ELLA GERIS

A ROLE FOR TIKANGA MĀORI IN THE EXERCISE OF DISCRETIONARY POWER: A critical analysis of the interpretation of Tiriti obligations in *Te Pou Matakana v Attorney-General*

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2022

Table of Contents

Abstract

Despite the long-standing question of the place of obligations under te Tiriti o Waitangi in the exercise of discretionary power, the courts are still reluctant to acknowledge their automatic application. It is well-established in the law of judicial review that Tiriti obligations are relevant to the decision-making process to the extent that they can be brought in on a Western legal basis. The judgment of Te Pou Matakana v Attorney-General proved this point in relation to the relevance of Tiriti obligations in the provision of requested vaccination data of Māori residing in the North Island. In this paper, I argue that this was one of two paradigms open to Gwyn J to approach her discussion of the Ministry's Tiriti obligations. The alternative approach was to adopt a tikanga-led discussion of whether the Ministry should have released the requested information. This approach would have strengthened tikanga as determinative law in New Zealand and assume life to Tiriti obligations. The more recent decision of Trans-Tasman Resources saw the Supreme Court taking the Western approach a step closer to the tikanga-led paradigm. Although Gwyn J acknowledged the importance of a tikanga-led discussion in her second decision, she left the place of tikanga in administrative law weak by not bringing it to the beginning of her process. Ultimately, this case is evidence that administrative law lacks behind in the recognition of the importance of tikanga-focused discussions in New Zealand law generally.

Key Terms: *'Tikanga', 'Te Tiriti o Waitangi', 'Judicial Review', 'Legitimate Expectation', 'Te Pou Matakana v Attorney-General'*

I Introduction

By accepting that tikanga Māori should inform the development of our constitutional law, our constitutional arrangements are strengthened and legitimised, as Dr Carwyn Jones expresses.[1] The judgment of *Te Pou Matakana Limited v Attorney-General* showed the High Court of New Zealand lacking an appreciation of this idea.[2] Te Pou Matakana brought judicial review proceedings of the Ministry of Health's (the Ministry) decision to decline their request for the provision of vaccination data amongst Māori residing in Te Ikaa-Māui (the North Island).[3] The focus of this paper will be on one argument; that the Ministry's decision was inconsistent with Te Pou Matakana's legitimate expectation that it would be made in accordance with the principles of te Tiriti o Waitangi.[4] By making this Western legal mechanism the focus of her discussion of Tiriti obligations, the judge left tikanga in a weak position in administrative law. I suggest Gwyn J's decision shows that the courts are reluctant to determine a decision-makers' Tiriti obligations with an analysis of what tikanga requires.

The relevance of te Tiriti to the exercise of discretionary power has been an extremely important issue since the question arose of its status as a key legal factor in the 1980's.[5] *Te Pou Matakana* is one of the most recent cases which has dealt with this matter.[6] Since then, it has come to be widely accepted that New Zealand's public law system has recognised that where te Tiriti is expressly referenced in legislation, any public decision taken under that statute without regard to its principles is subject to prudent judicial review.[7] I argue that this was one of two paradigms open to Gwyn J in which to bring about a discussion of Tiriti obligations. On one hand, a Western doctrinal basis could be used to impose Tiriti

---

[1] Carwyn Jones "Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi" (2013) 25 NZULR 703 at 717.
[2] *Te Pou Matakana Limited v Attorney-General (No 1)* [2021] NZHC 2942 [2022] 2 NZLR 148.
[3] At [4].
[4] At [40].
[5] Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (University of British Columbia Press, Vancouver, 2016).
[6] At [40].
[7] See, e.g. *New Zealand Māori Council v Attorney-General (Lands)* [1987] 1 NZLR 641.

obligations on the Ministry. On the other hand she could have moveed the focus to determining what a tikanga-led interpretation would require of the Ministry by acknowledging Tiriti obligations as generally applicable. The judge chose the former by focusing on Te Pou Matakana's legitimate expectation argument. I note that in distinguishing between the two, I am not attempting to undertake a more values-based comparative approach as to whether the underlying kinship nature of the tikanga approach could resonate with relationship-based doctrine of legitimate expectation. This is something that could be explored outside of this paper. Although both routes would have left her at the same conclusion, the judge missed a crucial chance to bring administrative law up to pace with New Zealand law generally regarding the determination of tikanga.[8]

This paper has three parts. In part one, I set out the background to Gwyn J's first decision and explain the arguments of Te Pou Matakana and the Ministry. I focus on Te Pou Matakana's argument that the Ministry's established legitimate expectation gave rise to Tiriti obligations.[9] I will also give a brief explanation of the consultation ground of review in the judge's second decision.[10] In part two, I highlight the two paradigms which I argue were open to Gwyn J to lead to a discussion of Tiriti obligations. The first being through a Western doctrinal mechanism and the second being through a tikanga-led interpretation. I will explain how the judge undertook the former through her focus on Te Pou Matakana's legitimate expectation argument. The latter would have allowed for a more tikanga focused discussion of the Ministry's failure to have regard to Tiriti obligations when making their decision. I will then highlight the judge's acknowledgment of the importance of a tikanga-focused discussion in her second decision.[11] I establish that this shows the courts are reluctant to bring a tikanga lens to the beginning of the process. By looking at Professor Dean Knight's observation that the case of *Trans-Tasman Resources* gives Tiriti norms more strength through the principle of legality, I then argue that the Western orthodoxy

[8] See, e.g. *Takamore v Clarke* [2012] NZSC 116 [2013] 2 NZLR 733 at [94]; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84 [2019] 1 NZLR 116 at [77]; *Edwards (Te Whakatōhea)* [2021] NZHC 1025 at [77].
[9] At [85].
[10] *Te Pou Matakana Limited v Attorney-General (No 2)* [2021) NZHC 3319 [2022] 2 NZLR 178 at [82].
[11] At [107].

approach has moved closer to a tikanga-led interpretation.[12] I suggest Gwyn J could have used this approach to make a less drastic, more incremental development in this area of the law.[13] Finally, in part three I highlight that this judgment is evidence that administrative law has not kept pace with the pervasive acknowledgement of tikanga as a legitimate system of law in New Zealand. My ultimate conclusion is that the courts should move away from the question of whether the treaty principles are relevant at all and acknowledge them as automatically applying. The analysis should then move to what tikanga would require of the circumstances.

II The *Te Pou Matakana* Series

A Case No 1: Introduction, background facts and the law

The initial case was brought by Te Pou Matakana Limited, trading as the Whānau Ora Commissioning Agency. This agency was contracted by Te Puni Kōkiri (the Ministry of Māori Development) to deliver Whānau Ora services to the North Island to help wellbeing and development of Māori.[14] The work undertaken by Te Pou Matakana was to provide whānau in the North Island with assistance to address the adverse impacts of COVID-19.[15] The provision of vaccination services was a huge task for Te Pou Matakana as they needed to be provided in a way which was culturally and physically accessible to Māori. Whānau Tahi Limited was the information systems provider for Te Pou Matakana and was also an applicant in the case.[16] Te Pou Matakana wanted to respond to the problem of the Māori population having a lower percentage of vaccination rates compared to the New Zealand population as a whole. They therefore requested relevant personal information relating to this matter from the Ministry of Health.[17] Both parties agreed that the COVID-19 vaccination program had not achieved equitable coverage due to significant barriers to

[12] Dean Knight "New Zealand- Te Tiriti o Waitangi norms, discretionary power and the principle of legality (at last)" (2022) International Survey.
[13] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 [2021] 1 NZLR 801 at [151].
[14] *Te Pou Mataka (No 1),* above n 2, at [6].
[15] At [8].
[16] At [7].
[17] At [12].

Māori accessing primary health services.[18] A lack of trust by Māori in government institutions was also accepted as one of the reasons for this.[19] The initial engagement between Te Pou Matakana and the Ministry occurred in August 2021.[20] The Chief Executive Officer of Te Pou Matakana asked the Ministry to enter data sharing arrangements with Te Pou Matakana and to provide them with the relevant details of unvaccinated Māori.[21] In September 2021, a data sharing agreement was entered into by both parties. In October 2021, the Ministry confirmed that it would provide Te Pou Matakana with individual COVID-19 vaccination data of those who had previously been provided services by one of the Whānau Ora partners.[22] The focus of the case was the Ministry's refusal to share the same individual data in relation to Māori within the North Island who had not previously been provided services by one of Te Pou Matakana's Whānau Ora partners.[23]

Te Pou Matakana challenged this decision on three grounds of review, of which the final ground will be the focus of this paper.[24] The first ground was error of law on the basis that the Ministry incorrectly applied the relevant legal test for disclosing health information. The second was that the Ministry acted inconsistently by providing similar data to another health service provider. Finally, that Te Pou Matakana had a legitimate expectation that the Ministry's decision would be made in accordance with the principles of the treaty.[25] Therefore, a lack of upholding this expectation meant that the decision was inconsistent with the principles and tikanga.[26]

This case concerned primarily privacy law as the request was for the disclosure of the health information of individuals. Gwyn J's analysis started with the relevant area of law, governed by the Privacy Act 2020. This Act promotes and protects individual privacy,

---

[18] At [27].
[19] At [29].
[20] At [12].
[21] At [12].
[22] At [14].
[23] At [14].
[24] At [40].
[25] At [40].
[26] At [40].

whilst also recognising that other interests may also need to be considered.[27] Because health information was concerned in this case, the Health Information Privacy Code 2020 applied. This had the effect of modifying the 13 general information privacy principles in s22 of the Act.[28] Rule 11 of the Code was relevant in Te Pou Matakana's request because it put limits on the disclosure of health information.[29] Under the Rule, information can be shared where it is for a purpose of collection or where the disclosure is authorised by the individual concerned.[30] The Ministry's decision not to disclose the requested information was made pursuant to this rule.[31]

B Legitimate Expectation based on Tiriti obligations

1 Te Pou Matakana's submissions and the Ministry's response

Te Pou Matakana's main argument was that the Ministry's decision did not uphold the principles of te Tiriti.[32] They argued that a legitimate expectation was created by the government's specific commitments to uphold te Tiriti in the COVID-19 vaccination rollout.[33] The expectation was that the Ministry would have regard to the treaty and its principles in making the decision of whether to release the requested information. The legitimate expectation doctrine states that where a public authority promises to follow a certain course, it is in the interests of good administration that it should do so if it does not interfere with its statutory duty.[34] They submitted that the government's acknowledgement of its duty to uphold and honour the treaty's principles flowed from the treaty partnership obligation. Therefore, the Crown's express commitment to do this limited the scope of its discretion under s11(2)(d) of the Code.[35] They argued that the principles of partnership and tino rangatiratanga required the Crown to share the information sought.[36] While the

[27] At [31].
[28] At [32].
[29] At [36].
[30] At [36].
[31] At [37].
[32] At [88].
[33] At [84].
[34] At [87].
[35] At [86].
[36] At [86].

decision paper contained general references to the treaty, its principles were not listed, which did not adequately fulfil the established obligation.[37]

Te Pou Matakana based their argument that the Ministry had failed to uphold its Tiriti obligations on the treaty principles.[38] The first was the principle of 'options' which in the context of the pandemic required that Māori should have a genuine choice of kaupapa Māori providers. For this to be upheld, kaupapa Māori organisations such as Te Pou Matakana, needed to be sufficiently empowered and resourced.[39] By enabling Te Pou Matakana to best link culturally appropriate vaccination services, the provision of the requested data would satisfactorily uphold this principle.[40] Partnership and tino rangatiratanga required the Crown to afford to Māori the capacity and space to exert their tino rangatiratanga in the primary health care system.[41] Te Pou Matakana argued that the principle of partnership is a relationship of equals. Therefore, in this context it required disclosure of the information sought.[42] It was argued that it was not for the Crown to dictate to Te Pou Matakana who they ought to provide their services to, or that the services should be limited to only some Māori.[43] Active protection, the Crown's duty to actively protect the health rights of all Māori, required the urgent disclosure of the information.[44] Te Pou Matakana said that by adopting a least privacy invasive approach, the Ministry's decision did not do all it could to protect the health rights of all Māori. Therefore, the Crown was in breach of its duty of active protection.[45]

A huge focus of Te Pou Matakana's argument was that tikanga required the information to be released in the specific circumstances.[46] They submitted that having regard to tikanga was an integral part of considering and applying the principles of the treaty. Therefore this

---

[37] At [88].
[38] At [90].
[39] At [91].
[40] At [92].
[41] At [93].
[42] At [93].
[43] At [94].
[44] At [96].
[45] At [97].
[46] At [99].

situation required an application of a tikanga lens, not just a pākehā legal lens.[47] Te Pou Matakana said tikanga required a particular focus on their kaitiaki obligations to Māori in need, based on their demonstrable expertise, capability and leadership.[48] They argued that they were rangatira organisations set up and resourced specifically to meet the needs of whānau. In particular, whānau who have been poorly served by standard ways of delivery social and health services.[49] Dr Jones' evidence described the principle of whanaungatanga as the bedrock of tikanga.[50] Te Pou Matakana argued this needed to be the focus of the Ministry's decision. In response, the Ministry submitted that the treaty principles are a valid interpretive aid and are relevant considerations in statutory decision-making in relation to Māori health and personal information. However, they do not themselves create enforceable legal rights.[51] They argued that te Tiriti requires that the Crown makes decisions that are reasonable and within the bounds of its own broad responsibilities and authority. These decisions need to be made based on sound procedure and consideration of relevant material in light of all the circumstances. The Ministry said the principles do not assist in terms of concrete direction about what to do in this situation.[52]

2 Gwyn J's discussion of legitimate expectation

Gwyn J concluded the Ministry's decision was incorrect after she established that there was a legitimate expectation on the Crown to act in accordance with Tiriti obligations, which Te Pou Matakana reasonably relied on. Her discussion began with an outline of the principles of 'legitimate expectation'. She noted the concept is a well-established principle that means the court may require the decision-maker to follow the process that they have undertaken to follow through the expectation.[53] She first looked at whether there was a legitimate expectation on the Ministry. It was held that there was a commitment made by the Ministry to exercise its powers in relation to COVID-19 in accordance with te Tiriti

[47] At [99].
[48] At [99].
[49] At [101].
[50] At [100].
[51] At [102].
[52] At [102].
[53] At [111].

and its principles.[54] This expectation was created by the government's specific commitment to uphold and honour te Tiriti in the COVID vaccination program. They had also acknowledged the obligations that flow from te Tiriti partnership in implementing the program.[55] She therefore concluded that Te Pou Matakana's reliance on the Ministry's commitment was reasonable and legitimate.

Gwyn J's analysis then queried whether the Ministry failed to determine Te Pou Matakana's request consistently with the established commitment to act in accordance with te Tiriti. She looked specifically at the context and substance of the decision-making process of the Ministry.[56] The judge noted that although the Ministry's decision paper did mention the treaty principles, it put considerable emphasis on general concern about the sharing of data.[57] Although the paper acknowledged the Crown's commitment to active protection and the delivery of equitable health outcomes for Māori, there was no focus on Tiriti obligations. The decision paper noted that any proposed disclosure of health information must be assessed on a case-by-case basis. Data provision also needed to ensure that the scope and level of data was shared proportionate to each organisation's community, whanaungatanga connections and capacity to deliver.[58] Gwyn J said the decision paper did not undertake that kind of assessment in relation to Te Pou Matakana's request. This failure had a particular treaty dimension. It was also reflective of the Ministry's more general deficiency to take an evidence-based assessment of the harms and benefits of disclosure and use of the individuals information sought.[59] She said if the Ministry had carried out such an assessment it would have brought into sharp focus its obligations under te Tiriti and how they applied to the request.[60] Ultimately, Gwyn J concluded on this question that while the Ministry did have to weigh a range of factors, it did not do so based on an evidence-based assessment. This meant the decision was not informed by the principles of the treaty like the legitimate expectation suggested it would be.[61]

---

[54] At [112].
[55] At [116].
[56] At [119].
[57] At [125].
[58] At [130].
[59] At [131].
[60] At [131].
[61] At [134].

C Error of Law and Inconsistency

Te Pou Matakana's first claim was that the Ministry erred in law in the way it applied r11(2)(d) to its decision.[62] This section allowed the Ministry to disclose information if it believed on reasonable grounds that three considerations were met.[63] Both parties agreed that this rule gave the Ministry a discretion to disclose information without authorization but did not impose a duty of disclosure.[64] The first consideration was that it was not desirable or practicable to obtain authorization for the disclosure from the specific individual concerned.[65] The second was considering whether there was a serious threat to public health or safety.[66] There was no dispute by either party that the first two considerations were met.[67] The third, and most contentious consideration in this case, was whether the disclosure of the information was necessary to prevent or lessen a serious threat to public health.[68] Te Pou Matakana submitted that the Ministry applied a "least privacy invasive" gloss to this test. They suggested that the correct approach was to disclose the least information necessary to prevent or lessen the identified threat.[69] They argued that given the acknowledged seriousness of the threat, it was not sufficient for the Ministry to decline the data on the basis that it was merely possible that other approaches might work.[70] They argued that "necessary" meant only "needed or required". The Ministry argued that the rule did not impose a duty to disclose that information even if the disclosure was found to be necessary.[71] Gwyn J considered this rule for the first time in New Zealand courts.[72] She found for Te Pou Matakana and concluded that the Ministry erred in its application of r11(2)(d) of the Code. She noted that in the context of the serious public health risks imposed by COVID-19, the Ministry was required to look at the anticipated effectiveness and use of the requested information; the adverse consequences of the disclosure; and

---

[62] At [41].
[63] At [42].
[64] At [43].
[65] At [42].
[66] At [42].
[67] At [44].
[68] At [49].
[69] At [51].
[70] At [52].
[71] At [57].
[72] At [59].

whether there were other options open to address the risk.[73] Gwyn J held the Ministry did not conduct this necessary objective, evidence-based assessment, nor did it look into the use of the individual data requested by Te Pou Matakana.[74]

The second ground of review was that the decision was inconsistent with the Ministry's decision to share individual level data with other organisations. Te Pou Matakana argued that because the Ministry had shared similar data with Heathline, the decision not to release the requested data was inconsistent.[75] They argued it was also inconsistent with the Crown's approach under the Outreach Immunisation Service of sharing individual level data with community organizations.[76] Te Pou Matakana submitted evidence that Healthline had conducted a number of vaccination information campaigns using data of unvaccinated Māori.[77] The Ministry argued that Healthline was not in an analogous position to Te Pou Matakana because as the Ministry's direct agent they could use the Ministry's data to achieve their purposes.[78] This issue was dealt with swiftly by Gwyn J. She noted that it was not necessary for her to reach a conclusion on this point due to her findings on the other two grounds of review.[79] Despite its lack of significance to her ultimate decision, the inconsistency ground of review reinforced her findings in relation to the Ministry's error of law in in its approach to r11(2)(d) under the first ground.[80] She held that there was an inconsistency in the way the Ministry shared data with Healthline compared to Te Pou Matakana. The provision of data of unvaccinated individuals to Healthline showed a recognition that disclosure was necessary for mainstream provides to effectively target unvaccinated people.[81] In contrast, the decision in relation to Te Pou Matakana's request agreed to only sharing anonymized mapping representations that showed areas with unvaccinated communities.[82] This is what was inconsistent.

---

[73] At [63].
[74] At [77].
[75] At [79].
[76] At [78].
[77] At [79].
[78] At [81].
[79] At [83].
[80] At [83].
[81] At [83].
[82] At [83].

D The judge's overall findings: Ministry directed to reconsider

Gwyn J set aside the outcome of the Ministry's October decision not to release the requested data. She granted a declaration that the Ministry had erred in its application and interpretation of r11(2)(d) of the Health Information Privacy Code 2020. She also declared that the Ministry's power to disclose information under that rule in the context of COVID must be exercised in accordance with te Tiriti and its principles. Finally, she directed the Ministry to urgently retake the decision within 3 working days in accordance with law and having regard to findings in her judgment.[83]

E Te Pou Matakana (No 2)

1 The Ministry's second decision: another declined request

After Gwyn J gave her initial remedies in the first case the Ministry made a new decision. Once again, the Ministry declined the request. On November 5th, they stated that the Director-General of health accepted recommendations from Ministry officials. This included to "decline the request for access to all North Island individual level Māori health information sought by the applicants".[84] This second decision was to invite Te Pou Matakana to urgently work in partnership with the Ministry, relevant iwi and local service delivery providers to identify those rohe where vaccination outreach to Māori was most needed and to identity the necessary and appropriate scope of data sharing in each case.[85] There was also the requirement to continue Ministry engagement with iwi, Hauora providers and other Māori organisations to enable access to data to support vaccination of Māori across Aotearoa.[86]

2 Second application for judicial review: a flawed consultation process

---

[83] At [135].
[84] *Te Pou Matakana (No 2)*, above n 10, at [21].
[85] At [21].
[86] At [21].

Te Pou Matakana again applied to the High Court to seek judicial review of the Ministry's second decision.[87] They argued that there were a further four challenges to the Ministry's assessment of whether disclosure would be effective to address the health risk.[88] I will focus on outlining their challenge on the Ministry's consultation process for the purposes of my argument.[89] The Ministry argued that the consultation process they undertook was necessary to meet their Tiriti obligations. They said that not consulting with iwi was not an option.[90] They had put a great deal of time and resources into consulting with relevant iwi. A hui was conducted where they received strong opposition to information being shared with Te Pou Matakana without a mandate from iwi. The Ministry took a clear message from the first hui; that the interests of specific iwi in individual level data about people within their rohe needed to be reflected in the process around sharing that data. The iwi wanted to be consulted and to have input into whether, to whom, and the way in which individual data was shared.[91] A second hui was conducted where the views expressed were quite different to the first. The message was more supportive of the immediate provision of individual level data to Te Pou Matakana.[92]

3 The judge's findings

Gwyn J relied on expert tikanga evidence to conclude that the consultation process required a tikanga, rather than a pākehā lens. Dr Jones noted that the highly prized taonga of health had particular primacy in the context of the pandemic. Where that taonga was at risk, not all tikanga principles, values or practices would be able to be perfectly fulfilled. Where certain aspects of tikanga conflicted with the purpose of protecting health, there was little expectation that they would be pursued at the cost of caring for the health and wellbeing of whakapapa. Dr Jones said:[93]

---

[87] At [1].
[88] At [31].
[89] At [33].
[90] At [101].
[91] At [90].
[92] At [91].
[93] At [109].

> The control of data by individual iwi and hapū may have less priority as we work urgently towards the common goal of protecting the health of tangata Māori across the motu …

When making her decision on this ground of review, the judge noted that the issue was not about whether consultation with iwi was an error of law, for that would go entirely against the principles of the treaty. Rather, the question was, what did tikanga require.[94]

Ultimately, Gwyn J concluded that the post-second decision consultation process and the ongoing engagement between the Ministry and the applicants as part of the decision-making process were reviewable.[95] She noted that considerable progress had been made since the second decision because the Ministry had agreed to provide more of the data sought.[96] She therefore suggested that she would potentially undermine what had been decided in the intervening period by setting aside the Ministry's second decision and directing them to make a final decision.[97] It would waste valuable time and resources (for both the Ministry and Te Pou Matakana).[98] For that reason, she directed the Ministry to complete its consideration of the provision of the data in those areas where it has not yet agreed. The Ministry was also directed to review its decision to provide data in relation to those Maōri in Te Ikaa-Māui who have had only a first dose vaccination.[99]

III Two alternative paradigms

I argue that there were two alternative paradigms open to Gwyn J that would lead her into a discussion of Tiriti obligations. The first option being a Western doctrinal approach which has been preferred by the courts in the space of Tiriti obligations in administrative law. The alternative approach was to automatically assume life to Tiriti obligations through adopting a tikanga-led viewpoint. The former approach only acknowledges Tiriti obligations as being relevant when injected into law through a doctrinal mechanism. Gywn J took the

---

[94] At [107].
[95] At [177].
[96] At [177].
[97] At [178].
[98] At [178].
[99] At [179].

Western approach by using the legitimate expectation argument as a legal clue for the basis of a discussion of Tiriti obligations, rather than te Tiriti itself. Had the judge taken the tikanga-led approach, she would have left the place of tikanga in judicial review in a much stronger position. Although she was successful in using the tools provided by the doctrinal approach to conclude that the Ministry had failed to give regard to Tiriti obligations, tikanga was not a focal point.

A Western orthodoxy

The courts in the space of judicial review in New Zealand have been reluctant to give Tiriti obligations the recognition and strength that they deserve. The *Lands* case held that te Tiriti is enforceable through error of law where there is specific incorporation of the principles through legislative directive.[100] The court in the 2007 *New Zealand Māori Council v Attorney General* case said that te Tiriti could have direct impact in judicial review cases as an implied or express relevant consideration.[101] It could not however, form the basis of an action in the courts on its own.[102] The *Broadcasting Assets* case also established there is only a substantive limit on Crown power and an obligation to give regard to the principles when there is a principal treaty clause in the legislation conferring discretion.[103] The principles of the treaty were relevant in this decision only down to the direct incorporation of them in the legislation. Even then, it was held that the decision was not inconsistent with the treaty principles because the Crown had not acted in a manner that reduced their capacity to ensure or provide protection.[104] The courts in these cases only found the principles to be relevant because of the way they had been specifically mentioned in the legislation. Tiriti obligations were not seen to be automatically assumed by parliament and were only relevant with another legal basis to stand on. In Te Pou Matakana, Gwyn J can be seen using this traditional approach. Her discussion of the Crown's Tiriti obligations only came about through the Western doctrine of legitimate expectation.

---

[100] *Lands,* above n 7, at 689.
[101] *New Zealand Māori Council v Attorney-General* [2007] NZCA 269 [2008] NZAR 569, at [72].
[102] At [71].
[103] *NZ Māori Council v Attorney-General (Broadcasting Assets)* [1994] 1 NZLR 513.
[104] At [525].

B Tikanga-led interpretation

The protection of a taonga as important as the health and life of Māori should have meant the principles of the treaty were automatically relevant in this case. This left the option open for Gwyn J to bypass the injection of Tiriti obligations through a Western doctrinal approach, and focus on a tikanga-led discussion. Gwyn J would have benefitted from following this paradigm as she could have drawn on Te Pou Matakana's tikanga based arguments. In turn, she would have acknowledged that the values-based nature of Kupe's law would require the Ministry to provide the requested data. As Justice Joe Williams states, "in a tikanga context, it is the values that matter more than the surface directives".[105]

Taking a tikanga-led approach to Tiriti obligations would have allowed Gwyn J to strengthen the place of tikanga in administrative law by using Te Pou Matakana's tikanga-based arguments to guide her determination of what was required of the Ministry in the circumstances. Te Pou Matakana took a tikanga-focused approach to argue that the Ministry had failed in their Tiriti obligations. They stated that having regard to tikanga should be an integral part of considering and applying the principles of the treaty. A tikanga lens proved that the applicants had kaitiaki and rangatira obligations to Māori in need. This demanded for the data to be shared in the circumstances. Tikanga is centred around a culture of whanaungatanga, land rights by descent and resource use controlled by the idea of kinship.[106] Dr Jones's evidence in the case highlights this. He describes the principles of whanaungatanga as the "bedrock" of tikanga.[107] In the context of this case, Te Pou Matakana had established whanaungatanga relationships with Māori in the North Island which brought about kaitiakitanga obligations.[108] This required the relevant data to be released to maintain the balance. Gwyn J's judgment places tikanga Māori in the background by not focusing on these arguments to come to her conclusion that the Ministry needed to remake their decision.

---

[105] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 3.
[106] At 3.
[107] *Te Pou Matakana (No 1),* above n 2, at [100].
[108] At [100].

The approach Gwyn J took led her to incorrectly focus on what the treaty principles would require in the circumstances, rather than what tikanga would require. Tiriti obligations need to be viewed through a tikanga, rather than pākehā lens to acknowledge that the principles themselves are a compromise between pākehā and Māori.[109] This ensures they are properly applied. The judge's overall conclusion that the Ministry failed to be properly informed by Tiriti obligations was based on their failure to under-take an evidence-based assessment of the risks and opportunities of the data sharing. She notes that this would have fulfilled the legitimate expectation of having regard to Tiriti obligations. There was no acknowledgement of what tikanga would require in the circumstances, despite whether or not the assessment was undertaken. Gwyn J focused on Tiriti obligations through a westernized lens which reinforces the compromise that the treaty principles represent. Dr Jones notes that viewing te Tiriti through a Māori lens is not a new idea. This is important because Māori legal concepts in the Māori text of te Tiriti give light to the true intention of te Tiriti and that it was signed within the context of the Māori legal system.[110] Dr Jones argues that the treaty principles themselves are premised on existing constitutional arrangements which constrain the concepts of kāwanatanga and tino rangatiratanga to fit into the western mold.[111] He notes that although the principles provide a useful framework to fit within the Western legal system, they are premised on a compromise between the legitimacy of the state legal system and the recognition of Māori customary law.[112]

C Gwyn J's acknowledgment of a tikanga-led discussion

Gwyn J hinted that she recognised a tikanga-led approach was open to her in her second decision. She noted in *Te Pou Matakana (No 2)* that Tiriti obligations must be read through a tikanga lens.[113] In case *No 2*, Te Pou Matakana had a focus on the Ministry's consultation process when challenging their second decision.[114] The judge noted that the issue regarding the consultation process was not about whether consultation with iwi was an error of law,

---

[109] Carwyn Jones "Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi" (2013) 25 NZULR 703 at 709.
[110] At 709.
[111] At 715.
[112] At 713.
[113] At [112].
[114] At [82].

for that would go entirely against the principles of te Tiriti. Rather, the question was, what did tikanga require of the principle of consultation in the circumstances.[115] Gwyn J relied on evidence from Dr Jones that noted that the highly prized taonga of health had particular primacy in the context of a pandemic.[116] Where that taonga was at risk, not all tikanga principles, values or practices would be perfectly fulfilled.[117] Where certain aspects of tikanga conflicted with the purpose of protecting health, there was little expectation that they will be pursued at the cost of the caring for the health and wellbeing of whakapapa.[118]

D Gwyn J took the traditional route

By imposing Tiriti obligations on the Ministry through the doctrine of legitimate expectation, Gwyn J reinforces the traditional narrative that they are only relevant when there is a legal basis for the discussion to stand. She entered her discussion of Tiriti obligations by establishing that there was a legitimate expectation on the Ministry to have regard to te Tiriti and its principles.[119] This expectation was set by the government's specific commitments to uphold te Tiriti in the COVID-19 vaccination rollout.[120] This led to her declaration that the Ministry's power to disclose the sought-after information must be made pursuant to the principles of the treaty.[121] The legitimate expectation reasoning has long had importance in the context of Western English law where discretionary powers are vested in public authorities for the benefit of the public.[122] Public authorities with discretionary decision-making powers have a duty to exercise their powers in the public interest. Therefore, legitimate expectations created by these decision makers must be protected and upheld to those who rely on such expectations.[123] The term was first developed by Lord Denning MR in the case of *Schmidt v Secretary of State for Home*

[115] At [107].
[116] At [109].
[117] At [109].
[118] At [109].
[119] At [109].
[120] At [112].
[121] At [135].
[122] Soren Schønberg *Legitimate Expectations in Administrative Law* (Oxford University Press, Oxford, 2000) at 1.
[123] At 13.

Affairs.[124] He did not elaborate on the term until the case of *R v Liverpool Corporation*.[125] He said that a decision-maker's representation that a fair procedure would be followed created a legitimate expectation that embraced more than enforceable rights.[126] The principle was formulated as a legal doctrine in judicial review in *Attorney-General of Hong Kong v Ng Yuen Shiu*.[127] The Privy Council stated that it is in the interests of good administration that a public authority should act fairly and implement its promise to follow a certain procedure so long as it does not interfere with its statutory duty.[128]

Only after Gwyn J first acknowledges that the doctrine of legitimate expectation is well established in New Zealand law does she enter a discussion of whether the Ministry failed to act in accordance with Tiriti obligations.[129] The case of *Comptroller of Customs* set the test for whether a legitimate expectation is raised in New Zealand.[130] The inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise, settled practice or policy.[131] This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms. The second is to determine whether the plaintiff's reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the specific context.[132] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.[133]

---

[124] *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA).
[125] *R v Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, 304 (CA).
[126] Philip A Joseph "Law of Legitimate Expectation in New Zealand" Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing Ltd, 2017) 189 at 189.
[127] *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, 636 (PC).
[128] At 638.
[129] *Te Pou Matakana (No 1)*, above n 2, at [109].
[130] *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [121].
[131] At [125].
[132] At [126].
[133] At [127].

The consistency of this judgment with the traditional approach to Tiriti obligations in judicial review cases can be established in Gwyn J's application of the above test in *Te Pou Matakana.* She concludes on the first point that the Ministry had an established legitimate expectation through the government's acknowledgement that partnership with iwi and Māori are critical to the successful implementation of the COVID-19 vaccination programme.[134] The commitment was clear because the overarching principles of the programme were stated as protecting Tiriti rights and achieving equity for Māori. There was also express mention of the treaty principles in the government's public materials about the COVID-19 rollout. She concludes on the second point of the test that Te Pou Matakana's reliance on that commitment was reasonable and legitimate due to the Crown's repeated affirmations of their commitment to applying te Tiriti and its principles specifically in the COVID-19 response.[135]

Gwyn J's acknowledgment of tikanga in her second decision shows she appreciated that a tikanga-led approach was open to her. However, she was reluctant to fully depart from the Western orthodoxy that controls judicial review by not bringing this discussion to her first decision. It would have been more powerful for her to replace her discussion of 'legitimate expectation' with this discussion of what tikanga would require of the Ministry. This would have strengthened the role of tikanga in administrative law by recognising it as the guiding tool to take the judge to her ultimate conclusion, without Tiriti obligations having to first be determined through a Western orthodoxy. This would move administrative law to recognise Tiriti obligations as foundational to the review of discretionary power and turn the focus to what tikanga required in the circumstances.

E A step closer to the determination of tikanga: Principle of legality approach

If moving completely away from the Western orthodoxy approach was too great of a step for Gwyn J, the recent decision of the Supreme Court in *Trans-Tasman Resources* provided

---

[134] *Te Pou Matakana (No 1),* above n 2, at [112].
[135] At [116].

her with a less drastic move towards a tikanga-focused judgment.[136] This case seemed to take the Western orthodoxy approach a step closer to the tikanga-led approach. The court in that case took a much more generous perspective to Tiriti obligations in the exercise of discretionary power. The court established that Tiriti obligations are fundamental rights that are assumed unless Parliament expressly notes a contrary intention.[137] The court ruled that the authority had failed to adequately recognize and respect the Crown's obligations to Māori under te Tiriti. The judges spoke of the relevance of treaty principles with language connoting the principle of legality.[138] William Young and Ellen France JJ noted a move to recognizing te Tiriti's constitutional significance through a "broad and generous" construction.[139] They stated that "an intention to constrain the ability of statutory decision-makers to respect treaty principles should not be ascribed to parliament unless that intention is made quite clear".[140] On the facts of *Trans-Tasman Resources,* the relevant clause in the legislation acknowledged that te Tiriti had influenced the design of the statutory framework but did not explicitly mandate injection of Tiriti norms into the decision-making process.[141] The court said that where there is an absence of any treaty clause, they will not easily read statutory language as excluding treaty principles.[142] Therefore, the authority needed to recognize and respect treaty principles reflecting the Crown's obligations to Māori under te Tiriti.

The approach taken in *Trans-Tasman Resources* was an option that would have allowed Gwyn J to bring the tikanga focus of her second decision, to her first decision. She could have recognised that Tiriti obligations are owed to Māori in all situations unless parliament has expressly stated otherwise.[143] This would have acknowledged that it is incorrect to imply that Tiriti obligations are owed to iwi, or hapū alone. Rather, there should be recognition that they are fundamental rights owed to all Māori. The status of the 'partner' with whom the Crown is engaging to fulfil its obligations is not the sole criterion as to

---

[136] *Trans-Tasman Resources,* above n 13.
[137] At [151].
[138] *Knight,* above n 12, at 703.
[139] *Trans-Tasman Resources,* above n 13, at [8].
[140] At [151]
[141] *Knight,* above n 12, at 703.
[142] *Trans-Tasman Resources,* above n 13, at [151].
[143] At [151].

whether Tiriti obligations are at play, as Dr Jones argues.[144] The real question is whether the entity has the leadership, expertise, capacity, and capability to protect the health of tangata Māori through which the Crown can discharge its obligations to those Māori".[145] A more tikanga focused approach was open to Gwyn J through *Trans-Tasman Resources*. Had this principle of legality approach been taken by recognizing that Tiriti obligations are fundamental rights owed to Māori, there would have been a wider space for the judge to focus on Te Pou Matakana's tikanga arguments and discuss the interpretation of Tiriti obligations through a tikanga lens. The approach taken by the Supreme Court shows the courts are signalling a development, hopefully in the very near future, to bring tikanga focused discussions into the area of the review of the exercise of discretionary power.

IV Administrative law's failure to keep pace with New Zealand law generally

Gwyn J's decision to inject Tiriti obligations into her discussion through the Western doctrine of legitimate expectation proves that administrative law is well behind where New Zealand law is heading generally in the determination of tikanga. The judge proved that there is no clear position on the place of Tiriti obligations in administrative law in New Zealand by taking a backwards step from the approach in *Trans-Tasman Resources.* Had she taken the principle of legality approach, she would have more easily been able to enter a discussion of what tikanga would have required in the circumstances. This approach would have been much more transformative in the way administrative law deals with tikanga. Instead, she made her entry point of the discussion the Western concept of legitimate expectation.[146] Cases such as *Takamore* and *Ngāti Whātua* and *Edwards,* have shown that it is now well accepted that tikanga Māori is part of New Zealand's common law generally.[147] Therefore, had Gwyn J at least taken *Te Pou Matakana* down the principle of legality path, it would have signalled a step closer to this reality for administrative law.

---

[144] *Te Pou Matakana (No 2),* above n 10, at [140].
[145] At [140].
[146] *Te Pou Matakana (No 1),* above n 2, at [134].
[147] See e.g. *Takamore v Clarke*; *Ngāti Whātua Ōrākei Trust v Attorney-General*; *Edwards (Te Whakatōhea)*, above n 8.

The unclear position in administrative law provides a contrast to the place New Zealand law generally seems to be heading in recognising tikanga as determinative law. *Takamore* has acknowledged that tikanga is part of New Zealand's common law and recognises it as the law of the land before colonisation took place.[148] The Supreme Court held that tikanga can be recognised in the law of the executor.[149] Through this case, tikanga was recognised as part of the values of the common law and Māori custom is a relevant consideration and 'flavour' to the western system of law. The courts for the first time, had the opportunity to confront the question of where tikanga fits within the common law. The *Ngāti Whātua* line of cases showed that what is happening the space of tikanga Māori within the courts is unprecedented, given that these cases are very specialised. The courts recognized that Ngāti Whātua Ōrāki Trust should be able to pursue claims based on tikanga. Elias CJ stated that "rights and interests according to tikanga may be legal rights recognized by the common law and, in addition, establish questions of status which have consequences under contemporary legislation."[150] The progression here was the court allowing itself to be the sole arbitrator and engaging purely in tikanga matter. The case of *Ngāti Maru* showed that tikanga is not merely customary values and practices as it is in *Takamore*, but it has come to be understood as a body of principles and law that is cognisable by the courts. The Environment Court cannot make declarations of rights, but can make evidential findings about tikanga based rights, powers and authority insofar as that is relevant to discharge the Resource Management Act's obligations to Māori.[151]

The case of *Edwards* strengthens tikanga place as a source of law by using it as the main guiding lens than simply looking at it as a factor in the mix. The case had a focus on the interpretation of the Marine and Coastal Area Act and the application of tikanga in this statutory context. The key aspect of this case was the judge's analysis of the test for Customary Marine Title under s58(1)(a) of the Act.[152] The court considered the critical

---

[148] At [94].
[149] At [164].
[150] At [77].
[151] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited* [2020] NZHC 2768 [2021] 3 NZLR 352 at [64].
[152] At [77].

focus under this section is tikanga and the exercise of that tikanga by the claimant groups rather than any reference back to common law or statutory property rights. This section requires the court to change the default lens for viewing legislation, to a tikanga one.[153] The judge takes a similar approach s58(1)(b)(i) of the Act which required exclusive use and occupation of the specified area from1840 to the present day.[154] Exclusivity from a western perspective would generally be a black and white interpretation. However, when thinking about exclusivity under a tikanga lens, exclusivity cannot be interpreted narrowly, there needs to be space for shared exclusivity due to the whanaungatanga underlying the tikanga system.[155] This showed the court suggesting that if we approach the test in a tikanga way, it becomes logical in the sense of awarding Customary Marine Title but if court took western approach, these tests are extremely difficult to meet.[156] This is a transformative recognition of tikanga. The court had a choice of whether to interpret the statute with a tikanga or western lens. They chose the former which brings tikanga to the forefront of the process, making it much more determinative. The approach administrative law has taken to tikanga is back and forth. There is no clear line to determination of tikanga, like that which can be seen in New Zealand generally.

V Conclusion

By using the Western legal mechanism of legitimate expectation to discuss Tiriti obligations, Gwyn J left tikanga in a weak position in administrative law.[157] I have argued that there were two paradigms open to Gwyn J in which to bring about a discussion of Tiriti obligations. On one hand, she was able to impose Tiriti obligations on the Ministry through a Western doctrinal approach. On the other hand, she could have started with the assumption that Tiriti obligations were relevant and taken a tikanga-led discussion. By choosing the former, the judge missed an opportunity to give the maximum recognition possible to tikanga as law within a system based on legislative supremacy. Although both

[153] At [141].
[154] At [145].
[155] At [396].
[156] At [77].
[157] *Te Pou Matakana (No 1),* above n 2, at [13].

routes would have left her concluding that the Ministry was obliged to have regard to Tiriti obligations, her starting point should have been with the principle of legality. In doing so, she would have been able to acknowledge that Tiriti considerations stand on their own as fundamental rights. It would have been much easier to bring a tikanga lens to her discussion.

This paper suggested that Gwyn J's decision shows that in relation to the review of the exercise of discretionary power, the courts are reluctant to acknowledge that an obligation to adhere to Tiriti obligations should be assumed. The courts are yet to accept that the question should turn on what tikanga would require. If Gwyn J had brought her later understanding the underlying importance of tikanga values into the starting point of her first decision, we would be left in a much more hopeful position of the development of New Zealand administrative law. A judicial review claim would be able to be brought on a tikanga basis, rather than western law basis. The issue regarding whether Māori health data should be provided to Te Pou Matakana clearly needed to involve a discussion of what tikanga would require in the circumstances. There was an opportunity here for Gwyn J to begin the discussion through a tikanga interpretation of the issue. Instead, the western legal rule of legitimate expectation in administrative law was followed.

I have argued there was an additional option open for Gywn J to make her tikanga discussion the focus of her first decision, albeit continuing to adopt a Western orthodox approach. This has been seen more recently, in the case of *Trans-Tasman Resources*. In that case, The Supreme Court signalled that the New Zealand judicial systems should give Tiriti norms strength through the principle of legality. This approach acknowledges them as fundamental rights to be protected where a statute is silent on the question. By entering her discussion through the doctrine of legitimate expectation, Gwyn J took a step backward from this development.

Acknowledging that the courts are reluctant to make drastic legal developments, particularly in an area so specializes as tikanga Māori, this case leaves the place of tikanga in administrative law uncertain. The question remains: when we are going to see

administrative brought up to pace with acknowledgement of tikanga as a legitimate system of law in New Zealand law generally? Gwyn J's choice to focus on the application of the legitimate expectation doctrine rather than the clear tikanga arguments has left the approach for the courts to take in the question of Tiriti obligations in the exercise of discretionary power therefore seems to be somewhat of a 'pick and choose' exercise. In fact, while on the face of it the discussion of the treaty principles in a context where there was no express reference in the relevant legislation, could be seen as revolutionary in allowing a more open discussion of te Tiriti in administrative law, New Zealand law generally has moved well beyond this discussion. This leaves administrative law at a place where Tiriti obligations are still only viewed as relevant through being legitimised through western legal concepts. This case is not transformative in the way it could have been. Instead, it shows the orthodox position that administrative law cannot seem to depart from.

What is clear is that tikanga is a source of law in New Zealand. It is also clear that it has the strength of being brought to the beginning of the judicial process to replace traditional Western legal mechanisms. This fact needs to be given force by the courts in administrative law cases. The case of *Te Pou Matakana* was an opportunity for Gwyn J to haul the law of judicial review out of a place of Tiriti obligations simply being viewed as a factor to be injected in through a Western legal doctrine. The opportunity is there, as *Trans-Tasman Resources* has exemplified. The courts simply need to seize it.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,998 words.

VI Bibliography

A Cases

Edwards (Te Whakatōhea) [2021] NZHC 1025.

New Zealand Māori Council v Attorney-General [2007] NZCA 269 [2008] NZAR 569

New Zealand Māori Council v Attorney-General (Broadcasting Assets) [1994] 1 NZLR 513.

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

Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited [2020] NZHC 2768 [2021] 3 NZLR 352

Ngāti Whātua Ōrākei Trust v Attorney-General [2018] NZSC 84 [2019] 1 NZLR 116.

R v Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299, 304 (CA).

Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149 (CA).

Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733.

Te Pou Matakana v Attorney-General (No 1) [2021] NZHC 2942 [2022] 2 NZLR 148.

Te Pou Matakana v Attorney-General (No 2) [2022] NZHC 3319 [2022] 2 NZLR 178.

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127 [2021] 1 NZLR 801.

B Books and chapters in books

Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (University of British Columbia Press, Vancouver, 2016).

Carwyn Jones "Reconciling Legal Systems" in "New Treaty, New Tradition: Reconciling New Zealand and Māori Law" (Victoria University Press, Wellington, 2016).

Carwyn Jones "Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi" (2013) 25 NZULR 703.

Philip A Joseph "Law of Legitimate Expectation in New Zealand" Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing Ltd, 2017) 189

Soren Schønberg *Legitimate Expectations in Administrative Law* (Oxford University Press, Oxford, 2000).

C Journal articles

Dean Knight "New Zealand- Te Tiriti o Waitangi norms, discretionary power and the principle of legality (at last)" (2022) International Survey.

Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1.