IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC121/2023, SC123/2023, SC124/2023, SC125/2023, SC126/2023, SC128/2023, SC129/2023

BETWEEN	**WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) (SC121/2023)**
AND	**TE KĀHUI AND WHAKATŌHEA MĀORI TRUST BOARD AND OTHER RESPONDENTS**
BETWEEN	**NGĀTI MURIWAI HAPŪ (SC123/2023)**
AND	**WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) AND OTHER RESPONDENTS**

Cont.

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL ON APPEAL

20 September 2024

Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact:
A J Williams / R L Roff / Y Moinfar-Yong
Anthea.Williams@crownlaw.govt.nz / Rachel.Roff@cliftonchambers.co.nz /
Yasmin.Moinfar-Yong@crownlaw.govt.nz

BETWEEN	**KUTARERE MARAE (SC124/2023)**
AND	**WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) AND OTHER RESPONDENTS**
BETWEEN	**TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE UPOKOREHE IWI (SC125/2023)**
AND	**LANDOWNERS COALITION INCORPORATED AND OTHER RESPONDENTS**
BETWEEN	**ATTORNEY-GENERAL (SC126/2023)**
AND	**LANDOWNERS COALITION INCORPORATED AND OTHER RESPONDENTS**
BETWEEN	**NGĀTI IRA O WAIŌWEKA, NGĀTI PATUMOANA, NGĀTI RUATAKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) (SC128/2023)**
AND	**LANDOWNERS COALITION INCORPORATED AND OTHER RESPONDENTS**
BETWEEN	**NGĀTI RUATAKENGA (SC129/2023)**
AND	**CHRISTINA DAVIS ON BEHALF OF NGĀTI MURIWAI HAPŪ AND OTHER RESPONDENTS**

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INTRODUCTION

1. The Attorney-General brings an appeal against *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* (**the Court of Appeal Decision**)[1] in order to clarify the interpretation of the tests for recognition orders under te Takutai Moana Act 2011 (**the Act**).[2] The three issues raised in the Attorney's appeal concern the correct interpretation of:[3]

    1.1 the second limb of the test for customary marine title in s 58 (exclusive use and occupation from 1840 to the present day without substantial interruption) (**Issue 1**);

    1.2 sections 11(3) and 58(4) (concerning the effect of extinguishing events that have occurred prior to the Act's commencement) (**Issue 2**); and

    1.3 the test for protected customary rights in s 51 (**Issue 3**).

SUMMARY OF ARGUMENT

2. The Act creates a bespoke statutory regime for the recognition of extant customary interests in the takutai moana. The public record demonstrates that its history and development was the product of significant consultation and policy processes, as well as political negotiation and compromise. In particular, the test for customary marine title and its legal incidents reflect specific choices that Parliament made to balance the interests of Māori with the legitimate interests that all New Zealanders have in the takutai moana.

3. While the Attorney-General largely agrees with how the Court of Appeal interpreted the first limb of the test for customary marine title, the effect of the majority's approach to the second limb is to undermine the deliberate choices made by Parliament. The majority give the requirement of exclusive use and occupation "from 1840 to the present day" no work to do, and

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1 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [**Court of Appeal Decision**].

2 Six other parties have appealed: Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (on behalf of Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Ruatakenga and Ngāi Tamahaua as well as Te Whānau a Mokomoko and Te Whānau a Titoko) (SC128/2023), Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi (SC125/2023), Whakatōhea Kotahitanga Waka (SC121/2023), Kutarere Marae (SC124/2023), Ngāti Muriwai (SC123/2023), and Ngāti Ruatakenga (SC129/2023). The Attorney-General participated in the Court of Appeal hearing (and in the High Court at first instance) as an interested party. She did not take a position on whether the applicants had met the tests for customary marine title or protected customary rights. The Attorney's primary focus was on the law, and how the Act should be interpreted. The High Court has previously confirmed that the Attorney-General is entitled to participate as an interested party in hearings under the Act, and that she does so in the public interest: *Re Rihari* [2019] NZHC 2658 at [110].

3 Minute of Williams J dated 4 July 2024 at [7(a)-(c)]. The "broad issues" raised by the various appeals before this Court are summarised at [7] of the minute.

significantly narrow the criteria for what may amount to a substantial interruption. The majority do so by relying on a counterfactual about how the common law would have recognised customary interests immediately following *Ngāti Apa*, despite considerable uncertainty about how the common law would have developed. The majority also mischaracterise the effect of failing to satisfy the test for customary marine title as an "extinguishment". As a result, the majority discount the statutory wording and effectively set the threshold for "substantial interruption" as equivalent to legal extinguishment. Rather than engaging in a genuine, interpretive exercise to ascertain the meaning of the second limb, the majority's interpretation does "violence"[4] to the text of s 58 and contravenes discernible parliamentary intention.

4. The concept of extinguishment is also misunderstood by the Court of Appeal when approaching the matter of prior extinguishing events in respect of navigable riverbeds. The Court wrongly treats the divestment of Crown ownership under s 11(3) as though it has the effect of "reviving" customary interests that were extinguished prior to the Act coming into force.

5. Finally, the Court of Appeal's interpretation of the test for protected customary rights introduces an ambiguous "relevant connection" test (by concluding that s 51 may be satisfied as long as a group has a relevant connection to someone who has continuously exercised the right since 1840). While the section can accommodate situations where an applicant group's tribal identity has changed over time or where there has been a transfer of rights in accordance with tikanga, it is not clear (from the way the Court ultimately applies its "relevant connection" test) whether that is what it had in mind. The Attorney-General therefore seeks clarification from this Court on the proper interpretation of s 51.

BACKGROUND

6. The Court of Appeal Decision is the first appellate decision to address substantive proceedings under the Act, and needs to be understood against the backdrop of the legislative, historical and social context to the Act's enactment in 2011. This context is referred to in the Act's Preamble and was

[4] *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [62].

detailed in Miller J's judgment[5] as well as the Waitangi Tribunal's recent report, *The Marine and Coastal Area (Takutai Moana) Act 2011 Stage 2 Report*.[6] As Miller J observed, this context is instructive as it highlights the distinctive nature of New Zealand legislative policy in respect of customary title to the takutai moana and "the carefully circumscribed role to be played by [the] courts".[7]

Background to the Government's review of the Foreshore and Seabed Act

7. In November 2008, as part of a relationship and confidence-and-supply agreement between the National Party and the Māori Party, the Government decided to review the Act's predecessor legislation, the Foreshore and Seabed Act 2004 (**the 2004 Act**).[8]

8. Repealing the 2004 Act was the "genesis and cornerstone policy" of the Māori Party.[9] The legislative history of that Act had been the subject of intense political and media scrutiny. It was enacted partly in response to the Court of Appeal's decision in *Attorney-General v Ngāti Apa*, which held that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed.[10] An urgent Waitangi Tribunal inquiry concluded the policy underpinning the 2004 Act was in breach of Treaty principles. The Tribunal urged the Government to embark on a "longer conversation" with Māori in negotiating a way forward, noting this would inevitably involve "compromise between Treaty principles, claimant preferences, and what the Government might regard as practicable".[11]

9. The Foreshore and Seabed Bill was introduced into the House in April 2004[12]

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5 Court of Appeal Decision at [39]-[60] per Miller J.

6 The report was released on 4 October 2023, two weeks before the delivery of the Court of Appeal Decision. See in particular Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Stage 2 Report* (Wai 2660, 2023) at [2.2]. Section 129 of the Evidence Act 2006 permits reliance on Waitangi Tribunal reports for the purposes of evidence on matters of historical fact: *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 653; and *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (HC) at 300.

7 Court of Appeal Decision at [104] per Miller J.

8 See the foreword to Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: Consultation document.*

9 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) at [3.1.4(3)].

10 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) [***Ngāti Apa***]. Prior to *Ngāti Apa*, government policy and legislation relating to the foreshore and seabed was based on the understanding that Māori customary title to the foreshore and seabed had been extinguished. (*In re the Ninety-Mile Beach* [1963] NZLR 461 (CA) had held that title to the foreshore or seabed rested with the Crown by statute.) The Court of Appeal in *Ngāti Apa* held that, upon the Crown's acquisition of sovereignty in New Zealand, it acquired a "radical" title that was not inconsistent with common law recognition of native property rights, which continue until lawfully extinguished: at [160] per Keith and Anderson JJ. The consequence of *Ngāti Apa* was that applications could be made to the courts for status and vesting orders relating to the foreshore and seabed under Te Ture Whenua Māori Act 1993 or for common law declarations of aboriginal title.

11 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [5.3].

12 Foreshore and Seabed Bill 2004 (129-1).

(and enacted in November 2004). As part of a nationwide hīkoi in April 2004, an estimated 50,000 people demonstrated opposition to the Bill outside Parliament.[13] Nearly 4,000 written submissions were received by the select committee that considered the Bill, almost all of which were opposed to it in general terms.[14] The nature of the debate around the foreshore and seabed issue at this time was described in a later report by the Ministerial Review Panel[15] as "highly politicised", "subject to intense media scrutiny, much of it sensationalised [and] polarised" and "seriously divisive".[16]

10. The 2004 Act vested all public foreshore and seabed in the Crown as its absolute property.[17] It provided for public rights of access and navigation in this area,[18] and removed the jurisdiction of the courts to consider whether land within it had the status of Māori customary land (or customary rights claims in relation to such land).[19] The Act instead provided for two kinds of statutory orders to be made.[20]

Policy development process for te Takutai Moana Act

11. Following the Government's decision in 2008 to review the 2004 Act, an independent Ministerial Review Panel was established to provide advice to the Government.[21] The Panel issued its report in June 2009, after receiving over 500 written submissions and holding a number of public hui to hear submissions orally.[22] The Panel recommended the repeal of the 2004 Act, engagement with the public (including Māori) about their interests in the foreshore and seabed, and the enactment of new legislation.[23] Echoing the Tribunal's report, the Panel also stated the Crown should engage in a longer conversation with stakeholders about the foreshore and seabed.[24]

12. In response, the Government began deliberating on replacement legislation and agreed in late 2009 to a set of principles and non-negotiable positions that

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13 Ministerial Review Panel *Pākia ki uta pākia ke tai: Report of the Ministerial Review Panel* Volume 1 (30 June 2009) at [1.1] [**Ministerial Review Panel Report**] (available at <www.beehive.govt.nz/sites/default/files/24845%20Vol-1%20online%5B6%5D%5B1%5D.pdf>).

14 Ministerial Review Panel Report at 26.

15 See these submissions below at [11].

16 Ministerial Review Panel Report at 27.

17 Foreshore and Seabed Act 2004, s 13.

18 Foreshore and Seabed Act 2004, ss 7-9.

19 Foreshore and Seabed Act 2004, ss 10, 12 and 46(2).

20 Territorial customary rights orders were defined in s 32(1) and customary rights orders were specified in ss 50 and 74.

21 Ministerial Review Panel Report at 29. The panel was chaired by Taihākurei Edward Durie. The other members were Richard Boast and Hana O'Regan.

22 Ministerial Review Panel Report at 30 and 31.

23 Ministerial Review Panel Report at 13 and 152-154.

24 Ministerial Review Panel Report at 154 and 159.

would guide a replacement Bill.[25] In April 2010, the Government consulted the public on its proposals for developing replacement legislation, which were set out in a consultation document.[26] The submission period was open for a month, during which time over 1,500 written submissions were received and 20 hui were held throughout New Zealand.[27]

13. The consultation document set out the key features of the Government's proposed tests for customary marine title and protected customary rights,[28] and the awards it proposed for recognising proven customary interests.[29] The Government's stated objective in developing the new legislation was to establish a regime that balanced the interests of all New Zealanders.[30] The consultation document therefore gave the following assurances: public access to the takutai moana; recognition of customary rights and interests; protection of fishing and navigation rights; and protection of existing use rights until the end of their term.[31] Reflecting those principles, the Government proposed that the legal incidents of customary marine title would provide rights that were valuable and effective while also accommodating public rights of access, fishing and navigation, and existing use rights.[32] Those rights were ultimately set out in s 62 of the Act.

14. The central features of the Act were agreed to by Cabinet following the receipt of submissions, and the Bill was introduced into the House in September 2010.[33] The select committee that considered the Bill received nearly 6,000 written submissions, and heard 287 oral submissions at hearings across the country.[34] The Act came into force on 1 April 2011.

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25 See Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Stage 2 Report* (Wai 2660, 2023) at [2.2.4(1)]. The non-negotiable positions were: reasonable public access for all; recognition of customary interests; the protection of fishing and navigation rights; and the protection of existing use rights to the end of their term.

26 Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: Consultation Document* [**Consultation Document**].

27 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) at [3.1.1(2)].

28 Consultation Document at 34 and 36.

29 Consultation Document at 37-41.

30 Consultation Document at 9.

31 Consultation Document at 7. The assurances reflected the "non-negotiable" matters referred to above in fn 25, and are referred to in the Court of Appeal Decision at [54] per Miller J; and at [416], [417] and [427] per Cooper P and Goddard J.

32 See Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) at [5.3.1(3)]. See also at [6.4.2]: "in developing [the Act], Government officials had considered what legal scholarship refers to as the 'traditional incidents of fee simple title' to form the basis of customary marine title. However, they had to compromise on those 'traditional incidents' to reconcile customary marine title with … 'bottom lines' (preserving public access, rights of navigation, fishing rights, and other existing rights)".

33 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1).

34 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) at [3.1.1(3)].

Te Takutai Moana Act

15. The genesis of the Act and related context set out above illustrates that the Act stemmed from a political commitment to review the 2004 Act and was the product of a policy development process that spanned several years, involving several rounds of consultation with Māori and the public generally.[35] In this context, the Act aims to balance the legitimate interests of all New Zealanders in the takutai moana.[36] The statutory tests that were chosen for the recognition of customary interests,[37] the attendant rights that are conferred under the Act,[38] and the Act's preservation of public rights of access, fishing and navigation,[39] are a direct reflection of this process. The net result is a bespoke statutory regime for the recognition of customary interests in the takutai moana. It is clear that the Act is not a restatement or codification of the common law.[40]

16. The balancing that the Act aims to achieve is also evident in the Act's four purposes, none of which is expressed as having priority over the others. The first, in s 4(1)(a), is to "establish a durable scheme to ensure the protection of the legitimate interests of *all New Zealanders*" in the marine and coastal area.[41] The purposes in s 4(1)(b) and (c) are to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau"[42] and "provide for the exercise of customary interests in the common marine and coastal area".[43] The final purpose, in s 4(1)(d), is to acknowledge the Treaty.[44]

ISSUE 1 – TEST FOR CUSTOMARY MARINE TITLE

17. Section 58 of the Act provides that customary marine title exists in a specified

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35 Namely, the ministerial review process in 2009; the 2010 public consultation process; and the select committee process that occurred once the Bill was introduced into the House.

36 This is evident from recital four of the Act's Preamble, which records that the Act translates the inherited rights of iwi, hapū and whānau into legal rights and interests that are "inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations".

37 The test for recognition of protected customary rights is set out in s 51. The test for recognition of customary marine title is set out in s 58. The Act also provides for the recognition of customary interests in the takutai moana through the conferral of participation rights in conservation processes (Part 3, subpart 1). These rights are automatically conferred on any "affected" iwi, hapū or whānau and so there is no threshold "test" to meet to receive recognition.

38 See s 52 in relation to protected customary rights; and ss 60 and 62 in relation to customary marine title. Customary marine title provides an interest in land: s 60(1)(a).

39 Set out in ss 26-28.

40 This is apparent from, for example: the Preamble; the special status accorded to the common marine and coastal area such that no-one owns or is capable of owning it (s 11); and s 98, which provides that the jurisdiction of the Court to determine any aboriginal rights claim is replaced fully by the jurisdiction of the Court under the Act.

41 Emphasis added. The words "all New Zealanders" include iwi, hapū and whānau who have customary interests in the common marine and coastal area, as well as New Zealanders who do not.

42 Section 9(1) of the Act defines "mana tuku iho" to mean "inherited right or authority derived in accordance with tikanga".

43 These purposes are achieved, in particular, through the provision of customary rights in the Act.

44 Section 7 explains how the Act does so: through the recognition of customary interests in the takutai moana.

area of the common marine and coastal area if an applicant group:[45]

17.1 "holds the specified area in accordance with tikanga" (**limb one**);[46] and

17.2 has "exclusively used and occupied" the area "from 1840 to the present day without substantial interruption" (**limb two**).[47]

18. The Court of Appeal majority found it "exceptionally difficult" to reconcile the text of the second limb with the Act's purposes.[48] They considered a "literal reading" of this limb, and its requirement that the group must have exclusively used and occupied the area "from 1840 to the present day", would mean that, in many cases, the threshold for recognition would not be met. They described such an outcome as one that "extinguishes customary interests … by a side wind" and would be inconsistent with the Treaty of Waitangi, "assurances given" in the 2010 consultation document issued by the Government,[49] and the Act's stated purposes.[50] Instead, the majority held:

18.1 An applicant group is only required to have exclusively used and occupied[51] an area as at 1840, prior to the proclamation of British sovereignty.[52] Provided use and occupation has not ceased or been substantially interrupted post-1840, the second limb will be satisfied.[53]

18.2 An applicant group does not need to demonstrate exclusive use and occupation "from 1840 to the present day".[54] Such a requirement would be "unjust and unprincipled", given Māori did not have a legal ability to exclude others for most of the relevant period.[55]

18.3 A "substantial interruption" might occur where a group's use and occupation ceases or is interrupted because the group's connection with and control over the area was lost as a matter of tikanga.[56] The

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45 Section 58(4) provides that customary marine title does not exist if that title is extinguished as a matter of law. Section 59(1) provides a non-exhaustive list of matters (ownership of abutting land and the exercise of non-commercial fishing rights by the applicant group) that may be taken into account in determining whether customary marine title exists.

46 Section 58(1)(a).

47 Section 58(1)(b)(i). Customary transfer, outlined in s 58(1)(b)(ii) is not a subject of this appeal and is not addressed in these submissions.

48 Court of Appeal Decision at [416] per Cooper P and Goddard J.

49 Referred to above at [13].

50 Court of Appeal Decision at [416] per Cooper P and Goddard J.

51 Characterised as an intention and ability to control, and exclude others from, the relevant area: Court of Appeal Decision at [421] and [434(b)] per Cooper P and Goddard J.

52 Court of Appeal Decision at [434(b)] per Cooper P and Goddard J.

53 Court of Appeal Decision at [434(c)] per Cooper P and Goddard J.

54 Court of Appeal Decision at [429] per Cooper P and Goddard J.

55 Court of Appeal Decision at [429] per Cooper P and Goddard J.

56 Court of Appeal Decision at [432] per Cooper P and Goddard J.

majority rejected the submission that substantial third-party access to or fishing in an area can have this effect.[57] The majority held that third-party use can only amount to a substantial interruption where it is authorised by legislation capable of overriding customary rights and precludes a group's physical use of an area.[58]

19. The effect of the majority's approach to limb two, coupled with the Court's approach to the burden of proof,[59] is that an applicant group need only establish that its use and occupation has been continuous.[60] There is no requirement for an applicant group to prove exclusive use and occupation: from 1840 to the present day; or even as at 1840, despite the majority identifying this as a component of the test for customary marine title.[61]

The statutory language gives effect to Parliament's intention

20. The key error made by the majority is that their interpretation of s 58 ignores the test's clear and unambiguous requirement of exclusive use and occupation "from 1840 to the present day" without substantial interruption. The inclusion of this continuity[62] requirement was a deliberate choice by Parliament and is reflected in the statutory language.

21. The legislative history of the Act and extrinsic materials[63] demonstrate that, in developing the s 58 test, Parliament drew on elements of both tikanga Māori and the common law of New Zealand, as well as overseas jurisprudence.[64] The first limb is explicitly tikanga-based, and reflects the test for determining

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57 Court of Appeal Decision at [427] per Cooper P and Goddard J.

58 Court of Appeal Decision at [428] and [434] per Cooper P and Goddard J. The example given was the lawful construction and operation of port facilities in a manner that excludes the applicant group from access: at [433].

59 See Court of Appeal Decision at [435]-[436] per Cooper P and Goddard J; and [223]-[231] per Miller J. The Court held that to establish customary marine title, an applicant group need only prove the elements in s 106(2) of the Act. That is, an applicant group must establish that the specified area is held in accordance with tikanga, and their use and occupation of the area has been continuous from 1840 to the present day. Where those elements are met the Court may draw an inference that the s 58 test is met, unless some other party demonstrates otherwise.

60 Court of Appeal Decision at [435] per Cooper P and Goddard J.

61 Court of Appeal Decision at [434(b)]. The majority held that, where the Court is satisfied that limb one and continuous use and occupation are demonstrated, the Court may infer that the s 58 test is met: at [435]. In substance, the majority's interpretation of s 58 (together with its approach to s 106) renders it almost identical to the Canadian approach to establishing aboriginal title (see fn 67 below): an applicant group is required to have exclusively used and occupied an area prior to sovereignty only, and can establish that requirement through relying on continued use and occupation of the area from 1840 to the present day.

62 While the words "continuity" and "continuous" are not used in s 58, the Attorney uses that term as a shorthand for s 58's requirement of exclusive use and occupation "from 1840 to the present day" without substantial interruption.

63 The courts may (and often do) use the legislative history and extrinsic materials, including parliamentary history, to assist with interpreting legislation: see Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, 2021, LexisNexis online) at 362-366 and 379-383 (and see generally chapter 9(d) "Parliamentary history"). See also Court of Appeal Decision at [99] per Miller J, where he accepted the legislative history and extrinsic materials (referred to as "legislative fact") are "valuable background material", in respect of which the policy decisions "have been carried through to the [Act]". Miller J cited *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [126]-[129] (which in turn cited *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at [64] per Lord Nicholls of Birkenhead).

64 As indicated in the Consultation Document at 35-36 and in Ministry of Justice *Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill 2010* (4 February 2011) at [1389] [**Departmental Report**].

whether land is Māori customary land under Te Ture Whenua Māori Act 1993.[65] The phrase "exclusively used and occupied" in the second limb draws on the Canadian jurisprudence on aboriginal title,[66] which requires "sufficient" and "exclusive" occupation by the aboriginal group prior to sovereignty.[67] The departmental report on the Bill explained that this limb would require an applicant to show "their interest in the area has qualities akin to that of a land owner – the capacity to exclude others from the area".[68]

22. As for the second limb's requirement for exclusive use and occupation to be demonstrated "from 1840 to the present day" without substantial interruption, as Miller J correctly identified, this element is novel.[69] It is distinct from the Canadian jurisprudence (which requires exclusivity to be demonstrated prior to sovereignty only).[70] Despite this, the inclusion of this requirement was a deliberate drafting choice.[71] It was part of the Government's proposed test for recognising customary title, as set out in the 2010 consultation document referred to by the majority, and was carried through to the Act. (It was also a feature of the 2004 Act.[72])

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65 See Consultation Document at 35-36. Section 129(2)(a) of Te Ture Whenua Māori Act 1993 provides that land that is held by Māori in accordance with tikanga Māori shall have the status of Māori customary land. The Māori Land Court has found that "[t]he important word here is 'held'. There is no connotation of ownership but rather that [the land] is retained or kept in accordance with tikanga Māori": *John da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212. See the discussion of this phrase and *John da Silva* in the Court of Appeal Decision at [140] per Miller J; and in *Re Reeder* [2021] NZHC 2726 at [27].

66 Departmental Report at [1425]-[1426]; and the speech of the Attorney-General at the Bill's third reading: (22 March 2011) 671 NZPD 17650.

67 *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257; and see also *Chippewas of Nawash v Canada* [2023] ONCA 565 at [26], which recently confirmed that the *Tsilhqot'in* test for proving aboriginal title to dry land applies equally to submerged lands – in that case, a claim to a lakebed. The Canadian test for aboriginal title is outlined below in more detail at [39]. In brief, the requirements are: "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; continuity of occupation where present occupation is relied on to establish pre-sovereignty occupation; and exclusive historic occupation: *Tsilhqot'in Nation v British Columbia* at [50]. An application for leave to appeal the *Chippewas* decision to the Supreme Court of Canada was dismissed on 25 April 2024.

68 Departmental Report at [1426].

69 Court of Appeal Decision at [59] per Miller J.

70 See, for example, *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [47]. Where present occupation is relied on to establish pre-sovereignty occupation, continuity of occupation is required (in other words, a "substantial connection" between the people and the land must be maintained): *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [153]-[154], citing *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA). Continuity does not require an unbroken chain of occupation: it requires only that present occupation be rooted in pre-colonial times: *Tsilhqot'in Nation* at [46]; and *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [83] and [152]-[154], citing *R v Van der Peet* [1996] 2 SCR 507 at [62]. As for the phrase "substantial interruption", while Australian cases on native title employ the concept of substantial interruption, they do so to address loss of cultural connection with an area, as opposed to interference with a group's use and occupation: see the Court of Appeal Decision at [117] per Miller J; and *Re Reeder* [2021] NZHC 2726 at [43].

71 Consistent with the Government's intention for *extant* customary interests to be recognised under the statutory scheme: see the Departmental Report at [1409] ("Overall the Government has endeavoured to provide a test which recognises extant customary rights and does not inappropriately displace other legitimate interests in the area that have arisen since 1840") and [1436] ("The Government's intention is the rights being tested are extant rights in that they have existed since before 1840 and continue to exist today").

72 When the Bill for the 2004 Act was first introduced, it did not contain an explicit requirement for continuous, exclusive use and occupation in the test for territorial customary rights. As introduced, the Bill provided the High Court with jurisdiction, on the application of a group, to identify territorial customary rights that "would have amounted at common law to a right to exclusive occupation and possession" of part of the foreshore and seabed: Foreshore and Seabed Bill 2004 (129-1), cls 28-29. The departmental report prepared in relation to the Bill recommended amending the Bill to include a requirement of continuous, exclusive occupation: Department of the Prime Minister and Cabinet *Departmental*

23. The consultation document clearly identified a requirement for exclusive use and occupation to be demonstrated *from 1840 until the present day* as a distinct requirement of the proposed test:[73]

> - in order to establish the necessary connection/interest the relevant foreshore and seabed area must be held in accordance with tikanga Māori;
> - this connection/interest must be of a level that accords with the applicant group having 'exclusive use and occupation' of the relevant foreshore and seabed area; and
> - *this 'exclusive use and occupation' must date from 1840 until the present without substantial interruption.*

24. Following that public consultation process, Cabinet considered alternative recommendations from the Minister of Māori Affairs and the Attorney-General in respect of the very question of whether the test ought to include a requirement of exclusive use and occupation from 1840 to the present day.[74] The Minister of Māori Affairs' view was that this should not be an element of the test, whereas the Attorney-General favoured its inclusion. Cabinet ultimately agreed to adopt the Attorney-General's preferred test,[75] and this decision was carried through and reflected in the wording of s 58.

Majority substitutes statutory language with its assessment of "just" outcomes

25. The majority's approach undermines the deliberate policy choices made by Parliament by making a number of inter-related errors:

    25.1 The majority presume that, unless extinguished, customary interests in existence in 1840 have survived to the present day and that the post-*Ngāti Apa* common law position (absent statutory intervention) would have "give[n] effect to any rights of a group as at 1840" without requiring exclusive use and occupation from 1840 to the present day;[76]

Report on the Foreshore and Seabed Bill (8 October 2004) Chapter 4 at pp 10-13. The report said the inclusion of this requirement would reflect "the rationale of the doctrine of aboriginal title which is to preserve existing rights as opposed to restoring lost rights": at p 12. The requirement of continuous, exclusive use and occupation was then added to the Bill during the Committee of the whole House (by way of Supplementary Order Paper 2004 (304) Foreshore and Seabed Bill 2004), and was subsequently enacted as s 32(2)(a) of the Foreshore and Seabed Act 2004.

73 Consultation Document at 36 (emphasis added).

74 The Minister of Māori Affairs' preference was that there should be evidence of "exclusive use and occupation" at 1840 and an ongoing connection with the area since that time: CAB Min (10)21/4 *Review of the Foreshore and Seabed Act: Report on Public Consultation Process and Proposals for a New Regime* (14 June 2010) at 6 (publicly available on the Waitangi Tribunal's record of inquiry for the Wai 2660 inquiry, as part of document Wai 2660, #B3(a)).

75 CAB Min (10)21/4 *Review of the Foreshore and Seabed Act: Report on Public Consultation Process and Proposals for a New Regime* (14 June 2010) at 6.

76 Court of Appeal Decision at [373]-[378] per Cooper P and Goddard J and at [416] (describing the continuity requirement as something that is "not found in the common law of New Zealand, as *Ngāti Apa* makes plain"). The majority said a common law inquiry "would focus on the nature and extent of the group's rights as a matter of tikanga", which "would generally take as its starting point the position as a matter of tikanga in 1840": at [373]. While they noted it might be

25.2 They conclude the inclusion of a continuity requirement would mean "few areas" of the coastline would meet the test;[77] and

25.3 They characterise a failure to meet the s 58 test as an "extinguishment" of customary interests,[78] and describe such an outcome as inconsistent with the Treaty and the Act's purposes.[79]

26. The consequence of this chain of reasoning is that the majority discount the continuity requirement as an "unjust and unprincipled" element of the test.[80] They do so without engaging in a genuine, interpretive exercise concerning the meaning of "exclusive use and occupation" (and what that concept entails when considered from 1840 to the present day).[81]

The common law counterfactual

27. The majority's counterfactual is not supported by common law authorities that concern the likely tests for recognising customary interests in the takutai moana. *Ngāti Apa* itself was a decision about jurisdiction: it did not provide guidance on the question of whether and how customary interests might be recognised.[82] No one can predict with certainty how the High Court would have approached this question immediately following *Ngāti Apa.*[83] There is a paucity of New Zealand jurisprudence on the common law of aboriginal title,[84] and cognate jurisdictions have taken varying approaches to the issue.[85]

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necessary to consider whether the rights holder or content of the rights had been affected by events from 1840 to the present day, they considered this too would be "a tikanga-focused inquiry": at [373].

77 Court of Appeal Decision at [416] per Cooper P and Goddard J.

78 Court of Appeal Decision at [416] per Cooper P and Goddard J.

79 Court of Appeal Decision at [416] per Cooper P and Goddard J.

80 Court of Appeal Decision at [429] per Cooper P and Goddard J.

81 This is evident from the majority's characterisation of the requirement of exclusive use and occupation from 1840 to the present day as a "literal" reading of s 58: Court of Appeal Decision at [416] per Cooper P and Goddard J. The majority sets up a false conflict between s 58's wording and their preferred interpretation, because the concept of exclusivity is clearly not "literal" (given public rights of navigation and fishing are preserved under the Act).

82 The (then) Chief Justice was clear that the question of whether the applicants would succeed in the Māori Land Court in establishing any customary property in the foreshore and seabed (and the extent of any interest) remained "conjectural", noting at [9] that: "In the past, claims to property in areas of foreshore and seabed seem to have identified relatively discrete areas comprising shellfish sandbanks, reefs, closely-held harbours or estuaries, and tidal areas or fishing holes where particular fish species were gathered. … Nor will the appeal resolve questions of the nature of any property interest in land (whether it approximates a fee simple interest or whether it is lesser property)". See also the Court of Appeal Decision at [192] per Miller J: "In *Ngāti Apa* itself the Court took care not to speculate on the direction the common law might have taken. Counsel did not address the topic before us".

83 See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.3] and [3.3.3]; and more recently, Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry: Stage 2 Report* (Wai 2660, 2023) at [6.5.2]: "the Tribunal [in the Wai 1071 report] found that there was a substantial amount of uncertainty about how aboriginal title would play out in practice in Aotearoa New Zealand. We agree that the details of how exactly the High Court would have made use of its jurisdiction are unclear".

84 New Zealand courts have not had to consider the common law on aboriginal title or rights in detail. Richard Boast explains why this is so in "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 at 272-273: "The answer lies deeply embedded in the structure of New Zealand's land law and the particular functions of the Māori Land Court, which has been in continuous existence in something like its present form since 1865. The Court … was set up to convert Māori customary titles by freehold grants. … The Māori Land Court did not issue titles defined by customary law and it bears no resemblance to such institutions as the Native Title Tribunal in Australia. The Māori Land Court was an agency of title conversion".

85 In Australia, the High Court of Australia has determined that the common law does not recognise exclusive native title

Important matters that would have required resolution by the courts include: what test would be developed for the recognition of title in the takutai moana; and what the common law incidents of aboriginal title in the takutai moana would be, including how any determination would interact with existing common law rights of navigation and fishing, as well as existing statutory regimes.[86]

28. In addition, a small number of Native and Māori Land Court decisions (not referred to by the majority) had previously considered whether areas of the takutai moana were Māori customary land. The case law was not well-developed, but provides some indication that proof of continuous and exclusive use may have been required should the Māori Land Court have considered claims to the takutai moana immediately following *Ngāti Apa*.[87]

29. While the majority appear to assume that the entirety of the takutai moana is subject to extant customary rights that would necessarily translate into customary marine title today, *Ngāti Apa* did not adopt such a presumption.[88] To the contrary, the Court of Appeal expressed caution as to whether customary property interests could be proven to exist in the takutai moana. The (then) Chief Justice expressed the view that "the extent of any interest

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rights to the sea or seabed (on the basis that a grant of exclusive rights is inconsistent with the common law public rights to navigate and fish): *Commonwealth v Yarmirr* (2001) 208 CLR 1 (HCA) and *Western Australia v Ward* (2002) 213 CLR 1 (HCA). (In its *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.3.4] the Waitangi Tribunal expressed the view that it would be "a bold New Zealand High Court judge who would decline to follow the approach of the majority in *Yarmirr*".) In Canada, the courts have not yet determined whether aboriginal title in relation to the foreshore and seabed confers exclusive rights akin to a fee simple title. In the recent Ontario Court of Appeal decision, *Chippewas of Nawash v Canada* [2023] ONCA 565 (which considered a claim to submerged lands), the Court remitted the question of whether title was established to the trial judge and simply expressed the view that the question of whether aboriginal title to a portion of the Great Lakes is compatible with public rights of navigation "cannot be assessed until the extent of Aboriginal title in submerged lands is determined": at [97]. In *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc* 2022 BCSC 15, 2022 CarswellBC 36 (BCSC), Justice Kent of the British Columbia Supreme Court went further, stating (in obiter) that "the conflict between the exclusivity of Aboriginal title and the primacy of the public right of navigation might still provide a potentially insurmountable barrier to a finding of Aboriginal title in this case. In fact, on the face of it, this would appear to be the case for *any* Aboriginal title claim to the bed of a navigable waterway" (at [331], original emphasis) and that "Without some development in the law, there may be no path to Aboriginal title to submerged lands beneath navigable waterways" (at [333]).

86 Such as the Resource Management Act 1991 or the Crown Minerals Act 1991.

87 See the *Kauwaeranga* decision (1870) 4 Hauraki MB 236 and the *Ngakororo Mudflats* decision (1942) 12 Auckland NAC MB 137. In the *Kauwaeranga* decision, Chief Judge Fenton inquired into whether, at 1840, the applicants had any estate, title or interest in land on the Thames foreshore or whether they exercised rights of ownership over it; and whether the cession of sovereignty had destroyed any such right or title. The Court found that consistent and exclusive use of the land had been clearly shown from time immemorial, and no persons except the applicants and their ancestors had, at any time, appropriated this land to their use, nor had the exclusive right of the applicants to enjoy it ever been disputed by anyone until the present contention. In *Ngakororo Mudflats* (which concerned land that was once foreshore but had accreted), the Native Appellate Court held that to prove title, it had to be shown that the land was exclusively occupied from 1840 continuously until the date of investigation: at p 140. See also the Māori Land Court's *Ninety Mile Beach* decision, where the Court considered the foreshore of Ninety Mile Beach had been occupied by Te Rārawa and Te Aupōuri "to the exclusion of other tribes" and stated that "[i]t is well known that the Maoris had their fishing grounds at sea and that these were jealously guarded against intrusion by outsiders": *Ninety-Mile Beach* (1957) 85 Northern MB 126 at 127.

88 The Court confirmed the doctrine of continuity in respect of property rights means that pre-existing rights before 1840 continue, however, the doctrine does not presume that the rights are of a particular extent or character: see *Ngāti Apa* at [31] and [49] per Elias CJ and at [184] per Tipping J. The Native/Māori Land Court also did not apply any such presumption in the few cases concerning land below high-water mark that it considered (see fn 87 above).

remains conjectural".[89]

30. The Act similarly does not adopt a presumption that the entire takutai moana is subject to extant customary title. Instead, the Act requires applicants to establish their customary interests in the takutai moana by reference to specific criteria. This approach recognises that customary associations with the takutai moana can vary in intensity or strength, depending on the circumstances (including whether the area at issue is inshore or offshore[90] and whether rights have been attenuated by loss of seafront land and by rights acquired in the meantime by others).[91]

Exclusivity "from 1840 to the present day" is not an impossible test

31. The Attorney-General considers the concept of exclusive use and occupation requires both an externally-manifested intention to control the area as against third parties (both Māori and non-Māori) and the capacity to do so.[92] A requirement to demonstrate this intention and capacity over time (from 1840 to the present day) does not lead to the inexorable conclusion that "few areas" of the coastline can meet the s 58 test.[93] To the contrary, in this proceeding and others under the Act to date, applicants have been able to meet the test.[94] This point is developed further below from [37].

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89 *Ngāti Apa* at [9]. Gault P said he had "real reservations about the ability for the applicants to establish that which they claim": at [106]. The Waitangi Tribunal (in its review of the policy underpinning the 2004 Act) also did not accept the assertion that the Māori Land Court (if left to determine customary title claims immediately following *Ngāti Apa*) would have declared, in all cases, that land was customary land (absent extinguishment): Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.5.1] and [3.5.4]. Nor does the common law from overseas jurisdictions admit as a starting proposition that aboriginal rights or title are taken as a given (absent extinguishment). The first question asked by the common law of Aboriginal title is whether the common law is able to recognise the customary title that is claimed and, if so, to what extent: see for example *Fejo v Northern Territory* (1998) 195 CLR 96 (HCA) at [46] ("The underlying existence of the traditional laws and customary is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title" (original emphasis)); *Western Australia v Ward* (2002) 213 CLR 1 (HCA) at [51] ("A determination of native title … must state the *nature* and *extent* of the native title rights and interests in relation to the determination area. Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms") and [85]. In the Canadian context, in order to make out a claim for aboriginal title, the Supreme Court in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [143] stated that the aboriginal group asserting title must satisfy a number of criteria.

90 For example, the Ministerial Review Panel implicitly acknowledged it would not be realistic to treat all customary rights and interests in the takutai moana as amounting to full ownership. It said, "it is easier for a hapū to enforce its authority over the dry land and, the further from the shore the less likely it is that a hapū could prevent use by strangers": Ministerial Review Panel Report at 146. This statement necessarily admits that customary title may not extend to the full breadth of the territorial sea.

91 As Miller J recognises, the Act is not concerned with the provision of redress for rights that have been lost to the practical and legal effects of colonisation: Court of Appeal Decision at [196].

92 Consistent with the Court of Appeal Decision at [162] and [165]-[172] per Miller J. This distinguishes areas controlled by a group from areas in respect of which a group holds only specific resource rights: see [141] per Miller J.

93 A point recognised by Miller J: Court of Appeal Decision at [195].

94 See, for example, *Re Reeder* [2021] NZHC 2726 at [82]-[96], referred to by Miller J in the Court of Appeal Decision at [195] as "a good example of the sort of inquiry that I consider Parliament had in mind. Powell J found that customary authority over the application area had been maintained despite its close proximity to metropolitan Tauranga. That conclusion rested on factual findings about the physical characteristics of the area and practical restrictions on access to it".

32. In summary, the concept of exclusive use and occupation clearly does not require complete exclusion of third parties, because the Act *presumes* the exercise of public rights of access, fishing and navigation are compatible with the concept of exclusivity.[95] The Act also does not require the establishment of an "unbroken chain" of exclusive use and occupation from 1840 to the present day because it contemplates some level of interruption to exclusive use and occupation over time.[96] Instead, the s 58 assessment necessarily involves drawing inferences from evidence of instances of exclusive use and occupation across both time and location. Such an assessment is not, as it appears to be assumed by the majority, antithetical to tikanga. As Miller J observed, there are "means of establishing control of an area [that] survive as a set of cultural norms which are constantly reinforced through ritual engagement between tangata whenua and manuhiri".[97] (Miller J's approach in this respect was grounded in the tikanga evidence in this proceeding and an understanding of how that tikanga operates in relation to the takutai moana. In contrast, the majority did not refer to the tikanga evidence in its limb two assessment.[98])

Non-recognition is not extinguishment

33. The majority wrongly characterise the effect of not satisfying the test for customary marine title as an "extinguishment".[99] The Act expressly restored any customary interests in the common marine and coastal area that were extinguished by the 2004 Act.[100] However, as Miller J correctly observed, a distinction needs to be drawn between underlying customary interests (which s 6 reinstates but which are indeterminate), and the legal interests into which those rights may be translated under the legislation.[101] Those underlying customary interests continue to exist, even if a group is unsuccessful in obtaining customary marine title (or protected customary rights), and such

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95 As recognised by Miller J: Court of Appeal Decision at [120]. See also s 59(3) of the Act.

96 That is clear from the requirement in s 58(1)(b) for an applicant group to have exclusively used and occupied an area of the common marine and coastal area from 1840 to the present day without "substantial" interruption.

97 Court of Appeal Decision at [171] per Miller J.

98 Court of Appeal Decision from [416]-[434] per Cooper P and Goddard J.

99 Court of Appeal Decision at [416] per Cooper P and Goddard J. See also at [426(b)] and [427].

100 Section 6(1) of the Act provides that "[a]ny customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with this Act". The Act sets out the mechanisms by which customary interests are recognised, but is not the source of their existence. As the Supreme Court recently stated, "the processes such as that provided for by [the Act] are not the *source* of such customary interests but rather provide a mechanism for their recognition": *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [154] (emphasis added) per William Young and Ellen France JJ. See also at [237] per Glazebrook J, [296]-[297] per Williams J and at [332] per Winkelmann CJ.

101 Court of Appeal Decision at [230] per Miller J.

groups continue to have the right to participate in conservation processes afforded by s 47 of the Act. It is open to such a group to continue to exercise its tikanga in relation to the takutai moana, subject to statutory rules that apply. This includes, for example, the observance of kaitiakitanga practices and the imposition of rāhui.[102]

34. The majority's misuse of the concept of extinguishment materialises in two principal ways: it informs the majority's conclusion that s 58's continuity requirement should be discounted to avoid "unjust" outcomes that would "defeat the promises made in the Treaty/te Tiriti";[103] and it leads the majority to adopt a threshold for (third-party) substantial interruption that effectively resembles the test for extinguishment.[104] The majority's interpretation significantly narrows the scope for third-party use to amount to a substantial interruption,[105] by suggesting such use must be authorised by legislation "capable of overriding" customary rights and physically exclude applicants from accessing an area.[106] The majority take this approach because they consider the prospect of third-party access or fishing otherwise substantially interrupting exclusive use and occupation would lead to s 58 "extinguish[ing] many customary rights … by a side wind".[107]

Court's task is to implement the Act

35. As Miller J correctly observed, the Court's task is to implement the Act, which deliberately strikes a balance between customary rights and the rights of others in relation to the takutai moana. The Court's task is not to evaluate whether the Act breaches the Treaty.[108] As His Honour put it:[109]

> When read with the preamble and s 7, the purpose statement tells us that Parliament has taken account of the Treaty by establishing a durable scheme which recognises and promotes the exercise of customary interests while

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[102] It is also noted that extinguishment of customary rights cannot occur "by a sidewind", despite this phrasing being deployed by the majority: the authorities are clear that extinguishment must be "clear and plain" and unambiguously directed towards that end. See these submissions at [48] and *Ngāti Apa* at [154] per Keith and Anderson JJ; and *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 363, both applied in *Re Reeder* [2021] NZHC 2726 at [128]-[129].

[103] Court of Appeal Decision at [427] and [429] per Copper P and Goddard J. See in particular the authorities on extinguishment that the majority refers to in that context (at [427], footnote 462). The thrust of the majority's reasoning is that the Act itself has the practical effect of extinguishing customary rights through non-recognition, and that this is inconsistent with the Crown's Treaty obligations.

[104] Extinguishment is a question of law and is the consequence of legal events, such as legislation (see these submissions below from [48] for more detail). Substantial interruption, by contrast, is a consequence of the *de facto* loss of exclusive use and occupation.

[105] See these submissions below from [44].

[106] Court of Appeal Decision at [428] and [433] per Copper P and Goddard J.

[107] Court of Appeal Decision at [427] per Cooper P and Goddard J.

[108] Court of Appeal Decision at [67] per Miller J. See also at [96].

[109] Court of Appeal Decision at [190] per Miller J.

reconciling them with other lawful rights and uses. The courts' carefully circumscribed task is to implement that scheme.

36. The underlying logic of the majority's interpretive approach rests on an assumption that the statutory scheme devised by Parliament is inconsistent with the Treaty.[110] They reach this view by accumulating the errors identified above, and ultimately eschew the statutory wording of s 58 on the basis it would compel "unsatisfactory",[111] "ironic" and "unjust" results.[112] This approach does violence to the text of s 58 and is unsupportable.[113] Two additional concerns arise:

    36.1 The statutory scheme reflects specific choices made by Parliament about how to reconcile and provide for Treaty principles, tikanga Māori and the common law. Parliament deliberately drew on the dual perspectives of tikanga and the common law when developing the s 58 test,[114] and it chose to include a descriptive clause (s 7) to explain how the Act takes accounts of the Treaty.[115] In that context, "institutional modesty" is required.[116] Parliament, as the polity's representative body, is entitled to put forward its view of how the principles should be operationalised in a given setting.[117]

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110 See the Court of Appeal Decision at [426]-[427] per Cooper P and Goddard J in particular. See also fn 103 above.

111 Court of Appeal Decision at [428] per Cooper P and Goddard J.

112 Court of Appeal Decision at [426(b)] per Cooper P and Goddard J. Relatedly, the majority say at [416]-[417] that a literal interpretation of s 58(1) would be inconsistent with the "assurances" given by the Government in its 2010 consultation document (presumably referring to the assurance of "recognition of customary rights and interests" – see [13] above). The majority do not explain how that inconsistency is said to arise, but presumably come to this view because they (wrongly) conclude that it is inevitable that applicant groups will fail to meet the s 58 test.

113 See *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [62], where the Court of Appeal said that a "more active approach" to construction may be compelled where the plain or literal wording produces an outcome repugnant to duties arising under the Treaty of Waitangi, provided it "neither does violence to the text nor contravenes parliamentary intention. Construction in any context must remain tenable in light of the text and inferred statutory purpose".

114 See [21] of these submissions. The legislature has identified the primary points where consideration of tikanga is to occur, including in s 58(1)(a) for customary marine title.

115 The Attorney-General described this as a "very important and carefully defined Treaty clause" during the Committee of the whole House stage: (15 March 2011) 670 NZPD 17202. While this Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 held that similar types of Treaty clauses do not constrain the ability of statutory decision-makers to respect Treaty principles (at [150]-[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ), this case is not on all fours with *Trans-Tasman*. The Court there was addressing the issue of whether s 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 exhaustively describes how the Act respects Treaty principles or whether there was a residual expectation for statutory decision-makers to consider Treaty principles when performing functions under the Act. In other words, the issue was about how the Treaty bears on the functions of statutory decision-makers. By contrast, the majority in the Court of Appeal Decision deployed the Treaty more generally as an interpretive aid to arrive at a particular construction of s 58. Where the Treaty is used as an interpretive aid, the authorities are clear that this exercise must not do violence to the text nor contravene discernible parliamentary intention: *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [63]-[68] per Winkelmann CJ and *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [62].

116 Jason Varuhas "The Principles of Legality in Aotearoa New Zealand" (2023) 34 PLR 296 at 300. Professor Varuhas suggests the courts should be extremely cautious about superimposing their views about how Treaty principles should be operationalised where Parliament has clearly determined upon a particular model: at 310.

117 Jason Varuhas "The Principles of Legality in Aotearoa New Zealand" (2023) 34 PLR 296 at 310. This is consistent with the fundamental principles of law that: statutes are the highest source of law and the essential feature of the sovereignty of Parliament (*Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC) at 622); it is through the language of its enactments that Parliament "speaks" (regarding the primacy of the words Parliament has chosen, see Ross Carter *Burrows and Carter*

36.2 Contrary to the approach taken by the majority,[118] Treaty principles do not prescribe a particular course of action that must be followed by the Crown in exercising its right to govern.[119] Nor is the Crown's duty of active protection absolute or unqualified.[120] In devising a regime that concerns multiple, intersecting interests in the takutai moana, it follows that "no single interest in this mix should be treated as an automatic trump card".[121] When referring to Treaty principles as an interpretive aid,[122] then, the courts need to be acutely conscious that the question of Treaty-consistency is not necessarily binary[123] and that there may be a spectrum of policy options available for giving effect to the Crown's Treaty obligations.

The correct interpretation of s 58

37. It is clear from the structure of s 58 that both limbs of the test must be met before an order for customary marine title can be made. The Attorney-General broadly agrees with the majority's interpretation of limb one: because customary marine title is concerned with territorial (not use) rights, the Court must be satisfied the applicant group exercises control or authority as a matter of tikanga over the relevant part of the takutai moana.[124]

38. As for limb two, the Attorney largely agrees with Miller J's approach.[125] The

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Statute Law in New Zealand (6th ed, 2021, LexisNexis online), ch 10 'The Statutory Text", and also the Court of Appeal Decision at [99] per Miller J); and the meaning of legislation is ascertained from its text and in light of its purpose and context (Legislation Act 2019, s 10(1)). See too s 3(2) of the Senior Courts Act 2016, which records New Zealand's "continuing commitment to the rule of law and the sovereignty of Parliament".

118 See [427], where the majority concludes that the prospect of third-party access or fishing amounting to substantial interruption would "defeat the promises made in the Treaty/te Tiriti", "entrench and perpetuate" historical Treaty breaches, and would allow the Act to operate as an adverse possession regime that is "inconsistent with the Treaty".

119 Importantly, the Crown may decide from a number of possible policy options how to give effect to its Treaty obligations, provided it elects between the available options reasonably and in good faith: *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) at 135.

120 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*] at 517. The Privy Council said at 517 that, to demand such a standard would be inconsistent with "the Crown's other responsibilities as the government of New Zealand and the relationship between Māori and the Crown".

121 Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) Volume 1 at 196. The notion that a successful partnership requires multiple interests to be balanced has been repeatedly explored in Tribunal reports. See in particular, Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [5.1.4]; and Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry: Stage 1 Report* (Wai 2660, 2020) at [3.2].

122 See [26] above, however, in relation to how the majority (although ostensibly deploying the Treaty as an interpretive aid) was not undertaking a genuine, interpretive exercise about the meaning of exclusive use and occupation from 1840 to the present day without substantial interruption.

123 See *Students for Climate Solutions Inc v Ministry of Energy and Resources* [2022] NZHC 2116, (2022) 24 ELRNZ at [93]: "It should … be remembered that the Treaty principles themselves involve questions of evaluation, and of judgment. Issues may often involve an apparent contest between rangatiratanga and kāwanatanga. Respect for both concepts is necessary to give effect to the principles".

124 Court of Appeal Decision at [402] per Cooper P and Goddard J. That is, the group must show that as a matter of tikanga it has "the authority to use and occupy the area, and to control access to and use of that area by others": at [435(a)]. It follows that the use by a group of a particular resource in an area, coupled with an intention and ability to control the use of that resource by others, is not of itself sufficient to establish the area is *held* by the group in accordance with tikanga: at [404]. See also at [401].

125 Court of Appeal Decision at [134]-[210] per Miller J. Miller J's approach draws on the Canadian jurisprudence (as well as tikanga Māori): Court of Appeal Decision at [162], [105]-[113] and [138]. The High Court in *Re Reeder* also held that the

concept of exclusive use and occupation was drawn from Canadian law,[126] and the drafters had in mind that an applicant would demonstrates its "capacity to exclude others from the area".[127] While tikanga Māori may inform the interpretation of limb two,[128] it does not take precedence over the common law concepts that Parliament has drawn upon or permit elements of the statutory test to be disregarded.[129]

Exclusive use and occupation

39. At common law, the concept of exclusive use and occupation imports ideas of possession and control.[130] In Canada, to satisfy the test for Aboriginal title, the Aboriginal group must show it has historically acted in a way that would communicate to third parties that it held the land for its own purposes.[131] There must be some evidence of a "strong presence" on or over the land claimed, manifesting in acts of occupation that demonstrate that the land "belonged to, was controlled by, or was under the exclusive stewardship" of the claimant group.[132] Exclusivity needs to be understood as "the intention and capacity to retain exclusive control" over the land.[133]

Canadian jurisprudence is useful in considering use, occupancy and exclusivity: *Re Reeder* [2021] NZHC 2726 at [38].

126 Court of Appeal Decision at [51] per Miller J.

127 See [21] above.

128 See Court of Appeal Decision at [138] and [146]-[162] per Miller J. This also reflects the important role tikanga plays in the statutory framework of the Act. In some proceedings under the Act to date, court-appointed tikanga experts (pūkenga) have provided advice on aspects of tikanga that may be relevant to the test, including the second limb of s 58: see, for example, *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [109]-[118] and Appendix IV. See also the Court of Appeal Decision at [266] per Miller J, where he held that it would have been appropriate to ask the pūkenga whether any applicant group exclusively used and occupied a specified area, as that too is in part a question of tikanga.

129 As noted, the legislature has identified the primary points in the Act where consideration of tikanga is to occur by explicitly saying so (for example in ss 58(1)(a) and 51(1)(b)). It is acknowledged that tikanga, as a part of the common law, may also inform the interpretation of other provisions of the Act where relevant. Care must be taken, however, to ensure the interpretation adopted is consistent with the statutory scheme and Parliament's intent: *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]-[95] per Elias CJ; *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [98] and [117] per Glazebrook J and [267] per Williams J; *Bamber v Official Assignee* [2023] NZHC 260 at [46]; and *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521.

130 Exclusivity is a common law principle derived from the notion of fee simple ownership and is a concept that is central to the law of adverse possession (the process by which a person can acquire title to someone else's land by continuously possessing it for a set period) which in turn reflects common law notions of possessory title. In order to constitute possession, the person's control of the disputed land must be single and exclusive; and there must be effective control of the land, as distinct from mere occupation of the land. This difference between "possession" and "occupation" is fundamental to English land law. See Stephen Jourdan and Oliver Radley-Gardner (eds) *Adverse Possession* (Bloomsbury Professional Ltd, United Kingdom, 2011) at 124-125 (and in the New Zealand context see *McDonell v Giblin* (1904) 23 NZLR 660 (SC)). English common law cases relating to title in the foreshore and seabed place considerable weight on acts of exclusion and physical control, or on occupation and use of the marine environment by the construction, ownership and control of structures: *Attorney-General v Emerson* [1891] AC 649 (HL); *Lord Advocate v Lovat* (1880) 5 App Cas 273 (HL); *Attorney-General for Ireland v Vandeleuar* [1907] AC 369 (HL).

131 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38]; *Chippewas of Nawash v Canada* [2023] ONCA 565 at [15.7]. This standard does not require "notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal": *Tsilhqot'in Nation* at [38]; applied in *Chippewas* at [42].

132 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38]; *Chippewas of Nawash v Canada* [2023] ONCA 565 at [15.7]. The Supreme Court of Canada first imported the concept of "exclusivity" into the test for aboriginal title in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (albeit "with caution"): at [156], relying in particular on the writings of Professor Kent McNeil in *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) at 196-204.

133 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38] and [48]; and *Chippewas of Nawash v Canada* [2023] ONCA 565 at [15.8]. The phrase "intention and capacity to retain exclusive control" was used by Professor McNeil in *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) at 204. The fact that other groups or individuals were on the land does not necessarily negate exclusivity. Whether a claimant group had the intention and capacity to control the

40. Consistent with an interpretation of s 58 that is informed by tikanga Māori, the Canadian assessment must be approached from both the common law and Aboriginal perspectives, and take into account the context and characteristics of the Aboriginal society.[134] Applying this in the New Zealand context, as Miller J stated:[135]

> Exclusivity is a question of fact, heavily dependent on the characteristics of the specified area, the kinds, frequency and intensity of use, and the circumstances of claimant groups. The inquiry must be sensitive to the methods that were and are available to assert mana. It must also be sensitive to the practice of whanaungatanga and the existence of whakapapa linkages which mean that other groups may not have been physically excluded from the specified area but rather used its resources with permission of the applicant group.

The continuity requirement ("from 1840 to the present day")

41. A requirement to show an intention and capacity to control the relevant area to the exclusion of others "from 1840 to the present day" does not mean that the applicant group must show, in every case of third-party use, the ability to exclude others. Complete exclusion of third parties is not required because the Act *presumes* the concept of exclusivity is compatible with the exercise of public rights of access, fishing and navigation (protected under ss 26-28 of the Act).[136] Rather, evidence of intention and capacity to control must be assessed "in the round" in light of other evidence and the wider context (geographical landscape, remoteness, and environmental factors).[137] The Court is also

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land depends on various factors, such as the characteristics of the group, the nature of other groups in the area, and the characteristics of the land: *Tsilhqot'in Nation* at [48]; *Chippewas* at [15.9]. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control: *Tsilhqot'in Nation* at [48]; *Chippewas* at [15.9]. See also *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [156].

134 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [14], [34] and [49]; *Chippewas of Nawash v Canada* [2023] ONCA 565 at [15.2] and [15.9]. The Court in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [157] explained that a "consideration of the aboriginal perspective may … lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example … aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation".

135 Court of Appeal Decision at [162] per Miller J.

136 As recognised by Miller J: Court of Appeal Decision at [120]. See also at [163], where Miller J refers to Richard Boast's article, "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 at 281, where Professor Boast argues that rights of access and navigation cannot be destructive of 'exclusivity' because otherwise s 58 would be self-defeating. Professor Boast suggests the Act therefore leans towards the dissenting judgment of Kirby J in *Commonwealth v Yarmirr* (2001) 208 CLR 1 (HCA) at [309] ("A proper approach is … to ask whether native title rights and interests survived in fact, what their relationship was with other rights and interests and how such rights were 'asserted' in that context"), [316] and [320]. It is also relevant in this context that the Waitangi Tribunal found that the acquisition, exercise and impact of public rights of access and use has been uneven and Māori customary authority has subsisted in some areas (Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [2.2.4]), referred to in the Court of Appeal Decision at [164] per Miller J. The Tribunal also observed that, to some extent, use of the foreshore by non-Māori may have been permitted in the exercise of manaakitanga: [2.1.5].

137 Consistent with the Court of Appeal Decision at [162] per Miller J. See also *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 at [149]; and *Re Reeder* [2021] NZHC 2726 at [31] and [36] ("the interpretation [of exclusivity] must be informed by the relevant tikanga"). Such factors may explain periods of no or occasional use or occupation by an applicant group. As Powell J noted in *Re Reeder*, outside of any permanent structures, access to the takutai moana will largely be transitory, predominantly for navigation or fishing, or beach-related activities on the foreshore. How the applicable tikanga deals

entitled to draw reasonable inferences based on (physical) manifestations of occupation, drawing together evidence across both time and location[138] to determine whether the test is met. In other words, an unbroken chain of exclusive use and occupation is not required.[139]

42. To be clear, what is required is evidence of an intention and capacity – as a matter of fact – to control an area as against third parties.[140] The Attorney considers the following factors are likely to be relevant in demonstrating this:

    42.1 ownership of abutting land,[141] and in particular control over access points to the takutai moana;[142]

    42.2 the exercise of non-commercial customary fishing rights;[143]

    42.3 the presence of fishing grounds that "belong to" a group, and which may be used exclusively and kept confidential by that group;[144]

    42.4 the existence of coastal marae and tauranga waka within the area;[145]

    42.5 the observance of tikanga associated with wāhi tapu as a way of restricting access;[146]

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with these types of activities will therefore be of central importance: at [36].

138 At common law, exclusive use and occupation of one discrete area may justify an inference of exclusive use and occupation of a wider area, provided the discrete area and wider area could reasonably be said to be part of a single distinct location or area. See *Lord Advocate and the Trustees of the Clyde Navigation v Lord Blantyre* (1879) 4 App Cas 770 at 791-792; and more recently (in the context of a claim for the recognition of exclusive fishing rights), *Loose v Lynn Shellfish Ltd and others* [2016] UKSC 14, [2017] AC 599 at [46]-[47]. In *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38]-[44], [56] and [57], the Court held that "continuous occupation" may be inferred across territory through evidence of occupation of several sites or tracts of land that are linked together through regular use, cultural practice and geographical proximity. The Attorney considers the need to draw inferences will be particularly acute in relation to the seaward boundary of any customary marine title area.

139 The inclusion of the words "substantial interruption" in limb two of s 58 contemplates some level of interruption to exclusive use and occupation over time.

140 Court of Appeal Decision at [170] per Miller J. This is consistent with the Canadian authorities that s 58(1)(b) draws on (see fns 132 and 133 above). The Court in *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 likened aspects of the test for Aboriginal title to the requirements for general occupancy at common law, which is a wholly factual inquiry – there must be actual entry and some act or acts from which an intention to occupy the land could be inferred. The acts and intention had to relate only to the factual or physical occupation – it was unnecessary for a potential occupant to claim the vacant estate legally, and the law would recognise it by virtue of occupation alone: see at [39]-[40]. In other words, the fact of *physical* occupation is proof of possession at law, which in turn will ground title to the land: *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [149].

141 Section 59(1)(a)(i) of the Act.

142 See *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at [250]-[255] and [362]; and *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [249] and [434].

143 Section 59(1)(a)(ii) of the Act. The establishment of rohe moana and appointment of tangata kaitiaki under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 may be relevant in this context. See for example *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at [209]-[219] and [375]; *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [292]-[294] and [656]-[659]; and *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [495]-[497]. Some caution is required, however, because rohe moana recognition can exist regardless of the tenure or property ownership in a district.

144 See *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [492]; *Re Reeder* [2021] NZHC 2726 at [83(a)]; and *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at [212]-[218] and [372].

145 See *Re Reeder* [2021] NZHC 2726 at [1]-[12]; and *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at [166], [247]-[249], [269], [362] and [366].

146 See *Re Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [115(c)], [117(d)], [296], [311], [317], [453] and [556].

42.6 the imposition of rāhui, and their observance by third-parties;[147]

42.7 evidence of members of the applicant group educating and correcting the way third parties carry out activities within the area;[148] and

42.8 the applicant group's involvement in resource management and other regulatory processes concerning the takutai moana.[149]

43. The continuity requirement is not inconsistent with tikanga Māori. This is borne out by the tikanga evidence heard in this case. As Miller J identified, there was evidence of both a historical and contemporary nature that demonstrated the applicant groups exercise control and have the capacity to exclude others from parts of the takutai moana should they wish to, in accordance with tikanga.[150] While Miller J's consideration of the evidence primarily highlighted examples of an intention and capacity to exclude vis-à-vis other Māori groups, he also referred to examples in respect of non-Māori.[151] To avoid doubt, the Attorney submits the test requires an intention and ability to control and exclude both Māori and non-Māori.[152] If Parliament had intended "exclusive use and occupation" to apply as against other Māori groups only, it is reasonable to assume that it would have made that clear.

Substantial interruption

44. Properly interpreted, the Attorney-General submits the question of whether a substantial interruption has occurred requires an overall consideration of the evidence. The assessment is highly fact-sensitive (requiring considering of the

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147 See *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at [207(e)], [270]-[274], [327], [366], [375] and [416]; *Re Reeder* [2021] NZHC 2726 at [83(e)] (contrast with [114]); and *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [192(a)], [220], [298], [330]-[331], [417], [466], [563], [592], and [612].

148 See *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at [169(b)] and [224(i)].

149 See *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at [345] and *Re Reeder* [2021] NZHC 2726 at [94]. Caution should be exercised, however, in conflating distinct categories of authority and statutory regimes. For example, hapū or iwi involvement in Resource Management Act 1991 processes does not require customary property or interests in land as a pre-requisite. Resource Management Act proceedings are not designed to test or establish claims to customary property.

150 Court of Appeal Decision at [147]-[172] and [185] per Miller J. This included evidence of groups exercising customary authority over a certain area by "host[ing]" other hapū or granting them permission to, for example, gather kaimoana in that area; exercising manaakitanga by recognising that, in certain areas, kai is shared amongst certain groups through whakapapa connections; exercising kaitiakitanga and customary authority by placing rāhui and controlling access and activities in certain areas; and asserting mana through the pursuit of redress and use of statutory processes to limit incursions into the customary uses of a resource. It also included evidence of groups acknowledging certain areas are under the mana of other, identified hapū, asking for permission to enter into and fish in the rohe moana of another hapū (and being either granted or denied such access as a matter of tikanga), and respecting others' rights to assert authority and kaitiakitanga over an area by abiding the imposition of restrictions or exclusions, such as, for example, rāhui.

151 See Court of Appeal Decision at [164] and at [168].

152 Consistent with the Canadian jurisprudence on Aboriginal title, which requires exclusivity as against third parties: see [39] above. It is also consistent with the Ministerial Review Panel's statement that in traditional Māori society, hapū and iwi "asserted mana or authority over coastal marine territories and presumed the right to control and [physically] exclude others": Ministerial Review Panel Report at 72.

nature, extent, duration and cause of any interruption)[153] and is not constrained in the manner suggested by the majority.[154] A substantial interruption can come from either internal or external sources.[155] The term "substantial" may refer to a quantity of events over time and/or a single, interrupting event of such a nature that it factually interrupts a group's exclusive use and occupation. It therefore may be relevant to consider both the number of the alleged interruptions and their nature.[156] In some cases, then, there may be numerous interruptions that do not equate, even when combined, to a "substantial interruption" because they are of a temporary and insignificant nature.

45. The Attorney considers the following (non-exhaustive) matters may contribute to or constitute a substantial interruption:

    45.1 activities carried out in the area by third parties under a resource consent granted prior to 1 April 2011;[157]

    45.2 permanent structures in the area that are owned by third parties (such as port facilities, boat launch ramps, wharves, jetties and outfall pipes);[158]

    45.3 intensive and frequent use and occupation of the relevant area by third parties (for example, the use of commercial shipping lanes, commercial or recreational fishing, and other recreational activities).[159]

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153 Consistent with Miller J's view: Court of Appeal Decision at [174] and [181].

154 See [18.3] and [34] above.

155 For example, where there is insufficient evidence of exclusive use and occupation by the applicant group from the area (or part of the area) for a period of time; and where activity by third parties is of a sufficient nature or character that it constitutes a substantial interruption.

156 This was a point recognised by Churchman J in *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025, [2022] 2 NZLR 772 [**High Court Decision**] (at [230], [251]-[252] and [256]-[258] and was not disturbed on appeal: see Court of Appeal Decision at [174] per Miller J and [433] per Cooper P and Goddard J.

157 Section 58(2) of the Act states that any resource consent granted between the Act's commencement and the date a recognition order comes into effect is deemed not to amount to a substantial interruption. By implication, other resource consents may do so (see Court of Appeal Decision at [142] per Miller J). For example, in the High Court (during stage two of the proceedings), Churchman J found that parts of the Ōpōtiki Harbour Development Project amounted to a substantial interruption, on the basis it was an extensive project and the general public had been excluded from the area since mid-2021 and would continue to be for at least two years. The Court considered the project was "fundamentally changing the landscape and use of this part of the takutai moana on a substantial scale, and has a major impact on the use and occupation of this area": *Re Edwards (Whakatōhea Stage Two)* No 7 [2022] NZHC 2644 at [23]-[29].

158 For example, in *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [230], the High Court found that the outfall pipe from the Pan Pac Paper Mill had caused significant pollution in the area surrounding the pipe at Whirinaki, resulting in hapū members significantly decreasing or ceasing entirely the gathering of kaimoana or swimming in the area, and this amounted to a substantial interruption.

159 Evidence of exploitation and over-use of resources within the takutai moana by third parties may be suggestive of this. In addition, the existence of easily accessible, legal, public access to the takutai moana may contribute to a substantial interruption if it affects an applicant group's exclusive use and occupation of a specified area. The High Court in *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [272] found that significant recreational use and boat use in its totality had amounted to a substantial interruption in part of the application area. Intensive third-party use of a marina and a boat ramp also contributed to a substantial interruption on the facts. The Court also found that third-party use through walking tracks, highways and roads interrupted the ability to exercise tauranga waka rights and this constituted a substantial interruption:

46. In relation to the last point, s 59(3) of the Act provides that third-party use for fishing or navigation does not, "of itself", preclude the establishment of customary marine title.[160] Contrary to the approach taken by the majority,[161] as a matter of construction, s 59(3) clearly contemplates that some level of third-party use for fishing or navigation is capable of having that effect (depending on the scale, extent and duration of those activities).[162] As Miller J said, it will depend on the facts.[163]

ISSUE 2 – THE EFFECT OF PREVIOUS EXTINGUISHING EVENTS

47. Customary marine title cannot be recognised under the Act if the underlying rights have been extinguished as a matter of law. Section 58(4) makes that clear.[164] The Act presumes, in the absence of proof to the contrary, that a customary interest has not been extinguished.[165]

48. Extinguishment is a question of law and is the consequence of legal events. In *Ngāti Apa*, the Court held that, upon the Crown's acquisition of sovereignty in New Zealand, it acquired a "radical" title that was not inconsistent with common law recognition of native property rights, which continued until lawfully extinguished.[166] Whether customary interests have been extinguished will depend on the effect of the legislation or actions relied upon as having that effect.[167] Customary interests cannot be extinguished "by a side wind"[168] and the need for "clear and plain" extinguishment is well-established.[169] At

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at [238] and [272(c)]. See also *Re Ngāti Pāhauwera (Stage 2)* [2023] NZHC 15 at [66]-[69].

160 And, as noted, the concept of exclusivity is compatible with the exercise of public rights of access, fishing and navigation: see [41] above.

161 The majority rejected the submission that substantial third-party access to or fishing in an area can amount to a substantial interruption: Court of Appeal Decision at [427] per Cooper P and Goddard J.

162 If third-party fishing or navigation could never amount to a substantial interruption, the words "of itself" would have no meaning. This point is recognised by Miller J in his dissent (Court of Appeal Decision at [181]), and is supported by the Departmental Report at [1465]-[1466].

163 Court of Appeal Decision at [181] per Miller J.

164 Section 58(4) of the Act says that "customary marine title does not exist if that title is extinguished as a matter of law". Similarly, s 51(1)(c) says that a protected customary right is a right that "is not extinguished as a matter of law".

165 Section 106(3) of the Act. The party relying on extinguishment therefore bears the onus of proving it.

166 See *Ngāti Apa* at [21]-[48] per Elias CJ: [102] per Gault J; and [139], [143]-[147] and [160] per Keith and Anderson JJ.

167 *Ngāti Apa* at [47] and [49] per Elias CJ; and *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 363. See also comparable jurisprudence in Australia: *Wik Peoples v Queensland* [1996] HCA 40, (1996) 187 CLR 1 at 84 per Brennan CJ; and *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 (HCA) at [95] per Kirby J. Examples of extinguishment include the sale of customary title to the Crown, the investigation of title through the Native Land Court and subsequent Crown grant, or by legislation or other lawful authority or executive act (for example, where legislation confers freehold interests). See *Ngāti Apa* at [37]-[47] per Elias CJ; and at [99] per Gault J. For example, the grant of a fee simple estate, which grants the holder exclusive possession, will extinguish customary title because it is inconsistent with the continuance of customary rights and interests: *Ngāti Apa* at [58] per Elias CJ (and [99] per Gault J). See also *Fejo* at [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ and at [101]-[108] per Kirby J; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA) at 69; and *Western Australia v Ward* (2002) 213 CLR 1 (HCA) at [624].

168 *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 363.

169 *Ngāti Apa* at [148] ("the necessary purpose must be clear and plain"), [154], [162], and [170] per Keith and Anderson JJ; and *Akiba v Queensland (No 2)* [2010] FCA 643, (2010) 270 ALR 564 at [768]-[771]. Because of the value placed on property rights, they may only be "abrogated or redefined" through lawful exercise of the sovereign power: *Ngāti Apa* at [34] per Elias CJ; and [185] per Tipping J; and *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 (HCA) at [104] per Kirby J.

common law, customary interests, once extinguished, cannot be revived.[170] Their "revival" or "restoration" is possible, however, through legislation that has that express effect.[171]

49. Extinguishment arose in this proceeding because the High Court concluded that customary marine title was not available in respect of the beds of navigable rivers vested in the Crown under the Coal-Mines Act Amendment Act 1903 (**the CMAAA**),[172] as that vesting had had an extinguishing effect.[173]

50. The Court of Appeal, however, considered that customary marine title was nonetheless available.[174] The Court accepted an argument that if customary rights had been extinguished, s 11(3) of the Act "reinstated" them.[175] The Court's reasoning was that, under s 11(3), any previous vesting of the common marine and coastal area in the Crown under the CMAAA was reversed.[176] The Court went on to say that, while s 58(4) contemplates that customary marine title may be extinguished in law, "that provision appears to contemplate extinguishment … by means other than Crown ownership that was subsequently reversed".[177] (On the Court's reasoning, s 58(4) also has no application to extinguishing events brought about through local authority

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170 *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 (HCA) at [57]-[58] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: "[n]ative title to the land was not, and could not be, revived when the land came to be held again (as it was) by the Crown … That the grant of freehold title extinguishes rather than suspends native title rights follows from the way in which the sovereign power to create rights and interests in land was exercised … The rights created by the exercise of the sovereign power being inconsistent with native title, the rights and interests that together make up that native title were necessarily at an end. There can be no question, then, of those rights springing forth again when the land came to be held again by the Crown". See also *R v Saxton* [2009] NZCA 498, [2012] 1 NZLR 331 at [38], referred to in *Re Reeder* [2021] NZHC 2726 at [147].

171 See, for example, Kirby J's separate judgment in *Fejo v Northern Territory of Australia* [1998] HCA 58, (1998) 195 CLR 96 at [112], where he said that extinguishment is irreversible or "[a]t least, … would require legislation to achieve that result and to confer the 'new rights' propounded". In other words, specific legislation can alter the common law and "revive" native title (or specific legislation can confer new rights resembling those extinguished). See these submissions below at [52]-[54] in relation to the New Zealand context.

172 See High Court Decision at [342]-[361]. Under s 14(1) of the CMAAA, the beds of all navigable rivers were deemed to have been vested in the Crown. The High Court (at [355]-[361]) applied established principles to determine whether parts of the Waiōweka and Ōtara rivers (within the takutai moana) were "navigable" under the CMAAA (set out in *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 at [71]-[77]), and concluded that they were: at [361].

173 The vesting of navigable riverbeds in the Crown under s 14 of the CMAAA conferred absolute ownership of the riverbed in the Crown. Such ownership is inconsistent with any pre-existing interests in the same and so extinguished any customary interests in navigable rivers. The former Supreme Court of New Zealand held that the language of the CMAAA is "plain and unambiguous" in vesting beneficial ownership of navigable rivers in the Crown: *R v Morison* [1950] NZLR 247 (SC) at 267. Keith and Anderson JJ reached the same conclusion in *Ngāti Apa* at [161], stating that the phrase "absolute property" in s 14 "recognises the coexistence of the radical title of the Crown and other (beneficial) property; in the particular case of the 1903 Act the Crown had both and was the 'absolute' owner, to use the statutory language". The Attorney-General agrees with the High Court's findings in this case in respect of both the navigability of the Waiōweka and Ōtara rivers and the extinguishing effect of the statutory vesting under the CMAAA. The Court of Appeal implicitly accepted that s 14 of the CMAAA had an extinguishing effect (Court of Appeal Decision at [243]-[244] per Miller J; [360] per Cooper P and Goddard J); and an argument before that Court that the CMAAA was insufficiently clear to expropriate customary marine title was not accepted (at [243]-[244] per Miller J; [360] per Cooper P and Goddard J).

174 The issue is dealt with briefly in the judgment of Miller J from [239]-[244]. Cooper P and Goddard J were in agreement: at [360].

175 Court of Appeal Decision at [243]-[244] per Miller J; [360] per Cooper P and Goddard J.

176 Court of Appeal Decision at [244] per Miller J; and [360] per Cooper P and Goddard J.

177 Court of Appeal Decision at [244] per Miller J; and [360] per Cooper P and Goddard J.

ownership,[178] as s 11(3) also divests "every local authority" of title.)

51. The Attorney-General submits the Court wrongly treated the divestment of Crown and local authority ownership under s 11(3) as having the effect of "reviving" customary interests extinguished prior to the Act coming into force.

Revival of extinguished customary rights requires express legislation

52. The possibility of a statutory resurrection of extinguished customary interests has been discussed in proceedings under the Act. In *Re Reeder*, the High Court made an obiter observation that any extinguished customary interests in a particular part of the application area (as a consequence of Harbour Board vesting legislation)[179] would have been "statutorily revived" by the Foreshore and Seabed Endowment Revesting Act 1991 (**Foreshore Revesting Act**).[180] The Court accepted the Act was "sufficiently explicit to achieve that result"[181] and considered the correct position regarding revival of customary interests is better expressed as "customary rights, once extinguished, cannot revive unless legislation specifically provides otherwise".[182]

53. In *Re Ngāti Pāhauwera*, the Court found that customary interests had been extinguished by the registration of fee simple titles in the Napier Harbour Board.[183] However, the Court went on to find that the Foreshore Revesting Act (and in particular, the specific wording "as if it had never been alienated from the Crown" in s 5) achieved a "statutory revival" of customary interests in some parts of the relevant area.[184] The Court referred to the legislative history

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178 For example, through Harbour Board vesting legislation. The High Court has previously accepted that legislation that clearly vests foreshore lands in a Harbour Board for an estate in fee simple has an extinguishing effect: *Re Reeder* [2021] NZHC 2726 at [142], referring to the Whangarei Foreshore Vesting Act 1913; and *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [243]-[246].

179 The Court rejected an argument that the relevant customary rights relating to the foreshore of Te Tāhuna o Rangataua (part of Tauranga Harbour) were extinguished as a consequence of the Tauranga Foreshore Vesting and Endowment Act 1915 (see *Re Reeder* [2021] NZHC 2726 at [118]-[144]), and so its comments on statutory revival were obiter.

180 Section 4 of the Foreshore and Seabed Endowment Revesting Act 1991 provided that the Act applied to all land that was formerly alienated from the Crown and vested in a Harbour Board or a local authority, and at the commencement of that Act is foreshore and seabed and vested in a local authority. Section 5 of that Act provided that "all of the land to which this Act applies is hereby revested in the Crown as if it had never been alienated from the Crown and free from all subsequent trusts, reservations, restrictions, and conditions".

181 *Re Reeder* [2021] NZHC 2726 at [145]. The Court observed, "The clear words of the relevant sections of the Foreshore Revesting Act … make it clear that whatever the nature of the title transferred to a harbour board it is 'revested in the Crown as if it had never been alienated from the Crown'": at [146].

182 *Re Reeder* [2021] NZHC 2726 at [147].

183 *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [243]-[246].

184 *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [250]. Revival of interests was achieved only in respect of those areas to which the Foreshore Revesting Act applied (set out in s 4), namely areas of the foreshore and seabed that – at the commencement of that Act – were "vested in a local authority". Some land parcels included in the fee simple titles were not subject to the Foreshore Revesting Act because they had already been revested in the Crown under other legislation (which did not effect a statutory revival): at [268]. Further, in respect of some areas, subsequent registration of fee simple titles (that is, after the enactment of the Foreshore Revesting Act) extinguished customary interests and so customary marine title was not available for that reason: at [261].

as well as the express wording in that Act,[185] and concluded there was "a specific and explicit intention from the legislature to revive customary rights that [had] been extinguished".[186]

54. An obvious example of the express statutory revival of extinguished customary interests is found in the Act itself. Section 6 provides that any customary interests in the takutai moana "that were extinguished by [the 2004 Act] are restored and given legal expression in accordance with the Act".[187] Section 6 is unambiguous in declaring its intent to restore customary interests that were extinguished by the 2004 Act.[188]

Section 11(3) does not revive previously extinguished customary rights

55. There is nothing in s 11(3) of the Act that revives previously extinguished customary interests. Section 11 addresses the special status of the takutai moana (which no one is capable of owning).[189] To achieve this, s 11(3) provides for the divestment of Crown and local authority title over any part of the takutai moana:[190]

> On the commencement of this Act, the Crown and every local authority are divested of every title as owner, whether under any enactment or otherwise, of any part of the common marine and coastal area.

56. Section 11(3) is simply a divesting provision. It is also entirely forward-looking: it divests title upon the commencement of the Act and does not purport to reach into the past to address extinguishing events that occurred prior to the Act coming into force.[191] Neither the wording of the provision nor the

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185 The explanatory note of the Foreshore and Seabed Endowment Revesting Bill 1989 stated in relation to cl 4 (what became s 5): "[t]he intention is that the land concerned will have the same legal status as it had immediately before the alienation from the Crown. *This means that any Māori interests in respect of the land at that time can be revived when the Bill comes into force*": Foreshore and Seabed Endowment Revesting Bill 1989 (208-1) (explanatory note) (emphasis added). Similarly, when the Bill was introduced to the House, the Minister of Māori Affairs confirmed that it "opens up the right for Māoridom to go back and question of ownership of any seabed or foreshore": (7 November 1989) 502 NZPD 13389.

186 *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [259].

187 This appears to be precisely the type of revival of customary interests referred to in Kirby J's judgment in *Fejo v Northern Territory of Australia* 1998] HCA 58, (1998) 195 CLR 96 (HCA), referred to above in fn 171.

188 This is supported by the parliamentary materials. For example, in his second reading speech, the Hon Dr Pita Sharples said "This bill restores the ability of Māori to seek customary property rights in the High Court. Customary interests extinguished by the 2004 Act are restored": (8 March 2011) 670 NZPD 16991. In her second reading speech on behalf of the Attorney-General, the Hon Tariana Turia said "[t]he 2004 Act extinguished existing Māori customary title. … Inevitably, the essential legacy of this bill will be in repealing the discriminatory Foreshore and Seabed Act 2004": (8 March 2011) 670 NZPD 16976-16977. See also the Departmental Report at [439] ("The restoration, through clause 15 [which became s 6], of any customary interests in the [takutai moana] which were extinguished by the 2004 Act is a fundamental aspect of the regime established through this Bill. The clause is needed because merely repealing the 2004 Act is not enough to revive the extinguished interests. The restoration and recognition of these interests addresses the national and international criticism on this issue").

189 This is articulated in s 11(2): "Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act".

190 See also the Departmental Report at [369]: "in order to give effect to this special status, the clause [what became s 11(3)] divests the Crown and local authorities of their respective titles to the [takutai moana]".

191 Compare s 11(3) with the wording of s 5 of the Foreshore Revesting Act (see fn 180 and [53] above).

legislative history indicates a revival of customary interests via s 11(3) was intended. To the contrary, the overall statutory scheme is concerned with the recognition of *extant* customary interests, reflected by Parliament's preservation of the doctrine of extinguishment via s 58(4).[192] The legislative history bears this out:

56.1 During the committee of the whole House, the Hon David Parker said "everyone in this Parliament now agrees that there should be proper recognition of continuing customary interests in the foreshore and seabed *that have not been extinguished through history*".[193]

56.2 The departmental report on the Bill recorded the Government's intention for the test for customary marine title to recognise "*extant* rights [that] have existed since before 1840 and continue to exist today. This is consistent with the common law doctrine of customary title which recognises rights *which have not been extinguished* or lapsed".[194] The report also recorded the Government's intention for customary interests extinguished as a result of Crown historical breaches of the Treaty of Waitangi to be addressed through Treaty settlement processes.[195]

ISSUE 3 – TEST FOR PROTECTED CUSTOMARY RIGHTS

57. Section 51(1) of the Act provides for protected customary rights to be recognised if an activity, use or practice[196] has "been exercised since 1840"; and "continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group".

58. The interpretation of s 51 was at issue on appeal because the High Court had found that Ngāti Muriwai was entitled to protected customary rights,[197] despite finding there was no evidence of its presence in the Whakatōhea region between 1840–1870.[198] On appeal, Ngāti Ruatakenga contended this

[192] And in respect of protected customary rights via s 51(1)(c). The Attorney-General notes that the Court of Appeal's interpretation of s 11(3) leaves s 58(4) (and s 51(1)(c)) with no work to do in respect of extinguishing events that occurred prior to the Act's enactment (given "specified freehold land" is excluded from the definition of the common marine and coastal area under s 9).

[193] (17 March 2011) 670 NZPD 17396. This statement indicates that customary interests in the takutai moana that *have* been extinguished "through history" (that is, not via the 2004 Act) are not intended to be restored in the Act.

[194] Departmental Report at [1436] (emphasis added).

[195] Departmental Report at [1438] (emphasis added).

[196] See the definition of "protected customary right" in s 9 of the Act.

[197] High Court Decision at [497]-[513].

[198] In the High Court, Ngāti Muriwai claimed to have been a hapū of Whakatōhea since 1840, independent of Ngāti

was an error, on the basis that Ngāti Muriwai were not in existence in 1840 and so could not have been exercising any customary rights since that time.

59. The Court of Appeal rejected this ground of appeal. It held that s 51(1) does not state that an applicant group must itself have exercised the right since 1840.[199] Rather, s 51 requires the activity, use or practice to have been exercised since 1840 and the applicant group to continue to exercise it. Protected customary rights may therefore be recognised for groups that did not exist in 1840, so long as someone to whom the applicant group has a "relevant connection" has continuously exercised the right in the area since then, in accordance with tikanga.[200] The Court described this outcome as a "policy decision … to reflect post-1840 changes in Māori society",[201] but did not identify the source of the policy decision.[202]

60. When read in its entirety, the Attorney-General submits that s 51(1) requires there to be a clear and identifiable connection between the activity exercised "since 1840" and the activity the applicant group continues to exercise in the present day. The Attorney submits there must be a connection both with the *way* the activity is exercised,[203] as well as with the *group* exercising that right. This is consistent with the Preamble: the Act recognises the intrinsic, inherited rights of iwi, hapū and whānau, derived in accordance with tikanga prior to the Crown's acquisition of sovereignty, and translate those rights into modern-day legal rights and interests.[204] The contemporary recognition of these rights therefore requires them to be tied to historical practices that have been carried out in accordance with tikanga since 1840 by a particular group.[205]

Ruatakenga (with whom they acknowledged a close connection and lived with for a period, during which the two groups were collectively known as "Ngāti Muriwai-a-Rua"). The High Court appeared to accept an "implicit" finding of the pūkenga that Ngāti Muriwai does not presently have the status of a hapū of Whakatōhea, and found there was no evidence relating to Ngāti Muriwai in the Whakatōhea rohe between 1840 and the 1870s: High Court Decision at [459], [445] and [499].

199 Court of Appeal Decision at [336] per Miller J; [360] per Cooper P and Goddard J.

200 Court of Appeal Decision at [441] per Miller J; [360] per Cooper P and Goddard J.

201 Court of Appeal Decision at [341] per Miller J; [360] per Cooper P and Goddard J.

202 Ultimately, the Court concluded that Ngāti Muriwai met the s 51 criteria: Court of Appeal Decision at [342] and [337] per Miller J, referring to the High Court Decision at [512]; [360] per Cooper P and Goddard J. The Court relied on inferences drawn by the High Court that "the practices were historic and there was no reason to doubt that they had been carried on in the relevant area … since 1840": at [337].

203 Section 51(1)(b) makes this clear. It explicitly acknowledges the potentially evolving nature of tikanga by stating that a protected customary right can be exercised in accordance with tikanga in "exactly the same or a similar way, or evolve over time". The departmental report on the Bill explained that "[t]he effect of the provision is to avoid 'freezing' Māori culture at a particular point in time (i.e. at 1840) and recognise practices do evolve over time with, for example, the adoption of new technology": Departmental Report at [1149].

204 Preamble of the Act.

205 See, for example, Department of the Prime Minister and Cabinet *Departmental Report on the Foreshore and Seabed Bill* (8 October 2004), Chapter 7, p 20: "The basis of customary rights recognition is that they are tied to historical practices that, at the time of acquisition of sovereignty and since, have characterised the group's traditional culture and lie at the core of the group's identity. This requirement is based on the Canadian common law approach. For whānau, hapū and

61. That is not to say an applicant group's tribal identity cannot undergo changes over time, in accordance with tikanga (for example, where the group has a "tikanga predecessor").[206] Nor is the submission that an applicant group cannot meet the test because it exercises rights as a result of a transfer from another group, in accordance with tikanga. In such situations, the applicant group may still be able to satisfy the s 51 test provided the applicant group can trace the exercise of the right through connected and identifiable group(s) since 1840.

62. It is possible that the above interpretation of s 51 is what the Court had in mind when it referred to the need for a "relevant connection". However, the judgment is ambiguous on this point, because the Court did not identify the group(s) with whom Ngāti Muriwai were said to have a "relevant connection". In other words, it did not identify a predecessor group from whom Ngāti Muriwai were said to have continued use rights or received a transfer of rights. Nor did it assess whether the predecessor group had exercised the rights in the area since 1840.[207] For that reason, the Attorney-General seeks clarification from this Court on the proper interpretation of s 51.

63. The legislative history of the 2004 Act supports the view that s 51 requires there to be a clear and identifiable connection between the group currently exercising the right and the group that previously exercised the right since 1840. The departmental report on the Marine and Coastal Area (Takutai Moana) Bill explained that the protected customary rights provisions were "largely modelled on the customary rights orders provisions in the 2004 Act and therefore do not create a significant shift from the current position".[208]

64. The 2004 Act contained two separate provisions for recognising customary rights orders. To obtain such an order from the High Court, a particular group needed to have exercised an activity, use or practice since 1840.[209] To obtain

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iwi, the Bill defines this in accordance with tikanga."

206 The term "tikanga predecessor" is used in the Court of Appeal Decision in the context of describing the requirements of s 58 (see [434(b)]). Although the term is not defined in the judgment, the Attorney-General understands the Court to be referring to situations where an applicant group has evolved from an earlier, predecessor group (which is now defunct).

207 Court of Appeal Decision at [341] per Miller J; [360] per Cooper P and Goddard J. The Court said that "new and apparently substantial whānau groups have established themselves. Ngāti Muriwai are such a group. They say that they affiliate to the area and to the iwi [presumably, Whakatōhea], but not to Ngāti Ruatakenga". There was no assessment as to whether Whakatōhea (the iwi) has exercised the relevant customary rights in the area since 1840 in accordance with tikanga, or whether Ngāti Muriwai has a relevant connection such that it could rely on Whakatōhea's exercise of any such rights since 1840.

208 Departmental Report at [1147].

209 Foreshore and Seabed Act 2004, s 74. This section required the High Court to be satisfied the customary rights order

an order from the Māori Land Court, the relevant provision did not contain a similar emphasis on a particular group continuing to exercise the activity, use or practice since 1840.[210] When the Foreshore and Seabed Bill was introduced, both tests emphasised the need for *a particular group* to have exercised the activity, use or practice since 1840.[211] However, the Māori Land Court test was amended during the passage of the Bill,[212] to respond to concerns raised by the Māori Land Court Bench that the test would otherwise not capture instances where a transfer of rights has occurred in accordance with tikanga.[213] This policy choice supports the view[214] that s 51 of the Act can similarly accommodate customary transfers, provided the existence of the right can be traced through identified and connected groups from 1840.

20 September 2024

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A J Williams / R L Roff / Y Moinfar-Yong
Counsel for the Attorney-General

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The parties listed above.

applies to "a group of natural persons whose members share a distinctive community of interest", and that: the activity, use or practice is, and has been since 1840, integral to the distinctive cultural practices of *the group*; has been carried on, exercised or followed, in accordance with the distinctive cultural practices of *the group*, in a substantially interrupted manner *since 1840*; and continues to be carried out in accordance with the distinctive cultural practices of *the group*" (emphasis added). Section 66 of that Act also clarified that a "group of natural persons with a distinctive community of interest" does not include persons whose only connection to the group is as successors in title to any land.

210 Foreshore and Seabed Act 2004, s 50. This section required the Māori Land Court to be satisfied the customary rights order applies to "a whānau, hapū or iwi"; that the activity, use or practice "is, and has been since 1840, integral to tikanga Māori"; and "has been carried on, exercised, or followed in accordance with tikanga Māori in a substantially uninterrupted manner since 1840"; and "continues to be carried on, exercised, or followed in the same area … in accordance with tikanga Māori".

211 Foreshore and Seabed Bill 2004 (129-1), cls 42 and 61. See in particular the words "integral to tikanga Māori *in relation to the group of Māori*" (referring to the applicant group) in cl 42(1)(b)(i); and the words "integral to the distinctive cultural practices *of the group*" (referring to the applicant group) in cl 61(1)(b)(i)) (emphasis added). The departmental report explained the tests were intended to be similar, but with the Māori Land Court test focusing on "tikanga Māori" and the High Court test focusing on "the distinctive cultural practices of the group": Department of the Prime Minister and Cabinet *Departmental Report on the Foreshore and Seabed Bill* (8 October 2004), Chapter 7, p 19.

212 Supplementary Order Paper 2004 (302) Foreshore and Seabed Bill 2004 at 24 (see in particular the substitution of the words "integral to tikanga Māori in relation to the group of Māori" with "integral to tikanga Māori" in new cl 42(1)(b)(i)).

213 Department of the Prime Minister and Cabinet *Departmental Report on the Foreshore and Seabed Bill* (8 October 2004), Chapter 7, pp 21 and 26.

214 Set out above at [61].

CHRONOLOGY

19 June 2003	Court of Appeal's decision in *Attorney-General v Ngāti Apa* delivered.
4 March 2004	Waitangi Tribunal's *Report on the Crown's Foreshore and Seabed Policy* delivered.
April 2004	Foreshore and Seabed Bill introduced into the House.
November 2004	Foreshore and Seabed Act 2004 comes into force.
November 2008	Government decides to review the Foreshore and Seabed Act 2004.
June 2009	Ministerial Review Panel's report *Pākia ki uta pākia ke tai* delivered.
April 2010	Government consults public on proposals for developing replacement legislation.
September 2010	Marine and Coastal Area (Takutai Moana) Bill introduced into the House.
1 April 2011	Marine and Coastal Area (Takutai Moana) Act 2011 comes into force.
7 May 2021	High Court Decision in *Edwards* delivered.
4 October 2023	Waitangi Tribunal's *The Marine and Coastal Area (Takutai Moana) Act 2011 Stage 2 Report* delivered.
18 October 2023	Court of Appeal Decision in *Edwards* delivered.

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3. Evidence Act 2006, s 129.
4. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 12.
5. Fisheries (Kaimoana Customary Fishing) Regulations 1998.
6. Foreshore and Seabed Act 2004.
7. Foreshore and Seabed Endowment Revesting Act 1991, ss 4 and 5.
8. Legislation Act 2019, s 10(1).
9. Marine and Coastal Area (Takutai Moana) Act 2011.
10. Resource Management Act 1991.
11. Senior Courts Act 2016, s 3(2).
12. Te Ture Whenua Māori Act 1993, s 129.

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16. *Bamber v Official Assignee* [2023] NZHC 260.
17. *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521.
18. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.
19. *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC).
20. *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
21. *In re the Ninety-Mile Beach* [1963] NZLR 461 (CA).
22. *John da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212.
23. *Kauwaeranga* decision (1870) 4 Hauraki MB 236.
24. *McDonell v Giblin* (1904) 23 NZLR 660 (SC).
25. *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC).
26. *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682.
27. *Ngakororo Mudflats* decision (1942) 12 Auckland NAC MB 137.
28. *Ninety-Mile Beach* (1957) 85 Northern MB 126.
29. *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277.
30. *Re Edwards (Whakatōhea Stage Two)* No 7 [2022] NZHC 2644.
31. *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025, [2022] 2 NZLR 772.
32. *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309.
33. *Re Ngāti Pāhauwera* [2021] NZHC 3599.
34. *Re Ngāti Pāhauwera (Stage 2)* [2023] NZHC 15.
35. *Re Reeder* [2021] NZHC 2726.
36. *Re Rihari* [2019] NZHC 2658.
37. *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559.
38. *R v Morison* [1950] NZLR 247 (SC).
39. *R v Saxton* [2009] NZCA 498, [2012] 1 NZLR 331.
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45. *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599.
46. *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252.

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47. *Akiba v Queensland (No 2)* [2010] FCA 643, (2010) 270 ALR 564.
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51. *Western Australia v Ward* (2002) 213 CLR 1 (HCA).
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67. Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, 2021, LexisNexis online) chs 9 and 10.
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