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

SC 10/2025
[2026] NZSC Trans 17

BETWEEN

MICHAEL JOHN SMITH

Appellant

AND

ATTORNEY-GENERAL

Respondent

Hearing: 17–20 August 2026

Coram: Winkelmann CJ
Ellen France J
Williams J
Kós J
Cooke J

Appearances: D M Salmon KC, M Heard, N R Coates and
R M McMenamin for the Appellant
J E Hodder KC, J M Prebble, K F Gaskell and
D Ranchhod for the Respondent
M K Mahuika, H K Irwin-Easthope and B C K Murfitt for
Te Hunga Rōia Māori o Aotearoa | The Māori Law
Society as Intervener
A S Butler KC, R A Kirkness and H Z Yáng for Te Kāhui
Tika Tangata | Human Rights Commission as Intervener

CIVIL APPEAL

MR SALMON KC:

Tēnā koutou. Salmon, appearing with Mr Heard, Ms Coates and Ms McMenamin for the plaintiff.

5 **WINKELMANN CJ:**

Tēnā koutou.

MR HODDER KC:

E ngā Kaiwhakawā. tēnā koutou. Ka mihi atu ahau ki te mana o tēnei kōti. May
it please the Court, Hodder with my learned friends Mr Prebble, Ms Gaskell,
10 Ms Ranchhod for the Attorney-General.

WINKELMANN CJ:

Tēnā koutou.

MR MAHUIKA:

Tēnā koutou te Kaiwhakawā mātua. E ngā Kaiwhakawā, tēnā hoki tātou e te
15 Kōti. Ko Mahuika taku ingoa. Kei kōnei mātou ko Ms Irwin-Easthope me
Ms Murfitt. Kei kōnei anō hoki a Mr Tibble me te tumuaki o te Hunga Rōia Māori
a Ms Season-Mary Downs te tautoko atu i a mātou. Nā reira, tēnā koe, tēnā
tātou.

WINKELMANN CJ:

20 Tēnā koutou.

MR BUTLER KC:

Ata mārie e ngā Kaiwhakawā. Ko Andrew Butler ahau me Robert Kirkness me
Hannah Yáng tēnei mō Te Kāhui Tika Tangata. Butler, Kirkness, and Yáng for
the Human Rights Commission.

WINKELMANN CJ:

Tēnā koutou. Mr Smith, I understand you wish to give a karakia.

Karakia

5 **WINKELMANN CJ:**

Kia ora. Mr Salmon, so we received the Crown's memorandum on Friday and we indicated the Court's view was also in accordance with what the Crown had suggested in terms of order of address, but we left for discussion this morning timing. Have you had a chance to sort that out between yourselves?

10 **MR HODDER KC:**

No.

MR SALMON KC:

No. No is the short answer, and I might be behind on some of that, but I think we are, at the front bench, still planning on working to timing that worked in the
15 last Supreme Court three-day hearing Mr Smith had before you which saw us wrapping up on the morning break on day 2.

WINKELMANN CJ:

Morning break, day 2.

MR SALMON KC:

20 I'll leave my friend to speak to that.

WINKELMANN CJ:

Mr Hodder.

MR HODDER KC:

We have been discussing timing without getting a resolution but if the Court
25 could give us some indication as to exactly how much of a role it expects for the interveners that will help, because at the moment the preferred view of the other parties is that the Crown has something less than 40% of the time and

the appellant will finish up with something closer to 50% of the time which we think is slightly untoward, but then the question mark is partly about how much time the interveners will have.

WINKELMANN CJ:

5 Right.

MR HODDER KC:

If you could help us on that, but if you could that will speed up our discussions.

WINKELMANN CJ:

10 Well, we might discuss that over morning tea and come back to you but the intention is to give a fair amount of time to the Crown. We have a little bit of extra time, run-over time on the Thursday to make sure that the Crown has a fair amount of the time, Mr Hodder.

MR HODDER KC:

That's helpful, thank you your Honours.

15 **WINKELMANN CJ:**

But at the moment the indication is generally it's half an hour for the interveners. We just thought that the Human Rights Commission had a lot in its submissions and might require a little bit more time. That's the general indication. Mr Salmon.

20 **MR SALMON KC:**

Thank you your Honour. Mindful that we'll need to move at a clip and not perhaps as aware of the Thursday availability we've prepared a road map which is longer –

WINKELMANN CJ:

25 That's not an invitation to spill over into Thursday.

MR SALMON KC:

The road map is longer than it might normally be, which we'll distribute. While it's coming around I'll indicate the proposed structure of what we're going to address. I'll be relatively brief at the front end, handing over after some

5 introductory topics over the first hour or so this morning to Mr Heard who will deal with the Bill of Rights module and Ms McMenemy who will then deal with the international human rights sphere.

WILLIAMS J:

Do we have a soft copy of this?

10 **MR SALMON KC:**

We can send that, Sir.

WILLIAMS J:

Please.

MR SALMON KC:

15 It's not hyperlinked though I think, given its timing, so apologies for that, Sir.

WILLIAMS J:

That's all right.

MR SALMON KC:

And then Ms Coates will deal with the third cause of action. What we're

20 proposing to do, simply because it will be more efficient, is for me then to come back on the first cause of action so I'll get to my feet again briefly to wrap up on that. The reason for that is it's partly populated by what my offsideers will be saying and it's just more efficient to wrap it up rather than partly replicate what they are saying about rights and the Treaty. So, unless the Court has an

25 objection to that, that's the approach we propose to take.

Also by way of signposting parts of this outline, especially in the first few pages that I'll deal with now, we can move quite quickly over because the key issues

will be clear to you and you will not need to be versed in the strike-out jurisdiction in any detail at all, although I will come back to it at several points. One, because we have certain matters pleaded that are at odds with what the Crown says the Court can take from the legislative framework and the Crown's intentions and we have some other matters pleaded that we say they're on the need for a trial on any view of the authorities and this case.

So I'll come back to those but first if I could begin by going to a very brief touch on Mr Smith and why he's here. This Court, or most of the Bench, has heard argument in the *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 case and understands Mr Smith's broad connection with his lands in Northland and his whakapapa. I don't intend to spend undue time on that but I would briefly like to go to his affidavit, not least to bring up some of the local issues that are less manifest on the pleading and easier to read there.

So his affidavit is at 201.0013 and we'll try to bring these, I think we're going to be able to ClickShare perhaps. I'm not sure if the Court's had a chance to read this, and I won't go through it in detail, but on a high level it backgrounds his lengthy involvement in climate change issues specifically, and his some 34 years of engagement in the issue in many senses as a representative of others, and then from paragraph 10 his summary of the Māori world view and environment leading towards –

KÓS J:

Are you going to put this on the ClickShare?

MR SALMON KC:

Sorry Sir?

KÓS J:

Are you going to put this up on the ClickShare?

MR SALMON KC:

I think we're trying but we are mere novices Sir. I don't know how to use it at all.

WILLIAMS J:

5 201.0013.

MR SALMON KC:

Correct. I think it's coming now Sir. Where that leads to is identifying why for coastal Māori communities the loss of property is not just a loss of potentially food-gathering and home, but a loss of identity. This is summarised in his
10 paragraph 18, and for that reason he has, later on in his affidavit, produced a short video just shown as a flyover of his lands and his iwi's land. The effect of the initial sea level increase is now essentially locked in, or close to it.

So from paragraph 25 he goes through his connection to Mahinepua C Block
15 in Northland, near Whangaroa Harbour, and at 26 refers to the hundreds of sites of cultural and historical and spiritual significance to Ngāpuhi and Ngāti Kahu. You'll see a pinned visual, it's now on ClickShare I think, under paragraph 26 showing various locations in that immediate region.

20 At 28 he gives some examples of some of the historically and culturally significant sites, just three examples on that map, but one can readily imagine how many there are from a well populated and long inhabited piece of coastal land.

25 So there are grounds, marae sites, and the ability to catch food from the sea, and to live, are all threatened immediately by tide rise, and that's a feature of Mr Smith as plaintiff. He is concerned both by the macro implications of climate change on the ability to survive for humanity and other species, but also its impact on the maintenance of civilisation and the rule of law, and then also
30 locally on his own place.

So his video is linked at paragraph 35, 308.3728. I'll just see if we can go to that and pause while it plays a very brief flyover of his lands. There's no sound, but what he's described is that he's superimposed the impacts of a sea level rise of three metres with storm surges of an additional four metres
5 superimposed on top. those storm surges just being a Northland reality now but from a lower tidal level. So we see here Kaeo, and then a storm surge superimposed in blue, flooding already happening from weather events being shown now. Then again flooding over the land shown on screen now. There we have a gravesite just shown before, and Matauri Bay with and without
10 the surge.
1015

So that is just illustrative but it identifies the local reality of imminent climate change consequences for Mr Smith and his people, and in his affidavit he goes
15 on to identify what is acknowledged by the IPCC indeed, which is the particular vulnerability of Māori to the effects of climate change. I would add to that it's an additional particular vulnerability in Northland both because of the endemic poverty in Northland, it's the poorest electorate I think we have, but also because it is particularly reliant for coastal Māori on kaimoana, and the loss of
20 the foreshore impacts on that for obvious reasons and the loss of the foreshore land impacts on it, but as particularised in the pleading, climate change of course risks causing a cascade of ocean warming and ocean acidification and death of primary food engines like coral that feed the oceans that will imperil the ability to get food from the sea. For a poverty issue, that is significant.
25 So these are –

WILLIAMS J:

Can you just explain to me the community closest to the Mahinepua Block, the kāinga closest to the Mahinepua Block is what?

MR SALMON KC:

30 I'm not actually sure physically which is closest. Do you know?

MR SMITH:

Wainui, your Honour.

MR SALMON KC:

Wainui, Sir.

5 **WILLIAMS J:**

And – oh, okay, this is going to end up being a conversation with Mr Smith.

MR SALMON KC:

Well if you have questions, Sir, I can clarify and we can come back to you after the morning break with something more specific and local. Mr Heard has been
10 there more recently than me and it might be he can answer when he's on his feet, Sir.

WILLIAMS J:

Okay.

MR SALMON KC:

15 I've been there, but never in a way that enables me to answer.

WILLIAMS J:

Well –

WINKELMANN CJ:

Indicate your questions now.

20 **WILLIAMS J:**

Sorry?

WINKELMANN CJ:

Indicate your questions now, and they can get it.

WILLIAMS J:

So from the flyover it looks as if there's one or two houses on the Mahinepua Block itself, but the kāinga and the marae are off that block and somewhere else. I'm interested to know what those kāinga and marae are,
5 what are the hapū associated with them, and what's their role in this litigation.

MR SALMON KC:

Yes. Thank you, Sir, we'll come back to you with answers on that, and my apologies for not knowing the answers right now, Sir.

WINKELMANN CJ:

10 Especially the last point.

WILLIAMS J:

Sorry?

WINKELMANN CJ:

Especially the last point, Mr Salmon. The last point was what's their role in this
15 litigation.

MR SALMON KC:

They don't have an official role in the litigation.

WINKELMANN CJ:

Okay.

20 **MR SALMON KC:**

But Mr Smith does, as he says, sue as a person concerned for their interests, but he is suing in his own name. So he deals with that vulnerability and the local issues facing people on the coast there, deals then with the Crown policy on climate change and Māori over the subsequent pages, and the Crown's NDC
25 commitments. Given time I won't spend undue time on that, and it is a strike-out, but that gives something of the local to Mr Smith's concerns. Those are articulated in the pleading and of course this is just a strike-out, but

I deal with them briefly because the local is the first step and then of course there is the macro picture, which, without diminishing the local for a moment, is more alarming and deeply serious.

5 Now in that context we have sought to summarise in our submissions at paragraph 15 the key factlets or outtakes from what is a lengthy pleading of the best understanding of climate change and its implications for humanity. So paragraph 15 summarises the IPCC conclusions as to the need to peak before 2025, six years after this claim was filed, the pathway to net zero in 2050,
10 which only gives a “more likely than not” probability of reaching the Paris target.
1020

Paragraph 15(d), to increase the confidence of doing that faster and deeper cuts were required. (e) global emissions did not peak before 2025, and the
15 carbon budget associated with the more likely than not pathway will likely be breached next year or the falling year. So we are baked into already damaging consequences and hurtling towards worse.

(f) and (g) we’ve already experienced one 1.5 degree year, and that indicates
20 that we’re within the period now when the 1.5 degree target will be breached, not *might* but *will*, and that current global policies are predicted to deliver 2.8 degrees.

Materially though New Zealand’s commitments are worse and if the world
25 adopted New Zealand’s we would be above that again, and that’s noted because as is pleaded, and as the Court will know, New Zealand’s commitment under the international instruments is to do more than average as a developed country and to lead the way, so we’re doing the reverse of what New Zealand has acknowledged in those instruments it must be, and therefore by definition
30 less than we should.

Paragraph 15 (i) and (j) deals with sea level rise and the baked in nature of sea level rise we cannot turn around. We can stop it being worse than it is going to be but however bad it is going to be today will now happen.

Then over the page, summarising again pleaded points, climate harms are already being experienced. Māori generally are disproportionately harmed. The plaintiff, and those he represents, are among the most at risk and will suffer particular physical and cultural harm, a point relevant, of course, to section 20.

The Crown has acknowledged the fact that harm and the risk of future harm to people like the plaintiff, and then the Crown phases at (o) and (p) which I will spend a little more time on.

10

So that is the high level pleading. Perhaps the most significant point that is pleaded, though, in the statement of claim is that the Crown will not act to protect life or culture without court intervention, and that's not lightly pleaded. It's pleaded in the context where since 1992 the Crown has acknowledged the seriousness of this existential threat, and done nothing to address it beyond window dressing. Again I'm very mindful that the Crown will say that we should take at face value its statement that it intends to act, but it has been making those statements for 34 years and litigation on climate change has been happening for 20 years now with the same statements made and no action taken. So the pleading which Mr Smith says should be taken to be true for today, is that the Crown will not act to protect human rights and the maintenance of civilised society.

So I'll go briefly to the pleading then, at this is at 05.0100. This is a memorandum that annexes two versions of the proposed amended statement of claim, one redlined which we can skip past, and one bigger, 05.0136, which is not redlined. At the risk of moving over this too quickly, I'll begin by saying that most of the propositions of fact about climate change and its implications, and about cuts that are necessary and so on, are just taken from accepted records in the international instruments, or ones that New Zealand had ratified or confirmed agreement with. So while they're taken to be true here, they're not outlandish and they're not in terrorem submissions from Mr Smith but rather just reflect settled science, the IPCC's conclusion, and the level of seriousness

25

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that New Zealand has agreed in its statements to the international community and internally are real.

Starting from paragraph 10 the climate consensus, scientific consensus is dealt with, that it's necessary to limit warming caused by climate change to 1.5 degrees to avoid dangerous anthropogenic interference with the climate system, and to minimise the long-term and irreversible adverse effects of climate change. That doesn't mean have no damage. As we know from Europe, for example, we know there is already damage. They are at that point now where that damage is accruing, but it is still early days because, of course, the baked in cryosphere changes, the loss of ice sheets, and the consequences of increasing dry years are yet to be even remotely felt. But the point there is there is already harm, and the question now is how much. But 1.5 degrees is agreed both by the IPCC and in extensive peer reviewed scientific materials to be a vital stand against disaster, and we are failing to protect against that.

1025

At 11 we've already suffered harm as pleaded. At 12 the scientific consensus that the window is rapidly closing, we're at 11.59 pm figuratively speaking, and again that is, as we'll come to in the numbers, not contentious on the materials of scientific consensus.

Then at 13 the reductions and steps needed to avoid 1.5 degrees and past that are set out, but at 14 it's noted that those are just calibrated to a more likely than not probability of holding to that point, and I'll just pause there. It's very easy for us as we struggle to grasp climate change as normal human beings to think that that sounds okay, more likely than not, what balance of probabilities were probably good. But that is just saying there's a 50/50 chance of avoiding the collapse of civilisation at that point, and the obvious rhetorical question is why would any government, mindful of its right to life, be happy with that? We're spinning the revolver with three of the chambers full.

So then the precautionary principle is noted at 15, and the Court won't need any intro on the precautionary principle I'm assuming, but that informs an

assessment of what is needed to improve the odds beyond 50/50 likely in subparagraph (a), more likely or very likely than 90%. Again, what government would be happy with a 10% chance of calamity, but those are the steps needed. We are just not remotely trying to meet any of those as a country.

5

Then at 16 and 17 to inform that sense of how close to midnight we are. 16 pleads the amount of the carbon budget from 1 January 2020 left to stay within 1.5 degrees that is being used as at the time of this pleading, and then at 17 the pleading of the predicted use by date, end of 2027 and mid-2028 when we're past 1.5.

10

From 19 we're in the decade for 1.5 degrees, that's going to be with us now. Then over at the top of the next page, just dealing with a point that if a trial is allowed will be an important part of a trial. The Crown's aspirational goals for climate change often involve the nice-sounding hope that technology will emerge that enables us to fix all this later. In other words, don't worry now, we'll find a way of scrubbing carbon later, and what's pleaded there is that there's no credible prospect of that working. So the notion that *Star Trek* will occur and we'll find a way out of this with magic is taken to be wrong.

20

Then at 24 and 25, current projections are for a three degree world. At this point I'll bring up one other document, and with apologies for the Court who saw this in the *Fonterra* case, it's the most useful way in a short time period to illustrate just how serious this is. In a context where we are seeing parts of the world burn as they have never burned before, because it reminds us that it's only just begun. So this is 308.2805, and we'll go to page 158.

25

KÓS J:

Remind me, what is this?

MR SALMON KC:

This is part of AR5, the assessment report 5. What I'm coming to are the soil and moisture reports or predictions that you might recall Sir from the *Fonterra* hearing.

30

WILLIAMS J:

308?

MR SALMON KC:

The primary number is 308.2800 Sir.

5 **WILLIAMS J:**

This is the attachments to Mr Smith's affidavit?

MR SALMON KC:

Correct.

WILLIAMS J:

10 And the page number within that?

MR SALMON KC:

Within that it's page 158 of the PDF. I have it Sir.

1030

COOKE J:

15 And for my benefit, what is this document?

MR SALMON KC:

This is assessment report 5 from the IPCC, and I'll just note since this pleading, referred to as assessment report 5 in the pleading, AR6 has been released.

20 These pictures are essentially the same. So this is the summarised diagrams showing the best sense of what the world would look like under several temperatures.

25 So here we have annual mean temperature changes at one degrees, two degrees and four degrees and you will see they're not evenly distributed so we see very substantial temperature differentials in the poles areas and certain parts of certain continents. Now, that is just temperature but that's really first

order problem because moisture matters in the way it interplays with temperature.

I'll go to the next page, over one page, which shows mean precipitation and soil
 5 moisture and again with apologies for ground from before but this is the world
 we are about to live in and this is what Mr Smith pleads. I'll pause first on the
 two degrees warming precipitation changes and, as the Court will probably
 have read of, one of the issues with climate change and increased temperatures
 is that survivability is hampered by increased air humidity and the European
 10 air con shortage that is leading to a trade deficit as they import air conditioners
 is the only stopgap when temperatures reach a certain level, but the more the
 moisture in the air, the lower that level, and amongst the predictions are
 subcontinents like Northern India may have what are wet-bulb heat events.

15 A wet-bulb heat event is when it's sufficiently humid that sweat cannot
 evaporate. If sweat cannot evaporate, it doesn't cool one at all, so whereas
 one can live in Saudi Arabia in 50 degrees because it's dry and sweat
 evaporates and takes the latent heat of vaporisation with it. Once it's
 100 degrees the temperature for survival of the fittest individual is 35 degrees
 20 and for us more frail types it's less. What that means is there are the
 possibilities that what looks like a survivable country, if it has the confluence of
 a humid day in the monsoon with what is not a hot day by objective standards
 when there is not high humidity, results in mass deaths. Enormous.

WINKELMANN CJ:

25 Can we – and we can't really see what New Zealand's situation is on this
 because it's so small.

MR SALMON KC:

New Zealand is small but also as a – we're lucky on that one, your Honour, in
 the sense that no one is predicting wet-bulb heat events at the mortal level for
 30 New Zealand. I think the most likely first places are in Central Northern Africa
 and the Indian subcontinent, as I understand the science. But it is sufficiently

focused on that it's become a proper focus of how countries will respond with mass deaths.

So that's something just to keep in mind there if we imagine India. And then,
 5 bearing in mind this isn't showing sea level rise, but Bangladesh will have migrations of hundreds and hundreds of thousands of people just from a tropical storm-driven sea level rise now. Most of it's under two metres. So they will be moving. Moving out of Northern India and moving out of Bangladesh and then we recognise the loss of the Himalayan ice caps which provide the feed-water
 10 for about two billion people and we can see a population issue just from those events that destabilises the planet. And this is just one example of why when we read apparently alarmist statements like the loss of civilisation and a survivable planet, in such a fragile planet with peace maintained as it is, small refugee crises tip the planet on its end. So we saw Europe half destabilised by
 15 Syria alone, three million refugees. We're talking a thousand times as many, potentially, but that's just moisture in the air and changes in rainfall.

1035

I'll come finally to the next one down, if we can scroll up a bit please. We have
 20 the soil moisture change, which when one stops and really looks at these graphs, is the most alarming of all because it is just a fact that humanity has always gone to war for food. Always. And here we see some places keeping moisture in their soil. Some even benefiting in Africa. They may not be able to live there because it might be too hot, but plants will grow. But if one looks at
 25 just 1.5 degrees and sees the change, so this is change marked here, we can see alarming drying of Central America, Brazil, all those rainforests, Southern Africa, but strikingly the entire Mediterranean basin, so these early days of France realising the new reality it's in are just getting started. We see here perils for agriculture for all the countries surrounding the Mediterranean,
 30 and that includes the breadbasket of Europe as it has been, Ukraine, it includes half the civilised Western world. And then we have China, and one of the great agricultural nations on earth, one of the great food producers and teeming with people, a loss of soil moisture, and again a little understanding of history shows why scientists are terrified about the implications of a drying Asia.

And that means I need to hold that up against the very local picture Mr Smith sets out in his affidavit. That's not to downplay that, the tragedy of losing one's home and places of spiritual importance are real and should be protected, but

5 when we come to the pleading it's pleaded that this unchecked will undermine civilisation itself and the ability to live. It's because we don't need to wait 100 years for the tide to get high enough for all of the coastal holiday homes to go, which is the typical imagined consequence, perhaps this will take some houses. We see a collapse of international order happening well before

10 New Zealand has a climate problem here that stops life, and that is the problem with a highly interconnected world reliant on just-in-time food supply and heavily armed countries. Everywhere, scientists are terrified. The pleading reflects that, not because it's hyperbolic, but because once one looks at the actual data and the IPCC data is the best data, peer-reviewed by a greater collection of

15 scientists than any other scientific project ever on Earth, and New Zealand agrees it's right. So highly, highly serious and pleaded as such, and important factual context for one of the core Crown answers to this case, which is we plan on doing something soon.

20 So returning to the pleading, I was on page 4 at paragraph 26. I'll move quite quickly through it now. The national emissions pleadings begin at paragraph 26 and deal with both carbon and methane emissions. Now the pleading differentiates between national emissions which is everything caused by humans in New Zealand, and Crown emissions which are not covered by the

25 Climate Change Response Act 2002 and which the Crown has not measured and has not sought to mitigate and yet are a major source of emissions in their own right. So this is just national emissions, and then the impacts of those pleaded at paragraph 29 and the last subparagraph is the one I was leading to with those soil moisture maps, an unacceptable risk of social and economic

30 collapse and mass loss of human life and civilisation.

Then we have at paragraph 30 the UN General Assembly's concern about the imminent impacts to all countries, and I'll just note each of those, all six, translate into food and water being scarce. And then sea level rise from

paragraph 31 and the extent it's locked in before getting to harm to Māori from climate change from paragraph 36 onwards. And then moving to the more specific, harm to Mr Smith from paragraph 41, and over several pages from paragraph 52 the Crown's knowledge, its contribution, and its need to act.

5

Now knowledge is pleaded and is clear. The Crown has known of this. Indeed, there's a now-famous newspaper article from the *Rodney Times* from 100 years ago saying that this was a problem. So New Zealand was the first newspaper known on earth to identify CO2 and climate change, but this pleading links the Crown's knowledge not to those far-fetched days but to June 1992 when New Zealand signed and ratified the United Nations Framework Convention on Climate Change, the UNFCCC.

10

1040

15 What's summarised at paragraph 52 is just what is said in the UNFCCC, that it's dangerous, that it needs to act. At (c), that it was not open to smaller nations to delay acting on climate change. Something that in international cases has been confirmed as a preposterous proposition. We shouldn't do anything because we're smaller. Something that obviously, if reasonable, could be said
20 by every city or every town or every person and no one would act.

20

The need for "deep cuts" at (d), and that a failure by New Zealand to take action would cause and contribute harm to climate systems and human welfare not only by the direct contribution to climate change caused by the omissions of the
25 Crown itself caused, permitted or encouraged but also by the harm done to collective global action by its own inaction. In other words, if we don't move we can't expect others to.

25

Pausing just there. It's recognised that this is a collective action problem par excellence. It's one that's used as a cover by way of people saying we shouldn't
30 do anything because there are bigger polluters, but that is a rightly implausible and unacceptable response to a disaster in which everybody needs to chip in and has been rejected as such by those decision-makers who faced the argument.

30

At 53 we then have acknowledgement by the Crown pleaded, acknowledgements in New Zealand's outward facing role at (a), to the International Court of Justice, quoting there from the Crown's submissions at
 5 paragraph 1.12 which concludes that it threatens rights including the right to life, the right to be free from arbitrary interference with privacy, family life, and home life, rights to enjoy one's culture and so on.

WILLIAMS J:

Is that document in the materials?

10 **MR SALMON KC:**

The UNFCCC?

WILLIAMS J:

No, the Crown submission.

MR SALMON KC:

15 Oh, the Crown submissions. No, I don't think it is, Sir. It's just pleaded.

WILLIAMS J:

I couldn't find it.

WINKELMANN CJ:

I think it – I don't think it was in it. Got it.

20 **MR SALMON KC:**

We can –

WILLIAMS J:

Can we get a copy of it please?

MR SALMON KC:

25 Yes I will – yes Sir, certainly. So those are examples of acknowledgements carrying on for some pages and concluding at 54 and 55 the Crown has had

the powers to do what needs to be done but since at least the signing of the UNFCCC, the Crown has knowingly failed, and continues to fail, to exercise those public powers to reduce national emissions to avoid danger et cetera, et cetera, and elsewhere, including by adopting policies to achieve offshore mitigation instead of national emissions, which have not been effective to reduce emissions. If a trial is allowed, there will be much evidence about the futility, or lack of utility, in a lot of offshore mitigation using bogus credits or planting forests that burn down and – oh, Mr Heard tells me Sir that that is in the bundles already at AA65, which is the appellant's authorities, tab 65.

10 **WILLIAMS J:**

Tab 65.

MR SALMON KC:

And forestry within New Zealand of course as a mitigation model. We have been planting pine forests which are a monoculture destined to be at greater fire risk than other forms of forest and that's one example of the sort of tipping points that alarm scientists. As things heat up we see a cascade of further releases of CO₂. Our form of mitigation has not been to reduce gross emissions, but rather to offset them with unstable and unreliable lockups.

20 At 56 is a key pleading and Mr Smith doesn't shy away from it. He does say that the Crown will not take steps to protect the right to life and culture, to protect the rule of law and civilisation without court intervention and that's not lightly said. He has been living with this for three and a half decades longer than any of us probably as an activity. It's 20 years next month since Mr Heard and I stood in this court in our first climate argument and the answer given then on section 104(E) of the Resource Management Act 1991 was that the scheme was that the Crown would act through its Climate Change Response legislation and it was about to do so, and in each of the subsequent steps in that litigation and others the answer has been the Crown's about to do so. That might have been plausible in 2006 or 2010 or 2012 but it's implausible now and particularly implausible where, as the cemented pleading shows, still needing further updating as things unravel. It's not just that nothing's happening under the

CCRA, but steps are being taken to unwind protections designed to reduce emissions, and those are specifically pleaded. That is not to make this a political case, but rather just to acknowledge the uncomfortable truth that modern democracies aren't equipped with short election cycles, lobby capture, industry capture, and the difficulty of understanding climate change in a life of short attention spans, modern democracies aren't getting the job done. It's an uncomfortable and confronting observation that some of the autocratic regimes on earth are doing a better job responding to this.

1045

10 **COOKE J:**

What difference would a court declaration make though?

MR SALMON KC:

I think your Honour asking in part, without being impertinent, whether the Crown will seek to step up and meet a declaration?

15 **COOKE J:**

Yes. What difference would it make? You've got the IPCA giving very strong advice that this is the peril that everyone faces. What meaningful difference could a declaration from a court make?

MR SALMON KC:

20 It would be a determination that the Crown was not, in fact, doing what it was saying in the long title of an Act, it was doing, and it would have, at least the same utility as a declaration of non-compliance does in the normal New Zealand Bill of Rights Act 1990 context, which is utility and does resound. So it would determine that and it would at least declare rights.

25

Whether there are larger implications of court relief that might emerge as a point I'll just touch on briefly before Mr heard gets up because one can at least draw something of a straight line between the sorts of perils that have prompted jurists here and in the UK to suggest that there are certain fundamentals the government needs to keep in mind. The parallels can be drawn here.

30

They're complicated but they actually, once one reads the signs, are hard to deny. So the utility would be at least the utility of those declarations of non-compliance and the normal reward of a declaration. A court determining something on the facts, but there might be wider implications, and I think it

5 should be assumed that the Crown would listen to the Court's conclusions on a merits issue. I'm sure my learned friends will agree that the Crown usually does.

KÓS J:

May I question your target? You were launching an attack on democracy or at

10 least a condemnation of it. Isn't that an attack on the electorate rather than on the Crown?

MR SALMON KC:

No. It's not an attack –

KÓS J:

15 I mean it's a matter of public choice as to whom we vote for and your challenge seems to be to the electoral choices made by the public.

MR SALMON KC:

No, it's not so much that Sir, it's an observation about why we are stuck, and why democracies are not responding. It's, that one is evidenced from the Bar

20 so might be worth as little as you pay for it Sir. But it's not an attack on democracy, nor should that answer be suggesting that democracy is working well at the moment. It's another uncomfortable reality that it may not be and that modern attention spans, the loss of the fourth estate, and other factors, are causing strains that bear, I think, upon the long-held assumption about

25 separation of powers, which has always assumed a competent legislature, competently making laws, and protecting rights and mindful advice. I'm going to come to that as a theme, not because the Court needs to decide it now, but rather to highlight these are very significant issues. We won't have another case like this, and it seems depressingly possible that the notion of having

civilised cases like this might be one day a faint memory. That is the pleading, and it's plausible.

But in that context I will just comment, before I hand over to Mr Heard, on the Crown's, and the Court of Appeal's, suggestion that the assumptions as to separation of power and deference to parliamentary supremacy, warrant a close focus before the Court shies away from questioning, for example, the efficacy of this regime, which is what the Court of Appeal said, effectively. You can't judge that. So I'm going to circle back on that.

10 1050

Just rounding out on the pleading, and I'll perhaps move more quickly through the balance, but I wanted to particularly note that pleading that this will not be fixed. Not a pleading lightly made, not one that might have been made 20 years ago, but one that is taken to be true on normal strike-out principles.

15

The pleading then goes on to deal with Crown emissions, something outside the CCRA which, as our outline notes, the Crown's attempt to characterise our case as being solely litigating the content of the CCRA can't explain. Then at paragraph 60 –

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WINKELMANN CJ:

Sorry, just – what paragraph, can you just repeat your submission there? It was directed to which paragraph?

MR SALMON KC:

25 Sorry, your Honour, I've scrolled on. Oh, sorry, paragraph 56. Paragraph 56, your Honour.

WINKELMANN CJ:

So you're saying that that meets the Crown's argument that this is just asking the courts to review the effectiveness of the CCRA?

MR SALMON KC:

Sorry, I actually mean paragraph 57, your Honour. My apology. I'm talking about the Crown emissions there. So the point I was seeking to make – my old eyesight, your Honour – is that we have separately dealt in this pleading with

5 Crown emissions, being those caused by the Crown itself as opposed to by people in New Zealand. So earlier it was national emissions, now it's Crown emissions, the one the Crown emits, and our outline notes those are an independent problem outside the merits or lack of merits in the CCRA regime.

WINKELMANN CJ:

10 So just going back to the point that you were making that this puts a lie to the Crown's submission that this is just an attempt to get the courts to review the efficacy of the CCRA, what do you say about that headline submission?

MR SALMON KC:

I'll give a headline submission rather than go through the pleading in detail

15 because we plead this too, so the pleading will be the best answer given time. Firstly, the CCRA is embedded with serious defect. One is the targets are breaches Mr Smith says of what is needed to protect life, and that's not too controversial on the science, and in particular – so for methane, where in 2025 again pleaded or in part pleaded because it was a bill at that point the Crown

20 has reduced its methane targets to be less ambitious again, but it's pregnant with multiple defects that mean it's ineffective, and the Crown's answer is it allows – and the Court of Appeal said this too – it allows the targets to be revisited, so they can be revisited later, therefore it's defensible. But of course any legislation can be revisited later, any target could be revisited later. We

25 don't have the time to revisit it later in Mr Smith's case, and so those targets are the first point.

WILLIAMS J:

Why not attack the targets then?

MR SALMON KC:

30 They're statutory, Sir.

WILLIAMS J:

I'm not talking about the section – whatever it is – section 5.

MR SALMON KC:

Section 5Q.

5 **WILLIAMS J:**

But the budget, the five-yearly budgets.

MR SALMON KC:

Well each time they're judicially-reviewed of course, and this point you'll hear a little bit later, without me wanting to soak up oxygen from people later, they're
10 within the narrow confines of a judicial review with its procedural focus, so they often fail. They fail to look at the fact that they are housed within a framework that doesn't achieve what is needed to protect life. So people do try to review those but the necessary focus is procedural in a judicial review, and they are targets set by reference to a statutory target which is the start –

15 **WILLIAMS J:**

There's a rationality ground, surely?

KÓS J:

Yes, well why is it any different from this?

MR SALMON KC:

20 Well your Honour is saying one could argue irrationality, what used to be Wednesbury, what –

WILLIAMS J:

Well I'm not giving you legal advice, but if –

MR SALMON KC:

25 No, no, no, but if –

KÓS J:

It's worth the same as yours.

WILLIAMS J:

Well, thanks very much.

5 **MR SALMON KC:**

Probably worth a bit more.

WINKELMANN CJ:

There you go again.

MR SALMON KC:

10 It would be irrationality in the context of an irrational piece of legislation, is the short answer. It's the setting of five-yearly budgets against a target that's wrong in the first place.

WILLIAMS J:

You mean the net zero is wrong?

15 **MR SALMON KC:**

The statutory target. So I'll take methane, if I might. The methane targets are wrong and –

WILLIAMS J:

In section 5?

20 **MR SALMON KC:**

Yes.

WILLIAMS J:

Right.

MR SALMON KC:

And if I can just add to the other errors, because of course we've pleaded it doesn't work, this piece of legislation. I think the hardest or the thorniest question really is, is it possible for the Court to say that's untenable, that this won't work at the strike-out stage or not? If not – and in my respectful submission it's hard to see how the Court can conclude this is going to work when it hasn't worked yet and it's pleaded that it won't and it's walking like a duck, then the answer the Court –

WINKELMANN CJ:

Can I just ask you, at the high level then you are challenging the efficacy of the CCRA?
1055

MR SALMON KC:

Amongst other points, yes. Yes. But that is not to say this is the case Mr Hodder says. You will have read our reply submissions to say the CCRA is the Crown's attempt to say our case is an attempt to litigate the CCRA. Mr Smith is saying the Crown is not doing enough to protect life and culture. We've expressly pleaded in this pleading that it is for the Crown to determine how it does that, but it is not doing enough. So part of that is that the targets are wrong. Part of that is that agriculture is excluded, and agriculture is most of it. part of it –

WILLIAMS J:

But there are different versions of agriculture is excluded. There's the meeting target in the statute, and then there's the treatment pursuant to budgetary discretions.

MR SALMON KC:

To the ETS, correct, yes, and then there's the ETS of course which, and again, these are pleaded, has –

WILLIAMS J:

But your argument is, isn't your argument ultimately that the baked-in targets are wrong in the statute, and the fact that there is a discretion as to how you get there is fundamentally flawed.

5 **MR SALMON KC:**

And the fact that the statutory target is so far away that there's enough room to always kick the can down the road, which time has now shown always happens.

WILLIAMS J:

10 So is your point that a compliant act would have to include compulsory targets in the statute that got you to the required outcome by 2050 in accordance with Paris?

MR SALMON KC:

15 It's not that specific, Mr Smith is saying, I can come to the pleading, but the Crown has many ways it could reduce emissions. Many. And the CCRA, the Crown says is the one-stop shop, and the ETS has been presented as a one-stop shop, expressly pleaded are structural baked-in defects in both those processes that mean it's not achieving what it should, that it's not achieving it is clearly pleaded and in fact clear. It is not said that the Court should entertain a world of second-guessing exactly how that Act should be written. This is not
20 an attempt to do that, and the Crown is characterising our case as something it's not, and I can't put it better than we have in our reply submissions. What is said is the Crown is presently in breach. How it corrects that is properly a matter for the Crown. It could take one or many steps in concert. There are many things it could do to resolve the breach. The Court's role is not to legislate those
25 but rather to, as European courts might, to identify that there's a breach and to declare it.

COOKE J:

Is another way of saying that is that your claim is partly seeking a declaration of inconsistency?

MR SALMON KC:

Correct.

COOKE J:

In which case the remedy is for Parliament to consider amending the legislation,
5 and it's partly also seeking declarations that will effect the exercise of discretion under the Act?

MR SALMON KC:

Correct. But none of that is to say that the CCRA is the only vehicle or the
vehicle at all through which action might be taken. There are many tools any
10 government can use to address emissions.

COOKE J:

But you accept in the end that the Court can only deal with questions of law.

MR SALMON KC:

Yes.

15 **COOKE J:**

So what, the only remedies you can get from a court have to find themselves in
some kind of legal question that the Court answers and addresses.

MR SALMON KC:

Yes Sir, I'm familiar with that. So without spending undue time on it, the
20 pleading goes on to plead specifically the structural problems, defects in the CCRA and the ETS with a specific pleading at 73. That the ETS has been and will continue to be ineffective in mitigating national emissions, with the pleading of structural failure at 74. Methane structural failures pleaded at five and so on.

25 Then at 79 that New Zealand's emissions have continued to increase since 1990. I'll just note briefly the way in which this pleading developed, and this is apparent from the subsequent pages, is that in the early days of the case particulars were sought by the Crown and Associate Judge Johnston ordered

quite specific bespoke particulars which then populate a lot of the balance of the pleading, that order was complied with and particulars were given as examples of specific steps which the Crown took.

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I mean he required particulars on specific steps the Crown *could* take but that is not to detract from the core point in response to Justice Cooke which is Mr Smith is not seeking to legislate for the Crown or to predict exactly how it achieves the needed cuts, just to say it is not achieving them, it's got a piece of
 10 legislation that states its purpose is to do something it's not in fact designed to do and won't do, and that might be a feature, not a bug of course that the legislation sounds right but does nothing. He's not seeking the Court to rewrite that. He's not seeking that the Court have a policy debate with the Crown. There is no policy debate that this is incredibly dangerous and is threatening
 15 life. The Crown agrees with that. What is said in my learned friends' very eloquent submissions is we are asking the Court to delve into the delicate policy balance of right to life against economic and social considerations. Now that's not accepted by Mr Smith. There is no balance. There is no social and there is – and there is no economy. I'm hoping that was Andrew Butler. There is no
 20 economy and there is no society to balance unless climate change and its catastrophic consequences are avoided.

So we are not here looking at a case from Mr Smith saying engage in that balance and rebalance it. This is not a polycentric policy debate. It is merely
 25 saying right now the Crown has breached, is breaching, and will continue to breach his right to life and culture by letting them go. Now the details of that –

KÓS J:

Well it's a bit more direct than that, isn't it? I mean at the very least this is an argument that the CCRA is in breach of section 8.

30 **MR SALMON KC:**

Yes.

KÓS J:

You're not shying away from that proposition. So you're asking the Court to declare a statute passed by Parliament to be inconsistent with section 8?

MR SALMON KC:

5 Yes. But the Crown's entire response to be inconsistent, in fact, or its lack of response. So we do, and Mr Heard will deal with positive duties as well, but no, not shied away from at all, Sir. My point rather is to say the way this case has developed, and it was Mr Prebble in the courts below, brought the CCRA front and centre and said this is really an attack on the CCRA, so we've ended
10 up in each hearing focusing on the CCRA understandably, but Mr –

KÓS J:

Well Mr Prebble is right, isn't he?

MR SALMON KC:

In part, only because the Crown says the CCRA is the complete answer.
15 The Crown says, yes, emissions are high, yes, there is global peril from that, yes, you will lose your life and your culture unless emissions are cut, but the CCRA is going to do that.

WINKELMANN CJ:

But the declaration you're seeking is not that the CCRA is inconsistent with
20 rights, you're seeking a declaration that the Crown –

MR SALMON KC:

The Crown is in breach, which is a declaration that its statutory response to climate change is inconsistent with rights. And that includes the positive choice about settings in CCRA, the failures in the CCRA and the lack of anything else.

25 **COOKE J:**

But do you formally seek a declaration of inconsistency?

MR SALMON KC:

Can I have a chance to talk to Mr Heard about that over the break, Sir?
Because I think he's going to answer it probably differently than me and he's
dealing with the Bill of Rights piece. It's not far away, if your Honour is happy
5 with that.

COOKE J:

It's odd that you can't answer the question.

MR SALMON KC:

Oh, well sorry, Sir, I can answer it in this way. Yes, because it is the only
10 statutory response. It's pregnant with an inconsistency in that statute. I thought
you were asking whether we're seeking something not pleaded. My apologies.

WINKELMANN CJ:

Yes.

MR SALMON KC:

15 So yes, Sir, but it's not that that is the only inconsistency, the lack of other steps.
To put it another way, one could imagine a world where the Crown could take
other positive steps to deal with climate change and leave the CCRA as is, and
it would become – it would reach a position where Mr Smith accepted it was not
in breach of his right to life because it was cutting emissions through other
20 means, beginning an offset programme, implementing public transport, banning
oil wells, whatever it might be. So that's my reticence, Sir, about climbing onto
the CCRA point. The Crown seeks to say the whole case is about that, but it is
only about that in the sense that that's the Crown's only statutory response.

ELLEN FRANCE J:

25 So in that sense, the other things that are not covered by the Act, how would
you describe those?

1105

MR SALMON KC:

We've actually – in response to Associate Judge Johnston, your Honour, we've pleaded them as steps the Crown has taken in breach of its duty at – it's paragraph 82. We've breached – this is – his Honour required it in the context
 5 of the first cause of action but you'll see on page 24 and 25 he ordered particulars of that breach be given so the Crown emissions breaches are pleaded at (a) the national emissions at (b), and then at (c) the specific steps the Crown has taken which have collectively resulted in a breach, and you will see that some of those are the CCRA, but many are not. The changes to
 10 offshore oil drilling for example, public transport settings and so on.

So, there has been quite a persuasive push by certain lobby groups to say the ETS is the solution and the one-stop shop to emissions for New Zealand. That's not only contestable, it's rejected by most climate scientists and planners. It's not working, so it's rejectable for that reason, but also it's only
 15 one lever and there are many. And again, as I think we've said as clearly as we can in the reply submissions, how the Crown protects life is a matter for the Crown, the detailed policy there. So these particulars were not provided because Mr Smith is seeking to legislate for the Crown, but rather because the Associate Judge required Mr Smith to give those details. But those are
 20 examples that might help answer why the CCRA is not the only lever.

ELLEN FRANCE J:

But something for example like transport modes and so on, why is that not getting into other social and economic aspects? Is that only, is that because of your overarching submission about the nature of climate change? Is that your
 25 answer to that?

MR SALMON KC:

Yes. Yes, the answer is until emissions are reduced to a certain level there's not a balance.

30 I've taken a little bit longer on that than I planned so what I might do is go to the other main module I wanted to cover. You won't need to hear from me on the

approach to strike-out, which is item 4 on the outline. Can I just note after (e) the cautions about striking out in developing areas of tikanga, te Tiriti and other novel areas, this is an area of fast-moving law internationally, incredibly fast-moving.

5

The Grantham Institute, if the Court is helped by this, does a summarised report on climate cases and here is just a few data points. They're not important for the Court to write down. They are easily found through the Grantham Institute. In 2025 249 new climate cases were filed bringing the total since '86 to more than 3,600 cases. This is globally. Over three-quarters of these cases have been filed since 2015, the year of the Paris Agreement. Cases filed across 62 countries up from just 17 a decade ago. In terms of government framework cases and integrating climate consideration cases, the core ones against government, there were 115 new cases in 2025.

15

I note that just because, as you will have seen, the Court of Appeal in its discussion of these issues dealt with two cases really, the Swiss case that I'll get the name wrong of again, and a UK case, and the – I will get it right soon Sir –

20 **KÓS J:**

Well that one's easy, it's called *Plan B Earth v Prime Minister* [2021] EWHC 3469.

MR SALMON KC:

Plan B. Yes, that one's easy. *Verein KlimaSeniorinnen Schweiz v Switzerland* (App No 53600/20) (GC, 9 April 2024) (UCHR).

25

WINKELMANN CJ:

KlimaSeniorinnen, yes.

MR SALMON KC:

Yes. The short being this is developing so quickly that there are dozens of cases being filed this year which are moving the goalposts further. *Plan B* is, as

30

Mr Heard will come to, old news, respectfully, and of less assistance than, for example, the more nuanced and recent decisions arising out of specialist tribunals.

5 So, that's just a note. This constitutional context is an important area that warrants in my submission more than a strike-out sniff, but also one where, alongside the tikanga and te Tiriti issues, great care is warranted before assuming that an early English case, *Plan B*, is the definitive answer to what are very difficult and complex issues.

10 1110

At seven I've dealt with remedies which might be partly responsive to Justice Cooke's imminent questions. It is not accepted that the declarations really impinge on Parliament's role at all. They don't in other contexts for Bill of
15 Rights compliance, and nor do they here. Just noting at (b) my learned friend relies upon the Bill of Rights 1688, it's not accepted that that bears on these issues at all. We can deal with that perhaps in more detail in reply if need be.

At (c) the notion that a remedy is unavailable because of deference, comity or
20 asserted distinctions between challenges to legislation, challenges to the efficacy of legislation would not meet the pleaded claim, and on that, as noted at the outset of this summary, the Court of Appeal's trichotomy in which for some reason the efficacy of legislation couldn't be considered is highly contestable, and difficult respectfully to pass.

25

At (e), mindful of time, I'll just spend a little bit of time on (e). Parliamentary sovereignty and the deference to separation of powers. My learned friend begins his submissions by arguing that this is an affront to the separation of powers, and that there's no getting away from that, and to comity, that it offends
30 both, and indeed the Court of Appeal in its analysis of *Plan B Earth* and *KlimaSeniorinnen* said something similar with the Court of Appeal holding that Plan B was the preferable authority because our constitutional structures are more consonant with those in the UK.

I'd note also the Court of Appeal at 96 of the judgment proceeded on the basis that the Courts must take Parliament's state of intention to be sincere and real. In other words one can't look behind an act that says it's going to achieve protection of life, even if it factually will not, and that's a highly contestable proposition too because that is to take away substantive protection of the right to life, if Parliament can close off the Court's policing of the right to life merely by a statement of intention, then the right is robbed of shape.

But more than that I wanted to just question the assumption that we are constitutionally consonant with the United Kingdom, given the differences between our two constitutions. It is true we have one thing in common. We are one of the three countries, where each one of the three countries on Earth would know written constitution, and New Zealand has adopted the English assumption that Parliament is supreme, parliamentary supremacy. But we do have differences that you'll hear more from, from my learned friends. In particular we have the Treaty as part of our core constitutional fabric, and that is a profound difference between New Zealand and England that is increasingly apparent in New Zealand modern society and law. We also have no upper house, and no check on Parliament, and thus a supreme Parliament is rightly identified by commentators as making New Zealand the purest Diceyan democracy there is.

I just observe, the assumption of parliamentary supremacy carries with it assumptions of Parliament doing its job correctly, and I say that because again and again when judges and commentators, often judges, extrajudicially comment on, limits the parliamentary sovereignty. It's taken as a given that if Parliament collapses democracy, or undermines democracy, the Courts will then police it. So there's at least one limit to parliamentary supremacy there. But in England, like in New Zealand, it's been suggested in cases and extrajudicially that there are fundamentals that Parliament may not be able to cross, and in that context we've noted in that subparagraph of the outline, the statement in *Taylor v Poultry Board* [1984] 1 NZLR 394 (CA). I do not think by literal compulsion by torture, for instance, would be within the lawful powers of

Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

1115

5 Now torture is, of course, abhorrent and we can easily picture it, and it's not that surprising that a judge in New Zealand would, or indeed anywhere in the democratic world, would regard that something courts would not countenance, but that's a suggested possible limit on parliamentary supremacy. Then in Lord Cooke's fundamentals, other examples were given of laws that the courts
10 would not countenance, or may not countenance, stripping people of citizenship and property was one of them. Disenfranchisement for women or men or admitting evidence even if compelled by torture. With that article saying that Lord Cooke doubted that we would take what he called Dicey undiluted. "It is easy to say the hypothetical examples are so unlikely that we need not bother
15 about the problem. That may be so. On the other hand, if honesty compels one to admit that the concept of a free democracy must carry with it *some* limitation on legislative power, however generous, the focus of debate must shift. Then it becomes a matter of identifying the rights and freedoms that are implicit in the concept. They may be almost as few as they are vital ... One
20 may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility."

Now I'm going to come back shortly to what Mr Hodder in his submissions says about the *Taylor* and Fundamentals examples compared to climate change.
25 He says we're a long way from those examples. Mr Smith says, we've eclipsed them. Torture of one or two people pales beside the peril that is now being faced and that the Crown is sleep-walking us into. So there's an issue there. Each might take your own factual positions but it is strongly disputed that the Crown can say we're a long way from those examples, which is what my
30 learned friend's submissions say.

KÓS J:

It's hardly the case, Mr Salmon, that the government is unaware of these issues, and your challenge here is to the Crown over a lengthy period of time including

administration is of different colours and stripes. So choices are made. Choices are made on the basis that it's a highly complicated business responding to that, and other social and economic needs that a government has to manage, and so you are dealing here with choices about healthcare,
 5 about immigration, about housing, about climate, all of which result, with a limited flow of funds. You're also dealing with issues of revenue. I mean we could solve all these problems if we taxed ourselves perhaps to 100%, because that's not going to be efficacious, is it. So how do you respond to Mr Hodder's really fundamental point here which is that it's a complicated issue that courts
 10 can't substitute for governments in pulling the levers of power and making economic and social choices.

MR SALMON KC:

With several answers. The first is the Court is not being asked to pull multiple levers, just as it would not be if it was asked to rule a torture-based confession
 15 unlawful.

KÓS J:

Well it's a very different issue I suggest.

MR SALMON KC:

It might be but I'll come to why I say it's less different than your Honour might
 20 say.

KÓS J:

That is a crisp and vindictive abuse of rights, as opposed to a highly, or in court you would say polycentric economic and social issue.

MR SALMON KC:

25 And that's my second answer. Mr Smith and scientists don't accept it's polycentric. They say that at trial they will persuade, or they would like the chance to persuade the Court that what appears to be polycentric is an illusion because there is no *Plan B*, to cite the case. Instead, all of those other centres in what my learned friend will say is polycentric are irrelevant because unless

this one thing is done, they are by the by. So the central problem with a climate change case, I've thought about this for a long time, the central problem is that humans can understand tortures. There are certain risks we viscerally identify, carcinogens in our children's food that will kill them 30 years from now, we'd
 5 react in moments, a law would be passed. Food would cost more. Some businesses would go out of business. It would be policy things but it's easy because the buyer understands torture, cancer, imminent individual death. We're good in the law at understanding peril for an individual, but systemic harms take evidence and context.

10 1120

What Mr Smith's case is, is that if he were given the opportunity then the courts would hear evidence that may persuade them, as we see in some offshore cases, that there's no polycentricity at all. There's an absolute baseline to
 15 survive that is being breached, at which there will be no income to pay tax on, there will be no democracy to balance, there will be no future elections, that will be that. That may sound in terrorem but it's not intended to be. It's what scientists are saying. They are literally now saying the loss of civilisation. So all of those other centres in the polycentric picture are predicated on the
 20 maintenance of civil society, all of them. Simple as that.

So he says the problem with a lot of these debates – and one of the problems that infects the political discourse in a democracy is there is just not time for people to sit down and look at that fact, that uncomfortable fact that kicking the
 25 can down the road and saying we need to have jobs in 10 years in this town or whatever it might be is illusory. That's what he says. The –

KÓS J:

But that's your critical audience. I mean we can't change the CCRA, the electorate can.

30 **MR SALMON KC:**

Yes. Well the Court can grant what relief the Court can grant if persuaded that it should. That relief will sound, it will be noticed and heard. One should

assume the Crown amongst others would listen to it, as will civil society. It does. There's value in a declaration of inconsistency, for example.

WILLIAMS J:

How does that submission that this is not polycentric at all, how does that sit
5 with your acceptance that there are many ways to address the problem, not a narrow range of ways?

MR SALMON KC:

I understand the question, I understand the question. It's that the Court is not
being asked to descend into the how to do it. So if I can put it this way, it is said
10 a declaration that X must be done and it's not being done, that the present setting has failed to meet the right to life is not one that gets into the detail of how to achieve it. Parliament remains possessed, and this is said in our pleading expressly, Parliament gets to decide how much of that it does with public transport, with planting native forests, with closing a smelter or whatever
15 it might do, even offshore emissions if they work, that polycentricity is the subcategory of how to achieve the cuts but there's not polycentricity around the fact we need the cuts. There's not – I would have to say respectfully to the Crown, the Crown doesn't even dispute that. The Crown's agreed in its inward and outward facing roles as a matter of fact that we are doomed if it
20 doesn't. So there's no controversy at all, and that's reflective of the fact that that is not a polycentric problem, respectfully.

WINKELMANN CJ:

And someone's going to take us to those Crown acceptances. Is that in the statement to the –

25 **MR SALMON KC:**

Well some are pleaded.

WINKELMANN CJ:

Right.

MR SALMON KC:

So the pleading is a place to see them, but they are just embedded in the Paris Agreement, in the UNFCCC, and so on.

WINKELMANN CJ:

- 5 And in the written statement of New Zealand given in relation to the advisory opinion?

MR SALMON KC:

Yes, without me being able to remember the exact words.

COOKE J:

- 10 Is another aspect of the polycentric idea the fact that inevitably to address climate change it requires international action, so it can't be achieved by New Zealand alone, whatever it does alone, it has to be an international relations issue. Doesn't that make it inherently polycentric?

MR SALMON KC:

- 15 No, well we say no and we – again Mr Smith seeks to prove at trial that New Zealand treating that as such is causing harm to other countries' steps too because someone is holding off moving because we are holding off moving, and –

WILLIAMS J:

- 20 Doesn't that make Justice Cooke's point?

MR SALMON KC:

- No, respectfully I'm not sure it does, because it has put up – the point Justice Cooke has made, we shouldn't act because others aren't or we shouldn't act because we're smaller, which one might see as polycentric, why
25 should we miss out on –

WILLIAMS J:

I don't think that was his point. The point is rather that New Zealand acting alone, even if it hits its targets, won't make a dot of difference. It's New Zealand acting with others of a common mind and establishing an appropriate model,
 5 which means there's lots of other circles going on to adopt the centricity point.
 1125

MR SALMON KC:

Yes. What I think I'm having trouble grappling with, and I might've, I might not have understood that first, those other centres are in other nations' minds.
 10 They're not part of New Zealand's decision making that other countries need to think. So polycentricity I think can only be an answer if it's Crown polycentricity, in the Crown's mandate.

WILLIAMS J:

But part of the Crown's, I think the point is, to speak for himself, I think the point
 15 is that Crown complies –

MR SALMON KC:

And no one else does.

WILLIAMS J:

And not enough others do.

20 MR SALMON KC:

Then we've – well obviously we're still lost, if not enough others do, they are the centres and the –

WILLIAMS J:

Well that's the point, that's the point.

25 MR SALMON KC:

But the other centres are worthless and have no weight if we still fail from climate change but –

WILLIAMS J:

Well they have all the weight because we fail from climate change. The point is that New Zealand's role is not just one of cutting emissions, it is one of promoting and setting an example for other international cities.

5 **MR SALMON KC:**

States.

WILLIAMS J:

States.

COOKE J:

10 Countries. States.

MR SALMON KC:

Yes that's right. It is pleaded, and Mr Smith argues and will seek to prove, with evidence, that New Zealand taking steps will prompt other countries to take steps. There's that first actor or first mover problem that New Zealand is helping
15 cause by not acting. But I think to try to answer Justice Cooke's question as best as I can, a lot of the considerations of which other countries will follow or not are not part of the polycentric analysis of what the various policy weightings are within the New Zealand Crown mindset. But within that mindset unless climate change is addressed, the making more dollars out of oil is worthless
20 because Mr Smith says there won't be a currency, so those other centres in the polycentric analysis are illusory unless climate changes result. That will be his case if allowed at trial.

KÓS J:

May I revert to your earlier answer on remedies. You say that a DOI,
25 declaration of inconsistency would be of value. Why? Why when at the end of the day the governments are still going to have to deal with this complexity of running a nation with all those choices that have to be made?

MR SALMON KC:

Well, one thing Mr Smith would say and would say if given a trial, is it's not actually that complex. It is economically better to take the steps that are mandated by scientists to deal with this. They are actually very simple
5 decisions. They're just harm incumbents and interest breach.

KÓS J:

But that's not a – that inference will not come from a declaration of inconsistency.

MR SALMON KC:

10 No, no, no. That's just an observation he makes that leads me to say a declaration of inconsistency will resound to some degree within the public and –

KÓS J:

Well you see you keep qualifying, you keep saying to some degree or of some value but it seems to me that there's a – given the very black case you
15 presented this morning, a declaration of inconsistency serves only to be another clarion call to be ignored.

MR SALMON KC:

And the reason I'm evading that opposition is that I respectfully suggest the Crown shouldn't be assumed to be likely to disregard a declaration on such an
20 important matter. We should credit it with giving it weight so the Crown –

KÓS J:

But it knows the problem. What does a declaration of inconsistency add to what thousands of people are saying to it?

MR SALMON KC:

25 Firstly, the fact that a Court of evidence and deciding something on the facts has identified it and called it out. There is –

KÓS J:

The IPCC is possessed of evidence. The Crown clearly gives great credence to the IPCC but for one reason or another it has not responded in the way you want.

5 **MR SALMON KC:**

Yes, and your Honour's point is the Crown might disregard a court declaration which would be an issue –

KÓS J:

10 Well it might say, look, we understand the problem, we've always understood the problem but there's nothing we can do about it. Or, we have many other competing demands including funding healthcare which mean that we can't do the things you want us to do.

MR SALMON KC:

15 Yes, and Mr Smith that by the time there is a, if there were a trial on this, that would be shown to be false. And so –

WINKELMANN CJ:

Right, so I think we've gone through that enough. Now, if we regroup at 11, it's 11.29, we've probably taken up quite a bit of your planned time, Mr Salmon.

MR SALMON KC:

20 I'm nearly done your Honour but if now's the time for a break I'll get my thoughts together and wrap up in five minutes.

WINKELMANN CJ:

Well so where are we going to next?

MR SALMON KC:

25 We're going to Mr Heard on Bill of Rights but if I could just have a few minutes after the break.

WINKELMANN CJ:

All right, we'll take the morning break now.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.50 AM

5 **MR SALMON KC:**

Thank you. Just wrapping up then, firstly on the declaration question from Justice Kós. Perhaps the thing I should've said first but will say now is of course that a declaration would be as to the legality and would determine the legality of what the Crown is doing. A declaration like that should and would resonate and have consequences in terms of reactions from both the Crown and voters. But in any –

10

WILLIAMS J:

Why would that be a declaration as to legality?

MR SALMON KC:

15 Because it's a declaration of a breach of legal rights.

WILLIAMS J:

But that's not the same as illegality. Clearly. It's the whole point of the middle ground of declarations of inconsistency in this country. What's been done is perfectly legal.

20 **MR SALMON KC:**

That is true for the Bill of Rights cause of action.

WILLIAMS J:

That's right.

WINKELMANN CJ:

25 Declaration of law anyway.

MR SALMON KC:

Yes, it's a declaration of law, but for the Bill of Rights it's still a declaration that human rights are being breached.

WILLIAMS J:

5 That's certainly true.

MR SALMON KC:

For the first cause of action I'm not sure that would be as straightforward, Sir, which is why I paused on that. So it would have at least the value that declarations of inconsistency have, as in, as in *Taylor* or anywhere.
 10 But, respectfully, I think on an issue like this, more, and more in particular because of the Court's institutional competence to deal with complex issues in a way that the democratic debate is failing to do, and on that point a very brief observation about the constitutional balance we have struck in this country.

New Zealand has had a rote incantation that we have parliamentary supremacy
 15 and we are the extreme Diceyan end, but like England that is just a decision judges have made, that we have parliamentary supremacy. I've mentioned the questions posed in *Taylor* and in *Fundamentals* as to whether there are limits to supremacy and it seems likely that there are at least limits around the rule of law to avoid a despotic tyranny by parliament.

20

But they probably go further and the torture is a good example. It's an example of one that, as Justice Kós said, is crisp and readily understandable. But there are others and I would just note two things. One is when the rubber hit the road in one of the other of the three countries on Earth that have no written
 25 constitution, and I note that repeatedly because we are an outlier in having a Parliament that can do this without a check. Globally we are the outlier, we are the Diceyan puritans, at least as perceived –

KÓS J:

Well it's not without a check, as I say, well that's the point of my argument with
 30 you. The check is the electorate.

MR SALMON KC:

Which again Sir is only partial, to give a couple of examples. One is tyranny by majority, which I think all of those commentators on Fundamentals would say the courts would or should check. So a democratic check on tyranny of the

5 majority will never cure those sorts of problems. It also assumes, and this is a point I was going to come to just briefly, there's a speech by, as she then was, the Chief Justice Sian Elias at Lord Judge Bingham's speech about the assumptions that underly Court deference to Parliament and a core one, this is I think a theme in the Lord Judge's speech as well as hers, a core one is that it

10 assumes a competent Parliament.

In that case what was being talked about was legislative competence rather than too much weight being put on the executive care around the passage of legislation and the like, which is part of our constitutional balance and which we

15 see Parliament as being checked only by the vote, for whatever the vote is worth. And as the then Chief Justice said, if Parliament starts getting frayed at the edges, my words, then the constitutional balance fails, and that resonates here because while that was about a process failure, an institutional failure by Parliament, a rights failure would have the same implications, in other words, it

20 is one thing for the courts to say on a fixable policy decision, a policy decision per se. Fine. That's outside our rubric. We're not institutionally competent to do that. On rights the Court is institutionally competent. It is indeed the only safeguard for a country with no written constitution against tyranny by the majority, for example, or against capture of democracies by donors and the

25 policy failures that are consequent on that. It is not safe to assume that democracy always remains perfect which is why we have checks and balances.

1155

So I just point to that as a reason why notions of separations of power require

30 care rather than absolutist statements, and the rote incantation that we have parliamentary supremacy here may become contestable at some point. I make two points about that if I might. England's the country we often think of that assumes it has parliamentary supremacy. As no doubt we all remember Lord Coke in *Dr Bonham's Case* (1609) 8 Co Rep 113b; 77 ER 646 (KB) just

said that was wrong and there were things the Court could do to tip over acts of Parliament that were, what were his words, against common right and reason or repugnant or impossible to be performed. The common law will control it and a judge such an act to be void.

5

Now there's been controversy about that, not in the States. *Marbury v Madison* 5 US 137 (1803) is just, arguably, an adoption of that. In the UK it's been retreated from but, indeed, after *Fundamentals*, Lord Woolf wrote in 1995: "If Parliament did the unthinkable then I would say that the courts would also be required to act in a manner that was without precedent." That's not controversial, respectfully, because of course we would expect courts to act in extraordinary and unprecedented ways when presented with extraordinary and unprecedented problems.

10

15 But I'll just note my learned friend put in his casebook *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 decision in which Lord Steyn, after noting that parliamentary supremacy was, in his words "... a construct of the common law. The judges created this principle." Which is right, it was a choice. So somewhere between Lord Cooke in Bingham's case and now, judges decided Parliament could do the unthinkable or at least that it was supreme. But three judges, three of the decisions in that House of Lords decision in *Jackson* all questioned the limits of that in the same way Lord Cooke did in New Zealand.

20

25 Lord Steyn went on to say the courts "... may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish." Lord Hope made similar comments, I can give the references if need be, but they are celebrated comments by them and caused controversy in some quarters: "... it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty." And then Baroness Hale as well: "The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law ..."

30

COOKE J:

But why do you need to take your argument into these fields? You're not asking the Court to invalidate an act of Parliament. You are just asking for a declaration of what the law is, aren't you?

5 MR SALMON KC:

We're asking for a declaration. I'm saying it in part because my learned friend has taken issue in particular with the first cause of action which I am going to come back to later, as if to say that it is upending parliamentary sovereignty and supremacy. So I'm anticipating that and just putting this front and centre as a
 10 live question what a modern democracy does when confronted with parliamentary failures.

I'm nearly done on this point but if I could just observe, there's a third country with no written constitution if we exclude Saudi Arabia which probably doesn't,
 15 I looked this up last night to check, and it's Israel, and of course we know what Israel did. The judges there decided that, in fact, parliament supremacy was limited and stepped in to intervene and the natural caution that we have that this might result in a populous reaction never eventuated. In fact, what the Court did was highly popular in Israel and is supported by the populous. That's
 20 not to suggest it happens here but it's rather an illustration that countries without a written constitution, without that check on Parliament and without judicial review available of any legislative decisions, have a live question to be asked if there's a point at which Parliament's misconduct or breach of fundamental rights might be policed. And Justice Cooke is right, we are not at that point yet,
 25 but I'd rather suggest we are not at that point in part because we should assume that the Crown will give proper weight to a declaration which is just a normal declaration of non-compliance or the declaration sought under the first cause of action.

1200

30

But that's a way to bring me back to where I earlier touched on my learned friend's submission at his paragraph 87 which is to say when suggesting that Mr Smith was overreaching his first cause of action, that while there have been

the suggestions in *Taylor* and *Fundamentals*, we are nowhere near the seriousness of the scenarios envisaged by Justice Cooke and I just want to test that before Mr Heard stands up. Those spectres that there was suggested would warrant judicial oversight of Parliament were tortured to get confessions, something that's happened throughout a lot of human history, it's bad. It's polycentric in the sense that there's a value in a confession. There was disenfranchisement of women for men, and there was depriving an ethnic minority of the right to vote. Those are all bad, but Mr Smith says if a trial is granted in this case and people are in a room looking at the realities of climate change, they will seem like small bear. That's not to be flippant about them, but it is to say that parliamentary misconduct in allowing torture pales beside parliamentary conduct in allowing the collapse of civilisation itself.

So if we, for a moment, envisage that Parliament passes a piece of legislation called the Evidence (Torture Enablement) Act, whatever it might be, but something that says while confessions are being obtained by torture, we recognise it's not ideal, we are making the torture lawful and the confessions admissible but will be setting up a commission to look at how we educate police to be gentler. That would be this case. It's polycentric. It's balancing the value of confessions against torture, but it's anathema because it's a breach of fundamental rights and the *Taylor* dicta and *Fundamentals* and indeed those English cases would all say, the courts would step in and say that is anathema and would not apply that law. That's what's said there.

The difference with climate change, and it's a problem with climate change litigation, is that it seems more complicated and the task for any climate change plaintiff is to seek the chance to lead evidence from experts because the plaintiffs and the experts, the scientists, are confident that if they were able to give evidence, and there was a proper dispute on the evidence, the Court would be persuaded it's not complex, and persuaded it's not polycentric and it is as simple and abject a failure and abdication or parliamentary responsibility to protect life and democracy at any other conceivable step.

So, where the Crown respectfully must be in those submissions that we're yet to deal with in detail is that the Crown rejects the notion that even for torture cases there would be any sort of oversight of Parliament. Mr Smith says those sorts of issues warrant a trial, as do the tikanga and Treaty implications here and as do fundamental trial questions like margin of appreciation. Thinking fast and thinking slow, if we think too quickly about the CCRA it looks like it's doing something. If time is spent looking at what it in fact does in the room it gives to fail to act and the history of failing to act it starts to look like a very serious failure, but the margin of appreciation analysis will be different once a court fully understands what is and is not being done, what could be done.

KÓS J:

To be clear about it are you saying the CCRA fails to do that, or the Crown's exercise of its powers under the CCRA? Are you running both?

MR SALMON KC:

Both. Both. Because the targets are bad.

KÓS J:

So the CCRA per se when it was enacted was in breach of section 8?

MR SALMON KC:

Yes, and has continued to be, but obviously the declaration is focusing particularly on now – the CCRA was implemented and did nothing to curb emissions for really two decades.

WINKELMANN CJ:

Is it better put that the CCRA on your case didn't cure the Crown's breach of section 8?

MR SALMON KC:

Correct.

WINKELMANN CJ:

Or does not presently cure the Crown's breach of section 8, as opposed to it itself being in breach of section 8? It's just –

MR SALMON KC:

- 5 Yes, the Crown's legislative response and lack of response is a breach of section 8.

KÓS J:

I mean I was responding to your, I believe (c), declaration of the CCRA is incompatible with section 8 and section 20.

- 10 **MR SALMON KC:**

Yes and that's because, I'm thinking aloud here in part Sir, but the targets now are in breach but we're now in 2026 –

1205

KÓS J:

- 15 But the target's not the CCRA, the targets are the ones that have been implemented under the CCRA.

MR SALMON KC:

The CCRA has mandated targets in certain sections. It's got the methane targets which are amended in December 2025 for example so –

- 20 **KÓS J:**

Can you just take me to that provision again?

MR SALMON KC:

It's going to take me a moment Sir.

KÓS J:

- 25 All right, we'll find it later.

MR SALMON KC:

It's an amendment to five, two letters, I'll have to find it Sir.

KÓS J:

Fine.

5 **MR SALMON KC:**

Unless the Court has any questions I'll hand over to Mr Heard on the Bill of Rights.

WINKELMANN CJ:

Thank you.

10 **MR HEARD:**

Tēnā koutou e ngā Kaiwhakawā. One of the bleak realities of acting for plaintiffs in climate cases is that the facts just get more compelling. The reality in this case also is that in the time since it was filed the law has changed significantly, so on both fronts the tax and the law. Mr Smith says that they're important
15 developments, important changes that support his claim and that confirm that it is, as we say, tenable.

Listening to your Honours this morning I thought probably the most useful thing that I could do at the outset is to talk about two things. The first is the proper
20 role of the courts in climate cases about alleging breach of rights, and the second is causation. The argument, of course, from the Crown being that whatever New Zealand does won't make a difference.

I'd like to do both by reference to the European Court of Human Rights Grand
25 Chamber decision in *KlimaSeniorinnen* which is in our authorities at 64. Perhaps because it's nice to have one more thing in common with Andrew Butler, I'm going to start at paragraph 367. One of the issues in that case was what is the proper role of courts, and particularly in that case a supranational court, and I'll come back to the significance of that later. But what

is the proper role of courts in cases alleging that there has been a breach of a protective right because of a State's action or inaction about climate change.

Now I've picked on Ireland for no particular reason. Its comments weren't really
 5 specific to it. There are themes, and there are a number of interveners, State parties, non-NGOs that were involved in this case. The case for Ireland was that yes climate change, reading from, looking at 367. Climate change is important. Actions critical. The threats urgent, but the response should be in effect a global response. "The Court could not engage in a form of law-making
 10 and regulation which would bypass the role of the democratic process and institutions in the response to climate change."

At the end of the first paragraph at 367: "They also submitted that, in accordance with the principle of subsidiarity" which of course is about the Court
 15 of Human Rights role as a supranational court, "and the wide margin of appreciation", which doesn't apply here, "the Court's main role in environmental claims was the procedural assessment of the decision-making process and only in 'exceptional circumstances' should the Court [consider the substance.]"

20 Went on to submit that the Convention on Human Right is, of course, important but it's the international treaties that matter, and the Court ought not to be taking a role, and indeed wasn't competent to talk about what was required in any given case by virtue of the international recognition of both the nature of the climate change problem, and what I will call the collective but differentiated
 25 responsibility of States to deal with it.

Ireland submitted that the case for the claimants was expanding upon the proper role of the courts, seeking to bypass the democratic process through which climate action ought to take place. If that was to be legitimate and
 30 effective and the application was inconsistent with the international framework. So, so far so familiar. My observation about this, without trying to take your Honours to many, many cases, is that in almost every one of them there is a version of this argument put forward on behalf of States. So this is by no means isolated, and the argument you're hearing here is by no means new.

1210

What's important, in my submission, is the very considered way in which the Grand Chamber, which I understand was 17 judges on this occasion, dealt with it.

If we turn to 410 of the judgment. The Court addressed at the outset what its role properly was noting at 410 the pressing "that climate change is one of the most pressing issues of the times". Also that: "The Court is also aware that the damaging effects of climate change raise an issue of intergenerational burden-sharing ... and impact most heavily on various vulnerable groups in society, who need special care and protection ..." which of course is a variation of the expression of being careful about majority rules decisions on these types of topics.

15

The Court acknowledges that it "can deal with the issues arising from climate change only within the limits of ... its competence under [the Human Rights Convention] which is to ensure the observance [by States of the Conventions].

At 412 the Court notes that: "Judicial intervention ... cannot replace or provide any substitute for the action which must be taken ... However, democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes."

We touch on this in our written reply submissions. The Bill of Rights Act applies to the legislature to criticise a claim that calls into question the rights compliance of a Bill is nothing more than exercising a right which Parliament has recognised, therefore exercising a right which as a matter of our democratic constitution, is available to anyone. It's simply no answer, respectfully, to say that there's a statute and therefore Parliament seems to think that rights have been adequately dealt with here. The question is always, are they?

“The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements ... always limited to the Convention.” And importantly here, the end of 412: “The relevant legal framework determining the scope of judicial review by domestic courts may be considerably wider and will depend
5 on the nature and legal basis of the claims introduced by litigants.”

At 413 the Court acknowledges that it must “must also be mindful of ... the widely acknowledged inadequacy of past State action to combat climate change globally entails an aggravation of the risks ... for the enjoyment of
10 human rights. So a situation “involves compelling present-day conditions, confirmed by scientific knowledge, which the Court cannot ignore in its role as a judicial body tasked with enforcement of human rights”.

So at 420 there’s a point which I’ll just touch on, on the way through. I’m going
15 to come back to the question of victim status under the European Convention and in relation to the Human Rights Committee’s jurisdiction. Victim status is a particular requirement in order for a claim to be admissible under the European Convention, and into the Human Rights Committee. Now what the Court’s observing at 420 here is that because of the way that the filter for
20 admissibility of claims had been set up in this supranational body where all domestic remedies have been exhausted before anyone can make a complaint, politically the parties to the Convention had decided that in order to be, in order for a complaint to be admissible one must – individual must be a victim. So you must point to an identifiable current harm, and I’m trying to paraphrase it here.

25 **COOKE J:**

Isn't it the position in New Zealand that, thus far at least, to bring a claim for Bill of Rights breach in New Zealand you actually have to have your rights breached?

1215

30 **MR HEARD:**

I do, and of course we say that is the situation here. Identify this, your Honours, because there is, as a result of this focus on individuals and harm to them, the

European Court has definitionally got incapacity in terms of dealing with the interests of future generations, and definitionally, in my submission, in New Zealand, we have the opposite because the common law of course affirmed in the Bill of Rights Act, recognises tikanga Māori, and it recognises the responsibilities to future generations, and I would add to that, that is not a novel concept to tikanga Māori. It's also seen in the Resource Management Act purpose provisions 5, 6, 7.

ELLEN FRANCE J:

I note in passing the Court does describe climate change as polycentric.

10 **MR HEARD:**

Indeed and doesn't shy away from it your Honour, doesn't shy away from it, and the question in that case wasn't, is this polycentric or not. What the Court was addressing here, and I'll come to in some detail, was what is the proper role of the courts given the nature of the problem, and the answer, just to jump to the chase, was not nothing.

WINKELMANN CJ:

If you go back to your earlier paragraph, before it goes on at the end of 413 to comment about how the issue raises wider issues of the separation of powers at the end of that 413.

20 **MR HEARD:**

It does and –

WINKELMANN CJ:

And it goes on to discuss those somewhere, does it?

MR HEARD:

25 It does, and I'll take your Honour to those shortly. To give your Honour the reference, if it's helpful, it's really 413, but when it comes to talking about the proper role of the courts, 540 and 542, 550, 567, and 573.

WINKELMANN CJ:

What paragraph did you start at, 450?

MR HEARD:

540 your Honour.

5 **WINKELMANN CJ:**

540, okay.

MR HEARD:

So squarely at issue in that case is questions around the proper role for the Court, because it's right in front of us at paragraph 425 I'm going to talk right now about causation as well. There, of course, were arguments raised, not for the first time, that States really ought not to be in front of that court because any one of them can't really do anything about the problem. The Court answers this at – well describes the problem at 425. It goes on to answer at 436, and this is a summary of its reasons above, but the Court is going to proceed with its assessment of the issues by taking it as a matter of fact that there are sufficiently reliable indicators that anthropogenic climate change exists. It poses a serious current and future threat to the enjoyment of human rights, and that States are aware of it, engaging with your Honour Justice Kós' observation, of course they're aware of it, they're aware of it and capable of taking measures to address it, which is part of our case. The relevant risks are projected to be lower if the temperature rise is limited to 1.5 degrees and if action is taken urgently, and that current global mitigation efforts are not sufficient. So there's a global problem, it's serious, it's engaging human rights.

At 439 the Court addresses what one might loosely term "but-for causation". "In the context of climate change, the ... issue of causation becomes more accentuated." A few lines down: "Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect ... in the context of local sources of harmful pollution." Which is the subject of other jurisprudence from this jurisdiction.

The observation, however, is that: "... from the perspective of human rights, the essence of the relevant State duties ... relates to the reduction of the risks ... failures in the performance [will] entail an aggravation of the risks involved, although the individual exposures to such risks will vary ... in this context, [the Court concludes that] individual victim status or the specific content of State obligations," more important for our purposes, "cannot be determined on the basis of a strict *conditio sine qua non* requirement." So but-for causation is ruled out in the rights context by this body.

10 1220

At 442 there's discussion about State responsibility and the fact that we have a collective problem in respect of which any individual State can only bear a differentiated responsibility. The Court of course records that undoubtedly that's the case "... the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States."

The States themselves have answered this problem. They have committed internationally over and over again to a regime that recognises there is a collective problem in respect of which they have a part to play and they've committed internationally to doing their part. So that commitment, in my submission, is difficult to square with an argument in a rights context that any one State can't make a difference. They've committed to making a difference. They've acknowledged that that difference may not be everything, it can't be everything, but that commitment is part of the unified decision to try and prevent this from leading us into the bleak consequences Mr Salmon has so eloquently described.

At bottom of 442: "The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not."

443 notes that is not novel, it “is consistent with the Court’s approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share”. So that’s the legal responsibility argument, if I can put it that way. The factual
 5 responsibility or causation argument in relation to State action or inactions at 444, the argument of course, the familiar it’s a “drop in the ocean”. Our drop doesn’t matter. Or if it does matter, at least we can’t be responsible to a domestic court in relation to whether or not a right has been breached by our drop in the ocean.

10

The Court notes, third line down: “... in the context of a State’s positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise. The relevant test does not require it to be
 15 shown that “but-for” the failing or omission ... the harm would not have occurred.”

WINKELMANN CJ:

Mr Heard, can I just ask you to explain the structure of how you’re going to take us through this, because I’m really interested in the kind of, in the more meta
 20 framing of this issue than you’re currently going. You’re going through, I think, from the causation end through to breach. I’m interested to know who’s going to be addressing the issue about the form of the declaration that’s sought and the competent, you know, meeting Mr Hodder’s point about whether it’s outside our current constitutional framework for the courts to make declarations, which
 25 I assume would be against effectively Parliament. It’s described as the Crown but is it the State? Or Parliament? And those more fundamental questions. Are you coming to those?

MR HEARD:

Well thank, your Honour.

30

WINKELMANN CJ:

You don’t have to go there straight away but...

MR HEARD:

Yes, that's helpful. Thank you.

WINKELMANN CJ:

But you're going to come to those, are you?

5 **MR HEARD:**

I am.

ELLEN FRANCE J:

So, I know we've got the road map but, just in brief, what is your intended course?

10 **MR HEARD:**

So what I was planning on doing your Honour was going from here to the Grand Chambers findings about institutional competence and measuring the breach of rights or not and I was then going to go back to road map.

WINKELMANN CJ:

15 So you're basically taking us through the entire conceptual framework for your claim through this case. Is that your thinking?

MR HEARD:

Well there's two things, your Honour. The question that's arisen this morning is about institutional competence of the courts, so I want to deal with that, and
20 then the second is well what does that mean for a claim under the Bill of Rights Act and I want to take your Honour through that.

1225

WINKELMANN CJ:

Yes, because the courts haven't dealt with a claim under the Bill of Rights Act
25 of this nature before.

MR HEARD:

No, and I acknowledge that, your Honour. There are two examples, just to give your Honour a signal now. In the supranational context there's *KlimaSeniorinnen*. In the domestic context there's a judgment from a land court
 5 in New South Wales in the *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21 case and both of those are the, in my submission, most recent developed judicial thinking about considering claims that emissions caused, enabled, whatever, by inaction of the State might breach rights and –

ELLEN FRANCE J:

10 What essentially do you say they tell us? Just so we know where you're going.

MR HEARD:

A number of things, your Honour. There's three types of climate cases in terms of breach of rights, if I can put it this way. The first is a case that says that the State has breached a right by doing something and Mr Smith's claim includes
 15 aspects of that, and I do need to come back to the Chief Justice's comments about relief, but what I was saying about that your Honour, in summary, is that a claim that the State has breached rights by doing an act is utterly uncontroversial and whether that's an act of Parliament or an executive act, there's jurisdiction to deal with it. It's not beyond any court's competence.

20

The next type of case where the Court of Appeal accepted that there was an arguable or tenable case is in relation to what's called a framework duty which is a feature of the European case that we're talking about now. That's not a case that the State did something that breached a right, it's a case that the
 25 framework established by the State was inadequate to prevent a breach of the right.

WINKELMANN CJ:

So, if we put it in simple concrete terms and staying away from climate change, say if the State only criminalised murder of some people in its society and not
 30 others it would be a framework duty failing the respective right to life?

MR HEARD:

Yes.

COOKE J:

And your broad point is that Mr Smith doesn't need to show a breach of the right
5 to his life caused by State action. It's sufficient to show that what the State is
doing is insufficiently protecting life.

MR HEARD:

I'll answer that in two ways if I can, Sir. On the negative aspect of the case
where we say the Crown did things that are a breach of the right, then what will
10 be necessary is to show in the way that the Court ultimately finds causation
works in a rights claim we need to show that there's been a breach of the right,
we're backwards-looking. In terms of the allegation that the Crown's framework
is wholly inadequate, then that's forward-looking and in that context the
jurisprudence says and we will say that what's necessary is to show that there
15 is a material impact on the risk of loss of life, relevantly to the section 8.
Same goes with culture, section 20, that's a lower bar.

ELLEN FRANCE J:

And, sorry, you said there were three types of cases, what's the third type?

MR HEARD:

20 The third type, your Honour, is a case where people have alleged that the
State's actions have deprived them of a life with dignity.

ELLEN FRANCE J:

Deprive them of what, sorry?

MR HEARD:

25 Sorry, the right to live a life with dignity. So in those cases people aren't alleging
that necessarily they're own life is imperilled, they're not alleging that the State's
framework isn't sufficiently protective of the right to life in its raw form if I can

call it that, they're more alleging that the conditions that I'm being subject to mean that I don't have a dignified life and that's a breach.

WINKELMANN CJ:

Well isn't that just a subtype of a second kind? It's just extending the right to
5 life to...

MR HEARD:

It could be both, your Honour. I mean the point for present purposes is that the right to live a life with dignity is perhaps the broadest formulation and so it's one where the contest is the sharpest as between Mr Hodder and ourselves and it
10 doesn't often appear bluntly because –

WILLIAMS J:

Doesn't – sorry, I didn't hear that?

MR HEARD:

Doesn't often appear.

15 **WILLIAMS J:**

Appear.

MR HEARD:

Reason being that there are other rights which are more directly engaged. If one wants to speak, for example, about a right to dignity in this case then we
20 might point specifically to cultural interests that are protected by section 20 of the Bill of Rights Act and that are protected under te Tiriti, which we say is an instrument that wants to be informative of approach under Bill of Rights, and rights to culture include the right to, together with other people of your culture, practice your traditional cultural way of life.

25 1230

KÓS J:

So to be clear are you advancing all three of your categories here, or the first two only?

MR HEARD:

- 5 Well there is a pleading, your Honour, that there has been a breach of the right to live a life with dignity. I think the better focus for our purposes is on the other formulations of the right to life, and the right to culture.

WINKELMANN CJ:

- Mr Heard, you started out by saying there are three types of climate cases.
10 I thought you were giving us some sort of taxonomy that encompassed all climate cases but you're not. Is this specific – do you mean, are you talking about your own claims, because I don't see that third one as a category all on its own. It seems to me to be a subcategory of the other two.

MR HEARD:

- 15 Your Honour, I'm trying to create – it is a scheme of sorts, not of our claim as such, but to explain, if I might, and this is done in the outline. The nature of the different cases at issue.

KÓS J:

Your third category is an extension of the definition of the right, isn't it?

- 20 **WINKELMANN CJ:**

Yes.

KÓS J:

It's a right to life incorporating dignity. The first two don't depend on the dignity extension.

- 25 **MR HEARD:**

Yes.

KÓS J:

Is that, I've got that right?

MR HEARD:

Yes.

5 **KÓS J:**

Thank you.

WINKELMANN CJ:

So you aren't giving us a meta taxonomy, you're just talking about this case?

MR HEARD:

10 Well –

WINKELMANN CJ:

Well say he's breached a right by doing something, that's a general kind of a claim. Another one is framework duty, that means the State has failed to provide sufficient framework to protect rights, that's another very broad
15 category, and then suddenly – I'm finding it hard, you're at human dignity, which is an extension of one right.

MR HEARD:

That's fair your Honour. I suppose in my mind I've put it in a separate category because the cases don't tend to be about it. But you're probably right in terms
20 of taxonomy. It's an extension of the first right which one might say also need to be protected in a framework case.

WINKELMANN CJ:

Right. So these are three types of claimant cases which are based on rights?

MR HEARD:

25 Yes.

WINKELMANN CJ:

But really two types.

MR HEARD:

We'll call it two and move on.

5 **COOKE J:**

Just one other question. The decision of the Human Rights Committee in *Billy v Australia* UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) found that there was no breach of the right to life because the State could still take measure, including relocating the Torres Islanders to the Australian mainland.

10 So that's a different approach to causation in the European Court, is that fair?

MR HEARD:

Your Honour, in *Billy* the Court, in my submission the Human Rights Committee essentially moved on to deal with the alleged breach of the right by a failure to adequately provide for adaptation, and in that case, your Honour, there was a temporal dimension to it. Whether or not there's a straight line between that case and this case, we would say no.

15

COOKE J:

But there seems to be a different approach to causation taken by the Human Rights Committee than the European Court.

20 **MR HEARD:**

Well the Human Rights Committee your Honour is – and I want to draw your Honour's attention to one thing if I might, and I'll do it by reference to the *Waratah* decision I was going to take your Honour to, which is tab 97 of the appellant's authorities. Now factually, your Honour, in relation to *Billy* the State at that point had a timeframe of between 10 to 15 years to take action, so on the facts, even putting to one side causation, we say this case is very different, and that there's effectively no time to act Sir. So on the facts that's a very different case.

25

In relation to the jurisprudence from the Human Rights Committee, one thing that the Land Court of Queensland identified –

WILLIAMS J:

New South Wales?

5 **WINKELMANN CJ:**

Queensland.

WILLIAMS J:

This is *Waratah*?

MR HEARD:

10 Yes your Honour. At 1528 to 1536 –
1235

COOKE J:

Just so I understand, what's the status of this Court in the, what's a comparable court in the jurisdiction to this Court?

15 **MR HEARD:**

My conception is the Environment Court your Honour.

WINKELMANN CJ:

It's got a different kind of a jurisdiction. Partially it's compensatory, partially it's purely recommendatory for a decision-maker.

20 **MR HEARD:**

In this context yes, that's helpful, thank you your Honour.

WILLIAMS J:

That's the same as the Environment Court.

WINKELMANN CJ:

25 Well it's less powerful than the Environment Court.

MR HEARD:

In this case the role of the Land Court was statutorily to make a recommendation to a Minister on whether or not to grant a permit to mine for coal. The Judge needed to consider in that context whether or not granting a permit would be consistent with obligations under the relevant human rights legislation, and in that case the Court determined that it would be inconsistent with rights to grant the permit. To close the loop on that I understand that the Minister accepted that recommendation and did not grant the permit, and that that was the end of the application.

10 **WILLIAMS J:**

Is it in your materials?

MR HEARD:

It was late added Sir. An oversight, apologies for that. It was 97 of our authorities.

15 **WINKELMANN CJ:**

But much of the content of this decision is obiter, isn't it?

MR HEARD:

It's a long decision your Honour. I wouldn't necessarily want to accept that.

WINKELMANN CJ:

20 All right, well my recollection is that most of it is, but there we are.

MR HEARD:

So the Land Court there at 1528 and following talks about the international jurisprudence. I'm sorry, I might have taken your Honours to the wrong reference. Here we go. At 1477, apologies. So the Court there at 1477 discusses a temporal dimension of the claim, about which there's no consensus. The argument for the defendants again was all of this is going to happen in the future. The Court's response, and the opponent's response there was to say well this was a negative rights case. We're saying that if the State

does this affirmative act, then it will be breaching our rights. The Court there says that the temporal dimension may be relevant to a case which invokes the positive obligation, i.e. a framework case. But the relevance to a negative case is not obvious. In a positive case if, it's a big if, there remains a possibility of taking action, the failure has not yet occurred. "In a negative case, it is not a failure to take action, but the action [that's an issue]."

WINKELMANN CJ:

I must admit I'm really at a loss as to what, as to the structure of your argument here Mr Heard. We seem to be going around the edges of a thing, whereas it would assist me to have a kind of a bigger picture of where we're heading, which takes me back to the –

MR HEARD:

Thank you your Honour, and I'll just note for his Honour Justice Cooke that in *Waratah* there was a number of arguments based on international jurisprudence. The Court's observation is 1354, that it's useful but must be approached with great caution. In the middle of the paragraph: "Most international and foreign human rights instruments are remedy-based, requiring the claimant to establish 'victim status'. Many decisions do not consider the merits because admissibility requirements are not met." And with that strong caveat which is repeated later, his Honour goes on to summarise –

WINKELMANN CJ:

Her Honour.

MR HEARD:

Her Honour, at 1480, the propositions that emerge from the international jurisprudence. So coming back to your Honour's point about *Billy*, my response to that is twofold. One, it was a temporal dimension case and we don't have time. Two, the international cases do need to be approached with some caution because they are not domestic courts. The HRC and the Grand Chamber are both supranational courts, both of which are tasked generally with a review than a first instance exercise, if I could put it that way.

1240

KÓS J:

I think we need to get to the question of proper role of courts and institutional competence, Mr Heard, before too long. We're eager to get there as you can
5 tell.

WINKELMANN CJ:

So, if you could just give us an indication of the structure of how you're going to take us through, because you're carrying the weight of the Bill of Rights Act part?

10 **MR HEARD:**

Yes.

WINKELMANN CJ:

But Mr Butler and Mr Kirkness and Ms Yang are going to also talk about this to some extent so we just wanted to know how this is all going to work.

15 **MR HEARD:**

So, coming to the institutional competence of the courts I am going to address your Honours on that and then I'm going to go back to the outline. I'm not intending to go through any authorities with you on the outline, I just want to talk through the argument. If there's anything particularly you don't need to hear
20 from me on, on that then I'm more than happy to hear that.

WINKELMANN CJ:

Well, not in a position to say that at the point.

MR HEARD:

So, on institutional competence and margin of appreciation, at 542 of
25 *KlimaSeniorinnen*.

WINKELMANN CJ:

Well can we just step back a moment from that. So, the courts have said that they will make declarations under our Bill of Rights Act.

MR HEARD:

5 Yes, your Honour.

WINKELMANN CJ:

And to date they've said they'll make declarations of inconsistency in relation to legislation. You're asking us not to make declarations of inconsistency, or yes partially, but also just declarations of a failure to provide a framework?

10 **MR HEARD:**

What we're seeking, your Honour, in relation to the Bill of Rights Act is set out –

WINKELMANN CJ:

Yes, but I'm asking you conceptually. So there's some – it's more than just a declaration of inconsistency, isn't it? It's a declaration of inconsistency insofar
15 as the CCRA is concerned?

MR HEARD:

The claim raises a series of allegations that the Crown has breached rights by its positive acts and those are noted at 3(d) of the outline.

WILLIAMS J:

20 3(d)?

MR HEARD:

Sorry, that's the positive – sorry, 3(e) is the negative aspects of the pleaded claim.

COOKE J:

25 Do you mean the outline?

MR HEARD:

The outline.

WILLIAMS J:

There is no 3(e).

5 **MR HEARD:**

Yes, sorry your Honour, we've had a numbering problem.

WINKELMANN CJ:

I have a 3(e).

MR HEARD:

10 So the heading at the bottom of page 3 is: "Negative aspects of the pleaded claim," and we say that the: "Crown's own emissions –"

COOKE J:

Oh, yes.

WINKELMANN CJ:

15 So that's 3(c).

MR HEARD:

It is.

WINKELMANN CJ:

"Negative of the ..."

20 **WILLIAMS J:**

Right. There's two 3s.

MR HEARD:

There's two 3s, there's a (c) and then there's some missing letters, so I'm sorry your Honour that –

ELLEN FRANCE J:

So, sorry, which one are we talking about?

COOKE J:

Page 3.

5 **MR HEARD:**

We're talking about in the outline, your Honour, of oral argument which we handed up this morning –

WINKELMANN CJ:

Page 3.

10 **MR HEARD:**

We're on page 3 at the bottom. The bold heading is: "Negative aspects of the pleaded claim."

WINKELMANN CJ:

15 So those are positive acts you say that are inconsistent though: "Crown's own emissions; setting inadequate targets ... reforming the ETS so as to weaken its effectiveness, breaching ... the methane target." Right.

MR HEARD:

And "licencing new fossil fuel exploration ... and investing in fossil fuels". So, those are all acts that we say were a breach of rights and –

20 **KÓS J:**

And if each of those were pleaded – no, if each of those were the subject of a separate judicial review proceeding it might be a loss less controversial than the huge umbrella case that we're dealing with today. Is that a fair point?

MR HEARD:

25 Well one could divide a case up into smaller cases, Sir. That's certainly the case I would –

KÓS J:

Yes, this is your safest ground, firmest ground isn't it, 3(c)?

MR HEARD:

It's the least controversial, Sir, certainly.

5 **KÓS J:**

Yes.

1245

MR HEARD:

And what I would say, I would resist the proposition that judicial review would
10 be more straightforward having been involved in a number of those cases,
including one with his Honour Justice Cooke. So, in every case where one
seeks to hold the Crown to account for its acts or emissions in relation to climate
it's hotly contested.

KÓS J:

15 Well, Mr Heard, if you found those cases not very firm ground, bundling it all up
together in a big case like this is hardly going to make your ground any firmer.

MR HEARD:

Well they're different cases, Sir.

WINKELMANN CJ:

20 Any case Mr Heard, can we just go back to your outline. So, the Bill of Rights
Act, you were just giving us this overview of your claim, so it consists of having
breached rights through positive acts and you seek a declaration to that effect?

MR HEARD:

Yes, the declaration sought is general, your Honour.

25 **WINKELMANN CJ:**

Right, okay.

MR HEARD:

I'm not suggesting the declaration to focus specifically on positive and negative aspects of the Crown's breaches. The declarations sought cover all of them. 96(a), (b) and (c).

5 **WINKELMANN CJ:**

Okay, so, first breached rights by positive acts then, secondly?

MR HEARD:

We plead that the Crown's failed to implement a framework which is capable of protecting rights. Those are summarised the first full paragraph on page 4 and
10 we say that that framework's inadequate both for Crown emissions, which are not covered by the CCRA, and at this point in time are no longer – excuse me, that they're not measured, the Crown does not measure its own emissions and best I'm aware it's got no target to reduce them. The second aspect is national emissions and the relevant framework there is the CCRA.

15 **WINKELMANN CJ:**

Where are you in your outline?

MR HEARD:

Page 4 your Honour. First full paragraph, (d).

WINKELMANN CJ:

20 (d)?

MR HEARD:

(d).

WINKELMANN CJ:

Yes.

25 **COOKE J:**

To get back to the Chief Justice's question about the overall framework, isn't what you're doing inviting the Court to develop the Bill of Rights jurisprudence

so that the Court can make declarations that state actions breach Bill of Rights duties irrespective of the particular rights of individuals that are affected by those breach of duties and that the breach of duties is performed by the collective response to climate change and international obligations?

5 **MR HEARD:**

Just to make sure I understood your Honour's question. If I understand it correctly, your Honour's saying well the claim pleads the Crown as opposed to executive A, executive B, or the legislature, or the judiciary. And in that sense, yes.

10 **COOKE J:**

And in another sense because it's irrespective of an infringement of any particular individual's rights.

MR HEARD:

No your Honour.

15 **COOKE J:**

Focusing more on the duties of the Crown?

MR HEARD:

No, we say that the rights have been infringed.

WINKELMANN CJ:

20 Okay, so there's two parts, only two parts. Is it breached rights by positive acts and breached rights by failing to implement a framework and those particular rights sit under those frameworks?

MR HEARD:

Yes.

25 **WINKELMANN CJ:**

And the declarations you seek are against, you say the Crown but is it effectively against the State in the sense of the thing, made up all the branches?

MR HEARD:

Yes.

KÓS J:

Well your paragraph (a) of the relief is a declaration the Crown has acted in a
5 manner incompatible with section 8, and (c) is a declaration that the Act is
incompatible.

MR HEARD:

Yes.

KÓS J:

10 You're not suggesting you're happy with those declarations? You're not
changing them are you?

MR HEARD:

Those are what we seek, Sir, that's the draft claim.

KÓS J:

15 Yes, yes.

WINKELMANN CJ:

My only query was with the Crown but –

KÓS J:

Yes, so some is the Crown and there's one against the – in relation to the Act.

20 **WINKELMANN CJ:**

Right, okay, and how do you say that fits with the current jurisprudence about
the Court's role under the Bill of Rights Act?

1250

MR HEARD:

25 Well, your Honours, if the – to engage with Justice Cooke's observation, we do
say that it's proper for the Court to consider the actions of the State collectively

in relation to climate change. As Mr Salmon has identified this morning, one of the reasons why there are numerous particulars, a particular we say breach by the State, is because the Crown asked for them. Fundamentally the case is the State has the power to take action which is consistent with rights, and the State
 5 has breached those rights, and there are particulars of how it is breached, and they may be attributable to different emanations of the State.

WINKELMANN CJ:

So the State has an obligation to take action in relation to climate change?

MR HEARD:

10 Yes.

WINKELMANN CJ:

And were you taking us to the *KlimaSeniorinnen* to show us a court operating in a similar kind of a space, because this Court, the courts of New Zealand have not operated in this space in relation to the Bill of Rights Act, which is a relatively
 15 new thing in New Zealand in law time, and in that case the Court was being asked to make findings that a State had failed to provide a proper framework, was it?

MR HEARD:

Yes.

20 **WINKELMANN CJ:**

And the European Court of Human Rights is not so far as domestic courts, domestic States are concerned, are operating fundamental law. Its decisions don't bind the State in the sense of they have to act on them. They're just recommendatory or stating what the law is, as you would have us do. Is that
 25 also the point?

MR HEARD:

I'd want to consider that your Honour. My understanding, at least in terms of the UK, is that's correct. That there's a –

WINKELMANN CJ:

Parliament can ignore what they say?

MR HEARD:

At a national level courts, for example, and this is mentioned in the *Plan B*
 5 decisions, courts have to have regard to, and it maybe stronger language, the
 decisions of the Grand Chamber.

COOKE J:

The other thing that they did, and yet you backed off this a little bit, but they also
 took a less prescriptive view of causation in terms of individuals having to show
 10 that their rights had been breached because of the collective nature of climate
 change in the passages you've actually taken us to already.

MR HEARD:

In the *KlimaSeniorinnen* case the ultimate conclusion of the Court was that
 because the requirements of the Convention are individual, that the individuals
 15 didn't have victim status. The Court went on to, from what I understand,
 develop law quite considerably in terms of its jurisprudence to give standing to
 an association to sue on the basis that its modus operandi was to protect the
 interests of older people who are directly affected by breaches of the right to
 life, and the other right at issue.

20 **COOKE J:**

And the finding that the States were in breach of their Convention duties?

MR HEARD:

Yes.

COOKE J:

25 With that looser view of causation because of its very, the very nature of climate
 change?

MR HEARD:

Yes. And, your Honour, I don't want the Chief Justice, I don't want to take you back into a case that may not be useful to talk about.

WINKELMANN CJ:

5 Oh *Waratah*. No, please do.

MR HEARD:

I was going to draw your Honour's attention to paragraph 550 of the *KlimaSeniorinnen* case.

WINKELMANN CJ:

10 Oh *Klima*. I was just trying to understand why we were going to quickly and in such a deep way when we hadn't addressed more fundamental structural issues. But I feel I've got a better sense now of what you're saying.

MR HEARD:

15 So in 550 the Court addressed what in that case was required for a State to remain with the margin of appreciation which applies in that jurisdiction in relation to whether or not a State has complied with its obligations under the Human Rights Convention. There's a list of factors.

COOKE J:

Doesn't the New Zealand legislation meet all these requirements?

20 1255

MR HEARD:

25 Well that's the question your Honour, and just taking the claim at its most straightforward, and treating it as if it's only a claim about whether or not the CCRA is consistent with the Bill of Rights Act, then that is the question for trial, and the proposition from our side is that that's just a justiciable question. Now whether or not a framework in and of itself is capable of meeting a right depends, as this Court held, that depends upon the State having actually set a target that's capable of meeting the right, having actually set a budget that's,

for the emissions of the State that's consistent with that target, and having actually set some, set in place some means of meeting it, and at (d) the targets need to be continuously adopted in accordance with best available science. And at (e) the State must "act in good time and in an appropriate and consistent
5 manner".

Then at 567 there's a response from the Court to a submission from the State in that case to the effect that we've got some legislation on the boil. We want to pass it. It's sort of hung up, but we're going to do it in good time. The Court's
10 response to that is well given the present urgency the Court has got difficulty accepting that their legislative commitment to adopt concrete measures in good time satisfies the State's duty.

COOKE J:

So it wasn't the issue in this case that Switzerland didn't have a target?

15 **MR HEARD:**

No Sir, Switzerland did have a target. It was an old target. It was out of date. It was inadequate. They had legislation which was on the books from a decade or more previously. So there had been a target set, and 573 your Honour, which is the conclusion on these matters, and illustrates the way the
20 Strasbourg Court approaches the issue of State responsibility in a framework sense, and the Court held there were critical lacunae in the Swiss regime. There was a failure to quantify through a carbon budget national emissions. Failed to meet prior emissions reduction targets, and failed to act in good time in an appropriate and consistent manner, and the implementation of a
25 framework, and by doing so it exceeded the margin of appreciation.

So that's an example, your Honours, of how we see the courts can and should grapple with issues of climate.

WINKELMANN CJ:

30 And what paragraph was it, separation of powers was 540 onwards, you would have had us back to that. Is it convenient to go there now?

MR HEARD:

Where I was going to go from there, your Honour, was exactly where I've gone to talk about the Court's rulings on what the margin of appreciation required, what the Court's role required, given the separation of powers, and I've taken
 5 you to the application at 542.

ELLEN FRANCE J:

And what do you understand by the Court's description in its summary of the principles of the Court's role is a subsidiary one?

MR HEARD:

10 Primary responsibility under the European Convention for compliance with the Convention falls to the domestic courts. The European Court of Human Rights only has a role to the extent allowed for under the Convention is the first point. But the second point to the extent that domestic remedies have been exhausted. It only has a role in respect of individual claims who have been
 15 damaged. It does not, and this is in the Convention, it does not have a role in assessing claims that are, for want of a better word to use an equivalent, representative actions. It's all about individuals, individual humans. It issues decisions that are binding within that rubric. However, its subsidiary to the primary parties to the Convention. That's my understanding of it. The primary
 20 responsibility falls on the domestic authorities and the domestic courts, and I took your Honours earlier to the passage where the Grand Chamber had drawn that distinction itself, identifying that the role of domestic courts could well be different in the Strasbourg Court.

WINKELMANN CJ:

25 Mr Heard, I see it's 1 o'clock, so we'll take the luncheon adjournment.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

MR HEARD:

Thank you, your Honour.

WINKELMANN CJ:

5 Mr Heard.

MR HEARD:

I was intending, your Honour, to first come back to her Honour Justice Frances' question about supranationality having clarified something.

WINKELMANN CJ:

10 Yes.

MR HEARD:

And then go on to work my way through the outline which I have there. On the first point, your Honour, another element of the Strasbourg system is that the decisions of the Strasbourg Court are binding as between States. I understand
15 that in terms of a mechanism for enforcement if you like for want of a better word, there's a reference back to a group of ministers for Europe in the European Parliament, that's a political body so in terms of precedential effect domestically within any given state, that's going to be a matter for domestic law.

WINKELMANN CJ:

20 So, Mr Heard I think you might need to speak up a little bit and perhaps pull your microphone a bit higher, although...

MR HEARD:

Yes, sorry your Honour.

WINKELMANN CJ:

25 I don't know the microphones are so short but...

MR HEARD:

No that's okay. I – post-lunch. So the United Nations Human Rights Committee of course has got a similar conceptual framework in the sense that if there's a recommendation from the committee in one of its decisions then it's a
5 recommendation to a state which is –

WINKELMANN CJ:

It's the United – sorry, which Human Rights Committee?

MR HEARD:

The United Nations Human Rights Committee.

10 **WINKELMANN CJ:**

Right.

MR HEARD:

And as I understand it the State is expected to report back on compliance with any recommendation but fundamentally, à la *Quilter*, it's not a binding process.

15

So, coming back to the outline, we've discussed at (d) the positive aspects of the claim, and I've set out at (d) there the elements of a rights compliant climate change framework as identified in *KlimaSeniorinnen*, which I won't repeat. In terms of the origin of a New Zealand positive obligation under the Bill of Rights
20 Act that's a matter at issue between us and raised on the respondent's notice of intention to support on other grounds, we say that the basis for a positive obligation is in the Act itself (a) the long title affirms the rights and confirms that the purpose of the Act is to protect, and promote human rights and fundamental freedoms.

25

The next point that we say is that whether and how a right is breached and what the right response is to prevent a breach depends upon the right, the conduct, and the context. And, as was held in *Wallace v Attorney-General* [2022] NZCA 375, [2022] 3 NZLR 398, what's required to protect the right to life depends
30 specifically on that context, including the requirement that the right to life is not

to be deprived otherwise than consistently with the principles of fundamental justice and, as held in *Wallace* that can mean that there can be a positive obligation on the State in order to prevent a breach of the right.

1420

5

The obvious point in relation to the right to life of course is that once it's gone it's gone and the proposition that the State can stand by and watch it go is, at its heart, the foundation for a positive duty in *Wallace* and in the New Zealand cases. I mention those at 7. The first case mentioned is in *Re J (an infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) where there was a refusal of treatment, specifically a blood transfusion, and the Court held that it wasn't a breach of rights to intervene and have the child effectively appointed a ward of the State in order to administer treatment and indeed that that was consistent with the right to life.

10

15 **WINKELMANN CJ:**

I still can't hear, you're fading away there Mr Heard.

MR HEARD:

Sorry, your Honour.

WILLIAMS J:

20 The problem is the mic, it's not very good.

WINKELMANN CJ:

It is a terrible mic.

WILLIAMS J:

It's not multidirectional so you've got to have it right in front of you or we won't
25 pick you up.

MR HEARD:

Thank you, your Honour. That mic, not this one?

WILLIAMS J:

Yes, yes, no not you – well the, you know.

COOKE J:

Wrong mic.

5 **WILLIAMS J:**

Well, that remains to be seen.

MR HEARD:

I shouldn't've asked, I shouldn't've asked. Thank you. There are a number of cases in New Zealand that have reflected the, in concept at least, it wasn't really
10 thrashed out in the authorities but in my submission the case about the blood transfusion and the case about dialysis, implicit in both of them was the proposition that the State can have a positive obligation to protect the right.

In terms of what is a limitation or interference with the right, in the climate
15 context the risk is to be considered in light of the grave risk of inevitability and irreversibility of climate harm and it is a key part of our case that any reliance on technologies that are yet to be invented is misplaced. There is no feasible ability to reverse emissions.

20 The precautionary approach to what's called imminence is appropriate, we cite a European case on that, *Cannavacciuolo v Italy* App nos 51567/14, 30 January 2025 (ECHR), which I won't take you to. But what we say is required to establish a breach is that the right is being limited. That's the first step of course. Whether or not a right has been so limited, we say is a trial issue, as
25 is any suggestion that a limitation is reasonable. Paragraph 3(h) notes again the framework cases, points I've taken your Honours to already. *Cannavacciuolo* I note in paragraph 3(i) because of the Court's acceptance there of the relevance of the precautionary approach and the ruling that authorities can't rely on a failure to comply or delays in complying with a duty in
30 order to deny its very existence, in other words, the State there took the position that, similar to this case, timing means that it's not the State's issue.

I mention here *Plan B*. Now, on the facts that case is distinguishable. It was a case that was brought, prosecuted by a lay litigant.

WILLIAMS J:

He was a lawyer though, wasn't he?

5 **MR HEARD:**

Sorry your Honour, that may well be right. Perhaps litigant in person's more accurate in that case. In any event, the framework claim was not upheld on a first instance permission ruling. That preceded the ruling in *KlimaSeniorinnen* and it was a ruling that was made on the facts as recorded in the judgment on the basis that the United Kingdom was meeting its emissions reductions targets and in that case there was no challenge by the claimant to the targets that had been set under the UK's framework and there was no allegation that there had been an active breach by the Crown, so the negative duty case. It was simply a case that said the framework doesn't measure up without challenging the targets that underpin that framework.

1425

KÓS J:

Well what was the challenge to, then?

MR HEARD:

20 It was to the sufficiency of the framework but the Court specifically recorded, your Honour, that the claimant for whatever reason didn't put in issue whether or not the target itself was adequate or sufficiently rights-protective.

KÓS J:

Nonetheless it was a sufficiency fail in some respect?

25 **MR HEARD:**

It was and why the claimant framed the claim in that way I can't say.

WINKELMANN CJ:

Well what was the insufficiency? There must have been some explanation or else it's just an irrational claim. What was the insufficiency of the framework?

MR HEARD:

- 5 The claim was that there were a number of decisions made under the framework, that they were the specific things that were put in issue by the claimant, a number of decisions made under the framework that were inconsistent with rights, all of which indicated, as I apprehend it, that the claimant said we'll look at those particular decisions, they demonstrate that the
- 10 framework's inadequate. So it would be about the sufficiency in that respect, you know, to the extent that the framework enabled decisions that the claimant thought were not sufficiently protective, the claimant was saying that framework's a breach of my rights.

KÓS J:

- 15 Are you suggesting that Justice Bourne would've reached a different decision if targets had been an issue?

MR HEARD:

- Well, I can't speak for the English court your Honour. I can certainly say that for whatever reason they were not in issue and we know also of course that
- 20 *KlimaSeniorinnen*, they were an issue, and the Court there had no difficulty with the proposition that that was a potential breach of rights, in that case it was a breach of rights, and also that in respect to the setting of targets as opposed to implementation there was a reduced margin of appreciation.

KÓS J:

- 25 All right. It just seems to me that *Plan B* is not a case you can just distinguish away on its facts. I mean it stands for a bigger constitutional point than that and it is in large part the institutional competency of this Court to strike down a, well not to strike down but to declare that a framework is incompatible with human rights.

MR HEARD:

I understand the point you're making, Sir. In terms of the case and whether it's distinguishable on its facts, the things that we do point to, I understand your Honour's comments on that but in this case it's pleaded that the targets
 5 which we've talked about are insufficient. It's also pleaded that there are active breaches of rights by the Crown through its decision-making and it's also pleaded that the Crown, through its own emissions, has breached rights. The last point in particular is simply outside the CCRA.

So, *Waratah* is, as I mentioned this morning your Honours in my submission, a
 10 very useful illustration of the approach that a common law court in a very similar jurisdiction to ours can take and challenges to State action on the basis of rights. I'm going to take your Honours to a few paragraphs from the judgment if I might, which is at appellant authorities 97, tab 97, where I'll start slightly out of sequence because for some reason the content of the right to life isn't recorded
 15 until page 277 of the judgment. Below para 1451, so that's 277 of the judgment. The: "*Right to life of people in Qld ...*" It simply stated: "Every person has the right to life and has the right not to be arbitrarily deprived of life." The Court went on at 1452 to note that: "... drawn from art 6(1) of the ICCPR and confers both positive and negative obligations."

20 Coming back to the Chief Justice's comments earlier about obiter. In one respect you might say that's an obiter comment because the claimant or opponent of the permit in that case disclaimed any effort to rely on positive obligations. So one might say that that wasn't strictly in issue.

25 1430

So paragraph 1452 is the substantive right. Paragraph 1301 is how the right is engaged in the case. Relevantly, acts of the State may be compatible with human rights if they don't limit the right or if that limit is justified, and there's a
 30 recitation there of section 8 of that statute, which – it's not of course in the same terms as section 5 of the Bill of Rights Act, but as we all know the criterion there is whether any limit on a right is reasonable, and I would say that that amounts to much the same thing. Section 13 is to similar effect and it's quoted at

paragraph 1303 there, a human right can only be subject “to reasonable limits that can be demonstrably justified”, et cetera.

Turning to paragraph 1320, there’s the landing point of a discussion about causation in the judgment. The applicant for the permit in that case had argued that on the basis of private law tortious claims, specifically *Minister for the Environment v Sharma* (2022) 400 ALR 203, what was needed to demonstrate a limit was effectively common law or private law causation. Paragraph 1320 records the applicant is relying on the reasoning of Allsop CJ “about the causal connection”, and paragraph 1321, her Honour’s conclusion that the applicant’s submissions “misstate the Court’s function” in a rights context.

Next para: “The Court is not required to find the applications ‘would in fact cause a given level of GHG emissions that causes harm and limits the human rights relied upon.’” Over at paragraph 1327: “Administrative and civil proceedings are fundamentally distinct in purpose, process, and effect.” And quoting from *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398: “The common law concept of causation is concerned not only with determining cause and effect but also attributing legal responsibility. This injects and evaluative element into the inquiry. The Minister’s task ... is a factual inquiry about the impact of an action.”

COOKE J:

But isn’t the only point being made here is the Court’s dealing with a different question, which is whether a permit should be issued? Isn’t that what it’s saying?

MR HEARD:

The Court’s dealing with a question – in this section of the judgment, your Honour, the Court is dealing with the question of whether or not the permit would involve the State sanctioning a breach of rights.

30

So coming over to paragraph 1480, her Honour there examined the international jurisprudence, the science in relation to climate change, all of

which I've jumped over in the interests of time. The propositions that the Court records there as emerging is that of course a generous interpretation has got to be given to the right to life, that humans in their physical environment are interconnected, and: "The right to life can be violated by a life-threatening situation, without the loss of life occurring." The last point made is that environmental degradation can of course constitute a serious threat to the ability to enjoy the right to life, and we now have subsequent decisions from a number of bodies, including the ICJ, reaffirming that.

1435

10 At paragraph 1481 the Court turns to the question of whether or not the limit of the right is arbitrary, and paragraph 1488 summarises the limit – sorry, your Honours, paragraph 1486 just above that, last sentence four lines up from the bottom: "Assessing the economic benefits and environmental and social costs consistently, the limit is unreasonable in the sense of being disproportionate because it extends beyond what is reasonably necessary to achieve the purpose of the Project."

Paragraph 1488 discusses the limitation on the right and how it arises. It arises from the combustion of coal, causing emissions, contributing to accretion of greenhouse gases and causing increasingly adverse impacts, including to people in Queensland, including increased fatalities due to bushfires and bushfire smoke, heat waves, mosquito-borne diseases, et cetera, floods and cyclones, floods and cyclones being of particular risk in Northland in Aotearoa. The Court notes that the exact or precise effect of the Project's emissions can't be identified in terms of precise, you know, one-for-one emission and health impact. It goes on to discuss the evidence, however, and this is the type of evidence that in my submission a court at first instance would be greatly assisted by, evidence from public health experts and others talking about the effect of temperature increases and climate-related impacts on health outcomes to people. And as we've pleaded for Mr Smith and his whānau, they are in a category of people, Māori, who are particularly susceptible to the impacts of climate change, all of which is well-accepted by the Crown.

At paragraph 1505 the Court records its conclusion that: “The evidence presents a clear and pressing threat to the right to life that is now experienced by people in Queensland and will only be exacerbated by increasing emissions, to which the Project would make a material contribution.” So similar to New Zealand, having established that there is a limit to the right, the Court went on to discuss balancing competing interests, reasonableness, and at paragraph 1513 concluded that: “The importance of preserving the right to life, taking into account the nature and extent of the limitation, weighs more heavily in the balance than the economic benefits of the mine ...”

So that’s the type of analysis that the Land Court in Queensland went through. By my calculation there were 25 hearing days spent there, just from the front page of the judgment, which is of course not an inconsiderable burden but not impossible in the context of the Strasbourg Court. My understanding of its procedure is that it typically does not involve viva voce evidence and is dealt with a lot more on the papers than our system, and again the Court there was able to receive and consider and make findings on the basis of factual and expert evidence. It appeared to be within its practical competence, if I can put it that way.

Back to the written outline at paragraph 3(k), I’ve mentioned specifically *Teitiota v New Zealand* UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) because the respondent places a fair degree of weight on it, and what I would urge upon your Honours is to take great care before – in this case and in *KlimaSeniorinnen* – reaching the conclusion that an analysis of victim status under the European Convention and in the ICCPR context under the Optional Protocol both require victim status, an analysis of victim status is quite separate, quite distinct from analysis of the merits of a claim, and that’s most obviously highlighted in *KlimaSeniorinnen*.

1440

The other thing I would say about *Teitiota* is that it was a case relatively early in the development of jurisprudence about climate change. It also is a case that was about refugee status and naturally the question in any refugee status case,

boiling it down, is is the State obligated to provide this person in front of it with refuge? Naturally the Court there when considering victim status focused on the question of – sorry, the Human Rights Committee – focused on the question of if this person is returned to the State today, are they going to face an immediate risk? That’s the obvious question. In that context in that case there was over a decade, 15 years, up to 15 years it was said for the State to address the risks that Mr Teitiota was facing. Now in a refugee case one can naturally see the conclusion that might follow from that, which is you don’t immediately need refuge.

10

I’ve included in the outline here some citations to commentary which is footnoted in *Teitiota* at paragraph 8.5, the general comment at paragraph 30 and 31, and I do urge upon your Honours to look at that commentary in the footnote 13 in *Teitiota* which makes very plain –

15 **WINKELMANN CJ:**

So, hang on, can you just tell us what we’re meant to be looking at? Because I’m a bit lost, all the references you just gave us then.

MR HEARD:

Well I’m not intending to take your Honour to them right now –

20 **WINKELMANN CJ:**

No, but just recite them?

MR HEARD:

Yes, the –

WINKELMANN CJ:

25 You’ve urged us to look at?

MR HEARD:

Footnote 18 [*sic*] in *Teitiota* at paragraph 8.5, which references UN general commentary 36, which is in the bundle. In my submission, those three things

make very plain that the consideration that was foremost in the Committee's mind at that point was victim status and refugee status.

5 The other point which is made plain on the HRC's decision is that its communication was concerned not with the merits of the decision that was made by New Zealand's immigration authority, it was really concerned with whether it was clearly arbitrary, so a great degree of supranational deference being shown there.

10 Emphasising the supranational causation is at paragraph 3(l) of the road map and I won't work through that, we've already spoken about it in some depth. And in paragraph 3(m), unless your Honours want to have me address you on it, I think we've covered the ground there as well on whether or not the CCRA is an answer to the claim.

15 **WINKELMANN CJ:**

Yes, thanks.

MR HEARD:

20 So from there I'll move on to the claim under section 20. Now I'm not going to spend as much time on this, your Honours, not because it's not as important, it is, but because as I mentioned earlier, it's a much more straightforward claim because effects on right to culture are much more obvious and in my submission they may well be found at trial to emerge before a threat to life.

25 We submit that, at paragraph 4(a), it's unquestionable that a positive duty can arise under section 20, which was accepted in *Mendelsohn v Attorney-General* [1999] 2 NZLR 268 (CA) and the Court of Appeal on this case. It's also well-accepted internationally that Article 27 requires positive steps to protect the right.

KÓS J:

30 I suppose one difference though is that it may be possible for a state Crown to more readily establish a demonstrable justification for a limit on a cultural right

as opposed to a right to life. There's something absolutely fundamental about the latter.

1445

MR HEARD:

- 5 Yes your Honour, in concept I think that's correct, I think that's fair. Yes, another dimension of the right to culture is – just to add a gloss on that if I might – there's good authority including in *Waratah* that one needs to bear in mind that the right to culture is one to enjoy your culture in community with others with the same culture, which depends of course upon intergenerationality. So,
10 also a destruction of culture is one which is final and there's no going back once that culture starts to get diminished in a way that impinges the right.

- In *Waratah*, one of the matters that the Court took into account when assessing the importance of the right was the Australian Native Title Act 1993. Here, we
15 would say of course there are many sources of autochthonous law in New Zealand that emphasised the importance of the rights that are protected by section 20 and other contexts, beginning with te Tiriti and, I ought to say, chronologically before te Tiriti with tikanga Māori and it being recognised as part of the common law. So, in a New Zealand context we'd say that the right to
20 culture vis-à-vis Māori is a fundamental building block of the constitution. The court of –

WILLIAMS J:

Just work me through that. How do you get to that point?

MR HEARD:

- 25 That point of a fundamental building block, Sir?

WILLIAMS J:

Mmm.

MR HEARD:

Well I don't want to pre-empt what Ms Coates is going to be addressing your Honours on later in the day, and she will be doing that, so if your Honour's content with her doing so then I might leave my comments there.

5 **WILLIAMS J:**

You're saying there's something special about section 20?

MR HEARD:

I'm saying that section 20 needs to be read in light of the other, the content of the rest of our fundamental constitutional values so, for example, the right to
10 life is simply stated in the Bill of Rights Act. Well why does it have value? It has value because as a common law country we place incredible if not the most importance upon it.

WILLIAMS J:

I don't think it's just common law countries that have that view.

15 **MR HEARD:**

It might not be the best example, Sir, but there are others that may not necessarily give it the same prominence, for example, if you're in a country where execution is still a criminal punishment which is deemed to be appropriate for the State to carry out.

20 **WILLIAMS J:**

There's one or two common law places that take that view. Anyway...

MR HEARD:

Anyway.

WILLIAMS J:

25 In terms of sourcing that fundamentality in the Treaty and tikanga, that's going to be a matter addressed by Ms Coates, is it?

MR HEARD:

As a general proposition, in terms of how that translates into a rights context your Honour, what I would say is that (a) the Bill of Rights protects common law rights, it affirms them, (b) those things are, in part, part of the law, in part, part
 5 of our consultation, te Tiriti, and (c) when one is, for example, engaging in the type of balancing exercise that's called for under section 5 then one must take into account the significance of the rights in question and that in a context where Mr Smith is claiming as Māori and claims that his rights as Māori are being impinged upon, that those other sources of law inform how important that right
 10 is for any balancing exercise.

WINKELMANN CJ:

So that picks up on a point that flow through your submissions which is that the rights contained in the Bill of Rights Act take colour not just from the ICCPR but also from other instruments and commitments from international law more
 15 broadly?

MR HEARD:

Yes.

WINKELMANN CJ:

And also te Tiriti. Do you have anything you want to say about that particularly?
 20 Because you haven't really delved into that very much I don't think.
 1450

MR HEARD:

Your Honour, what I'd say about it is it's just an example of the ordinary approach to statutory interpretation and that in any situation where the Court's
 25 looking to give meaning to a statute, then permissible if not mandatory sources of influence, just putting that at its most neutral, include international obligations, both under treaties and as a matter of customary international law which Ms McMenamin will address you on. It includes the common law values that we all hold. It includes constitutional protections that are fundamental such
 30 as the right to a fair hearing, natural justice, et cetera. Now when one interprets

the Bill of Rights Act then one naturally looks to the common law about well what does that mean.

WINKELMANN CJ:

Well, what's the point of saying it though unless it takes us somewhere, then
5 we wouldn't be without those obligations, so what's your point, really?

MR HEARD:

The point is, your Honour, that in a climate context where we're facing, or we have been struck out, and we're facing arguments from the Crown that all of this is too ambitious that, in our submission, the Court needs to look beyond
10 simply assertions that this hasn't been done before and take its approach to the Bill of Rights Act based upon the international jurisprudence including over the ICCPR, common law values, constitutional values. So it's not simply a matter of saying well there's never been a case about this or the New Zealand case about this, that or the other thing, doesn't help you here. What we're saying is
15 that the Court in this rapidly developing area of law needs to start with a wider horizon.

WINKELMANN CJ:

Well, just being common lawyers, I think I need a bit more help with that, Mr Heard. I mean, I know it's kind of an exultation to allow this to proceed and
20 that's a general point, but are you saying that our international climate change obligations gives particular colour to section 20 or section 8?

MR HEARD:

Yes, and the analysis that we would say is appropriate in a context like this is the analysis that was done in *KlimaSeniorinnen* where the Court looked to
25 matters such as, in a climate context, the fact that as a matter of international Treaty law there are differentiated responsibilities to contribute to the solving of a collective harm and that in a causation sense, in a climate context, one can't simply look for but-for causation.

WINKELMANN CJ:

Right, so it feeds most clearly on causation?

MR HEARD:

Yes.

5 **COOKE J:**

And it goes a little bit further because the argument is that New Zealand has agreed with other countries that the way of dealing with a threat to life and culture is by meeting the international obligations collectively?

MR HEARD:

10 Yes, and what we suggest your Honour is that – I don't want to talk for other jurisdictions but we don't need to relitigate the question of whether or not New Zealand has a drop in the bucket defence, if I can put it that way, that's a solved problem and it's solved by our interlocking international obligations.

ELLEN FRANCE J:

15 Just following up on that. In terms of *Wallace*, which is one of the higher points I take it for you in terms of positive obligations, the Court there does suggest or does seem to suggest that causation will be a means of confining the approach taken there. So, for example, in response to the Crown's argument about, you know, this will mean you're looking at systemic issues, causation seems to be
20 the way the Court envisages keeping that within proper confines. Do you agree with that? That that's the approach that the Court there took?

MR HEARD:

I would endorse what the Court of Appeal said in *Wallace* in relation to every rights case needing to be considered in its context and there not necessarily
25 being a single approach to assessing breach under the Bill of Rights Act, and *Wallace* of course was a case where the Crown said that there's a statute that enables right-consistent outcomes and that should be the answer and the Court of Appeal said it's a case about whether or not the regime is consistent with a right and it went on to consider that claim.

1455

Now on a causation sense, your Honour, in one way there's – if one's dealing with a decision-by-decision challenge to, you know, the right to life by people
 5 who are arrested by the police, for example, then one could see that a causation threshold is one which makes a lot more sense, you know, that there's going to be a lot more physical temporal proximity and those things are going to be simple to identify in relative terms. I would say that, ironically in a climate context, that causation may also be simpler and it may be the cases in the
 10 middle that are more difficult, because we have New Zealand's international commitments to meeting its differentiated share of an international obligation and because we have an existential challenge to humanity and because we've had, as the Grand Chamber commented upon, for whatever reason 26 or 30 years of states using powerful language and not following through.

15 **COOKE J:**

Is there another way of looking at causation, which is that the only remedy that you are seeking is declaratory, and because of that you only need to show that New Zealand has a contribution to global emissions? It might only be 3% or whatever it is, I don't know what the number is.

20 **WILLIAMS J:**

Less.

COOKE J:

Less. Provided there is some contribution, therefore that declaration can be made which would be different from another kind of remedy such as damages,
 25 Bill of Right damages?

MR HEARD:

Yes, that – yes, your Honour. There's – I agree with that as a statement.

WILLIAMS J:

But the way you're articulating that is – takes you to a declaration about breaching international obligations, but not about threat to life.

MR HEARD:

- 5 Thanks, your Honour, for the perspective. The authorities that I have taken your Honours to address that question. It's not a matter of enforcing international obligations at all. It's a matter of looking at New Zealand's obligations under the Bill of Rights Act and considering those in light of the nature of climate change and the nature of New Zealand's international
10 obligation, so it is all still –

WILLIAMS J:

But you have to make that leap between a small country meeting its obligations and the impact of that meeting on the lives of New Zealanders.

MR HEARD:

- 15 Yes, and –

WILLIAMS J:

And there's quite a leap to be made there.

MR HEARD:

The –

- 20 **WILLIAMS J:**

Given that the Northern Hemisphere burps and New Zealanders are affected but New Zealand's own emissions, even if they were brought under control, would really make no difference to the lives of New Zealanders.

MR HEARD:

- 25 And I guess I have the same answer, Sir. At the risk of repeating myself, there's a –

WILLIAMS J:

The cases say that's okay?

MR HEARD:

Well it's more than that, Sir. I'm not being flippant about it by any stretch.

5 **WILLIAMS J:**

No, no, no, I am not suggesting you are. But that –

MR HEARD:

Yes. It's a matter of conceiving of New Zealand's obligations in respect of the right to life in a climate context and asking the question, well, what is necessary
 10 to meet the obligation to we say not damage the right to life or to protect the right to life? And we can't say for example that New Zealand needs to stop the world from emitting all of its greenhouse gases. All we can say is that in the context of the interlocking international obligations what New Zealand needs to do is its bit, and if it doesn't do that then it is limiting the right to an extent which
 15 we say engages breach and questions around reasonableness, et cetera, to follow.

WILLIAMS J:

Hmm.

MR HEARD:

20 To put it a different way, Sir, it's impossible to conceive of any state's particular obligations in this area without having regard to the international obligations. It's part and parcel.

WILLIAMS J:

I see the logic of that. It's just the connection between that and a right as
 25 powerful and evocative as the right to life.

1500

MR HEARD:

And, your Honour, the other thing we would say about that of course is this is unique. We haven't had a problem like climate before and in the context of climate then what might be called for is perhaps a bit more of a wider funnel on
5 issues like causation, and I say that because the consequences of the breaches are so significant. And at the risk of repeating things Mr Salmon said and probably not as well, if the State's response to climate is one which the courts have absolutely no role in from a is this a breach of rights or not context, then one really must ask the question if not in relation to that, then how are we
10 upholding rights at all, bluntly?

ELLEN FRANCE J:

How do you see that playing out in other areas? So for example, if you take healthcare and the State having positive duties in that area.

MR HEARD:

15 Yes, well I don't see this case as developing that, is my first point. There's been a number of decisions in the healthcare context already and the courts have already accepted the proposition that there may be a positive duty to give dialysis or a blood transfusion or what have you.

ELLEN FRANCE J:

20 In individual cases rather than across the board?

MR HEARD:

Yes, in individual cases.

ELLEN FRANCE J:

So how is that limited?

25 **MR HEARD:**

In a causation sense, your Honour?

ELLEN FRANCE J:

No. If you're saying this case doesn't have any impact on say arguments about right to life as it affects provision of healthcare, what is it conceptually that means that's not – it's not going to lead to further development in those areas?

5 Because we have other international obligations in some of those areas as well.

MR HEARD:

Well perhaps, your Honour, I might not be catching your drift strongly enough, but in the healthcare context then the causation inquiry is just fundamentally different. An individual is going to need to show that right now my life is at risk
10 and there's a duty on the State to protect it, and then the question's going to be, well, what are the reasonable limits on that? I mean it's – I don't –

WINKELMANN CJ:

Is your point that the mechanism of risk is so distinct to climate change because it's a worldwide phenomenon and it has a lengthy mechanism that continues
15 acting long past time, and therefore you're dependent on these other – you're pointing to these other decisions as to the approach taken in other contexts to issues of causation and saying they can be applied here? So it's not actually changing the content of the right, it's really focusing on the causation aspect, whether the State is contributing to harm, and also I suppose it is – goes to
20 immediacy, the imminence of the risk, so that is something that goes to the core of the right?

MR HEARD:

Yes, it's a problem of a particular nature that has all of those dimensions that mean that a different approach is called for.

25 **ELLEN FRANCE J:**

Well I mean for myself I'm struggling to see how if you move to a recognition of positive duties that has the impact in this sort of area, so you – if you think about all of the various factors that are said to give rise to that, that is – it's hard to see that's not going beyond where the Court has gone before in terms of the
30 right to life, at least in New Zealand.

MR HEARD:

I'd acknowledge, your Honour, that there may be other instances where people would look to say, well if this was something the Court accepted here then it may be applicable in other contexts. And how I would answer that is, well, first

5 I'm not sure that's a problem as opposed to simply the Bill of Rights Act doing its job. The second point I'd make is I see your Honour's concerned to look at the broader landscape but, fundamentally, if there's a rights-consistent outcome that comes from a case like this and it's applicable in another area I would struggle in my submission to see the problem as such albeit it might have

10 impacts and I acknowledge that.

1505

COOKE J:

So both nuclear weapons and cancer pose a risk to life in New Zealand, so why wouldn't this analysis apply equally to that kind of claim?

15 **MR HEARD:**

To a claim that's –

COOKE J:

That the New Zealand Government's not doing enough about cancer or nuclear weapons such that the right to life is being threatened.

20 **MR HEARD:**

The nuclear weapons case has been tested to an extent offshore and in terms of cancer, your Honour, the claim would be answered I imagine by the Crown saying well we have a framework in place that carefully analyses the susceptibility of populations to cancer and within our means we do something

25 about it. Now what we plead here is that there is no such framework.

COOKE J:

Well the Crown say here they do have a framework that's addressing the issue.

MR HEARD:

And our claim is it's not the right framework in the sense that it fundamentally doesn't address the issue, so what I'd say your Honour is that our case is very much that the fact that there's an argument that there's a positive obligation is
 5 not a barrier to a claim, it's a call for the Court to engage with the question of whether or not the right has been breached.

KÓS J:

Isn't the fact that it's an existential crisis something that makes the causation analysis fundamentally different? We don't have any nuclear weapons. That
 10 doesn't mean the Government cannot take a position on that or should not take a position on that. Anything we do in relation to improving our climate change avoidance or compliance with obligations is not going to fundamentally save a single life in New Zealand directly. But, indirectly, only nuclear weapons and climate change can be solved by international joint action and the simple point
 15 I think you're making is that unless we demonstrate in our own backyard it is sorted, we're in no position to contribute to that international joined-up response.

MR HEARD:

Yes.

20 **KÓS J:**

Isn't that the essence of your argument? I mean, meeting these frameworks here is going to do not a jot to saving a single life unless it's done in conjunction with other nations.

MR HEARD:

25 Yes.

WILLIAMS J:

The point is really, just picking up on that point that the obligation is owed by all States, at least to all humans, if not to all life, and they seem to have agreed to that because there is this matrix of agreements making that point but this Court,

on your argument, can make declarations in respect of humans within New Zealand even if the obligation is owed as much by States in the northern hemisphere or the western or the eastern hemisphere, as it is by this State.

MR HEARD:

5 Yes, and –

WILLIAMS J:

So it's a bit like those 19th century pollution cases that *Smith v Fonterra* raised, it's an obligation owed by all polluters. You can't get out of it by saying I didn't pollute very much.

10 **MR HEARD:**

Yes, the other point I'd make, just engaging with Justice Kós' comment around existentiality and contributions. We're in a strike-out appeal and we haven't had all the evidence about how in fact contributions to emissions can have an impact and in a gross sense there is of course this baseline proposition that there's a contribution that each State needs to make. In a particular sense, when one looks for example at the proposition of tipping points in various climate systems that help the Atlantic current run or keep the ice sheets in place, the science on that is quite particular now and very well developed and in one sense you might say well New Zealand didn't meet its obligation to reduce emissions by, I don't know, 100 gigatonne, whatever. But if 100 gigatonne is a tipping point, if we need to have regard to the precautionary principle as in my submission we do when we're looking to things like the right to life, then that set of emissions may well make a difference, it may well make a catastrophic difference.

1510

25 **WINKELMANN CJ:**

Well see, there's something you do want us to take into account, which is the precautionary principle when we're having a look at the right to life, which is a customary international law principle.

MR HEARD:

Yes, and Ms McMenamin is going to address you in detail on customary international law, your Honour, and I –

WINKELMANN CJ:

5 Okay, well we've probably grilled you enough on this, I suspect.

MR HEARD:

10 So right to culture, I've worked through at least in concept (a) and (b). In relation to the suggestion that there's a high threshold before a court will find that there's a breach of right to culture, in my submission that's a wrong approach and that what's in question really is is there a limit to a right after which there is an analysis of whether or not it's a reasonable limit, and that's that.

Now I've cited a Human Rights Committee decision in *Länsman v Finland* UN Doc CCPR/C/52/D/511/1992 (26 October 1994). Our authority is at tab 58,
 15 paragraph 9.4. That decision makes the simple point which we've made a number of times, that there's no margin of appreciation when it comes to assessing whether or not there's a breach of a right. In practical terms, Mr Smith is in the same position as the claimants in *Billy* and the affected people in *Waratah*. His rights to culture are presently impaired. We'd say his right to
 20 life is presently imperilled. There are real and immediate risks to whenua, customary resources, sites of cultural significance, and in our submission, your Honours, that engages the right to life.

Unless your Honours have any further questions, I'll hand the...

25 **WINKELMANN CJ:**

Thank you.

MR HEARD:

Coming back to your Honour Justice Williams' questions about hapū and kāinga and pā, we're going to address that and make sure that we've got the

geography correct for your Honour, so Ms Coates will be able to address you on that in time.

WILLIAMS J:

Thank you.

5 **WINKELMANN CJ:**

Thank you. Just a good pause actually to remind – we’ve talked about the interveners and we thought actually that given the centrality of the Bill of Rights we probably would need to hear from the Human Rights Commission for 45 minutes and Te Hunga Rōia Māori for 30 minutes, is our estimation that’s
10 helpful for tomorrow. I think Mr Butler got the drift of what we really need assistance with. So we would ask that you focus not on te Tiriti, Mr Butler, but just on the rights side of it.

MR BUTLER KC:

Thank you very much for that indication, your Honour. Just if I can indicate,
15 we’ve had a discussion between ourselves and thought in light of what was said earlier today that perhaps what would be easiest from the Commission’s perspective then in that regard is that we hear first from Te Hunga Rōia Māori. In relation to what they wish to say on the Treaty, I suspect on a number of points the Commission is in agreement, and I could then very simply and
20 straightforwardly say, well, you’ve heard from Te Hunga Rōia Māori and having heard them we agree with their position, and that would then mean that I can focus most of my time then on the Bill of Rights issues, if that’s helpful in terms of indication.

WINKELMANN CJ:

25 Yes. Well we’d really like you to focus pretty much all of your time, but we wouldn’t preclude if you think there’s a match.

MR BUTLER KC:

I understand that, but your Honours will understand the Commission does have a view and would like to be able to at least have that view stated.

WINKELMANN CJ:

Yes, yes. Right, okay. Ms McMenamin.

MS McMENAMIN:

Thank you, your Honour. Hopefully we can get this – I've got a broken foot
5 sorry, so it's a bit of a balancing act, no pun intended.

WILLIAMS J:

That's commitment, Ms McMenamin.

MS McMENAMIN:

I've got all the devices. Tēnā koutou e ngā Kaiwhakawā, it's a pleasure to
10 appear before you today with team Mr Smith, and I thought it would be helpful –
you've got our road map but I thought it would be helpful to start with perhaps
adding some more detail to the answers Mr Heard gave to some of your most
recent questions. And the first one I would start with is the Chief Justice's
15 question, do the international obligations give particular colour to section 8 and
section 20 of the Bill of Rights Act, and the answer which I'm going to come to
in quite a lot of detail is at paragraph 3(c) and paragraph 5(a) of the road map.
1515

Adding to Mr Heard's answer to Justice Cooke in respect of New Zealand
20 choosing to have collective measures and engage in this international
treaty-making exercise, the answer is not just that New Zealand has agreed to
collective action, but the answer is that New Zealand has agreed to collective
action to reach a particular temperature goal to prevent dangerous interference
with the climate system. So it's to secure a liveable planet. So it's not just
25 about cooperation, which many of the judges have raised issues with, but it's
also recognising that since – now that we have the ICJ's advisory opinion that
1.5 degrees is the legal obligation for states to take climate action based on,
and if you'd like a reference for that it's paragraph 224 of the ICJ's
advisory opinion.

Justice Kós raised a similar concern that this is – not a single life in New Zealand might be saved from New Zealand taking action in conjunction or consistently with its Bill of Rights obligations, and I thought that it was particularly useful that he pointed to nuclear weapons as a parallel example because that's exactly the basis from which the ICJ found that climate change is a problem of collective concern, but also a problem of collective action and one which gives rise to the duty to prevent significant harm to the environment. And that reference for you there, Judge, is at paragraph 272 of the advisory opinion.

10

Further answer to that question is that this claim isn't really about international cooperation. This is a claim about New Zealand's obligations under New Zealand law, and to the extent that the common law incorporates customary international law obligations that's where they come in, but this claim is not a direct invocation of customary international law in the way that some cases, for example *Nevsun Resources Ltd v Araya* [2020] SCC 5, [2020] 1 SCR 166, which is in the bundle of authorities, was. As the Crown rightly points out, which we omitted from our submissions because it isn't part of the case, the ICJ also identified customary obligations in respect of international cooperation, but those obligations operate only on the international plain. They're obligations owed to other states, not to humans.

20

And here there's a useful link to Justice Williams' question about these obligations being owed by all to all, and there's a distinction I think that is particularly helpful for us and why I'll hopefully step you through the different sources of international legal obligations, because some of them are owed to states and some of them are owed to humans, and in the advisory opinion the ICJ at paragraph 440 said that the obligations under the climate treaties are owed to states, they're *erga omnes* obligations owed to all states, but a separate source of obligations are those under the human rights treaties and those are qualitatively distinct from those in climate treaties because those ones are owed by states to humans in their territory or subject to their jurisdiction, and while effectively a contract is between the states, the beneficiary of the obligation is the humans.

25

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So what I plan to start with is, returning to the road map, some interpretive principles that help us understand why the Court got to where it got to and – sorry, why the ICJ got to the points that it got to about the obligations of states in respect of climate change, and there are three that I would like to draw to your attention. The first is called *lex specialis* and that's the interpretive maxim used to determine which of several potentially applicable rules prevail or whether the rules coexist, and the reason why this is useful to point you to is because it provides further, a further useful analogy for the Court in understanding why the CCRA doesn't cover the field.

10

In its advisory opinion, and I don't need to take you to these particular paragraphs but here are the pincites, it's from paragraph 166 to paragraph 171. The ICJ explained to find that one rule prevails or ousts – prevails over or ousts another there must be an actual inconsistency or a discernible intention that one is to exclude the other, and we get there through assessing the object and the purpose of the treaties. In that case the ICJ found that there was no inconsistency, nor a discernible intention to exclude in states' making of the climate treaties to exclude customary international law, nor human rights obligations. This is another useful parallel, the courts explained in these paragraphs that I've given you references for, that the fact the climate treaties are carefully negotiated, and a calibrated set of rules, does not itself indicate an intention to exclude the application of other rules.

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The second principle, which goes to Justice Williams' question of, and the Chief Justice's question of why are we talking about environmental law here, we've got a human rights claim, is the principle of systemic integration and that's a rule particularly for the interpretation of treaties which can be found in the Vienna Convention on the Law of Treaties, Article 31(3)(c). If you wanted that that's at tab 76 of the appellant's authorities, but I don't need to take you there.

30

WILLIAMS J:

21(3)(c) did you say?

MS McMENAMIN:

31(3)(c). The text there says, in interpreting a treaty “there shall be taken into account ... any relevant rules of international law applicable in the relations between the parties.” That’s not limited to only other treaty rules, it’s open to
 5 all sorts of other rules and as we know there might be customary rules. The ICJ explains that and identifies the other relevant rules and this is at paragraph 172 of their advisory opinion where they say the relevant rules are climate treaties, the UN charter, the customary no-harm rule, international human rights law, various environmental law principles such as the
 10 precautionary approach or principle. So, all of those are in-built into the task of understanding what a treaty means.

The third principle that I’d like to talk about is harmonious interpretation and this is explained in the ICJ’s advisory opinion as well at paragraph 165 where it says
 15 “when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”. Those two principles read together mean that when any body doing interpretation of a human rights treaty is undertaking that process, they must consider, they’re obliged to consider or to take into account the customary duty to prevent
 20 significant harm to the climate system and the precautionary principle.

WINKELMANN CJ:

How does that fit when it’s not a – when our human rights – it’s a piece of legislation, it’s not a treaty, are you taking that up to the level of the ICCPR?

MS McMENAMIN:

25 Yes, insofar as the BORA claim is the legislation we’re talking about assessing consistency with, then we’re taking it to the ICCPR. We’re looking at the analogue rights in the ICCPR. Which takes me to point 3 on the road map which is the relevance of international jurisprudence. So it’s very well established that courts should interpret legislation consistently with international
 30 obligations so far as the wording permits and we get that from *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298.

Two more points on that are whether or not the particular act was enacted with the purpose of doing so and it's useful here to think about the purpose of the CCRA, which was not intended to be a code. And that is the case, even where New Zealand has entered a reservation curtailing the applications the ICCPR write and that is from *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

In this case, the case for interpreting BORA consistently with international obligations, the content of which we now know because we have the ICJ's advisory opinion, is that it is particularly strong because there is no reservation to Article 6, the right to life. New Zealand has not made such reservation. The long title expressly confirms New Zealand's commitment to this ICCPR and the appellant would agree with the Human Rights Commission in paragraph 8 of their submissions that the Bill of Rights Act should be interpreted consistently with the ICCPR to the extent that their terms and purpose permits, and that it would be retrograde for New Zealand courts to create a gap between the content of rights protected by BORA and those protected by the ICCPR.

Some jurisprudence may be more helpful than other jurisprudence in this whole realm of international and comparative jurisprudence and we'd like to focus in particular on the ICJ's advisory opinion which the Crown has said has no bearing on this case. Let's see if I can ClickShare for myself. There we are, yes. So what I've taken to you here is Article 38 of the Statute of the International Court of Justice and that provision functions to tell us what are the sources of law in international law that the ICJ would apply. It's considered not to be a more complete enunciation of, pronouncement of the sources of international law but it's a very good starting point.

The point I'd like to take you to here or point out is that Article 38(1)(d) provides that "... judicial decisions ... [are a] subsidiary means for the determination of rules of law." And so we're not seeing the ICJ as some kind of persuasive authority in a precedent sense, we're understanding that it is one of these judicial decisions that tells us what the primary rules of international law say

and, looking earlier in the paragraph, we see those are treaties, “international conventions”, “international custom”, and “general principles of law”.

5 In our case, the ICJ's advisory opinion serves to clarify and concretise these open-textured principles of customary international law. Before the advisory opinion, nobody was particularly certain that the duty to prevent significant harm to the environment applied to the climate for many of the reasons your Honours have been concerned with. The question was is climate this special thing that is so different from everything else that the law doesn't really respond to it? And
10 the answer was no, which I'll come to.

WINKELMANN CJ:

Can I just take you back to Article 38.

MS McMENAMIN:

Yes.

15 **WINKELMANN CJ:**

Doesn't it just say, doesn't it just tell you the methodology the Court's going to apply?

MS McMENAMIN:

Technically that's what it does, but it's considered to be the explanation of what
20 the sources of international law are and how they relate to each other.

WINKELMANN CJ:

Okay, so you're not saying what its decisions are, you're just saying this is its sources of law for its own processes?

MS McMENAMIN:

25 Yes, and the sources of international law everywhere.

WILLIAMS J:

More generally for us.

MS McMENAMIN:

More generally for us, exactly, thank you Justice Williams.

KÓS J:

But the institutional competency issue is a very different one from the ICJ, that
5 is for the Supreme Court of New Zealand I think.

MS McMENAMIN:

Absolutely Justice Kós, yes.

KÓS J:

Yes.

10 **MS McMENAMIN:**

But as we come to, almost, not quite there yet, to the extent that the ICJ's
advisory opinion has told us what the content of customary international law is
and to the extent that applies as common law, then this Court has competence
to integrate those rules, and that of course goes in particular to the first, to the
15 public duty claim.

I'd like to briefly note a reply or the Crown's concern with what judicial decision
means. The Crown has said the ICJ's advisory opinion is not binding. It's not
binding. We all agree with that. It's an authoritative statement of the law on the
20 primary sources of law. It's not binding in an inter partes sense and in any event
the ICJ's decisions only have a very limited concept of bindingness in that they
don't bind other states, they only bind parties to the claim.

WINKELMANN CJ:

It's an authoritative statement of law. What's the scope of that?

25 **MS McMENAMIN:**

Sorry, could you –

WINKELMANN CJ:

On what matters, on what is it an authoritative statement of law, on what? On matters?

MS McMENAMIN:

- 5 On the first three sources in Article 38(1), so the international conventions or treaty law, international custom, which I'm particularly concerned with, and general principles of law. So to the extent a court anywhere in the world is tasked with answering what are those primary rules of international law, you can look to the ICJ advisory opinion and find out the answer and effectively take
- 10 judicial notice of it.
- 1530

- So, we've covered that the Court should interpret legislation consistently with international obligations, we've covered that the jurisprudence is going to be
- 15 relevant to domestic courts' interpretation of domestic rights and I'd like to briefly point you to *Dini Ze' Lho'imggin v Canada* 2025 FC 1586 which is at footnote 110 where the ICJ – sorry, of our submissions. I think it's paragraph 46 of our submissions. Let me take you there and just read it to you. Sorry, 47 of our submissions, and this is one of the first cases to have been decided since
- 20 the ICJ's advisory opinion on what the ICJ said about climate change and how that's relevant to domestic constitutional rights, so it's particularly useful for this Court.

- The Federal Court of Ontario said that the ICJ's advisory opinion is not binding.
- 25 We've covered that in an inter partes sense. But it is a source of law. We've covered that, Article 38(1)(d), and the "principles outlined ... can influence how courts interpret domestic laws, particularly in relation to constitutional rights and international obligations", and that's exactly what the appellant is asking the Court to do here, to interpret constitutional rights under Te Tiriti and under the
- 30 Bill of Rights Act and under the common law in light of what the International Court of Justice has told us the content of rights are.

It's useful, I think, to turn now to the substance of that. What is this context that we're getting? We've established the process for getting there. Let's talk about what it means for us and the most useful two references I can take you to there are in the submissions at paragraph 31 where we have set out the ICJ's
 5 conclusion on what States must do to guarantee the effective enjoyment of human rights.

At paragraph 403 of the ICJ's advisory opinion it said that: "States must take measures to protect the climate system and other parts other parts of the
 10 environment. These measures may include, inter alia, taking mitigation and adaptation measures, with due account given to the protection of human rights, the adoption of standards and legislation, and the regulation of the activities of private actors. Under international human rights law, States are required to take necessary measures in this regard." And "necessary" has a particular meaning
 15 which engages the concept of due diligence which I'll come to in point 5 of the road map.

Following on from that paragraph the ICJ explained that: "States must therefore take their obligations ... under the climate change treaties and other relevant
 20 environmental law treaties and under customary law into account when implementing their human rights obligations." And that's effectively the Court restating those interpretive principles I started with.

WINKELMANN CJ:

That's the harmonious principle, is it?

25 **MS McMENAMIN:**

Yes, that's right, Chief Justice, and it's not just the harmonious, the rule of harmonious interpretation. It's also systemic integration, and there's a slight difference there where "harmonious interpretation" is a principle that Courts should strive to do, whereas "systemic integration" is the rules for interpreting a
 30 treaty, more akin to the Legislation Act or the direction in section 6 of the Bill of Rights Act, in terms of that's the mandatory rule of interpretation.

My important point here to cover is that what the appellant is asking the Court to do isn't anything very different from what is happening in courts all around the world. It's not a case of the appellant asking this Court to break new ground in terms of our understanding of what international obligations under human rights law require, and as we've discussed we're not trying to directly enforce the ICCPR. We're saying that BORA must be interpreted in light of that, and I can give you briefly a few examples of that. The Human Rights Committee in its General Comment 36, which Mr Heard took you to earlier at tab 69 of the bundle of authorities from the appellant, says that the enjoyment of the right to life "depends on measures taken by States to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors."

1535

Mr Heard just covered *KlimaSeniorinnen* in quite a lot of detail and the relevant paragraphs there are 546 and 550 which he has taken you to. The point here is about consistency. In line with climate treaties and the best available science, states must put in place necessary measures – again the due diligence hook – aimed at preventing greenhouse gas emissions and preventing a rise in global average temperature beyond that capable of producing "serious and irreversible adverse effects on human rights".

There's also in the Inter-American Court of Human Rights Advisory Opinion which was issued a few weeks before the ICJ's one last year, again we get reiteration of best available science, the precautionary principle, prevention, defining a human rights-based strategy, for a mitigation target to achieve it it has to be rationally connected, reach us to the goal, and states must address the causes of climate change. It's also in *Waratah Coal*, which I wouldn't have otherwise relied on but earlier this morning I found it at paragraph 1480, it's all entirely consistent with this. We see the same principles reiterated again and again.

WILLIAMS J:

So that's consistent with *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA), is it?

MS McMENAMIN:

Consistent with what the ICJ said that human rights treaties require states to do, which is to take necessary action.

WILLIAMS J:

5 But not the – okay, all right.

MS McMENAMIN:

So hopefully, Chief Justice, that has now much more comprehensively answered your question about what colour do the international obligations give to sections 8 and 20 of the Bill of Rights Act.

10 **WINKELMANN CJ:**

And do you say the Court is part of the State?

MS McMENAMIN:

Yes, your Honour, particularly in application of the Bill of Rights Act.

COOKE J:

15 So we interpret sections 8 and 20 of the New Zealand Bill of Rights Act in light of these international obligations?

MS McMENAMIN:

Yes, your Honour, because I would say you're mandated to do so, to the extent that there's an analogue in the ICCPR. We now know and I think domestic
20 courts would be remiss to interpret the ICCPR without complying with the mandatory rule of systemic integration or understanding that the right to life is engaged by climate change. Obviously the engagement on the facts is a matter for trial, but as a matter of law, yes.

25 Happy to take further questions, or I'd like to move on to customary international law.

WINKELMANN CJ:

Move on.

MS McMENAMIN:

Thank you. The orthodox position – so this is now at the road map, I think we're
 5 in paragraph 4, yes. The orthodox position is that customary international law
 is automatically part of the common law except insofar as it is inconsistent with
 statute. That's at paragraph 43 of our submissions. And an apology if we were
 misleading the Court by accident, the Crown seems to have suggested perhaps
 we were, we did not mean to imply there's no caveat of except insofar as
 10 inconsistent with statute. That was possibly a typographic error or a drafting
 omission. We entirely agree with that proviso, and so therefore we're in
 agreement with the Crown on the orthodox position.

WINKELMANN CJ:

And in terms of that, do those interpreted principles you applied earlier apply so
 15 that the rule only is ousted where it would be actual inconsistency or an
 apparent intention to exclude and – possibly not? What's the rule that a – of
 construction applied there?

MS McMENAMIN:

There's a very useful – well it's obiter but there's a useful explanation of how
 20 that except insofar as is inconsistent with statute could be applied in *Nevsun*,
 where they test the –

WINKELMANN CJ:

Which case, sorry?

MS McMENAMIN:

25 Sorry, *Nevsun* in the Supreme Court of Canada.

WINKELMANN CJ:

Nevsun.

MS McMENAMIN:

That's trying to enforce customary international law directly, but there they test the intention of the customary law rule, the effect of it, and whether or not the legislation achieves that effect. I can come back to you with the paragraph
5 reference for that.

WINKELMANN CJ:

Because certainly Treasa Dunworth seems to think that it's really only got space in areas such as sovereign immunity.

MS McMENAMIN:

10 Yes. Your Honour, I would take issue with that and perhaps it's useful to go to the issues I have with the Crown's arguments against the settled position before we talk about the application of the rules.

WILLIAMS J:

Wasn't her point that it's because so much law space is taken up by statute in
15 this country that there's just not a lot of wriggle room outside that?

WINKELMANN CJ:

Yes, that's the point.

MS McMENAMIN:

Yes, that's exactly right, your Honour.

20 **WINKELMANN CJ:**

Yes, that's the point, and she says the only space left is sovereign immunity and you take issue with that.

1540

MS McMENAMIN:

25 Yes. There are two reasons why I take issue with that. The first is that it assumes that the legislation covers the field and intended to do so and I just don't think that's the case with the CCRA and it's certainly not the case that,

and as this Court found in *Smith v Fonterra*, it's not the case that CCRA excludes the application of the common law and if we have accepted that customary international law is going to be part of the common law, except in is so far as inconsistent with statute, and that's the application point we have to come to soon, then there's also no reason for this Court to depart from that in this case.

The second –

ELLEN FRANCE J:

10 What, sorry, what about the fact that there is other relevant legislation? So do you agree you take a broad picture of what it is that's covering the field?

MS McMENAMIN:

Yes, your Honour, I agree. Other –

ELLEN FRANCE J:

15 So you'd look at the RMA, for example?

MS McMENAMIN:

Exactly. In particular, the purpose provisions of the RMA, as I'm hoping to –

WILLIAMS J:

20 Well, the working provisions of the RMA, because that's where the mandate is to undertake mitigation and the limitation of effect measures.

MS McMENAMIN:

Exactly.

WILLIAMS J:

That's the statute it's done under.

MS McMENAMIN:

I still would say, though, that those two statutes together don't necessarily exclude the application of the common law – sorry, the customary international law duty and I can come to that now if that's helpful.

5 **KÓS J:**

What about in relation to human rights? Because it's not really so much a question of the interpretation of the CCRA, perhaps, it's the interpretation of sections 8 and 20?

MS McMENAMIN:

10 Yes. Could you rephrase your question, sorry? I –

KÓS J:

Well, it seems to me that customary international law might have something to say about human rights when we're dealing with BORA.

MS McMENAMIN:

15 Yes, Justice Kós, that's exactly right.

KÓS J:

I'm not sure yet quite what, but you're going to tell me?

MS McMENAMIN:

20 I'm going to tell you. One of the things it has to do with BORA is the precautionary principle and that's through those interpretative principles that I started with and the Court's – the ICJ's identification of the relevant law which was at –

ELLEN FRANCE J:

25 But am I right, you would accept that that, that even in the Bill of Rights context, that can be affected by other legislation covering the field?

MS McMENAMIN:

Yes, if it truly did cover the fields, but I would suggest that it doesn't cover the fields entirely.

WINKELMANN CJ:

- 5 But is there a distinction between customary law being directly enforceable and customary law obligations colouring the interpretation of other – of statutory provisions?

MS McMENAMIN:

- 10 I think there's a fine distinction there, Chief Justice, and it might depend on the claim as pleaded. In the public law duty claim, we're pleading customary law as part of the common law.

WINKELMANN CJ:

- 15 So to pick up Justice France's point, you might say, well, customary international law colours the interpretation of the New Zealand Bill of Rights Act but when the Climate Change – when the CCRA, best to use the initials – when you look at that, it might exclude customary international law, its ability to shape the Bill of Rights Act's interpretation.

MS McMENAMIN:

- 20 Yes, I would agree with that. And one, perhaps it's useful to have an example of that, and the ICJ's advisory opinion points out to us that customary international law has a separate independent existence from treaty law and that, for example, one of the things that the duty prevent significant harm to the environment does, which is the customary law duty, is that it requires action or stopping fossil fuel prospecting mining licensing and that's all in paragraph 427
25 of the ICJ's advisory opinion and notably the Paris Agreement is entirely silent on those things. So if we consider the relevance of international law to understanding the CCRA, we might say that purpose is to enable the implementation of the Paris Agreement, but the Paris Agreement says nothing about fossil fuel exploration or licensing and therefore there is already a gap we

can see that customary international law does say something about those things.

ELLEN FRANCE J:

But that, I'm not – that's partly why I asked about other statutes because if, for
5 example, you – as we do – we have other regimes that deal with mining licences
and so on, and presumably they equally could have some impact?

MS McMENAMIN:

I agree they could absolutely have some impact, but it would be about testing
whether or not they prevent significant harm to the environment and if there are
10 open-ended licensing laws then that is not compliant with that customary
international law duty and therefore arguably not compliant with the common
law.

WILLIAMS J:

Well, but you, if they're open-ended framework measures like the RMA, for
15 example, they're the very sorts of measures you can read customary
international law directly into?

1545

MS McMENAMIN:

Yes, they are, but I guess that's a – I don't mean open-ended, I mean the rolling
20 back of restrictions on fossil fuel exploration.

WILLIAMS J:

If they expressly are in breach.

MS McMENAMIN:

Yes, yes. And it might well be the case that Parliament has chosen to be in
25 breach of that international law obligation and that's a matter for the
international responsibility of New Zealand. What matters for this claim is that,
as we've covered, to the extent it's not inconsistent with the statute then the
duty to prevent significant harm is part of the common law which is –

WILLIAMS J:

Well, most of the statutes in this area are not precise and prescriptive because they can't be.

MS McMENAMIN:

5 Yes, they can't be.

WILLIAMS J:

They do have lots of interstitial space and, of course, the RMA has an express common law preservation clause.

MS McMENAMIN:

10 Yes, exactly, and so that's the work that the customary law duty of prevention has in this space and under the first cause of action.

COOKE J:

Is another way of putting this, that the New Zealand legislation, the various bits of it, may well cover the field but that doesn't mean the international law
15 customary obligation doesn't have a very strong interpretive influence over the legislation.

MS McMENAMIN:

I would agree with that and that would go to the Chief Justice's point before of is it customary international law as part of the common law or is it going to just
20 colour the interpretation of the law. I think both are available.

KÓS J:

Some of the questions that we have to deal with in terms of section 8 may not be environmental or totally environmentally focused. For instance, the right to life arises or denial of that in many different circumstances and it may well be
25 the customary international law has something to say about both causation and the eminence requirement and I'm not sure, again, whether that does, but I wouldn't necessarily assume that the CCRA covers the field in relation to those questions.

MS McMENAMIN:

Thank you, Justice Kós.

KÓS J:

Which is generic points.

5 **MS McMENAMIN:**

I agree, yes, and some of those other obligations under customary international law that aren't covered would be the, for example, the precautionary principle. And that would go to imminence under what's a risk to the right under section 8 of the Bill of Rights.

10

Okay, I'd like to come back, if I may, to the appellant's challenge to the Crown's arguments on reception of customary international law. So this is the point the Chief Justice raised in respect of Treasa Dunworth's article or that sovereign immunity is one of the only ways, one of the only remaining bastions of the applicability of customary international law and the way the Crown phrased it is that customary international law is established, is only part of the common law of New Zealand, if it's established beyond approach and I think it's useful to explain why that argument doesn't make any sense, because customary international law isn't established as a matter of fact. There's no – while there's a hierarchy within customary international law of jus cogens norms, those which cannot be derogated from, or which invalidate treaties at the international claim, there's no other step, there's nowhere else in the spectrum here, so there's no argument that the duty to prevent significant harm to the climate system is not established beyond reproach in any event, but that's not a condition that applies in New Zealand law. There's no judicial authority for that proposition.

25

WINKELMANN CJ:

So what is there no judicial authority for – proposition for? Is that customary law is only part of New Zealand law to the extent it is established authoritatively?

MS McMENAMIN:

To the extent it is established beyond reproach.

WINKELMANN CJ:

Beyond reproach.

5 **MS McMENAMIN:**

So the Crown had read in two qualifications to the orthodox position. The orthodox position being customary international is automatically part of the common law except insofar as inconsistent with statute. On that we agree.

10 The Crown would say further, only if it's established beyond reproach. That, we say, is a – there's no authority for that proposition and it doesn't really make sense in terms of what customary international law isn't.

And the second extension that the Crown argues for is that the customary
15 international law is not automatically part of the common law if it's precluded by constitution or principle.

1550

Again, there is no New Zealand authority for such a limit. The authority that the
20 Crown relies on is an English case called *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, from the UK Supreme Court in 2015, about reparations for colonial atrocities in the Malay independence wars. I'm happy to go into it further but I think in the interests of time it would be better not to. I can point you to –

25 **WINKELMANN CJ:**

What's the name of the case sorry?

MS McMENAMIN:

Keyu, K-E-Y-U.

WILLIAMS J:

K-E-Y-U.

ELLEN FRANCE J:

That does seem to have been approved by the Supreme Court in the
5 *Ukraine v Law Debenture Trust Corp Plc* [2023] UKSC 11, [2024] AC 411 case.

MS McMENAMIN:

It's still argued about in the *Ukraine* case and it was obiter in the *Keyu* case.

ELLEN FRANCE J:

Well –

10 **MS McMENAMIN:**

And we know it's obiter from paragraphs 144 and 155 of that case, of *Keyu*, and this gets us into a very messy argument about whether or not the UK is changing its position from an adoption of customary international approach to a transformation one. Australia sits on the transformation side of that doctrinal
15 debate and New Zealand and Canada, the UK have sat on the adoption side, which go back to Blackstone and in our submissions we've cited Lord Denning's explanation of that in *Trendex Trading Corp v Central Bank of Nigeria* [1977] QB 519.

ELLEN FRANCE J:

20 Yes, although in the *Ukraine* case they start off by citing the Blackstone quote but they do then seem to be pumping for the *Keyu* approach, as I read it, the majority, I appreciate, well Carnwath doesn't but...

MS McMENAMIN:

Yes, I think in our submissions we have references to the dissenting opinion
25 there which says we were kind of shading into this transformation camp without any reason for departing from it and to leave the adoption camp and move into Australia's transformation camp where in which customary international law

probably requires affirmative legislative confirmation, that to do so that's going to be a big shift.

ELLEN FRANCE J:

Yes, it does seem to me that at the least, though it's perhaps not quite as clear
5 as it might have been before those more recent cases.

MS McMENAMIN:

Yes, I'd agree with that, Justice France.

WINKELMANN CJ:

In England.

10 **MS McMENAMIN:**

In England, exactly, thanks Chief Justice.

ELLEN FRANCE J:

In England.

MS McMENAMIN:

15 At best, that idea hasn't really been tested, this idea of precluded by constitutional principle. In New Zealand we haven't had a case that directly challenges the issue and in this case it's not appropriate to have it challenged on appeal by the respondents in a strike-out claim where it hasn't been argued before now.

20 **WINKELMANN CJ:**

It seems to have some inherent problems in it, the notion that it's excluded by constitutional principle because customary international law doesn't mean that everybody has to apply, but it's something that has force because it is the great rising tide of everybody. It should inform your constitutional principle in those
25 circumstances.

MS McMENAMIN:

That's exactly right, Chief Justice, and there are two points in which I'd agree with you there or expand or add to what you've said. The first is that the Supreme Court of Canada in *Nevsun* in paragraph 164 explains that exactly
 5 and says customary international law has this "high bar", it's an "extraordinary" type of law, "it leads the courts to adopt a role otherwise left to legislatures" because it's this very high bar of agreement. General, almost universal, unless you're persistently objecting.

10 The second point is what is the constitutional value that it's inconsistent with. The Crown suggests that that value is parliamentary sovereignty, and that's at paragraph 108 of their submissions. But if that's exactly the orthodox position that the appellant relies on except insofar as inconsistent with statute, there's not a lot of a gap here and to the extent that we can conceive an inconsistency
 15 with parliamentary sovereignty, that argument would require the Court to presume that by enacting the CCRA, Parliament intended to breach the no harm rule, and that's a proposition the Court should be very slow to accept, particularly in light of the Crown's denial of an inconsistency between the no harm rule and the CCRA.

20 **COOKE J:**

If customary international law has that interpretive influence, in any event why does this really matter?

MS McMENAMIN:

It matters to the public duty claim, your Honour.

25 **COOKE J:**

The first cause of action?

MS McMENAMIN:

Yes.

COOKE J:

So that gives you, arguably, an independent cause of action based on customary international law. Is that what you're saying?

MS McMENAMIN:

- 5 That's not what we're saying, although that's the type of claim *Nevsun* was. What we're saying is that, and Mr Salmon will come to this later, what we're saying is that the pleaded public law duty has a number of sources, one of which is the common law and part of the common law is this customary duty of harm prevention.

10 1555

COOKE J:

All right, I understand that point, but apart from that does this debate really matter?

MS McMENAMIN:

- 15 No, it doesn't your Honour, except insofar as the Court would be going on new ground in New Zealand and should be cautious to do so without real argument on the point.

COOKE J:

- 20 If its main significance is the first cause of action, why would the customary law obligation create an enforceable duty by the State towards Mr Smith? Because that's not the content of the customary international law obligation, is it?

MS McMENAMIN:

No, and Mr Salmon will come to this in much more detail but there's a – the customary international law obligations are owed to other states.

- 25 **COOKE J:**

Yes.

MS McMENAMIN:

Insofar as the content of those obligations is integrated in common law then the State owes them to people in its jurisdiction, including Mr Smith.

COOKE J:

- 5 Well that's a step, isn't it. That goes beyond the customary international law obligation. That last step a duty to Mr Smith.

MS McMENAMIN:

- Well if the duty is to prevent significant harm to the environment as part of the common law, and it's not in this international plain where it's only owed to
10 states, then the question is to whom does states owe obligations under the common law, and I would say the people under its jurisdiction.

We've talked a lot about the no harm rule, and I know we're very short on time, so I'll take you –

15 **WINKELMANN CJ:**

Yes, you have four minutes before 4 o'clock.

MS McMENAMIN:

- Yes, thank you Chief Justice. Briefly, I would say it's long established in respect of environmental harm and as I covered in my response to Justice Kós' question, it now is very clear that the customary rule of prevention of significant
20 harm applies to the climate system, and the paragraphs I would leave you with there are paragraph 273 of the ICJ's advisory opinion and following. It entails a strict due diligence obligation to take measures within the State's power to prevent significant harm to the climate system and there's a string, a whole set
25 of intersecting pinpoints which are in our submissions in paragraphs 23 to 27 of our submissions.

- The key points to take out there are that the ICJ said it's necessary to take into account the risks which current activities might pose in the future. That's a
30 temporality point about and that goes to imminence under section 8 of the

- Bill of Rights Act. States must assess the possible cumulative effects of their acts and their planned activities under their jurisdiction or regulatory control. That determination must take into account the best available science. It includes the precautionary principle where there are plausible indications of potential risk a state would not meet the due diligence standard if it disregards those risks. The standard is stringent given the risk of specific harm to the climate system is indisputably established. And, in summary, states are obliged to take appropriate and effective measures to prevent significant harm. Where there is reliable scientific evidence of risk of significant harm, where there are plausible indications of potential risks, and that all goes to the point that you're assuming the facts as pleaded are true, but many of those and the extent to which the Crown in the suite of causes of action claimed by Mr Smith has complied with that – has acted with due diligence, those are a matter for trial.
- I would leave your Honours with two last points, that we don't say that the only customary international or duty relevant is the no harm rule, or the duty of prevention of significant harm to the environment, but also that there is arguably, and that's a matter for trial, a human right to a clean, healthy and sustainable environment and you'll find that in our submissions at paragraphs 32 to 33 and 45. You'll also find that in the Inter-American Court of Human Rights Advisory Opinion, which is at tab 60 of the bundle, paragraph 291 to paragraph 294.

WINKELMANN CJ:

What paragraphs in your submissions?

MS McMENAMIN:

32, 33 and 45.

WINKELMANN CJ:

So you say that there is such a human right arising in customary international law?

MS McMENAMIN:

Yes, Chief Justice, that's what we would argue. That one the ICJ didn't confirm and so you can't take judicial notice of it which makes it a matter for argument at trial.

5 **WILLIAMS J:**

It's quite telling that it didn't.

MS McMENAMIN:

It is and it isn't, Justice Williams, because some of the separate opinions say the evidentiary record is so strong, it's very strange that it didn't – you have the
10 Inter-American Court saying this is well established, so it's not a clearcut case that because the ICJ didn't say it's there, it's not there, and I would point you to the separate, or the declarations of Judge Tladi and Judge Aurescu in the ICJ's advisory opinion which detail the evidentiary record setting out that there is a customary law duty in that respect. In my last minute your Honours – sorry.

15 **WILLIAMS J:**

Well, I mean there's no need to go there anyway, is there?

MS McMENAMIN:

There's no need to go there unless you – well it's part of the contextual background, right, because if there is a customary right to a clean, healthy and
20 sustainable environment then that completely shades what the right to life means and the right to culture means. The transition of culture depends on there being a clean, healthy and sustainable environment for there to be –

WILLIAMS J:

Well if you've got a statute whose purpose is the sustainable management of
25 natural and physical resources, or whatever the phrase is in section 5 of the Resource Management Act, then you've probably done enough.

MS McMENAMIN:

I agree, you've probably done enough, yes.

WILLIAMS J:

Interesting argument but your case is pitched higher, and necessarily so.

MS McMENAMIN:

Yes, yes, thank you.

5 **WINKELMANN CJ:**

Right, well I think we'll take the afternoon adjournment now.

MS McMENAMIN:

Thank you very much, thank you your Honour.

COURT ADJOURNS: 4.01 PM

COURT RESUMES ON TUESDAY 18 AUGUST 2026 AT 10.01 AM**WINKELMANN CJ:**

So the observant amongst you may have noticed that Justice France is not here but on the screen. She's a little indisposed so she's joining us from chambers.

5 Right, Ms Coates.

MS COATES:

Tēnā koutou e ngā Kaiwhakawā. Nōku te hōnore ki te tū, hei māngai mō Mr Smith, e pā ana ki tēnei kaupapa ara ko te Tiriti o Waitangi. Good morning, your Honours. Just two preliminary matters –

10 **WILLIAMS J:**

Just before you do –

WINKELMANN CJ:

What is this sound –

WILLIAMS J:

15 I might just ask if Justice France, can you mute your screen? I think it's you, yes.

ELLEN FRANCE J:

Yes, thanks.

MS COATES:

20 Are you able to hear me okay, your Honour?

ELLEN FRANCE J:

It's – I need to adjust it upwards slightly but I can do that, thank you.

WINKELMANN CJ:

And if you just speak up, Ms Coates.

MS COATES:

Speak up. At least I'm not as tall as Mr Heard. So just by way of two preliminary matters, in terms of appearances I think I understand an email was circulated but I seek leave of the Court in terms of myself tomorrow, I'm going to miss the
 5 first session and appear on AVL for tomorrow. And then the other matter was just timing. I was reading with interest – is that me?

WINKELMANN CJ:

Justice France, have you muted or is it some other –

KÓS J:

10 I don't think it's her.

WINKELMANN CJ:

Yes, excellent, yes.

MS COATES:

Ka pai. Just in terms of timing for today, I was reading with interest that in the
 15 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC) case, the singular issue of te Tiriti, they sat in front of the Privy Council for a week, and I am, with the efficiency of the Māori women, I'm going to attempt to try and cover what is a very nuanced, complex topic in a singular session. So I guess I'm just pre-empting that we're still wanting to make sure that it takes the time it
 20 needs to to appropriately ventilate what is a fundamental constitutional issue. So hoping to be done certainly by the morning break, but that will be moving at pace, and we'll see where we are at that point.

In terms of my plan for today, your Honours, I'm going to give a brief outline of
 25 the position, our overarching position on te Tiriti o Waitangi. I'm then going to speak to some of the errors that we say the Court of Appeal made because that helps to ventilate I think some of the key issues that this case cuts to, then going to positively make the case that te Tiriti o Waitangi is cognisable in the way that we say it is, including addressing *Te Heuheu*, and then I'm going to make a few
 30 comments on the specific relief of declarations of inconsistency. So I'm going

to – the plan is to largely follow the outline and the outline largely follows the order and structure of the submissions, apart from a couple of small things I've turned around for flow purposes.

- 5 So by way of summary, Mr Smith claims that – the fundamental claim is that Crown acts and emissions in respect of climate change, including the legislative response in the CCRA, is a breach of te Tiriti o Waitangi and he seeks declarations of inconsistency to that effect.

1005

10

In the pleadings, we say Te Tiriti o Waitangi is part of the law of New Zealand and creates binding legal obligations on the parties to it. We also say that Mr Smith and his whānau, Ngāpuhi and Ngāti Kāhu, are rights holders under te Tiriti and that rights have been breached in this instance.

15

Now, Justice Williams asked a question yesterday just around the geography, some of the hapū and some of the marae, and overnight Mr Smith has prepared a PowerPoint that just lists his hapū on page 1 and you should have that hopefully, your Honours, in front of you, but also a physical copy next to you so
20 hopefully you've received that by email, Justice France.

25

But on page 1, he lists his 32 hapū. On the second page, he points out where some of his associated marae are and this is the broader district or rohe of Whāingaroa. I understand that there are 17 marae associated with the broader area but this map includes some of the coastal ones. And his primary marae and hapū is Tahawai, although he has whakapapa to all of them.

Some of the other maps in that –

WILLIAMS J:

30

So when you say 17 marae, 17 marae in?

MS COATES:

Associated with those hapū in that general area of which Mr Smith whakapapa's to.

WILLIAMS J:

- 5 So we're talking the Whāingaroa area?

MS COATES:

Yes. The second map is Pukepuke Valley and it just shows some of the Māori land blocks in the area. I understand that squiggly line is anticipated inundation if it rises to three metres.

- 10 **WINKELMANN CJ:**

Which squiggly lines? There are many.

WILLIAMS J:

The red. The red.

MS COATES:

- 15 Yes, so there is red lines and then there is red lines, but the red, these lines here, your Honour, some of them show Māori Land blocks but then the almost heat line –

WINKELMANN CJ:

Yes.

- 20 **MS COATES:**

So that shows flooding if it rose to three metres.

WILLIAMS J:

Is that, so when you say that shows flooding, you mean that shows inundation on an average sea level rise, or inundation in –

- 25 **MS COATES:**

Projected inundation if it rose three metres, I understand, base on –

WILLIAMS J:

Based on average rather than inundation events?

MS COATES:

Yes, yes. If it rose, if it just rose and sat at that level rather than storm surges.

5

We also, in some of our, the later ones, he just shows some of his coastal lands effectively which includes the Mahinepua Block.

10 So that was just for the benefit of your Honour who was keen, I think, to understand the lay of the land as it relates to the hapū, the marae and the general area that we're talking about as it relates to Mr Smith.

WILLIAMS J:

15 Can you just help with superimposing the Mahinepua Block on the sea level rise line? Because they seem to be a different scale, so I might be wrong about that.

MS COATES:

So the Mahinepua Block, which I think is physically located on page 1, 2, 3, 4, these are some of our coastal land blocks including Mahinepua. So you'll see in there where Mahinepua is located, Sir.

20 **WILLIAMS J:**

Yes, but in terms, I'm just –

MS COATES:

25 Where sea level rises? Well, I understand that the actual block, there's likely to be some sea level rise down the bottom, but that actual block is forestry and it's also on a hill.

WILLIAMS J:

Is it shown on that picture with the inundation lines?

MS COATES:

I'd have to double-check with Mr Smith but –

WILLIAMS J:

All right, well, we'll leave it and perhaps you can come back to us.

5 **MS COATES:**

Yes, Sir. I did want to clarify, because our pleadings say that the –

KÓS J:

Well, there must be something. You look at the Matauri Bay one, I mean, the clearly a three-metre rise is going to – the last picture, oh, second to last picture
10 – clearly three-metre rise there would rise across the beach, Matauri Bay, so it doesn't seem to show full inundation?

MS COATES:

Yes, Sir. I understand that these were based on NIWA modelling but I –

WILLIAMS J:

15 Oh, I see, is that sort of yellow/red line running around the coast the equivalent of the –

MS COATES:

Sea level rise.

WILLIAMS J:

20 The, yes, I see, I understand now.

MS COATES:

Yes. I understand that. And of course, I think, just on the sea level rise point, that's really only one of the impacts of climate change of which we plead a multitude, but it is one of the more visible ones that evokes a sense of claiming
25 of the whenua and clear visible loss.

1010

I did just want to clarify one point that we make in our proceedings, because we use the word binding. So what we mean by that is we say te Tiriti is not merely a political or moral commitment, that it's a solemn constitutional compact that gives rise to rights and obligations and that the common law is capable of

5 recognising and giving legal consequence to those obligations.

So the legal remedy that we're seeking, or legal obligation, doesn't dictate a single remedial consequence. In this case, Mr Smith is not seeking, as has already been covered, to invalidate legislation, obstruct its introduction or

10 compel the Crown to adopt a particular climate policy. The legal consequence we are seeking here for Te Tiriti o Waitangi is a declaration that Crown conduct falls outside the bounds of te Tiriti consistency and any other relief that the Court may see fit.

15 So, the key issue for this Court, we say, in the strike out context, is whether it's tenable to argue that a declaration of inconsistency can be granted when te Tiriti is recognised as fundamental to New Zealand's constitutional obligations, when common law already gives legal consequences to it without requiring expressed statutory incorporation, when it has become deeply interwoven into our laws

20 and our constitution, when the rights under tikanga that it affirmed and guaranteed are themselves legally cognizable and the Crown has expressed, including in legislation, recognising that its te Tiriti obligations apply in a climate context.

25 We say in that context, Mr Smith's claim is tenable and the remedy sought is a principled and coherent development of contemporary New Zealand law. We also say that *Te Heuheu Tukino v Aotea District Māori Land Board*, the Privy Council 1941 case, does not prevent that conclusion. *Te Heuheu* is founded upon a flawed understanding of te Tiriti and the broader proposition

30 that it stands for should be reconsidered but even if the Court is not prepared, in this appeal, to determine the full extent to which te Tiriti may be directly enforced, we say *Te Heuheu* doesn't answer the narrower question before the Court, whether a court may recognise a breach of te Tiriti through a non-invalidating declaration of inconsistency.

We're aware that the argument is novel but it is not unprincipled or without legal and constitutional logic. It is being argued now because we have developed a unique constitutional remedy that straddles the line between Parliamentary sovereignty and the law and also recognising and appreciating that te Tiriti forms part of that constitution and striking the appropriate balance between those two things and we say that this remedy strikes that balance and should appropriately be extended to Te Tiriti o Waitangi. If that proposition is reasonably argued, we say that whether there has in fact been a breach of te Tiriti is a matter for trial.

10

So that's the overarching kind of parameters of our argument on te Tiriti, your Honours, and I am going to delve into where we say the Court of Appeal went wrong.

15 So, the approach that the Court of Appeal took to dealing with Te Tiriti o Waitangi was that they circumnavigated or didn't answer the constitutional question of whether courts may be able to grant declarations of inconsistency because they say, in this context, that Treaty-consistent decisions were available under the CCRA and they also point to alternative
20 avenues for relief including the Waitangi Tribunal and section 20 of the New Zealand Bill of Rights Act. So they said, because of those things exist, we're not going to address *Te Heuheu* and the proposition that it stood for and we're not going to address the questions of declaration, it is untenable in this context.

25

So I wanted to first address the issue of availability of Treaty-consistent decision-making under the CCRA and, of course, the CCRA is not our whole claim, it is just a central part of it because that is the mechanism, as my learned friend said, that the Crown points to for dealing with climate change.

30 1015

That te Tiriti/Treaty-consistent decisions are available under the CCRA is contested. We say it cannot be assumed that the existence of a Treaty clause means that legislation is consistent with the Treaty, nor that Treaty-consistent

decision-making is necessarily available under it. One only needs to open one of the number of Tribunal reports, for example, that cover contemporary issues with a Treaty clause in it, one of which I think was released only a couple of weeks ago, but in the authorities – and you don't need to go to this – but at

5 tab 98 we've included the freshwater stage 2 report where the Tribunal there says part 2 of the RMA is inconsistent with the principles of the Treaty. So that there as a Treaty clause does not necessarily mean that Treaty-consistent decisions are available under the Act.

WILLIAMS J:

10 Did it say why?

MS COATES:

Why they came to that conclusion?

WILLIAMS J:

In a nutshell, of course.

15 **MS COATES:**

The Court of Appeal, why they came to that conclusion?

WILLIAMS J:

No, no, no, the Waitangi Tribunal.

MS COATES:

20 Oh –

WILLIAMS J:

Why did they say section 8 I presume was in breach?

MS COATES:

Section 2 – oh, sorry, yes, they looked at the whole part 2 of it. So that was in

25 the context of the freshwater, recognition of freshwater. I can go to it, your Honours, but we've just included –

WILLIAMS J:

Well let's not get distracted.

MS COATES:

Yes, time constraints.

5 **COOKE J:**

Isn't it implicit when Parliament introduces a Treaty clause or other machinery within a piece of legislation guided by the Treaty that it knows it may not be completely consistent with the Treaty, it's actually manufactured or crafted a limited way in which Treaty principles apply but it knows it's not full-blown Treaty compliant?

MS COATES:

15 It may know that, your Honour, but the language that it uses is we're giving – usually and in the climate change context it refers to giving effect to te Tiriti, so what we say that does is it refers to an external standard. Te Tiriti is not self-defining by the Crown. It refers to something that exists separate, that has clear rights and guarantees and duties in it. And so, yes, I think I agree with your Honour that the Crown may already know that but that doesn't mean that the way that we look at that, given that they're intending to seek to honour and give effect to te Tiriti, means that that's the limit and extent of the duty. And I think courts have already recognised that – will read that in a Treaty-consistent manner to the extent possible because of the constitutional weight of te Tiriti, but we say even if you read those clauses in a manner that's Treaty-consistent our pleading is that that still doesn't get you there in this context.

KÓS J:

25 Are you going to come back to sections 3 and 3A? Because they seem to support what Justice Cooke suggests. The purpose of the legislation in section 3 doesn't refer to the Treaty at all, and section 3A then makes provision, additional provision, to achieve some kind of compliance with obligations.

MS COATES:

Yes, your Honour, I will come back to that specific section and explore that in a little bit more detail, but –

KÓS J:

5 And do you agree it supports Justice Cooke's proposition?

MS COATES:

That they're deliberately trying to limit the Treaty duties?

KÓS J:

10 Well that the Treaty is not at least centre, the centre of the legislation, or compliance with it is not the centre of the legislation.

MS COATES:

15 I would agree with the proposition that the whole Act doesn't comply with te Tiriti o Waitangi, and that in the Act they've attempted to funnel their duties into a particular space that doesn't exhaust what Treaty consistency might require.

KÓS J:

Right, okay.

MS COATES:

20 But I do also say that they've indicated that they're seeking to give effect to te Tiriti in this context and they've done that in a number of other climate-related contexts, and so the point I think is that te Tiriti o Waitangi, whilst they're seeking to have a list of how they say it might be expressed, that is, in an elaborated way, that te Tiriti still exists as an external constitutional yardstick against which that can be measured. So that's one of the points that we're making in this
25 claim.

WILLIAMS J:

The task of the courts in respect of the Treaty is at least a similar task to that of the courts in respect of BORA rights, which is to fill the statutory provisions with compliance if that's at all possible. Isn't that the first task?

5 **MS COATES:**

Yes, and we don't disagree with that, Sir. And what we still say in this case though is that even if you try to fill it within the constraints of compliance within this particular legislative framework, it still doesn't get you to what compliance looks like. So even if we're reading the statute in the most permissive way, ultimately what it does in terms of the Treaty is it says, we'll give you some Māori representatives, we'll consult and we'll, I think, take you into account or have a plan around emissions, reductions, and its impact on Māori.

1020

WILLIAMS J:

15 But how do we know that's going to breach until we know what the result is?

MS COATES:

Well –

WILLIAMS J:

I mean, if the point is one of the advantages of these kinds of process and substance clauses is that it has Māori at the table, carrying the burden of filling the Treaty obligation, it requires consultation with iwi and hapū, et cetera, et cetera, and it has taken into account, all of which can be infused with Article 2 and Article 3 compliance, and then you have got to find out what the result is.

MS COATES:

25 Yes, Sir, and I'd just revert though back to this being a strike out and then the pleaded – what we're pleading is the outcome of the application of this Act which is we're still going to burn and die, effectively, that's –

WILLIAMS J:

But your argument is really having Māori at the table and taking into account the Treaty won't cut it, in terms of –

MS COATES:

- 5 Not within the systematic framework in the way that it's been designed. That still doesn't get you to Treaty consistency.

WILLIAMS J:

Yes, so that takes a lot of unpicking before you get to a point of argue-ability on that, doesn't it?

- 10 **WINKELMANN CJ:**

Well, could you just clarify for me exactly how you say it isn't capable of Treaty-compliant interpretation?

MS COATES:

We say that it's contested and reasonably argued and –

- 15 **WINKELMANN CJ:**

But in what respect? What's not compliant about it?

MS COATES:

- 20 Well, so in terms of, I guess, the pleaded case that Mr Salmon took you through yesterday, I think, in an extensive way, we'd say that the compliance there jars with the ultimate pleaded facts which are we're not getting any improvement in this space.

WINKELMANN CJ:

So is your point that because it sets the targets too low it's not Treaty compliant? Is that the point?

MS COATES:

Yes, although I think it's more complicate than it just sets the targets too low, it's I think that whole systemic framework is still not going to get us to the place that we need to get to.

5 **WINKELMANN CJ:**

So it's not Treaty compliant because it doesn't deliver outcomes that are Treaty compliant?

MS COATES:

Yes.

10 **WINKELMANN CJ:**

So it's an outcome.

MS COATES:

Yes.

WINKELMANN CJ:

15 It's not an input.

MS COATES:

Yes.

WINKELMANN CJ:

20 You're not challenging the process, you're challenging the outcomes that are capable under it?

MS COATES:

25 Yes and that are, we say, are going to not do what it needs to do to get you to a Treaty-consistent place. So that you have Māori at the table doesn't ultimately mean that you get to an outcome where our pleaded case says that it's going to make a substantive difference.

COOKE J:

But does that mean that just because coastal communities are going to be significantly adversely affected by climate change ergo that's a breach?

MS COATES:

- 5 No. We refer to the breaches existing on a multitude of different levels and harms and so in our pleaded claim we refer to the harms not only to coastal communities but we refer to the devastating impact of climate change in this space more generally. So it's more layered than just there's going to be some sea level rise here.

10 **WINKELMANN CJ:**

Justice France has a question.

MS COATES:

Yes, your Honour.

ELLEN FRANCE J:

- 15 Sorry, I just wanted to check. If you take something like section 3A(ae), so the national adaptation plan, where the Minister has to: "... take into account the economic, social ... [et cetera] ... and cultural effects of climate change on iwi and Māori ...", two points, I suppose: Justice Williams' point about, well, how do we know that what comes out of all of that may not be consistent; and why isn't
- 20 that sufficient in relation let's just focus on adaptation, for example?

MS COATES:

I think I go back to and must go back – sorry, your Honour, this microphone has just fallen, I won't touch it.

WINKELMANN CJ:

- 25 Yes, apologies for the microphones.

1025

MS COATES:

No. I think I must, again, I think the territory in which we're dealing with is strike out and so what we're or our claim is saying, that it's reasonably arguable on the pleaded facts that Treaty consistency is not available in this context and

5 that requires an analysis, a fuller analysis, that we say is more appropriately ventilated with the full bounty of argument on this particular topic, and based on our pleaded case around what the outcome of this scheme and all of the things that the Crown are doing in this climate context, we say that looked at with a Treaty lens that it's arguable that it's inconsistent with the Treaty.

10 **WILLIAMS J:**

That argument gets you to you can't guarantee the Treaty will be complied with pursuant to this, so that's enough for us to be able to sue.

MS COATES:

That's enough for us to go to a strike-out claim where we're arguing that in full.

15 **WILLIAMS J:**

Well, that's my point. That's enough for us to be allowed to sue.

MS COATES:

Yes, to have that tested as opposed to being the route by which we're – assumed, and circumnavigating dealing with the issue of whether – so it's

20 assumed here. The Court of Appeal said Treaty-consistent decisions are available. We say that's contested, and therefore we – that in itself is not the reason that we say declarations of inconsistency are available, I need to take you through that argument, but that shouldn't be a reason for striking it out and that whether Treaty consistency is available is something that's more

25 appropriately ventilated in that context.

WINKELMANN CJ:

Is this just another formulation, which is not a criticism, but is it just at heart the same argument we heard yesterday that on this framework compliance with New Zealand's collective international commitments is not possible?

MS COATES:

Yes, and we're saying on this framework compliance with Te Tiriti o Waitangi is not possible and there's a legal yardstick against which you can look at that and measure it, and it may be in a High Court context that they look at that and say,
 5 well, yes, XYZ, we fill this and we might get to Treaty compliance, but we at least say that that's – it's tenable that they don't get there on that.

WINKELMANN CJ:

As I articulate that, I think I'm not really clear how it isn't possible under this framework to get to compliance when I look at section 3 which is – possibly I
 10 should have been asking Mr Salmon.

MS COATES:

Happy to – well, he's getting back up, Ma'am, so you can.

WINKELMANN CJ:

Good.

15 **MS COATES:**

How compliance with Te Tiriti is not possible within this framework.

WINKELMANN CJ:

Well, how compliance with our international obligations is not – I mean, well, do you accept that – would you – what are you saying that they should do to
 20 comply? This framework should deliver compliance with our international obligations or does Te Tiriti set a different framework than compliance with our international obligations?

MS COATES:

I would say at the very least that that's what Te Tiriti o Waitangi would require
 25 to go towards protecting the taonga and having the additional devastating effects that's required, so there would be alignment between what's required and the commitments that we've made and what would be required to protect taonga in that context.

KÓS J:

Isn't this a bit like the argument that Mr Butler's going to make about under his jurisdiction argument paragraph 33 of his submissions where he says first of all you've got to work out the paradigm of what compliance is and then you look at what is in fact being achieved and if there's a gap that's the argument on compliance.

MS COATES:

Yes, your Honour, I'd accept that, and I think it's the same. Te Tiriti o Waitangi doesn't – and although I think the Crown points to Te Tiriti o Waitangi have a spectrum of options available to achieve Te Tiriti consistency, there are some minimum bottom lines to that as well. Not all action is treaty consistent, and what we say in this case, in a context where you have some of to the most serious breaches of Te Tiriti o Waitangi we say that there is a gap between what is being proposed and what is being done and what Te Tiriti requires.

1030

COOKE J:

If New Zealand met its international obligations, would it be meeting its Treaty obligations?

MS COATES:

That would go some way, Sir, but I'd need to think about that more because that's not rangatiratanga over taonga. So I wouldn't necessarily accept that that's where the Treaty obligation ends.

WINKELMANN CJ:

Because there's an obligation – there's a reasonableness component in compliance with te Tiriti, isn't there, it's not an absolute obligation to for instance avoid climate change because New Zealand would have to – it would stop its economy and still not achieve avoiding climate change, so you have to set the threshold somewhere.

MS COATES:

Yes, your Honour, and we've got 50 years of jurisprudence that indicates where those thresholds might be set where courts and the Tribunal have engaged in that process of rangatiratanga and taonga, and also grappling with what that
 5 means in the context of Crown exercising kāwanatanga.

COOKE J:

I guess what this is revealing is that the target of the claim is really emissions, New Zealand's emissions, and yet anything that tries to analyse Treaty compliance is more particular than that. It seems to me that the claim at that
 10 very macro level about the level of New Zealand's emissions doesn't really get to an issue about Treaty compliance.

MS COATES:

I would disagree, Sir, because I think Treaty compliance – yes, we're talking about emissions but that's directly related to an outcome and impact that that's
 15 going to have on Māori, a devastating one, that we say.

COOKE J:

Well global emissions do.

MS COATES:

Yes, but of course as we sort of traversed yesterday, the Crown has an
 20 obligation to do its bit within the powers and the extent to which it controls, and Māori I think and te Tiriti o Waitangi obligations exist – like an additional layer of obligation exists there because of the active protection role that the Crown plays in relation to Māori. So, yes, acknowledge that it's an international problem and not just a domestic one, but in terms of the duty that's owed by
 25 the Crown to Māori in this context, there is still a duty to act to try and prevent that as much as possible.

In terms of the Waitangi Tribunal point, so that was one of the reasons that the Court of Appeal also declined to grapple with the issue of declarations of
 30 inconsistency because they pointed to the Tribunal and said there's your

answer. We acknowledge of course that the Tribunal performs an integral role, a constitutional role in Aotearoa, but of course that is a role and function that is different and unique to that of a court. So the Tribunal of course is a commission of inquiry, has composition that is mixed membership, usually only the
 5 presiding officer has legal training. They make non-binding, often extensive recommendations including that Parliament not legislate or take particular actions.

And also one of the points that we make briefly in our submissions is the
 10 ongoing scope and existence of the Tribunal is more tenuous than the Court, and we point to the New Zealand First Coalition Agreement on that front. The High Court of course exercises judicial power, determines and upholds rights, supervises the exercise of public power, has inherent enduring jurisdiction including the power to grant declarations. So he mana tō te Kōti, to put simply,
 15 that is, the Court and the Waitangi Tribunal have their own mana and standing and distinct constitutional role and function.

WINKELMANN CJ:

Mr Hodder will say that what you're inviting the courts to do is to shift the status of te Tiriti within our constitutional fabric, that it is more than an incremental step
 20 to issue declarations as to the law, you know, a declaration of law that this is a breach of te Tiriti, is a change in its status. So what do you say to that?

MS COATES:

Yes, and Ma'am, I'm going to work you systematically through why we say that, because I think there's a number of linking arguments that come to the answer
 25 to that.

WINKELMANN CJ:

So you agree with them or not?

1035

MS COATES:

30 That it's a fundamental constitutional shift?

WINKELMANN CJ:

Yes.

MS COATES:

We agree it's an extension and that there is a legal and constitutional
5 justification for its extension and that some of the reasons that are stopping it,
ie, *Te Heuheu* and some of the rhetoric around that, are wrong or can be
distinguished in this particular instance. So we will come to that, Ma'am.

WINKELMANN CJ:

All right.

10 **MS COATES:**

Do you need to hear anything else on the Tribunal point?

WINKELMANN CJ:

No, thank you.

MS COATES:

15 Ka pai. In terms of the –

WILLIAMS J:

Well, except this, the Tribunal has an express statutory authority to enquire into
the Treaty consistency of legislation.

MS COATES:

20 Yes.

WILLIAMS J:

That's one of its fundamental roles. That's what makes it unique. It was part
of accommodation that led to the 1975 Act. There would be no binding powers
but it could inquire into current legislation, in fact it could only inquire into current
25 legislation or policy, not historical legislation or policy. Does that mean the
Tribunal is the primary place where those arguments should be directed? It's
designed for that purpose.

MS COATES:

Yes, and I don't think – and this is pushing back on the submission made by the Crown that having power here would make the Tribunal redundant in a way. We say it will likely still stay the primary place in which that occurs. There's a

5 number of reasons why claimants would choose that particular forum to have those issues ventilated, but that doesn't, and shouldn't, stifle the separate and distinct constitutional role of the Court to issue a different type of remedy than what the Tribunal is doing.

COOKE J:

10 How's it different?

MS COATES:

Well, the Tribunal makes extensive recommendations about what the Crown should do. What we're asking the Court to do is to hold up the constitutional bounds of Te Tiriti and say whether what they're doing is consistent with it, and

15 so we say there's a difference in those two roles and functions.

KÓS J:

Aren't they both –

WINKELMANN CJ:

Can you say more?

20 **KÓS J:**

Well, aren't they both declaratory?

MS COATES:

Well, yes, although again – and this goes to he mana tō te Kōti – it is different, we say. There's clear overlap I think as well. We can't say that there's not.

25 The Tribunal is looking at Te Tiriti o Waitangi, looking at legislation, saying that it doesn't meet the mark and extending that further, but what a court is doing, we say, is a different role and function. It is looking at what is constitutional, what is legal, what is the basic minimum constitutional line that we have, and

we say rights and interests are sourced in that that are cognisable and within the common law, and so that then is a different role and function to what the Tribunal is doing.

WILLIAMS J:

- 5 Maybe a useful analogue is the Ombudsman's Office and the Court where there are equally overlapping roles –

MS COATES:

But you still have a role.

WILLIAMS J:

- 10 – without the sense of conflict. Perhaps that's – particularly where the Ombudsman's Office makes recommendations to the executive as to how they should go about dealing with these sorts of issues in the future. They can also make binding decisions, of course, but they often make recommendations about how things should be done differently.

15 **MS COATES:**

- Yes, Sir, and the only I think additional point to add is that in this particular instance, of course, there is no clear ousting of court jurisdiction to perform it's separate role and function and there are a number of pieces of legislation, including the Employment Act, that says we're looking at this therefore
20 jurisdiction is ousted everywhere. So you would expect clear statutory language to diminish the role of the Court.

WILLIAMS J:

- Well, you've got to doubt whether in 1975 anyone had these kinds of proceedings and this kind of relief sought in mind when they drafted the Treaty
25 of Waitangi Act 1975.

MS COATES:

Well, yes, and that's right, Sir, and...

WILLIAMS J:

That doesn't necessarily help you though.

MS COATES:

Well...

5 **WILLIAMS J:**

It might not have occurred to them to write an ouster clause.

MS COATES:

To put it in there? Yes, but it doesn't exist and we say that's not a bar to the Court or a route by which you shouldn't grapple with the issue of whether such
10 relief might be available.

KÓS J:

Or they would have been steeped in the idea of the principle in *Te Heuheu*. Of course it wouldn't occur to them, I would have thought.

MS COATES:

15 Yes, I don't disagree with that, Sir.
1040

COOKE J:

At the very least, they'd have to be – the Court would have to exercise a discretion not to embark upon an inquiry if the Tribunal was doing that job?

20 **MS COATES:**

Well, the way that we're going to put it, Sir, I think, is – well, yes, all declarations have a discretionary element to it and so would acknowledge that discretion exists there, but what we're trying to, I guess, make the case for here is that one is at least available and this doesn't preclude it. So that may influence the
25 exercise of discretion but it doesn't, at this stage, strike us out on that basis.

WINKELMANN CJ:

So the Tribunal, correct me if I'm wrong, doesn't have jurisdiction to issue a declaration, it makes findings?

MS COATES:

5 They make findings and recommendations.

WINKELMANN CJ:

Yes.

MS COATES:

10 So not formal declarations of what a constitutional position is as it relates to te Tiriti, so it's worded differently, Ma'am.

WILLIAMS J:

I suppose one point in your favour is, is it *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests*]? Perhaps it's the *Lands* case, *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA),
15 that clearly contemplates there being overlapping enquiries by the Tribunal and the Court and in fact I think the President says, we're not bound by what the Tribunals says but we will always respect its articulation of the problem and the answer, suggesting it's expecting some kind of overlap.

MS COATES:

20 Yes, your Honour, and I think it's in *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 or *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 where they – and this, of course, is dealing with a different type of claim, that is fiduciary obligations, but they do say that the Tribunal has a distinct role and it doesn't preclude common law remedies
25 elsewhere of which we're saying this is one.

So, on the overlap with section 20 of the New Zealand Bill of Rights Act and I'll address this point quite quickly, because this was again one of the other reasons that the Court of Appeal declined to let the claim proceed, we of course

acknowledge that there is overlap with the right to culture and that if you take a te Tiriti interpretive presumption of consistency as applies to the New Zealand Bill of Rights Act that you would look at the right to culture and look at it with the Treaty lens.

5

So it would, for example, protect taonga, having a place to practice culture, kai gathering, identity and those sorts of things. But we say what's protected by te Tiriti extends and is not exhausted by section 20 in the New Zealand Bill of Rights Act. It's a different sorts of right, different substantive rights flow. The right to culture is not equivalent to the constitutional guarantee of tino rangatiratanga over taonga and so we say that even though there may be some overlapping constitutional rights that the existence of that overlap should not invalidate one source and Te Tiriti o Waitangi has its own separate mana within the legal system.

15

We also say that overlap helps us. That we can repackage parts of a Treaty breach up as a section 20 breach for which declarations of inconsistency are permissible indicates how unrevolutionary we are being in seeking a declaration of inconsistency in a Treaty context.

20

So, I am wanting to move on to point 3 in my road map, your Honours, which is where we say or set out the case effectively for why a declaration of inconsistency is available and one of the starting places is we say te Tiriti is a source of constitutional rights and interests for both the Crown and Māori.

25

Now, the idea that te Tiriti might qualify the Crown exercise of authority is not a new one. I don't need to take you here, but I was reading with interest the previous Chief Justice Elias' comments that she made around te Tiriti in a speech that is at tab 14 of Te Hunga Rōia Māori's authority.

30 **WINKELMANN CJ:**

Yes, so I was just going to point out the general convention that extrajudicial writings are not cited.

MS COATES:

Oh, okay, Ma'am. I'm happy to leave that there, if you want. The only thing was that there's two – I can just leave that there actually, Ma'am, that's not necessary.

5 **WINKELMANN CJ:**

Okay.

MS COATES:

So what I will take you to though is Professor Frame's article because we are lean on that, not his full argument, but we do refer to it a number of times, so
 10 this is at, for your Honour, at the appellant's authorities tab 77 and page 162.
 1045

So Professor Frame at the commencement of his – well, before this he talks about sovereignty which aligns with a number of the comments my learned
 15 colleague refers to yesterday, so it's worth reading, but – because we're not making the full qualified sovereignty point, I'm referring to this because it supports sort of the trajectory in which we're heading.

So he says: "With those preliminaries out of the way," referring to some of his
 20 comments around sovereignty, he says: "I will now state my conclusion that what the Crown acquired from the Treaty of Waitangi and its subsequent proclamations was a sovereignty qualified and limited by the Treaty itself. In particular, the law-making power acquired by the Crown is limited by the terms of the Treaty." And he sets out five reasons for this conclusion. 1, he says:
 25 "Powers based on a treaty must, as a matter of elementary logic, be consistent with the treaty. The treaty cannot be relied upon for what it confers but discounted as to its limitations." He then talks about: "The most fundamental rule of international law is often stated in Latin: *pacta sunt servanda* – treaties must be complied with. This is accepted by both customary international law
 30 (*jus gentium*) and explicitly by art 26 of the Vienna Convention on the Law of Treaties of 1969, to which New Zealand is a signatory." 3: "Peculiarities of domestic law (such as the supposed New Zealand rule that treaties are not

directly enforceable by courts unless Parliament so commands) may not be pleaded as an excuse for non-compliance with a treaty.”

5 And if we go up to the top of the next page: “The Crown is an essential part of the law-making capacity of Parliament, which is therefore constrained by the Crown's obligations under the Treaty of Waitangi.” And he goes on to say: “The decision of the Privy Council in London in *Te Heuheu Tukino v Aotea District Maori Land Board* in 1941 is not supported by the authorities on which it purports to rely, and in so far as it treats Parliament as free to enact laws
10 contravening the Treaty of Waitangi is now open to restatement and/or revision by the Supreme Court of New Zealand since its creation by the Supreme Court Act 2003.”

15 So we're not taking it as far as Professor Frame does in terms of seeking to directly qualify the sovereignty of Parliament by Te Tiriti o Waitangi but we say some of these arguments align and support where and why we say declarations of inconsistency should be available.

So I think the first place to start –

20 **KÓS J:**

Even his theory still seems to operate on the basis that it is a Treaty of cession, even if it's qualified cession.

MS COATES:

Can you say that again, sorry, your Honour?

25 **KÓS J:**

Even his theory at 162 seems to operate on the basis of the Treaty is a treaty of cession, albeit limited cession or qualified cession.

MS COATES:

30 Yes, and I'll come to that point when I address *Te Heuheu* in more depth, Sir, if that's okay, which will be shortly.

I did want to start though with just that general point that we make at 3(a) around Te Tiriti as being a source of constitutional rights and interest for the Crown and Māori, and the best place, of course, to start is with the Te Tiriti text itself and I'm not going to take you there because you'll be familiar with it but I think it's

5 always worth reorientating ourself in that space: what it was and what it was intended to do. It was, of course, a solemn compact, an exchange of promises executed in 1840 between the Crown and Māori and it conveys duties, rights and guarantees. The Crown obtained a new form of authority, Kāwanatanga, while existing Māori rights over kāinga, whenua, taonga katoa, were affirmed

10 and guaranteed. It was intended to form the foundation of our State and govern the coexistence of people, legal systems, power and the respective spheres of influence that would be exercised. So the intention was, behind the Treaty, was that it be honoured.

15 We say that the Treaty – and this is drawing on Professor Frame's argument: "The Treaty cannot be relied upon for what it confers but discounted as to its limitations."

1050

20 I don't need to take you there, but in our submissions we cite a Canadian Professor Emeritus from York University in Toronto who is a constitutional scholar, Brian Slattery, and that's at tab 81 in our authorities at 209, and I'm not relying on this for the same constitutional context in which Canada operates. I'm relying on it just for the propositions and the reasoning behind the statement.

25 He says: "It would be incongruous if the Crown could now deny that it is bound by such treaties after consistently representing the contrary to aboriginal peoples over a period of several centuries. In equity, the Crown cannot be permitted to impugn the binding force of statements that have induced another party to surrender certain rights or otherwise alter its position to its detriment,

30 as by accepting the suzerainty of the Crown or ceding tracts of aboriginal lands." What he's talking about there is really just you cannot ignore the conditions of a conditional agreement, that is, take the power part but ignore the basis upon which that was assumed, and so that speaks to deeper principles of fairness,

trust, reasonableness, equity, those big principles that sit behind our legal system.

5 That basic proposition flows through and is expressed in the principle that we cite, *pacta sunt servanda*, which stands for that basic proposition as you'll well know that agreements must be honoured. That exists on the international plain but it's also reflected in the way that we develop our common law and a number of the doctrines expressed in our common law. So we refer to in our submissions – and this is –

10 **WINKELMANN CJ:**

Can I just ask you what page of Slattery article it was on? Was it page 210 that you were reading from?

KÓS J:

Page 210. Top of page 210.

15 **MS COATES:**

Page 209, I think.

KÓS J:

Yes, and top of page 210 really.

MS COATES:

20 Yes. And again that's just really – I'm not trying to take that out of the context in which it belongs, but it's really just the reasoning that I'm relying on there, Ma'am.

25 So we refer in footnote 239 to the articles of the Vienna Convention which expressly affirm the principle of *pacta sunt servanda*, and those particular provisions say: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 further provides that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

WILLIAMS J:

What do you make then of – well *Te Heuheu* contradicts that, of course, and –

MS COATES:

Yes, and what I'm leading to, Sir, is I'm building up the argument for the general
5 proposition that our law enforces agreements that are made.

WINKELMANN CJ:

But is that speaking between states, the Vienna Convention?

MS COATES:

Yes, yes, it is, but of course that's part of our customary international law and
10 then part of our common law, but I think I'm more broadly relying on it for the
proposition that that principle is something that infuses the law. It infuses it on
the international plain but it also infuses it in our common law domestic contract,
and so – our common law domestic context, and there's of course a number of
examples that we have in our law where legality flows from agreement. So
15 contract is an obvious one, legitimate expectation is an obvious one, where you
say something you follow through, and so even without legislation affirming it
we have legality that flows from that basic core idea that when you say you're
going to do something there's legal remedy in that. Now *Te Heuheu* comes
along and disrupts that proposition and so I want to turn to *Te Heuheu*, after
20 setting that up, now.

So our position on *Te Heuheu*, our primary proposition is that it should be
reconsidered, but in the alternative we say even preserving its core propositions
Te Heuheu doesn't preclude a declaration of inconsistency. Now in terms of
25 what *Te Heuheu* actually decided, in our bundle of authorities we've got an
article by Katherine Sanders and also a different article by Professor Frame that
help paint the context of *Te Heuheu*, and they're quite good reads. I'll commend
them to you if you haven't read them already, because they very much situate
you in the Privy Council with bombs falling on them in that World War II context
30 where counsel takes a steamship over to London to argue the case.

WILLIAMS J:

Where is *Te Heuheu* itself in the authorities?

MS COATES:

Oh, that is at tab 82, Sir. Sorry, tab 32 of ours, apologies. My junior is doing a
 5 good job to my left. No, you're good.
 1055

So just by – and the facts aren't particularly important but I'll paint them really
 briefly, because it's a key case in this context. So the facts basically of
 10 *Te Heuheu* is that Parliament transferred the management of Tūwharetoa lands
 to a Land Board to paternalistically look after, that is, you can't do it yourself,
 we are going to transfer the management of your whenua to a Land Board.

That Land Board then entered into commercial arrangements that resulted in a
 15 debt owing to shareholders. The Egmont Box Company ironically owned, in
 the context of Mr Smith's other proceedings, by the Taranaki Dairy Farmers.
 Parliament, as a result of lobbying, passed laws in 1935, the Native Purposes
 Act, charging the debt which was £23,500 against Tūwharetoa lands.

20 Tūwharetoa argued or *Te Heuheu* took a case arguing, because they woke up
 one morning, someone else is managing their lands, a debt is now owed on it
 and that was statutorily passed and affirmed, they argued that the Act was
 ultra vires as it was contrary to the guarantees of the Treaty of Waitangi. So,
 they were seeking to effectively have that piece of legislation struck down on
 25 the basis of Te Tiriti o Waitangi.

The Court held at page 596 and this is the often quoted statement that gets
 wheeled out in the context of these types of arguments that: "It is well settled
 that any rights purporting to be conferred by such a treaty of cession cannot be
 30 enforced in the Courts, except insofar as they have been incorporated in the
 municipal law."

And I am going to expand on this but if we just break that sentence down, “rights purport” –

KÓS J:

So which page is that, Ms Coates?

5 **MS COATES:**

This is – of the decision, Sir?

KÓS J:

Yes?

MS COATES:

10 It's at page 596, I understand, but we've quoted that paragraph in our submissions if you are wanting –

KÓS J:

Oh, thank you.

COOKE J:

15 Right at the bottom of the page.

KÓS J:

Right, thank you, yes.

MS COATES:

Yes, it straddles the page.

20 **KÓS J:**

Thank you.

MS COATES:

So if we break that down, “rights [purported by a] treaty of cession”, we say that's incorrect. They say then it “cannot be enforced in the Courts”, we're not
25 seeking enforcement in terms of the same remedy that was being sought in

Te Heuheu. And they then say unless has “been incorporated [into] the municipal law” and we say it is arguable that *te Tiriti* through a combination of statute, common law and constitution recognition does have or has been, since this, been incorporated into the municipal law in a number of different ways.

5 So, it’s kind of the basic breakdown of our argument.

KÓS J:

Well, given Alex Frame’s argument, why is this not a treaty of cession?

MS COATES:

Yes, well, in terms of this particular case, that was not argued, it was assumed,
10 and that was based on –

WILLIAMS J:

Why does it matter?

MS COATES:

Sorry, why does it matter?

15 **WILLIAMS J:**

Why does it matter?

MS COATES:

Would you like me to take – I’ll answer this question and then I’ll come to this one, so –

20 **WINKELMANN CJ:**

Maybe we should just let Ms Coates go through this in order, if she wishes to.

MS COATES:

No, no, we’re good. So, the treaty of cession point, that was based on the English version of the Treaty, because that’s what it says in the English version
25 of the Treaty. That is only a viable interpretation if you only look at the English version of the Treaty, not the *te reo* version which Māori subsequently signed.

Since *Te Heuheu*, there has been significant developments in our understanding of what those documents meant, right. We've had Claudia Orange's book, we've had Ned Fletcher's book, we've had Ani Mikaere, we've had Moana Jackson, we've had Sir Hugh Kawharu's translation, we've

5 had court and Waitangi Tribunal jurisprudence delving deep into what the Tiriti was, what it means for the parties, and what its effect is.

The Waitangi Tribunal and we refer to that in our submissions, in the Te Paparahi o Te Raki report it held that the Chiefs did not cede sovereignty

10 and I think, like your Honour said before, although that's not binding on this Court, in the *Lands* case they held that Tribunal decisions should be given some weight in a court context.

WILLIAMS J:

Why is it relevant? Why is it a relevant question here?

15 **MS COATES:**

Well, we say – well, why, we say that it was wrong. So, the *Te Heuheu* ratio proceeded on that presumption and so if we disrupt that presumption we then need to question, well, does the rest still follow and apply?

WINKELMANN CJ:

20 You've already said though, that does take you –

WILLIAMS J:

I don't really follow you.

WINKELMANN CJ:

Yes.

25 **WILLIAMS J:**

I don't really follow the point. Even if it was a treaty of cession, your argument stands, doesn't it?

MS COATES:

Yes, that's what we're saying.

WILLIAMS J:

So what's the point in fighting it?

5 1100

MS COATES:

Because we still think that the *Te Heuheu* ratio is still – that that seems – and the Crown's accepted I think, or they don't, at least maybe not accepted as taking it too far but the Crown in their arguments also don't lean on Te Tiriti o
10 Waitangi being – that as a treaty of cession is necessary and nor do they, even I think generally in their documents claim that it was, but we still think it's worth addressing the Court on because that's the fundamental presumption upon which that case then flows. It's an important part of the ratio of that case. The question then flows is what is it?

15 **WINKELMANN CJ:**

Are you making the job harder for yourself than you need to though is the point, because it's been said against you that you're making a revolutionary point and you seem to be making a more revolutionary point than you need to make.

MS COATES:

20 Yes, I mean, we say that your Honours don't necessarily need to go there but it's still wrong and so we're working through the steps as to why it's wrong.

WINKELMANN CJ:

Well we won't stop you because it is the law and you're a lawyer. Argue it, Ms Coates.

25 **WILLIAMS J:**

I guess the point is that sovereignty is itself a malleable idea and in fact if you want to enforce this stuff against the Crown it needs the power to be able to

effect those rights, therefore it must have some law-making power, otherwise if you didn't see to any law-making power what's the point in the proceeding. So –

KÓS J:

And why are we here.

5 **WILLIAMS J:**

Exactly, so even in 1941 sovereignty had a malleable idea. It certainly did in the 19th century and in 1840 most particularly.

MS COATES:

Yes.

10 **WILLIAMS J:**

And there was, as Ned Fletcher says, there's nothing particularly revolutionary in 1840 about some kind of distribution of power by treaty, in which one side gets enough power to do what it promises to do and the other side gets enough authority to protect what it wants to protect.

15 **COOKE J:**

Which seems to be exactly what Alex Frame was saying in the passage he quoted.

MS COATES:

That it does – that we don't need to resolve that question, sorry?

20 **WINKELMANN CJ:**

I mean I don't think we need to resolve the question in this case.

MS COATES:

Yes, although I think – yes, I agree with that your Honour, I don't think you need to resolve the question but, again, the purpose of going through it is working
25 you through that case and why we think the propositions that are often put up as barriers to it don't necessarily flow, and that it was a treaty of cession was relevant to what their Honours did in that particular case. The question then is

if it's not addressed in a treaty of cession, what is it? And do your Honours need to put it in to a particular box in relation to this case? That is what do you then do with the other propositions that it stands for if you take that out of the equation. There's of course –

5 **ELLEN FRANCE J:**

Sorry Ms Coates, can I just ask one thing?

MS COATES:

Yes.

ELLEN FRANCE J:

10 I'm not clear why it is that you say it's dependent on the characterisation as a treaty of cession because what they're talking about is acquisition and they say it doesn't matter how acquisition's brought about, so why doesn't any sort of treaty trigger what they say? So require recognition and by municipal law, et cetera.

15 **MS COATES:**

Yes, well I think what we're trying to – well, one, we say is that it has achieved that recognition and we can come onto why, but I guess what we're trying to disrupt there is just the necessary presumptions that follow. There's a number of – and we refer to these in our submissions where treaties are characterised
 20 as *sui generis*, that is they're distinct treaties with indigenous people, so appreciate the dualism doctrine that we have in New Zealand that we're not trying to destroy, but we say that treaties that are constituent, that form part of the constituting of the State, are quite different, even from a purpose and reason presumption to those that we enter into with other states. So New Zealand is
 25 party to, what, over 2,000 I think different treaties and the purpose of that distinction between Parliament and the executive – hang on, I'm just going to make sure I work through your question, your Honour – you're saying it's still a treaty therefore the propositions still flow. We say that –

ELLEN FRANCE J:

Well that's my question.

MS COATES:

Yes.

5 1105

ELLEN FRANCE J:

Why is that not so?

MS COATES:

Yes. The case we're making is not that – the case that we're making is that
 10 te Tiriti has assumed constitutional significance in Aotearoa New Zealand, and
 that it might exist on the international plain does not preclude that. And there's
 a number of reasons that we say that, but one of them is that we point to some
 of the international cases, including *Simon v R* [1985] 2 SCR 387. We point to
 some of the international commentary, including by Professor Brian Slattery
 15 and Rebecca Tsosie that talk about these treaties as being unique and sui
 generis, that is, they are able to have legal effect at both different levels.

In terms of your Honour's question, we say that even if the Crown is right and
 that two propositions survive, so one, the Treaty cannot override the legislature,
 20 we're not saying it does, but two, there's no free-standing justiciable duty on the
 basis of the terms of the Treaty alone, we say that also doesn't resolve this
 claim, because the obligation that we're saying is not asserted in a legal vacuum
 and that it has been recognised in a way that allows for te Tiriti to have meat to
 the bones.

25

So Frame I think interestingly points to some of the two cases upon which
Te Heuhe relied upon, which were some of those Indian Privy Council cases,
 and in them they say that not only can you get recognition through express
 statute, but they refer to broader recognition that might be assumed over time.
 30 So for example, the case of *Secretary of State for India v Bai Rajbai* (1915) LR
 42 IA 229 decision which is at tab 53 of our authorities, the way that they put it

is that you can't: "... carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have, as against their new Sovereign, were those ... [by] which that new Sovereign, by agreement, expressed or implied, or by legislation, chose to confer upon them." So the point that he's making is that it's not just through express statutory legislation that you might obtain new rights. So the fundamental point that we're arguing is that the constitutional nature of *te Tiriti* that has now been well-recognised in a whole bunch of different places and the legal recognition that it has is part of the new system effectively recognising rights, recognising Treaty-related rights.

WINKELMANN CJ:

Do you really need to take *Te Heuheu* on at all in that circumstance? Because isn't there something embedded in *Te Heuheu* which rather suits you, your purposes in the New Zealand context, which is things become established over time in our constitutional order and our constitution is sort of a working thing?

MS COATES:

Yes, and I think – that's right, your Honour, and we've sort of, that's why we've got the two propositions. We think *Te Heuheu* is wrong for a bunch of different reasons, but also that our case doesn't rely on *Te Heuheu* being wrong.

20 COOKE J:

But even if we take the proposition that *Te Heuheu* is now qualified because New Zealand has evolved and given greater recognition to the Treaty in indirect ways, what's wrong with that evolution? Doesn't that fulfil the *sui generis* way in which it operates in the New Zealand system? Why do we need to change it?

MS COATES:

I think that goes to our point, your Honour, is that you don't need to ultimately overrule *Te Heuheu* to get us across the line in relation to this declaration context, that is, that we have, even if those two fundamental tenets stand, that the tide of public law has flowed around it and this is consistent with that tide.

WILLIAMS J:

But in any event, *Rajbai and Vajesingji Joravarsingj v Secretary of State for India* (1924) LR 51 IA 357 stand for the proposition that affirmations by the Executive exercising executive powers will be effective and you don't have
5 to have statutory incorporation.

MS COATES:

Yes.

WILLIAMS J:

Only *Te Heuheu* says statutory incorporation.
10 1110

MS COATES:

Yes, and I think that's the point that Professor Frame was making, is that if you just take that as meaning legislative incorporation – well, even *Te Heuheu* just says "incorporated [into] the municipal law".

15 **WILLIAMS J:**

Didn't it say by statute?

KÓS J:

No, it didn't.

WILLIAMS J:

20 Okay.

MS COATES:

I think it's been subsequently interpreted as you need that positive affirmation but I think the precedent that it stands for and the authorities relies upon is broader than that and what we say is if you go through and examine it in the
25 forensic way, that there has been enough in this context for it to be a well-accepted constitutional standard but that also, yes, that flows from that a consequence in court that we say makes it cognisable.

COOKE J:

At page 597 at line 25 it does seem to go on to talk about the statutory recognition, or can be interpreted to mean that, anyway.

KÓS J:

- 5 It leaves you in the unsatisfactory position that under these treaty cases, as they put it I think in the first of those Indian decisions, you are looking for a high contracting party to enforce against, but in a situation where the treaty is with a distributed nation and with tribes, representative tribes, it's hard to identify that person. So you have in one situation a treaty between two nations where each
- 10 can enforce against the other, but on the *Te Heuheu* principle, a treaty without a high contracting counter-party effectively becomes something that isn't directly enforceable at all.

MS COATES:

- Yes, Sir, although, I think that's where the sui generis nature of the Tiriti comes
- 15 into play as a constitutional agreement rather than looked at through the narrow lens of contract, like, doctrinal contract way of looking at it.

WILLIAMS J:

Aren't the context this, that the Treaty doesn't create any rights in fact.

MS COATES:

- 20 It affirms them.

WILLIAMS J:

- It simply records and affirms rights which were rights by imperial law anyway, exclusive and undisturbed possession of lands, there might be argument about the right to internal self-government, but that was certainly the way in which the
- 25 American courts around the same time interpreted English or British imperial practice. So, most of these rights, as we have discovered over the last 50 years, are independently enforceable.

Secondly, the two earlier Indian cases and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 and *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 all seem to accept that Treaty obligations are binding on the executive at least.

5 **KÓS J:**

Enforceable by whom, though?

WILLIAMS J:

Enforceable by those whose interests are protected by the document and you said, for example, the context of substantive legitimate expectation created by
10 a constitutional document that guarantees certain constitutional rights.

MS COATES:

Yes.

WILLIAMS J:

This can all be framed in orthodox public and constitutional terms without a
15 revolution.

MS COATES:

Yes, Sir. I mean, that's our argument. That this is a natural extension of what already exists.

WILLIAMS J:

20 But these things have to be understood as a complex, layered system of developed rights and obligations. You don't need to get to a directly enforceable treaty.

MS COATES:

Which is not what we're claiming.

25 **WILLIAMS J:**

Okay.

MS COATES:

I think that brings us to the end point of (d) which is can be conflated with (e), which is that, of course, which is that of course the social, constitutional and legal context in Aotearoa now is materially different than it was in both in 1840
 5 but then also in 35 years ago when *Te Heuheu* was decided.

We go through the process in our submissions, and everyone does to a certain extent in their submissions, mapping the developments since *Te Heuheu* and so I'm not going to do that in an extensive way because you'll be relatively
 10 familiar with that but I do think there's a couple of things that are important to point out.

1115

So in terms of our submissions, we're around paragraph 149. So this is where
 15 we map, I guess, the various ways in which the executive parliament and of course the Court has treated *Te Heuheu* in the intervening 85 years. At paragraph 150 we point to the cabinet manual which was drafted I understand by Sir Kenneth Keith and that's –

WINKELMANN CJ:

20 He did the introductory chapter.

MS COATES:

Yes, yes, and in that it says, it describes te Tiriti as “a major source of New Zealand's constitutional arrangements.” The cabinet manual also expressly acknowledges that the Treaty “may indicate limits in our polity on
 25 majority decision-making”. It goes on to further identify the principles of the Treaty as among the “legal principles and obligations” with which legislation must comply and requires ministers to draw attention to any implications proposed legislation may have for Treaty principles. So they are treating it, rightfully, as the constitutional standard and document that it is. We're not
 30 saying that the cabinet manual is enforceable. We're saying that evidence is the way that we're treating it and represents the role and function of te Tiriti o Waitangi.

The Cabinet Office Circular similarly gives guidance for policy makers and it describes again the Treaty as “one of the major sources of New Zealand constitution.” It states that the Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and
 5 acknowledgement of Māori rights and interests within that shared citizenry. It also goes on to talk about how through Article One the Crown obtained the right to govern, Māori were guaranteed tino rangatiratanga and that promise “holds true today” and it’s “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”. So again,
 10 we have a number of these documents referencing the Treaty commitment and what it requires.

Just finally, the Legislation Design and Advisory Committee Guidelines state that “legislation should be consistent with the Treaty of Waitangi”. The
 15 Guidelines also recognise the “vital constitutional importance” of the Treaty and state that the development of policy and legislation should show appropriate respect for the spirit and principles of the Treaty. So again, you start to have these cumulative expressions of recognition of the constitutional nature of te Tiriti o Waitangi.

20

We also refer to Treaty settlements which are of course a significant feature of our constitution. We’ve picked out just one example in our submissions from the Ngāti Tūwharetoa settlement given the *Te Heuheu* case, we picked that one, but in there of course you have the Crown saying things like: “The Crown
 25 looks forward to building an enduring relationship of mutual trust and cooperation with Ngāti Tūwharetoa based on the Treaty of Waitangi ... the Treaty of Waitangi and its principles, and to support you in the revitalisation of ngā hapu o Ngāti Tūwharetoa.” We’re of course not all the way through treaty settlements but again there’s just this cumulative recognition across all of these
 30 settlements that the Treaty of Waitangi is a central part and parcel of our constitution, and that the Crown relationship going forward is premised on that basis. Of course the legislature has taken steps across a range of pieces of legislation to recognise to te Tiriti o Waitangi including in the Supreme Court Act 2003 which has been carried on over to the current version.

At 156 I attempt to in, sort of, one paragraph list some of the court developments that have occurred since *Te Heuheu* which is of course the courts have recognised that the Treaty is a fundamental constitutional document, the rights in te Tiriti are similar to fundamental common law rights, and we use the principle of legality reference there and some courts have referred to that principle but that's referring to the interpretive presumption that has attached to it and that's what we've called it.

There was one case since *Taylor* in the Court of Appeal that said this type of declaratory relief concerning Treaty inconsistency, they don't take it as, they don't, they don't grant it but they do sort of reference it and talk about it being arguable and a possible extension.

1120

What we say about these cases is – sorry, just orientating myself – is that the cases as well as the representations made by the Executive as well as what's been done in that Parliament space, it's really accepting – there's a broad constitutional acceptance of te Tiriti o Waitangi as being fundamental to our arrangements. The courts have gone further than constitutional acknowledgement. They already give te Tiriti legal consequence without express statutory incorporation linked to its domestic constitutional significance, so there's a sustained pattern of recognition, and the significance for this case is that Mr Smith doesn't ask the Court to create the constitutional status but it's whether really read against that accumulated constitutional and legal recognition that declarations should be precluded.

We refer briefly in our submissions to tikanga, and I understand the Te Hunga Rōia Māori submissions expand on that. So not passing the ball to Mr Mahuika on that but he'll address your Honours, I understand, on that tikanga point. The reason that we raise it is for the point that your Honour mentioned before, is that of course the obligations recognised in te Tiriti aren't sourced in te Tiriti itself, they're an affirmation of existing obligations that have legal effect. And what we say and we're drawing on – and we cite Nicole Roughan when we're doing this, the theorist at Auckland University, but she talks about in *He*

Poutama, her article there, about Te Tiriti existing as a site of inter-legality, that is, it's a place where it was decided how those two systems would intersect, and the reason that we're leaning on it is because again we're talking about law and we're talking about constitutions, not politics and morality. And so that's

5 why we refer to that intersection.

Now in terms of my road map, and we're tracking through pretty quickly, Ma'am, so I'm still hoping to wrap up relatively shortly –

WINKELMANN CJ:

10 In eight minutes.

MS COATES:

Yes, it's the efficiency of Māori women, which is –

WINKELMANN CJ:

Yes.

15 **MS COATES:**

No. We've already, so we've gone through the CCRA I think in some depth, and so I can go back there but what we have – we make the point in our submission that the Crown has expressly acknowledged that they will honour te Tiriti in a climate change context, and so that's clear I think in its references

20 in section 3 of the Climate Change Response Act, but also there's a number of other representations as well.

So we draw your attention in our submissions, and if we can pull it up quickly, in the first Emissions Reduction Plan I think there's 25 references to te Tiriti o

25 Waitangi and it refers to upholding the Treaty eight times. So in this climate change emissions plan there is an indication that the Crown seeks to honour and uphold te Tiriti o Waitangi.

We briefly at paragraph 3(i) of our road map talk about the intersection with the

30 international customary law concept of self-determination, and I don't think I

need to expand much upon that because we do reference it in our submissions, but I guess the reason that we put that in there is because of the overlap that exists with self-determination and te Tiriti o Waitangi as well.

1125

5

Coming to paragraph 3(j), I think the main point that I want to make there in terms of the overlap with the New Zealand Bill of Rights Act, which I've already talked about, is that we acknowledge that the declaration of inconsistency that was developed in that *Taylor* context comes from a different source, that is, the
 10 New Zealand Bill of Rights Act, and the remedy that was developed in this context is different. What we are relying on *Taylor* for is some of the reasoning, the remedial right that flows from a source, right, so we acknowledge those sources are different. The New Zealand Bill of Rights Act is statutory and we say the source of the Treaty obligation comes from its constitutionality, statute
 15 and the common law and the representations made in this context, so it comes from a different source but it supports that remedial proposition and becomes relevant once that foundation is established.

So, it assists us, because it stands for the proposition that just because
 20 legislation does not specifically provide the remedy for a declaration does not mean that the Court lacks the power to vindicate the constitutional obligation. It also stands for a proposition that courts can declare legislation inconsistent with protected constitutional rights without affecting the validity of the legislation itself and also provide a pathway for that development of a unique constitutional
 25 remedy.

In terms of declaratory, the final point that we are making on declaratory relief and it being an available and constitutionally orthodox remedy, we, of course, say that the relief sought does not challenge Parliamentary sovereignty, or
 30 impinge on section 15 of the Constitution Act 1986, or interfere with the legislative process, and most of the Crown objections that rely upon a characterisation of what we're seeking as direct enforcement and fall away in the absence of it.

We say that declaratory relief is a well-established and flexible remedy within the laws of New Zealand and that the courts are well-equipped to undertake an assessment of whether Crown conduct falls within those bounds.

5 Now, the Crown points out that the Court would need to establish a methodology for that but we say there's a well-established methodology that's been developed over the last 50 years for assessing what inconsistency looks like: got the document, got the jurisprudence, apply it to the facts.

10 That there is a balancing act that needs to take place is not a barrier, we say, and is something that the Courts also need to do and engage with in the context of the New Zealand Bill of Rights Act, ie, there's a right and then you have to engage with what democratic rights may require for that right.

WINKELMANN CJ:

15 Well, I mean, I suppose you could say that there is already a form of balancing required in terms of compliance with te Tiriti, so reasonableness of Crown efforts comply.

MS COATES:

Yes and that's the jurisprudence that's developed from it.

20 **WINKELMANN CJ:**

If this jurisdiction was established, there'd be no reason – the next argument would be to extend it beyond the statutes to executive action, would it?

MS COATES:

25 Yes, I think we're already claiming in our case that it extends to exec – we're talking about the entire suite of climate change reaction, so we're not limiting it just to legislation in this case.

WINKELMANN CJ:

Well, how could it not be enforceable in those circumstances, because we'd be declaring the law? I mean, you can see why it is not enforceable if you speak

to Parliament and say their legislation is inconsistent and they are then – then they choose, with all of their sovereignty, as to whether to respond to it. But if we're declaring the law for lesser people, wouldn't we be giving ourselves enormous rule of law problems if we then declare the law in expectation that it might be ignored?

You might like to come back to that, after the morning break.

MS COATES:

Yes, your Honour. Yes, I am just thinking that point through.

10 **COOKE J:**

Unless the declaration became so abstract that it didn't bite on executive action, but that's the problem, isn't it? The more –

WINKELMANN CJ:

It's a rule of law problem. We'll take the morning adjournment.

15 **COURT ADJOURNS: 11.29 AM**

COURT RESUMES: 11.47 AM

MS COATES:

Tēnā koe Ma'am, just two final points to end on and then I'll sit down and Mr Salmon will get back up but just to address the last question that your Honour asked which was around executive action versus Parliament.

WINKELMANN CJ:

Yes.

MS COATES:

My answer to that is it sort of goes to what we're seeking. So we're not seeking an injunction, we're not seeking compulsion, we're not seeking, so it goes to the form of what we're seeking which is a declaration of inconsistency. What the executive does with that in light of the pleaded claim and the constitutionality

of what, or the constitutional infringement that we're seeking a declaration of, is up to them. So this does sort of reflect the unique nature of the Treaty-based claim as opposed to others in different context.

WINKELMANN CJ:

5 So, sorry, what's the answer then Ms Coates?

MS COATES:

So it goes to what we're seeking Ma'am. So a declaration of inconsistency in this context is not, again we're not seeking compulsion, we're not seeking, you know, we're seeking commentary on the action that is being taken, feasibly the
10 constitutional document te Tiriti.

WINKELMANN CJ:

So you would not say that – the principle you want established in such a piece of litigation would extend to executive action, because a declaration is a statement of the law.

15 **MS COATES:**

A declaration is a statement of the law, it's a statement of inconsistency of the law. It can't be assumed that the executive would then act in a manner that's inconsistent with that, but enforcement is a different question.

COOKE J:

20 But if you declare that say the emissions target set under the Act are in breach of the Treaty does that not have some legal effect?

WINKELMANN CJ:

And before you answer that, think through the rule of law implications if the courts are declaring the law the executive's then free not to apply it.

25 **MS COATES:**

Yes your Honour, but we're in a different – it's declaratory of the constitutional status – it's declaratory...

COOKE J:

You must be declaring in relation to executive actions or inactions and then –

MS COATES:

Yes, that there is an inconsistency.

5 1150

COOKE J:

Yes, and therefore that must have implications for what the executive must do or must not do.

WILLIAMS J:

10 The executive doesn't have a choice. Parliament does.

MS COATES:

Yes, and I think that – but again we're not seeking compulsion, so I think that is different.

WINKELMANN CJ:

15 I don't think the Court would be competent to issue a declaration which said – that carried with it an implication that people didn't have to comply with the law as we issued it other than as against Parliament, because of Parliament's sovereignty.

MS COATES:

20 Yes, and we're not saying that again they shouldn't comply but I think it goes to how the declaration is framed and a broad declaration of inconsistency may not compel – it again goes to the detail in the way in which I think that declaration is framed, your Honour. So I think –

KÓS J:

25 But how could it not be detailed, Ms Coates. I mean, to give a broad declaration you have to justify it by reason and the reasons have got to be particular in detail. So even if the ultimate declaration is broad, the reasons are going to be

explicit and precise. That then poses a conundrum. The conundrum for the executive if they don't comply with it and a conundrum for the Court if they don't comply with it also.

WINKELMANN CJ:

5 Justice France has a question, if you don't have an answer to that question.

MS COATES:

Yes your Honour.

ELLEN FRANCE J:

Well mine is probably perhaps more for Mr Salmon, but if you look at the
 10 declarations that have been made to date they're quite specific, so for example
 what the Court said in *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1
 NZLR 768 and so on, specific or detailed as Justice Kós says, and in those
 cases it doesn't matter particularly who the actor is because the declaration is
 about what the legislation does or doesn't do. But here, it would be, it is a little
 15 different and I can see why in the context of the Treaty one you would say the
 declaration relates to the Crown because it's the Crown's obligations, but it
 seems to me you might have different issues when you're talking about
 potentially other actors and particularly in the Bill of Rights claim where the Bill
 of Rights applies to the legislative and executive branches but the declarations
 20 are talking about the Crown and they will be potentially covering a whole range
 of different actors, some of whom arguably don't fit within that nomenclature.

MS COATES:

So I think, well one, I think that was directed to Mr Salmon so happy to keep
 that directed at Mr Salmon, your Honour.

25 **WINKELMANN CJ:**

I think the question is the constitutional confusion, yes.

ELLEN FRANCE J:

Well I suppose in terms of the Treaty one, it does make the point that you're covering, the declaration would be purporting to cover quite a range of different actors. That's not been the experience to date, so to that extent at least it is an
5 extension.

MS COATES:

In terms of who treaty obligations are held against.

ELLEN FRANCE J:

No, in terms of the detail and specificity and width and I suppose reach of the
10 declaration.

MS COATES:

Yes, which reflects the broad nature of the claim that we're making and that it doesn't just target one particular thing, it targets executive action and the full suite, and it goes to the framework that we're asking you to assess your Honour.
15 So I appreciate that's a broad catch as it relates to te Tiriti o Waitangi. I think the question of who sort of holds obligations under te Tiriti o Waitangi at the Crown side of things is something that there's been books written on. The executive is sort of clearly captured and in this context we say Parliament action is as well. And I think – sorry, your Honour, I – yes, I'm not sure where else
20 you'd like me to go with that, but I guess in terms of the claim that we're making which is against the Crown, we say that there is – yes, apologies, your Honour, I'm not sure if I can take it further than that.

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WINKELMANN CJ:

25 No, I think we've probably got it.

MS COATES:

Yes.

ELLEN FRANCE J:

I understand that that's – I suppose it emphasises the width of the claim.

MS COATES:

Yes, and the complexity of the claim that we're making.

5 **ELLEN FRANCE J:**

Can we think about it in terms of what your relief would look like?

MS COATES:

Yes, your Honour. I don't disagree that we are making a big, broad claim here that captures a multitude of different actions within it.

10 **WINKELMANN CJ:**

Right.

MS COATES:

Ka pai. I think the only final point that I wanted to make – and there's a number of points in my outline but I think that those points have been picked up in our
15 submissions, including the question around utility, which I think has been addressed already by my learned friends.

I think the only final point that I wanted to make on the Treaty point, which is captured at paragraph 5, is an acknowledgement that te Tiriti o Waitangi has
20 always been contested. There's always been noise around it and the noise around it in particular at the moment is loud. And that's where we say that the role of the independent court in upholding rights including minority rights assumes particular constitutional importance, and that we say when looked at accurately, that the claim that we're making in this context is legally tenable,
25 and again that flow of that public law tide, this runs with it and not against it.

And so unless your Honours have any further questions from me, that's my submissions on the Treaty.

WINKELMANN CJ:

Thank you, Ms Coates.

MR SALMON KC:

Thank you. I understand there are a few things for me to come back on and a
 5 couple where I suspect I'll get tested. I'll try and move through them as
 efficiently as possible. With a vague idea of the order I'll do it in, if I can begin
 by addressing the Chief Justice's question just because it was earlier, why do
 we say the Climate Change Response Act will not deal with this problem.

10 Several points, and I'll come back to this one in a bit of detail, but firstly, as
 noted the CCRA is not by any means all of the claim. The Crown characterises
 this as a case about the CCRA but it is not. It is represented in some of the
 breaches pleaded in the claim but not all of them because it is only a partial
 response. One, it's only a partial response to Paris, two, Paris is only a partial
 15 response to the problem of climate change, and three, the targets, and I'll just
 note Justice Cooke framed it to Ms Coates just now as the targets set under
 the Act, the targets are in the Act in section 5Q and they are as a matter of fact
 pleaded to be well short of what is needed to avoid cataclysmic harm. So the
 Act itself as a matter of fact taken to be true at the strike-out stage fails on its
 20 primary purpose.

Now I appreciate that that needs to be tested if a trial is ordered, but that is the
 cascade of propositions about the CCRA. It's part of the claim, it only deals
 with part of Paris, Paris only deals with part of climate change, and the targets
 25 themselves are inadequate. Further, the reports show and at trial Mr Smith will
 seek to show that the steps taken by the Crown, not just in the CCRA but
 generally, are inadequate to protect him from harm, New Zealand and its
 democracy from harm, and Māori from harm.

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30 **WINKELMANN CJ:**

Can I just take you back to the targets in the Act as a matter of fact, because
 facts alleged are presumed to be true for these purposes are well short of what

is required to avoid cataclysmic climate change, but are they well short of what we've undertaken in the Paris Agreement?

MR SALMON KC:

Yes, they are. He says they are for several reasons. The methane ones are
 5 separated out by New Zealand and are well short, but they're short in subtle
 ways that are going to exhaust too much time in the strike out context to get
 into in detail, but one of them we've excluded agriculture so, of course, they are
 a false flag of a target. It would be like crimes statistics excluding all major
 cities, or something like that. It doesn't tell us anything meaningfully and doesn't
 10 require progress. Secondly, there's one end target but no progress in between
 and the commitments internationally are to make progress urgently –

WILLIAMS J:

You mean they've excluded agriculture in the ETS?

MR SALMON KC:

15 From the ETS, correct. From ETS, sorry, yes, Sir.

WILLIAMS J:

Because it's not excluded from the Act.

MR SALMON KC:

No, but it doesn't have to happen, is the point.

20 **WILLIAMS J:**

No, I understand.

MR SALMON KC:

Sorry, you're quite right, Sir. I am hurrying up too quickly, I will slow that down
 a bit. You're quite right.

25

But the commitments internationally and that which Mr Smith says as a matter
 of fact is needed to protect life require action now and the, he says, feature or

bug, both probably, of setting only a target that is so many election cycles away, eight election cycles away now or whatever it is, many more when it was set up, enables the can-kicking that has happened every year since the CCRA was enacted.

5

So that is, whether feature or bug, that has, he says, inevitability about it. So he's pleaded what's happened to date will continue to happen and that the 2050 target, which is too late, is the cover for doing nothing now.

10 Now, I will come to his pleadings about other breaches, because it is not a case that the Crown can just characterise as an attack on that Act, given it's contained and focused.

Another observation about the CCRA regarding the exchange with Ms Coates
15 is that it is a passive step by the Crown. The act of announcing a target then short of implementing it now is passive and I will note Mr Smith's pleading and I took you to this yesterday, it says that the carbon budget to avoid the next step up of harm, there is already harm but the next step up, is exhausted in 2027 or 2028. That is pleaded but pleaded based on sound factual footings. A target
20 in 2050 is just passively ignoring that harm and I just note that because of the duty of active protection under Article 2 and a point of non-compliance which might warrant further dialogue if a trial is allowed.

But the short point is, the CCRA is pleaded to be inadequate, pleaded to have
25 failed and pleaded to continue to fail and that's the most confronting. In a rule of law sense, I understand it's confronting. But Mr Smith says, with years of back up and form, that the Act is incapable of achieving mitigation of harm properly and that it will not happen.

30 That leads me to deal with another point raised in part with Mr Heard by Justice Kós regarding judicial review and why that isn't a path to go. One point to make there is that, of course, judicial reviews are limited by the framing of the Act under which the decision is made and a flawed Act with flawed targets and with a flawed failure to consider all of the other steps that need to be made.

For example, it doesn't cover off-shore mining permits and the opening up of new oil fields, something that is internationally agreed to be unacceptable, there must be no further oil dug up is the consensus scientific view. We are about to do it again and the CCRA is silent on that because it's a mechanism that ignores exported petroleum completely.

So these are problems in a judicial review context that mean we end up in a judicial review with those real limits of evidence, process and focus and realistically with the incredible difficulty of pleading an unreasonableness or a rationality claim, which is the one Justice Kós put to Mr Heard, has been tried but it's within the narrow confines of each statutory step very, very difficult actually to get a rationality or Wednesbury claim off the ground, again, because it is so unduly focused in its sweep and we can contrast that with *KlimaSeniorinnen* – I've learnt to say it – where the Court in paragraph 551 made clear that the Court in assessing the super wicked problem of climate change needs to undertake an overall and sweeping assessment because it's an overall and sweeping scale of problem. Judicial review's quite at the other extreme.

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A couple of other points to note on judicial review in particular because of the comments about *Plan B* and the exchanges about that and whether it is a useful precedent, and this is a point I think I let you down on in my response on yesterday so I'd just like to come back to it. *Plan B* illustrates the judicial review point I've just made and that is because, and this isn't really clear in the Court of Appeal's treatment of it, but that was a judicial review and the first-instance court which was the substantive decision focused on, made clear that the institutional competence concerns that the Court had about dealing with the targets that were being sued on there were heavily indexed to the evidential limitations of a judicial review. I'll just read a paragraph from that because it really does help inform the problem of dealing with these issues without a trial. That's not a reason to stop Mr Smith's claim or to say it should be a JR. That's rather an illustration of the value of it being done in that way and the paragraph is 51 of the High Court's decision, the King's Bench decision: "It also reflects

the fact that the Court is not well equipped to form its own views on the matters in question.” Again, not a trial point because his Honour went on to say: “I am being invited to adopt the views expressed in selective quotations from the work of the CCC and others. When I refer to selective quotation I am not questioning the good faith of any of the parties. Rather I am pointing out that the Court does not have and cannot acquire expertise in this complex area, and will always be dependent on competing extracts ...” It was an on the papers judicial review and of course the Court can’t decide competing facts like that. We all have a trail of judicial review experiences where the Court makes clear that those competing factual contests are not amenable to judicial review.

WINKELMANN CJ:

So, it wasn’t on –

COOKE J:

But what would be different about – sorry.

15 **WINKELMANN CJ:**

It wasn’t on the papers due to review as application for permission, wasn’t it?

MR SALMON KC:

Permission to do a judicial review.

WINKELMANN CJ:

20 And so the threshold was what? Reasonably arguable or?

MR SALMON KC:

Yes it was. Your Honour’s right, but it was to be a judicial review and thus at the end of that paragraph his Honour said: “Even if I could overcome the problem of selective quotation, I would not be equipped to assess the correctness of what is being quoted.”

COOKE J:

What would be different about your proceeding here?

MR SALMON KC:

Multiple things. Firstly, the Crown agrees on the science. It's extensive science, but actually when put to the test it agrees, so different there for a start. It's the same as with the *Fonterra* case. One thinks from the misinformation in the global sphere and in the democratic space about climate change that there'd be disagreement. But once the rubber hits the road the large corporate defendants agreed with the IPCC reports, as a matter of fact. So that was a trial in which the IPCC conclusions on the peril were largely common ground. They said that in this court indeed that they accepted the seriousness of the problem, so the IPCC reports went in by consent.

The Crown's done more than that. It's ratified it all and agreed with the significance. It has multiple reports confirming the seriousness of the problem, so there won't be selective quotations, rather, there will be consonance about the seriousness of the problem.

KÓS J:

Why would that be different in a judicial review?

MR SALMON KC:

Because in a judicial review they will then introduce the, which I'm about to come to as another point arising out of discussions, the factual debate which I think will be the trial debate and hear the trial debate. So, firstly, just to park *Plan B*, in *Plan B* people were selectively quoting in a way that presented a factual context. Maybe there'll be some of that here on the seriousness of the problem, but I doubt it.

25

Often there's an attribution argument, so in *Royal Dutch Shell plc v Milieudefensie* ECLI:NL:GHDHA:2024:2100 there was an attribution contest, how much of the harm can you draw from these emissions as opposed to others? And that's a factual context that requires trial and prompts me just to issue a word of caution, and I'll say this on a few different points, about in the strike-out context the working assumptions that we have often drawn from a

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very rough understanding of climate change, and I don't mean that critically of me or anyone, but without scientific evidence, that we understand causation.

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- 5 So, for example, there'd been exchanges suggesting New Zealand's emissions aren't making a difference and I make two cautions about that: one relevant to trial and one just an illustration for strike-out sake, Mr Smith pleads in terms that New Zealand's emissions has caused harm and will cause further harm, very serious harm to his rights. He's pleaded that and he is entitled to have this
- 10 Court hear his strike-out application, assuming he will prove that. So that's a procedural point that makes this a very orthodox reason to have a trial. There's nothing stunt-like about it. He pleads that that causes harm and this Court, respectfully, is required to proceed with a strike-out application on the basis he will prove that if New Zealand met his pleading of the required steps, it would
- 15 be mitigating harm to his rights. That's the first thing, and he says that for two reasons: one, because it's causing harm itself, and the other because the non-actor, the bystander non-intervention concept of states is real. When one state acts, another acts.

KÓS J:

- 20 I understand the in-principle point but that's an in-principle point, it's not a factual point.

MR SALMON KC:

It's a pleading. He's pleading that, and he literally has pled that.

WILLIAMS J:

- 25 Yes, but that's not, you don't need a trial for that because it's a proposition that's either accepted or not.

MR SALMON KC:

- No, well it's accepted or not at trial. My point is rather there have been some exchanges today, I'm not being pejorative in saying it, but some reflecting the
- 30 natural instinct that some of the spin out there in the ether suggests which is

New Zealand can't make a difference and that is not an assumption this Court can make today. In other words –

WILLIAMS J:

But this is a standard argument that's been addressed by the international fora,
5 the drop in the ocean point, right, which has been responded to in international
fora in the way that you've suggested.

MR SALMON KC:

Yes it is.

WILLIAMS J:

10 But that suggests it's not an evidential question, it's an in-principle question.

MR SALMON KC:

It shouldn't be but I'm reacting to the way some questions from the Bench were framed to say if New Zealand stops it won't make a difference and there might be economic carnage. I'm just dealing with that if I might, I'm not –

15 **WINKELMANN CJ:**

Well if that was my comment I was simply making in the context of te Tiriti and the notion of reasonableness so, yes.

MR SALMON KC:

And it might have been me misunderstanding. I don't think it was your Honour –

20 **WINKELMANN CJ:**

I wasn't saying anything to that effect.

MR SALMON KC:

No, no, no.

WINKELMANN CJ:

25 Because obviously that argument is pretty much put to bed. It is accepted that there is a causative force and failure to participate in the collective effort.

MR SALMON KC:

Yes, and coming to a question from Justice Cooke, how does a trial make a difference to this. A good illustration, which I won't spend time on but four of the members of this Bench have heard and seen before, is the evidence that

5 was advanced in the Australian case we've seen by Professor Steffen, who's unfortunately deceased but was very much a leading expert on tipping points in particular and he had a metaphor the Court might remember that made it into evidence in that case of a ball that rolls past a certain point and careers off down a different trajectory down a slope. The Court might remember the

10 graphic. It was his attempt to explain in court the fact that what seemed like small marginal contributions can cause profound escalations of damage, and we know of them generically, the collapsing of ice sheets, the permafrost ending and carbon release, all our mitigation efforts involving very burnable monocultural forests catching on fire, which is no longer science fiction or

15 futurism, it's very real.

So those tipping points, the reversal of the Gulf Stream or picking up of the Amazon burning and you will remember the soil, moisture, and rainfall graphs of the Amazon, that's now. Those tipping points meant every bit that comes

20 out from New Zealand causes harm and all I'm saying there is that this claim is entitled to be and should be treated as one that may prove at trial exactly what's pleaded.

COOKE J:

Can I just ask what sort of trial you're envisaging? Is it viva voce evidence and

25 expert evidence and that sort of thing? Not done on affidavits?

MR SALMON KC:

Yes, correct, correct. And I would just note, can I come to another point which –

WINKELMANN CJ:

Well just before you do, can you just tell me where in your submissions,

30 because I can't recall seeing it, the material you took us through is to the

deficiencies of the Act itself. I see that as quite important in your argument but I didn't recall reading –

MR SALMON KC:

The best source of those is the pleading itself, your Honour, I would sought to
5 plead those in detail so I think it will take more time than you probably want to give me to go through those but –

WINKELMANN CJ:

Yes, no so just go through the pleading.

MR SALMON KC:

10 Yes, the pleading is the best touchstone and hence not taken up in the submissions so if the Court has further questions about that we can address them by memorandum perhaps but I think the pleadings are pretty clearly framed: national emissions, Crown-specific emissions, problems generally, problems in the CCRA, the targets, and so on.

15 **KÓS J:**

That's only – while you mention the Crown emissions, they're pleaded in a broad way, paragraph 82(a) and then at 86. What are these Crown emissions?

MR SALMON KC:

20 Fortunately, they're pleaded in a much more detailed way earlier in the pleadings, Sir. So they're, backward about, guessing the 30s, Mr Heard will find that, Sir. Someone will find that. 57 is the definition of Crown emissions.
1215

KÓS J:

Right, thank you.

25 **MR SALMON KC:**

So just trying to wrap up on the strike-out stage issues, that was one example of one that New Zealand might not make a difference. Another is assuming

that the – and this comes back to the Chief Justice's question – assuming that the CCRA and ETS might work to address or meet any of the causes of action, including the te Tiriti cause of action, that is a highly contestable proposition that they will meet the peril. Mr Smith says they won't as a matter of fact. When

5 we envisage a trial as Justice Cooke has asked me about just now, yes, it would be a witness trial, yes, there would be scientists called. The internal documents of the Crown show that the Crown's scientists' science advice is that they are committing us to a terrible path.

10 The trial will also deal with Crown knowledge of this, which it's asserted went back to at least 1992. There's sufficient – and the affidavits show a bit of this from the two deponents other than Mr Smith – there's pretty clear evidence the Crown has known. So a trial might sound like a huge undertaking but a lot of it will be clear this was knowing an action, knowing not just of the science,

15 but of the level of peril to rights and to Māori and to Northland, so moving from the general to the specific, all known. I mention that it's known because, as I come to the first cause of action, one of the points that you will have noted about it is that it pleads a strict duty. That's just a reflection of the fact that this is known, so it's not a duty that needs a knowledge component, it is known.

20 Another –

KÓS J:

I have to say, Mr Salmon, I'm still baffled given this state of common acceptance of the evidence why there's a fundamental problem in running this in a judicial review.

25 **MR SALMON KC:**

Because proof in a judicial review requires proving each of those things, and let me come to some things that will be disputed –

KÓS J:

Well what's going to be disputed?

MR SALMON KC:

Polycentricity. The Crown says and it says today this is a highly polycentric and complex environment. So we say we will prove at trial as I put to you yesterday that it's not, but they say that now. So I'm not seeking to say they agree on everything at all. They will disagree on the pathways and on New Zealand's impact on those. They will disagree on when tipping points happen. What I'm saying they'll agree on is the IPC science, I think. They're not required to but my anticipation is they'll struggle to displace that enormous scientific project, so there'll be plenty of factual disputes. Knowledge will be hard to dispute and the IPC science so they'll dispute pathways, they'll dispute the impact of New Zealand's emissions. They'll assert polycentricity and I accept that that's an assertion can be made. The caution I am seeking to sound now is that, and I've seen it respectfully again and again in these cases, it's beguiling and the courts say, well, they're having to weigh up jobs against climate and you're always weighing up the environment against progress or against industry or against economic progress. That is a reaction that is understandable but Mr Smith says is a mistake factually, evidentially. He says that at trial when scientists on both sides are on the witness box he will prove, the Crown will contest this, but he will prove that that's a false – an illusion of polycentricity which operates as a device to avoid the inevitable and the obvious, which is that none of those other centres in the polytheism will exist unless climate change is stopped. There will be no business. There will be no café if everybody is dead.

So polycentricity, which is in my experience the best answer often in the interlocutory stage, in the judicial review stage, we took account of that. We considered that, weighing it up on balance. The carefully-written report by aides to a decision-maker, those play differently in a judicial review where the reaction with competing evidence is deference to the decision-maker's discretion and so on and so on than they would here. But secondly, the judicial review – to engage finally with that question, Justice Kós – illustrates the difference between what in *Plan B* was that limited focus and what in *KlimaSeniorinnen* was required, which is to look at this super wicked massive problem as it actually is as a matter of science, and that's what a trial would do.

KÓS J:

In *Plan B* Justice Bourne referred to an Irish case which I haven't looked at, at paragraph 56, *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49, which is an ultra vires conclusion. Now, we haven't talked
 5 about that. You're not simply confined here to an irrationality, the hardest of the judicial realms. Many of your arguments are ones of vires. So you're not, again, a more straight-forward, less evidential argument.
 1220

MR SALMON KC:

10 A vires one would be.

KÓS J:

Yes.

MR SALMON KC:

But there's nothing that could be asserted about the CCRA that's ultra vires, I
 15 don't think. The problem is the whole of government response. I'll come to our pleading in a moment, which will illustrate that it's a piece.

KÓS J:

Well, it seems to be fundamentally your argument is that targets that are being set do not meet the purposes under section 3 of the CCRA.

20 **MR SALMON KC:**

No, no, no, it's not, Sir. Because the targets in the Act itself are bad.

WILLIAMS J:

No, these are the five-yearly budgets.

MR SALMON KC:

25 Understand.

WILLIAMS J:

They're set by discretion.

MR SALMON KC:

Yes, but discretion, if one judicially reviews them. Set by discretion in an Act that sets a final target that is what it is.

KÓS J:

- 5 And if your argument is based on the science that inevitably there will be failure, you have a vires argument.

MR SALMON KC:

Or an irrationality one, perhaps.

KÓS J:

- 10 Well.

MR SALMON KC:

But still within the limits of the CCRA in which all of the other conduct is out of frame and, look –

WILLIAMS J:

- 15 By the other conduct, do you mean off-shore mining and ag and so forth?

MR SALMON KC:

Yes, or the failure to protect in the te Tiriti context, the failure to do anything to safeguard these communities from influx of seas, all of those things that might be legitimate causes of complaint under te Tiriti.

- 20 **WILLIAMS J:**

But those are, those things, to the extent that they relate to iwi involvement in decision-making pursuant to the Act, are matters of attack against those decisions under the Act, aren't they? Otherwise, what's different –

MR SALMON KC:

- 25 A lot of the decision –

WILLIAMS J:

– between the Māori claim and the claim that might be put by the rest of New Zealand?

MR SALMON KC:

- 5 Well, apart, it's a claim, as I understand that area and I'm not a specialist in that area, but there has been a failure to actively taonga, et cetera, which is –

WILLIAMS J:

But the act of protection would start with the measures in section 3A, the participation in advisory bodies, the plan makers, the ministerial decisions?

10 **MR SALMON KC:**

I understand that proposition, Sir. Sir, my point is rather that the CCRA is one tool. It's an Act that sets up one tool and this super wicked problem requires more tools.

WILLIAMS J:

- 15 Yes.

MR SALMON KC:

- Many more. So, for example, the mantra of those who are perhaps on the side of doing less about climate change is let the ETS do all, not a lot said about its gaps, but let the ETS or it is established, Mr Smith says that he will prove at
- 20 trial, that that is a factually false and misleading proposition and, in fact, all sorts of other levers need to be pulled or not least emissions become a plaything of the rich and the poor miss out. So, for example, public transport reform and so on and so on.

- 25 So it's more complicated than that and I think that comes back to Justice Kós' point, the notion that all of this can be dealt with, with a vires JR under the CCRA assumes all of the problems are under the umbrella of the CCRA and that's the only lever and assumes that something is vires that meets a target that's wrong.

So to take the methane target –

KÓS J:

Well, methane –

MR SALMON KC:

5 – if the target in section 5Q is wrong, then a vires claim –

KÓS J:

Well, that's not a vires claim, clearly.

MR SALMON KC:

Correct.

10 **KÓS J:**

But every other budget that's set by executive decision under the Act is potentially a vires question. What's more, there is also a fundamental issue which you're raising of non-compliance.

MR SALMON KC:

15 Yes.

KÓS J:

With the requirements that which, you know, start section 3(1)(aa): “provide a framework by which New Zealand can develop and implement [a framework] that— (i) contributes to the global effort under the Paris Agreement to limit the
20 global average temperature increase to 1.5° ...” so it's an annual target.

MR SALMON KC:

Yes.

KÓS J:

So it's not simply an end-target Act.

MR SALMON KC:

That's right. That part, I accept, Sir, is right.

KÓS J:

Yes.

5 **MR SALMON KC:**

Your Honour will appreciate there have been attempts to –

KÓS J:

Sure.

MR SALMON KC:

10 – review those targets and they come up against the real world limits of judicial review. I think Mr Heard might have been one, I haven't done one of those, but they are stark, because –

WILLIAMS J:

Well, they have been thus far, but yes, aren't you, on your theory of the case,
15 even if the Crown is right about polycentricity, it will eventually stop being right?

MR SALMON KC:

Well, I think that that I do say.

WILLIAMS J:

That might be too late.

20 1225

MR SALMON KC:

Mr Smith does say that will be too late and that is one of the things, an iterative death of a thousand cuts, which is the judicial review experience. It's limited, it's slow. It's evidentially limited so any evidential dispute, for example,
25 asserting that something is compliant with New Zealand's contribution to 1.5, where there's a factual dispute makes for a bleak plaintiff's side case in a judicial review.

COOKE J:

But why is it any different in this action? I mean what you're really pointing out is that courts require all sorts of steps before they're prepared to make decisions about things.

5 **MR SALMON KC:**

It's different because as of right one can ask the Court via cross-examination and solve a factual dispute as opposed to realistically being declined the right to cross-examine most of the time. One gets discovery –

WINKELMANN CJ:

10 I'm worried that you've gone from something which is I agree very process focused, input focused, judicial review, and you say the framework is essentially flawed so who cares if the inputs are correct within that flawed framework.

MR SALMON KC:

Yes.

15 **WINKELMANN CJ:**

But you've kind of...

MR SALMON KC:

I didn't intend to spend this time on judicial review if that's what your Honour's hinting, that I'm taking too long.

20 **WINKELMANN CJ:**

No, no, I'm just saying your claim is so big, it's so much, it's the absolute antithesis of the precision that we expect and require in judicial review. It's so much. It's quite hard to get your mind around.

MR SALMON KC:

25 It's certainly hard to get my mind around it, your Honour. Might be younger minds end up doing this. We can hope they're here to do it. But your Honour is right, it's a big claim. I am just cautious about the inference that it's a

year-long trial and too big in actual scope because yes, there are disputes about some of the issues, but they are cleaner than one would think and a difference procedurally. The right to discovery will solve the knowledge point, I think, I predict. The ability to cross-examine closes off the problem in a judicial review that the Court can't deal with those issues, the plan B problem, which, of course, in theory the Court could hear evidence in a judicial review but it just doesn't, and it deals with the super wicked problem which is urgent because a judicial review year-by-year challenging for irrationality or vires annual targets, we're out of time, and we have no time.

10 **COOKE J:**

But you are challenging those targets in this proceeding, are you not?

MR SALMON KC:

Yes, but in a one-stop global attempt to have a judicial determination of issues that otherwise would be raised again and again in a process context for each new decision, and in a – your Honour knows this well, we all know – in a judicial review with another decision to come you face the mootness argument. You're supplanted by a new decision before you get to court. That one's gone. It's been replaced by a new target and then, of course, maybe the targets aren't being implemented.

20 **COOKE J:**

But that's going to happen in your proceeding too.

MR SALMON KC:

Well, that assumes –

COOKE J:

25 Especially if the trial goes for three months or whatever, it's going to be changing landscape as you go.

MR SALMON KC:

Well, there might be change in Crown announcements but the finding of whether or not the Crown has a duty to do X will be an enduring finding. That's different from a procedural focus on was that decision in July the 7th 2022, was that good or bad? That becomes stale and moot. A question of whether the Crown owes a duty, and this will be the occasion on which that *Taylor v Poultry Board* question is argued, I suspect, because that quaint world in which torture of individuals was our biggest concern is really replaced by a world in which the very fabric that enables us the luxury of thinking torture is bad is now at threat. That question dealt with at trial could never be dealt with in a judicial review, and it matters. It's a constitutional discussion that the country would benefit from, and this brings me to another point that's arisen, the rule of law problem as it's been put.

Respectfully, we shouldn't deal with a problem which doesn't yet exist which is the proposition that the Crown might ignore a declaration that it's causing a risk of all of us dying. That declaration may not be granted. Mr Smith might lose his case. But if a trial is run and the Crown does its best to show it's doing something and fact-finders, independent fact-finders, our only check on the executive and the legislature, conclude that the Crown is woefully breaching its obligation to protect its citizenry and preserve democracy, respectfully, if there's one assumption we should make for the good of the rule of law, it is that the Crown will respect that declaration.

1230

If it doesn't then there'll be a constitutional dialogue that might be painful, might be important and might be highly valuable. Israel has had one. England, the only other unwritten constitutional State, may yet have one. It started to during the Brexit stages, but that's a dialogue that right now we're at risk of closing off at the strike-out stage because of the allure of either polycentricity or the notion that this hard case, and this is a hard case to put in front of the Supreme Court in a modern democratic environment, Mr Smith knows that, but this is the last chance in the last chance saloon to resolve this issue before it is too late. These are the adults in the room checking whether we are going beyond the limits of

what Parliament should ever do, and that dialogue he says should happen at a trial. It should happen in a context where Ms Coates and Mr Mahuika in a moment have proper time to assist the Court to form views about the constitutional significance of te Tiriti. That's a really important topic that at the
 5 strike-out stage is constrained. That's no criticism of anyone, but if I turn then –

WINKELMANN CJ:

To your public law –

KÓS J:

This case –

10 **WINKELMANN CJ:**

I was just going to say it's probably a good idea to turn to your public law claim.

KÓS J:

Yes.

MR SALMON KC:

15 Yes, I can feel the eyes behind me. So I was about to, but your Honour was –

KÓS J:

Right. I just wanted to note, Mr Salmon, this case is seven years old already and if you get your independent decision-maker at the end of your trial in perhaps three years' time from now you face another five years of appeals.

20 Nothing here is going to provide a magic bullet and the courts can't do that either.

MR SALMON KC:

Well up here, Sir, the commercial list is solving a lot of that, so haven't ruled that out.

25 **KÓS J:**

Yes, is this one of those cases?

MR SALMON KC:

Your Honour is right, there is further delay to go but that would also be the case for new judicial reviews started afresh. It is a problem that's inevitable. This isn't the way that Mr Smith wanted to resolve this problem. He's been literally,
 5 it's not exaggeration, been working on this for 34 years but it is the last chance. Tonight the private law claims are likely to have their third reading and be gone, that's done. The Parliamentary response isn't happening. Progress is going backwards and I'm going to come the duty, the public duty point, because that pleads these points. This is the last chance and, yes, it will take a while, it's a
 10 trial none of us want to do, but here we are.

So the public law duty, if I can just note parts of the pleading, I know Justice Kós was on these, but at paragraphs 80 and 82 and in part these are adopted – sorry, just before I start that I forgot to say something about *KlimaSeniorinnen*.
 15 *Plan B* in the appeal, the Court noted as the reason for declining the appeal that there was no European Court of Human Rights decision on these issues as a reason favouring declining it. There has since been one, so that's all really just noting whatever else this Court does, putting weight on *Plan B* as influential on this Court in the face of *KlimaSeniorinnen* or other matters would be a flaw.
 20 Apologies for that.

So coming back to the pleading. From paragraph 80 the duty is particularised now. These were required by Associate Judge Johnston, so they are meeting that requirement from 2020, but I just want to note at paragraph 80(c) because
 25 I've referred to it before, paragraph 80(c), the very clear statement by Mr Smith that he is not seeking to frame how the Crown achieves this. There are many pathways, public transport or not, solar or not, closing a smelter or not, forestry or not. He is pleading overtly there that it is for the Crown to choose pathways. He just wants society to survive, and again because it's referred back to me
 30 later, amongst others at subparagraph (ix) of paragraph 80(c), an undertaking of assessment of risks under the Tiriti.

The sources are set out in paragraph 81. I'm going to go through them in a mo, but I think you understand what our sources are. It's paragraph 82 I want to

just spend a moment on, which contains those earlier defined – Justice French [*sic*], your microphone is on which might mean you have a question? France, sorry, Justice France?

ELLEN FRANCE J:

- 5 Yes. Sorry, I was just going to say in terms of the submission that Mr Smith is not asking the Government to act in a particular way, some of those particulars do do that, don't they? For example, no more mining licences.

1235

MR SALMON KC:

- 10 Yes, that one does. That one he does take a strong position on, as does the international scientific and climate community. There's a – I forget the exact phrase – but something like all oil not already drilled needs to stay under the ground. There must be no more wells is a proposition he makes that is a bright line, recognising that's a trial question, but you're right, your Honour, that is one
15 where he does take a position. He's not alone in that, though.

ELLEN FRANCE J:

- It's not the only one in the sense of some of the others are perhaps a little less specific, but the next one down: "Prioritise investment and infrastructure that will cut emissions", et cetera, that is saying, government, you need to put – you
20 need to change your priorities in this way?

MR SALMON KC:

- I'm sorry, I haven't helped you quite as much as I should have, your Honour. Those are all sub-paragraphs under the words: "The choice of specific pathway and its exact details are matters for the Crown, but specific steps that were and
25 are available ...".

ELLEN FRANCE J:

Yes, but presumably to achieve what he is seeking you would have – you are saying that's what the government has to do?

MR SALMON KC:

Well, he's certainly saying that and he does use the word "and necessary" as well, I see. None of that is taken quite to bright line positions as no more off-shore drilling, for example, which would be a bright line position. They're

5 more identifying without specificity (i) measuring and monitoring, or (ii) setting reductions that are consistent, (iii) using powers to prevent emissions from increasing, those are points that leave a lot of room for executive and parliamentary discretion as to which one to move more and less.

10 So for example, the less one does of pricing emissions the more one might decide to do as a matter of discretion to increase public transport, or electrify rail, or whatever it might be. New Zealand will take a different approach to that and the international engagements confirm this because agriculture is so big here it will take a different – put a different weighting than countries for whom

15 agriculture is smaller but electricity generation is all fossil fuels. So, he's not seeking to legislate that, rather and this is a point we've tried to make, rather this was something he didn't think he needed to plead but given the Judge directed he plead and tell the Crown what it could do, he did so.

20 Moving then to 82 –

WINKELMANN CJ:

Can I just, on those particulars, I think you made the point at the beginning that they were ordered by Associate Judge Johnston and did not necessarily reflect a general thrust that positive action is required.

MR SALMON KC:

25 Correct, correct. And that's partly an excuse for drafting. We might have put them earlier in the pleading but he required them specifically for paragraphs well down the claim.

WINKELMANN CJ:

30 But you do say that positive actions in respect of off-shore mining are part of the claim?

MR SALMON KC:

He will say that at trial, yes, yes. That as a matter of fact, all that oil needs to stay in the ground.

- 5 I was on paragraph 82 and I'll be brief there, that trust in the Court to have time to read it in due course, but the point I want to note as we come to breach and continuing breach, because this is a paragraph referred back to inter alia by the te Tiriti courts, at (c) again responding to Associate Judge Johnston but at (c), steps taken by the Crown which have collectively resulted in the breach are
- 10 pleaded and I just note you can get a proper sense of the significance of the CCRA piece in the plaintiff's mind by looking at those, subparagraphs (ii) and (iii) deal with the CCRA that is true, but many of his other complaints – and these are not his wish list or something he has dreamed up, these are ones that are substantiated by a great deal of scientific analysis and writing in which he
- 15 seeks a chance to prove are necessary, or prove a real causative breaches, he pleads a whole suite of other conduct that could never be part of a CCRA judicial review and more importantly, I think for this case, that make it problematic for the Crown to say that this is just an attack on the CCRA.
- 20 So from there, I turn to and I think I can be briefer now subject to no doubt some difficult questions, the approach the Court takes to novel duties. You don't need to hear from me on the strike out threshold or the notion that novel duties are usually best dealt with in an proper evidential context, but I've highlighted why some of the working factual assumptions about the lack of utility here or how
- 25 difficult a trial might be are properly just worked through at trial.

1240

- In terms of how a novel duty is approached in that context, one example is Justice Whata's decision on the right to protection from intrusion and seclusion,
- 30 looking at the foundation, looking at the rights affected and looking at how the duty is reflected in or reflects existing law and existing norms.

And so what I'll briefly do is just go through what we plead are the touchstones and have addressed in our submissions and I'll begin by saying that it goes

without saying, I think, in this democracy, as in England, that although we don't have a written constitution there are some limits on Parliamentary supremacy.

5 And this is not seeking to litigate a case we don't have here, because we are just seeking declarations, but rather to anticipate what my learned friend Mr Hodder said. He says, well, in his written submissions, which is that this is an attack, this cause of action is an attack on Parliamentary supremacy and comity and separation of powers.

10 It goes without saying, I submit, that there would be things Parliament would do that the courts would intervene on. An attack on the rule of law or the maintenance of democratic rights would be one of them if Parliament seeks to –

WINKELMANN CJ:

But do you need to pitch your argument that high?

15 **MR SALMON KC:**

No, well, I don't think I need to, but at trial we will have this argument in more detail. It's the foreshadowing of that, I guess. But I am responding to the suggestion this is an attack on Parliamentary sovereignty.

WINKELMANN CJ:

20 Well, you're saying, you're suggesting that it might be and the courts might have to curtail them, but I thought that another way of articulating your claim is that it's not an attack on Parliamentary sovereignty?

MR SALMON KC:

25 No, it's not. That's not this case here. I'm rather seeking to deal with the concept that – and this, I'm paraphrasing the Crown and Mr Hodder will put it much better than this – by characterising this as an attack on the decisions embedded in the CCRA, which we dispute is a fair characterisation, it is then said that asking a court to judge the quality of that Act is an attack on Parliamentary sovereignty. He may not be putting it that high.

All I am seeking to do is not to turn this case into something it is not, but rather to say there may be confronting occasions facing any democracy where courts face conduct by Parliament that does warrant a blurring of those boundaries or, indeed, a stepping right across them. We're not in the latter case here but to the extent that it is said by Mr Hodder, which he does say in his written submissions, that we are nowhere near the examples given in *Taylor*, for example, I just want to deal with that, firstly, by reference to the touchstones and sources of the duty and, secondly, by just looking at what is really alleged here.

10 **COOKE J:**

Well, can I just ask you first, it's similar to the Chief Justice's question, I mean, declarations of inconsistency are not an attack on Parliamentary sovereignty because it is for the Parliament to decide what to do. So why do you need to make this argument, if you are only seeking declaratory relief, because it is then for Parliament to decide what to do?

MR SALMON KC:

That proposition, Sir, is common ground for the front Bench here. We agree that this is not – we say it is not an attack on Parliamentary sovereignty. What I am dealing with here is the submission that it is and I am just briefly responding to that. But I'm not going to spend undue time on that, I'm just responding to it, but also noting the notion that there will be, in future, some high-tension between the courts and Parliament if the declaration is not complied with. It is not this case, it is a future set of events that haven't happened, but it is not the reason to shy away from the most important problem the world has ever face.

25

So, I am really anticipating that submission that this is an assault on sovereignty, rather than telling the Court we are assaulting sovereignty which we are not.

30 In terms of the foundational principles that underly this and looking at what the duty seeks to reflect, the first, of course, is principles going back to Roman law times, as noted in submissions, which have been diluted in some ways in the

public trust doctrine but which were then self-evident, which is people need certain things to live and they are entitled to them as a matter of natural law or right.

- 5 With a different set of facts that might be self-evident here, but it is accepted that the facts are more complicate and require more time to understand and so that might not be as instinctively obvious but that's the first, is that it has been for most of the period of the existence of law self-evident that rulers cannot deprive people of what they need to live.

10

It is more recently self-evident that rulers can't deprive people of what they need to have their democracy. So, the concerns in *Jackson*, for example, identified were attacks by Parliament on the rule of law, but those I note, because Mr Smith says that that is a risk, too.

15 1245

- Then being more specific, we point to the Bill of Rights Act as not needing to succeed in order for the first cause of action to succeed, but rather the Bill of Rights Act contains a reflection of rights that are fundamental, and that populate the identification of the first cause of action duty. The same is said about the customary international law rights. Yes, they are part of domestic law. We do not say that on the – I found very interesting the exchange between Justice Cooke and Ms McMenamin as to who could enforce customary international law legal rights under our common law. We're not saying that that controls the first cause of action at all, rather that the existence of those and their existence as part of our common law make a recognition of the duty here consonant with that, in the same way that Justice Whata saw privacy rights and the right to protection from seclusion as consonant with existing privacy laws. So it's part of our domestic law both under the Bill of Rights Act and under customary international law that these are rights that should be protected, and that means at both of those stages we can see this duty not as something that clashes with New Zealand's fundamental constitutional values, but rather embodies them.
- 20
- 25
- 30

We say the same about the Resource Management Act purposes in sections 5 through 7, unsurprising and so obvious that they should go without saying, we should think of future generations and make sure there is still a liveable planet for them. That's part of the Act uncontroversially, how it's done

5 might be more controversial, the Act of course doesn't meet the super wicked problem because of its planning limits and other limits and because climate change was for a long period excluded from consideration under the Act and is still limited. So that's another.

10 The other two are te Tiriti and the duty of active protection and kaitiakitanga and I defer to people with more expertise on that, but in many senses it reflects a view, if I can put it this way, the Crown in charge of and in control of the essentials for life have a responsibility also to protect them, and that is how Mr Smith sees it. He will put it much more articulately than me, but he sees that

15 as a profound responsibility reflected in New Zealand's common law and so obvious it goes without saying that if you're in charge of the things that give us life you must preserve them.

So no single one of those is the source of the duty. Indeed if we take a broad

20 legal historian sweep, amateur legal historian sweep of this, the ways in which for example Lord Cooke in Bingham's case made his assertions about what laws would be struck down really did reflect a simpler time when certain things were so obvious that Parliament could not do them, so obvious. We're in a curious world now where we are debating the existence of the right to life

25 around fine distinctions of whether a particular person can show imminent threat to them. That's not a criticism of the law as it is or about positive and negative obligations in a context where the problem is bigger than any other problem the courts have considered in that context ever, and ever will. There won't be a bigger one than this. And that's something of a mirror to hold up to

30 the not myopic but really granular focus we have on the ways in which those particular havens of rights, whether the Bill of Rights Act or customary international law or te Tiriti jurisprudence, the ways in which they've been quite granular, dealing with more granular issues is not a stable platform for dealing with fundamental breaches of fundamental rights, which are fundamental and

deserve the very sweeping, deserve the all-in-the-round view that Mr Smith seeks at trial. That is to say nothing in what he's saying offends any New Zealand legal principle that the State shouldn't deprive its people of civilisation and a liveable planet. That cannot and should not and cannot be a
 5 controversial proposition.

What has made climate change so hard is the problem of humans understanding the complex issue, and that's not a criticism of any humans, but it is a super wicked problem that's not as visceral and easy to identify. So if we
 10 just imagine instead of the State allowing emissions that cause climate change, protecting a bunch of emitters by exempting them from the ETS and then opening up a whole bunch more emissions and imagine a slightly different problem, for example factories that it turns out are emitting radioactive or carcinogenic materials around every school in New Zealand, every city, and the
 15 Crown implements an Act which says it will set some targets, it's going to let a whole bunch of them be exempt from any of the primary levers, the ETS, and it's going to open up a whole bunch more, but it meets its obligations under all of those pieces of legislation by having a framework – might not be good, but it's a framework – and that it's an affront to ask the Crown to stop pouring
 20 poisons into every school in New Zealand.

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Now, we understand that more readily because immediate impacts to health, the psychologists believe, are ones that the human mind is adapted to react to
 25 and it is not with climate change. Climate change requires thinking slow not fast, looking at actual evidence and – and this is really what Mr Smith seeks – having the adults in the room hear evidence and reach the point that the scientists have all reached, in the biggest scientific consensus of all time, which is it's not as complicated as it seems. Once you have heard the case, it is
 30 obvious that there is a cause and an effect and it is existential.

KÓS J:

What do we add to the International Court of Justice?

MR SALMON KC:

What do we what, sorry?

KÓS J:

What do we add to the advisory opinion of the International Court of Justice if
5 you are looking for that kind of adult statement?

MR SALMON KC:

Well, one thing is that there's a vindictory consequence in a declaration. That
is not the primary goal for Mr Smith.

10 Another is the expectation that people might have, including Mr Smith, that the
Crown will listen to a declaration.

Another is, at the moment, because of the amount of disinformation and
because of the way in which modern democracies are operating, the lack of a
15 fourth estate and the fracturing of information, it is very easy to say we are doing
something, we are serious about this. Court provides an occasion, in the
modern short attention span, where we test that and I understand the concern,
as the changing world involves a tax on the courts and criticisms of this, that
and the other, one understands the concern about making a finding on these
20 issues but that is no reason to shy away it. It is, in fact, a reason to do it. It is
a reason to engage with the jurisdiction.

Now, if the Court finds against Mr Smith, at least we have heard the case. But
if the Court hears a case and find that those answers are not true and that is
25 not going to protect it, the working assumption should be that people will hear
and understand that.

Your Honours point yesterday, it's one of the hard questions in these contexts,
is if this is bad, people can vote to change. They don't hear facts anymore.
30 They don't see facts tested. They hear algorithmic noise. This is an occasion,
one of our few, where actual facts are tested, irrelevant evidence is rejected,

pseudo-science is passed out as it was in *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98.

5 We have rules that make sure that proper decisions are made about proper evidence, in a fair way. We'll have that and at the end of that, if Mr Smith has proven his case, then the working assumption, for a rule of law perspective, the working assumption should be that the Crown will listen and if it doesn't then the working assumption should be that something so profound might be the time at which the incumbent government is voted out.

10

But the tail should not wag the dog here. A concern that there might be constitutional tension, which is the submission I am facing, is the tail wagging the dog. We do not have that case yet. We have a trial that could happen that will find some facts and order or not order relief, and then the working assumption is that parties will respect that decision and that is the harmonious approach to the rule of law that we can but hope for and expect from the Crown, because our balance of powers, our separation of powers assumes a competent Parliament.

15

20 Those are my submissions for Mr Smith, I appreciate the time to make those and I think that takes us to nearly lunch but –

WINKELMANN CJ:

Well, takes us to we've got six minutes till lunchtime. So in terms of timing, next we're having?

25 **MR SALMON KC:**

Mr Mahuika.

WINKELMANN CJ:

You can, yes, you can – thank you, Mr Mahuika, next you're up, Mr Mahuika.

MR MAHUIKA:

30 Yes.

WINKELMANN CJ:

Did you want to start for five minutes?

MR MAHUIKA:

In the interest of keeping things moving, yes, I can.

5 **WINKELMANN CJ:**

Yes, excellent.

MR MAHUIKA:

I can do that.

WINKELMANN CJ:

10 And we're going to keep you to half an hour?

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MR MAHUIKA:

Yes, I am expecting to be kept to half an hour, Ma'am. I can't claim to be an efficient wahine Māori but I will try and follow that example. Heoi anō rā, tēnā
 15 koutou ngā Kaiwhakawā, tēnā anō hoki tātou i te Kōti kua haramai i tēnei wā ki te whakarongo, ki te whakaputa kōrero kei mua i te aroaro, nā reira tēnā koutou, tēnā tatou. What I'll do, Ma'am, is I've given a road map. It is in – it's not in quite the bullet point form that I would normally have done it simply because of the limited time, and before lunch I'll hopefully take you through those first
 20 four paragraphs under the heading: "Te ngako o ngā kōrero," which is the gist of what we have to say.

So first of all, Te Hunga Rōia Māori's participation is limited to the appellant's third cause of action, and that is the cause of action relating to
 25 te Tiriti o Waitangi. In summary, the decision that the Court of Appeal reached in relation to that cause of action was that the cause of action is untenable. Now it did so, in our submission, while leaving open the question as to whether the courts may declare legislation to be inconsistent with te Tiriti o Waitangi, so effectively park that for another occasion. And in doing so, we say it also left

open the possibility that a future court may make a declaration of inconsistency with the Treaty, a position that, in our submission, has to date been barred by the – we say the dicta because it wasn't actually something that the Privy Council needed to say in *Te Heuheu*, but by the comment made by the

5 Privy Council in *Te Heuheu* that the Treaty of Waitangi is of no effect unless incorporated into the law by legislation. And picking up on that I think question that you asked, Justice Williams, about actually it talks about municipal law as opposed to legislation, so perhaps we have overstated that. But either way, the dicta from *Te Heuheu* is that the Treaty is not enforceable in and of itself unless

10 it is incorporated into the law of the land.

We say that perhaps *Te Heuheu*'s case and the focus on the Treaty of Waitangi has – the expression we use there is has skewed our gaze a little from the fact that the Treaty is not the creator of rights. The Treaty of Waitangi is affirmative

15 of those rights, so that the word that is used is that they are affirmed and guarantee. In other words, the rights existed at the time the Treaty of Waitangi was entered into and the position for *Te Hunga Rōia Māori* is that those rights continue to exist. So what Article 2 of the Treaty of Waitangi did was it created an obligation on the part of the Crown to guarantee and protect those rights,

20 but it did not create the rights themselves.

And so perhaps when we ask the question about whether the Treaty is directly enforceable or whether it should have, and perhaps we're talking against our own position in respect of *Te Heuheu* when we say this, is not quite the right

25 question or the law has evolved to the point where rights based on tikanga are now unarguably able to be established and be the subject of declarations by the courts. So that being the case, perhaps this is more properly framed in a manner where what you do is you ask, well, what are the tikanga-based rights at issue? So in order for the obligations under Article 2 to be activated at all,

30 the first question to ask is are there rights that Article 2 protects which are at issue in this particular proceeding. So you might say in the context of Mr Smith's proceeding *Mahinepua* is Māori land that his hapū, his whānau, that the iwi of Ngāpuhi and Ngāti Kahu have occupied that land for a considerable

period of time, people live on that land, they continue to exercise a connection with that place and the places adjacent to it based on tikanga Māori...

1300

- 5 That as a consequence of that and the fact that they have inherited the right to occupy and the rights that they exercise from their ancestors who occupied that place prior to the signing of the Treaty of Waitangi, then that right is something that the Treaty protects.
- 10 That an action by the Crown which fails to give effect to that protection is a breach of those rights and then by extension a breach of the Treaty of Waitangi.

- The point we are making, though, is that there are a series of questions that you, in our submission, must necessarily ask and at the centre of those
- 15 questions is, is what is the nature of the rights that are being dealt with here and –

KÓS J:

Seeing as you have asked the question, can I affirm your question?

MR MAHUIKA:

- 20 Yes.

KÓS J:

Are you saying these rights protected by it or, too, for instance, are exclusively tikanga-based rights, or are they also rights that simply may be adjacent in the common law arising out of ownership of property?

- 25 **MR MAHUIKA:**

I think they could have both characteristics.

KÓS J:

Yes, I would have thought so, I would have thought so.

MR MAHUIKA:

Yes, yes, I mean, by virtue of the fact that they – tikanga gives rise to the existence of those rights, but they're also rights that are cognisable within the common law, your classic example being customary title to land and rights that
 5 are adjacent to that title. So, those are rights which arise as a matter of tikanga Māori but also rights that the common law has and does recognise.

WINKELMANN CJ:

Or if it is converted to statutory-based title.

MR MAHUIKA:

10 Yes.

WINKELMANN CJ:

It continues, it doesn't get extinguished, obviously.

MR MAHUIKA:

No, no, no, that's right.

15 **WINKELMANN CJ:**

Yes.

MR MAHUIKA:

I mean, what has happened in this particular situation and Mahinepua C is a Māori Land block, so by virtue of the way that the Native Land laws operated,
 20 that will have been converted from a customary title to a Torrens title. The fact of the matter, however, is that the owners of that land and the occupiers of that place are the descendants of those people that occupied that place, that exercised customary rights in respect of it, in the period prior to the signing of the Treaty of Waitangi. That the transition and the nature of the underlying title
 25 doesn't affect that connection.

Ma'am, we've just hit 1 o'clock. I think I'll stop.

WINKELMANN CJ:

Yes, we'll take the lunch break.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.18 PM

5 **WINKELMANN CJ:**

Mr Mahuika.

MR MAHUIKA:

Ma'am, we're onto paragraph 3 of the road map, and what we say there is that the Crown urges the Court to further endorse the position of the Privy Council in *Te Heuheu* on the basis that a declaration of inconsistency would require the direct enforcement of the Treaty of Waitangi. Te Hunga Rōia Māori agrees with the appellants that *Te Heuheu* is no longer good law and should no longer be followed.

15 With that being the case, and we are mindful that there are the right cases and the wrong cases to make these sorts of determinations, so the view that we take is that the options available to the Court or that we would submit the Court should consider are two. The first is to agree with the appellants and confirm the declaratory jurisdiction in this case, or at least confirm that it's tenable and allow the matter to be argued in more detail at a trial of this matter, or in the alternative to endorse the approach taken by the Court of Appeal which is to leave the door open for an appropriate time.

1420

25 In our submission, however, what the Court should not do is endorse *Te Heuheu* which, apart from having its limitations, we say has been overtaken by, it's probably not 85 years, but it is 40 or 50 years on, jurisprudence and thinking about the role of the Treaty of Waitangi in New Zealand and in the New Zealand constitution.

30

What we do say and there is a tendency when arguments relating to the Treaty are raised, that these are matters of politics, not matters of law and the position that we take is that it cannot be the case that Māori rights that are guaranteed by the Treaty of Waitangi and the declaration of those rights is beyond the

5 jurisdiction of the courts.

There was a discussion earlier about the role of the Waitangi Tribunal and now is maybe a time to deal with that. So, the Waitangi Tribunal has recommendatory function, has a very broad ambit of things that it is able to

10 consider and the fact that it has that jurisdiction does not, in our submission, prevent the Court from doing its job which is to make rights declarations.

So, those jurisdictions exist alongside each other but are different, and the fact that Parliament has created a Tribunal to make recommendations in relation to

15 the Treaty should not prevent the Court from making declarations as to legal rights if it is satisfied that those rights exist.

And I think, again, it was Justice Williams who raised the role of the Waitangi Tribunal in some of that litigation in the late 1980s. So, I don't recall

20 whether the Tribunal actually said anything prior to the *Lands* case on that particular topic. It certainly issued a memorandum, as I recall, in relation to the fisheries situation.

WILLIAMS J:

Did the same with land, in my recollection.

25 **MR MAHUIKA:**

Yes and the fact of that, the fact of that memorandum, helped to inform the Courts when they granted the injunctions preventing the introduction of the quota management system. Ultimately, that leads to a settlement but the fact of the matter is that the two have quite distinct but complementary roles;

30 however, ultimately, we say the fact that the Tribunal has a jurisdiction to make recommendations does not displace the role of the courts.

In the same way as the situation I think your Honour Justice Cooke was confronted with in *Hata v AG (No.2)* [2023] NZHC 2919, I think was the case. So the fact that there may be some political or Parliamentary interest in a particular topic doesn't displace the jurisdiction of the Court to make
 5 declarations of right. The Court has that function to perform and it ought to fulfil that function.

And our ultimate proposition is that it is insufficient to say that these are matters of politics, because they are matters of rights and the Court has a role when it
 10 comes to declaring the existence or otherwise of legal rights and that assumes a whole range of things including your ability to prove the existence of those rights to the extent that you might get into a declaration of inconsistency, the fact that there has been a breach of those rights. So, you have all of the issues, perhaps, in the climate change context around causation and those sorts of
 15 things, but that doesn't detract from the Court's role and the Court's function which is distinct and important in the overall constitutional framework.

So, moving on from there to – sorry, Ma'am, I'm very – I'm just checking the time, from time to time, to make sure that I'm –

20 **WINKELMANN CJ:**

Yes, you're up to about seven, are you?

MR MAHUIKA:

Yes. I have already made this point and that is that the Treaty itself is not the source of the rights. What the Treaty does is that it affirms and it guarantees
 25 those rights and it becomes relevant, I think, and it would be wrong of me not to accept, that the extent to which it could be said that the boat is being pushed out here is around the declaration of inconsistency with the Treaty.

So, what we would say is there is no doubt that you can make the rights
 30 declarations. The Courts have and do make those declarations. Once it is established that the right exists, we would say that, well, of course you can make a declaration that a right is being abrogated.

1425

And I heard the earlier discussion about does it apply to the executive or to the legislature? We would certainly say that it applies to the executive. Whether
 5 that applies to the – and I'm talking about the non-legislative part of government – whether it applies to Parliament and to acts of Parliament I think I would agree is a more complicated type of matter. But once you establish that a right exists then we would say that there must be an obligation to respect and even protect that right and the extension of the law, if you like, comes about from the idea
 10 that you would say that not only has a right been abrogated but it is a breach of the Treaty of Waitangi to abrogate that right, although I'll talk about that a little further when we get into declarations. This is not the massive shift that the Crown would suggest that it is. It's actually a much smaller step that's been taken to make a declaration of that nature.

15 **COOKE J:**

How do you make a declaration of inconsistency in relation to executive action? Don't you have to have some particularity about what executive action is in issue?

MR MAHUIKA:

20 Yes.

COOKE J:

And then why do you need this idea of a declaration of inconsistency because either it's a lawful executive action or it isn't under traditional judicial review action?

25 **MR MAHUIKA:**

Yes. Now I certainly agree with the proposition that judicial review is a pathway that you could take in order to address these sorts of matters, but in my submission that doesn't preclude the Court exercising its declaratory jurisdiction in relation to an action that's been taken.

COOKE J:

But it does in judicial review anyway, so what does the declaration of inconsistency add to that traditional framework?

MR MAHUIKA:

- 5 It may not add a lot, Sir, is the answer to your question. But all I'm saying is that you establish the existence of a right and if an action isn't consistent with that right then surely the Court can exercise its declaratory jurisdiction to say whether or not a right has been abrogated.

WILLIAMS J:

- 10 The declaration in respect of the executive would be one of lawfulness, not of inconsistency.

MR MAHUIKA:

Possibly. That's possibly how you would frame this, Sir, yes.

COOKE J:

- 15 And doesn't that mean the only really value of a true declaration of inconsistency is in relation to legislative acts?

MR MAHUIKA:

Yes, because those acts couldn't be dealt with through the normal courts. That's correct, Sir, yes.

20

I feel like you have another question, Sir.

COOKE J:

No, I don't have another question.

KÓS J:

- 25 I suppose there would be potentially some executive acts and executive instruments that might be susceptible to a DOI, I mean regulation, for instance.

COOKE J:

But as Justice Williams said, that is just traditional declaring that the regulatory action is unlawful.

WINKELMANN CJ:

5 Or if failing to act.

MR MAHUIKA:

Yes. I don't particularly want to fall back on this either. We would really approach this from the view of what's plausible and what's possible and how far could this jurisdiction potentially extend. So what I've tried to outline, Sir, is
 10 that you should certainly do the rights declaration but that must have a consequence. So the consequence is you then have a series of rights that are enforceable and, on our submission, the Crown is bound to respect. We say certainly in the exercise of its executive function, and my friends would also argue and we would support them, that that could also be applied in relation to
 15 parliamentary acts, subject of course to the comments your Honour made earlier on about discretion around the application of comity principles, all of those types of things.

So it is an argument that probably requires more ventilating than I am able to
 20 give it in this particular context. My ultimate submission is that once the rights are established then it is plausible to grant remedies in respect of those rights, including remedy by way of declaration.

1430

25 So then onto paragraph 6, which I think follows on from the point that I've just made, Sir, that what we're not submitting is that tikanga would "displace fundamental principles and policies of the law", and that's because we found it in the recognition of rights which the law is capable of recognising and does recognise.

30

I think I will skip over part Crown, I think you've heard a lot of submissions already today in relation to Te Heuheu's case. I mean what we do say at

paragraph 7 is that *Te Heuheu* has been we think uncritically accepted by the courts, that *Te Heuheu* was predicated on the treatment of the Treaty as an international treaty and one of cession of sovereignty. We submit that the Treaty is thought about in much broader terms now. I did note the discussion

5 about whether it's a treaty of cession or not a treaty of cession, whether it matters. The answer is it probably doesn't matter, and I say that not as an international lawyer, but the issue with *Te Heuheu*'s case all along has been the idea that upon the signing of the Treaty of Waitangi in the first article *kāwanatanga* is ceded to the Crown. Whether you say that's sovereignty or

10 something different, something was ceded to the Crown, the ability to make laws.

And to the point that – I think it's Doctor or Professor Alex Frame talks about it was qualified, however, by an obligation to recognise and protect the

15 *tino rangatiratanga* of Māori in relation to their lands, properties, and other sacred possessions. And so the issue with *Te Heuheu*'s case is that it gives effect to the first article while ignoring the second, or making the second article entirely dependent upon the exercise by the Crown of its sovereignty in a way which recognise and protects those rights.

20

So in simple terms, *Te Heuheu* itself is inconsistent with the terms of the Treaty of Waitangi because it acknowledges the first article and ignores the second. So whether you call that a treaty of cession or you give it some other title, the fundamental issue is the approach that's taken to the treatment of the

25 Treaty, which is for the Crown to accept the grant of *kāwanatanga*, sovereignty depending on how you wish to interpret it, but not give effect to Article 2 and not have any obligation that flows from the guarantees that Article 2 made. And in any event, what we say is that 85 years have passed and the law has moved on, the way that we think about the Treaty of Waitangi has moved on. It's even

30 arguable that the principle in *Te Heuheu* has now been sufficiently eroded by other developments in the law that, although we're debating it, does it really matter so much anymore given the prominent role that the Treaty plays either directly in legislation in the interpretative principles that this Court applies, in the fact that courts increasingly now recognise rights that are derived from *tikanga*

Māori and are guaranteed by Article 2, that that combination of things means that if *Te Heuheu*'s case still applies it has significantly been superseded by these other legislative developments. And perhaps, in our respectful submission, the best thing to do would be to revisit what was decided by the Court in that case and apply it in the light of the context in which we currently live.

I think I have six minutes, Ma'am, is that right?

WINKELMANN CJ:

10 Yes.
1435

MR MAHUIKA:

So, I think I have dealt as well as I can with declarations of inconsistency. We say that it is a natural development in relation to the Treaty. There is some overlap, particularly in this context, with section 20 of NZBORA, the right to culture, but there is a different and I think important distinction between the two, in that section 20 is the right to culture, you know, it has its own history and its own context.

20 A declaration that an action is inconsistent with the Treaty of Waitangi and the promises particularly those contained in Article 2 is still important and is an actual development and for the reasons that I have given as to why *Te Heuheu* maybe is not as relevant as it was once, also goes to the idea of whether it is appropriate for the Court to make a declaration of inconsistency in relation to the Treaty.

So, the Crown has said that such a move and I quoted there, what it would do: "... it would move the Court into an unmandated and unprecedented constitution-making role ..." and it "... would represent a profound and wide-reaching constitutional change ..." and we say, actually, the leap is not that great for the reasons that I have given and it follows from that, that we say that that is a very significant overstatement about what would actually be

happening. And in that last sentence in that paragraph, we say that the alternative would be to ignore the way that the law has evolved and to keep New Zealand anchored in 1941.

- 5 I have dealt with E and that is the distinct role of the Waitangi Tribunal and I don't think I need to revisit that.

And then there are some general comments that we make at F and it is really just dealing with a couple of points. The Crown in its submissions relies on
 10 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 and the decision in *Kamo v Minister of Conservation* [2020] 2 NZLR 746 for some important propositions and we just wanted to make the point that aspects of the Crown's characterisation of these cases is inaccurate.

- 15 So, the suggestion that *Ngāti Whātua* dealt with the question of the enforceability of the Treaty is not accurate. There were, I think, the declarations were (a) to (f) and the Court struck out the last two of those declarations, or the majority of the Court. The then Chief Justice disagreed and would have allowed all of the declarations to proceed.

20

The declarations weren't struck out because there were issues concerning the Treaty of Waitangi, they were struck out for reasons of comity. So, in our submission it is not accurate to suggest that the legality or otherwise, or the enforceability or otherwise of the Treaty of Waitangi had any bearing on the
 25 strike out decision that was made.

And secondly, *Kamo* is also not an authority for the idea that the Treaty should not be enforceable. The ultimate issue in that particular instance and it is similar to *Hata*, Sir, was that there was a dispute as to who had rights, in that case
 30 mana whenua, in relation to a piece of land on the Chatham Islands. It was that contest that persuaded the Court not to intervene, not a question as to the enforceability or otherwise of the Treaty of Waitangi.

Ma'am, I think I'm coming to the end of my time. I did have a couple of notes. Would you mind if I just quickly read those?

WINKELMANN CJ:

That's fine, you've got another – well, one minute.

5 **MR MAHUIKA:**

I'll have to read quickly.

WINKELMANN CJ:

I'll leave you, give you a little bit of leeway.

1440

10 **MR MAHUIKA:**

Ma'am, there was only one other matter that arose in questioning and that did concern section 3A of the CCRA and the fact that there was already a Treaty provision in that legislation and I think there are a couple of observations that we would make. The first observation is that the process in that legislation focuses very much on the idea of engagement and the setting of targets. It reflects a commitment by the Crown actually to endeavour to apply the Act in a manner that is consistent with the principles of the Treaty of Waitangi even though it specifies the steps that ought to be taken. But it doesn't ultimately derogate from the idea that in a climate change context, Parliament has clearly taken the view that the Treaty of Waitangi is a matter that is not only relevant but pertinent to the question of climate change and the execution of tasks that arise under that Act and the observation we would make is that it goes to the question as to how big a leap is it in the context of climate change to be entertaining the idea of a declaration about Treaty compliance.

25 **WINKELMANN CJ:**

Are you saying that section 3A gives you some sort of footing for that? Because it seems to me to rather support contrary argument which is that Parliament's turned its mind to it and says this is how we deal with it, as opposed to the sort

of *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) kind of argument where the Treaty is spread throughout our legislation.

MR MAHUIKA:

Well I mean the Crown says in order to fulfil our obligations we will do these
5 things. In my submission it doesn't foreclose the possibility that Treaty considerations are more broadly relevant, firstly, and secondly, which was my overarching point, if it does nothing else, I mean that the Treaty and its application is clearly relevant to the question of climate change.

10 So therefore a declaration about the question of – so there are two questions that arise. The first is whether the Court of Appeal was correct in the idea that the fact of these provisions displace a broader obligation, and we would say arguably not. The second consequence though is that it still makes an enquiry into those matters relevant and does open the possibility that a court, because
15 the Crown has said in the legislation that the Treaty is relevant, might determine that it's appropriate to make a declaration as to whether it's meeting that standard. Ma'am, I've come to the end of my time.

WINKELMANN CJ:

Thank you.

20 **MR MAHUIKA:**

Unless there are any questions those are my submissions.

WINKELMANN CJ:

Thank you Mr Matanuku [*sic*].

MR MAHUIKA:

25 Thank you.

WILLIAMS J:

Mr Mahuika.

WINKELMANN CJ:

Mahuika. Sorry. I got your name around the wrong way.

MR MAHUIKA:

That's all right.

5 **WINKELMANN CJ:**

I have my assistant on the left to point it out.

MR MAHUIKA:

Thank you Ma'am.

MR BUTLER KC:

10 Kia ora your Honours. I just want to check with Justice France, you can hear me okay?

ELLEN FRANCE J:

(no audible answer 14:44:08).

MR BUTLER KC:

15 Thank you. So your Honours, we have again because it – in recognition of the shortness of time that we have got I've prepared a few hand-ups to give you which I'll talk to extremely briefly but they're there to provide information to the Court. I've supplied them in soft copy to Mr Registrar, Mr Marr, and I have soft copies in court. So the tables are a table of what I refer to as a table of key
20 climate change in human rights case involving assessment of adequacy of measures. I thought since part of the case made for the Crown is that looking at the adequacy of measures is not something that courts do. It might be helpful if I just created such a chart.

WINKELMANN CJ:

25 Have we got that?

1445

MR BUTLER KC:

No, you haven't got it yet because I need to ask permission, so I need to tell you what it is that I'm handing up. Then I've got two other tables. One is a table which sets out the extent to which this Court has adopted, followed the

5 views of human rights committees in decisions that you have made, and then a second is a table which sets out the use of the UN Human Rights Committee General Comments in judgments of this Court. That is directly relevant to an issue raised by my friend in his reply submission, my friend Mr Hodder, where he refers to the statements in General Comments as being aspirational in

10 nature. By that I understand him to wish to diminish the role that they might play in the interpretation of the relevant rights, and I just thought I could put that information before the Court just to show that on many occasions you've had regard to those comments and views in the task of interpreting domestically the relevant rights as incorporated through the Bill of Rights. Can I have those

15 handed up?

WINKELMANN CJ:

And we have them in soft copy now. I've got – yes, physical would be good too, thanks.

MR BUTLER KC:

20 Thank you. So I'll have those distributed. I also, in reflecting overnight, thought in the time I've got available to try and assist you, I've been trying to see what cases might assist you in that regard and I've got two additional cases I'd like to hand up. Again soft copies will be provided of those. One is an English High Court decision from the administrative division of the High Court which I'll

25 refer to as *AH*, so it's *R (on the application of AH) v Secretary of State for the Home Department* [2025] EWHC 3269 (Admin) and then the second case is a decision of the New Zealand Human Rights Review Tribunal in the case called *IHC New Zealand v Attorney-General (Strike-Out Application)* [2020] NZHRRT 47, and I'll come to the relevance of those two cases at the right point in my

30 submissions, if I may. Soft copies have been sent through to Mr Registrar and hard copies are now being distributed by Ms Yang.

So, your Honours, as a starting point just to give you a sense of an orientation from the Commission's perspective, looking at the judgment under appeal you'll have seen from the written submissions that our view is that there was much in that judgment that would commend itself to this Court, and in particular we

5 support the analysis that was undertaken by the Court of Appeal on the relevant scope and reach and potential application of the right to life and the right to culture, so sections 8 and 20, in the climate change context. So unlike our friends for the Attorney-General, we take the view that the Court of Appeal's approach to the interpretations of section 8 and 20 were correct and that

10 this Court should not disturb the analysis which was undertaken by the Court below.

Where we say that the Court of Appeal ran into difficulty, went slightly off-piste if I may say, put it that way, is in its approach to the role of the courts. And

15 your Honours will recall from reading the judgment, the Court of Appeal contrasted the approach of the English courts in the *Plan B* case as against the approach of the European Court of Human Rights in *KlimaSeniorinnen*, and I'm just going to call it *Klima* if I can.

20 And listening to the discussion that took place yesterday between Bench and bar and again today and anticipating a little I imagine what the exchange may be with my friends for the Attorney-General, it seemed to me, I made some notes and I just thought there were a number of matters that appeared to be of concern or troubling or, you know, just questions that the Court had to have,

25 and I thought if I could just identify what I believe those to be and if I've correctly identified those then I thought I could assist the Court by actually just directly responding to those issues as I've raised them. So I thought, just bearing in mind the time, I might list what those are and then make an attempt in the time available to respond to those. That's not me trying to say please don't ask me

30 any questions as I go through that because that would be most unusual in this Court and I wouldn't wish to stifle, but I just had wanted to give your Honours a sense as to the number of issues that I think I can provide some assistance to.

WINKELMANN CJ:

Yes, go ahead. Yes, we've got the idea.

1450

MR BUTLER KC:

5 Thank you, your Honour. So the first matter that I'd identified was what is the true nature of the claim before the Court in Bill of Rights terms and is it cognisable by New Zealand courts, so that seemed to me to be a big picture sort of issue that's worth separating out and having some discussion. So that was the first issue I identified.

10

Another issue which I think is related to how one thinks about the claim that is being advanced by Mr Smith here and you'll see there is an element of overlap or bleeding between these issues, but I do think there is benefit in separating them out to the extent we can, is isn't this just a case about social and economic policy dressed up as a human rights case?

15

There was a sense of that coming through and allied to that but again slightly different and looking at nuances, different shading, was, well, if this is a case which involves the or implicates the right to life, say, and raising that right in the context of climate change one can see, or I can see the sense of that, but how does one limit that right, if it's given positive obligation sense to it, how do we limit it from having an impact on, for example, other rights such as healthcare?

20

There was a concern, I think, raised and we had it again, I think, today in the exchanges around what is the relief that can be given in respect of a claim like this and what would, in particular, the value of a declaration be?

25

There was a question about what is the role of the courts in this space? Are we part of the State for the purposes of discharging international human rights obligations?

30

And then there was a concern about, well, does the claim require the Court to determine the efficacy of the CCRA and does that perhaps bring us into

dangerous waters? Is Mr Smith effectively asking the courts to tell Parliament what laws it must enact?

5 So they were the big, I think, the big issues as I discerned them that came out of the discussion, the exchanges yesterday and again today and if I could add two for further discussion that, if we could, we'd like to expand upon and those are the importance of looking at this case through a lens of access to justice/"in dubio pro actione" lens and that's a notion that I'm taking from the Inter-American Court on Human Rights advisory opinion, but I discern elements
10 of that in other decisions which I'd like to take you to and you may think that that is an appropriate lens to apply when what one is looking at here is a strike-out.

And then another topic I'd like to touch on, if I may, is the following. Even if this
15 court were to hold that the claim as formulated by Mr Smith is not cognisable, it should still affirm the approach to sections 8 and 20 adopted by the Court of Appeal, because the value of the approach that the Court of Appeal adopted, even if it didn't go as far as some may wish, is in the holding that, at least in respect of executive action under the CCRA, individual steps or actions
20 that need to be taken by actors under the legislation can be assessed for lawfulness not simply on what one might regard as traditional judicial grounds, such as failure to take into account relevant considerations or poor process, but also on the grounds of non-compliance with either or both of sections 8 and 20 of BORA.

25

And then brings in, at least in the judicial review context, the climate change judicial review context, those substantive elements which create some bite and I think that was part of the exchange that your Honour Justice Kós, as I interpret it, was having with my friend Mr Salmon.

30 1455

So, those are the topics that I've identified and which I'd like to talk to, at least I'd like to talk to because I think it may assist you. Are there any of those which

your Honours say, look, in the time available put a line through that, we don't want to hear from you on those? Are there any I've missed?

WINKELMANN CJ:

No, just go ahead.

5 **MR BUTLER KC:**

No, thank you.

KÓS J:

My count you have about four minutes per topic.

MR BUTLER KC:

10 Yes, thank you, that is exactly right, so it's going to be a little bit of a race but I do –

WINKELMANN CJ:

Well, look, I'm going to exercise my discretion as presiding judge and say you have until 20 to.

15 **MR BUTLER KC:**

Okay.

WINKELMANN CJ:

So that gives you 45 minutes starting now which is a – gain five minutes in the transaction.

20 **MR BUTLER KC:**

Right, okay, well I'll try and do it more quickly than that. Thank you. So, what is the true nature of the claim before the Court that has been brought here, and I do think the exchanges that we've had, particularly today, have been very helpful in that regard.

25

From the perspective of the Commission, the way the Commission had understood the statement of claim, was that this was not intended to be a mere

judicial review. We've always understood that this was an ordinary action. The relief that the plaintiff is seeking is, in certain respects, ambitious, for example, the ongoing reporting obligation. But, in substance, you couldn't get anywhere near the reporting obligation unless some illegality, some failure of legal duty
 5 had been found, and so from our perspective we'd always understood this case was principally about getting relief in the form of declarations from a court, from a New Zealand court.

Now, what the exact form of the declarations would be, that would be a matter
 10 for the trial court to determine. It could be that there would be a mix of declarations, and here I'm thinking of the question that your Honour Justice Cooke put to my friend Mr Mahuika the context of the Treaty, te Tiriti. So, it could be that what one gets is a general declaration of rights. You could have a situation where the trial court says well we've heard all the evidence
 15 where reasonably the judge is satisfied that Mr Smith does indeed have these rights and that in fact there are gaps either in the legislation or the policies or whatever it may be, which enables the Court to make a declaration to the following effect, the State in the form of the Crown and Parliament has failed to provide effective protection of Mr Smith's life or culture from the serious adverse
 20 effects on life, quality of life, culture, arising from the harmful effects and risks caused by climate change. And here I'm just picking up the language of the European Court of Human Rights, for example, in the *Klima* case at paragraph 544 the Human Rights Committee in *Billy* at 8.4, and the type of language used by the International Court of Justice in the advisory opinion at 377.

25

So, it could be that the court simply has a declaration made at that level which is not, in technical terms, a Declaration of Inconsistency which is fed into the Bill of Rights (Declaration of Inconsistency) response mechanism, now provided for in sections 7A and 7B of the New Zealand Bill of Rights Act 1990.
 30 It could be. It could be however that having had the matter conducted at trial the Court forms a different view and does see the CCRA as being the problem, or a significant problem as Mr Smith's counsel would have it, in which case the Court might decide in terms of relief that that should be the principal focus of relief in terms of declaratory relief provided.

All I'm trying to say is there are a number of possibilities this Court, in my submission, shouldn't foreclose or second-guess what the relief is, the exact form of relief would be, that a court would deliver after having had trial and
 5 having had extensive submissions made to it as to relief.
 1500

Now, when you look – the reason for handing up that chart of the climate change cases is to give your Honours a sense as to the sort of claims that are
 10 being made overseas, and I'm not going to take you to the detail because the details is actually in the chart, the chart does a lot of its own, hopefully, speaking for itself. The way I've prepared the chart was just to list the relevant case. I thought you would find it helpful if I had a column which talks about relevant parts of defendant's argument, because that's the State, almost always, and
 15 just to reinforce a point put to you by my friend, Mr Salmon, you know, there is a standard toolkit of responses you make when you are in the shoes of my friends for the Attorney and you will see them repeated and recorded in that column and used in almost all of the cases. The German case I haven't been able to do because we didn't have an English translation, although I could
 20 probably read it myself, but you'd have to work on my – trust my translation of what was the German government arguments were.

Then I thought it would be helpful to you if I extracted what the relevant courts said on the role of the court, because I think it's very important that when
 25 reading these decisions that one appreciates that in every case the relevant court, be it domestic or international, expressly accepted that they have to tread carefully in this area. They must be conscious of separation of powers. They must be conscious that they are a court. They must be conscious of not doing the work that other constitutional actors do. But the fact that they are in territory
 30 where the primary work is to be done by Parliament and executive, and here I am – that notion of primary work of the executive and Parliament is a phrase taken from *Klima*, and also the ICJA advisory opinion in its penultimate paragraph, does not foreclose a role for the Court in assessing whether or not

human rights norms as applicable in the climate change space have been complied with.

Then I have given you a column which talks through the positive obligations
 5 piece, the discussion on positive obligations. A piece on the court's assessment
 and then a piece on the relief that is granted.

And I have given you that level of detail and information, that hopefully detail,
 pinpoint citations, just to give the Court comfort that what you're being invited
 10 to do here is work that courts do do. When they go into that space, however,
 they constantly and correctly remind themselves of the limitations that they
 have as an institution.

And for our part, in the Commission, we would also obviously wish to reinforce
 15 the importance of observing those constitutional norms, separation of powers,
 the nature of judicial relief in a case like this.

So what then of the width of the case?

20 Oh, sorry, the other point I had wanted to make in relation to that chart is when
 you look through the cases you will see that in many of the cases what one has
 got is a mix of criticism, to use my friend Mr Hodder's word – challenge, my
 word – to actions of Parliaments and of governmental authorities . In other
 words, I think there was a notion advanced by my friend Mr Salmon of a hybrid
 25 claim, I think that was the words might be described in his submissions, the
 notion being –

Oh, yes. I just noticed that Justice France has disappeared from the screen, so
 I hope we haven't lost her.

30 **WINKELMANN CJ:**
 Right, I'll just find out.

TECHNICAL ISSUES (15:03:59)**WINKELMANN CJ:**

Right, carry on, Mr Butler.

1505

5 **MR BUTLER KC:**

So the point I was just making, your Honour Justice France, before you got turned – you disappeared, so as to speak, was that a number of the challenges contained a mix of what might be described just for convenience sake as a hybrid challenge, in other words, a challenge to both legislative and executive
10 emissions.

WINKELMANN CJ:

Can you hear us, Justice France? We might be getting a text.

DISCUSSION – TECHNICAL DIFFICULTIES (15:05:40)15 **MR BUTLER KC:**

Thank you, your Honours. So I think I've now, for the third time, I was just making the point that when you look at those cases, and one of the cases I think will be – well just thinking about it, well it may be new to your Honours, just thinking of some of the cases that were touched on in the *Fonterra* case,
20 so one of the cases I think that is new and I should've pointed that out is the case which I just refer to as the Bonaire case, and I may be completely mispronouncing it, so that's *Greenpeace Netherlands v Netherlands (Bonaire)* ECLI:NL:RBDHA:2026:1347. So Bonaire is one of the Caribbean Dutch – I'll get it wrong but one of the islands in the Dutch Antilles, I think it used to be part
25 of the Dutch Antilles, anyway, it got separated out. So it was a claim made as to the steps that had been taken to protect the inhabitants of Bonaire from climate change and the challenge there was a challenge both as to inadequacy of legislative framework and the inadequacy of steps taken by the Executive. That is a similar sort of a challenge as one that was taken in *Urgenda*
30 *Foundation v Netherlands* ECLI:NL:HR:2019:2006. It's similar to the claim that

was brought in *Klima* because that was a mix of the statute being inadequate and then the steps taken by the Executive under it being inadequate.

WINKELMANN CJ:

Is there a difference because those – well I'm not sure about the
5 *Greenpeace v Bonaire*, is that pursuant to a constitution?

MR BUTLER KC:

No, it's pursuant to just ordinary principles of civil litigation. So the way you do it in Holland, in, sorry, the Netherlands –

WINKELMANN CJ:

10 Oh, sorry, it's the Netherlands, right.

MR BUTLER KC:

Yes, in the Netherlands is the Dutch civil procedure/Dutch civil code allows you to take an action against State authorities, and so that's what this was as to the adequacy – and I'm going to come to that word shortly and how it's not a word
15 to worry about unlike the suggestion from my friends for the Attorney – about the adequacy of the State discharge of duties that are owed, and –

KÓS J:

So it's essentially a judicial review or something like it?

MR BUTLER KC:

20 Exactly. So in our world it would be quite like the sort of action that my friend Mr Salmon described whereby you can call the State to account through trial, so it's not simply a judicial review, it's meant to be a trial process for failure to meet duties, and the relevant duties here are human right duties, so that's where the parallel, that's where I say the parallel comes in.

25

And what I think your Honours will be interested in in terms of the Court's role is that in both *Urgenda* and certainly in this *Bonaire* case, but in both cases the Court when it came to the question of relief made it quite plain its role was

confined to making declarations of failure to fulfil duties. The courts were very clear it was not their job to tell the State what actions were to be taken in order to ensure those duties were fulfilled except to the extent that you could identify a failure to implement a statute in the manner that the statute contemplated, going to the point that your Honour Justice Kós put. So in other words, in some cases you can say well look, part of the problem here is the statute requires you to do this and you haven't done it. So that's – but the important part of the proposition I've just put is part of the problem is it's not a full answer to the question has the State complied with its humans rights duties in respect of climate change? It's a partial answer and that I think was what my friend Mr Salmon was exploring with you earlier today.

1510

So, there's an awful lot, I think, of value in that chart, I just don't have the time to take you through it. I'm just trying to, I suppose, get you interested in going through it and seeing what is to be learned because the problems that confront courts in this space are common problems, just as the problem of climate change is common, the issues they raise for courts are ones that are common across jurisdictions. What is it that we can do? What is it that we should do?

20 **COOKE J:**

So, confining it to questions of law and declarations of rights?

MR BUTLER KC:

Absolutely, and to be very clear that's what I've tried to pick out in the chart as well in terms of identifying what the Court's role is. So, for example, in *Klima* there's probably even more paragraphs than the ones that I've alighted upon in there because the Court couldn't emphasise more strongly its job as one of law and only law, and if people are looking to the courts to be a solution, a policy solver, that's not their job. ICJ said exactly the same in the advisory opinion too, you'll see that as I said in the penultimate position, that all of these courts are really firm. We just did a little bit. We do – I've appeared in front of this Court on numerous occasions in these humans rights cases, your Honours will be well familiar, well, most of you will be familiar, with the propositions I advance

to this Court about the Bill of Rights sets a legal standard by reference to which executive or parliamentary action is to be assessed. And I've often said, that is its primary goal, is to enable that assessment to occur. There is then a question of relief which may or may not flow out of that, but the primary goal is to enable
 5 that assessment by reference to a legal standard, but only that. Only that.

KÓS J:

Where does institutional incapacity play here? The fact that the State has so many demands on its resources, is that a matter going to whether there was a breach, or is that a matter going to what relief ought to be granted if any?

10 **MR BUTLER KC:**

It will go to both. So, because it's not for the courts to tell parliaments and the executives how to manage their resources generally speaking, everything's always a general proposition as a general orientation and that sounds in the relief and so that is why you will see when you read through the orders that are
 15 given in these various cases why it is the courts are so careful to say it's not our job to say what money should be spent or what particular measures should be taken.

WINKELMANN CJ:

Okay, so that's your number one.

20 **MR BUTLER KC:**

Yes, and so then the second point is as regards breach, are resource issues relevant to institutional capacity relevant to breach? It can be, depending on what element of the analysis you are exploring when deciding whether there has been a breach. So, if you go back to *Klima* you will see the Court was very
 25 nuanced around its analysis of where the margin of appreciation should be allowed some wide effect in other areas where actually there should be very little if any margin of appreciation given. Both relevant to the question of breach or the duty breach analysis.

So, I think that's the – so of course institutional – so the broader point is, yes, institutional capacity can be relevant and it will sometimes, it will play out somewhere along the analysis for sure, but does it mean that one can say we cannot go here at all at all? To use an Irishism. No it does not. That's the point of this chart. It's not. What the courts do is they have trials, they look at what the claims are, they look at the measures that have been taken and then they say in certain areas, yes, we're comfortable making a declaration of breach here. In other areas they say we're not comfortable making a declaration of breach there, and here we can see there's been non-compliance with the relevant statute, so that's a partial answer. In the other space, look, we just, all we can do is identify that there is a non-compliance and how that gets resolved, that's back to the political governmental realm, and that's how this notion in my submission of institutional capacity gets recognised. So I don't see it as being, what I'm trying to say, I don't see it being hard-edged and binary, it's not a sluice gate, if I can use that image.

1515

So then the last thing I did want to emphasise while looking at this first question and the exchanges have been helpful because it means I don't have to take so long in some of the other issues I need to come to, was the width of the claim.

I think there's a very important passage in *Klima*, it may have been referred to by my friends from Mr Smith, if it was I apologise, I missed it being referred to and it's a passage at paragraph 551 of the judgment, so that's page 205 of the judgment. I'm sorry, I don't have the tab – oh, hold on, I do have the tab number. So, *Klima* is appellants' tab 64.

So probably the best place to look, can we just look, just to make it short, if you look at paragraph – the top of that page, paragraph 549, just since I'm here, I'd said to you this word "adequate" –

WINKELMANN CJ:

Yes and we were taking note yesterday.

MR BUTLER KC:

Oh, were you? So –

WINKELMANN CJ:

But you can take us to it again.

5 **MR BUTLER KC:**

Okay, so what I want to emphasise in paragraph 549, for example, is the use of the word “adequate”. So, do you see: “Moreover, in order for this to be generally feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate
10 ...” so there’s the use of the word “adequate”, for example, and if you look then one, two, three lines down: “... followed by adequate implementation.”

The only point I am trying to make is and I'm going to make it by reference to some other English cases, just to show it is not just Europeans who do this, it
15 is also our common law brother and sisters who now do it, but this notion of adequacy, that is the language you would expect to hear in a positive obligation-type case. Have you adequately discharged your positive obligations? Have you taken adequate steps to discharge your positive obligation? So that word “adequate” from a Human Rights perspective, that’s
20 not a red flag sign at all. That’s just normal language that you would expect to see being used.

So if we go down to paragraph 550, you see: “When assessing whether a State has remained within its margin of appreciation ...” and then you get the
25 cross-reference back to how the margin of appreciation works, as I say, that’s just a handy little spot of the paragraph I had in mind when I talked about different use of institutional capacity and so on, “the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level,” so obviously I’ll stop and emphasise “judicial” here, “have had due regard
30 to the need to ...” And then there is five examples given.

And then the part I just wanted to come to was at paragraph 551: “The Court’s assessment of whether the above requirements have been met will, in principle, be of an overall nature,” so why do I see that phrase, which I think is a very important phrase “of an overall nature”, why is that important here, well, the

5 Court goes on to say, “meaning that a shortcoming in one particular respect alone will not necessarily entail that the State would be considered to have overstepped its relevant margin of appreciation”

So the point is, that when assessing whether there’s compliance with the right

10 to life or right to culture, so sections 8 or 20, what the Court is interested in is the “overall nature”. So that means where, this is a bit of Dad joke so I apologise, but it is trying to make a point, you have to see it whole in order to see the holes. That’s what the nature of the exercise is that’s going on but it also says, to the benefit of the Crown, that just because somebody wins one

15 judicial review on a particular point within the mechanics of the CCRA doesn’t mean that you have proven overall a failure to abide by your positive obligations in respect of the right to life or right to culture.

So in other words, putting it, lastly, yet another way, the evaluation of the

20 question of breach of sections 8 and 20 is, of its nature, one which has to be assessed in a kind of a big picture way and that’s what makes climate change litigation, and particularly where human rights lens is applied, different from other types of litigation.

25 So, the width of the claim reflects the nature of the problem and the type of rights that are in play.

1520

My friend Mr Salmon talked, I noted, he talked about, you know, well, in this

30 space it's kind of like death by a thousand cuts and if one takes that notion a little bit further, one of the problems with that siloed approach, which is what sometimes judicial review can enable, is it only gives you sight of one particular cut and, of course, he said, well, it's only a cut, it's only two cuts. The wider view allows you to actually see, well, what's actually going on and be able to

have a proper frame of reference to determine whether or not the rights to life and culture are or are not being breached.

5 So, lastly, this question of the notion of adequacy of frameworks, legislative and regulatory –

WINKELMANN CJ:

What about the trade-offs, though? So what about the kind of trade-offs where it's a positive obligation, it's using a scarce resource.

MR BUTLER KC:

10 Yes.

WINKELMANN CJ:

Say it's in a different context, not climate, do you accept, because Mr Salmon puts in terms of this is as serious an issue as New Zealand and the world can face, but if you put it in, say, the health context.

15 **MR BUTLER KC:**

Yes.

WINKELMANN CJ:

What about the trade-off with other interests?

MR BUTLER KC:

20 So that was a – this is how these things all shade, one into another, your Honour. So that brings me to, if you – I'll answer it immediately, but I would like to come back to the concept of adequacy.

WINKELMANN CJ:

Yes.

25 **MR BUTLER KC:**

So, that's a mental note to me. So if we talk about the right to health, so that's Article 12 of the ICESCR. So the right to health is the right to enjoy: "... the

highest attainable standard of physical and mental health.” So that's how Article 12.1 of ICESCR describes the right.

5 But if you look then at Article 12.2 and you look in particular at the general comment 14 of the ICESCR committee, that right is one where you expressly take into account a State's available resources and the key thing and this is, I suppose, an answer a little to the query that was raised by her Honour Justice France yesterday about the bleeding effect, so as to speak, into the healthcare areas, is that healthcare rights are ones that are to be progressively
10 realised over time.

So, it is, what I am trying to say, it is in the nature of those rights that they are progressively realised over time. So, there is a resource, available resources, element built into the right and there is a progressive realisation. In other words,
15 they don't have to be delivered on to the fullest extent immediately.

Climate change, by it's nature, is of a different order. Whether or not and the extent to which resources and how they factor into the performance of the State's positive obligations, how that all factors in, that is something which I
20 imagine will be examined in some detail at trial. Whether that is something which can be taken into account.

Certainly, my reading of *Klima* suggests that the European Court of Human Rights sees that any assessment, particularly in the margin of appreciation
25 space, may need to take into account resource issues. But that may depend, this is again the nuance I want to add which is why trial is important, that may depend upon the question of where are we on the timeline towards, to cut to the quick, disaster?

WINKELMANN CJ:

30 Yes and just transition?

MR BUTLER KC:

And just transition, of course. This was an important point, I think, when his Honour Justice Cooke put the proposition to Ms Coates, I think it was, this morning. I think your Honour put the proposition, well, if there's compliance

5 with the Paris Agreement, doesn't that mean there's compliance with the Treaty, te Tiriti? And the Commission would say, no, because of course it is possible for New Zealand to reach compliance with Paris but at the expense of particular parts of the community including, for example, Māori, so that you could achieve the one by breaching the other.

10

So, the two, we don't see as being entirely congruent. It is very important, and I have always understood it is part of Mr Smith's claim, that any steps that are taken to achieve compliance, inadequate and all as they may be according to his pleading, also fail on the – to just use a quick phrase – the just transition

15 principles, insofar as they apply to Māori, in accordance with te Tiriti.

1525

WINKELMANN CJ:

And I suppose the International Court of Justice integrated, whole, harmonious reading approach helps there.

20 **MR BUTLER KC:**

Yes, it did and it certainly did and there's a number of places where it's done that but so, too, the advisory opinion of the Inter-American Court of Human Rights and I just wanted to, not many people have talked about that advisory opinion, it is an important advisory opinion and it is particularly, I think, important

25 because in the Americas the place and significance of indigenous peoples within the population and within the various States is quite prominent, so it was not surprising that the role of or the impact on indigenous peoples would assume quite – a lot of ink was consumed on making sure that the human rights of indigenous peoples are well-respected in fighting the climate crisis. I would

30 urge your Honours to have a look at that opinion, that advisory opinion as a useful source on right to culture and the need for care in respect of indigenous people.

WINKELMANN CJ:

Now you want to take us back to adequacy?

MR BUTLER KC:

5 Yes, I did. So, the reason I want to do this, just simply because as I apprehend my friend for the Attorney's submissions, they are concerned at the Court delving into issues of adequacy. So I just thought, I just wanted to explain, you know, that word "adequacy" is the normal word you would use where one is looking at discharge of the State's positive obligations under Human Rights norms.

10

So, the example I have chosen, just simply because it contains many references that means it's a one-stop shop, is that *AH* case that I have handed up to you. In particular, I had in mind from paragraph 88 onwards – paragraph 188, I hope I said, I should have said.

15

So very briefly, this is called, you will see there is the heading: "*AHs Ground 6 and IS Grounds 3 – the systems ground*." So, it is possible now in the UK, because of the terms of Articles 2 and 3 of the European Convention, Article right to life, Article 3 degrading treatment, for a challenge to be brought by individuals on the basis that the systems that were put in place to protect the right to life or to protect them against abuse which would amount to degrading treatment were not in place and as Mrs Justice Jefford notes here at paragraph 118, that systems ground is sourced to the positive duties imposed by Articles 2 and 3 and then she goes through and discusses the various cases.

25

If you look at paragraph 190 where there is a discussion there of *R (Limbuela) v SSHD* [2005] UKHL 66, *Limbuela* is an authority in our bundle – sorry, the Crown's supplementary bundle at tab 23, just note that, your Honours, I'm not going to take you to it, just so you know it's there.

30

And you will see in that case there is reference to the *X v Bulgaria* (2021) 50 BHRC 244 (Application no. 22457/16) case in paragraph 178: "It emerges from the Court's case law as set forth in the ensuing paragraphs that the authorities'

positive obligations under Article 3 of the Convention comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures ... ; and, thirdly, an obligation to carry out an effective investigation ...”, where that doesn’t take place, and that notion of a “legislative and regulatory framework of protection” is repeated in the paragraph below from another case.

And you will see at paragraph 191 the lingo now in the UK is to refer to: “... the systems duty, the operational duty and the investigative duty.” Do your Honours see that at paragraph 191? Yes, there you go.

WINKELMANN CJ:

Paragraph 191 of *AH*?

1530

MR BUTLER KC:

Paragraph 191 of this, of *AH*, yes. And so just to give your Honours a sense of how these things could apply, if you look over the page at paragraph 192, there’s a summary of principle from the case called *R (MG) v SSHD* [2023] EWHC 1847 (Admin), and I’m looking at the third line of the italicised paragraph:

“The content of this duty depends on the particular context and what is required adequately to protect life.” See that word “adequate”? There’s that word “adequate” again. “It may involve ensuring that competent staff are recruited, that they are appropriately trained, that suitable systems of working are in place, that sufficient resources are available and that high professional standards are maintained. It may also involve regulatory measures ...” Blah blah.

Then if we look at paragraph 194 still within *AH* there’s reference here to the judgment of Justice Bourne, you’ll remember him from *Plan B*, this is in a case called *R (CSM) v SSHD* [2021] EWHC 2175 (Admin). He summarises at paragraph 11 what the Article 3 positive obligations are, and then goes and quotes from *Savage v South Essex NHS Trust* [2009] 1 AC 681, and then you’ll see paragraph 72. I just want your Honours to see what the duty involves. Duty

to protect lives requires health – ensure hospitals which – competent staff to a high professional standard, et cetera, et cetera. “Failure to perform these general obligations may result in a violation of article 2.”

COOKE J:

- 5 This case was about detaining immigrants in detention centres when there was a risk of suicide.

MR BUTLER KC:

Correct, correct.

COOKE J:

- 10 So that possibly explains the language that’s being used here?

MR BUTLER KC:

- Yes and no, but the important point I suppose from our perspective is that the exercise which the Court is required to undertake is to assess whether or not the legislative and regulatory systems are adequate to meet the State’s positive obligations, so that in principle the concept of the Court assessing the adequacy of the legislative and regulatory framework is part of the Court ensuring that the Article 2 or Article 3 rights are met. That’s the point that I’m trying to make.
- 15

WINKELMANN CJ:

Now Mr Butler, I’m just looking at the time.

- 20 **MR BUTLER KC:**

Yes, thank you. Okay...

WINKELMANN CJ:

So I think we’re up to your –

KÓS J:

- 25 Second point.

MR BUTLER KC:

I've done my width, I've done largely my second, is this –

WINKELMANN CJ:

You've done the third as well, haven't you?

5 **MR BUTLER KC:**

Yes I have, I've done the third.

WINKELMANN CJ:

Relief, 4?

MR BUTLER KC:

10 Relief I've done. I've done relief, I think I've talked about the nature of the relief
in some of the early remarks that I made so I feel I've touched on that. I think
I've said enough to deal with the issue about is this just a case about social and
economic policy dressed up as a human rights case, it's not. It's plainly a case
about the right to life and culture. It may have implications for economic and
15 social policy but that makes it not much different from many other human rights
cases. Let's take family carers, for example. They've plainly had implications
for social policy and plainly implications for economics and which are still
playing out in the courts and Parliament many, many years later. That didn't
stop the Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 183;
20 [2012] 3 NZLR 456 saying no, there's discrimination here and this can't
continue. That's just one New Zealand example.

WINKELMANN CJ:

So is that relevant to your 6, are we being asked to assess the efficacy of the
CCRA?

25 **MR BUTLER KC:**

No, I'm going to work on the basis that I've explained that at a high level what
you are being asked to do, as I understand the claim, is to assess the adequacy
of measures undertaken.

WINKELMANN CJ:

Yes.

MR BUTLER KC:

And whether the legislative and regulatory framework are adequate to meet the
5 article – the section 8 and section 20 positive obligations.

WINKELMANN CJ:

Are we up to 7?

MR BUTLER KC:

So I did want to talk about the pro actione lens if I may, just very –

10 **WINKELMANN CJ:**

So that's precautionarily favouring access?

MR BUTLER KC:

Yes, exactly, that's –

WINKELMANN CJ:

15 If in doubt, favour access?

MR BUTLER KC:

Exactly right. That's exactly it, and that concept is set out in the advisory
opinion –

WINKELMANN CJ:

20 Oh, now I think Justice France has got a question.

MR BUTLER KC:

Thank you, yes.

ELLEN FRANCE J:

Sorry, I know you were racing because of time, but it's not clear to me why
25 you're saying it's not a direct challenge to the efficacy of the Act? You say for

example in your submissions at paragraph 27 at a minimum you've got to put in place the necessary requirements: "... and measures that would, if adopted by every country, prevent the level of warming that threatens life or culture as pleaded."

5 **MR BUTLER KC:**

Yes.

ELLEN FRANCE J:

And at the moment I know there are a whole range of things that the Crown might rely on but that is saying, isn't it, that there is a problem with the efficacy
10 of what – their main centrepiece if you like.

MR BUTLER KC:

That's a fair way of expressing it, your Honour. I suppose it's just how the question gets asked, what's the right question to be asking. The question to be asked is whether or not the State has done enough or sufficient, both
15 "adequate" and "sufficient" are the words used by the European Court of Human Rights in *Klima*, to meet the positive obligations upon the State. So, it can advance the CCRA or any other item as meeting that positive obligation, that's how we see the thing framing up as opposed to it being a – it's the way I think it's been characterised from my friend Mr Hodder's submissions, that the claim
20 is about the efficacy of the CCRA, it's not simply as I understand it about the CCRA. The claim is I've got these risks. The State has got positive obligations to protect my right to life and culture and the question then for the trial court will be, well, has the State discharged its positive obligations. That's the question. That may well mean a trial, as Mr Salmon has flagged, that Mr Smith will identify
25 holes in the CCRA insofar as it is put up as a sufficient discharge of the State's positive obligations under sections 8 and 20.

KÓS J:

I mean, presumably, Mr Butler, Parliament could express and enact the statement that notwithstanding anything in the Bill of Rights these are to meet
30 the State's obligation under that Act.

MR BUTLER KC:

And just on that Sir, of course Parliament, as we know, subject to the qualifications that my friend Mr Salmon so eloquently expressed and can do what it likes, one of the things that is very interesting in that regard is when I
 5 went and looked at the Bill of Rights vetting exercises undertaken by Ministry of Justice, and this goes to my point by why I think it's so important that even if the Court doesn't uphold the claim as advanced by Mr Smith that it does not disturb the findings of the Court of Appeal in relation to the breadth of scope of sections 8 and 20, he said none of those Bill of Rights vets make any reference
 10 at all to the right to life or the right to culture being in any way implicated by the various amendments that are proposed there. If Parliament were to introduce legislation of the, a section of the sort that your Honour talks about, then the Bill of Rights would be, you would hope, front and centre stage in any analysis or debate or discussion that would take place in respect of such a sweeping
 15 and surprising amendment.

KÓS J:

Well, I raise it as a potential parliamentary response to the very point that Justice France is making.

MR BUTLER KC:

20 It is.

KÓS J:

I'm not aware of any such provision in any New Zealand Act. Is there one?

MR BUTLER KC:

From memory there was an attempt in *Fitzgerald v R* [2021] NZSC 131; [2021]
 25 1 NZLR 551 but that attempt misfired. It wasn't expressly about a Bill of Rights
 —

WINKELMANN CJ:

It was notwithstanding the provisions of any other enactment.

MR BUTLER KC:

Of any other enactment, exactly, that's right. I want to say I think there might be one or two, I just can't think straight off the bat.

KÓS J:

5 Thank you.

WINKELMANN CJ:

I think there are lesser rights.

MR BUTLER KC:

But it would be an extraordinary step to take it seems to me.

10 **MR BUTLER KC:**

So, the pro actione lens should be applied here. I was about to give your Honours a reference to that, it's in the Inter-American Court of Human Rights advisory opinion at paragraph 543. You see the same theme coming through in *Teitiota*, the Human Rights Committee decision, one of the things
15 that the Human Rights Committee emphasise when it rejected the claim that was brought forward by Mr Teitiota in that particular case was that he had been given the benefit of what the Committee referred to as an adequate and individualised assessment of risk, in other words his claims were actually looked at and assessed on the evidence, on the facts.

20 1540

So I think, I submit rather, that there is value in making sure that these issues are ventilated and the table of cases that I've given you in my submission shows you the value of allowing citizens to bring claims against climate change
25 emissions on behalf of States because it does enable a process of examination to take place and, indeed, in a number of the cases what has happened as a result of the judgments that have been issued is that steps have been taken by those States. And I just simply say that to reinforce the point that was made by my friend, Mr Salmon, about how one would expect, in a rule of law country,

other organs of the State to respond to the identification of Human Rights non-compliance by the Courts.

5 Your Honours, the last point I wanted to make was that even if the Court were to hold the claim as formulated by Mr Smith as not cognisable, it should affirm the approach to sections 8 and 20 adopted by the Court of Appeal. I think I have had the opportunity, in the course of the presentation to you, to say why it is the Commission says that that aspect of the Court of Appeal's judgment should be upheld. It would at least enable, not on the scale that Mr Smith would wish or the Commission would support, but it would at least enable the Human Rights norms to play a role, albeit through the narrower lens of a judicial review, focusing on each individual cut rather than the whole. That would still be some sort of valuable role.

15 And I am sure there was a few other things to say, but those seem to be the main points to cover, your Honours. Is there anything else I can assist you with?

WINKELMANN CJ:

No. Thank you, Mr Butler.

20 **MR BUTLER KC:**

Thank you, your Honours.

ELLEN FRANCE J:

And – sorry.

WINKELMANN CJ:

25 Sorry.

ELLEN FRANCE J:

Can I just ask one quick question and that's in relation to discretion.

MR BUTLER KC:

Yes.

ELLEN FRANCE J:

So I assume that you will say it doesn't matter that relief is discretionary, the
5 granting of a declaration, for example, because that's an issue for –

MR BUTLER KC:

For trial.

ELLEN FRANCE J:

– for trial, not for now. But do you agree that things like the availability of other
10 remedies and so on that have been discussed would be relevant to the granting
or otherwise of declaratory relief?

MR BUTLER KC:

If I can respond this way. I don't think I could say that the availability of other
remedies would be irrelevant to whether relief would be granted. I think that
15 would be right.

What I would, with respect, reject is the proposition that because a trial court
might form the view that it will not give relief, taking into account discretionary
factors, after it has heard a trial, that it would be appropriate for this court to not
20 allow the matter to go to trial. That would be, in a sense, to get ahead of the
trial court. It would be to assume the role of a trial court without the benefit of
having heard the evidence and the argument that the trial court presumably
would have before it when asked to make that decision, the context for that
decision it would be asked to make being that Mr Smith has proven some
25 breaches.

So, again, the significance of that is if Mr Smith has proven breaches in this
particular context, the idea, it seems to me and I could be wrong, the idea that
a court would not wish to give some form of relief in recognition of the
30 seriousness of those breaches just seems, to me, frankly unimaginable, but –

ELLEN FRANCE J:

Yes, I suppose I was thinking that for quite a significant period of time the approach would have been to give in the reasons to discuss that, but not then go on and, pre-*Taylor*, make the declarations. But I understand the point you
5 are making about the time at which that's relevant.

WINKELMANN CJ:

Can I just ask a follow-up question on that.

MR BUTLER KC:

Thank you, your Honour, yes.

10 **WINKELMANN CJ:**

Which is the role of the Courts.

MR BUTLER KC:

Yes.

WINKELMANN CJ:

15 What is our traditional role. For some time as Justice France said, Courts didn't issue declarations but they, nevertheless, reasoned through the law. Would you say that if that, if the Courts were not – were to say that declarations weren't available in this subspace, would it still be a valid thing for the Courts to reason through whether or not there is a breach of the rights without a kind of a formal
20 remedy at the end?

MR BUTLER KC:

So if the role of the Court was simply to opine –

WINKELMANN CJ:

Yes.

25 1545

MR BUTLER KC:

– upon facts put before it and legal standards without there being something, the possibility of something being reflected in an order, then I would struggle with that proposition because it seems to me the task of courts is this, that

5 courts are asked to make – the reason people go to court is to get an order. Even if it's only just under the DJA, it is a declaration which the seal of the High Court of New Zealand is affixed to.

WINKELMANN CJ:

Well that's a sort of interstitial space that courts were teetering around in prior

10 to the *Taylor* decision.

MR BUTLER KC:

It was, and that's why some of us found it quite unsatisfactory. That was kind of trying to have one's cake and eat it in a context where actually the point of going to court is to get an order. You're not – and here I agree with my friend

15 Mr Hodder – you're not a commission of inquiry, you're a court, the High Court's a court, and the task of a court is to listen to the parties and if persuaded that relief should be granted then to reflect that. So if there is no possibility of relief being granted because it's not the nature of the case put before the Court that any relief can be granted, contemplated as being granted, that's the important

20 point, then that doesn't sound to me like litigation before a court. So that's why I have resisted the proposition – I think it's very important to make it clear that this court is not saying that relief even in the form of a simple declaration cannot be granted in a case like this. It may be that what Mr Smith gets is much narrower in scope in terms of what the Court would consider to be a breach and

25 how the Court would signify that through whatever the declaratory relief it gives, in other words, look at the breadth of what he's asking for but also consider what he might get. So long as he might get some of what he's asking for through this mechanism, that sounds to me like a proceeding which (a) should be allowed to get underway and which holds the prospect of relief being

30 granted.

WINKELMANN CJ:

Thank you, Mr Butler.

MR BUTLER KC:

Thank you, your Honours.

5 **WINKELMANN CJ:**

Mr Hodder. So I should say that I mean obviously we're quite short on time if we're just running three days, so we will sit into Thursday so counsel should make arrangements on that basis.

MR HODDER KC:

10 Grateful to your Honour. My general approach, we don't have a road map for the Court but my general approach was to say something by way of preface then something by way of introduction. I'll explain the distinction later on. And then as I see it, one of the major issues in this case is the Court's function, the judicial function, and I want to address that in two bites. The first bite I will get
15 to in the morning fairly early and I will then talk about the Act, the CCRA, I'll address the pleadings, and then I'll come back to the judicial function with particular reference to rights claims, and then I'll come back to the cause of action. But my general approach is that while there are a fascinating array of issues of greater and smaller size, in the end the Court issues here are really
20 about the judicial function in various ways.

So the preface, which is really a late thought of mine this morning, is that the most disturbing and persistent aspect of the submissions for the appellants is the profound disrespect for the democratic process and our system of
25 governance, or in other words, our constitutional settings. It was illustrated by references to adults in the room in the oral submissions earlier today, that is to say that neither the legislative nor Executive branches can be trusted to get on with it, there has to be some other way of testing what gets done. It's also reflected in part of the pleadings that didn't get much attention, but if I can just
30 draw attention at this stage only to paragraph 82(d) headed: "Failed legislative response," where it is pleaded that: " ... Parliament's legislative response to

climate change has since 14 June 1992 constituted a knowing failure to reduce national emissions adequately or at all. For the avoidance of doubt, the plaintiff says that Parliament's legislative response (in particular its lack thereof) constitutes a breach of the Duty for which the Crown can be sued."

5 1550

Now, that creates some degree of confusion about what's meant by the Crown in various parts of the pleading, but it goes back to my point that what is being challenged here is the legislative – sorry, is a response to climate change issues. At the heart of that is in fact the not immodestly-sized Climate Change Response Act 2002. That is the centrepiece of it, and when it is said that the Climate Change Response Act is not all of it, it's only part of it, the reality is that climate change responses of the order that are contemplated by the international arrangements and by the CCRA will require constraints on what would otherwise be done by private and public actors. Those sort of constraints could only be imposed by legislation. So if not the CCRA, the implication is there has to be something else done by way of legislation. In our submission that proposition is effectively unavoidable.

Now, the approach that says there is no balancing to be done, that Parliament has failed and will fail again, has obvious implications for such matters as the separation of powers. The Court is being asked to make a major change in the relationship it has with the other branches of government. Changes to comity. Those changes wouldn't happen without an impact on comity. With parliamentary sovereignty what the Court's being invited to do is entirely contrary to almost any concept of parliamentary sovereignty. The rule of law, which I'll come to, and not least, the right to vote, the right to freedom of opinions, the right to freedom of expression, the right to freedom of association, all of which feed into the democratic process which, according to the submissions for the appellant, can't be trusted with the issues of climate change. That's, in our submission, the way in which the matter should be seen and seen in that way it is, in our submission, so far removed from the constitutional settings that it should be treated as untenable and the trial that's been contemplated, which I'll come to a bit later on, should never occur.

What I want to do, and I want to try and do it today, is to take the Court to three documents that come from different branches of government which illustrate what I've been trying to outline in terms of our constitutional settings. I want to go to a Cabinet Manual, I want to go to the Appropriation (2025/2026 Estimates) Act 2025, I want to go to the Sealord's decision of the Court of Appeal in 1992, *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA), which the Court may recall is one that addresses questions of non-interference and what I want to do that for is to indicate that in our traditional settings the system works. The system is meant to work in the way that I outline in those features which we say will be drastically affected by what the appellant is seeking to do.

In terms of the trial that's contemplated, which I might address at this stage and I'll do the documents I was talking about tomorrow morning given where we are on the timing, the issue about a trial had been partly picked up by what's been said, but what is contemplated is that because it is said that the claims survive a strike-out threshold, then they can go to trial and that trial will be a civil trial, it won't be judicial review, and that trial is going to resolve the issues that have to be resolved.

So what's that trial going to be like? Well we have some degree of indication from *Smith v Fonterra*. It may be that it gets undermined by today's events in another place but at the moment, last time I heard, it was set down for a 14-week trial commencing in April.

1555

It has required an enormous amount of discovery by defendants and in a case of the Crown and a claim that says Parliament and you, the executive, have failed since 1992 and my learned friend says he wants discovery to prove knowledge of various kinds, then one can contemplate the discovery is going to be enormous.

The trial will be measured in months and the costs involved will be substantial, the time involved to get to the trial will be substantial and on any sensible basis,

standing back and saying why would we be doing that, when we would be moving away from what would be orthodox but which the plaintiff has conspicuously declined to do which is to seek judicial review of some particular decision or decisions, isn't going happen.

5

So the alternatives that we are talking about are what the appellant says or the orthodoxy of judicial review, which has been developed substantially and I will come to a couple of cases where this Court has been involved in judicial review of climate change issues.

10

It has no difficulty in getting involved in those cases, in making a very substantial contribution to the rule of law and the way that they are addressed. But what we do not have at the moment is the ability to say that Parliament's work is somehow defective, insufficient and cannot be relied upon and the consequences of that which is that something else has to happen and, to repeat what I said earlier, the something else that has to happen on a national scale is going to be legislation. That is a way of indicating to Parliament that something has to be done, that Parliament wouldn't necessarily of its own volition have done. That is a major constitutional change and the attempts by or on behalf of the appellant to sidle away from that proposition are, with respect, unconvincing.

20

The last thing I will do before I can come to the 4 o'clock end of the Court's hearing time is just say something about the rule of law, why I mentioned it earlier on. I am conscious that the rule of law is an elastic concept, shall we say, but going to the source of Lord Bingham, Tom as he is on the front of his book *The Rule of Law*, he describes and I am here referring, I haven't got that in our materials, but in his 2010 book *The Rule of Law* at page 37 he describes the first principle of the rule of law, the law must be accessible, insofar as possible intelligible, clear and predictable. We would say the way in which this case has been presented to you by the appellant contributes in no way to that. In contrary, it undermines that concept of what the rule of law is designed to achieve and that is, itself, a reason why the Court of Appeal's approach was entirely appropriate and should be upheld.

25

30

WINKELMANN CJ:

Although, he did also say that the rule of law should be protected by fundamental rights which was controversial, his articulation.

MR HODDER KC:

- 5 If those rights are as understood and predictable.

WINKELMANN CJ:

I take your point. Right, I think is that it, Mr Hodder, or?

MR HODDER KC:

That's where I can make a natural stop there.

- 10 **WINKELMANN CJ:**

I thought so.

MR HODDER KC:

If that suits the Court.

WINKELMANN CJ:

- 15 Okay, we will take the adjournment.

COURT ADJOURNS: 3.58 PM

COURT RESUMES ON WEDNESDAY 19 AUGUST 2026 AT 10.05 AM**WINKELMANN CJ:**

Good morning, Mr Hodder.

MR HODDER KC:

5 Good morning, your Honour, and other members of the Bench. A couple of preliminary matters. I should've mentioned yesterday that we are dividing this argument and Mr Prebble will be dealing primarily with the third cause of action involving the questions of the Treaty. He has extremely broad experience in this area, unlike me, and so he will come on at some point probably this
10 afternoon and I will come back and deal with probably both the other causes of action but very briefly and then wrap up, but we will go into tomorrow, I'm reasonably confident about that. I can't give an estimate yet about how far into tomorrow, but with the Court's invitation it was irresistible that's what's going to guide the timing on this.

15

The second point is that we have one hand-up which is not a road map, but which we won't be getting to until I start talking in more detail about the CCRA. I think it's been sent to the Court electronically but we'll have hard copies when I get to that, which may or may not be before the morning adjournment.

20

And the other preliminary matter is just in terms of the way I'm approaching this. I want to concentrate on a relatively few number of authorities to try and establish the principles which we contend. Now "relatively few" is obviously a matter that has a certain amount of latent fear in it when there is something
25 close to 300 authorities as I understand it in the bundles. I'm aiming for something between five and 10% if that helps, closer to five I hope, but we'll see how we go.

The other thing I should say before I turn to my starting point for the day is that
30 it is of course accepted by the Attorney that climate change effects are a major concern for humankind. That's stating the obvious but I need to state it so there's no misunderstanding about that, and secondly, that international and

national responses are required. Self-evidently, that is the purpose of the CCRA 2002 and the processes and the decision-making associated with it which I will be going into in a little detail to try and make that point clear, and that is processes and decision-making have now been going on for something
 5 like two and a half decades.

The other final sort of preliminary point is that of course Mr Smith is entitled to come to court to seek to persuade the Court that it should intervene by issuing declarations of the kind that he seeks. The Crown, Attorney's position is that
 10 he is misguided in doing so and the Court should decline to let this matter proceed by upholding the Court of Appeal's strike-out decision and the High Court strike-out decision.

Now there are any number of questions that are raised by this proceeding, but
 15 I thought it might be of assistance to the Court if I outlined a handful of questions which we see as underpinning the submissions that we are presenting to the Court both in writing and orally. They're a bit more blunt perhaps than the questions that my learned friend Mr Butler was proposing to you yesterday, but we will see whether that makes any substantive difference.

20

The first is why has the appellant chosen not to seek judicial review of executive decisions on climate change responses? I should say these are all rhetorical questions and I'm not proposing to answer them at this point, but why no JR. As I'll come to, there's ample scope for judicial review in the area. Secondly, if
 25 the appellant seeks to avoid the principles of parliamentary sovereignty, separation of powers, and comity by avoiding judicial review is that a legitimate use of the Court's processes and resources?

WILLIAMS J:

Can you repeat that?

30 **MR HODDER KC:**

If the appellant is seeking to avoid the principles of parliamentary sovereignty, separation of powers, and comity by avoiding judicial review is that a legitimate

use of the Court's processes and resources. Thirdly, what is the purpose of the declarations sought other than to obtain critical judicial commentary, and I take the word "commentary" from my learned friend Ms Coates' submissions yesterday, on the legislative and executive decisions on climate change responses since 1992.

5 1010

Fourthly, if the appellant wants the Court to undertake an independent assessment of legislative and executive decision-making on climate responses since 1992, which is how I understood the submissions that you heard yesterday, and to obtain critical judicial commentary, is that a legitimate use of the court's processes and resources?

10

Penultimate, for present purposes, does the concept of rights, as invoked here, effectively convert issues of policy and politics into questions of law? And if I go to the postscript of the question, and subvert the democratic process?

15

I will be coming to that language from the *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] 1 AC 719 judgment of Lord Bingham back from 2008. If the Court wants a reference, it's at paragraph 45 of *Countryside Alliance*.

20

And finally, in terms of BORA and Justice Tipping's spectrum of latitude referred to in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at paragraph 116 and also in your Honour the Chief Justice's judgment in *Chisnall* at paragraph 251, don't legislative decisions on climate change responses fall squarely in the category of major political, social or economic decisions?

25

So I took those questions on the basis that they are at the heart of our submissions and it seems to us that the Court may not be able to avoid having to address them, as you proceed through your deliberations in this case.

30

Now, what I indicated yesterday was that I wanted to go through three documents drawn from each of the branches of government to illustrate in broad

terms how the system works. The first of those is the Cabinet Manual which I think can be brought up, I can't recall the reference at the moment. It's on the screen. But the Cabinet Manual is, of course, well-known in public law jurisprudence, even though it doesn't have a statutory force, and in particularly

5 well-known is the introduction on page 1.

WILLIAMS J:

Is this in the respondent's bundle or in the appellant's?

MR HODDER KC:

Gaskell, which will confirm that for me?

10 **COOKE J:**

And certainly from my perspective, I'd like to know where things are.

MR HODDER KC:

Appellant's bundle at tab 86, I believe.

WILLIAMS J:

15 Of?

MR HODDER KC:

The appellant's bundles.

WILLIAMS J:

Appellants, thank you.

20 **MR HODDER KC:**

I take that back, that's the Circular.

KÓS J:

Tab 89, I think.

COOKE J:

25 Tab 89.

MR HODDER KC:

Okay, thank you. So what I was looking for was Sir Kenneth's: "Introduction to the Foundations of the Current Form of Government," very typically cautious language from the author, "current form of government".

5

But he starts off by addressing: "A constitution: What is it?" in broad terms. The only comment I would make about that is that if we compare it to the judgment in the British case of *Miller*, the Brexit case, the lead speaks there, refers to "events" which brings it's own echoes of Harold McMillan about events, dear boy, events and what makes one, what happens in politics.

10

But I think it goes also to a point made by Justice Williams, at least and extra judicially I have heard him say this, about constitutional moments and although Justice – sorry, Sir Kenneth's introduction doesn't refer to constitutional moments as forming part of the constitution, my suggestion to you is it probably does and it may be implicit in what he has written in that first paragraph, that constitutional moments go towards that broad sense of a constitution, even though there is no formal written constitution.

15

1015

20

I should also acknowledge what my learned friend Ms Coates said yesterday that the Treaty is referred to three times in this document. The first is on page 1 in the second paragraph, referring to the practice or: "... the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand." It's also on page 2 as one of the major sources of the constitution and it's on page 5 which talks about the balance between individuals, autonomy and majority rule. But what I was seeking to draw attention to is the more broad structure in which references to the Treaty and other matters are dealt with, and at the bottom of, going back to page 1 under "The Constitution Act 1986" is where the introduction starts, and properly so we say.

25

30

It points out that the executive, this is about four paragraphs up from the bottom: "The provisions about the executive emphasise its parliamentary character."

I'm sorry, so the Court knows this, but: "Only members of Parliament may be Ministers ... Parliament – the legislature – consists of the Sovereign and the House of Representatives. The members of the House are elected ... The Constitution Act recognises that Parliament continues to have full power to make laws ..." and at the last paragraph it confirms, or "... reaffirms the constitutional principles about parliamentary control of public finance".

Now, there was some discussion about that yesterday but it is sometimes overlooked in public law discourse, if I can use that phrase, that Parliament has two major functions, although they're related, they both stem from the law-making power. One is to make general laws, the other is to, and as I'll come to, is to fund the government. Those are parliamentary decisions. In the indirect sense they're Parliament, they're democratically accountable.

Coming to page 3 and the underlying principle is democracy, going back to my introductory concern yesterday, pointing out the that "The King reigns ... but the government rules," provided as it says the Ministers "have the support of the House of Representatives". And then as long as it has the support of the House of Representatives, it's followed by Sir Kenneth's phrase: "This convention of course incorporates its own limit – one that conforms with democratic principle. If the government loses the support of the House ..." they cease to be the executive, and that covers confidence and supply as discussed in the next paragraph.

And so as you see in the last paragraph: "In a broad sense, it is the ministry or government of the day that governs" and they have the "responsibility and power" to do that but that "... results from the electoral process and the political contest". If I can add what is in there, there's always some degree of concern and temptation by those who don't like what's going on to say, but an expert says, therefore, that's what should happen. We have a messier system, that's what Sir Kenneth is talking about in his last sentence, the "... power to take decisions results from the electoral process and the political contest." The reason I say that is of course because we perceive this litigation is an attempt to bypass that statement of the obvious and the facts of our constitution.

Sir Kenneth's paper on page 4 goes on to discuss "The role of political parties". For me all these political parties and the whole democratic politically process itself is messy. It's untidy. Not rational. But it's the political process that makes decisions under our system. Whether they're wise or not, as courts have

5 commented, is something which the electorate has to judge in the end.

Also underlooked in some of our public law discourse is the role of the public service, which Sir Kenneth addresses at the bottom of page 4, and those constitutional principles and legislation which identifies in the five bullet point

10 principles are significant and what we are talking about in this case are processes I'll come to in more detail that involve conscientious intelligent expert work undertaken by, among others, the public service, who provide that input to their ministers who make the decisions, in addition in our CCRA context with the expert outside help of the Climate Change Commission.

15 1020

And then at the bottom of page 5, there is a question of: "Individuals, autonomy and majority rule," and as Sir Kenneth says: "A balance has to be struck between majority power and minority right ..." and so, of course, the courts are

20 concerned to make sure that minorities are not being oppressed, discriminated against or deprived of benefits available to others. That's the nature of clear understandings and principles which guide the courts in a range of decisions that they make.

25 And then goes on to say that there is the: "... right of elected governments to have their policies enacted into law [but also] the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision-making." And as is well understood, that's where the Bill of Rights Act has a role. It has been designed and we will come to say in a bit

30 more detail a carefully calibrated role different to other jurisdictions in ensuring that there is no overlooking, through the majority decision-making process, of the relevant rights of individuals and minorities.

And finally, another Keithian proposition at the very last sentence or paragraph on page 6, talking about Constitutional change: “Some matters are best left to evolving practice rather than being made the subject of formal statement.” Now that, we will say, has something to be said for and the Court has already been

5 implicitly discussed about information of a third cause of action at least. But there are two propositions that are being made in this part of the Cabinet Manual and elsewhere in other writings notably by Sir Kenneth, is that changing the constitution should be a slow, deliberative process, the litigation forum has some limitations in terms of assisting that process or in terms of creating and

10 finishing that process, and the second is the point he makes about some matters are best left unsaid for the time being and that is, in part, probably the way in which although *Taylor v Poultry Board* has survived in debate and no doubt in law schools for whatever number of years it is now, 30-odd years, maybe a bit more, it has had to be resolved and those of us who are optimists

15 are optimistic it won’t have to be resolved and certainly not for the purposes of litigation like this.

KÓS J:

It is perhaps a shame that this introduction wasn’t updated by Sir Kenneth to discuss the development of the declaration of inconsistency.

20 **MR HODDER KC:**

Yes.

KÓS J:

So we have to rather guess there as to what he might have said.

MR HODDER KC:

25 Yes.

KÓS J:

What do you think he would have said?

MR HODDER KC:

I will give you more than that. I think in his memoir he is supportive of it, although at the time that he was writing it, I am not sure how far it had got. But I would be surprised if he didn't think there were limits to it and so the question is and indeed the question generally for the Court, but particularly about declarations of inconsistency or incompatibility, is at what point do you stop? Do you make a declaration about anything that you could make a declaration about?

10 Whereas the submission I will be making in a bit more detail about the Bill of Rights Act is that the courts here and particularly – not particularly – but here and in the United Kingdom on a basically similar constitutional setting had been looking for and developing, not in great formality, constraints on the potential explosion of the Bill of Rights scope.

15

And so there are a number of ways you can do it, by way of proportionality and so on and so forth, but in the end the courts are clear and perhaps the UK it has been becoming clearer in the last few years, that there are limits to what can be treated as a justiciable right, because criminal lawyers can make a justiciable right about almost anything and do and that is the process that we go on.

20

So, there is a balance to be taken between those genuine minority and individual concerns and matters which then veer into the area of politics. But to come back to Justice Kós' question, I wouldn't dare to speak for Sir Kenneth, but I think that given his experience it would be surprising if he didn't think that there were those sorts of limits that were relevant to the judicial function there.

25

COOKE J:

The justiciable rights are those in the Bill of Rights, though, aren't they? Subject to section 5 of the Bill of Rights?

30

MR HODDER KC:

Yes but the issue is how you define them and interpret them.

COOKE J:

And that's a judicial function, defining them?

MR HODDER KC:

Well, yes, it is, I agree. That that itself doesn't happen in a vacuum.

5 **WINKELMANN CJ:**

And but that's the essence of what you need to address under the second cause of action, the Bill of Rights cause of action.

1025

MR HODDER KC:

10 I'll come back to that, but yes. But this Court as well as the UK Supreme Court in recent cases has been wrestling with those issues. That's really what Justice Tipping's spectrum is addressing in part as well, that question of interpretation or proportionality or whatever it may be.

15 The second document that I wanted to take the Court to, because these sorts of documents probably deserve more court time than they get, but it goes to my point about the funding function of Parliament, is the Appropriation (2025/26 Estimates) Act 2025. I'll come back with a reference for the Court.

COOKE J:

20 Yes, because I'm working on my own version.

MR HODDER KC:

25 So that's our supplementary bundle at tab 59, as I understand it. Now in an abstract way we all know that services have to be paid for, and in public services they're paid for by public funds, most of those from taxation. So this is the part-funding for 2025 and drawing attention to Schedule 1 that starts on page 5 of the document, you have the whole set of appropriations for the entire Government. Less helpfully than like they used to, they don't have complete totals that tell you how much money is being spent by each vote, but the votes

that I am relevantly concerned with was the vote: “Environment” which we find on page 15.

Again the Court will know this, but this document is based on the estimates, published estimates in detail which is sort of probably getting up to encyclopaedic size, but each vote – so for example, vote of environment, we have here in a bit over a page the relevant vote of environment document behind it runs to close to 50 pages, the detail about what this is about. So Parliament is being told before it votes the money what the money is going to be spent to in broad terms, and what we see on page 15 is that among the departmental output expenses are improving New Zealand’s environment 128.4 million, managing climate change in New Zealand 46.4 million, and then some – you’ll see at the bottom of the page non-departmental other expenses, allocation of New Zealand units, and over the page some large numbers about debt and other aspects of NZ units. But in terms of business as usual, my very crude arithmetic suggests there’s somewhere north of \$50 million being spent out of this vote on climate change. So one of the questions is, is that enough? Should it be 75 million? We don’t know. There’s a whole process that works that out, but it can’t be done through litigation.

20

I may finish up overusing this word, but in terms of calibration of how you deal with these issues, how you fund it is an important part of the calibration. That calibration involves a Parliamentary process. Now I accept the proposition that was made yesterday that if the Court comes down and makes a finding in favour of care workers and it costs money then the Government has to respond somehow, but this is the, as it were, the proactive way in which the calibration is done. It doesn’t happen at random, it isn’t arbitrary, it goes through the Parliamentary processes.

25

KÓS J:

Well that depends a bit on the scale of the issue, doesn’t it? I mean the care worker example is closer to what you were calling a JR before.

30

MR HODDER KC:

Yes.

KÓS J:

This is a much bigger topic.

5 1030

MR HODDER KC:

It is, it is. Lastly, from the third branch of Government, the Court's branch of Government, if I can bring up – and it's in the respondent's bundle at tab 86, *Te Runanga o Wharekauri Rekohu* or *Sealords*, it might be *Sealords 2*, but it's
10 the decision of the Court of Appeal comprising the President Sir Robin Cooke, Justice Richardson and Gault from November 1992, and a challenge to a Sealords deed and which addresses in particular the principle of non-interference.

15 And so picking it up on page 307 – and I should say I'm going to this case because there is a question about whether there remains a division between political questions and legal questions, and I start here as a judgment that we say still has entire relevance. The main part of the judgment of course was endorsed by the Court in the *Ngāti Whātua Ōrākei* decision of the Court given
20 I think 2018, if I remember rightly. Justice France wrote the judgment, as I recall it.

Anyway, on page 307 of what I call the *Sealords* judgment, the first proposition that we find in the present of the judgment for the Court which was unanimous,
25 but a bit after line 30 there's a sentence that says the Solicitor-General was concerned: "... that the declaration was being sought for political purposes." And the response from the Court: "It would certainly be wrong for the Court to grant a declaration for political purposes ..." Then there's an expansion of that by reference at the bottom of the page to "an established principle of
30 non-interference ... parliamentary proceedings", and that is of course the context of this case. It goes on and elaborates that and says firstly: "... it applies so as to require the Courts to refrain from prohibiting a Minister from introducing

a Bill into Parliament.” That’s at line 13 and 14 on page 308, and on the same page from line 26: “Closely allied is the conclusion that the Courts would not compel a Minister to present a measure to a representative assembly for consideration.” And then the next sentence: “Surely in a democracy it would
 5 be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament.”

Now the appellant here says we are not telling Parliament what to do, but if you
 10 effectively say that the existing system of statutory regime is unlawful you are compelling something to be put before Parliament, which isn’t the CCRA.

COOKE J:

But this must be subject to the declarations of inconsistency, so the Court makes one of those, it’s for Parliament to decide what to do about it, and that
 15 doesn’t interfere with Parliamentary supremacy, does it?

MR HODDER KC:

It doesn’t interfere with Parliamentary supremacy but it still – the reason in our submission that we’re here is that the declaration still has the force of the Court’s mana behind it, and the declaration is meant to be implemented.
 20 That’s the moral. The normative expectation is that a declaration will be complied with.

WINKELMANN CJ:

Are you taking us –

MR HODDER KC:

25 Now one of the questions is if you say the CCRA is incompatible with the Bill of Rights Act, what do you do in response? But something has to be done in response. It can’t be left undone and something has to be put before Parliament.

WINKELMANN CJ:

Is your – because you're describing, you're giving this a very broad ambit but I think there's more discussion about the *Ngāti Whātua* later case, isn't there? It adds considerable nuance to it.

5 **MR HODDER KC:**

I don't perceive *Ngāti Whātua* as narrowing any of these propositions down.

WINKELMANN CJ:

Can you take us to its discussion of this?

MR HODDER KC:

10 I'll revisit that and attempt to confirm my understanding before we finish our submissions.

COOKE J:

Just following on my question, the Privileges Committee reviewed what its response would be to the *Taylor* decision about declarations of inconsistency and then agreed that it was an example of an improvement of a constitutional dialogue between the legislature and the judiciary, and that that wasn't inconsistent with Parliamentary supremacy but actually quite helpful to support Parliamentary supremacy, because ultimately Parliament would then decide what to do about the inconsistency.

20 1035

MR HODDER KC:

And I don't think I need to challenge any of that except to qualify it by saying that arose in a Bill of Rights Act context and the way in which *Taylor* is decided is from the Bill of Rights Act context, there needed to be a remedy of that kind.

25 That doesn't necessarily apply to the first and third causes of action here. They don't have the same statutory context. There was a question mark about what's sought here. So if we talk about the Declaratory Judgments Act 1908, if we talk about the common law of declaratory jurisdiction, you don't have those constraints. There is an expectation that something be done but, with respect,

when we – accepting what your Honour has said about that, but that reference to dictate has sort of – it's ambiguous in the sense that it could mean there is a formal requirement to do something or as, in my submission it extends to, is the idea that it is an indication from the Court. Now, I accept that in the Bill of Rights

5 Act there has been an acceptance by Parliament an enactment of provisions, I'd accept that and formalise that. What I don't accept is that necessarily applies more widely in the Bill of Rights Act context.

COOKE J:

Well, you're right to draw a distinction between the second cause of action on

10 the first and third, we can all see that, but in the Bill of Rights context on a declaration of inconsistency there is not necessarily an expectation by the courts that Parliament will do anything except go through the process now provided for in standing orders and in the Bill of Rights Act itself which is to consider the Court's opinion. That's why I suggested in *Make It 16 Inc v*

15 *Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 68342 that the function of a declaration of inconsistency in this context is more advisory, in other words, there is no expectation, no statement by the Court that Parliament must change the law. It is simply an advice by the Court, which Parliament must consider, to say that there is a mismatch between two pieces of legislation. That is the

20 inconsistency.

MR HODDER KC:

I agree. That's –

COOKE J:

Well, that's a relatively innocuous state of affairs.

25 **MR HODDER KC:**

Well, it's at one level. If I can go back to my commentary about, or partly my question about processes and resources and the commentary and the discussion that the Court had yesterday about what a trial here would look like to finish up with an advisory opinion which might or might not be taken into

account and might or might not assist Parliament. That's an extraordinary use of resources to achieve no more than that, unless there's something more.

Now, in some cases there'll be a question mark about the vindication and there's a question mark about what's been vindicated. Is the individual being vindicated or is a right being vindicated? But in a situation that we're talking about, with a proposition that says for 30-odd years, the Crown and Parliament have got it wrong on how to respond to climate change, that's not a vindication, that's simply a critique. It is a profound critique. It says it has been incompetence on a massive scale, like other due branches of government. We have a major trial, major discovery, cross-examination, possibly three levels of appeal, and we finish up with an advisory that says you might or might not have to take this into account in five years' time. That's the fact, that's the reality of what we have here in our submission.

WINKELMANN CJ:

So Mr Hodder, you were taking us to what the Court has said in relation to comity and I referred you to *Ngāti Whātua*. Perhaps, to complete the picture of what the Court said we could go to paragraph 46 of *Ngāti Whātua* which discusses the point I was making.

COOKE J:

Which tab is that?

WINKELMANN CJ:

I think it's tab 53.

MR HODDER KC:

So is that 49, Ma'am?

WINKELMANN CJ:

Paragraph 46, it's tab 53 of –

COOKE J:

Yes, same bundle.

WINKELMANN CJ:

5 Yes. It says that it's important not to draw the principle of non-interference in parliamentary proceedings too broadly: "It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights."

10 **MR HODDER KC:**

I don't – well I accept that –

WINKELMANN CJ:

15 I'm not saying it's inconsistent with the earlier one, I'm saying that there's more nuance to the picture than – it adds more nuance to the picture that is apparent in the *Sealords* decision.
1040

MR HODDER KC:

20 And I accept that, your Honour. I accept that, although not expressly stated so in the *Sealords* judgment, that the function of the Court to deal with rights is important, whether or not it was sought in that time that a declaration would be sufficient I'm not sure and I don't know what kind of relief was sought in that case. I assume it was by way of injunction and declaration, the Convention that occurred.

WINKELMANN CJ:

25 Which case, sorry?

MR HODDER KC:

In *Sealords*.

WINKELMANN CJ:

I think – trying to stop the introduction of a piece of legislation.

MR HODDER KC:

Yes, but it doesn't describe whether or not it was a judicial review actually or
 5 something else, it just says it was "seeking interim relief by way of injunction or
 declaration" in the headnote but there's no discussion in the judgment.

WINKELMANN CJ:

Yes, it's very hard to research the history of that piece of litigation.

MR HODDER KC:

10 Correct. I don't know if it matters for our purposes. I mean I accept
 your Honour's proposition that you read the *Ngāti Whātua* paragraph together
 with the *Sealords* material about this, but the point is that there is a valid
 concern being expressed here about the courts being seen to be involved in
 what Parliament must do. Now, that hasn't been followed through in relation to
 15 the particular provisions now found in the Bill of Rights Act about declarations
 of inconsistency, but if we go over then to page 309 of *Sealords*, at line 11:
 "Parliament is free to enact legislation on the lines envisaged in the deed or
 otherwise. Whether or not it would be wise to do so and whether there is a
 sufficient 'mandate' ... are political questions for political judgment."

20

That question there, political questions for political judgment, raises the
 question I raised earlier. Is there still a situation where there are political
 questions? Even if they are wrapped up in the language of rights. In some
 cases the answer will be the language of rights is important because it serves
 25 the purposes of protection of minorities and important individual rights. In
 others, it will be being used to achieve a particular policy objective, and in those
 cases the question of political question for political judgement will arise.

So we say that that concern remains and notwithstanding the changes to the
 30 Bill of Rights Act scenario – is that right – standing back from that. While I have
 been thinking about this case it seems to be that the most plausible part of it is

the part that says we want a declaration of inconsistency under the Bill of Rights Act with a particular provision of the statute, but we don't have that case. We have a proposition that says the whole statute is incompatible and then we have claims against the executive, not against any particular statutory provisions. So

5 it looks like, if you carve off the bits that shouldn't be there you might finish up the judicial review application, but we haven't got it, deliberately. That's one of the concerns.

COOKE J:

So, in other words, what you're saying is the second cause of action jumbles

10 together executive and legislative action?

MR HODDER KC:

It does.

COOKE J:

And under the New Zealand legal landscape there is a mechanism to have

15 declarations on inconsistency in relation to legislation?

MR HODDER KC:

Yes.

COOKE J:

And then if you're challenging executive decision-making it's done by way of

20 judicial review?

MR HODDER KC:

Yes, but that's reasonably fundamental –

WINKELMANN CJ:

And the proposition you have to answer though is that the Bill of Rights Act

25 applies to the legislature and the declaration – why, if the declaration of inconsistency jurisdiction is built on the Court's constitutional role of declaring the law and declaring the law as to rights in part, that declaration of

inconsistency jurisdiction should be limited to declaring acts of Parliament which seems a more acute comity issue. Why should we limit it to that and not extend to the framework approach which it has, on Mr Butler's submission, been extended to in a slightly different constitution context and other jurisdictions at the supranational level.

MR HODDER KC:

Yes, yes, I understand that and I'm coming back. This is still my –

WINKELMANN CJ:

That's the nub of the issue.

10 **MR HODDER KC:**

– my preliminary part of the process but, yes, implicit in that question from your Honour was how much time I need to spend on the first and third causes of action but so I'm, but we'll come back to that. We will address all of them but what we'll be discussing will be fundamental criticisms of the first and the third.

15 **WINKELMANN CJ:**

Yes.

1045

WILLIAMS J:

If in a declaration of inconsistency, insofar as the CCRA is concerned, the declaration sought is to advise Parliament that in exercise of its law-making power the right to life is at stake and that it should, when making laws going forward, take proper account of that given that it guaranteed that right in 1990, why is that merely innocuous and a waste of State funds?

MR HODDER KC:

25 Well, it assumes that Parliament doesn't really do that or know that.

WILLIAMS J:

I think the advice, I haven't checked the Attorney-General's advice to the House, but I got the impression from submissions made by –

WINKELMANN CJ:

5 Mr Butler.

WILLIAMS J:

– perhaps of Mr Butler, was that advice was not given when the CCRA was enacted.

MR HODDER KC:

10 Yes, well, I haven't gone back to check that myself and I accept that if it's the case, that is the case. But the general proposition would ordinarily be that Parliament does know the context in which it is legislating and in the 21st Century after over a decade of the Bill of Rights Act it would be surprising if it didn't.

15 **WILLIAMS J:**

But declarations of inconsistency are essentially saying to Parliament, you may not have understood that this legislation engages right A, B or C, and that the way you enacted it breaches that right.

MR HODDER KC:

20 We'd have to have the specifics about what breaches them.

WILLIAMS J:

Well, there are lots of cases that do it, so –

MR HODDER KC:

But they would have –

25 **WILLIAMS J:**

– my point is that declaring to Parliament that a right, particularly one as important as the right to life, is at stake and as currently constituted is likely to

be breached is quite an important statement to make to the Parliament. Not merely performative and not merely turning the Court into part of the commentariat?

MR HODDER KC:

- 5 That would, well, let me – I'll come back to that, because I think it does raise a question I haven't focused on in my submissions to date. I have focused on the fact that Parliament would need to have advice about what particular provision is in breach. If it's the proposition is that it's the target in the Bill that – in the, sorry, in the Act that is somehow wrong –

10 **WILLIAMS J:**

Well, your point was you're going to spend lots and lots of money, and lots of lots of time, getting to this merely performative statement in which the Court is basically joining the commentariat over the great issue of our time, the threat –

MR HODDER KC:

- 15 Well, the commentariat is probably –

WILLIAMS J:

– the threat of climate change, so the reason I put the nature of this sort of declaration to you is to say, is that really correct? On a declaration like this, if it were granted, of course.

20 **MR HODDER KC:**

Yes, yes. Well, I think – I do want to come back and give you a more considered response to that before I finish, but the commentariat, because the question will be, what does it add to what the legislature and the executive are likely to know today, given the International Commission of Juris – sorry, try again – the
 25 International Court of Justice advisory opinion and other material that it is undoubtedly aware of from its various advisors and departments? If the proposition is that Parliament must do something different, then is the Court going to spell that out or is the Court just going to be saying, you have to take it into account?

KÓS J:

Well, I'll give you one simple, I think, example that's complex-simple, it's this: if this Court were to take the view that the section 8 right is engaged now, on the basis of the imminence rule or the imminence principle is non-applicable in this

5 country's jurisprudence on section 8, that is something Parliament should know, shouldn't it?

I mean, the view that you express in your submissions is that section 8 is not yet engaged because the threat is not one of imminent loss of life. This Court

10 took a different view of the extent of section 8, that's an important matter Parliament should know and fundamentally what we're doing in a declaration (re: consistency) is, first, testing the right that is asserted which is section 8 and then section 20, and then then the second thing we do is measure up another piece of legislation against that.

15

Now, certainly in relation to the first exercise there is much for us to say. There may be relatively less to say in relation to the second but at least the first is important.

MR HODDER KC:

20 Maybe so. I am going to say, I am going to come back the second cause of action much later in my submissions.

1050

WINKELMANN CJ:

But before you do, I suggest you do read *Ngāti Whātua Ōrākei* because that's

25 basically what the Court says there, that Parliament is entitled to know what the Courts say about the law, the legal rights concerned, before they proceed to legislation, it's useful for the Courts to fulfil their constitutional function of clarifying the law.

MR HODDER KC:

30 I will reread *Ngāti Whātua* before we resume this part of the dialogue.

So, going back to where I was – but that's been helpful, thank you – what I am seeking to show is that all three branches of government have roles which they perform conscientiously and consistent with their respective views of the public interest and they are separate roles, going back to the core proposition about the separation of powers.

So, my next tranche of submissions are directed to the question of scope of judicial review outside – the scope of the judicial function outside the rights area and I may not need to spend too much time on this, but what I wanted to do was to draw attention to the Court's own decisions, the two recent decisions, which show the system works perfectly well with judicial review. It doesn't – there's no crying need for more in this area.

And so I start with – I think I might start one step further back, because I did want to emphasise the point about the nature of this jurisdiction and why it is different to other jurisdictions where Parliamentary sovereignty is not taken so seriously.

Accepting the points that have been made and including by Justice Cooke about whether or not declarations of inconsistency cause difficulties, I just want to start on the basic proposition that's a fundamental and the most recent explanation of it that I have come across and the most forceful, if you like, is from *Miller* which is the 2017 case, Supreme Court, at our bundle authorities I think it's tab 119.

WILLIAMS J:
Number 9?

MR HODDER KC:

Tab 119. So this is the combined judgment of eight of the *Miller* Judges and was the majority and the constitutional background description starts at paragraph 40 and no single author is identified.

Paragraph 40 includes the reference to events that I made to the Court before: “Our constitutional arrangements ... [are] a combination of statutes, events, conventions, academic writings and judicial decisions.”

- 5 And then it goes on to explain which of the period from: “... 1688 to 1707 were [the statutes] of particular legal importance,” in paragraph 41 at the bottom of page 137, going on to page 138, and that is an era which I think it was Professor – no? What’s wrong?

WINKELMANN CJ:

- 10 It's at a different page.

WILLIAMS J:

Yes, it's a different *Miller*.

COOKE J:

Yes, they’ve got different numbers.

- 15 **MR HODDER KC:**

Got the right Miller? Excuse me. Ah, you probably got tied up in the Court of Appeal judgment. Page 137.

WILLIAMS J:

This is Miller number 1.

- 20 **KÓS J:**

There are two judgments.

WILLIAMS J:

You’re citing Miller number 1, are you?

KÓS J:

- 25 Yes, we are in the Court of Appeal, but we – you're in the Supreme Court.

MR HODDER KC:

I'm in the Supreme Court.

KÓS J:

Yes.

5 1055

MR HODDER KC:

There is a trap I fell into a few days ago where I finished up being enthused by parts of the Court of Appeal judgment but discovered it was the Court of Appeal judgment. But just for other players, the Supreme Court judgment starts at
 10 page 129 and I have been referring to page 137 and I've just been referring to the statutes referred to at the bottom of page 137 onto page 138, starting with the Bill of Rights Act 1689 and observing that in part of the preparation of this case I came across an article by Mark Hickford, formerly professor, Dean of Law School, now in the Law Commission, called "The Historical, Political
 15 Constitution" of the 2013 New Zealand Law Review at 585 and at 598 he referred to these statutes, et cetera, being part of the "whakapapa of British constitutional values" inherited by the citizens of this country. I rather like the phrase that that is part of the inheritance. It explains our system.

20 So, paragraph 42 goes on to talk about the battle of the common law, can't be done "inconsistent with the law as laid down in or under statutes ... because Parliamentary sovereignty is a fundamental principle of the UK constitution" in paragraphs 43, et cetera.

25 It also goes on to make a point that, and this is relevant in part that I'm anticipating the treaty issue, at paragraph 48 "consistently with Parliamentary sovereignty" treaty power may be "curtailed or abrogated by statute ... by express words or ... by ... implication." And then at paragraphs 54 to 55, making a point that although "ministers exercise the Royal Prerogative" in the making
 30 of treaties "without legislative authority ... the exercise of that power is not reviewable by the courts" and that is what gives rise to the "... dualist theory, which is based on the proposition that international law and domestic law

operate in independent spheres.” That dualist theory goes to the question of customary international law, which I’ll come to in due course, and also underpinning *Te Heuheu*, it’s the logic of *Te Heuheu*, which I won’t get into for the time being.

5

So at paragraph 57 the majority says: “It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty ... it exists to protect Parliament not ministers.” And we have, I’ll come to this later on, the dualist theory remains, as far as we apprehend it, part of the law here and the law in the United Kingdom. So that fundamental nature of the system is parliamentary sovereignty.

10

COOKE J:

Does this decision address when customary international law becomes automatically part of common law?

15

MR HODDER KC:

Customary international law?

COOKE J:

Yes.

MR HODDER KC:

Insofar as it doesn’t conflict with constitutional settings and the existing law, yes.

20

COOKE J:

Right.

MR HODDER KC:

Yes.

25

WINKELMANN CJ:

Is that you Mr Hodder or are you saying the case says that?

MR HODDER KC:

The cases say that.

WINKELMANN CJ:

No, this case though.

5 **WILLIAMS J:**

Does it use the phrase “constitutional settings”?

MR HODDER KC:

When I come to *Keyu* I think it says something like that.

WILLIAMS J:

10 Well I’m talking about *Miller*.

WINKELMANN CJ:

Yes, that’s not dealt with in this case though?

MR HODDER KC:

Sorry?

15 **WINKELMANN CJ:**

Is it dealt with – Justice Cooke was asking if it’s dealt with in this case.

MR HODDER KC:

Not in that case.

WINKELMANN CJ:

20 No, I didn’t think so either.

MR HODDER KC:

When I come to that – I’m sorry, I misheard. The case I rely, or cases I rely on are *Keyu* and *Ukraine* which deal with that.

WINKELMANN CJ:

Yes.

1100

MR HODDER KC:

5 So, back to this Court. The first case is the *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2025] NZSC 200, (2025) 27 ELRNZ 445, sometimes acronymised to LCANZI and which this Court's decision is I hope in our bundle at 38. I'll come to the Court of Appeal decision, *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2025] NZCA 80, [2025] 2 NZLR
10 808, which it was upholding in the sense that leave was refused and I see two members of this Court were on the leave-refusing panel. And what, in the risk of stating the obvious, what we find in this case is the Court, considering and respecting the nature of the emissions budget purposes of the CCRA, noting that it was in generalised terms and thus didn't support being interpreted as
15 providing a bottom line mandatory requirement.

So it's a careful analysis of the statute to come to that view, which is the same view as the Court of Appeal, and it gave weight to the appropriate and substantial enquiry and consideration by the statutorily-empowered decision-
20 makers, this is all around paragraphs 18 and 20, and to the extent and note it's useful it's really endorsing what the Court of Appeal had said at paragraphs 105 and 108 and engaged carefully with and was unpersuaded by arguments of major errors by the decision-makers, that we find at paragraph 19 and 20, likewise in the Court of Appeal at paragraphs 89 and 171.

25

So it upholds the Court of Appeal's judgment which is notable for a rather longer description of the CCRA and the climate change regime, including the proposition that "there is no single right answer" in relation to many of these matters, and that comes from paragraphs 105 and 106 of the Court of Appeal
30 decision which is in our bundle at 37. I wasn't proposing to take the Court to it.

WINKELMANN CJ:

What's the point you're making?

MR HODDER KC:

The point that I'm seeking to make is that in this way the Court of Appeal and then this Court take seriously issues around climate change. They look carefully at the legislative regime. They look carefully at particular decisions
 5 made to identify whether there is some basis known to law to challenge those decisions. In this case the answer was no. It comes up in the context of interpretation. And we say that's precisely what a litigant can expect.

Indeed it goes further than that because the Court of Appeal found, and that
 10 stands in the light of the refusal of leave, that the Climate Change Commission is itself subject to judicial review. That matter was argued up to the Court of Appeal but the Court of Appeal said given its critical role within the CCRA, it too should be subject to review because it, like the Minister, had a fundamental role to play. So, in terms of deciding questions of reviewability, in
 15 terms of deciding questions of interpretation, the Court is playing an important role in the area of climate change.

The second case is the *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] 1 NZLR 1021 (SC) case, which is at our bundle at 23, both
 20 of these decisions given by this Court in December of last year, and as all except Justice Cooke were on that Court it probably doesn't take very much explanation for me to say this was about whether the Crown Minerals Act 1991 should be regarded as including a mandatory relevant consideration of climate change in the decision to issue permits, petroleum mining permits –

25 **COOKE J:**

Yes, I was the High Court Judge. I was the High Court Judge on this.

MR HODDER KC:

In that case I overlooked that and I apologise.

KÓS J:

30 Where is this case please?

MR HODDER KC:

It's at our bundle 23, tab 23 I hope.

KÓS J:

Oh, yes.

5 **ELLEN FRANCE J:**

So, Mr Hodder, can I just check what the purpose, what your proposition is in terms of taking us to these cases?

MR HODDER KC:

My proposition is that there is no reason why the appellant should have any
 10 expectations of more than judicial review because judicial review provides a very careful and thorough scrutiny of the Act and decisions, and that's illustrated by these two very recent decisions of this Court. It's not, it shouldn't be a difficult proposition but the fact that judicial review is being avoided here seemed to be worthwhile to make the point by reference to these cases.

15 1105

WINKELMANN CJ:

Yes, but the point that's made against you on that is something you do have to answer which is that it's playing, that the rules are too narrow, effectively that the Act and overall scheme is inadequate, and so you can judicially review it all
 20 you like but the rules, fundamental rules, are already set against achieving the necessary target. So the CCRA will not take New Zealand to the point it needs to be because it's got, it is in itself, doesn't cover the field adequately.

MR HODDER KC:

Well, that's, well, there's two points relating to that. In terms of covering the
 25 field and I come to that in due course, I get to the CCRA, but in terms of whether or not these cases are – well, of course, they don't cover what the statute says, that's the nature of judicial review.

And so that we come back to the point which underpins this, that in terms of the first and third causes of action, which are outside the Bill of Rights Act, you don't get there unless you start inventing a jurisdiction, just the plaintiffs and the appellant seek to encourage a jurisdiction, whereby the Court can assess the
5 legislation.

And at this stage, there is no such jurisdiction and so why should there be a jurisdiction? It becomes an issue. Part of the answer that we say why there shouldn't be a jurisdiction is because the scope of judicial review is intense and
10 on all our basic settings, leaving aside the BORA DOI, then there should no basis for interrogation of the efficacy of the CCRA.

Now, this, these are judicial review cases and the point is that judicial review is a very appropriate and important remedy in this context. They don't deal with
15 rights and so I'll come back to rights cases when I come back to the scope of the judicial function part 2, if I can put it that way, but I wanted then to address the CCRA itself at this point, on the grounds that it is significant and it hasn't had much airtime to date.

20 I'm working off a hard copy of the Climate Change...

KÓS J:

You made your point.

MR HODDER KC:

Yes, so I drop it a couple of times. The point I was about to make is I'm not
25 sure the whole thing is in our bundle, or anybody's bundle. There are extracts –

WINKELMANN CJ:

No, it's not.

MR HODDER KC:

– in there but I'm not sure the whole thing is there. In any event.

And I suspect that the Court, members of the Court, not least from involvement in various other things, knows how this works but it is perhaps worthwhile recording that among other things the bulk of the Act is contributed to by, although not very much, by the Schedules which, in turn, contain the
 5 international instruments and so at page 520 of the Schedule 1 of the Act, we find the “Framework Convention on Climate Change” from 1992.

We don’t have Schedule 2?

1110

10

My apologies for that delay, but you now have it on your screens. If I could just mention a couple of things. In terms of the preamble, the recitals, going back to the fifth or sixth recital: “Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their
 15 participation in an effective and appropriate international response ...” What I want to say about these schedules is that they contemplate a collaborative, cooperative, and voluntary response. That’s inevitable, and in the way that they work they don’t make major prescriptions. They indicate the issue, they indicate some of the objectives, but they are not as prescriptive as is suggested we say
 20 in the appellant’s pleading. So: “Acknowledging that the global nature ... calls for the widest possible cooperation ...” is one illustration of that. Two from the bottom: “Recognizing that States should enact effective environmental legislation ...” well that’s what Parliament believes it has done.

25 And then coming to the Objective on page 524, Article 2, we say this indicates a range of factors that have to be considered: “The ultimate objective of this Convention and any related legal instruments ... [is] stabilization of greenhouse gas concentrations ... at a level that would prevent dangerous anthropogenic interference with the climate system ... [to] be achieved within a time-frame
 30 sufficient to allow ecosystems to adapt naturally ... to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.” And so with a range of factors in there, including economic factors, it’s inevitably so nobody, no country is going to sign up to an

international convention that says you must destroy your economy now or next year.

And so when we go down to the Principles, Article 3, at the bottom of page 524 is Article 3(4): “The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system ... [and measures] should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.” So you have to balance economic development with the need to reduce emissions. Likewise on the next page, Article 3(5): “The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties ...”

WINKELMANN CJ:

Well I don’t want to rush you, Mr Hodder, but we’re quite familiar with these documents and that things move on a long way from this because this is a non – it didn’t have binding targets, et cetera, and there are far more – it is a context, but how much time are we going to spend on it? I’m a bit worried about the timing, given the later agreements where nations entered into binding commitments.

MR HODDER KC:

Thank you, your Honour. So let me go then to Schedule 2A which is at page 573, and just confirming your Honour’s point at Article 4(3), all of Article 4(1), (2), and (3) deal with the parties’ nationally-determined contributions –

WINKELMANN CJ:

This is the Paris Agreement, is it?

1115

MR HODDER KC:

This is Paris, yes. It starts at page 573 of the printed statute and Article 4 is on page 575, but Article 4(3): “Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current
 5 nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

And I am mentioning this to the Court and I don’t think I need much more detail
 10 on it from here or from Kyoto or otherwise, because these are the background to the legislation, but they’re also the background to the propositions that underpin the statement of claim that the government must be guided by what I call minimum global reductions and by framework principles. Those minimum global reductions are not part of – are not prescribed by these instruments, nor
 15 are they prescribed, as I will come to, by the IPCC.

So, let me move to the Act itself as opposed to the Schedules. Taking the point that the Court is relatively familiar with the Act and can find its way around perfectly comfortably, but let me then come to our hand up.

20

So, originally it was an attempt to do a map of the CCRA. That was given up on the basis that a map wasn’t going to work and so this, I think in the order you’ve got are not quite the order I want to address it. So the first page is “Climate Change Response Act 2002: Roles of actors ...”, the second in the
 25 stapled set is: “Climate Change Response Act 2002,” in the top box is about: “Purpose,” and the third one is headed: “Setting an Emissions Budget.” And the logical order is pages 1, 3, 2, so I don’t think I need to spend much time on page 1.

30 We’ve attempted to capture in some sort of logical order the purpose, noting the Treaty of Waitangi clause section 3A, the role of the Climate Change Commission including out on the right: “The ability of the Minister to seek advice ... at any time,” all this is referenced back to the sections of the Act. And then the fundamental values of the: “2050 Target (section 5ZQ),” which is set itself,

and then the: “Emissions Budgets,” which I will come back to, “Duty of the Minister to ensure the Emissions budget are met,” and then the: “Emissions Reduction Plans,” in which –

KÓS J:

- 5 This doesn’t seem to refer to section 5Q(1)(b) which is the methane targets that are set in the statute?

MR HODDER KC:

I don’t think we identify those out separately.

KÓS J:

- 10 Right and those are not the subject of Commission determination, they’re Parliamentary-set.

MR HODDER KC:

- Yes. That’s a fair observation, thank you. And then just noting that there is a: “Declaration available for failure to meet the 2050 target or emissions budget,”
- 15 that role is specifically given to the Court, so that is already provided for. And the rest of it, the Court likely knows, although we did perhaps work, I’ll make the point, at the bottom that: “The NDC is an exercise of the Crown’s external affairs prerogative [as a] contribution ...”, it isn’t laid down by the instruments that we have been looking at, voluntarily.
- 20 1120

- Turning to the front page, which is the role of actors, it seemed worthwhile to provide to the Court to indicate that there are roles allocated through the three different branches of Government, although we’ve included the Tribunal
- 25 which is a separate category in the judiciary circle on the left-hand part of the page. I don’t propose to go through them. And then on the right-hand side of the page, international law, Climate Change Commission, and the public role there.

And emphasising the public role, one of the features of the Act in our submission is that it has a quite remarkable level of consultation required and information required. It's a very open process which is appropriate we suggest given its importance, but also in terms of it's one of those matters where to

5 undertake the reconciliations that are required the public has to be brought along, but I should've said with reference to the international instruments there's a strong focus on public education and public support. That is reflected in the role that the public has under the Act. It is entirely appropriate and it helps to come up with calibrations which are tolerable in terms of the electorate,

10 because if they're not then you finish up with difficulties of the obvious kind.

The last page in the three is the process for setting an emissions budget, which is a reasonably important part of the process and we've set that out in a way which I hope can be readily followed, but again noting in that top set of boxes

15 the third one, the role of the public, and going back to the first box, section 5W, the purpose and the reference to: "... greater predictability for all those affected, including households, businesses, and investors, by giving advance information on the emissions reductions and removals ... required."

20 And then section 5ZC is in our submission quite significant. Section 5ZC has two levels of mandatory requirements and these apply as – section 5ZC(1) says to "the Commission" and to "the Minister". Section 5ZC(2), the Commission and Minister must have particular regard to how targets, et cetera, can realistically be met, including consideration of key opportunities for reductions

25 and removals and principal risks and uncertainties, all of which is inconsistent with the idea of something entirely specific and prescribed. But then section 5ZC(2)(b) sets out 12 different considerations. Those are the 12 different considerations in blue in the middle of our page, our third – our second page – in our emissions budget page. My numbering may not be yours.

30 But you've got those 12 boxes that are set out there in considerable detail. Reading through either (b) on the page or following through the boxes on the hand-up, there are a wide range of factors in there which are prescribed by the statute to be taken into account. I have come to dislike the word "polycentric" as I suspect the Court has because it doesn't tell us very much, but if there was

a single word to describe what these 12 boxes add up to it's something like that. There are a wide range of factors to be taken into account. A number of them may be incommensurable, but they are to be taken into account and the overall exercise becomes a balancing exercise.

5 1125

So I am partly saying this because when I come to the statement of claim, but as the Court probably apprehends, fundamental features of the statement of claim are that what has been the failure that is described, is the failure to meet
10 the minimum global reductions identified by the appellant and have regard to the framework principles.

The point that I'm making is that those minimum global reductions aren't prescribed by anybody and that the factors that go into the decision-making
15 under this Act are factors which are appropriate laid down by Parliament and which don't – which require a balancing exercise which ultimately has to be something for which the decision-makers are accountable.

WINKELMANN CJ:

What of our international commitments in that picture, though?

20 **MR HODDER KC:**

Well, the question is what the commitment is. The commitments are to have –

WINKELMANN CJ:

Yes, well, I'm asking you, what, in your submission, are the commitments?

MR HODDER KC:

25 The commitments are to work towards achieving the reductions that are sought and identified, in a very broad way, in the international instruments. Those are the commitments.

But the whole regime is –

ELLEN FRANCE J:

Sorry, Mr Hodder, so do you take Article 4.1, for example, all just to be, of the Paris Agreement, as non-prescriptive? But it does seem to be premised on reaching the long-term temperature goal that is in Article 2?

5 MR HODDER KC:

It's prescriptive as attempting to achieve that, that's the attempt to achieve that, and that's the language that we find in the Act itself, appropriately in section 3: "Purpose."

10 So we see that the section 3 "Purpose" clause is relevant or has the way of giving effect to Article 4.1 of Paris. It's in different language and to the extent there's difference, then the "Purpose" clause prevails.

So perhaps the point behind your Honour's question is, can New Zealand just
15 ignore this and say, well, we'll just comfortably ride along and do nothing? Well, the answer, as a matter of international law, no, we have to do something. Those commitments are as described and implemented through the purpose clauses and in a whole range of others, so not just section 3 but also section 5W.

20 WINKELMANN CJ:

Mr Hodder, I'm not really understanding, I realise, as you are speaking to me, what exactly is the status of our nationally determined contribution to reduce emissions by a certain level by a certain date. Can you clarify, because you're saying it's just a best endeavours commitment?

25 MR HODDER KC:

The nationally determined contributions are not prescribed by anybody. They are the best endeavours efforts by New Zealand to meet these targets, yes. But they're not prescribed in any way by the instruments or by the IPC.

COOKE J:

30 Article –

MR HODDER KC:

That's the nature of the system. The nature of the system is that each country, in terms of Article 4.3 and 4, are seeking to do what they can in the light of their particular national circumstances.

5 **WINKELMANN CJ:**

So where do the financial penalties kick in if we don't meet certain levels then?

MR HODDER KC:

I'm going to have to get advice on that.

WINKELMANN CJ:

10 Because the scheme you're describing to me is not my understanding of the scheme?

MR HODDER KC:

National determined contributions are not limited to reduction of emissions. They include the acquisition of set-offs, but beyond that I am going to have to
15 check, come back to you after the adjournment.

COOKE J:

The other thing about Article 4.3 is that the domestic targets have to be the highest possible ambition.

MR HODDER KC:

20 Yes.

COOKE J:

Does that not set some sort of an objective standard? A legally objective standard?

MR HODDER KC:

25 It sets an aspiration. I'm not quite sure what an objective view of the highest possible ambition is.

WILLIAMS J:

Well, it means you can't sit around and do nothing.

MR HODDER KC:

No, I accept that entirely.

5 1130

MR HODDER KC:

And I accept that entirely.

KÓS J:

I think it means more than that. I mean Article 3 talks about all – there's a
10 commitment in Article 3 to "undertake and communicate ambitious efforts as
defined". That's an objective obligation.

MR HODDER KC:

Sorry, you're referring to Article 3, Sir?

KÓS J:

15 I was.

WINKELMANN CJ:

I mean I thought we had made a commitment in Paris to reduce net emissions
by 50% by 2030, but I may be wrong. I am quite interested to know what our
international commitments are in your submission, because I am sure that
20 Mr Salmon is going to want to reply on this.

MR HODDER KC:

Well I don't know that – well I'll check, but I don't know that I'm resisting the
proposition that we have committed to do something, to respond to
Justice Williams' proposition, and that that something should reflect ambition,
25 but once you get beyond that it's hard to say there is a prescription in this
process.

WINKELMANN CJ:

Isn't that quite fundamental to your case, though? Because I think we have committed to do something concrete and you're saying we haven't, and I'd like to know who is right on this. So –

5 **MR HODDER KC:**

Well as –

KÓS J:

It might be a good time for –

WINKELMANN CJ:

10 It's 11.31, it's a good time.

KÓS J:

15 minutes to work that out, Mr Hodder.

WINKELMANN CJ:

Right.

15 **COURT ADJOURNS: 11.31 AM**

COURT RESUMES: 11.50 AM

WINKELMANN CJ:

Mr Hodder.

MR HODDER KC:

20 Thank you, your Honour. In terms of the NDCs.

WINKELMANN CJ:

Yes.

MR HODDER KC:

My instructions are that the NDCs are dealt with as a matter of the prerogative, external affairs prerogative and they are set for a period over – of years, the current NDC 1 expires or the target date is 2030, so at that date it will be known
5 whether or not it has been achieved or not.

The obligations as per Paris are to have one. That it be the appropriate ambition. That it be notified and that it will then be subject to international scrutiny and I understand it was also scrutinised at an early stage of the LCANZI
10 litigation. But it's outside the CCRA and it does include the scope for offsets which are recognised in Article 6.3 of Paris, or Articles 6.1 and 6.3 of Paris.

WILLIAMS J:

Is it consistent with clause 5Q or is it a different target?

MR HODDER KC:

15 Clause 5Q? It won't be – I don't think it will be in the Act, that target, but I'm not quite sure what clause 5Q says.

WILLIAMS J:

No, is the target consistent with the target in, the 2050 target, in clause 5Q? Or is it a different one?

20 **MR HODDER KC:**

Well, it's the overall structure of having NDC is designed to that end. I don't know that's a – I imagine it's a fundamental –

WILLIAMS J:

Do you know what the target is?

25 **WINKELMANN CJ:**

It's 50% by 2030, isn't it? That's my recollection.

MR HODDER KC:

The obligation is to meet the target by 2030, that we in New Zealand have selected.

- 5 In terms of the penalties question the Chief Justice asked, my instructions are that relates only to Kyoto. There are no penalties outside the Kyoto. There are no penalties under Paris.

WINKELMANN CJ:

It's 50% from 2000 and – 50% below 2005 gross levels by 2030.

10 **COOKE J:**

So is that an international obligation?

MR HODDER KC:

I'm sorry?

COOKE J:

15 Is that an international obligation?

MR HODDER KC:

Yes, this operates at the international level. But as I think I mentioned, it kind of – it inevitably comes into the debate, as it appears to have done in the LCANCZI litigation, in the first instance.

20 **WINKELMANN CJ:**

Mr Hodder, you might just need to move your microphone over, because I'm finding it a little bit hard to hear you.

MR HODDER KC:

I'm sorry, I'm probably –

25 **WINKELMANN CJ:**

That means the transcribers may be also.

MR HODDER KC:

Right, I'm – yes. So what I wanted to do then was to simply draw attention to the affidavits that were filed about this process to the extent the Court needs assistance on that and those affidavits are by Ms Wilson at 201.0047 and by
 5 Ms Plume at 201.0029. I won't take the Court through them, but I commend them in terms of providing a background and reinforcing my submission that the public service contribution in these areas should not be overlooked or understated, or the bona fides of what is being done in that area.

1155

10

I will, if I may spend a couple of minutes on the emissions reduction plans, there are two in the materials. The first is the one dated 2022. These are published under section 5ZI and prepared under section 5ZG.

WINKELMANN CJ:

15 Have you got a reference for us for that?

MR HODDER KC:

Thank you. I'm told it's in the respondent supplementary bundle at tab 52. You won't see from there but it's a 300-odd page document entitled, in English, "Towards a productive, sustainable and inclusive economy" and one of the
 20 features of it is a focus on the economy and on creating worthwhile jobs and inequitable transition as the attempts to reduce emissions are pursued. They're covered in considerable detail and it's difficult to do that in a short time as to what is being sought.

WINKELMANN CJ:

25 Well we can read it, Mr Hodder, but you can draw us to what you want to particularly highlight.

MR HODDER KC:

Well I would, I'm going to try and spare you from reading the whole lot so in terms of what I encourage reading, it really is sufficient probably to go through
 30 the first 20 pages as opposed to the other following 180 pages. The ones that

– so there’s a description of a work programme, a description of a strategy, there’s a graphic of a plan on page 12, if we could bring that up for a moment.

I know it’s hard to grasp all this with one single page but when the Court comes
 5 to look at it it’s a useful concentration or distillation of the whole lot of moving
 parts that are going on in the processes that lead into this and there are five
 principles which are identified and largely picked up in the middle of that graphic
 “Empowering Māori”, “Playing our part”, “Empowering Māori”, “Equitable
 transition”, “Working with nature” and the end result, “A productive, sustainable
 10 and inclusive economy”. Again that shows us that it’s got a wide range of
 considerations that have been taken into account and there’s a, on a higher
 degree of reference to the consultation that’s already undertaken, and the
 various groups that are being worked with to produce what is described as an
 “all-of-government plan”.
 15 1200

Now I think almost all that’s picked up from the beginning to page 25, but again,
 for the same reason I brought attention to the affidavits, I make the same point
 that this process, if anybody is suggesting it’s a superficial or not particularly
 20 serious process, the document is a fairly firm answer to that in our submission.

The second of the plans is in the supplementary bundle at 58 and is amended
 in January 2026 and so I observe in passing we’re talking about a different
 government to the first one but the features that come through are similar, and
 25 again they’re picked up in the first 20 or 30 pages. There was probably more
 emphasis on technology in this and science in this particular plan but all the
 factors that we were looking at before, including just transition and the position
 of Māori, are picked up in considerable detail in the document and in both there
 is an emphasis on the desire that New Zealand can have prosperous
 30 communities, affordable and secure energy, increasing exports and a thriving
 economy. That the inspiration is to achieve that at the same time as achieving
 the reductions. That is the kind of balance that successive governments have
 been seeking to achieve.

WINKELMANN CJ:

Nevertheless they've committed themselves to certain levels of reduction. The Crown, well, through the prerogative, has committed itself to certain levels of reduction.

5 **MR HODDER KC:**

Well as long as one doesn't take levels as being specific. The levels are as specified in the NDC.

WINKELMANN CJ:

Yes.

10 **MR HODDER KC:**

Yes.

WINKELMANN CJ:

Well how do you say all these variables weigh against that because of course they're all just how you go about getting there.

15 **MR HODDER KC:**

They are, but as I'll come to when I come shortly to the pleading, well (inaudible 12:02:55) the pleading, these are provided in a way which is, or they are developed in a way which is quite sophisticated and involves those multiple factors, not all of which are easily reconciled. So the proposition that says here
20 are minimum global reductions that you need to bring into play according to some principles, is a much, which is what the essence of the criticism is, that you haven't done that. Needs to be said alongside what actually is going on which is what is being found in the Act and under the plans and as described in the affidavits. That's the point of making these submissions to the Court.

25

So the proposition that there has been a failed legislative model, including failures by those who were making decisions under the model, in our submission, needs to be put into some sort of perspective.

WINKELMANN CJ:

Yes, but the fundamental submission in that regard, Mr Hodder, is that it won't deliver the commitments the government – that have been made on New Zealand's behalf, which is the issue that needs to be addressed in particular.

MR HODDER KC:

Yes it is. That's one of those future projections which –

WINKELMANN CJ:

No, it's that the framework itself is not calibrated at a level – we're using that word – because –

MR HODDER KC:

Well I understand that Mr Smith says the Act is a failure.

WINKELMANN CJ:

No, I think the point is that these targets don't deliver New Zealand's commitments because the exclusion at least in one respect I think is exclusion of agricultural methane from the regime.

MR HODDER KC:

Yes, and the question's whether that's authorised, whether that's a contrary to international obligations or it's contrary to the Act. If that's what the Act provides for then we say that is really the end of it, apart from any declaration of inconsistency under the Bill of Rights Act, but Paris recognises that national circumstances matter. If New Zealand has an economy which has the benefit of a lot of renewable energy through hydro but has exports which are largely dependent on ruminants of various kinds, then those are national circumstances that can be taken into account.

1205

WINKELMANN CJ:

Yes, and the argument you have to meet is that as a nation we have agreed that a certain level of reduction on our part is necessary as part of the worldwide collective action to avoid cataclysmic civilisational meltdown, and the CCRA
 5 does not take us to that level.

MR HODDER KC:

That's what the pleading is. To establish that requires a projection in the most part, but it doesn't say that the countries concerned are in breach of international obligations. The international obligations recognise, as I say, that
 10 degree of international autonomy. The autonomy is comprised of the ability to have one's own nationally-determined contribution, that contribution to reflect the circumstances of the particular country, including its economic wellbeing. Now when the plaintiff or the appellant says it's not going to work, that's a projection into the future and it's a challenge to the policy of the legislation.

15 KÓS J:

Well could we have a look at page 9? Perhaps Ms Gaskell could take us to page 9 of that document that you have up.

MR HODDER KC:

Which one?

20 KÓS J:

The –

MR HODDER KC:

Oh, that one, sorry.

KÓS J:

25 Go up a bit please. Right, so there is a chart showing net emissions. These are projections. We've had this legislation since 2002. Can you show me a chart which projects not projections – sorry, which depict not projections but shows actual performance? Where is that to be found?

MR HODDER KC:

I don't have – I'd have to find out whether there's such a chart in here. I'm...

KÓS J:

Well I'd like to see that after lunch if possible, please.

5 **MR HODDER KC:**

We'll see what we can do, but I do draw attention to the fact that the NDC is not limited to emissions. So this is a CCRA document. The NDC covers offsets and – sorry, just so I'm clear on what your Honour is seeking, you would have included offsets in the chart?

10 **KÓS J:**

Well if we're looking at progress towards 2050, the target identified in section 5Q, there must be a depiction of progress, not just projection.

COOKE J:

And then coming back to the point of principle, *KlimaSeniorinnen*, the
15 European Court of Human Rights didn't seem to have a difficulty with finding that there had been an inadequacy in the regime in issue in that case, notwithstanding we're all looking at projections. It was saying there is a current failure of the regime and therefore a breach of the right to life and the right to culture.

20 **MR HODDER KC:**

Well yes, a different regime and with no regard to a Parliamentary sovereignty context because there wasn't one that it was concerned with and it didn't find a breach of the right to life. It found that it was questionable, whether there was a right to life issue arose in that circumstance. But that may be your Honour's
25 point, but perhaps I –

WILLIAMS J:

Your case is – you're pitching your case at the highest level and you're saying this is not law, this is politics.

MR HODDER KC:

I am saying that there are a whole set –

WILLIAMS J:

Get off the law, get off the politics paddock and stay in the law paddock. That's
5 the essence of your case.

MR HODDER KC:

I'm saying – with politics, what I'm saying is that it has a whole range of social, economic, and other political considerations to it that make it difficult to apply a legal yardstick.

10 **WILLIAMS J:**

Of course, but in that context *Klima* and *Urgenda* and so on rather call that basic, that very basic proposition into question quite apart from the different constitutional context.

MR HODDER KC:

15 Well I'm not sure that I've got a response to that. Perhaps I misunderstood the question.

WILLIAMS J:

So your argument, your primary argument is that this is politics, not law and not for judges. You also say there are constitutional settings that make it
20 inappropriate in a Westminster-style polity, but –

MR HODDER KC:

In a – in a –

WILLIAMS J:

But your argument is pitched higher than that, as I understand it.
25 1210

MR HODDER KC:

Well, it covers both, but the basic proposition is that all these decisions are difficult decisions. They're not immediately or even obviously after a period of time amenable to a legal yardstick analysis and that makes it questionable as to whether or not they are appropriate to be assessed, when we're talking about assessing legislation, by a judicial method.

WILLIAMS J:

Right but –

MR HODDER KC:

10 (inaudible 12:10:20).

WILLIAMS J:

And yes, and you're, the problem with that proposition, is that a number of Courts, albeit in different constitutional settings, have come to the view that these are appropriate for judicial assessment.

15 **MR HODDER KC:**

Well, I'm about to take the Court to the United Kingdom jurisprudence which takes a different approach.

WILLIAMS J:

Yes but my question is, are you arguing about politics versus law or are you arguing about different constitutional settings? Because they're different arguments.

MR HODDER KC:

So I'd always like to agree with the Court, but in a sense they're inextricably related. The point about the British jurisprudence and we say which would apply in the New Zealand position is that the Court in recognising politics defines what it sees as law and what it sees as politics and what is unable to be reviewed by reference to rights. And so there are various ways in which one

limits the scope of judicial engagement in some of these matters because, in the end, they can't be assessed by a judicial yardstick, on the legal yardstick.

I will come to, I think we're probably about the point where I come to it now, is to go into those cases where rights are being addressed in the Westminster construct, because what we say is that the point of Parliamentary sovereignty is it emphasises the role that politics has, because that's what Parliamentary sovereignty is largely related to. The idea that Parliament, which is essentially political, and as we say the New Zealand constitution is essentially political, that once you get into that area where Parliament is sovereign then it is difficult for the Courts to come in unless there was a clearcut, to use Justice Kós' word, crisp issue of law. There isn't a crisp issue of law in deciding whether or not these budgets have been properly undertaken or not. That's our submission, so I hope that responds.

15

Where it says either/or, we say that the constitution drives the approach to what is politics versus law.

WINKELMANN CJ:

Well, there's a contest between how you are framing the case and how the appellant is framing the case. The appellant is framing at the macro level and saying, we have, where New Zealand has made international commitments which reflect its assessment and the world-wide assessment of what everybody needs to do to avoid cataclysmic meltdown, and when we look at the macro systems in place they are not inadequate to do that, and New Zealand has also enacted legislation which commits to preserve, which provides for a right to life and culture, and therefore – and gives the Court a role in assessing rights compliance and the Bill of Rights Act makes the judiciary, the executive and the legislature subject to those commitments, whilst affirming Parliamentary sovereignty in the form of section 4. So they're saying, in that context, the *KlimaSeniorinnen* approach is conventional.

30

MR HODDER KC:

And my response is, it may be conventional in a European context, it's not conventional in a Westminster context, and I'm about to develop that proposition by reference to authorities.

5 **WINKELMANN CJ:**

Yes, I think that's, as we said earlier, it's the crux because, in fact, that constructed is a reasonably conventional legal argument and what you need to show is that the *Klima* approach doesn't apply in our context.

MR HODDER KC:

10 That's what I hope to do by reference, as I say, to the cases but perhaps a short point to make before I dive into that is it really comes back to the proposition that there is a spectrum. That the spectrum that comes back and which has been underpinning this Court's jurisprudence for the best part of the last two decades remains a valid concept and at one end of the spectrum there is a
15 problem because the Court finds itself in politics, to use Justice Williams' shorthand.

WILLIAMS J:

I think I was quoting you.

MR HODDER KC:

20 Well, I wasn't trying to share the blame, your Honour, but in any event, that's where we're going to. Yes.

WINKELMANN CJ:

Right.

1215

25 **MR HODDER KC:**

Excuse me while I disappear below sight level, I need to get pencil and paper.

WINKELMANN CJ:

Yes.

MR HODDER KC:

Right, my apologies for that. I made an executive decision to defer dealing with
 5 the pleading before I – until after I deal with the spectrum issue, if I can call it
 that. So how does the Court’s function, the Court’s plural function work with
 rights claims? And of course the Court has dealt with this in various cases and
 working backwards in a sense in this Court’s jurisprudence in climate change,
 10 *Climate Clinic* I suspect, the Court referred to the notion of a “just transition” in
 the context of the Crown Minerals Act as an acknowledgement that “managing
 climate change” is a reasonably – “... necessitates complicated policy decisions
 that balance the need for action with a need for equity and economic stability.”
 That’s that same balance that we were talking about before, but the Court is
 recognising that in terms of what is required.

15

In *Chief of Defence Force v Four Members of Armed Forces* [2025] NZSC 34,
 [2025] 1 NZLR 21 where we’re concerned about the – we have there reference
 to the idea of “a reasonable margin of appreciation”, and that is in part justified
 on democratic grounds and partly on institutional competence grounds, and
 20 that’s – if I can –

WINKELMANN CJ:

It was quite – in the *Defence Force* case wasn’t the margin of appreciation really
 focused on the necessities of a defence force, which is the institutional
 competence point I suppose?

25

MR HODDER KC:

So this is in our bundle of authorities at tab 29, I believe.

WILLIAMS J:

The main bundle?

MR HODDER KC:

Yes. Tab 22, okay. Tab 22 in that bundle, yes, the main bundle.

COOKE J:

I mean, this case is in a very different context of course. What really are you
5 taking us to it for, the proposition that in a different context there can be a wide
margin of appreciation?

WINKELMANN CJ:

Because that was why I was asking, Mr Hodder, because it's about the
Defence Force's needs, what they need to run an effective force.

10 1220

MR HODDER KC:

I take it because it's a recent discussion by this Court about the margin of
appreciation and what that means, and I understand that discussion to be in a
– it's in the context of proportionality review but it's in the – it creates a
15 discussion at a level of principle which I am submitting to the Court is helpful for
our present case.

WINKELMANN CJ:

And what, have you got the paragraph reference?

MR HODDER KC:

20 So the discussion that I'm concerned with starts at paragraph 96. So we're into
serious BORA territory here and paragraph 97, explain that: "... the Court
affords the legislature a reasonable margin of appreciation in the choice of
measure; it suffices if the measure doesn't exceed reasonable limits. That
approach has been justified on democratic grounds and by reference to the
25 respective institutional competencies of the legislature and the Court,
particularly when assessing matters of social policy."

And then in the footnote 133, we see for example the reference to the Canadian
jurisprudence: "... the Court does not substitute judicial opinions for legislative

ones as to the place at which to draw a precise line.” So in terms of categorising matters, law or politics –

WINKELMANN CJ:

I think Justice France might have a question for you.

5 **ELLEN FRANCE J:**

Yes, I was just – sorry, I was just going to ask Mr Hodder, this is in the context of once it's been established there's a breach and you're then looking at whether or not this is a justified limit and I didn't understand the respondent's argument to be that the limits were justified here? You're rather saying there isn't a breach at all, is – am I right about that?

MR HODDER KC:

My proposition is the broader one that says that at some point the Court will wish to constrain the scope for invocation of rights claims on claims that go into matters of deep and complicated social and economic policy. It can do so at a number of levels, one of them is about proportionality, partly it's about definition.

WINKELMANN CJ:

I mean, it does most typically arise in the area of justification, margin of appreciation, for limitations on rights?

MR HODDER KC:

20 Well, the –

WINKELMANN CJ:

Not in terms of the scope of the right?

MR HODDER KC:

Well, if I can go through the jurisprudence, I suspect that that does go to the scope of rights, because as the – as has been said, you can define rights or attempt to define rights in ways that are expansive. But in terms of the general approach, we say that that's reflected in this case, I agree, in this case occurs

in the context of a margin of appreciation on proportionality concerned with section 5 but the function of the court is implicit in this discussion and the role of the Court, compared to the other branches of government. And so whether it is dealt with in this way or another, the Court is mindful of and if I can use the phrase again, that spectrum.

At paragraph 102, the Court –

WINKELMANN CJ:

Yes and the reason why, I think, why I am troubled by your submission, is it's suggesting that you're using this to take us into justiciability but it doesn't really arise in this context in a justiciability sense, it's arising in terms of the Court not saying that this isn't a reasonable assessment of an appropriate limit. So the Court is still subjecting the decision-making or, in this case, decision-making to scrutiny, it's still saying it's justiciable, but it's appreciating that the Defence Force has its own needs and its own expertise.

MR HODDER KC:

Well, it may be that that submission is one that I meet resistance on, but the basic proposition is, as your Honour says, not so much it's justiciable, so for example, I don't wish to suggest there are no-go areas, what I'm suggesting is that if you get onto the spectrum, then in terms of the idea that the right intrudes into matters of complex economic and social policy is itself the way in which the Court can exercise, if you like, a control mechanism over what it has to address and that's the result. It also applies at other stages in the process but it's not limited, in our submission, to section 5.

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In the matter of margin of appreciation, as Justice Miller for the Court says in *Chief of Defence Force*, frames that in terms of “institutional capabilities” and he cites the Beatson text which I would commend to the Court which is in our materials...

COOKE J:

Which paragraph of the decision are you at now?

WINKELMANN CJ:

103.

5 **WILLIAMS J:**

103.

COOKE J:

Thank you.

MR HODDER KC:

10 I'm looking at the Court's paragraph on 103 of *Chief of Defence Force* and he has features at footnotes 152 and 154 but much of that paragraph, or much of that chapter in fact of Beatson's text, is of significance and that is in our supplementary bundle at, I think, tab 56.

15 So the decision dates from 2008 – sorry, the text dates from 2008 and it addresses those questions of weight and latitude over a wide range of the chapter and I think my intention would – I draw the Court's attention to paragraphs 3-182 to 3-211.

WINKELMANN CJ:

20 3-182?

MR HODDER KC:

3-182 to 3-2 – can probably go further than that but, well, about 320. There's a separate section that this Court referred to about the limits of the adjudication process which is around 3-230 to 3-237.

25 **COOKE J:**

Have to be careful about applying international commentary like this because our Bill of Rights is slightly differently structured from other international models,

particularly in having section 5 as a limit. It's demonstrably justified. Not all countries have that framework of right with demonstrably justified limits and therefore you find more analysis of whether the rights are inherently limited in some way.

5 **WINKELMANN CJ:**

Well, it's very similar.

MR HODDER KC:

The analysis undertaken by the UK courts effectively comes to the same proposition and my understanding is that Beatson is talking about the English
10 or the British provisions. In the same area, although not referred to by the Court, in *Chief of Defence Force* while I'm here, in our supplementary bundle at tab 32...

WINKELMANN CJ:

I mean, normally it does arise in any case as to whether a limitation is justified
15 because it's the decision-maker's assessment that it is justified. It's the necessary limit that has to be applied because of resource constraints or whatever, so that's the context normally is the scope of the writers normally, I think, not the inquiry.

WILLIAMS J:

20 Well it wasn't a sensible matter for inquiry in the *Defence Force* case because it was about the right to refuse to accept medical care. So the shape of the right was pretty clear, the question was whether you should interfere in it.

MR HODDER KC:

Yes, I agree with you.

25 **WILLIAMS J:**

You're talking about the shape of the right is being unclear.

MR HODDER KC:

I'm talking about the shape of the right as part of the process.

WILLIAMS J:

Well so the point is I wonder whether this helps you much anyway. Beatson
5 might, but the decision itself is a bit too far.

WINKELMANN CJ:

We'll read Beatson.

1230

MR HODDER KC:

10 I was referring to the text by Aileen Kavanagh at our supplementary bundle,
tab 32. Her chapter on the nature and grounds of judicial deference I commend
to the Court. The relevant part of these purposes probably starts around
page 181.

WINKELMANN CJ:

15 Which tab is that? 31 or 32?

COOKE J:

Supplementary 32. There's another one of Kavanagh under the main one at
31.

WINKELMANN CJ:

20 32.

MR HODDER KC:

So Kavanagh, page 181 and following, and which has, among other things
discussed, what she describes as the prudential reasons for deference and it
starts at page 197. It's a point that isn't discussed by Beatson, well not
25 explicitly, but simply saying that there is an aspect of that that goes to the
Court's own reputation.

WINKELMANN CJ:

Yes.

MR HODDER KC:

Now that's –

5 **WINKELMANN CJ:**

It's a theoretical analysis.

MR HODDER KC:

10 It is. There are debates on that but I'm just simply saying that for discussion of that particular proposition you won't find it in Beatson but you will find it in Kavanagh.

WINKELMANN CJ:

No she's at one end of the spectrum – oh, you said she is, isn't she.

MR HODDER KC:

15 So, beyond *Chief of Defence Force* I should come then to the Court's decision in *Chisnall* and I acknowledge that in this judgment that the same point that can be made as was made in relation to my discussion of a previous case, that it's the focus on section 5, for these purposes I'm reasonably confident the Court understands the *Chisnall* background. Again a very narrow issue in terms of whether or not there was more scope for incarceration beyond the extent of the
20 end of a sentence than was justified and the discussion about institutional competence and proportionality probably starts around paragraph 211 and the Court goes through a careful process over a number of pages in terms of trying to identify what the features of the regime are, the core characteristics of the regime, and whether or not they are required for the purposes of the objectives
25 of the legislation.

Then at paragraph 232 it poses in general terms the issue in terms of, on the one hand, Parliament is the one that constructs the "model for New Zealand's conditions". "The task of the courts is to identify the core characteristics."

That's "within the particular expertise of the courts". Then: "Delineating rights and determining proportionality is familiar judicial work." So it's the delineating rights parts that I am saying this discussion is equally relevant to as the proportionality concern.

5

Then having found that there would be other options the Court is comfortable that it isn't "reviewing Parliament's legislative choices". We find that at 247, and why does the Court need to address that, rhetorically? Well because there are areas where Parliament's legislative choice don't give rise to – sorry, are based on an institutional competency which the Court can't match.

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That's picked up again in paragraph 248, "not the task of the court to check whether Parliament has made the best choice possible", and that's particularly relevant to our case. Then there's the discussion of weight and justification and then at paragraph 250 we come to Parliament's institutional capacity and: "... the case that when it comes to complex social problems Parliament has institutional capacity and expertise to which weight should be given." And so a feature of the submission that I'm putting to the Court is that an institutional capacity includes the way in which the legislation has been framed and the balances made when it comes to complex social problems. That may include definitional issues, as we say it does here.

15

20

And then when we come down to paragraph 251 we get to your Honour Chief Justice's reference to Justice Tipping's spectrum from *Hansen* in terms of "major political, social or economic decisions at one end", and at the other end "the more intense the court's review will be". So when there is a choice about the definition of the right as the Court is confronted with in this case in terms of sections 8 and 20, we say these considerations are entirely relevant. If what is required by an expansive definition of section 8 or section 20 is to engage the Court in major or seem to engage the Court in "major political, social or economic decisions", then the definition of "right" doesn't need to be expanded beyond its existing – well its own language, if you like.

25

30

And then finally we come back to paragraph 264 which I mention at this point, but that's where there's a discussion around footnote 334, the relevance of the utility of relief, a material exercise of the discretion. So we've come back to that but we have partly touched on that already.

5 WINKELMANN CJ:

Could this framework be used to argue against your proposition that that's – the Court's showing that they do have an institutional framework to stay on their side of the line? So when it comes to justification, as was in issue there, the Court was concerned to be sure not to be second-guessing Parliament's
10 choices, and it gave itself a framework for working out how to – where that line was?

MR HODDER KC:

Well I think the proposition is probably that the framework is a way to achieving the right interpretation of the legislation in the first place, and to decide what is
15 and isn't appropriate to be brought before the Court. That probably takes us into the territory of justiciability if that also incorporates the nature of the definition of the right, and so the Bill of Rights is what it is. If we're talking about the definition or the interpretation of its provisions we say all these considerations go into the interpretation exercise. They're not limited to a
20 justification exercise and they are relevant when the Court is considering a strike-out state of affairs and an undoubtedly ambitious piece of litigation.

WINKELMANN CJ:

So let's say this kind of case was presented to the courts in that scenario I mentioned earlier where there's a right to life and Parliament is obliged, has its
25 international obligations to protect people against the arbitrary deprivation in their lives and they legislate to make it a crime to murder one sector of society but not the other, so to create a kind of a mental exercise akin to a modern-day version of *Taylor v Poultry Board*.

MR HODDER KC:

30 It makes the interpretation easier.

WINKELMANN CJ:

Yes, and so would we say that the courts have no role with this framework approach in that scenario, would the courts be precluded by your approach to issue of staying in our lane, from enquiring into whether or not the State, in
 5 international law terms, the State had failed in its duty under the Bill of Rights Act to protect that sector of society, the right to life of that sector of society, by saying that it had failed to enact legislation to protect them?
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MR HODDER KC:

10 Well, on the – it's an interesting hypothesis, but it is very close to the redheaded slaughterer going, that goes from law schools, et cetera. In terms of my main point at the moment which is about the interpretation exercise, it doesn't arise because you have clearly a deprivation of life and so that becomes straight-forward –

15 **KÓS J:**

Sorry, I couldn't hear you, what was that?

MR HODDER KC:

Clearly you have a deprivation of life on the Chief Justice's hypothesis.

KÓS J:

20 Yes.

MR HODDER KC:

And so then the question arises after that, what does the Court do? That gets us into the question of whether or not, I mean, presumably the Court would issue a declaration of inconsistency. I wouldn't be suggesting otherwise.

25 **WINKELMANN CJ:**

Because why I ask you is that you can have – you can conceptualise your argument as being pitched at different levels, because this notion of the Court exercising a declaration of inconsistency jurisdiction at that framework level,

that's a new notion for the Courts, because it's a relatively new jurisdiction, the declaration of inconsistency, and so we haven't been asked to do that before.

At one level, your argument could be seen as saying, well, no, the Courts
 5 shouldn't go into that area because it's for Parliament to decide what the content
 legislation is and it breaches comity for us to say, hang on, Parliament, you
 haven't enacted an adequate framework, or else your argument could be taken
 at a more micro level which is, well, courts may have that framework jurisdiction
 under the Bill of Rights Act but the climate change area, if it does, climate
 10 change is not an area in which you should be exercising it (a) because it doesn't
 engage a right or (b) because it does engage a right, but it is such a policy-rich
 area that you'll be going beyond your institutional capacity. So I'm just trying to
 get from you where you are pitching your argument?

MR HODDER KC:

15 I am pitching it at both levels. So the first is the interpretation point which I am
 pursuing because it seems to me that it's an easiest or simplest and clearest
 way to deal with a strike-out scenario.

WINKELMANN CJ:

Well, I actually gave you three scenarios and the first one was that the Court
 20 doesn't have a framework jurisdiction under the declaration of inconsistency?

MR HODDER KC:

That's what we do say.

WINKELMANN CJ:

Right.

25 **KÓS J:**

In any circumstance?

WINKELMANN CJ:

If the framework is a framework designed to preserve life and it – but it doesn't involve the deprivation of life, no.

KÓS J:

5 So that's really the policy.

MR HODDER KC:

You don't need a framework.

KÓS J:

That's the policy, which limitation, isn't it?

10 **MR HODDER KC:**

Look, if there is a deprivation of life by legislation and the question is, does the legislation breach the Bill of Rights? The interpretation exercise isn't an issue, because clearly enough it does. You don't get to that.

WINKELMANN CJ:

15 Well, that's another way of putting it. Are you saying our declaration of inconsistency jurisdiction is limited, at the legislation level, to interpreting legislation that's enacted and saying it's inconsistent, so it's just that interpretative function?

MR HODDER KC:

20 Well, I hope I'm not saying – I hope that I'm saying both. The first proposition is that if there is a right, if there's an allegation of a right being breached, the right has to be interpreted and understanding as to whether what's been alleged can constitute a breach. In this case, we have a proposition that says not that there's a deprivation of life in the sense that we would say the plain reading of
25 section 8 says, we're saying, no, there has to be – there's a risk to the quality of life or the enjoyment of life and this is a collective problem, contribution, et cetera, and we say that doesn't fall within section 8. If you get past –

KÓS J:

Well, that's plainly within our wheelhouse, though, isn't it?

MR HODDER KC:

I'm sorry?

5 **KÓS J:**

That interpretative task is plainly within our wheelhouse.

MR HODDER KC:

Yes, yes, but the question –

KÓS J:

10 Yes.

MR HODDER KC:

– then what interpretation? I'm not saying there's no jurisdiction, in any sense, to look at that. I'm not – I'm trying not to say there's any jurisdiction – trying to avoid jurisdictional arguments. What I'm trying to say is that there's an interpretative exercise and which the Court can bring to bear the consequences of the interpretations that are being proposed, in the way that I am explaining those consequences, if there is a recognition of that right in a way that brings the Court into the issues of economic and social policy. They may be brought into account and proportionality at a later stage in the analysis, but they're not mutually exclusive on my submission.

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WINKELMANN CJ:

I see as implicit in your argument that for the Courts to take the approach that Mr Butler explained, which is – and Mr Salmon – that you look across the realm of legislation and see if it's a sufficient framework to protect, to fulfil the State's positive obligations to protect a right. And that the Court has a jurisdiction, declaration of inconsistency jurisdiction to say, no, that's not a sufficient

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framework, which is a new concept in New Zealand law but not a new concept in European Court of Human Rights, or the Inter-American, I think.

MR HODDER KC:

Yes.

5 **WINKELMANN CJ:**

And so what I am asking you and it may be that there's something you want to come back to after lunch, is whether that I am correct, that it is a necessary implication of your argument that the Court should not assume that jurisdiction, because inherent in it is looking at what Parliament has done in saying whether
10 it's adequate to protect your rights and I think that is perhaps that it lies at the heart of your difficulty with the appellant's arguments? But you may say I'm wrong.

MR HODDER KC:

I may well want to come back and refine what I'm about to say after lunch, but
15 at the moment what I want to say is that whether there is a framework obligation or it is a matter of interpretation of section 8, whether there is a deprivation constituted by the kind of things that the plaintiff alleges may not be just part of the framework/positive obligation, it may just be that there's a separate form of expansive interpretation that doesn't require the framework.

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On both of those, I see those as interpretative issues in which the Court is, of course, able to make a decision but the decision it makes, we say, should be informed by the consequences, what that means the Court is getting involved into or being led into.

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If there is no question about the interpretation issue, that there is clearly a breach of rights, there must be something slightly less dramatic than the Chief Justice's hypothesis, then the question arises later in the Court's own approaches to Bill of Rights cases, including proportionality.

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But in either case, we would say that the relative institutional competencies associated, whether the issue involves complex economic and social problems, informs both the interpretive and the proportionality aspects.

- 5 But I will see if there anything more than can be said. I mean, I will be coming back to section 8, the idea that it actually is different to other positions because of the approach that was taken to the enactment in the first place, the fact that it doesn't include things like protected by law, and the distinctions that can be made with other jurisdictions which have quite different constitutional settings.

10 **WINKELMANN CJ:**

- Well, I think you are going to have to come back to it, because I think I am too slow and I am not really understanding your point, I'm sorry, Mr Hodder, so you might have to loop back around after lunch, because I am not understanding if you are not – I had understood your submission to be that the Court shouldn't
15 review the adequacy of the legislative response.

- I mean, certainly you argue that the rights are narrower than is argued for, but if the Court were to rule against you on that, and that is a simple legal issue as to scope of the section 8 right, then the question is what steps should the Court
20 take in reviewing the legality or the rights-consistency in the climate context in relation to section 8?

- And I had understood your submission to be, well, it shouldn't look at whether the overall framework is compliant with the State's positive obligations, because
25 to do so takes the Court out of proper role and that was the submission I had understood you were making in your written submissions, but I'm not sure you are saying that now, so perhaps we should press pause on that and resume after lunch on that one. Not that I'm saying we should break for lunch now.

MR HODDER KC:

- 30 I think I am, but I'm happy to accept that suggestion, so we can move on.

ELLEN FRANCE J:

But could I just ask, Mr Hodder, you'd accept that in some situations I think you'd say where there's no issue of interpretation the sort of need for restraint and comity and so on may come into the discretionary stage, so I'm thinking of something like *Nicholson*, you know, the assisted suicide case where the Court there says yes there is a limit on the right being imposed, but it's premature because we should wait for what Parliament does about it, and I assume you say well that's because there's no real interpretation issue so logically it does come at that later discretionary stage. Am I right about that?

10 **MR HODDER KC:**

Yes you are, Ma'am. As I was seeking to submit earlier there are a range of points at which the Court has options and in that case the discretion was one of them. Now that's in a situation that didn't have the formalised statutory declaration we now have under the Bill of Rights Act but it's exactly that and indeed what I was proposing to do was to go to *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 now and address that. *Nicklinson*, as I understand, will be in our supplementary bundle at tab 24 and we referred to it in our reply submissions and I think it was referred to in *Make It 16*. I confess I have –

20 **WINKELMANN CJ:**

It was referred to in *Make it 16*.

COOKE J:

It was.

MR HODDER KC:

25 It was, yes, yes. And the reference in *Make It 16* and it's endorsed by other judges in the majority in *Nicklinson* is Lord Mance's discussion of those issues, so maybe it is appropriate to turn to the judgment, to his judgment, and the relevant part of that is I think it starts at page 163, sorry, paragraph 163. I mean, he is talking about the margin of appreciation but also institutional competence
30 at 164 and insofar as he's saying: "The interpretation and ambit of section 2 are

on their face clear and general, and whether they should be read down or declared incompatible in the light of article 8 raises difficult and sensitive issues.” So again we say that’s the point that the interpreter role is involved in that. Goes on to say, still at 164: “On some issues, personal liberty and access
 5 ... being prime examples, the judiciary can claim greater expertise than it can on some others. The same applies to the legislature ...” Then goes on to the question of proportionality, “may well be appropriate to give a very significant weight to the judgments and choices arrived at by the legislator”.

10 Goes on to say its issues there including from the *Airedale NHS Trust* about what the role of the courts is not, and then cites Lord Mustill from the same case, two insights from Justice Scalia in *Cruzan*. “These are problems ...” that have to be “properly decided by citizens ... not by the courts.” So that’s the proposition that we’re all kind of wrestling with, and we say it’s not confined to
 15 proportionality. It goes back to the overall approach to the issue.

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Now again just to recall that in this case we’re talking about a really specific concept of individuals and their risk of, or their ability to undertake assisted
 20 suicide and also the implications for those who might assist them. Those are reasonably binary narrow issues, unlike an overall regulatory regime.

So at 166 Lord Mance says “mistake to approach proportionality as a test ... which is insensitive to considerations of institutional competence and
 25 legitimacy.” And goes on and carries on the rest of the propositions and discusses deference through the balance of the paragraph which I commend but won’t read.

Paragraph 167 he refers to previous authorities and, among others, refers to
 30 Lord Bingham’s speech earlier in the judgment where at paragraph 102 of this judgment, which we find on page 102, we find that quote from *Countryside Alliance*. Sorry, is it page 789, paragraph 102. Lord Neuberger sets out Lord Bingham’s *Countryside Alliance* proposition which concludes with a reference to subversion of the democratic process.

If that's a valid proposition, and we say that it is, then that proposition is not limited, in our submission, to the question of justification and well not less than the question of proportionality at section 5, it arises in the Court is considering the interpretation of the rights themselves.

5

So if we have here a right exhibiting, acknowledged in the way it's been presented by the Court, it's an expansion of the right. If the expansion is going to involve those sort of problems then we say that's a factor against interpreting it in an expansive way. If the Court nevertheless decides that it should interpret it in an expansive way, we say when it gets to the justification or the proportionality, it recognises the same proposition and says well even there's a, I don't know, technical breach, then this is a matter that is deeply either political and moral or deeply social and economic and it's a matter in which we shouldn't grant any remedy. Either way, there is no remedy and it's, we say in a case like this, it's obvious from the outset.

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WINKELMANN CJ:

Isn't there a problem with your submission though which is that it would mean that rights would be conscript – would be restricted – because rights are generally described in quite broad ways and then their place in society is worked out through the proportionality assessment. But you would cut the right back to avoid bumping up in the climate change area against what you say is policy but the cutting back of the right would operate in all sorts of circumstances where that kind of concern would not apply. Isn't it better for the law just to allow the considerations you're speaking of to be dealt with in the proportionality assessment?

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MR HODDER KC:

Well in our case we say that the Bill of Rights has to be approached in its own New Zealand circumstances and recognising that the Bill of Rights is a matter of conscious legislative decision didn't include the Treaty, it didn't include economic and social rights. All that is well known and understood. In those circumstances the right to deprivation or the right not to have one's life deprived has the ordinary continuation of the common law ideas which were protected

30

by criminal law in particular, but also in the tort law about not having your life deprived by somebody else's action and a reasonably close causal connection and dealing with all sorts of issues that are well known: the abortion issue, capital punishment, suicide, so on and so forth, nothing remotely of the kind

5 that we're talking about here and we say that – and also the language is different to the Canadian legislation, it's different to the European legislation, as I said we don't have the protected by law aspect you find in some of those. In those circumstances then the language of section 8 can be taken to mean what it says. You cannot be deprived of life by the State. What we're talking about

10 in the claim brought forward by the appellant is something quite substantially different, not by just a question of degree, it's by a question of the different level of obligation, and if it's –

1300

WINKELMANN CJ:

15 So your argument, your principal argument then is that section 8 does not reflect the international commitments that were made, does not fully reflect the international commitments made in the ICCPR and –

MR HODDER KC:

No, it's –

20 **WINKELMANN CJ:**

And shouldn't be construed into a positive obligation because it involves really giving it social and economic content as well, which New Zealand decided not to do, and that's why it's just carried on the old common law thing in section 8.

MR HODDER KC:

25 I don't think the – the common law is part of it, so we would say that yes, the legislative history matters and again I don't imagine any dispute about that, the *White Paper* never had anything remotely like this, no expectation of anything like this in the Parliamentary materials that led up to it, but a deliberate pulling back from the original proposal so that the courts weren't involved in social and

30 economic matters, that is the way in which we say the Court should be

approaching section 8 and that the attempt to leverage off decisions in other jurisdictions which don't have that same, that legislative background, is erroneous.

COOKE J:

- 5 Can I just understand what you're saying the right in section 8 is, is that limited to the State cannot take your life?

MR HODDER KC:

Yes.

COOKE J:

- 10 And nothing more than that?

MR HODDER KC:

- Well it can't – yes, it can't directly cause the taking of your life. I mean I'm not – I don't think I need to resist the proposition if you have somebody in State control, I mean what's an example, I think maybe in the literature the idea that
 15 you have people incarcerated in a prison institution which is sitting on top of a volcano or sitting underneath a landslide that maybe there's something involved in that aspect of it. It goes positive – it goes beyond negative to positive.

COOKE J:

So it does include some protective due care situations?

- 20 **MR HODDER KC:**

Yes.

COOKE J:

And why wouldn't that be engaged by what the appellant says here, if failing to take due –

- 25 **MR HODDER KC:**

The remoteness, the causation levels are just entirely different, because what's being challenged is not a particular action of a kind that could easily be the

action of a tort claim, for example, or – probably tort is the best example, but is in fact requiring the Court to become engaged with the entire edifice that the CCRA represents at its international and its internal inputs and complexities.

WINKELMANN CJ:

5 Well we'll take the – did you want to –

KÓS J:

Well that's at the second stage of the analysis, but in the first stage when we're identifying the right it's not simply a negative obligation, a non-denial of right, but the question is how far there is an obligation of active protection on the part
10 of the State to give effect to section 8.

MR HODDER KC:

Yes.

KÓS J:

You accept that there must be some measure of active protection?

15 **MR HODDER KC:**

In relation to specific individuals or specific minorities. If there is – if you have a Rwandan situation and there's a minority being persecuted and they gave –

KÓS J:

Or an Act of Parliament that only applies to blue-eyed, blonde people, it protects
20 them but not others, for instance?

MR HODDER KC:

Yes, but again it has to be kept within a narrow confine. It doesn't require the Court to be engaged at all in something as broad as the considerations that go towards climate change responses, that it –

25 **WINKELMANN CJ:**

Mr Hodder, I think we had all understood that your argument was more than this, that it went to that framework issue. So it would be good – we'll take the

luncheon adjournment now but it would be good to have clarification about that, thanks.

MR HODDER KC:

Sure, thank you.

5 **COURT ADJOURNS: 1.04 PM**

COURT RESUMES: 2.19 PM

WINKELMANN CJ:

Mr Hodder.

MR HODDER KC:

10 Thank you, your Honour. There were a few matters that were put to me as things to focus on or contemplate over the lunch hour. I have duly focused. Satisfaction may be a different question. Firstly on Justice Kós' question about how we're doing, that turns out to be not quite as straightforward as you might hope, but –

15 **WINKELMANN CJ:**

How we're doing against our CCRA targets.

MR HODDER KC:

Well we say in our submissions at paragraph 40 that in the first ERP period we have met those.

20 1420

KÓS J:

Whereabouts in the submissions, Mr Hodder?

MR HODDER KC:

Paragraph 40, Sir.

KÓS J:

Paragraph 40, thank you.

MR HODDER KC:

Paragraph four-zero. So the first budget ended in the end of 2025 and the
5 projection is to meet with a buffer. That is the CCRA proposition.

In terms of the NDCs, which is more complicated, because that depends on whether – so a combination of both the CCRA emissions reduction plus any other matters that are undertaken including the purchase of offsets and at this
10 stage it's we don't have that information and in particular, well, we haven't had information directly back from particularly the Crown, but what I can refer the Court to is the Ministry for the Environment has on its website an item headed "New Zealand's Projected GHT Emissions" and it deals with both the international and the domestics and, as I read it, we are coming down but there
15 is a gap which will need to be bridged by something which other than the CCRA activities and that raises the question of whether or not the country will be purchasing offsets.

KÓS J:

Right.

20 **MR HODDER KC:**

And that's the position.

WINKELMANN CJ:

Which is where the media commentary has come in about whether we're going to be purchasing offsets.

25 **MR HODDER KC:**

Yes.

WINKELMANN CJ:

That's it, yes.

MR HODDER KC:

There is a question about whether that's a – and that would require a decision by Parliament. So, if it helps the Court or Justice Kós in particular to look for more material, I can try and do that but that, I think, is –

5 **KÓS J:**

No, I think that's – I think that found some myself.

MR HODDER KC:

All right.

KÓS J:

10 Which rather suggested we were doing quite well on the GHT reductions for energy but poorly from agriculture, the broad picture, that's probably what you saw over lunch as well.

MR HODDER KC:

Yes. Relatedly perhaps, or almost relatedly, I should have said earlier in
 15 response to an exchange between, I think, my learned friend Mr Salmon and the Court, the Crown's emissions are covered by the CCRA and we can find all that in something called the New Zealand Greenhouse Inventory 2026 and so things like the Defence Force operating a landfill, Air New Zealand owning fossil fuels, forestry activities undertaken by the Accident Compensation Corporation,
 20 are all covered by items or by entities listed in the schedules to that inventory and are part of the scheme that way and the Crown-owned companies, including the part-owned SOEs, the energy companies, are also listed in the schedules, in particular we're talking about Schedules 3 and 4 of that Inventory.

WINKELMANN CJ:

25 Which inventory?

MR HODDER KC:

It's called the New Zealand Greenhouse Gas Inventory 2026. We can send a link to the Court if that helps.

WINKELMANN CJ:

And you say it covers the whole of the Crown? Covers the whole of the Crown?

MR HODDER KC:

Yes, any Crown emissions are within that, any Crown activities. So coming out,
5 the activity is what creates the obligations and there is no discrimination or no exemption or immunity for the Crown's activities.

WINKELMANN CJ:

And the Greenhouse Gas Inventory, is that used to report internationally?

MR HODDER KC:

10 That I don't know. I can find out.

WINKELMANN CJ:

Well, I was just wondering what it means, that they're covered by the CCRA, how it is the New Zealand Greenhouse Gas Inventory tell us that they're covered by the CCRA?

15 **MR HODDER KC:**

Well, an ETS is part of the CCRA and there's something in the ETS, is what I'm saying.

WINKELMANN CJ:

Okay.

20 **MR HODDER KC:**

The third point that I was asked about was the *Ngāti Whātua Ōrākei* decision. A certain amount of nostalgia going back and rereading that again, but so I don't have any queries at all, I'm very happy with that decision then and now. I accept, of course, that it says that when there are preexisting rights and they
25 do not involve interference with the Parliamentary proceedings then the Court's obligations to our jurisdiction to deal with rights is extant, and then there was a difference of opinion about whether that's what happening with two of the

declarations that were sought, but the other six declarations then duly went to trial, so there's no doubt about that.

1425

- 5 The point that I was and just to be clear, those rights were largely rights of tikanga, mana whenua was the primary one that was being pursued in relation to the particular executive actions that were contemplated in that case.

- 10 The reason for referring to *Sealords*, which may/may not have impressed itself upon the Court as being a particularly useful exercise, was because when the Court said it would – whether or not it would be wise to enact legislation, there's a political question for political judgment –

WINKELMANN CJ:

Sealords says that?

- 15 **MR HODDER KC:**

Sorry?

WINKELMANN CJ:

Sealords says that?

MR HODDER KC:

- 20 *Sealords* says that. That's at page 309, line 12, and the underlying question is why? Why is it not wise for the courts to pronounce on whether a legislation is wise? And that is because, at that point, you are into politics and that's the language, that's the word that the Court uses. It's a political question for political judgment and so my proposition, which I probably didn't express at all well,
- 25 that when the issue arises as to whether something is wise, that does get you into, in shorthand, politics, whether the way, and so when you ask about whether the way we're dealing with climate change responses is sufficient or adequate, then and say, well, there might be other ways to do it, then the real question is, is it wise to do it the way we've done it or is there greater wisdom
- 30 in doing it a different way?

That's the main issue that is raised by the exercise and our point is, that if you're asking that question substantively, which we say the plaintiff/appellant is, then we are in the realm where judicial reasoning and yardsticks are in trouble. That's all, no more no less. As I say, possibly more trouble than I intended to
5 cause.

That takes me back then, or that one takes me to the last of the items that I understood the Court wanted to hear from me, which is the discussion not least with the Chief Justice about what our position was about, in particular,
10 framework obligations and having gone back and looked at our written submissions I think they say pretty much what I thought I was saying before, that and this in terms of being accurate, in terms of our written submissions, those written submissions cover the really from about paragraph 118 all the through to about paragraph 151, are all really variations on the same thing.

15

So under paragraph 118, the scope of the right does not enable the courts to review the adequacy of legislative settings.

And then, section 8 concerns actual loss of life or increased likelihood of death,
20 that's at paragraph 126.

And then at paragraph 134, no sufficiently real and imminent risk to life for positive duty to arise.

25 And then finally, no positive framework obligation in section 8, at paragraph 146.

They are variations on the same theme, although the way I put it, I think, was in terms of there's an interpretation issue about section 8 in part based on
30 legislative history, because of that it doesn't extent to a framework obligation, both of those being interpretation issues, and that to the extent that there is an operational positive duty that's in very confined imminent circumstances. That's illustrated by the Court of Appeal decision in *Wallace*.

And then underpinning most of that, there's a general proposition that says there is an institutional competence issue because getting into those issues does require the Court to go to the far end of the Tipping *Hansen* spectrum.

WINKELMANN CJ:

- 5 So your point is not that there is no – you're not taking a jurisdictional point about the Court's DOI powers, you're making a narrow point about section 8 and the scope of the power such that it can't be placed at a positive level that requires the Court to review the framework?

1430

10 **MR HODDER KC:**

Most of those submissions I referred to go to the interpretation exercise but they also, we say, apply to the discretion about the DOI if you get to that point, as they would apply to the proportionality exercise as well.

KÓS J:

- 15 In terms of the question of interpretation and imminence –

MR HODDER KC:

Yes.

KÓS J:

- there seems to be an implied question of fact in that whichever way you look at it, that is to say how imminent is adverse harm threatening life. I assume that we would be dealing with that on the balance of – or a trial court but possibly this Court – looking at the thing at a broad level, would be concerned with that on a balance of probabilities basis? I tell you where I'm getting to with that question which is the IPCC analysis which doesn't seem to admit of a great deal of doubt that alone on the balance of probabilities it will, and which I understand the Crown broadly accepts.

MR HODDER KC:

Well, the Crown accepts the general thesis of the IPCC. The apocalyptic vision that you got from my learned friend is not part of that acceptance and –

KÓS J:

- 5 Well I think I'll read the IPCC rather than the apocalyptic oral submission.

MR HODDER KC:

- Yes, so I'll come to that but the general proposition is that it is founded, that the appellant's pleading and case is founded essentially on the minimum global reductions based on IPCC literature and there is no prescription in the IPCC literature. It does, I think I'm going to come to this, but there are about 97 pathways that it has mapped out and one of those is reflected in the minimum global reductions as defined only in the statement of claim. Not defined that way anywhere else. So there is no such prescription defined anywhere else. Within that there are a range of projections as to how this will play out. None of them are happy projections, I accept that and the Crown accepts that and that's why taxpayers are spending a reasonable amount of money on the whole system, but what can't be said with any certainty is that the apocalyptic vision is inevitable. There are all sorts of things going on around the world to try and deal with that. We have no idea how that will work out in –

20 **WINKELMANN CJ:**

Although the apocalyptic vision is currently playing out in France where there's been 1,600 excess deaths this year.

MR HODDER KC:

16,000 sorry, attributable, they believe, to the heat.

25 **MR HODDER KC:**

There's certainly issues around that. There's also literature around that says that's mostly due to a failure to clear the old undergrowth, as happens in Australis. That is a question of management and adaption which was not being successfully undertaken, and there's differing data about the areas that are

affected, estimating Canada, for example, has less on fire this year than the previous years, but it has fires every year.

WINKELMANN CJ:

No this is not fires, this is to do with the temperature rises causing excess
5 deaths.

MR HODDER KC:

I have – the only ones about France that I'm familiar with are the ones that are associated with the recent heatwave in '25. Anyway, those are matters that the Court doesn't have because we don't have extensive facts on a strike-out
10 application.

WINKELMANN CJ:

Yes.

MR HODDER KC:

My proposition is simply that the expectations that are in New Zealand in terms
15 of the executive and the legislature are that we are making progress and it's worthwhile making progress and we are looking forward to being able to combine a viable economy with a meaningful reduction in emissions from this country. That's what the ERPs are both about and they are giving effect to the legislation and I should've mentioned before but didn't, that the duty of the
20 Minister under section 5X is to ensure the emissions budget are met. That's the matter that can be, you know, it is a question where, as are many aspects I would suggest of the CCR, it could be subject to judicial review but it doesn't require the kind of litigation and trial that is contemplated by the appellant.

COOKE J:

25 Can I just check what your interpretation argument is about section 8 because I think you accepted that section 8 is not just the State can't take your life, but there is a degree to which the State must protect against the loss of life, yes?

MR HODDER KC:

There's an operational requirement in specific situations.

COOKE J:

5 Okay and how would you formulate with precision what the scope of that obligation is?

MR HODDER KC:

I think I would frame it in terms on being something both imminent and within the scope of the negligence causation arrangement. They were effectively equivalent to a duty of care in tort.

10 1435

COOKE J:

And you say that it's not arguable here, is that because although climate change increases the likelihood of loss of life, extreme weather events kills people, but because New Zealand's just a drop in the ocean in terms of the emissions causing that?

15

MR HODDER KC:

So I would say more indeterminacy on a whole range of issues which would be the normal way in which a duty of care will probably be addressed if it were raised in a tort action now. So the indeterminacy issues would be ones that would be sufficient, in our submission, to defeat a tort claim of that kind.

20

COOKE J:

So not sufficiently determinate?

MR HODDER KC:

Yes.

25 **WINKELMANN CJ:**

What's not sufficiently determinate? Who's responsible or – what's not sufficiently determinate, Mr Hodder?

MR HODDER KC:

It's indeterminate about who the duty is owed to and the extent to which it is going to be affecting, kind of, where the rest of society. It's the same point that arose or has arisen at various points but the famous formulation is an independent indeterminate number of persons affected in an indeterminate value.

COOKE J:

But you don't have to know who's going to drink the ginger beer with the snail in it.

10 **MR HODDER KC:**

No.

COOKE J:

So provided there is an increased risk to the loss of life from the inaction, isn't that sufficiently determinate, approximate?

15 **MR HODDER KC:**

We would say that indeterminacy is a wider precautionary approach in these areas and it's simply that and there were a range of – I think probably some Canadian judgments I'll have to think of due course in recent memory that go to that point, but I think there may be a whole range of other situations there that – I mean the relationship which brings all sorts of policy factors into identifying the relationship that's relevant to the duty of care, those sort of issues arise and if, I mean we are talking about something that is very substantial.

WINKELMANN CJ:

I'm not sure why we'd be using tort law to define the scope of the section 8 obligation.

MR HODDER KC:

Well I'm offering it really on the basis that it provides a useful tool that the law already uses in order to avoid indeterminacy because it factors indeterminacy

in as a control mechanism and if there are no control mechanisms then we finish up with quite extraordinary consequences beyond where the courts would normally expect to have their decisions go.

WINKELMANN CJ:

5 It's just the rights model has its own methodology, doesn't it?

MR HODDER KC:

Well –

WINKELMANN CJ:

10 So that's what proportionality is, it's a methodology to constrain the obligations placed upon the State.

MR HODDER KC:

That's the language that's used, I agree your Honour, but in substance it seems, in our submission, that the same issue is dealt with in tort by reference to those different words of indeterminacy and policy.

15 **COOKE J:**

I mean, one way of looking at it is that New Zealand has agreed internationally that climate change is life-threatening and it can only be addressed by collective action and if New Zealand fails to meet its international obligations in that respect it is increasing a risk of life that it's agreed it should not allow.

20 **MR HODDER KC:**

I agree one can formulate a conceptual argument like that and indeed obviously we've got that pleaded in some detail by the appellant, but the question is whether it's a pleading of a kind which can be accepted as being one which does not involve disrupting society to such an extent that it should be regarded
25 as untenable in terms of the implications and the resources involved. I mean, it doesn't matter from the plaintiff's pleading because it starts with a premise, which the Crown doesn't accept and the Court shouldn't accept, that there's no alternative otherwise there will be no society and no civilisation. That is an

assumption which the Court has nothing substantive to underpin it apart from the assertions and pleadings of the appellant. But if the consequences that are being sought in litigation involve that assumption, then everything based on that assumption should not be coming to the Court.

5 1440

WINKELMANN CJ:

Yes, I'm still struggling with the tort formulation of how we go about scoping a right under the Bill of Rights Act, because traditionally the courts have had regard to New Zealand's obligations under the ICCPR when they scope the
10 right as opposed to – I mean certainly it's obviously relevant to how it would work in society, I freely accept that, but you are relegating the ICCPR into nothing in this analysis?

MR HODDER KC:

I'm relegating to the one factor the Court will take into account, having regard
15 to the differences between what the language is there and the way in which it's been applied elsewhere and the position here.

WINKELMANN CJ:

Hmm.

MR HODDER KC:

20 Particularly when the challenge is to legislation.

WINKELMANN CJ:

Because under the ICCPR that work you're talking about is not done by tort time of conceptions, it's done by proportionality, because it is a broadly-stated right.

25 **MR HODDER KC:**

I agree with your Honour, but I was attempting to respond to Justice Cooke's question, which is effectively how would you – what does the Crown say you would limit this by.

WINKELMANN CJ:

Yes, and having done so, I'm now testing your model to see how it stands up.

MR HODDER KC:

And I'm suggesting to the Court that proportionality – well (a) bearing in mind
 5 the proportionality and policy issues and that would go to the interpretation
 function under the Bill of Rights Act, and if you get to the point where
 proportionality comes into it then the question arises there again, which I'm
 about to get to, which says that these are matters on which it's not possible to
 apply the legal yardstick, and therefore they are best dealt with by not getting
 10 the courts involved, which is where I was about to go with *R (SC) v Secretary
 of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223.

WINKELMANN CJ:

Is that a case?

MR HODDER KC:

15 Yes, your Honour. And this is a more recent case than *Nicklinson*, which we
 looked at earlier today. It's in our bundle at tab 123, according to my notes. I
 hope that's right?

KÓS J:

Yes, it's tab 123. SC, tab 123.

20 **MR HODDER KC:**

I've got tab 123 on my note.

KÓS J:

Yes, well it's come up on my screen, yes.

MR HODDER KC:

25 If that works, that's good.

KÓS J:

Yes.

MR HODDER KC:

So this involved a question of the two-child limit on child tax credits, as the Court may be aware, and there were claims that this was a breach of rights relating to family rights and they were dismissed, including with reference to the democratic credentials of Parliament's choice to limit it to a two-child family.

So there was a passage which starts around paragraph 159. I should say that this is a judgment delivered by the President, Lord Reed, on behalf of a seven-member bench. The judgment starts at page 240 of the report, and I'm citing the case for the proposition that the courts do recognise in various ways, here including the questions about the "manifestly without reasonable foundation" approach, in which that institutional competence is taken into account. So the starting point of the discussion is at paragraph 159. It is not just a matter of "categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions", takes into account "other factors", but "the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security".

1445

20

And paragraph 160 says, well, that phrase is the same as "a wide margin of appreciation" recognised in the European court and other areas: "... national security, penal policy ... sensitive moral or ethical issues." And then paragraph 161, the "more fruitful" question is whether: "... a wide margin of judgment is appropriate in ... the circumstances of the case," talking about "a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy", et cetera. All of that is entirely consistent with what the UK appellate court has said.

And then paragraph 162: "It is also important to bear in mind that almost any legislation is capable of challenge under article 14," and cites from the *JD and A v United Kingdom* (Application Nos 32949/17 and 34614/17) [2020] HLR 5, ECtHR opinion, and quoting from that says: "Any legislation will differentiate." And then the quote goes on –

WINKELMANN CJ:

What paragraph are you at, sorry, Mr Hodder?

MR HODDER KC:

I was quoting – I am referring to Lord Reed’s paragraph 162 at the very bottom
5 of page 285.

KÓS J:

And Article 14 is the discrimination provision, is it?

MR HODDER KC:

Yes. And then he finishes the quote over on page 286 and says: “In practice,
10 challenges to legislation on the ground of discrimination have become
increasingly common ... They are usually brought by campaigning
organisations which lobbied unsuccessfully against the measure when it was
being considered in Parliament ...” et cetera. And then a little bit further down
in that same extract at about marginal note C: “Since the principle of
15 proportionality confers on the courts a very broad discretionary power, such
cases present a risk of undue interference by the courts in the sphere of political
choices.” And then goes on to say it has to be avoided by applying: “... the
principle in a manner which respects the boundaries between legality and the
political process.” And then has another quote, a relatively blunt quote from the
20 judgment he cited before, the *JD* judgment.

WINKELMANN CJ:

Is this a strike-out?

MR HODDER KC:

I’m sorry?

25 **WINKELMANN CJ:**

Is this a strike-out?

MR HODDER KC:

I don't believe so. I had assumed it was judicial review.

WINKELMANN CJ:

Would consent had to have been obtained, hmm.

5 **KÓS J:**

Claims for judicial review.

WINKELMANN CJ:

It is.

KÓS J:

10 Yes.

WINKELMANN CJ:

In most circumstances they have to cross a threshold, don't they?

COOKE J:

Get leave.

15 **WINKELMANN CJ:**

To get leave?

MR HODDER KC:

They would under that, under the British system, no question. But again, the general standing back approach is required in considering the leave application as well.

20

So the judgment goes on and the topic is picked up – there's another quotation of the point made in *Countryside Alliance*, we find that at paragraph 179 about the democratic process being "liable to be subverted". That's at page 291C.

25 And then paragraph 180 talks about: "... the degree of respect which the courts should show to primary legislation ... will depend on the circumstances. Among the relevant factors may be the subject-matter of the legislation, and

whether it is relatively recent or dates from an age with different values ... [and] whether Parliament can be taken to have made its own judgment of the issues which are relevant ... If so, the court will be more inclined to accept Parliament's decision, out of respect for democratic decision-making on questions of political controversy." So again I acknowledge this has been dealt with in a proportionality discussion, but the –

WINKELMANN CJ:

And what's the procedural context for this one?

MR HODDER KC:

10 In the context?

WINKELMANN CJ:

Yes, is it a strike-out or it's a judicial review? This is *Countryside*, is it?

KÓS J:

Have we moved to *Countryside* or are we still in –

15 **WINKELMANN CJ:**

We haven't. We're still on *Work and Pensions*.

MR HODDER KC:

I simply mentioned the quote from *Countryside* was in this judgment at paragraph –

20 **KÓS J:**

Yes, thank you.

WINKELMANN CJ:

Oh, okay.

KÓS J:

25 I was trying to find that. So where was that?

WINKELMANN CJ:

It is in the materials. Tab 55?

KÓS J:

But where is the quote from *Countryside* in SC?

5 1450

WILLIAMS J:

Over the page.

WINKELMANN CJ:

Countryside is the Hunting Act 2004, hunting of wild mammals with dogs.

10 **MR HODDER KC:**

In the SC judgment, your Honour, it is at page 291C which is part of paragraph 179.

KÓS J:

I'm not sure that is *Countryside*, is it? Oh, it is, yes, thank you.

15 **COOKE J:**

And again, you're just – you're inviting us to adopt a similar approach to the definitional questions of section 8 of the Bill of Rights, is that right?

MR HODDER KC:

I am and I just can mention it and for about the way the question is framed in
 20 part is at paragraph 199, after explaining that there were two issues that the –
 or two mischiefs that the legislation was concerned with, one was the high level
 of public spending and the second was that there was a guaranteed inflationary
 adjustment for that spending, then Lord Reed says at paragraph 199 there were
 “legitimate aims”, if you were going to have a differentiation than that what was
 25 going to happen then: “... the remaining question which can be asked ... is
 whether the inevitable impact on women outweighed the importance of
 achieving the aims pursued. Parliament decided that the importance of the

objectives pursued by the measure justified its enactment, notwithstanding its greater impact on women. I see no basis on which this court could properly take a different view.”

- 5 Because as he says at paragraph 200: “That is, of course, the differentiation deliberately made by Parliament in enacting the legislation.”

COOKE J:

In New Zealand, we would be addressing these questions under a section 5 analysis?

10 **MR HODDER KC:**

Yes and I accept that that’s where it would apply, but the policy, the principle under this point, is that these are matters where the Court, having considered what the particular circumstances of the case are, may choose to not go and our submission to the Court is it should choose not to go here because of those
15 sorts of considerations. Whether it's done in a strike-out stage by way – including by way of definition or otherwise.

WILLIAMS J:

- If it's established that threat to life is imminent, if that's established as a result of the settings in the legislation, doesn't this argument really mean it's a matter
20 of policy and careful democratic consideration pursuant to which Parliament has decided people will perish? That can't be your argument. You've got to be saying that the facts aren't going to get them there, because if the facts do get them there, how can this argument help you?

MR HODDER KC:

- 25 Because it's a strike-out, I have the situation of whether or not we have to accept the facts as pleaded or whether the Court has the ability to stand back and say, in any circumstances, we're not going to go here in these circumstances.

WILLIAMS J:

But your argument is, this is a matter of policy and democratic mechanisms operating –

MR HODDER KC:

5 It is, it is.

WILLIAMS J:

– and judgments have been made, et cetera, et cetera, right? And that may well be so, except if it can be established at trial that there is an imminent threat to life, then the democratic process won't be a reason not to look at it, surely?

10 **MR HODDER KC:**

Well, you come back to the basic dichotomy here. If there is something that can be challenged on judicial review by way of executive decision-making, fine, judicial review is available.

WILLIAMS J:

15 But Parliament can decide a proportion of the population can perish?

MR HODDER KC:

If the proposition is that there was more that could be done to save people who live in areas prone to fires, for example, there should have been more money spent on clearing the undergrowth and that is something that is a State or
20 another public responsibility, maybe.

WILLIAMS J:

Don't you think the closer you get to the proposition of imminent threat to life –

MR HODDER KC:

And again, the Court –

25 **WILLIAMS J:**

– the more judge-like the decision becomes, even if it's a decision made in Parliament?

1455

MR HODDER KC:

No, I don't think I accept that proposition. In the end, we come back to the core proposition as to why we have Parliamentary sovereignty, is because decisions
5 that involve balancing are required to be made by those who are democratically accountable. I mean, your Honour is putting me a difficult proposition and I don't see it as one that is at all made out in this case and shouldn't be –

WILLIAMS J:

But that's on the facts?

10 **MR HODDER KC:**

It shouldn't be, well, it shouldn't be accepted.

WILLIAMS J:

You're arguing at quite a high level. You're basically saying, whatever is going to happen here, it's a matter of politics and democracy, it's not a matter of rights.

15 **MR HODDER KC:**

And I'm saying, well, I'm saying that partly because it's about projections, we simply don't know and in the absence of not knowing, the basic proposition is the constitutional arrangements we have will carry on.

WINKELMANN CJ:

20 If you look at your paragraph 179, in this case. I'm just wondering how your submissions stands against that?

KÓS J:

In SC?

WINKELMANN CJ:

25 Yes, in SC. Think it's paragraph 179.

MR HODDER KC:

Sorry, Ma'am, I'm at paragraph 179 of SC?

WINKELMANN CJ:

Yes, second quote.

5 **MR HODDER KC:**

Yes, I accept that, too.

WINKELMANN CJ:

So but that means the courts embark upon the inquiry. That you're basically saying that because this is a policy-rich area, climate change, the courts should
 10 not, it's not justiciable. But there is a rights-framework that Parliament has created and to quote Lord Bingham – well, I'm not quoting him, I'm paraphrasing him – that's the democratically assigned task for the judiciary to do that. So, I am not understanding how any of these, and all the cases you're taking us to are where the judiciary has been performing its democratically-assigned task
 15 and then it's decided, oh, no, this has actually got – there is too much policy content at the back end of the exercise when we come to proportionality, we're not satisfied it's a case we should interfere in, which is the exception of *Nicklinson*, I think, but in these other cases they've said, no, there's a margin of appreciation at the proportionality assessment.

20 **MR HODDER KC:**

Yes.

WINKELMANN CJ:

But the Court hasn't said we're precluded because this is a policy-rich area, even in the case of the two-child benefit limit, they haven't been – they haven't
 25 said this is not, this is beyond our jurisdiction.

MR HODDER KC:

And I think I said earlier, I'm not contending for a no-go area, I'm contending the proposition that the Court can look at the whole of the piece of proceeding

it's concerned with, to come to a view about whether it is or is not at the far end of the spectrum in terms of *Hansen* or whether it would be subverting the democratic process in terms of *Countryside*.

COOKE J:

- 5 You're saying we should define section 8 so we don't get into this?

MR HODDER KC:

- I am. And entirely legitimately to do so and effectively the Court's members are validly expressing and testing the proposition that says, well, what if they're right on their apocalyptic proposition that threats to life are imminent and we say you
10 should not accept that proposition without something much more substantial than you've got.

WINKELMANN CJ:

Well, it's a strike-out though, so we do kind of have to accept it.

MR HODDER KC:

- 15 That's the problem this creates because the courts also recognise, as this Court does as well, that it's not that hard to take an expansionist view of almost any right and, as is said in this case, section 14 rights are relatively commonplace, one has to be careful about enabling them simply to be used for political ends which is what we say is happening here, and the Court is alive to that.

20

The alternative is a long, drawn-out process of trial and which will involve that long period of assessing, as the appellant is entirely candid about, assessing 30-odd years of executive and Parliamentary action and in terms of knowledge.

- 25 So is that kind of almost – and plus it also has the idea that at the end of it the Court acts as some kind of probation officer to see whether or not it's kind of Parliament's been kicked up to the mark.

- All of that is sort of so foreign to our system, that it should be rejected as being
30 so foreign to our system.

WINKELMANN CJ:

So Mr Hodder, those questions I had for you before lunch, they were not – I was not trying to trick you or anything, I was really interested in what your submission was. So I am correct then in understanding that you do not take a

5 position that the declaration of inconsistency jurisdiction could not extend to the courts reviewing the adequacy of a legislative response or a range of legislative response overall. Your point is simply that in this case, section 8 should not be so expansively defined so as to draw the Court into that kind of exercise?

1500

10 **MR HODDER KC:**

I am. I'm sorry to – I hope I'm not restating it differently. There was an initial question about whether the Court gets there because there's a right affected. That's a question of interpretation. We say the Court shouldn't get there for reasons that we've already been discussing and which are set out in detail in

15 my written submissions which I am not seeking to amend or change.

If the Court says, okay, either we need to test the hypothesis that it might be there or even says there is a right of that kind, then we say the rest of it falls into the same sort of areas that Lord Reed is describing in this judgment in

20 particular in ways in which proportionality suggests that the Court should not get themselves involved in these kind of issues because it is going to involve an assessment of the workings of a complicated piece of legislation which has a major governmental edifice around it and which has been in operation for two and a half decades and for the end result of a declaration that said somehow

25 it's inconsistent with these rights.

So there are discretions, the first part, it's all discretionary, right, so the interpretation is in a sense discretionary. Beyond that there are other discretionary steps. The general proposition to the Court is, as set out in our

30 submissions, at each stage the Court will be mindful of the consequences and context in which this matter is being raised against a backdrop of complete disregard of constitutional orthodoxy and in that situation we say that's enough to justify the strike-out, even if there are pleadings which, if you took them

absolutely literally, in other circumstances you might say you don't get there, and the reason I referred to in my questions this morning about is it a proper use of the Court's resources and processes is that ultimately the strike-out jurisdiction is just about that. Is it a proper use of the Court's processes and resources? Let alone the resources of other parties. So we say all that comes together. It's all the same point.

COOKE J:

I understand the definitional argument without difficulty. I find the other part of your argument harder to conceptualise. Is it saying that, and I understand the sort of, the pleading, the kitchen sink pleading, everything's in there, but are you saying that adopting the general approach of these cases, the Crown's case on a section 5 justification is so strong, the pleading can be struck out now?

MR HODDER KC:

Yes.

COOKE J:

So is that the point?

MR HODDER KC:

That would be one – that's part of it, but it's included in my submission.

WINKELMANN CJ:

It's a second leg of it as –

MR HODDER KC:

It's part of the second leg of it.

WINKELMANN CJ:

Well because the first leg is don't define the right that widely, so it's just non-engaged.

MR HODDER KC:

Yes.

WINKELMANN CJ:

And the second leg is if it's engaged then it's such a lay down *misère* on
5 proportionality and so clearly margin of appreciation that it should be struck out
now too, is that –

MR HODDER KC:

Yes. There may be more to it than just that but that's essentially it.

COOKE J:

10 Well I'd be interested what the "more to it" is because I now understand two
frameworks for your argument. Is there something else?

MR HODDER KC:

Well my understanding of the human rights jurisprudence is that there are
various considerations that the Court takes into account between the right being
15 identified and the section 5 analysis being applied, and no matter how it's done,
whenever there is a discretion to the Court and that's in analysing and reading
it, that discretion should be influenced by the matters I'm talking about.
Primarily that will be section 5 and disproportionality or margin of appreciation.

KÓS J:

20 That's really a constitutional argument, not a factual argument. You're not
making a case that the CCRA is an adequate response. You say we should
not even consider that question.

MR HODDER KC:

Yes. So if we can kind of use language I don't think is being used yet. The
25 Crown has no objection to judicial review of decisions that are being made
under the CCRA to the extent that that's justified in the ordinary way. It's
already been done, the cases that I took you to and the Court's well aware of.
What we object to is something like a constitutional review which is what is

sought to be invented in this pleading, a claim against legislation and against parliamentary action outside judicial review. We say that's not known to the law and it shouldn't be allowed to proceed.

1505

5 **WINKELMANN CJ:**

And yet then those courts had no problem contemplating such an approach in relation to the two-child benefit. They allowed that to run through the courts and reach fully considered resolution because of the task that they had been assigned to do.

10 **MR HODDER KC:**

Right, sorry, that's a fair response. In terms of the claims, the proceeding that the Attorney is responding to, that narrows it down to the Bill of Rights Act and that takes us back to the question of the discretion to issue a declaration of inconsistency. We would say that there is a discretion, I mean there is a suggestion in places that there isn't. We would say there is a discretion. We'd say that discretion is informed by the same things I'm talking about.

15

WINKELMANN CJ:

So it's the third leg of it?

MR HODDER KC:

20 It is.

WINKELMANN CJ:

Yes. The point about, what is it, Mr Butler's in *dubio pro actione*, favouring access to the courts. I think that's what it was.

MR HODDER KC:

25 Switzerland.

WINKELMANN CJ:

Anyway, that kind of shuts the courts down before they even get started and there is a comity issue there too, Mr Hodder, because the courts do have a really significant role in our democracy rule of law obviously but also

5 investigating and considering carefully, rights issues. But if you just strike things out because you say, well look, this is a policy-rich area, we're not going to let you bring this proceeding through to hearing, that shuts that out.

MR HODDER KC:

Well I hope I said nothing that says that the courts don't have an important role

10 in this area, and I'm just trying to make that clear by reference to the judicial review areas by mentioning the fact that there's a role specifically written into the CCRA about that and that the Court's general jurisdiction is obviously fundamental and important.

15 What I am trying to respond to the proposition that says when you have a case that's so far removed from ordinary constitutional conventions and settings, that it is possible for the Court to say in advance, without going through the acceptance of all the facts as pleaded when having a trial, that here the settings and the nature of the issues are such that the Court cannot find a way to come

20 to a conclusion on that, and the proposition that is better put than I am putting it would take us to the last couple of pages at (SC) in paragraphs 203...

WINKELMANN CJ:

203 did you say?

MR HODDER KC:

25 203 on page 296 and from about, just on marginal note D: "Since the legislation is a general measure of social and economic strategy, involving an assessment of priorities in the context of the allocation of limited state resources, it follows that Parliament's assessment that the difference in treatment is justified should be treated by the courts with the greatest respect."

KÓS J:

I mean this is where it seems to me that your conversion of the analysis from a quinella to a trifecta actually works against you. If the second step is the proportionality one and you say well there's a constitutional argument, we
 5 shouldn't embark on that, the fact that another possibility is that at the third stage the Court would decline to grant relief in its discretion might suggest that the Court could approach the second stage with slightly more enthusiasm, bearing in mind that at the third stage it might say well, actually, despite the fact we find an inconsistency we will simply leave it there and let Parliament reflect
 10 upon that without actually making a formal declaration.

MR HODDER KC:

Well the way your Honour's putting it, on my first step we don't have a trial, on my second step we don't have a trial, on the way you're putting, describing the third step we do have a trial and the Attorney's position is there should be no
 15 trial.

KÓS J:

I understand that.

MR HODDER KC:

And that at this stage the Court is in a position to say that the discretion equally
 20 would be affected by the same considerations.

KÓS J:

Well I find that very difficult. It seems to me that a judge would not know whether to withhold relief in their discretion until they knew the outcome of the first two stages.

25 **MR HODDER KC:**

Well, but that dooms us, well that's wrong –

WINKELMANN CJ:

You don't concede that point, Mr Hodder.

KÓS J:

I'll note the concession.

WINKELMANN CJ:

Yes, we'll record that concession.

5 **MR HODDER KC:**

That dooms us to purgatory rather than oblivion.

WINKELMANN CJ:

Oh, I get it. Nicely saved.

MR HODDER KC:

10 I think the Court understands my proposition.

WINKELMANN CJ:

We certainly do understand your proposition.

MR HODDER KC:

Each of those steps is there. The last paragraph that I – no it's two
15 paragraphs –
1510

WINKELMANN CJ:

Because why I kept on troubling you with the framework thing is that it's actually
I thought that your argument was going to be that this is so constitutionally –
20 this is so far from our ordinary constitutional settings, because it goes beyond
SC and is asking the Court to look at the overall legislative response and say
it's not enough, which is that framework.

MR HODDER KC:

Yes, we do say that. So that the questions against me are –

WINKELMANN CJ:

I don't think you do say it. You limited yourself to really these three legs, haven't you, which is saying you are not saying we don't have the jurisdiction to do that, you're saying in the case of section 8 and climate change we shouldn't?

5 **MR HODDER KC:**

I'm saying that the framework is part of the interpretative stage. And I, because I'm about to come to *Plan B Earth*, I do want –

WINKELMANN CJ:

Justice France has got a question.

10 **ELLEN FRANCE J:**

So I was just going to check, Mr Hodder, you're not moving away from your submissions, paragraph 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." You're not moving away from that, are you?

15 **MR HODDER KC:**

I hope not, your Honour.

ELLEN FRANCE J:

Or are you?

WINKELMANN CJ:

20 Paragraph 117? What paragraph was that, Justice France?

WILLIAMS J:

Paragraph 117.

ELLEN FRANCE J:

Paragraph 117.1.

25 **MR HODDER KC:**

That is the interpretation stage, your Honour.

ELLEN FRANCE J:

Right.

MR HODDER KC:

So, no, I'm not moving away from it. So before I turn to *Plan B Earth*, can I just
 5 invite the Court to turn to page 208 – sorry, to paragraph 208 at the bottom of
 page 297 of SC which is where Lord Reed winds up, as it were and says: “The
 [question] of proportionality, therefore, ultimately resolves itself into the
 question as to whether Parliament made the right judgment. [There] was at
 [that] time, and remains, a question of intense political controversy. It cannot
 10 be answered by any process of legal seasoning. There are no legal standards
 by which a court can decide whether balance should be struck between the
 interests of children and their parents in receiving support from the state, on the
 one hand, and the interests of the community as a whole in placing
 responsibility for the care of children ... on the other ... can only be determined,
 15 in a Parliamentary democracy, through a political process [et cetera] ...
 Democratically elected institutions are in a far better position than the courts ...”
 and “209 That is what has happened in this case. The democratic credentials
 of the measure could not be stronger.” And I would add, in the case of the
 CCRA, the democratic provisions are written into the Act in terms of the
 20 involvement of the population through the extensive consultation requirements.

And that reference at the end of paragraph 208 to who has the best position:
 “... to reflect a collective sense of what is fair and affordable, or of where the
 balance of fairness lies.”

25

In the case of the CCRA, we are talking about, inevitably, about trade-offs and
 as we know the international instruments recognise the need for economic
 development, economic activity. You cannot and I think a member of the Court,
 possibly the Chief Justice, said you can't turn the economy off to reduce your
 30 emissions. It isn't going to happen. Who decides how much of the economy
 turns off? Who decides if you close down Glenbrook because it generates too
 many emissions? Who decides if you are going to exempt agriculture because
 it is key to our exports? That's not, with respect, that is what Lord Reed's

reference to “no legal standards”, we say is entirely appropriately applicable and if you do that then in each of the three stages we have been discussing in the last few minutes then those considerations are relevant and we say decisive.

5 COOKE J:

I guess the issue might be, though, the Court would only be making declarations and it would be then for Parliament to decide what to do. It would be up to Parliament to decide whether it turns off Glenbrook or reduce agricultural emissions and the advantage it would have is it would have the Court's
 10 declarations of what the rights were to work with.

MR HODDER KC:

I understand that point and it was well put, if I may say so, by Justice Williams to me this morning, I thought it was – and again, both, they're both entirely fair points to put. My concern in response about both the propositions is that they
 15 both imply a trial. If you can't get there without a trial, then you are taking about the use of resources and processes to achieve something which we say, on this kind of analysis, is not going to get there. You shouldn't have to go to trial to get to that point.

WILLIAMS J:

20 Yes, this, this case is about –

WINKELMANN CJ:

To get to what point? To get to what point, sorry?
 1515

MR HODDER KC:

25 To get to the point where the litigation is struck out. Where this argument doesn't have to be had, that says the testing of legislation's adequacy is not a matter the Court needs to have a trial about.

WILLIAMS J:

SC is about whether child 3, 4, FF, are going to get a tax credit. This case, purportedly at least, is about how many New Zealanders will perish. That's a big difference.

5 **MR HODDER KC:**

It is different, I accept that, but I also don't accept that that's the premise that the Court should take into account. The Court would be –

WILLIAMS J:

10 It's quite a tough call for a judge to make, don't you think? We're bound by our constitutional structures to ignore the prospect that in a future inquiry it will be found that the right to life has been breached.

MR HODDER KC:

Not on the appellant's theory. It'd be too late.

WILLIAMS J:

15 No, no, I'm saying we are required because of the invocation of the strike-out jurisdiction to ignore the prospect that the appellant will make out the proposition that New Zealanders' lives are imminently at risk.

MR HODDER KC:

Yes, on my argument you would have to do that because –

20 **WILLIAMS J:**

That would take a courageous judge, don't you think?

MR HODDER KC:

25 Well no, we would say that until you have much more convincing evidence, even in a strike-out context about that inevitability of the apocalypse, then you don't have the basis to do that and when the Court – what should happen is if the Court were to accept our submissions it can invite again the appellant to consider judicial review, and if judicial review, it gets there, then we have a

process which is much more accustomed to it and in which it also is much more efficient in terms of what is required.

WILLIAMS J:

It does seem to me this case does resolve itself down into is there enough here
 5 on the facts for a judge to be sufficiently worried to let this proceed, despite the constitutional tightrope walking that it would inherently require.

MR HODDER KC:

Well can I – part of my response to your Honour’s point is that if this was a case where Parliament had done nothing then the arguments would be so much
 10 stronger, but it isn’t the case where Parliament has done nothing. Parliament has enacted a weighty tone about how to respond to climate change in response to the international instruments about responses to climate change, which do not prescribe major specific actions by any particular country. They simply go through the NDC process which was required to achieve some
 15 degree of international agreement to what we have. And in the circumstances where that has been done, where money has been – real taxpayers’ money has been spent year by year, where we have seen the processes that are involving the community, involving quite strong requirements to have regard to the independent position of the ICC – sorry, the CCC, the Climate Change
 20 Commission, where there are duties in there to achieve various objectives, then it’s a judicial review matter if anything, and that’s what the Court we say would be entitled to say back in response to the appellant here. You deliberately chose not to seek judicial review, why? Because you don’t like parliamentary sovereignty. Well even within parliamentary sovereignty you may be able to
 25 get somewhere out of judicial review action, but don’t come to the Court saying we want a trial, cross-examination, massive discovery, and three years from now there might be a trial followed by two appeals.

WILLIAMS J:

Even if it were JR, there’d be two appeals.

MR HODDER KC:

Maybe so, but that can happen in a year or 18 months.

WILLIAMS J:

Not in our experience.

5 **WINKELMANN CJ:**

So you said something, Mr Hodder, you said there was not enough on the facts here but that's not really what you say, is it? Because the strike-out obviously – isn't your point that even if there was enough on the facts because there's certainly sufficiently – sufficient on the facts alleged, even if there was
10 something on the facts you have to say the right under section 8 is not broad enough to entitle us to inquire into whether Parliament is adequately acting to take positive steps to protect New Zealanders' lives from climate change effects. That's really the point you have to pitch it at for your strike-out.
1520

15 **MR HODDER KC:**

That's the primary point, that there isn't an engagement of rights that justifies any of the litigation under any of the causes of action, but to the extent that the Court goes beyond that and says, well what do we do now, we say what you do now is recognise the limits of what can be done by the courts and the fact
20 that these are matters where there should be a margin of latitude, or whatever the relevant language is, for Parliament's decisions about these very matters.

WINKELMANN CJ:

So that takes us outside all the models that we've seen, and all the cases you've taken us to is not what, that's not the Court's approach. They deal with those
25 issues in a conventional judicial process of hearing the case and deciding it at the relevant time.

MR HODDER KC:

But they are, well, two things. Firstly, most of them involve relatively narrow issues. They don't say the entire Act is not challenged and, in part, these cases

are essentially judicial review cases. They're not trial cases of the kind that the appellant is contemplating.

WINKELMANN CJ:

See, part of your argument is that this is an overly broad thing. It's –

5 **MR HODDER KC:**

That's a gentle way of putting it if I can say so, your Honour. It is an extraordinary series of claims, principally because it says this is something the Court should get involved with and in the course of that, as I said yesterday, it means that one doesn't have regard for parliamentary sovereignty. I repeat, if
10 there were no challenges to legislation, and I'll come to those when I get to the statement of claim in due course, then the Attorney wouldn't have that issue because then the claim would be dealt with by way of judicial review.

KÓS J:

Seems to me your argument is strongest on the second of your three stages,
15 but it may be that on the first stage this Court in this judgment may be able to define the right. Do you disagree with that?

MR HODDER KC:

Well I think the Court will define the right in this judgment because it's inevitable.

KÓS J:

20 Correct. So, to that extent at least part of it will be guided by what the right, that it could be in conflict with the CCRA –

MR HODDER KC:

It could.

KÓS J:

25 Yes.

MR HODDER KC:

And well I mean it goes back really to the discretion point.

KÓS J:

The next question is whether the Court can and should go further than to deal with whether there is a disproportion in the legislative response to the right.

MR HODDER KC:

- 5 Yes, well, underpinning all of this is the question of utility which goes mostly back to the discretion at the third stage what we've been discussing.

WINKELMANN CJ:

- Well, there's a prior question before the proportionality which is we'd have to be persuaded, or the trial court would have to be persuaded that the legislative
10 response is not adequately protective of the rights, that there is a limitation on it. So that's in between 1 and 2, isn't it, that there's not an appropriate framework.

MR HODDER KC:

Yes, I think that's fair.

- 15 **KÓS J:**

That's not part of part 2?

WINKELMANN CJ:

No, it's not.

MR HODDER KC:

- 20 But what we are – sorry, Justice Kós?

KÓS J:

Well I think I'm having a debate with the Chief Justice. I see that as part of stage 2 but she does not.

WINKELMANN CJ:

- 25 Well I don't, but anyway, I may be wrong. It's unlikely.

MR HODDER KC:

Well it might be 2A. I'm not sure how one – one can cut it a series of ways. My proposition, as you know, is broad –

KÓS J:

5 That's great. What was the two-stage test is now ramping towards four.

WINKELMANN CJ:

Well somewhere you have to review the adequacy of the legislation on the appellant's case and there's the reviewing the adequacy and reaching a view about the adequacy and then you might say, well, is that – it could – it may not
10 be a perfect scheme but it may be the best scheme that we can have in terms of section 5. It's a justifiable – any limit implicit in it is justifiably, is justified.

MR HODDER KC:

Well the other evidential aspect of this, including on a strike-out, is you'll recall my learned friend Mr Salmon took you to the pleading yesterday and said, well
15 we're not telling the Crown what to do, but nor is it telling the Court what should happen, what an all-viable alternative scheme is. He's just saying it's not enough, which is a relatively meaningless piece of advice to Parliament.

WINKELMANN CJ:

Well I think there are some aspects regulating agricultural emissions and
20 banning offshore –

MR HODDER KC:

Mining and exploration.

WINKELMANN CJ:

Mining.

25 **MR HODDER KC:**

And again well if the Court says, if we take your Honour's first point, if the Court says you need to do something about agricultural emissions then that's saying

that Parliament got the balance between economic well-being for the country and whatever else that has been involved, wrong. We say that is the kind of area where the Court really isn't appropriately engaged.

1525

5 **COOKE J:**

But courts get involved in those sort of issues all the time when it's, for example, COVID, were the COVID mandates demonstrably justified in a free and democratic society? Its legal function is to answer those questions. So whether the exclusion of agricultural emissions from the scheme is demonstrably
10 justified in New Zealand, is something the Court might need to ask as its legal duty.

MR HODDER KC:

Well, there's a progression in what your Honour's putting to me which we would resist in the sense that it's whether or not agricultural emissions should be
15 included in a scheme in a way which interferes with the economic performance of the country's primary sector, is not a legal question. The question that's being raised here is emissions need to be brought down somehow, irrespective of the impact on the economy. It's not for the Court to say how that could be done, but it is for the plaintiff to say how it could be done because then the
20 Court has a credible alternative to the one that's in play. So the one that's in play has gone through the contributions of all those involved in generating the legislation, all those involved in generating the ERP, the plans, the Climate Change Commission and the work that it's put in independently and in an expert fashion, and what does the appellant say? The appellant says we don't have
25 to tell you what you need to do, you just have to do something better. That we say is so inadequate as a basis for the Court to rest itself and say, well sure, you can go to trial, when so patently it isn't.

WINKELMANN CJ:

Right now I'm looking at the time, Mr Hodder, it's 3.30.

MR HODDER KC:

It is.

WINKELMANN CJ:

We've been inconvenient with lots of questions so I know that's impeded your
5 progress.

MR HODDER KC:

It has. What I think follows from that, briefly, is that shortly after, in fact four months, five months after that decision in *SC* we're looking at, Justice Bourne gave his *Plan B Earth* judgment which is of relevance to us because it's one of
10 the few judgments that squarely addresses the issue of climate change in relation to a rights challenge. So that's at the appellant's bundle of authorities at tab 49, according to my note.

WILLIAMS J:

I'll ask your junior where it is actually at.

15 **KÓS J:**

Been pretty good so far.

WILLIAMS J:

No, you're right. Mr Hodder.

MR HODDER KC:

20 Thank you. Always comforting. So the Court may well have already looked at this but I do encourage you to have a look at it, but could I pick it up at paragraph 36 in which his Honour says "... the Claimants rely to a very substantial extent on criticism of Government contained in CCC reports. But that criticism, far from demonstrating that the 2008 Act is not being complied
25 with, demonstrates that the 2008 Act is working as Parliament intended. Parliament plainly contemplated that the periodic provision of reports and responses would feed into an evolution of policy over many years while successive Governments grapple with the vast and unprecedented challenge

of climate change.” So there is flexibility built into the CCRA. There can be revisions of budgets under a process which is highly consultative as well.

Then at paragraph 40(1) it notes that the European Court of Human Rights on
5 positive obligations: “A duty to put in place an administrative framework designed to provide effective deterrence against threats to ... life”.

Then taking it onto 48, that “is an administrative framework”, that’s what’s been created by the CCRA. And he says there it’s already “in the form of the 2008”
10 and the “policies and measures adopted under it”. So if it’s simply about having in place a framework, there is a framework.

The next-level question though that is being raised by the appellant is how good is the framework? What does Justice Bourne say? Paragraph 50 “... high level
15 economic and social measures involving complex and difficult judgments.” As Lord Reed said in *SC* the State enjoys a “wide margin of appreciation”. Then goes on to say at paragraph 51, which my learned friend Mr Salmon drew attention to, “... the Court does not have and cannot acquire expertise in this complex area, and will always be dependent on competing extracts from a
20 global debate.”

1530

So my learned friend says, well, actually, if we had a trial and we had cross-examination of experts then maybe the Court could be sufficiently
25 informed, and we say that’s not sufficient to justify the continuation of this litigation.

And that gets upheld, of course, in the sense that leave was declined by Lord Justice Singh in the appeal leave which is at our supplementary bundle at
30 tab 54 and paragraphs 5 through to 8 become relevant but in particular we say...

WINKELMANN CJ:

Some of the aspects of the reasoning are a little bit unusual. If you look at paragraph 52, the Court says there was reliance on the Paris Agreement to

show that if you don't keep temperature down to "1.5°C above pre-industrial levels [that] poses a threat to life" and the Judge says, well: "... the Court is being asked thereby to enforce the Paris Agreement, contrary to the guidance in SC," if we're using that for that purpose, which seems an unusual proposition.

5

And then: "Whether or not that is so, these claims invite the Court to venture beyond its sphere of competence." But that's a matter of evidence and I suppose the problem there is that it's judicial review.

MR HODDER KC:

10 Well, this –

WINKELMANN CJ:

Which is a point, I think, that Mr Salmon made?

MR HODDER KC:

15 It may be. I mean, in terms of paragraph 53, the Court isn't being asked to enforce the Paris Agreement.

WINKELMANN CJ:

No.

MR HODDER KC:

Because the Paris Agreement has nothing prescriptive to enforce.

20 **WINKELMANN CJ:**

No, it's being – he's saying, it's effectively bringing it into, by using it as evidence to prove that temperatures above that level are harmful, that's effectively bringing it into the domestic law. He says that objectionable but then he goes on to be concerned about the evidence and how is he to form a view? Which
25 tends to show the difficulty with judicial review, which was Mr Salmon's point.

MR HODDER KC:

Yes, it was judicial review and if the appellant wants to persuade the Court in judicial review that it can achieve what wasn't achieved in *Plan B Earth* then it should do so. What it shouldn't be doing is coming for what I loosely called

5 "constitutional review" and asking the Court to endorse that as an available route for somebody who is dissatisfied with what Parliament has done.

In terms of cases, the last case I want to refer to in this sequence which is, and I'm not going to spend too much time on it although it raises a number of

10 interesting questions, is Toronto's *Cycle Toronto v. Ontario (Attorney General)*, 2026 ONCA 582 which is in our supplementary bundle at tab 60. One of the more enjoyable judgments that one can read, written by Justice Huscroft, whose name will be known to a number in this jurisdiction.

WINKELMANN CJ:

15 Yes.

MR HODDER KC:

With whom his colleagues agreed.

WILLIAMS J:

What tab is it, sorry?

20 **MR HODDER KC:**

Tab 60, I believe, Sir.

WILLIAMS J:

In the supplementary?

MR HODDER KC:

25 Yes.

WILLIAMS J:

Thank you.

MR HODDER KC:

Yes. He says and he doesn't really spare the first instance Judge much in this judgment, but his basic proposition is that the first instance Judge got carried away by deciding that the removal of bicycle lanes involved the right to life,
 5 because according to the first instance Judge there might be people who chose to ride on roads without cycle lanes who could be maimed or killed in the process, and his reasonably firm response to say this isn't a case about the right to life, it's a case about bicycle lanes.

10 And in a sense, the same point applies here. This is a case about a challenge to the CCRA. It's not about the right to life expanded in the way that the appellant suggests.

And there is also and the general point I'm making is probably in his
 15 paragraph 55: "Disagreement and debate invariably accompany changes in legislative policy and must be allowed to play out in the political process. It is not for the court to end the debate by declaring a winner ..." in terms of the legal analysis. Also says that you can't make legislation or require legislation to be based on expert advice but the legislation does that to a very large extent.

20 1535

And then in terms of the orders being sought, paragraph 38 is of some interest: "An order under the *Charter* prohibiting removal of bicycle lanes can only be understood as establishing a *Charter* right to those bicycle lanes ... if the
 25 *Charter* prevents the removal of bicycle lanes because of the protection they are thought to afford, it can only be because there was a constitutional right to that protection – and hence, the bicycle lanes – in the first place." And so as I'll come to when I get to the pleading, the right really being asserted is not really a right to life, it's a right to a regulatory framework which complies with the
 30 minimum global reductions that the plaintiff alleges and which is inconsistent with the framework principles it has selected as criteria. It's the attempt to convert that into a right to life or a right to culture which we say is one of the objectionable features of the reasoning behind the entire case advanced by the appellant. This is a case about challenging what Parliament has decided and

what the Executive has been doing under the CCRA. Trying to turn it into a rights case we say is a matter that is untenable and should be treated as such at this stage of the case.

- 5 Now if the Court pleases, we're at 3.36. If I can, I think – although I had hoped to have got to a stage where Mr Prebble could address you in part on the third cause of action before I come back, I think I better say something by reference to the amended pleading or the draft amended pleading, and for today's purposes I think I need to pick it up. So if the Court pleases, there's a version
10 at 05.0100 –

WINKELMANN CJ:

This is the marked-up version, is it, or the –

MR HODDER KC:

It's the mark-up version, which I confess I have been using.

- 15 **WINKELMANN CJ:**

Yes, so am I.

MR HODDER KC:

- And just for range-finding, the minimum global reductions are at paragraph 13 on page 0104 onto 0105, and I'll elaborate if I need to tomorrow but the basic
20 proposition is the IPCC refrains from prescribing any particular levels of reduction. It doesn't prescribe that at all. What it does do, and we can go if necessary, it produces a document that has, as I said, 97 different pathways summarised into a table which has got a certain degree of difficulty which I will perhaps take you through tomorrow, but that's where the minimum global
25 reductions are said to come from, and so what –

WINKELMANN CJ:

Are you disputing the allegation in the statement of claim, is that what your point is, or are you –

MR HODDER KC:

I'm saying that when we look at the IPCC document you have 97 pathways. This selects one, and so that's – what the appellant wishes to have the Court take is that these are hard numbers from an authoritative organisation with
 5 which New Zealand is obliged to comply and that it simply isn't the same.

KÓS J:

I think I'd be helped by your showing me the 97 pathways, at least if it's in a chart.

MR HODDER KC:

10 All right.
 1540

WINKELMANN CJ:

Oh, yes, we've just got to pause while you find the pathways because Justice France has just been disconnected, so – we're back, excellent. You
 15 missed nothing, Justice France. Whilst you were both away, Mr Hodder has been searching for a document, an assignment that Justice Kós set him, so you haven't missed anything.

MR HODDER KC:

Yes and I am almost being defeated by locating where that damn document is,
 20 but I think I may have tracked it down. So the document is 307.2707.

KÓS J:

Again, please?

MR HODDER KC:

307.2707.

25 **KÓS J:**

Thank you. Right.

MR HODDER KC:

- And it's the IPCC's Climate Change 2022 Summary for Policymakers. I can't recall now whether Mr Salmon took you to this or not, he may have done. And it is what it says. It's a summary for policymakers so can I quickly draw attention
- 5 to page 307.2714 "Introduction and Framing", and I draw attention to the third bullet point: "Close linkages between climate change mitigation, adaptation and development pathways." And where it notes in the last few lines: "Literature highlights that climate change mitigation action ... will be more acceptable, durable and effective ..." if it is "... conducted in the context of sustainable
- 10 development, equity, and poverty eradication, and rooted in the development aspirations of the societies in which they take place" The fundamental proposition about the degree of national autonomy that's involved in these processes.
- 15 Moving on to page 2728 is where you find the table headed "SPM.2 | Key characteristics of the modelled global emissions pathways" and in relation to that on the left-hand side, there is a column headed "p50" and then describes, not particularly helpfully, what is going on. But my instructions are that when we get down to the light blue box below the grey box, C1[97] means there were
- 20 97 pathways that were modelled as part of the process. Of those, 47 were modelled without achieving net zero greenhouse gas emissions.

And then in terms of dates at which –

WINKELMANN CJ:

- 25 But do they do – some of those pathways are modelled "failed to comply" or –

MR HODDER KC:

Yes.

WINKELMANN CJ:

So?

MR HODDER KC:

Failed to comply with 2050.

WINKELMANN CJ:

So which are the ones that are shown there comply with 2050?

5 **MR HODDER KC:**

The balance between 47 and 97, as I understand, comply. Takes us down to 50.

WINKELMANN CJ:

So 50.

10 **MR HODDER KC:**

Yes. Again, the IPCC doesn't prescribe anything about the dates, it's simply recording what it's pathway show and then on "Emissions milestones" which is four boxes across at the top, then on the second of the grey boxes below that you'll see the median five-yearly intervals that net zero carbon dioxide is achieved in the total C1 category is a 2050–2055 period, that's carbon dioxide, and then in terms of net zero greenhouse gases, that's in the next one across, that's in the 2095–2100 period, that's the median five-year interval in relation to those.

20 Now, that's, the point that I'm making, is simply that it's showing a very wide spread of outcomes from this particular modelling exercise, some of which will comply with expectations and some of which may not.

1545

COOKE J:

25 Is your point here that this is modelling what would happen if States followed these particular pathways?

MR HODDER KC:

Yes.

COOKE J:

Yes. That doesn't mean that there are these authorised different pathways to get there, does it? It's just some modelling of how States might get there?

MR HODDER KC:

5 As are the minimum global reductions.

COOKE J:

Right.

MR HODDER KC:

They're taken from this kind of modelling.

10 **WINKELMANN CJ:**

That doesn't seem right.

MR HODDER KC:

Sorry?

WINKELMANN CJ:

15 Mr Hodder, it doesn't seem right, because reductions, the reductions in emissions must be – there must be something they're aiming towards, so the fact there are different pathways to get there, anyway, we'll have to read the report and see if we agree with you.

MR HODDER KC:

20 Well, I wish the Court well.

WINKELMANN CJ:

I'm looking forward to it.

MR HODDER KC:

25 There may be more to be said, I know that. I also draw attention to pages 2736 and 2737, which again model a wide range of pathways. My point, my fundamental point is that there are a range of model pathways, whereas the

pleadings suggest that the IPCC has endorsed a particular level of reductions, very specifically as pleaded in paragraph 13, and we say that simply isn't the case.

WINKELMANN CJ:

- 5 Yes, but the point that I'm having – struggling with, is your conflating or perhaps not pathways and ultimate targets and surely there must be some agreement about how much carbon we can release, how much greenhouse gases we can release into the atmosphere, without tipping over the 1.5 limit, and are you saying they haven't agreed that?

10 **MR HODDER KC:**

- Not as part of this exercise. There are a range, I mean, there's a carbon, a carbon pool, if you like, that's been described which I think is referred to, but I'm particularly focused on what the minimum global reductions are because they are what the Crown is said to have failed to have achieved. That's how
15 they're pleaded in the declarations and in the breaches, based on the minimum global reductions and those are those set out in paragraph 13. And what the pleadings say is: "According to most recent science from IPCC, to have a better than even chance of limiting warming ..." then you must have these propositions.

- 20 But the IPCC work doesn't prescribe anything and it gives a wide range of materials that may get there, a wide range of pathways that may get there. They aren't those specific numbers which the Court is being effectively asked to say can be enforced as such.

COOKE J:

- 25 So, is your point that international obligations contemplates that different States may have different rates of progress and still be compliant?

MR HODDER KC:

And they'll have different balances of gases that are involved. There is more than one gas involved in the projections, as we know, there's – I think my

understanding is it's not just methane and GHGs, it's a wide range that they've taken into account.

COOKE J:

So it's not a hard number for each State?

5 **MR HODDER KC:**

There's no hard number, no.

WILLIAMS J:

Well, each State adopts a hard number.

MR HODDER KC:

10 Each State can choose a number under its NDC, yes.

WILLIAMS J:

Must choose a number?

MR HODDER KC:

Must choose a number, correct.

15 **WINKELMANN CJ:**

I think you've taken us to model pathways that are, there, how they're trying to model what the temperature rise is, as opposed to what people have agreed to?

MR HODDER KC:

20 No, I can't do that, (inaudible 15:48:52) –

WILLIAMS J:

What they have agreed to is under two and target 1.5.

WINKELMANN CJ:

Yes, and –

WILLIAMS J:

They've all agreed to that.

MR HODDER KC:

By 2050.

5 **WINKELMANN CJ:**

And these model pathways take us to –

WILLIAMS J:

By 2050, that's right, well –

WINKELMANN CJ:

10 Yes, if you look through, that's –

WILLIAMS J:

Well, not getting above that by 2050.

MR HODDER KC:

Yes.

15 **WINKELMANN CJ:**

If you look at the section, it takes us from the different pathways to different projected temperature rises. It doesn't seem to be – but anyway, I'll read it.

MR HODDER KC:

20 Well, I mean, but – well, replying to Justice Williams, that will be tested at 2050 and being on track is a question which depends on what happens and when.

WILLIAMS J:

Well, I think the scientists would say if you're testing at 2050 it's too late.

MR HODDER KC:

That's probably right, but at this stage –

WILLIAMS J:

You need to be testing it every five years.

MR HODDER KC:

Right, but the whole lot of factors that come into it. What do countries achieve?

5 What technology changes occur? What constraints are imposed by trading partners? All those factors come into account. Are there going to be different agreements reached, to supersede or somehow or other strengthen Paris? All those things are in the next 24 years to be determined, within the scope of that target.

10 1550

But in the meantime what the countries have committed to is to do their NDCs.

New Zealand has done that. And the NDCs, as I said, combine both the CCRA emissions reduction exercise and the possibility of seeking offsets either by

15 buying offshore carbon credits or such.

WINKELMANN CJ:

Well it would be nice if we could be referred to some document which sets all of this out for us, the framework of these different obligations, et cetera.

MR HODDER KC:

20 I'll see what can be done overnight.

WINKELMANN CJ:

I don't mean a counsel-generated one, there must be something that sets out –

MR HODDER KC:

Well we will ask about that. In the last few minutes of this session I will, if I can,

25 invite the Court to go to the back of the pleading and go to the duty and breaches and the interrelationships between them. Perhaps I pick it up at page 0120 on the red line version, paragraph 54: "At all material times, the Crown has had public powers through the executive and legislative branches of government to control national emissions." So immediately we're

engaged with the legislative position. And then: “Since at least the signing of the UNFCCC” – which was 1992 – “the Crown has knowingly failed, and continues to fail ...” That in part defines the scale of the litigation that’s contemplated. Paragraph 56: “Absent court intervention, the Crown will

5 continue to fail to take steps to reduce national emissions ...” which we say is patently wrong in the face of the material that are on the public record. But the main point there is that: “Absent court intervention, the Crown ...” which is here meant to cover either the legislative branch directly or somehow control the legislative branch, it’s inviting the Court’s intervention in that arrangement.

10

And then paragraph 64 and 65 are attacking the CCRA, the provisions in there, and then paragraph 65, the target “is not within a range of reasonable targets” having regard to key principles of law in addition to the Minimum Global Reductions. The key principles of law are then set out, the (i) through to (viii)

15 which include rights under the New Zealand Bill of Rights Act. They don’t include rights outside of the Bill of Rights Act, the right to earn a living, the right to property, and various other bits and pieces. So there’s a selection of phrases from instruments and no direct reference to specific obligations under the international instruments, but then simply invoking section 8 and section 20 as

20 being at kind of the very heart of what it is said to be tested against, section 8 and section 20.

25

But then in paragraph 65(b) there’s a challenge to the discretion in section 5ZC we saw before, which has those 12 relevant material considerations and says: “There is no prescribed methodology for the setting of emissions budgets with

the Minister having a wide discretion ...” Well that’s a complaint about the structure of the Act. Turning it to say this is a right to life issue is we say such a stretch that the Court is entitled to uphold the striking out where we have.

30

More criticism is at paragraph 72 to 74, and then when we get to the questions of breach we pick those up at paragraph 82, and within those there are I think something close to 30 different complaints going through in the national emissions proposition in particular paragraph 82(c), which collectively result in a breach of the duty, and the first one is: “Failing to reduce national emissions

in accordance with” – guess what, the MGRs – “and the framework principles ...” and then it criticises offshore mitigation as a substitute. Secondly, enacting the CCRA, that is a particular of breach, and then we go on through and we find that about half of these matters, just under half involve legislation
 5 enacted or legislation before Parliament. The others are executive decisions, and we say again the point that the Court’s entitled to take into account is that those matters that are executive decisions could be judicially-reviewed. Those matters that are legislative decisions should not be the subject of scrutiny by the Court except insofar as there can be something specific and narrow focused
 10 on under a Bill of Rights Act claim.

1555

All of that takes us to paragraph 82(d), which is the failed legislative response I took you to yesterday, and then we come back to the declaration (c) under
 15 paragraph 82 which again is focused on Crown emissions that do not achieve consistency with “the Minimum Global Reductions in accordance with the framework principles”. So we can see that’s the complaint, that’s what was being sought. And then the expansive part on the section 8 comes in paragraphs 85 and 86. Paragraph 85: “‘Life’ in s 8 includes the presence of
 20 circumstances which are fundamental to a dignified and meaningful life and, in particular, the presence of a sustainable climate system,” that’s a global climate system. That’s what the concern really is, that the global climate system is under an overall pressure.

25 And what is the breach in terms of national emissions? We come to paragraph 90. Again it’s the failure “to put in place a regulatory framework that [provides a] rational and effective deterrence of the risk ... as it relates to national emissions, and so has breached the rights of the rights-holders” with the particulars being paragraph 61 to 79 which cover those matters about
 30 legislation and non-legislative things that have been done.

Over – up to paragraph 96 we see the declaration (c), there’s: “A declaration that the CCRA is incompatible with ss 8 and 20 of the NZBORA.” In terms of paragraphs (a) and (b), they’re declarations about the Crown but unlike the

position in *Taylor* it can't be said that the Crown is immune from the consequences of a declaration because of parliamentary sovereignty, so there's a question mark about how that works out.

- 5 And then the third cause of action in terms of the remedies references back to paragraphs 82 and 90, and so the effective range of that is as I say to seek to in effect have the Court cement in the minimum global requirements as enforceable obligations where they're not enforceable obligations at international law and in accordance with framework principles which are a
10 selection of some principles, not taking into account the various considerations that governments are taking into account or the considerations that are referred to in section 5ZC. The implication is that the factors in section 5ZC are somehow irrelevant to the exercise the Crown is meant to undertake. All those go to the general proposition about what this is seeking to do and which I have
15 been attempting to grapple with in my responses to the Court during the course of the day.

WINKELMANN CJ:

Right.

MR HODDER KC:

- 20 Now the Court may want to know where we're going tomorrow?

WINKELMANN CJ:

Yes, but just before you do, I have been whilst – I'm quite familiar with the pleadings so I've also been scanning the report as you've been speaking to me and I've discovered the answer to the question.

- 25 **MR HODDER KC:**

Oh, good.

WINKELMANN CJ:

Which is that the report says at paragraph C.1.1 that –

MR HODDER KC:

Sorry, paragraph 30.1.1, Ma'am?

WINKELMANN CJ:

307.2727.

5 **MR HODDER KC:**

2727, yes.

WINKELMANN CJ:

It says that net global emissions are projected to fall, blah blah blah, by 27% by 2030 and 63%, and then the next sentence, this compares with reductions of 43% by 2030 and 84% by 2050 in pathways that limit warming to 1.5 degrees. So those pathways are various models they have run as to what they can do to achieve and it shows that the pathways that do achieve the 1.5 are reducing emissions by 43% by 2030 and 84% by 2050. So that's just a modelling exercise they've done for policy makers, and if you scan through you'll discover that New Zealand and Australia have some of the highest per head of capita emissions in the world.

WILLIAMS J:

"Per head of capita"?

1600

20 **WINKELMANN CJ:**

"Per head of capita". Yes. Per capita.

MR HODDER KC:

I too will read that with some care later on.

WINKELMANN CJ:

25 Yes. Right, well, so where are we going to go from here, Mr Hodder?

MR HODDER KC:

Once I have said what I need to say about the pleading which may require a few more minutes, I'm going to hand over to Mr Prebble so he can address the third cause of action, and then I'm going to have something to say about
 5 international legal materials in terms of my addressing of the second cause of action and –

WINKELMANN CJ:

That's the Bill of Rights Act?

MR HODDER KC:

10 That's the Bill of Rights Act – to the extent it hasn't been covered today, and then something about the first cause of action although in the same that my learned friend, Mr Salmon, did that's probably largely covered in terms of the substance by the other two but my objections, my most extreme objections if you like to the orthodoxy or constitutional outrage of that pleading are well know
 15 to the Court already.

WINKELMANN CJ:

Thank you, Mr Hodder. So – and Mr Mahuika?

MR MAHUIKA:

Ma'am, just in terms of tomorrow –

20 WINKELMANN CJ:

I'm sorry, can't hear you up here.

MR MAHUIKA:

Ma'am, just in terms of tomorrow I do have another commitment. I will be here for part of the day, probably the session where Mr Prebble is making
 25 submissions, but I will have to go and attend to that other matter so I will be absent for the balance of the day if it goes beyond the first session.

WILLIAMS J:

This is where you seek leave?

MR MAHUIKA:

Yes, that was the next thing I was going to ask, Sir, although –

5 **WILLIAMS J:**

I thought so.

MR MAHUIKA:

– the Honourable Chief Justice is having a conversation, so...

WINKELMANN CJ:

10 I'm sorry, I didn't hear that answer. I was being distracted by –

WILLIAMS J:

Mr Mahuika was just seeking leave to be absent from court.

MR MAHUIKA:

15 I was just seeking leave, Ma'am, to be absent for probably after the first session tomorrow.

WINKELMANN CJ:

Yes. Perhaps we can assist you by getting some clarification as to how long you'll be, Mr Hodder, before Mr Prebble addresses do you think?

MR HODDER KC:

20 I'm hopeful no more than 15 minutes before him. He's thinking about an hour and a quarter. I'm thinking I can deal with what I need to deal with after that in half an hour.

WINKELMANN CJ:

25 So for your planning purposes it might assist to know that we should be finished that part by morning tea I think then, wouldn't we?

MR HODDER KC:

I confess that I wasn't anticipating replies by interveners.

WINKELMANN CJ:

No, that's not the issue. No, that's –

5 **MR HODDER KC:**

But I'm not sure whether Mr Mahuika is doing that or simply his presence.

MR MAHUIKA:

Yes, I'm simply asking for leave not to be here.

WINKELMANN CJ:

10 Yes. Mr Mahuika just wants to hear it. He's not suggesting he's going to reply to you.

MR HODDER KC:

Well, in that case I have no objection to that.

MR MAHUIKA:

15 I'm happy to reply if my friend is inviting me to do so.

MR HODDER KC:

No, he wasn't.

MR MAHUIKA:

I was really just trying to save myself a memo or an email, Ma'am, by seeking
20 leave, so thank you.

WINKELMANN CJ:

It's turned into late entertainment, so thank you very much.

All right, we'll adjourn now.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON THURSDAY 20 AUGUST 2026 AT 10.03 AM

WINKELMANN CJ:

Good morning, Mr Hodder.

MR HODDER KC:

- 5 Good morning, your Honours. On the question of timing which is merely a housekeeping matter and I thought I would mention at the outset, our expectation is that we would go on until around and possibly a bit after lunch.

WINKELMANN CJ:

Okay.

10 **MR HODDER KC:**

And partly because you haven't heard from us at all about the third cause of action and that's going to be dealt with by Mr Prebble shortly.

WINKELMANN CJ:

Yes.

15 **MR HODDER KC:**

And some of our friends have travel plans for Wellington and were enquiring through me as to whether the Court might be minded to start at two rather than 2.15.

WINKELMANN CJ:

20 Yes, certainly.

MR HODDER KC:

- And if I could indicate then that what we propose to do this morning is I want to say something more about the pleading, and then Mr Prebble on the third cause of action and then I return to deal with international materials and then the Bill
25 of Rights Act including DOIs and then I will be concluding. But I am of course mindful of the reasonably intense discussions on a range of those matters yesterday and I will attempt not to retrace steps unless invited to.

WINKELMANN CJ:

Well there's one aspect that I would like you to address which is I've been reflecting on the pleading and I wondered if it's not amenable to a conventional declaration of inconsistency pleading in respect of the Climate Change Act, the

5 CCRA, so on the basis of section 8 and 20, I know you have your arguments about section 8 and 20, but should the Court continue – consider the Court of Appeal's formulation was correct, what's the obstacle to proceeding with that kind of a claim?

MR HODDER KC:

10 Yes, I understand the issue. I'll come back to that if I can when I get to the – after section 8 and section 20.

WILLIAMS J:

Can you bring your mic over. Thank you.

MR HODDER KC:

15 Apologies, your Honours. I'm conscious that while we have a conversation it's a conversation that has to be held at a certain volume otherwise it isn't going to work.

What I wanted to do was to explain how we understand the statement of claim

20 operates so that there's no different version between the way the Court thinks a statement of claim operates and the way we think it operates, and it focuses, for present purposes, around paragraphs 61 to 79 and as the Court's aware those feature later on, but I just wanted to follow the sequence through briefly just to explain that.

25

So, using the marked-up version, which I am, 61 starts on page 05.121, or page 19 of the document and then 61 to 79 which I'm about to come to in more detail and recording this is the fourth version of the statement of claim and it's dated May of this year, so it's sort of presumably up to date. That then leads to

30 paragraph 82, in particular, paragraph 82(c) which commences at the bottom of page 26 of the document, or page 05.0128, and it identifies "steps the Crown

has taken which have collectively resulted in a breach of the Duty” and the duty itself is defined in paragraph 50.

5 So, 61 to 79 lead to a breach for the purposes of the first cause of action. They also lead to paragraph 90 at page 30 of the document, with particulars paragraphs 61 to 79, which is the second cause of action. Also go to paragraph 95, which is the second part of the second cause of action, again in particulars (a), and then when you come to the third cause of action we see that the breaches of Article II and of the Treaty duties as defined in paragraphs 100
10 and 102 on page 32 of the document, refer back to paragraphs 82 and 90. So, all of the causes of action are anchored in paragraphs 61 to 79.

WINKELMANN CJ:

Hang on, the third cause of action refers back to paragraphs 82 and 90 did you say? Oh okay, so it's a chain.

15 **MR HODDER KC:**

Yes, there's a sequence going through. So the third cause of action on page 32, you will see that in paragraph 100 “acts and omissions pleaded in paragraphs 82” which means paragraph 82(c) that we're looking at –

WINKELMANN CJ:

20 So your submission is that 61 to 79 is the engine room of this statement of claim?

MR HODDER KC:

Yes, 61 to 79 are the breaches of the conduct which is at the heart of the claim, and that's why I wanted to spend a little time just working through some aspects
25 of that with some commentary as I go through.

1010

So, some of it sets the scene. So paragraphs 61 through 64 describe the legislation, beginning with the Climate Change Response Act, the CCRA, and
30 then there's discussions of amendments in paragraphs 62, 63, and then a kind

of summary where things are at in paragraph 64, before one gets to paragraph 65 where the “however” prefaces a series of criticisms.

KÓS J:

I mean, I understood that pleading to be focused on the legislative Acts as
5 opposed to the executive Acts which are dealt with earlier?

MR HODDER KC:

Yes, although there is a couple of points to make in addition to that. Some if it is, involves executive Acts and the question mark about judicial review, but if I may just indicate that in terms of the description of the legislation that you get
10 in paragraphs 61 to 64, it doesn’t illustrate or refer to the inherent ability to evolve matters under the CCRA and those are important. Most of the material, most of the objectives and regimes can be amended under the Act’s own terms following the processes the Act set up.

15 The concept of the ability to evolve and the effect of it is mentioned, for example, in Ms Wilson’s affidavit at paragraph 6 which is on page 201.0049.

So at paragraph 65, you get to the challenge to the primary legislation, and starting with the 2050 target, but without reference to the fact that there is a
20 process for addressing the 2050 target which runs from sections 5Q to 5U of the Act and under those provisions there are significant processes available which take us to the point where there is a requirement for the reviews to go through to reviews, the Climate Change Commission, the Minister and matters being presented before the House.

25

So that process is itself subject to review, at least to the extent it gets put before the House, which is the last step –

WILLIAMS J:

Do you think that might make a DOI more efficacious than less?

MR HODDER KC:

Well, my answer to that is no, but I mean, I understand the argument could be made.

5 Within that and a point I could have, should have mentioned yesterday, really, is section 5ZM which the Court is probably aware of but which I should have, as I say, should have mentioned yesterday. Section 5ZM: "Effect of failure to meet the 2050 target and emissions budgets (1) No remedy or relief is available for failure to meet the 2050 target or an emissions budget, and the 2050 target
10 and emissions budgets are not enforceable in a court of law except as set out in this section."

And then subsections (2) and (3) say: "(2) If the 2050 target ... budget is not met, a court may make a declaration to that effect, together with an award of
15 costs." And then that is required to be referred to the House of Representatives under subsection (3). So the two in combination are effectively an exclusion clause in (1) but with an exception for the Court to make a declaration to (2).

So, to the extent that your Honour Justice Williams was referring to something
20 like that, then it's provided for in the statute, so there's no criticism or concern about that, that's simply adhering to what the statute says.

But the rest of it, the policy inherent in section 5ZM is significant in the discussions that we have been having, and in our submission they should be
25 respected and acknowledged in the process. So this –
1015

WILLIAMS J:

Presumably, section 5ZM only works at 2050.

MR HODDER KC:

30 I presume that too.

WILLIAMS J:

Perhaps there's an argument that it doesn't but –

MR HODDER KC:

Well just to be clear what we're talking about, it's not just the emissions budget,
5 it's also any emissions – sorry, not just 2050 target, it's any emissions budget.

WILLIAMS J:

Right.

MR HODDER KC:

That's much more extensive in terms of its scope. So, to the extent that the
10 budgets are the stepping stones to 2050 and there is a scope to, for challenge
or concern in relation to the stepping stones then the Act is contemplating
declarations may be sought in relation to each of those. So it's not, I agree that
if it was simply said you can review it after we get to 2050 that would be a matter
that doesn't have an enormous appeal as a helpful solution but the statute is
15 not like that. The statute is workable and constructed in this way.

COOKE J:

Are you saying that 5ZM(1) excludes any DOI apart from the declarations
contemplated by the section?

MR HODDER KC:

20 I am.

COOKE J:

Exclusion clause.

MR HODDER KC:

I'm sorry?

25 **COOKE J:**

And a privative clause?

MR HODDER KC:

Yes, yes. It has to mean something and what it says there's no remedy or relief and if a DOI is not relief it's not clear to me what it is.

WINKELMANN CJ:

- 5 Well, that's only for a failure to meet the budgets. You're saying that in interpreting a privative clause we should expansively interpret it.

MR HODDER KC:

- But the essential – yes. There's a question about giving a fair interpretation of a statute. This challenge is, in effect, a concern about the fact that there won't
10 be meetings of budgets and targets.

WILLIAMS J:

Well it's that the budgets and targets aren't big enough too.

MR HODDER KC:

But that's because the budget – well the budgets are reset.

- 15 **WILLIAMS J:**

No, the targets are not big enough, or small enough.

MR HODDER KC:

Well there's only one – well the target is a question of reviews.

WILLIAMS J:

- 20 The two targets, yes.

MR HODDER KC:

- Well, whatever they are, but they themselves are subject to review processes I mentioned a couple of minutes ago, so if there's a concern about that that can be pursued. That's partly has a role for the Climate Change Commission in
25 relation to that.

WINKELMANN CJ:

Mr Hodder, this is quite a significant argument that a privative clause excludes this proceeding. Was that included in a rule 20A notice? I think the answer is no.

5 MR HODDER KC:

I think the answer is no on that. So effectively it is a – it effectively creates a bespoke DOI. It seems that the suggestion is that's what the cause is doing.

KÓS J:

10 It seems to me it's that Parliament knows what it's doing when it drafts a privative clause and this is a pretty narrow one and Parliament has to be taken to have intended that only a narrow privative clause which applies to the failure to meet budgets and targets, but not about processes leading to it.

MR HODDER KC:

But the processes themselves may be subject to judicial review.

15 KÓS J:

Yes, quite.

MR HODDER KC:

20 Yes, so I'm not suggesting that otherwise than that, but in terms of the kind of declaration about, a declaration that they have not been met, which is the kind of the meaty one, then that's provided for. And with that in place as part of the overall structure the assessment of the Act takes that into account. Now I accept of course that the Court's approach to ouster clauses is ungenerous but it's still part of the overall calibration of the Act and needs to be acknowledged as such.

25 WINKELMANN CJ:

Well, for my part, I think your argument that this provision excludes the possibility this claim faces two significant obstacles, firstly, that it hasn't been notified to the parties and I hadn't picked it up in your written submissions even,

so rule 20A requires notice to be given. Secondly, it does require expansive reading of the clause, an ouster clause, which the courts do not normally do.

MR HODDER KC:

And I acknowledge, I think I certainly acknowledge both of those but my
5 proposition is the Court will have to stand back and consider what the Act structure is designed to achieve.

WINKELMANN CJ:

You say even so it can go into the mix?

MR HODDER KC:

10 It goes into the mix. So I apologise for the section 20A absence, well I think it's absence, I'm pretty sure it is, and I acknowledge the ouster, general ouster approach, but, in my submission, the Court is entitled and should have regard to the fact that when you're looking at the structure of the Act it's part of it. It's part of the accountability mechanisms that are incorporated in there and it
15 shouldn't be ignored.

COOKE J:

Putting in –
1020

KÓS J:

20 The counter argument would be that, in fact, it enhances the plaintiff's opportunity to obtain the DOI because of one's contrasting section 8 right in the Bill of Rights Act with an Act of Parliament which precludes declarations in the way this provides. There surely will be an argument that that even less meets the section 8 obligation? I mean, it becomes – it effectively tries to make a part
25 of that obligation relating to a right to life unenforceable?

MR HODDER KC:

Look, I think the only response that I want to make at the moment is that it would be possible to, absent the clause, to seek a DOI in relation to a failure to meet

an emissions budget, saying that it is itself, on the same logic that is being put forward on behalf of the plaintiff –

KÓS J:

Well, the DOI is, in fact, a failure to meet the obligation to protect the right to
5 life, by reason of the CCRA.

MR HODDER KC:

Yes, but if it's premised on a failure to meet the budget, then it falls within this. So that would be available. There has – it doesn't, in our submission, expand it, it simply clarifies what the scope of this is.

10 **COOKE J:**

It also might be said to not be fully consistent with their view that we've got to keep to our lane and because this section is inviting a declaration of inconsistency to be made by the Court to be put before Parliament, so that is inviting the very function that the appellants seek more broadly in this
15 proceeding.

MR HODDER KC:

As part of the accountability mechanism, as specified in the Act as part of the bespoke provisions, the calibrated provisions I'd be calling, yes. But the question that is obviously raised by your Honour's question is, well, does that
20 mean more than that?

And in terms of that, the point that we make in relation to paragraph 65 generally is there's no prescribed methodology for the setting of emission budgets and it's made in this pleading paragraph 65(b) but rather the Minister has a wide
25 discretion. That is treated as being a breach of something, but section 5ZC is the one that lists the various mandatory considerations. It seems remarkably odd that that is somehow or other to be treated as a breach and yet it's fundamental and it involves having regard to a wide range of interests.

And so the point we're making is simply that this is a wholesale attack on the CCRA and those are the, or the first part of that, and then there is a series of omissions that are set out in subparagraphs (c), (d), (e) and (f) about what is not in the Act. So what is not in the Act is also a decision of Parliament.

5

Paragraph 66 challenges the methane target. That again is subject to legislation about methane, which I'm about to get to, but also there's potentially scope for judicial review within that, it's a decision under the Act, that is a matter for you to sort out, but it's important to be aware of it.

10

And then from there the pleading moves into the ETS system from paragraphs 68 to 72.

15

And then the complaint is at paragraph 73: "... the emissions cap is too high, the emissions subsidies are too great and [there is a] agriculture exemption ..." and that agriculture exemption is a matter of legislation.

Paragraph 74 is another complaint about the ETS.

20

And then paragraphs 75 through 77 set the background in relation to methane and agriculture.

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And paragraph 78 then complains about pricing of agricultural emissions, in particular subparagraphs (c) and (d) by reference to the introduction of legislation. At the least the first of those, to my knowledge, has been enacted. And so I think it's appropriate to reinforce our point that whether you do or do not include methane targets and agriculture in the legislative scope is a matter of politics and balancing. That is the clear understanding in the documents that are in evidence that the Court has.

30

And I mentioned Ms Wilson's affidavit. If I can just draw attention, that's at 201.0047, if I can just draw attention briefly to what she describes at paragraph 90 to 95. So this was affidavit sworn in 2021 and I – the Court will

be obvious that these are under different administrations. So paragraph 91 she's attaching a Cabinet paper in relation to NDC and then at paragraph 92 explains the way the Cabinet paper approached it and indicates that there were balancing factors involved and the balancing was "a political decision". That's
 5 a quote from the Cabinet paper. And then paragraph 93, it goes on to say that the paper – in paragraph 94 through 95 goes on to explain the logic behind the Cabinet paper's approach to dealing with emissions in the agricultural sector, which comes back to the nature of the economy.

10 That in turn is reflected in the latest plan which is the one that we looked at yesterday briefly which is in our supplementary bundle at tab 58 I believe, and at page 61 of that under the heading: "Approach to reducing agricultural emissions" you see that the proposition is: "We remain committed to taking a multi-pronged approach to reducing agricultural emissions without undermining
 15 profitability," and identifies what is contemplated, and over the page how to assist food and fibre producers.

WINKELMANN CJ:

Does that explain why the target is not included, why the emissions are not included, though, in the targets? Does that rationally connect the decision not
 20 to include the emissions in the targets?

MR HODDER KC:

Why the targets are not included in the plan?

WINKELMANN CJ:

The emissions – yes, isn't the – well what's the point you're making here,
 25 Mr Hodder?

MR HODDER KC:

The point I'm making is that in terms of is it politics, is it law, the point I'm making is that this is clearly politics. These are political decisions, and that is established by both the affidavit and by the plan in our submission.

Right, so Ms Gaskell was telling me that the agricultural emissions are included in the budget so I can't take you to the document that says that, but I'll look for it and come back to it.

WILLIAMS J:

- 5 Yes, they are. How do we deal with the nuance in that argument, which is there is in most difficult cases no simple binarity between politics and law, not least because politics results in law, but more particularly big policy choices can involve intrusion into legal rights. By their nature it's not, you know, it's not politics on that side of the fence and law on this side of the fence, there's a big
10 overlap between the two, isn't there?

MR HODDER KC:

- I'm not sure how big the overlap is. I agree the line is not always impossibly really absolutely distinct, so I don't say that a political context removes the Court's role, but the cases I was taking the Court to yesterday indicate that
15 whole spectrum kind of approach, and the point about the way in which the balance is struck within the CCRA outputs is a question which has to be made taking into account all the various factors.
1030

WILLIAMS J:

- 20 Aren't you really arguing that there is too much political content in this to be amenable to judicial interference and that deference is required?

MR HODDER KC:

Yes, I am. If the proposition –

WILLIAMS J:

- 25 But you're arguing it in a very totalising way.

MR HODDER KC:

Well I apologise for not making it before.

WILLIAMS J:

You don't need to, I mean I'm just pointing that out to you.

MR HODDER KC:

Yes.

5 **WILLIAMS J:**

You can tell me whether it's justified or not.

MR HODDER KC:

10 The point is that if the – I'm attempting to deal of course with the pleading complaints. The complaint is that methane is not being sufficiently addressed in the work that's been done to date under the CCRA and in the CCRA. That's one part of the overall balance that is required to be achieved in terms of the responses. But to second-guess that response in the way that the Court is being apparently invited to do by the pleading gets you into that kind of a decision. It's not a decision that the Court we say really wants to go near.

15 **COOKE J:**

But the courts develop quite sophisticated approaches to these difficult decisions and spoken about margins of appreciation for example in respect to the democratically-elected decisions as part of a very carefully worked out process under section 5 of the Bill of Rights or otherwise for delineating the legal questions from the political and allowing political judgement its appropriate scope in the legal questions.

MR HODDER KC:

Yes.

COOKE J:

25 And the cases you took us to yesterday were good examples of that. For Defence Force members the Court recognised that appropriate margin for appreciation, so why can't the appellants here bring their case and the Crown argue these very matters for substantive determination?

MR HODDER KC:

Because other than the basic proposition, I don't want to repeat my answers from yesterday, but the kind of – the resources and utility involved encourage we say a narrow interpretation really to head-off that point even before you get

5 to the proportionality arguments where – but I accept that through that process the Court is mindful of that margin of appreciation. All I'm really wanting to say is that in terms of that margin of appreciation these kind of claims and the nature and the way in which the matter has been treated by the legislative and Executive branches indicate that that's where that larger margin of appreciation

10 is justified. But there will be issues, many issues like that if one goes through all the points that are criticised at paragraph 61 to 79 and the question is what is the Court to do with that, is the Court to go through all of those through a trial of the kind that's been described and the time it's going to take and the resources it's going to divert from other activities in a matter which is actually

15 indeed a fast-moving area anyway, or let's go to the basic proposition, I think this is – I'm sure I'm saying not much differently what the Court of Appeal said, that in the end this is not a matter which the – should survive a strike-out application. So these are –

KÓS J:

20 When the human right at issue is one involving the right to life, arguments in relation to resourcing seem to me to assume a rather paler place in the assessment. Surely your argument has to be that the margin of appreciation here is so substantial that it must exclude a judicial evaluation of a contest between that right and the legislation.

25 **MR HODDER KC:**

In effect, yes.

KÓS J:

So that's what it comes down to, the margin of – it's not really a question of resources and it can't be in this instance really. It must be a question of the

30 extent of the margin of appreciation.

MR HODDER KC:

All the various topics that the Court was engaging with me yesterday on and the language that can be – whether it's the question of margin of appreciation or institutional competence or whatever it might be, all those are the same thing, so we all understand that. The question is what does the Court do with it when it's confronted with a strike-out application on a matter which requires a major challenge or involves a major challenge to the Act as a whole on a whole series of planks of the Act, the planks of which are the results of fairly obvious policy decisions made by reference to section 5ZC considerations.

That's probably as much as I want to say. The point is that within the paragraph 61 to 79, which are at the heart of this pleading, most of it is about legislative matters. Within it there are some matters that are Executive matters which may be reviewable and that makes this quite different to any other pleading given the complexity of the legislation. In most, in fact all of the cases I think I've come across where declarations have been made and the Court has become deeply involved, the issue is a relatively narrow confined one. This is not a narrow confined challenge and the issues are not narrow and confined.

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WINKELMANN CJ:

They could be reflected to be far more narrow and confined though, couldn't they? Or are you saying it's Justice Tipping's, what was it, a train coming off the rails?

MR HODDER KC:

What I'm saying, the point of 61 to 79 is – sorry, Ma'am.

WINKELMANN CJ:

Justice Tipping described the difference between different pleadings that were salvageable and those which were like a train coming off the rails.

MR HODDER KC:

Yes, that's right, and if it's possible to replead but in effect this isn't a complaint about the pleading. The pleading provided the particulars, not voluntarily as it seems, but they are there in some detail and they are numerous. So it's not

5 the question that they are not articulated; it's the fact that they are cumulatively substantial in number and extraordinarily wide in scope which is why there was an application to the Court to use its power to grant a DOI to say that the Act is incompatible with the Bill of Rights Act, and in other cases it will be much narrower propositions. In *Taylor*, for example, it's a particular section. In *Make*

10 *it 16* again it's a particular provision that can be seen in that relatively narrow, if I can borrow Justice Kós' word again, crisp kind of analysis or crisp kind of focus. That's not this case.

WINKELMANN CJ:

So I'm just thinking about the time. We probably need to press on and speed

15 through the pleading.

MR HODDER KC:

That's all I wanted to say in relation to the pleading for present purposes and I at this point was proposing to hand over, subject to any questions on this area from the Court.

20 **WINKELMANN CJ:**

Thank you, Mr Hodder.

MR HODDER KC:

So, Mr Prebble, on the third cause of action.

MR PREBBLE:

25 E ngā Kaiwhakawā, tēnā koutou. Before I begin I just want to acknowledge obviously the significance of this particular matter and also acknowledge Mr Mike Smith, the Rangatira who brought this significant Kaupapa to the Supreme Court. Tēnā koe, te Rangatira.

With that I will just start with an overview really of the oral outline that I propose, and I don't have a hand-up or a road map, apologies, your Honours, but I will do is sketch really what I propose to take your Honours through and try and be as predictable as I can with that.

5

This claim invites the Court to scrutinise execution and executive action going back to 1992 against the terms of the Treaty. This is not a small step forward as the appellant and interveners suggest. This claim, if accepted, would represent a significant adjustment to our existing legal order. It would require the Court to determine, without legislative guidance, the meaning of the Treaty and whether Parliament has appropriately balance Article 2 interests while ensuring as a nation we are adequately responding to climate change, and it would not be limited to climate change. There are a number of reasons why this is a misstep and something that was rightly struck out.

15

So the theory that I want to take your Honours through today is really divided into two parts. The first is I want to talk about the correct position of the Treaty in our legal system, and when I say that I want to talk about the significant position that the Treaty has come to occupy based on a common understanding of it not being directly enforceable unless and until put into legislation, and that understanding came from *Te Heuhe* and has been woven into our framework surrounding the Treaty. There are remedies for rights and test legislation within our existing frameworks.

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That is the first topic really that I want to cover which is the correct position of the Treaty as we say and then I'll cover the second part which is really about declarations, or declarations of inconsistency, and that that would amount to direct effect of the Treaty and would run counter to our legal settings. And in sketching this I want to cover broadly three points, what this case is about, and in our submission it's not about rights clarification, rather it's putting the Court into the position of grappling with competing interests. And the second point is there is no legislation comparable to the New Zealand Bill of Rights Act to provide the Court with such a role, and the third point really is to look at, well,

30

the Treaty has been incorporated domestically, it's just not incorporated in the way that the appellant wants, and part of that is section 3A but obviously fundamentally it's also the Waitangi Tribunal under the Treaty of Waitangi Act, and that does we say in substance provide the remedy sought which would be

5 undermined if the Court developed this new novel role.

So with that brief sketch I will start with the first part, which is what we say the legal status of the Treaty is, and that's covered in our main submissions at paragraph 179 to 189 and our reply at paragraph 30 to 32.

10 **WINKELMANN CJ:**

Is your point about that last – about the Waitangi Tribunal that that Tribunal is in fact part of the constitutional compact, so that to undermine it is inconsistent with our existing constitutional compact?

MR PREBBLE:

15 I would say that it's described as having constitutional significance, but it's provided by legislation so it's effectively a – it's a legal entity through the legislation and it provides a very important role in our legal system. It's been described as constitutionally significant and I would say that that will be undermined through this claim.

20 **WINKELMANN CJ:**

But your submission is that it shifts our constitutional order, so are you saying that the Tribunal is part of the constitutional compact? You can just say yes or no, Mr Prebble.

MR PREBBLE:

25 I would say it is effectively part of the constitutional fabric of this country, yes.

In terms of the correct legal status of the Treaty, the legal and constitutional landscape has changed but obviously as we say there are two fundamental principles that are now interwoven with Treaty jurisprudence, and that is the

30 first point that the Treaty is not statutorily entrenched, it does not provide the

ability to strike down inconsistent legislation. I don't think anyone is contesting that point. The second is that unless it's incorporated into statute the Treaty does not form the basis of a claim. In short, the Treaty is not directly enforceable in that a free-standing cause of action can be maintained for
 5 declarations that enactments are inconsistent with the Treaty.

And what we sketch or what we outline in some detail actually in our submissions, and I'm only going to sketch it for your Honours, is that understanding which does draw from *Te Heuheu* really and then was confirmed
 10 in *Lands* is reflected in a number of ways in our legal framework since that time, and the most obvious one or one of the most obvious ones is statutory weighting, and so the Treaty has been incorporated in our domestic legislation through a wealth of statutory references with varying degrees of weight that are provided to that.

15 Outside of that it's still considered a relevant consideration, so the case law is saying it's unlikely to be irrelevant simply because it's not referred to in legislation and we have the decisions like *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) and *Huakina* that confirm that,
 20 including *TTR*. And so –

WILLIAMS J:

Including what, sorry?

WINKELMANN CJ:

TTR.

25 **MR PREBBLE:**

Sorry, your Honour. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC).

WILLIAMS J:

Oh, *TTR*, right.

MR PREBBLE:

Yes.

WILLIAMS J:

I thought there was a case I didn't know about.

5 **COOKE J:**

Unlikely.

WINKELMANN CJ:

That'd be exciting.

MR PREBBLE:

10 I don't expect that to be the case, your Honour.

WILLIAMS J:

Yes, sorry, I didn't – that came out wrong.

WINKELMANN CJ:

Is the overall submission that in an unwritten constitutional environment we've
15 effectively got a settled constitutional compact now after how many years it is,
80-something years since *Te Heuheu*?

WILLIAMS J:

Five.

WINKELMANN CJ:

20 85 years. There's a settled compact as to the place of te Tiriti and that it's –
while it may change incrementally it would be a – it's not for the Court to make
sort of an abrupt change to it?

1045

MR PREBBLE:

25 I just hesitate with the word "compact" as to what –

WINKELMANN CJ:

Well there's no – we haven't, we never have a constitutional moment, do we, so our constitution is the thing that it is now but there's – I think you're going to take us – I saw a case referred to in your authorities where a constitution is

5 really what is accepted and works in a society.

MR PREBBLE:

I think what your Honour is asking me is – the answer is yes in that what I'm describing is that our legal systems and our constitution have developed around a common understanding of the position of the Treaty in our legal system, and

10 that thread of common understanding has come through from *Te Heuheu*. We do say *Te Heuheu* is an orthodox decision and I will go to that, but notwithstanding that, that understanding has come through and it's been woven into a broader landscape now around how the Treaty is treated in our constitution in our legal frameworks, and it's on the basis that the Treaty itself

15 doesn't have direct incorporation and effect unless and until it's brought into legislation first.

And what I was saying about some of that infrastructure is of course there's a lot of Treaty provisions or clauses in legislation which all talk about principles,

20 and that is a way that Parliament has decided to give effectively direct incorporation of the Treaty into our legal domestic setting. In addition to that obviously we have the Treaty of Waitangi Act which was a very pivotal, important moment, and I would say it's a little bit analogous to the New Zealand Bill of Rights Act in this discussion we've been having in that it provided an

25 ability for a remedy for inconsistent action, and that applies across the board both to Executive and to legislative action, establishing as we know an expert body to provide that recommendation to the Government.

COOKE J:

Could it be said that declarations of inconsistency are consistent with the idea

30 that the Treaty doesn't have direct effect and it's given effect by legislative action, because what a declaration of inconsistency is is advice to Parliament

that there is a matter which is not consistent with the Treaty and then Parliament decides what to do about it.

MR PREBBLE:

I will come on to talking more about declarations of inconsistency. I would say
 5 no, that you need legislation in order for that, because I think what has been signalled is that that is not a role for the courts, with respect. It's a role for the Waitangi Tribunal.

COOKE J:

Right.

10 **MR PREBBLE:**

And that Parliament is being quite careful about where that role sits, because – I'll come onto the Act, but one of the main purposes of the Act is inconsistency with both legislation and policy.

COOKE J:

15 So the Tribunal is exercising the declaration of inconsistency jurisdiction?

MR PREBBLE:

Essentially, yes. And I think the other important aspect of –

ELLEN FRANCE J:

Sorry Mr Prebble, just in relation to that, if the analogy is drawn with say the
 20 declaration of inconsistency in the Bill of Rights context what the Court – and I think there is a majority on that, this point, what the Court there says is it's a formal declaration of law, so – and it does obviously have an effect on at least the plaintiff's right and status. So I'm not sure I suppose whether it's necessarily
 25 the case that you'd treat it as advisory? I mean it is in the sense that Parliament doesn't have to follow it, but it is at least in the Bill of Rights context a formal declaration of the law.

MR PREBBLE:

Yes, your Honour, and I'm not proposing to argue with that. I am suggesting that there has been a deliberate attempt to provide a mechanism or if you like a remedy for inconsistency with the Treaty and it's been given to a specialist

5 body, and I think when you look at that and then you compare it, and I did want to come to *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, one of the key – there's two aspects to that decision as I read it from your Honour's decision and that of Honourable Justice Elias very much focused on section 3 and the fact that the Act applied to Parliament, and so there was

10 domestic legislation by Parliament saying this Act enables this function for the Court to do this as well as then the provisions 4 to 6 which gave the – almost like this is the mechanics of how it's going to work, and so read together the Court reached the view obviously that there was essentially jurisdiction for what otherwise I suggest would've been considered quite a novel extension, and so

15 as a result it was we can clarify these rights and the legislation has enabled us that role. And there's a heavy emphasis I would suggest on section 3, and the point in saying that is there's just nothing for the Treaty. So even if we took the Treaty of Waitangi Act out of the picture I would say the Treaty itself hasn't been directly incorporated to provide that function so there isn't a function for the

20 Court to do that.

1050

The other point I just wanted to note because it's important is that Treaty settlements have addressed obviously Crown action since 1840 in terms of

25 breaches of the Treaty and significant grievous breaches of the Treaty that the Crown has apologised for and recognised through Treaty settlements, and I would suggest that's also part of the overall framing of how the legal system has developed with a common understanding of the position of the Treaty itself.

WILLIAMS J:

30 Say that again?

MR PREBBLE:

So Treaty settlements I am suggesting are part of the overall fabric of how we are responding to Treaty breach and the fact that, for example, a lot of them were dealing with obviously pre-1992 actions that are inconsistent with the

5 Treaty itself, and I suggest that in part that is because the Treaty itself is not directly enforceable. So we've entered into Treaty settlements on the back of a body that has got a recommendatory function who has provided historical reports on how the Crown has acted through that period, and that includes understanding of the Treaty and its place. And I'm really just trying to paint a

10 picture that it forms part of the overall landscape and common understanding of the Treaty within that landscape, and I think they're important when thinking about is the Treaty directly enforceable. It's not a direct point to suggest, for example, like with the Treaty of Waitangi Act or clauses in legislation but it's supportive of that overall landscape of giving some effect if you like to the

15 Treaty.

WINKELMANN CJ:

How does that sit with concepts of the rule of law that you should stop breaches rather than just paying out for or compensating for them, and also with the Tribunal's jurisdiction which is more directed to that, which is its original

20 jurisdiction to investigate whether Government's current policy is consistent? I mean, which might be an argument in your favour.

MR PREBBLE:

I think, in terms of rule of law, I think the Treaty settlement process was really acknowledging that the Crown hasn't acted honourably and part of that is we

25 obviously have a period of time where attitudes and actions undertaken under the Treaty were not Treaty compliant, were seen to be not Treaty compliant, and the Crown is acknowledging that through a process after often a historical inquiry that looked into those actions by the Waitangi Tribunal. I don't think I'm making any broader suggestion about rule of law implications in saying that, but

30 it's to settle those grievances that occurred and they're then fully and finally settled. The Tribunal remains to provide recommendations for future

contemporary actions of the Crown. I'm not sure if that answers your Honour's question about rule of law.

WINKELMANN CJ:

I just don't see how this really feeds into the broader picture but I may just need
5 to reflect upon your submissions, Mr Prebble. I don't know that you can –

WILLIAMS J:

I rather doubt it helps that the fact that the Crown has established a system of settling Treaty claims following or not following Tribunal inquiry doesn't tell you a lot about the enforceability of the Treaty.

10 **MR PREBBLE:**

I accept that point, your Honour. I'm not suggesting it's a –

WILLIAMS J:

It speaks a lot about its political power.

MR PREBBLE:

15 Yes, yes.

COOKE J:

If the Treaty is a constitutional document it might have some legal effect even though it's not domestically recognised, and doesn't that mean there is a role for the courts that is different from the role of the Tribunal in the sense the courts
20 concern themselves with questions of law and it may be able to exercise its law jurisdiction in a way that is complementary to the Tribunal, not inconsistent with it?

1055

MR PREBBLE:

25 I understand your argument. I would suggest that the Treaty is often described as being a source of the constitution, a source document in say the Cabinet Manual and I think it's obviously a significant founding document as often the

other way it's conceived. It's a significant document however you look at it and it's been, in terms of its legal place, whether you say in our constitution or our legal order or our legal system, its place is very clear, in my submission. There's no incoherence. I know that that's a word often said about the Treaty. There isn't any incoherence because that common understanding has informed our constitution and has informed our legal system on the basis that all of the infrastructure if you like that I'm talking about is built up around that common thread or common understanding that has come down from *Te Heuheu* and I therefore would resist a suggestion it's somehow become law in conflict with all of that.

WILLIAMS J:

Well there's no question it's become law in some sense and that that has developed since that development started before 1975 and it's been a collaborative exercise between the courts and the Parliament, it hasn't been entirely controlled by Parliament as *Barton-Prescott* and *Huakina* demonstrate, and both the courts and the Parliament have been tip-toeing through this thicket for more than a generation now. It's not as if the *Te Heuheu* proposition is a static one.

MR PREBBLE:

I accept that, your Honour, and –

WILLIAMS J:

The question is really is there room for further incrementality.

MR PREBBLE:

Yes and –

WILLIAMS J:

You say no, this is a constitutional upheaval.

MR PREBBLE:

Yes, I say it will continue to incrementally change but what is being sought here is an upheaval because it's asking the Court to effectively step into the position of making decisions about what is the right balance to make under the Treaty without any statute to provide for that, and I do say that the way our legal systems have developed is to still give strength to the Treaty within what I'm describing as our broader legal and constitutional settings and that is because there's the very strong public law aspect now that is growing up around the incorporation and so it has been incorporated domestically in a particular way and that is being used by the courts, *Climate Clinic* is a great example of that, *TTR* is also a great example of that. Public law challenge is continuing and will continue to give strength to challenges based on the Treaty and direct incorporation to statute.

Outside of the public law challenge you've obviously got the ability to go to the Waitangi Tribunal for recommendations for inconsistent action and the bit that I haven't come on to but is important is the growing recognition of rights that are protected under Article 2. So from, for example, *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) through, we have the *Ngāti Whātua Ōrākei* litigation, and now including *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 in that, we have a growing sense that in terms of continuity of rights that are protected by the Treaty, they are able to be litigated upon and the Court can make declarations of rights in relation to those. I think that means there is still ongoing change and those rights then feed into, if there are declarations made about them, then you would foresee that impacting on public law decision-making as well, because it gives a more hard edge to challenging government action.

WILLIAMS J:

It becomes rather difficult to distinguish the one from the other.

MR PREBBLE:

I have thought quite a bit about that, your Honour, in terms of that this is Article 1 and Article 2 almost like –

WILLIAMS J:

Well the Article 2 content and the Treaty in which it is affirmed, that content is affirmed.

MR PREBBLE:

- 5 Yes, yes, and that is a submission made by Te Hunga Rōia Māori about maybe – and therefore almost this kind of like it's a small step forward to almost say you can therefore have declarations about the Treaty. I would say it's actually a large step forward because when you think about declarations over rights you are looking at, well, what rights exist. You're not seeking the Court to make
10 declarations about whether or not the Crown's conduct in respect of those rights are Treaty compliant and I think they are different.

WILLIAMS J:

- You wouldn't, couldn't have any problem with a declaration that said these rights referred to in the Treaty are being breached. Or, perhaps better, these
15 rights referred to in the Treaty are legally enforceable.
1100

MR PREBBLE:

- I would say that that latter formulation is appropriate but the former one where you talk about breach, you're getting into asking the Court for a determination
20 on whether or not the Crown's conduct is Treaty compliant and I think –

WILLIAMS J:

Well, yes, but because the Crown as executive is subject to the law, if the rights contained in Article 2 are lawful rights the Crown cannot abrogate them.

MR PREBBLE:

- 25 And this came up – I agree with that, your Honour, in the sense that if we're talking about the executive, and I do think there needs to be some care with executive versus Parliament in this discussion.

WILLIAMS J:

Of course.

MR PREBBLE:

Because I think if it's the executive I would be suggesting that if you get your
5 rights clarified, I mean, for any person the executive needs to act according to
the rule of law and shouldn't trample and trespass on your rights and so of
course you –

KÓS J:

Well, the question in that situation is not whether it's Treaty compliant, it's
10 whether the conduct is rights compliant.

MR PREBBLE:

Correct. Lawful. Yes. And I think therefore it's not a case of declarations of
inconsistency in that space, it's really just – you might have a particular cause
of action actually arising out of your rights being clarified or, and this is my
15 suggestion about public law, it would mean that you had greater strength for a
public law challenge when the government, executive ministers, make
decisions in respect of that interest.

KÓS J:

Or a private law challenge if you're talking about enforceable private law rights.

20 **MR PREBBLE:**

Yes, yes.

KÓS J:

Which in Article 2 you are, at least sometimes.

MR PREBBLE:

25 Yes, yes. So I'm not arguing with any of that but what this claim does is not
that –

WILLIAMS J:

I understand that but we're talking about legal enforceability and once you get yourself to that point the distinctions become shades of meaning.

MR PREBBLE:

- 5 I think there's still a distinction and a reasonably clear one. I do want to come back to this point. I just wanted to touch on the Supreme Court jurisprudence around judicial review and if I may bring up the *TTR* decision, because I would put forward –

KÓS J:

- 10 I mean, may I just say that the point that you are making seems to go directly to the pleading here because the pleading is a declaration the Crown has committed a breach of Article 2, a declaration the Crown is acting in breach of its Treaty duties.

MR PREBBLE:

- 15 Yes.

KÓS J:

So it's certainly the one, not the other.

MR PREBBLE:

- What I would say in answer to that is that is entirely about Article 1 as much as
20 it is about Article 2 because the reason the Crown has done that is because it's governing and it's making decisions that have an impact on rights that are protected under Article 2. You cannot have an action of the Crown without thinking about the Treaty as an interplay between the three articles, and when you're thinking about it in that space that's where I would say you need
25 legislation to give direct effect to the Treaty.

I do make the point that the Supreme Court jurisprudence and the senior court jurisprudence is founded on this notion of enforceability which depends on legislative incorporation and so if we bring up the *TTR* decision which is in the

appellant's bundle of authorities at tab 37 and go to paragraphs 150 to 151 which are often cited. You'll see there that the Court is noting it wasn't "contended that s 12" in that case which was the relevant Treaty clause didn't oust the "Treaty's constitutional significance". Then it notes that it's "been the subject of" discussion in those authorities like *Huakina* and the relevant bit that I really wanted to simply note was at 151. So it talks about there's a different formulation. Sometimes you have general ones, for example, section 4 of the Conservation Act 1987 is an example, or the State-Owned Enterprises Act 1986, where you have, like there's a more specific one which is actually not dissimilar to the Climate Change Response Act. Then at 151 you have the comment: "But the move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance ... The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent ..." and I think that wording is really important because what the Court is, I would submit, saying is if it is silent, the Treaty is likely to still be a relevant consideration. Simply because you don't have it in the statute doesn't mean it's going to be ignored. It may well be still relevant, and the fact that it's relevant goes to the fact that it's not given weighting, it's not directly enforceable. The weighting part and the direct enforceability comes from the statutory clause, and that's what the Court is saying you give a broad interpretation to when thinking about it.

1105

WILLIAMS J:

25 Yes, well it comes from the statutory clause in combination with the inherent constitutional significance of the instrument it's incorporated.

MR PREBBLE:

This case is saying yes, you read the clause in a reasonably broad way because of the significance of the Treaty, and that's where you have a weighting and a clause in legislation. If you don't have a clause in legislation this case I suggest is suggesting that it's a relevant consideration. Not one of weighting, but it's a relevant consideration. That's simply –

WINKELMANN CJ:

Is that a correct characterisation of *Barton* and *Huakina*?

MR PREBBLE:

Yes, so in those decisions the Treaty was –

5 **WINKELMANN CJ:**

I thought it was more that –

MR PREBBLE:

No, it was a relevant consideration found in *Huakina* and *Barton-Prescott*, not one to be given a specific legal weighting, but a relevant consideration for
10 decision-making because it wasn't in the legislation.

WILLIAMS J:

Once you get to the point of it being a matter of constitutional significance that carries inherent weight, doesn't it?

MR PREBBLE:

15 No, this comes back to my point that I would say the way that Parliament is giving effect to the Treaty is actually to be quite specific as to when it's given weighting, and so where it's given weighting it's saying that's the weighting that it wants the Court to apply to it. If –

WILLIAMS J:

20 But that's inconsistent with *TTR*.

MR PREBBLE:

No, your Honour. In my respectful view it's consistent with this. It's saying if it's given a clause that has specific weighting, the Court is saying we will give that a broad and generous reading. That's where it's got a clause. All I'm
25 suggesting is if there is no Treaty clause then it's still a relevant consideration because it hasn't been put into legislation, it hasn't been directly incorporated so it doesn't have a legal weighting in that situation.

WILLIAMS J:

Well that's your assertion. Now give me your justification.

MR PREBBLE:

Well my justification is this whole thesis if you like that the Treaty needs to be
5 incorporated into legislation to have some weight, and so –

WILLIAMS J:

Well that's – again that's a conclusion. Just tell me why you take into account
constitutional significance in back-filling a statutory provision with perhaps
additional weight, but you don't do that where it is a relevant consideration in
10 the absence of express inclusion.

MR PREBBLE:

So I would say firstly that it's about reading the wording of the statute, and
obviously it's not departing from the language of that statute and giving it weight,
and that's recognising that it's a significant document but it's still respecting the
15 language of the statute, so it's not to depart entirely from the wording. It's
actually to say, well, we've got these provisions, we're not going to lightly read
them down, but in terms of if they aren't there I would say that it's not a case
that you can ascribe a legal weighting to the Treaty because at that point you
are getting into a situation where the Court is giving direct effect without any
20 legislation guiding that.

WILLIAMS J:

What do you make of its constitutional significance then in that context? Do
you ignore it?

MR PREBBLE:

25 Well as I was saying to his Honour Justice Cooke, obviously it's been described
as a source document but the way in which it's been incorporated into our
domestic settings reflects its significance.

WINKELMANN CJ:

So I think you may be misstating *Barton*, because when I look at page 184 of *Barton*, line 4, the Court says: “We are of the view that since the Treaty of Waitangi was designed to have general application, that general application
5 must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute.”

MR PREBBLE:

Yes, your Honour.

10 **WINKELMANN CJ:**

So you’re saying – you said that *Barton* and *Huakina* just said it was a relevant consideration, but that’s not an accurate reflection of that.

MR PREBBLE:

If I could bring that up on the screen, your Honour.

15 **KÓS J:**

Whose authorities are these in?

WINKELMANN CJ:

I think it’s in the –

WILLIAMS J:

20 It’s in the respondent’s.

KÓS J:

Thank you.

WINKELMANN CJ:

It’s tab 19.

25 1110

MR PREBBLE:

Yes, I would suggest it still is putting forward the orthodox position that where it's not in the legislation it is otherwise a relevant consideration. I don't think this case stands for giving it a particular weighting.

5 **WINKELMANN CJ:**

Well you're just submitting something that's contrary to the very words in front of you.

MR PREBBLE:

Which part are you referring to, sorry, your Honour?

10 **WINKELMANN CJ:**

Line 4, where it says –

WILLIAMS J:

Page?

WINKELMANN CJ:

15 Oh, page 184.

MR PREBBLE:

Yes, this is the: "We are of the view ..."?

WINKELMANN CJ:

Yes.

20 **MR PREBBLE:**

"General application".

WINKELMANN CJ:

Whether or not there is a reference to the Treaty in the statute: "... it will have a direct bearing whether or not there is a reference to the treaty in the statute."

MR PREBBLE:

Yes, yes.

WINKELMANN CJ:

Well you said – you’ve just –

5 **MR PREBBLE:**

So that’s saying – in my submission that is saying that the Treaty is something that could be relevant, has relevance, to which it is where it’s not otherwise in the statute.

WINKELMANN CJ:

10 It’s saying that the Treaty, where – that it colours “all matters to which it has relevance, whether public or private”.

MR PREBBLE:

Yes.

WINKELMANN CJ:

15 So it’s a principle of statutory interpretation which may operate in a multiplicity of ways, not just as to whether it’s a relevant consideration. Possibly the confusion – I might be confused by your reference to “relevant consideration”, which is the language of decision-making.

MR PREBBLE:

20 Yes, it is, and I think that we’re putting forward simply the proposition that if the statute doesn’t include the Treaty then it may well still, because of its significance, be a relevant consideration when interpreting the statute. I do not see this decision as saying and it’s going to be directly enforceable or has to be given effect to in a more weighted sense.

25 **WILLIAMS J:**

I don’t think anyone’s suggesting you draw direct enforceability from that, but it’s a little more nuanced than merely saying it’s generically relevant in a public

law sense. It's saying it colours the statute, this is really important because these were solemn obligations accepted and this has constitutional status.

MR PREBBLE:

I accept that it is obviously a matter that will be – and this goes to the
 5 interpretation of the legislation ultimately as to what the Court is going to do with it. I still would come back to this is an instance of the Court interpreting legislation and finding whether or not the Treaty has some place in that legislation. It is not the same as giving direct effect in a more general way, and I think –

10 **WINKELMANN CJ:**

Well you can see how powerful it is actually in the decision itself. Just a little bit further down the page, line 30: “That the Family Court Judge was wrong in finding that matters concerning tikanga Maori are not dominant in making a determination as to what is in the best welfare of a Maori child.” To be fair, I
 15 think that’s an argument.

COOKE J:

At the very least, this is showing that there is a very sophisticated legal analysis of the place of the Treaty going on here and that rather suggests that there is an important place that the Court has in identifying Treaty rights and how they
 20 are relevant, and that rather suggests declarations of inconsistency could be made by the Court and not just by the Waitangi Tribunal because of the legal questions that have been developed since *Huakina – Te Heuheu*, I mean.

MR PREBBLE:

I would suggest that this case and *TTR* and *Huakina*, *Barton-Prescott*, I would
 25 suggest they are all instances of the Court working out when the Treaty is relevant and what kind of weighting to give it within legislation. I do not accept that they stand for a proposition that that enables the Court to have jurisdiction to move from that to declarations of inconsistency.

WINKELMANN CJ:

Right, okay, well I don't think – I can see that submission. I was just struggling with how you were articulating *Barton-Prescott*.

MR PREBBLE:

- 5 I might've been in your Honour's view too narrow in the way I conceive of this. I think there's a matter of interpretation going on here which is obviously one that is going to continue to evolve in a public law sense, but I don't think that changes the outcome in that doesn't bring the Treaty in as directly enforceable for declarations against – in this case against the terms of the Treaty.

10 **WINKELMANN CJ:**

So your essential submission is that the law has – since *Te Heuhe* the law has been developing in a way to give the Treaty status within our law, but it has not made it directly enforceable.

MR PREBBLE:

- 15 Correct.

WINKELMANN CJ:

And is the next submission that *Te Heuhe* was correct, or –

MR PREBBLE:

Yes.

- 20 1115

WINKELMANN CJ:

And/or even if it was incorrect it doesn't really matter because it's now part of the constitutional fabric?

MR PREBBLE:

- 25 Yes, except for the "doesn't really matter" part. I pondered that, your Honour. Obviously there's a threat of reasoning that we say was correct from *Te Heuhe* that has flowed into, and is now part of, the fabric of our law surrounding the

Treaty and so if for example the Court was to overturn *Te Heuhe* then it pulls that out from that fabric and I think when I say that, that understanding is what I mean by supporting things such as these clauses, the operation of the Treaty of Waitangi and the Waitangi Tribunal, it is built up around the common
 5 understanding of the place of the Treaty in our legal system and –

WILLIAMS J:

I suspect in – sorry.

MR PREBBLE:

Sorry, your Honour.

10 **WILLIAMS J:**

Well I suspect that in the courtroom before Justice Chilwell, the argument for the, what became Environment Waikato but was then the *Waikato Valley* Authority, I think, something like that, would've been this is revolutionary madness. It's not in the statute and you can't wish it into the statute, don't you
 15 think? Yet it wasn't.

MR PREBBLE:

No, and Justice Elias who argued that case obviously persuaded –

WILLIAMS J:

Did a good job.

20 **MR PREBBLE:**

Did a good job. I think the decision came shortly after the *Lands* decision.

WILLIAMS J:

Yes.

MR PREBBLE:

25 So I saw some of the same cases being referred to and she was in both so I thought obviously had got well prepared –

WINKELMANN CJ:

Was a busy period of time for her.

MR PREBBLE:

Yes.

5 **WILLIAMS J:**

That's the point, that that first half of the 80s was kind of itself a constitutional moment that drove the shifts, a lot of them judicially led.

MR PREBBLE:

Yes.

10 **WILLIAMS J:**

Which is whether it's revolution or evolution is the tricky thing.

MR PREBBLE:

Yes, and I think that these shifts or changes have been still respecting the common understanding of the Treaty is really what I'm putting to your Honours, and about where the Treaty is placed in that. I do put forward the proposition it's not incoherent and it might well be that people would like to see the Treaty against its terms, not its principles, given more direct effect and what I'm really saying is that ultimately is a matter for Parliament because the constitution and our legal systems are set up in a particular way, in a particular understanding of the place of the Treaty within that. I think it is worth just going briefly to *Te Heuheu* and I'll be guided by your Honours as to how much you would like –

TECHNICAL ISSUE – INTERRUPTION (11:17:56)

MR PREBBLE:

– how much you want to talk about *Te Heuheu* but we do say, as point in time, it was an orthodox decision and that it does reflect dualism in New Zealand and that dualism in terms of the continuity of dualism has been confirmed from prior

to *Te Heuheu* through to modern day and if we bring up, for example, page 597 of *Te Heuheu*.

WILLIAMS J:

Is that in your bundle or the appellant's bundle?

5 **MR PREBBLE:**

Sorry, your Honour, that's in the appellant's bundle at 32. And if we go, you'll see the main discussion is on page 597 and I think really the key points that I would highlight in this is that it talks about, it's got the *Vajesingji* decision where a territory is acquired "may be by conquest, may be by cession ... may be by
10 occupation ... in all cases ... it's the same." And then you've got this: "Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized."

15 Then it goes down and there's a paragraph which begins is it "quite clear" and it talks about the *Cook v Sprigg* 1899 App. Cas. 572 decision: "It was held that the 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 to the individuals is not one which the municipal courts are authorized to enforce." Then it talks
20 about: "So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed ..."

WINKELMANN CJ:

What page is that?

25 **MR PREBBLE:**

Sorry, your Honour, that is at page 597.

1120

WINKELMANN CJ:

Thank you.

KÓS J:

It's the middle of the page.

MR PREBBLE:

And there are a number of things I want to say about this. Firstly the point about
 5 officers, because I know that is a critique and that the general proposition being
 the *Vajesingji* decision and the *Bai Rajbai* decision which this refers to were
 broader because they referred to officers rather than legislation, I don't accept
 that that's material, and if you look at those earlier decisions they are often
 concerned with particular private – like leases or licences that were promised
 10 at the time of ceding sovereignty, and so when the State entered into the
 treaty of cession in those cases there was undertakings about a particular
 continuation of a lease. So in the *Vajesingji* decision it was you've got we'll
 enter into a lease with you, there was a promise made, and what this I think
 case is anticipating is back – I mean this is early, early on, that the governor
 15 may well simply perfect that lease or licence or contractual matter after the
 sovereign has taken over the new territory, and –

WILLIAMS J:

See, these – I was struck by that when I read them because I had never
 bothered to before. These are the equivalent of *R v Symonds* (1847) NZPCC
 20 387 (SC) and of *Johnson v McIntosh* 21 US 543 (1823) in the US, both of which
 say that the rights provided by treaties are enforceable.

MR PREBBLE:

What I would say – you mean in terms of these earlier decisions, your Honour?

WILLIAMS J:

25 Well *Cook v Sprigg* and the *Joravarsingj* case are about, as you say,
 transactions, pre-annexation transactions or pre-treaty transactions and
 whether they're enforceable.

MR PREBBLE:

Yes, yes.

WILLIAMS J:

That's the facts in *R v Symonds* in which the Judge says whatever the nature of the rights of the aboriginal inhabitants of New Zealand they're entitled to be respected in the law, or words to that general effect.

5 **MR PREBBLE:**

And I would say in terms of those –

WILLIAMS J:

Which is contrary to what these say.

MR PREBBLE:

10 No, I would say that it's not contrary in terms of – rather than the point about rights and the continuous nature of rights, what those decisions are saying is they are not enforceable in the domestic courts. They're all saying this, which is really a reflection of duality, unless –

WILLIAMS J:

15 But here in New Zealand *Symonds* is cited for the proposition that aboriginal title is enforceable.

MR PREBBLE:

That's what – yes, I think there's two things going on here, continuity of existing interests pre and post, and we know from *Ngāti Apa* for example that there's an
20 ability for continuity of existing interests and that confirms –

WILLIAMS J:

Yes, but it draws its inspiration from *R v Symonds*.

MR PREBBLE:

Yes, and I would say that that actually reflects and is consistent with this line of
25 decision, which is what we're talking about here is the promises and the undertakings that were made in the actual document, the treaty between state-to-state, and what those decisions are clearly saying is at the

state-to-state level those obligations are binding but not at the domestic level, and I think the only exception that is pointed out here is, well, it could be – it says through officers and I think what that really is getting at is the fact that those early, some of those early decisions were promising particular contracts or particular leases and so it made sense. It also makes sense for why in *Te Heuheu* it doesn't refer to through officers because it's clear you would need legislation to give effect to that.

WILLIAMS J:

Doesn't *R v Symonds* say to the extent that the Treaty of Waitangi confirms that, it says nothing new?

MR PREBBLE:

I think what that decision and subsequently what *Ngāti Apa* ultimately confirmed is that the Treaty doesn't displace customary interests.

WILLIAMS J:

Well it certainly doesn't. It guaranteed them.

MR PREBBLE:

Yes.

WINKELMANN CJ:

Is the point you're trying – the distinction you're trying to make that by giving effect to the rights that the Treaty guaranteed the Court is not directly enforcing the Treaty, it's giving effect to the structure that was thereby brought into being, and that's different to saying I'm suing on the Treaty to access those rights?

MR PREBBLE:

Absolutely, yes.

WILLIAMS J:

So the problem is that *Cook v Sprigg* doesn't say that. It says those rights don't exist at all.

MR PREBBLE:

But I think what *Cook v Sprigg* is saying is that the rights within the treaties that are entered into –

WILLIAMS J:

5 But those treaties they're talking about are the transactions.

MR PREBBLE:

Yes.

WILLIAMS J:

10 So they're the equivalent of the transaction between the Māori owners and whichever of *Symonds* and the other person was the purchaser from them. It's not the treaty between the annexing state and the indigenous people.

1125

MR PREBBLE:

15 We can go to *Cook* if your Honour wants but my reading of that decision and my reading of the *Vajesingji* and the *Bai Rajbai* decision is that in terms of the State-to-State interaction that there needs to be some action to bring it into the domestic setting before the Courts can make it enforceable, and I think that is consistent with *Te Heuheu* and it's consistent with later cases, and I did want to go to – and the point I was making about the officer point is there's a comment
20 made about officers and I was just giving your Honours a rational explanation to why there's a reference to "officers" because, at the State-to-State Treaty level, some of the stipulations, so if you go to the *Vajesingji* decision it talks about there being leases and licences in the territory that were promised as part of the seeding of sovereignty, and so where it's part of the seeding of
25 sovereignty and the taking over of a territory by a new entity, that promise is not enforceable until it's been brought into the domestic setting somehow.

WILLIAMS J:

Then you see that's my point, that you're not talking about the underlying rights. You're talking about the enforceability of a transaction –

MR PREBBLE:

Yes, your Honour.

WILLIAMS J:

– which is the facts in *R v Symonds*.

5 **MR PREBBLE:**

Yes. My point is that the consistent response in the cases, majority of the cases, including in *Te Heuhe*, is that those obligations are not enforceable domestically unless you have legislation, and there's an exception for officers and I was just putting forward what that might mean.

10

And I think the other point I wanted to make about this is there's often a reference to the Canadian decisions and the Canadian treaties and I know that my learned colleague made this point about *Simon v R* and the Canadian jurisprudence and cases and settings generally needs to be treated with some
 15 care because of the fact that in that case it was after the 1982 Constitution Act which gave direct effect to the Treaty in section 35. But the other point about Canada is those treaties are, I would suggest, quite different to what we have in New Zealand. So they were often with particular bands over particular areas and almost to some extent excluding from operation the surrounding laws and
 20 then brought into the Indian Acts and you'll see this kind of flows through to fiduciary law and the cases around that as well in Canada because there was an ability over that area to have almost like a duty of loyalty to that particular group which is quite distinct from what the Treaty by its nature was, and I just put forward the proposition that they therefore need to be treated with some
 25 caution because they are factually and legally distinct from what was happening here.

WILLIAMS J:

Yes, well, some are. The further east you go the more Treaty of Waitangi-like they become, but in fact when you get to Nova Scotia they are straight
 30 international treaties of allyship and mutual cooperation in the revolutionary war.

MR PREBBLE:

Your Honour is an expert in the area.

WILLIAMS J:

Well, I'm not. You'd have to ask a Canadian that. But certainly the lands
5 transactions in the western part of Canada are very distinct from the truly
Foreign Affairs treaties on the eastern seaboard.

MR PREBBLE:

And I think the point I just wanted to draw out was that one that's referred to by
my friend, *Simon v R*, and the article by Slattery, and I just make the point that
10 some of those treaties are quite distinct in terms of the Canadian band
decisions.

The decision I did want to go to is the *JH Rayner (Mincing Lane) Ltd v
Department of Trade and Industry* [1990] 2 AC 418 (HL) decision because I just
15 wanted to make the point about the continuity of duality and how it has applied
from *Te Heuheu*.

WILLIAMS J:

Where is that?

MR PREBBLE:

20 And so this is in the respondent's supplementary bundle at 10.

WINKELMANN CJ:

How do you spell it? R-A?

MR PREBBLE:

It's R-A-Y-N-E-R, and if we go to...

25 **WILLIAMS J:**

Give me the number?

WINKELMANN CJ:

It's 10.

1130

MR PREBBLE:

- 5 Page 499, and you'll see there: "It is axiomatic that municipal courts have not and cannot have the competence," sorry, this is about three paragraphs from the bottom, "to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states ..." Firmly established. And it's referred to the *Cook* decision which is one of the ones that
- 10 *Te Heuheu* also relied upon. "On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative ..." and then over the page "is beyond the control of municipal law, and ...are not to be examined in" the courts. So this is the entering into the Treaty, so the entering into the Treaty creates binding obligations between the
- 15 two states essentially: "That is the first of the underlying principles. The second is that, as a matter of the constitutional law ... whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals ..." et cetera "... in domestic law without the intervention of Parliament."
- 20 Really that is, the Treaty is not part of the law unless and until it's been incorporated by legislation and that, you'll see, is consistent with *Te Heuheu* as we see it. And that line of common law and thinking is entirely consistent with our dualistic constitution and legal system. It's also reflected, and I won't go there, in the *New Zealand Air Line Pilots' Association Inc v Attorney-General*
- 25 [1997] 3 NZLR 269 (CA) decision and the *HeLu* decision which are both in your Honours' bundles.

KÓS J:

- But these are cases that generally involve entirely new obligations, state to state obligations. That's not what we're dealing with here where we have underlying
- 30 rights that pre-exist the Treaty.

MR PREBBLE:

Totally, your Honour. I think, possibly poorly, I was trying to make the point that those rights continue to the extent they haven't been displaced. So the common law comes along and if the common law doesn't displace those interests and
5 rights, and you see this in *Ellis* –

KÓS J:

Well there's two points about that. The first is to the extent they're not displaced, but the second is that the Treaty can't displace them.

MR PREBBLE:

10 No.

KÓS J:

Until it's enacted.

MR PREBBLE:

Yes, yes, absolutely.

15 **KÓS J:**

Yes.

MR PREBBLE:

And that's basically the point I want to make about this. The other key point I want to make though is that there's often a reference to the Treaty being one of
20 cession and I would say, and we say this in our submission, that that's irrelevant to considering this. The main thing is it was and is an international instrument and that's the way *Te Heuhe* looked at it. It still needs to, in an orthodox sense, which is part of our common law, be brought into our domestic legislation to have legal effect and I would say that point is the key point, and not one of, or
25 we can just say this is constitutionally significant so we can do that. I would say no, it still must be brought in to our domestic law before it has legal effect.

WINKELMANN CJ:

Right.

MR PREBBLE:

So, the point –

5 **WINKELMANN CJ:**

Morning tea?

WILLIAMS J:

Oh, is it? Oh yes, sorry.

WINKELMANN CJ:

10 You want to finish your question though?

WILLIAMS J:

I wonder if you would think about this over your coffee. If you connect these decisions to *Miller* and so on, the articulation of it is that international treaty obligations are not directly enforceable because the Crown cannot by exercise
15 of prerogative alter domestic law.

WINKELMANN CJ:

So –

WILLIAMS J:

But where, but what does that say about direct enforceability of Treaty against
20 the executive that entered into it. Can you give that some thought?

WINKELMANN CJ:

Right, and we'll take the adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:

Mr Prebble.

MR PREBBLE:

5 Thank you, your Honour. *The Attorney-General v Canada* [sic] –

WINKELMANN CJ:

Now you’ve faded away.

MR PREBBLE:

Sorry. *The Attorney-General v Canada* [sic] – sorry, *Attorney-General for*
10 *Canada v Ontario* –

WILLIAMS J:

Ontario.

MR PREBBLE:

I just wanted to go to that and I’ll just read it out because I think it answers
15 your Honour’s question to me. It says that essentially when undertaking these
treaties it’s a “function of the executive alone”, and this is me now reading
directly: “Once they are created, while they bind the State as against the other
contracting parties, Parliament may refuse to perform them and so leave the
State in default. In a unitary State whose Legislature possesses unlimited
20 powers the problem is simple. Parliament will either fulfil or not treaty
obligations imposed upon the State by its executive.” And in my submission
that is really the answer to this in the orthodox sense, and if your Honours did
want to go to that –

WINKELMANN CJ:

25 Well do we – for your argument do we really need to resolve this issue?

MR PREBBLE:

No –

WINKELMANN CJ:

Because isn't your argument that we'd be pulling so many threads out of the constitutional fabric to assert this jurisdiction that it's not for the courts to do it?

MR PREBBLE:

5 Yes, and in a way – I would say my argument's a bit more nuanced than that. In terms of the legal position the Treaty has, I'm trying to say these threads from *Te Heuheu* have been incorporated and become part of our legal system constitution, and now I think we can turn more to the declaration of inconsistency in a moment because I think that declarations and declarations
10 of inconsistency, there's some further reasons as to why I would say that is not something that the Court should entertain, but I think at a broad level what your Honour has just articulated is essentially what I'm putting forward as the Crown's answer to this, that you would be running counter to the legal system and constitution that has developed up around a common
15 understanding built from *Te Heuheu*.

And I just wanted to go to that decision, sorry if it was distracting, but the answer to your Honour's question is that it binds state-to-state, it doesn't bind in terms of the territory until Parliament has made a decision to incorporate it.

20 WILLIAMS J:

And where is that?

MR PREBBLE:

Sorry, that is in the *Ontario* decision which is in the Te Hunga Rōia Māori bundle at tab 3 and I'm at page 348, which is – I would submit that's also reflected in
25 the *Rayner* decision and it's reflected in our own decisions as well. So *Air Line Pilots* is one in the bundle and so is the *Hehu* decision, which is really saying you can enter into these obligations at the State level and that's where they are binding, but they don't have effect domestically until there's been a decision to incorporate that by Parliament.

30 1155

WILLIAMS J:

That's true in – this case was a labour relations case, wasn't it? This was the equivalent of the American cases that struck down FDR's new deal.

MR PREBBLE:

5 Yes.

WILLIAMS J:

Labour relations material. So you can see why that is, because there would already have been a statutory regime in place covering it.

MR PREBBLE:

10 I accept that there's a range of different facts behind these and the *Rayner* is again different and obviously, you know, the argument might be, well, the Treaty is quite different but in my submission it's the same and those earlier decisions before *Te Heuheu* are reflected in *Te Heuheu* fairly. I'm just pointing out this continuity in the law when dealing with dualism and that what really the binding
15 effect of entering into a treaty at an international level is it's binding on the State-to-State. It's not binding in a domestic sense.

WILLIAMS J:

But the point I was trying to drive at was that there seems to be an argument available under *Miller* (No. 1) and earlier authorities to – that the executive can
20 be held to its promises affecting local people by treaty.

MR PREBBLE:

I would say the *Miller* decision, which also refers and cites the *Rayner* decision, is consistent with these propositions that I'm putting forward, your Honour.

WILLIAMS J:

25 Yes, but *Miller* says the reason that treaties are not enforceable is that the prerogative cannot change extant law. It does not say that the executive is not directly bound by promises it made that do not change local law.

MR PREBBLE:

In my submission it's saying, and we could go to that decision as well, but the *Rayner* and *Miller* decisions I would say, and including our decisions, are saying that the executive in our domestic settings is not bound by what is agreed at an international level. At international level it is binding between States but for it to bind domestically it does need to be –

WILLIAMS J:

Yes, I understand that. I was struck by *Miller (No. 1)*'s reason for why that was the rule, and the reason was that basically relying on the *Case of Proclamations* that the executive cannot change the law. But that does not mean that the executive cannot be directly sued on those promises –

MR PREBBLE:

It can be –

WILLIAMS J:

– because that's not changing the law.

MR PREBBLE:

The executive entering into it as a matter of prerogative can be the subject of a challenge by the other State as a matter of international law as well –

WILLIAMS J:

No, I mean locally. If what's contained in the document is local promises, that seems to be consistent with the reference to "officers" in *Vajesingji* and so on.

MR PREBBLE:

I would take a different view, your Honour, and say if it's an international treaty it's between two States and so the entity, and Palmer writes about this too, the entity that has the ability to bring the litigation is at the State level, so the other State can bring the litigation. So when we're talking about private individuals it gets into a different area but where we're dealing with treaties that are between

two nations or two States or two sovereign entities the binding nature is between those two entities.

WILLIAMS J:

The difference is that this Treaty extinguishes one.

5 **MR PREBBLE:**

Absolutely, and in a way – well, Palmer wrote about this in his book as well in that over time obviously there's no entity because if you accept Parliamentary sovereignty there's no entity to bring a claim at an international level that the Crown is no longer complying with the Treaty, if you accept the Treaty is an
10 international document.

But the point I'm making is that the binding nature of these obligations where between States is between the States, not between individuals within the territories, and I think that proposition is consistent throughout these decision.

15 **WINKELMANN CJ:**

So moving on to declaration of inconsistency?

MR PREBBLE:

Yes, your Honour. I did want to, before I did that, I just – I don't propose to spend any time on this but to note that I have been trying to sketch this first half
20 which is really our theory and position on the position of the Treaty in our legal system, and there are a number of other points that our submissions do respond to that have been, I would say, put forward by the appellant as potentially supportive, although I didn't hear it so much in oral submissions, of the Treaty having greater direct effect, and that included under the Vienna Convention and
25 non-enforceable guidance like the Cabinet Manual, the Cabinet Circular and LDAC, and the reason for mentioning those is we do not see them as altering the legal position the Treaty has. UNDRIP is not ratifiable or binding on States. It can be used for interpreting human rights but it can't change the fundamental legal status of the Treaty, we say.

The Vienna Convention and the *pacta sunt servanda* principle, that again is operating at an international level between States. It again wouldn't change the effect of the Treaty domestically. It might give rise to a claim in an international sense, and this is what his Honour Justice Palmer wrote in his book that, if there

5 was another entity still capable, another sovereign state capable of enforcing the Treaty and you accept the Treaty as an international Treaty, then they could bring a claim based on that principle from the Vienna Convention.

In terms of the non-enforceable guidance the decision of *Rabson v Attorney-General* [2016] NZHC 2876 in our bundle is that the Cabinet Manual itself is not

10 directly enforceable and they are conventions for the executive in acting, they are supportive I would say of the legal framework that I have sketched for your Honours this morning about the position of the Treaty in our legal system.

I did want to move to declarations, or declarations of inconsistency, and we say that amounts to direct enforcement of the terms and it's contrary therefore to the legal case of the Treaty that I've outlined and there are two things that I want to say about this. What this claim isn't is this claim isn't a claim in judicial review, and I know that's pretty obvious to your Honours now, but it has been

15 in the submissions before you and certainly in the Court of Appeal it was argued that it was more of a constitutional review akin to judicial review and there was a lot less focus on declarations of inconsistency. That has certainly become a more heavily focused argument in this Court than it was in the Court of Appeal. The idea of a constitutional review relied on authorities that I would say are

20 really orthodox judicial review authorities and I just wanted to make that point because this clearly is a challenge to executive action and legislation and I would not say it's consistent with those authorities. It's clearly not.

25

In terms of what this claim is not, it's also not a claim about rights, and we've

30 had that discussion to some extent. It's not a claim that is simply seeking, like in *Ngāti Whātua Ōrākei*, the clarification of existing rights and whether they still persist, it's about whether the Crown's action in response to climate change is offensive to breaching the Treaty with regard to existing interests.

So it is drawing, which is really my next point, this claim is going to the heart of how the Treaty operates, and we do say in our submissions that the Treaty is a forward-looking relational document built on partnership and that means it requires consideration of the interplay between Articles 1, 2, and 3, how best to
 5 balance tino rangatiratanga with governance and Article 3, the commitment to equal rights. I do want to, I know it's an older authority but it's often referred to, the *Broadcasting Assets* decision which is at the appellant's bundle, tab 20.

WINKELMANN CJ:

What's the name of the case?

10 **MR PREBBLE:**

Sorry your Honour, it is *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC). So this obviously followed not long after the *Lands* decision and I wanted to go to page 517.

WILLIAMS J:

15 Just give me the tab number again sorry.

MR PREBBLE:

Sorry, that was appellant's bundle, tab 20.

COOKE J:

20.

20 **WILLIAMS J:**

20.

WINKELMANN CJ:

20.

WILLIAMS J:

25 It's the Privy Council decision?

MR PREBBLE:

I hope I've got that right. Yes, Privy Council. You'll see there, if you can scroll down to page 517. Firstly, I'd acknowledge that this decision is critiqued, I've seen it critiqued in a number of different places because it focuses too much on the English version, not on te reo version, it therefore in some sense is following on from *Lands* as a criticism that it doesn't take account of both versions of the Treaty and so forth. It's actually a decision that is referred, however, by the Supreme Court in the *Climate Clinic* decision and adopted some of the reasoning and so I would say the core reasoning here is still applicable and useful to this Court.

1205

And there's a paragraph that I wanted to go to which starts with: "Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property ... in return for being recognised as the legitimate government of the whole nation ..." And then it talks about the English text: "... emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified." And in all of the cases, including in the Waitangi Tribunal reports, I don't think it's ever stated that it is absolute and unqualified. There needs to be an ability for the Government to govern under Article 1.

And there's an ongoing dialogue in the Tribunal I would suggest about the strength of the Article 2 interest and obviously coming out of the 1040 Northland reports, but the point that this decision is making is it's not absolute and unqualified in terms of tino rangatiratanga and that would be inconsistent, the Privy Council says: "... with the Crown's other responsibilities as the government ... and the relationship between Maori and the Crown." It envisages it: "... should be founded on reasonableness, mutual cooperation and trust." And so then it says it is not therefore obligated: "... in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant" – and that's the same language used in *Climate Clinic* – "the protective steps which it is reasonable for the Crown to take change depending on the situation which

exists at any particular time.” And I would say that is the fundamental part of the decision which is helpful to your Honours, and it really demonstrates that what is being asked is essentially for this Court to get into an exercise of working out whether something is Treaty compliant which requires balancing the

5 Article 1 interest governing for all of New Zealand’s interests while protecting the Article 2 interests or rights.

And as this decision is saying, there’s a degree to which that decision-making is very much dependent on the circumstances, and you’ll see this: “For example

10 in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure ...” et cetera, and so the what is required in any particular situation is going to be heavily factually dependent. And I think that’s important when thinking about this in terms of this rights or is this about ultimately governing, because I would say this is really getting into

15 the heart of governing to determine whether something is Treaty compliant. You can get your rights clarified under Article 2, but if you’re going to say something is Treaty compliant you’re really saying has the balance been correctly struck between governing for the country as a whole while protecting the Article 2 interest and ensuring equal rights under Article 3.

20 **COOKE J:**

Is that not a similar exercise that would be engaged in when dealing with a Bill of Rights claim under Article 20 and whether –

WILLIAMS J:

Section 20.

25 **COOKE J:**

Section 20, sorry, and whether they were demonstrably justified under section 5 of the Bill of Rights?

MR PREBBLE:

I would say no to that, your Honour, and that – I mean this comes back to the

30 conception of those rights under Article 20, but a number of points, obviously

the Treaty was deliberately taken out of from the *White Paper* to the New Zealand Bill of Rights and I think it would be an odd result if you could effectively reason it back in through an exercise in broadening section 20, but in addition to that it's a negative right that requires therefore the scope of that

5 right is about protecting culture, but also it is a right that is focused on just that, and what I'm really trying to put to your Honours is when you're dealing with the Treaty you've got another whole dimension to take into account, which is governing for all of New Zealanders.

COOKE J:

10 In a Bill of Rights declaration of inconsistency case under section 20, the section 20 rights would be informed by Treaty principles?

MR PREBBLE:

Possibly, your Honour.

COOKE J:

15 So it would come in indirectly to a Bill of Rights inconsistency claim in that way?

MR PREBBLE:

Yes, but I think the point I'm making is you would still be very much focused on the right, one, the scope of the right, and obviously my learned senior is making submissions to you about what the scope of these section 8 and 20 are in terms

20 of their predominantly negative orientation, but then when you're dealing with – if you are dealing with a situation of inconsistency under section 5 it is about the right which is more crisp, to be using this language, but it is a defined right verse a regime that impacts on that right and what that misses and what that is quite different to in terms of the Treaty is you're really being asked to make an

25 assessment of all of New Zealand's interests in climate change and whether or not in considering all of those interests under Article 1 has the Crown appropriately protected the Article 2 interest, and I would say that is a more multifactorial assessment that is quite different to a comparison between rights and potentially offensive legislation.

30 1210

So if you're getting into that section 5 proportionality assessment it is different, and *Chisnall* makes this point by your Honour in terms of if it's rights consistency between a right and a competing legislative regime that is offending that, that is within the Court's wheelhouse, effectively, but once you're getting into social,
 5 economic and other considerations your Honour is saying – I mean we've had a lot of discussion obviously about this, about competence – but you are then entering into a world where potentially it's not any more about those two matters, and I would suggest to your Honours that Treaty consideration and consistency is very much having to grapple with a very wide range of interests
 10 because you have to grapple with the governing interests under Article 1 as well as a number of different interests under Article 2.

I did want to go to – not because his Honour –

WINKELMANN CJ:

15 So you're saying definitionally you're in the area where deference is due so predictably that it justifies a strike-out?

MR PREBBLE:

Absolutely.

WINKELMANN CJ:

20 Because in *Chisnall* that's taken into account at the limitation of right.

MR PREBBLE:

Well, I'm suggesting that this is not about – one, it's not a case about rights as such, it's a case about Treaty consistency, and I'm putting forward the proposition that you can immediately, and I think maybe we're saying the same
 25 things, your Honour, you can immediately see that the Court is being drawn into an assessment that requires a careful balancing of economic, social, other matters, that has to be taken into account when considering governing along with the fact that the Crown has its significant obligations under Article 2, but they're not absolute.

WILLIAMS J:

What *Broadcasting Assets* seems to suggest though is that that balancing is a balancing about rights and it particularly says where the Māori interest is in a particularly vulnerable state the obligation, far from reducing, being reduced, is
 5 increased upon the Crown.

MR PREBBLE:

Yes.

WILLIAMS J:

But it doesn't look as if the Privy Council is saying, this isn't for us.

10 **MR PREBBLE:**

Well, I think in this case, which is judicial review, but I think what the Privy Council is saying is that your obligation under Article 2 when governing for all of New Zealand, because I think they're saying when governing for all of New Zealand, how onerous your obligations are under Article 2 will vary
 15 depending on not only the Article 2 interest but also obviously the Article 1 interest because you talk there about where there's economic downturn the Crown has to factor in, for example, other factors.

WILLIAMS J:

Yes, but my point is that the Court does not say where you have a process of
 20 balancing democratic interests per Article 1 and Māori interests per Article 2 that is not an area we are prepared to exclude from participation.

MR PREBBLE:

I would say in the context of judicial review the Courts have grappled with whether or not decisions have been made consistently with Treaty clauses and
 25 this is an example of that thinking, but that is not the same as suggesting what has been put to your Honours that you can step into direct application of the terms against whether or not the Crown is putting in place a Treaty-compliant regime addressing climate change. They are very different things. One is

executive action that is being made and you're assessing whether or not that decision, which is not the Court's –

WILLIAMS J:

Right. I didn't understand that was your point though. I thought you were talking
5 about there's something inherent about this subject that the Court should just stay out of.

MR PREBBLE:

I am suggesting –

WILLIAMS J:

10 That doesn't appear to be what *Broadcasting Assets* actually says.

MR PREBBLE:

I think *Broadcasting Assets* is saying that in the case of judicial review the Court will have a monitoring role as to whether or not the decision is meeting the requirements of whatever the legislation sets out. But that is very different to
15 what is being invited by this claim.

COOKE J:

Do you agree that when one is interpreting section 20 of the Bill of Rights Act in accordance with the legislative interpretation principles, it should be interpreted as far as possible in a manner consistent with the Treaty of
20 Waitangi?
1215

MR PREBBLE:

I think that that's probably a point I should defer to my learned senior on, given he's answering these questions, but I would suggest that –

25 **COOKE J:**

Well you've been relying on these interpretive principles as being the –

MR PREBBLE:

Yes, I think the – this is touching on what is starting to develop about principles of legality and how generously you read legislation. I would say the primary driver for that interpretation must be obviously the purpose of the legislation and what was intended, because it's not just about culture, it's also about religion, and I think you would be considering obviously the purpose of the legislation, the *White Paper* and the fact that the Treaty was taken out and so not put in there, and I think that's a very relevant consideration as to whether or not you bring it in in a strong way when interpreting section 20. You'd also look at it's a negative-orientated right and so I think you would have to be guided by the fact that it shouldn't be unduly broad and beyond what it was intended to, because that would have the same impact for religion as well and I think there's a definite consideration the Court should be grappling with and thinking about that.

WILLIAMS J:

That's not really about the Treaty though.

MR PREBBLE:

No, not at all, but it goes to how broadly you want to construe that right because it's not just about culture and minorities, it's also about religious minorities. Anyway.

20 **WINKELMANN CJ:**

Right, so Mr Prebble, I'm just mindful of the time. Have you got much more to cover? Anything more to cover?

MR PREBBLE:

Yes, I do.

25 **WINKELMANN CJ:**

Well, we better press on then.

MR PREBBLE:

Just a final point on clauses within legislation because we're talking about judicial review. One of the other factors which is referred to in the *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 decision, which is a Supreme Court decision, when looking at section 4 of the Conservation Act, it very much – the context within which those clauses sit within legislation also is relevant in defining the discretion on decision-makers. I just wanted to make that point because I think it goes to this idea that this claim is about saying certain decisions of the executive or Parliament are treaty-inconsistent, when Parliament has put particular provisions in place dealing with the Treaty you're having to consider that clause in its statutory context as well, and that's all relevant to what are the obligations on the decision-maker, which this claim doesn't engage.

The next set of submissions, I really wanted to go to *Taylor*, and so if we bring that up because I want to talk about there's no legal basis for a declaration of inconsistency, so I'll talk about that and then I'll briefly talk about the Waitangi Tribunal and the Treaty of Waitangi Act and those are the two remaining areas that I want to focus on.

So, if we bring up the Supreme Court decision in *Taylor* which is at the appellant's bundle, tab 9, and as I mentioned earlier the decision, if you look at, if we go to 42 and 43, is really, there's two very important aspects to this decision in my submission. One is about the fact that the Court reasons that because it's got this adjudicatory role under sections 4 to 6, that that implies the legislation gives the Court jurisdiction to provide declarations of inconsistency, and the other core aspect of this decision which is both in her Honour Justice France and Glazebrook's decision which I'm in here, but also in Elias' decision later –

WINKELMANN CJ:

Chief Justice Elias.

MR PREBBLE:

Sorry, Chief Justice Elias – sorry your Honour – is that section 3 is very much a key provision in providing jurisdiction for the Court to issue declarations of inconsistency and –

5 **ELLEN FRANCE J:**

Sorry Mr Prebble, what was your first point?

MR PREBBLE:

My first point were the two core aspects to how the Court reasoned it had jurisdiction to provide declarations of inconsistency and the first is the
 10 assessment of inconsistency with rights through the interplay between sections 4, 5 and 6 of the Act and you saw that in the Court of Appeal decision too which is well we're able to effectively make, it's kind of drawing on some of the past cases, we're able to say where the legislation is inconsistent. It just essentially wasn't a significant step forward in the scheme of the legislation to
 15 say we can also therefore say as a matter of law whether this legislation is inconsistent, even though there wasn't a specific remedy at that time providing for that. But I would say the other very key point to the Supreme Court decision is one that it applied to Parliament in section 3, and I'm just pointing out that that is the reasoning that you'll see at their paragraphs 42 and 43. You also
 20 see it particularly in her Honour the Chief Justice Elias at paragraph 106, 111, and 117, and I did want to –
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WINKELMANN CJ:

I mean the first ground doesn't really help you, does it, because it's just saying
 25 there is a statute here and the argument the Court was facing was that Parliament had decided not to enact a remedies clause and therefore you shouldn't be making up this, coming forward with this remedy. So that's not really responsive to this situation.

30 The second one, what exactly is your argument in relation to that?

MR PREBBLE:

Well I think the first is in that it's providing a framework domestically for then – I would say the Supreme Court was reasoning that the legislation was overruled, indicating that the Court had a role in providing declarations of inconsistency, and I think that sections 4 to 6 were giving the Court the ability to perform that role and I would say the point about section 3 is that enabled the Court – it's essentially Parliament saying we are not above the Court giving us opinions on the adequacy of our law as compared to these rights.

WINKELMANN CJ:

So a large, a strong thread was it was the Court's usual declaratory power, but is your point in relation to the scheme that the fact that the legislation bound Parliament meant that the Court might issue a declaration which would only speak to Parliament?

MR PREBBLE:

My submission, your Honour, is that it wasn't just simply that they have inherent jurisdiction in terms of the Declaratory Judgments Act and their inherent jurisdiction generally, it was that because of section 3 it enabled the Court to go further and provide essentially advice, advisory opinion, on the adequacy of that legislation and without that I think it would be difficult for the Court to reason it had jurisdiction to do that. And you see that for example at paragraph 111 where it says – it's talking about the Australian – Victorian Charter of Human Rights and Responsibilities Act 2006 and the New Zealand Bill of Rights Act: The requirement under s 3 of the New Zealand Bill of Rights Act that the rights recognised apply to acts of the legislative branch has no parallel ...” And her Honour goes on and at paragraph 117 and says: “I consider that the availability of declaratory relief follows from the scheme of the New Zealand Bill of Rights Act and its requirement that the rights recognised apply to the acts of the legislature,” and I would suggest that that is very much clearly indicating that at least her Honour the Chief Justice was saying it's because of both of those things that we've got jurisdiction to do this.

And the reason for pointing this is out is I know that *Taylor* is being used and the New Zealand Bill of Rights Act is being used as an analogy in this situation, and I'm putting to you that the fundamental reason for why the Court has jurisdiction here doesn't exist with the Treaty, and what we do have instead is

5 the Treaty of Waitangi Act.

ELLEN FRANCE J:

Don't you have to address though the – I mean part of that discussion was about saying why what the Court was doing wasn't inconsistent with the scheme of the Bill of Rights, and the Court does then go on to talk at paragraph 53 or at

10 least – and I don't think there's a disagreement in relation to this amongst the majority – but at paragraph 53 make the point that it's a formal declaration of law and dealing with the effect on rights and status, and the Court will go on to say: "... the courts may make a declaration under the Declaratory Judgments Act 1908 even when there is no lis." And I suppose apart from what you've said

15 already about the status of the Treaty that sort of line of reasoning would apply, wouldn't it, to the Treaty because you're talking about rights in status?

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MR PREBBLE:

So that's where I come back to what we were just talking about. Firstly,

20 your Honour, I would see this decision as saying the jurisdiction was ultimately found because of section 3 and sections 4 to 6, because ultimately there is an impact to parliamentary sovereignty under section 15 of the Constitution Act and the Court was prepared to do this because of those provisions, and so I would say without that I would have thought that this Court may not have found

25 the jurisdiction to do that. So if you didn't have the New Zealand Bill of Rights Act I don't think you would have had the ability to do it, and in terms of the Treaty my next point would be, as I was saying, I don't see this as just straight rights as in with the New Zealand Bill of Rights Act there's catalogues of rights that are protected and therefore within the adjudicatory role of the Court to

30 clarify whether those rights are being offended and it drew on its jurisdiction on the Declaratory Judgments Act but there's no right here in that this is about whether in governing New Zealand has got that balance right and that is not

about rights definition which is what Article 2 protects. There are rights in there, but that is not what is being asked which is inconsistency of government action as a whole, and it's quite conceptually different.

WINKELMANN CJ:

- 5 Well, you're making it sound complex but I really think your argument boils down to no more than section 3 said the Act applied to Parliament and therefore that gave the Court confidence that it was within its powers to issue a declaration that spoke to that.

MR PREBBLE:

- 10 In *Taylor*, yes, but I guess I'm going here because it's been used as an analogy for why the Court has –

WINKELMANN CJ:

And the next point is there's no such platform here.

MR PREBBLE:

- 15 Yes, and I think the next point again is that what we do have signals that the intention of Parliament is the opposite and I do – really the last topic that I want to go to is to go to the actual Act, the Treaty of Waitangi Act, which sets in place the Waitangi Tribunal, and this is in our supplementary bundle at tab 2.
- 20 So really this goes to if the Court was thinking about whether to push, and I think I heard from my learned colleague saying this is a novel extension to the law, and I'm essentially saying and the Court shouldn't take that step and one of the reasons it shouldn't take that step is because of this legislation and what it's being asked to do, and I say in substance it's being asked to do the very
- 25 thing that you're being asked to do here.

- If you look at the long title to the Act which sets out its purpose, it's got a number of parts to it: "An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make
- 30 recommendations on claims," et cetera, "and to determine whether certain

matters are inconsistent with the principles of the Treaty,” and so one of the purposes of the Act is to set up this body to provide an adjudicatory role on whether certain matters are inconsistent with the principles of the Treaty. That’s reflected again in the preamble. It says: “And whereas it is desirable that a

5 Tribunal be established to make recommendations,” et cetera, on practical application, for the purpose “to determine its meaning and effect and whether certain matters are inconsistent with those principles.”

The next point I make – and I make this – sorry, there is one further point before

10 I get to that. It’s in section 4. It talks about the membership and that’s been talked about in cases like – and I won’t go to these in the interests of time – the *Skerret-White v Minister for Children* [2024] NZCA 160, [2024] 2 NZLR 493 decision, *Wairarapa Moana ki Pouākani v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 and *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012]

15 2 NZLR 53, which all emphasise the significance of the Waitangi Tribunal, but the mixed membership also is reflective of the Treaty partnership and so it’s, I would say, considering the task that the Tribunal is being asked to make recommendations to government. There’s consideration there about making sure that that body is reflective of the two parties to the Treaty, and you’ll see

20 that’s at section 4(2A)(a).

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The key provision really I wanted to go onto is in section 5 it talks about the functions and at 5(2): “In exercising any of its functions under this section the

25 Tribunal shall have regard to the 2 texts of the Treaty ... and, for the purposes of this Act,” which I take as a reference back to the long title that I’ve just taken your Honours to, because its purpose is, “shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.” And the point I would

30 make is, and I’m mindful of the conversation your Honour has had with my learned senior about ouster clauses, I am not putting this forward as an ouster, I’m really just saying that this shows clearly that the intention was that the Waitangi Tribunal would be the entity that considered these matters, and that’s why it says “exclusive authority”. And if you think about exclusive authority to

what, “to determine the meaning and effect of the Treaty” in terms of the purposes, which includes inconsistency, then it’s hard to see how the High Court could have this role without undermining what the intention of that provision is.

5 **WILLIAMS J:**

You mean insofar as DOIs are concerned?

MR PREBBLE:

Yes, your Honour.

WILLIAMS J:

10 It certainly has the jurisdiction to do it in ordinary proceedings.

MR PREBBLE:

In ordinary proceedings we come back to that discussion about, well, there you would be declaring rights and your remedies would be through judicial review, if we’re talking about the High Court, your Honour. So I’m certainly focusing at
15 this point on the legislation aspect of the claim because I don’t see there being declarations of inconsistency when dealing with Executive action. I just – I think it’s declarations.

WINKELMANN CJ:

Yes.

20 **MR PREBBLE:**

Because of course the Executive will be acting under the law, but I would say in that situation that’s where the High Court would have an ability to test the rights under Article 2 but not go further than that in terms of testing governance essentially and the arrangements that the Crown has made when dealing with
25 Article 1 and 2 interests. So it can define the rights and then that could be used for public law litigation or other forms of litigation.

And the last case I just wanted to take your Honours to, because I think it highlights that if this Court were to take on this role it's not one that has been anticipated by both Parliament but also the judiciary and it would lead to incoherence, and there's some useful discussions around this from
 5 her Honour the Chief Justice in *Paki*. And so if we go to *Paki* and that's in our bundle of authority at tab 56, and I want to take you to her Honour's decision at paragraph 165 and then I also wanted to go to his Honour Justice McGrath.

But at paragraph 165 her Honour is talking about the courts and the
 10 Waitangi Tribunal and she says there: "A claim of this nature does not confuse the role of the Courts with the role of the Waitangi Tribunal. The Tribunal is the body to which claims that the Crown has failed to meet its political obligations" – she calls it "political obligations" which I thought was surprising but that's how she refers to them, and I would say that is the governing and the interplay
 15 between the articles – "under the Treaty must be addressed." And really I mean this is a claim about fiduciary law in respect of the river that essentially they claimed out to – that the *ad medium filum* rule didn't apply, but she is saying here that really those claims about customary interest, if there are claims, can be pursued in the courts but if it's about how they have been lost and the actions
 20 of the Crown in losing them then that is an action that you would take to the Waitangi Tribunal, and you'll see that there: "But claims of legal right in respect of property are properly brought to the courts ... [whereas] the claims of unconscionable dealing are properly characterised as legal claims or Treaty of Waitangi claims depends on whether the duties claimed were owed and
 25 breached as a matter of law."

And in terms of Justice McGrath at paragraph 190, so he sets out: "It is Parliament, however, that has full power to make laws under our constitutional arrangements." Supreme Court itself recognised that. An Act of Parliament,
 30 supreme – superior law prevails over other inconsistent laws. "It follows that the" – and this is in the context again as I mentioned of fiduciary duty and whether to expand that duty, but: "It follows that the courts should not develop the common law in a manner inconsistent with legislation," and I would say that his reasoning here is applicable to whether the Court should develop and push

this law into enabling declarations of inconsistency which would run against the Waitangi Tribunal, and his Honour says: “where Parliament has legislated in a certain area, the courts must consider whether development of the law may be more appropriately left to Parliament. When, in the future, a case that involves circumstances giving rise to an arguable case of fiduciary duty” goes on to, et cetera, et cetera, “would cut across the statutory scheme established in the Treaty of Waitangi Act 1975 for recognising and providing remedies for breaches” of the Waitangi Tribunal.

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He then outlines what the Tribunal’s task is and then outlines some of the benefits of that in terms of overcoming limitation problems, evidential difficulties and really just, in my submission, outlining that the Court should be thinking about these existing mechanisms before taking on developing the law in a way that might be incoherent with the, in this instance, the Waitangi Tribunal, and I would say that reasoning applies equally with force in our situation here.

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I would also say that some of the points that he refers to, which the appellants and Te Hunga Rōia refer to about, it’s not binding, it’s the Tribunal, it’s not a natural adjudicatory body as to points of law, it’s not like the High Court. I would say they are all reasons in support of what I’m putting forward to your Honours, because actually there’s a reason behind that, it’s to ensure that not only is it expert and representative, but it’s accessible. It’s been going for 50 years and it’s a well-known remedy which has more relaxed rules around evidence to provide a more accessible remedy for claimants. So I would say the differences support the Waitangi Tribunal having this role and it is a further reason why the courts should be wary about expanding into that jurisdiction.

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My final point really was about the practicalities of this, and I know that’s not a legal submission in the sense it’s just – I do think we are now at week 10 of the climate change inquiry in the Waitangi Tribunal and one of the great things about that is, obviously it’s taking a long time, but it’s airing all of the issues that you would expect to hear if this went to trial for declarations of inconsistency in the courts. There are arguments about the impact of the Crown’s legislative

and policy under the CCRA, whether it's consistent with its international obligations, whether that's prejudicing and affecting Māori interests, customary interests. It is raising all the things you would expect to see if this went to trial, yet it's in the Waitangi Tribunal and it's ongoing at the moment.

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Not only that, it enables all of, in terms of standing, it's not just one person, there are 55 claimants who are part of that with a wide range of differing issues and I think this goes to that point about rights and how complicated this space is.

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There is no one position. So there might be groups that are supportive, for example, of the ETS settings and pine setting, *pinus radiata*, there might be some who want productions at source more consistent with international obligations. It is not a straightforward picture when looking at the Māori interests involved in whether or not the Crown is responding adequately to climate change, let alone what are the governing interests that the Crown has

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to take into account.

I make that final submission because it is a long and complicated process and it does involve multiple interests that need to be grappled with and my overall submission is the Waitangi Tribunal is uniquely set up to do that, and is doing that, as a form of remedy for providing ultimately critique on whether the Crown has got its settings right, and that would apply just as much to what is being put forward by Mr Smith.

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Two points to end with, they're pretty minor, unless your Honours have any question, I just note that Te Hunga Rōia Māori made two points on our submissions. At paragraphs 13(a) they noted that our footnote 39, paragraph 29 was I think incorrect and my apologies if either of these were misleading but we –

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WILLIAMS J:

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Can you just give me the references again, sorry?

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MR PREBBLE:

Sorry, they said at the outline that they provided, paragraph 13(a) noting our paragraph in our reply submissions at 29, footnote 39, wasn't correct essentially and we were referring there to the *Ngāti Whātua Ōrākei* decision and I do
 5 accept, and the footnote says, that the main reason that those two further out of the seven declarations that were struck out were struck out because of the principle of non-interference. So I'm just clarifying that was the main reason, we accept that was the main reason they were struck out, not because they related to the Treaty necessarily. They also did happen to relate to the Treaty
 10 but they were struck out primarily in the Supreme Court because of the non-interference aspect of it.

Then at paragraph 13(b) they referred to the *Kamo* decision and we refer to that at paragraph 33, footnote 52, and really just to explain what we were meaning
 15 with that is that was a case where there were arguments based in tikanga around mana whenua between the Ngāti Mutunga and Moriori and it was really just to make the point that if there are those disputes, the outcome of that might well impact on executive decision-making and the need for care, and it's just an illustration of that point about Article 2 interests do have a close connection then
 20 to how the Crown treats and deals with them in making decisions, in that case a vesting. That was the ultimate I think end point of the decision was we can't necessarily rule this is offensive to tikanga until we know the conditions of the vesting. But it does provide an interesting insight into clarification of the rights, so rights based in mana whenua tikanga might have a direction bearing on or
 25 influence decisions in a public law sense that are made to vest or something by the executive under statute, and that was the reason for including that.

You're looking lost, your Honour.

WILLIAMS J:

30 I am. Just explain to me what your – is your suggestion that that has efficacy whereas a DOI doesn't? Is that your point?

MR PREBBLE:

That's all part of the overall submission that there's adequate protection already and you don't need to expand the jurisdiction for DOIs because Article 2 interests are able to be litigated upon now and that's a growing area of the law,
 5 and clarification of those interests gives them strength then in public law challenge.

WILLIAMS J:

That was a section 4 Conservation Act case, wasn't it?

MR PREBBLE:

10 Yes. Well, it was a – and a vesting in Moriori contrary to the views of Ngāti Mutunga, I believe.

WINKELMANN CJ:

Right, is that your submissions?

MR PREBBLE:

15 Yes, thank you, your Honour.

WINKELMANN CJ:

Thank you, Mr Prebble. Mr Hodder. Now, are you speaking about the first cause of action now?

MR HODDER KC:

20 I'm going to say only something about the first cause of action to the extent it's not covered by material on the second and third causes of action. I would say it topples over under its own ambition and should be treated accordingly. There's really not much else I can say beyond what I said yesterday in terms of the objectionability of the alleged duty.

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But what I did want to do was to address, partly as a preface to dealing with the second cause of action, an aspect of the, or the use or reliance on international materials, and I also want to have something to say in conclusion, but just by

way of a linkage between what's just been traversed between the Court and my learned colleague, then the Court will appreciate, and I think I've probably used this language already, that we say there are in fact two carefully calibrated statutes in play here. Well, actually probably three if you take in BORA as well.

5 But for our present purposes our focus is on the calibrations within the CCRA, what is and isn't in there, and in the Treaty of Waitangi Act, the calibrations in that, and so although it wasn't directly addressed by my learned friend we would say that the durability of the Treaty of Waitangi Act regime has been assisted by the fact that it doesn't get all the political slings and arrows that it would if it
10 were making binding decisions, that there's a process whereby the arrows are directed towards the politicians, not towards the Tribunal.

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Now at times that may look a little thin in terms of the protection but that's the
15 statutory design and our submission is that it's a good design and it indicates why and that there are reasons for those calibrations, and that it doesn't – working well, it's achieved durability, and it doesn't require judicial reinforcement or almost redundancy if it's said that there is a need to deal with these matters by way of a direct enforcement of the Treaty if that's the essence
20 of the claim that's being made.

So in international legal materials, and I do hope that I am not thought to be xenophobic about this, but we say that the third of these calibrated statutes is the New Zealand Bill of Rights enacted by the New Zealand Parliament, and in
25 particular it was enacted after a lengthy public debate in which there were fundamental changes made to the original proposals, and those proposals and that debate is important in the way in which one approaches it. We didn't just photocopy an international instrument. We didn't just photocopy a Canadian statute. It's a bespoke statute reflecting what were then and we say still are
30 now public interest factors that go towards the way in which it's structured.

So that, we say, means that the reliance on international materials needs to be treated with some caution. I mean, to state the obvious what happened was that the fundamental nature of the statute was altered, the Treaty was excluded,

the language was different, and the existing rights, all existing rights were affirmed or the rights in the BORA are affirmed implicitly, they are known rights before you get there. So the question then for the Court is how far can that be developed, how far is it needed to be developed, how far is it appropriate to be developed?

There's no denial that the courts do develop the law from time to time, but our submission is that in this area and in this matter it shouldn't be done and it shouldn't be done in reliance of international materials where, as in a phrase that you used by Justice Keith in the *Mendelssohn* decision, requires recognition there may be critical differences in the text, the history, and the context between New Zealand and those jurisdictions from where those matters are drawn, and that's drawn from – if I can find it, it may not be easy – *Mendelssohn* is in our main bundle of authorities. I think if I can read my writing that's at tab 42 and I was drawing attention to paragraphs 23, I think – I just referred to paragraph 23, the Court being Justices Gault, Henry and Keith: "Nor do we see the foreign constitutional material as supporting a positive obligation ..." This is in terms of freedom of religion, having regard – taking note of: "... the question of how it is to be related to quite a different legal text arising from a different history and context." Nothing profound about that we say, but it is relevant in the approach that we offer.

WINKELMANN CJ:

Although those of course are foreign constitutional materials but I think we would find Justice Keith in other cases, and I can't bring them to mind at the moment, but looking at the ICCPR to inform the content of the Bill of Rights.

MR HODDER KC:

And I'm not attempting to impose either blinkers of censorship on the Court's consideration of matters. I simply want to emphasise that that is an important consideration, that the differences have to be borne in mind, and I am going to deal with a couple of instruments to make the point.

I did want to just indicate that in the *White Paper* that preceded the Bill, notwithstanding its rather greater ambition, there there was reference to the – and that’s – the full text of the *White Paper* is in our supplementary bundle at tab 36. I’m not proposing to go there, I was just going to give some references given the timing factors. But it notes the conscious omission of major economic and cultural rights, paragraph 3.14, page 23, the related significance of “the continuing essence of our constitutional and political system”, same paragraph. The focus on process rather than substance, paragraph 4.14, and the draft Bill seeking to reflect “widely accepted public policy”, paragraph 3.6, and the observation that the very essence of democracy is it allows for people to hold differing views on controversial issues, and for democratically elected governments to define the public interest and to be electorally accountable for that, paragraph 6.1

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So the *White Paper* is certainly in no way, particularly after it comes into its amended version, looking for any substantial change in the overall balance that we are concerned with.

In terms of international law generally, our assessment and the submission on, the major focuses on, on customary international law, we say it’s clear that while this is incorporated into common law there is a critical proviso. The law must be consistent with domestic constitutional principles, statutory law and common law rules, and particularly when legislation has effectively pre-empted the area.

That comes in the *Keyu* decision which is in our bundle at tab 117 and I draw attention to what’s said by Lord Mance around paragraphs 145 and 150, agreed by, I think, Lord Neuberger at 117 and 122.

WINKELMANN CJ:

Unless I’m mistaken, and I may well be, but my recollection is that the UK Courts take a different approach in the area of statutory interpretation with international obligations?

MR HODDER KC:

Sorry, who –

WINKELMANN CJ:

So it's not a consistency approach; it's where there's an ambiguity they use it
5 to assist. I might be wrong about that, Mr Hodder.

MR HODDER KC:

I hope I'm accurately paraphrasing what *Keyu* says of consistency.

WINKELMANN CJ:

It's the context in which the comments are made.

10 **COOKE J:**

Can I ask another question about that? That may suggest that the appellant's first cause of action is overly ambitious and collapses under its own weight, but is there another possible way of formulating it with the *Keyu* nuance which is that there is a customary international obligation to take due diligence that's
15 recognised in domestic law and that could be recognised in domestic law by a simple proceeding under the Declaratory Judgments Act saying that New Zealand had failed to meet its international obligations and that will be consistent with our legal culture in the sense that in other contexts we have looked at international obligations and whether the New Zealand legislation are
20 consistent with those international obligations, such as in the *ALPA* decision itself. So wouldn't a declaratory judgment proceeding of that kind be consistent with a domestic culture and would allow for the margin of appreciation that you impressed on us yesterday?

MR HODDER KC:

25 It would although – well, it might. I haven't given a lot of thought to that proposition that your Honour just put to me but my immediate thought is that the jurisdiction is discretionary which brings in much of the discussion from yesterday, and so the various points of objection I think would be applicable in relation to that as well.

COOKE J:

Right, so that would be it's so obviously would be declined in the discretion that we shouldn't let it run now?

MR HODDER KC:

- 5 Indeed. That's the basic response to the fact, the repeated proposition from our colleagues, that this is a matter that should go to trial and/or everything will be resolved and revealed at trial, and we say – and that you should accept everything that's said in or said as a matter of fact is true – and we say no, the Court has to stand back and take an approach about, strike out a jurisdiction
10 about appropriate use of resources and processes.

So, yes, I'm not sure. Have I answered your Honour's point?

COOKE J:

I think you have, yes.

MR HODDER KC:

- Okay, thank you. I was just going to say that the *Ukraine* decision which was referred to yesterday is also to the same effect. That's in our bundle at 113, and the appropriate reference is around paragraph 204, and that's – again, these are recent decisions. I don't think there's any doubt about them and just
20 in case there was I was wanting to rely on that.

- On treaties, we do say that the *Miller* decision establishes that parliamentary sovereignty means that the executive can make or unmake treaties that are effective at the international plane, but those have no effect on domestic law
25 until or unless they are incorporated by legislation. So all I'm saying is one of the – Mr Prebble said that's also the underpinning in *Te Heuhe* and the orthodoxy that we say it represents in that aspect of it.

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- 30 So, there's reliance on the United Nations Human Rights Committee work and, in particular, General Comment 36 is relied upon. That's at the appellant's

bundle at tab 69 and it says on the right to life: “The right to life ... should not be interpreted narrowly. It concerns the entitlement of individuals ...” to avoid “premature death, as well as to enjoy a life with dignity”. And it says: “Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily
 5 deprived of life [which] right shall be protected by law.” And the point that I wanted to make about this is that phrase “protected by law” does quite a lot of work.

So I’m reading from paragraph 3 and 4 on the front page of this document, if
 10 that’s what we have, yes, paragraphs 3 and 4. If we go to paragraph 18 we see the emphasis on: “The second sentence of article 6 (1) provides that the right to life ‘shall be protected by law’. This implies that States parties must establish a legal framework to ensure the full enjoyment of the right to life by all individuals ...” et cetera. Likewise, at paragraph 21: “The duty to take positive
 15 measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant ... articulated in article 2 (1) when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law, which is articulated in the second sentence of article 6.”

20 So, the point I am making is that that phrase “protected by law” does a lot of work in the way that the GC 36 sees matters and there are issues around that and I mention that there are reservations about the work of these review committees, the most recent judicial one that I’m aware of is from the United Kingdom Supreme Court in *Regina (AB) v Security of State for Justice*
 25 [2021] UKSC 28, [2022] AC 487, which I should have got a reference for but didn’t. Right, so, respondent’s bundle, 115. At paragraph 64 Lord Reed – I think for the Court, yes, for the Court – paragraph 64 “it is unfortunate that the General Comments” of an analogous committee from the UN “... have been described in some dicta in this court as authoritative.” Then it goes on to explain
 30 why that, not accord, not making binding decisions, not using judicial legal reasoning, et cetera, and that’s elaborated over on paragraphs 65 and 66.

So, in addition to the judicial criticism, when the draft of Article 36 was circulated it provoked adverse responses from a range of countries, not in fact

New Zealand which only responded on the question of the capital punishment, but from – and these are public documents – responses from the United Kingdom, Australia, the United States, all highly critical, and I think we put into the materials the Canadian response on the basis that it – or as the

5 Court says, as the paper says – this is, as they do, really quite exquisite diplomatic language but the point being made, at paragraph 2: “The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Covenant that is necessarily agreed upon by States Parties.” That’s paragraph 2.

10 1300

Paragraph 4: “As a general comment, Canada recommends that the Committee clearly distinguish between obligations ... and what the Committee considers to be best practices ...” Paragraph 5: “Article 6 does not provide the authority for

15 the Committee to expand the scope of measures required by the Covenant ... The Committee should refrain from intimating that these measures are legally required to be adopted ...” And in terms of environmental matters at paragraph 17, I won’t take the time to read it but paragraph 17 through 19, Canada says very strong supportive effective measures, we’ve got them but we

20 are not at all impressed by the idea that human rights are being intruded into our legislation in relation, or could be between our legislation on environmental matters as by a virtual expansive approach to the right to life. That is to say the expansive interpretations set out in the first page of GC 36.

WINKELMANN CJ:

25 So, hold on, it’s 1 o’clock. A couple of things, one is, how much longer after the lunch break do you think you’ll be?

MR HODDER KC:

I’d like at least 25 minutes and hopefully no more.

WINKELMANN CJ:

30 All right. Second thing is, I’m interested to hear from you in relation to what you say is the significance of the fact that New Zealand did not enter any reservation

in respect of the “right to life” Article, because it has entered quite detailed reservations in respect of one or two, which say that New Zealand commits no more than is reflected somewhere in its law with specific detail, to be provided by someone.

5 **MR HODDER KC:**

Just one query, are we talking about reservations entered in relation to –

WINKELMANN CJ:

Reservations, no reservations in respect to the right to life provision.

MR HODDER KC:

10 The right to life under the covenant.

WINKELMANN CJ:

Under the covenant.

MR HODDER KC:

Thank you.

15 **WINKELMANN CJ:**

And Mr Mahuika’s standing on his feet. That’s it, thank you Mr Hodder.

MR MAHUIKA:

I’m sorry, Ma’am. I thought I would re-make my application for leave to withdraw. I was able to push out the other matter that I have, but I don’t think I
20 can responsibly push it out any further.

WINKELMANN CJ:

Yes. No, certainly, you have leave.

MR MAHUIKA:

Thank you, Ma’am.

WINKELMANN CJ:

We'll take the adjournment.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.03 PM

5 **MR HODDER KC:**

Thank you, your Honour. Just dealing if I may as best I can with the question you posed before we adjourned, which I understood was why did New Zealand not enter a reservation in relation to the ICCPR right to life.

WINKELMANN CJ:

10 And what were the implications of its failure to do so.

MR HODDER KC:

And the implications. So – and that's a decision from 1978 at ratification, as I understand it, and we haven't had time to go back to any kind of official acceptance of why. The implications we say are few. We say no estoppel
 15 notion applies in relation to that and we say that the key issue remains the language that Parliament use, and we draw attention – and this can be found in our paragraphs 130 to 131 and 127.6 of our main submissions which refer to *Matadeen v Pointu* [1999] 1 AC 98 (PC) and *Helu* – that what matters is the language that was being used and if that differs from whatever the international
 20 instrument says, it's the domestic version that matters. So that's, unless your Honour wants more background which I'm happy to ask for, that's my best response at the moment. Thank you.

I am of course going to attempt to hopefully and coherently go reasonably
 25 rapidly through this in terms of enabling us all to close proceedings and allow my learned colleague to reply.

1405

I did want to pick up a point that was made by or on behalf of the Human Rights Commission which took exception to the use of the word “aspirational” in relation to United Nations Human Rights Committee comments, general comments, such as GC 36. It’s in our reply submissions at paragraph 12. I’m
 5 not suggesting the Court goes there but that’s where it comes from, and it comes from paragraph 62 of the UK Supreme Court’s *AB* decision I took the Court to earlier on. That was our bundle of authorities at tab 115, and at the end of paragraph 62 there’s a reference to the fact that the committee concerned there has “a wider relevance” and so forth, the: “... purpose is aimed
 10 at prevention or the promotion of good practice, rather than adjudication.”

And then it was also based on an academic piece by Takata and others which we’ve submitted electronically in the last little while which is a general commentary from the Max Planck Institute in fact, and I draw attention to
 15 paragraphs 23, 26, and 61 to 63. Sorry, paragraphs 23, 26, and 61 to 63, and the particular paragraph that comes towards that is paragraph 23. It’s talking generically across committees and saying “they often interpret the scope of rights and obligations expansively in a manner not necessarily based on treaty text” and they have “a significant normative dimension”, and then there are
 20 various other comments made in the paragraphs I have referred to, but that’s the basis of the aspirational comment in our reply at paragraph 22.

In terms of the particular UNHRC decisions in *Billy* and *Teitiota*, in terms of timing we have addressed those in a little bit of detail in our written submissions
 25 and unless the Court would be assisted I’m proposing to move beyond those, but I just note that when they are issued they are described as being views, not as any kind of judgment or decision, just the simple point they’re not adjudications. And so insofar as reliance is placed on that paragraph of the GC 36, we say that’s difficult and it shouldn’t be given weight.

30

I then move to the ICJ’s advisory opinion, which of course –

WINKELMANN CJ:

Sorry, what is difficult and shouldn't be given weight? What is difficult and shouldn't be given weight? I'm just asking you to repeat –

MR HODDER KC:

5 GC 36.

WINKELMANN CJ:

GC 36, okay.

MR HODDER KC:

Yes, insofar as it is saying the right to life includes the right to live in dignity, and
10 that's the foundation of submissions that you heard from parties other than us.

Moving then to the ICJ's advisory opinion, there are – no doubt there could be a debate about this for days, I propose to spend less than a few minutes on it, but can I just draw attention given the size of the thing to paragraphs that I invite
15 the Court to focus on. Paragraph 135, the customary "duty to prevent significant harm" is one of conduct, not result. Paragraph 137, the obvious point that: "All States contribute ..." The determination of what is required by due diligence is a reasonableness test, particularly of paragraph 280, and "the standard required in each case ultimately depends on the specific situation of each
20 State", paragraph 292, and reference to: "The multifactorial and evolutive character of the due diligence standard ..." also at paragraph 292, and reference to compliance and good faith by a state with climate change treaties at paragraph 314.

WINKELMANN CJ:

25 I think that contextual matter about the ability of the State is more by reference to undeveloped nations, isn't it?

MR HODDER KC:

Not entirely. It is certainly true that there is much in the advisory opinion and indeed in the instruments themselves, Paris and the UNFCCC, that emphasise

the position of developing countries, but they also, not least the Paris Article 4, are focusing on the individual circumstances enabling continuing economic development, and we say –

1410

5 **WILLIAMS J:**

If you're continuing with that point, are you continuing to respond –

MR HODDER KC:

No, I was simply going to rattle off a series of other paragraphs for your attention.

10 **WILLIAMS J:**

314, I missed it. What's in that?

KÓS J:

Good faith.

MR HODDER KC:

15 I'd just been talking about 314?

WILLIAMS J:

Yes.

MR HODDER KC:

Compliance in good faith was being referred to there.

20 **WILLIAMS J:**

Thank you.

MR HODDER KC:

And the principle of sustainable development, being the need to reconcile economic development with protection of the environment, referred to at 147

25 and 197, and adaptation –

WILLIAMS J:

Sorry, can you give me the numbers again, please?

MR HODDER KC:

From the beginning, Sir?

5 **WILLIAMS J:**

No, no.

WINKELMANN CJ:

147 and 197.

WILLIAMS J:

10 It would help, for me anyway, if you gave me the number first and then the proposition.

MR HODDER KC:

Sure. So 251, the obligation that parties pursue domestic mitigation measures is substantive in nature. It's an obligation of conduct, not result.

15

257, no specific action that parties must take in relation to the adaptation, planning actions, that are required from 256, and then a discussion of best efforts at 270, and at 258 best available science to be used.

COOKE J:

20 Do you agree that the decision, the advisory opinion, does correctly identify customary international law?

MR HODDER KC:

I would say it's an indicator as opposed to being definitive, and in relation to this matter its point about climate is mostly on the basis of making a point that a
25 liveable planet is a foundation for everything else, which, of course, is a proposition that can't be disagreed with but it doesn't take us very far in terms of specifics.

So I feel I am doing great injustice to the International Court of Justice's opinion but it is what it is, but it is a balance operation and it's not prescriptive. It identifies the issue. It identifies that States have obligations. Beyond that, those are to be worked out by the States in terms of their own internal constitutional arrangements. Nothing surprising about that either.

What I will call *Switzerland*, the decision of the –

KÓS J:

You're not suggesting that internal constitutional arrangements veto though international obligation? I mean it may alter the ability to effect them but it doesn't qualify them.

MR HODDER KC:

Yes, I haven't used this word yet but I think our position is slightly more nuanced than that, that it doesn't negate international obligations. They are factors that can be taken into account. But to say the simplistic proposition that because the ICJ opinion says X then that's the law of New Zealand, we don't accept that proposition. The thing needs to be read as a whole.

The same thing can really be said of the *Klima* or *Switzerland* decision, again another very, very long decision, and given timing I'm inclined, if I can just, your Honours, maybe go into this in some detail, but the paragraphs –

WINKELMANN CJ:

Are they in your written submissions, Mr Hodder?

MR HODDER KC:

Not all of them.

WINKELMANN CJ:

Okay.

MR HODDER KC:

I mean I've – kind of the preparation throws up more paragraphs that may be relevant.

WINKELMANN CJ:

5 Okay.

MR HODDER KC:

So the paragraphs that I would draw attention to are 310, 506 to 513, 536 where it is said that Article 2, the right to life, is more questionable than Article 8, applicable here, so it's not a decision on the right to life. It's a decision on
10 Article 8, and then the dissent at page 256 makes the sort of arguments you've been hearing from me in terms of the creation of a new right or duty departure from previous arrangements.

1415

15 So then that takes me to Mr Butler's hand ups which again I will do a disservice to because the amount of work that went into them is impressive, but what we say about them is that they don't take us particularly far. All cases involve different rights or they include language such as "protected by law" which I referred to earlier, and that language has been developed in the European
20 context over some considerable time. I think here what's being proposed is that there be a kind of rapid leap forward. In our submission, there's no such leap required. None of the cases come from a common law or domestic court. There is no focus on the imminency of the threat to life which we find in a number of the cases, not least *Billy*.

25 **WINKELMANN CJ:**

Which hand up are you talking about here?

MR HODDER KC:

I'm talking principally about the spreadsheet.

WINKELMANN CJ:

That's the case spreadsheet?

MR HODDER KC:

Yes, and I'm doing this in general terms because if I addressed each one of
 5 them I wouldn't be able to sustain any tolerance, by the Court, I'm talking about.
 And there is a – no mention of *Teitiota* which again has an aspect of imminence
 to it, and it doesn't, as I recall it, note that there was no finding of breach in
 relation to sufficient mitigation measures in *Billy*.

10 So there's a range of factors there. The main point is that these are not common
 law case conclusions. They don't address the New Zealand Bill of Rights
 language and background and while one can only congratulate the quality of
 the work that's gone into it and the volume of it, in our submission what really
 matters is what the Bill of Rights act says and the way in which it's interpreted
 15 consistently with our Legislation Act, its own context.

Finally on this, and I have already warned my learned friend, Mr Butler, that I
 am about to go here, which involves a suggestion which I think he would
 welcome and which I might not, that there is a cosmopolitan constitutionalist
 20 aspect of this in play. This is the reference to the Martin Loughlin piece which
 we included in our submissions and from his text called *Against
 Constitutionalism*, and there I simply mention that the progress from Kant,
 Immanuel Kant, through to a threat to parliamentary and democratic processes
 takes place between pages 179 to 183 to 190, and the basic proposition is that
 25 a somewhat self-reinforcing aspect of rights on a cosmopolitan basis has
 caused issues for the democratic process, and this is "a world if not quite yet
 without states, then perhaps without politics, and certainly without the pivotal
 significance of democratic practices", is the concluding sentence in the relevant
 chapter.

30

If I move to –

WINKELMANN CJ:

Of course it was, when it was conceived of, the United Nations Declaration of Human Rights, intended to cause difficulties for the majoritarian democratic process which could deliver the horrors of World War II.

5 **MR HODDER KC:**

That's a big topic, your Honour.

WINKELMANN CJ:

Exactly. So you've launched one, so...

MR HODDER KC:

10 Well, I'm content to go with Professor Loughlin.

WINKELMANN CJ:

We'll read Martin Loughlin again.

MR HODDER KC:

15 So mindful of where I am, in terms of the Bill of Rights Act, section 8 and section 20, having re-read our written submissions during the course of an early start to the morning and now, I actually think they're not bad.

COOKE J:

In your submission.

MR HODDER KC:

20 I should have said "re-read" just to make that clear.

WINKELMANN CJ:

It's always refreshing to see people engage in self reflection.

1420

MR HODDER KC:

25 And so on the basis of that, I am inclined to say that I am content to rely on them to a very large extent. I draw attention to the *White Paper*, as I already

have, I draw attention to the judgment of the Court of Appeal in *Wallace* in terms of such matters as focusing on the Act itself, and, likewise, attention to *Mendelssohn* which I referred to earlier.

5 So, the basic proposition we have there are set out. The point that I probably should've emphasised more, and I mention it now, is that we submit that the Act, the CCRA, is itself protective of life. The whole point of having the CCRA is to protect life. That's the whole point of the international instruments, and that's a point that perhaps is understated but I think it does provide an important
10 dimension to be taken into account. So this also goes to the interpretive exercise about interpreting statutes, mindful of rights matters, then the point of having the CCRA as opposed to what occurred before the climate change was regarded as seriously as a major issue by the organs of the State, that's why the CCRA is there. There is a concern about the threat to well-being across
15 the planet and we continue the proposition that says that there's no basis for a positive duty, nor for a framework duty and the basis of the material we provide there.

Now, the reason I do that rather cursory review of the Bill of Rights Act is
20 because most of the discussion yesterday really focused around the Bill of Rights Act cause of action and the reason I'm doing a cursory review of the first cause of action is because most of that revolves around either the Bill of Rights Act, I'm not sure it really adds very much to talk about the Treaty in it, and for the rest of it it is part drawing back on the instruments that underpin the CCRA,
25 that doesn't take us very far either.

So, the basic kind of summary in terms of the causes of action is that there is an argument to be had, of course, and that's reflected in the Court of Appeal's judgment about the Bill of Rights cause of action. It's accepted that there is an
30 argument to be had at a level of principle, but it's an argument that can be resolved and should be resolved in the way that I have been attempting to submit over the last day or two and the necessity follows across that.

We say that the Article 3 arguments, for the reasons developed by my learned colleague, Mr Prebble, are sound and should be accepted and they are respectful of the existing, to use that word one more time, calibrations of the Treaty of Waitangi Act and the way in which the Cabinet Manual recognises the role of the Treaty without converting it into a cause of action in the ordinary courts and we say that's a perfectly satisfactory place for things to be. There will be progress in other fields and on the first cause of action I've really got nothing to add.

10 So, in terms of some – a handful of concluding remarks. Firstly, nobody on the Bench and nobody at the Bar misunderstands the importance and ramifications of the Court's assessments. They really should not be underestimated and I mention that because in terms of representation of the Crown, which is why I'm here, there are implications that go beyond simply this particular statutory regime. The whole range of regimes, the Resource Management Act, 15 New Zealand Public Health and Disability Act 2000, Oranga Tamariki, Land Transport, thinking of speed limits for example, the Healthy Futures (Pae Ora) Act 2022 which involves Pharmac's decisions about drugs, all those things are capable of being challenged if you want to take a wide enough view of the language that's used in BORA, but in our submission they have so far been not 20 done, that has not been done for good reason and one of the reasons for taking a cautious approach here is that the kind of reasoning that's being applied here, if it were to be endorsed by the Court, is probably well capable of repetition in a wider range of spaces and that, we say, is not a useful contribution of the public interest. 25

1425

30 So the basic proposition about the CCRA is it's careful, considered and calibrated and it contributes to the global responses to climate change, consistent in particular with the Paris Agreement. It's been in place on my rough recall nine cycles of Parliament in Government and it's evolutionary in nature and self-adjusting in nature. All of those are really important considerations compared to the sorts of situations where the Court has addressed rights issues involving declarations of inconsistency claims to date, and as we know from

section 5ZC, the range of mandatory relevant considerations under the Act is very broad and there are a wide range of stuff.

And I probably should pause here just to say something about the word
5 “politics”. In a sense there is an aspect of the legal world where politics is regarded as untidy at best and ill-disciplined and unattractive further down the spectrum, but in fact it’s what the democratic process involves. There’s nothing wrong in saying something involves politics and political decisions and policy, including the economic aspects, recalling that it used to be called political
10 economy. And the accountability mechanisms including the section 5ZM declarations are not to be underestimated and I hope they are clear enough, if they weren’t before, from the hand-ups we provided yesterday.

So in all of that you have a range of trade-offs, compromises, judgments, and
15 so I don’t – I’d like to kind of piggy-back on the rhetoric of Lord Reed in SC. There will be issues of political contention and controversy but this is a statute that has impeccable democratic credentials, and notwithstanding the idea about the factual pleadings being accepted as unchallengeable and strike-out scenarios, this is well capable of strike-out. The High Court and Court of Appeal
20 judgments show that.

And in terms of, well, the pleading was struck out in *Fonterra*, why not here – sorry, was resurrected in *Fonterra*, why not here, we say that there is quite a different set of circumstances here. In *Fonterra* the essence from the judgment
25 of this Court was that there was a known tort whose development and application warranted exploration through evidence, including in policy and tikanga at trial, and so that led to the contemplation and acceptance that there would be a lengthy trial at some considerable distance down the track, and that is the way in which that was approached. This is quite different. Here we’re
30 concerned of course with a much wider statutory regime and an invitation by the appellant to create a justiciable legal framework and settings to run in effect either behind or alongside the CCRA regime. That invitation, with respect, should be rejected. Going back to my questions at the beginning of yesterday,

our basic submission remains that this case going forward would not be a legitimate use of the Court's processes and resources.

Subject to questions, and being four minutes over where I'd hoped, going three
5 minutes over I had to be, those are the submissions on behalf of the Attorney.

WINKELMANN CJ:

Thank you, Mr Hodder.

MR HODDER KC:

As your Honour pleases.

10 **WINKELMANN CJ:**

Mr Salmon.

MR SALMON KC:

Yes, thank you, your Honour. I'm very mindful of the time and of the extent –

WINKELMANN CJ:

15 Well we have time for your reply. Flights have been shifted.

MR SALMON KC:

Thank you, your Honour, appreciate that. Nevertheless mindful of time, some
of what I'm going to do is hand up some material that brings together reference
points and so on, and to save a bit of time on note-taking I hope that's
20 acceptable. It will –

WINKELMANN CJ:

Be very acceptable, especially because of some people's difficulty in capturing
numbers.

MR SALMON KC:

25 It also avoids me seeking to channel what Ms McMenamin would have said
better on some of the Human Rights Act points, so with a nod to her for
preparing an outline I'll hand that up. I won't spend a lot of time going through

it, but it summarises a set of responses in relation to the human rights issues and does so with references to points in the materials that we say answer a number of the points my learned friends have identified. I'm not going to begin with that though, I'd rather just distribute it and having started to do so I realise

5 that Justice France won't have a copy.

1430

WINKELMANN CJ:

Is it possible – have you got it in a soft copy? Can it be emailed?

MR SALMON KC:

10 Yes, we'll do that.

WINKELMANN CJ:

Because then the registrar can send it on to Justice France and she'll have it in front of her.

ELLEN FRANCE J:

15 Thank you.

MR SALMON KC:

Yes, we'll do that now for Justice France's – for your sake, your Honour, I don't intend to go through it in detail and don't intend to go to it yet. What I'd like to do, in the face of what has been a fascinating hearing and genuinely thoughtful

20 and extensive submissions from my learned friends and colleagues which have given us all – and/or – which have given us pause for thought I'm sure over the last few days I'd like to begin by reflecting on the way in which the Crown began and has argued this case in the courts below, which is to characterise what Mr Smith is seeking to do as radical and upending constitutional settings, with

25 the argument that the Crown is ultimately running and has been so well argued here, just to test where the radicalism and constitutional radicalism really lies.

So if the Court will bear with me for a moment that's my first topic. We've endeavoured to just try and identify some ways in which what the Crown is

doing is in order to meet the claim at the strike-out stage and the Crown says to justify its dismissal, unheard, on its facts, a series of propositions the Crown makes that highlight just how radical the Crown's position is constitutionally and how limited it seeks the Court's role to be in a modern constitutional democracy,
 5 not only in the abstract but compared to constitutional settings that are well-established. So, I will go through these points. They're not ones I suggest the Court needs to take a note of, but rather rhetorical reflections on what the Crown is really saying.

10 So, point 1 is that New Zealand's constitutional settings prioritise politics, as the Crown frames it here in this case, such that the Court has no legal yardstick enabling it to assess the Crown's actions and inactions on climate change and no constitutional functions in that space to determine and declare the law, and it goes without saying that we say that that's not right of course and indeed that
 15 recent decisions, internationally and, to a sense, here, show that to be wrong and that those points are justiciable.

Secondly, and this is more procedural than constitutional, but it's striking, that in a strike-out about climate change the pleaded facts should not be assumed
 20 to be true, and there have been a number of points in which my learned friend with his usual skill and courtesy has said that pleaded statements are just not true, and I'll come to some of those briefly when dealing with the facts in what a trial would show. They are to be taken to be true and indeed, as I'll come to, they're not actually hyperbolic compared to the public record and what the
 25 Crown has in separate fora agreed to be true.

Number three, that strike-outs should somehow be subjected to an assessment of complexity or trial cost as a factor going to whether or not the claims should be struck out, even in a Human Rights Act case relating to the most profound
 30 issue of the times. I'll come back to that a little bit in relation to the suggestion that judicial review is the right way to proceed here but a number of times in the last few days we've heard talk of how long and expensive a trial would be. Given the stakes, given the importance of the issues, and given responsible parties, this litigation is not disproportionate in any sense to the issues at stake.

Fourthly, that rights under the Bill of Rights Act should be interpreted narrowly, contrary to decades of settled law. That is one of the points run by the Crown here.

- 5 Fifthly, the Court should depart from settled international law and treat general comments from the HRC as aspirational. Now my learned friend just went to several paragraphs in Max Planck's Encyclopedia of International Public Law. I'll just draw the Court's attention to one more if I might, which is paragraph 49. That's in the –

10 **WINKELMANN CJ:**

Can someone put that up?

1435

MR SALMON KC:

- 15 Possibly. So paragraph 49 is notable because it records what the respondent has said outside this Court about exactly that issue, and it should come up shortly, but the passage I'm going to read out is that New Zealand is recorded in this way: "New Zealand specifically referred to general comments as 'credible and authoritative interpretations of States' obligations.'"

WINKELMANN CJ:

- 20 Is that in the Max Planck material?

KÓS J:

The Takata article.

MR SALMON KC:

Yes, the Oxford Public International – I think he calls it an encyclopaedia.

25 **WINKELMANN CJ:**

All right.

WILLIAMS J:

What page are you on?

MR SALMON KC:

I'm on page –

5 **KÓS J:**

Page 14, it's paragraph 49.

MR SALMON KC:

Page 14 of the PDF, that's right, paragraph 49 about eight lines from the bottom – seven lines from the bottom. So just a note that New Zealand's position in this Court as to the weight to be put on general comments from the HRC is somewhat different to that elsewhere and that those general comments are aspirational is contentious, to say the least.

Sixthly, that the Court should treat New Zealand's international obligations as being merely aspirational. So to build on the last, contrary to the ICJ's clarifications that firstly, the Paris targets are not entirely up to the discretion of the State. Secondly, its confirmation of a customary duty to prevent significant harm, that being harm beyond 1.5 degrees, the internationally legally-agreed global average temperature limit, and requiring a precautionary approach, both of which that limit and the precautionary approach which is subjected to stringent due diligence.

WINKELMANN CJ:

So you will have picked up my struggles with finding sure-footing in this area in terms of what our commitments are. What is the best place to find that?

25 **MR SALMON KC:**

Well the cheat code, as the kids say, would be to look at the pleading and see what we are pleading is –

WINKELMANN CJ:

The cheat code, okay.

MR SALMON KC:

I think that's what the kids say. It's been a long time. My learned colleagues
5 will know.

COOKE J:

But about an authoritative source for that?

MR SALMON KC:

Well it is of course a proposition of fact in part what that international legal
10 commitment is, but perhaps if I can – can I come back to that shortly? I
understand the concern, your Honour. Your Honour was right to put to my
learned friend that those 97 pathways were part of modelling rather than a
commitment, but I'm going to come to some concrete other markers as well and
I'll come back to that, if I might, just to keep this in a rough sense of order
15 because I'm mindful of the time.

WINKELMANN CJ:

Yes, fine, that's fine.

MR SALMON KC:

8 – 7, sorry, the Court should depart from the settled and orthodox New Zealand
20 position that customary international law is part of the common law and should
make new qualifiers on the reception of customary international law in
New Zealand domestic law. I understood that to be slightly ameliorated by
submissions made today, but still with the suggestion that there were caveats
on the status of customary international law that are at the least contestable.

25

Eighth, the Court should presume – and this relates for example to the
appropriation point my learned friend went to yesterday, learned colleague –
the Court should presume that where Parliament has made a funding decision
impacting rights that it intends the Bill of Rights Act not thereafter to apply to

the rights so affected. That's a remarkable proposition made. I will note that when you come to go through the hand-up one of the points noted which we've identified is in the last cell, the *IHC v Attorney-General* case which was handed up by my learned colleague Mr Butler shows the Human Rights Review Tribunal readily dealing with issues in the face of such circumstances showing that they are capable of being determined in the face of a Crown objection of a similar nature, capable of being determined without constitutional disarray.

1440

10 Ninth, the Court should rule that a section 5 analysis would be pointless where a statute or decision being challenged is, I was going to say involves policy decision but I'll say is asserted to involve policy considerations being done suitable for judicial consideration and that the Court should strike out claims for declarations of inconsistency in any such case. And that's an important gloss on that point, it's not just that they might contain those policy considerations, the Crown just asserts that they do in the face of a pleading that says they do not. So that's mixing the collapsing of the strike-out presumption that it can be proven that there are not competing policy considerations and allowing the executive to just assert that it has concluded that there is such a polycentricity or a balance.

20

10, that the Crown should not have to demonstrably justify breaches of rights under section 5 of BORA, contra the text of that section, and that the Court can assume breaches would be justified in the abstract.

25

11, if there is another available procedural remedy which the Court or the Crown might regard as suitable or prefer, the Court should strike out the claims, and the obvious example is the suggestion that each granular piece, each of the cuts, as Mr Butler put it, of the thousand cuts, could in themselves be the subject of a judicial review. The Crown proposition there is that Mr Smith should find pro bono lawyers to run 214 judicial reviews, instead of one case, and that that would be more efficient than one case, and that that would meet the procedural needs of this case, even though they would be procedurally constrained by affidavit evidence, a presumptive lack of discovery and a presumptive lack of

30

cross-examination, all preventing a resolution of the factual issues in this case which are said to be in dispute and thus bringing us all back to the *Plan B* problem in the UK which is that one of the core reasons that case stalled was that judicial review is not fit for purpose for determining the factual questions
5 that might arise here.

COOKE J:

Do you choose 214 because 214 decisions are challenged in your pleading, or is that just a hyperbole?

MR SALMON KC:

10 No, point taken Sir. There aren't 214. It was a random number chosen.

COOKE J:

Right.

MR SALMON KC:

Purely a random number. Say 57. Whatever it might be.

15 **WILLIAMS J:**

Well if there were 57, some of them JRs, some of them DOIs, some of them private law actions in the nature of public law duty, why can they not be run as a consolidated body of proceedings, each of them pleaded separately? Why do you not achieve what you want to achieve, as long as you've got a single
20 case to run on a single body of evidence?

MR SALMON KC:

Well, that's what he's done here Sir, is the short answer. Judicial review isn't some alternative jurisdiction of law, it's a procedural jurisdiction, it's just more limited than this. So that's the first point is he is doing that here, and what the
25 Crown's really saying is slow it down and split it up, but also do it without the ability to test evidence and have those mechanisms of discovery in cross-examination, in other words –

WILLIAMS J:

That's a matter of trial process and management, whether you have cross-examination and so forth.

MR SALMON KC:

5 Well, it is in a sense Sir –

WILLIAMS J:

That would have to be an issue anyway in a declaration case.

MR SALMON KC:

10 In a declaration case one would. My learned friend's focused on – the Bench has put declarations to him, which is this case, this is a declarations case, so, violent agreement there. For judicial review of course, while in theory cross-examination and discovery are available, they're usually declined.

WINKELMANN CJ:

That's by leave.

15 **MR SALMON KC:**

By leave.

WILLIAMS J:

But you don't normally cross-examine on declaration cases either.

MR SALMON KC:

20 Well you don't –

WILLIAMS J:

You normally proceed on the basis of an agreed set of facts.

WINKELMANN CJ:

Well you can –

MR SALMON KC:

In those narrow declaration cases, but with a wider mandatory view of declarations you'll often have cases in which the relief is properly declaratory but there are contested –

5 **WINKELMANN CJ:**

Do you know if – we haven't seen them yet, we haven't had that many declaration cases, but do we know if it occurs in the Human Rights Tribunal?

MR SALMON KC:

I'm sure someone here does.

10 **WINKELMANN CJ:**

I might just ask, since we have the expertise in the room.

MR BUTLER KC:

Your Honour, I just remind you, I can provide to you again a short hand-up that I provided on a previous occasion before the Court where I made the point that
 15 the Human Rights Review Tribunal when dealing with discrimination claims performs it by trial, there have been trials or discrimination claims in the Tribunal that have lasted six weeks, seven weeks and – if that is what is required. So take *Child Poverty Action Group Inc v Attorney-General* NZHRRT decision 31/08, 16 December 2008 which is a wholesale challenge to the Working for
 20 Families scheme, wholesale challenge, that case, if I remember rightly, proceeded before the Tribunal for something like five weeks. The parents as caregivers case or *Atkinson* which started in the Tribunal –
 1445

WINKELMANN CJ:

25 Well I was going to say we don't need to go to the Tribunal, do we, because *Atkinson* had evidence in the High Court.

MR BUTLER KC:

Atkinson started in the Tribunal and went –

WINKELMANN CJ:

But there was evidence in the High Court as well.

MR BUTLER KC:

But there was evidence in the High Court by way of updating and such like.

- 5 Then there's been – more recently in the High Court there's been a judgment of Justice Gwyn in the pay equity case which was to do with midwifery care, if I remember rightly, something of that or nursing, and that was a trial with evidence that was taken, was a combined private law and public law Bill of Rights claim. I can provide the references to those materials if that would be
- 10 helpful afterwards, but to be very clear, it is absolutely kosher to proceed by way of trial in human rights cases.

WINKELMANN CJ:

I don't think it's necessary. Right.

WILLIAMS J:

- 15 Is there a declaration –

WINKELMANN CJ:

Jurisdiction.

WILLIAMS J:

– power in the Human Rights Act?

- 20 **WINKELMANN CJ:**

Yes, that's its origin.

MR BUTLER KC:

Absolutely. It began there, section 92J I think it is of the Act.

WINKELMANN CJ:

- 25 Thank you, Mr Butler.

Mr Salmon, is there at some point you're going to deal with the question I asked Mr Hodder, which is about – because this is extremely complicated pleading. That's one of the obstacles you faced, I think. It's hard to encompass it in your mind. Is there an argument that all you really need to do is seek a declaration
 5 of inconsistency in respect of the CCRA, especially now that it seems to be sort of avowedly all-encompassing?

MR SALMON KC:

That is one piece. Can I deal with that now briefly, your Honour?

WINKELMANN CJ:

10 Yes, deal with it – well, okay.

MR SALMON KC:

Well I'll deal with it now because Justice Cooke made a kindly humorous observation about my choice of 214 judicial reviews. I wasn't seeking to suggest there are that many particulars in the statement of claim, rather judicial
 15 review – and I'm coming to answer your Honour's question – judicial review focuses on specific decisions and each decision is a cause of action, and each time a decision is made, if I can take the Crown Minerals Act, under the Crown Minerals Act that is a cause of action in which the reasonableness or not, legality or not of that particular decision is in issue, so an omnibus pleading
 20 is impossible with a rolling set of decisions because there will always be more, but also the systemic overview which this claim seeks to approach –

WILLIAMS J:

But a judge can deal with the whole context in a single omnibus judgment. That's not going to stop you from – you're worried about disaggregation, but if –

25 **MR SALMON KC:**

Not just disaggregation, Sir. I think I understand what you're saying, but if we take the Crown Minerals Act, for example. Now an appeal, it was moderated, but Justice Cooke's decision in the High Court was that climate change was an

irrelevant consideration under the Crown Minerals Act, if I recall the case right, and I think it settled on it being a permissive but non-mandatory consideration.

WINKELMANN CJ:

No, mandatory I think.

5 **MR SALMON KC:**

Mandatory, it was – in the Court of Appeal it was not mandatory but a relevant consideration.

COOKE J:

It got better as it went up.

10 **MR SALMON KC:**

Or worse.

WILLIAMS J:

Or worse, depending on...

MR SALMON KC:

15 Yes. So my point there is the scope to litigate climate change concerns in any particular piece of legislation is defined, restricted by the scope of that Act, a statutory power of decision and the way in which it should be made is all –

WINKELMANN CJ:

That's judicial review.

20 **MR SALMON KC:**

Correct, that's a facet of judicial review. So to look at it in a systems-wide context in the way *KlimaSeniorinnen* would look at this, and in the way in which Mr Smith says this needs to be analysed and his pleading seeks to, it is necessary to aggregate and have procedural flexibility to litigate those factual

25 issues that –

WINKELMANN CJ:

So what I'm asking you is really whether if you just – if the CCRA claims exclusivity as it now clearly does in alliance with the Resource Management Act I suppose, could you not challenge, could you not pursue that kind of systems

5 compliance simply through a conventional declaration of inconsistency proceeding in respect of those two pieces of legislation, given that they claim – given the exclusivity that they now claim?

MR SALMON KC:

And the answer is no, for reasons I –

10 **WILLIAMS J:**

No, because you've got more Acts than that.

MR SALMON KC:

For reasons I'll develop. But if I can give a couple of examples, Crown Minerals Act oil permits, those emissions are outside the CCRA. They're exports.

15 Unless they're burnt air, they're exports. If they go to a corrupt or broken country they are utterly unconstrained and they are their own problem and, for reasons I'll come to, they're problems that are probably unlawful in their own right internationally.

1450

20 **WINKELMANN CJ:**

So would it be a reasonable way for us to view your second action, as Mr Butler has tried to characterise it, which is a framework challenge?

MR SALMON KC:

Correct.

25 **WINKELMANN CJ:**

A declaration of inconsistency based on the framework that the nation has settled upon being inadequate?

MR SALMON KC:

Correct. The framework being a suite of steps, and I'll come to – the Court's raised some interesting questions about relief from the executive which I think I can address and give comfort on.

5 **WINKELMANN CJ:**

Yes, because that is an anxiety, you know, to suddenly issue declarations of inconsistency against the executive is a different thing.

MR SALMON KC:

Yes, and what I'd like to do, given it's come up now and interrupted my cheap
10 rhetorical listed points.

WINKELMANN CJ:

Yes, sorry.

MR SALMON KC:

Not at all. I think these are some of the most important issues I need to reply
15 on so I'll deal with them as they arise in this context. Your Honour is right that the statement of claim is long, and one might even say too long. I would just invite the Court to go, not now, but to go to tab 1 of volume 1 of the bundle, just to see what Mr Smith's original statement of claim was like, because it's become this long because the Crown has required, and this was argued and
20 got orders against opposition requiring the pleading of many particulars, but that statement of claim ran to just over five pages. It was a simple statement of claim saying the framework fails, the government's response is wrong, and if one recognises that those provisions of particulars are not an attempt to have particular acts of the executive policed or judged, but rather just a response to
25 particular requests or orders, then it becomes very difficult to see any airgap between what is pleaded to be wrong here and the analysis in *KlimaSeniorinnen*, and I'll just refer – I know you've been to these so I won't ask you to pick them up – but the passage from 550 to 551 as to what is required in that case is remarkably in line with what Mr Smith says is appropriate here
30 which is reading from 5 –

WINKELMANN CJ:

Sorry, what paragraphs again?

MR SALMON KC:

550 and 551. 550, several of us have taken you to them but 550 is: “When
 5 assessing whether a State has remained within its margin of appreciation ... the
 Court will examine whether the competent domestic authorities, be it at the
 legislative, executive or judicial level, have had ...” Then 551 begins: “The
 Court’s assessment of whether the above requirements have been met will, in
 principle, be of an overall nature ...” I think –

10 **COOKE J:**

But when they come back to their conclusion though it’s – they identify a couple
 of things that the State failed to do, which don’t seem to me include the big
 shopping list that your pleading does.

MR SALMON KC:

15 No, but again, and I don’t mind this as an excuse Sir, the shopping list is not
 one we wanted to put forward and we’ve tried to overtly plead, you’ll recall the
 paragraph, it is not said that the Court should order or the executive should be
 required to change any one particular thing, it is for the executive to develop –
 sorry, executive legislature to develop the framework but, as per
 20 *KlimaSeniorinnen*, it has to develop a framework that will work.

ELLEN FRANCE J:

But, Mr Salmon, in terms of the point that I raised with you before, you don’t, in
 an answer to the Chief Justice, you don’t back away from things like no mining
 permits.

25 **MR SALMON KC:**

The no mining’s in a bright line space, if I can respond on that, because it’s
 been the subject of international legal observations and scientific conclusions
 that put it in a special category. So there are lots of areas where there’s not a

bright line answer, for example, transport settings or energy generation and exactly how one balances that, but there is for offshore drilling.

5 The ICJ, and the reference is paragraph 427, has determined that the granting of those licenses could breach international law with consequences for breaching states and that is because the science is clear that all oil that's underground has to stay there, so that one is slightly different than many of the particulars because it's been elevated elsewhere. Of course, that's a trial issue we would say, so I don't retreat from saying that the drilling is in a special
10 category of its own.
1455

ELLEN FRANCE J:

Well you're presumably not backing away from things like transport.

MR SALMON KC:

15 Not backing away from it being an area in which the State's framework may have to or should or will make some changes, no, but we are not –

ELLEN FRANCE J:

Well, it presumably must be that they have to make changes in relation to that, otherwise you wouldn't be challenging it in that way.

20 **MR SALMON KC:**

Well again, it –

ELLEN FRANCE J:

I mean you're presumably challenging it so that you get some change.

MR SALMON KC:

25 Not quite, your Honour. Again, and I appreciate I'm saying this repeatedly, but the shopping list of change is a shopping list of possible change put in because Associate Judge Johnston required us to articulate areas where there could be change.

WINKELMANN CJ:

So are you saying that you would not seek an order, so that would not be some detail that you would seek an order?

MR SALMON KC:

5 No.

WINKELMANN CJ:

You wouldn't say it's inconsistent because it doesn't deal with transport?

MR SALMON KC:

Correct.

10 **WINKELMANN CJ:**

But you would include in the inconsistency offshore drilling?

MR SALMON KC:

Offshore is in a special case, yes. For everything else, no, there would be no attempt to say the Crown needs to buy five more buses or the Crown needs to
 15 have a tax on roads, nothing like that. That is all – and this is pleaded overtly and, I hope, acknowledged clearly enough in our submissions, my apologies if not, all of that is for discretion by the legislature and executive, which is why I think coming back to the concern about declarations biting on the executive, that concern can be put to rest because any declaration would be systems-
 20 wide, framework-wide, rather than biting on any particular executive act and its response to any declaration would be to the extent the Crown chose to respond would be legislative.

So, that's a long-winded answer to multiple concerns the Court has, but the
 25 shopping list is not a wish list from Mr Smith, it's a court-ordered identification of possible areas. The orders sought remain ones of framework compliance with *KlimaSeniorinnen*. This claim was begun before that case came out I think, but the case reflects the original intent of the claim, as I say, in a five-page statement of claim.

So, pretty skilful advocacy from my learned colleague, Mr Prebble, he got a lot of particulars out of us. It would be unfortunate if those particulars made Mr Smith's claim look like something it is not. It is not seeking a granular calibration of governmental responses. It's not asking the courts to legislate.

- 5 It's asking solely for a declaration that the framework is falling short, because it is, and that that is a breach of rights.

COOKE J:

Don't they have to go through each of those things you've particularised in order to address your framework allegation?

10 **MR SALMON KC:**

No Sir, respectfully, I think the most it would come to is the due diligence and the all necessary haste parts of the international commitments, but the actual emissions and the actual way they're tracking are analysed by the experts, by the IPCC, by a climate tracker and at trial by Mr Smith in aggregate terms. So,
15 Mr Smith accepts that if the necessary cuts require 25% of cuts over a certain time period, all of that could come from one area of New Zealand's emissions, or none of it from that area, and that that –

WILLIAMS J:

- 20 So these aren't really your particulars. Your particulars are simply this is how much we've emitted.

MR SALMON KC:

It's a much simpler claim, correct. There are particulars in the sense that we wrote them down because we were told we had to and the conventional approach is to do what a judge tells a party to include –

25 **WINKELMANN CJ:**

Well I don't understand that actually, I don't understand that.

WILLIAMS J:

Because your answer is this is a particular.

WINKELMANN CJ:

I was going to say I don't understand that because if it isn't a particular of your claim you can just say there is no particular of that claim.

MR SALMON KC:

- 5 Well, the nature of the orders were such that we felt they required us to say steps the Crown could take, for example.

KÓS J:

Well let's move from the abstract to the real and look at page 31 of your pleading which is the –

10 **MR SALMON KC:**

Are you on the red line version, Sir?

KÓS J:

Red line version.

MR SALMON KC:

- 15 I'll have to change to that.

KÓS J:

And that's the relief sought in the second cause of action.

MR SALMON KC:

Which page Sir, sorry?

20 **KÓS J:**

31.

WINKELMANN CJ:

Under the heading "Relief sought".

KÓS J:

- 25 That's right.

MR SALMON KC:

Yes Sir.

KÓS J:

Okay, well help me to understand what the first two are actually seeking. "A
5 Declaration that the Crown has acted in a way that's incompatible with section 8
and section 20. So what are we dealing with there? Are we talking about
executive action?

1500

MR SALMON KC:

10 We're talking about the collective Crown response which is principally
legislative but an all-of-Crown response, but not.

WILLIAMS J:

So you mean the State?

MR SALMON KC:

15 The State, the same State that's promised under Paris and the same collective
approach that was undertaken in *KlimaSeniorinnen*, Sir, which again just
referring to 550 of that case was about legislative executive and judicial.

KÓS J:

20 So, okay, so for Crown read State, and then in declaration (c) you seek a
declaration that the CCRA is incompatible?

MR SALMON KC:

Correct.

KÓS J:

25 So where for instance is this bright line CMA high point dealt with? Is that under
(a) and (b)?

MR SALMON KC:

Correct. But I'm not suggesting that that is a standalone cause of action, rather, that is a point on which there is not – a trial issue Sir if I might, but that is a point on which there's, Mr Smith says, no room for debate, that there should be no
 5 new wells. He's not alone in that, Sir, the UN agrees. I believe the IPCC agrees and the New Zealand's agreed with each line of its report, line by line.

But the short point is the way in which the pleadings evolved, and her Honour the Chief Justice may be right, that there should've been more resistance to the
 10 particulars requirement but sometimes the instinct is to give what's required rather than have more delays of further applications. For better or worse there are particulars in there that are really just reciting the various areas of emissions, rather than changing the fundamentals of the claim which is that this is a framework case, and framework cases are routine now, abroad. The
 15 question is whether this one should be struck out.

WINKELMANN CJ:

So, in terms of who the relief is sought, does that give us constitutional problems? State/Crown?

MR SALMON KC:

20 I don't think so because –

WINKELMANN CJ:

Does it create uncertainty as to whether we're compelling the executive to do something?

MR SALMON KC:

25 Well, it's a declaration. I think the concern as I understand it is if a declaration about executive legality is made, that can be read as requiring a particular member of the executive to act to fix it. That would have effective injunctive consequences. Because this is a framework declaration, Mr Smith's case is that it doesn't put any particular member of the executive in that position.

So the first answer is once this case is brought back to what Mr Smith has in fact sought by way of relief, which is the framework relief and what he says the case is and those particulars are seen as in the limited way in which they should, there is not a risk of a particular member of the executive being caught
 5 in that way at all, and I think that's just right, but to the extent that a risk emerged that there was some nature of possible relief that risked having mischief for a member of the executive at trial, that is easily accounted for by a judge and tailored for, if indeed it needs to be, which is a long-winded way of getting to the point of saying if there might be devil in the detail in some relief, and it's only
 10 might, respectfully it seems unlikely given it's a framework case and given there's not specific executive conduct targeted by the declarations and it's not a judicial review of each one of those.

It's not what Mr Smith seeks to do, he seeks to frame a consistent case, but if
 15 an issue emerges it's a comfortable trial issue for a trial judge and far better assessed at the time it arises, such as it is, because it may not be an issue at all or it may be very easily tailored to with a minor framing of the relief. But it's a good example of, I'm not saying it's an in terrorem point for my learned friends but it's a good example of a point that seems to have menace until one looks
 20 at the likelihood it won't arise and the fact that if it does arise it will be identified before any relief is ordered and can be tailored to.

WINKELMANN CJ:

So, did you want to take us back to your rhetorical points? We're at (k).

MR SALMON KC:

25 Yes, certainly your Honour. 12, the Court should take an expansive approach to interpretation of privative clauses and read section 5ZM as an ouster clause that precludes any court assessment of the Crown's response to climate change under BORA or logically under any other statute. I took that ouster clause interpretation point my learned friend articulated as meaning that the
 30 suggestion that judicial reviews would be available would have to fall away too because it would be an ouster for those purposes as well so –

WINKELMANN CJ:

I think that Mr Hodder did not press it that hard. It was making more of a point that it showed you the kind of constitutional waters we were swimming in I suppose.

5 1505

MR SALMON KC:

Yes, that may be right your Honour and I'd accept that if that's where it landed.

WINKELMANN CJ:

13, contra settled law. The Court should not entertain claims that an enactment
10 has breached rights if the enactment is not about those rights but about something else. This may be another one that had been retreated from but –

WINKELMANN CJ:

Sorry, can you just repeat that one?

MR SALMON KC:

15 Yes, it's the crisp point as it emerged, that some acts are crisp and identify specific purpose or have a section that breaches the right to life. That was accepted as I understood by my learned friend as engaging the right, but acts that have, as a result of side wind or their effect or their substances to deprive rights are not justiciable. That's as I understood the submission at least at one
20 point.

ELLEN FRANCE J:

Sorry, wasn't that more to do with the idea of there should be some proximity?

MR SALMON KC:

I thought the proximity point was – there were several tort threshold points that
25 emerged over time that I thought were separate, but it may have been, your Honour, there was an indeterminacy point raised at one point in the Bill of Rights context but I'm not sure it went far given indeterminacy as a screening mechanism for who the duty is owed to as a device and tort law

doesn't really work for an Act where the Act has said who the duty is owed to and it's to every person. But there was also that tortious causation point again, I think I'd anticipated that they weren't points I would need to reply on in detail but I'm happy to if that would help.

5

15, and these are the last two, 15, that the Court should conclude that definitionally human rights, including the right to life and the right to culture, cannot be threatened by climate change when New Zealand, despite New Zealand having approved and voted in favour of UN resolutions to the exact opposite effect.

10

16, the Court should reject as –

WINKELMANN CJ:

So, what are the human – what are the UN resolutions to the exact opposite effect?

15

MR SALMON KC:

That human rights and the right to culture are threatened by climate change.

WINKELMANN CJ:

Where do we find those?

20

MR SALMON KC:

I would have to dig out the precise references but they're in the –

WINKELMANN CJ:

Are they referred in your submissions?

MR SALMON KC:

25

They are, yes your Honour, they are.

WINKELMANN CJ:

Yes.

MR SALMON KC:

And then last in 16, the Court should reject as untenable on the facts the position of status taken on the international stage that the NDC's of states are insufficient to meet the goals of Paris, that present commitments are not being
 5 met, that those commitments are in any event inadequate to meet the Paris goals when New Zealand has approved every statement in the assessment reports to the contrary. Every single one.

WINKELMANN CJ:

Okay, can you just go back through that one more slowly?

10 **MR SALMON KC:**

Certainly.

WINKELMANN CJ:

There were a lot, you delivered a lot very fast.

MR SALMON KC:

15 The Court should reject as – I'm flattered your Honour called me too fast – that's high praise.

WINKELMANN CJ:

Yes.

WILLIAMS J:

20 That depends on who you're talking to.

MR SALMON KC:

I'll slow down so much I'll get the opposite flattery. The Court should reject as untenable on the facts the position the State has taken on the international stage that the NDCs of states are insufficient to meet Paris goals, that present
 25 commitments are not being met, that those commitments are in any event inadequate to meet the Paris goals, when New Zealand has approved every statement in the summary for policy makers, in the ARs in other words, to the

contrary, and where that is the position determined by the global stocktake, the implementation review mechanisms under the Paris Agreement.

In short, what the Crown is saying here is untenable are a series of allegations
5 it's agreed with in the most stern of consequences in its engagement with –

WINKELMANN CJ:

Can Mr Heard or Ms McMenamin find us the specific reference in your submissions for those parts?

MR SALMON KC:

10 Yes, certainly.

WINKELMANN CJ:

You carry on though.

MR SALMON KC:

Certainly, your Honour. So, thanks for the patience as I went through those.
15 Mr Smith says that, collectively, the invitations to depart from the express wordings of BORA and the settled cases about it are framed by the Crown as necessary to give effect to Parliament's will. But inherent in each of them is a request that the Court decline to apply settled law in any area that might involve a decision about not just climate harm, but any area involving questions of
20 policy or decisions about spending money.

1510

What the Court in short is being asked to do is not to apply the law, including as enacted by Parliament, but at the request of the executive, unsupported by
25 relevant authority, to decline to apply it and in doing so, regarding the facts, to ignore the position New Zealand has formally endorsed internationally and pretend that rights to life and culture are strangers to the problems of climate change. It's urging the Court to adopt an approach to the facts and law that is incoherent with New Zealand's formal international position. So we see a
30 respondent case that seeks to shrivel the conception of rights. Human rights

become reduced to those crisp affronts to a particular single individual, a pure classical liberal conception of what a human right might be, disregarding substantive loss of rights and mass loss of lives, to shrivel the role of the courts in determining and declaring laws, and to shrink the seriousness of the issues

5 despite the respondent being on record in the most serious of fora agreeing with their seriousness.

So that is a long-winded way of saying Mr Smith's case is confronting, that's acknowledged.

10 **WINKELMANN CJ:**

Yes, well it is confronting, and there's a great deal of force in Mr Hodder's response to your, you know, submissions before he spoke about how you want to review every decision that was – I cannot, I'm not quoting you accurately, but the general gist was you want to review every decision made since 1992.

15 **MR SALMON KC:**

Yes, and –

WINKELMANN CJ:

There is a lack of focus in your pleading and you say it's because you've complied, against your will, with the provision of particulars that you don't really

20 see as particulars to your claim.

MR SALMON KC:

Well more, your Honour, we would say because the particulars are of little moment to the claim, and this is a point made in the courts below as well, this is a framework case. It is true that there is a pleading that the Crown has known

25 of these problems since at least 1992, because it has, but that is not –

WINKELMANN CJ:

Yes, but may I finish my point –

MR SALMON KC:

But that is not to say – sorry, I don’t mean to talk across you.

WINKELMANN CJ:

Well, so Mr Hodder says this is, you know, you’ve created something that looks
5 bigger than *Ben-Hur*, which is a very dated reference, but very large, and –

MR SALMON KC:

I remember.

WINKELMANN CJ:

And counsel have a responsibility to be careful with scarce court resources
10 because in New Zealand our court resources are very scarce, so we don’t want
to engage the courts in an unmanageable inquiry. So what’s your response to
that?

MR SALMON KC:

The response is we don’t see those particulars as necessary. The Court could
15 strike them out or just take note that they are not the gravamen of Mr Smith’s
case.

WINKELMANN CJ:

But you did say yourself that you were going to, you know, the Crown would be
called in to justify every decision it had taken since 1992.

20 **MR SALMON KC:**

I’m not sure I said that, your Honour.

WINKELMANN CJ:

Well no, I’m probably misquoting you, but there was the general flavour that
there was going to be an inquiry into everything that occurred since 1992.

25 **MR SALMON KC:**

Certainly that’s how my learned friend saw it, heard it, your Honour, and I
apologise if I put it in quite that way. You might recall that he responded

negatively to my suggestion it's not as big a case as it suggests. I maintain that view. I don't think it's that big because, and you'll recall this backfired on me, but with Justice Kós saying well if there's not a dispute about a number of these issues why can't it be done efficiently, why couldn't it be done on the papers, it

5 is unlikely that there'll be a real dispute about the science. It's unlikely the Crown will dispute knowledge. But if it does, yes, there will need to be cross-examination of people because we say the Crown knew and these were decisions. But the –

WINKELMANN CJ:

10 Is Crown knowledge necessary? I mean in a rights context how is Crown knowledge necessary? You're alleging knowledge –

KÓS J:

It's not a mens rea issue.

WINKELMANN CJ:

15 Yes.

MR SALMON KC:

No, it's not a mens rea issue. Well part of the reason was just in that novel duty context one might –

WINKELMANN CJ:

20 So in the rights context knowledge is not necessary, because it's not a necessary element.

MR SALMON KC:

In the second cause of action. I think in the third it probably is because of the act of protection point. One would think that knowing of the problem is relevant,

25 but also it in part populated the strict nature of the framing of the first cause of action. But that's not to say that's a big issue. It's not a Truth and Reconciliation Commission point because there's just a record that the Crown knew. So really I think what the case would become, because Mr Smith's case is a framework

case, is a case about the framework's adequacy, a point that's justiciable, it's capable of determination, it's indeed well analysed already by many scientists and their concerns are a matter of public record.

1515

5 **KÓS J:**

But what is this framework? I mean here we've gone beyond the pleadings. I mean we've had three goes, Mr Salmon, at – in your drafting and the bit you haven't touched is the relief sought in those three paragraphs we focused on before. Now I can understand declaration (c) that the CCRA is incompatible
10 with sections 8 and 20 but you say that's not enough because you want to deal with other pieces of legislation as well, so apparently those are in (a) and (b), but (a) and (b) combines both executive and legislative acts. This is becoming a pretty broad-ranging inquiry.

MR SALMON KC:

15 Well –

KÓS J:

If your framework is simply the various pieces of legislation in combination, more than the CCRA but not including executive acts, then you might be getting closer to something that is justiciable and capable of being dealt with in the kind
20 of proceeding you're talking about.

MR SALMON KC:

Yes –

KÓS J:

But as soon as you start talking about executive acts, we're in trouble.

25 **MR SALMON KC:**

Certainly at the moment it's asking the Court to make findings that a particular act is legitimate or not, I accept that, Sir. The best I can put it, Sir, and obviously this was drafted before *KlimaSeniorinnen* which is the best example I can give

of a case that has been run cleanly and efficiently, the hearing times for this were very short, is that it is a framework sense in that sense commonly used in international law, which is to say declarations (a) and (b) can be read and perhaps should've been drafted, I don't shy away from that, as saying

5 New Zealand's framework response is a breach of its obligations, and in that sense –

KÓS J:

So is that legislative, or legislative and executive?

WINKELMANN CJ:

10 It's legislative, isn't it, if it's your framework?

MR SALMON KC:

It's effectively legislative, yes.

WILLIAMS J:

Why –

15 **KÓS J:**

Well hang on, what's "effectively" mean?

MR SALMON KC:

It means that there are certain matters, certain settings are a matter of prerogative, for example, as Mr Hodder took you through.

20 **WILLIAMS J:**

But you're going to have to plead then sufficiency of NDCs and emissions budgets under the Act, aren't you?

MR SALMON KC:

I'm not sure they need to be pleaded, but they'll certainly be –

25 **WILLIAMS J:**

You'll have to prove them.

MR SALMON KC:

They'll be proven, yes.

WILLIAMS J:

So you are talking about executive action.

5 **MR SALMON KC:**

The NDC is the one, that's what I was talking about as a matter of prerogative.

WILLIAMS J:

Well that's a key – and emissions budgets. Unless you're stopping at section 5Q and that's what you're arguing about, which I don't take you to be,
10 you're going to have to attack executive decisions under each of the Acts.

MR SALMON KC:

Or if the Court is concerned about the coverage of executive steps as part of the overall framework then it's a matter of saying the legislation has failed to deal with those, but even if one resorts to a fallback position of only legislation,
15 the lack of legislation effecting, effective NDCs, it's part of a legislation case, so that's a way of saying one can conceptualise all of this is a legislation problem.

WINKELMANN CJ:

What is it in *Klima*?

MR SALMON KC:

20 That's a good question, your Honour. I think it's –

COOKE J:

Inadequacy of their legislative response.

WILLIAMS J:

Their targets, yes.

COOKE J:

I mean isn't – you've called it "framework" but isn't your case really that the Crown's actions to limit New Zealand's emissions have been inadequate? It's an emissions case?

5 **MR SALMON KC:**

Yes, and –

COOKE J:

And some emissions are in the Act and some are taken by executive action.

MR SALMON KC:

10 Well I'm not sure an emission can be taken by executive action. I understand the point you're making.

WILLIAMS J:

Well some are allowed by executive action and some are constrained by the Act on its own terms.

15 **MR SALMON KC:**

Yes, there are steps that could have been taken by executives that were not, but the entire case could be framed as a failure to legislate to effect an effective framework.

COOKE J:

20 Effective emission reduction?

MR SALMON KC:

Correct. Framework.

WILLIAMS J:

25 And in order to do that you'd have to establish that the decisions being made under the current legislation, whether it's the Crown Minerals Act, the CCRA, or the RMA, or the Land Transport Act 1998 have failed to achieve what you say must be achieved.

MR SALMON KC:

No, I'm not sure we'd have to, Sir. If I can – if we envisage a parallel world in which the Court said those are out of bounds, the answer is not that the case fails but that Mr Smith's case is seen as an attack on the efficacy of that
 5 legislative framework, those collection of statutes, for their lack of statutory mechanisms to ensure that the due diligence and precautionary and other obligations are met.

WILLIAMS J:

So my point is that in order to get to that point, which is some time through the
 10 trial, you'll have to have established that the exercise of discretions pursuant to the legislation as it currently exists and the legislation itself in some respects has produced the overshoot that we are now in, won't you?

1520

MR SALMON KC:

15 I don't think we have to Sir, if I can mount –

WINKELMANN CJ:

Well there's a *Chisnall* kind of model, isn't there, which is that the basic operation of this model will produce these outcomes.

MR SALMON KC:

20 Correct.

WINKELMANN CJ:

And that could be the thing you say that is set at these levels and this is what this model will produce.

MR SALMON KC:

25 Correct. So our first point, our starting point would be to say this should be looked at collectively in line with the international legal approach in *KlimaSeniorinnen* and that –

WILLIAMS J:

Yes, but they didn't have a trial.

MR SALMON KC:

No.

5 **WILLIAMS J:**

The Europeans do this stuff on the papers.

MR SALMON KC:

Certainly Sir, but they were able to make factual findings. I'm not sure we'll have a long trial here, the factual propositions are, many of them established –
10 the Crown says we will, we might, on polycentricity, that a lot of these issues New Zealand has committed to and might have stopped itself from saying otherwise. But I think the Court's concern is that there might be devil in the detail, I don't mean to minimise it saying that, around the impact of declaratory relief on executive actions and I just wish to differentiate evidence about what
15 has happened on emissions reduction which includes a mix of legislative and executive steps, from the question of the way in which a declaration might bite. The way I anticipate this case is most likely to run, obviously subject to how the Crown defends it, is that it will be a case that looks at that emissions curve and looks at whether it's met and looks at some pretty basic science on what's likely
20 to happen to that emissions curve.

WILLIAMS J:

So you won't need to deal with individual discretions under the various pieces of legislation, you just produce the statistics.

MR SALMON KC:

25 I think it will prove to be unnecessary detail in what is largely accepted facts about the history of the emissions and forecast emissions. That's my prediction as a litigator. It's a prediction but I think it's likely to be right because what matters is the total budget and the total output and what matters for example is, and Justice Kós asked my learned colleague, Mr Hodder, and this is going to

take a while, Mr Hodder about this, there's the curve of expected reductions over the next 20 years. For 19.11 years that graph with different dates at the start has shown we're about to cut our emissions drastically. We never have. There'll be argument about that. There'll be argument about the notion that

5 New Zealand – that this is the case, this is the day when we are actually about to start the downhill charge and cure emissions. That's the factual dispute but that's linked to the overall framework.

So it comes back to that framework case. It's not an inquisition, it's not an attempt to parade witnesses through forever, it's does this framework meet the purpose. So, your Honour's right, that they didn't have a full witness trial in *KlimaSeniorinnen* but it is essentially that case that Mr Smith seeks to run, albeit with the modifications to reflect New Zealand's unique constitutional environment.

15 **ELLEN FRANCE J:**

I struggle to see how you can say it's a framework case without that involving enquiry into executive action because not everything that is done in this area is done currently by legislation and that's part of your complaint, isn't it, that there needs to be legislative action to change things.

20 **MR SALMON KC:**

Yes.

ELLEN FRANCE J:

Which was Mr Hodder's point, that a lot of these things that Mr Smith seeks will in fact require legislative action, and why is that? Because they're not currently

25 dealt with by statute.

MR SALMON KC:

That's right your Honour, he does say that and there would likely be statutes that are required to produce a compliant framework. What I'm seeking to highlight is that doesn't mean that there will be many trials about multiple

30 executive decisions because the international obligations sued on, the pleaded

targets, are global targets. So it is not helping to analyse how many emissions New Zealand has to look at, which ones are executive or legislative, but rather to look at whether it is effective. And the solution to that is likely to be, in every sense, legislative, and Mr Smith has a remedy if the answer in a declaration is

5 a declaration that the statutory settings are inadequate. My point is just to note it's quite contestable that a declaration that is qua the State as a whole in fact is a declaration that is effectively an injunction against any particular executive. That seems unlikely that that would be the effect of the type of orders that a framework case would result in if that makes sense.

10 1525

So, I'm not sure if I've fully answered your question, Justice France, but I think the core point is a framework case is going to look at total emissions and sufficiency and leave it to the State to get into the particulars and Mr Smith does

15 the same and we've – I take on the chin the feedback about the particulars given, but we have endeavoured in submissions and when I began in this Court today to make clear by expressly pleading Mr Smith is not seeking to legislate the details. He's not.

WINKELMANN CJ:

20 So what could be said against you, which is again something that probably is encompassed in the *Chisnall* sort of model, well there's sufficient leeway in the executive model to enable us to meet those targets. The executive can work within this framework to enable us to meet these targets.

MR SALMON KC:

25 Well, that might be said. I'm not sure this Court can decide that that's right, here in the strike-out but –

KÓS J:

Well I think we need to know what your position on that is. I mean if you were, you and your colleagues on the front row were the entire cabinet and had

30 control of the Climate Change Commission, could you make the CCRA work?

MR SALMON KC:

No.

KÓS J:

Well then your claim is – the executive actions are beside the point. You may
5 as well just focus on the legislation.

WINKELMANN CJ:

That's what he's been saying. I think that's where he's got to, yes.

MR SALMON KC:

I think that's the way it shapes out, but her Honour Justice France is right, that
10 in the mix are a bunch of executive decisions as context for total emissions
rather than as the focus of the claim, but I do resist the notion that it's just the
CCRA that's the short point. The Crown says it's just the CCRA. Mr Smith
doesn't because there –

KÓS J:

15 I understand there is other legislation but my question is is this a framework
case because no exercise of discretion, in the most favourable way towards the
environment under the existing framework, could meet Paris obligations.

MR SALMON KC:

Yes that's right, but that does not mean Mr Smith abandons, for example, the
20 pleading, the notion that conduct within the executive sphere effects, affects the
extent of the breach.

KÓS J:

That's fine, but it may well be that the cognisable case might be a declaration
of inconsistency in relation to the legislative framework alone, that being an
25 orthodox DOI.

WINKELMANN CJ:

Yes, and I must say I have some anxiety about a DOI that affects the State because that's quite a significant development of the law and it doesn't seem to me to be, this does not seem to be a particularly comfortable context in which
5 to be making that development of the law.

MR SALMON KC:

Yes, I had a little bit to say about related topics on that too so I'll engage with that if I might, your Honour.

WINKELMANN CJ:

10 Yes.

MR SALMON KC:

So, this Court is at the strike-out stage, obviously, you don't need to be reminded of that.

WINKELMANN CJ:

15 Yes.

MR SALMON KC:

But I mention it because this is about whether the case gets to go to trial and be fully argued, and it is an uncomfortable feature of a strike-out case to be dealing with the fine-tuning of relief in anticipation of a trial so far down the track.
20 That's not a criticism, it's court, it's a very healthy testing of what are really important constitutional issues. But I add a couple of observations about the strike-out context that I think are worth dealing with in reply.

Firstly, some of the issues raised by this case are constitutionally of great
25 importance. Some of them are of real personal and cultural importance to many, but inter alia to Mr Smith and his partner who have been here during this, and as well as the concern about the Court seeking to do more than be a gatekeeper of whether the claim proceeds to trial, and obviously the Court is rightly concerned that the High Court not be involved in a trial that goes from

proper constitutional grounds, obviously the Court is interested to understand how relief might work. But, in a case that might be easier to run once we do it, and it's often the case that parties stand and say this case is going to be unworkable, and it's not, they work, a degree of caution about closing off the claim if parts go ahead, if closing off other parts in a strikeout context is worth keeping in mind.

Related to that though, for me personally, it's been fascinating to hear the discussion of the te Tiriti issues and the third cause of action generally and that includes my learned friend Mr Prebble who thoughtfully and sensitively advances submissions on te Tiriti issues in a context where he will have understood that they involve legal submissions my client doesn't agree with and that strike very close to the quick for him.

1530

15

I just make a couple of observations about that. One is it's been put forward by my learned friend in a very measured way that there's a common understanding of the role of te Tiriti. This led to the discussion about 85 years since *Te Heuheu*. That's not how Mr Smith views the status of te Tiriti in New Zealand. He is Ngāpuhi and Ngāti Kahu. Neither of those believe they have ceded their sovereignty and they exercise their own sovereignty. In Ngāpuhi's case that's been confirmed by the Waitangi Tribunal. They entered a compact with the Crown in which while the Crown may see itself as made up of separate arms, he doesn't see it that way, and as rangatira of Ngāpuhi and Ngāti Kahu he doesn't share the common understanding of the status of te Tiriti. He doesn't share the view reached in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC), nor in *Te Heuheu*, and he's here because the State holds political power that is affecting his land and his life and that of his descendants, not because he has a common understanding of the status of te Tiriti.

Now that's not a criticism of anyone here, but rather to say this. This is – could be one of the more important constitutional questions, the te Tiriti one, certainly that I've been in the presence of in courts, but one of the more important ones

to arise for this Court and respectfully and acknowledging here the limitations of one reply from me and key interveners rightly not being able to reply, but this leads me to say these issues warrant a more detailed hearing than at the strike-out stage. There is no menace in allowing the important, hugely
 5 important constitutional debate that is – that the third cause of action is pregnant with to proceed in a full hearing with proper evidence and proper time for the Court to consider the issues in context and with all interested parties making proper submissions.

10 So that, linked to the concerns the Court has about relief and the executive action, leads to a submission that there is – it is submitted real appeal in allowing those issues to be worked through and teased out in a proper way at trial rather than sped through in this Court, and that's not to suggest the Court has constrained us at all, it hasn't, but rather that this is a strike-out and that
 15 these issues are too important to be resolved without just, for example, someone such as Mr Mahuika having the chance to respond to what are quite contentious submissions from the Crown about the status of te Tiriti under New Zealand law.

WILLIAMS J:

20 It is a question of law though, isn't it, and it's not a matter of evidence?

MR SALMON KC:

It is a question of law. But I am just very mindful, Sir, it might be being unduly sensitive, but I'm mindful that it's me who it's fallen on to reply to that and I know there's a lot that would want to be said by others on it.

25 **WINKELMANN CJ:**

Although that submission that Mr Prebble made was one I – a point I put to Ms Coates.

MR SALMON KC:

Yes, parts of it were, yes. I guess the reason, to answer Justice Williams' point,
 30 the reason I make this point, of course it is possible to determine all points of

law at the strike-out stage if they are true to be pure points of law, is that we haven't had the extent of debate we might about it, but more particularly at the strike-out stage the Court is not required to determine the constitution. It's merely required to determine whether the point should go to trial. And given

5 that it's acknowledged, the extent of common ground as to what might be part of domestic law under the Treaty, the third cause of action can go to trial and it's really a cautionary note about determining constitutional issues based on the extent of argument we've been able to have here.

WINKELMANN CJ:

10 Right, now moving on.

MR SALMON KC:

Cranking on, your Honour, thank you. A short note about the – another submission made by Mr Prebble, there are a number of treaties just dealing with the concept of the status of treaties which have been judicially-interpreted

15 as creating rights for citizens derived from those treaties. The EU has key examples. It's not the case that calling something a treaty means that there are no domestic rights arising from it.

So those are some points about the Tiriti, otherwise rest on our submissions.

20 But in my respectful submission, there is some appeal in not deciding finally points of vital constitutional import without – based on the scope of argument enabled at the strike-out stage where the question being focused on is tenability.

1535

25

So then I move to – I won't go through that human rights paper because I think time pressures are acute. I move to –

KÓS J:

This was the hand-up you were talking about?

MR SALMON KC:

Correct.

KÓS J:

Yes. It's helpful, thank you.

5 **MR SALMON KC:**

If the Court's happy with that, I hope Justice France has it now, but I think it will tire you if I try to go through that in detail.

10 So what I want to conclude with are just a couple of comments about the strike-out jurisdiction, the first of which is if the Court has concerns about the scope of relief for the pleading Mr Smith would like the chance to fix that. If it's unduly prolix because of the way it's evolved he would like the chance to fix that, but as before, the first statement of claim at five pages was his original vision. It was just one cause of action but seeking effectively a framework case.
15 He seeks that again.

Secondly, the first cause of action, I heard with interest the question from Justice Cooke about whether a declaration just in relation to the customary international law, complies with customary international law was the
20 component – this wasn't the way your Honour put it – was the component that might have the best legs. We do, Mr Smith does, say the duty is mandated on the basis of more than that customary international legal duty, but that is part of domestic law and is a justiciable point for the Court as things stand on the first cause of action and it is separate from the Bill of Rights.

25

Otherwise, in terms of the strike-out jurisdiction there are multiple factual issues that have been presented as ones the Court can decide here that are properly trial issues. Obviously the novel duty context is a standard one justifying a trial, but so too is margin of appreciation, which is not properly addressed at the
30 interpretive stage but as a matter of fact, and the suggestion that the Court can conclude that now is wrong. A proper trial analysis of margin of appreciation would be highly productive.

And there are many other things that a trial would do, including – well, I've addressed them. I'll just address one point in particular here, which is a trial would enable the Court to understand who is really advancing the in terrorem case. My learned friend very courteously suggests it's Mr Smith, that his vision of the IPCC report is his own spin and it's apocalyptic. Mr Smith says the Crown suggesting there's polycentricity is hyperbole and wrong too, and the suggestion this will harm the New Zealand economy is in terrorem because the scientists say it'll harm the New Zealand economy not to do this.

But that leads me to just a couple of comments about the facts and in particular the suggestion that Mr Smith's apocalyptic characterisation is his, and in this context Justice Kós' response to that was that he'd be going off the IPCC, not evidence from the bar, which is endorsed. The IPCC is hard to read and the *Plan B* problem of limited excerpts being read to the Court is recognised. The AR5 reports, which are the precursors to the AR6 so less bleak but also in the bundle, after their release but before all of AR6 was out the AR6 physical science report was released in August 2021. So that's in the bundle.

Here is what the UN Secretary-General said about it, just a couple of excerpts, and my reason for reading these out is just to deal with the notion that Mr Smith's out on his own being alarmist or apocalyptic. First words: "Today's IPCC Working Group 1 Report is a code red for humanity. The alarm bells are deafening, and the evidence is irrefutable," and on it goes. This is five years and nearly three weeks ago – and two weeks ago. And then the Secretary-General goes on to say: "We need immediate action on energy," talks about cuts, and says: "This report must sound a death knell for coal and fossil fuels, before they destroy our planet. There must be no new coal plants ..." et cetera, et cetera, and then these words: "Countries should also end all new fossil fuel exploration and production, and shift fossil fuel subsidies into renewable energy," and that was followed, as I noted, by the – that sort of comment by the International Court of Justice concluding that granting new exploration licences could breach international law. That was the paragraph 427 reference I gave.

That there can be no more drilling has been acknowledged not just by the ICJ, but by the International Energy Agency of all things, and the IPCC itself, and when one compares that stark apocalyptic clarion call to what is pleaded by Mr Smith in paragraph 82(c) in his subparagraphs 15 through 21, the reversal
 5 of the offshore ban and other steps, one sees that what New Zealand is doing is in fact apocalyptic, in fact, and we are the international outlier that we are described as internationally, or one of them, with the result that as those raft of policies were released that are summarised in those last six paragraphs of 82(c), the public media response, to the extent the public still read media, they
 10 read articles such as that from Newsroom's article entitled *Let it burn* which concluded that it was difficult to describe New Zealand's legislative steps, and other steps, as doing anything other than intending to make it worse.

Here's the example I'll end on which is given from that article indexed to
 15 published material: "The warming impact of just the Government's change to the methane target is on a similar scale as all of the road, aviation and shipping transport emissions in the entire European Union (population: 450 million) in 2024. If a government wanted to deliberately increase New Zealand's contribution to global warming, what would it do differently than this?" So that's
 20 after listing the various legislative steps of late.

WINKELMANN CJ:

Is that in the evidence?

MR SALMON KC:

I don't think that article is. I accept it's evidence from the Bar but it is reflecting
 25 the pleading because the pleading in part was updated just to reflect that same raft of steps.

The point I'm seeking to make is this: there's not a lot of dispute about that. The Crown has agreed with the science on it and with the implications for
 30 human rights. The Crown has agreed with almost every statement Mr Smith makes in his pleading. He has pleaded science from the IPCC that's been agreed with and approved and ratified by New Zealand. So his is not a

controversial claim. It's accepted that there might be issues, devil in the detail on relief regarding executive action but Mr Smith says, and it is submitted, that's unlikely to arise because he is bringing a framework case, he is bringing New Zealand's version of *KlimaSeniorinnen* and –

5 **WINKELMANN CJ:**

You keep on changing that name.

MR SALMON KC:

I'm waiting until someone looks satisfied that I've said it right.

WINKELMANN CJ:

10 Seniorin [*sic*] I think.

COOKE J:

It's unlikely.

WINKELMANN CJ:

Seniorinnen.

15 **KÓS J:**

I think we'll have to finish before that.

MR SALMON KC:

I'll do it outside, Sir. So, I'll end Mr Smith's case saying what seems like an outlandish duty, his first cause of action which the Crown objects to the most,
 20 is really just a suggestion that the State shouldn't be allowed to deliberately let the world burn and it's easy to imagine that 20 years from now it will seem remarkable that there was any controversy about that, remarkable that it was obvious that the Crown couldn't torture one person to give a confession, but that it could just let it all go. And that's why Mr Smith's here. He's no longer
 25 young, he's been doing this for a very long time, he would like to go to trial and have the chance to establish, in a relatively simple framework case, that what

is happening is wrong and a trial on that is not disproportionate and it's not an unreasonable ask from him in the later years of his life.

Unless the Court has any further questions, those are my reply submissions.

5 WINKELMANN CJ:

No. Well thank you very much, Mr Salmon, and thank you counsel for your very helpful submissions. I'd also like to thank all counsel for their participation in the Court's outreach programme. We've had two events in relation to that already and I understand some counsel are travelling down with the
 10 University of Waikato to participate in a third which I really do take my hat off to you all. It's really a fantastic commitment on your part and it is important because it allows our students and our new lawyers to see how the courts operate, how the law is debated and shaped, and to understand the role of counsel and the Ministry of Justice. So, thank you very much.

15 MR SALMON KC:

Well your Honour, I think I can say on behalf of all of us, and all of us did attend last night, we all enjoyed it actually. Really worthwhile.

WINKELMANN CJ:

As I say, counsel's always the best part of it.

20 KÓS J:

Exactly.

MR SALMON KC:

Thank you, your Honour.

WINKELMANN CJ:

25 And we will reserve our decision. Thank you.

COURT ADJOURNS: 3.45 PM