
IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 10/2025

BETWEEN

MICHAEL JOHN SMITH

Appellant

AND

THE ATTORNEY-GENERAL

Respondent

AND

TE HUNGA RŌIA MĀORI O AOTEAROA |
THE MĀORI LAW SOCIETY

Intervener

AND

TE KĀHUI TIKA TANGATA |
HUMAN RIGHTS COMMISSION

Intervener

RESPONDENT'S REPLY TO INTERVENERS' SUBMISSIONS

28 July 2026



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o te Karauna**
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NZBORA

1. Te Kāhui Tika Tangata | Human Rights Commission (**the Commission**) make the following points not emphasised in the appellant’s submissions:
 - 1.1 The purpose of the New Zealand Bill of Rights Act 1990 (**NZBORA**) envisages a protective role for the State to ensure that rights are upheld. Further, how the rights are framed tell us nothing about the positive or negative nature of what the State must do.
 - 1.2 NZBORA is to be interpreted consistently with international obligations, thus the Commission places significant reliance on General Comments by the United Nations Human Rights Committee (**UNHRC**).
 - 1.3 Reliance can be placed on international environmental law concepts to transform the content of ss 8 and 20 to seek to impose a positive obligation on Parliament to enact legislation that “takes all reasonable steps” in responding to complex social and economic issues.
 - 1.4 The United Nations Declarations on the Rights of Indigenous Peoples (**UNDRIP**) provides support for expanding the scope of NZBORA rights.
 - 1.5 A negative conception of s 20 NZBORA would be inconsistent with Te Tiriti o Waitangi | Treaty of Waitangi (**Treaty**).
 - 1.6 A suggested four-stage structure of analysis for NZBORA claims.
2. To the extent these points are not addressed in the respondent’s submissions, they are responded to below.

Crown response

3. The statutory context for any claim of human rights breach is important. However, the Commission does not address in detail, let alone rebut, the crucial point made by the Court of Appeal: Given the comprehensive legislative framework and purpose of the Climate Change Response Act 2002 (**CCRA**), the appellant’s alleged “gaps” (i) reflect policy choices properly made by Parliament, and not by the courts; and (ii) are not of a kind that could be considered as a failure to take positive steps on a novel and expansive view of the scope of rights under ss 8 and 20.¹

¹ Cf *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1 [**CA Judgment**] [[05.001]] at [8].

4. Likewise with the Court of Appeal's related second crucial point: Under our settled (Westminster) constitutional arrangements, not least the separation of powers between the branches of government, the efficiency/sufficiency of a complex policy and legislative regime such as the CCRA is a matter for the democratically elected branches.²
5. The Commission acknowledges this, at least in part, as it must. It says of informed policy choices by Parliament: "[o]f course, appropriate weight may be brought to bear by [a Court] in undertaking its assessment of the legal question before it"; before adding that "weight cannot be invoked to insulate entire subject matters from judicial assessment".³
6. But here the Crown is not suggesting that any entire subject matter is insulated from judicial assessment. There are plenty of cases involving judicial review of environmental and climate related matters. The question is whether *this* is a case where that is appropriate on the pleaded facts.
7. The Crown's position is that this is plainly a case where judicial assessment of the type sought by the appellant is not appropriate. Recognising this does not, as the Commission claims, "subvert the legislative framework under NZBORA...".⁴ It simply recognises the intended reach of the BORA framework within New Zealand's constitutional order.
8. NZBORA does not anticipate or permit the judicial critique of a complex regulatory regime, wielding the rights not to be deprived of life and culture. And in particular, ss 8 and 20 of the BORA do not contemplate the courts articulating a "line"⁵ that a complex climate change regime must not fall below, and then assessing whether it has fallen below that line. Undertaking such tasks would make the courts resemble a scientific think tank or standing Royal Commission. Sections 8 and 20 are addressed to cases where the breach lies in a deprivation or a denial having occurred or at least being imminent in a manner that the facts pleaded by the appellant do not support.
9. Further, the Commission's submissions fail to acknowledge and address the radical expansion of the declaration of inconsistency jurisdiction that it proposes

² Cf CA Judgment at [94].

³ Human Rights Commission (**Commission**) submissions at [34].

⁴ At [34].

⁵ At [33].

– beyond what the existing caselaw does or contemplates into a critique of a comprehensive legislative framework for addressing complex social and multifactorial problems.

10. Declarations of inconsistency may be available where a limitation on NZBORA rights in particular statutory provision(s) cannot be justified under s 5, and the relevant provision(s) cannot be interpreted consistently with NZBORA under s 6.⁶ The Crown's position is that the declaration of inconsistency jurisdiction cannot be used to assess whether an entire complex legislative regime,⁷ designed to respond to a multifaceted societal problem, and implemented with institutional capacity and democratic legitimacy, is "sufficiently" rights enhancing.
11. The purpose of s 8 is addressed in the Crown's submissions at [127]-[133] and [153]. The Commission's arguments seek to convert negatively framed and procedural rights, designed to protect against State interference,⁸ into socio-economic entitlements intentionally omitted from NZBORA.⁹
12. A generous interpretation of NZBORA cannot extend to an interpretation contrary to the text and purpose of a provision.¹⁰ The legislative history of NZBORA is an important source of guidance in interpreting its provisions.¹¹ Much of the UN General Comments are aspirational in nature, comments of treaty bodies such as the UNHRC being "aimed at the prevention or promotion of good practice".¹² There is no gap in NZBORA, the scope of which reflects the position that it is for the State to determine how to give effect to its international obligations.¹³

⁶ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [84].

⁷ *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [66] and FN 78.

⁸ Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] 1 AJHR A6 at [4.14]-[4.18]; Claudia Geiringer, "Ely in New Zealand" (2021) 19 ICON 439.

⁹ Crown submissions at [127]-[133]. More generally, on expansive interpretation in the human rights context (and historically): see James Spigelman "Legitimate and Spurious Interpretation" (presented at the third lecture in the 2008 McPherson Lectures: Statutory Interpretation & Human Rights, University of Queensland Press, 12 March 2008).

¹⁰ *Wairarapa Moana Ki Pouākani Inc v Attorney-General* [2026] NZCA 255 at [97]-[98]. To the extent that there are differences between the wording of Art 6 ICCPR and s 8 NZBORA, the domestic provision will prevail: *Helu* [2015] NZSC 28, [2016] 1 NZLR 298 at [143]. See also *Wallace v Attorney-General* [2022] 3 NZLR 398 at [114].

¹¹ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [161], [165] (per Winkelmann CJ); *Combined Beneficiaries Union Inc v Auckland City Cogs Committee* [2008] NZCA 423 at [22]-[24], [28]-[30], [33] (per Glazebrook J); Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 457-458; Peter W Hogg and Wade K Wright (eds) *Constitutional Law of Canada* (looseleaf ed, Carswell) at [36.20].

¹² *R (AB) v Secretary of State for Justice* [2022] AC 487 at [62]. Both the ECtHR and the UK Supreme Court have expressed scepticism as to the extent to which such comments can be determinative of the scope of a domestically enforceable right: *Re (AB)* at [61]-[67].

¹³ Crown submissions at [130]-[131]. Cf the Commission's submissions at [8]. See also: Crown subs at [127.3]-[127.6] Parliament deliberately chose not to include rights protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in NZBORA. ICESCR, Preamble: recognising the inherent dignity of the human person. Art 12, recognising the right of everyone to the highest attainable standard of physical and mental health. New Zealand has detailed environmental regulation (including the Local Government Act 2002) to protect people, society and their environment.

13. As observed by Keith J in *Mendelssohn* the purpose of NZBORA recognises that some rights are more negative in orientation than others.¹⁴ That is not to say a positive obligation might not arise in limited circumstances.¹⁵ However, both the right to life and right to culture in NZBORA are negative in orientation.
14. The recent Court of Appeal decision in *Wallace* recognised limited positive obligations in s 8 that were an inherent part of the State's obligation not to deprive life.¹⁶ Section 8 only extends to loss of life (or imminent threats to life) for which the State may be held accountable – i.e., s 8 requires a *deprivation* of life thus implicitly can only provide for operational liability.¹⁷ This is consistent with language and purpose. Section 8 is materially different to Art 2 ECHR and Art 6 ICCPR.¹⁸
15. The Commission asserts a 4-stage structure for rights analysis.¹⁹ The orthodox and better framing is more straightforward: whether the right is engaged (which includes considering the scope and content of the right), if so, is the right limited, and, if so, is the limit on rights demonstrably justified.
16. In other words, for the s 8 right to be engaged there must be either death, or an imminent threat to life.²⁰ Notably, neither the UNHRC nor the ECtHR have found a breach of the right to life (notwithstanding the wider drafting of the ICCPR and ECHR rights) due to the effects of climate change.
17. Section 20 is addressed at [154]-[173] of the Crown's submissions. For s 20 to be engaged, there must be an impairment of the exercise of the right to culture (or religion), or such impairment must be imminent.
18. The Commission advocates for an expansive reading of s 20 to promote the right.

¹⁴ *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [15] (per the Rt Honourable Justice Keith): "The reference in the long title to the Bill of Rights to affirming, protecting and promoting human rights and fundamental freedoms recognises that some of the rights are positive (involving positive governmental obligations) while others are negative." Cf Commission submissions at [5]-[6]. At [19]: "To return to the covenant, several of its provisions highlight the distinction between negative and positive freedoms by directly imposing obligations (sometimes in general form) on the states parties to take action: the inherent right to life "shall be protected by law" (art 6(1)), as just the right to privacy (art 17(2)), and rights of families (art 23(1)) and of children (art 24(1)). See also Professor Paul Rishworth KC *Human Rights* [2025] NZLR 531 at 539.

¹⁵ *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [20]. This decision remains remarkably accurate in depicting, consistent with *Wallace*, that in limited (operational i.e. threatening or risky situations) a positive obligation might arise on the State.

¹⁶ Crown submissions at [150].

¹⁷ *Wallace v Attorney-General* [2022] NZCA 375, [2022] 3 NZLR 398 at [97]. The Court did not accept indirect liability would extend to "systemic fault" (i.e., framework responsibility) given: (1) To be liable under s 8 is to find the State responsible for someone being deprived of life without lawful justification. (2) There must be a causal connection between actors of the State and a death, which points to the need for an operational error rather than systemic defects – at [98].

¹⁸ Crown submissions at [149]-[150].

¹⁹ Commission submissions at [15].

²⁰ Crown submissions at [134]-[145]. *Osman v United Kingdom* [1998] ECHR 101 at [116]. *R (Gardner and Harris) v Secretary of State for Health and Social Care* [2022] EWHC 967 at [238]. Threat to life requires a threat of death: [127]-[133]. The right to life need not carry the weight of all the other rights. Life with dignity is not a workable standard for the purpose of domestic enforcement of s 8 or intended as such.

However, that approach has not won favour with the UNHRC.²¹ If s 20 does entail a positive obligation,²² any such obligation would be limited to a known, specific, immediate and real risk of substantial interference.²³ That is in marked contrast to a positive obligation to enact legislation that is “adequately” protective of culture/religion.²⁴

19. While UNDRIP may be relevant as an interpretative aid, reliance on UNDRIP cannot expand the content of s 20 to include such broad positive duties claimed.²⁵ It is a soft law instrument not binding at international law. The legislative history, not least the decision to not include reference to the Treaty in NZBORA, is significant.²⁶
20. The Commission’s reliance on *R (Limbuela) v Secretary of State*²⁷ to respond to the concerns around the expansion of the scope of rights in this case is not well founded. *Limbuela* was simply a declaration that a provision of the relevant enactment was triggered on the facts, thereby requiring the Secretary to give support to three plaintiffs (rough sleepers and asylum applicants who were “late” in applying for asylum and therefore disqualified from social support). The statute said that late applicants could get support only “for the purpose of avoiding a breach of a person’s Convention rights (within the meaning of the Human Rights Act 1998)”. Such a condition was held to exist in that it was in imminent prospect.²⁸ Thus, *Limbuela* was a case about a culpable omission: a rights breach if nothing were done was agreed to be imminent.²⁹
21. As Lord Bingham recognised, “a general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3” [rights against torture and degrading treatment].³⁰ In other words, art 3 of the ECHR did *not* speak to or control the need for a regime, nor provide a basis for critique of the absence

²¹ Andrew Butler and Petra Butler *New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, 2015) at 17.22.9.

²² Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 404.

²³ Crown submissions at [165]-[173].

²⁴ The Court will need to consider more broadly the consequences that are likely to flow from the interpretation advocated for by the Commission, including whether it is considered desirable in New Zealand’s democratic and diverse society for the State to be under an obligation to put in place legislation that promotes religious freedom and practices.

²⁵ UNDRIP has, on occasion, been noted by the Court as additional support for a particular interpretation of certain statutory provisions or support for a particular remedy: *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC) at [158]. But it has not been determinative: *Takamore v Clarke* [2012] NZSC 116 at [12]. In *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31 (SC) at [92] the SC observed UNDRIP may not add anything to principles of the Treaty when they are incorporated into legislation.

²⁶ Crown submissions at [158]. Paul Rishworth “Indigenous Peoples and Bill of Rights” in Paul Babie and Neville Rochow (University of Adelaide Press, 2012) at 403-404. Cf Commission’s submissions at [12].

²⁷ *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 2 AC 396.

²⁸ At [63].

²⁹ At [9].

³⁰ At [7].

(or inadequacy) of a regime.

22. Sections 8 and 20 cannot be interpreted to encompass a wide-ranging positive obligation “to take all reasonable steps”³¹ for domestic regulatory frameworks, in the climate context or otherwise, to be protective of life or culture. Rather than giving the right to life or culture a “generous interpretation”, the Commission seeks to leverage the rights with something akin to an implied reasonableness standard for judicial assessment of Parliament’s responses to complex and multifaceted issues facing society.³²
23. Furthermore, the Commission’s approach of requiring the courts to review the adequacy of Parliament’s response to societal concerns (to a purported standard of “taking all reasonable steps”) is both unworkable and risks devaluing the fundamental protections and legitimacy of NZBORA.³³
24. At a practical and institutional level, the scale of any trial of the rights-consistency of Parliament’s response to climate change would necessarily be very extensive. Unlike in *Chisnall*, where the statutory regime being assessed was relatively narrow and straightforward, and the rights-limiting aspects of that regime were clear, the CCRA is a complex, technical and multifaceted regime that aims to be rights-enhancing. To determine the appellant’s claims at trial, the court would be required to hear evidence on the basis for the policy objectives and determinations underlying what was included and – crucially – *not* included in a 500-page legislative framework, as well as how this has evolved (and continues to evolve) over two decades.
25. The CCRA impacts on a multitude of actors in a wide variety of ways, and involves the careful balancing of environmental, social and economic considerations. The regime-based analysis conducted by this Court in *Chisnall* could not meaningfully be applied to the general operation of the CCRA. The CCRA is a paradigm example of a complex social problem in respect of which Parliament has unique institutional capacity and expertise.³⁴

³¹ Commission’s submissions at [7].

³² This is far removed from the legislated s 5 of NZBORA. Where, even there, the courts recognise their limited institutional capacity to address policy questions or competing social and economic interests. For example, *R v Hansen* [2007] 3 NZLR 1 (SC) at [116], [119]. *Chief of Defence Force v Four Members* [2025] 1 NZLR 21 (SC) at [97], [102]-[105]. Parliament is better placed to determine contentious political issues: *R (SC, CB, and 8 Children) v Secretary of State* [2021] UKSC 26 at [208].

³³ See *Wairarapa Moana Ki Pouākani Inc v Attorney-General* [2023] NZHC 2086 at [27]-[30] (upheld on appeal on a different point).

³⁴ See *Plan B v Prime Minister* [2021] EWHC 3469 at [48]-[50] (citing *R (SC) v Work and Pensions Secretary* [2021] UKSC 26, [2021] 3 WLR 428 at [158]): The State’s large margin of appreciation in such matters posed an “insuperable problem” for a claim that UK

26. From a wider perspective, there is no sound basis in this country’s democratically based constitutional arrangements to treat as tenable the appellant’s NZBORA claims (and the Commission’s support) that a declaration of inconsistency claim can be brought to challenge alleged lacunae or inadequacy in a statutory framework. This would of course impact the well-established separation of powers and parliamentary sovereignty elements of our political and legal spheres.³⁵ That would include the pursuit of rights-based challenges to complex statutory frameworks in other policy heavy contexts, such as the Resource Management Act 1991, Public Health and Disability Act 2000 or Oranga Tamariki Act 1989, where disaffected claimants disagree with Parliament’s policy choices.

TREATY OF WAITANGI

27. Te Hunga Rōia Māori o Aotearoa (**THRM**) argues for, and the Commission largely adopts the following propositions:³⁶ **(1)** While the Treaty is not a source of rights, it recognises rights such as those sourced in tikanga capable of legal recognition by the Courts, and it is ‘not a great leap’ for the Court to exercise its declaratory jurisdiction for the Treaty. **(2)** How the Treaty is recognised by law is founded on flawed legal foundations such that it is no longer viewed as an international Treaty. **(3)** Declarations of inconsistency with the Treaty can be granted by the Courts. **(4)** The Waitangi Tribunal’s role should be distinguished. **(5)** Declarations of inconsistency will not impact legislative Treaty clauses.

Crown response

28. Treaty-based declarations of inconsistency would lack any statutory foundation. Extending the declaratory jurisdiction as contemplated would be a significant constitutional change that only Parliament can enact.

*The position of the Treaty in New Zealand’s legal system*³⁷

29. Fundamentally, neither the Executive nor the Judiciary can declare international instruments to be domestic law without express action of the Legislature.³⁸ This

emissions policies were ineffective to address climate change”. See also: *Chief of Defence Force v Four Members of Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [103]-[104]; and *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, per Lord Sumption at [230]-[232].

³⁵ From a wider perspective, see Martin Loughlin *Against Constitutionalism* (Harvard University Press, 2022) ch 13 (“The Cosmopolitan Project”); and Aileen Kavanagh *The Collaborate Constitution* (Cambridge University Press, 2024) ch 7, and *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) ch 7.

³⁶ The Commission does not substantively raise any additional points to those raised by THRM.

³⁷ Generally, see the Crown’s submissions at [179] to [192].

³⁸ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) at 499-500 per Lord Oliver: “Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation”. See also *R v Miller*, 2017 UKSC 5, 2018 AC 61 at 19-20.

remains the settled position for the Treaty³⁹ regardless of how it is conceptualized in terms of cession or protection.⁴⁰

30. Since *Te Heuheu* our legal system has moved in significant ways.⁴¹ However, a ‘free-standing’ cause of action cannot be maintained for declarations that enactments are inconsistent with the Treaty or require the executive to comply with Art 2.⁴² The core reasoning from *Te Heuheu* remains sound.⁴³
31. Reflective of the Treaty’s public importance, it has come to play a role in New Zealand law in a number of ways.⁴⁴ Caselaw is consistently founded on the notion that Treaty enforceability depends on Parliamentary intent/legislative incorporation.⁴⁵ Authorities emphasise that where the Treaty is incorporated it should be given a liberal interpretation; and it is presumed Parliament intends to legislate consistently with Treaty principles.⁴⁶
32. The Treaty was not codification of a rule of customary international law.⁴⁷ The

³⁹ See *Ngāti Whātua Ōrākei Trust v Attorney General* [2019] 1 NZLR 116 (SC) at [65]: declarations that particular decisions were made inconsistently with the Treaty and its principles and rights affirmed in the UNDRIP were struck out as problematic in terms of the principle of parliamentary non-interference.

⁴⁰ M S R Palmer and D R Knight *The Constitution of New Zealand: A contextual analysis* (Hart Publishing, Oxford, 2022) at 220: “At international law, we consider te Tiriti may well be regarded as a valid international treaty.” See Matthew S R Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 160-169, 178. As Palmer goes on to note, reliance on the Vienna Convention and *pacta sunt servanda* applies between States it is not a matter for domestic Courts (at 161-162). In any event, the principle is consistent with the findings in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 644 that the parties to the Treaty have a duty to act in “good faith, fairly, reasonably and honourably towards [each] other”.

⁴¹ *Lands* at 655-656 and at 690-691; *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA) at 603; *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 at 168; *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [72]. Treaty principles, indeed the role of the Waitangi Tribunal all speak to its constitutional significance as well as it not being directly enforceable.

⁴² *Lands* at 655; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*] at 515; *West v Martin* [2001] NZAR 49 (CA) at [27]-[29]; *Joseph Miru v R* (CA 65/01) at [8]; *Clark v Governor-General of New Zealand* [2005] CIV-2004-485-1902 at [38]; *New Zealand Māori Council v Attorney General* [2008] 1 NZLR 318 (CA) at [62]-[65], [72], [75]; *Hardie v Commissioner of Inland Revenue* [2010] NZCA 389 at [17]; *Takamore v Clarke* [2012] 1 NZLR 573 (CA) at [248]; *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 (SC) at [824]; *Ngāti Whātua Ōrākei Trust v Attorney-General (No. 4)* [2022] 3 NZLR 601 (HC) [*Ngāti Whātua (No. 4)*] at [589]; *Stafford v Attorney General* [2022] NZCA 165 at [77(c)].

⁴³ The core proposition from *Te Heuheu* being an international treaty does not give rise to enforceable rights until incorporated into legislation and this has become an integral part of our legal system; see also *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL). Canadian authorities, such as *Simon v R* [1985] 2 SCR 387 at 404, operate within a completely different factual and legal system, often reliant on a sui generis fiduciary relationship with the state under the various Indian Acts. Further, Canada has taken the step of providing statutory protection for such treaties in s 35 of the Canadian Constitution Act 1982.

⁴⁴ The Treaty is recognised by the law today in various ways supportive of the core the findings in *Te Heuheu* (see Crown’s submissions at [190]-[192]). See also Helen Winkelmann: The power of narrative-shaping Aotearoa New Zealand’s public law (6-8 July 2022, Dublin).

⁴⁵ The principle of continuity is consistent with the dualism of municipal and international law. Litigants “may not rely on the terms by which territory came to be acquired, or on prior rights granted by a previous sovereign and not assumed by the Crown within the new municipal legal system applicable to them”. This is the simple consequence of the application of the municipal law to the determination of such rights. Campbell McLachlan, *Foreign Relations Law* Cambridge University Press 2014 at 7.57 to 7.63. Refer also to *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453 at [154] – [155] per Lord Carswell; and Berriedale Keith, *The Constitution, Administration and Laws of the Empire* Collins and Sons, London, 1924, at 9.

⁴⁶ *Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [296].

⁴⁷ While the Treaty is protective of customary property and customary rights, this is only one aspect of continuity of custom in the common law. The Treaty itself does not codify existing customary property and customary rights, nor does it address what the powers of a sovereign in the new colony were under common law. The promises made in the Treaty are protective of those rights, but did not constrain the sovereign authority of the Crown in common law. Therefore, the articles relied on by Sian Elias “The Meaning and Purpose of the Treaty of Waitangi” (2015) Māori Law Review 3; and KJ Keith “International Law and New Zealand

Treaty as a contract is a poor analogy given many iwi did not sign it, and its wider significance is recognised publicly and in public law. It has instead been described as a foundational document establishing an enduring relationship between Māori and the Crown.⁴⁸

The Treaty partnership

33. While the Supreme Court has recognised it is a Court function to make declarations as to *existing* rights,⁴⁹ this does not extend to directly enforcing the Treaty itself.⁵⁰ As THRM acknowledge, the Treaty is not the source of tikanga rights.⁵¹ Declarations about existing customary rights held in accordance with tikanga are distinct from adjudicating on whether Crown action/omission, or policy and legislation, is Treaty compliant.⁵²
34. While tikanga is recognised as a source of law that may inform the development of the common law, it cannot displace fundamental principles and policies of the law.⁵³ Its application will depend on context.⁵⁴ Tikanga principles alone do not give rise to distinct causes of action, automatically bind the Crown, or directly modify the common law.⁵⁵ Recognition of tikanga in the law will continue to develop and is plainly not the same as the Treaty being directly enforceable.⁵⁶

Municipal Law” in JF Northey (ed) *The AG Davies Essays in Law* (London, Butterworths and Co., 1965) 130, only present part of the picture. This is consistent with the separation of powers, and the differing roles between the Executive and Legislature, as Lord Atkin explained in *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (PC) at 347 (cited in *New Zealand Air Line Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA)): “it is well established that while the making of a Treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action... The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses.” Similarly, at 348: “The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature.”

⁴⁸ Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262), at 18-19: “Parliament, the courts, and the Tribunal have all characterised the exchange of rights and obligations encompassed by the Treaty – its provision for both kāwanatanga and tino rangatiratanga – as a partnership. Indeed, partnership can be seen as an over-arching principle beneath which others, such as kāwanatanga and tino rangatiratanga, lie.”

⁴⁹ *Ngāti Whātua Ōrakei Trust v Attorney-General* [2019] 1 NZLR 116 (SC) at [34]. See also: *Ngāti Mutunga o Wharekaui Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2 at [27].

⁵⁰ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 where after surveying the law, the High Court found: “This review of the authorities invites the conclusion that the Treaty is not part of the municipal law of New Zealand in the sense that it gives rights enforceable in the Courts by virtue of the Treaty itself. Notwithstanding the more general observations of Williamson J in *Te Weehi v Regional Fisheries Officer*, to the effect that customary rights retained by the Māori tribes under the Treaty of Waitangi remain in being and are enforceable unless specifically extinguished...” The Court went on to find the Treaty, Treaty of Waitangi Act 1975, and Waitangi Tribunal findings were relevant considerations under the Soil and Water Conservation Act 1967 (refer to 223), and that ‘interests’ under s 24(4) of that Act when considering an objection would include customary interests such as Māori spiritual and cultural values. To a large extent the case is about extant rights, rather than the status of the Treaty but confirms it is a relevant consideration in a public law sense.

⁵¹ THRM submissions, 14 July 2026, at [5].

⁵² *Kamo v Minister of Conservation* [2020] 2 NZLR 746 at [34]–[37]. This case illustrates how right contests (who has manawhenua) can then feed into Treaty arguments (whether the Crown should have vested the land in the Moriori). The ability of the Court to test rights exists (*Ngāti Whātua* (No. 4)), which can inform in judicial review the application of Treaty principles under statute.

⁵³ *Ellis v R* [2022] 1 NZLR 239 (SC); *Smith v Fonterra* [2024] 1 NZLR 134 (SC); *Hata v Attorney-General* [2025] NZAR 241 (HC) at [101] citing Law Commission *He Poutama* (NZLC SP24, 2023) at [8.39(f)]. Referred to with approval by the Court of Appeal in *R v R* [2025] 3 NZLR 336 (CA) at [46]–[59]. Treaty principles may mean the Crown has an obligation to protect tikanga – see *Ngāti Whātua* (No. 4) at [67], [69].

⁵⁴ *Delamere v Minister of Immigration* [2025] NZHC 3008 at [15] citing *Ellis v R* [2022] 1 NZLR 239 (SC) at [117] (per Glazebrook J), [164]–[165] (per Winkelmann CJ), and [264]–[265] (per Williams J).

⁵⁵ *Sweeney v Prison Manager, Spring Hill* [2024] NZHC 1361 [83]; *Ellis v R* [2022] 1 NZLR 239 (SC) at [267]; *Smith v Fonterra* [2024] 1 NZLR 134 (SC) at [187]. See also *Ngāti Whātua* (No. 4) at [68].

⁵⁶ *Ngāti Whātua* (No. 4) at [64].

35. The Treaty is a forward-looking relational document, built on partnership.⁵⁷ This goes to the heart of recommendations from the Tribunal: requiring consideration of the interplay between Arts 1 and 2 on how best to balance tino rangatiratanga with governance; and Art 3, the commitment to equal rights.⁵⁸ Non-binding recommendations provide scope for Governments to address complex and potentially controversial questions in the particular context, and with regard to other affected interests.⁵⁹
36. THRM assert the present claim could be a rights-based claim grounded in tikanga, or direct enforcement of the Treaty.⁶⁰ This is incorrect. The appellant's declarations are not limited to rights held under Art 2.⁶¹ The claim seeks an assessment of adequacy of the Crown's legislative and policy response to climate change (since 1992), against the terms of Art 2, when putting multifaceted legislation in place providing for Māori and all New Zealanders (Arts 1 and 3). This is an untenable extension of the declaratory jurisdiction and undermining of Parliament's full competence to legislate.

Declarations of inconsistency not available;⁶² role of the Waitangi Tribunal

37. There is no legal basis for declarations of inconsistency with the Treaty. The

⁵⁷ Palmer and Knight, above n 40, at 220: "...an agreement upholding the Crown's legitimacy, in governing New Zealand for the benefit of all New Zealanders, in exchange for the Crown's active protection of the rangatiratanga, or authority of hapū, iwi, and Māori generally to use and control their own interests, especially in relation to land, fisheries and te reo Māori and their other tangible and intangible taonga or valued possessions. The Crown must also ensure that Māori enjoy the rights and privileges of Pākehā New Zealanders. Since this agreement involved a continuing relationship akin to partnership between the Crown and Māori, the parties should act reasonably and in good faith towards each other, consulting with each other, compromising where appropriate, and reasonably redressing past breaches of the Treaty." *Broadcasting Assets* at 517: the "relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances."; and *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC) at [110].

See *Tino Rangatiratanga Me Te Kawanatanga; The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Waitangi Tribunal, 2022): "Partnership, not active protection, is the framework for governance of New Zealand; this unique arrangement is one to be celebrated and cherished. In the interests of pursuing this ideal partnership, we consider that the treaty standards embodied in the principle of active protection as articulated in previous Tribunal reports are still useful for assessing Crown actions and omissions, and for reminding the Crown of its obligations where such actions and omissions, particularly in respect of land loss, have caused prejudice to Māori. We use it in this report accordingly. However, we prefer to emphasise the principle of mutual recognition and respect as better reflecting the treaty-based partnership that Te Raki Māori entered into."; and Palmer, above n 40, at 117 discussing various comments made by Waitangi Tribunal on the Treaty, including the Crown should only override Māori interests in exceptional circumstances and in other cases, a careful balancing of interests is required to mutual advantage.

⁵⁸ Art 2 'rights' do not exist in isolation. *Broadcasting Assets* at 517.

⁵⁹ By way of example, *Marine and Coastal Area (Tukutai Moana) Act 2011 Inquiry Stage 2 Report* (Waitangi Tribunal, October 2023) at 6.5.4 "The Crown as failed to achieve a proper balance" in protecting Art 2 interests with the Marine and Coastal Area (Takutai Moana) Act 2011. See also *Tino Rangatiratanga Me Te Kawanatanga; The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, Wai 1040 (Waitangi Tribunal, 2022): at 43, 45, 50, 66, 67, 70 and 71. The nature of partnership and power sharing under the Treaty is at the heart of this inquiry, and a recognition from the Tribunal of different perspectives, changing understanding over time, and not absolute governance or tino rangatiratanga. These are matters that require the utmost care at a political and constitutional level.

⁶⁰ THRM submissions at [11]. Casting this claim as either direct enforcement of the Treaty, or direct enforcement of underlying tikanga rights.

⁶¹ Mr Smith's claim relates to his whakapapa to the Whangaroa District, including an interest in tikanga to the Mahinepua C Block located at Mahinepua, north east of Kaeo, Northland: 3ASOC at [41]. Mr Smith claims the Crown has breached Art II including the exercise of tino rangatiratanga in respect of taonga (which are defined as the list of customary sites and resources): 3ASOC, at relief paragraph following [102] [[05.0167]].

⁶² Generally, addressed in the Crown's submissions at [193] to [197].

analogy with *Taylor* and s 3 NZBORA is not apt. NZBORA affirms New Zealand's commitment to the ICCPR.⁶³ Meaning Parliament positively incorporated rights sourced outside of domestic law, making them cognisable in domestic courts as free-standing obligations. While the Treaty is a constitutional document it is not directly enforceable. Judicial enforcement through declarations of consistency requires action by Parliament to provide a legitimate basis or jurisdiction (as was done with the NZBORA).⁶⁴

38. It must be emphasised that the appellant's claims are not simply seeking an effective remedy for "rights".⁶⁵ They challenge all Executive and Legislature action and omission since 1992 touching on climate change. This is significantly different from *Taylor* whether conceptualised under BORA or the Treaty.⁶⁶ The Court would need to establish a methodology for assessing Treaty compliance, where the Māori interest protected by Art 2 may be contested when set against the need to reconcile this with Arts 1 and 3.⁶⁷ When reconciling Arts 1, 2 and 3, policy choices will often involve considering competing social, economic and cultural factors.⁶⁸ Climate change epitomises such a complex balance.
39. The declarations sought would move the Court into an unmandated and unprecedented constitution-making role if they were to give the Treaty direct legal force, whether assessing the Crown's climate change response, or any

⁶³ NZBORA, long title. *Attorney General v Taylor* [2019] 1 NZLR 213 (SC) at [41]. The Court emphasised that s 3 of NZBORA applies to the legislature, and declarations are formal declarations as to the law: at [43], [53], and [118]. The ability to get declarations as a remedy is therefore reliant on the scheme of NZBORA.

⁶⁴ Commentators that suggest constitutional change to require the Treaty to have direct force or to be implemented as supreme law accept this would require action by Parliament. For example: (a) The suggestion the Treaty be included as a right protected by NZBORA in the White paper: Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] 1 AJHR A6. (b) The draft constitution included in *Geoffrey Palmer and Matthew Palmer, Bridled Power* (4th ed, Oxford University Press, 2004) at Appendix is draft legislation. (c) Discussion of the option of the Treaty being superior law in: Palmer, above n 40, at 338-389. (d) The constitutional reform discussed in: Palmer and Knight, above n 40, at Chapter 12.

⁶⁵ Rights as in customary rights and those interests protected by Article 2 of the Treaty can be the subject of separate litigation, per *Ngāti Whātua* (No. 4).

⁶⁶ The Court does not have jurisdiction (inherent or otherwise) to issue declarations that define the constitutional parameters under the Treaty. The Court's inherent jurisdiction, or DJA jurisdiction, is to determine existing legal rights and obligations between the parties – including customary rights and corresponding obligations (*Ngāti Whātua* (No. 4) at [35]; Wade and Forsyth, *Administrative Law* (12th ed, Oxford University Press, Oxford, 2023) at 455-456; and Rt. Hon. Lord Woolf and Jeremy Woolf *The Declaratory Judgment* (Thomson Reuters, 2011) at [3-34] to [3-36])). This is distinct to the Court exercising its supervisory jurisdiction (in judicial review) of public powers of decision-making for lawfulness, in which the jurisdiction to grant declaratory relief might be wider (Woolf & Woolf at [3-08]).

⁶⁷ Paul Rishworth *Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of the Bill of Rights* (University of Auckland, 2019) at 6.

⁶⁸ *ALT New Zealand Ltd v Attorney-General* [2025] 3 NZLR 60 (CA) at [112]-[113]; Waitangi Tribunal, *Kō Aotearoa Tēnei* (2004) at 578: "...The Tribunal has said often that taonga Māori are entitled to a reasonable level of priority in this contest, because they are Treaty protected. This does not mean that Māori interests will trump all others. Rather, the people who set priorities both across government and within agencies are required to give careful consideration to the relative weighting of the Māori interest, even as they focus on the wider issues and priorities of the day (many, perhaps most, of which will have no specific Māori element). Māori interests may not always receive substantive priority, but they are always entitled to priority consideration. This process of balancing priorities is, we accept, for the Crown, but priority decisions must be reasonable, and the process must be transparent. Put simply, decision-makers ought to explain how and why they came to their view. In that way they are accountable to the Treaty partner and the wider public."; and *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) at 198: where its explained policy content and decision-making is within the sphere of elected representatives, meaning the Courts are less well-equipped to weigh the considerations involved.

regime impacting Māori. The reasons for why a declaration of inconsistency is not available in this case under NZBORA are amplified in this context. Enforcing the Treaty through declarations of inconsistency would represent a profound and wide-reaching constitutional change without legislative guidance in contrast to *Taylor*, which was relatively orthodox and narrow, and based on the interpretation of NZBORA.⁶⁹

40. No such step is required.⁷⁰ The Waitangi Tribunal provides a bespoke regime and an available remedy for claims of alleged breaches (including by the Legislature). While the Treaty of Waitangi Act 1975 does not bar common law claims, the Tribunal jurisdiction strongly indicates the statutory purpose and intent that,⁷¹ when it comes to assessing consistency with the Treaty, the role and remedy lies with the Tribunal.⁷²
41. The Tribunal is the body to which Parliament has given the inquiry power.⁷³ This is for good reason. The Tribunal can assess claims from all affected Māori claimant groups on a particular issue like climate change, assess competing claims, balance interests and make policy recommendations to the Crown on how to compensate for grievances on an effective and national basis to prevent others from being similarly affected in the future.⁷⁴ Courts, unlike commissions

⁶⁹ Even in *Attorney-General v Taylor* [2017] NZCA 215, which founded jurisdiction for declarations of inconsistency on the common law, this was developed “in tandem with the supportive structure of the NZBORA.” See Claudia Geiringer “The Constitutional Role of the Courts under the NZ Bill of Rights” (2017) 48 VUWLR at 568. As noted, the Supreme Court in *Attorney-General v Taylor* moved back from the Court of Appeal’s position in this respect. See also Jason Varuhas “Declarations of inconsistency in the Supreme Court” [2024] NZLJ 122.

⁷⁰ How the Treaty is given legal significance in the New Zealand legal system is addressed in the Crown’s submissions at [191].

⁷¹ *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC) at [137] (minority); *Skerret-White v Attorney-General* [2024] 2 NZLR 493 (CA) at [36]-[37], [40], [43]; *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 651-652; and [1975] 401 NZPD 4495 (Hon Minister Rata): (a) the Waitangi Tribunal, as a standing commission of inquiry, is distinct to a Court; (b) the inquisitorial role enables the Tribunal to take a more flexible approach commensurate with the political balancing of issues involved in considering Treaty compliance; (c) while findings of law are not generally determinative they are of assistance to the Court in cases of existing rights (customary title for example) and this does not rule out binding recommendations in certain circumstances (in accordance with the Treaty of Waitangi Act 1975, which allows this for particular Treaty breaches); and (d) Treaty of Waitangi Act 1975, s 8I provides the Minister must prepare and lay before the House of Representatives a report on progress being made in the implementation of recommendations made to the Crown by the Tribunal.

⁷² See *Paki v Attorney General (No 2)* [2015] 1 NZLR 67 (SC) at [196] per McGrath J: “It is necessary that the Courts do not frustrate legislative mechanisms or render statutory remedies redundant by developing alternative laws that go beyond the scope of what is available under statute.” See also [288] where William Young J observed: “Finally, there is the reality that remedies are provided for under the Treaty of Waitangi Act 1975... This provides a more flexible mechanism for addressing the underlying grievance than the rules of equity invoked by the appellants. Under the Treaty of Waitangi Act there are no limitation issues. And outcomes can be calibrated to current circumstances.”

⁷³ In this respect, the Tribunal’s role is different from the Human Rights Review Tribunal (in contrast to *Taylor* - where the Supreme Court considered the HRRT’s ability to declare inconsistencies with s 19 of NZBORA under the Human Rights Act 1993 was supportive of the Court’s jurisdiction to do so).

⁷⁴ As recognised in *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [63], not only must the Court be wary not to cross the boundary into the domain of Parliament, but also respect the role the Tribunal plays “...as in much Treaty rights litigation over the past generation in which both the courts and the Waitangi Tribunal have been utilised by Māori in the same conflict, it simply means that this court must tread carefully and deferentially along paths that the Tribunal has already travelled.”; and *New Zealand Educational Institute Te Riu Roa Inc v Minister of Education* [2025] NZHC 2964 at [121]: “A wide-ranging examination of [inequity] and whether the Crown is meeting its obligations under the Treaty is the kind of inquiry for which the Waitangi Tribunal is designed...the Tribunal would be able to examine the system as a whole, drawing on expertise.”; *Skerret-White v Minister for Children* [2024] 2 NZLR 493 (CA) at [40]; and *Smiler v Attorney-General* [2026] NZHC 375 at [155].

of inquiry, deal in matters of law rather than policy.

42. Legislative frameworks have been imposed reliant on the understanding of the position of the Treaty in New Zealand law; that it is not directly enforceable; that it can have impact in judicial review applications; and that a standing commission of inquiry exists to consider historical and contemporary breaches and provide non-binding recommendations based on the Tribunal's expertise.⁷⁵
43. Current settings enable legislation to be critiqued by the Tribunal and adjusted by Government, while being applied by the Courts.⁷⁶ This illustrates an orthodox relationship between the Tribunal, Crown and Courts; and it recognises the inherently political dimension in considering whether legislation is 'Treaty' compliant.⁷⁷ The practical effect of the declarations sought (and supported by THRM) would be a Court sanctioned provisional opinion on what is Treaty compliant policy or legislation.⁷⁸ The Court avoids "suggestions" designed to interfere with Parliamentary process.⁷⁹ Even if Parliament is under no obligation to remedy a law if declared inconsistent with the Treaty, there would be a reasonable expectation the inconsistency would be at least addressed, if not considered,⁸⁰ creating a shadow over future reform.⁸¹ Such a change would "involve a fundamental re-conceptualisation of the separation of powers" in the Treaty context.⁸²
44. Other documents, such as the Cabinet Manual, LDAC Guidelines and the Red Book⁸³ do not create justiciable rights and are not supportive of such a fundamental change.⁸⁴ UNDRIP does not support giving direct effect to the

⁷⁵ In specified circumstances concerning memorialised lands the Tribunal has the power to provide binding recommendations.

⁷⁶ *The MACA 2011 Inquiry Stage 2 Report* (Waitangi Tribunal, 6 October 2023) at 103: The Tribunal recognised the test implemented was subject to the Tribunal's determination of whether it is consistent with the Treaty, and the role of the Courts in fulfilling their judicial function of interpreting and applying the tests.

⁷⁷ *Lands* at 694, lines 19 to 24.

⁷⁸ Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights" (2017) 48 VUWLR at 561. A declaration of inconsistency is not an authoritative view on the law, but rather a provision opinion on a question of moral principle and would be a fundamental re-conceptualisation of the separation of powers. And, at 563: "issuance of a formal but non-binding declaration of legal non-right is not quite business as usual. It involves, at very least, an extension of common law dialogical method. Interestingly, the Court of Appeal decision went further than the Supreme Court in *Taylor*, which noted at [66] "As is apparent, we have not found it necessary to undertake a similar exercise. We are accordingly not to be taken as endorsing the Court of Appeal's approach towards these matters."

⁷⁹ See *Te Rūnanga o Ngāti Whātua v Attorney-General* [2024] NZHC 2271, [2024] 3 NZLR 218 at [49]-[61].

⁸⁰ Convention provides the Executive complies with Court declarations. See *Singh v Refugee Status Appeals Authority* [1994] NZAR 193 (HC); and *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) at [49].

⁸¹ *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC) at [134] (minority judgment); a declaration would "simply hang in the air and possibly create some sort of moral obligation on the part of the legislature to consider. That in turn carries the risk that a formal order of the court may be simply ignored, with the consequential danger of the erosion of respect for the integrity of the law and the institutional standing of the judiciary." See also *R v Hansen* [2007] 3 NZLR 1 (SC) at [254].

⁸² See Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights" (2017) 48 VUWLR at 561.

⁸³ *Te Arawhiti Healing the past, building a future: the Red Book* (June 2018) at 6 is clear the Treaty "is not directly enforceable in New Zealand's courts, specific legislation does provide for the principles of the Treaty to be given some effect".

⁸⁴ See *Rabson v Attorney-General* [2017] NZSC 22 and *Rabson v Attorney-General* [2016] NZHC 2876 at [9]: "the Cabinet Manual is a

Treaty through declarations of inconsistency;⁸⁵ but, to the extent it envisages a remedy, the Waitangi Tribunal already provides this.⁸⁶

References in existing legislation

45. THRM suggests a declaration of inconsistency (presumably against both the Executive and Legislature) is a natural development of the law not impacting on existing statutory references. That is not so: enabling declarations of inconsistency against the Treaty terms will impact on the manner in which Parliament is giving effect to the Treaty.
46. The Treaty is incorporated into domestic law through explicit reference in numerous Acts; in preambles; and detailed provisions that guide how the Treaty is relevant and the weight given to it.⁸⁷ The norm since *Lands* is for legislation to be drafted requiring Executive action in relation to Treaty principles; not the terms of the Treaty.⁸⁸ This approach provides ongoing significance and strength to the Treaty.
47. The principle of legality reflects a presumption that Parliament does not intend to legislate contrary to fundamental human rights⁸⁹ unless Parliament expresses such an intention in clear words.⁹⁰ The common formulation of the principle was given in *Ex Parte Simms*.⁹¹ Recent cases clarify the principle applies only to statutory interpretation.⁹² This was confirmed by the Supreme Court's use of the principle in *Fitzgerald*, in the context of s 6 of NZBORA.⁹³

guide to central government decisions making for Ministers, their offices, and those working within government. Its focus is, by definition, on the executive branch of government. Although the Manual is undoubtedly authoritative, its function is informative, rather than directive. In other words, it merely records pre-existing constitutional arrangements (and may be amended as these develop). It is not a primary source of constitutional law or convention. For that reason it is not, and never could be, independently justiciable."

⁸⁵ UNDRIP is not binding in New Zealand, and is insofar as the Treaty is concerned, the scope of art 2 is the subject of academic and historical debate (including through the development of Treaty principles in *Lands*). Given Parliamentary sovereignty, constitutional reform through legislation would be required to address principles such as self-determination. Reliance on the *pacta sunt servanda* principle and the Vienna Convention does not assist. Compliance with Vienna Convention is a question for an international court by claims taken at a state-to-state level. This and reference to overseas cases (*In the Matter of a Reference by Cabinet* [2025] FJSC 1 (Miscellaneous Case No 1 of 2025, Supreme Court of Fiji)) do not sufficiently address our unique constitutional and legal settings.

⁸⁶ *UNDRIP* does not materially add to the Crown's duties under the Treaty in relation to tikanga: *Ngāti Whātua (No. 4)* at [608], [609].

⁸⁷ Palmer and Knight, above n 40, at 221 noting the Treaty is referenced now in over 30 different Acts.

⁸⁸ *Lands*, *Takamore* [2012] 1 NZLR 573 (SC), *Ngāti Whātua Ōrākei Trust* [2019] 1 NZLR 116 (SC), *Attorney General v Taylor* [2019] 1 NZLR 213 (SC), and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) are examples of the Court operating with a framework that relies on Treaty principles and incorporation of Treaty principles into statutory provisions to guide legislation, decision makers, and the Court's in public law remedies.

⁸⁹ *D v New Zealand Police* [2021] 1 NZLR 213 (SC) at [165]; *Fitzgerald v R* [2021] 1 NZLR 551 (SC) at [251]. See Legislation Design and Advisory Committee Legislation Guidelines: 2021 Edition (September 2021) at 32 in relation to the Treaty.

⁹⁰ Natalie Coates and Nerys Udy "The intersection of the principle of legality with Te Tiriti o Waitangi, tikanga Māori and indigenous rights" in *Intensive: Human Rights* (NZLS CLE Ltd, 2022) 71 at 72.

⁹¹ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

⁹² *Timaru District Council v Minister of Local Government* [2023] NZLR 572 (HC) at [98]; *Fitzgerald v R* [2021] 1 NZLR 551 (SC) at [56]; *New Health New Zealand Inc v South Taranaki District Council* [2018] 1 NZLR 948 (SC) at [292]; *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [26]; *Ulrich v Attorney-General* [2022] 2 NZLR 5099 (CA) at [62]; *Wairarapa Moana Ki Pouākani Inc v Attorney-General* [2026] NZCA 255 at [97]-[98].

⁹³ *Fitzgerald v R* [2021] 1 NZLR 551 (SC) at [51], [55]-[57] per Winkelmann CJ.

48. *TTR* confirmed the application of the Treaty in terms of *weighting* through statutory mechanisms; and outside of express provisions the Treaty's *relevance*.⁹⁴ The ability for the Treaty to be subject to adjudication by the Courts in judicial review: "depends on whether there is a Treaty clause in the relevant statute or whether the Judiciary considers to it be so salient it must be a relevant consideration to an official decision".⁹⁵ The Courts have interpreted and applied Treaty principles where incorporated by Parliament.⁹⁶
49. Consistent with the principle of legality, Treaty clauses in legislation should not be narrowly construed.⁹⁷ That reasoning and authority does not support the extension of a substantive review power or declaration of inconsistency to all Executive and Legislative decisions against the terms of the Treaty.

28 July 2026

J E Hodder KC/ J M Prebble/ K F Gaskell/
D Ranchhod
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⁹⁴ *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [150]–[151] noting *Huakina Development* and the indirect and direct application of the Treaty, and [151] where silence in a statute does not necessarily exclude "consideration". Stands for the proposition that as a matter of weight; to directly apply the Treaty it requires a statutory provision with an applied standard or weight is for the decision-makers.

⁹⁵ Palmer and Knight, above n 40, at 222. See also *Stafford v Attorney General* [2022] NZCA 165 at [77(b)].

⁹⁶ For example in *Lands*, s 9 of the State-Owned Enterprises Act 1986. Where a Treaty provision exists, it becomes the duty of the courts to check whether the obligation on Crown has been observed and, if not, provide a remedy. At 660: "the firm declaration by Parliament that nothing in the Act shall permit the Crown to act inconsistently with the principles of the Treaty must be held to mean what it says." See *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2019] 1 NZLR 368 (SC) at [47]; and *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC).

⁹⁷ *Cropp v Judicial Committee* [2008] 3 NZLR at [26]–[27].