

SMITH v ATTORNEY-GENERAL – APPELLANT ROADMAP

References: *AA [n]* = Appellant’s bundle of authorities, tab *n*; *RA [n]* = Respondent’s bundle of authorities, tab *n*; *refs in the form 05.0001* are to the Case on Appeal; *Subs* = appellant’s submissions (29 May 2026); *Resp Subs* = respondent’s submissions (29 June 2026); *HRC Subs* = Human Rights Committee’s submissions (14 July 2026); *THRMōA Subs* = Te Hunga Rōia Māori o Aotearoa’s submissions (14 July 2026); *Reply* = appellant’s reply submission (28 July 2026)

STRIKE-OUT, THE CLAIM AND THE PUBLIC LAW DUTY

1. **Key issue:** whether each cause of action was properly struck out as untenable in law, or whether the claims — including the pleaded public law duty — should proceed to trial for determination on evidence and full argument.
2. **Facts:** *Subs* at [15] – [17]; affidavit of Michael John Smith (201.0013).
3. **Court of Appeal erred in:**
 - a. treating the claim as an impermissible challenge to the “efficacy” of legislation, by way of a trichotomy with no principled foundation (*Subs* [73] – [76]; **CA judgment at [94] – [95], 05.0042**);
 - b. applying a wide “margin of appreciation” — a doctrine of supranational subsidiarity — to a domestic rights claim, and treating the CCRA as comprehensive so as to answer the claims (*Subs* [77] – [83]; **CA judgment at [89] and [94], 05.0039 and 05.0042**); and
 - c. treating the public law duty claim as “captured” by the NZBORA and Te Tiriti causes of action, and engaging in substance only with the public trust doctrine, which is no longer relied on (*Subs* [54] – [55]; **CA judgment at [179] – [185], 05.0078**).
4. **Approach to strike-out** (*should a novel rights / tikanga / te Tiriti claim be determined at strike-out, or go to trial?*).
 - a. *Smith v Fonterra* requires special caution before striking out novel claims founded on seriously arguable allegations of non-trivial harm; full evaluation on evidence at trial is to be preferred (*Subs* [87], [116], [126]; ***Smith v Fonterra* RA [74] at [74] – [76] and [83]**).
 - b. Novelty in law is no barrier *but* particular care is required in situations where the law is developing: ***Couch v Attorney-General* RA [24] at [33] per Elias CJ**.
 - c. Whether the Crown has breached any protective duty is quintessentially a trial question, particularly given genuine factual disputes about the steps the Crown has and has not taken (*Subs* [87], [116]).
 - d. Pleadings facts are assumed true (submitted also that the potential for expert evidence to illuminate the issues is important; see eg ***Warratah Coal* AA [96] at [1491] – [1505], [1548], [1589 – 1601]**, on the type of expert evidence that trial can be expected to

illuminate); if the pleading is deficient, the orthodox course was leave to amend, not strike-out (**Subs [76], [122]**).

- e. Courts have consistently cautioned against strike-out in developing areas of tikanga and te Tiriti, especially where significant factual matters must be resolved; complexity requiring extensive argument is no bar where the Court has the materials (**THRMoA Subs [41] – [42]**).
5. **Nature of the case** (*what does the claim require of the Courts?*).
- a. Claim for declarations, reporting back order re BORA, on basis Crown knew at all times of threat of climate change and necessary response in terms of NZ GHG reductions, has the means to set consistent targets and achieve consistent reductions, and in breach of rights has failed to do so: **Draft 3ASOC [20], 05.0139**.
 - b. Particulars due to Crown’s particulars request and Johnstone AJ’s judgment requiring particularisation of acts and omissions (***Smith v Attorney-General* [2020] NZHC 836 at [43], 101.0021**), but the case for the plaintiff has not changed: the plaintiff does not call for the Court to assess every act or omission to assess breach. Seeks declarations of breach and BORA requirement for reporting back on achieving consistency. How Crown achieves consistency is for it to determine (**Reply [9] – [10]; Draft 3ASOC [80(c)], 05.0158**).
6. **Scope of the case on acts and omissions** (*is the case limited to challenging the CCRA or acts under it?*).
- a. Claim is that the 2050 Target enshrined in the CCRA is inconsistent with rights, and that Crown failure to measure and reduce its own GHG emissions breaches rights (**Draft 3ASOC [65] and [82], 05.0154 and 05.0160 – 05.0161**).
 - b. If the CCRA is an answer to the claim, it can only be an answer for conduct captured by it; it cannot be an answer to the Crown’s failure to measure and reduce its Crown emissions (**Draft 3ASOC [82(a)] – [82(b)], 05.0160; CCRA, ss 3A and 5ZM AA [1]**).
7. **Remedies:** (*What does the claimed relief require of the courts?*)
- a. Declarations do not impinge on parliament’s role: the Crown can meet its duties by legislative or non-legislative means of its choosing (**Ngāti Whātua Ōrakei Trust v Attorney-General RA [53] at [46]; Subs [68]**).
 - b. Claim does not engage Bill of Rights 1688: **Reply [7]; *Attorney-General v Taylor* AA [9] at [113] – [117]; *Ngāti Whātua Ōrakei Trust* RA [53] at [36] – [48], particularly [46]** (in the context of proposed legislation, which is not this context).
 - c. Arguments that a remedy is unavailable as a matter of law because of deference, comity, or asserted distinctions between challenges to legislation and challenges to the *efficacy* of legislation do not meet the pleaded claim (**Reply [3] – [6] Draft 3ASOC at [56], [73]**).
 - d. Not for the Court to engage with assertions by the present executive that the “will” of Parliament is to preclude claims without Parliament having expressed that will: see, in a NZBORA context, ***B v Attorney-General* [2026] NZHC 2179 at [106] – [110]**.
 - e. Parliamentary sovereignty in any event sits within a constitutional framework that requires it to be exercised consistently with the rule of law. To the same extent as it is,

at trial, called upon as a last refuge against relief, the legitimacy of that call will be in question (Subs [69]; *Taylor v New Zealand Poultry Board* AA [30] at 398).

NZBORA CLAIMS (ss 8 AND 20)

1. **Key issue:** whether it is tenably arguable that ss 8 and 20 impose positive protective obligations engaged by the Crown's acts and omissions on climate change, such that breach is a matter for trial.
2. **Court of Appeal erred in:**
 - a. having accepted the building blocks — breach arguable (CA at [48] – [57], 05.0021 – 05.0024); wide impact no bar (CA at [58] – [61], 05.0025); timeliness and proximity a trial issue (CA at [67] – [74], 05.0028 – 05.0031); positive duties tenable (CA at [88] and [113] – [116], 05.0039 and 05.0049) — striking out on characterisation of claim as being to “efficacy” of legislation;
 - b. applying a “margin of appreciation” in a domestic setting (CA at [89], 05.0039; Subs [81] – [83]): in *KlimaSeniorinnen* the margin reflects the Convention's subsidiarity (AA [64] at [449] – [451]), does not negative State obligations ([550] – [552])), and is in any event *reduced* for the State's commitment, aims and target-setting ([543]).
 - c. preferring *Gardner* and *Plan B* to the Grand Chamber (CA at [85] – [86], 05.0037 – 05.0038; Subs [106] – [108]), and reading the *KlimaSeniorinnen* victim-status ruling as a substantive holding on proximity (CA at [72] – [73], 05.0031; Subs [105]), when the association's substantive claim in fact succeeded; and
 - d. on s 20: imposing an extra-statutory “high threshold” without principled analysis (CA at [123], 05.0053; Subs [117] – [119]; *Chisnall* AA [7] at [98]) and distinguishing *Billy* on the pleadings while accepting the same allegations would be tenable (CA at [131], 05.0055; Subs [120] – [122]).
3. **Section 8:**
 - a. **Art 6 ICCPR:** The right “should not be interpreted narrowly” (GC36 AA [69] at [3]). A State “may be in violation of article 6 even if such threats and situations do not result in loss of life” (at [7]; *Teitiota* [9.4]). No reservation was entered to art 6 (Subs [93]; HRC Subs [6]–[8]).
 - b. **Negative and positive aspects of right:** the negative aspect is uncontroversial – the duty to refrain from conduct resulting in arbitrary deprivation of life (GC36 at [7]). Positive aspect in ICCPR jurisprudence has three limbs — protective (take “reasonable, positive measures that do not impose disproportionate burdens” against “reasonably foreseeable threats to life originating from private persons and entities”) (GC36 at [7], [21]); a framework duty, to “establish a legal framework” and “adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats” (GC36 at [18]); and a general-conditions duty, expressly extending to “degradation of the environment” (at [26]), said to be the source of the “life with dignity” element.
 - c. **Negative aspects of the pleaded claim:** Crown's own emissions; setting inadequate 2050 and biogenic methane targets in the CCRA; reforming the ETS so as to weaken its effectiveness; breaching the commitments underpinning the methane target to

price agricultural emissions by 2025, while dismantling the mechanisms to do so (**Draft 3ASOC [64(a)], [65(a)], [66], [72], [73], [76], [78], [82(a)] – [82(b)], 05.0154 – 05.0160**); licensing new fossil fuel exploration (**at [82(c)(ix)]**); and investing in fossil fuels (**at [82(c)(xi)]**).

- d. **Positive aspect of the pleaded claim:** Claim engages the framework obligation re Crown emissions (**Draft 3ASOC [88], 05.0164**) and national emissions (**[90]**). Cases on framework obligation under Art 8 require (i) a framework capable of achieving the required reductions — quantified carbon budgets, targets and pathways consistent with best available science and the precautionary principle, updated with due diligence and enforced against private emitters (***KlimaSeniorinnen* AA [64] at [546], [550]**); (ii) operational measures — adaptation works protecting identified communities, as with the seawalls in *Billy*.
- e. **Basis for positive obligation:** (i) NZBORA long title affirms both the rights themselves (“to affirm, protect, and promote human rights and fundamental freedoms”) and New Zealand’s commitment to the ICCPR;; (ii) whether and how a right is breached, and what the Crown must do to prevent breach, depends upon the right, the conduct, and the context. As *Wallace* holds, what is required to protect the right to life depends on the context — including the requirement that life not be deprived otherwise than consistently with the principles of fundamental justice – and the positive obligations such as reporting can be a necessary incident of the right (***Wallace* at [132]**). See also ***Klimaseniorrinen* at [545]**
- f. **Positive obligations have been recognised under s 8:** in *Re J (An Infant)* the State intervened to protect a child’s life against the parents’ refusal of treatment (**RA [63]**); in *Shortland* it was implicit that withdrawing dialysis without proper clinical assessment could engage s 8 (**RA [68] at 445**); and *Wallace* recognised planning/control and investigative obligations (**AA [41] at [97] – [98]**). (NB respondent’s reliance on *AR (India)* misplaced- it rejected a claim based on breach of right to live with dignity, where claimant’s life was not at risk (**AA [6] at [45] – [47]**)).
- g. **Limitation / interference with right to life:** Risk is to be considered in light of “the grave risk of inevitability and irreversibility” of climate harm (***KlimaSeniorinnen* at [513]**) and with a precautionary approach to imminence (***Cannavacciuolo* at [390] – [391]**). What is required is to establish a right has been limited, which is fundamentally a trial question (**CA at [74], 05.0031**), as is any claimed reasonable limit.
- h. **Framework cases: *KlimaSeniorinnen*:** Grand Chamber; positive framework duty **upheld** (under art 8; art 2’s applicability left open at **[536]**), the Court applying “to a great extent ... the same principles” under arts 2 and 8 (**at [537] – [538]**), with “critical lacunae” including failure to quantify a national emissions budget, constituting unreasonable limits on the right even where there is a framework (**at [573]**). **NB: admissibility and context:** Supra-national body, domestic remedies first, no representative claims allowed, victim status a filter – individual harm, definitionally precludes consideration of rights of future generations cf common law, over 51,000 pending claims, 31,000 lodged last year. ***Waratah*:** Caution required, “strong caveat” about IJ and HRC because of victim status requirements and diff context: **AA [976] at [1354] generally, [1464] – [1468] re *Billy***.
- i. ***Cannavacciuolo*:** (pollution) art 2 positive duty **upheld** re pollution on a precautionary approach, authorities being unable to “rely on a failure to comply or delays in complying with a duty in order to deny its very existence” (**AA [56] at [377], [390] – [391]**). *Plan B*: lay litigant, framework claim **not upheld** on a first-instance

permission ruling preceding the Grand Chamber, on facts recording the UK *meeting* its budgets, with no challenge made to the targets set in the framework legislation (AA [49] at [41], [48] – [50], [55]).

- j. **Negative obligation cases:** *Waratah*: a *negative*-obligation case; the limit to the right to life was established and not demonstrably justified (AA [96] at [1360], [1453] – [1454], [1654] – [1657]). (Permit ultimately not granted,
- k. ***Teitiota* (HRC):** care required – Supra national body, domestic remedies first, individual victim status required under optional protocol. Case about risk as a result of deportation of a non-citizen. Requires risk of serious harm to life to the specific individual, and more than “conjecture or surmise,” rather than “likely” (AF (*Kiribati*) RA [14] at [90]). “Imminence” with respect to that risk with reference to the individual: *Teitiota v NZ* at [8.5] (NB also different imminence focus re victim status). HRC review of communications is limited to situations where “clearly arbitrary” (AA at [9.3], see fn 13 and GC36 at [30]-[31]: focus on individual is in context of deportation *Teitiota* rejected imminence and risk to applicant *which fell to be determined by reference to the immediate risk in the receiving state* because there was said to be a 10 – 15 year horizon that “could allow for intervening acts ... to take affirmative measures to protect and, where necessary, relocate” (AA [63] at [9.12]; AA [57] at [8.7]; see also *Billy* Annex V at [2]). No longer have that window (Subs [7]; Draft 3ASOC [13] – [20], 05.0138 – 05.0139), and unlike *Teitiota* the pleaded facts are of dismantling of protections (Draft 3ASOC [52] – [55], 05.0152; Livesey affidavit 201.0001).
- l. **Causation:** Accepted in UNFCCC and Paris Agreement that states have individual obligations, not for them to point to others to excuse own breach, and but for causation wrong test *Kliimasorinnen* at [439], [442], [444]. Private law “but for” test misconceives the rights analysis, (*Waratah* at [1310] – [1311], [1313] – [1321]; and see [35]); the decision-maker is “not required to find the [conduct] would in fact cause a given level of GHG emissions that causes harm and limits the human rights relied upon” (*Waratah* at [1322]).
- m. **CCRA:** Not an answer does not exclude NZBORA, s 5ZM covers only missed targets and budgets, not rights-inconsistency; per *Taylor*, where there is no other effective remedy the courts draw on the ordinary range, including declarations (Subs [77]; *Taylor* AA [9] at [30], [38] and [41]).

4. Section 20.

- a. A positive duty can arise under s 20: accepted in *Mendelssohn* and by the Court of Appeal (CA at [113] – [116], 05.0049). Article 27 requires positive measures of protection (General Comment 23 at [6.1]; *Billy* AA [57] at [8.13]), interpreted for indigenous peoples in light of UNDRIP. Indigenous cultural rights are distinct, collective and intergenerational (AA [96] *Waratah* at [1529], [1536]). Importance informed by other sources of rights: here, Te Tiriti, Tikanga Māori, in *Waratah*, NTA [1540].
- b. The “high threshold” is an extra-statutory restriction with no principled basis; the correct methodology is Chisnall’s (Subs [119]; *Chisnall* AA [7] at [98]). In the domestic context there is no “margin of appreciation”, the right is limited, or not (*Länsmän* AA [58] at [9.4]). (As to what is required even within a “margin of appreciation” see *Kliimasorinnen* at [550], applied at [558] – [573])

- c. Mr Smith is in the same position as the *Billy* claimants and affected peoples in *Waratab*: present impairment and real and immediate risks to whenua, customary resources and sites of cultural significance are pleaded (Subs [120] – [121]; Draft 3ASOC [92] – [96], 05.0164; Billy AA [57] at [7.10] and [8.14], *Warratah* at [1547] – [1565]). The art 27 violation in *Billy* was of the positive obligation to protect the collective ability to maintain a traditional way of life — impairment already under way.

THE ICJ ADVISORY OPINION AND CUSTOMARY INTERNATIONAL LAW

1. **Key issues:** legal significance of international jurisprudence and customary international law as part of the common law.
2. **Interpretive principles:** systemic integration (Subs [21]-[22]); harmonious interpretation (ICJ Advisory Opinion AA [61] at [165], [310]); and *lex specialis* (ICJ at [166]-[171]) mean: (a) climate treaties do not cover the field; (b) obligations under customary environmental law inform the content of ICCPR rights (Subs [30]-[31], ICJ at [145], [377]).
3. **Relevance of international jurisprudence:**
 - a. Courts should interpret legislation consistently with international obligations (Subs [38]-[41]).
 - b. International and comparative human rights jurisprudence is relevant to domestic courts' interpretation of domestic rights (Subs [21], [72]; *Zaoui (No 2)* AA [44] at [24]). The ICJ decision is a “subsidiary source of law” (Subs [44], [46]; Statute of the ICJ AA [73]) and “great weight” should be given to HRC decisions (Subs [46], [92]).
 - c. Consistent principle: to guarantee the enjoyment of human rights, States must take necessary measures to protect the climate system, including regulating emissions and having fair and ambitious emission reduction targets according to the best available science (Subs [31], [34], [79]; ICJ at [403]-[404]).
4. **Customary International Law:** Orthodox position is that customary international law is automatically part of the common law except insofar as it is inconsistent with legislation (Subs [43]; *Zaoui (No 2)* AA [44] at [24]; *Zhang RA* [100] at [23]; *Richards RA* [64] at [93]). There is no inconsistency in this case between customary rules and the CCRA (Resp Subs [74]). Cf Crown submissions, which argue against settled law regarding: (a) “beyond reproach” and (b) precluded by constitutional principle (Resp Subs [74], [100], [103], [108]; *Keyu RA* [117]; Subs [43] fn 97).
5. **Content of Customary International Law**
 - a. **Duty to prevent significant harm to the climate system:**
 - is a long-established rule in respect of environmental harm (ICJ at [272]), applies to climate harm (Subs [23]; ICJ at [134], [273]-[279]) and is independent from climate treaty obligations (Subs [20], [42]; ICJ at [314] and **Declarations of Judges Charlesworth, Brant, Cleveland and Aurescu and of Judge Nolte**).
 - entails a stringent due diligence obligation to take all measures within a State's power to prevent significant harm to the climate system (Subs [23]-[27]; ICJ at [138], [289]-[294]), breach of which gives rise to New Zealand's responsibility on the international plane (Subs [35]-[37]).

- b. **Human right to a clean, healthy and sustainable environment:** Subs [32]-[33], [45].
 - c. **Self-determination:** Subs [139].
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TE TIRITI

1. **Key issue:** whether it is legally tenable for Mr Smith to seek a declaration that Crown conduct including its legislative response to climate change, is inconsistent with Te Tiriti o Waitangi.
2. **Court of Appeal erred in:** failing to address key issue on the basis that Treaty consistent decision-making was available under the CCRA and alternative avenues for relief existed under s 20 of the NZBORA and the Waitangi Tribunal (**Subs [125] – [131]**).
3. **We say a declaration of inconsistency is available for the following reasons:**
 - a. Te Tiriti is a source of constitutional rights and interests for both the Crown and Māori. (**Subs [135] – [137], Frame AA 77 at 162, Te Tiriti text, Palmer THRMOAA 11 at p.74**).
 - b. Te Tiriti cannot be relied upon for what it confers but discounted as to limitations (**Frame AA 77 at 162, Slattery AA 81 at 209**).
 - c. The *pacta sunt servanda* principle reflects that solemn obligations cannot be disregarded. Domestic law likewise recognises that legal consequence can flow from promise making without requiring implementing legislation (**Subs [138], [159]-[162], Arts 26 & 27 of Vienna Convention**). This should inform how the common law understands Te Tiriti.
 - d. ***Te Heuheu Tukino* (AA 32) is not a barrier to the claim because:**
 - it is open to the Supreme Court to take a different position (**Frame AA 80 at 171-172**);
 - it was based on the flawed characterisation of Te Tiriti as a Treaty of cession (**Subs [141], Waitangi Tribunal in *Te Paparahi o Te Raki* AA 92 at 529, *Lands* AA 19 at 661, *Palmer* AA 79 at 164**), which was not argued;
 - Te Tiriti is a sui generis constitutional agreement which is capable of operating on more than one juridical plane (**Subs [143] – [146], *Elias* THRMOAA 14 at 7-9, *Simon v R* [1985] AA 54 at 204, 404, *Slattery* AA 81 at 207, 208**);
 - orthodox dualism does not map neatly onto Te Tiriti;
 - even if Te Tiriti held to have effect on the international plane, and aspects of *Te Heuheu* maintained, that does not dispose of the claim (**Subs [147]**);
 - the strict legal doctrine *Te Heuheu* established is not supported by the authorities on which it purports to rely (**Subs [142]**); and
 - the social, constitutional and legal context in Aotearoa is materially different in 2026 (**Subs [149], Frame at footnote 244**).
 - e. Te Tiriti is now recognised across all branches of government as a fundamental part of New Zealand's constitutional arrangements. Reflected in: Laws of New Zealand **[158]**, Cabinet Manual **[150]**, Cabinet Office Circular **[151]**, Legislation Design and Advisory

Committee Guidelines [152], Treaty settlements [153] – [154], s66(1) Senior Courts Act 2016 [155]). The Crown accepts Te Tiriti's constitutional significance.

- f. Courts already recognise that the rights in Te Tiriti engage the principle of legality, that it can be read in where legislation does not refer to it, that Treaty clauses should be interpreted generously, and that DOIs are arguable (Subs [156]).
 - g. Te Tiriti guaranteed existing Māori rights under tikanga that are part of the common law of Aotearoa. It also occupies a distinctive constitutional position at the intersection of inter-legality (Subs at [164]).
 - h. The Crown has expressly acknowledged that they will honour Te Tiriti in a climate change context including in legislation (Subs [165] – [166], s3(a) of CCRA and 25 references in **First Emissions Reduction Plan AA 88 at 4, 15, 42**).
 - i. Te Tiriti intersects with international customary law concept of self-determination (Subs [138] and *In the Matter of a Reference by Cabinet* [2025] FJSC 1 AA 59).
 - j. The rights protected by Te Tiriti overlap with cultural rights for which DOI are available under NZBORA (Subs [167]).
4. **Declaratory relief is an available and constitutionally orthodox remedy**
- a. In context, the declaration sought is a modest development of existing law.
 - b. The relief sought does not challenge parliamentary sovereignty, impinge on s 15 of the Constitution Act or interfere with parliamentary proceedings (Subs [169]).
 - c. Declaratory relief is a well-established and flexible remedy within New Zealand law including for agreements where there is no lis (Subs [106]-[107], s 3 and 11 of **Declaratory Judgments Act AA 2**).
 - d. The absence of an express declaratory remedy for Te Tiriti is not determinative. *Taylor v Attorney-General* confirms that declaratory relief may be an appropriate judicial response to infringement of a legally recognised constitutional right.
 - e. Courts are well equipped to undertake an assessment of whether Crown conduct falls within the bounds of Te Tiriti consistency (Subs [173]).
 - f. Declarations serve the function of: upholding and vindicating rights, indicating a constitutional baseline, creating appropriate dialogue with Parliament, having utility in the international sphere, promoting accountability and transparency. (Subs [174] – [176]).
5. “Contestation is the Treaty’s only consistent companion”. This is where the independent role of the courts in upholding rights (including minority rights) assumes particular constitutional importance.

PUBLIC LAW DUTY

8. **Public law duty** (*issue - is the claimed duty arguable?*).

- a. What is contended for: strict liability to exercise Crown authority in a manner that protects plaintiff and future descendants from the adverse effects of climate change, including loss of life, health, culture, economic and social wellbeing (**Draft 3ASOC [80], 05.0158**), with a defence of total absence of fault available in principle (**Subs [67]**).
- b. Interest and duty pleaded is not novel. Reflects foundational principles recognised at common law and by Parliament: **AA [93] RMA ss 5, 6, 7**; common law relating to provision of necessities of life (**Subs [61]; Vector AA [39]; Mueller AA [17]**); common law of nuisance; kaitiakitanga (**Subs [62]**). Consistent with CIL obligation recognised by the ICJ (**ICJ Advisory Opinion AA [61]**), with CIL being part of the common law (**Subs [43]**). Consistent with UNFCCC, Paris Agreement, ICCPR (**AA [75], [72], [71]**).
- c. Critically to this and other claims pleaded: the defendant's knowledge, and its deliberate conduct in the face of that knowledge. Livesey affidavit **201.0001 at [7] – [10], [14] – [17]**. Consistent theme has been commitment, plan of action, undermining of plan of action, undermining of commitment. Plaintiff says as a matter of fact it is likely the Crown will not act as is necessary to meet the requirements of the duty: **Draft 3ASOC [52] – [55], 05.0152**.
- d. No established test for when a public law duty is actionable. Test for private law duties is instructive: **Couch RA [24] per Elias CJ at [56] – [58], [60] – [64], [66], [68] – [69]; per Tipping J at [81] – [83], [85]**.
- e. Only novelty is seeking a remedy by way of a declaration that duty has been breached (**Draft 3ASOC [82] and relief, 05.0160 – 05.0163**), as to which see **Couch at [69] per Elias CJ**.
- f. CCRA does not negative the claimed duty, it creates a framework, only (**CCRA, s 3 AA [1]**), and does not “cover the field”: **Smith v Fonterra RA [74] at [100] – [101]**.