Dame Helen Winkelmann, Chief Justice of New Zealand

Continental Drift: Constitutional Development and Divergence in New Zealand and Australia[1]

Lucinda Lecture, Thursday 21 August 2025

Tuia te rangi e tū nei

Tuia te papa e takoto nei

Tuia te Moana-nui-a-Kiwa e awhi nei

Tuia te muka tangata e hono nei i a tātou katoa

Tuia ko ngā mate o te wā, haere, haere, haere atu rā

Ki a tātou te hunga ora e kawe nei i ā rātou mahi, tēnā tātou,

Ki ō tātou whanaunga nō te Ao Moemoeā,

Tēnā koutou, tēnā koutou, tēnā tātou katoa.

It is an honour to present this lecture to you tonight. As always, I offer my warm greetings to our Australian cousins. I wish to acknowledge the people of the Kulin Nations, on whose land I am being hosted virtually this evening. I pay my respects to their Elders, past and present.

I felt there was something irresistible, if not inevitable, about the title of my lecture "Continental Drift: Constitutional Development and Divergence in New Zealand and Australia". After all, at some time in the distant past, New Zealand drifted off the bottom of the east coast of Australia and still sits there on the map off to the east, like the missing puzzle piece.

Then there is also the eponymous Lucinda boat trip. As I understand it, this stands as a symbol for the constitutional voyage that Australia embarked upon, assisted by that trip on the Hawkesbury River during which important matters of constitutional drafting were attended to.

Although it was not represented on that boat trip, New Zealand had been invited to be part of the new nation to be created through federation. The decision it ultimately took in 1901 not to join, is one of the forces that has propelled New Zealand on its own constitutional voyage.

New Zealand signalled early a reluctance to join the federation. Even so, it was invited to, and did, play an active role in discussions at the early Federation Conference and Constitutional Convention in 1890 and 1891. So active, that a representative from one of the Australian colonies, Alfred Deakin, observed the tendency on the part of New Zealand representative Captain William Russell to express reservations about joining the federation while at the same

[1] I thank my clerk, Alexandra Briscoe, for the assistance she provided in the preparation of this lecture. Any inaccuracies and failures of expression or reasoning are my own.

time laying down, "with great fullness", what kind of federation New Zealand believed should be created.[2]

New Zealand remained sufficiently curious about the possibility of federation that in 1900 it appointed a Royal Commission to inquire into "the desirability or otherwise of our … colony federating with the Commonwealth of Australia".[3] Ultimately the commissioners concluded that:[4]

> … merely for the doubtful prospect of further trade with the Commonwealth of Australia, or for any advantage which might reasonably be expected to be derived by this colony from becoming a State in such Commonwealth, New Zealand should not sacrifice her independence as a separate colony, but that she should maintain it under the political Constitution she at present enjoys.

Nonetheless, the possibility of future federation remained tantalisingly present. Indeed, it remains so today thanks to the provision of cl 6 of the Constitution, which includes New Zealand within the definition of "the States".

There is a great deal of scholarship as to why New Zealand did not join the federation, much of it treating the decision as inevitable — a foregone conclusion. James Belich, a prominent New Zealand historian, however, observes just how significant the decision was for New Zealand. He characterises it as a declaration of independence, marking a decision by New Zealand to strike out on its own.[5] Prior to that point, New Zealand had been one of a number of British colonies, located down in an area which included the Australian colonies, and for which collective nouns were common — such as the Southern Lands, the Antipodes and Australasia. Belich points out that the identity of Pākehā (European) New Zealanders was tied to two principal concepts: Britain (New Zealand was "*the* Britain of the South") and Australasia.[6] While the latter concept was coined by the French in the 18th century to include New Guinea, he says it soon took on its modern meaning of "Australia plus New Zealand".[7]

As we try to assess the significance of New Zealand's decision to go it alone, it is useful to remind ourselves of just how deep were, and indeed are, the links between these southern lands of Australia and New Zealand. These links go back to the birth of New Zealand as a nation and even further to the beginning of the 19th century, at a time when there was a fast-growing trade between Te Ika-a-Māui (the North Island of what would become New Zealand) and the Australian colonies. The early 19th century was also a time when the Governor of New South Wales had notional responsibility for the administration of criminal justice as it affected British citizens who committed "crimes" in New Zealand.[8]

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2 Nicholas Aroney "New Zealand, Australasia and Federation" (2010) 16 Canta LR 31 at 39 citing *Convention Debates, Sydney* (1891) at 68–69.

3 *Report of the Royal Commission on Federation, Together with Minutes of Proceedings and Evidence, and Appendices* (Government Printer, 1901) at v.

4 At xxiv.

5 James Belich *Paradise Reforged: A History of the New Zealanders From the 1880s to the Year 2000* (Allen Lane, Auckland, 2001) at 46.

6 At 47.

7 At 46–47.

8 See the discussion of early attempts to prosecute British subjects for crimes committed in precolonial New Zealand in David Collins *Fragile Foundations: The Application of English Criminal Law to Crimes Committed in Aotearoa New Zealand between 1826 and 1907* (Te Herenga Waka University Press, Wellington, 2024) at 41–85.

As is well known, the Treaty of Waitangi | te Tiriti o Waitangi, signed on 6 February 1840 between Māori rangatira (chiefs) and the British Queen, is the founding document of the nation of New Zealand. But what is often overlooked is the fact that this new nation started its life as part of New South Wales. There it remained until 3 May 1841 when it became a separate colony.[9] As one of my colleagues pointed out to me recently, the first Chief Justice of New Zealand was not Sir William Martin, as I often claim, but rather Sir James Dowling, New South Wales Chief Justice in 1840.

I think Belich makes an important point when he emphasises the psychological impact for New Zealand of Australian federation, and New Zealand's decision not to join that federation. On 1 January 1901, New Zealand suddenly and simultaneously both stood alone and became small, down here at the bottom of the world.[10] After all, at the time, it was still about a two-month boat journey back to Great Britain.

Bringing a constitutional lawyer's perspective, I would highlight as a matter of equal significance, at least, that in 1901 New Zealand had missed its constitutional moment. The Australian colonies had debated and settled upon a new form of constitutionalism — quite different to the British model. To this day, New Zealand has never had a constitutional moment of that order.

Where did the 1901 decision leave New Zealand constitutionally? It left us with the British model of constitutionalism — for New Zealand that meant a constitutional settlement made up of a patchwork quilt of English statutes, New Zealand Acts of Parliament, common law and convention. We soldiered on without a constitutional charter, and without a constitution that had the status of fundamental law. Today, apart from a few entrenched provisions in our Electoral Act 1993 and just one in our Constitution Act 1986 (requiring a 75 per cent majority for amendment or repeal),[11] any part of our constitutional settlement can be changed through legislation passed by a simple majority.[12]

In the 1931 Statute of Westminster, the British Parliament offered full self-government to Australia and New Zealand. It cannot be said that Australia accepted this offer of full independence with alacrity — it did not take up that opportunity until 1942.[13] New Zealand was even slower — only ratifying the statute in 1947.[14] Again New Zealand did not take the opportunity to opt for a different model of constitutionalism.

Even so, our constitutional arrangements — whilst perhaps closest to those of Britain — were, and remain, distinctive. We have a strong institutional slant and cultural commitment to

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9 At 82–83.

10 Belich, above n 5, at 51–52.

11 Electoral Act 1993, s 268 (re-enacting Electoral Act 1956, s 189). The entrenched provisions are ss 28, 35, 36, 74 and 168 of the Electoral Act, relating to (among other things) the drawing-up of electoral districts, voting age and method of voting, and s 17(1) of the Constitution Act 1986, relating to the term of Parliament.

12 See, however, Cooke P's suggestion that "[s]ome common law rights presumably lie so deep that even Parliament could not override them": *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398. The more settled view is that Parliament *can* legislate to override fundamental rights, but it must use clear language if it wishes to do so — ie, the principle of legality: see *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [75]–[76] per Winkelmann CJ and O'Regan J citing *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

13 Statute of Westminster Adoption Act 1942 (Cth).

14 Statute of Westminster Adoption Act 1947.

parliamentary sovereignty. Our courts have no power to judicially review legislation — by that I mean no power to invalidate or disapply legislation.[15]

Today a unicameral Parliament and the lack of a supreme law constitution, combined with a party system, also make for a powerful executive branch of government. The checks on executive power are to be found at the ballot box, in the law-mindedness of our politicians and our populace, and in the judiciary's power to judicially review the exercise of public power.

New Zealand has been said to have a political model of constitutionalism — in the sense that our constitutional arrangements are better analysed and understood by describing how they operate in practice, rather than in positive law terms.[16] Certainly it is a dynamic model, with the constitutional landscape capable of being reshaped by legislation, by court decisions and even by significant events. Professor Claudia Geiringer has put it this way: "we are constantly reconstituting ourselves. There is no one constitutive moment; just a series of constitutive iterations, in which we reexamine, refine or redefine our constitutional signposts".[17]

I am going to focus on two areas tonight to sketch out, and I hope illuminate, the way these different constitutional voyages, and different institutional settings, play out in the operation of the law. The first area is the place of human rights in our nations' respective constitutional settlements. The second is the jurisprudential path that each nation has followed in upholding indigenous rights, a path which is itself, in large part, a product of our constitutional settings. I record a disclaimer. I have attempted comparisons between Australia and New Zealand law. My apologies to the extent I misdescribe Australian law.

Human rights

As colonies, each of Australia and New Zealand inherited similar sources of rights — sources such as the Magna Carta, the Bill of Rights 1688, the Habeas Corpus Acts, the common law and relevant legislative provisions. This body of law could not, however, be described as a "rights framework". It did not provide decision makers (in Parliament, the executive or others exercising public power) with a framework for checking the justification for any limitation on rights. This absence of a rights-based framework had significant implications for each of our nations.

In New Zealand, by way of example, it allowed significant limits on freedom of speech and protest. Sir Geoffrey Palmer, former Prime Minister and leading constitutional theorist, describes how the law of sedition was used during times of war and civil unrest to suppress dissent.[18] In the 19th century, it was used to suppress peaceful resistance to Māori land confiscations by the Government.[19] In the 20th century, it was used to suppress the leaders

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15 See New Zealand Bill of Rights Act 1990, s 4.

16 David V Williams "Justiciability and Tikanga: Towards 'Soft' Legal Constitutionalism" (2021) 29 NZULR 649 at 650 referring to the use of the term in Mark Hickford "The Historical, Political Constitution — Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value" [2013] NZ L Rev 585 at 586. See also Edward Willis "Political Constitutionalism: The 'Critical Morality' of Constitutional Politics" (2018) 28 NZULR 237 at 238.

17 Claudia Geiringer "What's the story? The instability of the Australasian bills of rights" (2016) 14 I•CON 156 at 171.

18 Geoffrey Palmer "Political Speech and Sedition" (2008) 11 Yearbook of New Zealand Jurisprudence 36 at 46.

19 See Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 199 and following.

of the growing union movement, and later those who spoke out against conscription laws.[20] Remarkably, criminal sedition laws remained on New Zealand's statute books until 2008.[21] As I understand it, similar laws were on the Commonwealth's statute books until 2010, when the term "sedition" was removed from federal criminal law.[22]

World War II created an interest amongst the political classes in Australia and New Zealand in a human rights framework that would protect against the repetition of the horrors that had been perpetrated within and between nations.

Here another link between our countries is of note. Australia can be proud of the role it played in the shaping of the United Nations Charter, and in the drafting of the Universal Declaration of Human Rights.[23] Australia's delegation to the conference convened in San Francisco in 1945 to consider the draft Charter was led by its Minister of External Affairs, Dr Herbert V Evatt.[24] New Zealand's delegation was led by its Prime Minister, Peter Fraser. Fraser was a man of deep philosophical and political conviction. Unprotected by a "rights framework", he had been convicted of sedition and served a year in prison during World War I for a speech in which he called for the repeal of conscription laws.[25] A committed unionist, as a younger man he had been involved in the creation of New Zealand's Labour Party.

Both Evatt and Fraser wished to see a post-war order in which all nations made commitments to respect the human rights of all people. Proposals for a post-war international body had been worked on by the great powers in the latter stages of the war, and detailed proposals had been published following a great power summit at Dumbarton Oaks. But those proposals made little mention of human rights. Evatt and Fraser agreed to work together to push forward a rights agenda.[26] At a meeting in Wellington in 1944 together they formulated a proposal to take to the San Francisco Conference, that this new international body should be founded upon universal respect for and observance of human rights.[27]

In San Francisco in 1945, both the Australian and New Zealand delegations played a significant role in promoting that agenda. That was true again at Paris in 1948, when the draft of the Universal Declaration came to be considered, with both nations in their own ways arguing for structures and commitments that would result in strong and binding obligations on signatory nations.[28]

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20 Palmer, above n 18, at 46–48.

21 Crimes (Repeal of Seditious Offences) Amendment Act 2007. The Act came into force on 1 January 2008.

22 The resulting situation is of some complexity: see National Security Legislation Amendment Act 2010 (Cth), enacting the recommendations of Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, July 2006).

23 *Universal Declaration of Human Rights* GA Res 217A (1948).

24 Michael Kirby "Herbert Vere Evatt, the United Nations and the Universal Declaration of Human Rights After 60 Years" (2009) 34 UWA Law Review 238.

25 Michael Bassett and Michael King *Tomorrow Comes the Song: A Life of Peter Fraser* (Penguin Books, Auckland, 2000) at 72–73.

26 Paul Gordon Lauren "'A very special moment in history': New Zealand's role in the evolution of international human rights" (1998) 23 New Zealand International Review 2 at 4–5.

27 At 5.

28 See Colin Aikman "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1; and Annemarie Devereux *Australia and the Birth of the International Bill of Human Rights 1946–1966* (Federation Press, Sydney, 2005).

Even so, after the adoption of the Universal Declaration of Human Rights, interest in a rights framework faded at the political level in both countries. This may have been due to changes in government, but no doubt also to the practicalities of everyday life reasserting themselves, as the horrors of war receded.[29]

It was not until 1990 that New Zealand enacted a comprehensive national rights framework, in the form of the New Zealand Bill of Rights Act 1990. This was a statutory human rights framework, and not supreme law. The Bill of Rights was the brainchild of Sir Geoffrey Palmer, who had initially contended for its adoption as supreme law.[30] However, such is New Zealand's commitment to parliamentary sovereignty that this aspect of his proposal could not be secured. His achievement must not be underestimated, however. New Zealand's statutory bill of rights model has subsequently been adopted by the United Kingdom,[31] and by several Australian states and territories.[32]

Although several Australian states have adopted a statutory bill of rights, to this day Australia has no national human rights framework document. As I understand it, there have been several unsuccessful proposals to introduce one, but none to date has succeeded.[33] Stephen Gardbaum characterises the outcome for Australia as "judicial supremacy on the structural issues of federalism and separation of powers, and mostly parliamentary sovereignty on matters of rights".[34]

George Williams has described the dangers, from a constitutional perspective, of the tendency towards "coincidental protection" of human rights in Australia — that is, a rights protection that exists where it can be sourced to the institutional imperatives of the Constitution.[35] This coincidental protection lacks the narrative simplicity and, some suggest, the substantive coherence of a rights framework, but it nevertheless does do significant rights-affirming work. This can be seen in decisions such as *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*. In that case the High Court relied on the doctrine of separation of powers to declare invalid provisions in the Migration Act 1958 (Cth) to the extent they permitted the plaintiff's detention where there was no prospect of achieving a legitimate, non-punitive purpose for that detention.[36] That was because it was for the courts, and not the executive, to order detention for punitive purposes, in the exercise of the "exclusively judicial function of adjudging and punishing criminal guilt".[37]

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29 Devereux, above n 28, at 7–8 and 233; and Bassett and King, above n 25, at 272.

30 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 22.

31 Human Rights Act 1998 (UK).

32 Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic); and Human Rights Act 2019 (Qld).

33 See David Erdos "The Rudd Government's Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?" (2012) 65 Parliamentary Affairs 359.

34 Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* (Cambridge University Press, Cambridge, 2013) at 204.

35 George Williams "Australia's Constitutional Design and the Protection of Human Rights" in Matthew Groves, Janina Boughey and Dan Meagher (eds) *The Legal Protection of Rights in Australia* (Hart Publishing, Oxford, 2019) 17 at 24.

36 Namely his removal from Australia: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, (2023) 280 CLR 137.

37 At [28].

On the other hand, while New Zealand's Bill of Rights may not be supreme law (s 4 in effect confirms parliamentary sovereignty), since its enactment the rights framework it creates has had a powerful shaping effect on our constitutional settlement, changing how public power is conferred, constrained, exercised and even how it is thought about. It has been described by the courts as a constitutional statute and as being "woven into the fabric of [the] law".[38]

Section 7 of the Bill of Rights is directed at Parliament and the executive. It places an obligation on the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill that appears to be inconsistent with the Bill of Rights. This was intended to bring the affirmed rights and freedoms into the minds of policy- and lawmakers. It undoubtedly has that effect, even if research shows that the New Zealand Parliament has enacted legislation even when in receipt of a report from the Attorney-General that it is inconsistent with the Bill of Rights.[39]

Section 6 of the Bill of Rights is directed at the courts. It is an interpretive direction that whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning "shall be preferred to any other meaning". This is in substance a rule of statutory interpretation to the effect that the courts should presume, in the absence of strong indications otherwise, that Parliament intended to legislate in a rights-consistent manner.[40] This directive protects all the affirmed rights. In a view I have expressed judicially, I believe it operates more powerfully than the common law principle of legality.[41]

As with the Bill of Rights itself, s 5 of the Bill of Rights applies to all branches of government and to any person or body in the performance of a public function, power or duty conferred or imposed on them by law.[42] It provides that the rights and freedoms affirmed in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Section 5 has been held to impose substantive law obligations on public decision makers.[43] These are obligations that can form the basis of a challenge to the lawfulness of decisions.

The Bill of Rights does not expressly provide for remedies. This has left the courts to fashion them. Remedies vary depending on context. For example, a rights-inconsistent piece of primary legislation will not be invalid,[44] but a rights-inconsistent policy or decision by a statutory decision maker may be. A breach of rights has led to the exclusion of evidence,[45]

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38 See, for example, *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [83]; and *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 per Cooke P.

39 Janet Hiebert and James B Kelly *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, Cambridge, 2015) at 100.

40 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [48] and [55] per Winkelmann CJ and [207] and [217]–[218] per O'Regan and Arnold JJ.

41 At [56]–[57] and [139] per Winkelmann CJ.

42 New Zealand Bill of Rights Act, s 3.

43 *Moncrief-Spittle*, above n 38, at [81]–[86].

44 New Zealand Bill of Rights Act, s 4.

45 *R v Shaheed* [2002] 2 NZLR 377 (CA). See now Evidence Act 2006, s 30.

the quashing of decisions, the invalidating of secondary legislation,[46] and the award of public law damages for breach of rights where no other vindication is available.[47]

Most recently the courts have held that available remedies include the power to declare legislation inconsistent with the Bill of Rights.[48] Such a declaration is said to be a vindication of rights but has no effect on the validity of the legislation.

It is interesting that in New Zealand, a country with no power of judicial review of legislation, this power has been recognised by the courts even though it was not expressly conferred in the legislation. Recently New Zealand's Parliament has, however, amended the Bill of Rights and Parliament's standing orders to provide its own framework for dealing with such declarations.[49]

This can be contrasted with the fate of a statutory power to declare legislation inconsistent that was included in the Charter of Human Rights and Responsibilities Act 2006 (Vic).[50] In the case of *Momcilovic v The Queen*, the High Court of Australia held that granting a declaration of inconsistency under the Victorian Charter was not within the judicial function conferred by Chapter III of the Constitution.[51] Although by a slim majority the Court refrained from declaring the power invalid in its entirety,[52] commentators have suggested that the decision has led to the "quiet demise" of declarations of inconsistency in Victoria.[53]

More broadly the power of the Bill of Rights framework in New Zealand, and particularly its interpretive direction, can be seen in the decision of the Supreme Court in *Fitzgerald v R*.[54] That case concerned the interpretation and application of "three strikes" legislation providing for the mandatory imposition of maximum sentences. The issue was whether it compelled a court to impose the maximum sentence of seven years' imprisonment for an indecent assault, which was low-level and where the offending had been contributed to by the offender's mental health issues. It was common ground before the Court that the sentence was grossly disproportionate, in breach of s 9 of the Bill of Rights.

The Bill of Rights was critical to the Supreme Court's (majority) conclusion that a proviso must be read into the statute such that the requirement to impose the maximum sentence did not

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46 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

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

48 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

49 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, inserting ss 7A and 7B into the New Zealand Bill of Rights Act; and Standing Orders of the House of Representatives 2023, Appendix F.

50 Section 36.

51 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 at [80] and [89] per French CJ, [178] and [184] per Gummow J, [280] per Hayne J, [457] per Heydon J and [661] per Bell J. Crennan and Kiefel JJ said the making of a declaration was not an exercise of a judicial power but found it was incidental to judicial power: at [584] and [600].

52 A majority (French CJ, Crennan, Kiefel and Bell JJ) held that it survived the *Kable* test, such that the power to issue declarations of inconsistency was valid for courts exercising state, as opposed to federal, jurisdiction: at [95]–[97] per French CJ, [595]–[605] per Crennan and Kiefel JJ and [661] per Bell J.

53 Bruce Chen "The Quiet Demise of Declarations of Inconsistency under the Victorian Charter" (2021) 44 MULR 928 at 940.

54 *Fitzgerald*, above n 40.

require a court to impose that sentence if it would result in a breach of the Bill of Rights' protection against grossly disproportionate punishment.

Meanwhile, again in *Momcilovic*, the High Court rejected an analogy between the interpretive direction in s 32 of the Victorian Charter and the strong "remedial" approach to interpretation seen under comparable instruments (particularly the United Kingdom's Human Rights Act 1998).[55] As Gummow J put it, rights frameworks such as New Zealand's and the United Kingdom's "present imperfect analogues" for the reason that "[n]one of them involves legislation … in a federal structure with a rigid constitution".[56] In cases since, Victorian courts have held that the interpretive direction in s 32 "does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision".[57] Nor does it "allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision".[58]

Indigenous rights

The other area in which constitutional forces have been at work in New Zealand is in relation to indigenous rights. To understand these issues, some New Zealand historical context is necessary.

The story of human habitation of the lands we now call New Zealand begins with the voyage of the Polynesian explorer Kupe. That voyage led to the arrival of Polynesian settlers about seven centuries ago.[59] On any account, this is a much shorter story of human habitation than is that of the lands that make up Australia.

The language and customs of these early Polynesian settlers quickly evolved so that they became the people we know as Māori. Māori are a society with a strong connection to family and place. When British settlers began arriving in New Zealand in their numbers in the 1820s, they discovered a people already present, organised into broad clan-like entities — hapū. They discovered that these people had a language and a set of values and rules that governed social relations. Those rules and values are collectively referred to as tikanga — literally "what is right".[60]

I have already referred to the Treaty of Waitangi | te Tiriti o Waitangi. That was the document signed in 1840 between the British Crown and Māori rangatira of various hapū. Drafted by Crown officials with the assistance of Anglican missionaries, it was prepared in both English and the Māori language (te reo). The Treaty was signed by 540 rangatira, but only 39 signed the English version.

The English text recorded that Māori ceded to the Queen all rights of sovereignty which they possessed and granted rights of pre-emption to their lands. In return, Māori were guaranteed

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55 *Momcilovic*, above n 51, at [20] and [47]–[51] per French CJ, [146] and [170] per Gummow J, [280] per Hayne J, [542]–[545] and [565]–[566] per Crennan and Kiefel JJ and [684] per Bell J.

56 At [146] per Gummow J.

57 *Slaveski v Smith* [2012] VSCA 25, (2012) 34 VR 206 at [20].

58 At [45].

59 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 2; and James Belich *Making Peoples: A History of the New Zealanders* (Penguin Books, Auckland, 1996) at 24–26.

60 See generally Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).

"the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties" and the rights and privileges of British subjects.

The document written in te reo Māori inevitably used different concepts. It guaranteed Māori tino rangatiratanga (unqualified chieftainship) over their lands, villages, and their treasures (taonga). It ceded to the British kāwanatanga, which could be construed as governorship.

And with this linguistic dissonance, the scene was largely if not inevitably set for race relations over the next 180 plus years. This is a history in which Māori were largely dispossessed of their lands, leading to a powerful urban drift of Māori, the undermining of traditional hapū-based social structures, and the marginalisation of tikanga in that process. There is widespread acceptance within New Zealand of the connection between this history of dispossession and colonisation, and the poor social and economic outcomes for Māori that persist to this day.

As to the position of te Tiriti in New Zealand law, on one level that can be answered simply — a 1941 case, *Te Heuheu Tūkino v Aotea District Māori Land Board*, stands as authority for the proposition that the Treaty is not directly enforceable in New Zealand courts except in so far as it is made so by legislative authority.[61] But the Treaty has nevertheless been recognised as the founding document of the nation of New Zealand, and as a document of constitutional significance.[62] It is, however, as a political document that it has had its shaping effect.

It was social and political pressure which ultimately led to a response to the issues of historical and racial justice in New Zealand — a response which has predominantly been parliamentary and political. The creation of the Waitangi Tribunal by the Treaty of Waitangi Act 1975 was part of that response. This legislation empowered the Tribunal to inquire into whether government actions were consistent with the principles of the Treaty.[63]

It is hard to overstate the significance of this Act. It ensured that public resource would be devoted to investigating breaches, including (when the Tribunal's jurisdiction was extended in 1986) historical breaches.[64] The historical accounts that were and continue to be recovered and documented by the Tribunal have contributed to our national understanding of these issues and have altered the political landscape.

They also formed the basis for negotiated settlements of Treaty claims between the Crown and iwi (tribes). Often subsequently given legislative status, the settlements typically acknowledged past breaches by the Crown and gave monetary and land compensation for those breaches. Recognition of iwi mana whenua (authority over land, not necessarily equating to common law concepts of title) was also usually included in various forms.

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

62 See, for example, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150] per William Young and Ellen France JJ and [296] per Williams J; and *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210. See also David V Williams "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand" (2006) 14 Wai L Rev 120 at 125 and the sources cited there.

63 Treaty of Waitangi Act 1975, ss 5–6.

64 Treaty of Waitangi Amendment Act 1985.

The concept of "free floating" Treaty principles included in the Treaty of Waitangi Act, not pinned to any expression in the text, also played its part in these settlements. It broke a log jam created by the conflict between the language of the Treaty and te Tiriti and created a path forward through a contested space.

While the historical and legal legitimacy of these principles is now the subject of debate,[65] the phrase "the principles of the Treaty" in subsequent legislation has also led to a body of jurisprudence which has reinforced te Tiriti as a document of constitutional status.

The first significant engagement by the courts with this concept came in 1987 with the decision in *New Zealand Māori Council v Attorney-General* (the *Lands* case) in which the New Zealand Court of Appeal addressed the meaning of a statutory provision that "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty".[66] The issue for the Court was whether this provision created justiciable obligations. The argument presented for the Crown was that it did not. The Court found that the provision did create justiciable obligations[67] — and that in the particular context of the legislation it required that the Crown not transfer assets in a way that would defeat Treaty-based claims.[68] The Court found that the Treaty created an enduring relationship of partnership with responsibilities akin to fiduciary duties, with each party accepting a positive duty to act in good faith, fairly, reasonably and honourably toward each other.[69]

Since 1986, Parliament has frequently legislated to require decision makers under that Act to have regard to the principles of the Treaty, or to act consistently (or not inconsistently) with those principles.[70]

Those provisions have in turn led to a steady flow of judicial review proceedings in which the principles of the Treaty are invoked to challenge executive decision making.[71] The legislation arising from negotiated settlements between iwi and the Crown has also given rise to later allegations that Crown actions are inconsistent with the settlement.[72] This case law, along with the work of the Waitangi Tribunal, has added rich content to the concept of Treaty principles.

A parallel development in the law occurred not long after the creation of the Waitangi Tribunal but can be seen to be directly linked to the status accorded to the Treaty by that legislation.

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65 See, for example, the view expressed in Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330 at 341–342.

66 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); and State-Owned Enterprises Act 1986, s 9.

67 At 660–661 per Cooke P.

68 At 668 per Cooke P and 718 per Bisson J.

69 At 664 per Cooke P and 703 per Casey J.

70 See, for example, Conservation Act 1987, s 4; Resource Management Act 1991, s 8; and Environment Act 1986, long title. I note that the Government is currently undertaking a review of legislative provisions containing references to the principles of the Treaty.

71 I will not attempt to add to the scholarship of Matthew Palmer in which he provides an analysis of 53 cases in which the Treaty was directly invoked in judicial review proceedings: Matthew S R Palmer "Indigenous Rights, Judges and Judicial Review in New Zealand" in Jason NE Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2020) 123 at 135.

72 See, for example, *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2025] NZHC 657, [2025] 2 NZLR 382.

In *Huakina Development Trust v Waikato Valley Authority*, Chilwell J said that the Treaty imposed obligations on the Crown and that those obligations, as he put it, were "perceivable", if not enforceable, at law.[73] He continued:[74]

> … the authorities … show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people. Among the direct recognitions are the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976 both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

Chilwell J found that the Treaty and its principles were relevant to the interpretation of statutes and were, moreover, implied relevant considerations in the exercise of the broad statutory discretion at issue in that case.[75]

These principles were drawn upon in the Supreme Court decision of *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[76] That case concerned an application by Trans-Tasman Resources Ltd for consent to undertake seabed mining off New Zealand's west coast. Local iwi and conservation groups objected to the proposal. One of the principal issues for the Court was the relevance of tikanga values and te Tiriti-based customary rights and interests. There was a provision in the relevant Act which particularised the sections that had been included "[i]n order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of [the] Act".[77] It was argued that the enumerated sections exhaustively stated the extent of the Crown's relevant obligations under the Treaty.

However, the Supreme Court was unanimous in rejecting this aspect of the argument.[78] It said of the clause:[79]

> … 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 of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. … An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

As sketched out in this narrative, indigenous rights in New Zealand have foremost been given recognition through political processes which can be traced back to the promises made in 1840 in the Treaty, and the social and political forces that grew to "honour the Treaty". This political response is built at least in part upon the understanding of the history of Treaty

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73 *Huakina Development Trust*, above n 62, at 206.

74 At 210.

75 At 227.

76 *Trans-Tasman Resources Ltd*, above n 62.

77 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 12.

78 *Trans-Tasman Resources Ltd*, above n 62, at [8], [149]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

79 At [151] per William Young and Ellen France JJ (footnotes omitted).

breaches explored and documented by the Waitangi Tribunal. Legislation invoking the "principles of the Treaty", and the political and legislative Treaty claim settlement processes, each in turn put the courts to work, in a way that threaded the Treaty through the constitutional fabric of New Zealand. And yet, the authority of *Te Heuheu* stands: the Treaty of Waitangi is not directly enforceable in New Zealand.[80]

This is a process that to a large degree is not built upon acknowledgment of native or aboriginal title. As a result of land sales, cessions, confiscations and the work of the Native Land Court in the 19th century, much of New Zealand's dry land was alienated from Māori.[81] As McHugh explains, by the time the common law doctrine of native title was gestating in Australia and Canada, there remained little land still occupied by Māori in the relevant (legal) sense.[82]

In recent times, legislation has placed the issue of native title back on the agenda.[83] But that is an issue very much before the courts, and indeed Parliament, and I therefore do not comment upon it.

Australia has no compact with indigenous peoples of comparable status to the Treaty of Waitangi. While it has a constitution which is fundamental law, it is now, as I understand it, silent on indigenous peoples.[84] In Australia, indigenous rights have been worked out in the courts in large part through assertion of native title, and issues of compensation arising from its extinguishment.

With an outsider's perspective, it seems to me that in contrast to New Zealand this process was initiated by the courts, in the case of *Mabo v Queensland (No 2)*, which recognised the existence of native title in Australia (disapplying the doctrine of terra nullius).[85] The legislature then became involved, enacting the Native Title Act 1993 (Cth). The courts played a part again, in the *Timber Creek* case, which decided how compensation for extinguishment of native title under the Act was to be calculated.[86] And importantly the decision this year in *Commonwealth v Yunupingu* confirmed the application of the so-called "just terms" provision in the Constitution to laws of the Commonwealth extinguishing native title, giving rise to a

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80 See, however, Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 81 describing the decision as a "crumbling façade".

81 See Williams, above n 59, at 8.

82 PG McHugh "What a difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public law" (2004) 15 PLR 87 at 89. The "dramatic" exception was the foreshore and seabed, in respect of which the Court of Appeal recognised the possibility of continuing customary rights in 2003: *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

83 See Marine and Coastal Area (Takutai Moana) Act 2011; *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hāpū o Te Whakatōhea* [2024] NZSC 164, [2024] 1 NZLR 857; *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hāpū o Te Whakatōhea* [2025] NZSC 104; and Hon Paul Goldsmith "Restoring test for Customary Marine Title" (press release, 5 August 2025).

84 This has not always been the case. As George Williams explains, the operative provisions of the Constitution, as drafted, were "premised upon the exclusion of Aboriginal people, and even discrimination against them": George Williams "Race and the Australian Constitution" (2013) 28 APR 4 at 6.

85 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

86 *Northern Territory v Griffiths* [2019] HCA 7, (2019) 269 CLR 1.

right to compensation which reaches further back in time than had previously been thought possible.[87]

There is another point of comparison that is worth dwelling upon for a moment. It is the place of customary law in legislation and common law in each of our nations.

In New Zealand, the courts have always had to engage with customary law because Māori have continued to regulate their lives in accordance with tikanga. After 1840, customary law was frequently employed by courts to facilitate the formal recording of native title, preparatory to its extinguishment.[88] That is not by any means the full story, however. Historical research continues to recover decisions in which mainstream courts have given effect to tikanga concepts in the common law, or within broad statutory frameworks. Nevertheless, it would be a true picture to say that for the first half of the 20th century tikanga was marginalised in the operating of the common law and statute.

In the last 50 years, again in response to political and social forces, there has been increasing legislative recognition that tikanga-based interests (such as claims to fish or harvest birds in certain locations), tikanga-based social relations (such as the ordering of whānau relations) and even tikanga-based values (such as whanaungatanga and kaitiakitanga)[89] should be weighed by judges and public officials in their decision making.[90] Moreover, because Māori are active social, cultural, economic and political participants in every part of New Zealand society, tikanga concepts have come to imbue general society, in business dealings, family relations, the protection of natural resources, responses to public tragedy, and so on.

In a series of decisions New Zealand courts have recognised that tikanga has been and will continue to be recognised in the development of New Zealand's law where it is relevant to the issues in the proceeding.[91] In *Trans-Tasman Resources Ltd*, the Supreme Court unanimously held that tikanga fell within the statutory words "any other applicable law".[92]

The latest in this line of cases was the Supreme Court's decision in *Ellis v R (Continuance)*.[93] That was a case concerning the test to be applied by the Court when deciding whether to permit a criminal appeal (for which it had already granted leave) to continue after the appellant had died. There was no statutory test, and the Court was required to fashion one for itself. The argument against the continuation of leave included that Mr Ellis had no interest to vindicate following his death.

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87 *Commonwealth v Yunupingu* [2025] HCA 6, (2025) ALJR 519. See Australian Constitution, s 51(xxxi).

88 Williams, above n 59, at 8.

89 Whanaungatanga means kinship or familial connections and relationships. Kaitiakitanga means guardianship and stewardship.

90 See, for example, Resource Management Act 1991, ss 2, 6(e) and 7(a); Oranga Tamariki Act 1989, ss 2 and 4–5; Trademarks Act 2002, ss 3–4, 17 and 178–179; and Patents Act 2013, ss 3, 5 and 225–228. See generally Te Ture Whenua Māori Act 1993; Coroners Act 2006; and Education and Training Act 2010.

91 See, for example, *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

92 *Trans-Tasman Resources Ltd*, above n 62, at [9], at [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ. See Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act, s 59(2)(l).

93 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

One of the issues was the weight the Court should give to the tikanga concept of mana (the notion of power, presence, authority, prestige and reputation), which is recognised to persist after death and to affect the deceased person's family. Mr Ellis was Pākehā, but it was argued the concept of mana was relevant as having imbued much of New Zealand society. It was common ground between the Crown and the appellant's representatives that the mana of both the complainants and Mr Ellis were implicated in the appeal, as well as the mana of their wider families.

The Court was unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa.[94] The majority held that the relationship between tikanga and the common law should evolve contextually and as required on a case-by-case basis.[95] And caution was expressed that this was not a revolutionary moment in the law, but simply the common law doing what the common law does, emphasising the continuity in society and in statutory and common law of the place of tikanga, and the stabilising effect that the incremental common law method must be allowed to have.

I understand that some commentators in Australia have assigned similar significance to the High Court's decision in *Love v Commonwealth*, in which case the majority of the Court held that Aboriginal Australians are not, and cannot be, "aliens" as that term is used in the Constitution.[96] The majority recognised the unique connection of Aboriginal Australians to Australia's lands and waters. Particularly notable was the majority's adoption of the test from *Mabo (No 2)* for determining membership of an indigenous community, relying in part on recognition by elders and others enjoying "traditional authority".[97] Commentators see in this a potential for courts to begin engaging with indigenous law beyond the confines of native title claims — Elisa Arcioni and Kirsty Gover suggest that in *Love* "contemporary, live expressions of traditional law and custom seem to find their way into the court's line of sight".[98]

Conclusion

I draw to a close with these observations. If, as Claudia Geiringer has put it, New Zealand's constitutional settlement is built on a series of constitutive moments,[99] then surely New Zealand's decision not to join the federation was one of the more important of such moments. These two areas of constitutional development in New Zealand — human rights law and indigenous rights — provide some insight as to the implications of that decision. Thank you for listening to me this evening.

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94 At [19], [108]–[109] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O'Regan and Arnold JJ.

95 At [21], [116], [119] and [127] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J.

96 *Love v Commonwealth of Australia* [2020] HCA 3, (2020) 270 CLR 152 at [81]. See Australian Constitution, s 51(xix).

97 See *Mabo (No 2)*, above n 85, at 70 per Brennan J.

98 Elisa Arcioni and Kirsty Gover "Can Private International Law Methods Facilitate Indigenous-Settler Legal Pluralism?: Possibilities in Australia and Aotearoa" (2025) 11 Constitutional Studies 207 at 218.

99 Geiringer, above n 17, at 171.