**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA511/2023**
**[2026] NZCA 255**

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| BETWEEN | WAIRARAPA MOANA KI POUĀKANI INCORPORATION<br>Appellant |
| AND | ATTORNEY-GENERAL<br>Respondent |

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| Hearing: | 22 October 2024 |
| Court: | French, Katz and Ellis JJ |
| Counsel: | S J Mount KC, M K Mahuika and T N Hauraki for Appellant<br>C D Tyson and J B Watson for Respondent<br>H K Irwin-Easthope and P A Mitskevitch for Te Kāhui Tika Tangata \| Human Rights Commission as Intervener |
| Judgment: | 16 June 2026 at 2.00 pm |

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The appellant must pay costs to the respondent for a standard appeal on a band A basis, together with usual disbursements.**

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**REASONS OF THE COURT**

(Given by Katz J)

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## Introduction

[1] In October 2021 the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a Rua Settlement Trust (Settlement Trust) signed a deed of settlement with the Crown in respect of the historical Treaty of Waitangi | te Tiriti o Waitangi (Treaty) grievances of Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua. Legislation giving legal effect to

the deed of settlement — the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act 2022 (Settlement Act) — was enacted the following year, in December 2022.

[2] The Settlement Act provides for a full and final settlement of Ngāti Kahungunu ki Wairarapa Tāmaki nui-a Rua's historical Treaty claims.[1] One of the claims settled was the Wai 85 claim, which had been brought by Wairarapa Moana ki Pouākani Incorporation (Wairarapa Moana Inc) in the Waitangi Tribunal.[2] The Wai 85 claim related to the Pouākani block of land in the central Waikato, including the land on which the Maraetai Power Station complex on the Waikato River has been built.

[3] Wairarapa Moana Inc accepts that s 15 of the Settlement Act has fully and finally settled its Wai 85 claim and barred the jurisdiction of the Waitangi Tribunal or the courts to consider that claim further. It asserts, however, that the statutory extinguishment of this claim is inconsistent with its right under s 27(3) of the New Zealand Bill of Rights Act 1990 (Bill of Rights) to bring civil proceedings against the Crown and have them heard according to law, in the same way as civil proceedings between individuals. Wairarapa Moana Inc filed a proceeding in the High Court, seeking a declaration of inconsistency (DOI) to that effect (the DOI proceeding).[3]

[4] The Attorney-General protested the jurisdiction of the High Court to hear and determine the DOI proceeding and filed a dismissal application, based on the ouster clause in s 15(4) of the Settlement Act. Cooke J found, however, that the High Court did have jurisdiction to make a DOI under s 27(3) of the Bill of Rights.[4] The Judge went on, however, to decline to exercise that jurisdiction and dismissed the proceeding in reliance on the Court's inherent jurisdiction.[5]

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1 Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act 2022 [Settlement Act], ss 15(1)–(2).

2 Section 14(3)(a)(i).

3 Wairarapa Moana Inc's statement of claim also seeks declarations of inconsistency with arts 2(3)(a) and 14(1) of the International Covenant on Civil and Political Rights and the Treaty of Waitangi or its principles. Wairarapa Moana Inc's notice of opposition to the dismissal application, however, focussed solely on its application for a declaration of inconsistency under the New Zealand Bill of Rights Act 1990 [Bill of Rights]. Further, that is the only claim addressed in the High Court judgment. We take the same approach.

4 *Wairarapa Moana Ki Pouākani Incorporation v Attorney-General* [2023] NZHC 2086 [judgment under appeal] at [7]–[25].

5 At [26]–[42].

[5] Wairarapa Moana Inc appeals the dismissal of its proceeding. It says that the only matter before the High Court was the Attorney-General's application to dismiss the proceeding on jurisdictional grounds. As the Judge found that the Court did have jurisdiction, the proceeding should have continued to trial.

[6] The Attorney-General, on the other hand, argues that the Judge erred in declining to dismiss the proceeding on jurisdictional grounds, and has filed a notice of intention to support the High Court decision on that basis. Alternatively, the Attorney-General says that the Judge was correct to decline to exercise jurisdiction and dismiss the proceeding in the Court's inherent jurisdiction.

[7] Te Kāhui Tika Tangata | Human Rights Commission (the Commission) appeared as an intervener, supporting the position of Wairarapa Moana Inc in this appeal.

## Background

*Historical context*

[8] Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua is a grouping of interconnected hapū that occupy (or historically occupied) two of the six taiwhenua (regions) that make up the broader Ngāti Kahungunu iwi: Ngāti Kahungunu ki Wairarapa and Ngāti Kahungunu ki Tāmaki nui-a-Rua.

[9] In the late 19th century, the Crown acquired two lakes (Lake Wairarapa and Lake Ōnoke) located in those regions, and the lands surrounding those lakes, under the promise of providing "ample reserves" of land for the affected hapū and whānau.[6] This promise was not acted upon until 1916, when the Crown vested 30,486 acres of (then) unproductive land (the Pouākani block) in the Waikato to some of the dispossessed hapū. The Crown had itself acquired the Pouākani block from its original owners, Raukawa and Ngāti Tūwharetoa.[7]

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6 *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 [Supreme Court decision] at [33].

7 At [33]–[34].

[10] Wairarapa Moana Inc is a Māori incorporation representing the descendants of certain hapū of Ngāti Kahungunu ki Wairarapa Tāmaki nui-a Rua.[8] In broad terms, the shareholders of Wairarapa Moana Inc are descended from the original 230 owners of Lake Wairarapa and Lake Ōnoke and the surrounding lands.[9]

[11] In 1949, the Government compulsorily acquired 787 acres of the Pouākani land for hydroelectric development, including the construction of the Maraetai Power Station complex on the Waikato River, and compulsorily leased 683 acres for construction of the Mangakino township.[10] The Waitangi Tribunal has found that this was done without timely notice to or proper compensation for the Māori landowners.[11]

[12] A small number of the descendants of the original owners relocated from Wairarapa to Pouākani after 1949. The vast majority of descendants, however, remained living in the Wairarapa. In addition, many of those who did move subsequently returned to the Wairarapa. In 2000, it was estimated that only four per cent of Wairarapa Moana Inc's approximately 1,600 shareholders actually lived in the Mangakino-Tokoroa district.[12]

*Transfer of the Maraetai Power Station to Mighty River Power Ltd*

[13] The Maraetai Power Station and associated land were subsequently transferred to Mighty River Power Ltd which, at the time, was a state-owned enterprise (SOE). Mighty River Power Ltd was later renamed Mercury NZ Ltd. It is no longer an SOE but is now a mixed-ownership listed company, with the Crown owning approximately 51 per cent of the shares. Mercury NZ Ltd is still subject, however, to the resumption regime in ss 8A to 8H of the Treaty of Waitangi Act 1975,[13] which confers on the

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8 Pursuant to pt 13 of Te Ture Whenua Maori Act 1993.

9 Not every living descendant of the original 230 owners is a shareholder and not every shareholder is a direct descendant. This reflects that prior to the passage of Te Ture Whenua Māori Act, legislation allowed Māori land interests (and shares of Māori incorporations) to be left by will to spouses and other individuals who had no whakapapa (descent) connection to the original owners. See Waitangi Tribunal *The Wairarapa ki Tararua Report* (Wai 863, 2010) [Wai 863 report] at 609–610.

10 Supreme Court decision, above n 6, at [36].

11 Wai 863 report, above n 9, at 1057.

12 At 697.

13 Section 8A(1)(a) of the Treaty of Waitangi Act 1975 provides that the resumption regime applies to land transferred to a state enterprise "whether or not the land or interest in land is still vested in a State enterprise".

Waitangi Tribunal the power to compel the Crown (by binding recommendation) to resume ownership of certain land transferred to SOEs, for return to Māori ownership.[14]

*Waitangi Tribunal claims*

[14] Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua, along with its various hapū, whānau, and representative entities (including those hapū represented by Wairarapa Moana Inc) filed a number of historical claims in the Waitangi Tribunal, including claims relating to Lake Wairarapa and Lake Ōnoke and surrounding lands, the Pouākani land, and/or the Maraetai Power Station assets.[15] Those claims included Wairarapa Moana Inc's Wai 85 claim.

[15] In June 2010, the Waitangi Tribunal released its Wairarapa ki Tararua Report. It found the historical claims to be well-founded and recommended that the Crown provide redress.[16] Amongst other things, the Tribunal found that the Crown had breached its Treaty obligations in relation to its compulsory acquisition of the Pouākani lands for the construction of the Maraetai dam, and recommended reassessment of the compensation provided for those lands, to include the value of the land's potential for hydroelectric generation.[17]

[16] Following the release of the Wairarapa ki Tararua Report, the Crown formally recognised the mandate of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Trust (the Trust) to negotiate a treaty settlement on behalf of Ngāti Kahungunu ki Wairarapa and Ngāti Kahungunu ki Tāmaki nui-a-Rua, in November 2012.

*Settlement negotiations and the draft deed of settlement*

[17] The Crown and the Trust reached an agreement in principle on 7 May 2016. In November 2016, the claimant community ratified the establishment of a new post-settlement governance entity, the Settlement Trust, which then assumed the

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14 Section 8A(2)(a).

15 The relevant claims are Wai 1023 (the Pouākani Wairarapa Exchange Claim), Wai 97 (the Wairarapa Moana Trust Claim/Wairarapa Land and Fisheries Claim), Wai 1050 (the Ngā Aikiha Claim) and Wai 85 (the Mangakino Lands and Waikato River claim).

16 Wai 863 report, above n 9, at 1058–1059.

17 At 1057 and 1059.

mandate to conclude the Treaty settlement.[18] After further negotiations, the Settlement Trust and the Crown initialled a draft deed of settlement on 22 March 2018, which was then ratified by the registered beneficiaries of the Settlement Trust between September and November 2018.[19]

*Resumption claims in the Waitangi Tribunal*

[18] Meanwhile, on 10 February 2017, Mr Kingi Smiler, acting on behalf of the shareholders of the Wairarapa Moana Inc, filed a resumption application for the Pouākani land that had been transferred to Mercury NZ Ltd, under s 8A of the Treaty of Waitangi Act, based on the Wai 85 claim.[20] Subsequently, on 23 August 2019, Ms Reti, acting on behalf of the Settlement Trust, also filed a resumption application for the same land, based on the Wai 1023 claim.[21]

[19] In 2020 the Tribunal issued "preliminary determinations" (the Preliminary Report) indicating it was inclined to recommend resumption of the Pouākani land,[22] but was of the view that Wairarapa Moana Inc was not the appropriate recipient.[23] Instead, the land should be returned to the wider Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua iwi, as the value of the Pouākani assets was proportionate to the much greater, iwi-wide prejudice caused by the Crown's continuum of wrongdoing. The Tribunal was also concerned that returning the land to Wairarapa Moana Inc would mean individuals would benefit in proportion to their financial shareholding, rather than in proportion to the actual Treaty prejudice suffered by individual shareholders.[24]

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18 Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Bill (100-2) (select committee report) [select committee report] at 2.
19 Supreme Court decision, above n 6, at [38].
20 At [40].
21 At [42].
22 Waitangi Tribunal *Determinations of the Tribunal Preliminary to Interim Recommendations Under Section 8A and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) at [215].
23 At [278]–[282].
24 At [279].

*Judicial review of the Preliminary Report*

[20] The Crown, Raukawa, and Mercury NZ Ltd sought judicial review of aspects of the Preliminary Report.[25] The High Court found that the Tribunal had erred in several respects. Amongst other things, Cooke J considered that the fact that other iwi had mana whenua over the Pouākani land would likely be fatal to the resumption claims.[26] Wairarapa Moana Inc appealed the High Court decision directly to the Supreme Court, in a leapfrog appeal.

*The final deed of settlement*

[21] The Crown was initially unwilling to sign a final deed of settlement while the Pouākani land resumption proceedings (and a resumption proceeding relating to Ngāumu Crown Forest land (Wai 429)) remained on foot.[27] Following delivery of the High Court's judicial review decision, however, the Crown and the Settlement Trust re-engaged. In July 2021, they agreed on an enhanced settlement package that increased the financial redress package by approximately $22 million (to $115 million), and an offer of an additional $5 million for the restoration and preservation of the Wairarapa Moana.[28] The increased redress was intended to reflect the resumption claims (Wai 85 and Wai 1023) that had been made in respect of the Pouākani land. The Crown and the Settlement Trust signed the final deed of settlement on 29 October 2021.

*The Tribunal's Process Report*

[22] Meanwhile, the Tribunal undertook an urgent inquiry into the Crown's settlement process, culminating in a report issued on 18 November 2021 (the Process Report). The Process Report found that the Crown's settlement process had been flawed (particularly in respect of mandate issues) and breached the principles of the Treaty.[29] The Tribunal recommended that the Crown postpone the introduction of the settlement legislation.[30]

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25 *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at [10].
26 At [118].
27 Supreme Court decision, above n 6, at [42].
28 At [44].
29 Waitangi Tribunal *Decision of the Tribunal* (Wai 3058, 2021) [process report] at [186]–[189].
30 At [190].

*The progress of the settlement legislation*

[23] The then-Minister for Treaty of Waitangi Negotiations, the Hon Andrew Little (the Minister), considered the Process Report but ultimately decided to proceed with the settlement legislation. He considered that halting the settlement would further delay to the broader iwi the deserved, comprehensive redress that the majority had voted to accept.[31] The Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Bill (Settlement Bill) was introduced into Parliament on 4 February 2022.

[24] On 7 December 2022 the Supreme Court partially allowed the judicial review appeal and referred the matter back to the Tribunal for it to reconsider the resumption applications afresh.[32] By this time, however, the Select Committee had reported back on the Settlement Bill, and the third reading of the Bill was scheduled for five days' time.

[25] The Supreme Court decision was expressly referred to in Parliament during the debate on the third reading of the Settlement Bill, on 13 December 2022. The Minister advised, however, that he had decided to proceed with the legislation, as the Crown had to consider a "whole variety of interests", and had decided to prioritise the desire of the broader Ngāti Kahungunu iwi for certainty, the restoration of their relationship with the Crown, and the $115 million in compensation provided by the settlement.[33] The Settlement Bill was passed and received Royal assent on 16 December 2022.

*The Settlement Act*

[26] The Settlement Act is structured to formally settle the historical Treaty claims of Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua and provide comprehensive cultural and commercial redress.

[27] Part 1 of the Settlement Act records the Crown's historical Treaty breaches and contains a formal apology acknowledging the severe consequences suffered by the iwi, including landlessness, social marginalisation, and environmental degradation.

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31 See select committee report, above n 18, at 3–5.
32 Supreme Court decision, above n 6, at [59] and [163].
33 (13 December 2022) 765 NZPD 14582–14583.

Section 14 defines the "historical claims" being settled. The definition includes every claim that the iwi (or a representative entity) had on or before the settlement date, or may have after the settlement date, that meets two main criteria:[34]

(a) the claim must be founded on a right arising from the Treaty of Waitangi or its principles; under legislation; at common law (including aboriginal title or customary law);[35] from a fiduciary duty; or otherwise; and

(b) the claim must arise from, or relate to, acts or omissions by or on behalf of the Crown, or by or under legislation, that occurred before 21 September 1992.

[28] The definition also expressly includes various Waitangi Tribunal claims, including the Wai 85 and Wai 429 resumption claims.[36] Any pre-21 September 1992 claim is captured by the definition of "historical claims" regardless of whether it had actually arisen, been considered, researched, registered, notified, or formally made on or before the settlement date.[37]

[29] The full and final settlement of the historical claims is provided for by s 15(1)–(2). This is followed by the ouster clause in s 15(4).

[30] Part 2 of the Settlement Act provides cultural redress. This includes vesting culturally significant lands in the trustees, often as reserve land, recognising the iwi's cultural and spiritual associations with specified statutory areas, establishing consultation and protocol arrangements with Crown agencies, and providing for changes to geographic names.

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34 Settlement Act, s 14(2).

35 Although the Settlement Act bars the iwi from pursuing claims in respect of any pre-21 September 1992 actions that are alleged to have breached customary rights, the underlying aboriginal title or customary rights are legally preserved, to the extent they still exist. The Deed of Settlement (which the Settlement Act implements) includes an explicit "avoidance of doubt" clause regarding this issue. Clause 9.5 states that nothing in the deed or the settlement legislation will extinguish or limit any aboriginal title or customary right that Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua may have; constitute or imply an acknowledgement by the Crown that any such aboriginal title or customary rights actually exist; or affect a right the iwi may have arising at common law, including in relation to aboriginal title or customary law, except as otherwise provided in the settlement.

36 Settlement Act, s 14(3)(a)(i)–(ii).

37 Section 14(5).

[31] Part 3 provides commercial redress. This includes the transfer of Crown properties, including licensed Crown forest land, to the trustees. The trustees become licensors under Crown forestry licences and receive accumulated rental proceeds, alongside other commercial benefits.

## The High Court decision

[32] The issues before the High Court turned on the correct interpretation of s 15 of the Settlement Act, which states that:[38]

> **15 Settlement of historical claims final**
>
> (1) The historical claims are settled.
>
> (2) The settlement of the historical claims is final, and, on and from the settlement date, the Crown is released and discharged from all obligations and liabilities in respect of those claims.
>
> (3) Subsections (1) and (2) do not limit the deed of settlement.
>
> (4) Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of—
>
> (a) the historical claims; or
>
> (b) the deed of settlement; or
>
> (c) this Act or the Te Rohe o Rongokako Joint Redress Act 2022; or
>
> (d) the redress provided under the deed of settlement, this Act, or the Te Rohe o Rongokako Joint Redress Act 2022.[39]
>
> (5) Subsection (4) does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or implementation of the deed of settlement, this Act, or the Te Rohe o Rongokako Joint Redress Act 2022.

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38 Footnote added.

39 The Te Rohe o Rongokako Joint Redress Act 2022 [Joint Redress Act] is a separate but closely linked piece of legislation that was progressed through Parliament alongside the Settlement Act. The Joint Redress Act gives effect to specific cultural redress that is shared between Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua and neighbouring iwi, Rangitāne o Wairarapa and Rangitāne o Tamaki nui-ā-Rua, as provided for in their respective deeds of settlement. See select committee report, above n 18, at 2.

[33] The Attorney-General's position is that s 15(4) is a comprehensive jurisdictional bar that uses "very broad language" to completely oust the jurisdiction of courts and tribunals "in respect of" the specific *subject matter* set out in paragraphs (a) to (d). By expressly including the Settlement Act and its resulting redress within the excluded subject matter, Parliament intended to entirely foreclose any post-enactment challenges to the settlement (including the Settlement Act), regardless of the nature of those challenges or the relief sought. This is to ensure the absolute finality of the settlement. Consequently, any judicial inquiry that requires assessing or questioning the protected subject matter (including a proceeding seeking a DOI under the Bill of Rights) is barred. We refer to this as "the wide interpretation" of the ouster clause.

[34] The Judge rejected the wide interpretation. He found that, correctly interpreted, the scope of the ouster clause was significantly narrower, and did not oust the jurisdiction of the High Court in respect of the DOI proceeding.[40]

[35] The Judge noted at the outset that the issue of whether the ouster clause excluded the Court's jurisdiction in relation to the proceeding engaged core constitutional principles.[41] The Judge commenced his analysis with s 15(5) (which preserves the jurisdiction of the courts for matters of interpretation and implementation of the Settlement Act and settlement deed). He found that the DOI proceeding fell within the scope of s 15(5) because:

> [16] … proceedings involving making declarations of inconsistency with the [Bill of Rights] are properly considered to be an aspect of the Court's function of interpreting and applying the law, and accordingly within the jurisdiction contemplated by s 15(5).

The Judge reasoned that DOIs "ultimately depend on questions of statutory interpretation", specifically the interpretation of the legislation in issue "in light of the meaning and effect of the [Bill of Rights]".[42]

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40 Judgment under appeal, above n 4, at [7]–[25].
41 At [7].
42 At [16].

[36] Having found that the proceeding fell within the scope of s 15(5), the Judge went on to consider whether s 15(1) to (4) precluded that jurisdiction, concluding that they did not. He found the meaning and effect of s 15(1) and (2) to be clear, namely that Parliament intended to comprehensively settle all the claims associated with the subject matter of the settlement.[43] He considered, however, that the meaning and effect of s 15(4) was more ambiguous:[44]

> But it is apparent that in addition to settling the historic claims Parliament is also providing that there is no jurisdiction to *inquire into them in any new proceedings*. This includes excluding the jurisdiction of the Waitangi Tribunal to conduct any new inquiry or make new recommendations into alleged Treaty breaches. That is particularly captured by the words in brackets "(including the jurisdiction to inquire or further inquire, or to make a finding or recommendation)". It is also apparent that this exclusion is not limited to the Tribunal, but also includes any court or other judicial body.

[37] The Judge considered that the words in parentheses were critical and indicated a parliamentary intent to exclude the jurisdiction of the courts only in relation to any new proceedings seeking to advance, re-open or re-litigate the settled claims themselves, with the subject matter of the excluded claims more specifically particularised in s 15(4)(a) to (d).[45] Expressed another way, on the Judge's interpretation of the ouster clause:

(a) the subject matter of the new claim must fall within s 15(4)(a)–(d) (hence it must be a claim "in respect of" the historical claims; the Settlement Act; the Te Rohe o Rongokako Joint Redress Act 2022 (Joint Redress Act); or the redress provided under the deed of settlement, the Settlement Act or the Joint Redress Act); *and*

(b) the claim must seek to advance, advance, set aside, re-open or re-litigate one or more of the historical claims.

We refer to this as "the narrow interpretation" of the ouster clause.

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43 At [17].
44 At [18] (emphasis added).
45 At [18].

[38] The Judge noted that the power to grant a DOI is a core judicial function associated with the rule of law. General statutory language such as that in s 15(4) was insufficient, in his view, to exclude such a fundamental constitutional role.[46] The narrow interpretation was also found to be more rights consistent and was therefore to be preferred under s 6 of the Bill of Rights.[47]

[39] Applying the narrow interpretation to the case before him, the Judge found that the DOI proceeding did not fall within the scope of the s 15(4) ouster clause, as the claim did not seek to re-open or re-litigate the settlement itself.[48]

[40] Having determined the jurisdictional issue in favour of Wairarapa Moana Inc, the Judge went on to consider (on his own motion) whether the Court should nevertheless decline to exercise its jurisdiction. He held that it should, for many of the reasons the Attorney-General had advanced in support of the submission that the Court lacked jurisdiction.[49] Specifically, the Judge reasoned that:

(a) As an aspect of the principle of comity, the Court should respect the wishes of the legislature and not exercise its jurisdiction in an inappropriate way.[50]

(b) Ultimately the assessment of consistency with the Bill of Rights would likely depend on assessing whether any limitation was justified under s 5 of the Bill of Rights.[51] The s 5 inquiry would inevitably be very extensive and would open up not only issues between the Crown and Wairarapa Moana Inc, but also as between other groups involved in the settlement.[52] Evidence would be required in relation to all the historic claims that were settled and the adverse implications of them.[53] Hence, the merits of the settlement would need to be re-opened and re-litigated, which would be inconsistent with Parliament's intent that a full and

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46 At [21].
47 At [23].
48 See at [22]–[25].
49 At [26].
50 At [28].
51 At [31].
52 At [32] and [34].
53 At [34], as evidenced by the Wai 863 report, above n 9.

final settlement was not to be re-litigated.[54] In any event, it would be difficult for the Court to decide whether the removal of the right of access to the courts as part of the settlement of historical claims was demonstrably justified.[55]

(c) Allowing scrutiny of the settlement would set a precedent for re-litigating other Treaty settlements, including those that have been in place for many years.[56]

(d) It was doubtful whether the decision of the Court would have any practical utility as the settlement has been implemented and a declaration would not lead to renegotiation.[57]

(e) There was a risk that exercising jurisdiction in this context could bring the declaration of inconsistency jurisdiction into disrepute. It may be inappropriate to put the Crown in a position where it needs to consider whether it wants to participate in the proceeding altogether.[58]

**The appeal**

[41] The parties identified two issues on appeal:

(a) Did the High Court err in dismissing the proceeding under the inherent jurisdiction?

(b) Did the High Court err in declining to uphold the Crown's protest to jurisdiction?

[42] Although the second issue arises from the Crown's intention to support the High Court judgment on other grounds, rather than from Wairarapa Moana Inc's appeal, it makes sense to consider that issue first. If we agree with the Crown that the

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54 Judgment under appeal, above n 4, at [33].
55 At [35].
56 At [37].
57 At [38].
58 At [39].

High Court has no jurisdiction to hear the DOI application, Wairarapa Moana Inc's appeal must largely fall away.

**Our approach to the interpretation exercise**

[43] We deal at the outset with some preliminary matters.

[44] First, the interrelationship of s 15(4) and 15(5) of the Settlement Act. In our view, the primary focus for the interpretive exercise must be s 15(4). That is because s 15(5) is a "savings" clause which provides an exception or carve out from the jurisdictional bar in s 15(4), in order to preserve the Court's jurisdiction to interpret or implement the deed of settlement and Settlement Act in circumstances where the Court's jurisdiction would otherwise be barred by s 15(4). Accordingly, in our analysis below, we consider the scope of the jurisdictional bar in s 15(4) first, before turning to consider the correct interpretation of the exception in s 15(5).

[45] Second, whether s 6 of the Bill of Rights Act is engaged. Section 6 requires an interpretation of s 15 that is consistent with the rights and freedoms contained in the Bill of Rights to be preferred. Wairarapa Moana Inc submit that s 15 does not clearly and unequivocally remove the Court's jurisdiction to make a declaration of inconsistency, referring (amongst other things) to the Supreme Court's decision in *Fitzgerald v R*.[59] Similarly, the Commission submit that "applying a [Bill of Rights] interpretative lens supports a finding of jurisdiction to consider whether a DOI should be granted". Those submissions give rise to a question about how inconsistency with the Bill of Rights is to be assessed in this case.

[46] Although the six-step methodology set out by Tipping J in the Supreme Court decision of *R v Hansen* has become a cornerstone of Bill of Rights jurisprudence,[60]

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59 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

60 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [88]–[92] per Tipping J. See also at [57]–[62] per Blanchard J and [192] per McGrath J.

the courts have increasingly recognised that its rigid, sequential application is not appropriate in all cases.[61]

[47] Most notably, in *Fitzgerald*, the Supreme Court considered the conflict between the mandatory three strikes sentencing regime (specifically s 86D(2) of the Sentencing Act 2002 (now repealed)) and the right under s 9 of the Bill of Rights not to be subjected to disproportionately severe treatment or punishment. The *Hansen* methodology was found to be inapt due (in large part) to the absolute nature of the human right involved. It was common ground that no limit on the s 9 right can ever be demonstrably justified in a free and democratic society.[62] Accordingly, the *Hansen* methodology, which relies heavily on s 5 of the Bill of Rights and consideration of whether a limit on a right is demonstrably justified, was not well suited to the case. Instead, the Court took the following approaches to the interpretive exercise before them:

(a) The Chief Justice's approach repositioned s 6 of the Bill of Rights as the primary driver of statutory interpretation, rather than a "fall-back" provision to be used only if a rights-infringing meaning fails the s 5 proportionality test.[63] She considered that s 6 is not simply a statutory embodiment of the common law "principle of legality" (which dictates that fundamental rights cannot be overridden by general or ambiguous words; Parliament must "squarely confront what it is doing" and use explicit language).[64] Instead, she viewed s 6 as going further, mandating a "more proactive approach" that actively requires courts to strive to find a "possible" or "tenable" rights-consistent meaning, even

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61 *Fitzgerald v R*, above n 59, at [47] per Winkelmann CJ, [175] per O'Regan and Arnold JJ and [244] per Glazebrook J; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33]; *D (SC31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [100]–[102] per Winkelmann CJ and O'Regan J and [259], n 361 per Glazebrook J; and *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [38]–[41]. The majority in *R v Hansen* also recognised that the approach set out is not always applicable: see *R v Hansen*, above n 60, at [61] per Blanchard J, [93]–[94] per Tipping J and [192] per McGrath J.

62 *Fitzgerald v R*, above n 59, at [78] per Winkelmann CJ, [241] per Glazebrook J and [160] per O'Regan and Arnold JJ.

63 At [48].

64 At [52]–[56].

if it is not necessarily the most likely or obvious grammatical meaning.[65]

(b) O'Regan and Arnold JJ (who delivered joint reasons) framed their interpretive approach through the lens of the principle of legality, rather than repositioning s 6 as the absolute starting point. They considered that s 6 "at least requires the courts to take a similar approach to that adopted under the common law 'principle of legality'".[66]

(c) Glazebrook J considered that it was not necessary for the purposes of the appeal before the Court to revisit *Hansen*. Instead, she resolved the case using "standard statutory interpretation techniques".[67] Like O'Regan and Arnold JJ, she relied heavily on the principle of legality, noting that plain and explicit words are needed to override fundamental rights, and that the language in the three strikes legislation failed to reach that threshold.[68]

(d) William Young J (dissenting) expressly disagreed with Winkelmann CJ's approach. Rather than starting with s 6, he argued that the starting point for the Court should be s 4 (which prevents courts from declining to apply an enactment solely because it breaches the Bill of Rights).[69] He reasoned that ss 4 and 6 must be read together with s 5(1) of the Interpretation Act 1999.[70] In his view, the phrase "can be given a meaning" in s 6 strictly means a meaning that "can, in light of its text and purpose, be reasonably given".[71] He considered this approach to be entirely consistent with the *Hansen* methodology and rejected the idea that s 6 allows the court to read in exceptions that

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65 At [56]–[58] and [61].
66 At [207] (footnote omitted).
67 At [244].
68 At [250]–[251].
69 At [292].
70 Now s 10(1) of the Legislation Act 2019.
71 *Fitzgerald v R*, above n 59, at [293].

> contradict clear statutory text, viewing that as "statutory revision, not interpretation".[72]

[48] Ultimately all of the members of the Court, save for William Young J, found that the words used in s 86D(2) were not sufficiently explicit to override the right not to be subjected to disproportionately severe punishment, particularly given the absolute nature of that right.[73]

[49] We note that *Fitzgerald* differs materially from this appeal in a number of respects. First, a key factor in the Court's reasoning in *Fitzgerald* was that the right engaged (the right not to be subjected to disproportionately severe punishment) is so fundamental and absolute that no limit on it could ever be justified under s 5 of the Bill of Rights. By contrast, the s 27(3) right at issue here is not absolute and is capable of being subject to reasonable, demonstrably justified limits under s 5 of the Bill of Rights.[74] It was due to this distinction that this Court found in *Borrowdale v Director-General of Health* that the *Hansen* approach was appropriate in that case:[75]

> [140] Although *Cropp* and *Fitzgerald* did not apply the *Hansen* approach, they did not doubt the continued application of *Hansen*. Rather, they show that the most appropriate approach will depend on the issues raised on a case by case basis.
>
> [141] In this case, we consider the *Hansen* approach to be appropriate. We say this because, unlike in *Fitzgerald,* this case involves rights that can be justifiably limited under s 5 of the NZBORA. We shall therefore begin our analysis by ascertaining Parliament's intended meaning in accordance with general interpretation principles. In any event, we consider the rights consistent approach we are taking to be in line with the approach taken by the majority in *Fitzgerald*.

[50] In this case, a further distinction lies in the certainty of the rights violation. In *Fitzgerald*, it was common ground that applying the mandatory three strikes sentence regime would involve a breach of the appellant's fundamental s 9 rights. There was a clear and indisputable inconsistency between the sentencing regime and s 9 of the Bill of Rights. In the present context, however, whether s 15(4) of the Settlement Act

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72 At [294] and [330].

73 At [119] per Winkelmann CJ, [251] per Glazebrook J and [218] per O'Regan and Arnold JJ.

74 See, for example, *Official Assignee v Sharma & Family Trustee Ltd* [2016] NHZC 1843, [2016] NZAR 1145 at [20].

75 *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356. See also *Eastwood v New Zealand Police* [2023] NZHC 3885, [2024] NZAR 321 at [42]–[43].

actually breaches s 27(3) of the Bill of Rights at all is a matter of genuine contest. Given this contest, it is conceptually challenging to commence the interpretation exercise with s 6, or the principle of legality, when both of those interpretive presumptions are predicated on the existence of an inconsistency or rights violation, on at least one interpretation of the provision in issue. Here, the Attorney-General's position is that Wairarapa Moana Inc has fundamentally misinterpreted s 27(3) of the Bill of Rights and, on the correct interpretation, there can be no inconsistency between that provision and the s 15(4) ouster clause (at either the jurisdictional stage or in the substantive DOI proceeding).

[51] As discussed further at [84] below, on appeal Wairarapa Moana Inc placed relatively little reliance on the interpretive presumption in s 6 of the Bill of Rights, instead relying largely on the principle of legality and administrative law ouster jurisprudence as supporting the narrow interpretation of s 15(4). The Attorney-General, on the other hand, placed little reliance on s 5 of the Bill of Rights, preferring to leave the issue of justification to the substantive proceeding, if Wairarapa Moana Inc succeeds in this appeal. Accordingly, neither the *Fitzgerald* methodology nor the *Hansen* methodology provides an entirely apt analytical framework for this appeal. Instead, to address the various submissions made by the parties, we structure our analysis as follows:

(a) First, we consider Parliament's apparent intended meaning of the s 15(4) ouster clause, applying ordinary principles of statutory interpretation.

(b) Second, we consider the Attorney-General's submission that s 6 of the Bill of Rights is not engaged at all in this case (and the Judge erred in finding otherwise).

(c) Third, we consider whether s 6 of the Bill of Rights (if it applies) or the principle of legality require a narrow reading of the s 15(4) ouster clause.

(d) Finally, if the DOI proceeding is barred by the ouster clause, we consider whether the High Court's jurisdiction to hear it is nevertheless preserved by the s 15(5) exception for matters of interpretation and implementation.

**What is Parliament's intended meaning of the ouster clause, using ordinary principles of statutory interpretation?**

*The ordinary principles of statutory interpretation*

[52] The meaning of legislation must be ascertained from its text and in the light of its purpose and context.[76] As the Supreme Court observed in *Commerce Commission v Fonterra Co-operative Group Ltd*:[77]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 [the predecessor to the Legislation Act 2019, s 10] makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[53] Here, the Settlement Act must also be "interpreted in a manner that best furthers the agreements expressed in the deed of settlement".[78]

*The text of s 15(4)*

[54] We begin with the plain meaning of the text of s 15(4). For ease of reference, we set out s 15 again:

> **15 Settlement of historical claims final**
>
> (1) The historical claims are settled.
>
> (2) The settlement of the historical claims is final, and, on and from the settlement date, the Crown is released and discharged from all obligations and liabilities in respect of those claims.

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76 Legislation Act, s 10(1).

77 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (footnotes omitted).

78 Settlement Act, s 11.

(3) Subsections (1) and (2) do not limit the deed of settlement.

(4) Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of—

(a) the historical claims; or

(b) the deed of settlement; or

(c) this Act or the Te Rohe o Rongokako Joint Redress Act 2022; or

(d) the redress provided under the deed of settlement, this Act, or the Te Rohe o Rongokako Joint Redress Act 2022.

(5) Subsection (4) does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or implementation of the deed of settlement, this Act, or the Te Rohe o Rongokako Joint Redress Act 2022.

[55] Section 15(4) opens with the sweeping phrase "[d]espite any other enactment or rule of law" which on its face indicates a clear parliamentary intention that the ouster clause is to prevail over any other statutory provisions, secondary legislation, or legal rules or presumptions that are inconsistent with it. The subsection then goes on to state that "from the settlement date, no court, tribunal, or other judicial body has jurisdiction … *in respect of*" the subject matter set out in paragraphs (a) to (d).[79]

[56] The phrase "in respect of" is very common in legislation and is generally interpreted as having a very broad meaning, similar in scope to phrases such as "relating to", "with regard to", or "concerned with". Courts have made two key observations regarding the scope of this phrase: [80]

(a) First, it denotes a connection or relation between the two subject matters to which the words refer.

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79 Emphasis added.

80 See *Shell New Zealand Ltd v Commissioner of Inland Revenue* (1994) 16 NZTC 11,303 (CA) at 11,306. See also *Hunua Holdings Trust v Alderson Logistics Ltd* [2013] NZHC 3102, (2013) 15 NZCPR 112 at [17]. Similar statements have been made in other jurisdictions. For example, Australia: *The Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 (VSC) at 111 and *State Government Insurance Office (Queensland) v Crittenden* (1966) 117 CLR 412 at 416; the United Kingdom: *JTI Polska sp z oo v Jakubowski* [2023] UKSC 19, [2024] AC 621 at [101]; and Canada: *Nowegijick v The Queen* [1983] 1 SCR 29 at 39 and *R v Barton* [2019] 2 SCR 579 at [72].

(b) Second, the words are very widely drawn. In *Shell New Zealand Limited v Commissioner of Inland Revenue* this Court stated that: "The words 'in respect of or in relation to' are words of the widest import."[81]

[57] Accordingly, the plain meaning of s 15(4) is that it bars the jurisdiction of courts and tribunals over all proceedings related to, concerned with, or connected with the subject matter listed in s 15(4)(a)–(d), subject to the exception in s 15(5).

[58] The breadth of the jurisdictional bar in s 15(4) is reinforced by the parenthetical wording "including the jurisdiction to inquire or further inquire, or to make a finding or recommendation". These words indicate that Parliament intended to exclude not only civil proceedings seeking a substantive adjudication or determination, but also any investigatory or recommendatory jurisdiction, such as that held by the Waitangi Tribunal, in respect of the listed subject matter.

[59] In addition, courts will generally strive to interpret a statutory provision in a way that gives meaning to all parts of it, rather than adopting an interpretation that renders any subsection otiose, redundant, or superfluous. Here, however, the narrow interpretation renders parts of s 15 redundant. Specifically:

(a) The inclusion of s 15(4)(a) (the historical claims) would likely suffice to meet the purposes of the narrow interpretation. Section 15(4)(b) (the deed of settlement) could be justified out of an abundance of caution. But there is little additional role for s 15(4)(d) (the redress) and none at all for s 15(4)(c) (the Settlement Act). On the narrow interpretation the necessary connection to a historical claim[82] means that those subsections would not capture any claims not already be covered by s 15(4)(a) and (b).

(b) The exception in s 15(5) (preserving the jurisdiction of the courts in respect of matters of interpretation and implementation) is also redundant. On the narrow interpretation such proceedings would not

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81 *Shell New Zealand Ltd v Commissioner of Inland Revenue*, above n 80, at 11,306.
82 See above at [37(b)].

fall within the scope of the jurisdictional bar and there would be no need for the s 15(5) jurisdictional carve out.

[60] On the wide interpretation, however, s 15(4)(c) has a key role to play. It excludes the jurisdiction of the courts and tribunals in relation to *any* proceedings whose subject matter is the Settlement Act. This would include, for example, proceedings that ask the courts, the Waitangi Tribunal[83] or the Human Rights Review Tribunal[84] to evaluate the Settlement Act, inquire into it, find fault with it, make recommendations regarding it, or assess its consistency with the Bill of Rights, international conventions or the Treaty.

[61] Similarly, on the wide interpretation, s 15(5) plays a vital role in preserving the jurisdiction of the Court in relation to matters of interpretation or implementation, as those matters would otherwise fall within the wide scope of the ouster clause.

*The statutory context*

[62] The statutory context also supports the wide interpretation of the ouster clause. Section 15(1) and (2) provide the immediate statutory context for s 15(4). They provide that the settlement is full and final and that "from the settlement date, the Crown is released and discharged from all obligations and liabilities *in respect of* [the historical] claims".[85] As noted, this phrase is "of the widest import".[86]

[63] Pursuant to s 15(1) and (2), the Crown is discharged from all obligations and liabilities related to, concerned with, or connected with the historical claims. Here, on the plain meaning of s 15(1) and (2), a sufficient nexus or connection between the DOI proceeding and the settled historical claims appears to exist. The substantive claim in the DOI proceeding is fundamentally premised on, and cannot be evaluated independently from, the Crown's settlement of the historical claims. The alleged

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83 For example, the Waitangi Tribunal has express statutory jurisdiction under s 6(1) of the Treaty of Waitangi Act to investigate and determine whether an Act of Parliament (or other legislative enactment) is inconsistent with the Treaty of Waitangi.

84 For example, a claim in the Human Rights Review Tribunal alleging that the Settlement Act is discriminatory in breach of Part 1A of the Human Rights Act 1993. In such circumstance the Tribunal could grant a declaration in respect of the enactment, although s 92K makes it clear that such a declaration does not affect the enactment's validity or enforcement.

85 Emphasis added.

86 See above at [56(b)].

violation of s 27(3) of the Bill of Rights arises directly from the legislative act of settling the Wai 85 historical claim without Wairarapa Moana Inc's consent. It is accordingly a claim "in respect of" the historical claims.

*The statutory purpose of s 15(4)*

[64] We now turn to consider the statutory purpose of finality clauses (including in particular ouster provisions such as s 15(4)) in Treaty settlement legislation.

The purpose of finality clauses in Treaty settlement legislation

[65] Since the first major Treaty settlements with specific iwi were completed in 1995[87] and 1998[88] more than 70 further Treaty settlement acts have been enacted. All of these statutes include finality provisions with wording broadly similar to s 15 of the Settlement Act, albeit there are minor differences in form and content.[89]

[66] Wairarapa Moana Inc and the Commission support the Judge's findings regarding statutory purpose (as summarised at [37] above). The Attorney-General, on the other hand, submits that the purpose of s 15 generally (and the s 15(4) ouster clause in particular) is to guarantee *absolute* finality in respect of the subject matter listed in s 15(4)(a)–(d), in order to meet a range of key policy goals that reflect the unique nature of the Treaty settlement process and Treaty settlement legislation.

[67] Treaty settlement legislation is a unique category of legislation, because it does not simply reflect the Crown unilaterally implementing government policy. Rather, Treaty settlement legislation flows directly from, and gives legal effect to, a previously negotiated agreement reached between the Crown and a Māori claimant group. The passage of Treaty settlement legislation therefore features a constrained parliamentary process. Because the legislation gives effect to a finalised agreement, it is not subject to substantive, clause-by-clause debate and amendment in Parliament. While the

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87 With Waikato-Tainui in 1995 through the Waikato Raupatu Claims Settlement Act 1995.

88 With Ngāi Tahu in 1998 through the Ngāi Tahu Claims Settlement Act 1998.

89 We note that some finality clauses carve out specific claims from the final settlement. For example, s 15(6) of the Ngatikahu ki Whangaroa Claims Settlement Act 2017 enabled a particular Waitangi Tribunal claim to proceed and s 25(6) of the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 preserved the jurisdiction of the courts in respect of a particular proceeding contemporaneously in the Court of Appeal.

Select Committee reviews the settlement bill to ensure it properly reflects the agreed settlement and works in a technical sense, its purpose is not to renegotiate or alter the substantive terms of the relevant deed of settlement. This reflects a long-established parliamentary practice that Parliament should not use its sovereign power to unilaterally change legal agreements reached between the Crown and a third party unless necessary in the national interest. As a result, Parliament essentially treats the legislation similarly to an international treaty, where the House must vote to accept or reject the agreement as a whole.[90]

[68] Given this unique statutory context, we accept the Attorney-General's submission that it is helpful, and appropriate,[91] to consider the broader policy context in which the settlement agreement was reached, as set out in various Crown policy documents and Cabinet papers, explanatory notes to Bills, legislative history materials such as parliamentary debates (Hansard) and select committee reports. The following interrelated themes emerge from those documents:

(a) A primary policy justification for strict "full and final" settlement clauses in Treaty settlement legislation is to achieve a "sense of completion" and promote healing, allowing both Māori and the wider community to shift their focus away from past grievances and toward the growth and development of Māori potential.[92] The aim is to facilitate the Crown and iwi moving forward into a more positive, forward-looking, and partnership-based relationship.[93] This has been a cornerstone of the Crown's policy framework for settling historical claims since the mid-1990s. The Crown view is that, even if a subsequent claim is ultimately dismissed, the mere lodging and hearing

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90 Office of Treaty Settlements *Ka tika ā muri, kā tika ā mua — Healing the past, building a future* (June 2018) [Red Book] at 73. See also Ngāi Tahu Claims Settlement Bill (112-2) (select committee report) at iii.

91 See Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 362–368.

92 *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals* (Te Puni Kōkiri, Wellington, 1994) [detailed proposals] at 50; and Cabinet Paper "Treaty of Waitangi Policies: Ensuring Finality" (26 September 1994) CSC (94) 130 [Treaty of Waitangi Policies: Ensuring Finality] at [10].

93 Red Book, above n 90, at 77.

of that claim would risk disturbing the healing of grievances and the sense of conclusion the settlement is designed to achieve.[94]

(b) To facilitate this shift in relationship:

(i) The Crown provides a formal apology for past wrongs and the agreed redress. By formally addressing past wrongs, the aim is to lay the foundation for an even stronger, forward-looking relationship between the Crown and Māori.[95]

(ii) All settlements are concluded by a mutual and visible acknowledgement from both parties that past grievances have been satisfied.[96]

(c) Treaty settlements are inherently complex and recognise the collective nature of Māori rights and interests based on shared whakapapa. Due to the highly complex and intertwined nature of historical grievances, the Crown considers a claim-by-claim approach to resolving Treaty grievances to be unworkable and not feasible. Rather, settlements are negotiated with "large natural groupings" (iwi or large collectives of hapū).[97] In such circumstances, a degree of opposition from members of the collective group is a common, and almost inevitable, feature of resolving historical claims.[98] However, as the Waitangi Tribunal observed in its Process Report (in agreement with the Crown's submission) "minority groups do not have a power of veto over the settlement process".[99] Hence, settlements almost always proceed despite some degree of internal conflict or dissent and the specific grievances of individuals or hapū will often need to be subsumed into the larger iwi settlement.[100] Finality clauses ensure that "dissidents"

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94 Treaty of Waitangi Policies: Ensuring Finality, above n 92, at [11]; and detailed proposals, above n 92, at 50.
95 Red Book, above n 90, at 79–80.
96 Detailed proposals, above n 92, at 50.
97 Red Book, above n 90, at 39.
98 Select committee report, above n 18, at 5.
99 Process report, above n 29, at [81].
100 At [82].

cannot subsequently use judicial proceedings as a platform to keep grievances alive, thereby protecting the durability and finality of the settlement for the broader iwi and the Crown.[101]

(d) Achieving financial certainty and ending further claims on public funds is a core component of the Crown's policy regarding finality. Because the Crown provides significant financial, commercial, and cultural redress to an iwi to resolve their grievances, it demands certainty in return to secure its "quid pro quo".[102] This ensures that no individual, hapū, or dissident group can successfully seek further financial compensation from the public purse in relation to the historical Treaty breaches that have been settled.

(e) Finality provisions remove a public sense of "open-endedness" around historical claims and are considered vital to maintaining the "wider social licence" and public confidence in the Treaty settlement programme.

The nature of a DOI claim

[69] Wairarapa Moana Inc nonetheless submit that a DOI claim would do little damage to the statutory purpose articulated above. The suggestion was that it would involve a limited inquiry that would not involve interrogating or inquiring into the substantive merits of the settlement itself. In order to explain why we are unable to agree with that submission, it is necessary at this point to say a little more about the nature of a DOI claim.

[70] The history of DOIs in a New Zealand context was recently canvassed by the Supreme Court in *Attorney-General v Chisnall*, where the majority of the Court said:[103]

> [83] In *Attorney-General v Taylor* this Court confirmed that the High Court has jurisdiction to make a declaration that an enactment is inconsistent with

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101 Treaty of Waitangi Policies: Ensuring Finality, above n 92, at [11].

102 Cabinet Paper "Treaty of Waitangi Settlement Fund: Claimant Representation" CSC (94) 15 at [3(b)].

103 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 (footnotes omitted).

> the Bill of Rights. The majority in that case said that by doing so the court is fulfilling its obligation to grant remedies for breaches of the Bill of Rights, and its obligation under the Declaratory Judgments Act 1908 to vindicate rights through the issue of a declaration. Identifying whether the obligation of compliance has been met is a judicial function. As to the purpose of such a declaration, the majority in *Taylor* said that a declaration is in itself a vindication of rights, may be of assistance to Parliament, and may have implications in the context of a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). As Elias CJ said, the issue of a declaration is therefore important in terms of compliance with the rule of law — addressing, at least in part, the rule of law deficit that would otherwise exist in respect of the inconsistency with the right, and the absence of any justification for that inconsistency.
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> [84] The first task for any court when addressing an application for a declaration of inconsistency is to interpret the legislation in question in accordance with the Bill of Rights interpretive framework. This is because the logic of the Bill of Rights, apparent from its provisions, is that a declaration of inconsistency is only appropriate where the court has concluded that the legislation cannot be interpreted in a rights-consistent manner.
>
> [85] If, on the interpretation settled upon by the court, it is satisfied that there is a limitation on rights, the court then proceeds to assess, under s 5, whether that limitation is a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society. This is also called the "proportionality" assessment. At each stage the court may well require evidence to provide necessary context to assist it in assessing the existence, nature and extent of any limitation of rights.

[71] It is the second stage of the required analysis that is highly problematic here. Assuming that Wairarapa Moana Inc was successful in establishing that s 15(4) has, on its face, limited its s 27(3) right, there would then need to be an inquiry about whether the limit was demonstrably justified. That would necessarily involve an interrogation of the settlement itself, the Wai 85 claim and the other competing claims as well as wider matters of government policy and fiscal constraints. It would likely be a very considerable exercise, and one in which the courts are not well placed to engage.

[72] We also regard it as highly relevant that, in the event that Wairarapa Moana Inc ultimately prevailed and the courts were persuaded that a DOI should be made (and upheld on any appeal) there would be further substantive consequences for the settlement. That is because following the Supreme Court's decision in

*Attorney-General v Taylor*,[104] Parliament enacted ss 7A and 7B of the Bill of Rights,[105] and the House of Representatives adopted standing orders which together set out how the executive and Parliament are to respond to any such declaration.[106] The required response is not just procedural, but substantive. Put briefly, it entails:

(a) the Attorney-General must bring the DOI to the attention of the House of Representatives;[107]

(b) the DOI is referred to the appropriate select committee for consideration;[108]

(c) that select committee must, within four months of the referral, consider the declaration and prepare a report for the House, which can include recommendations to address the declaration;[109]

(d) the select committee report on a DOI is set down as a Government order of the day;[110]

(e) the Minister for the infringing statute must present to the House a report advising of the Government's response;[111] and

(f) there is then a debate in the House on:[112]

    (i) the DOI itself,

    (ii) the select committee's report on the DOI, and

    (iii) the Government's response to the DOI.

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104 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.
105 See New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, s 4; and New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (230-2) (select committee report).
106 Standing Orders of the House of Representatives 2023, SO 269A and appendix F.
107 Bill of Rights, s 7A(2).
108 Standing Orders of the House of Representatives, appendix F cl 4.
109 Appendix F cls 5–6.
110 Appendix F cl 7.
111 Bill of Rights, s 7B(1).
112 Standing Orders of the House of Representatives, appendix F cl 10.

[73] The possibility that these measures could be a consequence of Wairarapa Moana Inc's substantive claim proceeding seems to us to be wholly inconsistent not only with the principle of finality that underpins the Settlement Act, and others like it, but also with the conventional constraints discussed in [67] above.

Conclusion

[74] In our view, therefore, the broader policy and legislative context, including the nature of a DOI remedy itself, strongly supports the conclusion that the overall statutory purpose of s 15 is to secure the absolute finality of the settlement by barring further proceedings, of whatever nature, in respect of (related to, concerned with, or connected to) to the historical claims, the settlement deed, the Settlement Act, and the redress provided.

[75] The interpretive directive in s 11 also supports a wide interpretation of the ouster clause. It provides that the Settlement Act must be "interpreted in a manner that best furthers the agreements expressed in the deed of settlement". The broader context summarised above supports the view that the deed of settlement reflects a political compact intended to achieve absolute finality. To interpret the s 15(4) ouster clause narrowly (thereby permitting ongoing litigation regarding the Settlement Act or the settlement deed) would, in our view, be contrary to the interpretive directive in s 11.

*Conclusion on Parliament's apparent intended meaning of s 15(4)*

[76] In conclusion, the plain meaning of the text, the statutory context, and the statutory purpose of finality all support the view that Parliament intended the jurisdictional bar in s 15(4) to be comprehensive in scope. It is our view that Parliament intended to foreclose all post-enactment challenges "in respect of" the listed subject matter, whatever the nature of those challenges. Paragraphs 15(4)(a) to (d) operate collectively to shield the historical claims, the settlement deed, the Settlement Act, and the redress provided from any claims, inquiries or investigations before a court, tribunal or judicial body, save for proceedings falling within the scope of the exception in s 15(5).

*Applying Parliament's apparent intended meaning of the ouster clause in this case*

[77] On this wide interpretation of the ouster clause, the High Court's jurisdiction in respect of the DOI proceeding is clearly barred. Even if it were possible to keep the scope of the DOI proceeding relatively narrow (as Wairarapa Moana Inc advised is its intent) it would still be necessary for the High Court to "inquire" into and "make a finding or recommendation … in respect of" the historical claims, the deed of settlement, the Settlement Act and/or the redress provided. Such an exercise is expressly prohibited by s 15(4).

[78] Further, as the Judge found in the second part of his judgment (declining to exercise the Court's jurisdiction), the DOI proceeding will inevitably, in substance, reopen and re-litigate a Treaty settlement intended by both the Crown and Parliament to be "full and final".[113] We endorse the Judge's observation that:

> [33] … the merits of the settlement would be reopened, and re-litigated. That is inconsistent with what the Crown and the counter-parties intended by entering the settlement, and what Parliament intended by the legislation. It was intended to be a full and final settlement that was not to be re-litigated.

[79] The claims made in the DOI proceeding cannot realistically be considered in isolation from the settlement of the historical claims. The alleged breach arises directly from the legislative settlement of the Wai 85 claim without Wairarapa Moana Inc's consent. If the Court accepted that s 27(3) of the Bill of Rights applied, it would have to embark on an inquiry into whether the inclusion of Wai 85 within the wider settlement was justified, including assessing the relationship between the various settled historical claims. The Court would also likely have to consider pre-settlement events, aspects of the Treaty settlement process (including mandate issues) and whether an appropriate balance was struck between the different groups involved in the settlement process. Such matters are inextricably connected with the historical claims, the deed of settlement, the Settlement Act, and the redress provided. Accordingly, the Court would inevitably be drawn into examining and inquiring into the very subject matter barred by s 15(4)(a)–(d). The DOI proceeding accordingly falls squarely within the jurisdictional bar created by s 15(4).

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[113] Judgment under appeal, above n 4, at [33].

**Is s 6 of the Bill of Rights engaged?**

[80] The next issue we consider is whether s 6 of the Bill of Rights is engaged. That section provides that if an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, then that meaning is to be preferred to any other meaning. We have summarised the guidance given by the Supreme Court in *Fitzgerald* regarding s 6 at [47] above.

[81] One of Wairarapa Moana Inc's grounds of opposition to the Attorney-General's dismissal application was that, in the absence of express statutory language to the contrary, Parliament is presumed to have legislated consistently with fundamental rights and freedoms, including those protected under the Bill of Rights. This ground appears to rely on both the principle of legality and s 6 of the Bill of Rights.

[82] The Judge considered that s 6 was engaged, and that it supported a narrow interpretation of the s 15(4) ouster clause. Referring to the observations of the Chief Justice regarding the scope of s 6 in *Fitzgerald*, the Judge found that:[114]

> [23] I also accept the applicant's argument that the interpretative requirements of the [Bill of Rights] support its arguments. Indeed the interpretative mandate in s 6 of the [Bill of Rights] may go further than the common law presumptions of interpretation as it "mandates a more proactive approach to interpretation". The Attorney-General's argument that s 15 of the Act precludes the applicant's right to bring proceedings against the Crown is not to be preferred under s 6 of the [Bill of Rights]. That involves interpreting s 15 so that it settles the historic claims and excludes the jurisdiction of the Court and tribunals to reassess the claims in any new proceedings. But it does not prevent proceedings which engage the Court's interpretative functions, or considering proceedings for declarations of inconsistency which form part of those functions.

[83] On appeal, the Attorney-General submitted that s 6 of the Bill of Rights is not relevant to the jurisdictional argument because, for s 6 to be engaged, a protected right must be limited by the natural and intended meaning of a provision in a manner that cannot be justified. The Attorney-General submitted that s 15 does not limit any rights protected by the Bill of Rights in the context of either the jurisdictional issue or in the substantive DOI proceeding. The argument at both the jurisdictional and substantive stage is essentially the same — namely that the only relevant right relied on by

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114 Footnote omitted.

Wairarapa Moana Inc is s 27(3) of the Bill of Rights. For the reasons we explain further below, the Attorney-General submits that there is no inconsistency between the s 27(3) right and s 15 of the Settlement Act.

[84] Wairarapa Moana Inc submitted, on the other hand, that s 6 of the Bill of Rights supported the Judge's finding that the High Court had jurisdiction to hear and determine the DOI proceeding. In oral submissions, Mr Mount KC (counsel for Wairarapa Moana Inc) supported the submission of the Commission that preferring a meaning of the ouster clause that is consistent with the rights and freedoms in the Bill of Rights does not necessarily require proof of "a specific breach" (in other words, an inconsistency with a specific right set out in the Bill of Rights). Rather, you "get to s 6 regardless of your answer on s 27" because a wide interpretation of s 15 which preserves access to the DOI jurisdiction of the High Court is more consistent with the rights and freedoms in the Bill of Rights than an interpretation of s 15 that bars such access. Given this position, Wairarapa Moana Inc elected not to engage with the Attorney-General's submission that at the jurisdictional stage there is no inconsistency between s 27(3) and the s 15(4) ouster clause that engages the interpretive presumption in s 6 of the Bill of Rights.

[85] We do not accept the submission that it is not necessary to point to any specific rights or freedoms in the Bill of Rights that are inconsistent with the plain meaning of the ouster clause in order for the interpretive presumption in s 6 to be engaged. In essence, Wairarapa Moana Inc and the Commission appear to be seeking to rely in this context on the general common law right of access to the courts, rather than the much narrower s 27(3) right in the Bill of Rights. That is, of course, open when applying the principle of legality (discussed further at [93]–[96] below). We do not accept, however, that such an approach is open in the s 6 context. Section 6 will only be engaged where there is an inconsistency between the rights and freedoms in the Bill of Rights and the plain meaning of the s 15(4) ouster clause.[115] The only specific right that has been identified as being potentially relevant in this context is that in s 27(3). We accept the Attorney-General's submission, however, that there is no inconsistency between s 27(3) and the s 15(4) ouster clause for the reasons set out below.

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[115] See *Fitzgerald v R*, above n 59, at [217] per O'Regan and Arnold JJ.

[86] Section 27(3) of the Bill of Rights provides that:

> Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

[87] The genesis of s 27(3) lies in the Crown Proceedings Act 1950. At common law the Crown had a number of procedural and jurisdictional advantages as a litigant.[116] The Crown could not be sued in the same way as private individuals. Special procedures were needed, and the Crown also enjoyed other privileges. For example, without the Crown Proceedings Act or its antecedents, the Crown could not be sued in contract, could not be held liable for the torts of its employees, and would not have been obliged to discover its documents in civil cases. The Crown Proceedings Act, and its antecedent legislation, "went a considerable distance towards abolishing the privileged position that the Crown had previously enjoyed at common law in litigation". [117]

[88] Section 12 of the Crown Proceedings Act provides that civil proceedings by or against the Crown under the Act may be "commenced, heard, and determined in the same court and in like manner in all respects as in suits between subject and subject". This is backed up by s 31, which applies the ordinary rules as to pleadings, parties, evidence, hearings, trials, amendments, arbitration, set-off, appeals and other civil procedures to proceedings by or against the Crown, unless the Crown Proceedings Act, another Act, special rules, or a court order provides otherwise.

[89] Section 12 of the Act was subsequently mirrored in s 27(3) of the Bill of Rights, albeit using more modern language. The 1985 White Paper on the Bill of Rights explains that s 27(3) was designed to elevate a core principle of the Crown Proceedings Act to constitutional status — namely that individuals should be able to litigate against the Crown without the Crown enjoying procedural or jurisdictional

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116 The New Zealand position prior to the enactment of the Crown Proceedings Act, and the changes made by the Act, are helpfully summarised in a series of articles in the New Zealand Law Journal shortly after the enactment of the Act: "The Crown Proceedings Act, 1950" (1952) 28 NZLJ 17; "The Crown Proceedings Act, 1950 (II)" (1952) 28 NZLJ 49; "The Crown Proceedings Act, 1950 (III)" (1952) 28 NZLJ 65; "The Crown Proceedings Act, 1950 (IV)" (1952) 28 NZLJ 81; "The Crown Proceedings Act, 1950 (V)" (1952) 28 NZLJ 97; and "The Crown Proceedings Act, 1950 (VI)" (1952) 28 NZLJ 113.

117 Law Commission | Te Aka Matua o te Ture *The Crown in Court* (NZLC R135, 2015) at [2.4].

privileges.[118] However, as the drafters of the White Paper noted, the *substantive* powers, rights, and responsibilities of the State and the individual will inevitably differ, and s 27(3) was "not designed to alter this".[119]

[90] The foundational decision on the interpretation of s 27(3) is the decision of McGechan J in *Westco Lagan Ltd v Attorney-General*.[120] McGechan J found that s 27(3) is a "clearly procedural provision" that is "aimed at procedures which govern the assertion or denial of rights in the course of Court or equivalent proceedings; and is not aimed at the creation of other rights in themselves".[121] Hence, s 27(3) does not restrict the legislature's power to determine what substantive rights the Crown has. Rather, it merely ensures that "the Crown shall have no procedural advantage in any proceedings to enforce rights *if such rights exist*".[122] Because of the procedural nature of the provision, McGechan J rejected the argument that it could be used to secure substantive rights, such as (in that case) a right to compensation upon the Crown's termination of contractual or property rights.

[91] Similarly, this Court held in *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* that while s 27(3) protects the right to sue the Crown, it does not guarantee the content of the substantive law that is to be applied in such proceedings.[123] It follows that s 27(3) does not prohibit legislation which alters, invalidates, or extinguishes contractual, property, statutory, or other substantive rights, including rights which are the subject of existing litigation. Its concern is procedural equality in litigation, not the preservation of substantive causes of action or remedies.

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118 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 [White Paper] at [10.176]. The White Paper was authored by Geoffrey Palmer (later Sir Geoffrey Palmer) who was the Minister of Justice at the time. Sir Kenneth Keith, who was then a Professor of Law at Victoria University of Wellington, also acted as an expert advisor to the Ministry of Justice and made significant drafting contributions to the document.

119 At [10.177].

120 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC).

121 At [63].

122 At [63] (emphasis added).

123 *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* [2024] NZCA 128, [2024] 2 NZLR 534 at [57] and [66].

[92] We accordingly accept the Attorney-General's submission that the Judge erred in finding that s 6 was engaged, and that it supported a narrow interpretation of the s 15(4) ouster clause. For the reasons outlined, it is our view that s 15 of the Settlement Act is not inconsistent with the right affirmed by s 27(3) of the Bill of Rights. However, even if we are wrong in that conclusion, it is our view that s 6 would not support a narrow reading of the s 15(4) ouster clause, for the reasons we discuss in the next section.

**Do either s 6 of the Bill of Rights or the principle of legality require a narrow reading of the s 15(4) ouster clause?**

[93] Regardless of whether s 27(3) is, itself, relevant to the interpretation of s 15(4), at common law, there is a fundamental right of access to the courts, dating back to Magna Carta.[124] As Lord Reed SCJ stated in *R (UNISON) v Lord Chancellor*:[125]

> The constitutional right of access to the courts is inherent in the rule of law.
>
> …
>
> Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.

[94] Fundamental common law rights are protected through the principle of legality, which we turn to discuss now.

[95] Both Wairarapa Moana Inc and the Commission relied on the principle of legality in support of the narrow interpretation of the s 15(4) ouster clause. Wairarapa Moana Inc also relied on the case law involving privative or ouster clauses in administrative law cases as supporting the narrow interpretation. In our view, however, the administrative law jurisprudence adds little to the analysis required by either s 6 of the Bill of Rights or the principle of legality. As Lord Carnwath SCJ

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124 Magna Carta 1297 (Eng) 25 Edw 1 c 29. This remains in force in New Zealand pursuant to the Imperial Laws Application Act 1988, s 3(1) and sch 1.

125 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 at [66] and [68] per Lord Reed SCJ, with whom Lord Neuberger P, Lord Mance, Lord Kerr, Lord Wilson and Lord Hughes SCJJ agreed.

commented in *R (Privacy International) v Investigatory Powers Tribunal* the ouster clause principle "can be seen as an application of the 'principle of legality'".[126]

[96] The principle of legality is a common law rule of construction. As Lord Hoffman famously described the principle in *R v Secretary of State for the Home Department, ex parte Simms*:[127]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon [the exercise of this power] by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[97] While both s 6 and the principle of legality are robust interpretive tools for safeguarding fundamental common law rights, they operate within strict constitutional boundaries. As these tools are aids to assist the court to find out what Parliament meant, they only apply where text is reasonably or tenably open to interpretation. They do not permit a court to "disregard an unambiguous expression of Parliament's intention".[128] In *Fitzgerald*, all of the members of the Supreme Court noted the strict limits on the interpretation exercise. For example, Winkelmann CJ observed that a court cannot use s 6 as a "concealed legislative tool" to rewrite the law.[129] "Reading in" or "reading down" a statute will be illegitimate if the resulting interpretation completely changes the substance of the provision, violates a cardinal principle of the legislation, or is fundamentally incompatible with the underlying thrust and scheme of the Act.[130]

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126 *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491 at [100]. See also at [199] per Lord Sumption.

127 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

128 Diggory Bailey and Luke Norbury (eds) *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, United Kingdom, 2020) at 824, citing *Ahmed v Her Majesty's Treasury (Nos 1 and 2)* [2010] UKSC 2, [2010] 2 AC 534 per Lord Phillips P at [117].

129 *Fitzgerald v R*, above n 59, at [66], quoting *R v Hansen*, above n 60, at [156] per Tipping J. See also at [178] per O'Regan and Arnold JJ.

130 *Fitzgerald v R*, above n 59, at [67], quoting *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264 at [28] per Lord Bingham.

[98] Similarly, these interpretive tools do not come into play where it is clear from a legislative scheme that the legislature intended to curtail fundamental common law rights and has made an assessment of where the appropriate policy balance lies.[131] If an interpretation triggers complex, cascading practical ramifications that are ill-suited for a courtroom, the boundaries of "possible" interpretation have been breached.[132] Rights-consistent interpretations cannot impose on the court a task that is beyond its institutional competence.[133] Hence, courts are generally reluctant to use interpretive presumptions to radically alter legislation if doing so involves complex questions of social or economic policy, which are matters better left to the democratic mandate of Parliament.

[99] In its substantive DOI proceeding, Wairarapa Moana Inc accepts that, on ordinary principles of statutory interpretation, s 15(1) and (2) of the Settlement Act have finally settled its Wai 85 claim. It also accepts that, correctly interpreted, s 15(4) has ousted the jurisdiction of the Waitangi Tribunal in relation to that claim. Hence, it does not seek a "rights consistent" interpretation of these provisions, to enable its Wai 85 resumption proceeding to continue. On the contrary, it relies on the plain meaning/purposive interpretation of s 15(1)–(2) and (4) to argue that those provisions are *inconsistent* with its alleged right of access to the courts in s 27(3) of the Bill of Rights.

[100] Given, however, the constitutional significance of the Bill of Rights and the importance of the fundamental right of access to the courts, Wairarapa Moana Inc and the Commission submit at this jurisdictional stage that s 15(4) does *not* bar the courts' DOI jurisdiction. Specifically, the principle of legality (and s 6 of the Bill of Rights, if applicable) requires that access to the courts' DOI jurisdiction can only be ousted by clear and express wording, which is not present in s 15(4). In effect, therefore,

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131 Bailey and Norbury, above n 128, at 824, citing *R (Belhaj) v Director of Public Prosecutions (No 1)* [2018] UKSC 33, [2019] AC 593 at [14] per Lord Sumption SCJ and [42] per Lord Lloyd-Jones SCJ.

132 See *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [33]–[34] per Lord Nicholls; and *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 at [37] per Lord Nicholls.

133 *Fitzgerald v R*, above n 59, at [69] per Winkelmann CJ, citing *Bellinger v Bellinger*, above n 132.

Wairarapa Moana Inc and the Commission contend that s 15(4) should be read as follows:

> Despite any other enactment or rule of law, *but subject to the courts' jurisdiction to hear and determine applications for declarations of inconsistency under the Bill of Rights*, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of …

[101] On this interpretation, the general jurisdiction of the courts and the Waitangi Tribunal (at least to the extent found by the High Court) would be barred, but the jurisdiction of the courts to hear and determine applications for a DOI under the Bill of Rights would be preserved.

[102] For the reasons we have outlined above, it is our view that the plain meaning of the text, the statutory context, and the statutory purpose all strongly support the wide interpretation of s 15(4). As noted above, finality clauses in Treaty settlement litigation serve several essential and interrelated purposes that reflect the highly complex nature of the Treaty settlement process, the unique nature of Treaty settlement legislation, and the critical importance of finality in this context. Amongst other things, adopting the narrow interpretation of the ouster clause (and allowing the DOI proceeding to proceed):

(a) would be directly contrary to the plain meaning of the text, which bars the jurisdiction of the courts to "inquire into" and "make a finding or recommendation … in respect of" the historical claims, the deed of settlement, the Settlement Act and the redress provided under those instruments;

(b) would require reading the words "in respect of" in s 15(4) very narrowly (contrary to all previous case law on the interpretation of that phrase);

(c) would render s 15(4)(c) (and possibly also 15(4)(d)) redundant;

(d) would render the s 15(5) savings clause redundant; and

(e) would be contrary to the statutory purpose of comprehensively foreclosing all post-enactment challenges (of whatever nature) to the settlement, the settlement deed, the Settlement Act or the redress provided, in the interests of finality.

[103] Taking these matters into account, it is our view that the narrow interpretation of the s 15(4) ouster clause is not "reasonably" or even "tenably" available.[134] Adopting such an interpretation would cross the line into a judicial rewriting of the s 15 finality clause rather than simply interpreting it in a "rights consistent" way, which is not permissible.

[104] We reach this conclusion without the need to rely on the sweeping opening words of s 15(4) which provide that the ouster clause is to operate "[d]espite any other enactment or rule of law". However, these opening words clearly reinforce the conclusion we have reached and indicate a clear parliamentary intention that the ouster clause takes absolute primacy over any other conflicting statutes or legal rules.

[105] We acknowledge that in *Fitzgerald* the Supreme Court found that the phrase "despite any other enactment or rule of law" lacked the necessary specificity to oust the Court's jurisdiction under the Bill of Rights in the context of the three strikes sentencing regime. As Winkelmann CJ noted, however, Parliament does not need to "always explicitly address the Bill of Rights when it legislates inconsistently with protected rights and freedoms".[135] In our view, *Fitzgerald* is distinguishable here, for various reasons including those set out at [49]–[50] above. In addition, the *Fitzgerald* interpretation was fortified by the fact that no permissible derogation from the right

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134 If there is a difference which means that s 6 of the Bill of Rights requires the Court to go further than the principle of legality. Compare *Fitzgerald v R*, above n 59, at [58] per Winkelmann CJ and [181] per O'Regan and Arnold JJ; and *R v Hansen*, above n 60, at [158] per Tipping J.

135 *Fitzgerald v R*, above n 59, at [120].

against severe punishment is recognised under international law (such as the International Covenant on Civil and Political Rights (ICCPR)),[136] meaning a literal application would force the state to breach its international obligations.[137] Here, there is no direct equivalent to s 27(3) in the ICCPR.

[106] We further note that the Supreme Court in *Fitzgerald* interpreted the phrase "despite any other enactment …" as being subject to an implied proviso: "except where to do so would breach s 9 of the [Bill of Rights]".[138] If the s 15(4) ouster clause was interpreted as applying "except where it breaches s 27(3)" (assuming for present purposes that s 27(3) includes a right of access to the courts) that would entirely remove the foundation of Wairarapa Moana Inc's substantive DOI proceeding. Instead, as discussed above at [100], Wairarapa Moana would have to rely upon a far narrower, and strained, proviso.

[107] In conclusion, it is our view that neither s 6 of the Bill of Rights (if it is engaged) nor the principle of legality require or support a narrow reading of the s 15(4) ouster clause, for the reasons we have outlined.

**Does the DOI proceeding fall within the exception in s 15(5) of the Settlement Act?**

[108] We now turn to consider whether the DOI proceeding falls within the exception in s 15(5) of the Settlement Act, which preserves the jurisdiction of the courts "in respect of the interpretation or implementation of" the deed of settlement, the Settlement Act and the Joint Redress Act.

[109] As summarised at [36] above, the Judge found that an application for a DOI is fundamentally an interpretive process and therefore falls "naturally within s 15(5)".[139] We accept the Attorney-General's submission that the Judge erred in this finding.

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136 At [78] per Winkelmann CJ, citing United Nations Human Rights Committee *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) at [3].

137 *Fitzgerald v R*, above n 59, at [42] and [116] per Winkelmann CJ, [247] per Glazebrook J and [167] per O'Regan and Arnold JJ.

138 See at [112] per Winkelmann CJ.

139 Judgment under appeal, above n 4, at [16].

[110] Section 15(5) is a savings clause. Its purpose is to preserve a narrow and practical jurisdiction to make the settlement work, while leaving intact the broader finality achieved by the settlement.[140] Settlement legislation necessarily creates ongoing legal machinery: assets must be transferred, cultural redress must be given effect, and statutory acknowledgements, protocols, rights of first refusal regimes, and administrative steps must operate. After settlement legislation is enacted, both the Crown and claimants must implement the deed, including through the transfer of settlement assets and the provision of cultural redress. Inevitably, during the course of this process, disputes may arise as to the correct interpretation of the deed of settlement or the Settlement Act, or how the required implementation steps should be given effect. Section 15(5) provides a mechanism for the resolution of such disputes by the courts, notwithstanding the wide ouster of jurisdiction in s 15(4).

[111] The DOI proceeding, however, does not involve any dispute as to the meaning of the Settlement Act or the deed of settlement. Nor does it involve a dispute as to how the settlement is being (or should be) implemented. On the contrary, it is common ground in the DOI proceeding that, correctly interpreted, s 15(1) and (2) have fully and finally settled the Wai 85 claim and that s 15(4) has ousted the jurisdiction of the Waitangi Tribunal and the courts in respect of that claim. That agreed interpretation forms the basis of the Wairarapa Moana Inc's DOI claim. Wairarapa Moana Inc does not seek an interpretation of those provisions; rather, it asks the Court for a declaration as to whether the statutory extinguishment of its Wai 85 claim is inconsistent with the right affirmed by s 27(3) of the Bill of Rights. This does not involve interpretation of the Settlement Act. Rather, it tests the agreed interpretation of the Act against external rights standards. It necessarily follows that the DOI proceeding lies outside the limited jurisdiction preserved by s 15(5).[141]

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140 See *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [44] and [47] per Williams J.

141 We acknowledge that in some other statutory context, a DOI might be said to be concerned with interpreting the statutory provision said to be inconsistent with the Bill of Rights. That seems to be the approach taken, for example, by the Supreme Court in *Attorney-General v Chisnall*, above n 103, at [189]. But here, the purpose of the s 15(5) carve out is very clearly concerned with ensuring that the Settlement Act "works". For the reasons already given, an interpretation of s 15(5) that would permit a DOI claim would risk leading to the opposite result.

**Did the Judge err in declining to exercise jurisdiction and dismissing the proceeding?**

[112] As set out at [40] above, having found that the Court did have jurisdiction to hear and determine the DOI proceeding, the Judge went on to find that the Court should decline to exercise that jurisdiction. The Judge dismissed the proceeding of his own motion, in the exercise of the Court's inherent jurisdiction.

[113] Wairarapa Moana Inc and the Commission submit that the Judge erred in adopting this procedure. The only application before the Court was to dismiss the proceeding on jurisdictional grounds. Having determined that s 15 did not exclude the Court's jurisdiction, they submit, the only appropriate course was for the Judge to dismiss the Attorney-General's application. The proceeding should then have continued to a substantive hearing. Amongst other things, Wairarapa Moana Inc submit that, due to the lack of prior notice that such a course was being considered, it did not have an opportunity to make submissions as to whether dismissal at a preliminary stage was appropriate. The Commission noted that courts play an important constitutional role in enforcing rights and submit that premature dismissal of DOI proceedings risks undermining that role.

[114] Given that we have found that the High Court lacks jurisdiction to hear the DOI proceeding, it is not necessary for us to engage with the detailed arguments advanced by the parties on this issue or determine whether the Judge erred in dismissing the proceeding of his own motion. We have reached the same outcome as the Judge (namely that the DOI proceeding must be dismissed) but for different reasons. Wairarapa Moana Inc's appeal must therefore be dismissed. As a general observation, however, we see considerable force in the Attorney-General's submission that most of the Judge's reasons for dismissing the proceeding aligned closely with arguments advanced by the Attorney-General on the jurisdictional issue. Wairarapa Moana Inc had a full opportunity to engage with the relevant submissions in that context (and did so).

**Result**

[115] The appeal is dismissed.

[116] The appellant must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements.

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