
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 SUBMISSIONS ON APPEAL

29 June 2026



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ISSUE ON APPEAL

1. The issue on appeal is whether the Court of Appeal¹ was correct to uphold the High Court decision² to strike out each of the appellant's causes of action on the grounds they cannot succeed as a matter of law.
2. The respondent submits that the answer is Yes: for good reasons each of the appellant's causes of action is untenable as a matter of law. These include that each seek to impermissibly invoke the declaratory jurisdiction of the courts to assess, criticise and dictate changes to:
 - 2.1 the Climate Change Response Act 2002 (**CCRA**) itself; and
 - 2.2 its associated and multifaceted policy framework for decision making about greenhouse gas emissions and adaptation to the adverse effects of climate change.

THE COURT OF APPEAL WAS CORRECT TO STRIKE OUT THE CLAIM

3. The respondent submits the Court of Appeal was correct in:
 - 3.1 Undertaking a careful analysis of the CCRA, including of its purpose, protections for Māori interests in respect of Te Tiriti o Waitangi | Treaty of Waitangi (**Treaty**),³ core processes and actors, engagement with multifaceted interests and criteria, and accountability provisions.⁴
 - 3.2 Concluding the CCRA is a comprehensive framework to reduce emissions and adapt to the adverse effects of climate change.⁵
 - 3.3 Recognising the CCRA reflects a range of policy choices appropriately and clearly made by Parliament and identifying the important but orthodox judicial role provided by judicial review of executive decision-making under the CCRA provisions.⁶
 - 3.4 Striking out all three causes of action as untenable on the principal ground that each invites the Court to eschew fundamental constitutional principles to second guess Parliament's policy choices

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

² *Smith v Attorney-General* [2022] NZHC 1693 [HC Judgment] [[101.0109]].

³ "Treaty" has been used throughout these submissions to refer to both versions of the text. When "Te Tiriti" is used, the Te Reo Māori version of the text is being referred to.

⁴ CA Judgment at [8], [10]–[11], [16]–[21], and generally.

⁵ CA Judgment at [8]–[9], [135] and [150].

⁶ CA Judgment at [8], [10], [89], [93], [125], [165]–[166], [183].

and framework as enacted in the CCRA.⁷

4. However, the respondent also submits the Court of Appeal's strike out conclusions can be supported on other grounds, including some not accepted in its reasons for judgment.⁸ Those include a narrower reading of the New Zealand Bill of Rights Act 1990 (**NZBORA**), s 8 (life) and s 20 (culture) than the Court of Appeal applied.

SUMMARY OF ARGUMENT

5. At the heart of the appellant's pleadings and arguments is the assertion that judicial intervention is available and required because, on his assessment, the legislative and executive branches of government have "failed" to take sufficient steps to reduce national and Crown emissions.⁹
6. Self-evidently, the appellant's invitations for judicial intervention are designed to achieve judicial commentary on, and criticism of, Parliament's policy choices and legislative settings in response to climate change. Each cause of action asks for declaratory relief designed to have Parliament enact different climate change legislation in accordance with the appellant's desired policy settings. The separation of powers and every notion of comity run against that political objective. The Court has a critical role in its judicial review jurisdiction relating to decisions made under the CCRA.¹⁰ But that does not extend to assessing the adequacy of Parliament's public policy choices and legislative settings in the way the appellant seeks — contrary to art 9 of the Bill of Rights 1688. Hence the appellant's claims go far beyond ordinary judicial review.
7. Perhaps inevitably, the appellant's pleadings and arguments pay minimal attention to the comprehensive scope and detailed consultative decision-making framework established by the CCRA. Within that framework there are necessarily a series of balancing assessments required, featuring broad and incommensurable scientific, economic, social, te ao Māori, distributional, environmental and international factors.¹¹ A central example is the list¹² of

⁷ CA Judgment at [94], [97], [101], [125], [150].

⁸ Notice of intention to support decision on other grounds, dated 27 January 2026 [[05.0097]].

⁹ For example, Draft Third Amended Statement of Claim (**Draft 3ASOC**) at [54]-[56] [[05.0152]]; Appellant's submissions at [68]-[69] and [75].

¹⁰ This role is respectful of the "constitutionally central line between judicial interpretation and judicial legislation" emphasised in the 2017 Hamlyn Lecture by (then) Professor Andrew Burrows KC "Thinking about Statutes" (Cambridge University Press, 2018). See also at 18, 40 and 44.

¹¹ CCRA, s 5M.

¹² The projected emissions and removals for the budget period; broad range of domestic and international scientific advice;

12 matters relating to setting emissions budgets specified in s 5ZC(2)(b).

8. It is important to bear in mind that the CCRA contains extensive provisions for public availability of reports relating to proposed climate change related decisions (for moving towards the 2050 target set in the legislation itself), and for consultation with the public and affected sectors and interests. This is consistent with parliamentary democracy; and the decision making, including about changes to legislation, and which may be controversial, is undertaken by the democratically accountable branches of government.¹³
9. The appellant's first cause of action is for asserted breaches of a hitherto unknown public law "Duty" inferred from an accumulation of disparate juristic elements. The pleaded breaches extend to the enactment of the CCRA and other primary legislation (Parliament's "failed legislative response ... for which the Crown can be sued"¹⁴). It would put the courts in the position of having to assess and regulate the content of legislative and policy measures (and alleged omissions) since 1992; and circumvent the CCRA regime already in place.
10. A customary law duty is unable to give rise to the appellant's claimed duty. Customary international law cannot become part of domestic law where inconsistent with statute expressly or by necessary implication, or precluded by constitutional principle. Reliance on a customary duty as the basis to assess the adequacy of the CCRA regime is, by definition, inconsistent with that regime.
11. It is untenable as a matter of law that the scope of ss 8 and 20 of NZBORA enable the Court to assess the "adequacy" of a multifaceted statutory framework and the policy choices contained within it. Employing the NZBORA in this way would amount to an upending of New Zealand's constitutional settings and be contrary to Parliament's intent. Further:

11.1 Engagement of s 8 requires loss of life or increased likelihood of death to an identified person or group of persons. The claim does not (and

existing technology and anticipated developments, including the costs and benefits of early adoption; the need for budgets that are ambitious but likely to be technically and economically achievable; results of public consultation; likely impact of actions taken to achieve an emissions budget and 2050 target, including ability to adapt to climate change; distribution of those impacts across regions and communities, and from generation to generation; economic circumstances and the likely impact on taxation, public spending and borrowing; implications, or potential implications, of land-use changes for communities; responses taken or planned by parties to the Paris Agreement or the Convention; obligations under international agreements; and the implications, or potential implications, for domestic food production.

¹³ Kenneth Keith *Without Fear or Favour: A Life in Law* (Te Herenga Waka University Press, Wellington, 2025) at 54 ("The underlying principle of the New Zealand constitution is democracy"); and see 63-64: ("New Zealand constitutional change generally involves lengthy processes").

¹⁴ Draft 3ASOC at [82] [[05.1060]].

cannot) demonstrate a real and immediate risk to life.

- 11.2 Section 8 does not impose a positive obligation on the Crown to implement a legal administrative framework ('framework duty') to safeguard life against the risks of climate change. Even if s 8 gave rise to a framework duty, any such positive duty has been met.
 - 11.3 Section 20 requires the Crown to refrain from infringing the rights of minorities to enjoy their culture. Even if a positive duty could arise under s 20, it would not extend to enabling the appellant's systematic claim.
 - 11.4 The pleaded effects are future focused, and the appellant does not appropriately recognise future mitigation, and adaptation, measures the Crown is and will continue to take to mitigate adverse impacts.
12. On the third cause of action, two fundamental constitutional aspects are firmly part of the constitution: (1) the Treaty cannot override Acts of the legislature without action of Parliament; and (2) there is no free-standing justiciable duty applicable to the Crown-Māori relationship on the basis of the terms of the Treaty alone.
 13. Institutional frameworks such as the Waitangi Tribunal; the Treaty settlement process; the ability to apply Treaty principles by way of judicial review; and by reference to the Treaty in legislation, are all ways in which the Treaty is given legal significance. Declarations that Crown action including legislation is inconsistent with the terms of the Treaty are not available at law, unless the Treaty is incorporated in statute first. Available remedies for the appellant's challenge lie in judicial review or claims made to the Tribunal.
 14. The appellant's causes of action unabashedly seek judicial declarations which would contradict the CCRA and the framework associated with it.¹⁵ That would involve "absurd" and unworkable consequences,¹⁶ and undermine the coherence of our laws.¹⁷ The constitutional and/or legal policy objections to the claims are patent and self-evident and they were and are properly struck out

¹⁵ Rather, any such declarations would be expected to establish a "parallel" common law scheme to "clash" with and "undermine", rather than "satisfactorily co-exist with" the CCRA statutory scheme. This language is drawn from Professor (now Lord) Borrows "Thinking about Statutes" (Cambridge University Press, 2018) at 63-66.

¹⁶ Diggory Bailey and Luke Norbury *Bennion on Statutory Interpretation* (9th ed, LexisNexis, London, 2026) at [13.1].

¹⁷ At [26.8].

without going to trial.¹⁸

COURT OF APPEAL DECISION

15. The Court of Appeal applied orthodox principles for strike out, as recently considered by this Court in *Smith v Fonterra*, and unanimously agreed with the High Court that each cause of action should be struck out:

15.1 The pleaded gaps in the CCRA framework were not of a kind that could constitute a failure to take positive steps to protect against the denial of the right to life or culture under NZBORA. Instead, they reflected policy choices for Parliament under New Zealand's constitution. While it was not clearly untenable that ss 8 and 20 might place positive obligations on the Crown to protect against denial of the right to life and to culture in a climate change context, it was clearly untenable that it extended to the appellant's pleaded claim.

15.2 It was untenable for an independent duty to directly enforce the Treaty to operate in a context where legislation already requires proper consideration of the Treaty, or where the Treaty can be a relevant consideration to the context of legislation or decisions and therefore amenable to judicial review.

15.3 To the extent the novel common law claim relied on NZBORA and the Treaty, those aspects depended on whether claims were tenable under NZBORA (they were not) or under the Treaty (again, they were not). They could not be combined with other sources of law to create a common law action.

CLIMATE CHANGE RESPONSE ACT 2002

16. The CCRA is Parliament's response to greenhouse gas emissions-related climate change, exercising its full law-making power.¹⁹ It provides a detailed (comprising 500 pages) and complex legislative framework for a national response.²⁰

17. The CCRA was originally enacted to allow New Zealand to meet its obligations under the United Nations Framework Convention on Climate Change and the

¹⁸ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) per Richardson J at 305.

¹⁹ Recognised in the Constitution Act 1986, s 15(1) but with a pedigree dating back to the Bill of Rights 1688.

²⁰ In relation to which, the important role of the Parliamentary Counsel should not be overlooked: see Professor (now Lord) Burrows "Thinking about Statutes" (Cambridge University Press, 2018) at 100-108.

Kyoto Protocol.²¹ Parliament has continued to refine the legislation and funded its administration including evolving climate policy determined by Cabinets, through appropriations for over two decades.²²

18. The legislation was significantly amended by the Climate Change Response (Zero Carbon) Amendment Act 2019, which passed with cross-party support. These amendments were Parliament's response to the Paris Agreement.
19. The purpose of the CCRA is to provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius; and to prepare for, and adapt to, the effects of climate change.²³ The purpose is also to enable New Zealand to meet its international obligations, and to provide for the emissions trading scheme.²⁴
20. The Zero Carbon Amendment Bill Explanatory Note explained its purpose and the balancing involved:²⁵

The overarching purpose represents a balance of the guiding principles agreed to by Cabinet to frame development of climate change policy: leadership at home and abroad; a productive, sustainable, and climate-resilient economy; and a just and inclusive society.

The Bill sets out a durable framework, and stable and enduring institutional arrangements, for climate change action that will help keep New Zealand on track to mitigate and adapt to climate change. It also contains mechanisms for increasing transparency of decisions relating to climate change. This includes processes, time frames, reporting obligations, monitoring, and considerations to take into account.

The Bill seeks to strike a balance between flexibility and prescription in New Zealand's long-term transition, as well as building in considerations of how impacts are distributed.

21. As outlined further below, the CCRA recognises and reflects that responses to climate change involve the weighing of a multitude of competing scientific, socio-economic, cultural and distributive justice factors – while moving towards the 2050 target.
22. Neither the CCRA nor the international instruments identified are absolutist or

²¹ Climate Change Response Bill 2002 (212-1) (explanatory note) at 1.

²² On funding, see (for example) Appropriation (2025/26 Estimates) Act 2025, sch 1. On policy evolution, see affidavit of Katherine Wilson (13 December 2021) at [6] [[201.0049]].

²³ CCRA, s 3(aa).

²⁴ CCRA, s 3(a) and (b).

²⁵ Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note). On the interpretation utility of explanatory notes see Lord Burrows' address "*Some issues on statutory interpretation*" (6 June 2025) at 5–6.

contain “bright lines” (in the manner sought by the appellant’s claim) and inevitably recognise the importance of taking into account economic and social realities.²⁶

23. The CCRA also reflects our parliamentary democracy, providing the important roles of various institutions and contributors in the climate response, including: Parliament; the Minister of Climate Change (**Minister**); the establishment of the Climate Change Commission | He Pou a Rangi (**the Commission**); government departments; members of the public through consultation processes, and the electorate at the ballot box; Māori and iwi; scientific experts; international instruments; and the judiciary.
24. The following paragraphs outline the nature and role of key elements of the CCRA: (1) the Commission; (2) the 2050 target; (3) emissions budgets; (3) emissions reductions plans; (4) national climate change risk assessments; (5) national adaptation plans; and (6) the emissions trading scheme.

Climate Change Commission | He Pou a Rangi

25. The Commission is an independent²⁷ Crown entity, established to provide expert advice on mitigating climate change and adapting to its effects, and to monitor and review successive governments’ progress towards emissions budgets, emissions reductions plans, the 2050 target, and adaptation goals.²⁸
26. The Commission’s advice must be publicly available and in all cases be presented to the House of Representatives.²⁹ In some, but not all cases, the Minister of must provide the House with a response to the Commission’s advice.³⁰
27. Membership of the Commission is comprised of inter-disciplinary experts. Before recommending an appointment to the Commission, regard must be had to the need for the Commission to collectively have: an understanding of climate change mitigation and adaptation, including the likely effects of responses to climate change; experience working in or with local and central government;

²⁶ CCRA, ss 5M, 5ZC(b); United Nations Framework Convention on Climate Change art 2 (food production), arts 3 and 4 (economic/social matters). See also: Affidavit of Helen Plume (9 December 2021) at [51] [[201.0041]].

²⁷ CCRA, s 5N.

²⁸ CCRA, ss 5A–5C; s 5O; ss 5ZJ–5ZL.

²⁹ CCRA, s 5L.

³⁰ For example see CCRA, s 5ZB (the Minister must provide a written response to the Commission’s advice on proposed emissions budgets to the House) s 5U (the Minister must do the same with respect to advice on a 2050 Target amendment), and under s 30GC(7) (if the Minister makes a recommendation about prescribing limits or price control settings under the ETS that differs from a recommendation by the Commission, the Minister must prepare a report of the reasons for difference and present it to the House).

knowledge of public and regulatory policy processes; and expertise relevant to the environmental, ecological, social, and distributional effects of climate change and policy interventions; the Treaty and te ao Māori;³¹ and a range of sectors and industries at regional and local levels.³²

28. Particular attention is required to seeking nominations from iwi and Māori representative organisations; and the Minister must, before recommending the appointment of a member, have regard to the need for members who have technical and professional skills, experience, and expertise, and innovative approaches relevant to the Treaty.³³
29. In undertaking its functions,³⁴ the Commission must consider, where relevant: current available scientific knowledge; existing technology and technological developments; the likely economic effects; social, cultural, environmental, and ecological circumstances, including the differences between sectors and regions; the distribution of benefits, costs, and risks between generations; the Crown-Māori relationship, te ao Māori, and specific effects on iwi and Māori; and responses to climate change taken or planned by parties to Paris.³⁵
30. Section 5N provides for the Commission’s obligations to consult proactively and widely.

2050 target

31. Section 5Q itself prescribes the 2050 target:³⁶

(1) The target for emissions reductions (the **2050 target**) requires that—

- (a) Net accounting emissions of greenhouse gas emissions in a calendar year, other than biogenic methane, are zero by the calendar year beginning on 1 January 2050 and for each subsequent calendar year: and
- (b) Emissions of biogenic methane in a calendar year—
 - (i) are 10% less than 2017 emissions by the calendar year beginning on 1 January 2030; and
 - (ii) are 14% to 24% less than 2017 emissions by the calendar year beginning on 1 January 2050 and for each subsequent year.

³¹ Including tikanga Māori, te reo Māori, mātauranga Māori, and Māori economic activity.

³² CCRA, s 5H.

³³ CCRA, s 3A, subs (ab) and (ac).

³⁴ CCRA, s 5J. For example, the preparation of national climate change risk assessments, and the preparation of reports on the implementation of the national adaptation plan.

³⁵ CCRA, s 5M.

³⁶ The 2050 biogenic methane target was amended by Parliament in December 2025: The Climate Change Response (2050 Target and Other Matters) Amendment Act 2025.

...

32. The Commission must undertake its next review of the 2050 target by 31 December 2029 and at any other time the Minister requests.³⁷ As a result of such review, the Commission may recommend a change to the 2050 target in accordance with s 5T. Section 5U provides for the Government's response to any target review recommendations within 12 months and for the Minister to make that response public and present it to the House of Representatives.
33. A review of the biogenic methane component of the 2050 target must also be initiated by the Minister and Minister of Agriculture taking into account the factors listed in s 5QA(3).

Emissions budgets

34. Section 5X requires the Minister to set five-yearly emissions budgets, essentially to act as "stepping stones" to the 2050 target.³⁸
35. Emissions budgets are set following advice from the Commission: s 5ZA. Section 5ZB requires that before setting an emissions budget, the Minister must be satisfied that there has been adequate consultation, and if not, undertake additional consultation.
36. Section 5ZC sets out the wide ranging scientific, social, economic, technological and political matters the Commission and the Minister must have regard to when advising on and setting emissions budgets.³⁹
37. The Minister has a statutory duty to meet the relevant emissions budget pursuant to s 5X(4). Emissions budgets must be met, as far as possible, through domestic emissions reductions and removals: s 5Z.
38. Once set, emissions budgets can only be revised if the Commission recommends it, and only in specific circumstances.⁴⁰ If the Minister decides to revise the emissions budget, he must present an explanation to the House.⁴¹
39. Following advice from the Commission,⁴² the first three emissions budgets were

³⁷ CCRA, s 5S.

³⁸ CCRA, ss 5W-5Y. Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 3.

³⁹ See FN 12, above.

⁴⁰ CCRA, s 5ZE.

⁴¹ CCRA, s 5ZE(7).

⁴² As well as the policy direction for the first emissions reduction plan, the 2030 Nationally Determined Contribution, and the reductions required for biogenic methane to contribute to limiting global average temperature rise to 1.5 degrees.

set in May 2022.⁴³ These emissions budgets (and Commission’s advice) were subject to challenge by judicial review.⁴⁴

40. Emissions budget one (EB1) ended on 31 December 2025. New Zealand is projected to meet EB1 with a “buffer” of 7.7Mt. Emissions budget two started (EB2) on 1 January 2026. Current projections have EB2 being met with a “buffer” of 3.6Mt.⁴⁵

Emissions reduction plans

41. The Minister must prepare and publish emissions reductions plans setting out the policies and strategies for meeting each emissions budget period.⁴⁶
42. Emission reduction plans must include a strategy to recognise and mitigate the impact of reducing emissions and increasing removals on iwi and Māori; and ensure iwi / Māori have been adequately consulted on the plan.⁴⁷
43. The first emissions reduction plan for meeting EB1 was published in May 2022 (and amended in December 2024). The second emissions reduction plan, for meeting EB2 was published in December 2024 (and amended on 29 January 2026).⁴⁸ These were informed by advice from the Commission.⁴⁹
44. The current emission reductions plans for the period 2026-2040 are subject to challenge by judicial review.⁵⁰

National climate change risk assessment (NCCRA)

45. A NCCRA is required to assess risks to New Zealand’s economy, society, environment, and ecology from the current and future effects of climate change.⁵¹ The assessment must identify the most significant risks, based on the nature of the risks, their severity, and the need for co-ordinated steps to respond to those risks.⁵²

⁴³ “Emissions Budgets for 2022 to 2025, 2026 to 2030 and 2031 to 2035” (16 May 2022). The fourth emissions budget is due by 31 December 2027 (s 5X(3)(d)).

⁴⁴ *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2022] NZHC 3064; *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2025] NZCA 80, [2025] 2 NZLR 808; *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2025] NZSC 200 (leave declined).

⁴⁵ “Emissions projections correction” (Ministry for the Environment, 29 January 2026) <environment.govt.nz>.

⁴⁶ CCRA, s 5ZL.

⁴⁷ CCRA, ss 3A(ad) and 5ZG.

⁴⁸ Ministry for the Environment, Aotearoa New Zealand’s first emissions reduction plan (16 May 2022); and Our journey towards net zero: New Zealand’s second emissions reduction plan 2026-2030 (amended 29 January 2026).

⁴⁹ The Climate Change Commission | He Pou a Rangi Ināia tonu nei: a low emissions future for Aotearoa (31 May 2021) [[306.1907]]; The Climate Change Commission | He Pou a Rangi 2023 Draft advice to inform the strategic direction of the Government’s second ERP (April 2023).

⁵⁰ *Lawyers for Climate Act NZ Inc v Minister of Climate Change*: Hearing before the High Court in March 2026, Judgment pending.

⁵¹ CCRA, s 5ZP(1)(a).

⁵² CCRA, s 5ZP(1)(b).

46. The first NCCRA was prepared by the Minister⁵³ and presented to Parliament in August 2020.⁵⁴ It was informed by advice from the Ministry for the Environment.⁵⁵ The NCCRA identified the most significant risks and opportunities for New Zealand; and highlighted gaps in the information and data needed to properly assess and manage the risks and opportunities. The NCCRA also identified risks that were of particular significance to Māori, or would have a disproportionate impact on Māori.
47. The Commission is required to prepare subsequent NCCRAs at least every six years.⁵⁶ Mandatory considerations are listed in s 5ZQ. These include the economic, social, health, environmental, ecological, and cultural effects of climate change; the distribution of the effects across society, taking particular account of vulnerable groups or sectors; New Zealand's relevant obligations under international agreements; how the assessment aligns or links with any other relevant national risk assessments produced by central government entities; current and likely future effects of climate change; and scientific and technical evidence.
48. The second NCCRA was published by the Commission and presented to the House on 7 May 2026.⁵⁷ It includes analysis of an independent kaupapa Māori assessment of seven national climate-related risks that affect iwi and Māori.⁵⁸

National adaptation plan (NAP)

49. In response to each NCCRA, the Minister must prepare a NAP, no later than 2 years after publication of the NCCRA.⁵⁹ A NAP must set out the Government's objectives for adapting to the effects of climate change; strategies, policies, and proposals for meeting those objectives; timeframes for implementation; how those matters will address the most significant risks identified in the NCCRA; and measures to enable regular monitoring of, and reporting on, the

⁵³ CCRA, s 5ZR.

⁵⁴ Ministry for the Environment First national climate change risk assessment for New Zealand | Arotakenga Tūraru mō te Huringa Āhuarangi o Āotearoa (August 2020) [[304.1201]].

⁵⁵ Ministry for the Environment Arotakenga Huringa Āhuarangi: A Framework for the National Climate Change Risk Assessment for Aotearoa New Zealand (1 September 2019) [[303.0807]].

⁵⁶ CCRA, s 5ZQ.

⁵⁷ The Climate Change Commission Full assessment: 2026 National Climate Risk Assessment for Aotearoa New Zealand (7 May 2026).

⁵⁸ The Climate Change Commission *Ngā mea hirahira o te ao Māori* (November 2025). This report was completed by independent researchers from Manaaki Whenua Landcare Research (now part of Bioeconomy Science Institute) and Ngā Pae o te Māramatanga Māori Centre of Research Excellence, who were contracted by the Commission. Their analysis was used in: The Climate Change Commission *Full assessment: 2026 National Climate Risk Assessment for Aotearoa New Zealand* (7 May 2026) at 220–231.

⁵⁹ CCRA, s 5ZT(1).

implementation of the plan.⁶⁰

50. The Minister must in preparing a NAP taking into account the economic, social, health, environmental, ecological, and cultural effects of climate change on iwi and Māori: s 3A(ae).
51. Section 5ZS contains a list of mandatory considerations for the Minister in preparing a NAP. These include the economic, social, health, environmental, ecological, and cultural effects of climate change, including effects on iwi and Māori; the distribution of the effects of climate change across society, taking account of vulnerable groups or sectors; New Zealand's obligations under international agreements; any advice of the Commission; the ability of communities or organisations to undertake adaptation action; and scientific and technical advice.⁶¹
52. The Minister must also undertake public consultation on the draft NAP.⁶²
53. The first NAP was published in August 2022 for 2022–2028.⁶³ It responds to risks identified in the first NCCRA, science from the IPCC, and sets out objectives, strategies, plans and policies for climate adaptation. Ihirangi were also commissioned to provide an indigenous worldview of national adaptation that was published alongside the NAP and referenced within it.⁶⁴

Emissions trading scheme (ETS)

54. The Climate Change Response (Emissions Trading) Amendment Act 2008 established the ETS as a mechanism for reducing emissions and meeting international commitments.
55. In recommending ETS settings, the Minister must be satisfied the recommended limits and price control settings will be in accordance with emissions budgets and the 2050 target: s 30GC.
56. ETS decision-making has been subject to two judicial review challenges.⁶⁵

⁶⁰ CCRA s 5ZS.

⁶¹ CCRA, s 5ZS(4).

⁶² CCRA, s 5ZS(6).

⁶³ Ministry for the Environment, Aotearoa New Zealand's First National Adaptation Plan (3 August 2022).

⁶⁴ Ministry for the Environment, *Rauroa Framework: Exploring an indigenous worldview framework for the national climate change adaptation plan* (27 April 2022); and at 3: Ihirangi was established by a foundational group of Māori climate and environmental experts.

⁶⁵ *Lawyers for Climate Action NZ Inc v Minister of Climate Change* [2023] NZHC 1835, where the Minister of Climate Change admitted an error in recommending unit limit and price control settings, resulting in a reconsideration; and *Insley v Minister for Climate Change* [2023] NZHC 1388 where Mr Insley brought an interim relief application as a chair of Te Taumata (representative of Māori forestry interests including of Māori forestry owners withing the ETS) that the Crown ought not to

Accountability mechanisms

Monitoring and reporting

57. The CCRA ensures accountability for successive governments in various ways, including through the Commission's monitoring and reporting roles.
58. The Commission is required to regularly monitor and report progress towards meeting an emissions budget and the 2050 target: s 5ZJ. This includes a requirement to report annually on the results of monitoring under s 5ZK. The annual reports must include the measured emissions and removals for that year; the latest projections; and an assessment of the adequacy of the Government's emissions reduction plan and progress in its implementation, including any new opportunities to reduce emissions. The Minister must then prepare a response to the Commission's annual report, and present it to the House and make it publicly available.
59. Further, the Commission must report to the Minister, after the end of an emissions budget period, evaluating the progress made in that period towards meeting the relevant emissions budget, including an assessment of the adequacy of the emissions reductions plan.⁶⁶ The Minister must present a report to the House with the Minister's response to the Commission's report, including reasons for any failure to meet the emissions budget and for any departures from the Commission's recommendations.⁶⁷
60. For each NAP, the Commission must also provide the Minister with a progress report that evaluates the implementation of the NAP: s 5ZU. The progress report must assess the progress of the NAP's implementation, its effectiveness, and identify barriers and how those can be managed (as well as considering factors in s 5M where relevant). The Minister must respond in writing to the progress report and present the response to the House.⁶⁸

Declarations available for not meeting 2050 target or emissions budgets

61. If the 2050 target or an emissions budget is not met, the Court may make a declaration to that effect, together with an award of costs.⁶⁹ If a declaration is made, the Minister must present it to the House and advise on the

make any public announcement relating to the review of the ETS.

⁶⁶ CCRA, s 5ZL(1).

⁶⁷ CCRA, s 5ZL(2) and (3), and also s 5ZK(3) and (4).

⁶⁸ CCRA, s 5ZV.

⁶⁹ CCRA, s 5ZM.

Government's response to the declaration.⁷⁰

Climate change as a permissive consideration

62. Section 5ZN provides that the 2050 target, emissions budgets, and emissions reductions plans are permissive considerations for any person or body exercising or performing a public function, power, or duty.⁷¹

Roles of various actors in CCRA

63. Accordingly, the CCRA provides for a range of actors in the climate change response:

- 63.1 **Parliament:** setting the 2050 target; recipient of tabled Commission reports; voting funds; considering and enacting amendments to CCRA; forum for debating climate change policies; and holding executive to account for climate response, including statutory and policy decisions.
- 63.2 **Minister of Climate Change:** statutory decision-making under the CCRA (setting emissions budgets, preparing emissions reduction plans, setting ETS settings, NAPs, responding to the Commission, balancing competing CCRA factors); duty to ensure emissions budgets are met.
- 63.3 **Climate Change Commission:** provides independent and expert advice to the Government on the 2050 target, emissions budgets, reduction plans, and NCCRAs; monitors and reports Government's progress towards meeting budgets and NAPs.
- 63.4 **Government departments:** policy development (including for emissions reduction plans and responses to NAPs); legislative policy developments; emissions accounting and international reporting; administering the ETS;⁷² implementing climate policies.
- 63.5 **Māori/Iwi:** consultation on emissions reduction plans and ETS setting decisions; be accounted for in the NAP; the Commission's advice must consider engagement with and impacts on Māori; Commission membership must have regard to seeking nominations from iwi and Māori representatives and those with Treaty expertise.
- 63.6 **Public/electorate:** input via consultation processes; expected audience

⁷⁰ CCRA, s 5ZM.

⁷¹ CCRA, s 5ZN. See also *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC) at [89].

⁷² The Environmental Protection Authority (a Crown entity) also has regulatory responsibilities in administering the ETS.

for Commission’s advice and reporting on Government’s progress; holding Parliament and the executive to account at the ballot box.

- 63.7 **Specific international instruments:** referred to in purpose of CCRA; must be considered by the Commission (s 5M) in preparing advice to the Minister, and the Minister in preparing emission budgets (s 5ZC).
- 63.8 **Scientific experts:** members of the Commission; the Commission’s advice must consider available scientific knowledge; emissions budgets must regard a broad range of domestic and international scientific advice.
- 63.9 **Judiciary:** administering and interpreting provisions of the CCRA; ensuring the executive lawfully applies and executes the CCRA through judicial review challenges to statutory-decision making; declaratory relief if the 2050 target or an emissions budget are not met (s 5ZM).

PRINCIPLES FOR STRIKE OUT

- 64. The principles of strike out are well established and recently endorsed by this Court in *Smith v Fonterra*.⁷³ Strike out remains appropriate where it is clear the claim cannot succeed as a matter of law.⁷⁴ Special caution is required in respect of novel claims, unless its tenability is not dependent upon evidence and trial but can be determined by reference to settled legal principles or patent policy considerations (explicit or implicit in legislation or other areas of the law).⁷⁵
- 65. The fact that applications to strike out raise difficult questions of law and require extensive argument does not *exclude* jurisdiction.⁷⁶ In fact, it may be when multiple, difficult, issues or law requiring extensive argument arise that the Court’s strike out jurisdiction has the *most* value.⁷⁷

⁷³ *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 at [74]-[75]; *Attorney-General v Price & Gardiner* [1998] 1 NZLR 262 (CA) at 267; endorsed in *Couch v Attorney-General* [2008] NZSC 45 at [33] the set principles being: (1) Pleadings, whether or not admitted, are assumed to be true; but that does not extend to allegations that are pleaded where there is plain evidence they are unsupportable or that is entirely speculative and without foundation; (2) The causes of action must be so clearly untenable that they cannot possibly succeed; (3) The jurisdiction must be exercised sparingly and only in a case where the Court is satisfied it has the requisite material; (4) The fact that an application raises a difficult question of law, and requires extensive argument, does not exclude jurisdiction; (5) Special caution is required where a claim involves a developing area of law, unless the tenability is not dependent upon evidence but can be determined solely by reference to settled legal principles.

⁷⁴ *Fonterra* [2024] NZSC 5 at [85]. *Couch* at [2], [40], [118]. Indeed, “if the action cannot ‘by any possibility be maintained’, then the Court ought to dismiss it”: *R Lucas & Son (Nelson Mail) Ltd v O’Brien* [1978] 2 NZLR 289 (CA) at 294; and *Peerless Bakery Limited v Watts* [1955] NZLR 339 (CA) at 351 (emphasis added).

⁷⁵ *Prince* at 267 (per Richardson P, Thomas and Keith JJ), 285 (per Henry J) and 291 (per Tipping J). *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) per Richardson J at 305.

⁷⁶ *Prince* at 267. *Fonterra* at [74]-[76].

⁷⁷ *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2001] 2 All ER 513 at [156]; *Kent v Griffiths and others* [2000] 2 All ER 474 at 485.

INTERNATIONAL DEVELOPMENTS AND THEIR RELEVANCE

66. Because of the weight placed on international law developments by the appellant, the relevance of international law is discussed before the three pleaded causes of action.
67. New Zealand has a dualist legal system.⁷⁸ This is based on the proposition that international law and domestic law operate in independent spheres.⁷⁹ International treaties and agreements are not directly enforceable in domestic courts save to the extent they are incorporated in domestic law. Domestic courts cannot determine whether New Zealand has breached its obligations under international law.⁸⁰
68. The appellant's position that the courts should effectively give direct effect to New Zealand's international treaty obligations to ensure compliance with New Zealand's obligations would amount to a fundamental overriding of the dualist legal system.⁸¹
69. There is a presumption of statutory interpretation that, so far as its wording allows, legislation should be read in a way that is consistent with New Zealand's international obligations.⁸² This presumption will not, however, override the terms of domestic legislation introduced by Parliament.
70. International law may also be a mandatory relevant consideration in judicial review terms.⁸³ In addition, unincorporated treaty obligations may influence the development of the common law.⁸⁴ However, the courts will be sensitive to government policy in determining whether and how particular unincorporated obligations could influence the common law.⁸⁵
71. The appellant's submissions focus on the Advisory Opinion of the International Court of Justice (**ICJ**) on the Obligations of States in respect of Climate Change.
72. The ICJ concluded that the customary international law duty to prevent

⁷⁸ *Ortmann v United States of America* [2020] 1 NZLR 475 (SC) at [75].

⁷⁹ See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [55]–[57] for further discussion of the dualist system (including as “a necessary corollary of parliamentary sovereignty”).

⁸⁰ *Richards v Attorney-General* [2025] NZHC 2833, [2025] 3 NZLR 440 at [93]; and *(Plan B Earth) v the Prime Minister and Ors* [2021] EWHC 3469 (Admin) at [25]. *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 229.

⁸¹ Appellant's submissions at [40].

⁸² *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]; and *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 28.

⁸³ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

⁸⁴ *Hosking v Runting* [2005] 1 NZLR 1 (CA).

⁸⁵ *Chief Executive for Department of Labour v Taito* [2006] NZAR 420 (CA) at [35]–[36].

significant harm to the environment applies in the context of climate change.⁸⁶ It is an obligation to act with due diligence. Due diligence requires a State to “employ all means reasonably available” to it so as to prevent harm (in this case, harm to the climate system and other parts of the environment) so far as possible.⁸⁷ The standard of due diligence in this context is stringent. It entails not only the adoption of appropriate rules and measures best recognising “differentiated responsibilities and respective capabilities” but also a certain level of vigilance in their enforcement and the exercise of administrative control.⁸⁸ In addition, the ICJ considered that the duty of States to co-operate for the protection of the environment formed part of the customary international law.⁸⁹

73. In an ambiguous passage,⁹⁰ the ICJ left open the question as to whether State compliance with climate change treaty obligations will, in practice, amount to State compliance with the applicable customary obligations.⁹¹
74. To the extent there are customary law obligations that are not met, including via the CCRA framework (which is denied), this is a matter for resolution at the international level. As set out below, any customary law obligations of the nature described in the Advisory Opinion cannot be given direct effect in New Zealand’s domestic law. The appellant’s submissions significantly oversimplify or misstate the law surrounding the incorporation of customary international law into domestic law.⁹² They do not address the key point that customary international law cannot become part of domestic law where inconsistent with statute or precluded by constitutional principle.⁹³
75. As the appellant acknowledges,⁹⁴ the Advisory Opinion did not recognise a right to a clean, healthy and sustainable environment as a rule of customary international law. The ICJ stated that a clean, healthy and sustainable

⁸⁶ Obligations of States in Respect of Climate Change, Advisory Opinion, 23 July 2025, ICJ Reports 2025 at [139].

⁸⁷ At [135].

⁸⁸ At [137],[138].

⁸⁹ At [142].

⁹⁰ Declaration of Judge Nolte at [3]; Joint Declaration of Judges Charlesworth, Brant, Cleveland and Aurescu at [5].

⁹¹ At [314], stating “the Court considers that, at the present stage, compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court [...], suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate. This does not mean, however, that the customary obligations would be fulfilled simply by States complying with their obligations under the climate change treaties.” See also at [270] (“measures... that make an adequate contribution to achieving the collective temperature goal”).

⁹² Appellant’s submissions at [43].

⁹³ See [99]-[110] below.

⁹⁴ Appellant’s submissions at [34].

environment was a precondition for the enjoyment of many human rights, such as the right to life, the right to health, and the right to an adequate standard of living, including access to water, food and housing.⁹⁵ This is not a surprising conclusion. The importance of the environment is self-evidently recognised in the comprehensive legal frameworks in place to provide for mitigation and adaptation to climate change (such as the CCRA), as well as in detailed environmental regulation (as under the Resource Management Act). However, nothing in the ICJ’s statement provides support for the sweeping obligations sought by the appellant, that would compel the Court to scrutinise the adequacy of environmental legislation.

FIRST CAUSE OF ACTION: APPELLANT’S CLAIMED NOVEL “DUTY”

76. The first cause of action is a claim for breach of an unknown duty “cognisable under the laws of New Zealand”. The appellant claims the Crown (which he consistently refers to as including Parliament) owes a duty to him to actively exercise its authority in a manner that protects the appellant and his future descendants from the adverse effects of climate change.⁹⁶ The appellant’s duty: (1) is alleged to have existed since no later than 6 February 1840;⁹⁷ (2) sits across legislation and all decision-making of Parliament and the executive;⁹⁸ and (3) has a strict liability standard; the Crown is required to take all necessary steps to reduce emissions and actively protect the appellant and his descendants from the adverse effects of climate change.⁹⁹
77. The appellant claims the Crown has breached the duty since June 1992 and is continuing to breach the duty.¹⁰⁰ The claim is not limited to specific Crown acts or omissions; instead, every legislative and executive¹⁰¹ action or omission since June 1992 is at issue. In particular, the claim is a direct challenge to the legislative response to climate change in its entirety (see in particular, [82(c) and (d)]).
78. The claim focuses on Parliament’s enactment of the CCRA (and subsequent

⁹⁵ See [127]-[133] below.

⁹⁶ Draft 3ASOC at [80] [[05.0158]].

⁹⁷ Draft 3ASOC at [80(a)].

⁹⁸ Draft 3ASOC at [80(c)] and [82(a)-(d)]. The claim challenges executive decision-making both: (1) in approving policy, legislation development and introduction of Bills to parliament; and (2) authorised by legislation (approvals of permits etc).

⁹⁹ Draft 3ASOC at [80(b)] [[05.0158]]. Appellant submissions at [67].

¹⁰⁰ Draft 3ASOC at [82] [[05.0160]].

¹⁰¹ Including actions of Crown entities and SOEs ACC and Meridian (Draft 3ASOC at [82(c)(xi)-(xii)] ‘allowed’ by the Crown).

amendments), including because the CCRA is said to be ineffective at reducing emissions consistent with what the appellant describes as “minimum global reductions” and in accordance with his own selection of “framework principles”.¹⁰²

79. The disparate collection of sources of the alleged duty include: the Treaty; rights affirmed by NZBORA; existing common law rights, freedoms, and duties; tikanga; customary international law; and international treaty obligations.¹⁰³
80. The relief sought includes a declaration the alleged duty exists and has been breached by the Crown; and the Crown will continue to be in breach of the duty until it takes all necessary steps to reduce emissions in an amount and at a rate consistent with the pleaded minimum global reductions and framework principles.¹⁰⁴ The current legislative regime in place for New Zealand under the CCRA is said to be non-compliant with these concepts.¹⁰⁵
81. This cause of action is misguided and cannot succeed. The appellant’s claim does not seek to expand a new duty but rather invites the Courts to recognise a previously unrecognised constitutionally supreme legal duty that would sit above other laws, decisions and policy directions of the legislature and executive, such that they must comply with the duty’s contents (as pronounced by declaration through the courts). The principles against recognition of the appellant’s novel duty are patent.¹⁰⁶

Appellant’s duty contrary to constitutional fundamentals

82. The alleged duty is at odds with fundamental principles underpinning New Zealand’s constitution, including parliamentary sovereignty and the separation of powers. If the appellant’s asserted duty were recognised, the courts would be placed in the position of having to assess the adequacy of the legislative and policy actions (and alleged omissions) since 1992.
83. Specifically, the courts would be required to assess whether the CCRA and other legislative responses were and are sufficiently effective at ensuring emissions reductions consistent with the pleaded “minimum global reductions” and

¹⁰² Draft 3ASOC at [82(c)(i)-(iii)] [[05.0161]] relying on [65(a) and (b)] [[05.0154]]. The appellant’s claim defines the concepts of “minimum global reductions” at [13] [[05.0138]] and “framework principles” at [65(a)] [[05.0154]].

¹⁰³ Draft 3ASOC at [81] [[05.0159]].

¹⁰⁴ Draft 3ASOC at unnumbered paragraph following [82] [[05.0163]].

¹⁰⁵ Draft 3ASOC at [65(a) and (b)] [[05.0154]].

¹⁰⁶ *Attorney-General v Prince & Gardiner* [1998] 1 NZLR 262 (CA) at 267; endorsed in *Smith v Fonterra* [2024] NZSC 5 at [76].

“framework principles”. The declaratory relief sought would have the effect of requiring the courts to dictate what should be placed before Parliament (and what Parliament should enact) in order to have a legislative response which prioritises and is consistent with the appellant’s desired policy settings.¹⁰⁷

84. This Court should not recognise a duty that is inconsistent with the executive’s freedom to propose statutes to the House (and the House’s ability to receive and consider these),¹⁰⁸ or inconsistent with the legislative freedoms, privileges and authority of Parliament.¹⁰⁹ In other words, there should be no interference with Parliament’s legislative supremacy.¹¹⁰
85. The Court of Appeal’s summation in *Shaw v Commissioner of Inland Revenue* remains correct:¹¹¹

Section 3 [of the Declaratory Judgments Act 1908] does not, however, give the Courts the power to consider the validity of the content of legislation.... “the constitutional position in New Zealand ... is clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.”

86. The Court has jurisdiction to determine there has been compliance with any mandatory manner and form requirements and can grant relief in cases of non-compliance.¹¹² Once legislation is enacted, it is incontrovertible that the function of the court is to administer the laws Parliament has enacted.¹¹³ Impugning existing legislation and legislative processes, without statutory power to do so, is contrary to art 9 of the Bill of Rights 1688.
87. Although there has been some jurisprudential debate over whether parliamentary sovereignty is ‘absolute’ (in the sense that there may theoretically be circumstances in which the Court would not enforce the law) the legislation pleaded in the amended claim is a far cry from “such theoretical extremes” as

¹⁰⁷ Draft 3ASOC at [82(c)] relying on [65(a) and (b)] and unnumbered paragraph following [82] [[05.0161]].

¹⁰⁸ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [36] to [47], [105] and [108]. A critical distinction drawn in that case was whether declarations were sought concerning existing rights, as opposed to declarations about legislation that would impact on rights. The latter being impermissible; *Kiwi Party Inc v Attorney-General* [2020] NZCA 80, 2 NZLR 224 at [58] citing parliamentary privilege.

¹⁰⁹ *Kiwi Party Inc v Attorney-General* [2020] NZCA 80, 2 NZLR 224 at [22], [39]-[40], [63]-[64]. H.W.R. Wade & C.F. Forsyth *Administrative Law* (11th ed, Oxford University Press, 2014) at 22-23.

¹¹⁰ Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at [16.4].; Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand* (Hart Publishing, Oxford, 2022) at 126-131, discussing the origins and notions of “legislative supremacy” in New Zealand.

¹¹¹ *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157.

¹¹² *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].

¹¹³ *Pickin v British Railways Board* [1974] AC 765 (HL) at 787 and 789.

those referred to at [69] of the appellant's submissions.¹¹⁴

88. The reality continues to reflect the constitutional heritage of the Bill of Rights 1688 and other more or less contemporary legislation: Parliamentary sovereignty is a fundamental principle of the constitution; and it is not open to the courts to develop the common law in a way which is inconsistent with the law as laid down in or under statutes (expressly or by necessary implication).¹¹⁵
89. To the extent the alleged duty is said to apply to executive decision-making under statute, this ignores well settled public law. Such decisions are required to be made within the lawful limits prescribed by legislation and their specific context. The Courts have a very significant but not unlimited supervisory role over such decision-making through judicial review without venturing into policy formulation and the essential business of Parliament.¹¹⁶
90. The Court's respect for parliamentary legislation is founded upon the unique authority parliament derives from its representative character and democratic accountability. Hence, the courts could not create or enforce the appellant's duty without intruding into significant policy and political decisions and breaching the well settled separation of powers.
91. The principle of non-interference is applied by the courts to prevent their processes from inhibiting the free functioning of Parliament and its essential operation, or crossing the boundary into the policy formulation of government.¹¹⁷ The making of and merits of legislation are matters for Parliament.¹¹⁸ Whether legislation is adequate or wise are political questions for the democratically accountable branches of government, and courts will seek to avoid being seen to dictate what should be placed before Parliament.¹¹⁹
92. To be clear, the respondent is not simply raising issues of non-interference¹²⁰

¹¹⁴ For example: compulsion by torture *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398; or "an attempt to abolish judicial review or the ordinary role of the courts" *Jackson v Attorney-General* [2005] UKHL, [2006] 1 AC 262 at [102]. See also: *Westco Logan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91] and [95] where the Court indicated it would not grant relief against an act that expropriated property without compensation.

¹¹⁵ *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [41]-[43] and [48]. David Wilson *McGee Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representatives, 2025) at [4.2].

¹¹⁶ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [39] and [108].

¹¹⁷ Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at [16.4.2].

¹¹⁸ Phillip A Joseph *The Laws of New Zealand* (online ed, Lexis Nexis) at [71]. *Smiler v Attorney-General* [2026] NZHC 375 at [121]; *Skills Active Aotearoa Ltd v Minister of Education* [2019] NZHC 2800 at [55]; *Mikisew Cree First Nation v Canada* [2018] SCC 40, [2018] 2 SCR 765 at [2] and [125].

¹¹⁹ *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 309; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [36].

¹²⁰ Appellant's submissions at [68].

(although it is engaged by the pleadings¹²¹). The respondent's position is the common law should not recognise a duty which imposes on the courts a responsibility for assessing and marking (for example, "fail") a government's policy choices; and which requires the Court to assess the adequacy of the statute book since 1992 and lawful decision-making under legislation. The respondent's submission is the Court is not the correct body to determine how best to balance the likely competing social, economic, political, and scientific considerations necessary to determine the merits of legislative policy – for climate change or otherwise. That is Parliament's role, responding also to international obligations and supported by the institutional capability and democratic mandate of the legislative and executive branches.

Courts' role in enforcing the CCRA regime

93. As outlined earlier, the CCRA provides a legislative and policy framework to deliver clear and stable policies to mitigate and adapt in response to the effects of climate change. The courts have (and will continue to have) a critical role in ensuring the executive lawfully administers the CCRA regime under the judicial review jurisdiction.
94. The appellant effectively asks the Court to do what the Commission must already do under this regime (yet under a different framework). The CCRA provides for emissions budgets to be set and implemented through emissions reductions plans to meet the 2050 target, on the expert advice and monitoring of the Commission. This process of formulating emissions budgets requires the Commission to advise on and the Minister to weigh the CCRA's competing social, economic, scientific, technical and distributive justice considerations including the effects on iwi and Māori.¹²²
95. Similarly, the CCRA provides for NCCRAs to be carried out, followed by NAPs, with various prescribed factors to be taken into account, such as the cultural effects of climate change, including effects on iwi and Māori. As above, the Commission is also required to evaluate and advise on the effectiveness and progress made in implementing NAPs.

¹²¹ The appellant's claim asks the courts to review the content of existing legislative settings for consistency with ensuring emissions reductions in an amount and at a rate consistent with "minimum global reductions", and to dictate what should be placed before Parliament by declaratory relief stating that the Crown will continue to be in breach until it brings itself into compliance.

¹²² For example, s 5ZC.

96. The appellant’s alleged duty seeks to circumvent this carefully calibrated, detailed and participatory regime. The regime itself is intended to be longstanding and reasonably predictable. The recognition of the alleged duty would mean imposing a parallel common law obligation in an area that is already legislatively complex and would undermine the efficacy of the CCRA regime (as well as the appellant seeking declaratory relief which would effectively require Parliament to “improve” it) – including the independent, expert advice of the Commission which delivers evidence-based advice to the Government to guide climate action following public consultation.

Alleged sources are not directly enforceable / cannot give rise to alleged duty

97. The pleaded sources of the duty are not directly enforceable; and to the extent the sources are said to be “common rights, freedoms and duties” or customary international law, these cannot give rise to the alleged duty.¹²³
- 97.1 The Treaty is addressed below; it must be incorporated into legislation to give rise to an independent actionable claim. Treaty principles may have direct influence in judicial review, particularly where decisions under review contain a Treaty clause.¹²⁴
- 97.2 The rights included in NZBORA, or at international law, are not constitutionally entrenched so that even if read in a new and expansive manner they do not override inconsistent legislation (s 4, NZBORA).
- 97.3 International treaty obligations and law are only enforceable domestically if incorporated into legislation.
- 97.4 Tikanga is a part of the common law¹²⁵ and relevant to environmental law in that concepts of whakapapa and whanaungatanga ties which Māori have to the whenua give rise to kaitiakitanga obligations. Context is of key importance to how tikanga values may inform the incremental development of common law.¹²⁶ In this case, tikanga does not support a novel duty contrary to “fundamental principles and policies of the law” such as principles underpinning New Zealand’s constitution.¹²⁷

¹²³ Notably, a number of its apparent sources were also not in force at the time the duty is said to arise (1840).

¹²⁴ *Smiler v Attorney-General* [2026] NZHC 375 at [112].

¹²⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 (SC) at [19].

¹²⁶ *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [261], [264]-[267]; *R v R* [2025] 3 NZLR 336 (CA) at [47].

¹²⁷ *Takamore v Clarke* [2012] NZSC 116, [2014] 2 NZLR 733 at [95]. *Ellis v R (Continuance)* at [117], [264]. Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at 223 cited in *R v R* [2025] 3 NZLR 336 (CA) at [58]. See also *Delamere v*

98. Unlike unincorporated treaty obligations, customary international law rules, may, in some circumstances, become enforceable in domestic Courts without legislative incorporation.¹²⁸ As detailed below however, customary international law cannot assist the appellant in this case.

ICJ Advisory opinion does not assist the appellant

99. The appellant's submissions seek to rely on the ICJ advisory opinion findings about customary international law as the foundation of the alleged duty.¹²⁹ These findings cannot be the basis for the appellant's duty.
100. Customary law norms established "beyond reproach", such as the rule of sovereign immunity, are applied as part of New Zealand common law.¹³⁰ However, the ability to recognise customary international law as part of domestic law is subject to the long-standing principle that "[w]here legislation clearly precludes the application of customary international law, the legislation must prevail."¹³¹
101. While an ambiguous statute will be interpreted, where possible, consistently with international law, in the absence of ambiguity the statute must be given effect.¹³² Butler and Butler observe that while customary international law has had domestic effect as part of New Zealand's common law without the need for legislative action, this is "of course only to the extent that the rule of customary international law [is] not inconsistent with a statute".¹³³
102. While differing approaches are taken across other common law jurisdictions to the incorporation of customary international rules in domestic law, this principle of requiring consistency with existing statutory law is a common thread throughout.

Minister of Immigration [2025] NZHC 3008 at [15].

¹²⁸ Customary international law may however impact on domestic law in a number of other ways: (1) an interpretation of statute consistent with customary international law will be preferred by the Courts: *Worth v Worth* [1931] NZLR 1109 (CA) at 1121-1122. *Sutton Governor of Pitcairn v Sutton* [1995] NZLR 426 (CA) at 433; (2) it may be relied upon as an interpretative aid: *Adams v Bay of Islands County* [1916] NZLR 65 (SC) at 71; (3) it can operate as a constraint on executive power: *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426 (CA) at 430; and (4) it may influence the development of the common law: *Belhaj v Straw* [2017] UKSC 3 at [252].

¹²⁹ Appellant submissions at [63]-[64].

¹³⁰ *Zhang v Police* [2009] NZAR 217 (HC) at [21]-[25]. See: Treasa Dunworth, "Sources of International Law in Aotearoa New Zealand", Chapter 2, An Hertogen and Anna Hood (Eds), *International Law in Aotearoa New Zealand*, Thomson Reuters (2021) at [2.3.1]: "[b]eyond the issue of sovereign immunity, there is little potential for claims based on customary international law to proceed in New Zealand because the legal system is dominated by statute".

¹³¹ *Zhang v Police* [2009] NZAR 217 (HC) at [23]. See: *Sodexo Pass Int SAS v Hungary* [2021] NZHC 371 at [34].

¹³² *Worth v Worth* [1931] NZLR 1109 (CA) at 1121-1122, 1131.

¹³³ "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 *Victoria University of Wellington Law Review* 173 at 177.

103. The United Kingdom Supreme Court has repeatedly held the incorporation of customary international law is subject to both (i) the requirement that the rule is not in conflict with statute; and (ii) the requirement that the recognition of the rule at common law does not itself abrogate a constitutional or common law value, or is not precluded for another constitutional reason.¹³⁴ As said by Lord Mance (for the Court) in *R (Keyu)*, the recognition of customary international law must be consistent with domestic constitutional principles, statutory law and common law rules.¹³⁵ The appellant's reliance on customary international law is profoundly inconsistent with those matters.
104. Accordingly, the English courts have repeatedly declined to develop a common law principle based on customary international law where there is inconsistent statute and/or where statute already covers the field.¹³⁶
105. In the leading Australian case of *Nulyarimma v Thompson*, members of the Full Court of the Federal Court of Australia took somewhat differing approaches as to how customary international law is given effect in domestic law. However, neither the majority nor minority judgments endorse the idea that customary international law is automatically applied as domestic law.¹³⁷
106. In the Canadian jurisdiction, prohibitive rules of customary international law are incorporated into domestic law automatically provided they are not inconsistent with statute.¹³⁸
107. The appellant relies on the customary law duty to prevent significant environmental harm in order to establish a conflict with, and to ground a claim for the alleged *inadequacy* of the CCRA regime. Such a claim of inadequacy would conflict with the CCRA's operation and the courts being precluded from assessing its efficacy via the common law.¹³⁹
108. Such reliance also conflicts with the requirement that the recognition of the rule

¹³⁴ *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 316 at [23] and [65]-[66]; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at [117], [144]-[145], [150]; *Law Debenture Trust Corpn Plc v Ukraine* [2023] UKSC 11, [2024] AC 411 at [204]; *R (Al-Haq) v Secretary of State for Business and Trade* [2015] EWHC 1615 at [125].

¹³⁵ *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at [150].

¹³⁶ *Al Saadoon v Secretary of State for Defence* [2015] EWHC 715 (Admin) at [273]. *Al-Adsani v Government of Kuwait* [1996] 2 LRC 344 at 351 and 357.

¹³⁷ *Nulyarimma v Thompson* (1999) 96 FCR 153 at [25]-[26] (per Wilcox J for majority) and [132] (per Merkel J). Lord Mance cited Wilcox J's statements in this regard with approval in *Keyu*, at [149].

¹³⁸ *R v Hape* [2007] 2 SCR 292 at [39]; and *Nevsun Resources Ltd v Araya*, 2020 SCC 5, [2020] 1 SCR 166 at [86].

¹³⁹ See: *Smith v Fonterra* at [97] (considering it unlikely the CCRA was intended to exclude tort actions "[u]nless there is reasonably clear language in the CCRA to that effect, or it is a necessary implication of the CCRA's operation").

may not itself abrogate a constitutional value or be precluded for a constitutional reason. As the Court of Appeal recognised, the pleaded gaps in the CCRA legislative framework “reflect policy choices that are for Parliament under New Zealand’s constitutional framework”.¹⁴⁰ To use a customary law rule as a basis to assess the adequacy of legislation would undermine Parliamentary sovereignty.

109. Incorporating a customary law duty to prevent transboundary harm into the common law —assuming the duty is not already met by extant legislation— would involve the courts requiring the legislative branch to take action so as to satisfy the duty. It is plainly inconsistent with New Zealand’s constitutional framework for the judicial branch to require the legislative branch to act so as to fill in alleged legislative lacunae which are, as the Court of Appeal found, policy choices.
110. As such, any customary law duty to prevent harm is unable to give rise to the appellant’s novel duty. The first cause of action is untenable as a matter of law and should remain struck out.

SECOND CAUSE OF ACTION: ALLEGED BREACHES OF NZBORA

111. The appellant’s third amended claim says the Crown has breached ss 8 and 20 of NZBORA by failing to put in place a regulatory framework for national emissions sufficient to provide a rational and effective deterrence of real and immediate risks of deprivation:¹⁴¹
 - 111.1 of the applicant’s life, the life of his whānau, members of Ngāpuhi, Ngāti Kahu and future descendants; and
 - 111.2 of those rights holders’ ability to enjoy their culture now and into the future.
112. In addition, the appellant claims the Crown has breached s 8 by failing to sufficiently regulate emissions produced by the Crown.¹⁴²
113. The relief sought is declarations the Crown has breached and is breaching ss 8 and 20; the CCRA is inconsistent with ss 8 and 20; and reporting orders requiring

¹⁴⁰ CA Judgment at [8].

¹⁴¹ Draft 3ASOC at [90] and [95] [[05.0165]]

¹⁴² Draft 3ASOC at [88] [[05.0164]]

the Crown to update the court of steps taken to bring itself into compliance.¹⁴³

114. On ss 8 and 20, the appellant submits: (1) international jurisprudence must be given “great weight”, telling against a narrow reading of these rights;¹⁴⁴ and (2) the Court of Appeal erred by (a) wrongly applying *Verein KlimaSeniorinnen Schweiz v Switzerland (Switzerland)* and UK decisions by not accepting claims against the efficacy of legislation through the lens of rights challenges; (b) wrongly finding the CCRA covers the field when it comes to obligations at law; and (c) wrongly applying the margin of appreciation in a domestic setting.
115. These points are addressed in detail below. By way of overview comment, while the Crown accepts NZBORA rights may be engaged in the context of climate change, the nature of the appellant’s claim is untenable as a matter of law. The appellant’s claim is premised on the alleged insufficiency of the CCRA. Even on an expansive approach to the rights relied on, and as the Court of Appeal considered, and as traversed in earlier paragraphs, it is not tenable that such rights could enable the court to assess the adequacy of the CCRA: a multifaceted statute put in place by Parliament to expressly respond to the issue of climate change.¹⁴⁵

Section 8

116. The appellant supports aspects of the Court of Appeal decision but further claims: (1) the Crown is under a positive obligation to put in place frameworks that are protective of life; and (2) the Court was wrong in its application of *Switzerland*, reliance on UK decisions, and the application of a margin of appreciation.
117. In response, the respondent says the appeal on s 8 should be dismissed, as:¹⁴⁶
- 117.1 It is untenable that the scope of s 8 extends to enabling the courts to assess the adequacy of legislation and the policy choices contained within.
- 117.2 The right not to be deprived of life in s 8 concerns actual loss of life or increased likelihood of death. Measures impacting on a person’s quality

¹⁴³ Draft 3ASOC at paragraph following [96] [[05.0165]]

¹⁴⁴ Relying principally on *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1 (Grand Chamber, ECHR) and the ICJ Advisory Opinion.

¹⁴⁵ CA Judgment at [94], [130] [[05.0042]], [[05.0055]].

¹⁴⁶ In making the first three of these points, the respondent departs from the Court of Appeal decision, as foreshadowed in our notice of intention to support on other grounds, dated 27 January 2026 at [2.2] and [2.3] [[05.0098]].

of life do not engage s 8.

117.3 The appellant’s pleading does not substantiate a real and imminent risk to life sufficient to engage s 8 or for a positive duty to arise. This is not a matter for trial but a material deficiency of the claim.

117.4 Section 8 does not encompass a positive duty to enact legislation to protect life (referred to as a “framework duty”). Even if s 8 were to be engaged, any such positive duty has been met.

Scope of right does not enable the court to review the adequacy of legislative settings

118. The most fundamental flaw in the appellant’s claim is that it is untenable that the scope of s 8 enables the courts to assess the adequacy of the CCRA regime.

119. As outlined above, in New Zealand, the Crown has implemented a carefully calibrated statutory framework to mitigate emissions and adapt to the adverse effects of climate change, while providing for a just transition, to meet the 2050 target and contribute to the Paris Agreement and multinational negotiations. Accordingly, should s 8 contain a ‘framework duty’ (denied by the respondent), any such a duty will have been met in the context of climate change. Contrary to the appellant’s submissions, this is not a trial issue. Evidence is not required to point to the CCRA in place.

120. It is untenable for the appellant to claim the CCRA is inconsistent with s 8.¹⁴⁷ The CCRA is a complex framework that is designed to be *protective* of life and the future wellbeing of all New Zealanders from the adverse effects of climate change as opposed to infringing upon rights.¹⁴⁸ As this Court found in *Chisnall*, a declaration of inconsistency is only appropriate where a court has found legislation cannot be interpreted in a rights consistent manner.¹⁴⁹

121. Assessing how “protective of life” the CCRA is, or should be, would require the court to make value judgements as to the adequacy of legislative and policy choices contained within it. It is not seriously arguable that this is the Court’s role.¹⁵⁰ Such an approach would not be limited to climate issues, but extend to

¹⁴⁷ The relief sought by the appellant includes a declaration that the CCRA is incompatible with ss 8 and 20 of NZBORA [[05.0165]].

¹⁴⁸ In stark contrast to previous declarations of inconsistency: *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 concerning the ban on prisoner voting; *Make It 16 inc. v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 on the voting age; and *Attorney-General v Chisnall* [2025] NZSC 126, [2025] 1 NZLR 619 concerning public protection orders and extended supervision orders.

¹⁴⁹ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [84].

¹⁵⁰ See: *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [247]-[248], [251]-[252].

other complex societal issues such as housing, health and immigration.

122. Where an individual's rights are breached, it is for the Court to determine any remedy.¹⁵¹ As recognised by the Court of Appeal, the success or otherwise of the CCRA regime will depend upon the policies and decisions adopted under it.¹⁵² The CCRA as a framework is self-adjusting and carries significant decision-making discretion.¹⁵³ By nature, it enables policy and decisions that are protective of rights¹⁵⁴ but, where they are not, as the Court of Appeal acknowledged, future claims are possible.¹⁵⁵ The courts have (and will continue to have) a critical role in administering the CCRA through scrutinising executive measures adopted under it.
123. As the Court of Appeal noted¹⁵⁶ the constitutional separation of powers in this country is closely aligned to that of the United Kingdom, and reflected in the domestic court's decision in *Plan B Earth*.¹⁵⁷ The European Court of Human Rights (ECtHR) in *Switzerland* and other cases have acknowledged the need for caution through providing a margin of appreciation.¹⁵⁸ The Court of Appeal correctly held it is untenable that the right to life under s 8 of NZBORA enables the court to second guess the policy choices that the CCRA reflects.¹⁵⁹
124. The Court of Appeal was correct to rely on the concept of a "margin of appreciation".¹⁶⁰ The reference to the margin of appreciation reflects the separation of powers between the judiciary and the elected branches of government.¹⁶¹ The CCRA is comprehensive in its reach (setting the 2050 target,

¹⁵¹ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA).

¹⁵² CA Judgment at [8], [97] [[05.0005]], [[05.0043]].

¹⁵³ Refer in particular to, ability to review the target (ss 5S to 5U CCRA); emissions budgets (ss 5W to 5ZD), emissions reduction plans (ss 5ZG to 5ZL); national adaptation plans (ss 5ZS to 5ZV).

¹⁵⁴ In contrast to *Chisnall*, where this Court found statutory regimes providing for extended supervision and public safety orders were evaluative rather than discretionary in nature (at [15], [95]-[96], [102]).

¹⁵⁵ CA Judgment at [10], [97], [102]. See also: Paul Rishworth "Human Rights" [2025] NZ L Rev 531 at 537-538.

¹⁵⁶ CA judgment at [94] [[05.0042]].

¹⁵⁷ *Plan B Earth v Prime Minister* [2021] EWHC 3469 (Admin).

¹⁵⁸ *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1 (Grand Chamber, ECHR), where the Court held: [413] Given the necessarily primary responsibility of the legislative and executive branches and the inherently collective nature of both the consequences and the challenges arising from the adverse effects of climate change, however, the question of who can seek recourse to judicial protection under the Convention in this context is not just a question of who can seek to address this common problem through the courts, first domestically and subsequently by engaging the Court, but raises wider issues of the separation of powers. And [421]. Even if in the longer term, climate change poses existential risks for humankind, this does not detract from the fact that in the short term the necessity of combating climate change involves various conflicts, the weighing-up of which falls, as stated previously, within the democratic decision-making processes, complemented by judicial oversight by the domestic courts and this Court.

¹⁵⁹ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [247] to [252]. *Wairarapa Moana Ki Pouakani Inc v Attorney General* [2026] NZCA 255 at [97]-[98].

¹⁶⁰ *Plan B Earth v Prime Minister* [2021] EWHC 3469 (Admin) at [48]-[51] and *Attorney-General v Chisnall* [2024] 1 NZLR 768 (SC) at [252], [257].

¹⁶¹ *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [144]; *Plan B Earth v Prime Minister* [2021] EWHC 3469 (Admin) at [48]-[51]. See, also: *Chief of Defence Force v Four Members of Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [97], [102]-[105].

emission reductions, risk assessments and adaptation).

125. Yet the appellant asks the court to review the choices made by the Parliament, assess the adequacy of the complex legislative framework that has been put in place based on those choices, and find a positive obligation to do more. The applicant also invites the Court to do so on an ongoing basis. This is simply not the Court's role. The relief sought offends against the principle of separation of powers inviting the Court to act as regulator. It is not tenable that the Court could or should do so.¹⁶²

Section 8 concerns actual loss of life or increased likelihood of death

126. Section 8 of NZBORA provides:

8 Right not to be deprived of life

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

127. The scope of the right that “no one shall be deprived of life” in s 8 refers to actual loss of life, or an increased likelihood of death.¹⁶³ This interpretation is supported by the plain meaning of s 8, and Parliament's intent when adopting a relatively narrow formulation of the provision:

127.1 The long title in NZBORA specifies that it was enacted in part to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (**ICCPR**). Yet, in contrast to art 6 of the ICCPR,¹⁶⁴ s 8 omits the words “[t]his right shall be protected by law”. It is also negatively framed providing “no one shall be deprived of life”, as opposed to everyone has an “inherent right to life”.

127.2 The White Paper contemplated the main application of s 8 would be for State action authorising and regulating things such as abortion, capital punishment, self-defence, and the use of deadly force to effect arrest, prevent escapes or control disorder.¹⁶⁵

¹⁶² The declaration of inconsistency jurisdiction does not entail the court reviewing Parliament's legislative choices: *Chisnall* at [247].

¹⁶³ *AR (India)* [2021] NZCA 291; *Wallace v Attorney-General* [2021] NZHC 1963 at [544]-[546]; [2022] NZCA 375 [2022] NZLR 398 at [97]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [79].

¹⁶⁴ Article 6(1) of the ICCPR states: “Every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [their] life.” To the extent that there are differences between the wording of art 6 ICCPR and s 8 NZBORA, the domestic provision will prevail: *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143].

¹⁶⁵ Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] I AJHR A6 at [10.84], [1085]-[10.89].

See: At [10.179] (noting that the Bill was concerned with certain civil and political rights only, that these were principally negative rights in that they impose a duty on the State to refrain from infringing them, and do not impose positive obligations

127.3 When Parliament enacted s 8, it specifically adopted narrower wording than Bills of Rights in other jurisdictions.¹⁶⁶ Despite a recommendation from the Justice and Law Reform Committee Report to include social and economic rights in the legislation,¹⁶⁷ Parliament expressly decided to exclude social, economic, and cultural rights from NZBORA.¹⁶⁸

127.4 The Final Select Committee Report defined social and economic rights as encompassing property; protection of the family; an adequate standard of living for a person's health and well-being; and protection for the environment. The Committee recognised that effective exercise of civil and political rights depended on securing an adequate standard of living, housing, health care and education.¹⁶⁹

127.5 Notwithstanding, and importantly, the Explanatory Note to the Bill states:¹⁷⁰

The rights and freedoms set out in the Bill are confined to civil and political rights... The Bill does not cover social, economic, and cultural rights. In this respect it departs from the recommendation of the Justice and Law Reform Committee, which recommended that certain social and economic rights be included in the Bill:

127.6 As such, the inclusion of social and economic rights (or “precursors” to enjoyment of civil and political rights) were intentionally excluded by Parliament. International social and economic rights were instead to be given effect through other legislative and administrative action.¹⁷¹

128. The previous cases where s 8 has been engaged all concern an actual loss of life

on the State to do something, and that economic, social and cultural rights were given effect through other legislative and administrative action).

¹⁶⁶ Section 7 of the Canadian Charter of Rights and Freedoms states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Article 2(1) of the ECHR states: “Everyone’s right shall be protected by law. No one shall be deprived of [their] life intentionally save in the execution of a sentence of a court following [their] conviction of a crime for which this penalty is provided by law”.

¹⁶⁷ Justice and Law Reform Committee Final Report of the Justice and Law Reform Committee on the White Paper on a Bill of Rights for New Zealand at 4.

¹⁶⁸ The right to life is addressed in detail below. The other rights referenced (the right to health, and the right to an adequate standard of living, including access to water, food and housing) are rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR). State parties’ obligations in respect of such rights are progressive: under art 2(1) ICESCR, State parties are to undertake to take steps, “with a view to achieving progressively the full realization of the rights”. Art 2(1) also recognises the State meets its obligations in relation to ICESCR rights by legislative and other measures. It is not arguable that such ICESCR rights could be the basis for a domestic court to assess the adequacy of a detailed legislative framework, whether in a climate change context or any other context.

¹⁶⁹ At 4 and 10. “In Appendix A the Committee suggests that some of these major specified rights could be included. It is recognised that effective exercise of civil and political rights depends on securing an adequate standard of living, housing, health care and education”.

¹⁷⁰ New Zealand Bill of Rights Bill (203-1) (explanatory note) at i-ii. Here, the drafters were likely drawing a distinction between the ICCPR and the International Covenant on Economic, Social and Cultural Rights ratified by NZ on the same day.

¹⁷¹ (10 October 1989) 502 NZPD at 13040; (14 August 1990) 510 NZPD at 3450 (Rt Hon Geoffrey Palmer). It is for the state to determine what legislative and “other measures” it may use to give effect to ICCPR rights: *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 116, referring to Dominic McGoldrick *The Human Rights Committee* (Clarendon Press Oxford, 1991) at 271.

or increased likelihood of death.¹⁷² Here, the appellant does not claim actual loss of life. The appellant claims that “life” can be construed expansively to encompass the “presence of circumstances which are fundamental to a dignified and meaningful life and, in particular, the presence of a sustainable climate system”.¹⁷³ On that basis, the appellant is asserting a collective social “right” for all persons, not an individually personal or human right not to be safeguarded to an increased likelihood of death.

129. However, as the White Paper, Final Select Committee Report, Hansard and Explanatory Note demonstrate, Parliament deliberately excluded social and economic (including environmental), or quality of life, issues from NZBORA.
130. The appellant argues international jurisprudence requires the right to life to include dignity. There are several points in response. First, even if this Court considers a ‘health’ or ‘dignity’ component to art 6 ICCPR exists, a distinction must be drawn between New Zealand’s international obligations under the ICCPR and obligations which can be enforced through a claim in a domestic court.¹⁷⁴ A state party may exercise choice about how the ICCPR is incorporated into domestic law.¹⁷⁵ As the House of Lords recognised, it is “the legal and political system as a whole and not merely the human rights entrenched in the Constitution which must comply with the [ICCPR]”.¹⁷⁶
131. Second, where domestic legislation is enacted with the purpose of giving effect to international obligations, using language which differs from the international text, the legislative purpose that decision-makers will apply is that found in the New Zealand statute.¹⁷⁷ Domestic legislation should therefore be read in a way that is consistent with international obligations, but the legislation must prevail to the extent it is in conflict.¹⁷⁸ When the genesis and purpose of the provision is considered, along with the wording chosen, the focus of s 8 was and is on life itself not quality of life.

¹⁷² *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA); *S v Midcentral District Health Board* [2004] NZAR 342 (HC); and *Wallace v Attorney-General* [2022] NZLR 398 (CA). *AR (India)* considered the purpose of Act and found that Parliament deliberately excluded quality of life or dignity. This is at odds with the Court of Appeal’s decision in this matter. With respect, for the reasons set out the approach taken in the *AR (India)* case, while concerning different facts, is legally correct.

¹⁷³ Draft 3ASOC at [46] [[05.0145]].

¹⁷⁴ *Wallace* CA Judgment at [114].

¹⁷⁵ *Wallace* CA Judgment at [86].

¹⁷⁶ *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 116 (also noting the UNHRC has held a State party is not obliged to incorporate the provisions of the ICCPR into its domestic law), cited in *Wallace* CA Judgment at [86].

¹⁷⁷ *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [143].

¹⁷⁸ *Wallace* CA Judgment at [114].

132. Third, key recent authorities do not provide the support the appellant claims. The Advisory Opinion reflects that the right to life is focused on the endangerment of the lives of individuals. Quality of life concerns are grounded in art 12 of the ICESCR (with the right to health; see *AR India*).¹⁷⁹ Equally, *Switzerland*, draws a distinction between human health (art 8 right to respect for private and family life), compared with life threatening consequences (art 2 right to life).¹⁸⁰ While the United Nations Human Rights Committee (UNHRC) General Comment No 36 does state that the right to life includes dignity, the General Comment is non-binding interpretative guidance.¹⁸¹ When applying this proposition in the context of specific communications, the UNHRC has nonetheless required a “a situation of physical endangerment of extreme precarity” in order for a breach of the right to life – including the right to dignity – to be found.¹⁸² All environmental cases to date in the ECtHR that have successfully been invoked also involve either death or a threat to life.¹⁸³
133. Parliament deliberately chose not to extend s 8 to encompass a right to quality of life or the protection of the environment. Doing that now would convert a negatively framed right, designed to protect against State interference, into providing protection for socio-economic or standard of living entitlements.¹⁸⁴ This would have significant implications beyond climate change.

No sufficiently real and imminent risk to life for positive duty to arise

134. While the right to life can be engaged where actions of the State result in an increased risk of death, not every risk to life engages the right under s 8. The claimed risk to life must meet a minimum legal threshold, being a real and immediate threat to life, before s 8 is engaged.
135. In *Teitiotia v Chief Executive*, the applicant challenged a decision declining his

¹⁷⁹ ICJ Advisory Opinion at 378-379.

378. The Court considers that conditions resulting from climate change which are likely to endanger the lives of individuals may lead them to seek safety in another country or prevent them from returning to their own. In the view of the Court, States have obligations under the principle of non-refoulement where there are substantial grounds for believing that there is a real risk of irreparable harm to the right to life in breach of Article 6 of the ICCPR if individuals are returned to their country of origin (see Human Rights Committee, *Teitiotia v New Zealand*, 24 October 2019, UN doc. CCPR/C/127/D/2728/2016, para. 9.11).

379. In the view of the Court, climate change also threatens the ability of individuals to enjoy the right to health. The “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” is protected by Article 12 of the ICESCR.”

¹⁸⁰ *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1 (Grand Chamber, ECHR) at 536.

¹⁸¹ The appellant overstates the authority of UNHRC views. While they may be a supplementary means of interpretation under the Vienna Convention on the Law of Treaties, they are not required to be taken into account under art 31(3) of the VCLT. Accordingly, they are persuasive authority, but not binding, even at an international level.

¹⁸² *Billy* at [8.6].

¹⁸³ *Öneryıldız v Turkey* [2004] ECHR 657; *Budayeva v Russia* [2008] ECHR 216; *Kolyadenko v Russia* [2012] ECHR 338.

¹⁸⁴ See: *Wairarapa Moana Ki Pouakani Inc v Attorney General* [2026] NZCA 255 at [97]-[98].

claim as a refugee or protected person due to the effects of climate change in Kiribati, including a risk to life under art 6 of ICCPR. The Immigration and Protection Tribunal dismissed his claim, finding any risk to life must be “imminent” and more than “conjecture or surmise”.¹⁸⁵ The Tribunal decision was upheld by the High Court, Court of Appeal and Supreme Court.¹⁸⁶

136. The allegations in the appellant’s claim do not, taken at their highest, identify a real and immediate risk to the life of the appellant or his whānau/iwi for s 8 to be engaged or a positive duty to arise.
137. In other examples where the State has been found to have a positive duty to act, under s 8, albeit at times implicitly, it has had knowledge of an immediate risk to life faced by particular individuals; the means to prevent that death; and its failure to act would have been culpable.¹⁸⁷
138. The UNHRC and ECtHR confirm that, in an environmental context, the right to life is not engaged unless there is a real and immediate threat of sufficiently material temporal and physical proximity to the claimant (or those they represent). Neither the UNHRC nor ECtHR have recognised a breach of the right to life (notwithstanding the wider scope of the right in the ICCPR and European Convention on Human Rights (**ECHR**) compared to s 8) in the context of climate change.¹⁸⁸
139. While s 8 implements art 6 of the ICCPR in domestic legislation, art 6 is framed more broadly than s 8 and has been interpreted more expansively by the UNHRC – as such the UNHRC’s comments on the scope of art 6 are not determinative as to the scope of s 8.¹⁸⁹ However, even the UNHRC has clarified that the right

¹⁸⁵ *AF (Kiribati)* [2013] NZIPT 9800413 at [89] and [91]. Considering ECHR authorities including *Oneryildiz v Turkey* and *Budayeva v Russia* at [87].

¹⁸⁶ *Teitiota v Chief Executive of MBIE* [2013] NZHC 3125, [2014] NZAR 162; [2014] NZCA 173, [2014] NZAR 689; [2015] NZSC 107.

¹⁸⁷ In *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA) at 445 it was implicit in the decision that, had the hospital not followed proper clinical procedure, not providing treatment may have constituted a deprivation of the patient’s life in breach of s 8.

In *Re J (an infant); B & B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) it was implicit in the decision that, where a State was aware of a risk to life of the child arising out of the parents’ religious choices, it had a duty to act to prevent the child’s death.

In *Wallace v Attorney-General* [2021] NZHC 1963 the High Court (upheld on appeal see *Wallace v Attorney-General* [2022] NZLR 398 at [99] and [132]) found that s 8 incorporated: (1) An obligation on State actors to “plan and control” potentially lethal operations in a way that does not unreasonably place individuals’ lives at risk (planning and control obligation). The standard to establish breach was high, requiring demonstration of “an egregious and significant failure to do something that the officers could, in the circumstances, reasonably be expected to do to protect [the victim]’s life” at [549] to [551]; and (2) An obligation to ensure a death at the hands of a State actor is properly investigated (investigative obligation) at [384].

¹⁸⁸ See *Re Officer L* [2007] 1 WLR 2135 (HL) at [20]. where obligations under art 2 only arose only when the risk was “real and immediate”. See also *R (Gardner) v Secretary of State* at [249]-[250], [252] where the Court rejected an obligation to take all reasonable steps to avoid the real and immediate risk to life posed by an epidemic.

¹⁸⁹ See: *R (AB) v Security of State for Justice* [2022] AC 487 at [61]-[67] where the UKSC distinguished judicial decisions, and “reports, comments and so forth by other treaty bodies whose purpose is aimed at prevention or the promotion of good

requires a *real and reasonably foreseeable right to life of an identifiable individual* before an art 6 violation may be established:

- 139.1 In *Teitiota v New Zealand*, the applicant claimed New Zealand had violated his right to life by removing him to Kiribati due to climate change impacts and sea level rise. The UNHRC considered the author had not demonstrated clear arbitrariness or error in the assessment of whether he faced a “real, personal and reasonably foreseeable threat to life”¹⁹⁰ such that art 6 was violated. The UNHRC found the impacts of climate change and associated sea level rise on the conditions of life in Kiribati did not pose a threat to life under art 6.¹⁹¹
- 139.2 Similarly, in the more recent decision of *Billy v Australia*,¹⁹² the UNHRC required a high threshold for breach of art 6. The Committee required that “a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment of extreme precarity that could threaten [the authors’] right to life, including their right to a life with dignity”¹⁹³ be demonstrated before finding a right to life violation. The UNHRC observed Australia could, within the available time frame, prevent the most life-threatening impacts. As such, the UNHRC declined the claim for violation of art 6.¹⁹⁴
140. The appellant also relies on authorities from the ECtHR to support his claim. New Zealand is not a party to the ECHR. The ECtHR has read a number of positive obligations into art 2 ECHR (which is not dissimilar to article 6 of the ICCPR), notably a framework duty, an operational duty, and a (procedural) investigative obligation.¹⁹⁵
141. Regardless of the positive duty at issue; for the right to be engaged under art 2 of the ECHR in an environment context, the ECtHR has also required at least the existence of a real and imminent risk to identifiable individuals, in the sense of a known, concrete hazard that was, or should have been expected to cause fatal

practice, rather than adjudication”.

¹⁹⁰ *Teitiota v New Zealand* CCPR/C/127/D/2728/2016 (HRC, 23 September 2020) at [9.7].

¹⁹¹ *Teitiota v New Zealand* at [2.1] and [9.6]-[9.12].

¹⁹² *Billy v Australia* CCPR/C/135/D/3624/2019 (HRC, 22 September 2022).

¹⁹³ At [8.6].

¹⁹⁴ At [8.7]-[8.8].

¹⁹⁵ See: *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2 at [12].

harm in the short term. For example:

- 141.1 *Cannavacciuolo v Italy* concerned large scale pollution of applicants living in the Campania region of Italy. The Court relied on the fact that art 2 did not solely concern deaths from agents of the state but also required, in the first sentence, a positive obligation to take all appropriate steps to safeguard the lives of those within their jurisdiction. While the Court took a broader approach to causation¹⁹⁶ it still required an actual threat to life.¹⁹⁷
- 141.2 See also, *Oneryildiz v Turkey*,¹⁹⁸ *Budayeva v Russia*,¹⁹⁹ and *Kolyadenko v Russia*.²⁰⁰ Taken together, these cases confirm the requirement for a real and imminent risk to identifiable individuals from the potential threat before the right to life is engaged.
142. The appellant relies on *Switzerland*, a case alleging the Swiss government's climate policies violated art 2 of the ECHR and the right of private and family life (art 8).²⁰¹ The claim was based on the demonstrable health risks during heat waves (increasing and intensifying because of climate change) to vulnerable groups, in this case older women. The case succeeded, by a majority, on the art 8 claim.
143. The majority stated it was "more questionable" whether the alleged shortcomings in the government's policies could trigger art 2 (right to life), and found it unnecessary to determine the claim.²⁰² In reaching its decision, the majority discussed the requirement in an art 2 claim that there be a "real and imminent risk" to life for the right to life to be engaged:

511. The applicability of Article 2, however, cannot operate *in abstracto* in order to protect the population from any possible kind of environmental harm arising from climate change. ...

¹⁹⁶ *Cannavacciuolo v Italy*, App 51567/14, 39742/14, 74208/14, and 21215/15 (ECtHR, 30 January 2025) at [390].

¹⁹⁷ At [377]: "It has also considered that, in order for Article 2 to apply in the context of an activity which is, by its very nature, capable of putting an individual's life at risk, there has to be a "real and imminent" risk to life. It may be impossible to devise a general rule on what constitutes a "real and imminent" risk to life, as that will depend on the Court's assessment of the particular circumstances of a case (see, *mutatis mutandis*, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, §§ 511-12, 9 April 2024). However, the Court's case-law indicates that the term "real" risk corresponds to the requirement of the existence of a serious, genuine and sufficiently ascertainable threat to life (*ibid.*, § 512, with further references). The "imminence" of such a risk entails an element of physical proximity of the threat and its temporal proximity (*ibid.*, with further references)."

¹⁹⁸ *Öneryildiz v Turkey* [2004] ECHR 657 at [98].

¹⁹⁹ *Budayeva v Russia* [2008] ECHR 216 at [148].

²⁰⁰ *Kolyadenko v Russia* [2012] ECHR 338 at [130].

²⁰¹ *Verein KlimaSeniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1 (Grand Chamber, ECHR).

²⁰² At [536].

512. It may be impossible to devise a general rule on what constitutes a “real and imminent” risk to life, as that will depend on the Court’s assessment of the particular circumstances of a case. However, the Court’s case-law indicates that the term “real” risk corresponds to the requirement of the existence of a serious, genuine and sufficiently ascertainable threat to life... The “imminence” of such a risk entails an element of physical proximity of the threat ... and its temporal proximity...

144. The Court in *Switzerland* did not make these findings with respect to the standing of the victim; rather whether climate change could engage the right to life.
145. While the Crown of course recognises climate change and its adverse effects, the identification of any specific adverse effects, accepting the geographic areas referred to by the appellant, involve projections about future impacts which are contingent on complex and evolving variables. Even if accepted for the purpose of strike out, the impacts identified in the amended claim, do not (and cannot) demonstrate a “real and immediate threat to life” of sufficiently material and temporal proximity. The appellant is unable to identify the requisite risk to life as required by the UNHRC and ECtHR caselaw. The difficulty of identifying such a claim is illustrated by *Billy*, *Teitiota* and *Switzerland*. As also recognised in *Billy* and *Teitiota*, the Crown and local authorities can (and will) take steps to prevent life threatening impacts in the intervening period.

No positive framework obligation in s 8

146. As above, the focus of the appellant’s case is on there being some kind of framework duty on the Crown: that s 8 requires the State to put in place frameworks that are sufficiently protective of life.
147. The text and negative framing of s 8 demonstrate Parliament’s intent was to impose an obligation on the State to refrain from taking life (whether directly or indirectly) without procedural safeguards, rather than to impose a positive obligation to enact legislative frameworks protective of life.
148. In the limited circumstances where domestic courts have recognised a positive duty under s 8, there has been an immediate risk to life of particular persons, and the State has had the means to prevent the death.
149. In contrast to art 6 of the ICCPR and art 2 of the ECHR, the requirement that the right “be protected by law” does not appear in s 8. International authorities which recognise a duty to enact regulatory frameworks (the framework duty) to

protect life should accordingly be treated with caution. The ECtHR's findings in environmental cases regarding the existence of framework obligations rely on the first sentence of art 2 of ECHR, namely, the positive requirement that the right to life "shall be protected by law".²⁰³ Similarly, art 6(1) of the ICCPR provides "this shall be protected by law". The UNHRC General Comment 36 draws on the "protected by law" obligation in art 6(1) for the framework obligation.²⁰⁴ Section 8 contains no parallel requirement regarding positive duties and omits the positive requirement that the right "shall be protected by law".

150. *Wallace* recognised narrow positive obligations under s 8 in the context of a State actor (Police) depriving someone of life: (1) an obligation to investigate deprivations of life for which the State is responsible; and (2): an obligation on State actors to plan and control potentially dangerous operations in a way that minimises risk to life. *Wallace* does not support a positive framework duty under s 8.²⁰⁵ The Court of Appeal was clear its findings did not open the door to claims for systematic fault but rather arose as an incident of the right to life in s 8:²⁰⁶

"to hold the State liable under s 8 is to find that it is responsible for someone being deprived of life without lawful justification. The need for a causal connection between the act of State actors and a death points to the need for an operational error rather than systematic defeats."

151. Section 8 cannot be interpreted to encompass a wide-ranging positive obligation that domestic regulatory frameworks, in the climate context, or otherwise, be protective of life. Rather than giving the right a "generous interpretation", it would put the court into the position of assessing the adequacy of New Zealand's climate change response.

Section 20

152. The appellant pleads the Crown has breached a positive duty under s 20 by

²⁰³ *Osman v United Kingdom* [1998] ECHR 101 (ECHR) at [115]: "the first sentence of Article 2...enjoins the State not long to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction." *Öneryıldız v Turkey* [2004] ECHR 657 (Grand Chamber) applies *Osman* at [89] and states at [71] "...but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction". *Budayeva v Russia* [2008] ECHR 216 at [128] and [129]. *Kolyadenko v Russia* [2012] ECHR 338 at [151].

²⁰⁴ Human Rights Committee General Comment 36 at [18] and [62].

²⁰⁵ Ellis J noted positive framework obligations under the ECHR but stated it was "not necessary... to consider those other protective duties in this judgment" at [517], footnote 178.

²⁰⁶ At [98] [Footnotes omitted]. In reaching this conclusion, the Court was careful to note that an investigative obligation in the event of death would not place an undue burden on the State. This is far removed from the present claim, which would seek to put the Government under an obligation to have frameworks that are sufficiently 'protective' of life (and sensibly could not be limited to climate change or environmental risks).

failing to put in place a regulatory framework that is *sufficient* to provide a rational and effective deterrent against the release of greenhouse gas emissions.²⁰⁷ The appellant also submits the Crown has failed to comprehensively assess the risks posed by climate change to the cultural rights and interests of Māori, and to protect those rights and interests.²⁰⁸

153. The appeal in respect of s 20 should be dismissed, including for many of the above points, but more specifically:

153.1 Fundamentally, again, the appellant’s claim is concentrated on the “sufficiency” of the CCRA. Even on an expansive approach to s 20, it is untenable to say the provision enables the court to assess the adequacy of a detailed, complex and multifaceted statutory enactment such as the CCRA.

153.2 Section 20 imposes a negative duty on the State to refrain from taking steps to deny the right of the appellant to enjoy his culture. Even if a positive duty could arise under s 20, it would not extend to enabling the appellant’s systematic claim.²⁰⁹

153.3 Despite numerous re-pleadings, the appellant’s claim does not identify or particularise any substantial interference such that there has been a denial of his rights, or the rights of his hapū. Neither does the claim identify a specific action the Crown could have taken to avert such denial.²¹⁰ The appellant’s claim is broader than that recognised by the UNHRC, including in *Billy v Australia*.

153.4 The pleaded effects are future focused, and the appellant takes no account of future mitigation and adaptation measures the Crown is taking and will continue to take to mitigate impacts.

Scope of s 20 does not enable judicial inquiry into adequacy of legislative settings

154. Again, and most fundamentally, the appellant’s key concern is whether the CCRA at the framework level is protective enough of Māori interests. The appellant’s claim under s 20 asks the courts to undertake a form of judicial

²⁰⁷ Draft 3ASOC at [95] [[05.0165]]. Appellant’s submissions at [115].

²⁰⁸ Appellant’s submissions at [115].

²⁰⁹ Rishworth describes the claim as “free-standing” against the “current state of affairs”.

²¹⁰ Such as in *Billy v Australia*, where the art 27 violation was based on the State’s failure to adopt timely adaptation measures (i.e., to initiate seawall construction).

inquiry into the “sufficiency” of the legislative response to climate change in respect of Māori.

155. Section 20 does not enable (or require) the courts to adjudicate on whether the CCRA is sufficiently protective of minority interests (including Māori interests). Such an expansive approach to s 20 would not be limited to climate change; but extend to all manner of other societal issues including health, education and housing. Notably also for s 20, finding a positive framework obligation for culture, would also mean the State was under a comparable positive obligation for religion and language. This would clearly push s 20 far beyond what Parliament intended.
156. The Court of Appeal was correct to find that the sufficiency of the CCRA was a matter of legislative policy that the courts were not required to second-guess under New Zealand’s constitutional settings.²¹¹ These issues are to be left to the political branches of government.
157. Given (1) the plain meaning of s 20; (2) Parliament’s intent when enacting NZBORA; and (3) New Zealand’s constitutional settings, the respondent says it is untenable that s 20 enables (and requires) the court to review and “improve” upon the CCRA to be more protective of Māori interests.
158. Parliament’s decision not to include reference to the Treaty in NZBORA is also significant. The Waitangi Tribunal remains the appropriate forum for Treaty grievances, in terms of the Crown’s legislative response; rather than expanding the negatively framed duty in s 20 beyond its intended meaning.

Section 20 prohibits denial of minorities right to enjoy culture

159. Section 20 states:

20 Rights of minorities

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

160. For s 20 to be engaged, there must be a *denial* of a person’s right to enjoy their culture in community with other members of that minority. The right in s 20 is formulated in the negative: it requires the State to refrain from removing the

²¹¹ CA Judgment at [130].

rights of minorities and on its face does not encompass positive duties to protect culture (or practise religion).

161. In *Mendelssohn v Attorney-General* the Court of Appeal found s 20 is an obligation not to deny the ability of a rights-holder to enjoy their culture (or practise their religion). The “very nature” of the right is a freedom *from* state interference.²¹² The *Mendelssohn* decision reflects the White Paper, which described the scope and intention of s 20 in the following terms:²¹³

What [s 20] is aimed at is oppressive government action which would pursue a policy cultural of conformity by removing the rights of minorities to enjoy those things which would go to the heart of their very identity – their language, culture, and religion.

162. The Court in *Mendelssohn* speculated the State could only be under a positive obligation in exceptional circumstances, such as where the right is being targeted by private oppression or coercion.²¹⁴
163. The CCRA regime is a comprehensive Act to address New Zealand’s climate change response. It does not deny the existence of Māori culture, whether for the appellant, his hapū or iwi.
164. As with the right to life, the CCRA is protective of the right to enjoy culture, not causative of a denial. It is untenable for the appellant to claim the CCRA is inconsistent with s 20.²¹⁵ The Crown enacted the CCRA to implement clear and stable policies to respond to climate change. The provisions of the CCRA are able to be interpreted consistently with s 20 NZBORA.²¹⁶

Section 20 does not encompass positive framework obligations

165. If, contrary to the above and the negative framing of s 20, a positive obligation could arise for the State to take action in specific circumstances to avert a denial of minority rights, UNHRC guidance and ICCPR case law do not support the systemic nature of the appellant’s wide-ranging claim.
166. Section 20 is derived from art 27 of the ICCPR, which is in substantially the same

²¹² *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [14], [24]; cited in *Moncrief-Spittle* [2022] NZSC 138, [2022] 1 NZLR 459 at [68].

²¹³ Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] 1 AJHR A6 at 87.

²¹⁴ *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [20].

²¹⁵ The relief sought by the appellant includes a declaration that the CCRA is incompatible with ss 8 and 20 of NZBORA.

²¹⁶ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [84].

terms as s 20. The UNHRC states in its General Comment on art 27 that:²¹⁷

Although article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through legislation, judicial or administrative authorities, but also against the acts of other persons within the State party.

167. The art 27 obligation is to ensure the minority rights are not denied and it is in the service of that obligation that positive acts may be required by the states.²¹⁸ A parallel may be drawn with *Shortland v Northland Health*, and *Re J (an Infant)*, where there was an implicit acceptance that the State had a positive duty under s 8 to act so as to avoid the deprivation of an individual's life.

168. Even if art 27 includes a positive component, s 20 must be seen as the domestic implementation of only the negative component of the art 27 right (albeit with a duty to act positively in limited circumstances to avoid a breach of the right).²¹⁹ As Professor Rishworth explains:²²⁰

This approach is all the more compelling given that economic, social, and cultural rights were expressly rejected in the Bill of Rights. If the Crown's non-feasance at any time could be construed as a failure to take positive actions to promote cultural, religious, and linguistic rights, there would be no bounds to potential litigation. Yet most of those controversies would be non-justiciable, involving fiscal and policy issues generally thought unsuited to judicial resolution.

169. Consistently with this, the UNHRC found in *Billy v Australia*²²¹ that individuals claiming to be a victim of a violation of a ICCPR right must demonstrate that a State party has, by act or omission, already impaired the exercise of their right or that such impairment is imminent.²²² The art 27 violation in *Billy* was based on the State's failure to adopt timely adaptation measures where it had assumed control over providing protection – in that case assuming control over a seawall construction.²²³ Remedies were focused on reparation and adaptation.²²⁴

²¹⁷ Office of the High Commissioner for Human Rights *General Comment No. 23: Article 27* HRI/Gen1/Rev.1 (1994) at [6.1].

²¹⁸ Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 404.

²¹⁹ Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 405.

²²⁰ Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 405.

²²¹ *Billy v Australia* CCPR/C/135/D/3624/2019 (HRC, 22 September 2022).

²²² At [7.9].

²²³ At [8.14].

²²⁴ At [11].

170. The UNHRC's findings in *Billy* reflect that a positive obligation may arise under art 27 in limited factual circumstances where the claimant's ability to maintain their culture had already been impaired *and* the State: (a) has knowledge a citizen's rights are endangered; (b) has taken responsibility to avoid that endangerment (normally under our system of climate response in the CCRA and wider legislative frameworks this sits with regional and district councils); and (c) the means to prevent a denial of minority rights. However, *Billy* is not authority for the positive framework obligation against the national framework for responding to climate change asserted for by the appellant's claim.²²⁵

No substantial interference with right

171. Further, s 20 requires a denial of the right to culture.²²⁶ Section 20 (and art 27) does not prohibit every interference with minority rights. The appellant must show an interference with the ability to enjoy his culture has been substantial.²²⁷
172. Contrary to the appellant's submissions, the Court of Appeal did not impose substantial as an unprincipled extra-statutory restriction.²²⁸ The Court relied on UNHRC authorities which require that an interference be "so substantial" as to constitute a denial of the right to enjoy culture under art 27.²²⁹
173. The appellant's claim does not identify a substantial interference such that there has been a denial of his, or the rights of his hapū. No interference akin to the already compromised circumstances in *Billy* is identified. The claim is future focused and does not provide for, or appropriately recognise, the future mitigation and adaptation measures the Crown is taking and will continue to take to mitigate any impacts to the right. Intervening acts by central and local government will continue to address future impacts of climate change.

THIRD CAUSE OF ACTION: ALLEGED BREACHES OF TE TIRITI

174. The appellant alleges the legislative and executive response to climate change is substantively in breach of article II of Te Tiriti. The appellant seeks declarations that:²³⁰

²²⁵ If anything, it is implicit authority for the proposition that mitigation measures do not fall within the scope of art 27.

²²⁶ Denial is defined by the Cambridge Dictionary as "the fact of not allowing someone to do or have something".

²²⁷ Rishworth at 408-409. *Länsman v Finland* Comm No 511/1992, 8 November 1994 at [9.5]; *Äärelä v Finland* (Communication No 779/1997) CCPR/C/73 /D/779/1997, 7 Nov 2001 at [7.5]; *Mahuika v New Zealand* (2000) 7 HRNZ 629 (HRC) at [9.4]; *Te Runanga o Whare Kauri Rekohu Inc v Attorney General* HC Wellington CP 682/92 12 October 1992 at 40.

²²⁸ Appellant's submissions at [119].

²²⁹ CA judgment at [123] and FN 209 [[05.0053]].

²³⁰ Draft 3ASOC at [100]–[102] [[05.0166]].

- 174.1 since 14 June 1992, Crown action in response to climate change, including the legislative regulatory framework, is inconsistent with the terms of art II of Te Tiriti;
 - 174.2 the Crown has and is committing a breach of art II by impeding, and not actively facilitating the appellant, his whānau, Ngāpuhi and Ngāti Kahu, to exercise tino rangatiratanga in respect of their taonga; and
 - 174.3 the Crown has acted and is acting in breach of Treaty duties, which include duties to perform the commitments undertaken in Te Tiriti, to take active steps to ensure those commitments are honoured and to act in good faith.
175. The alleged claim is untenable as a matter of law and should be struck out because:
- 175.1 The CCRA regime has been designed, and includes express provisions, to take account of te ao Māori and Treaty issues in the decision-making processes. Together with the Courts' judicial review jurisdiction and the Waitangi Tribunal's broad mandate, there is no tenable basis for a new form of claim to second guess legislative and executive decision-making relating to the field covered by the CCRA.
 - 175.2 It is contrary to the findings in *Te Heuheu* and the subsequent line of authority which reflect the fundamentals of our constitutional structure. The appellant is wrong to suggest his case does not demand the Court overrule *Te Heuheu*.²³¹ Each declaration sought, including the declaration of inconsistency, relies on direct enforcement of the Treaty as a stand-alone cause of action.
 - 175.3 The Treaty's unique and important place in New Zealand is recognised in the way it is given effect by all branches of government. It properly sits across political and legislative spheres and the relationship between Māori and the Crown.
 - 175.4 The pleaded claim is not an orthodox judicial review nor is it an accurate depiction of current public law mechanisms that recognise Treaty principles.

²³¹ Appellant's submissions at [147].

The CCRA expressly recognises and respects te ao Māori and Treaty principles

176. The appellant’s claim is the ‘Crown’ owes Treaty duties to Mr Smith, his whānau, Ngāpuhi and Ngāti Kahu to take active steps to ensure those commitments are honoured and to act in good faith. And, by its acts and omissions as pleaded the ‘Crown’ has committed a breach of its Treaty duties.
177. In so far as the appellant claims the Crown has failed to take steps since 1992, a claim could be made to the Waitangi Tribunal. As the Court of Appeal recognised, the Waitangi Tribunal is already conducting a priority Kaupapa inquiry into the Crown’s climate change policy.²³²
178. The third cause of action incorporates the appellant’s pleading designed to challenge primary legislation.²³³ As discussed elsewhere, the Court should not recognise a course of action designed to override settled constitutional principles and boundaries.²³⁴ In light of these points, an independent cause of action alleging breach of the Treaty is clearly untenable.²³⁵

Te Heuheu Tūkino v Aotea Māori Land Board

179. The appellant submits *Te Heuheu* should not be treated as determinative of the domestic constitutional significance or the Treaty’s legal relevance at law. This is because the findings were based on: (1) the incorrect assumption the Treaty was one of cession; and (2) are not supported by the authorities it relies on, *Vajesingji Joravarsingji and Secretary of State for India v Bai Rajbai*.²³⁶ Instead, the appellant relies on an argument of Professor Frame, that the sovereignty the Crown acquired is qualified and limited by the Treaty itself.²³⁷ As a result, the appellant questions whether the dualist approach adopted by the Privy Council in *Te Heuheu* should be followed.²³⁸

²³² CA Judgment at [154] [[05.0068]].

²³³ Draft 3ASOC at [82], [90] and [102] [[05.0160]].

²³⁴ Impugning legislative processes is contrary to Art 9 of the 1688 Bill of Rights; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2019] 1 NZLR 116 (SC) at [36] and [105]; *Timaru District Council v Minister of Local Government* [2023] NZHC 244 at [146]–[147], [154]. See also *R (A and ors) v Secretary of State for the Home Department* [2022] EWHC 360 (Admin), [2022] 4 All ER 615 at [22] and [26](i). *Mikisew Cree First Nation v Canada* [2018] SCC 40, [2018] 2 SCR 765 at [2]; [32]; [34]–[37]; and [39] per Krakatsani SJ, Wagner CJ and Gaskin J.

²³⁵ *Te Rūnanga o Ngāti Whātua v Attorney-General* [2024] NZHC 2271, [2024] 3 NZLR 218 at [37] referring to *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] NZLR 301 at 308.

²³⁶ *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357 at 360; and *Secretary of State for India v Bai Rajbai* (1915) LR 42 IA 229.

²³⁷ Appellant’s submissions at [135]; and see *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513 (PC) (**Broadcasting Assets**) at 517: In referring to the nature of the Crown’s obligations, the PC commented, “It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown’s other responsibilities as the government of New Zealand and the relationship between Māori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust.”

²³⁸ Appellant’s submissions at [132], [140] and [147].

180. The appellant asserts the principle of *pacta sunt servanda* and art 27 of the Vienna Convention on the Law of Treaties can inform how the Treaty is considered.²³⁹ He also refers to overlap between tino rangatiratanga, as protected under art II of te Tiriti, and the international law principle of self-determination.²⁴⁰
181. The appellant suggests this case does not require the Court to overrule *Te Heuheu* or conclusively determine the full juridical status of Te Tiriti. The respondent agrees that whether or not the Treaty is one of cession or not does not need to be finally resolved.
182. The Privy Council in *Te Heuheu* held art I of the Treaty involved, “complete cession of all the rights and powers of sovereignty of the Chiefs”.²⁴¹ Historically, this sits uncomfortably with the Waitangi Tribunal’s 2014 report, *He Whakaputanga me Te Tiriti: The Declaration and the Treaty*. The Tribunal detailed the agreement reached between Rangatira who signed Te Tiriti and Britain’s intention of ceding sovereignty by signing the Treaty. The Tribunal concluded the Rangatira who signed Te Tiriti did not cede sovereignty at 1840.²⁴² However, in declining to comment on “how and when the Crown acquired the sovereignty that it exercises today”, the Tribunal confirmed the contemporary constitutional consensus that such sovereignty exists and is lawfully exercised.²⁴³
183. Whether the modern-day sovereign authority of the Crown occurred at 1840, or because of events that followed,²⁴⁴ Richardson J in *Lands* accepted as a matter of law in 1987:²⁴⁵

²³⁹ Appellant’s submissions at [138].

²⁴⁰ Appellant’s submissions at [138].

²⁴¹ *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) at 596–597.

²⁴² Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 204) at 526–527: that is, they did not cede their authority to make and enforce law over their people and within their territories, rather, they agreed to share power and authority with the Governor... to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice... remained to be negotiated over time on a case-by-case basis.

²⁴³ Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 204) at 527; and *Mihinui v Attorney-General* [2017] NZHC 56 at [24].

²⁴⁴ Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 166: “However, British acquisition of sovereignty was eventually effective” citing Alan Ward, ‘*Law and Law Enforcement on the New Zealand Frontier 1840–1893*’ (1971) 5 *New Zealand Journal of History* 128. Palmer goes on to note at 167 that: “The Acts of the Crown that effected Britain’s actual acquisition of sovereignty, such as raupatu confiscations or fraudulent land dealings, have been or are being the subject of settlement by the Crown as breaches of the Treaty on other grounds – without resurrecting Māori sovereignty”. See also Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A contextual analysis* (Hart Publishing, Oxford, 2022) at 33–34.

²⁴⁵ *New Zealand Māori Council v Attorney-General (Lands)* [1987] 1 NZLR 641 (CA) at 671; *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC) at 213; see also *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [139], [140] per Keith and Anderson JJ; and PG McHugh *The Aboriginal Rights of New Zealand Māori at Common Law* (PhD thesis, University of Cambridge, 1987) at

It now seems widely accepted as a matter of colonial law and international law that [Hobson's two proclamations of 21 May 1840] approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.

184. Similarly, Somers J held, "[s]overeignty in New Zealand resides in Parliament."²⁴⁶ The Crown's governing authority today is exercised through a representative liberal democracy with a wide franchise, and responsible government under the rule of law.²⁴⁷ This Court's empowering legislation recognises New Zealand's commitment to the sovereignty of Parliament.²⁴⁸ The appellant wrongly asserts the Court has not confronted the scope of Crown authority.²⁴⁹ Today, the full power to make law resides in Parliament.²⁵⁰ Any fundamental constitutional reform in this area would need to occur by Parliament; it cannot be initiated by the Courts.²⁵¹
185. Whether the Treaty is a valid international treaty at international law has been referred to by Courts since *Te Heuhe* but not squarely confronted.²⁵² It has been described by commentators as akin to a valid international treaty because it was an agreement between states, and dealt with matters of international significance,²⁵³ and as more analogous to an international treaty of protection.²⁵⁴ The way the Treaty is treated in domestic law is akin to an international treaty.²⁵⁵
186. The Treaty has been described by the Courts as a foundational document,²⁵⁶

107: "Thereafter the Crown's sovereignty over New Zealand was fixed as a matter of English law."

²⁴⁶ *Lands* [1987] 1 NZLR 641 (CA) at 690; acceptance of such sovereignty underpins the other judgments in *Lands*; and see *Davis v Whangarei District Council* [2026] NZHC 1263 at [42].

²⁴⁷ As explained by the Privy Council in *Broadcasting Assets* at 517 [1994] 1 NZLR 513 (PC), the Crown is "the legitimate government of the whole nation" with a range of responsibilities beyond its Treaty obligations.

²⁴⁸ Senior Courts Act 2016, s 3(2); *Paki v Attorney-General (No. 2)* [2015] 1 NZLR 67 at [190]–[191].

²⁴⁹ Appellant's submissions at [144]. As noted by Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 175 to 179, past court cases including *Morunga v New Zealand Police* CIR2004-404-8 (HC, Auckland, 16 March 2004), at [4] where Justice Williams noted "The Courts are bound to comply with the laws of this country as passed by Parliament. If those who support Māori Sovereignty wish to pursue their ambitions, Parliament is the only avenue available and until, or if, Parliament intervenes, all Courts in this country will continue to obey the laws passed by that Parliament as they apply to all persons within New Zealand." These cases do not proceed simply on the basis of *Te Heuhe* being binding, rather, they stand for the orthodox proposition that the current system of New Zealand government exercises sovereign power.

²⁵⁰ Constitution Act 1986, s 15.

²⁵¹ See Hanna Wilberg *Administrative Law in Aotearoa New Zealand* (Hart, 2025) at 155 citing The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation (2016) and Andrew Erueti, 'Conceptualising Indigenous Rights in Aotearoa New Zealand' (2017) 27 *New Zealand Law Review* 715 at 742.

²⁵² *Lands* [1987] 1 NZLR 641 (CA) at 662-663 per Cooke P.

²⁵³ Tom Bennion "Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi" (2004) 35 *VUWLR* 165 at 179, 201, 230-204; and Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 220.

²⁵⁴ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 164.

²⁵⁵ At 167: "In either case, the Treaty of Waitangi is a valid international treaty".

²⁵⁶ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; See also, Law Commission *He Poutama*

“part of the fabric of New Zealand society”,²⁵⁷ and “of the greatest constitutional importance to New Zealand”.²⁵⁸ Generally authoritative, but not legally enforceable, guidance documents like the Cabinet Manual, Cabinet circulars, and the legislative design guidelines have recognised this status.²⁵⁹

187. A long line of authority has established the Treaty can have legal significance in various ways reflecting its unique constitutional position in New Zealand, based on the principal findings in *Te Heuheu* and *kāwanatanga* exercised by the Crown.²⁶⁰ Two fundamental aspects from the decision remain part of New Zealand law and firmly part of our legal system and constitution: (1) the Treaty cannot override Acts of the legislature without action of Parliament;²⁶¹ and (2) there is no free-standing justiciable duty applicable to the Crown-Māori relationship on the basis of the terms of the Treaty alone.²⁶²
188. While the Privy Council’s findings in *Te Heuheu* were made in reliance of *Vajesingji Joravarsingj* and *Secretary of State for India v Bai Rajbai*, they are consistent with an orthodox dualist approach. Those authorities suggested the sovereign may recognise treaties not only through legislation, but also through recognition by the sovereign’s officers or through express or implied agreements.²⁶³ What is meant by ‘recognition’ is ambiguous. This can be taken to mean action from the governing body (Parliament) or limited to legislation. Neither interpretation is sufficient to show the reasoning of the Privy Council,

(NZLC SP24, 2023) at [8.20].

²⁵⁷ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 213.

²⁵⁸ *Broadcasting Assets* [1994] 1 NZLR 513 (PC) at 516.

²⁵⁹ For example, Cabinet Manual 2023, at 2; 2019 CO (19) 5: *Te Tiriti o Waitangi / Treaty of Waitangi* guidance; and the Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition) at Chapter 5: The Treaty of Waitangi, Treaty settlements, and Māori interests.

Documents such as the Cabinet Manual, LDAC Guidelines and the Red Book do not create justiciable rights. *Healing the past, building a future: the Red Book* (Te Arawhiti, 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”. See *Rabson v Attorney-General* [2017] NZSC 22 and *Rabson v Attorney-General* [2016] NZHC 2876 at [9]: “the Cabinet Manual is a 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.”

²⁶⁰ *Lands* [1987] 1 NZLR 641 (CA) at 655; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; *Broadcasting Assets* [1994] 1 NZLR 513 (PC) at 515; *Barton-Prescott v Director of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318 (CA) (*Forests*) at [62]–[65] and [72]–[75]; *Takemore v Clarke* [2012] 1 NZLR 573 (SC) at [248] as per Glazebrook and Wild JJ.

²⁶¹ *Te Heuheu Tūkino* [1941] AC 308 (PC) at 595; *Lands* [1987] 1 NZLR 641 (CA) at 655 at 668 as per Cooke P; *Paki v Attorney General* (No. 2) [2015] 1 NZLR 67 (SC) at [189] per McGrath J. Compared with the situation in Canada where Treaty rights have been entrenched by s 35 of the Constitution Act 1982.

²⁶² *Lands* [1987] 1 NZLR 641 (CA) at 655–666 (Cooke P) and at 691 (Somers J); *Huakina Development v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210, 213, 215; *Broadcasting Assets* at 515; *Barton-Prescott v Director of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Forests* [2008] 1 NZLR 318 (CA) at [62]–[65], [72], [74]–[75]; *Takemore v Clarke* [2012] 1 NZLR 573 (SC) at [248] as per Glazebrook and Wild JJ; *Ngāti Whātua Ōrākei Trust* [2022] 3 NZLR 601 (HC) at [68] and [589]; and *Stafford* [2022] NZCA 186 at [77(b)].

²⁶³ *Vajesingji Joravarsingj v Secretary of State for India* (1924) LR 51 IA 357 at 360; and *Secretary of State for India v Bai Rajbai* (1915) LR 42 IA 229.

which has been upheld and woven consistently together with developments in the supervisory judicial review jurisdiction,²⁶⁴ should not be followed.

189. The Privy Council’s reasoning in *Te Heuheu* correctly rests on the principle that domestic courts cannot enforce the instrument by which the sovereignty under which they acquired jurisdiction was obtained.²⁶⁵ Courts instead exercise jurisdiction in the name of the sovereign.²⁶⁶

The Treaty requires incorporation to provide directly enforceable rights

190. New Zealand’s constitutional and legislative framework, and the place of the Treaty within it has developed to reflect, rather than overcome, the Treaty’s position as not directly enforceable. Developments since *Te Heuheu* have provided for a powerful position for the Treaty in the fabric of New Zealand’s legal system. The Treaty is woven into and influences all branches of Government and its significance has evolved materially in the more than 80 years following the Privy Council’s decision.²⁶⁷ However, the Treaty remains non-justiciable as the basis of a stand-alone cause of action.

191. Within New Zealand’s legal system, the Treaty is given legal significance by:

- 191.1 **Incorporation of the Treaty in statute:** The Treaty applies directly where it has been referenced in legislation, often by reference to Treaty principles. Treaty principles give contemporary legal effect to the Treaty, acknowledging the two texts, providing a basis for its application beyond signatory iwi.²⁶⁸ The principles reflect “the intent of the Treaty as a whole” encompassing, but not limited to its express terms.²⁶⁹ Treaty clauses must be given “a broad and generous

²⁶⁴ Explained below at [191].

²⁶⁵ *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357 at 2: “Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as the sovereign has, through his officers recognised”; and *Cook v Sprigg* 1899 App. Cas. 572: “...annexation of territory made an Act of State and that any obligation assured under the treaty with the ceding State either to the sovereign or the individuals is not one which municipal Courts are authorised to enforce” cited in *Te Heuheu Tūkino* [1941] AC 308 (PC); *Winfat Enterprise (HK) Co Ltd v Attorney-General of Hong Kong* [1985] 2 WLR 786 (PC) at 790-791. See also *R v Jones (Margaret)* 1 AC 136 at [63]–67; *R v Keyu and Others* [2015] UKSC 69 at [145] – a domestic court cannot adjudicate upon the question of whether the state of which it formed part had acted unlawfully in the course of exercising the Crown’s discretionary powers in the making of war and disposition of the armed forces.

²⁶⁶ *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC) at 22.

²⁶⁷ *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [98] as per Glazebrook J citing *Te Heuheu Tūkino* [1941] AC 308 (PC) and Natalie Coates “The rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence” in John Burrow and Jeremy Ginn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 81 stating that subsequent cases have “dealt a heavy blow to [Tūkino]’s crumbling façade”; and K Hille, C Jones, and D Ward *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) at 41.

²⁶⁸ *Broadcasting Assets* [1994] 1 NZLR 513 (PC) at 517. The foundational case is *Lands* [1987] 1 NZLR 641. See also Treaty of Waitangi Act 1975, preamble.

²⁶⁹ *Broadcasting Assets* [1994] 1 NZLR 513 (PC) at 517.

construction”, rather than being “narrowly construed”.²⁷⁰ Courts have at times referred directly to the Treaty text in interpreting Treaty clauses.²⁷¹ Incorporation in this way enables flexible development of case law in modern circumstances.

191.2 Outside of direct statutory reference but within statutory frameworks: Treaty principles may be applied in judicial review when there is no statutory incorporation to inform a pre-existing ground of review.²⁷² The Treaty can be an aid to statutory interpretation.²⁷³ Courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the matter.²⁷⁴ There is a presumption Parliament intends to legislate consistently with the Treaty, unless clear statutory language to the contrary is used.²⁷⁵

191.3 Challenges outside of statutory frameworks: Depending on context, in judicial review proceedings, the Treaty may bear on a failure to consider relevant considerations,²⁷⁶ or reasonableness.²⁷⁷ This does not extend to requiring substantive compliance with the Treaty terms, which would be a significant enlargement of orthodox judicial review standards.²⁷⁸ The common law of New Zealand should, as far as reasonably possible, be applied to and developed consistently with the Treaty.²⁷⁹

191.4 Legitimate expectation: Where on orthodox grounds, the Crown has

²⁷⁰ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [151] per William Young and Ellen France JJ; [237] per Glazebrook J; [296] per Williams J; and [332] per Winkelmann CJ in the context of a prescriptive treaty clause; *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC) at [128]–[130] in the context of a general treaty clause; and *Ngāi Tai ki Tāmaki Tribunal Trust v Minister of Conservation and ors* [2019] 1 NZLR 368 (SC) at 387.

²⁷¹ For example, ‘tino rangatiratanga’ in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC); and ‘active protection’ in *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC).

²⁷² See *Forests* [2008] 1 NZLR 318 (CA) at [62]–[72]; *Tukaki v Commonwealth of Australia* [2018] NZAR 1597 (CA) at [37]; *Osbourne v Attorney-General* HC Hamilton M198/99, 4 October 1999 at [78]–[80], [82]–[83] (under the Education Act 1989); *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC); and *Huakina Development Trust* [1987] 2 NZLR 188 (HC).

²⁷³ *Forests* [2008] 1 NZLR 318 (CA) at [62]–[65], [72], and [75]; *Ngaronoa v Attorney-General* [2017] 3 NZLR 643 (CA) at [46]; *Smiler v Attorney-General* [2026] NZHC 375 at [112]; *Stafford v Attorney-General* [2022] NZCA 165 at [77]; and *Huakina Development Trust* [1987] 2 NZLR 188 (HC) at 223.

²⁷⁴ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [151] per William Young and Ellen France JJ; [237] per Glazebrook J; [296] per Williams J; and [332] per Winkelmann CJ.

²⁷⁵ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [296] per Williams J; and *Ellis (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [98] per Glazebrook J. See also *Huakina Development Trust* [1987] 2 NZLR 188 at 210; *Barton-Prescott* [1997] 3 NZLR 179 (HC) at 184; *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46]; *Ngāti Whātua Ōrākei Trust* [2022] NZHC 843, [2022] 3 NZLR 601 at [68]; *Ulrich v Attorney General* [2022] 2 NZLR 599 (CA) at [62].

²⁷⁶ *Ngāti Whātua Ōrākei Trust* [2022] 3 NZLR 601 (HC) at [68]; *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA) (**Radio Frequencies**).

²⁷⁷ See *Minister of Land Information v Dromgool* [2021] NZCA 44 at [120].

²⁷⁸ *Stafford v Attorney-General* [2022] NZCA 186 at [77(b)].

²⁷⁹ *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [249].

created a procedural (not substantive) legitimate expectation, the Treaty may be relevant. This could be because statutory incorporation of the Treaty makes it relevant to the particular promise made and relied on,²⁸⁰ or because of an unambiguous commitment made in a policy document.²⁸¹ However, a legitimate expectation cannot be based on the Treaty itself. Legitimate expectation cannot be used to give the Treaty direct substantive effect.²⁸²

191.5 The Waitangi Tribunal: The Tribunal was established by the Treaty of Waitangi Act 1975 as a standing commission of inquiry. It is tasked with inquiring into the Treaty-consistency of Crown actions and policies, including failures to act, develop, or enact legislation from 1840 to today.²⁸³ Where claims are well-founded, the Tribunal may recommend action be taken to compensate for, remove prejudice, or prevent other persons from being similarly affected in the future.²⁸⁴ Such recommendations may be in general form or indicate specific actions which, in the opinion of the Tribunal, the Crown should take.²⁸⁵ The Tribunal's role has been recognised as a significant part of New Zealand's "constitutional architecture".²⁸⁶

191.6 Treaty settlements: The Crown and many iwi have reached settlement agreements in acknowledgment of past breaches of the Treaty, either following inquiry by the Waitangi Tribunal, or by direct negotiation.²⁸⁷ Treaty settlement legislation sets out agreed rights and interests, negotiated within a Treaty framework. This produces legally enforceable rights which have been specified between the parties. Settlement legislation regularly incorporates tikanga underlying the connection between land and mana whenua.²⁸⁸ The aim of Treaty settlements is to facilitate the Crown and iwi to move forward into a

²⁸⁰ For example, *Hart v Director-General of Conservation* [2023] 3 NZLR 42 (HC) at [74].

²⁸¹ For example, *Te Pou Matakana Ltd v Attorney-General* [2022] 2 NZLR 148 (HC) citing *Comptroller of Customs* at [109]-[111].

²⁸² *New Zealand Māori Council v Attorney-General* [2012] NZHC 3338 at [320]: "Pleading legitimate expectation of a substantive outcome based on future Treaty of Waitangi compliance is simply an attempt to get around restrictions on direct enforcement in law of the Treaty."

²⁸³ *Wairarapa Moana ki Pouākani v Mercury NZ Ltd* [2022] 1 NZLR 767 (SC) at [16]. See Treaty of Waitangi Act 1975, preamble, ss 2, 5, and 6; The Tribunal has exclusive authority for the purposes of the Act to determine the meaning and effect of the Treaty as embodied by the two texts, and issues raised by the differences between them.

²⁸⁴ Waitangi Tribunal Act 1975, s 6.

²⁸⁵ *Lands* [1987] 1 NZLR 641 (CA) at 652 per Cooke P.

²⁸⁶ *Skerret-White v Attorney-General* [2024] 2 NZLR 493 (CA) at [36].

²⁸⁷ *Wairarapa Moana ki Pouākani Inc v Attorney-General* [2026] NZCA 255 at [67]-[68].

²⁸⁸ *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [102].

more positive, forward-looking, partnership-based relationship.²⁸⁹

While historical settlements are nearing completion, this balanced constitutional arrangement endures and is not dependent on the Treaty being directly enforceable.

192. How the Treaty has been given legal significance by Parliament and the courts is consistent with the settled judicial approach reflecting dualist orthodoxy.²⁹⁰ This is unaffected by the legal position of the Treaty at 1840, whether as a Treaty of cession, protection, or as a valid international treaty.²⁹¹

Fundamental reasons why this claim cannot succeed

The Treaty cannot be directly enforced by declarations of inconsistency

193. No statutory power exists for the Court to declare legislation inconsistent with the Treaty. A declaration that Crown action, including legislation, is inconsistent with the Treaty would amount to direct enforcement, presumably against the Treaty text. This would require the fundamental findings in *Te Heuheu* to be overturned. The Courts' inherent jurisdiction has not been exercised to issue a declaration of this kind, largely because Parliament has chosen to only incorporate Treaty principles within specific statutory frameworks where Treaty interests are engaged – as opposed to giving legal effect to the Treaty itself through legislation.
194. The appellant argues a declaration of inconsistency does not invalidate legislation, which would continue to apply. The relief seeks a finding the Crown has and is committing a breach of the Treaty and Treaty duties, in part due to an alleged failure to put a sufficient regulatory framework in place for climate change.²⁹² The claim seeks the Court measure the current CCRA and Crown action against the terms of the Treaty and find it deficient.
195. Declarations are a substantive remedy against the Crown and, in turn, Parliament itself.²⁹³ It is a convention that the Crown complies with

²⁸⁹ *Wairarapa Moana ki Pouākani Inc v Attorney-General* [2026] NZCA 255 at [68](a).

²⁹⁰ *Takemore v Clarke* [2012] 1 NZLR 573 (CA) at [248] per Glazebrook and Wild JJ; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [151] per William Young and Ellen France JJ; [237] per Glazebrook J; [296] per Williams J; and [332] per Winkelmann CJ.

²⁹¹ See Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A contextual analysis* (Hart Publishing, Oxford, 2022) at 220.

²⁹² Draft 3ASOC at [102], [90] and [82] [[05.1060]].

²⁹³ *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC) at [55]–[56] per Glazebrook and Ellen France JJ and [101] per Elias CJ held a declaration is a vindication of rights and may be of assistance to Parliament.

declarations.²⁹⁴ Contrary to the obiter suggestion in *Kiwi Party* a declaration of inconsistency with the Treaty is not possible for the reasons set out below.²⁹⁵ In *Taylor*, this Court's view was that an effective remedy should be available for a breaches of NZBORA, and the courts could draw upon the ordinary range of remedies.²⁹⁶ This Court's findings in *Taylor* were largely reliant on the NZBORA statutory scheme and the statutory incorporation of the ICCPR.²⁹⁷

196. Analogies with NZBORA in the Treaty context are inapt because:

196.1 Parliament in enacting NZBORA positively incorporated *rights* sourced outside of domestic law, for example the ICCPR. NZBORA expressly applies to acts done by the legislative branch.²⁹⁸ The Supreme Court found it could issue a declaration of consistency with NZBORA, as this is part of its function to adjudicate on 'rights'. NZBORA provided a statutory vehicle through which these 'rights' became cognisable in domestic courts. When enacting NZBORA, Parliament left the question of remedies and their development to the Courts.²⁹⁹

196.2 When NZBORA was drafted, it was initially suggested that the Treaty be included. Comparisons were drawn to Canada – where Treaty and rights of indigenous peoples are statutorily entrenched in s 35 of the Constitution Act 1982. Under s 52 of that Act, Canadian courts can strike down legislation that unjustifiably infringes those constitutional rights.³⁰⁰ An equivalent of s 35 approach was proposed in the White Paper, but ultimately the Treaty was not included, following consultation (not least with Māori), and the view at the time that NZBORA should not be supreme law.³⁰¹

196.3 By contrast, Parliament has not enacted legislation broadly incorporating the Treaty text in statute. Instead, Treaty clauses have

²⁹⁴ *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].

²⁹⁵ *Kiwi Party Inc v Attorney-General* [2020] 2 NZLR 224 (CA) at [50] citing *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC).

²⁹⁶ *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC) at [38] per Glazebrook and Ellen France JJ.

²⁹⁷ *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC) at [138].

²⁹⁸ NZBORA, s 3(a).

²⁹⁹ *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC) at [49] per Glazebrook and Ellen France JJ citing Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 114.

³⁰⁰ Canadian Constitution Act 1982, s 52(1).

³⁰¹ See Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, 2003) at 17-18; Paul Rishworth "Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights" (University of Auckland, 2009) at 8-10; and Matthew S R Palmer "Indigenous rights, judges and judicial review in New Zealand" (paper presented to public law conference "Frontiers of Public Law", Melbourne, 11–13 July 2018) at 5.

been included in numerous statutes, with efforts made to specify what might be required of decision-makers as against the Treaty principles. At a similar time, the Waitangi Tribunal was given its retrospective jurisdiction to inquire into claims from 1840 to today.³⁰²

196.4 Significantly, Parliament has provided a bespoke forum for alleged Treaty breaches, through the Waitangi Tribunal. The Tribunal has jurisdiction to consider consistency of legislation with the principles of the Treaty.³⁰³ The Tribunal’s jurisdiction, including the ability to provide recommendations on breach, is an important feature of our constitutional arrangements.³⁰⁴ There is thus a contrast with the NZBORA context: this Court in *Taylor* considered declarations were necessary because there was no other effective remedy.³⁰⁵

196.5 More fundamentally, the Treaty is conceptually different from NZBORA, establishing a *relationship* forward between Māori and the Crown. It provides guidance for the ongoing relationship within which the Crown ought to act with Māori when governing New Zealand.³⁰⁶ Because the Treaty is a forward-looking relational document, whether something is ‘Treaty compliant’ requires judgement and balance. This goes to the heart of recommendations from the Tribunal; involving consideration of the complex interplay between arts I and II how best to balance tino rangatiratanga with governance; and art III, the commitment to equal rights.³⁰⁷ Treaty consistency involves complex consideration of multiple interests, including economic and policy driven concerns - as recently explained in *Smiler*, “Treaty analysis does

³⁰² Treaty of Waitangi Amendment Act 1985. This amended the Treaty of Waitangi Act 1975 extending its jurisdiction to events that occurred “at any time on or after 6 February 1840” as discussed in *Smiler v Attorney-General* [2026] NZHC 375 at [164].

³⁰³ Treaty of Waitangi Act 1975, s 6.

³⁰⁴ *Skerret-White v Minister for Children* [2024] 2 NZLR 493 (CA) at [36]: “There is no doubt about the importance of the Tribunal in our constitutional arrangements. The Tribunal’s significance was well captured by the Solicitor-General’s submission to this Court that it “is a critical part of our constitutional architecture”. And we agree with her further observation that the role it fulfils is an important way in which the Treaty is recognised as a major source of this country’s constitutional make up.”

³⁰⁵ *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC) at [41] per Glazebrook and Ellen France JJ.

³⁰⁶ K Hille, C Jones, and D Ward *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) at 37; Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 220; Matthew Palmer *The Treaty of Waitangi in Legislation* [2025] NZLJ 194 at 209; and Jason Varuhas, “*The Principles of Legality in Aotearoa New Zealand*” (paper presented at a public law conference “Human Rights Intensive” Wellington, 4 October 2022) at 20-21.

³⁰⁷ Art II ‘rights’ do not exist in isolation. Marine and Coastal Area (Tukutai Moana) Act 2011 Inquiry Stage 2 Report (Waitangi Tribunal, Oct 2023) at 12: “While the Court of Appeal specified that the Crown needs to actively protect Māori rights and interests ‘to the fullest extent practicable’, four years later the Privy Council noted in its *Broadcasting Assets* decision that the Crown is ‘not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances’.” Citing *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517.

not admit of only one outcome”.³⁰⁸ Conversely, NZBORA rights are described as “catalogues of things that should not happen”³⁰⁹ unless demonstrably justified (s 5). If legislation is in breach of an individual right and not demonstrably justified, a court can grant a declaration of inconsistency.³¹⁰

197. Whilst courts have a wide discretion to issue declarations,³¹¹ jurisdiction is limited to justiciable matters, and issuing declarations relating solely to existing rights, interests, or entitlements. It is untenable to seek a declaration that substantive action must be taken by reference to the Treaty text, when it is not directly enforceable. Nor is it open to the Court to provide “guidance concerning the extent to which Treaty-consistent conduct is achievable within the schemes that direct it”.³¹² An inquiry of this kind is not within the remit of the Courts’ declaratory jurisdiction. It is well settled as a matter of comity that declarations cannot extend to what Parliament is or is not proposing to do – this applies when declarations are framed generally and when the point of the declarations is to influence legislative reform.³¹³

This claim is not a judicial review application

198. Judicial review is a context where Treaty principles can properly apply and executive decisions can be challenged on Treaty related grounds.
199. The appellant submits public power can be subject to review where the policy does not necessarily create a legitimate expectation based on UK cases including *Re McFarland* and *Mandalia*.³¹⁴ These cases consider a situation where a specific government policy gives rise to a public expectation, as opposed to an expectation said to have arisen by an international treaty.
200. The New Zealand judicial review cases cited by the appellant, *Pora* and *Te Pou*

³⁰⁸ *Smiler v Attorney-General* [2026] NZHC 375 at [151].

³⁰⁹ Paul Rishworth KC, *What is consistency with the Bill of Rights?* (Human Rights Forum, 2026) at 48.

³¹⁰ Following *Attorney-General v Taylor* [2019] 1 NZLR 213 (SC), Parliament enacted ss 7A and 7B of NZBORA and adopted Standing Orders of the House of Representatives 2023, SO 269A and appendix F setting out how Parliament and the executive would respond to declarations of inconsistency in accordance with NZBORA or the Human Rights Act 1993.

³¹¹ Declaratory Judgments Act 1907, s 10.

³¹² Appellants’ submissions on appeal, dated 29 May 2026, at [174](b). The Court reframes from providing mere opinions. *R v (on the application of A and others) v Secretary of State for the Home Department* [2022] EWHC 360 (Admin), [2022] 4 All ER 615 (QB) at [26] and *Te Rūnanga o Ngāti Whātua v Attorney-General* [2024] NZHC 2271, [2024] 3 NZLR 218 at [49]–[61].

³¹³ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2019] 1 NZLR 116 (SC) at [36], [46]–[47]; *Lanauze v Attorney General* [2026] NZCA 244 at [54]–[57]; *Smiler v Attorney-General* [2026] NZHC 375 at [129]–[130]; *Te Rūnanga o Ngāi Tahu v Minister of Conservation* [2026] NZHC 722 at [25]; and *R (A and ors) v Secretary of State for the Home Department* [2022] EWHC 360 (Admin), [2022] 4 All ER 615 at [26].

³¹⁴ Appellant’s submissions at [159] to [161], citing *Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [29] citing *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

Matakana do not assist the appellant. *Pora* was an rare example of a Cabinet decision being assessed (in the absence of legislation) as against Cabinet guidelines, which were sufficiently clear to establish a legal yardstick to measure the Crown's actions against.³¹⁵ *Te Pou Matakana* was an orthodox judicial review application, in which, the Crown was found to have made a sufficiently clear undertaking that was relied upon to satisfy the test for a legitimate expectation.³¹⁶ The duty alleged by the appellant is not an orthodox judicial review. The claim seeks remedies that would enable the Court to declare Crown action and legislation inconsistent with Treaty terms. It would therefore sit across statutory frameworks. It would not be limited to a climate change context. The result would be constitutional entrenchment of Treaty rights, without legislation from Parliament sanctioning such an approach.³¹⁷

201. *Climate Clinic* is a recent example of a judicial review application that concerned the Crown's obligations when assessing Treaty principles (under s 4 of the Crown Minerals Act 1991) to a statutory decision where climate change was relevant.³¹⁸ This Court held the Crown's duty of active protection requires the Crown to "actively engage with the nature of the [Māori] interests affected by Crown action, and with the nature of that Crown action".³¹⁹ What is required of the Crown to comply with its Treaty obligations is what is reasonable in the circumstances, balancing considerations in a manner consistent with their Treaty obligations.³²⁰ The Crown may be required to take "vigorous action where taonga are in a vulnerable state".³²¹
202. Engaging with Treaty obligations requires an assessment of the Treaty interest engaged by a decision. Failure to meet applicable standards may result in judicial review. However, analysis of Treaty principles does not admit of only one outcome.³²² The pleaded claim requires a review of all Crown action since 1992, including assessing whether legislation has adequately provided for the Treaty.

³¹⁵ Appellant's submissions at [161]. See *Pora v Attorney-General* [2017] 3 NZLR 683 (HC) at [90]; and *New Zealand Greyhound Racing Association Inc v Attorney-General* [2025] NZHC 2665 at [30].

³¹⁶ *Te Pou Matakana Ltd v Attorney-General* [2022] 2 NZLR 148 (HC).

³¹⁷ See *Creeks v R* HC Auckland A138/00, 6 November 2000 at [7].

³¹⁸ *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC).

³¹⁹ At [133] and [146].

³²⁰ At [110].

³²¹ At [133] citing *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517; and FN 102 where in the Crown Minerals Act 1991 context, this Court was of the view that impacts for the decision-makers consideration under s 4 of that Act will include loss of taonga species, coastal places of cultural significance, mahinga kai and associated mātauranga.

³²² See for example, *Radio Frequencies* [1991] 2 NZLR 129 (CA) at 135.

It requires an untenable extension of orthodox judicial review principles, enlarging them to refute the core principles from *Te Heuheu*.

The existing statutory framework further counts against a separate duty

203. The Court of Appeal correctly accepted that by enacting s 3A of the CCRA, Parliament has given effect to the Crown’s obligations under the Treaty in the climate change context, “through representation of persons with relevant expertise on the Commission and any review panel, requiring that emissions reduction and [NAPs] take into account impacts on iwi and Māori and through consultation requirements on all key aspects of the framework.” The Court of Appeal considered s 3A’s comprehensiveness in practice is illustrated by the detailed consideration of Treaty issues in the Commission’s advice to the Minister.³²³
204. The Court of Appeal correctly held: (1) the lawfulness of decisions made under the CCRA are remedied “through an application for judicial review challenging those decisions” where the Court can scrutinise decision-making against the principles of the Treaty;³²⁴ and (2) where Parliament has acted in this way, “there is no room for a claim to operate that seeks to directly enforce the Treaty through an independent duty”.³²⁵

Reliance on UNDRIP, tikanga misplaced

205. UNDRIP and the principle of self-determination form part of the international human rights framework but do not change the legal position of the Treaty at domestic law.³²⁶ Indeed UNDRIP itself recognises self-determination cannot “dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states”.³²⁷

³²³ Judgment at [150] and FN 250. See also He Pou a Rangi | Climate Change Commission *Full assessment: 2026 National Climate Change Risk Assessment for Aotearoa New Zealand* (7 May 2026); and He Pou a Rangi | Climate Change Commission *Bioeconomy Science Institute (Manaaki Whenua – Landcare Research Group): Ngā mea hirahira o te ao Māori: Climate Change risks to the Māori Domain* (May 2025). This recognises and respects the Crown’s obligation: see *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [149] and [151]; but an overall assessment of all factors prescribed in the statute is required, albeit bearing in mind the statutory purpose (see [[42] - [51]]).

³²⁴ Judgment at [151] [[05.0067]].

³²⁵ Judgment at [150] [[05.0066]].

³²⁶ 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. *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. *Smiler v Attorney-General* [2026] NZHC 375 at [169]: “UNDRIP is not part of the New Zealand domestic law and not a direct source of legal rights.”

³²⁷ Refer to articles 4 and 46(1).

206. Tikanga has been described as the first law of Aotearoa, part of the common law, and as having independent legal relevance, by this Court in *Ellis*.³²⁸ Recognition and application of tikanga principles in the common law can be seen in the context of the obligations under the Treaty but as is clear from this Court's findings in *Ellis*, direct enforcement of the Treaty is not required for tikanga to be relevant.³²⁹ The findings in *Ellis* do not, in turn, convert the Treaty itself into a directly enforceable source of law.

The claim would supplant the jurisdiction of the Waitangi Tribunal

207. The Treaty of Waitangi Act 1975 outlines the jurisdiction of the Tribunal. This Court in *Wairarapa Moana ki Pouākani* recognised the Waitangi Tribunal's ability to inquire into claims from 1840 until today is unique.³³⁰ The appellant's claim as pleaded falls squarely within the jurisdiction of the Waitangi Tribunal. If allowed to proceed to trial, the appellant's claim would involve the creation of a High Court jurisdiction parallel to that of the Tribunal.
208. Which claims are best suited to the Court versus the Tribunal was described by Elias CJ in *Paki (No. 2)*. Her Honour's view was that claims suggesting that legislative mechanisms are inadequate are properly addressed to the Tribunal.³³¹ As, the "Tribunal is the body to which claims that the Crown has failed to meet its political obligations under the Treaty must be addressed."³³² Tribunal comments on potential law reform "point to the fact that process is a political, not a legal, process."³³³ In contrast, claims of legal right in respect of property, for example the claim in *Wakatū*, are properly brought to the courts.³³⁴ Other international law claims, like those made in reliance on articles of the Vienna Convention, should be brought to the appropriate international forum.³³⁵
209. If the appellant's claim is allowed to proceed, this risks impacting the role of the

³²⁸ *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC).

³²⁹ *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [94], [98]-[102], [109], [117]; *Takamore v Clarke* [2013] 2 NZLR 733 (SC) at [164].

³³⁰ *Wairarapa Moana ki Pouākani v Mercury NZ Ltd* [2022] 1 NZLR 767 (SC) at [16].

³³¹ *Paki v Attorney General (No. 2)* [2015] 1 NZLR 67 (SC) at [165].

³³² *Paki v Attorney General (No. 2)* [2015] 1 NZLR 67 (SC) at [165]; and see also, [288] per William Young J.

³³³ *Smiler v Attorney-General* [2026] NZHC 375 at [155].

³³⁴ *Paki v Attorney General (No. 2)* [2015] 1 NZLR 67 (SC) at [165]. See also, [288] per William Young J; *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 (SC) at [391].

³³⁵ At a more specific level, New Zealand has addressed claims of inconsistency with the Treaty since 1840 through the Treaty of Waitangi Act 1975, the powers provided to the Waitangi Tribunal, and Treaty settlements. As noted by Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 167, Treaty settlements have addressed Crown action since 1840 without resurrecting Māori sovereignty."

Waitangi Tribunal. The High Court would be looking at the adequacy of legislative mechanisms under the CCRA in order to determine whether the framework itself was substantively in breach of art II. A review of this magnitude is likely to be wide-ranging and involve among other things, disparate views within te ao Māori. It is best suited to a specialist commission of inquiry not a Court.³³⁶

210. The way the Tribunal is constituted reflects this. The Tribunal is not only focused on the express wording of both texts but also considers Treaty principles. The Tribunal has specialist panel members, can commission its own research and research staff, and has broad powers to receive any evidence that may assist it to deal with the matters before it.³³⁷ Tikanga Māori generally informs the Tribunal's process.³³⁸
211. The remedy also supports the relational status of the Treaty. Given that relational nature, giving legal effect to the Treaty requires findings and recommendations based on, "a sound interpretation of Treaty principles and a robust analysis of evidence".³³⁹ Tribunal reports can be relevant to assessing the Māori interests affected by Crown action.³⁴⁰
212. The Tribunal is currently inquiring into the Crown's response to climate change. The scope of the inquiry is "the physical, spiritual, and socioeconomic impacts of climate change on Māori and the Crown's response".³⁴¹ Broader climate change-related claims sit within two future kaupapa inquiries.³⁴² The legal status of the Treaty is also likely to be an issue in the Tribunal's constitutional Kaupapa inquiry currently underway.
213. Acceptance of the appellant's arguments on this point could undermine the Waitangi Tribunal's role and jurisdiction, as prescribed by Parliament.

³³⁶ *Skerret-White v Minister for Children* [2024] 2 NZLR 493 (CA) at [40].

³³⁷ Treaty of Waitangi Act 1975, sch 2 cl 6(1); and cl 5A(1) and (2); and s 4.

³³⁸ Practice and Procedure of the Waitangi Tribunal at [1.6].

³³⁹ Edward Taihākurei Durie in Maria Bargh and Carwyn Jones, *50 years of the Waitangi Tribunal* (2025, Huia Publishers and Te Tākupu, Te Wānanga o Raukawa) at 20.

³⁴⁰ *Radio Frequencies* [1991] 2 NZLR 129 (CA) at 135 per Cooke P; and *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC) at [135]. See also *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka* [2025] NZSC 104 at [205] and [358], where this Court suggested parties could, possibly recall the judgment if they were of the view the Waitangi Tribunal's later findings plainly contradicted those of this Court.

³⁴¹ Memorandum-directions of Judge Milroy concerning first steps of the inquiry (Wai 3325, 2.5.002) at [5]. The inquiry focuses "on the relevant Treaty principles to be considered in climate change policy and recommendations for how the Crown should meaningfully engage and consult with Māori."

³⁴² The Economic Development Kaupapa Inquiry and the Natural Resources and Management Kaupapa Inquiry: Memorandum-directions of Judge Milroy concerning first steps of the inquiry (Wai 3325, 2.5.002) at [6](c).

References to the Treaty in legislation will become redundant

214. As the Court of Appeal observed, it has “not been necessary to decide whether the Treaty was directly enforceable absent statutory recognition because relevant legislation generally requires its proper consideration.”³⁴³ The legislature has statutorily incorporated Treaty principles in a range of contexts, allowing the principles to be applied within the terms of each Act. *Lands* represented a watershed moment, where the Court recognised and gave meaning to Treaty principles.³⁴⁴ References to Treaty principles are now common in legislation.³⁴⁵
215. If the appellant’s claims were accepted, Treaty clauses and Treaty principles become redundant. The Court could simply enforce the Treaty directly on its terms (not principles) in ordinary civil proceedings contrary to New Zealand’s constitutional arrangements.

CONCLUSION

216. The appellant’s claims are untenable and the Court of Appeal was correct to strike them out in their entirety.

29 June 2026

J E Hodder KC / J M Prebble / K F
Gaskell / D Ranchhod
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant and interveners.

³⁴³ Judgment at [147] [[05.0064]].

³⁴⁴ *Lands* [1987] 1 NZLR 641 (CA) at 664.

³⁴⁵ Matthew S R Palmer “Indigenous rights, judges and judicial review in New Zealand” (paper presented to public law conference “*Frontiers of Public Law*”, Melbourne, 11–13 July 2018) at 8.