

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 10/2025

BETWEEN

MICHAEL JOHN SMITH

Appellant

AND

ATTORNEY-GENERAL

Respondent

WRITTEN SUBMISSIONS FOR
TE KĀHUI TIKA TANGATA HUMAN RIGHTS COMMISSION
INTERVENER

Dated: 14 July 2026

Counsel certify that these submissions are suitable for publication under the
Supreme Court Submissions Practice Note 2023

Solicitor:	E C Vermunt Te Kāhui Tika Tangata Human Rights Commission
Address:	PO Box 10424 Wellington 6140
Email:	ecleanorv@tikatangata.org.nz

Counsel:	A S Butler KC R A Kirkness H Z Yang Thorndon Chambers
Address:	PO Box 1530 Wellington 6140
Email:	andrew.butler@chambers.co.nz robert.kirkness@chambers.co.nz hannah.yang@chambers.co.nz

Table of Contents

I.	Overview	1
II.	Sections 8 and 20 NZBORA impose positive obligations	2
III.	Right to life includes a minimum baseline of quality	6
IV.	Structure of the analysis for positive obligation NZBORA claims ..	6
V.	Jurisdiction or competence to hear the NZBORA claims.....	12
VI.	Te Tiriti o Waitangi	13

MAY IT PLEASE THE COURT:

I. Overview

1. The appellant seeks the courts’ assessment of the consistency of the State’s climate change response with ss 8 (right to life) and 20 (right to culture) of the New Zealand Bill of Rights Act 1990 (**NZBORA**). This calls on the courts to fulfil their orthodox and constitutional functions of interpreting and applying the law, including to assess legislation – the Climate Change Response Act 2002 (**CCRA**) – against the legal standards under NZBORA. The courts’ function does not change merely because the claims rely on positive obligations. The same *legal* questions arise: what is the content of the legal obligation? What legal standard results from it? Has some state of affairs breached that standard? Is the breach demonstrably justified?

2. Nor does the function change because of the momentous and consequential nature of the broader debate over the existential threat to humankind posed by climate change. The legal questions that come before the courts under NZBORA will often be nested within broader social, political or economic debates. The role of a court is to identify and answer the legal questions before it. As this Court has recently emphasised in *Attorney-General v Chisnall*, courts “cannot shirk the responsibility to address issues of rights inconsistency”.¹

3. There is nothing undemocratic about the courts assessing the rights-consistency of legislation.² It is an essential feature of New Zealand’s liberal democracy. As Lord Bingham explained in *A v Secretary of State for the Home Department*: “the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself”.³

4. Against that background, Te Kāhui Tika Tangata Human Rights Commission (the **Commission**) addresses the following points below: (a) positive obligations under ss 8 and 20 NZBORA; (b) s 8’s minimum baseline of quality; (c) the structure of analysis for positive obligations claims; (d) jurisdiction or

¹ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR768 at [252].

² As suggested by the Crown Submissions at [8].

³ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [42].

competence to hear the appellant's NZBORA claims; and (e) te Tiriti o Waitangi (te Tiriti).

II. Sections 8 and 20 NZBORA impose positive obligations

5. The Court of Appeal accepted that positive steps may be required to protect against threats to life and culture under ss 8 and 20.⁴ It was correct to do so. How ss 8 and 20 are framed tells us nothing about the positive or negative nature of what the State must do.⁵ What it tells us is the content of the right that individuals have. Those rights are not to be deprived of life or culture, which logically equates to having one's life and culture preserved.

6. *First*, what NZBORA requires the State to do can be seen in the first of NZBORA's twin purposes, which is to "affirm, protect and promote" human rights and fundamental freedoms.⁶ This envisages a *proactive* role for the State in ensuring the rights in NZBORA are upheld.⁷ In this case, it means the State must protect the right to have life and culture preserved (or not deprived).

7. What then is specifically required of the State to protect those rights depends on the threat at issue. If life or culture is threatened by what the State might do or is doing, then the State has a negative obligation to stop or refrain. If life or culture is threatened by private actors or natural phenomena, then the State has a positive obligation to take all reasonable steps to prevent the deprivation of life and/or culture. For example, the State has an obligation to criminalise and take positive steps to prevent the murder of individuals by other individuals.⁸ The obligation is driven by the right, not by some formal act/omission distinction. This position should be uncontroversial.⁹ It is mandated by the well-settled principle that the rights protected under NZBORA are to be interpreted generously to give

⁴ CA Judgment at [88] and [113]-[116].

⁵ Cf. Crown Submissions at [127.1] and [147]-[149].

⁶ NZBORA, Long Title (a).

⁷ Cf. Crown submissions at [149]. The fact NZBORA does not say "protected by law" is no reason to read down NZBORA's purpose of protecting and promoting human rights.

⁸ UNHRC *General Comment No 36* UN Doc CCPR/C/GC/36 at [21].

⁹ Cf. the Crown's submissions at [146]-[151], which seem to suggest that the State would not be obligated to maintain criminal legislation against murder or a police force, as long as the State itself is not in the business of killing "without procedural safeguards".

individuals their full measure.¹⁰ It is also mandated by New Zealand's international obligations.

8. *Second*, NZBORA has as its other express purpose to “affirm New Zealand’s commitment to the [ICCPR]”.¹¹ Thus, NZBORA’s rights and freedoms should be interpreted consistently with their international analogues under the ICCPR to the extent that their terms and purpose permit.¹² It would be a retrograde step for the New Zealand courts to create a “gap” between the content of rights in NZBORA and the content of the international analogues to those rights under ICCPR.¹³

9. In respect of life, the UNHRC’s approach to art 6 of the ICCPR is to interpret it as obliging State parties to: (a) exercise due diligence and adopt appropriate laws to protect the lives of individuals from deprivations of life caused by non-state entities, as well as from “all reasonably foreseeable threats”;¹⁴ and (b) take special measures to protect those in vulnerable positions whose lives are placed at particular risk from specific threats, such as indigenous peoples.¹⁵ The UNHRC further recognises in General Comment 36 that the content of art 6 should be informed by principles of international environmental law.¹⁶ These include the customary international law rule on prevention,¹⁷ the precautionary

¹⁰ See, for example, *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [31] per Glazebrook and Hammond JJ; *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] per Elias CJ and Keith J; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [41] per Winkelmann CJ.

¹¹ European Court of Human Rights (ECtHR) case law on the interpretation of equivalent articles in the European Convention on Human Rights (ECHR) is also useful to the extent the expression of the corresponding right is not materially different. This is the case in respect of the right to life. See, e.g., *Wallace v Attorney-General* [2021] NZHC 1963 at [282].

¹² See, for example, the discussion in *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) at 691 per Casey J, 699 per Hardie Boys J and 704 per Gault J.

¹³ Crown Submissions at [77.5] and [84].

¹⁴ *General Comment No 36*, above n 8, at [7] and [18].

¹⁵ At [23].

¹⁶ At [62]. See also on the way environmental protection obligations impact the human rights of children: United Nations 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.

¹⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep 226 at [29]; *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment, 20 April 2010, [2010] ICJ Rep 14 at [101]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Judgment, 16 December 2015, [2015] ICJ Rep 665 at [118]. See also the International Law Commission’s 2001 *Draft Articles on the Prevention of Transboundary Harm*. Due diligence is the established standard for fulfilling this obligation: see *Pulp Mills* at [101]. Due diligence requires states

principle¹⁸ and the principle of inter-generational equity.¹⁹

10. In respect of culture, the UNHRC explained in General Comment 23 that art 27 requires positive measures of protection, “not only against the acts of the state party itself, ... but also against the acts of other persons within the State party”.²⁰ New Zealand itself treats its obligations under art 27 as positive ones. For example, in its Sixth Periodic Report dated 2015, New Zealand reported under art 27 on steps taken to protect minority rights, including: (a) its response to the Foreshore and Seabed Act 2004;²¹ (b) mechanisms developed by councils for engaging with Māori communities;²² and (c) establishment of consultation procedures between Māori and government.²³

11. The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) is also relevant to the interpretation of art 27 ICCPR (and, consequently, s 20 NZBORA). Although not a treaty, UNDRIP is the most comprehensive and authoritative international human rights instrument dealing with the rights of indigenous peoples. It elaborates on the requirement of the art 27 right to culture in the specific context of indigenous peoples.²⁴ Thus, in *Billy*, the UNHRC interpreted art 27 ICCPR in the light of UNDRIP as enshrining “the

to employ all necessary and appropriate measures to prevent significant environmental harm: see International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, 2015 ITLOS Reports 4 at [124], [129], [134]–[136] and [219(3)]; *Pulp Mills* at [197] and Seabed Dispute Chambers of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, at [120] and [242].

¹⁸ See Declaration of the UN Conference on Environment and Development, UN Doc A/CONF/151/26/Rev 1 [**Rio Declaration**], [principle 15](#); Stockholm Declaration of the United Nations Conference on the Human Environment, UN Doc A/CONF/48/14/REV 1 [**Stockholm Declaration**].

¹⁹ United Nations Framework Convention on Climate Change, [art 3\(1\)](#); Paris Agreement, Preamble, [recital 11](#); Rio Declaration, [principle 3](#); Stockholm Declaration, principles [1 and 2](#).

²⁰ UNHRC *General Comment No 23* CCPR/C/21/Rev.1/Add.5 at [6.1]. See also similarly UNCESCR *General Comment No 21* E/C.12/GC/21 at [6]. This statement was cited with approval in *Kamo v Minister of Conservation* [2018] NZHC 1983, [2018] NZAR 1334 at [83] and not disturbed on appeal (*Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746).

²¹ Human Rights Committee *Consideration of reports submitted by States parties under article 40 of the Covenant pursuant to the optional reporting procedure* CCPR/C/NZL/6 at 36–37.

²² At 38.

²³ At 39.

²⁴ James Anaya *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples* UN Doc A/HRC/9/9 (11 August 2008) at [40]–[41].

inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and culture identity”.²⁵ UNDRIP makes clear that there is an “urgent need to respect and promote” the rights of indigenous peoples,²⁶ and further emphasises the need for states to “provide effective mechanisms for prevention” of various harms;²⁷ “take effective measures” to ensure particular rights are protected;²⁸ and “take the necessary steps” to achieve realisation of rights.²⁹ It envisages that States “shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration”.³⁰ UNDRIP’s emphasis on positive action recognises that historic injustices resulting from colonisation and dispossession may already have negatively impacted indigenous peoples’ ability to enjoy the full measure of their rights.³¹ A purely negative conception of rights and freedoms assumes an adequate and equal baseline of enjoyment of rights in respect of all people. That is of course not the case in respect of Māori, who suffered manifest denials of their culture as a result of the government policies carried out in the second half of the 19th and well into the 20th century.³²

12. A purely negative conception of s 20 NZBORA would be inconsistent with te Tiriti.³³ Logically, as two written parts of New Zealand’s (fragmented) constitution, NZBORA and te Tiriti should be interpreted harmoniously to the extent possible. Indeed, the New Zealand courts apply an interpretive presumption that statutes are enacted consistently with te Tiriti.³⁴ Section 20 is a statutory

²⁵ *Billy v Australia* CCPR/C/135/D/3624/2019 (21 July 2022) at [8.13].

²⁶ General Assembly *Resolution adopted by the General Assembly on 13 September 2007* A/RES/61/295 [UNDRIP] at 2.

²⁷ See arts 8(2) and 32(3).

²⁸ See arts 13(2), 14(3), 15(2), 16(2), 21(2), 29(2), 29(3), 31(2), 36(2)

²⁹ See art 24(2).

³⁰ Art 39.

³¹ At 2.

³² See, e.g., discussed in David V Williams “The Continuing Impact of Amalgamation, Assimilation and Integration Policies” (2019) 49 *Journal of the Royal Society of New Zealand* 34.

³³ There is arguably also a connection between UNDRIP and the Treaty: Justice Glazebrook has noted, writing extrajudicially, that the rights articulated in UNDRIP align with those in the Treaty, and provide an elaboration of te Tiriti rights and obligations. See Susan Glazebrook “The Declaration on the Rights of Indigenous Peoples and the Courts” (2019) 25 *Auckland U L Rev* 11 at 28.

³⁴ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J, and [332] per Winkelmann CJ; and *Ulrich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [55].

provision and should thus be interpreted consistently with the Tiriti and the principles derived from it, including the principle of active protection.

III. Right to life includes a minimum baseline of quality

13. The Court of Appeal was correct to find that the s 8 right to life is not merely about being alive, but also about a minimum baseline as to the quality of one's life.³⁵ Also described as a "life with dignity",³⁶ this interpretation of s 8 gives effect to NZBORA's purpose of protecting and *promoting* rights. It also gives effect to the principle of giving individuals "the full measure of the enacted fundamental rights and freedoms" to render "the rights practical and effective".³⁷ And, it aligns with the UNHRC's approach to art 6 of the ICCPR, which requires States 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".³⁸ As the UNHRC has noted, "the right to life cannot be properly understood if it is interpreted in a restrictive manner".³⁹ It thus rejected the Respondent State's argument in *Billy* that art 6 could not be interpreted to include a right to life with dignity in the context of climate change.⁴⁰

IV. Structure of the analysis for positive obligation claims under NZBORA

14. Positive obligation claims can generally be analysed through the following steps: (a) Has the positive obligation been triggered? (b) If so, what is required by the positive obligation? (c) Has that obligation been breached (i.e., has the right been limited)? (d) If so, is that breach demonstrably justified?

15. Issue (a) raises legal questions about what is encompassed within the right in question (i.e., threats to what things count as threats to the rights to life and

³⁵ CA Judgment at [48]-[57].

³⁶ See, e.g., *General Comment No 36*, above n 8, at [3].

³⁷ *Fitzgerald v R*, above n 10, at [41] per Winkelmann CJ and [244], n 347 per Glazebrook J, and cases cited therein.

³⁸ *General Comment No 36*, above n 8, at [26].

³⁹ *Billy v Australia*, above n 25, at [8.3].

⁴⁰ At [8.4]. It is fallacious to view rights such as the right to life and the social and economic rights as operating in silos, such that if the latter were not intended to be included in NZBORA then no aspect of them could possibly be a part of the former (see Crown Submissions at [127.3]-[127.6]). See by analogy *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396 at [7]: "A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3 [of the ECHR]. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life."

culture?) and the proximity of a threat that is required before a positive obligation is triggered. Issue (b) raises a legal question as to the standard of conduct that should be applied under the positive obligation. Issue (c) raises a legal question as to what would be required before it can be said that an individual piece of legislation is inconsistent with a positive obligation to protect.

16. Triggering the positive obligation. For a positive obligation to be triggered under s 8 or s 20, there first needs to be a threat to those rights that the state must protect against.

17. *First*, in terms of s 8, the right to life encompasses a minimum baseline of quality (dignity) in addition to merely being alive;⁴¹ climate change can engage the right to life;⁴² and a claim cannot be precluded merely because a large number of people are affected.⁴³ However, not all injuries or threats to dignity (as it is understood in ordinary language) engage s 8; apart from death, the right is concerned with the sort of serious and sustained interference that impacts one's life.

18. In terms of s 20, the concept of culture that is protected by s 20 “manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples”.⁴⁴ This can include traditional activities such as fishing or hunting.⁴⁵ The purpose of the ICCPR equivalent, art 27, is directed at “ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned”.⁴⁶ When the case concerns Māori culture, as here, *te Tiriti o Waitangi* is relevant, including, in particular, the art 2 guarantee to protect “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa” (“chieftainship over their lands, villages and all their treasures”⁴⁷).

⁴¹ CA Judgment at [48]-[57]. Also discussed above in Part III.

⁴² CA Judgment at [57].

⁴³ CA Judgment at [61]. See *mutatis mutandis*, the failure of a state to give adequate access to the judicial system. The absence of such access affects many people, but that widespread effect cannot be used to deny individual effect: see e.g. *Airey v Ireland* ECHR 6289/73, 9 October 1979; and *Dietrich v R* (1992) 109 ALR 385 (HCA).

⁴⁴ *General Comment No 23*, above n 20, at [7].

⁴⁵ *Billy v Australia*, above n 25, at [8.13].

⁴⁶ *General Comment No 23*, above n 20, at [9].

⁴⁷ See at <<https://www.waitangitribunal.govt.nz/en/about/the-treaty/maori-and-english-versions>>.

19. Not all limits on an aspect of a minority culture will amount to a denial of the right to enjoy that culture.⁴⁸ At the same time, limitations need not be in respect of the entirety of a culture to amount to a denial; it is sufficient if the limitation relates to an “essential element” of the minority culture,⁴⁹ and if the limitation has a “substantive negative impact”.⁵⁰

20. *Second*, for a threat to trigger a positive obligation, it should be real and reasonably foreseeable. That is the threshold adopted by the UNHRC in relation to art 6 (life) and art 27 (culture) of the ICCPR.⁵¹ This approach should be preferred because it gives effect to NZBORA’s purpose of affirming New Zealand’s commitment to its international human rights obligations under the ICCPR. When a threat ceases to be theoretical and becomes real and reasonably foreseeable is a matter for assessment on a case-by-case basis, in the light of its likelihood, seriousness and urgency.⁵² However, as a general statement, it is now beyond doubt (and established by scientific data) that climate change poses a real and reasonably foreseeable threat to life generally (including quality). As this Court observed in *Smith v Fonterra*, it is “indisputable” that climate change threatens human well-being and that, “the window of opportunity to ensure a liveable and sustainable future for all is rapidly closing”.⁵³

21. Content of the obligation. The legal principles applicable to determining the specific content of the positive obligation should developed in a manner that is consistent with New Zealand’s international obligations, including the approach of the UNHRC to art 6 of the ICCPR,⁵⁴ the Paris Agreement and the customary international law duty to prevent significant harm to the environment.

⁴⁸ *Lansman v Finland* CCPR/C/52/D/511/1992 (26 October 1994) at [9.4].

⁴⁹ *Mahuika v New Zealand* (2000) 7 HRNZ 629 (UNHRC) at [9.3].

⁵⁰ *Poma v Peru* CCPR/C/95/D/1457/2006 (27 March 2009) at [7.5].

⁵¹ General Comment No 36, above n 8, at [7] and *Billy v Australia*, above n 25, at [8.14].

⁵² The ECtHR uses the phrase “real and imminent risk to life”, but substantively the test amounts to the same thing in the context of climate change: in light of the fact that there is a “grave risk of inevitability and irreversibility of the adverse effects of climate change”, the “real and imminent” test is understood as referring to “a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporary proximity of the threat to the harm complained of”: *Verein KlimaSeniorinnen Schweiz v Switzerland* ECHR 53600/20 (9 April 2024) at [513].

⁵³ *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [14].

⁵⁴ One of the purposes of NZBORA in its long title being “to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”.

22. Under the ICCPR, New Zealand has a “due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on [it] in response to reasonably foreseeable threats to life”.⁵⁵ If the trigger conditions for the positive obligation under s 8 of NZBORA are met, a s 3 NZBORA actor should be held to that due diligence standard. There does not appear to be any good reason to adopt a different standard for the positive obligation under s 20 NZBORA.

23. Due diligence is an obligation of conduct that requires States to employ all reasonable means available to prevent harm.⁵⁶ What due diligence requires in a particular case will vary depending on the scientific information available, the state’s capabilities, the risk of harm, and the urgency involved.⁵⁷ The higher the probability and the seriousness of the possible harm, the more demanding the standard of conduct required by due diligence.⁵⁸ Due diligence is therefore particularly well-suited as a standard of conduct for protective obligations that seek to prevent a particular state of affairs from occurring (e.g., loss of life; failure to achieve the necessary emissions reductions standards agreed by the international community).

24. It is indisputable that the risk of harm to the climate system is significant, irreversible, and urgent. The standard of due diligence for preventing climate harm is stringent.⁵⁹ The ICJ has said that compliance with obligations under the Paris Agreement is assessed based on whether the State has used “all the means at its disposal” to meet the obligation and prevent the harm.⁶⁰ The ITLOS has similarly stated that “measures as far-reaching and efficacious as possible to prevent or reduce the deleterious effects of climate change” are required, given the risks posed to the marine environment.⁶¹ This means implementing “regulatory mitigation mechanisms designed to achieve the deep, rapid and

⁵⁵ General Comment No 36, above n 8, at [21]. For more general discussion on the concept of due diligence in international law, see Caroline E Foster *Global Regulatory Standards in Environmental and Health Disputes* (Oxford University Press, 2021) at 99-129.

⁵⁶ *Obligations of States in Respect of Climate Change (Advisory Opinion)* ICJ, 23 July 2025 [ICJ AO] at [135].

⁵⁷ At [136]-[137], [254] and [283].

⁵⁸ At [275] and [283].

⁵⁹ At [138]. See also *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)* ITLOS, 21 May 2024 [ITLOS AO] at [389].

⁶⁰ ICJ AO, above n 56, at [229].

⁶¹ ITLOS AO, above n 59, at [399].

sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system”.⁶² The precautionary principle applies: lack of scientific certainty is not a reason for postponing cost-effective measures to prevent degradation.⁶³

25. Applied by analogy to ss 8 and 20 NZBORA, where climate change causes a reasonably foreseeable threat to life or culture and triggers a positive obligation, the State has an obligation to take all reasonable and proportionate measures, including regulatory mechanisms, to achieve the emissions reductions and/or implement the adaptations necessary to prevent the threat to life or culture posed by climate change.

26. A threat to life or culture caused by climate change and the threat to climate change are not necessarily co-extensive. Whether mitigation or adaptation is required, or both, depends on the nature of the threat at issue.⁶⁴ For example, if avoiding the threat to life or culture cannot be achieved by adaptation alone and requires mitigation of climate change more generally, then the positive obligation under s 8 or s 20 should encompass the content of the obligation under international law and the Paris Agreement. In those circumstances, the 1.5°C pathway under the Paris Agreement should be relevant to the content of the necessary measures to be taken to satisfy the s 8 or s 20 obligation.⁶⁵

27. The fact that New Zealand alone cannot stop the threat of climate change (i.e., the “drop in the ocean” argument) does not mean the state has no positive obligation. Rather, if protecting the right requires mitigation, the obligation should be calibrated to reflect New Zealand’s share of the global responsibility based on the country’s capabilities.⁶⁶ The State must do its part to mitigate the effects of

⁶² ICJ AO, above n 56, at [282].

⁶³ At [293]-[294].

⁶⁴ For example, in *Billy v Australia*, the threat to life alleged was the risk of islands becoming uninhabitable because they would be submerged underwater. It was therefore relevant that the Torres Strait sea walls programme was under way, and that stormwater and drainage infrastructure was also being upgraded: *Billy v Australia*, above n 25, at [8.7]. Where threats are alleged that cannot be addressed solely through adaptation measures, however, mitigation measures should be part of the positive obligation.

⁶⁵ See ITLOS AO, above n 59, at [207], [212] and [250], where the 1.5°C temperature goal was considered one of the relevant factors in determining the necessary measures required under art 194 of the UN Convention on the Law of the Sea.

⁶⁶ See *KlimaSeniorinnen*, above n 52, at [442].

climate change to ensure protection of the right.⁶⁷ At minimum,⁶⁸ that means putting in place the necessary regulations and measures that would, if adopted by every country, prevent the level of warming that threatens life or culture as pleaded.

28. Breach of the obligation. Whether the obligation has been breached is also a matter for trial. However, some matters of legal principle may be addressed at the strike-out stage. The main point is that the analysis for breach differs across the two types of declarations that the appellant is seeking.

29. The first type of declaration sought is generalised: it is that “the Crown has acted and is acting in a manner that is incompatible with s 8/s 20 of the NZBORA”.⁶⁹ The analysis to determine this sort of breach is straightforward conceptually because it is a matter of looking at all existing frameworks and mechanisms relevant to climate change harm and assessing whether, in totality, the Crown has met the due diligence standard by using all the means at its disposal to achieve the emissions reductions and/or adaptation measures necessary to prevent the threat to life or culture posed by climate change.

30. The second type of declaration sought is particularised: it is that specifically “the CCRA is incompatible with ss 8 and 20 of the NZBORA”.⁷⁰ The CCRA is only one part of New Zealand’s response to climate change and provides an overarching framework under which further decisions may be made. But this does not mean that it is impossible for the Act itself to be inconsistent with the positive obligation to use all reasonable means to prevent the threat to life or culture posed by climate change.⁷¹ What it means is that to get there, one of two things need to be shown. Either: (a) there is a reason to expect a particular measure should be covered in that Act (and it is not); or (b) there is something present in the CCRA that actively hinders the Crown from doing its part to prevent the threat to life posed by climate change.

⁶⁷ At [545].

⁶⁸ Noting that as a developed country, New Zealand has greater obligations under the UNFCCC compared to developing countries and, under the Paris Agreement, is expected to “continue taking the lead by undertaking economy-wide absolute emission reduction targets”: Paris Agreement, art 4(4).

⁶⁹ Draft 3ASOC [[05.0100]] at [96(a)] and [96(b)].

⁷⁰ Draft 3ASOC [[05.0100]] at [96(c)].

⁷¹ Cf. CA Judgment at [96]-[97] and [125], suggesting that the CCRA must be assumed to be adequate and only decisions made under the CCRA may be reviewed.

31. An example of (a) might be where the CCRA covers a particular field of regulation but does not go far enough in that field to discharge the due diligence obligation. An example of (b) might be that a target expressly set in the CCRA is too low to discharge the due diligence obligation.

V. Jurisdiction or competence to hear the NZBORA claims

32. There is no threshold obstacle to the general type of claim that is being brought (i.e., a claim seeking declarations that the Crown’s acts and the CCRA are incompatible with ss 8 and 20 of NZBORA for failure to address the threat to life and culture caused by climate change). It falls squarely within the courts’ established jurisdiction to make declarations of inconsistency with NZBORA. The fact the analysis required by the claim differs from negative obligation cases – because the courts must make assessments as to the sufficiency of Crown conduct and regulation – is simply the consequence of accepting (as the Court of Appeal accepted and as is established in domestic and international case law) that ss 8 and 20 NZBORA impose positive obligations to address reasonably foreseeable threats to life and culture.⁷² In any case, as Part IV above makes clear, there is a structured framework that allows for legal analysis.

33. It is therefore incorrect to suggest that “omissions of a kind that challenge the efficacy of the legislative framework” cannot be the subject of NZBORA declarations.⁷³ Characterising the task as “second guess[ing]” Parliament’s “policy choices”⁷⁴ is equally unhelpful.⁷⁵ Once enacted, Parliament’s policy choices become law, and it is the courts’ role to interpret the law and assess it against the fundamental rights and freedoms contained in NZBORA, *in the manner required by Parliament under NZBORA*. Where a positive obligation is triggered under s 8 or 20, two steps are required. First, courts should determine the line below which conduct should not fall without justification per s 5. If a

⁷² The Court of Appeal seems to have accepted this at [131] of its judgment, noting that a tenable cause of action under s 20 may arise if “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”. The Court of Appeal noted that that was not what was pleaded here. It seems to the Commission, however, that that is precisely the claim that is being brought.

⁷³ CA Judgment at [93]. See also Crown submissions at [118], [120]-[121] and [154]. The question of “how protective” the scheme is is precisely the legal question that is raised by the type of analysis required. Asserting that the CCRA is “designed to be protective of life” does not answer the standard imposed by s 8.

⁷⁴ CA Judgment at [94] and [126]. See also Crown submissions at [123] and [156].

⁷⁵ See *Attorney-General v Chisnall*, above n 1, at [248] and [252].

legislative framework *does* fall short of that line established in (a) (whether due to inefficacy or otherwise), then the right will be engaged, and it is for the courts to assess any justifications offered for falling short of that line. This assessment is done pursuant to legislative direction in s 5. It is a question of mixed fact and law, and it is ultimately for the court to determine.⁷⁶

34. Of course, appropriate weight may be brought to bear by the court in undertaking its assessment of the legal question before it, including in respect of informed policy choices by Parliament.⁷⁷ But weight cannot be invoked to insulate entire subject matters from judicial assessment.⁷⁸ That would subvert the legislative framework under NZBORA and lead the courts to abdicate their constitutional function of determining legal questions

VI. Te Tiriti o Waitangi

35. Under this cause of action, the main issue is whether courts may make declarations of inconsistency (DOIs) with te Tiriti.⁷⁹ *First*, as noted, UNDRIP is the most comprehensive and authoritative international human rights instrument dealing with the rights of indigenous peoples⁸⁰ and elaborates on the ICCPR rights within the specific context of indigenous peoples.⁸¹ UNDRIP makes clear that there is an “urgent need to respect and promote” the rights of indigenous peoples.⁸² It also emphasises that indigenous peoples have the right to “effective remedies for all infringements of their individual and collective rights”.⁸³

36. *Second*, as a majority of this Court held in *Attorney-General v Taylor*, an effective remedy is required for breaches of NZBORA, and that may include a

⁷⁶ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [84].

⁷⁷ *Attorney-General v Chisnall*, above n 1, at [249]-[252]. The Court of Appeal Judgment at [89]-[94] invokes the concept of a “margin of appreciation”. The Commission supports the appellant’s submissions at [81]-[83] that the concept of a “margin of appreciation” is likely to mislead in a domestic context because of the particular meaning attached to that concept in the case law of the European Court of Human Rights.

⁷⁸ See e.g. CA Judgment at [96], finding that “decisions about the treatment of agriculture emissions in the CCRA are for Parliament”.

⁷⁹ Draft 3ASOC [[05.0100]] at [101]-[102].

⁸⁰ In *Billy*, the UNHRC interpreted art 27 of the ICCPR in the light of UNDRIP as enshrining “the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and culture identity”: *Billy v Australia*, above n 25, at [8.13].

⁸¹ James Anaya *Report of the Special Rapporteur*, above n 24, at [40]-[41]

⁸² UNDRIP, above n 26, at 2.

⁸³ UNDRIP, above n 26, art 40.

DOI.⁸⁴ If DOIs may be necessary as an effective remedy for breaches of NZBORA, then in principle they may also be necessary as an effective remedy for breaches of te Tiriti. This is particularly so in circumstances where both NZBORA and te Tiriti have been recognised as instruments of constitutional significance.⁸⁵ There are clear analogies between te Tiriti and NZBORA insofar as both are fundamental rights documents that have been acknowledged to be “constitutional” in nature.⁸⁶ The specifics of this recognition across the three branches of government have been covered by the appellant’s submissions at [149]–[157]. The Court of Appeal in this case characterised te Tiriti as coming to “occupy a powerful position in our constitution and legal system”.⁸⁷

37. There is a further analogy, however, in that both NZBORA and te Tiriti, as constitutional documents of fundamental rights, exert interpretive influence over legislation. Legislation is presumed to be consistent with both documents; in the case of NZBORA through s 6, and in the case of te Tiriti through the common law application of the principle of legality.⁸⁸ It might therefore seem anomalous that no legal remedy is available where Crown conduct or legislation is not consistent with te Tiriti, even though legislative consistency with te Tiriti has been considered sufficiently important to be an interpretive presumption.

38. *Third*, in terms of *Te Heuheu Tukino v Aotea District Maori Land Board*, the Commission agrees with the appellant that that case does not preclude DOIs with te Tiriti. The judgment in that case was premised on the assumption that te Tiriti was a treaty of cession,⁸⁹ but of course that is not how te Tiriti is viewed today: when Parliament enacts Treaty provisions, it does not do so because it believes it is incorporating an international treaty into “municipal law”; te Tiriti is

⁸⁴ *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [38] per Glazebrook and Ellen France JJ and [74] per Elias CJ.

⁸⁵ See e.g. *Moncrief-Spittle*, above n 76, at [83] (in respect of NZBORA) and *Trans-Tasman Resources*, above n 34, at [150] per William Young and Ellen France JJ (in respect of te Tiriti). A degree of convergence in the legal tools available to protect and promote these constitutional values is to be expected.

⁸⁶ *Fitzgerald v R*, above n 10, at [41] per Winkelmann CJ, [221] per Arnold and O’Regan JJ and [250] per Glazebrook J; and *Trans-Tasman Resources*, above n 34, at [150]–[151] per William Young and Ellen France JJ and [296] per Williams J. Section 5(2)(d) of the Human Rights Act 1993 also recognises the “human rights dimensions of the Treaty of Waitangi”. CA Judgment at [147].

⁸⁷ See *Trans-Tasman Resources*, above n 34, at [150] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J, and [332] per Winkelmann CJ; *Ulrich v Attorney-General*, above n 34, at [55]; and *Students for Climate Solutions Inc v The Minister of Energy and Resources* [2022] NZHC 2166 at [91] and [99].

⁸⁹ *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) at 596–597.

not referred to in the Cabinet Manual as a “treaty of cession”; and nor do courts treat it as such when they presume legislative consistency with te Tiriti. New Zealand has moved on. Te Tiriti is referred to and given importance in our legal system as part of New Zealand’s constitution. It is properly within the judicial function to interpret te Tiriti. The courts can also assess whether conduct is consistent with te Tiriti, properly interpreted. Against that background, it would be peculiar if the courts could not take the further step of making a declaration that conduct is inconsistent with te Tiriti. Any concern about separation of powers is addressed – as in the context of NZBORA DOIs – by judicial restraint at the remedial stage because the response to such a declaration when it involves legislation is a matter for Parliament.

39. *Fourth*, a power to make Tiriti DOIs is distinct from the Waitangi Tribunal’s jurisdiction to make recommendations. The Waitangi Tribunal is deemed a standing commission of inquiry,⁹⁰ it is not a court, and its findings are recommendatory only.⁹¹ That a power to issue Tiriti DOIs would give an option of fora in which the same complaint might be heard should not cause difficulty; (a) this already occurs where legislation contains an express Tiriti provision, such as s 9 of the SOE Act;⁹² and (b) both the senior courts and the Human Rights Review Tribunal can make NZBORA DOIs in respect of legislation that unjustifiably breaches s 19 NZBORA.

14 July 2026

A S Butler KC / R A Kirkness / H Z Yáng

Counsel for Te Kāhui Tika Tangata Human Rights Commission

⁹⁰ Treaty of Waitangi Act 1975, Schedule 2, cl 8(1).

⁹¹ Save for recommendations in relation to resumption of land held by State-Owned Enterprises or institutions under the Education and Training Act 2020: Waitangi Tribunal Act 1975, s 8A; State-Owned Enterprises Act 1986, s 27B; and Education and Training Act 2020, s 569.

⁹² This Court directly engaged with the Tiriti-consistency of the proposed part privatisation of energy-generating assets in *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31, after the same complaint was heard in the Waitangi Tribunal and an interim report had already been issued: see Waitangi Tribunal *The Interim Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).