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 BY LANDOWNERS' COALITION INCORPORATED (INTERVENER) IN SUPPORT OF APPEAL BY ATTORNEY-GENERAL

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Counsel for the Landowners' Coalition Incorporated certify that this submission contains no suppressed information and is suitable for publication.

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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PART I: INTRODUCTION

1.1. The Landowners Coalition Inc (**LCI**)[1] was a participating interested party in this proceeding in the High Court and an appellant in the Court of Appeal. It did not seek leave to appeal to this Court but, on reflection, is participating as an intervener in the current appeal hearings. The essential LCI position is that the Court of Appeal has arrived at an erroneous and problematic interpretation of the s 58 criteria for determining the existence of customary marine title (**CMT**) under the Marine and Coastal Area (Takutai Moana) Act 2011 (**Act**). Accordingly, it generally supports this appeal by the Attorney-General.

1.2. More specifically, LCI contends that the Court of Appeal majority's "best available reading"[2] of s 58(1)'s two limbs involves a level of rewriting of the statutory text that amounts to illegitimate judicial amendment[3] of the Act and a disregard of the legislative history and language.

1.3. Significant points in LCI's submission include:

(a) The Act represents Parliament's second version of a statutory codification of the law relating to the foreshore and seabed in response to concerns about the Court of Appeal's 2003 *Ngati Apa* decision[4] having reversed a settled understanding of the legal position reflected in the Court of Appeal's 1963 *Ninety Mile Beach* decision.[5]

(b) The Act is clearly designed to achieve a new legal regime, emphasising the common marine and coastal area as community property, but including the explicitly prescribed tests for the new customary marine title (CMT) form of property interest. It was not designed to resurrect the common law position as discussed in *Ngati Apa*.

(c) The Act clearly demonstrates that the preceding legislative process included a substantial engagement with the Treaty of Waitangi | Te Tiriti o Waitangi; and its enactment represents a detailed legislative resolution

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1 LCI is a not-for-profit incorporated society that advocates for the protection of private property rights. It participated in the High Court as an interested party and appealed to the Court of Appeal against the High Court's judgment as of right under the Marine and Coastal Area (Takutai Moana) Act 2011 [MACA], ss 104 and 112; and see *Te Kāhui Takutai Moana O Ngā Whānui me Nga Hapū v Landowners Coalition Inc* [2022] NZCA 27 [[05.00633]].

2 *Re Edwards Whakatōhea* [2023] NZCA 304, [2023] 3 NZLR 252 [CA judgment] at [434] per Cooper P and Goddard J [the Majority] on appeal from *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 [HC judgment].

3 Compare *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [66] per Winkelmann CJ.

4 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

5 *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

of the conflicts and controversies associated with legal interests in the foreshore and seabed.

(d) Unsurprisingly in the circumstances, the Act reflects a legislative policy decision *not* to leave the courts to develop criteria for (relevantly) CMT or the incidents of CMT, but rather to state those explicitly in the Act itself. The role of the courts is to assess the evidence advanced by the applicants for CMT and to faithfully apply the explicit language of the operative statutory criteria — that is, the two-limbed test in 58(1).

(e) In both the High Court judgment and those in the Court of Appeal, the courts have strived to read tikanga considerations into the second limb of the s58(1) test, discounting not only the conspicuous omission of tikanga from the second limb (and the equally conspicuous express presence of tikanga in the first limb), but also the consciously constrained role conferred on the courts under the Act.

(f) The failure of the courts below to give effect to the clearly expressed language of each limb of s 58(1) constitutes a profound error which has influenced the determination of the relevant CMT applications. Regrettably, that requires this process to be recommenced.

1.4. Insofar as the purpose and context for the Act is concerned, it is clear that:

(a) Following the controversies and concerns prompted by the 2003 *Ngāti Apa* judgment and the Foreshore and Seabed Act 2004, the Parliamentary intent was to establish a durable scheme accommodating the interests of all New Zealanders in marine and coastal areas.[6]

(b) In particular, the common marine and coastal area (**CMCA**) was to be accorded a special status, with no "ownership" by the Crown or any other person.[7]

(c) Further, a number of newly explicit "ongoing public rights and powers" over the CMCA were provided for.[8]

(d) The Parliamentary intent included recognition of and respect for the customary interests of whānau, iwi and hapū as tangata whenua, and of tikanga, within the terms of the Act.[9]

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6 MACA, s 4(1)(a) (Purpose) and Preamble.
7 MACA, s 11(2).
8 MACA, s 3(3)(b) (Outline) and ss 26–28. See also s 4(2)(e).
9 Section 4(1)(b)–(c) and (2)(b)–(c).

(e) The Parliamentary intent was to establish a process,[10] including criteria specified in the Act itself,[11] for those with customary interests to seek a grant of CMT as a new and unique form of proprietary and territorial title of substance and importance.[12]

1.5. In the balance of these submissions, Part II explains LCI's contentions on the appropriate approach to statutory interpretation. Part III explains LCI's orthodox interpretation of the Act's provisions regarding CMT. Part IV critically assesses the Court of Appeal's interpretation. Part V summarises LCI's conclusions.

1.6. A summary of relevant aspects of the legislative history of the Act is attached as **Appendix I**. LCI relies particularly on the Ministry of Justice's Departmental Report on the Bill,[13] which expressly addresses many of the matters raised in these submissions.

PART II: LCI'S SUBMISSION ON THE APPROPRIATE APPROACH TO INTERPRETATION OF THE ACT

2.1. In summary, the fundamental points about legislation include:

(a) Parliament has full powers to make laws by enacting statutes;

(b) Statutes are the highest source of law, the essential feature of the sovereignty of Parliament to which New Zealand is committed;[14]

(c) It is through the language of its enactments that Parliament "speaks" to those subject to them;[15]

(d) The meaning of legislation is ascertained from its text and in the light of its purpose and its context;[16] and

(e) It is a core ingredient of the rule of law that laws are accessible and, so far as possible intelligible, clear and predictable.

Fundamental principles of statutory interpretation

2.2. The uncontroversial starting point in approaching the interpretation of the Act is s 10 of the Legislation Act: the meaning of legislation is ascertained from its

10 Section 94 and Part 4.
11 Sections 58–59.
12 Sections 60–62.
13 Ministry of Justice *Marine and Coastal Area (Takutai Moana) Bill: Departmental Report* (4 February 2011) [Departmental Report].
14 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC) at 622.
15 Regarding the primacy of the words Parliament has chosen, see R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at ch 10 ("The Statutory Text").
16 Legislation Act 2019, s 10.

text and in the light of its purpose and its context. LCI submits that, as Parliament's legislative work is expressed in the enacted statutory text, the text must be given primacy.

2.3. The Act is general legislation enacted by the Parliament of New Zealand. It is an exercise of the well-settled sovereignty of Parliament recognised, in particular, in the Senior Courts Act 2016, s 3(2). The same provision also explicitly recognises the rule of law.

2.4. The rule of law, and the feature of predictability of laws, requires primary focus on the words used by the legislature.[17]

2.5. Respect for the law and Parliament underpin the settled presumption that the legislature is a rational, reasonable and informed body, coherently pursuing clear purposes in a principled manner, and speaking through competently drafted legislative language.[18]

2.6. In this context, it must be uncontroversial that the work of statutory interpretation involves seeking to implement the intentions of the legislature as expressed in the statutory language.[19]

2.7. Purpose and context are of course relevant in the work of statutory interpretation, but these will be found predominantly in the relevant statutes read as a whole or expressed in specific provisions (including purpose clauses);[20] and in the pre-legislative materials available to, and the relevant consideration of those in, the legislature.

Property rights

2.8. In LCI's submission, it is necessary to engage with the concept of "property rights" to appreciate fully the legislative intention embodied in the Act.

2.9. While there is room for linguistic debate about categories of "property", LCI submits that the Act involves the following categories: community; State and public; private; and communitarian.[21] The principal focus of the Act is (per s 11) to accord a special status to the CMCA: it is not "owned" by anyone. Rather, it

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17 Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) [*Bennion*] at [11.1].

18 *Bennion*, above n 17, at [11.3].

19 See *Bennion*, above n 17, at [10.10], [11.3], [13.6] and [21.2]. Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 225 refers to "the courts' legal obligation" to this effect.

20 Legislation Act 2019, s 10; and *Bennion*, above n 17, at [12.1] and [12.2].

21 See J W Harris *Property and Justice* (Oxford University Press, Oxford, 1996) at ch 7.

is "common property", a context in which no-one can assert an ownership interest to dispute the right of any other person to make use of the resource.[22]

2.10. Private property, in the form of "specified freehold land", is excluded from the Act's definition of the CMCA.[23] This exclusion includes Māori freehold land and Māori reservations. State and local authority ownership title in the CMCA is divested under s 11(3) — that is, transformed into common property. This provides significant context for the Act's provision for (relevantly) CMT.

2.11. CMT is plainly a sui generis proprietary right created by the Act.[24] This recognises one of the Act's explicit purposes – giving some specified legal expression to customary interests (in accordance with the provisions of the Act).[25]

2.12. The Act provides some boundaries. In particular, it provides explicitly that:

(a) from its commencement, no one (including the Crown) does or can "own" the CMCA;[26]

(b) CMT "exists in a specified area" of the CMCA;[27]

(c) CMT provides an "interest in land", but not rights of alienation or disposal of any part of the CMCA;[28] and

(d) CMT rights are limited to those summarised (s 62) and explained (ss 66-93) in the Act and include a foundation of "exclusive" use and occupation since 1840 to the present day without substantial interruption.[29]

2.13. The indications in the Act are consistent with significant standard incidents or common features of ownership, or components of the "bundle of rights" analysis of property rights, recognised internationally.

2.14. A useful exposition is Professor AM Honore's well-known 1961 essay on ownership.[30] He explains these common features by reference to the common needs of mankind and the common conditions of human life, notwithstanding

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22 Harris, above n 21, at 109.
23 See the definition in s 9(1) of MACA of the "common marine and coastal area".
24 HC judgment, above n 2, at [38] [[05.00418]].
25 MACA, ss 4(2)(c) and 6(1).
26 Section 11(2).
27 Section 58(1).
28 Section 60(1).
29 Section 58(1)(b)(i).
30 AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1961) at ch 5, cited by the Court of Appeal in *Hampton v Canterbury Regional Council* [2015] NZCA 509, [2016] NZRMA 369 at [105] n 47.

variations.[31] In LCI's submission, it is these aspects of property that the Act is founded on, in particular s 58(1)(b)(i) and the requirement to prove exclusive use and occupation. As discussed below, that is entirely consistent with the legislative history.

2.15. Honore's first six principal common features (or standard incidents) are:[32]

(e) The right to possess some thing comprising (i) obtaining exclusive control, and (ii) denial of others' interference without permission.

(f) The right to use the thing at one's discretion.

(g) The right to manage the thing.

(h) The right to enjoy the fruits of the thing.

(i) The right to alienate or consume the thing in part or in whole.

(j) An immunity from expropriation of the thing.

2.16. In a more recent analysis, Professor Kevin Gray focused on "excludability" as the core concept in the notion of "property".[33] By "excludability", Gray means control over access (which is of course Honore's first standard incident).[34]

2.17. It remains LCI's submission that exclusivity and control over access are not at all inconsistent with te ao Māori. It is well known that te ao Māori has dominant collectivist features, often in marked contrast with the substantially individualist features of European culture and attitudes. Nevertheless, the use and control of things or property is not limited to European culture. The concepts of authority, power and control are well explained in the chapter on 'Mana Whenua, Mana Moana: Authority over Land and Ocean' in Professor Hirini Moko Mead's book on tikanga.[35] And CMT is explicitly described as an interest in land.[36]

PART III: LCI'S INTERPRETATION OF THE ACT

3.1. Self-evidently, much of Part II above provides fundamental background for LCI's orthodox interpretation of the Act.

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31 At 108.

32 At 112–119.

33 Kevin Gray "Property in Thin Air" (1991) 50 CLJ 252 at 294–305.

34 At 292 and following.

35 Professor Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishing, Wellington, 2016) at ch 17. Further, see also the evidence reviewed by Miller J on exclusivity: CA judgment, above n 2, at [149]–[167] and [185].

36 MACA, s 60(1)(a).

Section 58 — a two-limbed test

3.2. Section 58 of the Act involves two limbs which an applicant group must satisfy:

> **58 Customary marine title**
>
> (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group —
> (a) holds the specified area in accordance with tikanga; and
> (b) has, in relation to the specified area —
> (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
> (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

3.3. The statutory test has of course separated s 58(a) and (b)(i) into different subparagraphs, divided by a semi-colon and a disjunctive "and". The structure of s 58(1) compels the conclusion that there are two discrete and equally necessary limbs of the test for CMT that do not mean the same thing.

3.4. For convenience, these are referred to as "**Limb (a)**" and "**Limb (b)(i)**". Section 58(b)(ii), regarding customary transfers, is peripheral for present purposes — itself incorporating both limbs.[37]

3.5. An applicant group has the burden of positively proving it has fulfilled both limbs of the test.[38] The Court can only make an order for CMT if it is satisfied the requirements of s 58 are met.[39] Even in those circumstances, the Court is not obliged to make an order; the jurisdiction is discretionary.[40]

The purpose and context of the Act

Purpose

3.6. Reflecting submissions by applicant groups, the High Court said that the purpose of the Act justified a rejection of the relevance of "Western proprietary concepts" in favour of a tikanga-based interpretation of the CMT test (s 58).[41] With respect, that approach:

(a) showed inadequate respect for the text of s 58, which states that tikanga drives the interpretation and application of Limb(a), but not Limb (b)(i);

(b) was not an accurate reading of the purpose of the Act; and

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37 MACA, s 58(3)(c) and (d).
38 Section 106(2).
39 Section 98(2)(b).
40 Section 98(1) and (2) and "may".
41 HC judgment, above n 2, at [168] [[05.00452]]. See also at [120] [[05.00442]], [129] [[05.00444]], [142] [[05.00447]] and [161] [[05.00450]].

(c) meant that the High Court diverted itself from engaging appropriately with the Limb (b)(i) requirement, as elaborated below.[42]

3.7. The first stated purpose of the Act is the establishment of a "durable scheme" to ensure the protection of the "legitimate interests of all New Zealanders" in the CMCA.[43] To that end, the Act "gives legal expression to customary interests"[44] in the manner described in Part 3, including by way of orders for CMT.[45] The essential purpose was to establish a new scheme, not to resurrect a common law or customary regime.

3.8. In accordance with that purpose, Parliament's approach from as early as 2010 (when a test for customary title was first circulated for public consultation) was to combine a tikanga-based component drawn from the Te Ture Whenua Māori Act 1993 (now Limb (a)) with a separate, additional component drawing materially on concepts from the Canadian common law of aboriginal title (now Limb (b)(i)).[46]

3.9. A test based solely on tikanga was expressly rejected from the early stages of the policy development process for the reason it would be too uncertain.[47] In contrast, a test for territorial customary interests that combined "both tikanga Māori and common law" was seen to be "in line with the Treaty of Waitangi, its principles and associated jurisprudence",[48] consistent with New Zealand's heritage and legal context and generative of some certainty about how the tests would be applied.[49]

3.10. The inclusion of a common law-based element (properly understood as involving more general property law concepts, as discussed above) requiring exclusive use and occupation was maintained throughout the passage of the Bill, notwithstanding criticisms by some submitters that this limb of the test (in particular the concept of "exclusivity") was incompatible with tikanga.[50]

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42 See below at [3.25] and following.

43 MACA, s 4(1)(a).

44 Section 4(2)(c).

45 Part 3 (Customary Interests) and s 46.

46 Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: Consultation Document* (March 2010) [Consultation Document] at 35–36.

47 Consultation Document, above n 46, at 35; and Departmental Report, above n 13, at [1387] and [1416]–[1417].

48 Consultation Document, above n 46, at 37.

49 Ministry of Justice *Regulatory Impact Statement — Review of the Foreshore and Seabed Act 2004: Post Consultation Decisions* (September 2010) at [71]; and see also the Departmental Report, above n 13, at [1389].

50 For example, see Departmental Report, above n 13, at 5 (Executive summary) and [1381], [1382], [1400]–[1401], [1407], [1409], [1413]–[1414], [1416]–[1417], [1422]–[1427], [1429]–[1430], [1436]–[1438] and [1440]–[1442].

Context

3.11. As described in the Preamble and Purpose of the Act,[51] the Act is designed to be a 'clean slate' following the controversy that surrounded the Foreshore and Seabed Act 2004. Whether or not the recognition of customary interests under the Act represents an improvement or diminishment of the position applicants would have occupied under the Foreshore and Seabed Act (or the pre-existing common law) is irrelevant;[52] Parliament has spoken through the Act.

3.12. The Act addresses the core aspect of the Foreshore and Seabed Act controversy by restoring access to the High Court for Māori groups seeking recognition of their customary interests in the CMCA.[53] In the interests of providing a "durable scheme" that balances the interests of all New Zealanders in the CMCA, the consistent policy intent, as well as the enacted text, involved the Act deliberately defining the requirements for the recognition of customary interests rather than leaving the development of tests up to the courts.[54]

3.13. Section 58 provides for the recognition of limited exceptions to the default position under the Act that no one owns the CMCA,[55] and the high threshold it imposes is deliberate. When asked about the proposed test for CMT during 'Questions for Oral Answer' to Ministers, Hon Christopher Finlayson advised Parliament that the extent of CMCA likely to be covered by CMT under the proposed test would be "not ... very much, at all" and though "some iwi" would be able to meet the test "many iwi" might be unable to.[56]

The Treaty and tikanga

3.14. There can be no dispute that the Act was developed and enacted against a background which included full awareness in the legislature of the Treaty of Waitangi. Acknowledging the Treaty, including *by* providing for the grant of CMT, is one of the Act's express purposes.[57] Section 7 provides further reinforcement that the Act's provision for CMT (and PCR) is "*[i]n order to* take account of the Treaty of Waitangi" (emphasis added).

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51 MACA, Preamble and s 4.

52 In response to a Question for Oral Answer on 21 July 2010, Hon Christopher Finlayson stated that the proposed test would not represent much of a change to the test in s 50 of the Foreshore and Seabed Act 2004: "The overarching test will be exclusive use and occupation, without substantial interruption. The test has some emphasis on tikanga Māori. I do not believe that the overall changes will be very great, at all": (21 July 2010) 655 NZPD 12517.

53 MACA, s 6.

54 For example, see Departmental Report, above n 13, at [1387]–[1389].

55 MACA, s 11(2).

56 (22 June 2010) 664 NZPD 11880.

57 MACA, s 4(1)(d) and (2)(c).

3.15. The purpose of the Act was to create a durable statutory scheme to resolve the controversial issues associated with the CMCA in processes and outcomes which incorporated and rebalanced a range of interests, including tikanga and customary interests. The form of this rebalancing and resolution is prescribed in the detailed terms of the Act. These clearly reflect conscious and considered legislative engagement with and respect for the Treaty. Respecting the statutory language does not involve any 'narrow' construction of the Act or its references to the Treaty.

3.16. Any complaint that the test for CMT chosen by Parliament results in too high a threshold, or is insufficient to meet the Crown's Treaty obligations, is not a matter for these proceedings.[58] The courts must apply the test Parliament has prescribed.

3.17. The role that tikanga plays in that assessment is carefully defined and limited by Parliament's inclusion of the words "in accordance with tikanga" in connection with Limb (a), but not Limb (b)(ii), of the test. As elaborated below, reference to the Treaty cannot justify an interpretation of Limb (b)(i) that effectively reads in the words "in accordance with tikanga" when those words do not appear there.

Limb (a) — "held... in accordance with tikanga"

3.18. Limb (a) has four elements: a territorial element; a practical element ("holds"); contemporaneity (again, "holds"); and a justifiability element ("in accordance with tikanga").[59] The second element ("holds") warrants some elaboration. It cannot be disputed that te ao Māori features a range of expectations and interests, and these are not all of equal significance. Within a hierarchy, the concept of "holds" connotes a strong interest and some inference of control, as distinguished from a lesser interest (perhaps related to transit of a specific area occupied by others).

3.19. That is consistent with the meaning given to "held... in accordance with tikanga" in the Te Ture Whenua Māori Act 1993 (from which the language of Limb (a) was drawn).[60] The Māori Land Court has said "held" at least requires the land be "retained or kept", which in turn must have some inference of control and exclusivity.[61]

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58 Complaints about the appropriateness of the test for CMT in light of the Treaty is one for Parliament itself or the Waitangi Tribunal, which heard evidence and argument on the issue in 2021: see Wai 2660, Stage II.

59 "Tikanga" is defined in the Act as "Māori cultural values and practises": see MACA, s 9.

60 For example, see Consultation Document, above n 46, at 35.

61 *da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212 (25 TTK 212).

3.20. Applying the principles outlined earlier, the statutory language of Limb (a) is sensibly read as giving primacy to tikanga analysis in that paragraph, and weight is properly given to evidence from pūkenga (experts)[62] on what "holds … in accordance with tikanga" means. Conversely, what the High Court judgment referred to as "western proprietary concepts"[63] will not add much to the interpretation and application of s 58(1)(a).

3.21. However, as developed below, LCI's core submission is that s 58(1)(b) is a separate and standalone requirement going to the existence of CMT, and explicitly *not* governed or qualified by analyses "in accordance with tikanga".

Limb (b)(i) — a discrete and equally necessary requirement

3.22. Limb (b)(i) is self-evidently a separate and distinct part of the s 58 criteria. It does *not* refer to tikanga (which is fundamental to, and explicit, in Limb (a)). It has three elements: exclusivity; continuity; and a prescribed period of time. However, an applicant group has the benefit of an explicit presumption, in the absence of proof to the contrary, that a customary interest has not been extinguished.[64]

3.23. Apart from that presumption, the language of Limb (b)(i) indicates a serious but orthodox threshold in relation to proprietary interests. The concepts of exclusivity, continuity and duration are related to use and occupation of a specified area. The legislative logic is clear: an applicant group that seeks recognition by order of the High Court of an interest in a certain area, by way of CMT, must show that, as a matter of fact and proof, it has exclusively used and occupied that area since 1840.

3.24. This analysis of Limb (b)(i) is straightforward, and respectful of the legislative language and purpose, which both accord respect and recognition to tikanga and te ao Māori, and enact a considered legislative balancing of public interests and customary interests in the CMCA in a durable scheme.[65]

3.25. The two-limbed analysis above was *not* adopted by the High Court, which collapsed the discrete and equally necessary limbs of the s 58 test into what was effectively one limb — whether the applicant group "holds the specified area in accordance with tikanga" (Limb (a)). In consequence, and contrary to the plain words of the statute, the Judge failed to give Limb (b)(i) of the test any

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62 MACA, s 99.

63 For example, see the HC judgment, above n 2, at [112] [[05.00440]], [117] [[05.00441]], [144] [[05.00447]] and [168] [[05.00452]].

64 MACA, s 106(3).

65 Section 4.

independent meaning or effect.[66] As explained below, the Court of Appeal judgment is in substance to the same effect.

"[E]xclusively used and occupied"

3.26. Limb (b)(i) uses words — "exclusive", "use" and "occupation" — that are well-known to the law and to the legislature, and have a recognised meaning in the context of proprietary or territorial rights. They require, fundamentally, proof of an intention and ability to control the specified area to the exclusion of third parties.

3.27. Accordingly, LCI submits that there is no legitimate basis to 'interpret away' the exclusivity component of Limb (b)(i) based on a perception that it imposes requirements that are inconsistent with tikanga. While tikanga will inevitably be part of the historical context of an applicant group's exclusive use and occupation of an area, Limb (b)(i) does not lay down a tikanga-driven test (in contrast with Limb (a)).

3.28. Material assistance can be drawn from the Canadian common law of aboriginal title, which likewise uses the concepts of exclusive use and occupation to determine the boundaries of an indigenous group's territorial rights. It is clear from the legislative history of the Act that Limb (b)(i) of the test is materially drawn from the Canadian jurisprudence.[67]

3.29. The Supreme Court of Canada has held that to "occupy" land, the applicant group "must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes".[68] This occupation must not be "purely subjective or internal" and requires acts that "indicate a permanent presence and intention to hold and use the land for the group's purposes".[69] In order for occupation to be exclusive, an "intention and capacity to control the land" must be proven.[70]

3.30. In a different context, English cases concerning possessory title in the foreshore and seabed have likewise emphasised acts of exclusion and physical control.[71]

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66 HC judgment, above n 2, at [57]–[58], [111], [142], [149]–[152], [174] and [264].

67 For example, see Departmental Report, above n 13, at [1425].

68 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38].

69 At [38].

70 At [48]. Furthermore, the Supreme Court of Canada has been conscious that the identification of indigenous relationships with particular territory requires consideration of both common law and indigenous perspectives: see *Tsilhqot'in Nation*, above n 68, at [34] (but see generally [31]–[50]). That combination of lenses is precisely what Parliament has chosen to do in the Act with Limb (a) (an indigenous tikanga lens) and Limb (b)(i) (an orthodox common law proprietary lens).

71 See *Attorney-General v Emerson* [1891] AC 649 (HL); *Lord Advocate v Lovat* (1880) 5 App Cas 273 (HL); and *Attorney-General for Ireland v Vandeleuar* [1907] AC 369 (HL).

The Canadian and English jurisprudence is consistent with the conventional understanding of proprietary rights described above.[72]

3.31. The High Court considered that, although a grant of CMT is an "interest in land" that carries with it a "bundle of rights", [73] the rights associated with CMT are "limited" and are "not the equivalent of customary title" or "common law proprietorial rights". [74] On that basis, the Court reasoned, case law about any "different type of property right to CMT" is "of limited relevance".[75]

3.32. With respect, that reasoning is flawed. The concept of CMT and the bundle of rights associated with it are undeniably unique to the Act. However, the fact that CMT lacks some of the features of freehold title does not demand the abandonment of proprietary concepts altogether when interpreting Limb (b)(i). CMT is a territorial interest in land,[76] which does constitute a bundle of significant rights.[77] Proof of an intention and ability to control the specified area to the exclusion of third parties is fundamental to the recognition of those rights under the Act.

Section 59 — "relevant matters" for a finding of CMT

3.33. Interpreting Limb (b)(i) in the manner set out above is consistent with the "[m]atters relevant to whether customary marine title exists" described in s 59 of the Act.

3.34. Section 59(1)(a)(i) provides for the relevance of the applicant group's ownership of "land abutting all or part of the specified area" from 1840 to the present day. Ownership of abutting land will be good evidence of the applicant group's ability to control access to the specified area and exclude third parties from its occupation and use.

3.35. The applicant groups' exercise of non-commercial customary fishing rights in the specified area from 1840 to the present day, is also a relevant factor (s 59(1)(a)(ii)). This reinforces the Act's emphasis on tangible manifestations of an applicant group's occupation and use of the area.

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72 See above at [2.13]–[2.16].

73 HC judgment, above n 2, at [49] [[05.00605]].

74 At [55] [[05.00607]] and [139] [[05.00446]].

75 At [149]–[152] [[05.00448]].

76 MACA, s 60(1)(a). See, in contrast, the provisions for Protected Customary Rights [PCR] at ss 57–57 of the Act. PCR is a non-territorial recognition order (s 54(1)) that protects a group's customary activities. If an applicant for CMT is unable to prove continuous exclusive use and occupation as s 58(1) requires, the Court has the flexibility to grant an order for PCR instead: see s 107(2).

77 Section s 62.

3.36. The use "at any time" of the application area by third parties for fishing and navigation "does not, by itself" preclude a finding of CMT (s 59(3)). This provision reflects the commonsense proposition that, by nature, the CMCA will be "exclusively used and occupied" in different ways than dry land, and the total and constant exclusion of others from ever fishing in or navigating through it is an unrealistic prospect.[78]

"[W]ithout substantial interruption"

3.37. The analysis required by the Act is whether there has been a substantial interruption to the applicant group's *exclusive use and occupation* of the specified area.[79] That involves a matter of historical fact, proven by evidence.

3.38. "Interruption', in this context, means a break in the continuity of the applicant group's control of the area, including its intention and ability to exclude third parties.[80] "Substantial" will involve considerations of frequency and duration, the nature of the interrupting activity and the extent of its impact on the applicant groups' exclusive use and occupation.

3.39. Evidence of a third-party intrusion into the specified area will, if the intrusion is "substantial", prevent the applicant group from fulfilling Limb (b)(i) of the test.[81] Alternatively, a substantial interruption might take the form of a structure that is erected and maintained in the specified area. The applicant group's consent to the installation of a structure may be relevant to whether that structure amounts to a substantial interruption, but it will not be the only or decisive factor.

3.40. Third party fishing or navigation that amounts to a "substantial interruption" to the applicant groups' exclusive use and occupation will also prevent a finding of CMT.[82] That prospect is acknowledged in the terms of s 59(3), in particular the words "does not, *of itself*, preclude...".[83] But there is no sound reason to

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78 Departmental Report, above n 13, at [1465]: "The requirement to demonstrate exclusive use and occupation over an area without substantial interruption since 1840 is a stringent one. The effect of the provision about third party navigation and fishing is to clarify minor interferences to exclusivity such as a boat travelling through the area sometime over the last 170 years would not displace the customary interest". However, see below at [3.40] regarding third-party fishing and navigation that amounts to a substantial interruption.

79 MACA, s 58(1)(b)(i).

80 For the avoidance of doubt, if a third party temporarily uses or occupies part of the specified area with the *permission* of the applicant group (a matter for evidence), that is less likely to amount to a substantial interruption. In those circumstances, the applicant groups' continued control of the area is manifest in the fact that their (revokable) consent is the basis of the third party's temporary occupation and use.

81 HC judgment, above n 2, at [256] [[05.00474]].

82 MACA, s 58(1)(b)(ii).

83 See above at [3.36].

consider that s 59(3) means the test for "substantial interruption" could *never* be met if the activities said to amount to substantial interruption relate to navigation, fishing or access.[84]

Section 106 — Burden of proof

3.41. As the High Court correctly concluded, reading ss 58, 98 and 106 together, it is tolerably clear that the applicant group must prove all the elements for CMT.[85] That includes the absence of a "substantial interruption", which is properly in the knowledge of the applicant group and should be proven by them.[86]

3.42. Whether the applicant group has proven its exclusive use and occupation of the specified area since 1840, without substantial interruption, requires a rigorous assessment of the evidence. That will involve careful consideration of historical evidence of the group's use and occupation of the area provided by historians and oral histories by kaumatua, as well as physical and geographical factors going to the applicant group's ability to control third party access to the area.[87]

3.43. Significantly, there was no such analysis in the High Court's judgment, which relied almost entirely on expert advice regarding tikanga for its findings.

Overreliance on the pūkenga report

3.44. The High Court appointed a panel of two pūkenga to provide non-binding advice regarding matters of tikanga, a procedure contemplated by s 99 of the Act.[88] Importantly, the questions put to the pūkenga were appropriately directed at the question of whether the applicant groups had fulfilled the requirements of Limb (a), an explicitly tikanga-driven assessment.[89]

3.45. However, the advice of the pūkenga was not capable of determining the question of whether the applicant groups had met the test for CMT as a whole, including Limb (b)(i) and the requirement for exclusive use and occupation since 1840, without substantial interruption.

3.46. The pūkenga report is appended to the High Court's judgment (at Appendix A). In addition to advising about relevant tikanga, the report recommended a forward-looking "Tikanga Based Solution" (termed by the pūkenga as a

84 HC judgment, above n 2, at [269] [[05.00477]].

85 At [98]–[99] [[05.00437]]. However, the applicant group benefits from a presumption regarding extinguishment under s 106(3) of the Act.

86 At [98] [[05.00437]].

87 See, for example, *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559.

88 MACA, s 99.

89 HC judgment, above n 2, at [311] [[05.00489]] and Appendix A — Pūkenga Report on the Tikanga Process [Pūkenga Report] at [1(c)] [[05.00573]].

"poutarāwhare") to the competing claims for CMT before the Court.[90] The recommended solution was, in essence, the issue of CMT to multiple applicant groups who, the pūkenga opined, together held the relevant areas in accordance with tikanga.

3.47. In terms of the statutory test, the relevance of the pūkenga's recommended solution was limited to the underlying opinion it reflected, namely that the groups identified in the poutarāwhare all "held" the specified area in accordance with tikanga. That opinion could and did usefully assist the Court in its assessment of whether those applicant groups had fulfilled the requirement in Limb (a).[91]

3.48. However, the pūkenga's recommended "solution" could not constitute proof that the applicant groups identified in the poutarāwhare had met the requirements of Limb (b)(i).[92]

3.49. The advice of the pūkenga regarding tikanga was not capable of determining the overall question of which parties were entitled to CMT. The High Court's reliance on the pūkenga's "findings" flowed from its primary error of conflating the discrete requirements of s 58.

'Shared exclusivity' and 'joint-CMT'

3.50. The High Court issued "jointly held CMT" to the groups identified in the pūkenga's recommendations, reasoning that the pūkenga's "finding" was that these groups had "shared exclusivity" of the relevant areas.[93] The Court's reasoning placed central importance on the relevant groups' "acceptance" (or at least non-dispute) of the pūkenga's "findings".[94] That approach involved multiple errors.

3.51. The issue of "jointly held CMT"[95] to multiple applicant groups is not permitted by the Act. Sections 58 (describing the elements of CMT), 98 (describing the Court's jurisdiction to make an order) and 109 (describing the form of a CMT order) all constrain the Court to issuing one CMT in a specified area to a single "applicant group".

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90 Pūkenga Report, above n 89, at '2. Our Tikanga Based Solution' [[05.00574]].
91 HC judgment, above n 2, at [465] [[05.00524]].
92 Contrast the HC judgment, above n 2, at [161] [[05.00450]], [180] [[05.00455]], [182] [[05.00456]], [184] [[05.00456]] and [187] [[05.00457]].
93 HC judgment, above n 2, at [180] [[05.00455]].
94 At [184] [[05.00456]].
95 At [169] [[05.00453]].

3.52. If multiple whānau, iwi or hāpu seek an order for CMT on basis that they, together, meet the requirements of s 58 in a specified area, the Act contemplates they will apply for CMT as one "applicant group".[96]

3.53. The only "shared exclusivity" the Act contemplates is exclusivity shared between constituent whānau, hapū or iwi *within* an applicant group. That is confirmed by the Ministry of Justice's Departmental Report on the Bill (February 2011), which observed:[97]

> The Bill allows for shared exclusivity between iwi/hapū/whanau *within the definition of applicant group* in [now s 9]. That definition allows for one or more iwi, hapū or whanau groups to *apply jointly* as a *single applicant group*.

3.54. Other legislative materials state that, in order to meet the 'exclusivity' element of Limb (b)(i), an applicant group comprising multiple iwi, hapū or whānau will need to prove that they have "'shared' exclusive interests as against other third parties" since 1840.[98]

3.55. Proof of shared exclusivity will require evidence of an agreement or at least a mutual understanding, manifested in behaviour and practises, that the iwi/hapū/whānau comprising the applicant group have co-occupied and used the specified area together on a consensual basis. Evidence of one or more iwi/hapū/whānau acting together to ward off third-party intrusions would, for example, help support a finding of 'shared exclusivity'.

3.56. The different iwi/hapū/whānau's relationship need not have been amicable throughout their history, but there must be proof of some mutual acknowledgment of their respective rights to use and occupy the area.[99]

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96 See the definition of "applicant group" in s 9(1) and the reference to "1 or more iwi, hāpu or whānau groups."

97 Departmental Report, above n 13, at [1445] (emphasis added).

98 Ministry of Justice *Regulatory Impact Statement: Disclosure Statement* (September 2010) at 19 (Table 3). See also Consultation Document, above n 46, at 36 referring to "'shared' exclusivity between coastal hapū/iwi *as against third parties*" (emphasis added).

99 Kent McNeil "Exclusive Occupation and Joint Aboriginal Title" (2014) 48 UBC Law Rev 821 at 855, referred to in the HC judgment, above n 2, at [166].

PART IV: THE COURT OF APPEAL'S INTERPRETATION OF S 58

Interpretation of s 58 adopted by the Majority should be rejected

The Majority's "best available reading"

4.1. The essential conclusion of the CA Judgment on the interpretation of s 58 was the "best available reading", stated by the Majority, focused on:[100]

> (a) Whether the applicant group currently holds the relevant area as a matter of tikanga.
>
> (b) Whether in 1840, prior to the proclamation of British sovereignty, the group (or its tikanga predecessor(s)) used and occupied the area, and had sufficient control over that area to exclude others if they wished to do so. This inquiry essentially parallels the inquiry required by common law to establish customary title as at 1840.
>
> (c) Whether post-1840 that use and occupation ceased or was interrupted because the group's connection with the area and control over it was lost as a matter of tikanga, or was substantially interrupted by lawful activities carried on in the area pursuant to statutory authority.

4.2. This conclusion involved a significant rewriting of Limb (b)(i). In effect, the Majority held that Limb (b)(i) requires the applicant group to show, in relation to the specific area, that the group:

> exclusively used and occupied it [as a matter of tikanga[101] in 1840 prior to the proclamation of sovereignty,[102] which may generally be presumed,[103] and that use and occupation has continued] from 1840 to the present day [which can also be presumed[104]] without substantial interruption [by lawful activities carried on in the area pursuant to statutory authority].[105]

4.3. Importantly, as Miller J commented, that approach diminishes the language and concept of "exclusively", and makes the s 58 test very much easier to meet.[106]

4.4. In LCI's submission, the Majority's "best available reading", and the reasoning provided for it, should be rejected in favour of the orthodox or literal reading (on which all members of the Court agreed[107]) for a range of reasons.

Text of s 58 precludes the Majority's interpretation

4.5. The Majority's interpretation of s 58(1)(b) fails to give primacy to the actual and explicit statutory language which specifies the legal test for CMT. Not only that, but the Majority's expanded language (see above) is directly contradicted by the

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100 CA judgment, above n 2, at [434].
101 See at [403] and [434].
102 See the Majority at [419]–[421] and [434(a)]; and see the reasoning of by Miller J at [187].
103 See the Majority at [435]–[436]; and the reasoning of Miller J at [196].
104 See the Majority at [435]–[436].
105 See the Majority at [428], [433] and [434(c)]; and see the reasoning of Miller J at [187]–[188].
106 At [188].
107 See the Majority at [416]; and Miller J at [189].

text and structure of s 58 and, as such, is not a textually available reading. The language in s 58 is the best evidence of Parliament's legislative intention, which courts must faithfully implement.[108] This point is reinforced by the indisputable fact that the Act is designed to be a legislative formulation of the CMT test, not leaving it to the courts to provide that test.

4.6. First, for the reasons submitted at [3.22]–[3.40], the text of s 58(1)(b) expresses Parliament's clear intention that the applicant group must show (as a matter of fact and proof) that it has "exclusively used and occupied" the area since 1840. Accordingly, s 58(1) involves concepts of exclusivity, continuity and duration in relation to the specified area. By contrast, under the Majority's interpretation, the "exclusivity" test is confined to the pre-1840 period before the proclamation of sovereignty. Following 1840, the applicant need only show (with the benefit of the presumptions referred to above) that it continues to use and occupy the relevant area. On that approach, the applicant group is relieved of the express statutory requirement in s 58(1)(b) to prove that the group's 'exclusive' use and occupation persisted "*from 1840 to the present day*".

4.7. The Majority arrived at its preferred construction due to a perception that Limb (b)(i) must be interpreted in light of tikanga. However, the Majority's approach involves reading out or reading down express terms in s 58(1)(b) in preference for the Majority's tikanga consistent interpretation. Besides the fact that there is no necessary inconsistency between the text of Limb (b)(i) and tikanga,[109] the Majority also erred by adopting a methodology that allows tikanga to oust the clear terms of a statute and in circumstances in which s 58(1)(b)(i) has deliberately omitted any reference to tikanga and Parliament has already expressly acknowledged tikanga through s 58(1)(b)(a).[110]

4.8. Second, confining the 'exclusivity' test to the pre-1840 period is not an available reading because it contradicts s 58's textual focus on extant customary rights:

(a) As has been observed,[111] s 58 is framed in the present tense.[112] Only the literal interpretation of s 58 — requiring proof of the elements of s 58(1) on an ongoing basis — gives proper effect to that orientation.

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108 See above at [2.1]–[2.7].

109 As submitted above at [2.17].

110 The courts have recognised that although tikanga forms part of the common law of New Zealand, it cannot operate when it is contrary to statute: see for example *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [117] per Glazebrook J.

111 See above at [3.18].

112 See the references in s 58(1) to "exists", "holds", "has" and "from 1840 to the present day".

(b) Under the Majority's approach, post-1840, s 58(1)(b)(i) asks only whether there has been substantial interruption to the use and occupation of the specified area, not to the exclusivity of that use and occupation. However, that view is inconsistent with s 58(2). It clarifies that a resource consent permitting activity within the area issued after the Act's commencement is not a "substantial interruption to the *exclusive use and occupation* of a specified area". Read in light of that clarification, s 58(1)(b) must require proof of exclusive use and occupation on an ongoing basis after 1840.

(c) Similarly, s 58(3) dealing with customary transfers reinforces that logic. It provides that a customary transferee of the specified area can make out a claim to customary title where the statutory criteria are met. Relevantly, the transferee must show that it has "exclusively used and occupied" the area "*from the time of the transfer to the present day*".[113] Without proof of ongoing exclusivity post-dating 1840, the Act provides that a transferee cannot succeed under s 58. By limiting the exclusivity test to the pre-1840 period under Limb (b)(i), the Majority ignored s 58(3).

4.9. Third, the Majority's approach is inconsistent with the territorial nature of CMT reflected by the text of s 58. LCI submitted below that CMT falls at the territorial end of the spectrum of customary rights. Based on the text of s 58, the Majority accepted that submission — it found that s 58 protects a territorial interest in an area and "not simply use rights".[114] How then to distinguish between these two interests? The Majority stated that the dividing line is exclusive occupation; it marks the point when the applicant's connection to a specified area is elevated from resource rights to holding territorial rights.[115] Limiting that exclusivity test solely to the pre-1840 period therefore undermines the theory of territorial title that the Majority drew from the text of s 58. Applicants need not show exclusive use and occupation post-1840 despite that being the very criterion the Majority recognised as critical to territorial title, as established by s 58.

4.10. Fourth, the Majority approach also runs contrary to s 58's text by reading down the "substantial interruption" test. To explain:

(a) As Miller J correctly noted, the Majority effectively equated substantial interruption with cession or extinguishment.[116] Importantly, the Majority understood that its reasoning involved a refusal to endorse a threshold of

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113 Section 58(3)(d)(ii).
114 Majority at [400]–[404] and [417].
115 Majority at [400]–[404] and [420]–[423].
116 See Miller J's reasoning at [187] of the CA judgment, above n 2.

recognition that would "extinguish" customary rights "by a side wind".[117] It therefore reasoned that only cession / abandonment of the applicant's rights or the overriding of those rights by legislation suffices to amount to a substantial interruption.[118] Short of that, third-party use or occupation would be capable of extinguishing customary rights despite the rule that only Parliament can bring about that result through legislation.[119]

(b) However, the effect of applying the Majority's approach is to substantially read down the words "substantial interruption". That is contrary to text. Section 58 clearly and expressly contemplates that an applicant's use and occupation may be 'interrupted' in various ways. To preclude customary title, the level of interruption must be of a level so as to be incompatible with 'exclusive' use and occupation. Hence Parliament expressly enacted the "substantial interruption" test. By contrast, applying the Majority's interpretation, nothing short of cession or extinguishment precludes title. Neither can sensibly be termed an "interruption". Rather these examples amount to destruction / abandonment of customary rights. Viewed from the other direction, as submitted at [3.37]–[3.40], there exist other types of activity (such as fishing, navigation or recreation) that could amount to a substantial interruption. The Majority approach ignores that fact.

Legislative history and purpose

4.11. Pausing briefly to summarise, the Majority's interpretation of s 58(1) is contrary to the express text chosen by Parliament (as submitted above) and involved:

(a) Reading into s 58(1)(b)(i) a requirement that the "exclusivity" test is to be assessed as a matter of or consistently with tikanga;

(b) Reading down s 58(1)(b)(i) by interpreting it as subject to an unexpressed qualification that the "exclusivity" of the applicant's use and occupation need only be established prior to 1840 and not on an ongoing basis; and

(c) Effectively equating the "substantial interruption" test in s 58(1)(b) with the test for extinguishing customary title in a manner that reads down the scope and effect of s 58(1)(b).

4.12. Departing from unambiguous statutory text is only permissible when necessary to yield to sufficiently obvious Parliamentary purpose.[120] After all, it is the "text

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117 Majority at [416].

118 Majority at [428] and [432]–[434].

119 See the Majority at [416], [427] n 462, [428] and [432]–[434].

120 *Bennion*, above n 17, at [10.10], [11.3], [13.6] and [21.2]; and Goldsworthy, above n 19, at 225. See also Burrows and Carter, above n 15, at Ch 10.

that was passed by Parliament and it is the text that is published as law".[121] Even so, there are strict limits (of constitutional significance) beyond which the courts cannot stray without engaging in illegitimate judicial amendment. Outside of situations dealing with the abrogation of fundamental human rights,[122] it is long-established that the outer boundary of constitutionally permissible purposivism is tightly circumscribed.[123] Techniques such as reading in / out, reading down a provision or recognising an unarticulated qualification to statutory text all lie at the periphery and are exceptional. The classical expressions of the outer edge of purposive construction are the speech of Lord Nicholls in *Inco Europe* and Lord Diplock's speech in *Wentworth Securities Ltd*.[124] A court cannot add, substitute or omit words unless it is abundantly clear as to: (a) the intended purpose of the provision, (b) that Parliament failed to give effect to that purpose through error, and (c) the substance of the provision that Parliament would have enacted.

4.13. Recently a full court of the Court of Appeal in *Urlich v Attorney-General* affirmed those orthodox propositions.[125] Reading words in / out of a statute to give effect to parliamentary purpose is analogous to "rectification".[126] In *Urlich*, there was no question of human rights or Treaty repugnancy.[127] For that reason the special "active" approach to purposive construction deployed in those contexts did not apply. Instead, the traditional test articulated by the House of Lords in *Inco* was the correct test. Using that approach, the Court in *Urlich* rejected a submission that the offer-back provisions in the Public Works Act 1981 should be construed, among other things, consistently with relevant tikanga. There was "no warrant based on evident or presumptive parliamentary intent warranting a wholesale rewrite of s 40(5) under the guise of construction".[128] The constraints on

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121 Burrows and Carter, above n 15, at 395.

122 In these contexts, modern courts have adopted a more active approach to statutory interpretation which seeks to reconcile the relevant statute with Parliament's express or presumed intention to legislate consistently with human rights. Yet that approach remains subject to constitutional limits and must not do violence to the text nor contravene discernible parliamentary intent: for example see *Fitzgerald*, above n 3, at [63]–[68] per Winkelmann CJ. When interpreting MACA, there is no countervailing Parliamentary purpose to be reconciled with the Act's text. Instead, the provisions of MACA must (on orthodox principles) be given effect to according to their text read in light of their purpose as discerned from the Act's text and legislative history.

123 Burrows and Carter, above n 15, at Ch 10.

124 *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (HL) at 592; and *Wentworth Securities Ltd v Jones* [1980] AC 74 (HL) at 105. See also Tipping J's endorsement of *Inco* in *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [96]–[97]; and the reliance placed on *Wentworth* by Elias CJ in *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 at [24] n 46, and Glazebrook J in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 242 at [341] n 424.

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

126 At [62].

127 At [63].

128 At [64].

interpretation recognised by *Urlich* reflect the demarcation between legitimate statutory interpretation and judicial legislation.

4.14. Applied to this case, the Majority's analysis involved re-interpreting s 58(1)(b) in a manner that departs significantly from statutory text and without a mandate sourced in parliamentary purpose or legislative history. LCI submits that, to the contrary, the Majority's interpretation contradicts Parliament's explicit purpose and failed to engage with the recent legislative history of the Act itself, and the clear evidence there of policy decisions in favour of carefully circumscribed roles for both the courts and for tikanga.

4.15. First, rather than engage with the recent legislative history, the Majority discussed the "wider legal and historical context", focusing strongly on the pre-1840 position at common law.[129] This is problematic territory because in reality the common law did not address the foreshore and seabed until the reversal of the settled understanding of the law by the 2003 *Ngāti Apa* decision. As Miller J commented, the direction that the common law might have taken was not determined by *Ngāti Apa*.[130] Importantly, the legislative statement of both the content and criteria for CMT rendered speculation on that direction irrelevant.

4.16. Second, the recent legislative history that LCI refers to (traversed in the Appendix to these submissions) is clear. It is well illustrated by the Ministry of Justice's 4 February 2011 report to the Māori Affairs Committee on the Bill, and the Select Committee's own report on the Bill (which included the summary from the officials' advice as Appendix B), both produced after extensive submissions had been considered. The Ministry's report records clearly the policy decisions being implemented, including (a) avoiding the uncertainty of leaving the CMT test elements for the courts to develop and (b) establishing a "stringent" test with applications dependent on the evidence.[131] However, it was stated (more than once) that substantial activities in an area by non-members of the claimant group would likely displace claims of exclusivity. It was also stated that applicants would be required to show that their interest in an area had qualities akin to a landowner — that is, the capacity to exclude others from the area.

4.17. Third, in the face of the immediate legislative history, it should not have been regarded as "exceptionally difficult to reconcile the text of s 58(1)(b) with the

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129 See the Majority at [361] and following.

130 See Miller J's reasoning at [191]–[192] of the CA judgment, above n 2.

131 See generally the Departmental Report, above n 13, at [1374]–[1428].

purpose of" the Act.[132] Given that history, the text explains clearly the reconciliation intended by the legislature.

4.18. Fourth, but relatedly, the reconciliation of the Treaty with s 58 (and not least Limb (b)) was undertaken by Parliament in the Act itself. This is not a case where there is some prospect that the Treaty may have been overlooked in the legislative process. This is a situation where, with the benefit of a range of submissions and advice, the method and extent of "tak[ing] account of the Treaty" (s 7) was prescribed in the Act, including the specific language of s 58(1).

4.19. In other words, insofar as the Majority analysis reflected concern that something might have been lost in the "translation" of customary interests in to a statutory CMT, that is an enquiry into policy issues. The issue of how to give effect to the Treaty in relation to the new CMT was exhaustively considered in the legislative process and answered in the clear statutory language enacted.

4.20. Fifth, insofar as the Majority's analysis assumed that there are few areas of New Zealand in which exclusivity could be shown by an applicant group,[133] that involved speculation on matters of fact and evidence which was not intended to be predetermined by the legislation.

4.21. Finally, as commented by Miller J,[134] the Act is not concerned with redress for wrongs, but reconciling a complex range of property interests. The Majority analysis reflected a different approach. LCI submits respectfully that, on this point, Miller J's analysis should be preferred.

Miller J: no "stark dichotomy" between s 58(1) Limbs

4.22. In his separate judgment, Miller J rejected the LCI's submission that there was (in His Honour's words) a "stark dichotomy" between Limb (a) and Limb (b)(i).[135] He characterised the submission as advancing a dichotomy between customary rights protected by Limb (a) and "the common law of England" protected by Limb (b)(i). In response, the following points are made for LCI.

4.23. First, the LCI argument has been consistently that Limb (a) is clearly founded on tikanga, but Limb (b)(i) is not. Rather, Limb (b)(i) is founded on the conventional statutory analysis of "property" – hence the earlier references to the work of Professors Harris, Honoré and Gray.[136] That is not necessarily the same as "the

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132 See the Majority at [416].
133 Addressed by Miller J at [189] and [193]–[195] of the CA judgment, above n 2.
134 See Miller J's reasoning at [196] of the CA judgment, above n 2.
135 At [137].
136 See above at [1.14]–[1.16].

common law of England" and, to that extent, LCI says respectfully that Miller J has not captured the dichotomy contended for by LCI.

4.24. Second, insofar as Miller J states that s 58(1) "creates a single test which must be interpreted as a whole",[137] LCI again respectfully disagrees. Section 58(1) simply creates a two-limbed test.

4.25. Third, LCI takes issue with both reasons advanced by Miller J for rejecting any "stark dichotomy": (1) That the legislature was well aware that English common law had been modified upon receipt into New Zealand by recognised Māori customary interests; and (2) that s 58 establishes a single test, with the concept of "exclusive use and possession" required to be viewed "through the lens of tikanga".

4.26. On (1), LCI submits that the relevant point is that the Act is not designed to reflect earlier judicial statements from *Ngati Apa* of the common law. The Act is intended to create a new regime not tied to uncertainties associated with the common law (including by evolving judicial pronouncements). With respect, his Honour's assumption that Limb (b)(i) is to be read consistently with Parliament's presumed understanding of the law as stated in *Ngati Apa* cannot be reconciled with his later (correct) identification that Parliament consciously departed from the common law by, among other things, supplanting it with a bespoke "customary rights scheme".[138] LCI submits that the statutory language can and should speak for itself.

4.27. On (2), LCI submits that the result of Miller J's analysis is simply to read the word "tikanga" back into Limb (b)(i) when it has been conspicuously omitted. Further, as Miller J explains, the exclusionary aspect of tikanga is essentially consistent with the scholarly analysis of Professor Honoré. In short, no "lens of tikanga" is required or appropriate to interpret "exclusively used and occupied … without substantial interpretation".

4.28. Reading "tikanga" into Limb (b)(i) is also inconsistent with the statutory scheme of s 58 for the following additional reasons:

(a) On Miller J's interpretation, Limb (b)(i)'s requirement of exclusive use and occupation is derived from tikanga Māori.[139] It is not an independent test reflecting the common law or property-based concepts.

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137 CA judgment, above n 2, at [130].
138 At [192]–[193].
139 See his Honour's conclusion at [185].

(b) Were that the true legislative intent, s 58(1) could have been expressed in very simple terms. Parliament would have provided that an applicant need only show that it has held the area "in accordance with tikanga from 1840 to the present day without substantial interruption". Exclusivity forms part of what it means to hold an area pursuant to tikanga, on Miller J's analysis. In effect, his Honour's interpretation involves rewriting Limb (b)(i) so that the words "exclusively used and occupied" perform no independent work beyond the test stated in Limb (a). Respectfully, that interpretation suffers from the same flaws that led his Honour to reject the Majority's reasoning.[140]

(c) The logical corollary of Miller J's interpretation is that Limb (b)(i) is largely subsumed by Limb (a). Applying that formulation, if the applicant fails to prove exclusivity from 1840 onwards as a matter of tikanga, the applicant will also necessarily have failed Limb (a). Self-evidently, that approach simply ignores the "and" separating the two limbs. Parliament expressly appreciated that a group could succeed in proving that it holds an area pursuant to tikanga but yet fail on exclusivity. LCI's interpretation gives effect to Parliament's disjunctive test.

PART V: CONCLUSION

5.1. Properly interpreted, s 58 of the Act creates a two-limbed test. As much is clear from the express text Parliament enacted. Limb (a) gives primacy to tikanga, reflecting the Act's object of recognising extant customary interests. Critically, however, Limb (b)(i) establishes a separate and equally necessary statutory test. Proof of exclusive use and occupation is fundamental to the test for recognising CMT which is a bespoke statutory property right. Exclusivity is the main indicia of what it means to "hold" an area as property, as opposed to possessing lesser resource and use rights. Accordingly, Limb (b)(i) is central to the exercise of "translating" customary interests into legal rights in accordance with the Act.

5.2. LCI's interpretation of s 58 is consistent with Parliament's purpose and with the legislative history to the Act. Treating Limb (a) and Limb (b)(i) as establishing separate legal tests reflects Parliament's informed decision on how to draw on both tikanga and general property concepts. That approach also respects Parliament's deliberate decision to state an express test for recognising CMT (and the policy balance Parliament struck in calibrating that test) to replace *Ngāti Apa* and any common law developed framework of customary title. Put

[140] CA judgment, above n 2, at [187].

together, the two independent limbs of s 58(1) form the axis around which Parliament's statutory reconciliation between customary interests and common property revolves.

5.3. With respect, the Court of Appeal erred. Neither the Majority nor Miller J's view of s 58(1) is available on orthodox principles of statutory interpretation. For the reasons submitted, the Court of Appeal's decision is contrary to the text, history and purpose of the Act. Having adopted the wrong test that Court's decision will influence the determination of the relevant CMT applications by affirming a test not supported by the express language of the Act or intended by Parliament. Regrettably, that requires the process to be recommenced.

Dated: 4 October 2024

Jack Hodder KC / Brigitte Morten / S O H Coad
Counsel for Landowners Coalition Incorporated

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38. (15 Sept 2010) 666 NZPD 13999
39. (8 March 2011) 670 NZPD 16981

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45. Report of Māori Affairs Committee on the Bill

APPENDIX I: LEGISLATIVE HISTORY (POST-2004 FSA)

Date	Event/document(s)	Comment
2 Jul 2009	Ministerial Review Committee report on Foreshore and Seabed Act released. (Summary and Vols 1-3).	Concludes the FSA should be repealed and replaced with new legislation recognising customary interests. The option of leaving the courts to develop tests is rejected. The replacement regime will be "starting again" (p 5 Summary Report). The new Act will be "*based on the ToW principle of providing for both Māori and Pākehā world views"* (Vol 1 p 13).
18 Nov 2009	Cabinet Committee Paper, A-G Finlayson,	The Paper sets out 'Principles, common understandings or 'assurances'' that will underlie further policy work on the replacement regime. The Treaty of Waitangi is emphasised. The main objective is to balance the interests of all New Zealanders in the CMCA.
March 2010	Government consultation document 'Reviewing the Foreshore and Seabed Act 2004' (foreword by A-G Finlayson)	Test for CMT proposed for public consultation that combines tikanga Māori *and* common law elements — at pp 35-36. See also at p 33 under the heading 'Tikanga Māori and common law as the source': "...The government's view is that its approach must accommodate these two sources of authority in line with the Treaty of Waitangi, its principles and associated jurisprudence. The government's approach applies aspects of tikanga Māori while also using aspects of the common law."
15 June 2010	Questions for Oral Answer — Questions to Ministers	(15 June 2010) 664 NZPD 11644: "**David Garrett** [Act]: Which parts of the New Zealand coastline, if any, *will not* be subject to the grant of customary title under which iwi will effectively control activities along it, including reclamation, the construction and removal of structures, etc.? **Minister Finlayson**: Huge amounts."
22 June 2010	Questions for Oral Answer — Questions to Ministers	(22 June 2010) 664 NZPD 11880: "**Te Ururoa Flavell** [Māori Party]: Does he agree with Māori lawyer Moana Jackson that the standard that has been set for proving customary title is so high that it is practically impossible to meet; if not, what assurance can he give whānau, hapū, and iwi otherwise? **Minister Finlayson**: I thank the honourable member. There will doubtless be some iwi who can meet the test for customary title. Any application to the courts or any negotiations will be able to be dealt with on the facts, unlike what happened under the 2004 Act. Although many iwi may be unable to obtain a customary title under the new tests, they will still be able to enter into negotiations to obtain recognition of customary interests."

21 Jul 2010	Questions for Oral Answer — Questions to Ministers	(21 Jul 2010) 665 NZPD 12517: "**David Garrett** [Act]**:** Will the proposed legislation weaken the test in section 50 of the Foreshore and Seabed Act 2004, which requires, in order for customary title to be granted, uses or practices to have been carried on since 1840 that are integral to tikanga Māori; if so, in what way will the test for customary title be weakened? **Minister Finlayson**: The overarching test will be exclusive use and occupation, without substantial interruption. The test has some emphasis on tikanga Māori. I do not believe that the overall changes will be very great, at all."
Sept 2010	Three Ministry of Justice RIS's prepared.	RIS 1 'Disclosure Statement': Pages 18-19 describe possible tests for CMT – tikanga, common law or a combination of the two. RIS 2 'Post-consultation decisions': Concludes that a test for CMT that combines elements of Canadian common law and tikanga Māori is consistent with NZ's legal heritage and context as well as providing some certainty about how the tests will likely be interpreted in NZ (at pp 16-18). RIS 3 'Outstanding policy matters': Addresses reclaimed land and coastal marae.
6 Sept 2010	Bill introduced (with explanatory note).	Wording of cl 60 (CMT test) substantially the same as appears at s 58 of the Act.
15 Sept 2010	First reading (15 September 2010)	Minister Turia refers to use and occupation "to the exclusion of others": (15 Sept 2010) 666 NZPD 13999.
3 Sept 2010	SOP 167 (Minister Finlayson)	Subsection added to cl 60 (CMT test) stating that use by non-group members at any time for fishing and navigation does not, of itself, necessary preclude the group from establishing the existence of CMT (ultimately adopted).
4 Feb 2011	Ministry of Justice — Departmental Report on the Bill	See pages 275-290 regarding test for CMT, including: (d) At [1387]-[1389]: clear rejection of leaving the development of the test to the Courts, emphasising the need for certainty and a balancing of the rights and interests of all New Zealanders. (e) At [1381]-[1382], [1416]-[1417], [1425]-[1427]: Acknowledges submissions that "held in accordance with tikanga" should be the only test, that requirement to prove exclusive use and occupation is too high a threshold and/or is inconsistent with tikanga. No changes to the Bill are recommended in response. (f) At [1409]-[1410]: Deliberate incorporation of common law into the test, in addition to tikanga.

		(g) At [1416]-[1418]: Test based solely on "held in accordance with tikanga" rejected as too uncertain. Requirement for "exclusive use of occupation" is intended to enhance certainty (at [1420]-[1421]) and is derived from Canadian case law on aboriginal title (at [1425]-[1427]). (h) At [1441]-[1442]: The requirement to prove exclusivity is consistent with the territorial rights conferred by CMT. See also at [1490]: "In developing the CMT rights the Government has drawn on property rights and environmental management mechanisms. It has looked to create a set of rights generally akin to the rights of a property owner which can co-exist with existing public rights and activities...". CMT "draws on the bundle of rights associated with property ownership" at [1492]. (i) At [1445]-[1447]: 'Shared exclusivity' is contemplated so long as the whānau/iwi/hapū apply as one applicant group. (j) See at [1460] regarding factors that will be relevant to a finding of CMT and particularly at [1465] regarding third party navigation and fishing.
9 Feb 2011	Select Committee report(s) —Report of Māori Affairs Committee	Recommends (by majority) that Bill be passed without amendment; Appendix B is a summary of officials' advice.
8 Mar 2011	Second reading	(8 March 2011) 670 NZPD 16981: Labour (Hon David Parker) expresses view that test for CMT should be left to the courts and should not be codified by legislation. That approach is expressly rejected by the government on the basis that prescribing the tests will achieve "both certainty and equity" and "create an enduring situation in this area" (Minister Finlayson); and that the debate on tests should be conducted by Parliament (Hon Bill English).
8 Mar 2011	SOP 206 (Metiria Turei, Green Party)	Proposes removal of tests for CMT and PCR because they are "too high and will effectively remove existing Māori rights. The courts, using treaty and international law jurisprudence, are a better forum for establishing the appropriate tests to prove customary title". Not adopted.
8 Mar 2011	SOP 207 (Minister Finlayson)	73 pages of amendments including (p 21) amendments to cl 60 (CMT test) to provide for customary transfers (ultimately adopted).
31 Mar 2011	Royal assent	