

**I TE KŌTI MANA NUI O AOTEAROA
IN THE SUPREME COURT OF NEW ZEALAND**

SC 10/2025

BETWEEN MICHAEL JOHN SMITH

Appellant

AND ATTORNEY-GENERAL

Respondent

**AND TE HUNGA RŌIA MĀORI O AOTEAROA |
THE MĀORI LAW SOCIETY**

Intervener

**AND TE KĀHUI TIKA TANGATA |
HUMAN RIGHTS COMMISSION**

Intervener

**SUBMISSIONS ON BEHALF OF TE HUNGA RŌIA MĀORI O AOTEAROA
(THE MĀORI LAW SOCIETY)**

14 JULY 2026

Counsel certify that these submissions are suitable for publication under the Supreme Court Submissions Practice Note 2023 (and do not contain any information that is suppressed).



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KUPU TĪMATANGA | INTRODUCTION

1. The Court granted Te Hunga Rōia Māori o Aotearoa – The Māori Law Society (**Te Hunga Rōia**) leave to intervene in this appeal on the the nature and extent of the legal obligations owed by the Crown to Māori arising from te Tiriti o Waitangi | the Treaty of Waitangi (**te Tiriti**), and the extent to which tikanga gives rise to common law obligations on the part of the Crown.¹
2. The issues before the Court are well traversed by the primary parties. As such, these submissions focus on matters which, in Te Hunga Rōia’s view, would benefit from further consideration or an alternative view to those of the primary parties.

SUMMARY OF ARGUMENT FOR TE HUNGA RŌIA

3. Te Hunga Rōia does not take any position on the merits of the appeal (i.e. whether or not Mr Smith’s claim should be struck out or whether the declaration of inconsistency sought should be granted). Instead, these submissions focus on the following legal principles engaged by the appeal:
 - (a) Whether te Tiriti and the rights guaranteed by it are capable of legal recognition by the courts.
 - (b) The contemporary relevance of *Te Heuheu* and the extent to which it should remain authoritative today.
 - (c) Whether declarations of inconsistency with te Tiriti can or should be granted by the courts.
 - (d) The effect if the courts do make declarations of inconsistency with te Tiriti.

TE TIRITI AND THE RIGHTS GUARANTEED IN IT ARE CAPABLE OF LEGAL RECOGNITION BY THE COURTS

4. Both the Appellant and the Respondent recognise te Tiriti as “part of the fabric of New Zealand society” and a significant constitutional instrument.² Te Hunga Rōia agrees.

¹ Minute of the Court, dated 30 March 2026.

² Appellant’s submissions dated 29 May 2026 (**Appellant’s submissions**), see [132]-[158]; and Respondent’s submissions dated 29 June 2026 (**Respondent’s submissions**) at [186].

Te Tiriti is not a source of customary rights, it affirms and guarantees tikanga based rights that are cognisable

5. It is now accepted that 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.³ The rights affirmed by te Tiriti, and their corresponding duties, have been long recognised by the courts.⁴ Tikanga is now acknowledged as the first law of Aotearoa⁵ and it is recognised that tikanga values predate the arrival of the common law in 1840.⁶
6. While the High Court has said that “The Crown is not bound to follow tikanga in and of itself”⁷, the Crown can and does have legal obligations to protect Māori rights derived from tikanga.
7. It was recognised in this Court, by (the then) Elias CJ in *Ngāti Whātua Ōrākei Trust*, that “[r]ights and interests according to tikanga may be legal rights recognised by the common law”.⁸ The majority of this Court in *Ellis* found that the relationship between tikanga and the common law is not fixed by historic tests for incorporation, but continues to evolve contextually, with tikanga operating as a direct source of enforceable rights.⁹ In *Trans-Tasman Resources*, this Court also found in that tikanga as law had to be taken into account as other applicable law.¹⁰
8. Where rights arising from tikanga are legally cognisable or directly enforceable, te Tiriti is not being invoked in the abstract.

³ See for example Moana Jackson “The Treaty and the Word: the Colonization of Māori Philosophy”, in G Oddie & R Perrett (eds), *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) at 7; and Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 7.

⁴ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) (SC) (**Wi Parata**) at 78 and 79. Prendergast CJ noted that the Crown exercised sovereignty subject to “correlative duties” including being a “supreme protector of the aborigines” and “securing them against any infringement of their right of occupancy”.

⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 (**Ellis**) at [22], [107] and [110] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ and [272] per Williams J.

⁶ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 (**Trans-Tasman Resources**) at [297]; see also *Ellis*, above n 5, at [109].

⁷ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 (**Ngāti Whātua (No 4)**) at [64].

⁸ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 (**Ngāti Whātua (SC)**) at [77].

⁹ *Ellis*, above n 5, at [21], [176] and [171].

¹⁰ *Trans-Tasman Resources*, above n 6, at [9] and [169] (in the context of the relevant statute).

It is the constitutional instrument that affirms and guarantees those rights. Accordingly, the courts' recognition and declaration of those rights can be seen as connected to the te Tiriti guarantees.

9. The fact that the tikanga-based rights affirmed and guaranteed by te Tiriti are able to be recognised through the Court's declaratory jurisdiction means that it is not a great leap for the Court to likewise exercise its declaratory jurisdiction in relation to te Tiriti itself. It is arguably inconsistent to exclude the exercise of this jurisdiction in relation to te Tiriti when the underlying rights can be, and are, the subject of declaratory relief.
10. The Crown acknowledges the legal obligations to protect the Māori rights in the Cabinet Manual. In doing so the Crown recognises the place of te Tiriti by saying te Tiriti "may indicate limits in our polity on majority decision making."¹¹ Further, the Cabinet Office Circular CO (19) 5 recognises that:¹²

Māori were guaranteed rangatiratanga by the Treaty. This promise holds true today. It is the duty of the Crown to respect the right of Māori to control decisions in relation to their lands and the things of value to them.

11. Accordingly, Te Hunga Rōia considers that there are two specific ways to consider the justiciability of Mr Smith's claim. The first is to consider whether te Tiriti is enforceable in its own right. The second is to consider the enforceability of the underlying substantive tikanga based rights affirmed by te Tiriti and the power of the Court to make declaration of the type sought by Mr Smith in respect of those rights.

The principle in *Te Heuheu* is no longer good law

The legal position in relation to te Tiriti has evolved

12. The courts have moved on considerably from treating te Tiriti as merely an international treaty, and one of cession of sovereignty. Te Tiriti is now recognised as an important constitutional document, holding a unique place in the legal and constitutional framework of New Zealand. Further, jurisprudence concerning te

¹¹ Department of Prime Minister and Cabinet, Cabinet Manual 2023 (**Cabinet Manual**) at 2.

¹² Cabinet Office Circular, CO19(5) at [47].

Tiriti, and the rights affirmed and guaranteed by te Tiriti, continues to evolve.¹³

13. In considering *Te Heuheu*,¹⁴ the Court of Appeal in this case found that it was not necessary to decide whether te Tiriti was directly enforceable absent statutory recognition.¹⁵ This was because of the references to te Tiriti in legislation and that “its powerful position in our constitution has generally meant that Treaty considerations are not excluded when the context of the legislation or decisions made under it makes them relevant”.¹⁶
14. However, given the evolution that has occurred it is appropriate to further consider, and potentially revisit, the ongoing relevance of the principle in *Te Heuheu*.

Te Heuheu is now widely regarded as having been decided on flawed legal foundations

15. It is necessary to examine the Privy Council’s 1941 judgment in *Te Heuheu*, and the issues before that Court.¹⁷
16. In *Te Heuheu*, the Privy Council rejected the claim that legislation could be invalidated on the grounds that it was ultra vires the Treaty.¹⁸ The ratio of the judgment is concise:¹⁹

In the opinion of their Lordships, the appellant has failed to satisfy them that the enactment of the statutory charge in s 14 of the Native Purposes Act, 1953, was beyond the competency of the New Zealand Legislature, and the appeal fails on this point also.

17. In support of that conclusion the Privy Council reasoned:²⁰

Under Article the First there had been a complete cession of all the rights and powers of sovereignty of the Chiefs.

¹³ Further discussed below at paragraphs [21]-[23].

¹⁴ *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) (*Te Heuheu*).

¹⁵ *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1 (*Smith v AG (CA)*) at [147].

¹⁶ *Smith v AG (CA)*, above n 15, at [147].

¹⁷ For discussion of *Te Heuheu* (and earlier significant te Tiriti cases), see Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [4.7]; Alex Frame “Hoani Te Heuheu’s case in London 1940–1941: an explosive story” (2006) NZULR 149; and Katherine Sanders “The King in all His Cabinets”: Crown and Empire in *Te Heuheu Tukino v Aotea District Maori Land Board*’ (2026) 31 NZULR 465.

¹⁸ *Te Heuheu*, above n 14, at 593 the late-amended prayer for relief sought a declaration that the relevant legislation was “ultra vires the Legislature of New Zealand”.

Te Heuheu, above n 14 at 599.

¹⁹ *Te Heuheu*, above n 14, at 596–597 per Viscount Simon LC, citing *Vajeesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357 at 360.

²⁰

It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law. ...

18. Whether te Tiriti was a treaty of cession was not at issue in the appeal in *Te Heuheu*.²¹ Their Lordships simply assumed it was a treaty of cession based on the case for the appellant.²²
19. The findings in *Te Heuheu* were built upon the foundations laid by *Wi Parata v Bishop of Wellington*, which by that time had been the leading authority on the legal status of the Treaty for over 60 years.²³ In *Wi Parata*, Prendergast CJ found that te Tiriti was irrelevant to the core issues of that case²⁴ even though te Tiriti (in either text) was not pleaded or relied upon by the parties. The *Te Heuheu* decision effectively "supported Prendergast's claim that the Treaty could have no legal effect unless incorporated into statute."²⁵
20. As a product of its time, *Te Heuheu* reflected the colonial assumptions "from a 1941 standpoint".²⁶ Over the 85 years since *Te Heuheu* was decided, te Tiriti jurisprudence has evolved significantly. There is now doubt over whether te Tiriti was truly a treaty of cession.²⁷ It is also now accepted that the rights affirmed and guaranteed to Māori are rights capable of legal recognition in and of themselves. The findings in *Te Heuheu* are therefore no longer a reflection of legal thinking in Aotearoa and have been described as "a crumbling façade".²⁸

²¹ Sanders, above n 17, at 475.

²² Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008), at 173, "The Privy Council did not devote much space to the status of the Treaty of Waitangi but followed the approach of the Land Board's counsel in seeming (without being explicit) to assume, on the basis of the English text of the Treaty, that it was an international treaty of cession of sovereignty".

²³ *Wi Parata*, above n 4.

²⁴ *Wi Parata*, above n 4, at 78: "So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist"

²⁵ Grant Morris "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century" (2004) 35 VUWLR 117 at 133.

²⁶ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (*Lands*) at 667-668 per Cooke P. Also see Palmer, above n 22, at ch 2 and 163.

²⁷ See further Waitangi Tribunal *Report on Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 529.

²⁸ Natalie Coates The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (2022, LexisNexis NZ) 65 at 81; and also cited in Helen Winkelmann "The power of

New Zealand's common law has moved on since *Te Heuheu*

21. The position in the New Zealand courts is now that:
- (a) it is no longer settled law that in signing te Tiriti, the Māori signatories ceded sovereignty of New Zealand;
 - (b) te Tiriti is no longer viewed as an international treaty, yet to be formally domestically incorporated. It is now widely recognised as a foundational document that holds a significant place in the New Zealand constitution; and
 - (c) te Tiriti is treated as being affirmative of Māori rights, not the source of those rights, and those rights are capable of being legally recognised in and of themselves.
22. From the 1980s, the judiciary has progressively recognised the constitutional and legal importance of te Tiriti.²⁹ In the landmark *Lands* case (some 46 years after *Te Heuheu*) Cooke P held “the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms”.³⁰
23. The *Lands* case, alongside Waitangi Tribunal reports, laid the foundation for the courts to develop te Tiriti jurisprudence, to the point where te Tiriti is today recognised as having an important place in New Zealand’s constitutional framework.³¹ As Winkelmann CJ noted (writing extra-judicially) “while the principle in *Te Heuheu* remains part of our law, the tide of public law has flowed around it”.³²
24. The developments in the courts have been reflected in the both the legislative and executive arms of government.

narrative – shaping Aotearoa New Zealand’s public law” (“The Making (and Re-Making) of Public Law” Conference, Dublin, 6-8 July 2022) at fn 56.

²⁹ For discussion of significant Treaty of Waitangi cases in the time between *Te Heuheu* and *Lands*, and then following *Lands*, see Joseph, above n 17, at [4.7]-[4.9].

³⁰ *Lands*, above n 26, at 655-656 per Cooke P.

³¹ See for example *Trans-Tasman Resources*, above n 6, at [151] and [296]; *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116 at [90]-[93]; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46]; and *Ngāti Whātua (No 4)*, above n 7, at [68].

³² Winkelmann, above n 28.

25. Both the Appellant and Respondent recognise the authoritative guidance from the executive branch in the Cabinet Manual.³³ It describes te Tiriti as “one of the major sources of New Zealand’s constitution”, that “the Treaty’s status will continue to evolve along with other constitutional principles and norms”;³⁴ and distinguishes between the te Tiriti and “international treaties”.³⁵
26. The legislative branch has incorporated te Tiriti into many pieces of legislation. However, the most prominent legislative step was the passing of the Treaty of Waitangi Act 1975, which established the Waitangi Tribunal and introduced the concept of the “principles of the Treaty of Waitangi”. The establishment of the Waitangi Tribunal amounted to an acknowledgement by the legislature of the Crown’s obligations to Māori under te Tiriti.³⁶

Te Tiriti’s constitutional and legal significance requires broader consideration than the principle in *Te Heuheu*

27. The Respondent notes that “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”.³⁷ However, this overlooks the significant role of te Tiriti as a constitutional document (as opposed to an international treaty).
28. The Right Honourable Dame Sian Elias, writing extra judicially, provides an alternative view, drawing on the work of the late Sir Kenneth Keith:³⁸

The orthodox view of legal status of the Treaty of Waitangi is that it remains an unincorporated treaty in domestic law. To the extent it is recognised in statutes it has some direct effect but is not the source of independent rights and obligations. Sir Kenneth Keith, raised a number of questions about this orthodoxy more than 30 years ago.³⁹ He pointed out that, to the extent that recognition of indigenous property on acquisition of new territory is a principle of customary international law, the Treaty may be declaratory of customary international

³³ Appellant’s submissions at [149]-[150] and Respondent’s submissions at [186].

³⁴ Cabinet Manual, above n 11, at 155.

³⁵ Cabinet Manual, above n 11, at 5.

³⁶ Winkelmann, above n 28.

³⁷ Respondent’s submissions at [189].

³⁸ Sian Elias “The Meaning and Purpose of the Treaty of Waitangi” (2015) Māori Law Review 3.

³⁹ KJ Keith “International Law and New Zealand Municipal Law” in JF Northey (ed) *The AG Davies Essays in Law* (London, Butterworths and Co., 1965) 130 at 146.

law and applicable as part of the common law.

More directly confronting the orthodoxy, he has questioned whether the authorities denying the domestic effect of treaties are appropriate in considering a treaty of cession. He points to considerable injustice if such a treaty is neither enforceable in national law or in international law (on the basis that the previously sovereign body has lost its sovereignty by the treaty).⁴⁰ He asks why the Treaty of Waitangi cannot be enforced as a contract.⁴¹

The modern statement principally relied upon in denying the domestic effect of the Treaty is that of Lord Atkin in *Attorney-General for Canada v Attorney-General for Ontario*.⁴² He said there that a treaty does not have domestic effect if it alters municipal law.⁴³ A treaty of cession, it might be argued, does not alter municipal law, but is constitutive of it.⁴⁴ We need to engage with these ideas.

29. Given the surrounding context and constitutional significance of te Tiriti, the approach articulated by Dame Sian Elias and Sir Kenneth Keith must be meaningfully engaged with.

DECLARATIONS OF INCONSISTENCY WITH TE TIRITI CAN BE GRANTED BY COURTS

30. Te Hunga Rōia submits that declarations of inconsistency with te Tiriti can be granted by the courts. This relief would be analogous to the declaratory jurisdiction recognised in *Attorney-General v Taylor* (and subsequently given statutory recognition under the New Zealand Bill of Rights Act 1990 (**NZBORA**)).⁴⁵ There is no principled constitutional basis for allowing declarations of inconsistency as a remedy for NZBORA breaches while denying a comparable remedy in the context of te Tiriti.
31. The Supreme Court majority in *Taylor* affirmed the general power of the senior courts to make declarations of inconsistency.⁴⁶ A similar power in respect of te Tiriti is justified given the important

⁴⁰ Keith, above n 39, at 147-148.

⁴¹ Keith, above n 39, at 148.

⁴² *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326.

⁴³ *Attorney-General for Canada v Attorney-General for Ontario*, above n 42, at 347-348.

⁴⁴ Elias, above n 38.

⁴⁵ *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 (**Taylor (SC)**) at [65].

⁴⁶ *Taylor (SC)*, above n 45, at [65].

place of te Tiriti in Aotearoa's constitution.⁴⁷

32. Drawing on the three key threads of reasoning in *Taylor* (SC), Te Hunga Rōia submit:
- (a) Te Tiriti applies to the legislative and executive branches of Government (whose acts the Appellant is seeking declarations in respect of). In *Taylor* the key contention was that the legislature is not usually subject to the judicial scrutiny required for the purposes of declarations of inconsistency (more usually it was acts of the executive) – but it was clear from s 3 of NZBORA that it did apply to acts of the legislature.⁴⁸
 - (b) Where rights are breached there must be an effective legal remedy. A favourable recommendation from the Waitangi Tribunal has value but is not always an effective remedy (as it is not binding).⁴⁹ It also should not act as a barrier to the court undertaking its function.
 - (c) A declaration of inconsistency is part of the usual range of common law remedies for rights breaches.⁵⁰ The court's power to make a declaration of inconsistency with te Tiriti need not depend on express legislation.⁵¹ Section 12(b) of the Senior Courts Act 2016, gives the court "the judicial jurisdiction that may be necessary to administer the laws of New Zealand".⁵² The court therefore has the power to develop an effective remedy for breach of te Tiriti, such as making of a declaration of inconsistency.
33. In line with the majority reasoning in *Taylor*, Te Hunga Rōia considers declaratory relief for te Tiriti breaches are possible for

⁴⁷ *Taylor* (SC), above n 45, at [63] per Ellen France and Glazebrook JJ; and [94] per Elias CJ; Amy Dresser *A Taylor-Made Declaration? Attorney-General v Taylor and Declarations of Inconsistency* (2019) 25 AULR 254 at 258; and Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547 at 564-569.

⁴⁸ *Taylor* (SC), above n 45, at [42]-[43].

⁴⁹ The differences between the powers and functions of the Waitangi Tribunal and those of the courts is discussed below in [36]-[39].

⁵⁰ *Taylor* (SC), above n 45, at [30] per Ellen France and Glazebrook JJ; and [104] per Elias CJ.

⁵¹ *Taylor* (SC), above n 45, at [51] per Ellen France and Glazebrook JJ ("the absence of the mechanics does not mean the absence of a power"); and [118] per Elias CJ.

⁵² *Taylor* (SC), above n 45, at [97]-[100] per Elias CJ; also see [86]-[87] per Ellen France and Glazebrook JJ; and [104] and [118] per Elias CJ.

the following reasons:

- (a) Te Tiriti is recognised as having “constitutional significance”.⁵³ Based on Elias CJ’s reasoning in *Taylor* (SC)),⁵⁴ te Tiriti rights are clearly fundamental rights. This justifies applying the declaration of inconsistency jurisdiction in the same way as the courts exercise that jurisdiction as a remedy for breaches of NZBORA.
- (b) With NZBORA the courts have said effective remedies for breaches must be provided for NZBORA to be effective.⁵⁵ This principle also applies to te Tiriti.
- (c) UNDRIP supports the development of an ‘effective remedy’ in cases such as this.⁵⁶
- (d) It was well-established by the time of *Taylor* (SC) (and even more so in the wake of that case and the enactment of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022) that to ensure any remedy is an effective one, the courts can draw on the usual array of common law remedies, of which declaratory relief is a part.⁵⁷
- (e) In *Baigent’s Case*, Cooke P commented that NZBORA “requires development of the law when necessary. Such a measure is not to be approached as if it did no more than preserve the status quo”.⁵⁸ The majority in *Taylor* (SC) took the same approach.⁵⁹ In order to recognise and uphold the rights and obligations in te Tiriti, the Court must be free to develop remedies in respect of breaches.

34. The following te Tiriti-specific sources and authorities also lend

⁵³ Per Ellen France and William Young JJ in *Trans-Tasman Resources*, above n 6, at [150] and [151] (as cited in *Smith v AG* (CA), above n 16, at [146]).

⁵⁴ *Taylor* (SC), above n 45, at [102]–[105] and [121] per Elias CJ.

⁵⁵ *Taylor* (SC), above n 45, at [30] per Ellen France and Glazebrook JJ; and [104] per Elias CJ; also see [38]–[50] per Ellen France and Glazebrook JJ.

⁵⁶ United Nations (2007) United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295) art 40.

⁵⁷ *Taylor* (SC), above n 45, at [30] per Ellen France and Glazebrook JJ; and [104] per Elias CJ.

⁵⁸ *Simpson v Attorney General* [Baigent’s Case] [1994] 3 NZLR 667 (CA) (*Baigent’s Case*), at 676 per Cooke P, as cited in *Taylor* (SC), above n 45, at [30] and [39] per Ellen France and Glazebrook JJ; and [104] per Elias CJ.

⁵⁹ *Taylor* (SC), above n 45, at [38] and [50].

support to the court's ability to make the declaratory relief:

- (a) In *Lands*, Cooke P stated that te Tiriti "is a document relating to fundamental rights" that should be interpreted "taking account of the subsequent developments of international human rights norms".⁶⁰ It would be consistent with this view for te Tiriti to be treated in the same manner as human rights,⁶¹ are treated such as in *Taylor* (SC) and (more broadly) *Baigent's Case*.
- (b) The Court of Appeal in *Takamore* considered: "It requires no leap of faith ... to suggest that in general the common law of New Zealand should as far as is reasonably possible be applied and developed consistently with the Treaty of Waitangi".⁶² It would be consistent with the constitutional importance of te Tiriti for the court to exercise its declaratory jurisdiction in respect of te Tiriti.
- (c) In *Taylor* (SC), Elias CJ considered that the court should not only grant declaratory relief in the event of rights infringement, but it has an obligation to do so.⁶³
- (d) This Court in *Ngāti Whātua Ōrākei Trust* affirmed that it is a "function of the courts to make declarations as to rights". In that case it included rights arising as a matter tikanga, which are the same rights guaranteed and affirmed by te Tiriti.⁶⁴
- (e) The Cabinet Manual recognises "the Treaty's status will continue to evolve along with other constitutional principles and norms".⁶⁵

35. Based on the above, making a formal declaration would be a natural development in te Tiriti jurisprudence.

⁶⁰ *Lands*, above n 26, at 656 per Cooke P.

⁶¹ For example, see *Lands*, above n 26, at 672 per Richardson J.

⁶² See *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [249] per Glazebrook and Wild JJ.

⁶³ *Taylor* (SC), above n 45, at [95] Elias CJ described it as "the obligation of the courts to grant remedies for infringement" of NZBORA.

⁶⁴ *Ngāti Whātua* (SC), above n 8, at [104] and [106] per Elias CJ. See [71] and also [78]: "Where claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them".

⁶⁵ Cabinet Manual, above n 11, at 155.

THE EFFECT IF DECLARATIONS OF INCONSISTENCIES WITH TE TIRITI (AND RIGHTS IT GUARANTEES) ARE GRANTED

There is a role for both the Waitangi Tribunal and the court

36. Te Hunga Rōia does not consider that the court making declarations of inconsistency with te Tiriti would supplant or undermine the role of the Waitangi Tribunal.⁶⁶ There would remain a distinct role for the Waitangi Tribunal and the court; the Tribunal's role is to inquire and recommend actions to the Crown whereas the court's role is to declare the law.
37. The Waitangi Tribunal and the courts perform fundamentally different constitutional functions. The Waitangi Tribunal is a statutory Commission of Inquiry⁶⁷ with a broad inquisitorial jurisdiction.⁶⁸ It is charged with inquiring into and making recommendations "on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty".⁶⁹ In carrying out this role, the Tribunal has "exclusive authority" under the Treaty of Waitangi Act 1975 to determine the meaning and effect of te Tiriti.⁷⁰ The Tribunal may constitute inquiry panels from a body of permanently appointed Māori and non-Māori members.⁷¹ In comparison, the High Court is a senior court exercising judicial power to determine legal rights and obligations, with a broad jurisdiction across many areas of law.
38. While the Tribunal may make findings and recommendations to the Crown, those recommendations are generally not binding.⁷² Its jurisdiction is conferred by statute, and it does not possess inherent jurisdiction. The High Court, on the other hand, may issue binding judgments and orders,⁷³ and its inherent

⁶⁶ Respondent's submissions at [207]-[213].

⁶⁷ Established by [Treaty of Waitangi Act 1975](#).

⁶⁸ This allows the Tribunal to do for example: request and accept a wide range of information; 'look behind' legislation to the legislative process by which it was developed and progressed which the courts may be constrained from doing by the Parliamentary Privilege Act 2014 and principles of Parliamentary sovereignty and non-interference; and make findings and recommendations to the Crown in its discretion, not restricted to claimants' pleadings or submissions (see [ss 6\(3\), s 8\(1\)](#)).

⁶⁹ Treaty of Waitangi Act 1975, [long title](#).

⁷⁰ Treaty of Waitangi Act 1975, [s 5\(2\)](#).

⁷¹ Waitangi Tribunal website "Members" (accessed: 13 July 2025).

⁷² *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 64, [at 651](#): "The crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively".

⁷³ *Lands*, above n [26](#), [at 689](#), per Somers J regarding the binding findings by Court.

jurisdiction enables it to develop and grant effective and enforceable remedies, where appropriate.

39. Accordingly, the respective functions of the Tribunal and the High Court are complementary rather than competing. The availability of an inquiry before the Tribunal does not negate the need for judicial determination of legal rights or granting of declaratory relief. Applicants cannot obtain authoritative declarations of law or rights from the Tribunal. To that extent, the High Court's inherent jurisdiction performs a distinct function that cannot be replicated by the Tribunal. Rather than supplanting one another, the Tribunal and the courts operate alongside each other, each fulfilling an important but distinct constitutionally significant role.

References to te Tiriti in legislation will not be made 'redundant'

40. The ability of the courts to grant declarations of inconsistency with te Tiriti does not render te Tiriti clauses "redundant":⁷⁴
- (a) The availability of declarations of inconsistency has not rendered the NZBORA redundant. The key purpose of these declarations is to promote accountability, facilitate constitutional dialogue between the judiciary and legislature,⁷⁵ and strengthen the practical influence of NZBORA within New Zealand's constitutional framework. An important step in the exercise of the declaratory jurisdiction is to establish that the rights are engaged.
 - (b) Statutory references to te Tiriti and Treaty principles represent the legislature's acknowledgement that te Tiriti rights are engaged and a direction as to the weight to be given to Treaty obligations in the relevant statutory context. The court could not supplant any such legislative direction.
 - (c) Any declaration by the court would represent the court's assessment of what is required to uphold its Treaty obligations, but would not supplant the statutory direction given by Parliament. It would also be consistent with the

⁷⁴ Respondent's submissions at [214] and [215].

⁷⁵ See further commentary on constitutional dialogue in Matthew Palmer "Constitutional Dialogue and the Rule of Law" (2017) 47 HKLJ 505.

notion that the Crown should not be the “sole arbiter of its own justice”.⁷⁶

- (d) There will likely be areas where Māori rights are engaged but there is no specific te Tiriti provision.

STRIKE OUT IN THE CONTEXT OF TIKANGA AND TE TIRITI

41. The courts have consistently cautioned against striking out claims before they can be properly heard, particularly where they raise issues in developing areas of tikanga and te Tiriti:

- (a) The Court of Appeal in this proceeding confirmed that the Court must be slow to strike out claims in any developing area of law, and that a claim involving a complex question of law requiring extensive argument should be no bar, provided the Court has the requisite materials and assistance to determine the matter.⁷⁷
- (b) In *Smith v Fonterra Co-operative Group Ltd*, this Court adopted a cautious approach to strike out in relation to novel claims founded on a seriously arguable allegation of non-trivial harm.⁷⁸ This Court held further that, notwithstanding difficulties of attribution or legal novelty, the common law should prefer receipt of the claim and its full evaluation on evidence and argument at trial over pre-emptive elimination.⁷⁹
- (c) In her minority judgment in *Ngāti Whātua Ōrākei Trust v Attorney-General*, Elias CJ considered it inappropriate for the court, acting as a court of first and last instance, to strike out claims for declaratory relief where the relevant arguments and factual context had not been fully developed in the courts below.⁸⁰
- (d) In *Hata v Attorney-General (No 2)*, in the context of a stay application, the High Court recognised the applicants’ entitlement to access the Court for determination of their

⁷⁶ A phrase used by Williams J in *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [63] from a now-rejected colonial jurisprudence *Wi Parata*, above n 4, at 78.

⁷⁷ *Smith v AG (CA)*, above n 16, at [36].

⁷⁸ *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 (*Smith v Fonterra (SC)*) at [83].

⁷⁹ *Smith v Fonterra (SC)*, above n 78, at [83].

⁸⁰ *Ngāti Whātua (SC)*, above n 8, at [125].

rights.⁸¹ The Court placed weight on the fact that the claim sought declaratory relief concerning legal rights, rather than injunctive relief.

42. Where tikanga and te Tiriti issues are central to a claim for declaratory relief a cautious approach ought to be taken on the question of strike out. This is particularly so where there are significant factual matters to resolve, which is typically the case where tikanga is engaged.

KUPU WHAKAMUTUNGA | CONCLUSION

Whatungarongaro te tangata, toitū te whenua
People disappear but the land remains

43. The core kaupapa of this appeal involves the connection of tangata whenua to whenua and the broader environment. The whakataukī above emphasises the importance to Māori of land and the environment and maintaining it for future generations; and the ephemeral nature of human existence compared to the enduring nature of land (and the environment). This reflects the core Māori belief that, because human existence is ephemeral, there is, accompanying the right to use the land and its resources, an obligation to preserve the land and its resources for future generations.
44. The principle in *Te Heuheu* effectively meant that tangata whenua rights, which were affirmed and guaranteed under article 2 of te Tiriti, were not legally enforceable in New Zealand courts unless those rights were incorporated in legislation. The law and attitudes towards te Tiriti and tikanga based rights have developed considerably since *Te Heuheu*. A legitimate question therefore arises as to whether *Te Heuheu* now correctly reflects the constitutional significance that is today afforded to te Tiriti.

DATED this 14th day of July 2026

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⁸¹ *Hata v AG (No.2)* [2023] NZHC 2919 at [35].