legal proceedings. The right to use Māori during legal proceedings in s 4 does not entitle te reo Māori to become a language of court record. Section 4(2) provides that:

The right conferred by subsection (1) to speak Maori does not—

- (a) Entitle any person referred to in that subsection to insist on being addressed or answered in Maori; or
- (b) Entitle any such person other than the presiding officer to require that the proceedings or any part of them be recorded in Maori.

Section 4(2)(b) vests discretion in the presiding officer to decide whether or not recording legal proceedings in Māori is justified. There is no case law on the scope of s 4(b), but it is fair to say that discretion will only be exercised in exceptional circumstances. This limitation severely circumscribes the language in the law-making process.

D A Treaty-compliant framework

Given that the Tribunal has found that the language is “approaching a state of crisis”,¹⁵⁴ the Crown’s obligation to actively protect the language is greater and warrants a revision of the current legislative framework. A Treaty complaint framework would require that steps be taken towards providing an unqualified right to use Māori in the courts as primary law-making institutions.

Currently, the MLA does not fully reflect the nature of the rights and obligations to the language that arise from the Treaty (for example, by only providing a right to use Māori in limited official contexts). However, of greater concern is that some of the legislative provisions are directly in conflict with the Treaty’s guarantees. For example, the failure to provide for written Māori is a serious curtailment of the Treaty right, even considering the Tribunal’s finding in the *Te Reo Māori Claim* that the right to use Māori is not absolute. Furthermore, the requirement of disadvantage in s 1.12 is contrary to Tribunal’s emphasis on the right to *choose* to use te reo Māori.

¹⁵⁴ *Ko Aotearoa Tēnei*, above n 2, at [9.2.7].

To start, s 1.12 of the High Court Rules and s 3.6 of the District Court Rules should be repealed. The demand for Māori translations of court documents is not likely to be high, and is unlikely to incur such significant expenditure that it would be beyond what is considered “reasonable” given the current state of the language. For the same reason, s 4 of the MLA should be repealed. These are relatively small initial steps, but nevertheless would demonstrate progress towards providing a completely unqualified right to use Māori in the courtroom, thereby supporting the development of Māori as a functional language of law.

Chapter Five considers the second development that is necessary for te reo Māori to become a fully civic and functional legal language: the use of Māori in the substance of the law. It considers the use of Māori in substantive law historically, in documents such as the Declaration of Independence and the Treaty of Waitangi, and compares them to the use of Māori in forms of substantive law today: namely, in statutes. Chapter Five concludes that the increasing use of Māori in statutes has failed to produce substantive legal outcomes, thereby hindering the development of Māori as a fully functional legal language. To remedy this, Chapter Six identifies the need for a principled and consistent approach to drafting and interpreting Māori language in statutes.

V *The Use of Māori in Substantive Law*

A *Introduction*

The second development necessary for full civic development is the use of Māori as a language of substantive law. Substantive law can be defined as the language used in any kind of legal instrument to produce a legal outcome or create a legal relationship. One obvious example of substantive law is legislation enacted by Parliament. However, substantive law also includes documents which create legal rights and obligations, such as contracts, deeds and wills.

The use of a language in substantive law increases the influence and effect of the language in the civic realm. Matilla argues that one of the most remarkable features of a legal language is its communicative power to produce “legal effects by speech acts”.¹⁵⁵ Similarly, Loubster argues that the hallmark of any legal language is its ability to ‘declare’ law.¹⁵⁶

The first tentative steps have been taken towards developing Māori as a language of one form of substantive law. In the last thirty years or so, single Māori words have been increasingly enacted in statutes of general application, such as the RMA, and through the incorporation of extended passages of Māori text in statutes of specific application, such as Treaty settlement statutes.¹⁵⁷ However, Māori is certainly not an ordinary language of statute. More importantly, extended passages of Maori text are rarely used to produce substantive legal outcomes. It is often enacted in ineffectual sections of statutes, such as preambles, apologies and acknowledgments. Furthermore, Māori versions of such provisions are regularly ignored by judges (and lawyers), rendering the language ineffective.

¹⁵⁵ Heikki Mattila *Comparative Legal Linguistics* (Ashgate Publishing Ltd, Hampshire, 2006) at 31.

¹⁵⁶ Max Loubser “Linguistic Factors into the Mix: The South African Experience of Language and the Law” (2003) 78 Tul L Rev 105 at 108.

¹⁵⁷ Catherine Iorns Magallanes “The Use of Tangata Whenua and Mana Whenua In New Zealand Legislation: Attempts at Cultural Recognition” 42 VUWLR 2 at 259 at 260. See also Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [190].

Te reo Māori was, historically, a functional language of law in a number of respects. The Declaration of Independence and the Treaty of Waitangi, as well as private agreements, deeds and wills were all drafted and printed in Māori, and, to varying degrees, were used to produce legal outcomes. An analysis of these documents illustrates a number of necessary characteristics if Maori is to produce substantive legal outcomes:

1. The use of Māori to communicate substantive clauses of legal instruments;
2. Recognition that Māori is equally determinative of legal rights and interests when used in legal instruments;
3. The use of Māori to legal effect when interpreted by courts or other institutions.

The need to explore these three characteristics in greater detail warrants a comparison of the historical and contemporary use of Māori in substantive law. This Chapter makes such a comparison, and critiques the current use of extended passages of Maori in statutes. The enactment of single Maori words and phrases in statutes of general application is dealt with in Chapter Seven.

B The Declaration of Independence and the Treaty of Waitangi

As is well-known, the Declaration of Independence and the Treaty of Waitangi were both written and printed in Māori. While neither is directly enforceable in domestic law, both documents form part of New Zealand's constitutional framework and thus are part of the corpus of substantive New Zealand law.

Te Tiriti o Waitangi in particular is an example of how the language can be employed to substantive legal effect. Firstly, the Māori version communicates all substantive clauses of the English version. This contrasts somewhat with much of the contemporary use of Māori in statutes, where Māori is used for background information to a statute or for ineffectual purposes, such as Preambles, apologies and acknowledgments.

Secondly, the Māori version of the Treaty has been given legal effect to by the courts and the Waitangi Tribunal, causing the Māori text to become functional within the legal system. Section 5(2) of the Treaty of Waitangi Act 1975 enables the Waitangi Tribunal to give legal effect to the Treaty by considering both versions of the text.¹⁵⁸ As a result, several key words, such as ‘tino rangatiratanga’ and ‘kāwanatanga’ have been interpreted at length and have gained a definable presence in the legal system. The Tribunal has regard to both versions of the Treaty to define the legal relationship between the Crown and Māori.

Thirdly, the Tribunal has developed a coherent methodology for interpreting the Treaty that is based on having equal regard to *both* the English and Māori versions. Neither text is superior.¹⁵⁹ The Treaty of Waitangi Act 1975 directs the Tribunal to consider both versions and reconcile the differences that arise between them.¹⁶⁰ This differs to the current approach to interpreting Māori texts where an equivalent English version is provided, such as in Preambles to Treaty settlement legislation. The Māori version is usually completely ignored by judges, rendering the Māori version meaningless.

Finally, the Tribunal interprets the Treaty with an understanding and appreciation of tikanga Māori, which ensures that during the process of interpretation, kupu Māori can be understood, as far as possible, according to a Māori worldview. As the Tribunal stated in Wai 1071, the *Report on the Crown’s Foreshore and Seabed Policy*, when discussing the meaning of ‘tino rangatiratanga’:¹⁶¹

Tikanga informs our Treaty analysis too. Article 2 guarantees te tino rangatiratanga. The exercise of mana by rangatira was underpinned and sustained by adherence to tikanga. The chief whose thoughts and actions lacked that essential and recognisable quality of being

¹⁵⁸ The Treaty of Waitangi Act 1975, s 5(2) provides that “...the Tribunal shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them”.

¹⁵⁹ See the *Te Reo Māori Claim*, above n 23, at [4.2.5].

¹⁶⁰ Treaty of Waitangi Act 1975, s 5(2).

¹⁶¹ Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004) at [1.2].

‘tika’ would not be sustained in his leadership. In our view, the Crown’s guarantee of te tino rangatiratanga is meaningless if the tikanga that sustain and regulate the rangatira and his relationship to the people, and the land, are discounted and undermined.

A consideration of tikanga Māori ensures that Māori words are not hijacked and distorted during interpretation. In contrast, the interpretation of single Māori words and phrases, such as ‘taonga’ in the Property (Relationships) Act 1976, are often interpreted in a way that is arguably inconsistent with tikanga and causes the word to lose its cultural resonance.

C *Land Deeds*

In terms of defining rights and obligations in the private realm, the vast collections of land deeds between 1815 to 1925 represent the earliest use of te reo Maori in substantive law-making in New Zealand. The most extensive collections are *Māori Deeds of Land Purchases in the North Island of New Zealand* (Turton’s Land Deeds) and *A compendium of official documents relative to native affairs in the South Island* (MacKay’s Compendium), although there are at least two other separate collections.¹⁶²

In terms of the functional use of the language, the Māori versions of historical deeds communicated all substantive clauses of the English versions. This contrasts with contemporary deeds of settlement between Māori and the Crown today, where the entire deed is either in English, or where Māori is used only for background information but not for the substantive clauses of the agreement.¹⁶³ A comparison between the two versions of historical deeds reveals that an effort was made to preserve structural uniformity during the process of translation, presumably to replicate common law notions of land conveyance.

¹⁶² Turton’s Land Deeds consists of three volumes which range from 1815 to 1810. MacKay’s Compendium consists of two volumes which contain copies of land deeds of the South Island until 1873. Aside from *Turton’s Land Deeds* and *McKay’s Compendium*, the other two major collections are the *Auckland Crown Purchase Deeds (1900-1909)* and the *Wanganui Land Deeds (1914-1925)*. For an analysis of the various types of land deeds between Māori and the Crown, see Richard Boast “Recognising Multitextualism: Rethinking New Zealand’s Legal History” (2006) 37(4) VUWLR 547.

¹⁶³ See the Ngaa Rauru Kiiitahi Deed of Settlement 2003 (27 November 2003) where Māori is used to provide the background information, the historical account and the Crown apology but is not used for substantive clauses of the Deed. Available at <<http://www.atns.net.au/>>.

Māori was the primary medium through which negotiations initially took place and legal rights and obligations understood. This was certainly the case for deeds of cession before 1862,¹⁶⁴ and probably into the early 1900s. Tribunal reports indicate that effort was made to ensure that Māori were aware of the conditions of the deed, at least from the purchaser's perspective. As such, before signing the deed, it was often read out aloud in Māori.¹⁶⁵ In contrast, when iwi settle their grievances with the Crown through the Office of Treaty Settlements, English is the primary language of negotiation. At signing, te reo Māori is relegated to a language of ceremony, in karanga and whaikōrero. It is not typically used to discuss the content of the final deed.

English language versions of historical deeds were usually translations of the Māori versions and were often drafted well after the Māori deed was signed, which suggests that the Māori deed was the "official" version. The purchase of the 265,000 acre Ahuriri block by Donald McLean in 1851 is one such example. The Māori deed was drafted on the 7th November, and signed on the 17th. The English translation of the deed, which was drafted a day later, "rendered into English what McLean had felt had been transacted into Māori",¹⁶⁶ which demonstrates the importance of the use of Māori to procure the agreement.

Moreover, government officials at the time considered the Māori version the primary version, even if the language itself was not widely understood or spoken by Crown officials. In 1861, John Morgan, an inspector of Native Schools, reported injustice over a 780 acre block of land that was gifted by Waikato to the Government to establish a school. Referring to the wording of the Māori version of the deed (even drawing attention to the issues by italicising the relevant phrases), Morgan complained that the Crown had not fulfilled the required conditions:¹⁶⁷

¹⁶⁴ Richard Boast, above n 162, at 554.

¹⁶⁵ See Waitangi Tribunal *The Ngai Tahu Report* (Wai 27, 1991) at [6.5.17] [*Ngai Tahu Report*]. Similarly, the Kemp deed was read out aloud in Māori. See the *Ngai Tahu Report* at [8.4.8].

¹⁶⁶ Waitangi Tribunal *The Mohaka ki Ahuriri Report* (Wai 400, 2004) at [5.2].

¹⁶⁷ 'My Friend, Governor, this is our homeland that is gifted to you, to the Queen to vest in the Bishop of New Zealand, and to subsequent Bishops thereafter, for the establishment of a college or school, to increase

The [land], was given up by the Natives to Sir George Grey and the Bishop on certain conditions. The deed of gift reads, “E hoa, e Kawana, tenei ta matou kainga ka tukua atu nei ki a koe, ara ki te Kuini, mau e whakahoki atu, e whakapumau hoki ki te Pihopa o Nui Tireni, ki era atu Pihopa hoki o Niu Tireni a mua atu, *hei turanga kareti, kura ranei*, hei whakatini hoki i nga kura, hei whakatupu i a matou tamariki i a te Pakeha hoki, kia tupu tahi ai hei iwi tahi ki roto o te whakaponu ki a Karaiti, o te whakarongo hoki ki te Kuini. *Ko te utu mo to matou kainga ka tukua atu ko te kareti tonu.*

The conditions of this deed of gift have not been carried out...nothing has been expended for buildings or improvements...as stipulated for and promised by Sir George Grey and the Bishop of New Zealand in the deed. Our boys and Native teachers have in consequence suffered much from the want of proper accommodation...The effect of this breach of contract has been very injurious to the minds of the Natives...I trust that the Government...will take immediate steps to carry out the deed in its integrity, and by so doing prove to the Aborigines that they recognize as binding the conditions of the Grant...

Furthermore, there is evidence that government institutions recognised the Māori text as *an* official version of the deed, if not *the* official version. Provision was made for the translation of deeds from English into Māori in the Native Land Court (and vice versa), suggesting that the Māori text could be considered and given legal effect during proceedings, or at least translated.¹⁶⁸ In fact, from 1890 court interpreters were required to declare an oath to:¹⁶⁹

...well and truly interpret...all such other matters as the Court may from time to time require [the interpreter] to interpret from the English language into the Maori language, and from the Māori language into the English language, to the best of [the interpreter's] skill and ability.

the number of schools to teach our children in the ways of the Pākehā and to grow as one in the belief in Christ and in obeisance to the Queen. The compensation for our land that is gifted is [the establishment of] a school' [Translated by author]. John Morgan "Report of Rev John Morgan on Otawhao School" [1861] 1 AJHR E4 at 26.

¹⁶⁸ For a brief discussion, see Waitangi Tribunal *Te Urewera Pre-Publication Report – Part II* (Wai 894, 2009) at [10.8.3]. For an extensive analysis of land deeds see Waitangi Tribunal *Ngai Tahu Report 1991* (Wai 27, 1991) ch 2. [*Ngai Tahu Report 1991*].

¹⁶⁹ "Interpreters Oath" (March 20 1890) 1 *New Zealand Gazette* at 318.

On the rare occasions where a land dispute raised an ambiguity in the deed, judges did not uncritically accept the accuracy of English translations, but recognised the importance of capturing the true meaning of the original Māori deed. In 1934, during an inquiry by the Native Land Court into the Ahuriri deed, Judge Harvey described the English version as “incorrect and very untrustworthy” and ordered a new translation to be drafted, demonstrating the primacy of the Māori version.¹⁷⁰ This suggests that the Māori text was to be given full legal effect.

More recently, the discrepancies between the English and Māori versions have been scrutinised by the Waitangi Tribunal in the Mohaka River Report and the Te Whanganui-a-Orotu Report. The Tribunal in the Te Whanganui-a-Orotu Report noted that “it is often the case that Māori versions of deeds have different emphases from the English, apparently to highlight matters important to Māori”.¹⁷¹

Furthermore, the Tribunal appears to treat the Māori deed as the “official” version, and has, on occasion, subjected the Māori version to considerable scrutiny. In the Mohaka River Report for example, the Tribunal criticised McLean’s drafting of the Māori version of the Ahuriri deed, stating that it was drafted to be intentionally ambiguous in order to extend the Crown’s claims over resources not expressly stated in the deed.¹⁷² Māori deeds have also been considered extensively in the Ngai Tahu Land Report, yet further evidence that, the Tribunal, at least, considers the Māori version to be equally determinative of legal rights and interests.¹⁷³

Exploring the differences in meaning between the two language texts is necessary if Māori is to be considered a language that determines legal outcomes. If differences between two texts are ignored, the language cannot develop into a functional language of law. The interpretation of Māori deeds by the Waitangi Tribunal contrasts with the lack of attention to Māori versions of preambles, particularly in *Te Ture Whenua Māori*

¹⁷⁰ Waitangi Tribunal *Te Whanganui a Orotu Report* (Wai 55, 1995) at [4.2].

¹⁷¹ *Ibid.*, at [4.4.7].

¹⁷² Waitangi Tribunal *Mohaka River Report* 1992 (Wai 119, 1992) at [3.6].

¹⁷³ *Ngai Tahu Report* 1991, above n 165, at [5.7.3].

1993. Judges tend to ignore the Māori text in such provisions, inadvertently treating the English text as the “official” version.

D Wills

There is also evidence that Māori was used to record wills from the 1860s to at least the 1930s. The making of wills was actively encouraged by colonial governments, who were concerned about the uncertainty of succession to real and personal property under Māori custom.¹⁷⁴ From at least 1874 governments made a determined effort to inform and encourage Māori to write wills by issuing treatises and templates on wills to Māori communities.¹⁷⁵ While the precise number is not known, evidence suggests there was considerable uptake by Māori. Hon Tame Parata MP noted in 1901 that making wills had become common practice amongst Māori, often to staunch opposition of relatives who were not provided for.¹⁷⁶ Furthermore, the volume of petitions to the Native Affairs Select Committee challenging wills are recorded into the 1940s,¹⁷⁷ suggesting that Māori wills were relatively common.

Māori language wills, like the Treaty of Waitangi and land deeds, represented a functional use of Māori in substantive law. Firstly, te reo Māori was used to communicate all substantive clauses of the wills, although English translations typically accompanied the Māori versions.¹⁷⁸ Similar to land deeds, Māori was the language used to procure the legal document, and therefore to determine the legal rights and interests of beneficiaries. This is demonstrated by the numerous affidavits that accompanied

¹⁷⁴ Tom Bennion and Judy Boyd *Succession to Māori Land 1900-52* (Waitangi Tribunal Rangahaua Whanui Series, May 1997) at [1.2.1].

¹⁷⁵ See William Martin *Ko Nga Tikanga Nui o te Ture o Ingarangi* (Government Printer, Wellington, 1874) at 43-44. Available at <www.nzetc.victoria.ac.nz>.

¹⁷⁶ (16 July 1901) 116 NZDP 391.

¹⁷⁷ For a few examples see Native Affairs Select Committee “Petition of Hamiora Tuhaka No 166/1937” [1940] 3 AJHR I3; G P Shepherd “Report and Recommendation on Wi Hapeta and Others Praying for a Rehearing of the Application for Probate of the Will of Ngakete Hapeta” [1942] 1 AJHR G6; D B Morison “Report and Recommendation on Petition No. 3 of 1947 of Maniairangi Paora, Concerning the Will of Mou Te Hapuku” [1949] 3 AJHR G6B.

¹⁷⁸ For a few examples, see the wills of Hoani Te Okoro (1880) AAOM 6029 28/1441; Arapata Tapiu Potaka (1882) AAOM 6029 33/1728; Mihipeka Pareturere (1890) AAOM 6029 63/3470. Available at Archives New Zealand, <www.archway.archives.govt.nz>.

applications for probate which testified that the will was read out in Māori before the testator signed the document (usually, both language versions were appended together).¹⁷⁹

Secondly, the considerable amount of legal activity in relation to historic wills caused the language to become functionalised in the legal system. Applications for probate to the Native Land Court, which were recorded in *Te Kahiti o Niu Tirenī* well into the 1930s, are evidence that Māori wills were interpreted in court, either by a judge or a translator. Although probates were typically issued in English, there are some examples where copies of probate were issued, or at least translated into, Māori.¹⁸⁰ Such examples demonstrate that judges of the Native Land Court (and the Supreme Court) sometimes made binding decisions based on the Māori text, thereby using the language to produce a substantive legal outcome.

E Māori as a language of statutory translation

From the mid-nineteenth century, after the establishment and expansion of colonial government, the use of Maori in substantive law-making declined dramatically. However, its use in substantive legal *form* did not altogether disappear. From 1858, te reo Māori was an inchoate language of statute, even if it was not a language of statutory enactment. The Standing Orders of 1878 required bills introduced into the House which “specially affected the Maories” to be translated and printed.¹⁸¹ Governments printed extensive collections of Bills in Māori into the early 1900s, such as the Native Councils Bill 1872 and the Native Marriages Validation Bill 1877. A substantial body of Acts, mostly related to Māori land, were also printed, such as the Native Lands Act 1865 and the Native Districts Regulation Act 1858. Māori language Bills illustrate the use of Māori as a fully-fledged language of statute, something which te reo Māori will have to replicate if it is to achieve full civic status.

¹⁷⁹ For example, see the will of Aperakama Te Huruhuru (1882) AAOM 6029 34/1754. Available at Archives New Zealand, <www.archway.archives.govt.nz>.

¹⁸⁰ For example, the will of Tamihana Te Rauparaha (1879) MA1326/17c. Available at Archives New Zealand, <www.archway.archives.govt.nz>.

¹⁸¹ Standing Orders of the House of Representatives 1878, SO 355.

Firstly, even though Māori language Bills were not enacted as law, evidence suggests Māori versions had some degree of official status in Parliament. Māori versions of Bills, such as the Native Councils Bill 1872, communicated all substantive provisions of the English version. This contrasts with the use of Māori in statutes today, which, although enacted as law, is mostly used only in preambles, acknowledgments or apologies and not for substantive provisions. Furthermore, the historical Bills and Acts appear curiously loyal to the structure and layout of English versions. The long titles, short titles and side-notes of the English versions were replicated in the Māori versions. The font and pagination were also imitated in the Māori versions, which suggest they had a de-facto official status.¹⁸²

Secondly, Māori language Bills were a functional part of the law-making process to the extent that they enabled Māori MPs to participate effectively in Parliamentary debates. Debates in the House were adjourned on numerous occasions because Māori versions were not provided to Māori MPs, suggesting that, at least in theory, Māori language Bills were meant to be official for Parliamentary purposes. In 1884, at the second reading of the West Coast Settlement Reserves Bill, Ihaka Hakuene MP requested that the second reading of the Bill be postponed until it was translated “...so that the Native members might have an opportunity of studying its provisions”.¹⁸³ Te Puke Te Ao MP replied that he “did not think it right that a measure of this sort affecting the Natives should be read a second time without the Native members knowing its provisions”, causing the debate to be adjourned.¹⁸⁴

However, while Māori language Bills had a de-facto official status, they did not have equal status alongside the English language Bills. Firstly, compliance with the Standing Orders was sporadic, suggesting that providing Māori translations were not considered an essential part of Parliamentary procedure.¹⁸⁵ Secondly, where Māori MPs

¹⁸² See the Native Lands Act 1865, appendix 2.

¹⁸³ (3 October 1884) 49 NZPD at 218-219.

¹⁸⁴ Ibid.

¹⁸⁵ For examples where Māori members had to request translations of Bills and Acts, see (29 April 1887) 57 NZDP 30; (3 September 1883) 46 NZDP 512 and (9 June 1882) 141 NZDP 400.

requested Māori translations, Speakers of the House often gave greater weight to Parliamentary expediency than the need to keep Maori MPs informed of proposed legislation.¹⁸⁶ For example, in 1898, Hone Heke Ngāpua MP raised a point of order arguing that the Bill had not been translated despite the fact that “practically the whole of the amendments dealt with Native interests”.¹⁸⁷ The Speaker, who was concerned more about the delay that would result, replied that a Māori translation was not necessary because the interpreter could “explain the clauses without stopping the Bill on the mere point of order”.¹⁸⁸

Ultimately, Māori language Bills were inchoate - they were never enacted into law by Parliament, or given substantive legal effect by courts or other legal institutions. A modern example of this is the Māori Language Act 1987, a Māori translation of which appears in the statute books, but is not enacted or recognised as law.

F The contemporary use of Māori in substantive law

After 1910, Māori was seldom used as a language of statutory translation let alone enactment.¹⁸⁹ This trend coincided with the gradual retreat of te reo Māori from the private realm – even today, deeds of settlement between Māori and the Crown are not substantively negotiated or written in Māori. Nevertheless, in the last 30 years there has been a revival which has come about from the incorporation of te reo Māori into various forms of state recognised law. Te reo Māori is incorporated into statutes in two forms; the incorporation of extensive passages of Māori text with accompanying English versions (bilingual enactments) or the incorporation of a single Māori word or phrase. To produce substantive legal outcomes, Māori must communicate substantive clauses in legal instruments, be considered determinative of legal rights and interests and be put to

¹⁸⁶ (26 October 1905) 135 NZDP 1083.

¹⁸⁷ (20 December 1897) 100 NZDP at 922.

¹⁸⁸ Ibid.

¹⁸⁹ The last series of Acts translated into Māori recorded in the Legal Māori Corpus are in 1910. These Acts relate to Native Land administration and include such legislation as the Kaiapoi Reserves Act 1910 and the Native Lands Act 1909.

legal effect by the courts. In light of these characteristics, the section below considers the current use of Māori in bilingual enactments today.

1 Preambles, apologies and acknowledgments in Treaty settlement legislation

The majority of Māori statutory language occurs in Treaty settlement legislation, which incorporates extensive passages of Māori. It has become standard, although not universal, practice for preambles, Crown apologies and acknowledgments to be translated in Maori and enacted alongside the English version.¹⁹⁰

While these statutes, such as the Ngaa Rauru Kiitahi Claims Settlement Act 2005 and the Ngati Awa Claims Settlement Act 2005 are technically public statutes, their operation in the civic realm is limited – they are designed to give effect to a carefully crafted deed of settlement and apply only to a specific iwi. Nevertheless, the statute itself is still a recognised form a state law, and thus illustrates one way in which Māori is used as a language of legal enactment today.

The issue of whether the inclusion of bilingual provisions in Treaty settlement legislation is an ineffective use of te reo Māori is complex and requires careful consideration. Firstly, to point out that preambles, apologies and acknowledgments do not, of themselves, have operative effect in the statute is obvious. The Law Commission's Legislation Manual 1996 notes that preambles generally recite the events that lead to the passing of an Act, and are useful to understand "Acts of an historic or ceremonial nature" – an apt description of Treaty settlement statutes.¹⁹¹ Generally speaking, preambles are merely intrinsic aids to the interpretation of substantive statutory provisions and thus are only introductory or contextual.¹⁹² Given that such provisions are not substantive provisions of the statute, their ability to develop the functionality of te reo Māori as a language of substantive law is limited.

¹⁹⁰ Some of the recent Treaty settlement statutes do not contain any Māori text. The Rongowhakaata Claims Settlement Act 2012 and the Ngāti Apa (North Island) Claims Settlement Act 2010 are examples.

¹⁹¹ Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [26].

¹⁹² *Ibid.*

However, such provisions are not totally without a purpose. Section 5(2) of the Interpretation Act 1999 provides that “[t]he matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment”. Section 5(3) provides that such indications include, inter alia, preambles to statutes. Preambles can therefore assist in determining the purpose of the Act and the mischief the Act is designed to remedy.

Furthermore, several cases have come before the courts where the wording of the preamble and apology of settlement legislation has been considered.¹⁹³ There is therefore the potential for settlement statutes, to have some, albeit limited, impact in the civic realm.

Moreover, despite the fact that the preamble, apology and acknowledgments are merely contextual, the symbolic mana they give to te reo Māori as a result of enactment should not be understated. In terms of the structure of the statute, the Māori text appears before the English, which suggests te reo Māori is afforded some symbolic priority over the English version. More importantly, for the iwi concerned, preambles, apologies and acknowledgments provide a powerful means of codifying, in te reo Māori, the history of loss and degradation suffered as a result of the Crown’s actions. Preambles often summarise the findings of the Waitangi Tribunal in relation to the claim within their rohe and codify extensive historical accounts of Crown confiscation of iwi territory and subsequent oppression.¹⁹⁴ This serves as a permanent reminder of the grievances iwi have suffered and, ironically, helps to restore the Crown’s mana in the eyes of the iwi. The use of te reo Māori therefore serves a legitimate purpose in the context of permanently settling Treaty claims and establishing an on-going relationship between the Crown and iwi.

However, on the rare occasions when preambles of settlement statutes are considered by judges, invariably precedence is given to the English versions.

¹⁹³ *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2003] 1 NZLR 779 (HC) at [60]; *Ngati Apa ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (CA) at [30], [42]-[44] per Elias CJ and [143]-[144] per Blanchard and Tipping JJ.

¹⁹⁴ For example, see the Ngai Tahu Claims Settlement Act 1998, preamble.

Remarkably, the Māori text of the preamble or apology is rarely even acknowledged. In *Ngati Apa ki Te Waipounamu Trust v R*,¹⁹⁵ the appellants contended that the Ngai Tahu Claims Settlement Act 1998 did not preclude Ngāti Apa to claim customary land interests during Waitangi Tribunal proceedings. The Court of Appeal considered the statute, including the Preamble, in considerable detail and found that nothing in the statute precluded the right of Ngāti Apa to claim customary land interests. Elias CJ and Blanchard and Tipping JJ (who issued a joint judgment) referred only to the English text of the preamble without acknowledging the existence of the Māori text.¹⁹⁶ While all five judges of the Court considered the wording of the Crown apology in their reasoning, Blanchard and Tipping JJ were the only judges to acknowledge that a Māori text existed. Even so, their Honours chose only to cite the English version.¹⁹⁷

If te reo Maori is to have mana as a language of law, judges must at least be prepared to acknowledge the Māori text in a statute where it exists. If not, Māori will fail to achieve the degree of institutionalisation necessary to allow the language to develop as a functional language of law.

2 *Preambles in statutes of general application*

The situation regarding statutes of general application is somewhat different to Treaty settlement legislation – their ability to wield influence the civic realm is greater. There are two statutes of general application that contain preambles in te reo Māori; Te Ture Whenua Māori 1993 (TTWM) and the Maori Television Service (Te Aratuku Whakaata Irirangi Maori) Act 2003. TTWM is the only statute that gives substantive priority to the Māori version of the preamble. Section 2(3) provides that “[i]n the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail”. Unlike the preambles to settlement statutes, which have the English and Māori versions in separate sections, both the English and Māori

¹⁹⁵ *Ngati Apa ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (CA).

¹⁹⁶ *Ibid*, at [30], [42]-[44] per Elias CJ and [143]-[144] per Blanchard and Tipping JJ.

¹⁹⁷ *Ibid*, at [145].

texts in TTWM are contained in the single section, implying that due regard must be had to both versions to determine the underlying principles of the Act.

Section 2(3) of TTWM is important because it provides greater certainty when interpreting the Preamble. If Māori is to eventually develop into a language of statutory enactment alongside English, there must be some legal mechanism to resolve potential conflicts in meaning between the two languages. Apart from TTWM, no other bilingually enacted provision stipulates which version of the preamble is to be given priority, or how different interpretations arising from the two languages are to be resolved.

Additionally, s 2(3) of TTWM expressly contemplates a difference in meaning in the Māori version, which is significant because although the Māori text is a mere translation of the English, the Māori version is open to argument and interpretation based on the meaning of the Māori words in their own right. In the event of a conflict, the judge must defer to the meaning of the Māori version, providing greater scope for the language to influence substantive legal outcomes. Furthermore, s 2(1) of TTWM provides that “[i]t is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble” suggesting that the wording of the Māori version could have determinative legal effect in borderline cases.

Section 2(3) of TTWM is also important because a close reading of the two versions of the Preamble reveals at least three significant differences between the English and Māori versions, two of which have never been considered by any court. The English version of the Preamble provides that:

...it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū...

The equivalent Māori version provides:

...e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu...o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki...

Firstly, the English phrase “to *promote* the retention of that land” is communicated by the Māori phrase “he *whakahau* kia mau tonu taua whenua”. *He Pātaka Kupu* contains two entries for ‘whakahau’:¹⁹⁸

whakahau

1. Ka āta kī atu ki te tangata kia mahi i tētahi mahi¹⁹⁹
2. Ka whakatō i te wairua kaha ki tētahi atu e whāia ai tētahi mahi, e kaha tonu ai rānei ki te mahi.²⁰⁰

The *Williams Dictionary* defines ‘whakahau’, as ‘command’.²⁰¹ The *Te Aka Dictionary* defines ‘whakahau’ as ‘command, order, urge or exhort’.²⁰² If read independently of the English version, ‘whakahau’, these definitions communicate a much stronger emphasis on the need to retain land than merely to ‘promote’. This interpretation could justify the courts taking a stricter approach for applications to change land status from Māori freehold land to general land under s 135, or to alienate Māori land under Part 7 of the Act.

Secondly, the English sentence “...it is *desirable* to recognise that land is a taonga tuku iho” is communicated by the Māori phrase “...e tika ana kia mārama ko te whenua he taonga tuku iho”.

¹⁹⁸ Te Taura Whiri i te Reo Māori *He Pātaka Kupu – te kai a te rangatira* (Raupo, Wellington, 2008) at 1082 [*He Pātaka Kupu*].

¹⁹⁹ ‘To command someone to do a task’ [Translated by the author].

²⁰⁰ ‘To instil determination in a person to pursue a goal, to strengthen resolve to do a task’ [Translated by the author].

²⁰¹ H W Williams *Dictionary of the Maori Language* (7th ed, GP Publications, Wellington, 1971) at 38.

²⁰² John C Moorfield “Te Aka Maori-English English-Maori Dictionary” <www.maoridictionary.co.nz>.

He Pātaka Kupu contains five senses of ‘tika’, two of which are potentially relevant meanings in the Māori version of the Preamble:²⁰³

tika

3. E whai take ana, i takea mai i ngā pūtaka e mōhiotia ana he pono, e whakaarotia ana rānei he pono, he tōtika.²⁰⁴

4. E ū ana ki te pono, e ū ana rānei ki ngā pūtaka e mōhiotia ana, e whakaarotia ana rānei he pono.²⁰⁵

The *Williams Dictionary* contains two relevant of senses of ‘tika’: ‘just, fair’ and ‘right, correct’.

The word ‘tika’ places much more stress on the importance of land as a taonga tuku iho than is communicated by the English word ‘desirable’. The Māori version suggests that the recognition that land is a taonga tuku iho is not merely ‘desirable’, but obligatory. This interpretation would support adopting a strict approach to constraints on alienability of land under Part 7 of the Act.

Thirdly, the word ‘owners’, which features twice in the English version of the Preamble, is expressed by two different Māori phrases: ‘iwi nōna’ and ‘hunga nōna’, implying a difference between the two. This fact allowed the Māori Land Court in *da Silva v Aotea Māori Committee*²⁰⁶ to take a much broader definition of ‘iwi’ in the Māori version than that expressed by the equivalent English word “owners”. The applicant in that case sought a determination from the Māori Land Court as to the status of certain islands, rocks and outcrops in Mangaiti Bay. Judge Spencer found that “[the] use of ‘hunga’ clarifies the meaning of the earlier ‘iwi’ as applying in that context to tribal

²⁰³ *He Pātaka Kupu*, above n 198, at 923-924.

²⁰⁴ Having legitimacy, originating from that which is known to be right, is thought to be right and just [Translated by author].

²⁰⁵ ‘Adherence to what is right, to adhere to that which is known or thought to be true’. [Translated by author].

²⁰⁶ *John da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212.

identity (or identities) rather than the alternative ‘owners’.”²⁰⁷ His Honour stated that “the Preamble recognises the traditional relationship of Māori with their land in its tribal significance rather than ownership in an individualised sense” as expressed in the English version.²⁰⁸ This demonstrates that kind of differences that can arise if courts had regard to the meaning of the Māori words.

Yet, despite the *da Silva* case, and the paramount status of the Māori version of the Preamble in TTWMA, courts are generally unwilling to entertain linguistic arguments where no ambiguity arises in relation to the substantive provisions of the Act itself. Goddard J in *Hastings District Council v Maori Land Court* found that s 2 and the Preamble do not confer any specific jurisdictional powers, stating that the Preamble and s 2:²⁰⁹

...are of general purport and engender the spirit of the Act. Accordingly, whilst they are to be given weight in interpreting and applying the jurisdiction of the Act, they do not provide authority for interpretations going beyond the plain statutory language used by Parliament.

Given the comprehensiveness of TTWM, and that the “plain statutory language” of the substantive provisions are otherwise in English, the scope for the Māori text to influence the substance of a decision, as opposed to the statutory scheme, is narrow indeed. Thus overall significance of the Preamble and s 2 in the statutory scheme remains limited.

Furthermore, the substance of the Māori text of the Preamble does not filter through to the substantive provisions of the Act. While the Māori version is given priority in the event of a conflict, such conflicts rarely arise because the Māori version is generally superseded by subsequent provisions in TTWM that reiterate and emphasise the wording of the Preamble in English. Section 2(2), which largely repeats the English Preamble, requires that the powers, duties and discretions in TTWM be exercised:

²⁰⁷ Ibid, at 237.

²⁰⁸ Ibid.

²⁰⁹ *Hastings District Council v Maori Land Court* (1999) 5 ELRNZ 514 (HC) at 529.

...as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū and their descendants, and that protects wāhi tapu.

Furthermore, s 17(1)(a) states that in exercising the jurisdiction and powers under the Act, the primary objective of the court is to “promote and assist in the retention of Māori land and General land owned by Māori in the hands of the owners”. These provisions borrow exclusively from the wording of the English text of the Preamble.

In *Valuer-General v Mangatu*²¹⁰ the respondents, who were owners of Māori freehold land, challenged the valuation of their lands by Valuation New Zealand for rating purposes. The issue before the Court of Appeal was whether the constraints on alienability of land imposed by TTWM were to be taken into account in determining the land’s value under the Valuation of Land Act 1951. While Richardson P, writing for the Court, acknowledged that it was necessary to consider the policy of the TTWM and analyse the Act “in some detail”,²¹¹ His Honour found it sufficient to only refer to the English version of the Preamble in forming his view that:²¹²

...the court’s primary objective in exercising its jurisdiction and powers is to promote the retention of Maori land and general land owned by Maori in the hands of the owners and to promote the effective use, management and development of the land by or on behalf of the owners.

The Māori version, which conveys a much stronger, almost obligatory, emphasis on the value of land to Maori and the need to retain it was ignored. Secondly, Richardson P’s comment uses a number of the terms taken directly from the English text, endorsing it with “high status” and privileging it over the Māori version.

Similarly, in *Brown v Māori Appellate Court*,²¹³ the High Court found that the Māori Appellate Court had committed an error of law in refusing to make a partition order

²¹⁰ *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA).

²¹¹ *Ibid*, at 644.

²¹² *Ibid*.

²¹³ *Brown v Māori Appellate Court* [2001] 1 NZLR 87 (HC).

under s 288 for certain Maori freehold lands. In reaching that conclusion, the Court had no regard to the Māori text but relied heavily on s 2(2) and s 17, all of which draw heavily from the English text of the Preamble.²¹⁴ Thus, while a Māori version of a preamble symbolically recognises the status of te reo Māori, the language itself is generally not referred to or considered in judgments of higher courts, or it tends to get read down by the substantive provisions of the statute itself. As such, bilingual preambles, even of general public statutes, are currently an ineffective use of the language.

G Conclusion

While enacting bilingual provisions is a significant step towards developing Māori as a language of legal enactment, it has thus far failed to effect substantive legal outcomes. It is not used for substantive provisions in statutes, nor is it recognised as being determinative of legal rights or interests, or put to legal effect by the courts.

One difficulty is that most judges do not have the proficiency required to make culturally appropriate legal determinations based on Māori words and concepts. However, this problem is not systemic – the face of the judiciary can, and indeed does, change over time. A more pervasive problem is the uncertainty about the status of the language in the statute itself; in particular, whether a court is required to consider the Māori version or whether it is sufficient only to have regard to the English version.

The current approach to drafting bilingual provisions is discussed in the following chapter. It suggests that a principled and consistent drafting process is needed to give Māori authentic status within the statute, which would require judges to accord equal weight to Māori provisions. The following chapter considers how principles for enacting bilingual provisions have developed in Canada and Wales, and suggests an amendment to the Interpretation Act 1999 to provide some clear guidelines for the interpretation of Māori text in statutes.

²¹⁴ Ibid, at [36]-[38].

VI *A Principled Process for Drafting Bilingual Provisions*

A New Zealand's current approach

There is, currently, no principled approach to the drafting of bilingual provisions of statutes. While the preamble, apology and acknowledgement sections of Treaty settlements statutes are enacted bilingually, the drafting process, and therefore the statutory content, is negotiated in and dominated by the use of English. This chapter suggests that a co-drafting approach should be followed for preambles, apologies and acknowledgement sections of Treaty settlement statutes.

In terms of the current process followed, the Crown negotiates with the iwi on the content of the preamble to the proposed settlement legislation, which is first negotiated by both parties in English.²¹⁵ The Crown ensures historical accuracy of the English content, which might result in further negotiation with the iwi. The iwi are then responsible for formulating a Māori version (if it chooses to), which involves crafting a close and functionally equivalent translation of the English text.²¹⁶ The translation is checked by the Office of Treaty Settlements, who provides the Parliamentary Counsel Office with confirmation that the Māori version is a true and proper translation.²¹⁷ The Parliamentary Counsel Office asks that the translation check be carried out by a licensed interpreter whose qualifications are recognised by Te Taura Whiri i te Reo Māori and the Māori Language Act 1987. If the Crown does not consider the Māori text to be an accurate translation, it is amended until agreement is reached with the claimant group that the translation is accurate.²¹⁸

As Roderick MacDonald posed “[i]f legal bilingualism presupposes equal authority of both versions of a text, how ought the interpreter to react when one such version is

²¹⁵ Personal communication, Dr Briar Gordon, Parliamentary Counsel Office, 5 May 2011.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

patently a derivative translation of the other?”²¹⁹ The content of bilingual enactments are first determined in English, which prevents te reo Māori from playing a substantive role in determining the “legal content” of the provision. As a result, the Māori text is rendered a simple translation of the English.

A drafting process that relies on constructing “simple translations” of English text allows judges to take a dualistic approach to the interpretation of the relevant provision: it permits the judge to have regard *only* to the English version. In *McGuire v Hastings District Council*²²⁰ the appellant argued that a proposed designation of a road running through Māori freehold land amount to a “threatened trespass” under s 19 of TTWM, permitting the Māori Land Court to issue an interim injunction against the Hastings District Council. In finding that the Māori Land Court had no jurisdiction on the facts interim injunction,²²¹ Lord Cooke of Thorndon, writing for the Privy Council, considered the Preamble and s 2 of TTWM. Although His Lordship acknowledged the existence of both Māori and English versions and stated that the Preamble and s 2 were “important and should be set out in full”, His Lordship found it “...sufficient to quote the latter, with a preliminary explanation of some of the [Māori] terms” in the English version.²²²

Admittedly, the drafting process itself does not preclude a court from taking a textual approach to the Māori version. Courts often determine the meaning of foreign words in statutes according to the principles of statutory interpretation.²²³ A court may hear evidence of the meaning of the Māori words on the rare occasion that the preamble requires judicial consideration. However, as shown, such cases are rare, which suggests that the Māori versions of preambles are not intended to have any legal effect on the interpretation of the statute as a whole. The effect is that despite the presence of Māori

²¹⁹ Roderick A MacDonald “Legal Bilingualism” (1997) 42 McGill L J 119 at 148.

²²⁰ *McGuire v Hastings District Council* (PCC) [2002] 2 NZLR 577 (PC).

²²¹ *Ibid*, at [10].

²²² *Ibid*, at [4].

²²³ See *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (HC) at 327.

in statute, English remains the de-facto language of statutory drafting and interpretation.

B A principled approach to drafting bilingual statutes

The experience of drafting bilingual statutes in Canada and Wales below demonstrates the importance of ensuring firstly that both versions are considered equal throughout the process of drafting and interpretation, and secondly that the cultural worldview and nuances of both languages are respected.

1 Equal status

The Canadian experience of drafting bilingual legislation demonstrates, firstly, the importance of having a drafting process that recognises the official status of both languages; English and French. Section 133 of the Constitution Act 1867 provides that the “Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages”. The drafting process is guided by the principle that once enacted, both versions are to be treated as equally authoritative in law. Section 18(1) of the Canadian Charter of Rights and Freedoms states that “[t]he statutes, records and journals of Parliament shall be printed and published in English and French *and both language versions are equally authoritative*” (emphasis added).

Wales has recently adopted a similar approach. Since 1999, the National Assembly for Wales (the Assembly) has been required, unless exceptional circumstances permit otherwise, to draft Bills in both English and Wales.²²⁴ The Assembly is also required to “...give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that that the English and Welsh languages should be treated on a basis of equality”.²²⁵

This principle of equal status did not develop spontaneously. Before 1978, the process followed to extract a bilingual French text in Canada was to draft a literal

²²⁴ Government of Wales Act 2008, s 111(5).

²²⁵ Government of Wales Act 2008, s 35(1).

translation of the English version.²²⁶ The process of literal translation was thought to contradict the principle of equality between the two languages, and the official status of the French language. The Cabinet Directive on Law-making, published in 1999, remarked that the Constitution Act 1867:²²⁷

...requires federal laws to be enacted in both official languages and makes both versions equally authentic. It is therefore of primary importance that bills and regulations be prepared in both official languages. It is not acceptable for one version to be a mere translation of the other... both versions of legislation must convey their intended meaning in clear and accurate language.

Similarly, in Wales, the initial process of simple translation was also thought to “have unintended consequences detrimental to the aim of true linguistic equality”.²²⁸

French, Māori and Welsh are similar in that all are recognised as official languages in their respective jurisdictions, which is a critical starting point for the principle of equal status. While, unlike Canada and Wales, there is no constitutional or legislative provision that confers equal status on te reo Māori, the recognition that te reo Māori is “a taonga of transcendental importance”²²⁹ supports recognising Māori as having equal status alongside English; both during the process of legislative drafting and also when judges interpret such provisions. The Waitangi Tribunal in 1986 were influenced by the need for a degree of equality between the two languages; not only in the courts and in public institutions, but also in society generally.²³⁰ This sentiment was affirmed by Anderson J in *Kohu v Police*, where His Honour stated that the Act’s “essential premise, expressed therein, was that Te Reo Māori is a taonga, to be recognised as having *equal*

²²⁶ Serge Lortie and Robert Bergeron “Legislative Drafting and Language in Canada” (2007) 28(2) Statute Law Review 83 at 86.

²²⁷ Privy Council Office “Guide to Making Federal Acts and Regulations: Cabinet Directive on Law-Making” (1999) at [2]. Available at < www.pco-bcp.gc.ca >.

²²⁸ Keith Bush “New Approaches to UK Legislative Drafting: The Welsh Perspective” (2004) 25(2) Statute Law Review 144 at 145.

²²⁹ *Ko Aotearoa Tēnei*, above n 2, at [5.5.1].

²³⁰ *Te Reo Māori Claim*, above n 23, at [9.1.6]-[9.1.7].

status as an official language of this nation”.²³¹ A principled drafting process must therefore recognise that te reo Māori is to be equally authoritative in law; intended to have full legal effect alongside English.

2 *Respecting worldviews*

Secondly, the Canadian experience demonstrates the importance of ensuring that the cultural and legal worldview of both languages is reflected throughout the drafting process. This is difficult when the roots of the two legal systems are fundamentally different. Since the passing of the Quebec Act 1774, two legal systems have been in operation in Canada: the French civil law in Quebec and English common law elsewhere.²³² Even within Quebec, English and French have had different functions: French civil law governs private law and English common law governs public law.²³³ This causes difficulties during the process of legislative drafting. As Gambaro states:²³⁴

...in Canada the texts of laws drawn up in French and English refer to legal cultures which are traditionally different. In these circumstances, the connection between language structure and legal culture emerges. In fact, the legal terminology in both languages does not correspond because the basic legal concepts on which private law is based are different.

Despite the different origins of the two legal systems, bilingual statutes are drafted to ensure that the laws can be “understood in the legal context of civil and common law”.²³⁵ This is done to treat both legal systems with equal respect and to ensure, as far

²³¹ *Kohu v Police* HC Taupo AP7/88, 28 June 1989 at [2] [Emphasis added].

²³² Lionel A Levert “Bilingual and Bijural Legislative Drafting: To Be or Not To Be?” (2004) 25(2) *Statute Law Review* 151 at 154.

²³³ *Ibid.*

²³⁴ Antonio Gambaro “Interpretation of Multilingual Legislative Texts” (December 2007) 11(3) *Electronic Journal of Comparative Law* <www.ejcl.org> at 7.

²³⁵ *Ibid.*

as possible, that both languages and legal traditions are respected during the law-making process. As the Cabinet Directive on Law-Making states:²³⁶

...it is equally important that bills and regulations respect both the common law and civic law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.

Like Canada, New Zealand has two legal traditions; tikanga Māori and state law. Durie defines tikanga Māori as “[the] values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct...”²³⁷ This definition was recently accepted by the High Court in *R v Mason*.²³⁸ In that case, the applicant, who was convicted for one count of murder and one count of attempted murder, argued that he could be dealt with in accordance with tikanga Māori. This required the applicant to prove that tikanga Māori survived the imposition of English law after 1840. Heath J found that:²³⁹

Contrary to some of the contemporary jurisprudence, it is clear that around the time of both the Declaration of Independence and the Treaty of Waitangi, there was a general acceptance that existing customary practices had “the character and authority of law”.

While His Honour found that a separate criminal law system was extinguished by statute, tikanga Māori could nevertheless “play a meaningful role in criminal proceedings, provided it could be accommodated by the existing statutory system”.²⁴⁰ Significantly, His Honour found that the statute did *not* preclude the consideration of tikanga Māori during sentencing, and that relevant principles and processes of tikanga

²³⁶ Privy Council Office “Guide to Making Federal Acts and Regulations: Cabinet Directive on Law-Making” (1999) at [2]. Available at < www.pco-bcp.gc.ca >.

²³⁷ E T Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 OLR 449 at 452.

²³⁸ *R v Mason* [2012] NZHR 1361, Tauranga CRI-2011-070-149 27 July 2012.

²³⁹ *Ibid*, at [13].

²⁴⁰ *Ibid*, at [38].

Māori, such as *utu* and *murū*, could be accorded judicial recognition.²⁴¹ *R v Mason* therefore illustrates the continued existence and relevance of customary law in New Zealand society, and demonstrates an awareness of the need to recognise and accommodate *tikanga* Māori where possible.

In terms of drafting bilingual provisions in statutes, the drafting process must respect the distinct cultural nuances of the language, especially when concepts are used that pertain specifically to *tikanga* Māori. For example, it would not be desirable to use Māori words to communicate legal concepts where the legal concept is inconsistent with the customary meaning.²⁴² As is argued below, a co-drafting process would help identify when these sorts of tensions arise, and will provide a more coherent final product.

C A co-drafting approach to legislative drafting

The process of drafting bilingual statutory provisions should reflect the fact that *te reo* Māori is a *taonga* that warrants protection under the Treaty of Waitangi. The simple translation of English preambles does not reflect this. As MacDonald states, “[i]f one is to have a truly bilingual legal culture, one cannot be content merely with producing artefacts in two languages”.²⁴³ The Māori and English versions must be drafted with a view that both versions are equally authentic, and therefore both should be accorded equal weight when any bilingual provision is interpreted.

In general, there are two approaches to drafting bilingual legislation; translation and co-drafting. The translation approach involves a single drafter who drafts an original version of the statute, which is subsequently translated into the target language. As stated, this is New Zealand’s current approach. The co-drafting approach requires two drafters; one for each language.²⁴⁴ Each drafter drafts an original version in their assigned language and then compares the texts to resolve inconsistencies in vocabulary

²⁴¹ *Ibid*, at [39]-[43].

²⁴² The tension between ‘*utu*’ and ‘*compensation*’ is one such example. See Tai Ahu, Rachael Hoare and Māmari Stephens “*Utu: Finding a Balance for the Legal Māori Dictionary*” (2011) 42(2) VUWLR 201 at 213.

²⁴³ MacDonald, above n 219, at 128.

²⁴⁴ *Ibid*.

and ensures the same legal message is being communicated.²⁴⁵ Both versions are subsequently enacted as law.

1 Advantages of a co-drafting

The primary benefit of adopting a co-drafting approach in New Zealand is that both drafters participate fully and equally in the drafting process. A co-drafting approach would therefore be consistent with the principle of partnership under the Treaty.

Furthermore, as a result, te reo Māori becomes a formative language at the legislative drafting stage, thus elevating the status of the language from “translated” to “original”. As MacDonald notes:²⁴⁶

Distinct originals are...the precondition for legal bilingualism. Bilingual statutes will then be the result of integrating two separate texts initially crafted and drafted in a manner sensitive to the contexts and subtleties particular to each language.

Currently, judges seldom refer to Māori language translations. Most judges do not even acknowledge the presence of the Māori text, thereby according the English version greater weight during statutory interpretation. A co-drafting approach, which recognises both versions as authentic, would require judges to appreciate that an understanding of one version alone is not an authoritative interpretation of the spirit and intent of the statute or the relevant provision. Judges will be required to have due regard to both texts of the bilingual provision and, where possible, to read the two texts harmoniously. As MacDonald notes in the Canadian legal context:²⁴⁷

One must supplement one version with the other and recognize that the text is incomplete without both. The presence of an equally authoritative set of propositions in two languages that must be reconciled can force an analysis of the spirit, intent and objects of an enactment...

²⁴⁵ Ibid.

²⁴⁶ Ibid, at 159.

²⁴⁷ Ibid, at 144.

The co-drafting approach is therefore consistent with ensuring that both versions are equally determinative of legal rights and obligations and are to be given full legal effect.

This approach already underpins the Waitangi Tribunal's interpretation of the Māori and English texts of the Treaty of Waitangi. Firstly, the Preamble to the Treaty of Waitangi Act 1975 recognises that there are differences in both texts that need to be reconciled. The Act grants to the Waitangi Tribunal "exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them".²⁴⁸ The statute therefore contemplates that both versions are authentic and determinative of legal rights and obligations.

Secondly, the Waitangi Tribunal has affirmed that no version of the Treaty is superior, and both versions must be considered for an interpretation of the Treaty to be valid. The starting point is the Tribunal's analysis in the 1983 *Motunui-Waitara Claim* that:²⁴⁹

In a consideration of the specific terms of the Treaty it is important to appreciate that the Maori text is not a translation of the English text and conversely, nor is the English version a translation of the Maori.

The Tribunal relied on the analysis of an article written by Ruth Ross called "Te Tiriti of Waitangi – texts and translations".²⁵⁰ In that article, Ross argued that a number of English drafts were given to Henry Williams to translate. While five English versions of the Treaty were sent from Governor Hobson to the Colonial Office, the original English text did not survive.²⁵¹ On this basis, the Tribunal found, it is incorrect to treat the Māori version as a 'mere translation'.²⁵²

²⁴⁸ Treaty of Waitangi Act, s 5(2).

²⁴⁹ Waitangi Tribunal *The Motunui-Waitara Claim* (Wai 6, 1983) at [10.1] [*Motunui-Waitara Claim*].

²⁵⁰ Ruth Ross "Te Tiriti of Waitangi - texts and translations" (1972) 6 NZJH 129.

²⁵¹ *Ibid*, at 134.

²⁵² *Motunui-Waitara Claim*, above n 249, at [10.1].

The authentic status of both versions was further affirmed by the Waitangi Tribunal in the *Te Reo Māori Claim*, where the Tribunal found that “it is not possible to interpret the Treaty faithfully by looking at the English version only, nor the Māori version only”.²⁵³ Rather, as the Act contemplates, both versions are original and must be regarded during interpretation.

Another advantage is that the iterative process of co-drafting ensures that there is, in Wood’s terms, beneficial ‘cross-pollination’ between the two versions.²⁵⁴ Although difficulties might arise because some legal concepts might be more easily expressed in English, or vice-versa, the collaborative process of drafting two versions assists in identifying such instances. A co-drafting approach could alert drafters to the tensions that might arise between the customary meaning of a Māori word and the legal concept that needs to be expressed. The process will suggest to the drafters the changes that might need to be made to either version.²⁵⁵ Importantly, the Māori version need not be amended to slavishly replicate the English version, which will ensure that the final product represents a distinct and natural use of te reo Māori.

Furthermore, a co-drafting approach would provide an opportunity for iwi to be directly involved in the legislative drafting stage, strengthening the relationship between iwi and the Crown.

2 *Difficulties surrounding implementation*

Admittedly, co-drafting is arguably impractical and difficult to implement in a largely monolingual country. An obvious impracticality is the lack of a cohort of legally trained, fluent Māori speakers with legislative drafting experience. For preambles to Treaty settlement legislation, co-drafting would require both drafters to be fluent Māori speakers, one from the Crown and one from the iwi. It could take some time to develop sufficient capacity for co-drafting to become feasible, at least in the long-term.

²⁵³ *Te Reo Māori Claim*, above n 23, at [4.2.5].

²⁵⁴ Michael J B Wood “Drafting Bilingual Legislation in Canada: Examples of Beneficial Cross-Pollination Between the Two Language Versions” (1996) 17 Statute Law Review 66.

²⁵⁵ *Ibid*, at 69.

Furthermore, the effectiveness of co-drafting relies on judges having a high degree of proficiency in both languages. Currently, very few judges of the New Zealand courts can speak Māori fluently. One possible option is to refer the interpretation of bilingual enactments to the Māori Appellate Court, a jurisdiction with greater knowledge of te reo Māori and tikanga Māori.²⁵⁶ Section 61 of TTWM already empowers the High Court to state a case to the Māori Appellate Court on questions related to, inter alia, any question of tikanga that arises in the High Court.²⁵⁷ Subsequently, the Māori Appellate Court sends a certificate of its opinion to the High Court.²⁵⁸ If the stated case is one related to tikanga Māori under s 61(1)(b), the view of the Māori Appellate Court is binding on the High Court,²⁵⁹ subject to the High Court's power to refer the question back to the Māori Appellate Court for reconsideration.²⁶⁰ An amendment to the Interpretation Act 1999 might, for example, require the Māori Appellate Court to determine which version of the provision is to prevail in the event of a discrepancy between their meanings.

Another limitation is that adopting a co-drafting approach for statutes may not necessarily accord equal status to the Māori text, at least for statutes of general application. Government policy is determined beforehand in English and instructions issued by the relevant government to the Parliamentary Counsel Office (PCO) in English.²⁶¹ One could argue that the Māori version of an enactment would simply replicate pre-existing English language policy. For co-drafting to be fully effective, te reo Māori would need to be a fully-fledged language of government and used throughout the law-making process; from the formulation of government policy to enactment. This

²⁵⁶ Te Ture Whenua Māori Act, s 7(2A) provides that "A person must not be appointed a Judge unless the person is suitable, having regard to the person's knowledge and experience of te reo Maori, tikanga Maori, and the Treaty of Waitangi."

²⁵⁷ Section 61(1)(b).

²⁵⁸ Section 61(2)(b).

²⁵⁹ Section 61(4).

²⁶⁰ Section 61(3).

²⁶¹ See Legislation Advisory Committee "Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation" (May 2012) Parliamentary Counsel Office <www.pco.govt.nz> at pt 1.

is consistent with the Tribunal's recommendation that the Crown take steps to become Māori-speaking.

The situation with Treaty settlement statutes is, however, somewhat different. The content of the preamble, apology and acknowledgment sections themselves are not directed by government policy. Their content is determined at the drafting stage by direct negotiation with the relevant iwi. Co-drafting therefore gives te reo Māori the opportunity to substantively determine the content of preambles, apologies and acknowledgments without being hamstrung by the need to give effect to government policy pre-drafted in English.

D Resolving differences in meaning

A more fundamental difficulty arises from the implication that co-drafting grants both versions equal status. If both versions are to be equally determinative, and must be given equal weight, how ought conflicts in meaning be resolved? Currently, bilingual provisions in Treaty settlement statutes do not expressly contemplate any difference in the meaning of the two versions. With the sole exception of TTWM, there is no provision in the statutes to deal with a conflict in meaning between two bilingual provisions, which suggests that both versions are perfectly equivalent. This is counterintuitive given that conflicts in meaning inevitably arise when two languages interact.

Adding to the difficulty is that, for most of New Zealand's history, statutes have been enacted only in English. As a result, New Zealand courts have not established any common law rules to deal with conflicts in the meaning of Māori and English versions; a stark contrast to the well-developed, albeit controversial, set of statutory interpretation principles in Canada.²⁶²

Where a consistent and principled legislative drafting process is carried out, discrepancies between Māori and English are less likely. However, drafting errors

²⁶² See Paul Salembier "Equal Authenticity and Rule of Law in the Adjudication of Bilingual Legislation" (2004) 26(2) SCLR 570. See also Ruth Sullivan "Some Problems with the Shared Meaning Rule as Formulated in *R v Daoust* and The Law of Bilingual Interpretation" (2010) Ottawa L Rev 42 at 71.

inevitably occur.²⁶³ Furthermore, it is not always possible to achieve functional equivalence. As Joan Metge states:²⁶⁴

Māori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation – the direct reference – is substantially the same, the connotations are significantly different. Commonly, several sentences of explanation are needed to deal adequately with the similarities and divergences.

It is generally accepted that, where possible, judges ought to read two bilingual texts consistently in order to extract a single meaning from the statute.²⁶⁵ The Canadian courts have adopted two general approaches to arrive at a single meaning when a conflict arises. The first approach is to apply the ‘shared meaning rule’. This rule, which assumes that there is commonality between two meanings, applies the narrower meaning that is common to both.²⁶⁶ The advantage of the shared meaning rule is that it is consistent with the principle that both versions are equally authoritative in law.

However, the shared meaning rule may not a desirable rule to resolve conflicts between English and Māori versions of preambles, acknowledgments and apologies, or other bilingual enactments. This is because legal terms in Māori can often carry general, unspecialised meanings, especially where customary Māori terms are used. The more subtle, nuanced meanings are sometimes difficult to identify precisely. The Legal Māori Project, for example, identified 12 distinct meanings of the word ‘mana’, most of which are derived forms of the general meaning ‘authority’.²⁶⁷ On the other hand, English has an extensive technical legal vocabulary and is more likely to carry more specialised, and

²⁶³ Paul Salembier “Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule” 31 *Ottawa L Rev* 1 at 81.

²⁶⁴ Joan Metge “Commentary on Judge Durie’s Custom Law” (unpublished paper for the Law Commission, 1996) at [2.4] cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, 2001) at 29-30.

²⁶⁵ Salembier “Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule”, above n 263, at 98.

²⁶⁶ *Ibid*, at 79.

²⁶⁷ In order of frequency, these are: authority (*n*), authorise (*v*), enact or come into force (*v*), jurisdiction (*n*), legal rights (*n*), mandate (*n*), ownership (*n*), sovereignty (*n*), lawful (*v*), binding or of legal consequence (*v*), to give effect to (*v*).

therefore narrow, legal meanings. As such, the shared meaning rule could operate in favour of the English version. Furthermore, the shared-meaning rule has been criticised as being unpredictable and unprincipled. It is entirely possible, for example, that Parliament intended that the broad meaning was to be the correct interpretation, and not the narrow meaning.²⁶⁸

If there is no commonality between the two meanings of bilingual provisions, the alternative approach is to only apply the meaning of one version. Whether or not this rule detracts from the principle of equality depends on how the rule operates. If it operates arbitrarily, and without any legal justification, then the principle of equality is undermined. In Ireland, where an irreconcilable conflict arises, the version in the “national language”, Irish, prevails.²⁶⁹ Similarly, in s 2 of TTWMA provides that, in the event of a conflict in meaning between the Māori and English versions of the Preamble, the Māori version applies. Although these examples are politically justified because they respect the indigenous language, they cannot be said to treat each version equally.

However, when giving effect to agreements, the preference of one version over another is justified where the alternative version was not consented to by one party. For example, in the event of an irreconcilable conflict between the two versions of the Treaty, the Waitangi Tribunal applies the *contra proferentum* rule. This rule provides that in the event of an ambiguity between two versions, the relevant provision is construed against the party which drafted it.²⁷⁰ It is justified because the majority of Māori in 1840 assented to the Māori version of the Treaty. As the Tribunal stated in the *Ngai Tahu Report*:²⁷¹

Where there is a difference between the two versions considerable weight should, in our opinion, be given to the Maori text since this is the version assented to by all but a few Maori. This is consistent with the *contra proferentum* rule that where an ambiguity exists,

²⁶⁸ Paul Salembier “Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule”, above n 263, at 86.

²⁶⁹ Constitution of Ireland 1996, art 25.4.6.

²⁷⁰ See the *Ngai Tahu Report*, above n 165, at [4.4.4].

²⁷¹ *Ibid.*

the provision should be construed against the party which drafted or proposed the provision, in this case the Crown.

Such a rule would not be appropriate if the Crown adopts a co-drafting approach to drafting preambles, apologies and acknowledgments. This is because co-drafting envisages the active participation of iwi during the drafting stage.

An alternative approach to resolving conflicts is to apply the version which is most in accord with the purpose and scheme of the Act. This rule is desirable because it operates neutrally between the two languages versions, thereby upholding the principle of equality between both versions. Furthermore, this rule is no different to the approach followed when interpreting unilingual statutes. As Salembier states:²⁷²

The aim is the same in interpreting both unilingual and bilingual states: to arrive at a single meaning that is harmonious with the scheme of the Act and its apparent purpose.

There is overseas precedent for such an approach. Art 23(4) of the Constitution of Niue provides that the Niuean and English versions of enactments are equally authentic, despite the fact that in the event of a conflict, only one version prevails.²⁷³ The rule, which does not favour either language, provides that:²⁷⁴

...in any case there is any apparent discrepancy between any provision of the Niuean version and of the English version of this Constitution or of any such record or of any enactment, then, in construing that provision, regard shall be made to all the circumstances that tend to establish the true intent and meaning of that provision.

Furthermore, applying the meaning of the version that is most consistent with the purpose and general scheme of the Act is consonant with New Zealand's current approach to statutory interpretation. Section 5(1) of the Interpretation Act 1999 provides that "[t]he meaning of an enactment must be ascertained from its text and in the light of

²⁷² Salembier "Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule", above n 263, at 98.

²⁷³ Constitution of Niue, art 23(5).

²⁷⁴ Constitution of Niue, art 23(4).

its purpose". The purposive approach has been reaffirmed in case law as the primary principle. As the Supreme Court recently stated:²⁷⁵

...text and purpose [are] the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from the text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against the purpose in order to observe the dual requirements of s 5 [Interpretation Act]. In determining the purpose the Court must obviously have regard to both the immediate and general legislative context.

The purposive approach would therefore prove useful in resolving ambiguities between English and Māori versions.

To offer a practical example, the purposive approach would assist in determining the conflict in meaning between 'whakahau' and 'promote' in the Preamble to TTWM. To determine which version prevails, judges would have regard to the surrounding text of the Preamble and the legislative scheme of the Act as a whole. Firstly, both the Māori and English versions of the Preamble are consistent to the extent that they recognise the significance of the land to Māori. The Māori version states: "e tika ana kia marama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori". The English version states that "it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people".

Secondly, a recurring theme in the Act is that land is to be alienated only when strict procedural requirements are met. Māori customary land cannot be alienated,²⁷⁶ unless a vesting order is granted changing its status to Māori freehold land.²⁷⁷ Even then, the procedural requirements under Part 7 of the Act suggest a strict interpretation of the Preamble. Owners in common must not alienate their interest without the consent of at least three quarters of the owners (if no owner has a defined share in the land) or the consent of those who together own at least 75 per cent of the beneficial freehold interest

²⁷⁵ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

²⁷⁶ *Te Ture Whenua Māori* 1993, s 145.

²⁷⁷ Section 132.

in the land.²⁷⁸ Furthermore, those owners must give the first right of refusal to a preferred class of alienees.²⁷⁹ The legislative scheme therefore supports a finding that the strict term, 'whakahau', should be the preferred meaning.

E An Amendment to the Interpretation Act 1999

There is currently no provision in the Interpretation Act 1999 which ensures that Māori is to be equal authority alongside English in statutes. The fact that judges tend to ignore the Māori versions suggests that judges assume that the Māori version is functionally equivalent to the English version. If the Māori version is to have determinative legal effect, an amendment is therefore required:

40 Enactments in Māori and English

- (1) The Māori version and the English version of any enactment are equally authoritative and are to be given equal weight;
- (2) In the event of a conflict in meaning between the English and Māori version of any enactment, only one version shall prevail in accordance with s 5(j) of the Act.

The rule operates neutrally between the two texts and therefore ensures the equality of both versions. More importantly, it would establish some clear principles for the interpretation of Māori language text to increase the functionality of Māori in the civic realm.

In some ways, te reo Māori already features in the substantive clauses of statutes of general application, such as 'kaitiakitanga' in s 6 of the RMA. Unlike Treaty settlement statutes where extended passages of Māori are enacted, only single Māori words or phrases are incorporated. However, there are inconsistencies in how these words feature in the statute, and a significant degree of uncertainty about how they are to be interpreted. These issues are explored in greater depth in Chapter Six, which argues for

²⁷⁸ Section 150C(1)

²⁷⁹ Section 147A.

an additional amendment to the Interpretation Act 1999 to require all such Māori words to be interpreted consistently with tikanga Māori.

VII A Consistent Approach to Incorporating Māori Words

A Definitions

The increasing incorporation of Māori terms into substantive provisions of statutes provides a greater opportunity for Māori language to influence substantive legal outcomes. Māori customary terms, such as *whāngai*,²⁸⁰ feature in substantive provisions of general statutes, which suggests they are intended to have determinative legal effect. However, their interpretation is characterised by a high degree of legal uncertainty which is caused primarily by the inconsistent method of incorporation.²⁸¹ Some terms require an interpretation in accordance with tikanga Māori while others do not. This is despite the passing of the Interpretation Act 1999, one purpose of which is to “promote consistency in the language and form of legislation”.²⁸² Currently, Māori terms are incorporated into statute in three forms:

1. A Māori term is incorporated unaccompanied by an English definition;²⁸³
2. A Māori term is incorporated with a single phrase English definition;²⁸⁴
3. A Māori term is incorporated with a phrasal definition that requires an interpretation to be accorded by reference to another Māori concept²⁸⁵ or by reference to tikanga Māori generally.²⁸⁶

²⁸⁰ *Whāngai* features in three statutes of general application: the Maori Land Act 1993, Māori Land Court Rules 2011 and the Maori Fisheries Act 2004.

²⁸¹ Arnun Turvey “Te Ao Māori in a ‘Sympathetic’ Legal Regime – The Use of Māori Words in Statutes” (2009) 40 VUWLR 531 at 542.

²⁸² Interpretation Act 1999, s 2(c).

²⁸³ See Families Commission Act 2003, s 11 which provides that: “In the exercise and performance of its powers and functions, the Commission must have regard to the needs, values, and beliefs (a) of Māori as tangata whenua: (b) of the Pacific Islands peoples of New Zealand (c) of other ethnic and cultural groups in New Zealand. “Māori” and “tangata whenua” are not defined.

²⁸⁴ See Te Ture Whenua Māori Act 1993, s 5. Ahi kā is defined as “fires of occupation”. Kaitiaki is defined as “guardian”.

B *Māori word or Māori custom?*

The ability of Māori words to determine legal outcomes is hampered by the uncertainty of whether a word incorporates Māori custom, and so therefore requires an interpretation consistent with tikanga Māori, or whether a word is to be given general statutory application. The former treats the Māori word as a matter of foreign law requiring evidence of the content of custom, while the latter is considered purely a matter of statutory interpretation - a word to be interpreted by the judge according to his or her general linguistic knowledge.²⁸⁷

If no definition is provided, the orthodox approach of the New Zealand courts is to treat Māori terms as matters of statutory construction to be interpreted by the court at its own discretion. This flexible approach adopted by the House of Lords in *Fothergill v Monarch Airlines* where Lord Wilberforce stated that:²⁸⁸

... [t]he process of ascertaining the meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it... There is no reason why he should not consult a dictionary. If the word is such that a dictionary can reveal its significance: often of course it may substitute one doubt for another... They [the parties] may call evidence of an interpreter, if the language is one unknown to the court, or of an expert if the word or expression is such as to require expert interpretation. Between a technical expression in Japanese and a plain word in French there must be a whole spectrum which calls for suitable and individual treatment.

The dictum in *Fothergill* was adopted into New Zealand law by Paterson J in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*,²⁸⁹ after extensive litigation on the

²⁸⁵ See Resource Management Act, s 2. Tangata whenua is defined by reference to three other Māori concepts: "Tangata whenua, in relation to a particular area, means the *iwi*, or *hapū*, that holds *mana whenua* over that area".

²⁸⁶ See Resource Management Act, s 2(1). Kaitiakitanga is defined as "the exercise of guardianship by the tangata whenua of an area in accordance with *tikanga Maori* in relation to natural and physical resources; and includes the ethic of stewardship".

²⁸⁷ Richard Boast and others *Maori Land Law* (Butterworths, Wellington, 1999) at 36.

²⁸⁸ *Fothergill v Monarch Airlines* [1981] AC 251 (HL) at 273-274.

²⁸⁹ *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (HC).

meaning of the undefined word ‘iwi’ in the Schedule to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. His Honour acknowledged that iwi “is a Māori word used in an English language statutory context” and that:²⁹⁰

... In these circumstances, it is permissible to consider the dictionary meaning of that word, and it is also permissible, in my view, to take notice of appropriate historical, sociological, anthropological and etymological evidence.

His Honour heard extensive evidence on the meaning of ‘iwi’ and found that it meant “traditional Maori tribes in the sense that a tribe includes all persons who are entitled to be a member of it because of kin links and genealogy”.²⁹¹ Paterson J heard extensive evidence from experts in tikanga Māori, ensuring that a Māori understanding could be taken into account when interpreting the meaning of the word.

However, in the absence of any explicit statutory requirement that Māori words be interpreted according to, or consistently with, tikanga Māori, courts tend to adopt general meanings that distort the meaning of the word from a tikanga Māori perspective. The courts’ interpretation of the word ‘taonga’ in s 2 of the Property (Relationships) Act 1976 (PRA), which is undefined, is one example. Section 2 of the PRA provides that ‘taonga’ are excluded from the definition of “family chattels”. Establishing that a family chattel is a taonga therefore provides one means whereby possessions can be exempt from the equal division of relationship property under s 11.

The meaning of ‘taonga’ was first considered by Durie J in *Page v Page*, who stated that the ordinary and everyday use of taonga would encompass certain artworks gifted by a mother to her son.²⁹² This comment was relied on in *Perry v West*,²⁹³ where Judge Mather of the Family Court was required to determine whether a painting, which had been owned by the appellant for 39 years, was a ‘taonga’ despite the fact that both the

²⁹⁰ Ibid, at 327.

²⁹¹ Ibid, at 329.

²⁹² *Page v Page* (2001) 21 FRNZ 275 at [46].

²⁹³ *Perry v West* FC Waitakere FP239/01, 16 May 2003.

original artist and the owner were non-Māori and had little or no understanding of Māori culture, and the property in question had no Māori content. His Honour found that although taonga “is a Māori word, it describes a relationship between a person or persons and property, and I see no reason why it cannot apply to a person or any ethnic or cultural background”.²⁹⁴ Laurenson J upheld this approach on appeal.²⁹⁵

The sources considered in the *Perry v West* cases included the Williams *Dictionary of Modern Māori* (“property, anything highly prized”),²⁹⁶ P M Ryan’s *The Reed Dictionary of Modern Maori*,²⁹⁷ an authoritative family law textbook,²⁹⁸ various Waitangi Tribunal reports and Orsman’s *Oxford Dictionary of New Zealand English*.²⁹⁹

Jacinta Ruru has offered a robust criticism of the courts’ approach to interpreting “taonga”. In Ruru’s opinion, “...these judgments are a prime example where the court has adopted the simple literal translation of the word – ‘anything highly prized’ – without grasping the wider implications of the Māori world being modelled on collective responsibilities”.³⁰⁰

In *Kininmonth v Kininmonth (K v K)*³⁰¹ the respondent argued that a one-third interest in a family bach was a ‘taonga’. Judge McHardy accepted the observations made by Ruru and found that “the concept could not be relied on in respect of a non-Māori asset”

²⁹⁴ Ibid, at 89.

²⁹⁵ *Perry v West* (2003) 23 FRNZ 204 at [22]-[26].

²⁹⁶ Williams, above n 201, at 381.

²⁹⁷ P M Ryan *The Reed Dictionary of Modern Maori* (Reed, Auckland, 1995).

²⁹⁸ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (Butterworths, Wellington, 2001) ch 3.4.6.

²⁹⁹ Elizabeth Orsman and Harry Orsman *The New Zealand Dictionary* (New House Publishers, Auckland, 1994).

³⁰⁰ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297, at 336.

³⁰¹ *Kininmonth v Kininmonth* FC Auckland FAM-2004-004-509, 27 August 2008.

and that the “relationship component of taonga...is quite different to the concept of relationship in other cultures...”³⁰²

In a recent decision, the Family Court in *Sydney v Sydney* took a different approach altogether. Judge Coyle agreed with Judge Mather and Laurenson J that “it is wrong to interpret [t]ikanga Māori through a Pākehā lens”.³⁰³ His Honour found that despite the absence of a statutory definition, “whether an item of property is a taonga or not must be determined by the Courts using a [t]ikanga Māori definition”.³⁰⁴ His Honour accepted the expert evidence of Professor Peter Tapsell that anyone could own a taonga, whether or not that person was Māori, and stated that:³⁰⁵

...for an item to become a taonga it must be accompanied, through a marae or marae like setting, with elements of whakapapa, mana, tapu and korero...it must therefore be presented, either by a group or individual (but only on behalf of a kin group/tribal group) to another, in a marae like setting. It must additionally have accompanying it a history or whakapapa, some particular significance or mana, and be presented in the context of an oration or korero.

This approach has the effect of limiting the meaning of taonga according to tikanga Māori that would still be consistent with the purpose of the Act. Yet, despite the approach in *K v K* and *Sydney v Sydney*, there is still significant legal uncertainty. The High Court judgment in *Perry v West* has not been overruled. Nor has there been an amendment to the definition of ‘taonga’ in s 2 to clarify the approach to determining its meaning.

C Māori word or English word?

The courts’ interpretation of ‘taonga’ under s 2 of the PRA also illustrates two difficulties. Firstly, Māori words which are incorporated into statute without

³⁰² Ibid, at [26].

³⁰³ *Sydney v Sydney* [2012] NZFC 2685 at [54].

³⁰⁴ Ibid.

³⁰⁵ Ibid, at [57].

accompanying definitions are also typically English words. While words such as ‘taonga’, ‘iwi’ and ‘Māori’ derive from te reo Māori, they have been borrowed into everyday New Zealand English and can assume different meanings. The distinction between ‘Māori words’ and ‘Māori words in English’ affects the types of sources used by a court to determine the natural and ordinary meaning of the word in issue. While the courts in *Perry v West* were willing to treat ‘taonga’ as a Māori word that required it to be “...seen within the context of Māori cultural values”,³⁰⁶ the fact that the courts consulted Harry Orsman’s *Oxford Dictionary of New Zealand English* suggests that the court was also treating ‘taonga’ as an English word. Without an explicit indication of Parliamentary intent, Māori words risk becoming divorced from their cultural base.

D Broad meanings versus specific meanings

Secondly, Māori words in English sometimes assume broad meanings without including the more specific, nuanced meanings in Māori. To take one example, the word ‘Māori’ has three separate headwords in the seventh edition of the Williams dictionary. Each of those headwords has several distinct meanings. The first headword has four distinct meanings; ‘normal, usual, ordinary’, ‘Native, or belonging to New Zealand’, ‘Person of the native race’ and ‘Freely, without restraint, without ceremony, without object etc’.³⁰⁷ The Orsman New Zealand Dictionary however has only two definitions: ‘A member of the Polynesian race that first peopled New Zealand’ and ‘the Maori language’.³⁰⁸ Similarly, John Macalister’s *A Dictionary of Maori Words in New Zealand English* only contains two definitions: ‘a member of the Polynesian race who first peopled New Zealand’ and ‘the Maori language’.³⁰⁹

The distinction between ‘Māori words’ and ‘Māori words in English’ is therefore important because it affects how broadly or narrowly a Māori word should be

³⁰⁶ *Perry v West*, above n 298, at [29].

³⁰⁷ Williams, above n 201, at 179.

³⁰⁸ Elizabeth Orsman and Harry Orsman, above n 299, at 162.

³⁰⁹ John Macalister (ed) *A Dictionary of Maori Words in New Zealand English* (Oxford University Press, Oxford, 2005) at 69.

interpreted to ensure consistency with the purpose of the statute. For example, in English, 'taonga' has one meaning which is generally applicable: 'anything highly prized'. Such an interpretation under the PRA would significantly narrow the pool of relationship property, and is thus likely to run contrary to Parliament's intention. In Māori however, it can be argued that 'taonga' has two meanings. One of the meanings, as provided in the Williams Dictionary accords with the general English meaning: 'property, anything highly prized'. The second meaning of 'taonga' is a specific subset of the general meaning; it describes a particular kind of highly prized thing: an object or entity, tangible or intangible, for which the custodian is a kaitiaki.³¹⁰ Ascribing this meaning to 'taonga' in s 2 of the PRA is essentially to give 'taonga' as specific, technical meaning in the statute: 'taonga tuku iho'.

Narrowing the definition of 'taonga' to 'taonga tuku iho' for the purposes of the PRA has two benefits. Firstly, it would not narrow the pool of relationship property in a way that would be inconsistent with purpose of the statute, which is to ensure the equal division of relationship property.³¹¹ Given the Working Group's comments that "a person in possession of taonga is more of a guardian of taonga for the rest of the tribe and for future generations",³¹² it is likely that the specific meaning of 'taonga' is broadly consistent with Parliamentary intent. Secondly, and most importantly, narrowing 'taonga' in s 2 of the PRA to 'taonga tuku iho' captures the more nuanced meaning according to tikanga Māori. Therefore 'taonga' retains its cultural resonance and its meaning is not distorted by the process of statutory interpretation.

Given the distinction between Māori words and 'Māori words in English', there are two ways to explain the Courts' interpretation of 'taonga' in the *Perry v West* cases. One could say that the courts treated 'taonga' as a 'Māori word in English', in which case they adopted the natural and ordinary English definition. This is difficult to reconcile with the courts' view that 'taonga' should be seen in the context of Māori values. The

³¹⁰ For a detailed discussion of the meaning and significance of taonga, see Paul Tapsell "Taonga, a Tribal Response to Museums" (PhD Thesis, University of Oxford, 1998) at 1.

³¹¹ Property (Relationships) Act 1976, s 1C(3).

³¹² Department of Justice "Report of the Working Group on Matrimonial Property and Family Protection" (Wellington, October 1988) at 18.

second interpretation is that the courts treated ‘taonga’ as a Māori word but erroneously adopted the general Māori definition. Either way, the courts’ interpretation in this instance illustrates the danger to the language when Māori words are incorporated into statutes without any legal mechanism to ensure its interpretation is consistent with a Māori worldview.

E A consistent method of incorporating Māori terms

If Māori is to develop as a functional language of substantive law, it must retain its cultural worldview as much as possible. Unless a Māori word requires a technical definition for the purposes of a statute, definitions should be abandoned and the Interpretation Act 1999 should be amended:

42 Māori words to be interpreted according to tikanga Māori

Māori words shall be interpreted according to tikanga Māori.

There are three reasons to support such an amendment. Firstly, definitions of Māori terms are typically given in English, which risks ascribing inadequate and artificial meanings to Māori concepts. The reference to “kaumātua” in s 2 of the Criminal Justice Act 1985, which is defined as “elder” in parentheses, is one example where the English word is an unnecessary and artificial description of the Māori term. Joan Metge has stated that:³¹³

...the common practice of translating “kaumātua” by the English “elder” has misled Pākehā into taking advanced age as the defining feature of this role, whereas to Māori the exercise of leadership functions are as if not more important.

Metge goes on to state that, according to a Māori worldview:³¹⁴

...the concept kaumātua has five components, age plus social seniority plus life experience plus wisdom gained from reflecting thereon plus current occupancy of a position as leader to a group. Of these age is perhaps the *least* essential. True, the word ‘elder’ as used in English

³¹³ Joan Metge, above n 264, at [6.4.4] cited in Catherine Iorns- Magallanes, above n 31, at fn 2.

³¹⁴ Ibid.

also has implications of experience and wisdom, but because of its form it is associated first and foremost with advanced age.

On the other hand, a definition that is too descriptive is likely to inappropriately codify the content of the concept and can cause it to lose its cultural resonance.

Secondly, such an amendment appreciates the distinction between Māori words and Māori borrowings. Requiring a judge to interpret a word consistently with tikanga Māori would ensure that the judge has regard to authoritative Māori dictionaries when determining the natural and ordinary meaning as opposed to New Zealand English dictionaries. Furthermore, if a more specific meaning is needed to ensure consistency with a statute's purpose, such an amendment would provide an opportunity for the subtle and nuanced meanings of Māori words to be considered during the process of statutory interpretation. It would ensure that the more specific meanings are not subsumed by vague and all-encompassing general meanings.

Finally, such an amendment enhances not only the language but also to the Māori legal system. As in Canada, where lawmakers strive to ensure that judges will make rulings that “make sense” in both civil and common law traditions, such an amendment will give tikanga Māori a greater role in determining the content and meaning of its kupu.

VIII Conclusion

The conclusion of the Waitangi Tribunal in *Ko Aotearoa Tēnei* was that while a revival of te reo Māori occurred during the early to mid-1990s, and significant expenditure by the Crown over the last 30 years, te reo Māori is in renewed decline.³¹⁵ While this fact is no doubt alarming for some, it forces Māori and the Crown to think carefully about their obligations as Treaty partners, and the need to ensure the language survives into the future.

To date, language revitalisation initiatives have focussed on ensuring te reo Māori remains a language of the community; predominantly in schools and in the home. Language revival in these domains is important given the decline in both the numbers of older and younger speakers of the language.³¹⁶ However, focussing on language revitalisation in the private realm does not secure its survival as a language of the 21st century. In the long-term, the survival of te reo Māori equally depends on entrenching the language in the civic life of modern society; in particular, as a fully-fledged language of law and legal process.

Mō tātou te hunga kōrero Māori, ko te pātai ia ko tēnei: mā hea te reo rangatira e ora ai i ēnei rā? Mā hea te rētōtanga o te kupu, te hōhonutanga o te reo e mana ai ki te pūmanawa o te tangata? Ka ngaro atu te mana o te reo ki te kore e kitea, ki te kore e rangona i ngā wāhi tūmatawhānui o te motu. E kore rawa e taea te whakahē i te huatau, ko te haumanutanga o te reo kei te arero o te tangata, kei ngā waha o Māmā, o Pāpā i te kāinga. Engari atu i tērā, ko te tohu o te mauri o te reo ko tōna kawenga ki ngā pito katoa o te motu, ahakoa ki hea, ahakoa ki hea.

Mai i te whakatūtanga o te Kāwanatanga ki Aotearoa, ko te kōrero pono ka hāpai te Tiriti i te mana o te reo. He reo ka whakaruruhautia e te Karauna, e te iwi Māori, mō ake tonu atu, mō ngā uri whakaeke. Mēnā he tika rānei tēnei kōrero, me tīmata te whakatinana i aua kōrero. Arā noa atu te kōrero tautoko, heoi anō mā tātou te taonga e

³¹⁵ *Ko Aotearoa Tēnei*, above n 2, at [5.4.5].

³¹⁶ *Ibid*, at [5.4.4].

kawe ake kia ekea a tāpuhipuhi, a karamatamata. Ka rongō tonu tātou i te reo o te karanga, o te whaikōrero i ngā marae, engari ka tau noa iho ki reira? E kāo.

Ko te Tiriti o Waitangi te tūāpapa e hono ai te iwi Māori ki te iwi Pākehā, e noho tahi ai tātou ki raro i mana whakahaere o te Karauna. Kei reira kē te mana e taea ai te whakahau he reo mō te Karauna hoki. He reo kua mana ki te whare Pāremata hei whakaputa whakaaro, engari kua kore tonu i mana i ngā kōti. He aha ka pahawa i tērā?

E toru ngā poupou mō te haumanutanga o te reo Māori. Ko te tino mana o te reo, ko te mana whakatau ture, ko te mana whakatau tikanga. Mā tēnei te reo e whai wāhi kia noho hei reo mātua, hei poutokomanawa o te whakaaro o te tangata i ngā wāhi tūmatawhānui o te motu. Ko te reo i ngā ture o te Pāremata, me mana tonu. Ā, ka noho te reo hei waka eke noa mō tātou, mō ake tonu atu.

Appendix One

PLATE I

Whakalougatanga.

HE TURE hei whakatikatika hei whakaputahi i nga Ture e whai tikanga ana ki runga ki nga whenua i roto i te Koroni e mau tonu ana ano i runga i ta te Maori tikanga pupuru o namata hei whakarite hoki kia mohiotia ai te tuturutanga o nga whenua Maori a hei whakatakoto tikanga mo te whakaturanga iho o nga whenua matua mo era atu mea hoki. [Akatopa 30, 1865.]

Matua-korero.

NO TE MEA he pai ano kia whakatikatika kia whakaputahitia nga Ture whakaoti tikanga whenua i roto i te Koroni e tau tonu ana ano ki aua whenua nga tikanga pupuru a te Maori hei whakarite hoki kia mohiotia ai nga tangata e puritia ana e ratou aua whenua i runga i aua ritenga hei tautoko ake i tetahi tikanga hou hei tinei i taua tikanga pupuru a hei whakatakoto i tetahi ritenga mo taua tikanga pupuru o namata kia whakarereia kia mau anake te whenua i runga i te Karauna Karaati hei whakatakoto tikanga hoki mo te whakataturanga o nga whenua matua ina mahuetia taua ritenga pupuru o namata a hei whakatakoto i etahi atu tikanga mo runga mo anei mea kua whakahuatia nei.

NA KIA MEINGA HEI TURE e te Runanga Nui o Niu Tireni i tona huihuinga i roto i te Paremete nei i runga hoki i te mana o taua Runanga nga ritenga i raro iho nei.

Ingoa Poto.

I. Ko te ingoa Poto o tenei Ture ko te "Ture mo nga whenua Maori 1865."

The Native Lands Act, 1865

PLATE I

Title.

AN ACT to Amend and Consolidate the Laws relating to Lands in the Colony in which the Maori Proprietary Customs still exist and to provide for the ascertainment of the Titles to such Lands and for Regulating the Descent thereof and for other purposes.

[30th October 1865.]

Preamble.

WHEREAS it is expedient to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners thereof and to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown and to provide for the regulation of the descent of such lands when the title thereto is converted as aforesaid and to make further provisions in reference to the matters aforesaid

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled and by the authority thereof as follows—

Short Title.

I. The Short Title of this Act shall be "The Native Lands Act 1865."

The Native Lands Act, 1865

From Phil Parkinson "'Strangers in the House': The Māori Language in Government and the Māori Language in Parliament 1865-1900" (2001) 32 VUWLR 1 at 56.

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