

**Dame Helen Winkelmann, Chief Justice of New Zealand**

***A Legal Order Without a Codified Constitution: The New Zealand Experiment***

**George Winterton Memorial Lecture 2026**

**Sydney Law School, University of Sydney**

**22 April 2026**

***Ko Ranginui kei runga***

*Ranginui sky father. above*

***Ko Papatūānuku kei raro***

*Papatūānuku, earth mother below*

***Ko ngā tāngata kei waenganui***

*The people in between*

***Tīhei mauri ora***

*Behold there is life*

***Ki ngā mate o te wā, haere, haere, haere atu rā***

*To the recently departed, farewell*

***Ki te hunga ora, tēnā tātou***

*To us, the living, greetings*

***Ki ngā whanaunga nō te whenua Moemoeā nei***

*To my cousins from this land of*

***Tēnā koutou, tēnā koutou, tēnā tātou katoa.***

*Australia, greetings to you all*

I acknowledge the traditional owners of the lands on which we meet, the Gadigal people of the Eora Nation, and pay my respects to their Elders of the past, and those of today.

I acknowledge the Chief Justice of the High Court of Australia, Justice Stephen Gageler. I also acknowledge the Chief Justice of New South Wales, the Hon Justice Andrew Bell, and thank him for hosting this event. And I acknowledge the judges and other distinguished guests attending tonight.

I am grateful to the Winterton Committee for the invitation to deliver this lecture, and to the University of Sydney and the Dean and Head of Sydney Law School, Professor Fleur Johns, in particular, for their generous hospitality. And I acknowledge the work of the newly fledged Sydney Public Law Group — supported by the friends and family of George Winterton as foundation benefactors. The Group carries forward the law school's tradition of intellectual leadership and open inquiry in public law.

It is indeed an honour to deliver this lecture, which commemorates a great Australian constitutional scholar. I am humbled by the presence of members of Professor Winterton's family: his wife, Rosalind, and son, Phil.

My theme this evening is the unique, and in that sense experimental, nature of New Zealand's constitutional settlement. Having read some of Professor Winterton's writing, I understand him to have dedicated his career to the distinctive, and also experimental, nature of Australia's federal constitutional settlement.

Shortly prior to federation, Australia’s constitutional arrangements were described as being “[u]nique as the platypus.”<sup>1</sup> This metaphor has since been applied to the Commonwealth Constitution,<sup>2</sup> and is perhaps fitting for a charter that seemingly combines disparate parts of different constitutional creatures.

In *Parliament, the Executive and the Governor-General*, Professor Winterton pointed out the uneasy fusion of models in Australia which engages four great constitutional principles — representative government, federalism, the separation of powers, and responsible government under the Crown — to coexist “in a state of uneasy equilibrium”.<sup>3</sup> Much of the uncertainty surrounding federal executive power in Australia, he noted, stems from contradictions inherent in the simultaneous operation of principles of responsible government derived from the British tradition, and formal separation of powers and federalism derived from America.<sup>4</sup>

As a comparative constitutional scholar, Professor Winterton took a degree of interest in New Zealand’s constitutional arrangements.<sup>5</sup> In some senses, those arrangements are more straightforward, lacking the complexity of federalism, or a bicameral legislative branch of government.

Interest in each other’s constitutional arrangements is natural. Australia is part of New Zealand’s constitutional history, just as we are part of yours. Our connections pre-date the formation of New Zealand. It is perhaps emblematic that when New Zealand was founded in 1840, New Zealand’s first Chief Justice was the Chief Justice of New South Wales, Sir James Dowling, and New South Wales laws applied to New Zealand. This flowed from the fact that New Zealand spent its first 15 or so months as a dependency of New South Wales.<sup>6</sup>

In a recent exchange, Chief Justice Bell raised with me the possibility that the June 1840 Ordinance cementing this jurisdictional extension might not have been repealed. He seemed to be suggesting that New Zealand currently had two Chief Justices, and that he was in fact

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<sup>1</sup> Alfred Deakin “The Federal Council of Australasia” (1895).

<sup>2</sup> See, for example, Melissa Langerman “Reporting the Senate: Three Perspectives” in Marian Sawyer and Sarah Miskin (eds) *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate* (Papers on Parliament No 34, December 1999) at 167; Helen Irving *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge University Press, Cambridge, 1999) at 132; Stanley Bach *Platypus and Parliament: The Australian Senate in Theory and Practice* (Department of the Senate, Canberra, ACT, 2003); and JD Heydon “Sir Samuel Griffith and the Making of the Australian Constitution” (2012) 24 *Upholding the Australian Constitution* 17.

<sup>3</sup> George Winterton *Parliament, the Executive and the Governor-General* (Melbourne University Press, Melbourne, 1983) at 1.

<sup>4</sup> At 1.

<sup>5</sup> See, for example, George Winterton “Extra-Constitutional Notions in Australian Constitutional Law” (1986) 16(3) *Federal Law Review* 223 at 233.

<sup>6</sup> In 1840, following a proclamation as to the extension of the boundaries of New South Wales and the signing of the Treaty of Waitangi, New Zealand was placed under the jurisdiction of New South Wales. On 16 June 1840, the Legislative Council of New South Wales passed an Ordinance extending New South Wales laws to New Zealand and establishing courts and customs duties (4 Vic, No 1). By a Royal Charter on 16 November 1840, New Zealand was established as a separate Crown colony, with the separation formally taking effect in May 1841.

one of them. I am pleased to say this is not the case. The legislative situation has long since been regularised.<sup>7</sup>

Nevertheless, throughout the nineteenth century our constitutional pathways did stay close. At the beginning of the twentieth century New Zealand declined an invitation to join the Commonwealth of Australia. At the time, the invitation made good sense. In the days before air travel, New Zealand was no more remote than the other Crown colonies within the Australian continent. And we had a lot in common. We had all been founded as colonies within the British Empire, on lands “down under” that were, at that point of formation, already home to Indigenous peoples with their own customs, societal structures and laws.

It is an often-overlooked fact that New Zealand was invited to be involved in the various conferences and conventions held in 1890 and 1891 to discuss and draft the new Commonwealth Constitution — notwithstanding its early indication that it was unlikely to join. So active was its participation that future Prime Minister Alfred Deakin, then the Victorian delegate, observed the tendency on the part of New Zealand’s representative to express reservations about joining the Australian federation while at the same time laying down, “with great fullness”, what kind of federation New Zealand believed should be created.<sup>8</sup>

Perhaps because of the equivocation evidenced by our participation in those conventions, the Australian Constitution continues to include New Zealand within its definition of “the States”. It really is nice that the invitation remains open.

New Zealand’s decision not to join the Commonwealth was one of several points of divergence in our nations’ constitutional histories. Australia chose the path of codification. New Zealand continued with the British model — an uncodified constitutional settlement — and is today one of only three nations in the world without a written constitution. Nevertheless, in case it needs saying, New Zealand does have a constitution which provides it with a distinct legal order. That constitution is made up of statutes, principles of law, documents and conventions recognised as being of constitutional significance and status.

The thesis I develop tonight is that without the formal constraints of codification, New Zealand’s constitution has had flexibility and an ability to evolve, and that this has enabled it to secure stable government while meeting the needs of a dynamic society.

The absence of a constitutional charter has implications for the courts, the common law and the legal order. Without a codified system, the courts have no power to declare primary legislation invalid for reason of inconsistency with the constitution. The principle of legality operates in New Zealand, as it does elsewhere, to protect fundamental principles that underpin our constitutional structure. To avoid Trans-Tasman confusion, I should make clear that by the principle of legality, I mean the rule of statutory interpretation that some interests

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<sup>7</sup> On 15 March 1842 the New Zealand Legislative Council enacted an Ordinance providing that “No Law Act or Ordinance of New South Wales shall hereafter be of any force or effect whatever within the Colony of New Zealand” (2 Vic, No. 19).

<sup>8</sup> Nicholas Aroney “New Zealand, Australasia and Federation” (2010) 16 *Canta LR* 31 at 39 citing *Convention Debates, Sydney* (1891) at 68–69.

and rights are so important that Parliament must speak plainly if it wishes to abrogate them. While noting that the jurisprudential trajectory is not neat and that counter-examples exist, Professor Jason Varuhas detects a more constrained approach to the principle of legality in recent Australian jurisprudence than is the case in New Zealand.<sup>9</sup>

Related to the principle of legality is the New Zealand Bill of Rights Act 1990. Although it is not fundamental law, the Bill of Rights does important work. In the administrative state, and through the process of statutory interpretation, it protects the rights that it affirms. By and large, these are rights drawn from the International Covenant on Civil and Political Rights. Reading the High Court's decision in *Momcilovic*,<sup>10</sup> it seems likely that Australia's codified Constitution and federal structure explain the very different impact that statutory bills of rights have had in Australian states.<sup>11</sup>

In the absence of constitutional codification, there is certainly room for debate and even confusion as to what is, and what is not, in our constitution. There is also room for debate as to the limits on power conferred under New Zealand's very particular arrangements. And yet we have never had our own "Whitlam" moment, in which the powers of constitutional actors have been tested to the point of failure. Sir John Kerr's dismissal of Prime Minister Gough Whitlam in 1975 due to a supply deadlock was the event from which Professor Winterton's scholarly interest in the Governor-General's reserve powers drew, and to which he kept returning.

This is not to say that New Zealand has not experienced its own moments of constitutional discord. When I was at law school we learned about the Whitlam dismissal — a story filled with intrigue. We also learned about the moment in 1976 when the Hon Robert Muldoon, as New Zealand's new Prime Minister, purported to abolish a statutory superannuation scheme simply through the expedient of issuing a press release.<sup>12</sup> A public servant, Fitzgerald, sued on the grounds that the announcement constituted the exercise of a pretended power of suspending laws and was illegal by virtue of s 1 of the Bill of Rights Act 1988.

Wild CJ granted declaratory relief, but not the injunction Fitzgerald had sought to prevent dismantling of the scheme. The proceeding was adjourned for six months to give time for lawful repeal of the statute in question.<sup>13</sup> The rule of law and parliamentary sovereignty were asserted, a crisis was avoided, and another strand was added to our constitutional settlement.

In the years thereafter, Prime Minister Muldoon maintained a capacity for constitutional theatre. His government lost the 1984 general election but — as required by New Zealand's constitutional arrangements — continued to serve as caretaker in the days following defeat. In those few days, the Prime Minister refused to devalue the New Zealand dollar in the face

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<sup>9</sup> Jason NE Varuhas "The Future of Public Law in Aotearoa New Zealand" (2023) 21 NZJPI 1 at 12.

<sup>10</sup> *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1.

<sup>11</sup> In New Zealand, the Bill of Rights Act has long been characterised by the courts as a statute "of constitutional significance" which is "intended to be woven into the fabric of New Zealand law". See *Fitzgerald v R* [2021] NZSC 131 at [41] per Winkelmann CJ; at [206] and [221] per O'Regan and Arnold JJ; and at [250] per Glazebrook J. See also *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 per Cooke P.

<sup>12</sup> *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

<sup>13</sup> At 623.

of an urgent request by the incoming government. Ultimately, he acceded to his own Attorney-General's advice that an outgoing government must accept its successor's advice "on any matter of such great constitutional, economic or other significance that [it] cannot be delayed until the new government formally takes office".<sup>14</sup> Again, crisis was averted, and a constitutional convention to ease the transfer of power was articulated.

Despite, or perhaps in part because of, the failure to create our own codified constitution, New Zealand's constitutional settlement has continued to evolve.

In 1967, in a phrase that has been frequently repeated in Australian legal scholarship, Professor Geoffrey Sawer described Australia as "the frozen continent" — a reference to how difficult it is to change the Australian Constitution.<sup>15</sup> That epithet was chosen for the 2009 Gedenkschrift celebrating Professor Winterton's contributions to scholarship on constitutional advancement in Australia.<sup>16</sup>

If I search New Zealand's landscape for a fitting geographic metaphor, the one that springs to mind is a braided river of the kind found most typically in New Zealand's South Island.<sup>17</sup> The absence of codification has given us a constitutional landscape that is constantly being reshaped by legislation, by court decisions, and by significant historical and even cultural events. New Zealand constitutional scholar Professor Claudia Geiringer puts it this way: "[W]e are constantly reconstituting ourselves. There is no constitutive moment: just a series of constitutive iterations".<sup>18</sup>

In that fluidity and multi-stranded potential for change lies strength. My focus for tonight is how our experimental constitutional settlement continues to be shaped by Te Tiriti o Waitangi — the Treaty of Waitangi — which lies at the beginning of the story of New Zealand as a nation, and by tikanga Māori (Māori customary law).

As a working judge, my focus is on the cases that come to the courts. But in a charter-free system, historical and social forces have ongoing potential to shape and order New Zealand's public law. New Zealand's constitutional arrangements flow from that history and need to be understood in the context of New Zealand's society. So first a little history.

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<sup>14</sup> See F M Brookfield "The constitutional crisis of July '84" [1984] NZLJ 298; B Harris "The temporary constitutional crisis" [1984] NZLJ 302; and Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 171.

<sup>15</sup> Geoffrey Sawer *Australian Federalism in the Courts* (Melbourne University Press, Melbourne, 1967) at 208. See also H P Lee "Reforming the Australian Constitution – the frozen continent refuses to thaw" (1988) Public Law 535; Greg Craven "Original intent and the Australian constitution – coming soon to a court near you?" (1990) 1 PLR 166; and Brian Opeskin "Constitutions and populations: How well has the Australian Constitution accommodated a century of demographic change?" (2010) 21 PLR 109.

<sup>16</sup> H P Lee and Peter Gerangelos *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, Annandale, NSW, 2009).

<sup>17</sup> For scholarship on the concept and methodology of braided rivers, see Angus Macfarlane, Melissa Derby and Sonja Macfarlane (eds) *He Awa Whiria: Braiding the Knowledge Streams in Research, Policy and Practice* (Canterbury University Press, Christchurch, 2024).

<sup>18</sup> Claudia Geiringer "What's the story? The instability of the Australasian bills of rights" (2016) 14(1) 156 IJCL at 171. See also Janet Mclean "The Unwritten Political Constitution and its Enemies" (2016) 14(1) IJCL 119.

## Te Tiriti

The human habitation of the lands we call New Zealand began with the voyage of the Polynesian explorer Kupe. That voyage led to the arrival of Polynesian settlers about seven centuries ago.<sup>19</sup> On any account, this is a much shorter story of human habitation than that in Australia.

The language and customs of the early Polynesian settlers rapidly evolved. When an influx of British settlers began arriving in the 1820s, they discovered a people (Māori) organised into clan-like entities (hapū) within a broader tribal framework (iwi). Across their homelands, these inhabitants had developed values and rules that governed social relations, collectively referred to as tikanga — “what is right”.<sup>20</sup>

Eventually, by the late 1830s, the increasing number of “lawless” British settlers with a voracious appetite for land, forced Britain to act. However, the British government of the day decided that Māori consent was needed before governance could be established in New Zealand. Governor William Hobson was dispatched and instructed to negotiate a treaty with Māori. This foundational document is probably the first point of constitutional divergence between our nations.

The 1840 Treaty — the Treaty of Waitangi, or te Tiriti o Waitangi — was drafted by officials of the British Crown with the assistance of Anglican missionaries. It was prepared in both English and te reo Māori (the Māori language). Whereas the Māori version was signed by 540 rangatira (chiefs) of various hapū, only 39 signed the English one.

The English text recorded that Māori ceded to the Queen all rights of sovereignty and granted rights of pre-emption — meaning only the Crown had the right to purchase Māori land. In return, Māori were guaranteed “the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties” and the rights and privileges of British subjects.

However, the document in te reo Māori used tikanga-based concepts which guaranteed to Māori tino rangatiratanga (unqualified chieftainship) over their lands, villages and treasures (taonga), and ceded to the British only kāwanatanga, a transliteration of the term governorship. Much history has flowed from those linguistic differences.

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<sup>19</sup> 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.

<sup>20</sup> See generally Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).

As is now documented in our statute books, the promises made to Māori in the Treaty were broken throughout the length and breadth of New Zealand.<sup>21</sup> Land transactions, together with statutorily sanctioned land confiscations from iwi accused of rebellion during the colonial wars of the 1860s, played a formative part in that history. Over time, loss of ancestral lands and associated cultural connections led to urban drift, and the undermining of traditional social structures. There is now widespread acceptance of links between this history of colonisation and dispossession, and the poor social and economic outcomes for Māori that persist to this day.

For generations, the law failed to provide meaningful redress for breaches of the promises made by the Crown in that document. Yet for most of our history, iwi and hapū have fought for protection through the law that was extended to them under both Te Tiriti and the Treaty. This belief in the law is evidenced in many waiata or traditional songs, and in whakataukī or customary proverbs.

One example is associated with the Māori King movement (Kingitanga), which was founded in 1858 to unite Māori in fighting to retain their lands.<sup>22</sup> At his coronation, Pōtatau Te Wherowhero, the first Māori King, told his people:<sup>23</sup>

*I muri, kia mau ki te whakapono, kia mau ki te aroha, ki te ture. Hei aha te aha, hei aha te aha.*

After me, hold fast to faith, hold fast to love, hold fast to the law.

Early attempts by Māori to invoke rights under Te Tiriti as a means of fighting for their land were unsuccessful. In its 1877 decision in *Wi Parata v Bishop of Wellington*, the Court held that the Treaty was a “simple nullity” on the basis that there existed, in 1840, “[n]o body politic ... capable of making cession of sovereignty”.<sup>24</sup>

That decision stands in its own historical time — reached in the decade following large scale armed conflict between Māori and Imperial troops, and under mounting settler pressure for land.

Although the language of legal nullity is no longer used, the 1941 decision of *Te Heuheu Tūkino v Aotea District Māori Land Board* remains authority for the proposition that Te Tiriti is not directly enforceable in New Zealand courts unless incorporated into domestic law by

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<sup>21</sup> See, for example, Waikato Raupatu Claims Settlement Act 1995, preamble; Ngāi Tahu Claims Settlement Act 1998, preamble; and Whakatōhea Claims Settlement Act 2024, s 8.

<sup>22</sup> See Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, revised ed, Auckland, 2004) at 112–113.

<sup>23</sup> “Pōtatau Te Wherowhero” Manatū Taonga | Ministry for Culture and Heritage <<https://nzhistory.govt.nz/politics/the-maori-king-movement/potatau-te-wherowhero>>; see also James Cowan *The New Zealand Wars: A History of the Māori Campaigns and the Pioneering Period (Vol 1: 1845–64)* (R E Owen, Wellington, 1955) at 154.

<sup>24</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 78.

statute.<sup>25</sup> Even so, the Treaty shapes our law, such that it is properly seen as part of our constitutional settlement. How has that come about?

Māori have always fought to defend their rights under the Treaty. However, by the late 1960s protest movements were becoming more numerous, more organised and more forceful — prominently featuring land marches (hīkoi) and land occupations. Around that time, a new generation of Māori leaders was entering Parliament, with an agenda of securing justice under the Treaty.<sup>26</sup>

In response, Parliament enacted the Treaty of Waitangi Act 1975, creating the Waitangi Tribunal. As initially constituted, the Tribunal was empowered to inquire into whether current government actions were consistent with the principles of the Treaty.<sup>27</sup> The concept of “Treaty principles” was critical. Because it was not tethered to any specific textual expression, the concept transcended the impasse created by conflicts between the English and Māori texts.

It is difficult to overstate the significance of this legislative landmark. It ensured that public resource would be devoted to investigating breaches of the Treaty — including, following extension of the Tribunal’s jurisdiction in 1986, historical breaches.<sup>28</sup>

The accounts recovered and documented by the Tribunal continue to contribute to our national understanding of these issues and have altered the political landscape. The histories gathered through this process, and the resulting Tribunal reports, have formed the basis for negotiated settlements of Treaty claims between the Crown and iwi.

These settlements are often implemented through legislation which includes a narrative of Crown breaches of the Treaty. The settlements acknowledge past breaches by the Crown and provide monetary compensation for those breaches. Frequently, they also return areas of homelands — usually taonga, such as ancestral mountains and rivers — and recognise mana whenua (authority over land, not necessarily equating to common law concepts of title). These partial reparations have contributed to the revival of Māori as a social, economic and political force.

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<sup>25</sup> *Te Heuheu Tūkino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).

<sup>26</sup> See Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, revised ed, Auckland, 2004).

<sup>27</sup> Treaty of Waitangi Act 1975, ss 5–6.

<sup>28</sup> Treaty of Waitangi Amendment Act 1985.

I have mentioned the use of the concept of “Treaty principles” in the Treaty of Waitangi Act. While the historical and legal legitimacy of these principles remains the subject of debate,<sup>29</sup> the inclusion of this phrase in subsequent legislation yielded a body of jurisprudence reinforcing the constitutional status of Te Tiriti.

The first significant engagement by the courts with the concept of Treaty principles came in 1987, in *New Zealand Māori Council v Attorney-General* (the *Lands* case).<sup>30</sup> This decision 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”.<sup>31</sup> The Court of Appeal found that the provision created justiciable obligations<sup>32</sup> — in this case, requiring the Crown to refrain from transferring assets in ways that would defeat Treaty-based claims.<sup>33</sup>

The Court also found that the Treaty created an enduring 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.<sup>34</sup>

Since the *Lands* case was decided, Parliament has frequently legislated to require decision-makers to have regard to — or act consistently with — the principles of the Treaty.<sup>35</sup> In turn, such provisions have led to a flow of judicial review proceedings in which Treaty principles are invoked to challenge executive decision-making.<sup>36</sup> 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 New Zealand’s law emerged soon after the creation of the Waitangi Tribunal. In the 1987 decision *Huakina Development Trust v Waikato Valley Authority*, the High Court held that the Treaty imposed upon the Crown obligations that were “perceivable”, if not enforceable, at law,<sup>37</sup> and that there could be “no doubt that the Treaty is part of the fabric of New Zealand society”.<sup>38</sup> Chilwell J found that the Treaty and its principles were

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<sup>29</sup> 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.

<sup>30</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

<sup>31</sup> State-Owned Enterprises Act 1986, s 9.

<sup>32</sup> *New Zealand Māori Council v Attorney-General*, above n 30, at 660–661 per Cooke P.

<sup>33</sup> At 668 per Cooke P and 718 per Bisson J.

<sup>34</sup> At 664 per Cooke P and 703 per Casey J.

<sup>35</sup> See, for example, Conservation Act 1987, s 4; Resource Management Act 1991, s 8; and Environment Act 1986, long title.

<sup>36</sup> See, for example, Jack Oliver-Hood “Ko Ngā Take Ture Māori – Our Significantly Indigenous Administrative Law: The Treaty and Judicial Review” (2013) 19 Auckland U L Rev 53; and 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.

<sup>37</sup> *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 206.

<sup>38</sup> At 210.

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.<sup>39</sup>

*Huakina* was the first case to recognise the Treaty as an interpretative tool, and as being legally relevant beyond direct legislative mention.<sup>40</sup> *Huakina* was drawn upon by the Supreme Court in 2021 in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.<sup>41</sup> That appeal concerned an application for consent to undertake seabed mining off New Zealand's west coast. Local iwi and conservation groups objected to the proposal.

A provision in the applicable Act identified 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".<sup>42</sup>

The Supreme Court was unanimous in rejecting the argument that the enumerated sections exhaustively stated the extent of the Crown's relevant obligations under the Treaty.<sup>43</sup> Building on a longstanding line of authority, it held instead that:<sup>44</sup>

... 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 outlined in my historical sketch, the Treaty's power does not lie in enforcement of the undertakings given by the Crown. Indeed, the courts have said the Treaty is not directly enforceable. Rather, the Treaty's status as a document of great historic, economic and social significance was first acknowledged in the political and legislative spheres. In turn, this has led the courts to recognise the Treaty as a document of constitutional significance with

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<sup>39</sup> At 227.

<sup>40</sup> Natalie Coates and Nerys Udys "The Intersection of the Principle of Legality with Te Tiriti o Waitangi, Tikanga Māori and Indigenous Rights" (New Zealand Law Society CLE Intensive: Human Rights, October 2022) 71 at 74.

<sup>41</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at n 62.

<sup>42</sup> Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 12.

<sup>43</sup> *Trans-Tasman Resources*, above n 41, at [8], [149]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

<sup>44</sup> At [151] per William Young and Ellen France JJ (footnotes omitted): see, for example, *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573; *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643; and *Tukaki v Commonwealth of Australia* [2018] NZCA324, [2018] NZAR 1597.

implications for interpretation of statutes, and for judicial review of decisions made within the administrative state.<sup>45</sup>

In New Zealand law, Indigenous rights jurisprudence has been developed primarily through claims shaped by the Treaty, rather than through claims asserting customary title. This notable divergence from Australia's jurisprudence is partly explained by the existence of the Treaty. But the other critical point of context is that through land sales, cessions, confiscations and the work of the Native Land Court in the nineteenth century, the machinations of the law were effective in extinguishing most customary title.<sup>46</sup> Indeed, by the time the common law doctrine of native title was gestating in Australia and Canada, there remained little land in New Zealand that had not been alienated from Māori ownership or statutorily converted to Māori freehold title.<sup>47</sup>

This limited — but did not eliminate — the scope for litigation asserting customary title. There remained watery margins alongside riverbeds and on the foreshore where customary title had arguably not been extinguished. These border-zones, which are *mahinga kai* (resource-gathering places richly teeming with life) within a *tikanga* worldview, had at times escaped the rigour of processes converting customary title to freehold title under statutory regimes.

The 2003 decision in *Attorney-General v Ngāti Apa* concerned claims for customary title to the foreshore and seabed.<sup>48</sup> It drew directly upon *Mabo v Queensland (No 2)*<sup>49</sup> and has been described as the pivotal moment in “the reawakening of native title” in New Zealand.<sup>50</sup>

In *Ngāti Apa*, a Full Bench of the Court of Appeal overturned its own four-decade-old precedent in *Re the Ninety-Mile Beach*.<sup>51</sup> That earlier precedent held that when the Māori Land Court investigated title to coastal land, any customary rights in the adjacent foreshore were automatically extinguished. The *Ngāti Apa* Court held that the Crown had not automatically become the underlying owner of all land when it assumed sovereignty over New Zealand,<sup>52</sup> that *tikanga*-based rights continue and are a burden on the Crown until

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<sup>45</sup> See, for example, *Trans-Tasman Resources*, above n 41, 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.

<sup>46</sup> See Williams, above n 19, at 8.

<sup>47</sup> 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.

<sup>48</sup> *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

<sup>49</sup> At [30]; see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, (1992) 107 ALR 1.

<sup>50</sup> Natalie Coates “The rise of *tikanga* Māori and Te Tiriti o Waitangi jurisprudence” in John Burrows and Jeremy Finn *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 72–74.

<sup>51</sup> *Ngāti Apa*, above n 48; see also *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

<sup>52</sup> At [30]–[34] and [101] per Elias CJ and at [183] per Tipping J.

lawfully extinguished,<sup>53</sup> and that the term “title”, as used in the expression “Māori customary title”, should not necessarily be equated with the concepts and incidents of title as known to English common law.<sup>54</sup> The Court also held that while legislation was the primary mechanism for limiting recognition of enforceable tikanga-based rights at common law, such rights could not be extinguished by the “side wind” of a change of status to adjacent land.<sup>55</sup>

*Ngāti Apa* precipitated legislative, political and social responses which changed the political landscape in New Zealand. Implications of those responses are still being worked through in the political and legal realm and necessarily lie beyond the scope of this lecture.<sup>56</sup>

## Tikanga Māori

I move on to the role that tikanga has played in New Zealand law. To do so, I return to the period immediately after the signing of the Treaty.

New Zealand’s status as a Crown colony led, in turn, to the establishment of domestic courts. From their earliest days, these courts were required to engage with customary law. Tikanga was most frequently employed by courts to determine the nature and extent of native title, so that it could then be extinguished.<sup>57</sup> It was also used in other contexts, especially during the middle decades of the nineteenth century, when Māori still outnumbered Pākehā. Much early business was conducted in accordance with tikanga, and social interactions were regulated by it.

But over time, and certainly by the first half of the twentieth century, tikanga had become marginalised in the common law and statute law as applied in the mainstream courts. This may be explained in part by the fact that early engagements between Māori and Pākehā, and tikanga-based laws and customs, were not captured in law reports. New Zealand’s formal law reporting did not commence until the 1880s, well after those critical early encounters.<sup>58</sup>

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<sup>53</sup> At [146]–[149] per Gault and Anderson JJ.

<sup>54</sup> At [184] per Tipping J.

<sup>55</sup> At [13] per Elias CJ and at [154] per Tipping J; see also Joseph, above n 14, at 136.

<sup>56</sup> Legislative responses to date include the Foreshore and Seabed Act 2004; Marine and Coastal Area (Takutai Moana) Act 2011; and Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Act 2025. Significant case law in connection with the resulting legislative framework includes *Re Tipene* [2016] NZHC 3199; *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025; *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252; *Whakatōhea Kotahitanga Waka (Edwards)* [2024] NZSC 164; and *Whakatōhea Kotahitanga Waka (Edwards) (Judgment No 2)* [2025] NZSC 104.

<sup>57</sup> Williams, above n 19, at 8.

<sup>58</sup> See Helen Winkelmann “Picking Up the Threads: The Story of the Common Law in Aotearoa New Zealand” (2021) 19 NZJPIL 1 at 6–7.

Historical research is recovering early decisions in which mainstream courts gave effect to tikanga concepts under the common law or within broad statutory frameworks.<sup>59</sup> The “New Zealand Lost Cases project” has begun systematically searching for and compiling news reports, manuscripts and judges’ notebooks, with a Lost Cases database created in early 2013.<sup>60</sup> Distinguished Australian Professor Shaunnagh Dorsett has played a key role in this work.<sup>61</sup>

Importantly, even when marginalised in New Zealand’s law, tikanga continued to order Māori society. Moreover, because Māori are active participants in every part of New Zealand society, tikanga concepts imbue general society — in business dealings, family relations, the protection of natural resources, responses to public tragedy, and so on. Not uncommonly, for instance, a rāhui or temporary ritual prohibition is placed upon an area by mana whenua to allow regeneration or to respect a death and to restore the mauri of the area.<sup>62</sup> Rāhui are respected across wider society, such that they are now factored into local government responses to natural disasters and environmental issues. Another example is that a company doing business with a Māori business entity may well find a clause in their contract stipulating a form of tikanga based dispute resolution, rather than the more standard arbitration or mediation clause.

In the last 50 years, in response to the political and social developments I have described, Parliament has enacted legislation requiring that judges and public officials weigh aspects of tikanga in their decision-making.<sup>63</sup> This legislation spans 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 tikanga-based values (such as whanaungatanga and kaitiakitanga).<sup>64</sup> Many of the statutory references impose tikanga obligations on non-Māori as well as Māori. The 2021 Legislation Guidelines, which guide the legislative drafting process, provide:<sup>65</sup>

New legislation should, as far as practicable, be consistent with fundamental common law principles and tikanga (which may require appropriate

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<sup>59</sup> See, for example, Antonia Smith and Geoff McLay “Hiding in plain sights: The lost tikanga authorities” (2025) 56 VUWLR 79.

<sup>60</sup> See Damen Ward “New Zealand’s ‘Lost Cases’—Unreported Colonial Case Law on the Internet” (2013) Māori Law Review.

<sup>61</sup> See, for example, Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts, 1840 – 1852* (Auckland University Press, Auckland, 2017).

<sup>62</sup> See, for example, Kimberley H Maxwell and Wally Penetito “How the use of rāhui for protecting taonga has evolved over time” (2007) 2 MAI Review.

<sup>63</sup> 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.

<sup>64</sup> Whanaungatanga means kinship or familial connections and relationships. Kaitiakitanga means guardianship and stewardship.

<sup>65</sup> *Legislation Guidelines* (Legislation Design and Advisory Committee, 2021 ed) at [3.4].

consideration of Māori language, customs, beliefs and the importance of community, whānau, hapū and iwi).

Given this context, the common law has been required to engage with tikanga. Judges have applied tikanga concepts and values as they have interpreted legislation, given effect to tikanga interests they were statutorily directed to give effect to, and considered applications for judicial review.<sup>66</sup>

In a series of judgments, our courts have also found that tikanga has been and will continue to be recognised in the development of New Zealand's law where it is relevant to the proceeding.

In *Takamore v Clarke*, the Supreme Court had to decide a dispute over where a deceased man, Mr Takamore, should be buried.<sup>67</sup> Mr Takamore was of Tūhoe and Te Whakatōhea descent. He had been born in a small North Island town called Kutarere but had spent his adult life in Christchurch with his long-term Pākehā partner, Ms Clarke, and their two children.

Without Ms Clarke's consent, the Kutarere whānau uplifted Mr Takamore's body and carried it north. Burying Mr Takamore in a urupā alongside his father and other family members, they claimed they were acting in accordance with tikanga. However, Ms Clarke, the executor of the will, wished for Mr Takamore to be disinterred and taken home for burial in Christchurch. Common law as to burial gave decision-making power to the executor. As framed by the Court of Appeal, a clash between tikanga and established common law rules therefore arose.<sup>68</sup>

By majority, the Supreme Court held that the executor should decide on burial. However, the case has broader significance. In her dissenting judgment, Elias CJ said that values and cultural precepts important in New Zealand society must be weighed in the common law method used by the court in exercising its inherent jurisdiction, according to their materiality.<sup>69</sup> She described Māori custom according to tikanga as "part of the values of the New Zealand common law".<sup>70</sup>

Moreover, although Ms Clarke succeeded *legally*, the appeal did not resolve the dispute. In practical terms, the situation was simply too charged for police to exhume Mr Takamore's

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<sup>66</sup> See, for example, *Tukaki v Commonwealth of Australia*, above n 44; *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116; and *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181.

<sup>67</sup> *Takamore v Clarke*, above n 44.

<sup>68</sup> At [196] per Glazebrook and Wild JJ; and [268] per Chambers J.

<sup>69</sup> At [94] per Elias CJ.

<sup>70</sup> At [94].

body. Instead, a tikanga-driven mediation process brought to an end the issues in the litigation and, one hopes, the fractures within the family. The ultimate result is that Mr Takamore continues to rest in the urupā at Kutarere marae.

Other recent cases have recognised the place of tikanga in the common law. In *Trans-Tasman Resources*, which I referred to earlier, the Supreme Court unanimously held that tikanga came within the statutory words “any other applicable law”.<sup>71</sup>

In the 2003 decision of *Ellis v R (Continuance)*, the Supreme Court again addressed the relevance of tikanga to the development of common law principles.<sup>72</sup> Mr Ellis had been convicted in the 1990s for sexual offending against young children in his care in a crèche setting. Over the decades he maintained that he had been the victim of a miscarriage of justice. The Supreme Court’s grant of leave occurred many years after Mr Ellis had finished serving his sentence. It followed two earlier appeals and a petition for exercise of the royal prerogative of mercy which prompted a ministerial inquiry led by a former Chief Justice.<sup>73</sup>

When Mr Ellis died before the final appeal could be heard, the Court had to decide whether to allow it to continue. Because there was no statutory test for continuing an appeal in that circumstance, the Court had to fashion one.

The issue arose as to the relevance of tikanga to that test. The Crown accepted that the tikanga was relevant to the Court’s decision whether to allow the appeal to continue. Indeed, the Crown played a significant role in collecting evidence from tikanga experts to enable the Court’s consideration of the issue.

The core tikanga concept at issue was mana (the notion of authority, prestige or reputation), which is recognised to persist after death and to affect a deceased person’s family. Although Mr Ellis was Pākehā, it was accepted that the concept of mana was relevant because it imbued much of New Zealand society. It was also common ground that the mana of the complainants, Mr Ellis and their wider families was implicated in the appeal. However, the Crown contended that given the age of Mr Ellis’ convictions, the interests of society and the complainants in finality of the litigation outweighed those considerations.

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<sup>71</sup> *Trans-Tasman Resources*, above n 41, at [169] per William Young and Ellen France JJ; at [237] per Glazebrook J; and at [297] per Williams J.

<sup>72</sup> *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

<sup>73</sup> Mr Ellis formally appealed his convictions to the Court of Appeal twice in the 1990s. While the 1994 appeal successfully quashed three of his 16 convictions, the 1999 appeal was dismissed. The ministerial inquiry was conducted in 2000-2001 by former Chief Justice Sir Thomas Eichelbaum. It concluded in March 2001 that the interviews conducted with child witnesses and admitted in evidence at trial had been appropriate, and that Mr Ellis’ convictions were not unsafe.

The Court ruled that the appeal should continue after Mr Ellis' death, with some members giving weight to the interest Mr Ellis' family had in his posthumous reputation or mana. The Court was unanimous that tikanga has been and will continue to be recognised in the development of New Zealand's common law.<sup>74</sup> The majority held that the relationship between tikanga and the common law should evolve contextually and as required on a case-by-case basis.<sup>75</sup>

Caution was expressed that this was not a revolutionary moment, but simply an example of the common law in operation. The Court emphasised the continuing place of tikanga in society and in statute and common law, and the stabilising effect that the incremental common law method must be allowed to have. Ultimately, the substantive appeal was successful, with all convictions quashed.<sup>76</sup>

Reflecting on the recognition of the place of tikanga in statute and common law, it can readily be appreciated that lawyers, public officials and judges in New Zealand need to be able to apply tikanga-based concepts.

For this reason, in 2021 the New Zealand Council of Legal Education resolved that tikanga be taught as a standalone compulsory component of a law degree.<sup>77</sup> The new requirement came into force this year. The New Zealand Law Society has also issued a practice briefing which draws lawyers' attention to their professional obligation to consider the relevance of tikanga to legal matters before them and encourages them to consider undertaking continuing professional development on tikanga-based legal developments.<sup>78</sup>

Some commentators have drawn parallels between *Ellis* and the High Court of Australia's 2020 decision in *Love v Commonwealth*, where the majority held that Aboriginal Australians are not, and cannot be, "aliens" as that term is used in the Constitution.<sup>79</sup> The majority recognised the unique connection of Aboriginal Australians to Australia's lands and waters. Notably, the majority adopted 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".<sup>80</sup> Flowing from this decision, commentators perceive potential for Australian courts to begin engaging with Indigenous law beyond the confines of native title

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<sup>74</sup> *Ellis v R*, above n 72, 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.

<sup>75</sup> At [21], [116], [119] and [127] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J.

<sup>76</sup> *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338.

<sup>77</sup> Professional Examinations in Law Regulations, regs 1(3) and 3(1)(b) (as amended by the Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022).

<sup>78</sup> New Zealand Law Society | Te Kāhui Ture o Aotearoa *Practice Briefing: Tikanga Māori and Rules 3, 3.1, and 3.9 of the Rules of Conduct and Client Care* (July 2025).

<sup>79</sup> *Love v Commonwealth of Australia* [2020] HCA 3, (2020) 270 CLR 152 at [81]. See Australian Constitution, s 51(xix).

<sup>80</sup> *Mabo v Queensland (No 2)*, above n 49, at 70 per Brennan J.

claims. Elisa Arcioni and Kirsty Gover, for instance, suggest that in *Love* “contemporary, live expressions of traditional law and custom seem to find their way into the court’s line of sight”.<sup>81</sup>

## **Conclusion**

The iterative developments that I have sketched this evening remind us of the significance that constitutional structures have in the development of public law. History, culture and even singular events are capable of reshaping New Zealand’s constitutional landscape. Although the metaphor of a “frozen continent” might suggest otherwise, the points of contrast I have identified indicate that to some degree, that observation may also be true of the Australian constitutional settlement.

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<sup>81</sup> 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.