Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) AND OTHERS v NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) AND OTHERS

(SC 121/2023, SC 123/2023, SC 124/2023, SC 125/2023, SC 126/2023, SC 128/2023, SC 129/2023)

[2024] NZSC 164

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

This is the first of two judgments relating to claims to customary rights in the harbours, river mouths, beaches, and seascape of the eastern Bay of Plenty. This judgment, arising out of seven separate appeals to this Court, addresses the meaning of section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). Section 58 provides the test to be met to obtain a customary marine title (CMT) in the common marine and coastal area, previously referred to as the foreshore and seabed. The meaning of section 58 arises primarily on the appeal of the Attorney-General. The second judgment will address all of the remaining issues from the seven appeals, including fact-specific issues arising from the application of this interpretation to these appeals, the application of section 58 to navigable rivers, and outstanding questions relating to the lesser protected customary rights (PCRs) under section 51 of MACA.

Background

Under MACA, the common marine and coastal area cannot be owned, and public fishing, navigation and access rights within this area are protected. However, iwi, hapū and whānau groups can apply to have their customary rights in the common marine and coastal area recognised by two types of recognition orders. These are: CMT orders, which recognise customary interests meeting the test in section 58, and PCR orders, which relate to an activity, use or practice meeting the test in section 51. Applicant groups can apply to the High Court for these recognition orders or negotiate with the Crown for recognition.

Te Whakatōhea is an iwi whose rohe is situated in eastern Bay of Plenty around Ōpōtiki. Originally, one application was made by the late Claude Edwards and other hapū representatives to the Māori Land Court on behalf of Te Whakatōhea for recognition of the iwi's customary rights in the marine and coastal area within its rohe. With the enactment of MACA that application was transferred to the High Court to be dealt with under the new regime. Subsequently, various hapū and other groups within Te Whakatōhea took the view that recognition orders should be held at hapū (rather than iwi) level and have made their own applications. That has led to two umbrella groups forming within the proceedings, namely, Whakatōhea Kotahitanga Waka (Edwards), and Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (Te Kāhui). In addition, other claimant groups are participating to the extent that Te Whakatōhea's applications overlap with their own applications.

Other third parties are also participating as they may be impacted by the interpretation and application of MACA. These parties include the Attorney-General, Ngā Hapū o Ngāti Porou, interest groups (such as Seafood Industry Representatives and the Landowners Coalition Inc), Crown Regional Holdings Ltd and local authorities.

The seven separate appeals before the Court were heard together due to the significant overlap in terms of issues and location.

Issues

The key issue arising in this judgment is the correct interpretation of section 58 of MACA in determining whether a CMT is to be granted by a court. Relevantly, the test in section 58 has four key elements, the meaning of which form the basis of the Court's judgment. These are that the applicant group:

1. "holds" the relevant area "in accordance with tikanga";
2. has "exclusively used and occupied" the area;
3. has exclusively used and occupied the area "from 1840 to the present day without substantial interruption"; and
4. that title to the relevant areas has not been "extinguished as a matter of law".

Lower courts

On 7 May 2021, the High Court made various PCR orders and three CMT orders in favour of certain applicants. However, on 18 October 2023, the Court of Appeal determined that two of the CMT orders should be reconsidered by the High Court. In its decision, the Court of Appeal was divided as to the meaning of section 58.

Several parties applied for leave to appeal to this Court. On 17 April 2024, the Supreme Court granted the applications for leave to appeal the correctness of the judgment of the Court of Appeal.

Submissions

In this Court, a majority of the parties agreed on the interpretation of the first element, whether the applicant group "holds" the relevant area "in accordance with tikanga". Only two parties challenged the Court of Appeal's approach to that element. The bulk of submissions, primarily advanced by the Attorney-General and Te Kāhui, related to the appropriate tests for the remaining three elements.

Supreme Court decision

The Supreme Court has unanimously allowed the appeal of the Attorney-General on the correct interpretation of section 58. The meaning of use and occupation "without substantial interruption" was a key issue dividing the parties. The Supreme Court considered the majority of the Court of Appeal erred in its analysis of this issue by taking an unduly narrow approach. More generally, its three-stage test does not adequately address MACA's reconciliatory purpose. Given the importance of a correct statement of the test, the Court has allowed the Attorney-General's appeal on this point so that the Court can state the appropriate section 58 test afresh reflecting the text, purpose and legislative history of MACA.

The Supreme Court began by making the point that MACA's text and legislative history show the Act's purpose was to recognise competing interests over locations within the marine and coastal areas—namely, by reconciling prior rights guaranteed by the Treaty of Waitangi | Te Tiriti o Waitangi with the long-held rights and expectations of other New Zealanders in the marine and coastal area.

Incorporating these competing interests, the Court identified four baseline premises which underpin MACA. These are:

- the removal of Crown ownership in the common marine and coastal area;
- the revival of Māori customary interests which were removed under previous legislation;
- the protection of vested property rights and expressly authorised activities in the marine and coastal area; and
- the protection of expectations of the public's access to, and activities in, the marine and coastal area.

MACA acknowledges that there will be ongoing tension between these baseline premises, and so seeks to further reconcile them at two levels. At a general level it sets out conflict-minimising rules applicable to the entire marine and coastal area. For example, except where necessary to protect wāhi tapu, public rights of access, navigation and fishing may not be curtailed within a CMT. Another example is that specified activities and infrastructure are expressly permitted within CMTs. The second level is case specific. This level reconciles tensions primarily via the tests for customary rights recognition.

MACA's reconciliation of rights and interests through these four baseline premises, and the associated machinery provisions for resolving factual issues arising in CMT applications, all inform the interpretation of the four key elements of section 58 earlier identified.

In terms of those four elements, the Court first cautioned that they sometimes express the same idea from a different perspective. As such, the elements must be understood as overlapping conceptually and evidentially as outlined below.

"[H]olds … in accordance with tikanga"

The Court noted that the word "holds" requires a more significant relationship with the claimed area than is required for PCRs. The customary interest cannot be just a collection of unconnected activities or uses. There must be an integrated or holistic relationship with the seascape. "[H]olds" is informed by tikanga, with take tūpuna (ancestral right) being the most important source of right to this element. It may be expressed as whether mana, as control, is claimed and exercised over the relevant area. This tikanga relationship must continue to the present day, because tikanga (through ahi kā) imports continuity and "holds" is used in the present tense.

"[E]xclusively used and occupied"

This element requires a contextual inquiry of fact and degree, informed by both common law concepts and tikanga. All of the parties except one agreed that tikanga was relevant to the inquiry. Common law concepts of exclusive use and occupation are relevant, as are, among other matters, the nature of the customary relationship with the area, its use, and the tikanga which has regulated this relationship and use.

Taking into account the context and purpose of MACA, particularly that the Act expressly accepts that different uses and rights may coexist in the marine and coastal area, use and occupation cannot require actual physical occupation of the seascape to the exclusion of all others. The very nature of the seascape and its differences from dry land also suggest this must be the case; for example, the seascape cannot be fenced off, built up or otherwise occupied in the same way that dry land can be. What is required is making extensive use of the space (in light of its nature and resources), along with an intention and some capacity to exercise control over it, to the extent permitted by law.

The Court endorsed several factors drawn from existing MACA decisions which the Attorney-General had submitted may be considered in determining whether an applicant has "exclusively used and occupied" an area, and the Court identified others. These include, among others, ownership of adjacent land; the exercise of customary non-commercial fishing rights; the observance of tikanga associated with wāhi tapu, such as the imposition of rāhui; maintenance of deep cultural and spiritual connection with the area; and involvement in resource management concerning the takutai moana. The Court also noted briefly the possibility for shared exclusivity—where multiple applicant groups exercise mana and control over a particular area—and the fact that this does not prevent the granting of a CMT.

Continuity: "from 1840 to the present day without substantial interruption"

The Court described this element as the key reconciliation mechanism in section 58 and the most difficult to apply. The Court noted that section 106 of MACA, which addresses the

burden of proof, envisages how the test will work in practice because it provides for the applicant groups, first, to prove they hold the specified area in accordance with tikanga and, second, their use and occupation of the claimed area from 1840 to the present day. If these two hurdles are cleared, the effect of section 106 is that the burden shifts to those contradicting the claim to prove that the use and occupation has not been exclusive or has been substantially interrupted.

The substantial interruption test has spatial and temporal elements. Both the physical extent of an interruption, and the duration of such interruption, are relevant. Mere interference will not prevent the granting of a CMT—"substantial" recognises the inevitability of some interruption since 1840. This element requires a factual and contextual assessment in light of the applicant group's particular relationship with the place and MACA's purpose.

A wide range of matters which may contribute to a substantial interruption are discussed in the judgment, but in each case this will require an assessment of fact and degree. Some of these matters include permanent structures owned by third parties in the area; reclamation; intensive commercial use; and third-party fishing and navigation. But only lawful interferences are relevant, whether expressly authorised by statute or simply not unlawful. The Court noted that MACA's reconciliation is premised on the idea that rights and interests should be allowed to coexist as far as possible, such that the courts should be slow to conclude that an interruption has been so substantial as to prevent a CMT being granted.

Extinguishment

The Court, noting difficulties with the phrasing of this requirement in section 58, said that it can be assumed the question here is whether underlying customary title, rather than a CMT, has been extinguished as a matter of law. Referring to *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA), the Court noted that the common law preserves customary title, and that it is well established that customary title and rights can only be extinguished where Parliament's intention to do so is plain and clear. This is not to be lightly assumed.

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