

STRIVING FOR CONSISTENCY: THREE PATHS TO JUDICIAL REVIEW OF EXECUTIVE ACTION FOR CONSISTENCY WITH TE TIRITI O WAITANGI

George Barton*

Judicial review of executive action for consistency with te Tiriti o Waitangi has traditionally been limited to where the Crown has had an express statutory obligation to act consistently. Because of this, such review has been framed by the language that Parliament has chosen over the areas that Parliament has chosen. However, recent Supreme Court decisions suggest that our courts may be willing to move beyond this. In this article, I consider three paths by which the courts might require all executive action — save that allowed by statutory language that expressly authorises the contrary — to be consistent with te Tiriti. These are, first, by relying on existing “Treaty clauses”, secondly, by relying on the court’s inherent supervisory jurisdiction and, thirdly, by relying on the United Nations Declaration on the Rights of Indigenous Peoples 2007 and the legitimate expectations that flow from the New Zealand government’s adoption of it. I conclude that the legitimate expectations argument is the most realistic because of its feasibility as a legal argument, its consistency with precedents such as *Te Heuheu Tukino v Aotea District Maori Land Board*, and its harmony with the sovereignty of Parliament. While I argue that this path is the best means of achieving such consistency, I leave the question of whether pursuing such consistency from the Crown through the courts is normatively desirable to others, endorsing Claire Charters’ caution that the courts must be alive to their own biases against an “indigenous-generous” interpretation of the UNDRIP.

* BA/LLB(Hons) student at the University of Auckland. This article is based on a research paper submitted for my seminar course as part of the LLB(Hons) programme. I would like to thank my supervisor, Dr Fleur Te Aho, for her comments and guidance.

I Introduction

In light of recent Supreme Court decisions concerning Māori rights and interests,¹ Claire Charters has suggested that Aotearoa New Zealand may be approaching a new “constitutional development: a standalone doctrine of Māori rights-based judicial review of executive action when dealing with Māori rights and interests, especially with respect to land”.² This article asks, within Charters’ broader constitutional question, how could our courts move towards reviewing executive action for consistency with te Tiriti o Waitangi 1840 (te Tiriti), or with its principles, as a standalone ground of review? That is, how might our courts require all executive action to be consistent with either or both te Tiriti o Waitangi and its principles, save only that allowed by statutory language expressly authorising the contrary?³ Could this be possible without relying on such an overarching requirement to exist in legislation?

In this article, I outline and then assess three possible arguments — or what I call “paths” — for how this standalone ground of judicial review might be achieved. These possible paths are: first, through the use of what I call “inferred” express reference review; secondly, by way of contextual review and the courts’ inherent supervisory jurisdiction; and finally, through the doctrine of legitimate expectations and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁴ To do this, I first set out in Part II the context in which the courts are likely to consider these arguments, as a means of understanding how the courts are most likely to evaluate the validity of these arguments. Then, I move to set out the case for each of the three paths in Parts III to V, before evaluating them in light of the considerations in Part II. I conclude that while each of the paths have their own jurisprudential bumps and potholes, the use of the doctrine of legitimate expectations and the UNDRIP

1 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423; and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

2 Claire Charters “*Wakatū in Peripheral Vision: Māori Rights-Based Judicial Review of the Executive and the Courts’ Approach to the United Nations Declaration on the Rights of Indigenous Peoples*” [2019] NZ L Rev 85 at 87.

3 The supremacy of statutes is confirmed in Parliament’s full power to make laws under the Constitution Act 1986, s 15(1).

4 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007) [UNDRIP].

presents the smoothest and most realistic road to achieving a standalone ground of review. Given its relatively recent incorporation into New Zealand law and policy, this final route presents the best judicial opportunity to give effect to te Tiriti in this way.

II Setting the Context: The Paradigm for Judicial Determination

The context in which these arguments sit is important as the courts will be cognisant of this in determining their validity and merit. This context includes considerations of: first, the legal and constitutional status of te Tiriti and its principles; secondly, the courts' proper role in judicial review as distinct from their traditional adjudicative role; thirdly, the unlimited sovereignty of Parliament; and finally, justiciability and deference of executive action affecting Māori rights, with emphasis on the recent trend towards justiciability and away from deference as contended by Charters.⁵

A Te Tiriti o Waitangi

The first consideration is, of course, te Tiriti itself. The starting point is to acknowledge that it is te Tiriti (the Māori text of the Treaty) that was agreed by the representatives of hapu and the Crown, and thus, it is the terms of te Tiriti that should accordingly bind the Crown's partnership with tangata whenua. It is important to recognise that te Tiriti, the Treaty of Waitangi (the English text of the Treaty) and the principles of the Treaty are all different, distinct and fundamentally "irreconcilable" concepts.⁶ My focus on a standalone ground of review for consistency with both te Tiriti and its principles is less about whether Crown action should be reviewed for consistency with one particular conception, though I would argue that this should be te Tiriti itself. Instead, my focus is on the idea of the Crown acting consistently with either or both, in and of themselves. Hence, I refer to the aim of this article generally as advancing arguments for consistency. However, regardless of which conception of te Tiriti is chosen, it is necessary to understand the present legal and constitutional status of te Tiriti and

5 Charters, above n 2, at 93.

6 See Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at ch 6.

its principles. Courts will be conscious of their status in determining whether the Crown has a requirement to act consistently with them, subject to express language empowering it to act otherwise.

1 The legal and constitutional status of te Tiriti

The legal status of te Tiriti is different and, in many ways, completely the opposite of its constitutional status. In an act of ultimate colonial sabotage, Prendergast CJ declared it “a simple nullity” in his now-infamous judgment *Wi Parata v The Bishop of Wellington* in 1877.⁷ Now, the official legal position remains as concluded by the Privy Council in *Te Heuheu Tukino v Aotea District Maori Land Board* in 1941.⁸ The Privy Council held, in considering a claim challenging the validity of legislation that was inconsistent with te Tiriti, that te Tiriti was neither supreme law nor capable of giving rise to enforceable rights, except insofar as incorporated into domestic law.⁹ That precedent was acknowledged approvingly in the Court of Appeal’s seminal *New Zealand Maori Council v Attorney-General* judgment in 1987 (*Lands Case*),¹⁰ upheld by that same Court as recently as 2008,¹¹ and left untouched by the Supreme Court despite clear invitation to intervene in the *New Zealand Maori Council v Attorney-General (Water Rights Case)* judgment in 2013.¹² Indeed, the extent to which *Te Heuheu* is a barrier can be seen in Richardson P’s holding in the *New Zealand Maori Council v Attorney-General (Radio New Zealand Case)* judgment in 1996 that *Te Heuheu* was a “clear contrary ruling” to the idea that the Crown’s obligations under te Tiriti were directly enforceable,

7 *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 78. While all these decisions have dealt either with the English text, or with the English and Māori texts as one singular document, and so could be read as not concerning the legal status of the Māori text by itself (that is, of te Tiriti itself), it is likely that the courts would construe these decisions as dealing with the legal status of both the English and Māori versions.

8 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

9 At 596–597.

10 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands Case*] at 655–656 per Cooke P and 691 per Somers J.

11 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 [*Forests Case*] at [62]–[64] and [72].

12 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Water Rights Case*]. For example, CR Carruthers QC, counsel for the first appellant, argued that the principle in *Te Heuheu* should be overruled: at 36.

absent statutory recognition or adoption.¹³ Thus, while there are certainly strong reasons for the overrule of *Te Heuheu*, the inertia of precedent means it stands. Thinking cautiously then, the courts will be conscious of how far certain arguments for a standalone ground intrude upon it.

In contrast, te Tiriti's constitutional status is completely different. In this setting, te Tiriti has been recognised as "the foundation of New Zealand",¹⁴ "of the greatest constitutional importance" by the Privy Council,¹⁵ and frequently acknowledged for its constitutional significance and as New Zealand's founding document by government ministries.¹⁶ The courts have invoked the constitutional significance of te Tiriti as giving rise to an interpretive presumption of consistency, regardless of whether the statute mentioned or incorporated te Tiriti within it, and as a mandatory relevant consideration in public decision-making.¹⁷ The point is that while *Te Heuheu* limits the legal status of te Tiriti, the courts have nonetheless used its constitutional significance as a jurisprudential basis to review executive action against it.

2 The principles of the Treaty

The "principles of the Treaty" were first applied to restrain the Crown from acting inconsistently with them in the context of the State-Owned Enterprises Act 1986 (SOE Act). In the *Lands Case*, the Court of Appeal interpreted the principles in the context of whether the Crown's transfer of land assets to newly created SOEs under the SOE Act, without provision to consider future Treaty settlement claims against such land, was lawful.¹⁸ In upholding the appeal and determining that the transfer would be illegal, the Court held that the principles included an active duty on the Crown to protect Māori land and taonga, and recognised a relationship of good faith and

13 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) [*Radio New Zealand Case*] at 168.

14 Sian Elias "Maori and the New Zealand Legal System" (2002) 76 ALJ 620 at 625.

15 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets Case*] at 516.

16 See, for example, Ministry of Justice "Learn about the Justice System: Treaty of Waitangi" (11 March 2020) <www.justice.govt.nz>.

17 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 223.

18 *Lands Case*, above n 10.

partnership between tangata whenua and the Crown, analogous to a fiduciary relationship.¹⁹ In the *Broadcasting Assets Case*, the Privy Council later added that the principles reflected the intent of the Treaty and included, but were not confined, to its precise terms.²⁰

Margaret Mutu and others have criticised the use of the principles for “attempt[ing] to by-pass” te Tiriti,²¹ and for being predicated on the false idea that the Crown acquired sovereignty through the Treaty,²² a claim definitively refuted by the Waitangi Tribunal in 2014.²³ Their criticism is one that I readily defer to. However, despite the validity of this criticism, or perhaps because of the false assumption that it relies upon, Parliament has continued to use the principles and our courts have continued to apply them. Therefore, they remain a relevant concept in terms of assessing consistency. Accordingly, two points need to be made. The first is that the principles are presently the main conception of te Tiriti which the courts have required the Crown to act consistently with, because they are the predominant standard that Parliament has legislated for thus far. The second, however, is that because “the principles” are a legislative creation, it is not axiomatic — despite the extensive jurisprudence that refers to them — that a court would accept them as the proper standard for consistency. This is especially the case if the court’s starting point for such review is the constitutional significance of te Tiriti itself, as opposed to a provision directly incorporating the principles (what is known as a “Treaty clause”).

B The Role of Judicial Review

The second consideration is to emphasise the courts’ proper role in judicial review. The point here is that when a court undertakes such review, it is not acting as an appellate body to a decision maker, but rather as an independent reviewer of a decision

19 At 664 per Cooke P, 682 per Richardson J, 693 per Somers J and 703 per Casey J.

20 *Broadcasting Assets Case*, above n 15, at 517.

21 Margaret Mutu “‘To honour the treaty, we must first settle colonisation’ (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony” (2019) 49(S1) *Journal of the Royal Society of New Zealand* 4 at 10.

22 At 10. See also Mikaere, above n 6, at ch 6.

23 Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014).

maker's process.²⁴ In this way, the court is not concerned with the public authority's decision itself, but whether the decision was one the authority could have reached if it acted "fairly, reasonably and according to law".²⁵ While these requirements are parameters for public decision makers, they limit the courts' power to undertake review as well. Even if a decision is within those parameters, the court must defer to it, even if it perceives that a different conclusion should have been reached on its merits.

C Parliamentary Sovereignty

The third consideration is that under New Zealand's uncodified, or "political" constitution, Parliament has "full power to make laws".²⁶ Indeed, the courts have confirmed that they have no power to prevent or compel the introduction of Bills for enactment.²⁷ Thus, the requirement for the Crown to act consistently must be subject to clear statutory language to the contrary. However, the obligation on the courts to accept Parliament's law-making sovereignty should not be confused with the courts' typical deference towards the legislature.

The Supreme Court's decision in *Attorney-General v Taylor* is a good example of this. The Court held that it had power to grant declarations of inconsistency for legislation inconsistent with the New Zealand Bill of Rights Act 1990, despite the lack of any such provision in the Act.²⁸ The Court distinguished between commenting on the legal validity of a statute, which would have infringed on parliamentary sovereignty, and its inconsistency with the New Zealand Bill of Rights Act, as a matter of judicial observation. In doing so, the Court relied on the difference between defying parliamentary sovereignty and legitimately abutting against traditional notions of judicial comity towards the legislature.

24 *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 (HL) at 1174. See also GDS Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at ch 1.

25 Robin Cooke "Empowerment and Accountability: The Quest for Administrative Justice" (1992) 18 CLB 1326 at 1326 (emphasis omitted). See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) [CCSU] at 410–411 per Lord Diplock.

26 Constitution Act, s 15(1).

27 *Te Runanga o Wharekaui Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealord Case*] at 308.

28 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

D Recent Trends Towards Justiciability and Away from Deference

Finally, the last relevant consideration is justiciability and deference. That is, whether an issue has an appropriate “legal yardstick” for the courts to determine,²⁹ and to what extent the courts should defer to the executive. The original colonial position of the courts was that Crown action affecting Māori rights was inherently non-justiciable and completely deferential — Prendergast CJ in *Wi Parata* expressed that the Crown “must be the sole arbiter of its own justice” towards Māori.³⁰

However, Charters has concluded that recent decisions “have shown an increasing willingness to restrict and read down doctrine that limits judicial oversight of the executive”.³¹ Charters argues that two key decisions each respectively demonstrate a trend against deference to the legislature and in favour of greater justiciability.³² In *Proprietors of Wakatū v Attorney-General*, the Supreme Court held that the Treaty settlement process did not preclude the existence of a fiduciary duty.³³ In the decision in *Ngāti Whātua Ōrākei Trust v Attorney-General*, the Supreme Court restricted the doctrine of judicial non-interference with parliamentary proceedings to the specific decision to introduce legislation.³⁴ The Supreme Court’s decision in *Ririnui v Landcorp Farming Ltd*,³⁵ which Charters also points to,³⁶ is particularly instructive. The Court held that while “many decisions made in connection with Treaty settlements will not be justiciable as they will involve policy, political, fiscal and similar considerations”, this “does not apply to all decisions having a Treaty dimension”.³⁷ Hence, while issues of justiciability and deference will remain as they pertain to issues of a “policy, political, [or] fiscal” nature,³⁸ they no longer categorically apply to exclude consideration of

29 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [27].

30 *Wi Parata*, above n 7, at 78. See also Charters, above n 2, at 89–90.

31 Charters, above n 2, at 93.

32 At 93–100.

33 *Wakatū*, above n 1, at [386] per Elias CJ and [667] per Glazebrook J.

34 *Ngāti Whātua Ōrākei*, above n 1, at [46]–[49] per Ellen France J.

35 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

36 Charters, above n 2, at 96.

37 *Ririnui*, above n 35, at [98(e)] per Arnold J.

38 At [98(e)].

executive action, even in the context of Treaty settlements, for consistency with te Tiriti per se.

E Conclusions on Considerations

Thus, in considering the arguments to be advanced in Parts III to V, the courts are likely to have all of these considerations in mind. The relevant questions then for assessing each of the arguments — inferred express reference review, contextual review and legitimate expectations arising from the UNDRIP — covered in Parts III to V are: first, are these arguments feasible; and, secondly, to what extent do they intrude on the holding in *Te Heuheu* and the sovereignty of Parliament?

III Inferred Express Reference Review

Express reference review, the doctrine founded in the seminal *Lands Case*, is where a court reviews the exercise of public powers for consistency with the principles of the Treaty because such consistency is required by statute.³⁹ This first path builds on that concept. Under this path, the requirement for the Crown to act consistently is achieved by inferring that every requirement on the Crown to either act consistently with, take into account or give effect to Treaty principles in legislation applies to all of the Crown's powers that are not explicitly constrained. The basis for doing so is that each requirement for consistency is logically connected to the exercise of the Crown's non-explicitly constrained powers, such that the requirement of consistency should be inferred as applying. Hence, while this pathway relies on statute, it seeks to use various specific statutory provisions to achieve an overarching requirement of consistency by default.

In order to properly set out the argument for this first possible path, and then assess it in light of the considerations in Part II, it is necessary to begin by explaining the approach described above of “inferred express reference review”. Then I will consider

39 *Lands Case*, above n 10. See also Matthew SR Palmer “Indigenous Rights, Judges and Judicial Review in New Zealand” in Jason NE Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2019) 123 at 146.

how it could be used practically, before turning to evaluate its overall feasibility and the courts' likely reception of it.

A The Argument for Inferred Express Reference Review

The abstract approach that I described above, which I call “inferred express reference review”, is effectively the approach that was taken by the Court of Appeal in its landmark decision in *Ngai Tahu Maori Trust Board v Director-General of Conservation (Whale-Watching Case)*.⁴⁰ Thus, it is convenient to first explain that decision, and then turn to subsequent judicial considerations in this area, before explaining how it could be used.

1 The Whale-Watching Case

The *Whale-Watching Case* concerned a challenge to the issuance of a whale-watching permit to a competitor of Ngāi Tahu, who operated the only whale-watching service at the time. Ngāi Tahu argued that such action was inconsistent with the Director-General's requirement under s 4 of the Conservation Act 1986 to administer and interpret the Act consistently with the principles of the Treaty. In question was whether the permit issuance was reviewable for consistency at all, given that it was made under the then Marine Mammals Protection Act 1978 (MMPA) and the Marine Mammals Protection Regulations 1992, which contained no explicit requirement to act consistently with or give effect to Treaty principles. Cooke P, writing for a unanimous Court, held that the requirement on the Department under s 4 “should not be narrowly construed”, despite the lack of explicit incorporation in the MMPA.⁴¹ This finding relied on the fact that the Department was responsible for the administration of enactments listed in sch 1 of the Conservation Act (in which the MMPA was included). Accordingly, the use of the powers exercisable under the MMPA had to be consistent with

40 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [*Whale-Watching Case*].

41 At 558.

Treaty principles to the extent that the provisions were “not clearly inconsistent with the principles”.⁴²

In effect, the Court inferred a requirement on the Crown to use its powers consistently with Treaty principles from one statute onto powers conferred by another, despite the lack of any express requirement in the latter. The Court’s basis for doing so was two-fold. The first was that the provisions incorporating the principles of the Treaty were to be generously construed. The second was that there was a logical justification for making the inference, because the same Department empowered to issue permits under the MMPA was also required to use its powers of administration to give effect to Treaty principles.⁴³

2 Subsequent judicial considerations

Two decisions of the Supreme Court confirm this approach’s legitimacy, and its potential scope, respectively. The first decision, *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*, concerned a challenge by the appellants to the issuance of permits allowing certain companies and groups to administer ferrying and tour guide services on Rangitoto and Motutapu Islands, to which they had ancestral connections.⁴⁴ Though applied in the same context as that in the *Whale-Watching Case*, sch 1 of the Conservation Act, the Court treated the inference of s 4 effectively as settled law.⁴⁵

The second decision, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, provides an even more recent consideration of this approach.⁴⁶ The effect of the decision, which ultimately upheld a decision reversing a permit made for seabed mining off the Taranaki coastline,⁴⁷ is profound and still too early to fully comprehend. However, what is relevant for the purposes of this article is the Court’s treatment of s 12 of the Exclusive Economic Zone and Continental Shelf (Environment Effects)

42 At 558.

43 At 557.

44 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

45 At [34] per O’Regan J.

46 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

47 At [2].

Act 2012, which recognises that the Crown has a “responsibility to give effect to the principles of the Treaty” but sets out specific and precise prescriptions of how that responsibility was to be carried out. The Court was unanimous that the language of s 12, despite naturally limiting the consistency requirement to specific provisions and applications, should be given “a broad and generous construction”, even though the legislative history suggested that Parliament had considered and ultimately excluded the inclusion of a generally worded requirement for consistency.⁴⁸ Ellen France and William Young JJ, writing for the Court on this point, held that the limiting language of the provision “does not axiomatically give support to a narrow approach to the meaning of such clauses”.⁴⁹ Their Honours continued: “Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state.”⁵⁰

The decision in *Trans-Tasman* indicates that otherwise narrowly prescribed Treaty clauses should be read in such a way that the requirement to act consistently (or to take into account or give effect to Treaty principles) qualifies and applies to all exercises of powers conferred by the relevant legislation. Indeed, that is supported by the Court’s own language that “[a]n 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.”⁵¹ As such, *Trans-Tasman* would appear to dramatically expand the scope within which the inferred approach, as discussed, could apply, given the number of Treaty clauses that are narrowly prescribed.

3 How inferred express reference review might be applied

The nature of this proposal is that all statutes requiring the Crown to act consistently could be inferred to apply, where there was a logical justification for doing so, to such

48 At [148] and [151] per William Young and Ellen France JJ. See also Williams J at [296].

49 At [151].

50 At [151].

51 At [151].

a broad range of areas in which the Crown exercises its powers that its net effect is requiring the Crown to act consistently in all its powers by default.

An example of how this approach could be applied theoretically is with the Public Service Act 2020 and the Crown Entities Act 2004. Section 14(1) of the Public Service Act provides that “[t]he role of the public service includes supporting the Crown in its relationships with Māori under the Treaty of Waitangi”. While the language of s 14(2) limits the scope of the public sector’s role by prescribing how the public service carries it out, the clear holding of the courts is that where te Tiriti is incorporated into statute, it is to be generously construed,⁵² even in spite of such semantic constraints (as *Trans-Tasman* has recently affirmed).⁵³ Thus, there is an argument that in fulfilling its functions, s 14(1) recognises and imposes on the public sector a requirement to act only where consistent with that role of supporting the Crown in its relationships with Māori under the Treaty. Read generously, this means to support the Crown in acting consistently with it. Indeed, this would seem to be the obvious conclusion: surely the best way for the Crown to do this would be to act consistently with the agreement that gives it the legitimacy to govern, te Tiriti itself.

The Crown Entities Act is the governing Act for all Crown entities, which include Crown agents.⁵⁴ In contrast to the Public Service Act, it contains no reference to te Tiriti or its principles. While Crown agents are included in the definition of “public service” for certain parts of the Public Service Act, s 10(b) of that Act excludes Crown agents from the definition of “public services” for subpart 3, for which s 14(1) is included. At first glance, the overall impression may be that Crown agents have no obligation to act consistently with te Tiriti.

Despite this, s 14(1) can still be inferred as applying to the Crown through a two-step process, relying first on *Trans-Tasman*, and secondly on the inferred approach as described. The first step is to recognize that while s 10(b) excludes the application of

52 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) [*Coals Case*] at 518; and *Ngāi Tai*, above n 44, at [48]–[54].

53 *Trans-Tasman*, above n 46, at [151].

54 Crown Entities Act 2004, s 7(1)(a) and sch 1 pt 1.

subpart 3 of the Public Service Act as applying to Crown agents, such constraints are not to be read as limiting the ability of Crown agents to respect te Tiriti unless that intention is made quite clear. Accordingly, if a provision which cabins the Crown's "responsibility to give effect to the principles of the Treaty" to specific responsibilities can be construed as applying more generally (as the Court found in *Trans-Tasman*), the same can surely be said of s 10(b) in which no such intention to exclude te Tiriti has been explicitly made. The second step can then be used to infer the requirement under s 14(1) as applying to Crown agents under the Crown Entities Act, such that any action undertaken by a Crown agent that was not consistent with its role as set out in s 14(1) of the Public Service Act would be invalid, unless prescribed by the Act. Applying the inferred approach even further, the power of Ministers to direct Crown agents to give effect to government policy could also be qualified by the requirement in s 14(1) that the Crown agent must act in a way that supports the Crown in its relationship with tangata whenua under te Tiriti, thus directly constraining the executive itself.⁵⁵

Hence, the argument of this first path is that, assuming such an approach could be applied to as many areas in which the Crown exercises its powers as possible, it may be plausible to reach an overarching requirement of consistency by aggregating all such approaches together.

B Evaluation of Inferred Express Reference Review

How then might the Court receive such an argument, and is such an approach feasible? Three observations are evident.

The first is that in respect of the considerations in Part II, such an approach is consistent with *Te Heuheu* and parliamentary sovereignty. The courts' review function arises because of the incorporation of te Tiriti into statute, not despite it. Thus, it is merely giving effect to Parliament's sovereignty by giving effect, through its interpretation, to what Parliament itself has legislated. The second is that because the jurisprudential basis for this path is statutory, in that it relies on applying the language of statute,

55 Crown Entities Act, s 103.

the conception of te Tiriti used is confined to that which Parliament has predominantly chosen: the principles of the Treaty. While s 14(1) of the Public Service Act refers to te Tiriti without any mention of the principles, and some recent enactments have referred to “the principles of [t]e Tiriti o Waitangi”,⁵⁶ which perhaps suggests that Parliament intended to give effect to te Tiriti itself, the majority of the provisions requiring consistency refer specifically to Treaty principles. This underscores the point that the basis of such review relies on the fact that it is Parliament who has ultimately provided it.

The final and most determinative observation is that on a practical level, the application of this approach would appear to be exceptionally limited, rendering it unfeasible. Treaty principles do not, despite what one commentator recently asserted, appear in “almost all legislation”.⁵⁷ Of the 449 statutes that bind the Crown, only 140 of these include references to the Treaty.⁵⁸ That is to say nothing of how few are not related to Treaty settlements, or how few actually require that Treaty principles are given effect to, or acted consistently with. Thus, while it is at least arguable that a court may accept the argument advanced in cases such as that regarding the Crown Entities Act, the limited extent to which the Treaty has been incorporated into statute leads to the conclusion that it would not be sufficient to impose an overarching requirement. Indeed, even assuming that such an approach could be applied so as to cover the Crown’s statutorily conferred powers, this ground provides no clear basis for a requirement of consistency to be imposed on the Crown’s prerogative powers. This is especially important as the prerogative powers are thought to be how the Crown undertakes Treaty settlement negotiations.⁵⁹

56 See, for example, Education and Training Act 2020, s 9(1).

57 Elizabeth Rata “The Road to He Puapua – Is there really a Treaty partnership?” (5 July 2021) Democracy Project <www.democracyproject.nz>.

58 A search on www.legislation.govt.nz on 13 October 2021 shows that only 140 of the 449 New Zealand statutes that include the phrase “This Act binds the Crown” also include the phrase “Treaty of Waitangi”.

59 Baden Vertongen “Legal Challenges to the Treaty Settlement Process” in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 65 at 68. See also Sid Dymond “Treaty-Based Judicial Review: The Treaty Settlement Negotiation Process and Legitimate Expectation” (2018) 6 Te Tai Haruru Journal of Māori and Indigenous Issues 2 at 19–20.

IV Contextual Review

While the courts have been able to use the constitutional significance of te Tiriti by way of contextual review to great effect, thus far they have never used it to require the Crown to act consistently with te Tiriti or its principles, or as a basis to overrule *Te Heuheu*. This argument suggests that by invoking the constitutional significance of te Tiriti, and two other constitutional norms — namely, the rule of law and the Court’s inherent supervisory role for reasonableness — our courts may be able to develop a solely constitutional basis for review, without relying on statute or the Crown’s own undertakings.

To develop this argument, two central claims are made. The first begins with the proposition that the courts’ practice of interpreting legislation consistently with te Tiriti should be understood as acceptance of an obligation upon itself to act consistently with te Tiriti. Relying on this, the first claim is that if such an obligation exists upon the courts, it should similarly apply to the Crown, under the rule of law. The second is that it is possible, though admittedly novel to do so, to read the Court of Appeal’s decision in *Taiaroa v Minister of Justice* as authority for the proposition that the Crown’s obligation to act reasonably is defined by its obligation to act consistently.⁶⁰ Accordingly, judicial review for consistency arises out of the courts’ well-established constitutional role of review for unreasonableness.⁶¹ In order to explain and then assess these arguments, it is necessary to first explain the nature of contextual review and why it is insufficient on its own to provide a basis for this ground of review. From there, I explain how the two propositions mentioned above may be found in the jurisprudence. I then evaluate the argument in light of its feasibility and the considerations in Part II.

A The Context and Limitations of Contextual Review

Contextual review describes a court’s review of public exercises of power against te Tiriti because te Tiriti is relevant to the context in which the public power is being

60 *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA).

61 *Associated Provincial Picture Houses, Ltd v Wednesbury Corp* [1948] 1 KB 233 (CA). See also *CCSU*, above n 25, at 410–411 per Lord Diplock.

used. The founding case of contextual review is the landmark judgment in *Huakina Development Trust v Waikato Valley Authority*.⁶² The decision concerned whether the Authority had erred in not taking the “spiritual, cultural and traditional relationships” that Māori had with water into account when authorising the discharge of waste in the Waikato River.⁶³ Chilwell J held that the broad discretion accorded to the Authority under the then Water and Soil Conservation Act 1967 to determine water usage meant the statute had to be interpreted consistently with te Tiriti.⁶⁴ Accordingly, rights under te Tiriti were mandatory relevant considerations to be taken into account by the Authority, but were reserved for the Authority as decision maker to weigh.⁶⁵ Chilwell J’s reasoning for this was that:⁶⁶

There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

Furthermore, in *Barton-Prescott v Director-General of Social Welfare*, albeit a case concerning the interpretation of the Guardianship Act 1968 and not one of judicial review, Gallen and Goddard JJ held that:⁶⁷

We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute.

David Round has criticised the decisions in *Huakina* and *Barton-Prescott* as unacceptable judicial activism, stating that the conclusion on a presumption of

62 *Huakina*, above n 17.

63 At 223.

64 At 210.

65 At 223 and 227.

66 At 210.

67 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

consistency in *Barton-Prescott* has “no justification in the law, or even other parts of their judgement”.⁶⁸ While it would be sufficient to point to various examples of authoritative judicial acceptance of both judgments to refute Round’s claim,⁶⁹ his argument can be refuted on his own terms. His analysis ignores, or indeed flatly rejects, the common law’s longstanding practice of drawing on constitutional norms to inform the interpretation of law,⁷⁰ and it cannot be doubted that te Tiriti is such a constitutional norm. If these decisions are “activist” and therefore illegitimate for drawing on constitutional norms, then arguably so are *Fitzgerald v Muldoon* and the *Sealord Case*.⁷¹ Both cases form part of our constitutional canon and relied on constitutional norms such as the separation of powers. The doubtfulness of this proposition demonstrates, respectfully, that such critique is without merit.

However, despite the extent to which the courts have utilised the constitutional significance of te Tiriti, the courts have not yet used it as a basis for judicial review for consistency. This both suggests that the courts are unlikely to do so in the future, and that further reasoning to support this development must be found if this kind of constitutionally based review is to be adopted.

B Two Additional Reasons for Constitutionally Based Review

What further jurisprudential grounds could be sufficient to give rise to a constitutionally-sourced requirement of consistency? I argue they could be the rule of law and the courts’ inherent supervisory role for reasonableness over the executive.

1 Te Tiriti consistent interpretations and the rule of law

68 David Round “Judicial Activism and the Treaty: The Pendulum Returns” (2000) 9 Otago LR 653 at 665.

69 For example, the recent decision in *Trans-Tasman*, above n 46, at [151] relies on *Huakina* and *Barton-Prescott*.

70 See David V Williams “The Treaty of Waitangi: A ‘Bridle’ on Parliamentary Sovereignty?” (2007) 22 NZULR 598 at 614 for discussion about how the 17th century common law courts invoked the norm of the “ancient constitution” of pre-Conqueror England as a source for qualifying the royal prerogative.

71 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC); and *Sealord Case*, above n 27.

The basic idea that all persons and institutions are answerable to the law is a natural corollary of the rule of law. Accordingly, if the courts are required by law to act consistently with te Tiriti o Waitangi, the Crown should be as well.

Because of the force of stare decisis, the decisions in *Huakina* and *Barton-Prescott* are not merely directions to the courts that they *may* interpret statutory language consistently with te Tiriti. Instead, they are a warning to the courts that because of te Tiriti's constitutional significance, the courts are *bound* to do so, unless the meaning of the language is unmistakably clear. The exceptions to stare decisis are that our highest court remains free to decide the law unconstrained by precedent, and that Parliament's legislative power is sovereign. However, the courts have reaffirmed these holdings consistently,⁷² and Parliament has no law stating that te Tiriti cannot be used or given effect to in this broad way. Indeed, it has done the opposite by incorporating Treaty principles into several statutes. Hence, it is arguable that the courts' interpretative presumption of consistency is an actual qualification on their own power of statutory interpretation, which in turn is a manifestation of the courts' obligation to act consistently with te Tiriti itself.

The High Court's decision in *Commissioner of Inland Revenue v Tarahau Farming Ltd* provides a useful illustration of this.⁷³ In *Tarahau*, the Court held that its requirement to interpret the liquidation provisions of the Companies Act 1993 consistently with te Tiriti directed it to afford the defendant company more time to achieve solvency and meet its liabilities, before liquidation was necessary.⁷⁴ The Court appreciated that the company held legal title to the ancestral land of a Māori whānau, and that liquidation would destroy the whānau's ability to retain it.⁷⁵ While there was no suggestion that the Court still could have declined to liquidate even if the company was seriously insolvent, it demonstrates that insofar as the statute allowed, the Court used its powers

72 See *Trans-Tasman*, above n 46, as the most recent and most authoritative affirmation.

73 *Commissioner of Inland Revenue v Tarahau Farming Ltd* [2019] NZHC 1783.

74 At [30]–[33].

75 At [31].

of interpretation and statutory powers to make orders in relation to liquidation consistently with te Tiriti.

Thus, the argument is a simple one: if the same law is to apply to all, and the courts have an obligation under law to act consistently with te Tiriti subject to unmistakable statutory language to the contrary, then accordingly the Crown should be similarly bound, especially as a signatory to te Tiriti.

2 Reasonableness and the courts' supervisory role

The second possible jurisprudential ground is the courts' established role in reviewing decisions for reasonableness.⁷⁶ This relies, first, on a possible reading of *Taiaroa v Minister of Justice* as authority for the proposition that acting reasonably is defined by acting consistently, and secondly, in defending that reading.

(a) The decision

The issue in *Taiaroa* concerned the then Minister of Justice's advertising of the Māori electoral option in 1995, as required by the Electoral Act 1993. Judicial review was sought for the Minister's decision not to adopt a Waitangi Tribunal recommendation that more funding and resources be placed to advertise the option. The Court of Appeal accepted that the Crown was required to take the recommendation into account as a mandatory relevant consideration, but that it was not required to follow it, as the test for whether the Minister's obligation under the Act had been met was "reasonableness, not perfection".⁷⁷ The decision is interesting, however, for the way in which Cooke P articulated what was required for "reasonableness":⁷⁸

Special obligations to the Māori people, whether arising from the Treaty of Waitangi, partnership principles, fiduciary principles or all three sources in combination, are not needed to give rise to an implication that reasonable notice of such an option is inherent in it. The relevance of the special

76 *Wednesbury*, above n 61; and Cooke, above n 25, at 1326.

77 *Taiaroa*, above n 60, at 418.

78 At 415 (macrons added).

obligations lies rather in defining what is reasonable, bearing in mind the position of Māori in New Zealand society and the recognised fact that Māori enrolment numbers had been unsatisfactory.

The President's passage suggests an equivalence between reasonableness and consistency with te Tiriti such that it is at least arguable that the former requires the latter. That is, if the Crown's obligations to tangata whenua under te Tiriti inform what is reasonable for the Crown to do, then what is reasonable ought to be what is consistent.

(b) The case for this interpretation

While this reading is potentially transformative, admittedly it is also novel for two reasons. The first is that this understanding of the President's judgment would seem to be inconsistent with the central holding of the judgment: that Waitangi Tribunal recommendations are only mandatory relevant considerations on the Crown.⁷⁹ The second is that this reading would appear to be incompatible with the orthodox position that decisions are only reviewable for reasonableness if they are so irrational that no reasonable decision maker could have come to it. That standard is known as "*Wednesbury* unreasonableness", named after the case that founded it.⁸⁰ While these reasons are certainly significant barriers, it is not obvious that this reading should therefore fail.

In respect of the first reason, this reading of the President's passage can still be compatible with the holding in *Taiaroa* if, in that case, the Crown is understood as having still acted consistently with te Tiriti, though it did the bare minimum to do so. Much like the nature of judicial review itself, there are a range of different options and courses of action for acting consistently with te Tiriti. While it may seem disconcerting to think that the Crown could still act consistently while not adhering to a Waitangi Tribunal recommendation, it is helpful to think of this in the same way

79 At 418. See also *Attorney-General v Mair* [2009] NZCA 625, [2010] BCL 147 at [101] per Baragwanath J where *Taiaroa* was cited directly as authority for that proposition.

80 *Wednesbury*, above n 61.

as obligations on contracting parties to undertake *reasonable endeavours* versus *best endeavours* are understood. The latter obligation imposes a greater burden and a higher degree of intensity than the former, yet both are promised in order to fulfil the same underlying outcome. In the same way, while the Waitangi Tribunal recommendation would have been the most consistent course of action with te Tiriti, the Crown's actions in *Taiaroa* could, for the sake of this argument, be understood as a less intensive but nevertheless consistent means of acting in accordance with te Tiriti.

Secondly, while *Wednesbury* unreasonableness would seem to be a significant barrier to accepting this reading of *Taiaroa*, the precedent of *Wednesbury* is not immutable, and has been the subject of significant extrajudicial and judicial criticism.⁸¹ It may be possible for the courts to accept that the constitutional significance of te Tiriti is such that it justifies an exception to the general *Wednesbury* rule, or as a basis for discarding it altogether. Certainly, there is some support for this notion in the Privy Council's decision in the *Broadcasting Assets Case*, where the Board held that it was wrong to think that the only way in which review of the Crown's obligations under te Tiriti was possible was if they were "unreasonable in a *Wednesbury* sense".⁸² While the Board was dealing with s 9 of the SOE Act in that case, the holding gives authority to the idea that, if a constitutional requirement to act consistently with te Tiriti akin to s 9 was found, the *Wednesbury* standard for review for reasonableness should not be adopted.

Hence, as a whole the argument is that, by drawing on the constitutional significance of te Tiriti, the rule of law and the courts' role of review for reasonableness, the courts may have enough justification for a constitutionally-sourced standalone ground of review.

81 See Sian Elias "The Harkness Henry Lecture: 'Hard Look' and the Judicial Function" (1996) 4(2) *Wai L Rev* 1 at 14–23; and *Regina (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [32] where Lord Cooke called *Wednesbury* "an unfortunately retrogressive decision".

82 *Broadcasting Assets Case*, above n 15, at 524.

C Evaluation of Contextual Review

There are three main observations to make about the courts' likely reception of this argument.

The first observation is that because the source of this second path is constitutional in nature, it is entirely possible that the courts would, if this were to be accepted, adopt review against te Tiriti itself, rather than the Treaty or its principles. While both *Huakina* and *Barton-Prescott* invoked "the principles" as the standard of review,⁸³ this is unsurprising given the body of developing Treaty jurisprudence at the time they were both decided. In light of the now well-accepted critique of the principles by Ani Mikaere, Margaret Mutu and others, adopting the principles as the standard of review is far from an automatic matter.

The second is the obvious tension that this approach has with notions of parliamentary sovereignty. The argument is that if Parliament has the sovereignty to incorporate te Tiriti into legislation to qualify the powers of the Crown, as it has done before, then it would have done so.⁸⁴ Hence, if it has not, it naturally follows that Parliament never intended to do so, and that as such the courts should be accordingly deferential. This argument highlights the important difference between the courts' obligation to comply with Parliament's legislative sovereignty and their practice of judicial comity towards the legislature discussed in Part II. An expansive view of parliamentary sovereignty would suggest that the courts should not create or find this new constitutionally-sourced ground of review because Parliament omitted to impose a broad qualification on the Crown to act consistently. A narrower view, however, would look solely at whether the imposition of such a qualification infringes on Parliament's enactments or ability to make law. In this second, narrower view, it is reasonable to argue that this path does neither. There is no statute explicitly stating that the Crown

83 See *Huakina*, above n 17, at 223; and *Barton-Prescott*, above n 67, at 180.

84 For example, Greig J in *Ngatiwai Trust Board v NZ Historic Places Trust (Pouhere Taonga)* (1997) 3 ELRNZ 370 at 379 was doubtful that Parliament's deliberate choice not to include an explicit Treaty clause in legislation allowed the Court to infer the application of a Treaty clause from another statute.

is not required, or not allowed, to act consistently with te Tiriti that this would contradict, nor is there anything that prevents Parliament from enacting law to reverse it.

However, perhaps the most determinative observation for this particular path is the third: its obvious tension with *Te Heuheu*, the novelty of the reading of *Taiaroa*, and the lack of judicial uptake of these arguments, despite their availability over the last three decades. This argument only succeeds if a court decides that such reasoning is sufficient to either overrule or distinguish *Te Heuheu*. In order to distinguish it, the court would need to accept that there is a difference between enforceable rights, which give specific substantive outcomes, and an obligation on the Crown to act consistently, which contains a range of specific substantive outcomes for the Crown itself to choose between. The nature of judicial review is such that it seldom ever mandates a specific outcome. However, it is still, at best, unclear whether the court would be satisfied with this difference and, at worst, doubtful that such a difference is more than merely semantic. While there is, at least, an academic argument for this kind of constitutionally-sourced means of review, especially in terms of reversing *Te Heuheu*, the fact that the courts have not yet adopted it despite the opportunity available to revisit *Te Heuheu* suggests that the courts are unlikely to do so. The Supreme Court is unlikely to change the law without a catalyst, and these particular constitutional ingredients have been sitting on the shelf for long enough that it seems likely they will stay there. While this is disappointing, it is perhaps unsurprising given the constitutional paradigm in which the courts have operated this far: the supremacy of Parliament.

V Legitimate Expectations and the UNDRIP

In contrast to the first and second paths, the jurisprudential basis for this third path is not sourced in either statutory or constitutional grounds, but instead in the Crown's own undertakings. The argument for this third path is that when New Zealand agreed to adopt the UNDRIP, it gave a legitimate expectation that it would act consistently with the UNDRIP and thus, through art 37 of the UNDRIP, a legitimate expectation that it would act consistently with te Tiriti and its principles as well.

A The Argument for the UNDRIP as a Legitimate Expectation

It is necessary to first explain the doctrine of legitimate expectations before moving to demonstrate how this might be applied to the UNDRIP. I take these in turn.

1 Doctrine of legitimate expectations

In essence, the doctrine of legitimate expectations is designed to protect the promisee of a public authority's promise or undertaking to act in a certain way. The jurisprudential basis for this arises out of conceptions of fairness and reasonableness.⁸⁵ That is, if a promise has been made, it is only fair and reasonable that it is either followed, considered or appropriately justified, if it is not to be carried out.

The leading case on legitimate expectations in New Zealand is the Court of Appeal's decision in *Comptroller of Customs v Terminals (NZ) Ltd*, where Randerson J expounded the following three-step test.⁸⁶ The first inquiry "is to establish the nature of the commitment made", looking at promises, settled practices and policies as a question of fact.⁸⁷ The second inquiry "is to determine whether the plaintiff's reliance ... is legitimate", which is ultimately whether it is reasonable in the circumstances.⁸⁸ The third inquiry, which the Court noted was "often [the] most difficult", is what the appropriate remedy should be.⁸⁹ Therefore, a pertinent question is whether legitimate expectations are capable of substantive (as opposed to procedural) protection, or whether they are merely mandatory relevant considerations and natural justice repackaged. The courts have recognised that, in theory, a substantive legitimate expectation is just as conceptually available under the doctrine as a procedural legitimate expectation.⁹⁰ The former is an expectation related to a specific outcome while the latter is an expectation related to the process by which a decision is made. However, in *Terminals*, Randerson J noted that the usual remedies would be either to

85 *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC) at 638.

86 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137.

87 At [125].

88 At [126].

89 At [127].

90 See *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 at [709]; and *Terminals*, above n 86, at [155].

require the public authority to give notice and an opportunity for the affected party to be heard before a decision on the promise was made, or a direction to reconsider entirely. His Honour concluded by noting that:⁹¹

... relief in the form of a substantive outcome is rarely, if ever, granted. To do so would be to usurp the function of the person or body carrying out the relevant public function.

While that position is a challenge to the argument that a legitimate expectation may require the Crown to act consistently, it is arguably no less a challenge than the notion of using judicial review itself to achieve this. A court is not concerned with whether a decision maker has made the right decision, but whether it was one that they could have made if acting fairly, reasonably and according to law. In *New Zealand Assoc for Migration and Investments Inc v Attorney-General*, Randerson J noted that there were “two key policy considerations” underlying any legitimate expectation case: the public interest in holding public authorities to their promises, and the necessary flexibility needed by public authorities “to meet changing circumstances”.⁹² Viewed in this way, it is possible to reconcile imposing an obligation on the Crown to act consistently with te Tiriti by way of legitimate expectation, and the courts’ reluctance to grant substantive outcomes under the doctrine, by understanding that there may be multiple different ways, with varying degrees of intensity, in which the Crown could act consistently. Indeed, with respect to the balancing of competing interests that Randerson J referred to, this would seem to strike a reasonable balance: while there is importance in allowing flexibility and so therefore not requiring a precise and specific outcome, there is also public interest and constitutional importance in the Crown acting consistently too.

91 *Terminals*, above n 86, at [155] (footnotes omitted).

92 *New Zealand Assoc for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [140].

As to the second test, it is clear that Māori, as tangata whenua and as the Indigenous people of Aotearoa New Zealand, would be entitled to rely upon the UNDRIP as an affirmation of their natural rights.

2 UNDRIP as a legitimate expectation

Now that the doctrine has been introduced, it is helpful to start first with why New Zealand's adoption of the UNDRIP could amount to a legitimate expectation and then to turn to how this could manifest into a requirement for consistency.

(a) International instruments as legitimate expectations

The leading common law authority for the proposition that international instruments are capable of giving rise to a legitimate expectation is the High Court of Australia's seminal decision in *Minister of State for Immigration and Ethnic Affairs v Teoh*.⁹³ That case concerned a challenge against the respondent's deportation, alleging that the ratification of the domestically unincorporated United Nations Convention on the Rights of Child gave a legitimate expectation that the interests of the child would be a primary factor in a decision for deportation. The majority of the High Court held that:⁹⁴

... ratification of a convention is a positive statement by the executive government ... to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention ...

However, the High Court qualified this by stating that the legitimate expectation did not "compel" the decision maker to act in the way expected,⁹⁵ but instead only that any party affected by a decision not to adhere to it be given notice of this and

93 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

94 At 291 per Mason CJ and Deane J.

95 At 291.

the opportunity to argue against this course of action.⁹⁶ Kristen Walker and Penelope Mathew, looking at the case holistically, concluded that the legitimate expectation confirmed by *Teoh* was “something less than a legal right, giving rise only to a right of procedural fairness”.⁹⁷ Thus, for these purposes, *Teoh* needs to be persuasive for the proposition that the UNDRIP is a legitimate expectation, but not so persuasive that a court holds that it only provides procedural expectations. While this would likely be an issue with other international instruments, the specific nature of the UNDRIP to Māori and its constitutional significance, as explained below, suggest that this kind of having one’s cake and eating it too may indeed be possible.

Thus far, New Zealand’s courts have not explicitly accepted *Teoh*’s holding that international instruments amount to legitimate expectations. However, Thomas J’s dissent in the *Radio New Zealand Case* observed that, following *Teoh*, it was “almost automatic” that te Tiriti could also “found a legitimate expectation”.⁹⁸ His Honour held that such an expectation could give Māori both procedural expectations of being consulted where their rights were concerned, and substantive expectations that the Crown would honour its undertakings and Treaty obligations.⁹⁹ Thomas J’s dissent provides a useful precedent to argue that te Tiriti itself should form a legitimate expectation,¹⁰⁰ and therefore, at the very least, the UNDRIP as a recognised international instrument should as well.

(b) Applying the UNDRIP

The UNDRIP is a resolution of the General Assembly of the United Nations that represents the international community’s recognition of Indigenous peoples’ rights, including rights of self-determination and, importantly, rights to the observance of treaties.

96 At 291–292.

97 Kristen Walker and Penelope Mathew “Minister for Immigration v Ah Hin Teoh” (1995) 20 MULR 236 at 248.

98 *Radio New Zealand Case*, above n 13, at 184–185 per Thomas J.

99 At 184.

100 See Philip A Joseph “Constitutional Review Now” [1998] NZ L Rev 85 at 103–106.

While the UNDRIP is not strictly a treaty itself, and therefore not binding between states under international law,¹⁰¹ Dame Susan Glazebrook has suggested that this is “somewhat irrelevant in the New Zealand context” because of New Zealand’s position that customary international law is part of our common law.¹⁰² Her comment suggests it is likely that if the courts accepted the rationale in *Teoh*, they would accept that the UNDRIP imposes a legitimate expectation upon the Crown in the same way an unincorporated international treaty would. The hurdle, of course, is whether the courts would accept the rationale of *Teoh*.

Accordingly, a substantive legitimate expectation that the Crown will act consistently with te Tiriti and its principles could be achieved through art 37(1) of the UNDRIP, which states:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Article 37 has so far been “underutilized” in New Zealand.¹⁰³ However, commentary suggests that it could be transformative. Kirsty Gover offers that it “could assist to reinforce the priority of treaty rights ... in constitutional debates” about te Tiriti’s status,¹⁰⁴ and Glazebrook J extrajudicially suggested that it means New Zealand “has further committed to honouring te Tiriti”.¹⁰⁵ Furthermore, Fleur Te Aho argues that it provides a basis “to critique the extent to which [Treaty] settlements truly honour and respect the guarantee of iwi tino rangatiratanga”.¹⁰⁶ Te Aho’s critique is

101 Charters, above n 2, at 110.

102 Susan Glazebrook “The Declaration on the Rights of Indigenous Peoples and the Courts” (2019) 25 Auckland UL Rev 11 at 23–24.

103 Kirsty Gover “Treaties and the UN Declaration on the Rights of Indigenous Peoples: The Significance of Article 37” in Centre for International Governance Innovation *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS – Special Report* (10 March 2020) 77 at 77.

104 At 78.

105 Glazebrook, above n 102, at 27.

106 Fleur Te Aho “Treaty Settlements, the UN Declaration and Rights Ritualism in Aotearoa New Zealand” in Centre for International Governance Innovation *UNDRIP Implementation: Comparative*

significant in particular because it gives weight to the idea that there should be a political, if not judicial, revisitation of Treaty settlements despite being full and final if tino rangatiratanga is not upheld.

Thus, while there is little judicial guidance thus far on art 37,¹⁰⁷ on a first principles analysis the meaning of art 37 — and, therefore, this argument — would seem to be clear. If the UNDRIP is a legitimate expectation, then art 37 must surely be understood to mean what it clearly directs: that tangata whenua have a substantive legitimate expectation that the Crown will act consistently with te Tiriti.

B Evaluation of Legitimate Expectations and the UNDRIP

There are three observations to make in respect of this argument. The first is that because the jurisprudential basis for this proposition is the Crown's own undertaking — that is, its own agreement to adopt the UNDRIP — no issues of parliamentary sovereignty or tension with *Te Heuheu* arise. The requirement to act consistently originates from the Crown, not te Tiriti itself. The second is that because the requirement to act consistently is found in the UNDRIP, consistency could be assessed against te Tiriti itself, as opposed to its principles. Indeed, as an instrument recognising Indigenous rights, this would seem to be a natural conclusion.

The third observation is that the hurdles with this argument, as highlighted, are with whether the courts would accept the UNDRIP as a legitimate expectation, and if so, whether substantive expectations would flow on from that holding. While this is far from clear, it is not out of reach. The courts' omission to adopt the holding in *Teoh*, or Thomas J's dissent in the *Radio New Zealand Case*, thus far may suggest that the authority is a dimly viewed one. However, it is also possible — and, indeed, realistic — that our courts have not adopted it because the substantive conclusion in *Teoh* was already reached a year earlier by our Court of Appeal in *Tavita v Minister of*

Approaches, Indigenous Voices from CANZUS – Special Report (10 March 2020) 33 at 39 (italicisation omitted).

107 The latest of the Ngāti Whātua litigation continuing on from *Ngāti Whātua Ōrākei v Attorney General*, above n 1, is likely to contain valuable insights into the application of the UNDRIP and legitimate expectations in this context.

Immigration: namely, that unincorporated treaties were mandatory relevant considerations.¹⁰⁸ Therefore, a decision to consider it has not been presented until now. In light of the courts' increasing willingness to recognise and apply the UNDRIP, and to recognise its constitutional dimension in our jurisprudence, it is arguable that this is the necessary catalyst to bring this issue before the courts, and to finally (albeit indirectly) give effect to te Tiriti. Though such comment is merely speculative, it is not unreasonable to consider that the courts would prefer this solution, which still relegates *Te Heuheu* to the judicial dustbin in all but name, over the kind of direct constitutional approach discussed in Part IV. That approach would naturally inspire calls of judicial activism and partisanship, regardless of their validity.

The decision in *Teoh* was met with swift legislative and executive action seeking to reverse its effect.¹⁰⁹ While the effect of the decision has not yet been legislatively overruled for the entire commonwealth, it has been in South Australia.¹¹⁰ Under our constitutional order, that same risk remains. However, insofar as a judicial means for achieving a standalone ground of review might be found, this path would appear to be the most plausible. While this path is far from certain, the courts' constitutional embracement of the UNDRIP, the existing authority that such international documents can be legitimate expectations, and the courts' findings that substantive outcomes from legitimate expectations are conceptually available all suggest, in addition to te Tiriti's constitutional significance, that courts could find a requirement for consistency with te Tiriti itself.

108 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 265–266.

109 Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth) (senate committee report) at [1.24]–[1.29] for information about press releases by the then Australian Government rejecting the proposition in *Teoh* and its introduction of the Administrative Decisions (Effect of International Instruments) Bill 1995. See “Administrative Decisions (Effect of International Instruments) Bill 1995: Report by the Senate Legal and Constitutional Legislation Committee” in Senate Legal and Constitutional Legislation Committee *Reports on the Consideration of Bills: Tabled July – December 1995* (Parliament of the Commonwealth of Australia, Canberra, 1996) 1 at [1.24]–[1.29] for information about press releases by the then Australian Government rejecting the proposition in *Teoh* and its introduction of the Administrative Decisions (Effect of International Instruments) Bill 1995.

110 See Administrative Decisions (Effect of International Instruments) Act 1995 (SA), s 3(2), which was enacted promptly after the *Teoh* decision.

VI Conclusion

With the goal of a standalone ground for consistency in mind, three conclusions arise. The first is that although each path has its jurisprudential hurdles and potholes, there is a rationale within all of them that might be usefully applied, even though the first two paths are unlikely to achieve the goal of imposing an overarching requirement of consistency on the Crown. The inferred express reference review approach indicates how otherwise tightly constrained Treaty clauses may be better utilised and applied, showing just how effective these “constitutional guarantees” can be.¹¹¹ If nothing else, the contextual review approach challenges whether old precedents such as *Te Heuheu* and *Wednesbury* are still fit for purpose and justifiable within our constitutional order.

The second conclusion is that — in answer to the question put forward by this article — utilising the doctrine of legitimate expectations and the UNDRIP is the most feasible means of achieving a standalone ground of judicial review for consistency. That is, the third path is the path of least resistance. While this path still asks the courts to venture into uncharted territory, there is a clear and obvious jurisprudential basis for this, supported by the constitutional significance of te Tiriti itself, the courts’ growing use and reliance on the UNDRIP, and the Crown’s greater use and affirmation of its commitments to it.¹¹²

The third conclusion, however, must be a strong sounding of caution and a reminder of the need for perspective. The arguments advanced rest upon an assumption that a judicial remedy — and, indeed, judicial intervention in this area — is normatively desirable. Indeed, it assumes a paradigm of judicial benevolence, with all the jurisprudential assumptions that this entails. The history of colonisation, as *Wi Parata* shamefully reminds us, shows that this cannot be assumed. The barriers to realising

111 *Lands Case*, above n 10, at 658 per Cooke P.

112 See, for example, Claire Charters and others *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (Te Puni Kōkiri, 1 November 2019).

this constitutional ground are of the courts' own making too, reflected in the fact that *Te Heuheu* is, after all, a judicial creation. As Charters poignantly reminds us, the “courts must be alive to their internal, structural and systemic bias against a full, Indigenous-generous interpretation of the Declaration”.¹¹³ So too must we.

113 Charters, above n 2, at 118.