

**SMITH V ATTORNEY GENERAL – TE HUNGA RŌIA MĀORI ROADMAP**

**A. Te ngako o ngā kōrero:**

1. THRMOA's participation is limited to the Appellant's third cause of action relating to te Tiriti. The NZCA decided (at [155] of its judgment) that this cause of action is untenable. It did so while leaving open the question as to whether the courts *may* declare legislation to be inconsistent with te Tiriti (see [150]). In doing so it also left open the possibility that a future court may make a declaration of inconsistency with te Tiriti. To date, these claims have been seen as barred based on the dicta in *Te Heuheu* that the te Tiriti is of no legal effect unless incorporated into the law by legislation.
2. *Te Heuheu* has skewed our gaze away from the tikanga based rights that the Treaty guarantees. The question of "whether the Treaty is directly enforceable" has perhaps become a red herring. The questions might more be properly framed (1) what are the tikanga based rights at issue? (2) are they guaranteed by the Treaty? (3) what is the Crown action (whether through legislation or other Executive action) that puts those rights at issue? (4) is a declaration of inconsistency available in the particular case?
3. The Crown urges this court to further endorse the dicta of the Privy Council in *Te Heuheu* on the basis that a declaration of inconsistency requires direct enforcement of te Tiriti ([175.2] of Respondent's subs). THRMOA says that *Te Heuheu* is no longer good law and should no longer be followed. This being the case the approach of the Court should be to: (1) confirm the declaratory jurisdiction in this case (or confirm it is tenable); or (2) endorse the approach of the NZCA by leaving the door open, if the court is not prepared to confirm the jurisdiction in this case.
4. It cannot be the case that Māori rights, guaranteed by te Tiriti, and the declaration of those rights, is beyond the jurisdiction of the courts. That is the consequence of the Respondent's arguments.

**B. Te Tiriti and the rights guaranteed by it are capable of legal recognition by the courts (at [5]-[11])**

5. Te Tiriti is not the source of tikanga based rights. Te Tiriti affirmed and guaranteed those rights, which continued to exist after te Tiriti was signed and are capable of legal recognition independent of te Tiriti. The rights affirmed by te Tiriti, and their corresponding duties, have been long recognised by the courts.
6. THRMOA are not submitting that tikanga would "displace fundamental principles and policies of the law" (Respondent's reply subs at [33]-[36]), but that rights guaranteed in te Tiriti can be cognisable and therefore declarations are an available remedy.

**C. *Te Heuheu* is no longer good law and has been uncritically accepted (at [12]-[29])**

7. Historically, *Te Heuheu* has been uncritically accepted by the courts. *Te Heuheu* was predicated on the treatment of te Tiriti as an international treaty, and one of cession of sovereignty. Te Tiriti is no longer recognised in such a narrow frame.

8. The law has moved on considerably, and te Tiriti jurisprudence continues to evolve. Te Tiriti is now recognised as New Zealand’s founding constitutional document, holding a unique place in our legal framework. Given the development of the law over the 85 years since *Te Heuheu* was decided, it is appropriate to revisit, the relevance of the dicta in *Te Heuheu* and the extent to which it could be said to be authoritative today.

**D. Declarations of inconsistency with te Tiriti (and rights it guarantees) can and should be granted by the courts (at [30]-[35])**

9. Declarations of inconsistency with te Tiriti is a natural development.

10. There is some overlap with s 20 of NZBORA.

11. *Taylor* (SC) affirmed the general power of the senior courts to make declarations of inconsistency. A similar power in respect of te Tiriti is justified given the important place of te Tiriti in Aotearoa’s constitution (THRMOA subs at [32]-[33]). Te Tiriti-specific authorities also lend support to the court’s ability to make the declaratory relief (THRMOA subs at [34]).

12. Declarations of inconsistency with te Tiriti would not “move the Court into an unmandated and unprecedented constitution-making role” nor would it “represent a profound and wide-reaching constitutional change” (Respondent’s reply at [39]). The leap is not that great. It is a natural progression. The court routinely recognises Māori rights based in tikanga. The fact of those rights and the courts’ recognition of them is uncontroversial. The alternative would be to ignore the way the law has evolved and keep us anchored in 1941.

**E. If the court has the jurisdiction to make declarations of inconsistencies with Te Tiriti (and rights it guarantees), what would this mean for the Waitangi Tribunal? (at [36]-[39])** There would remain a distinct role for the Waitangi Tribunal and the court; the Tribunal’s role is to inquire and recommend, whereas the court’s role is to declare the extent of rights (*Ngāti Whātua* (SC)) and the law.

**F. Response to Crown argument re *Ngāti Whātua* and *Kamo***

13. The Crown relies on *Ngāti Whātua* (SC) and *Kamo* for important propositions. Aspects of the Crown’s characterisation of these cases is inaccurate:

- (a) *Ngāti Whātua* (SC) (see Respondent’s reply subs at [29], FN 39); comity and parliamentary non-interference not enforceability of te Tiriti was the basis upon which the majority struck out the declarations.
- (b) *Kamo* (see Respondent’s reply subs at [33], FN 52); the contest was between iwi groups rather than a focus on rights cognisable pursuant to te Tiriti.