



TIRITI O WAITANGI ASSESSMENT OF NZ UK FTA:

***MĀTAURANGA MĀORI,
DATA AND DIGITAL TRADE***

**This analysis is as accurate as possible within the time available*

HOW “DIGITAL TRADE” RULES BREACH TE TIRITI O WAITANGI

- Rangatiratanga and kaitiakitanga of taonga, including whakapapa, require
 - systems of Māori data sovereignty and Māori data governance, and
 - effective protections against abuse, which aren't in place in Aotearoa (or most places around the world).
- The Waitangi Tribunal's Report in November 2021 on the TPPA (Wai 2522) found the e-commerce (digital trade) rules in the TPPA
 - breached the Crown's obligations of active protection of Mātauranga Māori and
 - caused prejudice to Tiriti rights, interests and responsibilities by restricting the adoption of Māori systems of governance and protections in the future.
- Those “e-commerce” rules are almost the same as the UK FTA “digital trade” chapter 15.





WHAT THE
TRIBUNAL
SAID ABOUT
TIRITI RIGHTS
...

*“at the heart of the e-commerce issue explored in this report is the question of **governance and control of Māori data**”*

*which involves “**matters fundamental to Māori identity**, such as whakapapa, mana, mauri and mātauranga. ...*



WHAT THE
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...

Perhaps the **most fundamental** of te Tiriti/the Treaty guarantees to Māori is of **the right to cultural continuity.**

*This is nothing less than the **right to continue to organise and live in Aotearoa New Zealand as Māori in accordance with tikanga Māori.***”(180-2)

PROTECTION SHOULD NOT BE TRADED OFF AGAINST OTHER GOALS

*“Because mātauranga Māori is at the heart of Māori identity it is **not an interest or consideration that is readily amenable to some form of balancing exercise when set against other trade objectives, or the interests of other citizens or sectors.**”*

*“It is certainly **not a matter the Crown can or should decide unilaterally.** ...*

*However hard it may be, the question of the **appropriate level of protection for mātauranga Māori** in international trade agreements, and the governance of the digital domain, **is first and foremost a matter for dialogue** between te Tiriti/the Treaty partners.” (174)*



THE TPPA'S
PROTECTIONS
WERE
INADEQUATE
AND
PREJUDICED
MĀORI RIGHTS

*“We are **not convinced that reliance on exceptions and exclusions** [which includes the Treaty of Waitangi Exception] **is sufficient to meet the active protection standard.** ...*

*We conclude that there is a **material risk of regulatory chill and risk arising from the precedent and ratchet effect** of the CPTPP e-commerce provisions.” (185)*



THE CROWN FAILED TO REMEDY THE BREACH IN THE UK FTA

- The Waitangi Tribunal hearing on e-commerce was in late 2020,
 - when the UK FTA negotiations were already underway
 - so, the Crown was on notice of its potential Tiriti breach.
- The Tribunal's Report came out in November 2021, making it clear that active protection of mātauranga Māori was
 - paramount,
 - not to be traded off against business and exporters' interests.
- But judging by the final text, that exactly what the Crown decided to do.





WHAT THE NZ
UK FTA
DIGITAL TRADE
CHAPTER SAYS

The digital trade chapter 15 is not about “trade”, it’s about control over data and the digital space.

Everything today is digital, but there are almost no domestic laws that limit tech companies.

That might sound “open” and “free”, and benefit Māori start-ups by having no rules but Big Tech (Google, Facebook, Netflix, Amazon, UK banks and insurers, etc) run that space.



WHAT THE NZ
UK FTA
DIGITAL TRADE
CHAPTER SAYS

In the same way as the TPPA,
the UK FTA's "digital trade" rules guarantee
UK tech firms can
transfer and store NZ and Māori data
anywhere in the world, subject to limited and
unclear protections for other rights and
concerns,
including the the Treaty of Waitangi Exception,
which the Tribunal said do not provide
effective protection for mātauranga Māori.

AN EARLY
REVIEW OF
THE
CHAPTER
OFFERS
FALSE
HOPE

The Crown appears to be aware that it has breached of its Tiriti obligations again. The only way this can get fixed is to change the text.

The digital trade chapter includes a special review provision for 2 years time

in which NZ refers to the Tribunal report and says it intends to engage Māori to ensure the review

“takes account of the continued need of New Zealand to support Māori to exercise their rights and interests, and meet its responsibilities under Te Tiriti o Waitangi/the Treaty of Waitangi” (Art 15.22.2(a))

But the UK doesn't say it intends to consider the Tribunal report in the review.



THE BREACH OF TE TIRITI IS LIKELY TO CONTINUE

The early review is only of the digital trade chapter's *operation and implementation*, it is not a review of the *chapter's rules*.

The commitment is only to *hold* the early review, the UK doesn't have to agree on anything.

The first review of the *rules* is for the whole agreement, in 7 years' time.

Imposing new restrictions or exceptions in such reviews is almost unheard of and would require the UK to agree.

This creates a really bad precedent for other agreements NZ is negotiating that are likely to make similar rules on data and the digital domain.

