IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA617/2024
CA752/2025
[2026] NZCA 244

BETWEEN	THOMAS HENRY LANAUZE, KUSHLA JANE ALLEN, WILLIAM PETER KING, HAYDEN MCALAISTER PREECE AND CHAS KARAURIA TAURIMA AS TRUSTEES OF THE MORIORI IMI SETTLEMENT TRUST FOR AND ON BEHALF OF IMI MORIORI Appellants
AND	ATTORNEY GENERAL First Respondent
	MONIQUE CROON, DEENA NGAWHATA WHAITIRI, DIANNE KAY GRENNELL, JOHN CHARLES PREECE, MEGAN LOUISE LANAUZE-KING, MELODIE ERUERA FRASER AND PAULA PAGE AS TRUSTEES OF NGĀTI MUTUNGA O WHAREKAURI IWI TRUST FOR AND ON BEHALF OF NGĀTI MUTUNGA O WHAREKAURI Second Respondents

Hearing:	4 March 2026
Court:	Katz, Palmer and Whata JJ
Counsel:	C J Griggs and P C Kelly for Appellants D A Ward and U D Herath for First Respondent T J Castle and T I M Hautapu for Second Respondents
Judgment:	10 June 2026 at 2.30 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The appellants must pay one set of costs for a standard appeal on a band A basis to the first and second respondents, together with usual disbursements. We certify for second counsel.

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REASONS OF THE COURT

(Given by Whata J)

[1] Imi Moriori are the original inhabitants of the Rēkohu group of islands, commonly referred to as the Chatham Islands.[1] They seek the following declaration:[2]

> (e) It would be unlawful for the Crown to enter into a settlement with [Ngāti Mutunga o Wharekauri] which includes the transfer to that iwi of any interests in or rights affecting henu [land] in the Rēkohu group, or tangible miheke [treasures] found in those islands.

[2] They also seek interim orders preventing the Crown from taking further action in the settlement with Ngāti Mutunga o Wharekauri (Ngāti Mutunga) to the extent that it purports to recognise that Ngāti Mutunga holds mana whenua and te tino rangatiratanga over the Chatham Islands.

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1 Ngāti Mutunga o Wharekauri refer to the islands as Wharekauri. This judgment refers to the islands as the Chatham Islands unless context requires otherwise.

2 For ease of reference, like the High Court, we refer to declaration (e) as Declaration E.

[3] In separate decisions of the High Court, the application for Declaration E was struck out and interim orders were refused.[3]

[4] This judgment addresses the appeals against both decisions.

Background

[5] The background is helpfully described by McQueen J as follows:[4]

> [6] The dispute between Moriori and Ngāti Mutunga o Wharekauri in relation to the Chatham Islands is longstanding and deeply felt. The dispute pre-dates the signing of the Treaty. Both Moriori and Ngāti Mutunga o Wharekauri claim to hold customary rights and interests in the Chatham Islands. The current proceeding is one piece of this complex dispute.
>
> [7] The Crown, under its Treaty settlement process, has been in negotiations with both imi/iwi for many years. The Moriori Treaty settlement was finalised in 2021 with the passing of the Moriori Claims Settlement Act 2021. That process was not straightforward and included an unsuccessful challenge from Ngāti Mutunga o Wharekauri. The settlement process between Ngāti Mutunga o Wharekauri and the Crown is ongoing, with the latest step in the process being the [Agreement in Principle (AIP)] which is now challenged by Moriori.
>
> [8] The claims to the Chatham Islands by each party are set out in more detail in the 2001 report by the Waitangi Tribunal (the Rēkohu Report). For contextual purposes, I briefly outline the history of each imi/iwi and their respective Treaty settlement processes, but this must be read with the caveat that Moriori and Ngāti Mutunga o Wharekauri dispute many aspects of their respective connections to the Chatham Islands. It is not necessary for me to make any finding in this judgment on these matters. I also briefly outline the general Treaty settlement process.
>
> *Moriori Imi and the Moriori Claims Settlement Act 2021*
>
> [9] The historical account I set out here is largely drawn from s 8 of the Moriori Claims Settlement Act, which was agreed by the Crown and Moriori for the purposes of their Treaty settlement.
>
> [10] Moriori karāpuna (ancestors) were the original inhabitants of the islands making up the Chatham Islands. They arrived sometime between 1000 and 1400 CE and all Moriori hokopapa to (are descended from) the founding ancestor Rongomaiwhenua. Moriori lived undisturbed for many centuries until their first contact with Pākehā in 1791. Part of tikane Moriori was the practice of non-violence, known as Nunuku's law of peace.

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3 *Solomon v Attorney-General* [2024] NZHC 2385 [strike-out judgment]; and *Solomon v Attorney-General* [2025] NZHC 1811 [interim orders judgment].

4 Strike-out judgment, above n 3 (footnotes omitted).

[11] In late 1835, five years prior to the signing of the Treaty, about 900 people of two Māori iwi, Ngāti Mutunga and Ngāti Tama, sailed to the Chatham Islands on a Pākehā ship. They were welcomed and fed by Moriori in accordance with tikane Moriori. They began to walk the land. Some Moriori wanted to resist the invaders, but elders urged the people to obey Nunuku's law of peace. Moriori were attacked by the visitors and approximately one-sixth of the population were killed. Those who survived were enslaved. Then in 1842, the Chatham Islands were annexed to New Zealand. However, the Crown took no action before the late 1850s to address Moriori enslavement.

[12] In 1870, when the Native Land Court sat on the Chatham Islands, it awarded more than 97 per cent of the land to the recently arrived Māori and less than three per cent to Moriori, notwithstanding that tikane Moriori did not recognise conquest as a means of gaining land rights. Following this, and as a result of being left virtually landless, many of the remaining Moriori were forced to abandon the Chatham Islands.

[13] In the early twentieth century, prominent ethnographers wrongly portrayed Moriori as extinct and racially distinct from, and inferior to, Māori. The Crown contributed to this portrayal. Since the late 1970s, Moriori descendants have been working to rebuild their identity and culture as a distinct people with a unique heritage. In pursuit of this goal, the Moriori Imi Settlement Trust entered into a final Treaty settlement with the Crown. That settlement involved historical, cultural and commercial redress and was preceded by the Rēkohu Report.

[14] The Rēkohu report concluded, among other things, that:

> Moriori are the same people as Māori but, through isolation, they are unique as a Māori tribe. The Treaty of Waitangi Act 1975 provides that only Māori can bring a claim to the Waitangi Tribunal. It is obvious that that must include the Moriori tribe — unless the Treaty of Waitangi itself excluded them.
>
> …
>
> We conclude that Moriori are tangata whenua. So also, today, are Ngāti Mutunga.
>
> …
>
> We conclude that, like Māori, Moriori are beneficiaries of the Treaty of Waitangi and are able to bring claims to the Tribunal.
>
> …

[15] The final settlement included an agreed historical account (as summarised above), and a Crown apology for its breaches of the Treaty. Cultural redress included the provision to Moriori of certain properties, some in fee simple and some subject to overlay classifications, the ability to manage customary fisheries in the Chatham Islands with Ngāti Mutunga o Wharekauri as well as a right of first refusal in relation to commercial fishing quota. The Crown also issued statutory acknowledgements and deeds of recognition over certain areas. In terms of commercial and financial redress, Moriori were

given a monetary settlement and a shared right of first refusal over certain land with Ngāti Mutunga o Wharekauri.

Ngāti Mutunga o Wharekauri and the AIP

[16] The AIP states that the proposed Deed of Settlement is to include an historical account but as there is not yet any final settlement between the Crown and Ngāti Mutunga o Wharekauri, such an account is not yet agreed and available. However, some Ngāti Mutunga o Wharekauri history has been provided by Mr Thomas McClurg, Ngāti Mutunga o Wharekauri and Ngāti Mutunga Iwi, in his affidavits filed in this proceeding. Some history is also set out in the Rēkohu Report, although I note that Mr McClurg records that Ngāti Mutunga o Wharekauri contest that account.

[17] Ngāti Mutunga are Māori who trace their descent to their shared ancestor Mutunga. The ancestral home of Ngāti Mutunga is Northern Taranaki. After conflicts within Taranaki in the early 1800s, members of Ngāti Mutunga, alongside other Taranaki iwi, moved south to Te Whanganui-a-Tara.

[18] Mr McClurg describes Ngāti Mutunga o Wharekauri as also Māori but with a more diverse whakapapa reflective of the two voyages of the "Rodney", a Pākehā ship, in late 1835 from Te-Whanganui-a-Tara to the Chatham Islands.

[19] Today, Ngāti Mutunga o Wharekauri is an umbrella term that embraces Māori who descend from people who may have originally identified themselves as Ngāti Mutunga, Ngāti Tama, Kekerewai, Haumia or by the hapū names of those iwi. Like Moriori imi, Ngāti Mutunga o Wharekauri claim mana whenua over the Chatham Islands. They also claim that the Crown breached its obligations to Ngāti Mutunga o Wharekauri under the Treaty by acts and omissions before 1992.

[20] Ngāti Mutunga o Wharekauri, having supported the passage of the Moriori Claims Settlement Act, are currently engaged in their own settlement process concerning claims of historical Treaty breaches by the Crown. After years of negotiating, the AIP was entered into on 25 November 2022. It records the progress made in negotiations but does not determine or exclude any matter. This provides a platform for the Crown and Ngāti Mutunga o Wharekauri to work towards a formal deed of settlement. The AIP states that it is entered into on a without prejudice basis, is non-binding and does not create legal relations. Any Deed of Settlement that follows will have no force until settlement legislation is enacted by Parliament.

[21] In terms of the historical redress, the AIP proposes several provisional Crown acknowledgements that may be included in the Deed of Settlement. Relevant to this proceeding are the following acknowledgements:

> 4.3.1 the Crown acknowledges Ngāti Mutunga o Wharekauri as tangata whenua of Wharekauri (the Chatham Islands);
>
> 4.3.2 the Crown acknowledges that its annexation of Wharekauri in 1842 was carried out without any effort to consult with Ngāti Mutunga o Wharekauri. This represented a profound failure to give appropriate recognition and respect to the mana

> and te tino rangatiratanga of Ngāti Mutunga o Wharekauri. The Crown further acknowledges that its failure to seek the consent of Ngāti Mutunga o Wharekauri did not meet the standards of conduct set out in the instructions given to Governor Hobson when he was sent from England to establish sovereignty over New Zealand;
>
> …
>
> [22] The cultural redress proposed in the AIP includes a cultural revitalisation payment, the vesting of properties in Ngāti Mutunga o Wharekauri (including land on the Chatham Islands — some as tenants in common with Moriori), and various statutory acknowledgements. The financial and commercial redress proposed in the AIP includes the shared right of first refusal over land (as mentioned above in the context of the Moriori settlement), a commercial redress payment, and a right of first refusal over fisheries quota.

The Agreement in Principle

[6] Given its significance, we elaborate on the terms of the Agreement in Principle (AIP). It contemplates that the Crown and Ngāti Mutunga will enter into a deed of settlement that will settle the historical claims of Ngāti Mutunga.[5] Various types of redress are identified, including an historical account, acknowledgment and apology, cultural redress, financial and commercial redress, and shared redress with Imi Moriori. The following provisional acknowledgments are included:

> 4.3.1 the Crown acknowledges Ngāti Mutunga o Wharekauri as tangata whenua of Wharekauri (the Chatham Islands);
>
> 4.3.2 the Crown acknowledges that its annexation of Wharekauri in 1842 was carried out without any effort to consult with Ngāti Mutunga o Wharekauri. This represented a profound failure to give appropriate recognition and respect to the mana and te tino rangatiratanga of Ngāti Mutunga o Wharekauri …
>
> 4.3.3 the Crown acknowledges that the undertakings it made to Māori in te Tiriti o Waitangi/the Treaty of Waitangi apply and have always applied to Ngāti Mutunga o Wharekauri from the date of annexation;

[7] The AIP also states that the deed of settlement is to provide for statutory acknowledgments of historical connection to places of significance to Ngāti Mutunga, relationship instruments, shared first rights of refusal, shared cultural redress properties, customary fisheries and shared commercial redress.

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5 Clause 3.1.1.

[8] The Crown's entry to the deed of settlement is conditional on several matters, including Cabinet agreement and Crown satisfaction as to Ngāti Mutunga governance structures.[6] The AIP states:

> 11.2 The deed of settlement and shared redress deed are to provide that following the signing of the deed of settlement and shared redress deed respectively the Crown will propose a draft bill for introduction to the House of Representatives.
>
> 11.3 This draft bill will provide for all matters for which legislation is required to give effect to the deed of settlement and shared redress deed.
>
> …
>
> 11.6 The deed of settlement is to provide that the settlement is conditional on settlement legislation coming into force although some provisions may be binding on and from the date the deed of settlement is signed.
>
> 11.7 The shared redress deed will be conditional on settlement legislation coming into force although some provisions may be binding on and from the date the shared redress deed is signed.

[9] The AIP also states that it:

> 12.1.1 is entered into on a without prejudice basis; and
>
> 12.1.2 in particular, may not be used as evidence in proceedings before, or presented to, the Waitangi Tribunal, any court, or any other judicial body or tribunal; and
>
> 12.1.3 is non-binding; and
>
> 12.1.4 does not create legal relations.

The claim

[10] On 28 March 2023, Imi Moriori applied in the High Court to judicially review the Attorney-General's decision to enter the AIP with Ngāti Mutunga, along with an application for declaratory judgment. The decision is defined in the pleadings as "the reviewable decision". The statement of claim records:

> 35. The AIP states at clause 1.5 of Schedule 1 that the Deed of Settlement between the Crown and [Ngāti Mutunga] will provide that, under tikanga Māori, [Ngāti Mutunga] have exercised customary rights to occupy land in the Rēkohu group and also rights in relation to the use

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6 Clause 11.1.

> of that land or other natural or physical resources since 1 November 1842.

[11] Two grounds for relief are pleaded: illegality and failure to have regard to relevant considerations. The first ground based on illegality alleges, in summary:

(a) The decision to enter into the AIP was a reviewable exercise of prerogative power.

(b) The prerogative power must be exercised in accordance with the law, including the Treaty of Waitangi, international law, common law and tikane Moriori — the first law of the Chatham Islands.

(c) The exclusive customary ownership/tino rangatiratanga of Moriori over all of the henu in the Chatham Islands has never been lawfully extinguished.

(d) The reviewable decision breaches the Crown obligations under the Treaty, international law, common law and tikane Moriori because it manifests an intention to grant Ngāti Mutunga rights and interests in respect of the Chatham Islands.

[12] The second ground of relief pleads that the provisions of the Treaty are a mandatory relevant consideration and the Crown failed to consider the meaning of the authentic text of the Treaty in te reo Māori in making the reviewable decision.

[13] Imi Moriori sought that the AIP be set aside, together with declarations as follows:

> (a) Moriori are and have since time immemorial been the customary owners exercising tino rangatiratanga over all the islands in the Rēkohu group under tikane Moriori, common law and international law;
>
> (b) The Crown owes obligations under Article Two of the Treaty in respect of the henu of the Rēkohu group exclusively to Moriori and to no other party;

(c) The Crown owes obligations under Article Two of the Treaty in respect of tangible miheke found in or on the henu of the Rēkohu group exclusively to Moriori and to no other party; and

(d) No party other than Moriori is lawfully entitled to claim tino rangatiratanga, mana whenua, or any other customary right over the henu or moana of the Rēkohu group.

(e) It would be unlawful for the Crown to enter into a settlement with [Ngāti Mutunga] which includes the transfer to that iwi of any interests in or rights affecting henu in the Rēkohu group, or tangible miheke found in those islands.

[14] The Attorney-General and Ngāti Mutunga applied to have the Moriori claim struck out. The Attorney-General's application was limited to the judicial review of the decision to enter the AIP and Declaration E. Ngāti Mutunga's strike-out application related to the entirety of Imi Moriori's claims.

[15] On 26 August 2024, McQueen J struck out Declaration E, the relief sought to set aside the AIP and the claim for judicial review.[7] She found the appropriate approach was to allow Moriori to replead the remaining claims in a manner that does not breach the principle of non-interference.[8]

[16] Most relevantly, in relation to Declaration E, McQueen J found:

> [89] I start by addressing Declaration E because I consider that it plainly must be struck out. The decision to transfer property under a Treaty settlement is given effect through the legislative process. It is, as all the decisions discussed above have recognised, a matter for Parliament. It is not this Court's role to interfere with that function. Although, as pleaded, Declaration E is addressed against the Crown, it can only be properly characterised as a declaration that would prevent legislation transferring properties and interests to Ngāti Mutunga o Wharekauri in the Chatham Islands. The Court cannot dictate what Parliament can and cannot legislate.
>
> [90] Although I agree with Mr Griggs that the principle of non-interference has been developed further beyond the decision of the Supreme Court in *Ngāti Whātua*, I do not consider the principle as articulated in *Ngāti Whātua* has changed in such a way as to permit Declaration E to be able to proceed. It has considerable similarity to the declarations the Supreme Court considered must be struck out in *Ngāti Whātua*. As Cooke J emphasised in *Hata*, which is a case Mr Griggs sought to rely on, parties can have their rights determined by this Court, but they cannot ask the Court to interfere with the legislative function.

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7 Strike-out judgment, above n 3, at [110].
8 At [108] and [111].

> [91] Accordingly, I agree with the Attorney-General and Ngāti Mutunga o Wharekauri that Declaration E is untenable and has no chance of success. It should be struck out.

[17] Turning to the challenge to the Crown's decision to enter into the AIP, the Judge said it was useful to look at the relief sought to see whether the principle of non-interference was engaged. On this she found that "by involving itself in the redress element of the AIP, which is in essence what Moriori are seeking, the Court would be interfering in the legislative process — as it would be dictating what could or could not go before Parliament".[9] Furthermore, she accepted that the decision to enter into the AIP is not a distinct public law decision amenable to judicial review because the AIP was by its very nature made to begin a process of negotiation — it did not create legal relations or determine rights, was entered into on a without prejudice basis and is a non-binding agreement.[10]

[18] The Judge observed however that the existence of a Treaty settlement did not mean that differences as to customary interests and rights are settled and cannot come before the Court.[11] She accepted that issues as to customary rights and interests are matters on which it is "at least conceivable that there is a 'right' answer" and that access to the courts by a party to have its existing rights and interests determined must be preserved.[12] She concluded that a properly pleaded claim addressed to these matters will not breach the non-interference principle,[13] but this means ensuring that the pleading does not rely on political compact-making between the Crown and Ngāti Mutunga.[14]

The application for interim relief

[19] Imi Moriori subsequently applied for interim orders that the Crown not take any further action in the settlement with Ngāti Mutunga to the extent that it purports to recognise that Ngāti Mutunga holds mana whenua and te tino rangatiratanga over the Chatham Islands, pending the determination of proceedings. Applying the test

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9 At [93].
10 At [96] and [99].
11 At [103].
12 At [103].
13 At [107].
14 At [108].

under *Minister of Fisheries v Antons Trawling Co Ltd*, La Hood J declined to grant interim relief on 3 July 2025.[15] He found:[16]

> [21] I do not think Moriori's argument is a tenable interpretation of the acknowledgement. The plain words make clear that it is a Crown acknowledgment, and not a parliamentary declaration of Ngāti Mutunga's rights. As the Attorney-General submits, Crown acknowledgements do not, by themselves, confer legal rights or duties on the parties to a settlement deed or anyone else. As Palmer J has held, the Crown's power to enter Treaty settlements "cannot override rights and liberties prescribed by law, whether they be conferred by statute, common law or tikanga." Thus, the acknowledgement cannot extinguish or abrogate any customary rights or interests of Moriori. Moreover, simply including the acknowledgement in the settlement legislation does not convert it to a parliamentary declaration of rights.
>
> …
>
> [24] It follows that the scheme and purpose of the settlement legislation supports the conclusion that the acknowledgment is not a binding parliamentary declaration of Ngāti Mutunga's customary rights over the Chatham Islands.

[20] The Judge added that it has been held that legislation recording the Crown's acknowledgment and recognition of rights to one group is unlikely to be interpreted as prejudicing legitimate claims of extant customary rights by another group.[17] He accepted that the Crown is not able to, and does not purport to adjudicate on relative customary rights or interests when making acknowledgments in a settlement context.[18] He also noted that it has previously been held in this Court that mana whenua is not static and could come to be shared.[19] The Attorney-General's concession that the settlement legislation will not prevent Moriori seeking repleaded relief was also recorded.[20] Finally, the Judge assessed the merits of the substantive appeal to this Court and found it had "little prospect" of success as the principle of non-interference would not allow Declaration E to survive.[21]

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15 Interim orders judgment, above n 3; and *Minister of Fisheries v Antons Trawling Co Ltd* [2007] NZSC 101, (2007) 18 PRNZ 754.

16 Footnotes omitted, citing *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.

17 Interim orders judgment, above n 3, at [25] citing *Hart v Director-General of Conservation* [2023] NZHC 1011, [2023] 3 NZLR 42 at [98]–[104].

18 Interim orders judgment, above n 3, at [26].

19 At [27] citing *Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746 at [25]–[30] and [36].

20 Interim orders judgment, above n 3, at [28].

21 At [33] and [39].

The Deed of Settlement

[21] Matters have progressed since the High Court judgments were issued. On 11 December 2025, the Crown initialled a Deed of Settlement with Ngāti Mutunga. The Deed follows on from the AIP in providing for various forms of recognition, acknowledgment and redress. The initialled Deed of Settlement records, most importantly for the purposes of Imi Moriori's appeal:[22]

> 2.9 According to Ngāti Mutunga tikanga, the conquest of the original inhabitants, the takahi and the subsequent establishment of permanent settlements gave Ngāti Mutunga enduring customary interests over the entirety of the Chatham Islands (which they subsequently referred to as Wharekauri) and its offshore islands.
>
> …
>
> 2.16 As a result of this change, the Crown's sovereignty over New Zealand was extended to include Wharekauri. The Crown's annexation of Wharekauri was carried out without any effort to consult with Ngāti Mutunga o Wharekauri. Ngāti Mutunga o Wharekauri consider that this represents a profound failure to recognise or respect their mana and te tino rangatiratanga, and is the root of all Ngāti Mutunga o Wharekauri Treaty grievances and consequent relationship difficulties with the Crown.
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> …
>
> 3.2 The Crown acknowledges that:
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> …
>
> 3.2.2 its annexation of Wharekauri in 1842 was carried out without any effort to consult with Ngāti Mutunga o Wharekauri. This represented a profound failure to give appropriate recognition or respect to the mana and te tino rangatiratanga of Ngāti Mutunga o Wharekauri;
>
> …
>
> 3.19 The Crown is deeply sorry that it annexed Wharekauri/the Chatham Islands in 1842 without any effort to consult you, which was a profound failure to give appropriate recognition or respect to your mana and te tino rangatiratanga, and that this began a long and regrettable history of limited engagement with you and your rohe. This history of limited services on Wharekauri/the Chatham Islands and the painfully slow development of economic infrastructure has meant that many Ngati Mutunga o Wharekauri long felt they lived in a dependency of New Zealand rather than a fully integrated part of the country.

[22] Clause 3.2.2 is in effect largely the same as the clause of the AIP that was at issue in the High Court.

[22] The Deed refers to the need for settlement legislation. It states:

> 8.1 The Crown must propose the draft settlement bill for introduction to the House of Representatives.
>
> 8.2 The settlement legislation will provide for all matters for which legislation is required to give effect to this deed of settlement.
>
> …
>
> 8.5 Ngāti Mutunga o Wharekauri and the governance entity must support the passage of the draft settlement bill through Parliament.
>
> …
>
> 8.6 This deed, and the settlement, are conditional on the settlement legislation coming into force.

[23] The Deed also states:

> 8.11 This deed —
>
> 8.11.1 is "without prejudice" until it becomes unconditional; and
>
> 8.11.2 may not be used as evidence in proceedings before, or presented to, the Waitangi Tribunal, any court, or any other judicial body or tribunal.
>
> 8.12 Clause 8.11.2 does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or enforcement of this deed.

The key issues on appeal

[24] The key issues on appeal were agreed as follows:[23]

> **Issue One**: Did the High Court err in the decision to strike out Declaration E of the appellant's statement of claim on the ground that the Declaration was in breach of the principle of non-interference in parliamentary proceedings.
>
> **Issue Two**: Did the High Court err in the decision to decline to issue the interim orders sought on the basis that interim relief was not reasonably necessary to protect Moriori's existing rights because the Crown's proposed acknowledgment in a Deed of Settlement and then settlement legislation would not constitute a binding parliamentary

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[23] Footnotes omitted. We record that at the hearing counsel for Imi Moriori sought "interim, interim orders" preventing the Crown from progressing its settlement with Ngāti Mutunga further pending the determination of this appeal. Given no formal application was made or served on the respondents, we do not address the orders.

declaration of Ngāti Mutunga's customary rights over the Chatham Islands.

The key submissions

[25] We summarise the key arguments for the parties before addressing each issue.

Imi Moriori

[26] Mr Griggs for Imi Moriori makes a number of related propositions in support of his contention that the relief sought does not breach the principle of non-interference. First, the principle of non-interference was clarified by the Supreme Court in *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* to the effect that it does not apply to proceedings that raise orthodox claims of statutory or other right, including the right to have extant applications determined according to law and the related right to test the implication of tikanga considerations in that context.[24] The Court in that case is said by Mr Griggs to have adopted the dissent reasoning of Elias CJ in *Ngāti Whātua Ōrākei Trust v Attorney-General* (*Ngāti Whātua Ōrākei*).[25] This is a matter of significance as she would have allowed Ngāti Whātua Ōrākei to challenge a decision by the Crown to transfer properties to other iwi via proposed legislation on the basis that it, among other things, breached tikanga.

[27] Second, Declaration E concerns an orthodox challenge by Imi Moriori to the legality of the Crown's purported exercise of prerogative power to settle Treaty claims, and in particular the legality of the Crown's decision to recognise Ngāti Mutunga's adverse claim to tino rangatiratanga in respect of Imi Moriori lands and other miheke. As stated by Palmer J in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* the Crown's prerogative powers do not permit government officials to act in conflict with the rights and liberties of others.[26]

[28] Third, Imi Moriori simply seek a declaration that, as the law stands, it would be unlawful for the Crown to enter into a settlement agreement with Ngāti Mutunga which recognises that iwi's adverse claim to tino rangatiratanga over Moriori lands

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24 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [47].

25 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

26 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 16, at [575].

and miheke. Illustrative of the immediate impact of the Crown's recognition of Ngāti Mutunga's asserted tino rangatiratanga, Ngāti Mutunga may be recognised as holding mana whenua of the Chatham Islands under the Resource Management Act 1991 and Marine and Coastal Area (Takutai Moana) Act 2011 (MACA).[27] It is also an immediate violation of tikane Moriori, whatever its consequential effect in statute or common law.

[29] Fourth, Declaration E does not expressly or by necessary implication purport to prevent the Crown from introducing a settlement Bill granting any particular form of redress to Ngāti Mutunga. Rather, by exercising its power of review, the Court is simply discharging its constitutional responsibility to secure the lawful exercise of executive power. The alternative is executive tyranny.

[30] Fifth, contrary to the conclusion reached by the High Court, interim relief is necessary to preserve Imi Moriori's tino rangatiratanga because if any future Act of Parliament gives effect to the Deed and thereby affirms that Ngāti Mutunga have tino rangatiratanga over the Chatham Islands, the courts will have to give effect to it. This will irretrievably compromise Moriori's application for declarations to the contrary. In addition, the potential for interim relief was affirmed in *Ngāti Mutunga o Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations* (*Ngāti Mutunga*).[28]

Ngāti Mutunga

[31] Mr Castle for Ngāti Mutunga responds that the AIP and Deed do not assert that Ngāti Mutunga are "mana whenua" of the Chatham Islands and Ngāti Mutunga do not assert, and have never asserted, they have te tino rangatiratanga over Imi Moriori or the Chatham Islands. The AIP is also clearly the first step in a parliamentary process and so subject to the non-interference principle. No iwi or imi has the right to veto proposed settlements with other iwi and in any event, the Deed does not create rights affecting Moriori. Parliament is free to confer rights on Ngāti Mutunga and the Minister is free to put to Parliament in a Bill for Treaty settlement purposes such relief

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27 See Resource Management Act 1991, ss 165K(1)–(2), 165l(2) and 165N(5).

28 *Ngāti Mutunga o Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations* [2019] NZHC 1942 at [17] and [25]–[26].

as they think appropriate for such settlement. Overall, he says, this is a clear case of interference with a legitimate parliamentary settlement process.

The Crown

[32] Mr Ward for the Attorney-General submits Imi Moriori is free to seek declarations as to its customary rights, but they cannot pursue relief that is intended to shape or dictate the content of legislation.[29] The purpose and inevitable effect of Declaration E is to prohibit the Crown from placing before Parliament a proposed Treaty settlement in clear violation of the non-interference principle. He does not accept that the majority in *Wairarapa Moana* departed from the approach taken by the majority in *Ngāti Whātua Ōrākei*, emphasising that they were dealing with two different factual situations. *Wairarapa Moana* addresses the principles that apply when law-making processes that are currently underway may have an effect on extant proceedings, while *Ngāti Whātua Ōrākei* discusses the principles that apply in determining whether extant proceedings risk interfering with law-making processes. In *Wairarapa Moana*, the Court held that it was under a duty to determine a matter according to the law as it is, not what it might be in the future. The non-interference principle was therefore not engaged.

[33] Mr Ward also submits that the distinction made by Mr Griggs between executive and legislative action is misplaced. The decision by the Crown to reach agreement with Ngāti Mutunga for the specific purpose of giving effect to it *only* by way of legislation, is plainly a step in a parliamentary process subject to the non-interference principle. It is not executive action that gives rise to enforceable legal rights or otherwise affects any existing rights and interests.[30] By contrast, the focal point of the *Wairarapa Moana* case was the legality of the resumption process, the resolution of which would determine extant rights and interests. Any adjacent or subsequent Treaty settlement implemented by Parliament was irrelevant to that challenge.

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[29] *Te Runanga o Wharekauri Rēkohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308.

[30] Mr Ward refers to references in the AIP and Deed that expressly state that it is non-binding and does not give rise to enforceable rights and interests. We come back to these references below.

[34] Mr Ward highlights that Declaration E is clearly intended to constrain the legislative proposal for settlement, referring to the redress sought in the statement of claim:

(a) certain acknowledgments of Treaty breach or prejudice;

(b) transfer of properties on the Chatham Islands as cultural redress properties (all proposed in the AIP to be vested in a Ngāti Mutunga governance entity by settlement legislation); and

(c) statutory acknowledgment of statements of association of Ngāti Mutunga with areas on the Chatham Islands (to be provided by settlement legislation per cl 5.5 of the AIP).

[35] In terms of the interim orders, the application focuses on specific acknowledgments in the AIP, namely:

> 4.3 The following Crown acknowledgements are provisional and will be subject to further discussion and final confirmation by the parties before inclusion in the deed of settlement
>
> …
>
> 4.3.2 the Crown acknowledges that its annexation of Wharekauri in 1842 was carried out without any effort to consult with Ngāti Mutunga o Wharekauri. This represented a profound failure to give appropriate recognition and respect to the mana and te tino rangatiratanga of Ngāti Mutunga o Wharekauri. The Crown further acknowledges that its failure to seek the consent of Ngāti Mutunga o Wharekauri did not meet the standards of conduct set out in the instructions given to Governor Hobson when he was sent from England to establish sovereignty over New Zealand;

[36] Mr Ward says these acknowledgements relate only to Ngāti Mutunga, they do not create customary rights or resolve differences between them and Moriori or otherwise bind Moriori. Legislation is needed to give effect to them, and any such legislation will be interpreted in accordance with the intentions stated in the Deed. A court will be slow to find any customary rights were abrogated or extinguished by another group's settlement Act. Properly construed, the Deed does not purport to confer exclusive or dominant interests in the Chatham Islands or provide a basis for

asserting such interests. Both the Crown and Ngāti Mutunga have stated that acknowledgments will not preclude Imi Moriori from seeking declarations as to their tino rangatiratanga status. This also accords with the approach taken by the courts in other cases concerning competing customary claims, including the *Ngāti Mutunga* case.[31]

Issue One: Declaration E

[37] The scope of the principle of non-interference is in focus. As Ellen France J, speaking for the majority, explained in *Ngāti Whātua Ōrākei*:[32]

> [36] Some propositions as to the scope of the principle are not challenged. The first is the proposition, accepted in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* (*Sealords*), that a court would not make an order to prevent the introduction of a Bill to the House of Representatives. The second is the proposition that the courts should not try to "dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament".

[38] Ellen France J also said:[33]

> [46] From the cases to date, there remain questions about the exact scope, qualifications and basis of the principle of non-interference in parliamentary proceedings. As will become apparent, it is not necessary in the present case to resolve the exact metes and bounds of the principle. It is, nonetheless, appropriate to sound a note of caution at the extent to which the principle of non-interference in parliamentary proceedings has been held to apply to decisions somewhat distant from, for example, the decision of a minister to introduce a Bill to the House or from debate in the House. It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights. In that respect, it is relevant that the observations in *Milroy* were made in the context of acceptance by counsel for the appellants that the officials' advice did not affect the rights of any person or have the potential to do so.
>
> [47] The Court of Appeal in *Milroy* described the test as to what amounts to interference in parliamentary proceedings as one of function, rather than "remoteness in time or evolution". However, it may not be appropriate to discount out of hand the relevance of timing in determining the reach of the principle of non-interference in parliamentary proceedings. As the Court of Appeal in *Sealords* observed, the principle of non-interference with parliamentary proceedings can be characterised as "the corollary" of the "implied right to freedom of expression in relation to public and political

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31 *Ngāti Mutunga o Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations*, above n 28.
32 *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 25 (footnotes omitted).
33 Footnotes omitted, citing *Milroy v Attorney-General* [2005] NZAR 562 (CA).

> affairs [that] necessarily exists in a system of representative government". That suggests a rather more direct temporal link to what occurs in the House than was the case in *Milroy*.

[39] In *Ngāti Whātua Ōrākei*, the Supreme Court was dealing with decisions by the Crown to transfer land assets within Auckland to various iwi via legislation to be proposed to Parliament. Ngāti Whātua Ōrākei challenged the legality of the Crown's decisions and sought six declarations. The majority found the Court of Appeal was wrong to "characterise the relief sought as confined to [a] challenge to a legislative proposal for the transfer of the specified properties".[34] It was also wrong to find that the only impact on Ngāti Whātua Ōrākei will be through proposed legislation.[35] On the contrary the majority was satisfied that four of the declarations related to matters that were not directly related to the decisions to transfer the properties and any corresponding parliamentary process.[36] Furthermore, the majority said:[37]

> [53] … where there are potentially rights in issue, it must be open to Ngāti Whātua Ōrākei to seek to clarify its status in the area over which it claims rights short of a challenge to the particular decisions to transfer the specified properties.

[40] However, two of the declarations were then identified as problematic, namely:[38]

> (e) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with Crown's obligations to make those decisions in accordance with tikanga; and
>
> (f) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with the Treaty of Waitangi and its principles, and Ngāti Whātua Ōrākei's rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

[41] The majority observed, importantly:[39]

> [65] …. The relief sought in paragraph (e) is a declaration that the particular decisions, that is, the Ngāti Paoa and Marutūāhu decisions, "have

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34 At [48].
35 At [48].
36 At [50]–[64].
37 Footnote omitted.
38 At [29] and [65].
39 Emphasis added.

> been developed and made inconsistently with the Crown's obligations to make those decisions in accordance with tikanga". Paragraph (f) seeks a declaration the particular decisions have been made inconsistently with the Treaty and its principles, and with Ngāti Whātua Ōrākei's rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.
>
> [66] Both paragraphs are framed as challenges to process which may be broader. But the processes are described as relating only to the Ngāti Paoa and M[a]rutūāhu decisions, as specifically defined. *In context, the relief sought can only be characterised as a challenge to the decision which has been made to legislate to transfer the relevant properties albeit the illegality is said to arise because of some prior lack of process*. To this extent we agree with the approach taken in the Court of Appeal. We would accordingly strike out these two paragraphs. This would also require re-pleading of other aspects of the current pleading which are directed towards the transfer of these particular properties.

[42] We consider the italicised passage records the key threshold finding of the majority. And like McQueen J, we consider the same outcome is inevitable in this case. Put simply, while Declaration E is framed by Mr Griggs as a challenge to a decision of the Crown in the executive, its inevitable effect is to prevent parliamentary consideration of the Deed and proposed settlement legislation. As a consequence, Declaration E infringes the principle of non-interference in same way as the declarations the majority refused to reinstate in *Ngāti Whātua Ōrākei*.

[43] To elaborate, the operative part of the AIP and of the Deed is the agreement by the Crown to introduce legislation to give effect to the Deed. Imi Moriori allege that the decision to enter into the AIP and the Deed was an unlawful exercise of prerogative power. A declaration to that effect necessarily means that the Crown's purported agreement to introduce legislation to Parliament is also unlawful. That is not simply a matter of contractual unenforceability.[40] The Crown in the executive must not act outwith its powers,[41] and the effect of the declaration, if granted, is that the Crown is expected to act in accordance with it.[42] The making of the declaration thus envisages a direct interference in the parliamentary process. It would, as McQueen J aptly put it, dictate to the Crown what it could put before Parliament.[43]

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40 For a discussion on the separate issue of enforceability see: *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [44]–[46].

41 For statements to that effect in the context of Māori interests see *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577–578 and *Wallis v Solicitor-General* [1903] AC 173.

42 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at [31.5.1].

43 Strike-out judgment, above n 3, at [89].

[44] Furthermore, if there is any doubt about the effect of Declaration E, the application for interim relief makes this plain. The interim relief expressly seeks to prevent the Crown from taking "any further action that is or would be consequential on the exercise of the Crown's prerogative power to settle the claim of [Ngāti Mutunga] under the Treaty of Waitangi to the extent that it purports to recognise that Ngāti Mutunga holds te tino rangatiratanga over Rēkohu". Further "action" must include the act of proposing a draft settlement Bill for introduction to Parliament. This plainly offends the principle of non-interference.

[45] We do not consider the reasoning of Elias CJ in dissent in *Ngāti Whātua Ōrākei* or the reasoning of the Supreme Court in *Wairarapa Moana* mandates a different response. It is necessary to lay out Elias CJ's reasoning at some length to explain why that is so. The Chief Justice prefaced her analysis with the following observations:[44]

> [77] The difficulty faced by those hapū and iwi who claim rights according to tikanga or custom is that settlements by the Crown with other claimant groups may be inconsistent with their rights and interests according to tikanga. Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation. The overlapping claims policy means that such questions of status are not required to be authoritatively resolved before Treaty settlements which affect them are entered into.
>
> [78] Where claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them. Occasion to make such determination may arise in a number of ways, including in claims for redress for infringement of rights, in claims to restrain the exercise of public powers which impact upon rights, or under the jurisdiction of the High Court to declare what the law is. In the case of declaratory relief the parties sought to be bound by the determination will be joined and, because of the questions of status entailed, it may be appropriate for the Attorney-General to be joined to represent the wider public interest as well as because of Treaty of Waitangi implications.

[46] She then described the Ngāti Whātua Ōrākei claim in this way:

> [95] Ngāti Whātua Ōrākei takes the view that the matter is however quite different if the Crown, without Ngāti Whātua Ōrākei's agreement, provides land in which Ngāti Whātua Ōrākei claims mana whenua in settlement of historical grievances another iwi has with the Crown. That it treats as being inconsistent with its tikanga and with its legal rights and an unreasonable erosion of its mana whenua. It seeks declarations in the proceedings as to its legal rights and the lawfulness of the Crown's actions and policies. It says it is not reasonable for the Crown to treat its claim to mana whenua as irrelevant.

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44 *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 25 (footnote omitted).

> The Minister in confirming the provision of properties in central Auckland to Ngāti Paoa and to the Marutūāhu iwi said that he had "determined" that these iwi had "interests in the central Tāmaki region" which made the redress appropriate. Ngāti Whātua Ōrākei seeks access to the Court to challenge that determination by obtaining a declaration of what it says are its legal rights according to tikanga which are inconsistent with the imposition on it of the Crown's redress.

[47] The issue on appeal was then framed as:[45]

> … whether the declaratory relief Ngāti Whātua Ōrākei seeks in relation to its interests and rights and the Crown obligations in respect of them under the Treaty and in law is not available because the Crown proposes legislation to vest the properties directly in Ngāti Paoa and the Marutūāhu rōpū.

[48] The Chief Justice affirmed that it is well established that the courts cannot interfere in proceedings in Parliament;[46] that it is necessary to consider whether the core business of Parliament will be adversely affected;[47] and that the principle of non-interference exists to ensure that Parliament is free to consider what it will and Ministers are free to put before it suggestions to consider.[48] But even so, the Chief Justice did not think that the fact that the decision to transfer the properties might at some time in the future be legislated excluded the possibility of litigation about that decision. She said:

> [112] These authorities do not suggest any wider inhibition of court function simply because if legislation is enacted it may affect the issue before the court. If the relief sought in the proceeding is discretionary (as declaratory relief is) the fact that the court determination is likely to be overtaken or that the subject matter of the litigation is under active consideration in Parliament may well be relevant in considering whether the relief sought should be granted, although a decision to decline relief in exercise of discretion will often not be a matter capable of assessment on preliminary inquiry. I discuss the declaratory relief sought under the final heading of these reasons. For present purposes however it is enough to reject the suggestion that a Bill before Parliament constitutes a bar to the jurisdiction of the court.

[49] She also said:[49]

> [113] … In any event, it may be doubted that the more developed Treaty settlement processes and the post settlement relationships now in place can properly be regarded as policy development which is not amenable to the

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45 At [98].
46 At [105].
47 At [108].
48 At [111].
49 Footnotes omitted.

> supervisory jurisdiction of the court. I would regard cases which suggest as much with some scepticism in 2018.
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> [114] I consider that the Court of Appeal in the present case mischaracterised the claim when it said that its effect was to declare the authorisation to be obtained through Parliament as "unlawful" and in breach of Ngāti Whātua Ōrākei's rights "if made now in the course of a process already under way and with legislation intended to be introduced". Parliament speaks to the courts only through enacted legislation. Whether the enactment proposed will proceed and, if so, the form it will take is uncertain because it is a matter for Parliament. Just as the executive cannot bind itself by contract to introduce and pass legislation, it cannot properly give any assurance to the court that the legislation it proposes will be passed.
>
> [115] Provided that the court does not seek to preclude parliamentary consideration, I cannot see that any determination of present right of itself constitutes an interference with proceedings in Parliament. Indeed, in some cases it may provide information that Parliament may want to consider. That is not, in my view, interference with proceedings in Parliament. Parliament remains free to legislate to modify or abrogate any existing rights. It is free to legislate without inquiring into the existence of rights or waiting for court determination of them. The courts will do nothing to prevent Ministers from introducing legislation with that effect for Parliament's consideration. The freedom of debate and the freedom of speech in Parliament is not affected.
>
> [116] The constitutional functions of the courts are not enlarged by this approach. Rights in issue in the courts may always be changed by legislation. The prospect does not deflect the courts from carrying out their present responsibilities. Nor are they deflected by statements of government policy that legislative change will be sought. Such statements cannot mark out no-go areas for the courts.

[50] She then concluded:

> [121] The Court of Appeal in the present case reasoned that, since Ngāti Whātua Ōrākei's rights would not be affected other than by legislation, the proceeding was inevitably an interference with the proceedings in Parliament. That is not reasoning I can accept. Parliament remains free to act. But Ngāti Whātua Ōrākei should equally not be deprived of the opportunity to have its case heard. Even if the proposed legislation is enacted, it is not clear to me that there is no continuing live issue concerning Ngāti Whātua Ōrākei's status in relation to central Auckland, whatever the outcome of the settlements now being implemented with other iwi. These are matters for consideration at a substantive hearing.

[51] Thus the Chief Justice did not accept that the prospect of legislative implementation is "a talisman effective against court determination of rights where the courts do not seek to prevent parliamentary consideration".[50]

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50 At [124].

[52] Coming then to declarations (e) and (f) sought by Ngāti Whātua Ōrākei, Elias CJ did not consider this as a clear case for strike out. She observed:

> [127] … Whether the Crown's processes have been in breach of obligations in law to observe tikanga, the Treaty of Waitangi, and consistently with the rights affirmed by the United Nations Declaration on the Rights of Indigenous Peoples is a question likely to recur in the Crown's post-settlement dealings in respect of lands in which Ngāti Whātua Ōrākei claims mana whenua, whether under s 120 of the Collective Redress Act or in its inevitable continued dealings with Ngāti Whātua Ōrākei and other iwi. There remains a continuing Treaty relationship which means Ngāti Whātua Ōrākei has a continuing interest in how the Crown conducts itself. The approach taken by the Crown sets a pattern I would not at this stage of the proceedings prevent Ngāti Whātua Ōrākei from challenging.

[53] In the result, the Chief Justice came to a different view from the majority about whether the declarations amounted to an improper interference with parliamentary process, emphasising the functional importance of the courts as a mechanism for vindicating Ngāti Whātua Ōrākei's tikanga-based rights.

[54] But it would be wrong to construe the Chief Justice's reasons as licensing litigation that overtly seeks to prevent the introduction of draft legislation to Parliament. On the contrary, as just noted, the Chief Justice made clear that the prospect of legislative implementation is not "a talisman effective against court determination of rights *where the courts do not seek to prevent parliamentary consideration*".[51] In this regard, the Chief Justice did not have before her an accompanying application for interim relief designed to achieve exactly that. Declaration E and the corresponding interim relief clearly violates the principle of non-interference on Elias CJ's account of it.

[55] Nothing said by the majority in *Wairarapa Moana* suggests otherwise.[52] That case concerned a preliminary decision of the Waitangi Tribunal relating to the resumption of land under statute. When the matter came to be considered, settlement legislation then before the House, if enacted, would have put an end to the

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51 At [124] (emphasis added).

52 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*, above n 24.

proceedings.[53] The Supreme Court nevertheless found that the proceedings could continue, observing:

> [46] … At an earlier stage in this process, Mercury submitted in opposition to Wairarapa Moana's application for leave to appeal directly to this Court, that the application itself demonstrated this proceeding was, in substance, an attempt to interfere inappropriately in Parliamentary proceedings. We disagreed. Elias CJ's discussion in *Ngāti Whātua Ōrākei Trust v Attorney-General* of the 1976 decision of Beattie J in *Fitzgerald v Muldoon*, demonstrates why. As Elias CJ noted, the plaintiff sought injunctions and mandamus against the Prime Minister whose purported suspension of payments to the New Zealand superannuation fund was argued to be unlawful. An application for priority fixture was made to ensure the matter could be heard before Parliament's next sitting. The Crown opposed on the basis that retrospective legislation would be introduced into the House to deal with the issue. The Crown argued that the plaintiff was simply trying to "beat Parliament to the draw". Beattie J granted the priority fixture. He considered that the proceedings were brought to require the Prime Minister to comply with existing legislation. The plaintiff was entitled to have his case heard with expedition. After discussing that decision, Elias CJ said this:
>
> > [119] I do not think the circumstance that the plaintiff in *Fitzgerald v Muldoon* sought to uphold statutory obligations is reason not to apply the same approach. Until Parliament changes the law, the courts must be open to citizens who seek to have their existing legal interests and rights determined. The rights recognised in s 27 of the New Zealand Bill of Rights Act 1990 to natural justice and to bring proceedings against the Crown on equal terms would not otherwise be fulfilled. Parliamentary freedom of debate and in its proceedings is unaffected by the judicial responsibility to hear and determine rights and interests protected by law.
>
> [47] Second, these appeals do not put the claims settlement Bill in issue in any way. Rather, they raise orthodox claims of statutory or other right: the right to have extant applications for resumption determined according to law, and the related right to test the implications of tikanga considerations in that context. They therefore involve no conflict with the terms of s 11 of the Parliamentary Privilege Act 2014, nor any breach of the common law principle of non-interference. A passage from the Court of Appeal decision in *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General*, delivered sometime after this Court's decision in *Ngāti Whātua Ōrākei Trust*, captures the essential points:
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> > [33] … the reasoning of both the majority and Elias CJ in *Ngāti Whātua* is consistent with the proposition that the courts may make declarations of existing right, interest or entitlement whether or not there is a bill before the House which may affect them in some way. Such relief is not "in relation to parliamentary proceedings", in the sense provided for by … the Parliamentary Privilege Act. It does not amount to an interference by the courts in Parliament's "proper sphere of influence and privileges" because such declarations would be about existing rights, interests or entitlements, and not what

[53] At [45].

> Parliament may be proposing to do in relation to them. The terms of s 4(1)(b) of the Parliamentary Privilege Act are apposite here. Comity is a principle of "mutual respect and restraint" between the legislative and judicial branches as to their respective constitutional functions. It is the function of courts to adjudicate on rights and entitlements.
>
> …

[56] Those passages clearly affirm the constitutional role of the court to hear and determine disputes about extant rights, even though there may be legislation pending on the same subject matter. But the Supreme Court does not anywhere purport to derogate from the basic proposition that litigation of this kind is permissible provided it does not seek to prevent parliamentary consideration.[54]

[57] Returning to the facts of this case, Declaration E and the interim relief seek to prevent the Crown from introducing settlement legislation to Parliament pursuant to the AIP and the Deed. This offends the principle of non-interference and is beyond the power of the Court to grant.

[58] Nothing said here however should be taken to preclude Imi Moriori from seeking to vindicate their mana and any corresponding powers and responsibilities in tikane Moriori, common law (including customary law) or under statute. The Crown cannot purport to override existing rights, including customary rights sourced in tikane, unless expressly authorised by law.[55] It is evident to us that the declarations (a)–(d) sought by Imi Moriori are appropriately directed to this, and may be drafted in such a way as to explicitly avoid breach of the principle of non-interference. By contrast, Declaration E dealing specifically with the legality of the AIP and now the Deed goes too far. It is a bulwark that seeks wholly to prevent parliamentary consideration of proposed legislative recognition of Ngāti Mutunga's mana.

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54 *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 25, at [115].

55 *Nireaha Tamaki v Baker*, above n 41; *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [34] per Elias CJ; *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at [67]–[68]; and *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 16, at [65] and [575].

Issue Two: Interim relief

[59] Given our conclusion to issue one, interim orders of the kind sought are clearly impermissible, whether or not the AIP or the Deed also otherwise affect existing rights. But given the significance of this issue to the parties we make four observations.

[60] First, as La Hood J observed, neither the AIP nor the Deed purport to directly affect extant third-party rights and interests in law.[56] The agreements reached are expressed to be conditional on further legislative action. Moreover, as already noted, the Crown cannot purport to affect any extant legal rights without lawful authority. Nothing in the AIP or the Deed purports to confer such authority.

[61] Second, the AIP and Deed may nevertheless trigger an immediate legislative response with potential consequences for extant rights and interests. As explained by the majority when dealing with the reinstated declarations in the *Ngāti Whātua Ōrākei* case, declarations specifically tailored to the operation of existing legislation may be permissible. In this regard, Mr Griggs referred to the potential implications of the Crown recognition of Ngāti Mutunga rangatiratanga in the AIP for the purposes of the Resource Management Act and the MACA as illustrations of the immediate effect of the AIP and the Deed. But these are also complex issues and we have not heard sufficient argument about the effect of Crown recognition of Ngāti Mutunga's tino rangatiratanga on the operation of those Acts to be able to make robust findings.[57] But, in principle, litigation directed to that specific effect only may justify targeted interim relief.[58]

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56 Interim orders judgment, above n 3, at [26].

57 For illustrations of this complexity see *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352; *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka* [2024] NZSC 164, [2024] 1 NZLR 857; and *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka (No 2)* [2025] NZSC 104, [2025] 1 NZLR 739.

58 The facts and issues in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 80 are illustrative of the potential significance of tikanga as law in the context of the application of environmental legislation, in that case the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act). An issue in that case was whether tikanga could be treated as "applicable law" to be considered by the decision-making committee empowered to grant consents for the purpose of sea mining. The Supreme Court found that it was, observing (citations omitted):

> [169] For the purposes of the EEZ Act, tikanga Māori has the same meaning as in s 2(1) of the RMA, that is, "Maori customary values and practices". That definition is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law. Rather, tikanga is a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices referred to in the Act.

[62] Third, the AIP and the Deed speak directly to the relationship of the Crown to Imi Moriori and Ngāti Mutunga. Arguably, by recognising the "tino rangatiratanga" of Ngāti Mutunga over the Chatham Islands, the AIP and now the Deed have an immediate effect on the status of Imi Moriori in tikane Moriori that might justify orders for interim relief. In this regard recognition of "tino rangatiratanga" by the Crown is direct engagement with tikanga and tikane, the implications of which must be understood from the viewpoint of those most directly affected by that recognition — that is from within the Imi Moriori and Ngāti Mutunga worldview. As the Law Commission | Te Aka Matua o te Ture recently said in *He Poutama*:[59]

> Tikanga must not be viewed through a non-Māori lens, or shoehorned into an English law framework. It should be defined by reference to tikanga as a complete system in which the core concepts are intertwined and exist as an interconnected matrix. Tikanga is a principles-based system of law, capable of adaptation according to context.

[63] We understand from counsel that Imi Moriori sees the recognition of Ngāti Mutunga's tino rangatiratanga by the Crown in the AIP and now the Deed as an exercise of the Crown's mana in clear derogation of the mana of Imi Moriori.[60] The effect of this for them is existential and for which there must be, in tikane Moriori, an immediate response to restore and protect their mana.

[64] Applying the guidance afforded by the Supreme Court in *Ngāti Whātua Ōrākei*, it must be open to Imi Moriori to seek to have confirmed its status or more

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> It follows that any aspects of this subset of tikanga will be "applicable law" in s 59(2)(l) where its recognition and application is appropriate to the particular circumstances of the consent application at hand.

59 Law Commission | Te Aka Matua o te Ture *He Poutama* (NZLC SP24, 2023) at [8.39(d)] (footnotes omitted). See further: *Amodu Tijani v Southern Nigerian Secretary* [1921] 2 AC 399 (PC) at 402–404; *Paki v Attorney-General*, above n 55, at [15]–[20]; *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka*, above n 57, at [49]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 58, at [297] per Williams J; *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 at 58 per Brennan J; and *Commonwealth of Australia v Yunupingu* [2025] HCA 6, (2025) 421 ALR 604 at [139]–[143] per Gordon J.

60 Māmari Stephens, an expert for the Imi Moriori, explained the significance of the words used in the AIP in this way:

> It is clear to me that the references to mana and tino rangatiratanga in [the Crown's proposed acknowledgment] involve what would have been understood by those terms in the middle of the 19th century, rather than later senses such as 'self-determination'. In the context of the language used in Te Tiriti o Waitangi and the events of 1842, I consider that these words ("mana" and "te tino rangatiratanga") would be understood by any competent speaker of te reo Māori as affirming that, in 1842, the chiefs of Ngāti Mutunga held direct authority/chieftainship over the islands of Rēkohu, (now referred to as the Chatham Islands), hence the need to consult with them before annexing that territory.

accurately, its mana over the Chatham Islands short of a challenge to the particular decisions to introduce legislation about Ngāti Mutunga's rangatiratanga. Corresponding interim relief specifically tailored to the protection of its mana may therefore be available, subject to satisfaction of the ordinary threshold requirements for such relief.[61] The merits of the claim for substantive or interim relief, and the extent to which Crown recognition in fact affects their mana in any actionable sense, are matters to be resolved in the usual way. These are complex issues too. Our observations here should not be taken to address those merits.

[65] Fourth, the justiciability of the Crown treaty settlement negotiations in this case was not a matter argued before us. The appeal focussed on application of the principle of non-interference. But as the Supreme Court noted *Ririnui v Landcorp Farming Ltd*:[62]

> [89] … Courts have treated decisions about Treaty of Waitangi settlements as inappropriate for judicial review, not simply because they often involve legislation but also because the issues involved in settlements — such as the nature, form and amount of redress — are quintessentially the result of policy, political and fiscal considerations that are the proper domain of the executive rather than the courts.

[66] However, as that Court also said, that does not mean any decision having some Treaty context is inappropriate for judicial review.[63] Where, as here, the dispute is centrally about the correctness of the Crown's recognition of "tino rangatiratanga", that is essentially a matter of tikanga and tikane and, in appropriate cases, amenable to adjudication.[64] However, we have not been asked to examine this difficult issue and again nothing we say here should be to seen to express a final view on this. We simply acknowledge that for the purpose of interim relief, in a context where there are multiple competing considerations, bearing on the rights and interests of the affected Treaty partners, any interference in the settlement negotiation process is a significant matter demanding caution.

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61 *Minister of Fisheries v Antons Trawling Company Ltd*, above n 15, at [3].
62 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.
63 At [90].
64 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 16, at [564]–[569]; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 57, at [100]–[112]; *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka*, above n 57; and *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka (No 2)*, above n 57.

[67] Returning to the question of interim relief, orders directed to preventing the Crown from presenting draft legislation to Parliament plainly violate the principle of non-interference. This appeal must accordingly fail.

Result

[68] The appeals are dismissed.

[69] The appellants must pay one set of costs for a standard appeal on a band A basis to the first and second respondents, together with usual disbursements. We certify for second counsel.

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