

I Te Kōti Mana Nui o Aotearoa
In the Supreme Court of New Zealand

SC 10/2025

between

MICHAEL JOHN SMITH
Applicant

and

ATTORNEY-GENERAL
Respondent

SUBMISSIONS FOR APPELLANT

29 May 2026

Counsel for the appellant certify, to the best of their knowledge, that these submissions contain no suppressed information and are suitable for publication.

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TABLE OF CONTENTS

THE JUDGMENTS BELOW	5
DEVELOPMENTS SINCE THE COURT OF APPEAL JUDGMENT	6
Factual Developments.....	6
International Legal Developments	9
The Relevance of the General International Law Framework to this Case	17
PUBLIC LAW DUTY	20
THE COURT OF APPEAL DECISION	21
THE COMMON LAW AS THE SOURCE OF THE DUTY	22
BILL OF RIGHTS ACT CLAIM	26
INTERNATIONAL JURISPRUDENCE IS RELEVANT'.....	26
ERRORS IN THE COURT OF APPEAL'S JUDGMENT RELEVANT TO BOTH RIGHTS CLAIMS	27
Characterisation of Mr Smith's Claim.....	27
The CCRA and BORA	28
The Doctrine of the Margin of Appreciation	29
THE RIGHT TO LIFE CLAIM UNDER SECTION 8 OF BORA	31
Mr Smith's Claim	31
Mr Smith's Support for Certain Findings of the Court of Appeal	32
Errors in the Court of Appeal's Judgment.....	35
THE RIGHT OF MINORITIES TO ENJOY THEIR CULTURE UNDER SECTION 20 OF BORA	38
Mr Smith's Claim	39
Errors in the Court of Appeal's Judgment.....	39
DECLARATION OF INCONSISTENCY WITH TE TIRITI	41
ERRORS IN THE COURT OF APPEAL'S JUDGMENT.....	41

MR SMITH'S CLAIM.....	43
Te Tiriti as a Foundational Constitutional Compact	44
<i>Te Heuhen</i> is not Exhaustive.....	46
Te Tiriti Possesses Contemporary Constitutional Significance.....	49
The Intersection with Judicial Review	54
The Common Law and Climate Statutory Frameworks	55
Why Declaratory Relief Should be Granted	57

MAY IT PLEASE THE COURT:

1. Mr Smith brings this claim as a member of Ngāpuhi and Ngāti Kahu, exercising kaitiakitanga in relation to places he has whakapapa to, to uphold the mana of his tīpuna and for future generations.
2. The places Mr Smith has whakapapa to, and the relationships and practices connected to them, have been damaged by the Crown action and inaction. Those places, and the people connected to them, face imminent risk of irreparable harm.
3. The Crown says it has legislation and systems in place to address the cause of that damage – climate change. It says that the court should not look past that legislation. It says that Parliament has everything under control.
4. The Paris Agreement¹ was adopted on 12 December 2015. It recorded New Zealand’s commitment to limiting warming to well below 2°C and pursue efforts to limit warming to 1.5°C above pre-industrial levels in order to try to prevent dangerous human induced damage to the climate system, reaching global peaking of greenhouse gas emissions (**GHGs**) “as soon as possible” and to get to net zero in the second half of this century.²
5. The global scientific community has compiled extensive resources on how the Paris target could be achieved. It identified carbon budgets, emissions reductions pathways, and milestones to hit if the Paris agreement was going to be reached. Those pathways and targets were first spelled out in October 2018.³ On any scenario where 1.5°C was met, global emissions needed to peak before 2025. Not only did the global political community fail to meet that peak, in 2024 GHG emissions were the highest they have ever been. Globally, none of the milestones necessary to meet the Paris target have been met.

¹ Paris Agreement 3156 UNTS 79 (adopted 12 December 2015, entered into force 4 November 2016) (**Paris Agreement**).

² Paris Agreement, arts 2(1)(a) and 4(1).

³ 8 October 2018 IPCC Special Report on Global Warming of 1.5°C (SR1.5)

6. When Mr Smith filed his claim on 16 July 2019, the Crown maintained that its legislative and regulatory framework was fit for purpose and would deliver on its Paris commitments and ensure a “just transition” to net zero emissions. Today, the scientific evidence, which Mr Smith relies on in his claim,⁴ shows that New Zealand is on track to breach all of its substantive international climate obligations, contributing to and causing irreparable harm to the climate system and the ability of Mr Smith and the future generations he represents to survive.
7. The Crown is in control of what happens next. There is perhaps 18 months to 2 years, to reduce emissions in a way that will avoid catastrophic harm. Catastrophic is not an inaccuracy. The lag between emissions reductions and temperature reduction means that sea level rise, extreme weather, and the food and economic crises that will inevitably follow are locked in. The only question is how severe those effects are. Mr Smith says that if emissions are not immediately reduced, the science says at best, it will result in a removal of the conditions necessary for him and his descendants to enjoy their fundamental rights, and at worst a materially increased risk of death.
8. Mr Smith’s claim is simple. He holds up in one hand the Crown’s acknowledged obligations and duties to protect fundamental rights by taking effective action on climate change. In the other hand he holds objective evidence that the mechanisms and commitments the Crown says it has put in place to meet those obligations and duties have failed and will continue to fail to meet its obligations. The gap between obligations, commitments, and reality is obvious.
9. Mr Smith’s says that can be seen in the Crown’s failure to monitor or reduce its own emissions, to take necessary steps to reduce national emissions, and to properly address the known risks associated with climate change.
10. Mr Smith says that the Crown’s failures breach his fundamental rights. Three causes of action are pleaded:

⁴ Third draft amended claim, filed with these submissions (**Third Draft ASOC**). [05.0136]

- (a) An actionable failure to meet a public law duty to protect the plaintiff and future generations of his descendants from the adverse effects of climate change, including, without limitation, the loss of: life; health; culture; economic and social wellbeing; spirituality; lands; fisheries; forests; sites of cultural, customary, historical or spiritual significance; and taonga.
- (b) Breach of the right to life in s 8 and the right to culture in s 20 of the New Zealand Bill of Rights Act 1990 (**BORA**).
- (c) Breach of the guarantees in Te Tiriti O Waitangi / the Treaty of Waitangi.

11. The relief Mr Smith seeks is:

- (a) For the first, second and third causes of action, declarations of breach.
- (b) For the first cause of action, a declaration that the Crown will continue to be in breach unless it reduces Crown and national emissions in accordance with the minimum global reductions of emissions needed to meet the Paris target consistently with the precautionary principle and other framework principles;
- (c) For the second cause of action, orders requiring the Crown to report on steps it has taken to meet the requirements declared.

THE JUDGMENTS BELOW

12. The High Court struck out Mr Smith's claim.

13. The Court of Appeal recognised as correct many of the fundamental legal principles advanced by Mr Smith about the nature of the harm caused by the alleged breaches, and the fact that it was at least arguable that the Crown's conduct has breached his rights to life and culture.⁵ The Court of Appeal struck out Mr Smith's BORA claims on the grounds that his claim

⁵ *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1 (**Smith (CA)**) at [48]-[88]. [05.0021]

was an impermissible challenge to the “efficacy” of legislation, and states are entitled to a wide “margin of appreciation” in the area of climate change, particularly because, it said, the Climate Change Response Act 2002 (**CCRA**) is comprehensive. It struck out Mr Smith’s claim for a declaration of inconsistency with Te Tiriti on the basis that the (supposedly comprehensive) CCRA includes a “Treaty Clause”, meaning treaty-consistent decisions were *possible* under it. The Court of Appeal treated Mr Smith’s public duty claim as if it was either unnecessary because of the content of BORA and Te Tiriti, or a simple invocation of the public trust doctrine, which it rejected as providing a basis for the pleaded duty.⁶

DEVELOPMENTS SINCE THE COURT OF APPEAL JUDGMENT

14. Since the Court of Appeal’s judgment, there have been significant factual and legal developments. The Crown’s climate response is failing as the risk and urgency increase. In parallel, important decisions have clarified climate and related fundamental rights obligations both under international agreements and customary international law. Those developments underpin all claims made and are addressed first.

Factual Developments

15. Mr Smith’s draft amended statement of claim pleads facts that are taken to be true for the purposes of strike-out.⁷ Since filing, there have been extensive developments in understanding the damage caused by global heating, the costs and risks if emissions are not reduced, and the failure of states, including New Zealand, to take effective action. That material is not repeated here. The over-arching picture is:

- (a) On 8 October 2018 the IPCC identified that it was necessary for GHG emissions to peak before 2025 in any emissions reduction pathway where the Paris goal was reached.

⁶ At [179]-[185]. [05.0078]

⁷ Third Draft ASOC pleads facts taken from public sources including the IPCC and related scientific bodies, [05.0136] reports of the Climate Change Commission and Parliamentary Commissioner for the Environment, reports from local government, published scientific literature, and reports from NGOs that work to update work between IPCC reports and to assess and update emissions targets and returns.

- (b) Mr Smith’s claim was filed in the High Court on 16 July 2019.
- (c) The “Minimum Global Emissions” pathway, including a “net zero 2050” target gave only a “more likely than not” probability of reaching the Paris target.⁸
- (d) To “almost certainly” hit the Paris target, faster and deeper cuts in emissions were required.⁹
- (e) Global emissions did not peak before 2025. In 2024 GHG emissions reached record highs.¹⁰ The carbon budget associated with the “more likely than not” pathway will likely be breached in 2027 or 2028 without immediate action.¹¹
- (f) The world has already experienced a 1.5°C year and is likely already within the period during which the 1.5°C target will be breached.¹²
- (g) Current global policies are predicted to deliver 2.8°C of global warming this century.¹³
- (h) New Zealand’s commitments are worse. If the world adopted New Zealand’s commitments and approach it would result in up to 3°C of warming this century.¹⁴
- (i) The current warming trajectory will trigger irreversible melting of the West Antarctic and Greenland ice sheets, leading to metres of unavoidable sea level rise extending over millennia.¹⁵
- (j) In Northland this mean up to two metres of sea level rise this century, and between two to six metres over millennia if warming is kept to 2°C.¹⁶

⁸ Third Draft ASOC, above n 4, at [13]-[17]. [05.0138]

⁹ At [15]. [05.0138]

¹⁰ At [18].

¹¹ At [17].

¹² At [19]-[20]. [05.0139]

¹³ At [24]. [05.0140]

¹⁴ At [25].

¹⁵ At [32]. [05.0142]

¹⁶ At [43]. [05.0144]

- (k) Climate harms are already being experienced, and risk of death from climate impacts is increasing.¹⁷
 - (l) Māori generally are disproportionately harmed by climate change.¹⁸
 - (m) The plaintiff, and those he represents, are among the most at risk and will suffer particular physical and cultural harm.¹⁹
 - (n) The Crown has acknowledged the fact of harm and the risk of future harm to people like the plaintiff.²⁰
 - (o) In parallel, the Crown has failed to set emissions reduction targets that reflect its duties, ignoring advice from the Climate Change Commission, dismantling the mechanisms in the CCRA designed to effectively curb emissions, reframing and reducing the ambition of its emissions reduction targets, failing to take effective action to reduce its own emissions, and failing to take necessary steps to avoid the dangerous effects of climate change.²¹
 - (p) The Climate Change Commission has recently reported that the Crown’s response and ability to respond to infrastructure related climate risks and particular risks for Māori is “insufficient”.²²
16. The Crown is actively dismantling legislative and administrative tools designed to address its climate change obligations. It is doing nothing effective in substitution. When the claim was filed Crown actions were inadequate to meet its obligations, but there was perhaps a perception that there was some time available to allow the Crown to act on its promises. That is no longer the case.
17. On present trajectories the Crown is committing present and future generations to an unstable country in an unstable world, where it is likely

¹⁷ At [29]-[30]. [05.0141]

¹⁸ At [36]-[37]. [05.0143]

¹⁹ At [41]-[45] and [48]-[49]. [05.0144], [05.0146]

²⁰ At [46]. [05.0144]

²¹ At [59]-[78], [86], [90] and [95]. [05.0152], [05.0164], [05.0165]

²² At [38] and [95](d). [05.0144], [05.0165]

that the conditions necessary for society as we know it to function will no longer exist.

International Legal Developments

Climate Change Obligations are Not Restricted to Obligations Under Climate Law

18. The Crown says the CCRA is “by design” sufficient to protect the rights to life, culture and future wellbeing of New Zealanders from climate harm, and to give effect to its obligations under Te Tiriti.²³ In substance, the Crown’s position could be framed as being that climate harm, outside the confines of the CCRA, is not justiciable.
19. Internationally, the Crown has taken the same position. In submissions to the International Court of Justice (**ICJ**) in advisory proceedings on State obligations in response to climate change, the Crown argued that the United Nations Framework Convention on Climate Change (**UNFCCC**),²⁴ the Kyoto Protocol, the Paris Agreement, and related instruments (together the **climate treaties**) provide a self-contained framework of international treaties comprising the full scope of states obligations concerning climate change.²⁵ It argued that international human rights law imposes no separate obligation to mitigate climate change²⁶ and that if such rights existed, they would be discharged through good faith compliance with the climate treaties.²⁷ Likewise, in respect of the customary international law duty to prevent significant transboundary environmental harm, the Crown argued that *if* any such duty existed in respect of climate change, it is governed by climate treaties.²⁸
20. International courts, including the ICJ in its July 2025 advisory opinion *Obligations of States in respect of Climate Change*, have rejected the proposition that the climate treaties displace or take precedence over other rules of

²³ *Smith v Attorney-General*/SC 10/2025, Submissions on behalf of the Respondent in response to application for leave to bring civil appeal (28 March 2025) at [1]-[2] and [3.1] (**Crown Leave Submissions**).

²⁴ United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 9 May 1992, entered into force 21 March 1994) (**UNFCCC**).

²⁵ International Court of Justice (**ICJ**), *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Written Statement of New Zealand (22 March 2024) (**ICJ Advisory Opinion Written Statement of New Zealand**).

²⁶ At [114]-[118].

²⁷ At [119]-[122].

²⁸ At [96]. See also at [101]-[102].

international law.²⁹ Treaties and rules of customary law are distinct sources of law,³⁰ and compliance with climate treaties alone does not satisfy customary international law duties to prevent significant harm.³¹ States can no longer compartmentalise responsibility by arguing that compliance with one part of international law is sufficient to discharge their obligations.

Other Directly Relevant International Legal Obligations

21. International law has its own rules of interpretation, most pertinently art 31 of the Vienna Convention on the Law of Treaties.³² Like domestic law, treaties are to be interpreted according to the ordinary meaning and in light of their context, and purpose.³³ They must also be interpreted in light of the subsequent agreement and practice of States parties regarding the interpretation of the treaty and, under art 31(3)(c), must be interpreted taking into account “any relevant rules of international law applicable in the relations between the parties”. This is the interpretive principle of systemic integration. Relatedly, as the ICJ noted, when several rules bear on the same issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.³⁴
22. Applying these principles, the ICJ³⁵ found that the relevant law includes not only the climate treaties, but also the customary duty to prevent significant harm to the environment, the precautionary principle, and international

²⁹ ICJ, *Obligations of States in respect of Climate Change (Advisory Opinion)*, 23 July 2025 (**ICJ Advisory Opinion**) at [162]–[171]. While the Crown took the position that there is no need to apply the rule of *lex specialis derogate lex generali* as no conflict exists between the rules concerned, its position effectively placed primacy on the climate treaties. See also International Tribunal for the Law of the Sea (**ITLOS**), *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)*, ITLOS Case No 31, 21 May 2024 (**ITLOS Advisory Opinion**) at [223] (“The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations”). See also the Inter-American Court of Human Rights (**IACtHR**), *Advisory Opinion AO-32/25*, 29 May 2025 (**IACtHR Advisory Opinion**), at Part V.C; and European Court of Human Rights (**ECtHR**), *Verein KlimaSeniorinnen Schweiz v Switzerland*, App No 53600/20, 9 April 2024 (**KlimaSeniorinnen**) at 50–84.

³⁰ Statute of the International Court of Justice 33 UNTS 933 (opened for signature 26 June 1945, entered into force 24 October 1945), art 38(1)(a) and (b).

³¹ ICJ *Advisory Opinion*, above n 29, at [314].

³² *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [24].

³³ Vienna Convention on the Law of Treaties 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980), art 31(1). New Zealand is a signatory to the Vienna Convention; in any case at least the rules of interpretation are customary international law.

³⁴ ICJ *Advisory Opinion*, above n 29, at [164], citing *Conclusions of the work of the ILC Study Group on the Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law* [2006] II(2) Yearbook of the International Law Commission at Conclusion 4.

³⁵ The ICJ is the only international court with general jurisdiction.

human rights law.³⁶ Because each body of law is directly applicable, the other parts of the corpus of international law constitute “relevant rules” for the purposes of interpretation of the obligation at issue. What this means is that the obligations under the climate treaties, the customary duty to prevent environmental harm, the precautionary principle and concepts of intergenerational equity must be taken into account when interpreting and applying States’ obligations under human rights treaties.³⁷

Customary International Law

23. The ICJ found that the customary international law duty to prevent significant harm to the environment also applies to the climate system,³⁸ rejecting the argument that duties do not extend to transboundary climate harm. The cumulative nature of GHG emissions does not prevent a single State’s conduct leading to emissions from engaging that duty.³⁹ States remain obliged to prevent significant harm where there is a risk of future or further significant harm.⁴⁰ Whether climate harm is “significant” is to be assessed in each individual case⁴¹ and depends on “both the probability or foreseeability of the occurrence of harm and its severity or magnitude”⁴² and “must take into account the best available science”.⁴³
24. The duty is both substantive and procedural and primarily obliges States to take appropriate and effective measures to prevent significant harm where reliable scientific evidence of a risk of significant harm exists *or* “where there are plausible indications of potential risks”.⁴⁴
25. The precautionary principle informs international law obligations to prevent the adverse effects of climate change,⁴⁵ in particular, the duty to prevent significant environmental harm.⁴⁶ It provides that that “[w]here

³⁶ ICJ *Advisory Opinion*, above n 29, at [172] and [177].

³⁷ At [180], [182], [309]-[315] and [404].

³⁸ At [134] and [273].

³⁹ At [276]-[277] and [279]. See also ITLOS *Advisory Opinion*, above n 29, at [365].

⁴⁰ At [274].

⁴¹ At [137] and [278].

⁴² At [275], citing ITLOS *Advisory Opinion*, above n 29, at [239] and [397].

⁴³ At [278], [283]-[284] and [293].

⁴⁴ At [289] and [293]-[294].

⁴⁵ At [180] and [293]-[294].

⁴⁶ At [294], citing ITLOS, *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* [2011] ITLOS Case No 17, 1 February 2011 at [131].

there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing such measures” to prevent environmental degradation.⁴⁷ The ICJ held, in agreement with ITLOS, held that “where there are plausible indications of potential risks”, a State “would not meet its obligation of due diligence if it disregarded those risks” and, in that sense, the “precautionary approach is also an integral part of the general obligation of due diligence” under the duty to prevent significant harm to the environment.⁴⁸

The Stringent Due Diligence Standard

26. Compliance with the customary international law duty to prevent significant environmental harm is assessed by applying the due diligence standard.⁴⁹ Due diligence “entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control”.⁵⁰
27. The standard is more exacting where the probability and seriousness of harm is higher.⁵¹ In the case of preventing (further) climate harm, the standard of due diligence is “stringent”,⁵² because “the specific character of the risk of significant harm to the climate system is indisputably established”.⁵³

International Obligations on Climate Underpin Human Rights

28. It has been long recognised that climate change threatens the enjoyment of human rights and engages the obligations of States under international human rights law.⁵⁴

⁴⁷ ICJ *Advisory Opinion*, above n 29, at [158] and [180], citing UNFCCC, art 3(3) and Rio Declaration on Environment and Development UN doc A/CONF.151/26 (13 June 1992), principle 15.

⁴⁸ At [294].

⁴⁹ At [135], citing *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 (*Pulp Mills*) at [197].

⁵⁰ At [138], citing *Pulp Mills*, above n 49, at [197].

⁵¹ At [275] and [280].

⁵² At [138].

⁵³ At [137].

⁵⁴ See e.g. *Ksentini Report* UN doc E/CN.4/Sub.2/1994/9 (6 July 1994), Chap V at [161]-[234]; United Nations General Assembly, *Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* UN doc A/HRC/10/61 (15 January 2019).

29. In recent years, various courts have applied international human rights law when considering the adverse effects of climate change.⁵⁵ Consistent with this, and decisions of other international courts, the ICJ found that the core human rights treaties – the International Covenant on Civil and Political Rights⁵⁶ (ICCPR) and International Covenant on Economic, Social and Cultural Rights⁵⁷ – and human rights recognised under customary international law are sources of States’ obligations in respect of climate change.⁵⁸
30. As the ICJ found, applying the principles of systemic integration and harmonisation, States’ obligations under international environmental law inform the content of their obligations under international human rights law, and vice versa.⁵⁹ As the adverse effects of climate harm may, among other things, impair the enjoyment of the right to life⁶⁰ and the rights of indigenous peoples,⁶¹ a State’s inaction to implement timely and adequate measures to address climate change may violate these independently assessed but complementary obligations.
31. Helpfully, the ICJ shed light what States must do to guarantee the effective enjoyment of human rights:⁶²

[403] ... States must take measures to protect the climate system and other parts of the environment. These measures may include, inter alia, taking mitigation and adaptation measures, with due account given to the protection of human rights, the adoption of standards and legislation, and the regulation of the activities of private actors. Under

⁵⁵ See e.g. IACtHR *Advisory Opinion*, above n 29; *KlimaSeniorinnen*, above n 29, and IACtHR, *La Oroya Population v Peru* Ser SeriesC No 511 (27 November 2023); Human Rights Committee *Billy v Australia* UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) (*Billy v Australia*).

⁵⁶ International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976).

⁵⁷ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976).

⁵⁸ ICJ *Advisory Opinion*, above n 29, at [145].

⁵⁹ At [377], citing United Nations Human Rights Committee, *General Comment No 36 on Article 6: Right to Life* UN Doc CCPR/C/GC/36 (30 October 2018) at [62].

⁶⁰ At [377].

⁶¹ At [382]-[384].

⁶² At [403]-[404].

international human rights law, States are required to take necessary measures in this regard.

[404] ... States must therefore take their obligations ... under the climate change treaties and other relevant environmental law treaties and under customary law into account when implementing their human rights obligations.

The Right to a Clean, Healthy and Sustainable Environment

32. State practice recognising a right to a clean, healthy and sustainable environment is widespread. It is reflected in national laws,⁶³ in several major human rights treaties,⁶⁴ and resolutions of both the United Nations General Assembly and United Nations Human Rights Council resolutions, each adopted with overwhelming support and with no opposing votes.⁶⁵ Much of this practice constitutes *opinio juris*, reinforced by decisions of national courts enforcing the right.⁶⁶ In the ICJ advisory opinion proceedings, New Zealand argued that the content of the right is not sufficiently defined so as to have achieved customary status.⁶⁷ That position is contrary with the ICJ's recognition that State practice need not be

⁶³ At least 110 national constitutions and "well over 50 States" recognise the right in legislation and policies: ICJ *Advisory Opinion*, Written Statement of Vanuatu (21 March 2024) at [380].

⁶⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador (opened for signature 17 Nov 1988, entered into force 16 November 1999), art 11, which has been held by the Inter-American Court of Human Rights to form part of the economic, social and cultural rights protected by art 26 of the American Convention of Human Rights and creates obligations for States parties to respect, ensure and prevent violations of the right: IACtHR, *Advisory Opinion OC-23/17*, Ser A No 23, 15 November 2017 at [57]; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, ILM 58 (Banjul Charter), art 24; Arab Charter on Human Rights (2004), art 38; see also Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, 18 November 2012, art 28(f); and American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16), 15 June 2016, art 19(1) ("Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being", see further arts 19(2)-(4). See also Committee on the Rights of the Child, *General Comment No 26 on children's rights and the environment, with a special focus on climate change* UN Doc CRC/C/GC/26 (22 August 2023) (**Committee on the Rights of a Child, General Comment No 26**) at [23], [31], [37], [61] and [71].

⁶⁵ Human Rights Council *The human right to a clean, healthy and sustainable environment* UN doc A/HRC/RES/48/13 (8 October 2021) (adopted with 43 votes in favour, 4 abstentions, 0 votes against); UN General Assembly *The human right to a clean, healthy and sustainable environment* UN Doc A/RES/76/300 (28 July 2022) (adopted with 161 votes in favour, 8 abstentions, 0 votes against).

⁶⁶ Cases involving the constitutional right to a healthy environment have been adjudicated in at least 76 countries: United Nations Environment Programme, *Environmental Rule of Law: Tracking Progress and Charting Future Directions* (2023). For more examples, see New York University, *Unpacking the Right to a Healthy Environment: How National and Regional Laws and Jurisprudence Clarify the Scope and Content of the Universal Right* (January 2023) Appendix: R2HE Case Chart at 78-93.

⁶⁷ ICJ *Advisory Opinion* Written Statement of New Zealand, above n 25, at [114].

completely consistent⁶⁸ and with the International Law Commission's observation that in some cases "it is accepted that the rule exists but its precise content is disputed".⁶⁹

33. The Inter-American Court of Human Rights has not only recognised the right to a healthy environment as a rule of customary law but also reasoned that this right is a *jus cogens* norm.⁷⁰ This reasoning was based on the factual and legal connection between protection of the climate system and of human rights and the need to preserve our common ecosystem as a precondition to the enjoyment of other fundamental rights, which was also recognised by the ICJ in its advisory opinion.⁷¹
34. Mr Smith acknowledges the ICJ did not explicitly confirm the existence of the right to a clean, healthy and sustainable environment as a free-standing customary rule. Instead, it took an integrated approach and considered that, in order to guarantee the effective enjoyment of rights,⁷² "States must take measures to protect the climate system and other parts of the environment".⁷³ The reason for this is the factual and legal interdependence between protection of the climate system and protection of human rights.⁷⁴ As above, the ICJ also confirmed that human rights including those recognised under customary law constitute the most directly relevant applicable law.⁷⁵

Breach of International Obligations Give Rise to State Responsibility

35. Just as breaches of treaty obligations give rise to State responsibility, so too do breaches of customary international law rules.⁷⁶ Such breaches would entitle injured States to invoke New Zealand's responsibility,⁷⁷ involving

⁶⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [186].

⁶⁹ International Law Commission, *Draft conclusions on identification of customary international law, with commentaries in Report of the International Law Commission on the Work of its 70th Session* UN Doc A/73/10 [2018] II(2) YILC 122 at 124, Conclusion 1, commentary [4] (**ILC, Conclusions on customary international law**). This is the case in respect of many *jus cogens* norms, e.g. self-determination.

⁷⁰ IACtHR *Advisory Opinion*, above n 29, at [291]-[294] and see more generally at Part VI, B.1.

⁷¹ ICJ *Advisory Opinion*, above n 29, at [388], [389] and [393].

⁷² ICJ *Advisory Opinion*, above n 29, at [393].

⁷³ At [403].

⁷⁴ At [393].

⁷⁵ At [145].

⁷⁶ At [407].

⁷⁷ At [432].

significant legal and financial risk for New Zealand. The ICJ has confirmed that the loss and damage provisions in the Paris Agreement do not exclude the application of general rules of State responsibility, meaning this principle applies in that context.⁷⁸ A State breaches the customary duty to prevent harm where it fails to exercise stringent due diligence by not taking “all measures which were within its power to prevent the significant harm” to the climate system.⁷⁹ A failure of New Zealand to take appropriate action, including through “fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies”,⁸⁰ or through not taking the “necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction”⁸¹ would give rise to international responsibility. The potential consequences that follow from that highlight the importance of New Zealand’s international obligations on climate and will be relevant in any assessment of whether pleaded breaches of BORA are justifiable.

36. The consequences of breaching the customary duty to prevent significant harm are three-fold: (a) New Zealand remains under a continued duty to comply with the obligation;⁸² (b) New Zealand must cease its breach of the duty;⁸³ and (c) New Zealand must make full reparation for the injury caused, which includes restitution, financial compensation, and satisfaction.⁸⁴ The plurality of causation of climate harm by multiple responsible States is not a barrier to such consequences.⁸⁵
37. Further, many of States’ international legal obligations in respect of climate change are *erga omnes*.⁸⁶ States other than those who are “injured” may invoke New Zealand’s responsibility⁸⁷ for breach of the customary duty to

⁷⁸ At [412]-[420] and [432].

⁷⁹ At [409].

⁸⁰ At [427].

⁸¹ At [428].

⁸² Articles on the Responsibility of States for Internationally Wrongful Acts [2001] II(2) Yearbook of the International Law Commission (ARSIWA), art 29.

⁸³ ARSIWA, art 30.

⁸⁴ ARSIWA, arts 31 and 34.

⁸⁵ ICJ *Advisory Opinion*, above n 29, at [430].

⁸⁶ That is, owed to the international community as a whole. ICJ *Advisory Opinion*, above n 29, at [439]-[441]. In particular, the ICJ identified that all States have a legal interest in the protection of mitigation (as set out in the climate treaties) and, as all States have a common interest in the protection of the global environmental commons, the customary obligation to prevent significant transboundary harm is an *erga omnes* obligation.

⁸⁷ ICJ *Advisory Opinion*, above n 29, at [442].

prevent climate harm, as that is a duty owed to all States and exists for the protection of the collective interests of humankind.⁸⁸

The Relevance of the General International Law Framework to this Case

38. In New Zealand, human rights statutes have been enacted to give domestic effect to international obligations and treaty ratification. For example, the long title to BORA expressly affirms New Zealand’s commitment to the ICCPR, reflecting BORA’s foundation in, and incorporation of, the ICCPR’s principles.⁸⁹ International treaty obligations incorporated into domestic law are binding on all branches of government, including the judiciary. Courts should therefore interpret legislation consistently with international obligations,⁹⁰ “whether or not the legislation was enacted with the purpose of implementing the relevant text”.⁹¹

39. As the Legislation Guidelines explain:⁹²

New Zealand must give full effect to a treaty, or it will risk breaching its international obligations. In such instances, considerable resources will be required to remedy any non-compliance with the relevant treaty. Non-compliance places New Zealand’s international reputation at risk and exposes it to any applicable sanctions under the treaty.

40. Where the judiciary is the relevant actor, the State’s responsibility to give full effect to its responsibilities on the international plane falls to the courts.⁹³

41. Treaty obligations also inform the interpretation of domestic law. Courts may “have regard to international treaty obligations when interpreting

⁸⁸ ARSIWA, above n 82, art 48(1)(b); and see ICJ *Advisory Opinion*, above n 29, at [442].

⁸⁹ *Bailey v Whangarei District Court* (1995) 2 HRNZ 275 (HC) at 287 per Cartwright J.

⁹⁰ *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]; and *New Zealand Airline Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.

⁹¹ *New Zealand Airline Pilots Association Inc v Attorney-General*, above n 90, at 289, cited in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [225] per O’Regan and Arnold JJ.

⁹² Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) <www.ldac.org.nz> (**Legislation Guidelines**) at 45.

⁹³ *Fitzgerald v R*, above n 91, at [116] and [139] per Winkelmann CJ, [250] per Glazebrook J and [219] per O’Regan and Arnold JJ.

domestic legislation and will attempt to achieve an interpretation consonant with international obligations”.⁹⁴ That approach has long been applied in areas such as maritime law which is recognised as having an inherently international character.⁹⁵ This is despite disparate and partial incorporation through statute.

42. The significance of customary international law is that it retains a separate existence regardless of whether a State is party to a treaty with similar content.⁹⁶ In this case, customary international law obligations exist separately to the climate treaties.
43. The orthodox position is that customary international law is automatically part of the common law, without any need for legislative action.⁹⁷ As part of the common law, customary international law is therefore a binding part of New Zealand domestic law. In our constitutional separation of powers:
 - (a) Customary international law, as part of the common law, informs what is lawful or unlawful executive action.⁹⁸
 - (b) Customary international law, as part of the common law, must be applied by the judiciary.⁹⁹ Even when not directly applicable, customary international law may be an interpretive tool.¹⁰⁰
44. A rule of customary international law exists when there is a general practice among States that is accepted as law (*opinio juris*).¹⁰¹ Relevant practice

⁹⁴ *Richards v Attorney-General* [2025] NZHC 2833 at [93], citing *inter alia* *Fitzgerald v R*, above n 91, and *Students for Climate Solutions Inc v Minister of Energy and Resources* [2024] NZCA 152, [2024] 2 NZLR 822 at [70].

⁹⁵ *American Eagle Fishing LLC v The Ship "Koorale"* [2020] NZHC 1935 at [53]-[55].

⁹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America (Merits))*, above n 68, at [178].

⁹⁷ *Trans-Tasman Resources Limited v Taranaki-Wanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; *Richards v Attorney-General*, above n 94, at [93]; and *Zaoui v Attorney-General (No 2)*, above n 32, at [24]. This position is orthodox across the common law world: see for example *Trendex Trading Corp v Central Bank of Nigeria* [1977] QB 519 at 544 per Lord Denning; and, more recently, *Nepsun Resources Ltd v Araya* 2020 SCC 5, [2020] 1 SCR 166 at 169. The United Kingdom position appears to potentially be shifting: see *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 at [146]; but see *Ukraine v Law Debenture Trust Corp Plc* [2023] UKSC 11, [2024] AC 411 at [226] per Lord Carnwath (dissenting).

⁹⁸ *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 57-61 per Keith J for the Court.

⁹⁹ *Richards v Attorney-General*, above n 94, at [96].

¹⁰⁰ *Sellers v Maritime Safety Inspector*, above n 98, at 61-62 per Keith J for the Court. See also Treasa Dunworth, “Hidden Anxieties: Customary International Law in New Zealand” [2004] 2 NZJPIL 67 at 71; and Treasa Dunworth, “Public International Law” [2000] NZ Law Rev 217 at 224-226.

¹⁰¹ ILC, *Conclusions on customary international law*, above n 69, Conclusion 2. See also *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Merits)* [2023] ICJ Rep 413 at [77].

includes acts and omissions of all branches of government,¹⁰² and *opinio juris* can be evidenced (amongst other things) by governmental publications, diplomatic correspondence and decisions of national courts.¹⁰³ The ICJ has particular authority in determining the existence of such rules, and national courts may also determine the existence and content of such rules.¹⁰⁴

45. It is at least arguable – and therefore a matter for trial – that the human right to a clean and healthy environment is a freestanding right under customary international law, and therefore a binding norm of international law, and part of the law of New Zealand.
46. New Zealand courts should give significant weight to the decisions of international and foreign courts’ addressing the same underlying human rights law protections. Under art 38(1)(d) of the Statute of the ICJ, judicial decisions are a “subsidiary means” for determining the rules of international law.¹⁰⁵ As the ICJ explained in *Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)*, this promotes “the necessary clarity and essential consistency of international law, as well as legal security”.¹⁰⁶ The status of such decisions as subsidiary sources of law, together with the principle of comity, gives these decisions an authority beyond the usual common law concept of a “persuasive authority”.¹⁰⁷
47. The ICJ’s advisory opinion is itself a “subsidiary source” of international law because it clarifies the international obligations with more precision. On 20 May 2026, the UN General Assembly endorsed the ICJ’s unanimous opinion as “an authoritative contribution to the clarification of existing international law”.¹⁰⁸ The Federal Court of Ontario last year recognised that while the ICJ’s advisory opinion is not binding,¹⁰⁹ it is a source of law, and the “principles outlined ... can influence how courts interpret domestic

¹⁰² ILC, *Conclusions on customary international law*, above n 69, Conclusions 5 and 6.

¹⁰³ See above n 69, Conclusion 10.

¹⁰⁴ See above n 69, Conclusion 13.

¹⁰⁵ Statute of the International Court of Justice 33 UNTS 933 (opened for signature 26 June 1945, entered into force 24 October 1945).

¹⁰⁶ *Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo) (Merits)* [2010] ICJ Rep 639 at [66].

¹⁰⁷ *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA) at 393.

¹⁰⁸ United Nations General Assembly, *Advisory opinion of the International Court of Justice on the obligations of States in respect of climate change* UN Doc A/80/L.65 (20 May 2026) at [1] (with 141 States including New Zealand in favour, 8 against with 28 abstentions).

¹⁰⁹ Cf Statute of the ICJ, art 59 on the binding nature of contentious decisions.

laws, particularly in relation to constitutional rights and international obligations”.¹¹⁰ The same applies to UN treaty bodies, such as the Human Rights Committee.¹¹¹

48. Recent jurisprudence has already been used to inform the interpretation of domestic constitutional rights.¹¹² Mr Smith says the same approach is appropriate when considering his claims, “even where those obligations are not part of domestic law”, particularly “where fundamental rights are concerned”.¹¹³ The Court has an important role in ensuring that New Zealand’s acceptance and assumption of international obligations is not “mere window-dressing”.¹¹⁴

PUBLIC LAW DUTY

49. In his first pleaded cause of action, Mr Smith submits that the Crown has breached a duty owed at common law. The specific pleaded duty is:¹¹⁵

... to actively exercise [its] authority [over the territory of New Zealand, the activities occurring there, and the atmosphere above New Zealand’s territory] in a manner that protects the plaintiff and future generations of his descendants from the adverse effects of climate change ...

50. The pleaded duty also requires the Crown:¹¹⁶

... to take all necessary steps to reduce national emissions and to actively protect the plaintiff and his descendants from the adverse effects of climate change.

¹¹⁰ *Dini Ze’ Lbo’imgin v Canada* 2025 FC 1586 at [44].

¹¹¹ Rebecca McMenamin “Advisory Opinion on Obligations of States in Respect of Climate Change: Potential Contribution of Human Rights Bodies” (2023) 13 *Climate Law* 213 at 219. See also *R v Goodwin (No 2)*, above n 107, at 393: (“Whether a decision of the Human Rights Commission is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debateable...”).

¹¹² See e.g. ECtHR, *Greenpeace Nordic v Norway (Merits and Just Satisfaction)*, App no 34068/21, 28 October 2025.

¹¹³ *Richards v Attorney-General*, above n 94, at [116].

¹¹⁴ At [116], citing *New Zealand Māori Council v Attorney-General* HC Wellington CIV-2007-485 95, 4 May 2007 at [93].

¹¹⁵ Third Draft ASOC, above n 4, at [80]. [05.0158]

¹¹⁶ At [80(b)]. [05.0158]

51. The pleading recognises that the specific means of complying with the duty were for the Crown to determine.¹¹⁷ The pleaded duty has arisen since at least the date of signing of Te Tiriti o Waitangi.¹¹⁸
52. The pleaded duty is said to arise from a combination of legal sources including Te Tiriti o Waitangi, the Crown-Māori fiduciary relationship, Crown obligations to the public to protect public interests in common resources, rights affirmed in the BORA and rights and interests recognised at common law, tikanga and obligations arising under international law.¹¹⁹
53. Mr Smith submits the Crown has breached this duty from June 1992 onward (the date of the Rio Summit¹²⁰ and signing of the UNFCCC) by knowingly failing to exercise its authority to reduce its own emissions and to ensure reductions in Crown and national emissions to avoid dangerous anthropogenic interference with the climate system in accordance with the best available science.¹²¹

THE COURT OF APPEAL DECISION

54. The Court of Appeal treated the first cause of action as “captured” by the claims under the BORA and Te Tiriti. It is difficult to square that conclusion with s 28 of the BORA, the fact that pleaded duty is not one that is said to be owed only to Māori, and with the striking out of Mr Smith’s claims under those heads on the basis of an erroneous “margin of appreciation” approach to assessing whether a statutory right has been *breached*. The fact that the Court struck those claims out on that basis meant not that the common law claim must also be struck out as serving no useful purpose, but that the pleaded substantive rights were of even greater significance.
55. The Court of Appeal only engaged in substance with the contention that the “Public Trust Doctrine” was a source of the pleaded duty. Mr Smith no longer relies on that doctrine, which in its modern manifestation

¹¹⁷ At [80(c)]. [05.0158]

¹¹⁸ At [80(a)].

¹¹⁹ At [81]. [05.0159]

¹²⁰ See above n 47.

¹²¹ Third Draft ASOC, above n 4, at [80(c)(iii)]. [05.0158]

distracts from its source, which is the accepted common law position that things that are essential to life can be impressed with a right of public access to them.

THE COMMON LAW AS THE SOURCE OF THE DUTY

56. The primary source relied upon by Mr Smith is the common law, which recognises and protects fundamental principles of the constitution and has evolved over time to protect fundamental individual rights and interests.
57. The starting point must be that climate change is a unique collective action problem. As the ICJ recognised, climate harm is an “existential problem of planetary proportions that imperils all forms of life”.¹²² It creates risks of catastrophic harm to individual rights and interests which are orders of magnitude more serious than any other forms of conduct which have come before the courts. These rights and interests include dignity, life, autonomy, bodily integrity and property among others.
58. The risks posed by climate change are so great that they threaten the continued existence of Aotearoa New Zealand as a democratic state. If there is no stable climate system, then there will no longer be any polity of people in Aotearoa New Zealand. Humans and social order will cease to exist. None of the branches of government will be able to fulfil their constitutional roles and no other rights will have meaning¹²³ or will be capable of being enforced.
59. At the same time, the state is uniquely placed to mitigate these risks. It exercises authority over the territory of Aotearoa New Zealand, including common resources such as the atmosphere and the oceans. It alone is able to address the problem of “systemic domination” by major individual emitters who, by their emissions, exert their will over others, limiting their freedoms.¹²⁴ New Zealanders have created a state with the powers it has

¹²² ICJ *Advisory Opinion*, above n 29, at [456].

¹²³ As the ICJ put it, protection of the environment is a “precondition” for the enjoyment of human rights: ICJ *Advisory Opinion*, above n 29, at [373].

¹²⁴ Aravind Ganesh *Rightful Relations with Distant Strangers: Kant, the EU, and the Wider World* (Hart, 2021) at 129–130.

for the very purpose of addressing collective action problems like climate change.

60. The state must ensure the preconditions of the exercise of rights within the constitution of Aotearoa New Zealand are maintained. Those preconditions include the presence of a stable climate system. These factors compel the recognition of a duty on the state to take necessary steps to avoid dangerous interference with the climate system.
61. There is a long common law history (with origins extending at least to Roman Law) recognising that certain resources or property are unowned and unownable, or otherwise controlled by and protected by the State.¹²⁵ The doctrine recognises that the public have rights or *jus publicum* in certain assets having a public character. This principle was recognised in Justinian's Institutes, and has a long history of recognition in the common law, informing judgments on rights of access to ports, waterways, and infrastructure providing the "necessities of life".¹²⁶ Its foundations have been confirmed in several decisions of the courts recognising public rights in certain assets.¹²⁷ Conceptually similar are express references to the importance of stewardship or kaitiakitanga over resources in primary legislation.¹²⁸
62. Recognition of an actionable duty to protect the climate system is also consonant with and informed by the concept of kaitiakitanga: the right to govern the environment comes with a reciprocal obligation to care for it, and gives effect to the guarantees in Te Tiriti. As addressed below, those guarantees are a fundamental part of New Zealand's constitutional fabric.

¹²⁵ Consider, for example, a concept like *jus publici*: property affected with a public interest. *Bracton, De Legibus et Consuetudinibus Angliae* (c 1260), Book 1 Chapter 12: "By natural law these things are common to all - running water, air, the sea, and the shore of the sea..." ; *Hale, De Jure Maris* (quoted for example in *Ngati Apa* at [132]); *Vector Ltd v Transpower NZ Ltd* [1999] 3 NZLR 646, [1999] NZCA 480, CA 32/99. See also Michael Taggart, *Private Property and Abuse of Rights in Victorian England* (OUP, New York, 2002) at 202 and the works discussed therein.

¹²⁶ *The Institutes of Justinian* (Justinian I, 533 AD) I.2.1.pr-2, translated in JB Moyle (translator) *The Institutes of Justinian* (5th ed, Oxford University Press, Oxford, 1913).

¹²⁷ *Cranford v Lercen* (1868) 1 NZCA 117 (CA) and *Mueller v Taupiri Coal-Mines Limited* (1900) 20 NZLR 89 (CA) at 117. See also *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [133]-[135].

¹²⁸ Resource Management Act 1991, s 7(a) and (aa); and the Local Government Act, s 14(1)(g). The Marine and Coastal Area (Takutai Moana) Act 2011 also provides that the "common marine and coastal area" is not owned by the Crown or any other person, while retaining the possible recognition of customary interests under the regime of the Act, conferring the regulatory control of the state without conferring ownership.

63. The pleaded duty is also consistent with the customary international law obligations identified in the ICJ advisory opinion. As noted there, “the specific character of the risk of significant harm to the climate system is indisputably established”,¹²⁹ and states have an obligation to prevent significant environmental harm to the climate system. They must exercise “strict due diligence” to protect against that harm.¹³⁰
64. Whether or not a customary duty exists at international law depends upon whether or not there is consistent state practice and general acceptance of it as legally binding.¹³¹ So, as a matter of international law the existence of an obligation aligned with the pleaded duty is established as practice. Definitionally, this is recognition that the obligation, at least in an international sense, is not novel, but established and uniform. Because customary international law is part of the common law,¹³² it is difficult to see as well-founded a challenge to the pleaded duty on the basis of true novelty.
65. Similarly, it is difficult to understand a challenge to the pleaded duty on the basis it is not anchored sufficiently in an established legal framework. Both the ICJ’s and Inter-American Court on Human Rights’ recent advisory opinions on climate rights proceeded from the orthodox and well accepted position that rights to life and culture are meaningless if the climate system is damaged in a way that precludes their exercise.¹³³ The pleaded duty relies on the same wellspring, albeit in a domestic context – the fundamental common law concept, derived from Roman Law, that there are some things that must remain accessible to all because they are essential to life, obligations of kaitiakitanga, the guarantees in Te Tiriti, the right to life,¹³⁴ and the right to culture.
66. In any event, there are numerous examples of the common law evolving over time to recognise rights of action to protect fundamental rights or

¹²⁹ ICJ *Advisory Opinion*, above n 29, at [137].

¹³⁰ See generally above at [23]-[34].

¹³¹ See above at [44]. Statute of the International Court of Justice, [art 38\(1\)\(b\)](#) (the Court applies “international custom, as evidence of a general practice accepted as law”).

¹³² See above at [43].

¹³³ See above at [33]-[34].

¹³⁴ Including at common law.

interests: *Entick v Carrington* recognised a right of action in trespass,¹³⁵ *Donoghue v Stevenson* recognised a right of action in negligence,¹³⁶ *Hosking v Runting* for misuse of private information and *C v Holland* for intrusion upon seclusion. In each of these cases the courts recognised that conduct was occurring that was violating fundamental rights or interests; there was no other effective legal remedy; and the terms of the newly recognised causes of action could be calibrated to balance protection of the rights or interests with the interests of the defendant(s).

67. The proposed strict liability standard of care appropriately balances the need to vindicate the violations of fundamental rights with the interests of the Crown as defendant. To protect the fundamental natural justice interests of the Crown, the Court may also recognise that in principle, a defence of total absence of fault is available.¹³⁷
68. The Attorney-General submitted that the recognition of a common law duty would be inconsistent with statute and the principle of Parliamentary sovereignty.¹³⁸ This principle must be carefully delimited. It is commonly understood to mean that the courts cannot inhibit the freedom of the Crown to introduce legislation into the House of Representatives, or decline to apply or set aside an Act of Parliament.¹³⁹ This principle is not squarely engaged here. Mr Smith is not seeking to prevent the Crown from introducing legislation into the House and there is no provision of primary legislation which purports to prohibit claims of the kind brought by Mr Smith in this case. As a common law cause of action this Court can recognise and develop the law in a manner that is consistent with fundamental common law principles.
69. In any case, a real question can be asked whether Parliamentary sovereignty could preclude claims of the kind brought by Mr Smith. Given the

¹³⁵ *Entick v Carrington* [1765] 95 ER 807 (KB).

¹³⁶ *Donoghue v Stevenson* [1932] AC 562 (HL).

¹³⁷ As recognised by the courts in the criminal law: see *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [62].

¹³⁸ Crown Leave Submissions, above n 23, at [9.3].

¹³⁹ The freedom to introduce legislation into the House is discussed in *Ngāti Whātua Orākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 and *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1. The primacy of primary legislation is discussed in *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).

existential threat to human life and the constitutional order posed by climate change, the dicta of Lord Cooke of Thorndon in *Taylor v New Zealand Poultry Board* that “some common law rights presumably lie so deep that even Parliament could not override them” are pertinent.¹⁴⁰ Mr Smith pleads that the Crown has failed to ensure the reduction of its own and/or national emissions from 1992. This invokes comparisons with the examples given by Lord Cooke of other matters which are beyond the constitutional power of the legislature, such as laws purporting to disenfranchise women or strip Jewish people of their citizenship or property.¹⁴¹ Here, the pleaded harms will amount to all New Zealanders losing those and other equally fundamental rights.

BILL OF RIGHTS ACT CLAIM

INTERNATIONAL JURISPRUDENCE IS RELEVANT

70. As a matter of legal process, this Court in *Fitzgerald v R* emphasised the relevance of international human rights jurisprudence to the interpretation of rights guaranteed domestically in the BORA.¹⁴² In *Helu v Immigration and Protection Tribunal*, McGrath explained:

Resort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand’s international obligations.

71. This is a strong presumption because as part of the State, when domestic courts are operating in a sphere where New Zealand’s international obligations are relevant, they are responsible (sometimes directly, sometimes indirectly) for ensuring the state can meet those obligations.¹⁴³

¹⁴⁰ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke P.

¹⁴¹ Robin Cooke “Fundamentals” [1988] NZLJ 158.

¹⁴² At [50], citing *Fitzgerald v R*, above n 91, at [42] per Winkelmann CJ and at [250] per Glazebrook J.

¹⁴³ *Fitzgerald*, above n 91, at [116] and [139] per Winkelmann CJ, [250] per Glazebrook J and [219] per O’Regan and Arnold JJ.

72. As explained above,¹⁴⁴ international jurisprudence is more than a matter of persuasive authority in domestic courts. Where the content of the international human right underlying the domestic statute has recently been clarified in international jurisprudence – including in the ICJ, the Human Rights Committee, and regional human rights courts – domestic courts should follow the ICJ in giving “great weight” to those decisions for the purposes of consistency of international law.

ERRORS IN THE COURT OF APPEAL’S JUDGMENT RELEVANT TO BOTH RIGHTS CLAIMS

73. The Court of Appeal erred in its characterisation of Mr Smith’s claim, and its categorisation of the decision of the English and Welsh courts in *Plan B Earth v The Prime Minister*¹⁴⁵ and *Verein KlimaSeniorinnen Schweiz v Switzerland*¹⁴⁶ (***KlimaSeniorinnen***), which the Court of Appeal applied and declined to apply respectively. The Court of Appeal further erred in finding that the CCRA is “comprehensive in its reach”.¹⁴⁷ Finally, the Court of Appeal erred in finding that the Crown enjoyed a wide “margin of appreciation” in this area generally, and as to its own emissions.¹⁴⁸ These errors are addressed in turn.

Characterisation of Mr Smith’s Claim

74. In declining Mr Smith’s appeal the Court of Appeal set up a peculiar trichotomy:¹⁴⁹ rights challenges *to legislation* (which it found to be permitted); rights challenges to decisions *under legislation* (i.e. judicial review, which it found to be permitted); and rights challenges to the “*efficacy*” of legislation (which it found to be impermissible). It decided that Mr Smith’s claim was of the third, impermissible, type.¹⁵⁰

¹⁴⁴ See above at [46].

¹⁴⁵ R (*on the application of Plan B Earth and others*) v *The Prime Minister* [2021] EWHC 3469 (Admin), [2021] All ER (D) 92 (Dec).

¹⁴⁶ *KlimaSeniorinnen*, above n 29.

¹⁴⁷ *Smith* (CA), above n 5, at [94]. [05.0042]

¹⁴⁸ At [79]. [05.0034]

¹⁴⁹ At [94] (acknowledging the availability in New Zealand of declaratory claims that legalisation is inconsistent with the Bill of Rights Act); at [97] (acknowledging the availability of judicial review of decisions *under* legislation on the basis that they are inconsistent with the Bill of Rights Act); and at [94] (asserting the unavailability of rights-based claims concerning to the “efficacy” of framework legislation). [05.0042] [05.0043]

¹⁵⁰ At [95] (comparing Mr Smith’s case to *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1 (Grand Chamber, ECHR)). [05.0042]

75. The simple submissions for Mr Smith is that the supposed third type of challenge is illusory. Claims can permissibly raise both challenges to legislation and challenges to action under legislation. Making both types of challenge may raise the obvious question of whether legislation is efficacious. That is not impermissible. Mr Smith’s claim is that the Crown conduct has breached his rights, including by passage of legislation inconsistent with those rights and by action and inaction inconsistent with his rights. Those claims are orthodox.
76. To the extent there is a new subset of Crown conduct that cannot be challenged on the basis that doing so involves an impermissible challenge to “efficacy” of legislation, then the boundaries of that new categorisation ought to have been defined, and Mr Smith given the opportunity to re-plead so as not to offend against it.

The CCRA and BORA

77. The CCRA does not “cover the field” of obligations at law relating to climate change.¹⁵¹ It includes a limited ouster clause in s 5ZM, which precludes challenges to failures to meet a 2050 target or emissions budget. It does not exclude the operation of the BORA. The BORA therefore applies to it. The fact that the Crown points to the CCRA as its means of giving effect to fundamental rights and freedoms, including those under the BORA, does not mean that the CCRA is from of whether the CCRA is immune from claims that it breaches the BORA. It means that examining the CCRA and decisions under it against fundamental rights is even more critical.
78. The ICJ’s advisory opinion has clarified that where the international obligation requires States to adopt national policies and take corresponding measures,¹⁵² that obligation is not discharged simply by the establishment of a regulatory framework and the taking of such measures. Rather, as the ICJ explained, the “mere formality” of adopting policies and taking

¹⁵¹ *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [100]-[101].

¹⁵² Such is that under UNFCCC, art 4.2(a).

measures “is not sufficient to discharge the obligation of result”;¹⁵³ such policies and measures “must be such that they are able to achieve the required goal”.¹⁵⁴

79. International jurisprudence has established, based on the systemic integration of relevant rules of international law in respect of climate change, that to effectively safeguard human rights, governments must adopt mitigation and adaptation measures, including fair and ambitious emission reduction targets according to the best available science,¹⁵⁵ and regulation of the emissions of public and private actors with effective monitoring and enforcement.¹⁵⁶
80. The same reasoning applies to Mr Smith’s claims. The Crown cannot simply point to the CCRA as the regulatory framework that covers human rights; that would be an insufficient “mere formality” to use the ICJ’s phrase. To assess the pleaded claims the court needs to assess whether measures taken by the Crown (under the CCRA and otherwise) are able to do the Crown’s part to prevent dangerous anthropogenic interference with the climate system.

The Doctrine of the Margin of Appreciation

81. The Court of Appeal erred in its finding that “international jurisprudence allows a wide margin of appreciation to the state in implementing a framework, reflecting the respective constitutional roles and competencies of the courts and legislature”.¹⁵⁷ This led to the Court’s erroneous

¹⁵³ In the European regional human rights system, positive obligations arising under the art 2 right to life have three dimensions: (a) the duty to provide a regulatory framework; (b) the obligation to take preventive operational measures; and (c) the procedural duty to effectively investigate alleged breaches of the substantive (a) and (b) obligations.

¹⁵⁴ ICJ *Advisory Opinion*, above n 29, at [208].

¹⁵⁵ *KlimaSeniorinnen*, above n 29, see also Constitutional Court of Korea (*Do-Hyun Kim v South Korea* [2024] 2020HunMa389, 2021HunMa1264, 2022HunMa854, 2023HunMa846) and Brussels Court of Appeal (*ZW Klimazaak v Belgium & Ors* [2023] 2022/AR/891).

¹⁵⁶ ICJ *Advisory Opinion*, above n 29, at [282] and [403]. In the European human rights system, States are obliged by the regulatory dimension of positive obligations arising under the art 2 right to life to undertake necessary measures to ensure implementation of the framework, including supervision and enforcement: ECtHR *Lopes de Sousa Fernandes v Portugal*, App no 56080/12, 19 December 2017 at [189] (this is a right to life in the context of healthcare case, and provides a useful starting point to consider what the regulatory dimension of the positive obligation of the right to life entails in the climate context).

¹⁵⁷ *Smith* (CA), above n 5, at [89]. [05.0039]

conclusion that Mr Smith’s case was not “conventionally ... within [the court’s] institutional competence”.¹⁵⁸

82. The European Court of Human Rights’ judgment in *KlimaSeniorinnen* was “mindful” that it can be difficult to distinguish questions of law and policy “and, therefore, *of the fundamentally subsidiary role of the Convention*”.¹⁵⁹ As the Court went on to say, this is because the Court is an *international* court judging the decisions of domestic authorities.¹⁶⁰ It is precisely in this context that the Court considered it appropriate to give “substantial deference to the *domestic* ... measures resulting from the democratic process concerned and/or the judicial review by domestic courts” in application of the margin of appreciation.¹⁶¹ Thus the “margin of appreciation” is not the same as deference by courts to democratic decision-makers, but rather a unique feature of the European supervisory system and a unique doctrine that complements the principle of subsidiarity. The European Court’s final assessment was not the same as the Court of Appeal characterised it as; it was precisely the opposite: courts do have competence in the context of claims of rights breaches from State inaction on climate change and the question “is no longer whether, but how, human rights courts should address the impact of environmental harms on the enjoyment of human rights”,¹⁶² particularly in light of customary international law on harm prevention, precaution and intergenerational equity.¹⁶³
83. Consistently with this, the argument that a state should be given a “margin of appreciation” when considering whether rights to culture under the ICCPR have been breached was rejected by the Human Rights Committee, which expressed the view that State conduct must be measured by reference to the right at issue.¹⁶⁴

¹⁵⁸ At [89]. [05.0039]

¹⁵⁹ *KlimaSeniorinnen*, above n 29, at [449] (emphasis added).

¹⁶⁰ At [449]. This is entirely conventional; see also ECtHR *Handyside v United Kingdom*, App no 5493/2, 7 December 1976 at [48].

¹⁶¹ *KlimaSeniorinnen*, above n 29, at [450].

¹⁶² At [451] and [379].

¹⁶³ At [379].

¹⁶⁴ *Länsman v Finland* (No 1) HRC Communication No 511/1992, CCPR/C/52/D/511/1992 (26 October 1994) at [9.4].

THE RIGHT TO LIFE CLAIM UNDER SECTION 8 OF BORA

84. Section 8 of BORA provides:¹⁶⁵

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

85. For ease of reference and comparison, it is helpful to set out that art 6(1) of the International Covenant on Civil and Political Rights (**ICCPR**) provides:¹⁶⁶

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Mr Smith's Claim

86. Mr Smith's claims for breach of s 8 of BORA are focused on breaches of the protective duty, which he says imposes positive obligations on the Crown to put in place regulatory frameworks that are effective to reduce the risk to human life.
87. Mr Smith maintains that whether the Crown has failed to put in place regulatory frameworks to measures and mitigate Crown emissions and whether the Crown's national framework is unreasonable, irrational and ineffective in reducing national emissions is fundamentally a matter to trial, to be assessed on the basis of evidence and full argument. Mr Smith says that, if s 8 contains an implied protective duty that is capable of being engaged by the impacts of climate change, then the claims should be remitted for trial on whether it has been breached.
88. Mr Smith says the Court of Appeal erred in striking out his s 8 BORA claim. In particular, it erred in concluding that it was not tenable to argue that the

¹⁶⁵ Section 5 of BORA provides: "Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Crown does not rely on s 5 in support of its strike out application.

¹⁶⁶ International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976).

Crown knew that climate change posed a “real and immediate risk to the lives of members of the public” (including himself, present and future members of his whānau and iwi) and that the CCRA was not sufficient to meet the Crown’s obligations under s 8.¹⁶⁷ Nevertheless, Mr Smith supports the Court of Appeal’s reasons on a number of grounds, and briefly explains that support before turning to the errors in the Court of Appeal’s judgment.

Mr Smith’s Support for Certain Findings of the Court of Appeal

89. First, the Court of Appeal correctly held Mr Smith’s argument that s 8 of BORA is engaged because the argument that the right to life includes a right to life with dignity is tenable,¹⁶⁸ and is supported by international obligations and jurisprudence.
90. The Court of Appeal correctly dismissed the Crown’s argument that the underlying ICCPR rights is broader than the protections in s 8 of BORA. As the Court of Appeal correctly found, it is possible that “the meaning of the rights in ... [BORA] may gradually expand in ways that accord with international jurisprudence”.¹⁶⁹
91. As a matter of legal principle, it is well-established the jurisprudence of the Human Rights Committee that art 6 of the ICCPR has been interpreted to include the right to life with dignity, including in the context of climate change.¹⁷⁰ In *Teitiota v New Zealand*, while ultimately finding for New Zealand for other reasons, the Human Rights Committee reiterated that the right to life “cannot be properly understood if it is interpreted in a restrictive manner” and that the right to life “also includes the right of individuals to enjoy a life with dignity”.¹⁷¹

[05.0044]

¹⁶⁷ *Smith* (CA), above n 5, at [98]-[100]. See also *Smith v Attorney-General* [2022] NZHC 1693 at [174]-[195]. [101.0158]

¹⁶⁸ At [48]-[57]. [05.0021]

¹⁶⁹ At [50], citing *AR (India) v Attorney-General* [2021] NZCA 291, [2021] NZAR 248 at [46].

¹⁷⁰ Human Rights Committee, *General Comment No 36 on Article 6: Right to Life*, UN Doc. CCPR/C/GC/36, 30 October 2018 at [26] and [62] (“The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include ... degradation of the environment”); United Nations Human Rights Committee *Views: Communication No 2728/2016, Teitiota v New Zealand*, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) (*Teitiota v New Zealand*) at [9.4]; *Billy v Australia*, above n 55, at [8.3].

¹⁷¹ *Teitiota v New Zealand*, above n 170, at [9.4].

92. The interpretation of the Human Rights Committee on this issue is not just legally relevant as international jurisprudence (the point made above) but also as “subsequent practice” of the treaty parties in terms of the rules of interpretation of international law under the Vienna Convention of the Law of Treaties.¹⁷²
93. The Court of Appeal was therefore correct to find that Mr Smith’s claim was not precluded by the wording of s 8 of BORA or the narrow interpretation given to s 8 in *AR (India) v Attorney-General*.¹⁷³ New Zealand did not make any reservation in relation to the right to life or otherwise when acceding to the ICCPR, and the court should be slow to give BORA an interpretation that treats s 8 as if there was such a reservation.
94. Second, the Court of Appeal correctly held that the fact that a larger group of persons, or potentially all of the population, may be affected by a rights breach does not preclude the courts from recognising such breaches.¹⁷⁴ Again the Court of Appeal – in Mr Smith’s view correctly – considered it arguable that New Zealand courts would interpret s 8 of BORA consistently with how the Human Rights Committee interpreted it the corresponding right to life in art 6 of the ICCPR in *Teitiota v New Zealand*¹⁷⁵ and *Billy v Australia*.¹⁷⁶
95. Third, the Court of Appeal correctly determined that Mr Smith’s argument that the risk to the right to life is sufficiently timely and proximate to engage s 8 of BORA is arguable,¹⁷⁷ and a matter for trial as it depends on whether the evidence establishes serious current risks to life or an irreversible risk to the life of future generations that cannot be feasibly mitigated by timely action.¹⁷⁸

¹⁷² Vienna Convention on the Law of Treaties, 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980). International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice In Relation To the Interpretation of Treaties*, [2018] II(2) Yearbook of the International Law Commission at Conclusion 13(3).

¹⁷³ *Smith* (CA), above n 5, at [57]. [05.0024]

¹⁷⁴ At [58]-[61]. [05.0025]

¹⁷⁵ *Teitiota v New Zealand*, above n 170.

¹⁷⁶ *Billy v Australia*, above n 55.

¹⁷⁷ At [74]. [05.0031]

¹⁷⁸ At [67]-[73]. [05.0028]

96. The Court of Appeal’s reasons on this aspect of Mr Smith’s claim were detailed and relied substantially on the decision of the European Court of Human Rights in *KlimaSeniorinnen*. In particular, the Court of Appeal did not find his argument to be untenable on the basis that the European Court found it unnecessary to decide the case under the right to life as cast in art 2 of the European Convention on Human Rights¹⁷⁹ (instead disposing of the case under art 8, the right to family, home and private life).¹⁸⁰ The Court applies “to a great extent” the same legal principles to art 2 and art 8 claims when examining violations of rights stemming from environmental issues.¹⁸¹ This was, it is submitted, the correct approach.
97. Of note also, the European Court’s dicta on the requirements under the right to life as protected therein,¹⁸² in particular, that the assessment of a “real and imminent” risk to life:¹⁸³

... must be understood in light of the fact that there is a grave risk of inevitability and irreversibility of the adverse effects of climate change, the occurrences of which are most likely to increase in frequency and gravity.

98. Fourth, the Court of Appeal was correct to hold that the argument that s 8 encompasses a requirement to take protective measures against foreseeable threats to life is not clearly untenable. In particular, Mr Smith points to the Court of Appeal’s reliance on art 2 of the European Convention on Human Rights and correspondingly, the *KlimaSeniorinnen* judgment, and the Court of Appeal’s finding that s 8 of BORA could be interpreted consistently with art 2 of the European Convention to establish the Crown’s protective duties,¹⁸⁴ as informed by stringent due diligence obligations applicable in the context of climate change.

¹⁷⁹ Article 2(1) provides: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.

¹⁸⁰ *KlimaSeniorinnen*, above n 29, at [573].

¹⁸¹ At [537]-[538].

¹⁸² *KlimaSeniorinnen*, above n 29, at [507]-[513].

¹⁸³ At [513].

¹⁸⁴ *Smith* (CA), above n 5, at [88]. [05.0039]

99. Further on positive obligations, Mr Smith supports the Court of Appeal’s clarification that *Wallace v Attorney-General*¹⁸⁵ does not determine Mr Smith’s claim that s 8 entails positive obligations. While the Crown has made much of the ‘negative’ framing of s 8 of BORA as compared to the ‘positive’ framing of art 6 of the ICCPR, the leading authority on this point is that “nothing turns on this” and s 8, like art 6, positively “affirms the inherent right to life”.¹⁸⁶

Errors in the Court of Appeal’s Judgment

100. The Court of Appeal erred by finding that it was not tenably arguable that the Crown’s obligations under s 8 of BORA were not satisfied by it having passed the CCRA.¹⁸⁷ In respect of this error, Mr Smith relies on his submissions above on the CCRA and BORA.¹⁸⁸
101. The Court of Appeal erred in a number of respects in its approach to and reliance on “international jurisprudence”, in particular, misapplying the so-called “margin of appreciation”, finding that *KlimaSeniorinnen* was not analogous to Mr Smith’s claim, and failing to rely on the UN Human Rights Committee’s jurisprudence.¹⁸⁹
102. In *KlimaSeniorinnen*, the European Court of Human Rights held that the right to life is engaged where there is a “real and imminent risk” to life.¹⁹⁰ The Court concluded that this right may be engaged in respect of complaints of State inaction in the context of climate change,¹⁹¹ where there is a “serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant”.¹⁹²
103. The Court’s assessment of a “real and imminent” risk to life will depend on the particular circumstances of the case. The even more recent case of *Cannavacciuolo v Italy*, a case about mass pollution generated by waste disposal

¹⁸⁵ *Wallace v Attorney-General* [2022] NZCA 375, [2022] 3 NZLR 398.

¹⁸⁶ At [111], as endorsed in *Smith* (CA), above n 5, at [82]. [05.0035]

¹⁸⁷ *Smith* (CA), above n 5, at [99]. [05.0044]

¹⁸⁸ See above at [77]-[80].

¹⁸⁹ *Smith* (CA), above n 5, at [89]. [05.0039]

¹⁹⁰ *KlimaSeniorinnen*, above n 29, at [513], cited in *Smith* (CA), above n 5, at [69]. [05.0029]

¹⁹¹ At [511], cited in *Smith* (CA), above n 5, at [69]. [05.0029]

¹⁹² At [513], cited in *Smith* (CA), above n 5, at [69].

practices, interpreted “imminence” more broadly in that context, finding that criterion met by the fact of the applicants’ residence, over a considerable period of time, in municipalities identified by the State authorities as being affected by the pollution phenomenon at issue, which had been ongoing, omnipresent and unavoidable for decades and had not ceased at the time the applications were lodged with the Court.¹⁹³ The Court applied the precautionary approach to reject the argument that a protective duty was negated because there was no scientific certainty about the precise effects of the pollution on a particular applicant.¹⁹⁴

104. There are a few important distinctions between the European Court context and Mr Smith’s case that the Court of Appeal failed to properly appreciate.
105. First, standing works differently in the European Court, and turns on a narrow criterion of “victim” status.¹⁹⁵ In the context of a court without public interest litigation, a significant part of the *KlimaSeniorinnen* decision for the European Court context was its decision the NGO plaintiff had standing and the four individual claimants did not. The European Court’s finding that the four individuals’ claims were not admissible is a simple application of the Court’s victim status law. The Court of Appeal does not appear to have appreciated this point, treating *KlimaSeniorinnen* as illustrating “the difficulty for claimants to establish that climate change raises a sufficiently timely and proximate risk to life” to engage the right to life.¹⁹⁶ That was difficult in *KlimaSeniorinnen* but for procedural, not substantive or factual reasons.
106. Second, Mr Smith repeats the point about subsidiarity made above.¹⁹⁷ The fact the European Court of Human Rights operates as a supranational court in the United Kingdom explains why those courts are particularly cautious to “keep pace with Strasbourg jurisprudence”¹⁹⁸ rather than advance it. The

¹⁹³ ECtHR, *Cannavaccinolo v Italy* App nos 51567/14, 30 January 2025 at [377] and [390].

¹⁹⁴ At [391].

¹⁹⁵ European Convention on Human Rights, arts 34 and 35.

¹⁹⁶ *Smith* (CA), above n 5, at [72]-[73]. [05.0031]

¹⁹⁷ See above at [82].

¹⁹⁸ *R (on the application of Gardner and another) v Secretary of State for Health and Social Care* [2022] EWHC 967 (Admin), [2022] 4 All ER 896 at [252], cited in *Smith* (CA), above n 5, at [85]. [05.0037]

Court of Appeal’s reliance on *Gardner v Secretary of State for Health and Social Care* and *Plan B Earth* rather than *KlimaSeniorinnen* was therefore erroneous.

107. The Court of Appeal’s findings limited the effect of *KlimaSeniorinnen* on the basis of the decision of the High Court of England and Wales in *Gardner*. But *KlimaSeniorinnen* is the guiding judgment; *Gardner* is not. *KlimaSeniorinnen* is a decision by the Grand Chamber of the European Court and is therefore the most authoritative decision for the purposes of not just European human rights law but also United Kingdom human rights jurisprudence. *Gardner* was a decision in respect of the Covid-19 pandemic and *KlimaSeniorinnen* is exactly the same type of case as this one, claiming that the State is bound by human rights law to take appropriate measures if there is a real and immediate risk of the breach of rights to life because of Crown inaction on climate change.
108. Moreover, the Court of Appeal relied on *Gardner* to limit who can claim engagement of the right to life. In that case, the right was held to not be engaged because those whose rights were threatened were broad sections of the public “that are not of the state’s making or over which it has no control”.¹⁹⁹ But in *KlimaSeniorinnen*, the Grand Chamber held to the contrary. *KlimaSeniorinnen* was about Switzerland’s regulatory acts over emissions, that is, acts that are in the state’s making and over which it does have control.
109. Per *KlimaSeniorinnen*, the positive obligation under human rights law is, in line with states obligations under the climate treaties, to “put in place the necessary regulations and measures aimed at preventing ... a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights”.²⁰⁰ Taking this approach of systemic integration, the European Court assessed whether Swiss authorities had adopted measures specifying a target timeline for achieving carbon neutrality and quantifying future greenhouse gas emissions in light with global climate change mitigation commitments, and had kept those

¹⁹⁹ *Smith* (CA), above n 5, at [86]. [05.0038]

²⁰⁰ *KlimaSeniorinnen*, above n 29, at [546].

greenhouse gas emission reduction targets updated with due diligence, based on the best available scientific evidence.²⁰¹ In order for measures to be “effective”, public authorities must act in good time.²⁰² The European Court concluded that Switzerland had “critical lacunae” in its legislative framework regulating carbon emissions, including that it failed not just to appropriately regulate the emissions of private actors but also to quantify its own national emissions.²⁰³

110. The Court of Appeal also erred by failing to apply the decisions of the Human Rights Committee in the cases of individual communications (*Teitiota v New Zealand* and *Billy v Australia*).²⁰⁴ These cases have also been cited with general approval by the ICJ in its advisory opinion.²⁰⁵
111. The Court of Appeal’s decision thus puts New Zealand out of line with authoritative international jurisprudence.

THE RIGHT OF MINORITIES TO ENJOY THEIR CULTURE UNDER SECTION 20 OF BORA

112. Section 20 of the BORA affirms that people who belong to cultural minorities must not be denied the right in community with other members of that minority to enjoy their culture. Section 20 provides:²⁰⁶

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

113. Article 27 of the ICCPR provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall

²⁰¹ *KlimaSeniorinnen*, above n 29, at [551]-[552].

²⁰² At [548].

²⁰³ At [570] and [573].

²⁰⁴ See above at [47].

²⁰⁵ ICJ *Advisory Opinion*, above n 29, at [377]-[378] and [381]. See also *Billy v Australia*, above n 55; *Teitiota v New Zealand*, above n 170.

²⁰⁶ As in above n 165, the Crown does not rely on s 5 in its strike out application.

not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

114. The right to culture of indigenous peoples has been considered as engaged by climate change in international jurisprudence.²⁰⁷

Mr Smith's Claim

115. Mr Smith maintains that the Crown has failed to put in place a regulatory framework that is sufficient to provide a rational and effective deterrent to greenhouse gas emissions that have created a real and immediate risk that Māori rights-holders will be deprived of their ability to enjoy their culture. In particular, the Crown has failed to comprehensively assess the risks posed by emissions and climate change to the cultural rights and interests of Māori and the Crown has failed to actively protect the cultural rights and interests of Māori from the impacts of climate change on the basis of any such assessment. The denial of this right is not prescribed by law and/or is not justified under s 5 of BORA.
116. Whether the Crown has breached the protective duty implicit in s 20 is a question for trial, particularly in light of genuine disputes of fact between the parties about the steps taken by the Crown.

Errors in the Court of Appeal's Judgment

117. As the Court of Appeal noted, its prior decision in *Mendelssohn v Attorney-General* confirmed that a positive duty can arise under s 20, albeit it would require exceptional circumstances.²⁰⁸
118. Having accepted that, the Court of Appeal erred in treating denial of the right of culture as involving a “high” threshold,²⁰⁹ and in distinguishing *Billy*

²⁰⁷ *Billy v Australia*, above n 55; IACtHR *Advisory Opinion*, above n 29, at [450]-[452]; Committee on the Rights of the Child, *General Comment No 26*, above n 64, at [58].

[05.0049] ²⁰⁸ *Smith* (CA), above n 5, at [113]-[116]; *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA).

²⁰⁹ *Smith* (CA), above n 5, at [123]. [05.0053]

v Australia on the basis that Mr Smith’s pleading did not allege harm of the same type.²¹⁰

119. In holding that there was a “high threshold” for establishing breach of s 20 the Court did not conduct any principled analysis.²¹¹ There is no principled basis for imposing an extra-statutory restriction on the scope of any of the rights in the BORA. There is similarly no basis in law upon which it can be said that a Court should be precluded from determining whether there has been a breach of those rights, albeit arguments in support of that outcome may be relevant to whether or not a declaration of inconsistency should be made.²¹² While this Court held in *Chisnall* that there is no one methodology that must be applied in all rights cases, “the methodology to be adopted by a court when considering an application that engages the affirmed rights should be the one that best strives to identify and secure a Bill of Rights-consistent interpretation and application to the individual case utilising ss 5 and 6, and observing the limits imposed by s 4.”²¹³ The Court of Appeal judgment did not approach matters on that basis.
120. The Court of Appeal erred in distinguishing *Billy v Australia* on the pleadings, holding that it would be tenable to plead that “there is a failure to take reasonably proportionate available measures in a timely manner to address a real and imminent risk to the right to culture that Mr Smith and those he represents have. That is not what is pleaded here.”²¹⁴
121. Mr Smith and his whānau are in the same position as the claimants in *Billy*: Mr Smith has pleaded that global warming and climate change pose real and immediate risks to the enjoyment by them of customary rights and interests, including to whenua, access to customary resources and sites.²¹⁵

²¹⁰ At [131]. [05.0055]

²¹¹ At [123]. [05.0053]

²¹² *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [25]-[34].

²¹³ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [98].

²¹⁴ *Smith* (CA), above n 5, at [131]. [05.0055]

²¹⁵ Third Draft ASOC, above n 4, at [92]-[96]. [05.0164]

122. Mr Smith’s claim includes the very claims the Court of Appeal held were tenable.²¹⁶ If there were any question of that, Mr Smith should have been given the opportunity to amend.²¹⁷

DECLARATION OF INCONSISTENCY WITH TE TIRITI

123. Mr Smith says that the Crown has a duty to comply with Te Tiriti o Waitangi / the Treaty of Waitangi.²¹⁸ He seeks a declaration that the Crown has acted, and continues to act, inconsistently with Article II of Te Tiriti.²¹⁹
124. The central issue for this Court is whether Crown conduct, including the legislative response, in relation to climate change is capable of judicial review for consistency with Te Tiriti. If that question is answered in the affirmative, the further question of whether the Crown has in fact acted inconsistently with Te Tiriti should be remitted for trial.

ERRORS IN THE COURT OF APPEAL’S JUDGMENT

125. In addressing Mr Smith’s Treaty grounds, the Court of Appeal did not engage with the substantive issue raised by the proceeding. Instead, the Court dismissed the claim on the basis that this was not an appropriate case to determine the issue.²²⁰ The reasons given included their view that Treaty-consistent decision-making was available under the CCRA,²²¹ and alternative avenues for relief existed under s 20 of the BORA and the Waitangi Tribunal.²²²
126. That approach was flawed. Mr Smith’s claim and appeal were brought as of right, and the question was whether the pleaded claim was tenable. Tenability cannot properly turn on whether a Court considers another case may provide a preferable vehicle or factual context for addressing the issue. Indeed, Mr Smith says that the profound and potentially existential effects

²¹⁶ *Smith* (CA), above n 5, at [131]. [05.0055]

²¹⁷ *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 7: “It is only where, on the facts alleged in the statement of claim, and however broadly they are stated, [no claim] can succeed that it is appropriate to strike out the proceedings at a preliminary stage.” *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89]: if a defect in pleadings can be cured the normal order is for amendment.

²¹⁸ Third Draft ASOC, above n 4, at [97]–[100]. [05.0166]

²¹⁹ At [102]. [05.0166]

²²⁰ *Smith* (CA), above n 5, at [150]. [05.0066]

²²¹ At [149] and [150]. [05.0065]

²²² At [154]. [05.0068]

of climate change upon Māori rights and interests protected by Te Tiriti make this precisely the kind of case in which such constitutional questions properly arise for judicial determination.

127. The Court also wrongly relied upon its view that the CCRA constituted a comprehensive legislative framework, including by reference to Māori participation within committees and related bodies established under the Act,²²³ without squarely addressing the substance of Mr Smith’s pleaded case that the statutory scheme *itself* is inconsistent with the Crown’s obligations under Te Tiriti.²²⁴ That issue raises substantive questions unsuitable for strike-out.
128. The Court of Appeal was also wrong to conclude that the claim should be struck out because alternative avenues for relief may exist.²²⁵ The availability of other legal forums does not negate the jurisdiction of Courts to determine legal rights or grant appropriate declaratory relief.
129. The Waitangi Tribunal performs a different constitutional function from the Courts.²²⁶ It is a commission of inquiry, has a mixed membership, and a mandate to investigate Crown conduct and make recommendations.²²⁷ By contrast, the Courts exercise judicial power - they determine legal rights and obligations, supervise the lawful exercise of public power, and grant relief. The High Court possesses inherent jurisdiction of an enduring constitutional character whereas the continued scope of the Tribunal’s function appears more tenuous – particularly in the current political climate.²²⁸ The distinct role of the Tribunal should not displace the different constitutional role of the Courts.
130. The availability of alternative statutory mechanisms should also not preclude a claimant from pursuing relief in the forum best suited to the

²²³ At [150]. [05.0066]

²²⁴ At [150]. See also Third Draft ASOC, above n 4, at [80]-[82] and [102]. [05.0158], [05.0166]

²²⁵ *Smith* (CA), above n 5, at [150]. [05.0066]

²²⁶ As put by the Court of Appeal in *Te Runanga o Murīwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 651: “[T]he Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively”.

²²⁷ See Treaty of Waitangi Act 1975, ss 4-6.

²²⁸ The 2023 Coalition Agreement between the National Party and New Zealand First included an agreement to “amend the Waitangi Tribunal legislation to refocus the scope, purpose, and nature of its inquiries back to the original intent of that legislation.” It is currently unclear what changes are intended.

nature of the claim advanced. Proceedings before specialist tribunals or commissions of inquiry do not ordinarily oust the supervisory and declaratory jurisdiction of the High Court absent clear statutory language.²²⁹ The same principle applies here.

131. The Court of Appeal therefore erred. The question of whether the Court can declare Crown action (including their legislative response) inconsistent with Te Tiriti was squarely raised by the pleadings, is challenged in the strike-out application and will ultimately require determination by this Court.

MR SMITH'S CLAIM

132. Mr Smith says that the case of *Te Heuhen v Aotea District Maori Land Board* (*Te Heuheu*)²³⁰ proceeded upon contestable historical and legal premises and should not be treated as determinative of the domestic constitutional significance or legal relevance of Te Tiriti within Aotearoa New Zealand today.
133. Mr Smith says that Te Tiriti's constitutional significance is reflected across multiple recognised sources of legal authority and constitutional obligation within Aotearoa including constitutional practice, Crown acknowledgements of continuing Treaty responsibility and the common law. Mr Smith also points to the legislative scheme within the climate context itself, including the CCRA, which expressly recognises Crown obligations to give effect to Treaty principles.²³¹ In circumstances where Parliament has indicated an intention to give effect to the Treaty, it is properly within the constitutional function of the Courts to determine whether the legislative framework and Crown conduct undertaken pursuant to it are capable of achieving Treaty-consistent outcomes, including through declaratory relief where such outcomes are not achievable.

²²⁹ For example, under section 11 of the Inquiries Act 2013 even though an inquiry can make findings of fault, inherent Court jurisdiction is retained in respect of civil, criminal or disciplinary liability. In contrast, the Employment Relations Act 2000 expressly provides the Employment Relations Authority has exclusive jurisdiction over particular matters (s 161) subject to an appeal processes.

²³⁰ *Te Heu Hen Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC) at 596–597.

²³¹ For example, CCRA, s 3A.

134. Taken together, these matters provide a sufficient juridical foundation for the availability of declaratory relief concerning inconsistency between Crown conduct and the obligations reflected in Te Tiriti in this context.

Te Tiriti as a Foundational Constitutional Compact

135. Professor Alex Frame develops the argument that the Crown acquired from the Treaty a sovereignty that was qualified and limited by the Treaty itself.²³² We respectfully draw upon some of his reasoning.
136. The first fundamental proposition is that powers founded upon a treaty must, as a matter of “elementary logic” be exercised consistently with that treaty.²³³ It is unjust and unpalatable for Te Tiriti to ground Crown authority in Aotearoa while denying legal significance to the reciprocal obligations upon which that authority was obtained. Our modern state was founded upon an exchange of promises. Through Te Tiriti the Crown obtained kāwanatanga, while guaranteeing and affirming the continued exercise of rangatiratanga by Māori.²³⁴ The language and structure of Te Tiriti reflect that it was a constitutional exchange of mutual obligation with agreed limits upon the exercise of Crown authority in Aotearoa.²³⁵
137. That Te Tiriti forms part of the constitutional whakapapa of New Zealand’s modern legal and governmental arrangements, is not seriously disputed.²³⁶ That should not be understated. To treat Te Tiriti as merely justificatory of Crown authority, while denying force to the obligations accompanying that authority, risks reducing a foundational constitutional compact to a one-

²³² See Alex Frame “Ultimate legal principles for Aotearoa New Zealand: The place of the Treaty of Waitangi” in Mark Hickford and Matthew S R Palmer (eds) *The Futures of Democracy, Law and Government: Contributions to a conference in honour of Sir Geoffrey Palmer* (Victoria University Press, Wellington, 2024) at 158.

²³³ At 162.

²³⁴ Articles 1 and 2 of Te Tiriti o Waitangi.

²³⁵ There is extensive jurisprudence that confirms Te Tiriti was an exchange of guarantees and that the Crown right to enact laws and make policies is “not absolute” but is “conditional”, “fettered” and “qualified” by the guarantees provided to Māori. See the Waitangi Tribunal in their *Tinorangatiranga me te Kawanatanga Report* (Wai 1040, 2023) at pp 38-71. In particular at p. 41 the Tribunal refers to the many previous reports that “have often said that the scope of kāwanatanga is limited by those interests protected by the guarantee of tino rangatiratanga in Article 2.” There are also a number of cases that have substantively engaged with the Treaty of Waitangi and recognised that the Treaty creates obligations on the Crown. For example see: *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) 664–665; *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 at 530 where Cooke J observes that “reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government”; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 206 and *Greenpeace Aotearoa Inc v Hirlinga Energy Ltd* [2023] NZCA 672 at [194] and [203].

²³⁶ Belich *Making Peoples – A History of New Zealanders: From Polynesian Settlement to the End of the Nineteenth Century* (Auckland, Penguin Books, 1996) at 196.

sided instrument of acquisition. Such an approach sits uneasily with the fundamental legal principle that agreements entered into must be honoured.

138. The principle *pacta sunt servanda*, that agreements must be kept, is foundational in both international and domestic law. It has long been accepted as being part of customary international law and so the common law.²³⁷ It finds expression across legal doctrine, including the law of contract and the doctrine of specific performance²³⁸ and is reflected in the Vienna Convention on the Law of Treaties.²³⁹ The principles reflected in the Vienna Convention undermine the legitimacy of treating domestic dualist doctrine as a complete answer to Crown obligations arising under Te Tiriti and support the proposition that the principle of *pacta sunt servanda* can inform how we consider our founding constitutional document.
139. Comparative common law jurisprudence also demonstrates that courts have, in certain circumstances, treated other principles reflected in customary international law, including the *jus cogens* norm of self-determination, as relevant to constitutional legitimacy within state law.²⁴⁰ The rangatiratanga protected by Te Tiriti overlaps with conceptions of internal self-determination,²⁴¹ providing further support for the legitimacy of judicial engagement with the constitutional obligations reflected in Te Tiriti.

²³⁷ Jean Salmon and Agatha Verdebout, '1969 Vienna Convention' in O Corten et al (eds) *The Vienna Convention on the Law of Treaties: A Commentary* (2nd ed, Oxford University Press, Oxford, 2025) 740 at 741-742. The preamble to the Vienna Convention also recognises that the related principles of free consent and of good faith and the *pacta sunt servanda* rule are "universally recognized". See *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253 at 268, where the ICJ observed that "the very rule of *pacta sunt servanda* in the law of treaties is based on good faith" and that even in respect of unilateral declarations that States are "entitled to require that the obligation thus created be respected". It is generally accepted that customary international law is considered to be part of the domestic law of the land: see above at [42]. The principle of *pacta sunt servanda* was recognised in *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA) at 468.

²³⁸ In the Canadian indigenous peoples context, James Youngblood Henderson in *Treaty Rights in the Constitution of Canada* (Thomson Carswell, 2007) 25 at 887-997 has suggested that "the honour of the Crown is built on the promise principle of *pacta sunt servanda* or good faith foundation of sacred and inviolate Treaty rights".

²³⁹ Article 26 of the Vienna Convention expressly affirms the principle of *pacta sunt servanda* and provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 further provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

²⁴⁰ *In the Matter of a Reference by Cabinet* [2025] FJSC 1 (Miscellaneous Case No 1 of 2025, Supreme Court of Fiji) at [97]-[99] and [208]-[209].

²⁴¹ See N Coates "Self-Determination, Te Tiriti o Waitangi, and Judicial Method in Aotearoa New Zealand" (paper presented at NZLS Human Rights Forum, March 2026) at 69-80.

***Te Heuheu* is not Exhaustive**

140. The Privy Council case of *Te Heu Heu* has long been treated as authority for the orthodox proposition that Te Tiriti is confined to the international sphere unless incorporated into domestic law by statute.²⁴² This was based on the Privy Council's conclusion that the Treaty effected a cession of sovereignty and that "It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law".²⁴³ The continuing authority of the strict dualist approach reflected in *Te Heuheu* is, however, open to question.²⁴⁴
141. The reasoning in *Te Heuheu* proceeded upon a series of incorrect assumptions. The first is the premise that the Treaty constituted a treaty of cession by which sovereignty was completely transferred from rangatira to the Crown.²⁴⁵ While the Privy Council is often presumed to have reached this finding as a result of argument, modern scholarship has established that whether or not Te Tiriti was a treaty of cession was not in issue in the appeal.²⁴⁶ The case for the appellant was advanced on the basis that Te Tiriti was a treaty of cession - their Lordships simply proceeded on that basis. Subsequent historical and legal analysis has also substantially challenged the underlying characterisation. In particular, the findings of the Waitangi Tribunal in the *Te Paparahi o Te Raki Inquiry*, following extensive evidential hearings, rejected the proposition that the rangatira who signed Te Tiriti understood themselves to have ceded sovereignty in the sense contemplated by *Te Heuheu*.²⁴⁷ Scholarly commentary has similarly

²⁴² For background context to the case see: K Sanders "The King in all his cabinets": Crown and Empire in *Te Heuheu Tukino v Aotea District Maori Land Board* (April 01, 2026). The University of Auckland Faculty of Law Research Paper Series, Available at SSRN:<<https://ssrn.com/abstract=5704684>>. For an outline of the facts of the case see Alex Frame "Ultimate legal principles for Aotearoa New Zealand: The place of the Treaty of Waitangi" in Mark Hickford and Matthew S R Palmer (eds) *The Futures of Democracy, Law and Government: Contributions to a conference in honour of Sir Geoffrey Palmer* (VUP, Wellington, 2024) at 168-170. To date there have been no cases where New Zealand's highest court has had to reconsider *Te Heuheu*.

²⁴³ *Te Heuheu*, above n 230, at 596-597.

²⁴⁴ Writing nearly 20 years ago, Alex Frame observed that if the doctrine established in 1941 was "destined to suffer a slow and undignified demise – a death of a thousand cuts" through judicial adjustments and legislative confusion" it might be "the decent thing to bring matters to a merciful end by an act of jurisprudential euthanasia". See Alex Frame "Hoani Te Heuheu's case in London 1940–1941: an explosive story" (2006) NZULR 149 at 171.

²⁴⁵ See Frame "Hoani Te Heuheu's case in London 1940–1941: an explosive story", above n 244.

²⁴⁶ Katherine Sanders "'The King in all His Cabinets': Crown and Empire in *Te Heuheu Tukino v Aotea District Maori Land Board*" (2026) 31 NZULR 465 at 475.

²⁴⁷ Waitangi Tribunal, Report on *Te Paparahi o Te Raki Inquiry* (WAI 1040) 2014 at 529.

questioned whether Te Tiriti is properly characterised as a treaty of cession, with some describing it as a treaty of protection or constitutional compact.²⁴⁸ It has also been suggested that Te Tiriti could be considered a bilateral agreement recognising the rights of the tangata whenua and a unilateral declaration of a sovereign nation's intention to be bound.²⁴⁹ At minimum, the constitutional character and legal nature of Te Tiriti, upon which *Te Heuhe* proceeded, cannot now be regarded as so settled as to foreclose reconsideration.

142. Second, it is also significant that the strict legal doctrine established in *Te Heuhe* is not supported by the authorities on which it purports to rely. The Privy Council relied on Lord Dunedin's statement in a 1924 appeal where his Lordship said that where a territory is acquired by a sovereign state, "Any inhabitant of the territory can make good in the municipal courts established by the new sovereign *only such rights as that sovereign has, through his officers, recognised*".²⁵⁰ The other cited 1915 case of *Secretary of State for India v Bai Rajbai* also asserts a less restrictive doctrine which recognises legally enforceable rights that a new sovereign "*by agreement express or implied, or by legislation*" confers.²⁵¹ These precedents would not *solely* restrict the legal relevance of Te Tiriti to direct statutory incorporation. Instead, they are more consistent with the jurisprudence that has developed in Aotearoa New Zealand over time that recognises Te Tiriti as being constitutionally significant and capable of informing the interpretation and exercise of public power, including where legislation is silent as to Te Tiriti.²⁵²

143. Further, legal instruments and norms may derive force from multiple sources simultaneously. Certain human rights norms, for example, operate

²⁴⁸ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2009) at 164, 165 and 167 analyses the proposition and concludes it is "difficult to accept that the Treaty of Waitangi was a treaty of cession of sovereignty at international law." He concludes that the Treaty is best regarded as a valid international treaty of protection. Sir Robin Cooke in "Introduction to commemorative issue to mark the 150th anniversary of the Treaty of Waitangi" (1990) 14 NZULR 1 where the Treaty is described as "a grand constitutional compact akin to our Magna Carta". Ned Fletchers book on "The English Text of the Waitangi Tribunal" (Bridget Williams Books Ltd, Wellington, 2022) at 17 concludes that British sovereignty was not inconsistent with plurality in government and law and therefore makes the argument that the English and Māori texts of the Treaty reconcile. Whilst this does not directly assess the question of whether the Treaty was one of cession, it clearly contemplates that any authority received by the British was one that was intended to be qualified.

²⁴⁹ *Huakina Development Trust v Waikato Valley Authority*, above n 235, at 206.

²⁵⁰ *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357 at 360.

²⁵¹ *Secretary of State for India v Bai Rajbai* (1915) LR 42 IA 229.

²⁵² *Huakina Development Trust*, above n 235, at 210.

concurrently as principles of customary international law, treaty obligations, interpretive presumptions, and domestically recognised rights in statutory or unwritten form.²⁵³ Whilst Te Tiriti is unique in its constitutional character, it is also capable of possessing multiple juridical dimensions simultaneously, and its constitutional and legal significance is more complex than the orthodox dualist approach reflected in *Te Heuheue* suggests.

144. The question of the extent to which Te Tiriti defines the proper scope of Crown authority and directly constrains the Crown is unexamined by courts in New Zealand because *Te Heuheue* has been taken as a binding an absolute bar on that occurring. In other jurisdictions jurisprudence on how treaties between the Crown and indigenous people should be applied has continued to develop. For example, in *Simon v R* the Supreme Court of Canada observed that:²⁵⁴

While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.

145. Professor Brian Slattery similarly observes that “there is reason to think that some treaties constitute both international and domestic instruments, producing legal effects at both levels”.²⁵⁵ He also describes the law relating to Indigenous treaties as being *sui generis* in character²⁵⁶ and observes that many historic treaties are best understood as “constitutional agreements”.²⁵⁷
146. These Canadian authorities arise within a distinct constitutional context and must be approached with appropriate caution. However, they lend support to the broader proposition that agreements between Indigenous peoples and the Crown are unique and may possess constitutional and legal

²⁵³ See for example *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266; and James Crawford *Brownlie’s Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 48-52 and 615-620.

²⁵⁴ *Simon v R* [1985] 2 SCR 387 at 404. See also Rebecca Tsosie “Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights” (2000) 47 UCLA Law Review 1615 at 1623-1625.

²⁵⁵ See generally Brian Slattery “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Canadian Bar Review 196 at 209 (quote) and 207-210 more generally.

²⁵⁶ Slattery, above n 255.

²⁵⁷ Slattery, above n 255, at 209.

characteristics not fully captured by the international law classifications assumed in *Te Heuheu*.

147. Whether or not *Te Heuheu* was correctly decided, it did not consider and nor does it preclude a declaration of inconsistency. Mr Smith’s case therefore does not demand that the Court must overrule *Te Heuheu* or conclusively determine the full juridical status of Te Tiriti. Rather, the present appeal concerns the narrower question of whether *Te Heuheu* prevents the Courts from granting declaratory relief concerning inconsistency between Crown conduct and Te Tiriti. Given that matter was not directly before the Privy Council and Te Tiriti’s recognised constitutional significance within the domestic legal order, Mr Smith says that it does not.

Te Tiriti Possesses Contemporary Constitutional Significance

148. The Courts have long recognised that Te Tiriti gives rise to obligations and duties owed by the Crown, including in some of the earliest New Zealand authorities addressing the relationship between Māori and the State. For example, in *R v Symonds*, the Supreme Court used the language of the Crown having “duties of protection”.²⁵⁸ In *Re Lundon v Whitaker Claims*, the Court of Appeal referred to the Crown being “bound” by “its own solemn engagements”, implicitly referring to Te Tiriti.²⁵⁹ Even in the decision of *Wi Parata v Bishop of Wellington*, Prendergast CJ observed that the Crown exercised sovereignty subject to “correlative duties” including being a “supreme protector of the aborigines” and “securing them against any infringement of their right of occupancy”.²⁶⁰ The language of Crown duty and obligation flowing from Te Tiriti has a history dating back to when it was first signed.²⁶¹

²⁵⁸ *R v Symonds* (1847) NZPCC 387 (SC) at 391.

²⁵⁹ *Re Lundon and Whitaker Claims* (1872) 2 NZCA 41 at 49. See also *Mueller v Taupiri Coal-Mines Limited* (1900) 20 NZLR 89 (CA) at 117 in which Edwards J observed that the Treaty did not deny proprietary rights to Māori but rather guaranteed them and that there was a presumption the Crown would properly recognise its obligations; and *Baldick v Jackson* (1910) 30 NZLR 343 (SC) at 344-345, in which Stout CJ declined to apply an English statute affirming a right to take whales to New Zealand, holding “... it would have been impossible to claim [the whale] without claiming it against the Maoris, for they were accustomed to engaging in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with – they were to be left in undisturbed possession of their lands, estates, forests, fisheries [etc]”.

²⁶⁰ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) (SC) at 79.

²⁶¹ *Tinorangatiranga me te Kawanatanga Report*, above n 235, at 87 in which the Tribunal noted that “Today, the Crown has the power and capacity to recognise, respect, and give effect to the treaty guarantee of tino rangatiratanga. It has had this power since it signed te Tiriti. Its duty to give effect to the guarantee of tino rangatiratanga is as important today as it was in 1840.” Sir Geoffery Pamer and Dr Andrew Butler in their book

149. The constitutional and legal context of New Zealand in 2026 is materially different from the imperial context in which *Te Heuheu* was decided in 1941. Te Tiriti now occupies a largely accepted position within New Zealand’s constitutional arrangements.²⁶² The *Laws of New Zealand* describes it as “a fundamental part of New Zealand’s constitution”.²⁶³
150. The Cabinet Manual appends the full texts of the Treaty / Te Tiriti.²⁶⁴ In it, Sir Kenneth Keith describes the Treaty as “a major source of New Zealand’s constitutional arrangements” and recognises that the New Zealand constitution increasingly reflects the view that the Treaty is a founding document of government in New Zealand.²⁶⁵ The Manual expressly acknowledges that the Treaty “may indicate limits in our polity on majority decision-making”,²⁶⁶ and that a balance has to be struck between the sovereignty of the people exercised through Parliament and the protection of fundamental social and constitutional values.²⁶⁷ The Manual further identifies “the principles of the Treaty of Waitangi” as among the “legal principles and obligations” with which legislation must comply, and requires Ministers to draw attention to any implications proposed legislation may have for Treaty principles.²⁶⁸
151. The Cabinet Office Circular CO (19) 5 sets out guidelines agreed by Cabinet for policy-makers considering the Treaty in policy development and implementation.²⁶⁹ The Circular describes the Treaty as “one of the major sources of New Zealand’s constitution”.²⁷⁰ It states that “[t]he Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and acknowledgements of Maori rights and interests within that shared citizenry”.²⁷¹ The Circular further recognises

A Constitution for Aotearoa New Zealand (Victoria University Press, Wellington, 2016) at 148 described the Treaty as “... a key legal source of the New Zealand Government’s moral and political claim to legitimacy in governing the country”.

²⁶² See for example, *Trans-Tasman Resources v Taranaki-Wanganui Conservation Board*, above n 97, at [151] and [296].

²⁶³ The Laws of New Zealand, *Treaty of Waitangi*, para 1.

²⁶⁴ Department of Prime Minister and Cabinet, Cabinet Manual 2023 [**Cabinet Manual**], Appendix A.

²⁶⁵ Cabinet Manual, above n 264, p 2.

²⁶⁶ At p 2.

²⁶⁷ At p 5.

²⁶⁸ At [7.68].

²⁶⁹ Cabinet Office Circular, CO19(5) [**Cabinet Office Circular**].

²⁷⁰ At [2].

²⁷¹ At [7].

that it was through Article One that the Crown obtained the right to govern,²⁷² while Māori were guaranteed tino rangatiratanga under Article Two.²⁷³ It states that “[t]his promise holds true today” and that “[i]t is the duty of the Crown to respect the right of Māori to control decisions in relation to their lands and the things of value to them.”²⁷⁴ The Circular explains that those rights are exercised within the context of the Crown’s right to govern²⁷⁵ and emphasises the importance of policy-makers conducting their work in a manner that results in Treaty-consistent decisions.²⁷⁶

152. The Legislation Design and Advisory Committee Guidelines state that “legislation should be consistent with the Treaty of Waitangi”.²⁷⁷ The Guidelines also recognise the “vital constitutional importance” of the Treaty and state that the development of policy and legislation, as well as the final legislative product, should show appropriate respect for the spirit and principles of the Treaty.²⁷⁸ They further acknowledge that the Treaty requires the Government and Māori to act towards each other reasonably and in good faith, and that one means of achieving this is through the active protection by the Crown of Māori rights and interests under the Treaty.²⁷⁹
153. Treaty settlements have also become an accepted feature of our constitutional landscape. In December 2024 it was reported that, 80 Treaty settlements had been enacted into law.²⁸⁰ In those settlements, the Crown formally acknowledges and apologises for historical breaches of Te Tiriti o Waitangi and provides redress.²⁸¹ The significance of settlements is not confined to retrospective acknowledgement.²⁸² Many settlements contain forward-looking commitments and expressions that the Crown will act

²⁷² At [23].

²⁷³ At [47].

²⁷⁴ At [47].

²⁷⁵ At [47].

²⁷⁶ At [42].

²⁷⁷ *Legislation Guidelines*, above n 92, at 24.

²⁷⁸ At 24 and 28.

²⁷⁹ At 28.

²⁸⁰ Te Arawhiti *Whole of System (Core Crown) Report on Treaty Settlement Delivery* (The Office for Māori Crown Relations, Wellington, 2024) at p 5.

²⁸¹ For example, Ngāi Tūwharetoa Deed of Settlement of Historical Claims dated 8 July 2017.

²⁸² For example, in the Ngāi Tahu Deed of Settlement at 2.1 at 2-4 it states: “The Crown apologises to Ngāi Tahu for its past failures to acknowledge Ngāi Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngāi Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwa of Ngāi Tahu Whānui.”

consistently with Treaty principles in the future. For example, the Deed of Settlement with Ngāti Tūwharetoa records the Crown’s “unreserved” apology for the ways in which it dishonoured its obligations under Te Tiriti and concludes by stating:²⁸³

The Crown looks forward to building an enduring relationship of mutual trust and cooperation with Ngāti Tūwharetoa based on Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, and to support you in the revitalisation of ngā hapu o Ngāti Tūwharetoa.

154. Through treaty settlements, the Crown repeatedly affirms the historical and continuing normative force of Te Tiriti and the obligation of the Crown to conduct itself consistently with Treaty principles. Even though settlements are political in mechanism, they evidence acknowledgment of constitutional obligations.
155. The legislature has also taken steps to embed Te Tiriti across a wide range of legislation.²⁸⁴ For example, one of the purposes of the Supreme Court Act 2003 was to enable important legal matters, “including legal matters relating to the Treaty of Waitangi”, to be resolved with an understanding of New Zealand conditions, history, and traditions.²⁸⁵
156. Consistent with these developments, the Courts have also increasingly recognised Te Tiriti as capable of informing constitutional standards and the exercise of public power. In particular, the Courts have recognised that:
 - (a) the Treaty is a fundamental constitutional document;²⁸⁶

²⁸³ At [3.50].

²⁸⁴ The first example of legislation recognition was the Land Clams Ordinance 1841.

²⁸⁵ See the Supreme Court Act 2003, s 3(1)(a)(ii). The Senior Courts Act 2016 continued that recognition by expressly identifying matters relating to the Treaty of Waitangi as important “legal matters” presumptively treated as “significant issues” for the purposes of leave to appeal. See Senior Courts Act 2016, s 66(1).

²⁸⁶ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at [516]; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 682; *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission & Ors* CA209/98, 18 October 1999 at [64] per Thomas J (“The Treaty of Waitangi is this country’s fundamental constitutional document”); *Trans-Tasman Resources*, above n 97, at [269].

- (b) the rights in Te Tiriti o Waitangi are similar to fundamental common law rights and engage the principle of legality;²⁸⁷
- (c) the Treaty can aid in statutory interpretation even where legislation does not expressly refer to it.²⁸⁸
- (d) there is a presumption that Parliament intends to legislate consistently with the Treaty and clear language would be needed to refute that presumption;²⁸⁹
- (e) Treaty clauses should be given broad and generous construction;²⁹⁰
- (f) Te Tiriti compliance can be a mandatory relevant consideration;²⁹¹ and
- (g) declaratory relief concerning Treaty inconsistency has been recognised as at least arguable within New Zealand public law.²⁹²

157. This case law indicates we have already moved beyond the strict approach in *Te Heuhen*.²⁹³ It also demonstrates that Te Tiriti is increasingly treated in a manner analogous to other recognised constitutional norms and principles within the legal order of Aotearoa New Zealand.²⁹⁴

158. These collective developments are significant because they demonstrate that Te Tiriti is not treated as a historical instrument operating exclusively upon the international plane or one that is strictly confined to statutory incorporation. Rather, Te Tiriti has increasingly been recognised as possessing constitutional significance capable of informing the

²⁸⁷ *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, above n 97, at [151] and [296]; *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116 at [90]-[93]; *Ulrich v Attorney-General* [2022] NZCA 38 at [55] and Dean Knight “New Zealand: Te Tiriti o Waitangi norms, discretionary power, and the principle of legality (at last)” (2022) Public Law.

²⁸⁸ *Huakina Development Trust* [1987] 2 NZLR 188 at 210; *Barton-Prescott* [1997] 3 NZLR 179 (HC) at 184. *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46]; *Ngāti Whātua Ōrākei Trust* [2022] NZHC 843, [2022] 3 NZLR 601 at [68]; *Ulrich v Attorney General* [2022] 2 NZLR 599 (CA) at [62].

²⁸⁹ *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board*, above n 97, at [269].

²⁹⁰ See above n 97.

²⁹¹ *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA).

²⁹² *The Kivi Party Inc v Attorney-General* [2020] NZCA 80, [2020] 2 NZLR 224 at [50].

²⁹³ See for example: Natalie Coates “The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence” in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (2022, LexisNexis NZ) 65 at 80–81.

²⁹⁴ For example, the Treaty attracts similar presumptions to the rights recognised in the BORA; See s 6.

interpretation, exercise, and supervision of public power within the domestic legal order.

The Intersection with Judicial Review

159. As illustrated above, the Crown has repeatedly acknowledged, both generally and within specific statutory frameworks, that it owes continuing responsibilities under Te Tiriti and that public decision-making should proceed consistently with Treaty principles.
160. The rationale of judicial review extends beyond the enforcement of strictly binding legal rules.²⁹⁵ It includes ensuring that public power is exercised according to minimum standards of legality, rationality, consistency, and good administration.²⁹⁶ This explains why grounds of review such as breach of natural justice and legitimate expectation may arise in circumstances extending beyond the direct application of statutory duties.²⁹⁷
161. Courts therefore exercise supervisory jurisdiction by reference to standards, policies, representations, and commitments adopted by public decision-makers, including where those standards are not themselves directly enforceable legal obligations.²⁹⁸ In *Te Pou Matakana Limited v Attorney-General*, for example, the High Court reviewed Crown decision-making against a clear public representation that Treaty-consistent processes would be followed and found a breach.²⁹⁹ If the High Court can review internal decisions taken by Cabinet for consistency with non-legally binding guidelines on ex gratia payments,³⁰⁰ or require the Ministry of Health to follow Te Tiriti-compliant processes based on commitments in

²⁹⁵ For example, see Lord Steyn's comments in *Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289 at [24] as well as *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [29] and *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]. These principles have been applied in a New Zealand, for example see *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683.

²⁹⁶ Mark Elliot "Judicial Review's Scope, Foundations and Purposes: Joining the Dots" [2012] NZ Law Rev 75.

²⁹⁷ For example, the Courts have held decision-making in the context of Treaty settlements can be reviewable for consistency with the principles of natural justice and legitimate expectation. See: *Ngāti Mutunga O Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations* [2019] NZHC 1942 at [25] noting that with exercises of non-statutory powers "the scope for public law wrongs is reduced ...[but] it is not eliminated"; and *Te Ara Rangatū O Te Iwi O Ngāti Te Ata Waiobua Incorporated v Attorney-General* [2020] NZHC 1882 (*Ngāti Te Ata*), holding the High Court had jurisdiction to review the Crown approach to negotiations for breach of legitimate expectation.

²⁹⁸ For example, see Lord Steyn's comments in *Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289 at [24] as well as *Mandalia v Secretary of State for the Home Department*, above n 295, at [29] and *R (Nadarajah) v Secretary of State for the Home Department*, above n 295, at [68]. These principles have been applied in a New Zealand, for example see *Pora v Attorney-General*, above n 295.

²⁹⁹ *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, [2022] 2 NZLR 148 at [112] and [133].

³⁰⁰ *Pora v Attorney-General*, above n 295.

documents.³⁰¹ Mr Smith says the Courts must be able to assess Crown conduct against what is arguably the most fundamental document in the constitution of Aotearoa New Zealand.

162. The Crown’s representations and repeated recognition of Te Tiriti as a foundational constitutional instrument and source of continuing constitutional responsibility, supports the existence of a judicially recognisable Te Tiriti standard capable of informing public law review. That conclusion is consistent with the rationale of judicial review and the Courts role in the supervision of public power.

The Common Law and Climate Statutory Frameworks

163. The justiciability of Te Tiriti is also reflected in its interaction with tikanga as recognised by the common law, and in the statutory frameworks governing climate-related decision-making.
164. Te Tiriti did not merely confer rights upon Māori that otherwise lacked legal existence but Māori rights and interests existed independently under tikanga prior to the arrival of the Crown.³⁰² The Courts have long recognised that tikanga forms part of the common law of Aotearoa New Zealand.³⁰³ Te Tiriti guaranteed and affirmed those existing rights and forms of authority, while simultaneously providing a basis for Crown authority within Aotearoa.³⁰⁴ In that respect, Te Tiriti occupies a distinctive constitutional position sitting at the intersection of inter-legality within New Zealand’s constitutional framework.³⁰⁵ Questions concerning the consistency of Crown conduct with Te Tiriti therefore concern questions of law and constitutional ordering rather than matters of political morality alone. That

³⁰¹ *Te Pou Matakana Ltd v Attorney-General*, above n 299.

³⁰² See Robert Joseph “Re-creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) Waikato Law Review: Taumauri, 74-97 at 74.

³⁰³ *Ellis v R* (Continuance) [2022] NZSC 114, [2022] 1 NZLR 239 at [19] and [108]-[110] per Glazebrook J, [171]-[174] per Winkelmann CJ, [257]-[259] per Williams J and [279] per O’Regan and Arnold JJ.

³⁰⁴ Te Tiriti guaranteed rangatiratanga which is grounded and sourced in tikanga. Robert Joseph “Re-creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) Waikato Law Review: Taumauri, 74-97 at 76-77 also affirms that Māori customary law or tikanga is a taonga protected within Article 2 of Te Tiriti and that Te Tiriti sought to encourage the integration and reconciliation of Māori customary and English common law.

³⁰⁵ Nicole Roughan discusses the concept of interlegality in “Appendix 3: Interlegality, interdependence and independence: Framing relations of tikanga and state law in Aotearoa New Zealand” in *He Poutama* (NZLC SP24, 2023). She considers Te Tiriti could be interpreted to “constitute an interlegal domain between Crown and Māori authorities” (at [6] p 3) and to “constitutionalise interlegality” (at [6] p 6).

constitutional and legal character is a further reason why issues concerning Te Tiriti consistency are capable of judicial consideration.

165. The constitutional significance of Te Tiriti is also reflected within the statutory framework governing climate-related policy and decision-making. Parliament has enacted a number of provisions recognising Treaty principles and signalling an intention that climate-related public decision-making proceed consistently with the Crown's Treaty responsibilities. For example:

- (a) Section 3A of the CCRA provides that, “in order to recognise and respect the Crown’s responsibility to give effect to the principles of the Treaty of Waitangi”, the Act establishes a range of obligations throughout the statutory scheme. The need to meet Crown guarantees under Te Tiriti, and the impacts on Māori if it does not meet them, have been acknowledged by it.³⁰⁶
- (b) Section 4 of the Crown Minerals Act 1991 provides that all persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
- (c) Section 4 of the Land Transport Management Act similarly provides that “in order to recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi” it provides requirements intended to facilitate participation by Māori in land transport decision-making processes.

166. The relevant statutory framework does not expressly exclude or override Te Tiriti. Rather, the express statutory recognition of Treaty principles provides a clear constitutional and legal foundation for the Court to assess whether Treaty-consistency is achievable within the bounds of the legislation enacted by Parliament. The present claim does not seek an abstract advisory opinion concerning Te Tiriti. It concerns whether statutory schemes enacted by Parliament are capable of operating

³⁰⁶ Ministry for the Environment *Te Hau Mārohi ki Anamata: Towards a Productive, Sustainable and Inclusive Economy — Aotearoa New Zealand's First Emissions Reduction Plan* (Wellington, May 2022) at 41-43.

consistently with the Treaty obligations that Parliament itself has expressly recognised within those schemes.

167. There are also significant overlaps between obligations reflected in Te Tiriti and rights recognised elsewhere within New Zealand's constitutional and statutory framework, including rights relating to culture, participation, and collective identity protected under the BORA. Declarations of inconsistency are already recognised as an available constitutional response in relation to these constitutional rights and obligations.³⁰⁷ The existence of such overlap demonstrates that declaratory relief concerning Te Tiriti would sit comfortably within New Zealand's existing constitutional framework rather than constituting a novel departure from it.
168. As illustrated, Te Tiriti does not fit neatly within a single orthodox juridical category.³⁰⁸ Rather, its significance is reflected across multiple recognised sources of legal authority and constitutional obligation within New Zealand. Taken together, they support the conclusion that questions concerning Te Tiriti consistency are properly capable of judicial recognition and declaratory determination within New Zealand's existing constitutional framework.

Why Declaratory Relief Should be Granted

169. Mr Smith's primary submission is that Te Tiriti operates as a substantive constitutional constraint upon the exercise of Crown power and is capable of direct legal recognition by the Courts. However, the immediate relief sought is a declaration of inconsistency. That does not require the invalidation of legislation nor the displacement of parliamentary sovereignty.³⁰⁹ Accordingly, even if the Court prefers to leave questions of direct enforceability for another day, it is nevertheless submitted that the Courts possess jurisdiction to recognise and declare inconsistency between

³⁰⁷ *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 where the Supreme Court held that the High Court had jurisdiction to make a declaration that legislation was inconsistent with the New Zealand Bill of Rights Act 1990 and such a power was consistent with the judicial function.

³⁰⁸ This aligns with the uncodified and evolving character of New Zealand's constitutional arrangements that has often been regarded as permitting a degree of constitutional flexibility and incremental development not easily accommodated within rigid juridical categorisation. See generally

³⁰⁹ In BORA context, the Courts have recognised that declarations of inconsistency do not displace parliamentary sovereignty or prevent Parliament from legislating inconsistently with protected rights where it clearly elects to do so. See *Attorney-General v Taylor*, above n 307, at [46].

legislation or Crown conduct and the constitutional obligations reflected in Te Tiriti.

170. Declaratory relief is a well-established and flexible remedy within New Zealand public law.³¹⁰ Declarations serve an important function by identifying and clarifying legal rights, obligations, and constitutional boundaries. The declaratory jurisdiction is broad and capable of incremental development in response to evolving circumstances.³¹¹
171. In *Attorney-General v Taylor*, the Court of Appeal confirmed that superior courts possess jurisdiction to issue declarations that legislation is inconsistent with rights affirmed in BORA notwithstanding the absence of express statutory authorisation.³¹² *Taylor* is significant not because Te Tiriti is identical to BORA, but because it confirms the capacity of superior courts to recognise declaratory remedies in response to fundamental constitutional norms.
172. Declaratory relief is not confined to claims founded upon statute, deed,³¹³ contract, or other established private law causes of action. Courts have recognised that declarations may also be available in relation to broader principles and obligations recognised within the common law and public law. In *Smith v Fonterra & Ors*, for example, the High Court held that it was “seriously arguable” that declaratory relief founded in equity was available.³¹⁴ This suggests that the declaratory jurisdiction of the Courts is sufficiently flexible to encompass declarations such as that sought by Mr Smith.

³¹⁰ Declaratory relief is flexible and discretionary. See *Mark v Attorney-General* [2011] NZCA 176, [2011] 2 NZLR 538 at [91]. It is, however, generally the case that a successful plaintiff is entitled to the vindication of a declaration unless there are special considerations to the contrary or extremely strong reasons for refusal. See *Williams v Auckland Council* [2015] NZCA 479 at [99].

³¹¹ In *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 676 the Court held that declaratory relief “had very wide scope in the 20th century” and commented that a refusal to exercise a Royal prerogative (which is a non-statutory power) could be reviewable in a simple action for a declaration.

³¹² *Attorney-General v Taylor*, above n 307.

³¹³ It is notable that the High Court in *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [61]–[62] found that the Court could make declarations of inconsistency with Deeds of Settlement. In this case his honour noted that there were rights at issues that may be justiciable and a “satisfactory legal yardstick”. This did not interfere in the legislative process.

³¹⁴ *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 at [33].

173. The Courts are also institutionally well-equipped to undertake an assessment of Te Tiriti consistency given that they, alongside the Waitangi Tribunal, have already developed substantial jurisprudence around the meaning and application of Treaty principles.
174. Declaratory relief performs an important constitutional and juridical function, even where it does not invalidate legislation or compel legislative amendment. In this case it would:
- (a) provide formal confirmation and vindication by publicly marking and upholding the constitutional significance of the rights and obligations in question;³¹⁵
 - (b) possess substantial practical and constitutional utility for Ministers, departments, and other public decision-makers exercising powers and functions by providing guidance concerning the extent to which Treaty-consistent conduct is achievable within the schemes that direct it; and
 - (c) clarify disputed constitutional questions concerning the relationship between statutory powers and Treaty obligations.
175. Further, in the human rights context declarations have been recognised as having utility in demonstrating the extent to which domestic law conforms with internationally recognised rights and obligations.³¹⁶ Similar considerations arise in relation to Te Tiriti, as Māori have repeatedly invoked international indigenous rights and human rights mechanisms in relation to Crown conduct that is inconsistent with Te Tiriti.³¹⁷ The declaration sought by Mr Smith is therefore not abstract but would serve real practical utility in a context of genuine controversy, advanced by a plaintiff with a real interest in the outcome.

³¹⁵ *Vogel v Attorney-General* [2013] NZCA 545, [2014] NZAR 67 at [83]-[84].

³¹⁶ *Attorney-General v Taylor*, above n 307, at [55].

³¹⁷ For example, see: Committee on the Elimination of Racial Discrimination *New Zealand Foreshore and Seabed Act 2004* UN doc CERD/C/DEC/NZL/1 (11 March 2005); Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Mission to New Zealand* UN doc E/CN.4/2006/78/Add.3 (13 March 2006); and Human Rights Committee *Apirana Mahuika v New Zealand* UN Doc CCPR/C/70/D/547/1993 (27 October 2000).

176. In *Temese v Police*, Cooke P observed that a judicial statement of inconsistency might be criticised by some as “gratuitously criticising Parliament by intruding an advisory opinion” but further suggested that “possibly that price ought to be paid”.³¹⁸ Where legislation or Crown conduct is inconsistent with the constitutional obligations reflected in Te Tiriti o Waitangi, formal judicial acknowledgment of that inconsistency is itself constitutionally significant and promotes accountability and transparency. The possibility of constitutional dialogue, scrutiny, and political consequence is not a reason to withhold declaratory relief, but one of the reasons why such relief matters.

Dated 6 June 2026

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³¹⁸ *Temese v Police* (1992) 9 CRNZ 425 (CA) at 4.