In the Supreme Court of New Zealand
I Te Kōti Mana Nui O Aotearoa

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 128/2023
SC 129/2023

in the matter of: appeals made under the Marine and Coastal Area (Takutai Moana) Act 2011

between: **Whakatōhea Kotahitanga Edwards (Edwards) (SC121/2023)**

Ngāti Muriwai Hapū (SC123/2023)

Kutarere Marae (SC124/2023)

Te Ūpokorehe Treaty Claims Trust on behalf of Te Ūpokorehe Iwi (SC125/2023)

Continued

Synopsis of submissions for the Seafood Industry Representatives

Dated: 4 October 2024

Next event date: 4 – 15 November 2024

Before: Glazebrook, Ellen France, Williams, Kós and French JJ

Counsel certifies that the attached submissions and appendices do not contain suppressed information and are suitable for publication.

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Attorney-General (126/2023)

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)

Ngāti Ruatakenga (SC129/2023)
Appellants

and: **Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Ruatakenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o te Whakatōhea)**

Te Tāwharau o te Whakatōhea (formerly Whakātōhea Māori Trust Board)

Ngāi Tai and Ririwhenua

Te Ūpokorehe Treaty Claims Trust on behalf of Te Ūpokorehe Iwi

Te Rūnanga o Ngāti Awa

Whakatōhea Kotahitanga Edwards (Edwards)

Ngāti Ruatakenga

Ngāti Muriwai

Kutarere Marae

Landowners Coalition Incorporated
Respondents

and: **Attorney-General**

Te Whānau-ā-Apanui

Seafood Industry Representatives

Crown Regional Holdings Limited

Ōpōtiki District Council

Bay of Plenty Regional Council

Whakatāne District Council

Landowners Coalition Incorporated

Te Rūnanga o Ngāti Awa
Interested parties

and: **Ngā Hapū o Ngāti Porou**
Intervener

(A) Summary of submissions

1 The Seafood Industry Representatives (**SIRs**) participate in this appeal as an interested party. Their interest is in the impact on the rights and fishing activities of commercial fishers arising from customary marine title (**CMT**) orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (the **Act**).

2 The SIRs respectfully adopt the interpretation of the test for CMT orders advanced by the Attorney-General.[1] That is:

2.1 the s 58(1)(a) criterion requires an applicant group to hold the application area in accordance with tikanga;

2.2 the s 58(1)(b)(i) criterion requires the applicant group to demonstrate an intention **and** capacity as a matter of fact to control the application area without substantial interruption in the period from 1840 to present; and

2.3 use by third parties within the application area is relevant to the issue of whether applicants have had the intention and capacity to control the area, but whether this use constitutes a substantial interruption will be a question of intensity, frequency and duration having regard to the relevant context.

3 The Court of Appeal majority's interpretation substitutes for the words of s 58(1)(b) an alternative test, designed to give effect to what the majority anticipated the common law test for recognition of territorial customary interests would have been. This engages in the very common law development that the Act seeks to avoid.

4 CMT orders are a statutory form of territorial property right developed as one element of a wider legislative settlement of complex and politically contentious claims to interests in the coastal and marine area. The purpose of specifying the test and content of CMT orders was to provide certainty in circumstances where the test and content of common law recognition of customary interests was highly uncertain. The content of the statutory rights are deliberately bespoke forms of recognition of certain territorial customary interests. Equally, the threshold for recognition is bespoke, and not intended to fully replicate common law tests in other jurisdictions – although it draws on established concepts for parts of the test, in particular, "*exclusive use and possession*".

5 From the perspective of the SIRs, as third parties to numerous applications made under the Act, the interpretation supported by the Attorney-General will promote certainty and thereby fulfil the purpose of prescription of the test for CMT orders.

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[1] Written submissions of the Attorney-General dated 20 September 2024.

(B) The Seafood Industry Representatives

6 The SIRs represent the commercial fishing industries' inshore sector. They comprise four seafood industry bodies that represent participants in the rock lobster, pāua, and inshore finfish fisheries, together with the commercial fishers themselves.

7 At first blush, the Act may not appear to create much concern for commercial fisheries, given:

7.1 the express statutory preservation of rights in s 28 (nothing in this Act prevents the exercise of any fishing rights conferred or recognised by or under an enactment or by a rule of law);

7.2 the express requirement that wāhi tapu conditions not prevent fishers from taking their quota entitlement in a quota management area (s 79(2)(a));[2] and

7.3 the express prohibition for protected customary rights (**PCR**) to cover activities regulated by the Fisheries Act 1996, or which involve the exercise of commercial fishing rights or non-commercial Māori fishing rights, or relate to wildlife or marine mammals (s 51(2)).

8 However, this belies the complexity that sits beneath these and other provisions. Specifically:

8.1 the holder of a CMT order is entitled to prepare planning documents for the area, which can impact on commercial fishing in a range of ways, in particular via the Resource Management Act 1991 (**RMA**), the Conservation Act 1987, the Marine Mammal Protection Act 1978, the Wildlife Act 1953, the Marine Reserves Act 1971, and ss 85, 91 and 93 of the Act;[3]

8.2 there is an unfettered power to grant or withhold consent for resource consents. This is relevant to industry infrastructure, both for vessels and potentially processing facilities; and

8.3 even though wāhi tapu conditions cannot be established if they would prevent fishers from taking their lawful quota entitlement, this "prevent test" exists in a number of

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[2] The scope of wāhi tapu conditions are not an issue in this appeal. However, it is appropriate to record that there are important issues that remain unresolved in relation to the imposition of those conditions. In particular, while the High Court has to date rejected claims that entire application areas should be the subject of wāhi tapu issues (*Re Ngāti Pāhauwera* [2021] NZHC 3599 at [128] **[SIR BOA Tab 7]**), this remains subject to unresolved appeals.

[3] MACA Act, s 85(5)(a) **[AG BOA Tab 4]** and Conservation Act 1987, Sch 1 **[SIR BOA Tab 1]**.

statutory contexts and, in the industry's experience, is complex to apply and has often led to the industry losing access to important fishing grounds.

9 The potential future impact of planning documents on fisheries management in particular remains uncertain. The obligation of the Minister of Fisheries in s 91 of the Act, when read in light of s 85, remains untested. In addition, there are potentially significant implications under s 93 for regional council decision-making under the RMA. At least one appellate court decision has provided for more overlap between the exercise of powers under the RMA to manage the effects of fishing and the specific statutory regime to regulate fishing than was previously understood.[4]

10 For these reasons, the SIRs – and this Court in interpreting the legislation – cannot assume that the grant of a CMT order is irrelevant to commercial fishing activity in the application area. The same may be said about other third-party rights. The CMT orders are intended to provide, and do provide, substantive and meaningful statutory rights of participation in consenting and planning that has the potential to affect third party use of the area.[5]

(C) The legal test for CMT orders

(C1) Statutory text

11 On its terms, s 58(1) of the Act provides two requirements for a CMT order:

11.1 first, the applicant group must establish that it "holds the specified area in accordance with tikanga" (s 58(1)(a)); and

11.2 second, the applicant group must establish that it has, in relation to the specified area "exclusively used and occupied it from 1840 to the present day without substantial interruption" (s 58(1)(b)(i)).

12 The conjunction "and" in ordinary usage indicates that the subclauses impose cumulative requirements.[6] It also follows from ordinary principles of English usage that the limbs have different meanings and therefore require different things.[7] The natural inference is that the first limb is concerned with whether an area is

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4 *Attorney General v The Trustees of the Mōtītī Rohe Moana Trust & Ors* [2019] NZCA 532, [2019] 3 NZLR 876 **[SIR BOA Tab 4]**. See also *Royal Forest and Bird v Northland Regional Council* [2021] NZEnvC 228.

5 Cf Te Kāhui submissions at [4.38].

6 This point was made recently by this Court in relation to similar drafting: *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc & Ors* [2024] NZSC 111 at [80] **[SIR BOA Tab 9]**.

7 *Fenton v Auckland City Council* [1945] NZLR 768 (SC) at 774; *Browne v Police* [1962] NZLR 801 (SC) at 806; and *Bar Systems (New Zealand) Ltd v Wellington District Licensing Agency* [1996] 3 NZLR 100 (HC) at 108.

held in accordance with tikanga, and the second limb is concerned with something else and additional to that requirement. The majority of the Court of Appeal agreed that the High Court Judge had erred by adopting an approach that "*runs together the first and second limbs of s 58(1)*".[8] To this extent, the SIRs agree.

13 The "something else" required by the second limb is described in words with well understood meanings in ordinary usage and law. The ordinary meaning of "*exclusively used and occupied*" can be understood as using a place to the exclusion of others.[9] As explained later in these submissions,[10] that ordinary meaning is consistent with existing judicial interpretation and use of those words referred to throughout the legislative process.

14 The Court of Appeal majority acknowledged that it had found it "*exceptionally difficult*" to reconcile the text of s 58(1)(b) with its assessment of the purpose of the Act.[11] The test proposed by the majority replaces the text of s 58(1)(b)(i) ("*exclusively used and occupied [the application area] from 1840 to the present day without substantial interruption*") with an alternative two-limb test:[12]

14.1 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.[13]

14.2 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.

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8 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [***Re Edwards Whakatōhea (CA)***] at [408] **[AG BOA Tab 16]**.

9 "Exclusive" means "restricted to the person, group or area concerned": The Oxford Dictionary (Revised 10th Ed, Oxford University Press, 2002) **[SIR BOA Tab 21]**; "occupy" means "to fill, exist in, or use a place": *Cambridge Advanced Learner's Dictionary & Thesaurus Online* "occupy" (26 January 2023) <https://dictionary.cambridge.org/dictionary/english/occupy> **[SIR BOA Tab 22]**.

10 At [18]–[36].

11 *Re Edwards Whakatōhea (CA)* at [416] **[AG BOA Tab 16]**.

12 *Re Edwards Whakatōhea (CA)* at [434] **[AG BOA Tab 16]**.

13 The SIRs note that, in this respect of this first limb, the majority adopted an interpretation of what is required to demonstrate exclusive use and possession in the period up to and including 1840 that is broadly consistent with the SIR's preferred interpretation. As a result, the SIRs support the Court of Appeal's analysis at [421]-[423] in relation to the greater difficulty of establish use and control in respect of off-shore areas.

15 While the Court of Appeal majority suggests that its test "respects" the text,[14] the judgment contains no analysis of how its test can be reconciled with the text of the Act. In particular, the Court of Appeal majority does not and cannot explain how "from 1840" can both mean "in 1840" such that the requirement for exclusive use and occupation must only be demonstrated in 1840, prior to the proclamation of British sovereignty, and at the same time "from 1840" when considering substantial interruption; nor how the qualifier "exclusive" to the use and occupation that must be demonstrated in 1840 does not also qualify the use and occupation that must not be substantially interrupted post-1840.

(C2) Legislative history

16 The legislative history of the Act supports the adoption of the literal interpretation of s 58(1)(b). That history confirms both a deliberate decision to prescribe the test and content for CMT orders, rather than to leave the matter for the courts to develop, and confirms the meaning understood by the term "*exclusive use and possession*" by reference to existing jurisprudence.

17 The legislative history appears both in legislative materials and in material produced by the Executive, in particular Departmental Reports to Select Committees. Both are now accepted to be admissible to assist in the exercise of statutory interpretation.[15]

Foreshore and Seabed Act

18 The language of "*exclusive use and occupation*" without "*substantial interruption*" in s 58(2)(ii) is a conscious adoption and retention of the key concepts of the definition of "*territorial customary rights*" in s 32(1) of the Foreshore and Seabed Act 2004 (**FSA**).

19 That definition in s 32 of the FSA itself reflected a deliberate decision to codify the test for recognition of customary title, following the decision of the Court of Appeal in *Attorney General v Ngāti Apa* that the Māori Land Court had jurisdiction to consider applications for recognition of customary title to areas of the foreshore and seabed.[16]

20 The Court in *Ngāti Apa* was scrupulous to limit itself to the question of jurisdiction, rather than the legal test for recognition of customary title either under Te Ture Whenua Māori Act 1993 or at

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[14] *Re Edwards Whakatōhea (CA)* at [434] **[AG BOA Tab 16]**.

[15] *Yan v Mainzeal Property and Construction Ltd (in Liq)* [2023] NZSC 113, [2023] 1 NZLR 296 at [164]-[[166]; *Seafood New Zealand Limited v Royal Forest & Bird Protection Society of New Zealand Inc* [2024] NZSC 111 at [79]–[81] **[SIR BOA Tab 9]**. See also *Financial Markets Authority v ANZ Bank New Zealand Limited* [2018] NZCA 590 at [22]-[24].

[16] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) **[AG BOA Tab 5]**.

common law.[17] As both the Waitangi Tribunal and the 2009 Ministerial review of the FSA commented, it was therefore uncertain how the test under either the Act or common law would be developed and applied, and the extent of the rights recognised.[18]

21 Section 33 of the FSA conferred jurisdiction on the High Court to consider applications for orders recognising that, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown by s 13 of the FSA, the applicant group would have held "territorial customary rights" to a particular area at common law. This part of the FSA responded to the Waitangi Tribunal's criticism of the 2003 Foreshore and Seabed Policy for removing the Court's common law jurisdiction to recognise customary title.[19]

22 Section 32 therefore served as a deliberate prescription of the test for "territorial customary rights". In particular:

22.1 Section 32(1)(a) defined a territorial customary right as one that could be recognised at common law and that "*is founded on the exclusive use and occupation of a particular area*".

22.2 Section 32(2) then non-exhaustively provided for when exclusive use and occupation could be established in terms of use and occupation to the exclusion of others "*without substantial interruption*" in the period since 1840.

23 The Explanatory Note to the Bill that became the FSA reported that what was required was whether "*the full set of rights and interests in the claimed areas … amounted to exclusive occupation and possession at common law".*[20]

Marine and Coastal Area (Takutai Moana) Act

24 The Act reached a new political compromise in response, inter alia, to the Waitangi Tribunal's finding that the Crown assuming ownership over the foreshore and seabed without providing

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17 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [2] per Elias CJ, [106] per Gault P, and [128] per Keith and Anderson JJ **[AG BOA Tab 5]**; *Re Edwards Whakatōhea (CA)* at [45] **[AG BOA Tab 16]**.

18 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071 (Wellington, 2004) at 91–93 [**Foreshore and Seabed Report**] **[SIR BOA Tab 18]**; Ministerial Review Panel *Ministerial Review of the Foreshore and Seabed Act 2004* [**Ministerial Review**] (July 2009) at p 110-111 **[SIR BOA Tab 12]**.

19 Foreshore and Seabed Bill 2004 (129-1) (select committee report) at 5 **[SIR BOA Tab 11]**; Foreshore and Seabed Report at 128: the 2003 Foreshore and Seabed Policy only contemplated a statutory regime under which the Māori Land Court could hear claims relating to new forms of customary title / rights. This was the policy that eventually became "customary rights orders" under s 42 of the FSA **[SIR BOA Tab 18]**.

20 Foreshore and Seabed Bill 2004 (129-1) (explanatory note) at p 6 **[SIR BOA Tab 10]**.

compensation breached Te Tiriti.[21] The Act repealed the FSA, and the vesting of the public foreshore and seabed in the Crown, and provides in s 11 that the coastal and marine area cannot be owned.

25 However, while the Act makes a number of important changes to the recognition of customary interests in the takutai moana, elements of the test for "territorial customary rights" were retained for one of the new forms of recognition – the property rights of a CMT order in s 58(1)(b) – and in particular the requirement for "*exclusive use and occupation … without substantial interruption*" in the period post-1840.

26 It is acknowledged that the Act:

26.1 included a new limb in s 58 (applicants must also "hold the specified area in accordance with tikanga" to be granted CMT);

26.2 removed the specific definition of "*exclusive use and occupation*" in s 32(2)(a) and s 32(5) to require the exclusion of "*all persons who did not belong to the group*" unless those persons had the applicant group's express or implied permission to use the area, and recognised the group's authority to exclude; and

26.3 removed the explicit requirement in s 32(2)(b) of the FSA that the applicant group have continuous title to contiguous land (though ownership of abutting land is still a relevant factor for CMT).[22]

27 However, these changes were not understood as materially altering the fundamental requirements of "exclusive use and occupation" since 1840. In particular, the removal of s 32(2)(a) may be appropriately characterised as removal of an unnecessary definition, in circumstances where transitory use by some third persons of insubstantial duration alone was not intended to negative exclusive use and occupation.

28 In particular, the Attorney-General in explaining to Parliament the changes proposed by the Bill that became the Act compared with the previous test for territorial customary rights in the FSA, confirmed that "*the overarching test [for CMT orders] 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*."[23] Similarly, the Hon Tariana Turia (as she then was), in introducing the Bill on behalf of

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21 Foreshore and Seabed Report at 127 **[SIR BOA Tab 18]**.

22 MACA Act, s 59(1)(a)(i) **[AG BOA Tab 4]**.

23 Hon Christopher Finlayson (21 July 2010) 665 NZPD 12517 **[SIR BOA Tab 14]**.

the Attorney-General, described provisions for recognition of customary rights, including (but not limited to) through CMT orders, as follows:[24]

> The bill sets out a process by which customary rights that were exercised by iwi and hapū in 1840 and continue to be exercised today in accordance with tikanga Māori will be recognised and the future exercise of such rights can be protected. The bill **also** provides for the right to seek customary title to **a specific part** of the common coastal marine area if that area has been used and occupied by a group according to tikanga **and to the exclusion of others without substantial interruption from 1840 to the present day**. [Emphasis added]

29 That description of the test for CMT orders, and its effect, is consistent with the literal meaning of s 58(1)(b)(ii) but is inconsistent with the Court of Appeal majority's alternative test.

30 The introduction of the Bill was preceded by reports of the Waitangi Tribunal, a Ministerial review of the FSA, and a subsequent Ministerial consultation paper. That history confirms the intellectual link between s 58(1)(b) of the Act, s 32 of the FSA, and established meanings of the term "*exclusive use and possession*" in case law.

31 The Ministerial review commented that territorial customary rights orders are "*very difficult to obtain*". The review did not address comprehensively whether s 32 accurately reflected native or customary title in other jurisdictions, or to identify juristic sources. It observed that codification was difficult, and therefore preferred restoration of the common law jurisdiction.[25]

32 That recommendation was not accepted or taken forward in the Ministerial consultation document issued by the Attorney-General in 2010.[26] This document received some attention from the Court of Appeal majority, primarily for the assurance that "*any new legislation will include recognition of customary rights and interests*".[27] However, the consultation paper also addressed the proposed approach to recognition of non-territorial and territorial

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24 Hon Tariana Turia (15 September 2010) 666 NZPD 13999 **[SIR BOA Tab 15]**.

25 Ministerial Review, at 128-129 **[SIR BOA Tab 12]**.

26 Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: consultation document* (March 2010) [**Ministerial Consultation Document**] **[AG BOA Tab 38]**.

27 Ministerial Consultation Document, at 7 **[AG BOA Tab 38]**. The Court of Appeal did not expressly record the other assurances and principles stated by the Government, including "*protection of fishing and navigation rights – fishing rights provided under fishing legislation will be protected and rights of navigation in the foreshore and seabed will be protected, subject to certain exceptions such as in harbours*" (p 7) and "*certainty – there must be transparent and precise processes that provide clarity for all parties, including for investment and economic Development*" (p 8).

customary interests (with the latter being subsequently reflected in CMT orders). The key points to be drawn from the paper are:

32.1 the Government favoured having legislation setting out explicitly how customary interests are to be determined and recognised, rather than leaving the tests to the courts to determine;[28]

32.2 in developing the proposed test for territorial interests, the Government had considered Canadian common law, noting that this required, amongst other matters, that "*occupation was exclusive to the group at sovereignty – there is an 'intention and capacity to retain control'*" but concluded that using a test "*based entirely on another country's legal experience*" was "*inappropriate*";[29] and

32.3 the Government proposed a test for determining territorial interests based on tikanga Māori **and** common law and included within that test that the connection/interest "*must be of a level that accords with the applicant group having 'exclusive use and occupation'*" of the relevant area and that this "*must date from 1840 until the present without substantial interruption*".[30]

33 Accordingly, while the majority focused on the assurances and principles in the Ministerial consultation paper,[31] the detailed description of the proposal for recognition of territorial customary interests through what became CMT orders is entirely consistent with the literal meaning of s 58(1)(b).

34 Finally, and in the SIRs' submission significantly, the statutory criteria for CMT orders were also a significant focus of the Select Committee considering the Bill. Submissions were received both from the perspective of those who thought the test too permissive and those who thought the test too restrictive.[32] The Ministry of Justice Departmental Report on the Marine and Coastal Area Takutai Moana Bill 2011 (**Departmental Report**) responded to these criticisms and recommended no material change; a recommendation adopted by the Select Committee. Notably, key aspects of the Departmental Report were adopted by the Select Committee and appended to its report.

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28 Ministerial Consultation Document, at 32 **[AG BOA Tab 38]**.

29 Ministerial Consultation Document, at 35 **[AG BOA Tab 38]**.

30 Ministerial Consultation Document, at 36 **[AG BOA Tab 38]**.

31 *Re Edwards Whakatōhea (CA)* at [417] **[AG BOA Tab 16]**.

32 Marine and Coastal Area (Takutai Moana) Bill (201–1) (select committee report) at 4–5 **[SIR BOA Tab 17]**.

35 The following propositions are made clear by the Departmental Report:

35.1 The requirement for an area to be *"held in accordance with tikanga"* is the *"starting point"* of the s 58(1)(b) test for investigating customary interests. However, a deliberate decision was made to retain additional requirements from the FSA.[33]

35.2 Despite opposition from a number of submitters on the Bill, the requirement for "*exclusive use and occupation*" was retained (in addition to the separate tikanga requirement in s 58(1)(a)). That language was drawn primarily from Canadian case law on customary title, together with Chief Judge Morrison's decision *Wharo Oneroa a Tohe* (*Re Ninety Mile Beach*).[34] It was intended to require "*the 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*."[35]

35.3 The requirement was intended to be *"stringent"*.[36]

36 In summary, the legislative history confirms that the second limb of the test for a CMT order set out in s 58(1)(b)(i) of the Act was intended to be given a literal meaning, consistent with the meaning of "*exclusive use and possession*" developed in Canadian common law (discussed in the Department Report and further, below). The fact that this might significantly constrain the number of successful applications was understood by Parliament. Section 58 – as elaborated upon by s 59 – was intended to be a stringent test, reflecting the bundle of rights and interest in land granted by the CMT order.

Case law on meaning of "exclusive use and possession"

37 The Canadian cases referred to in the Departmental Report – *Delgamuukw v British Colombia*[37] and *Tsilhqot'in Nation v British Colombia*[38] – both considered the test for exclusive use and occupation in the context of applications for customary title.

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33 Ministry of Justice *Departmental Report on the Marine and Coastal Area Takutai Moana Bill 2011* (February 2011) [**Departmental Report**] at [1416] **[NM&KM BOA Tab 9]**.

34 *Wharo Oneroa a Tohe (Re Ninety Mile Beach)* (1957) 85 Northern MB 126 **[AG BOA Tab 9]**.

35 Departmental Report, at [1425]–[1426] **[NM&KM BOA Tab 9]**.

36 Departmental Report, at [1398] **[NM&KM BOA Tab 9]**.

37 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 **[AG BOA Tab 19]**.

38 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 **[AG BOA Tab 21]**.

38 The Supreme Court of British Colombia in *Delgamuukw* held that the test for aboriginal title is based on "*occupation*" of their ancestral territory prior to the assertion of European sovereignty. This occupation must, the Court held, be sufficient, continuous and exclusive.[39] That language reflects the language adopted in s 32 of the FSA.

39 Over a decade later, and prior to the enactment of s 58, in *Tsilhqot'in Nation*, the Supreme Court of British Colombia rejected the narrower British Colombia Court of Appeal test based on intensive use of a defined tract of land, accepting and expanding upon the language of the *Delgamuukw* test. In particular, the Court explained that:

39.1 sufficiency of occupation is a context-specific inquiry grounded in the perspective of the aboriginal group in question and the nature of the land, but equally must "*manifest itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in* ***question belonged to, or was controlled by, or was under the exclusive stewardship*** *of the claimant group*" (emphasis added);[40]

39.2 exclusivity means the group must have had the **intention and capacity** to retain exclusive control.[41] The presence of other groups on the land does not immediately negate exclusivity. However, the fact that other groups needed permission to use or enter the land, or were excluded from it, can be proof of exclusive use.[42]

40 As signalled in the Departmental Report, in an Aotearoa New Zealand context the Māori Land Court's decision in *Wharo Oneroa a Tohe (Re Ninety Mile Beach)* was an early indication that exclusivity was a factor when investigating customary title. The Māori Land Court held that:[43]

> The Court is of the opinion that these Tribes were the owners of the territories over which they were able to **exercise exclusive dominion and control**. The two parts of this land were immediately before te Tiriti of Waitangi within the territories over

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39 *Delgamuukw v British Colombia* at 1017-1018 **[AG BOA Tab 19]**.

40 *Tsilhqot'in Nation v British Columbia* at [38] **[AG BOA Tab 21]**.

41 *Tsilhqot'in Nation v British Columbia* at [47] **[AG BOA Tab 21]**.

42 *Tsilhqot'in Nation v British Columbia* at [48] **[AG BOA Tab 21]**.

43 *Wharo Oneroa a Tohe (Re Ninety Mile Beach)* (1957) 85 Northern MB 126 **[AG BOA Tab 9]**. See also the *Kauwaeranga* judgment (3 December 1870) Native Land Court, reported at (1984) 14 VUWLR 227, at 240 ("*consistent and exclusive use of the locus in quo has been clearly shown from time immemorial*") **[AG BOA Tab 7]**.

> which Te Aupouri and Te Rarawa respectively exercised exclusive dominion. [Emphasis added]

41 This characterisation is consistent with the Departmental Report, which explains that the term "exclusive use and occupation" was derived from Canadian case law, which "*requires occupation prior to, and exclusivity at, the time of Crown sovereignty and an intention* ***and*** *capacity to retain control*".[44]

42 Notably, both the Departmental Report, and the Ministerial consultation document before it,[45] expressly recognised that the Canadian common law position required an interest of "exclusive use and occupation" to be demonstrated only at sovereignty. Despite this, and consistent with the position in s 32 of the FSA, the proposal – carried forward to s 58(1)(b) – was to require this interest to date from 1840 to the present. In this sense, the legislature must be taken to have deliberately departed from full adoption of the Canadian common law position, as has been recorded in the Ministerial consultation document.

(C3) Purpose

43 The Court of Appeal majority's interpretation of s 58(1)(b) was driven by its assessment of what was required to give effect to the purpose of the Act. It is of course accepted that the meaning of legislation must be ascertained from its text in light of its purpose and context.[46] However, absent clear evidence that Parliament has made a drafting error that requires correction, which has not been suggested here, the words that Parliament has selected must be given effect to.[47]

44 The majority's analysis of what was required by the purpose of the Act reflected three assumptions about the effect and implications of the literal meaning of the s58(1)(b)(ii):

44.1 first, the literal meaning imposed a requirement on recognition of customary rights not present in the common law of New Zealand "*as* Ngāti Apa *makes plain"*,[48] and would therefore extinguish rights of a territorial nature that would have been recognised at common law;[49]

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44 Departmental Report, at [1425] (emphasis added) **[NM&KM BOA Tab 9]**.

45 Departmental Report, at [1425] **[NM&KM BOA Tab 9]**; Ministerial Consultation Document, at 35 **[AG BOA Tab 38]**.

46 Legislation Act 2019, s 10; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

47 *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [62] **[AG BOA Tab 15]**; *Andrews v Commerce Commission* [2024] NZCA 213 at [15].

48 *Re Edwards Whakatōhea (CA)* at [416] **[AG BOA Tab 16]**.

49 *Re Edwards Whakatōhea (CA)* at [416] **[AG BOA Tab 16]**.

44.2 second, the literal meaning would result in few and geographically limited areas subject to CMT orders;[50] and

44.3 third, CMT rights are "limited" and do not include many of the rights that are commonly associated with ownership at law,[51] such that the literal meaning would impose a requirement on recognition – in particular an ability to exclude - greater than the rights being granted.[52]

45 The majority considered that these outcomes would be inconsistent with the assurances given by the Ministerial consultation document, the purposes of the Act as set out in s 4, and the statement in s 7 that the Act "*recognises and promotes the exercise of customary rights to take account of the Treaty | te Tiriti*".[53]

46 The SIRs respectfully submit that, properly understood, there is no inconsistency between the purpose of the Act or the s 7 Te Tiriti statement and the literal meaning of s 58(1)(b)(ii). Nor is there any inconsistency with the assurances given by the Ministerial consultation document – which, as described above, contained a clear description of the proposal ultimately enacted.

Analysis of statutory purpose statement

47 The purposes of the Act are to establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal areas of New Zealand; to recognise the mana tuku iho exercised in that area by iwi, hapū and whānau as tangata whenua; to provide for the exercise of customary interests; and to "acknowledge" Te Tiriti.[54]

48 The latter purpose is elaborated on in s 7, which expressly records that "*in order to take account of … te Tiriti*" the Act recognises and promotes the exercise of customary interests of Māori through the mechanisms provided in pt 3 of the Act.

49 While an express Treaty clause is not required for courts to presume that the legislature intended legislation to be interpreted consistently with Te Tiriti,[55] the Act records the relationship between its provisions and Te Tiriti expressly. As to that relationship:

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50 *Re Edwards Whakatōhea (CA)* at [416] **[AG BOA Tab 16]**.

51 *Re Edwards Whakatōhea (CA)* at [387] **[AG BOA Tab 16]**.

52 *Re Edwards Whakatōhea (CA)* at [386]–[387] **[AG BOA Tab 16]**.

53 *Re Edwards Whakatōhea (CA)* at [416]-[417] **[AG BOA Tab 16]**.

54 MACA Act, s 4(1) **[AG BOA Tab 4]**.

55 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801. See also *Stafford v Attorney-General* [2022] NZCA 165 at [77(b)]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46] **[SIR BOA Tab 6]**.

49.1 it is appropriate to recognise that the Act's consistency with Te Tiriti is contestable. To make an obvious point: the Waitangi Tribunal has found that the Act, and in particular the inclusion of s 58(1)(b), is a breach of Te Tiriti.[56] While the Act was enacted as a political settlement of issues arising out of FSA, there was a vocal political constituency urging wider recognition of customary interests;

49.2 in that context, it is of some significance that ss 6 and 7 are, in the words of the Tribunal, a relatively weak form of Treaty clause:[57] the Act 'acknowledges' and 'takes account' of Te Tiriti through particular statutory mechanisms; and

49.3 in adopting those statutory mechanisms – including the two limbs of s 58 – Parliament must be taken to have expressly turned its mind as to how to take account of Te Tiriti. It is a basic principle of statutory interpretation that the provisions of a statute are likely to be internally consistent,[58] and therefore it must be assumed that the requirements of s 58(1), including in particular subs (1)(b), reflects the purpose of ss 6 and 7, which were enacted at the same time.

50 Put another way, the qualified nature of ss 6 and 7 themselves suggest particular attention is required to be given to the general principle that an interpretation based on a presumption of consistency with Te Tiriti must not do violence to the parliamentary purpose or the words Parliament adopted.[59]

51 In addition, CMT orders are only one of three mechanisms provided by pt 3 for the recognition and promotion of the exercise of customary interests.[60] It is therefore not the case that CMT orders bear the full burden of taking account of Te Tiriti in relation to the recognition of customary interests in the takutai moana. That is

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56 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* Wai 2660 (Wellington, 2023) at 227, 234 and 237 **[SIR BOA Tab 19]**.

57 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* Wai 2660 (Wellington, 2023) at 63 **[SIR BOA Tab 19]**.

58 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [44] **[SIR BOA Tab 5]**; adopting Burrows and Carter *Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 237-242 **[SIR BOA Tab 20]**.

59 *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [55] and [62] **[AG BOA Tab 15]**; citing *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [63]-[65] per Winkelmann CJ and [181] per O'Regan and Arnold JJ; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 655-656 per Cooke P. See also *Stafford v Attorney-General* [2022] NZCA 165 at [77].

60 The others are the provision, in subpt 1, of participation rights in the specified conservation processes relating to the common marine and coastal area and the provision for customary rights to be recognised and protected through subpt 2: see MACA Act, s 7 **[AG BOA Tab 4]**.

evident from the Ministerial consultation paper,[61] and other aspects of the legislative history.[62]

52 The specific purpose to which s 58 relates is the restoration of (only) one kind of territorial customary interest extinguished by the FSA. Section 6(1) of the Act records that those interests are "*restored and given **legal expression** in accordance with this Act*". A CMT order is the analogue of customary title. It is consistent with that purpose that the codified test for CMT reflects concepts that were understood to be likely to form part of the common law test for customary title. However, for the reasons given below, it is not inconsistent with that purpose for the test not to fully reflect the Court of Appeal's, or this Court's, analysis of how the common law would have developed but for the enactment of the FSA and the Act.

Assumption concerning common law test

53 At the core of the Court of Appeal majority's purposive interpretation was its view that the literal meaning of s 58(1)(b) would impose a requirement on the recognition of territorial customary interests that was not present at common law, and therefore would have the effect of extinguishing those interests.[63]

54 The majority's analysis of the position at common law absent statutory intervention was relatively brief.[64] It appears to assert, based on a passage of Tipping J's judgment in *Ngāti Apa*,[65] that in the absence of extinguishing legislation, all rights and interests existing as at 1840 would continue to the present day.[66] That is not what Tipping J said: his Honour's point was simply that the question of whether Māori customary title existed *and continues to exist* is essentially a matter of fact. Nor could his Honour's comments be taken to be a definitive statement of the common law as it would have developed. As Miller J correctly stated,[67] all the judgments in *Ngāti Apa* were careful not to purport to describe the test for recognition of customary title at common law, which was not the question before the Court of Appeal.

55 However, the critical point is not that the majority of the Court of Appeal erred in its conception of the common law test that would

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61 Ministerial Consultation Document, at 36 **[AG BOA Tab 38]**.

62 Departmental Report, at [1425]–[1427] and [1550]–[1551] **[NM&KM BOA Tab 9]**.

63 *Re Edwards Whakatōhea (CA)* at [416] **[AG BOA Tab 16]**.

64 *Re Edwards Whakatōhea (CA)* at [373]-[378] **[AG BOA Tab 16]**.

65 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [186] **[AG BOA Tab 5]**; *Kauwaeranga* judgment (3 December 1870) Native Land Court, reported at (1984) 14 VUWLR 227, where Chief Judge Fenton recognised the claimants' fishing rights in the Thames foreshore as easements **[AG BOA Tab 7]**.

66 *Re Edwards Whakatōhea (CA)* at [373] **[AG BOA Tab 16]**.

67 *Re Edwards Whakatōhea (CA)* at [44] **[AG BOA Tab 16]**.

have developed absent the FSA, but that the majority erred in undertaking that assessment at all.

56 The legislative history, summarised above, demonstrates that both the FSA and the Act were enacted against genuine uncertainty as to how the common law would develop to recognise the diverse range of customary interests existing in tikanga. That uncertainty was acknowledged by eminent jurists comprising and assisting the Tribunal,[68] the Ministerial review,[69] and the Minister's consultation document.[70] The confidence displayed by the majority in predicting the development of the common law was therefore absent at the time the response to *Ngāti Apa* was considered.

57 Against that background of uncertainty, Miller J correctly summarised Parliament's response: "*Parliament chose not to leave to the courts either the content of customary rights over the common marine and coastal area or the criteria for their recognition*".[71] That choice was made clear in the Ministerial consultation document,[72] and also by the Attorney-General in addressing the Bill. The expressed preference was to provide certainty and equity by legislating for the test for CMT orders, rather than leaving the matter for the Courts.[73]

58 The challenges posed by that choice were well understood. The difficulty in prescribing statutory tests for the diverse sets of interests in tikanga, and avoiding distorting tikanga perspectives by forcing these into existing common law concepts, were expressly acknowledged, including by the Ministerial review.[74] But Parliament nonetheless undertook that attempt, fashioning a test that drew on common law concepts and language from other jurisdictions, principally Canada, but not seeking to replicate the law of any particular jurisdictions.

59 The majority's attempt to reshape the statutory test to fit its assessment of how the common law position would have developed is directly contrary to and undermining of that legislative choice. It substitutes for Parliament's assessment of the proper test for the statutory rights created to recognise a particular sub-set of customary interests the Court's assessment of how the common law would have developed. This is despite Parliament expressly

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68 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* Wai 2660 at 84–85 **[SIR BOA Tab 19]**.

69 Ministerial Review, at 141 **[SIR BOA Tab 12]**.

70 Ministerial Consultation Document, at 35 **[AG BOA Tab 38]**.

71 *Re Edwards Whakatōhea (CA)* at [191]–[192] **[AG BOA Tab 16]**.

72 Ministerial Consultation Document, at 24 **[AG BOA Tab 38]**.

73 Hon Christopher Finlayson (8 March 2011) 670 NZPD 16981 **[SIR BOA Tab 16]**.

74 Ministerial Review, at 71 and 101 **[SIR BOA Tab 12]**.

choosing not to permit that development, and despite the bundle of statutory rights reflected in CMT orders being different from the rights that could have been recognised at common law.

60 In particular, the majority's position that the common law would have only required exclusive use and possession to be demonstrated on the assumption of British sovereignty in 1840, and therefore that the s 58(1)(b) test must be incorporated to avoid any requirement that exclusive use and possession be demonstrated from 1840,[75] is directly contrary to the choice made by the legislature. The majority's analysis correctly described the position at Canadian common law.[76] However, the legislative history demonstrates that this was well understood,[77] and a deliberate choice was made not to adopt the Canadian common law position in full but instead to require exclusive use and possession, as that term was understood in Canadian law, to be demonstrated from 1840 to the present.

Assumption of extent of CMT orders

61 The majority's second assumption, that the literal meaning would result in "few areas" where the test could be met, incorrectly asserts a legislative purpose to achieve a certain geographic coverage of CMT orders, and makes assumptions – without evidence – about the implications of particular tests for that coverage.

62 It is apparent that Parliament did not form any precise view of the 'correct' geographic extent of CMT orders. This was instead left for the Courts to discover through application of the statutory test to particular facts.

63 To the extent that Parliament received information on the likely extent of CMT orders, the Attorney-General in response to the question "*Which parts of the New Zealand coastline, if any, will not be subject to the grant of customary title…?*" responded "*Huge amounts*".[78] This is therefore not a case where the literal interpretation of the legislative text would result in outcomes inconsistent with Parliamentary expectations. To the contrary, it is the majority's interpretation, which will almost certainly result in CMT orders being made around most of the coastline of Aotearoa New Zealand (other than, potentially, where major infrastructure exists), that cannot be reconciled with what was advised to Parliament by the Attorney-General.

64 Importantly, it cannot be credibly asserted that the literal meaning would render CMT orders unavailable or the rights thereby granted

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75 *Re Edwards Whakatōhea (CA)* at [416] **[AG BOA Tab 16]**.

76 *Re Edwards Whakatōhea (CA)* at [403]–[404] **[AG BOA Tab 16]**.

77 Departmental Report, at [1425] **[NM&KM BOA Tab 9]**; Ministerial Consultation Document, at 35 **[AG BOA Tab 38]**.

78 Hon Christopher Finlayson (15 June 2010) 664 NZPD 11644 **[SIR BOA Tab 13]**.

redundant. To the contrary, on the SIRs' assessment, at least half of the CMT orders granted to date (two out of four)[79] would have been granted on a literal interpretation of the s 58(1)(b)(ii) test. One of these (*Re Tipene*)[80] demonstrates how exclusive use and occupation can be demonstrated over time, through both consensual recognition by the community of the applicants' use and later regulatory enforcement. The other case (*Nga Potiki Stage 1*)[81] saw CMT orders granted in respect of a harbour only a few miles from one of New Zealand's largest cities (Tauranga) where, through continued land ownership and community recognition and regulation, the five marae were able to demonstrate legally and practically exclusive use and occupation of the harbour. Neither decision has been appealed. Notably, those cases are consistent with the expectations of the Ministerial Review as to the types of situations in which orders would be made under s 32 of the FSA.[82]

Assumption of limited nature of CMT orders

65 Finally, the majority also considered that its interpretation of s 58(1)(b) was "*consistent with the limited nature of rights conferred by CMT*", and in particular that CMT orders are subject to rights of access for navigation and fishing. The majority considered it "illogical" to require an application to demonstrate exclusive use and possession from 1840 to qualify for statutory rights that do not confer that level of control in the future.[83]

66 Two initial points should be made. First, CMT orders can include the right to exclude access for fishing to at least parts of the application area through wāhi tapu conditions. The test for those conditions is uncertain, and the subject of separate appeals to the Court of Appeal, but conditions have been sought that would grant the power to impose rāhui over the full CMT application area.[84]

67 Second, it is by no means certain that common law recognition of territorial customary interests would have included a right to

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79 *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 **[SIR BOA Tab 8]**; *Ngā Pōtiki Stage 1 — Te Tāhuna o Rangataua* [2021] NZHC 2726, [2022] 3 NZLR 304 **[AG BOA Tab 13]**.

80 *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 **[SIR BOA Tab 8]**.

81 *Ngā Pōtiki Stage 1 — Te Tāhuna o Rangataua* [2021] NZHC 2726, [2022] 3 NZLR 304 **[AG BOA Tab 13]**.

82 Ministerial Review, at 140–142 **[SIR BOA Tab 12]**.

83 *Re Edwards Whakatōhea (CA)* at [430] **[AG BOA Tab 16]**.

84 *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [70]: "[*a] contentious aspect of the Ngāti Pāhauwera claim is their assertion that the entirety of their claim area is either wāhi tapu or a wāhi tapu area*." While the evidence of Ngāti Pāhauwera in that case did not support that claim, Churchman J commented that *"[i]t is conceivable that the entirety of an application area can be considered wāhi tapu. There may be future cases under the Act where the evidence quite clearly illustrates that an entire application area is wāhi tapu or is a wāhi tapu area"* ([126]–[128]) **[SIR BOA Tab 7]**. Ngāti Pāhauwera has appealed this conclusion: Notice of Appeal dated 9 February 2022 [1(a)(xi)(b)].

exclude third parties, at least for the purposes of fishing and navigation. In Australia, the High Court of Australia in *Yarmirr* held that the common law will only recognise rights that it can co-exist with,[85] and that the common law has always recognised public rights of fishing and navigation. Again, whether this would have been the case is unknown: the Tribunal thought it arguable that claims to exclusivity might succeed, but concluded that the majority approach in *Yarmirr* likely would be followed in New Zealand.[86]

68 However, the more significant flaw in the majority's analysis is that it fails to account for the meaningful statutory rights granted by CMT orders. Those rights include rights that have the potential to impact on commercial fishing in a range of ways, in particular via the RMA, the Conservation Act, the Marine Mammal Protection Act, the Wildlife Act, and the Marine Reserves Act.[87]

69 None of these rights could have been granted at common law, because they involve interaction with other statutory schemes,[88] including rights to veto third party activities requiring resource consent in the CMT area, and to participate in statutory planning processes for those areas that may affect third parties. Indeed, the nature and extent of CMT holder rights go beyond rights held by freehold title owners in regions in which their property is situated. The materiality of the rights to the use of the application area by third parties explains the rights of participation for interested parties in proceedings under the Act, including appeal rights,[89] as well as the exclusions in the Act for certain activities and significant infrastructure (accommodated activities and accommodated infrastructure) from the exercise of those rights.[90]

70 These bespoke statutory rights granted by CMT orders are properly characterised as rights to regulate, or at least participate in the regulation of, third party use of the application area. This applies particularly in the case of wāhi tapu conditions, but extends more generally to the statutory consenting and planning rights (which, as discussed above, may permit regulation of fishery activities in practice).[91] It is not logically inconsistent with the nature of those statutory rights for the applicant seeking statutory recognition of a

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85 *Commonwealth of Australia v Yarmirr* [2001] HCA 56, (2001) 208 CLR 1 at [42] **[AG BOA Tab 17]**; referred to in *Re Edwards Whakatōhea (CA)* at [48] **[AG BOA Tab 16]**; Foreshore and Seabed Report at 50 **[SIR BOA Tab 18]**.

86 *Re Edwards Whakatōhea (CA)* at [48] **[AG BOA Tab 16]**; citing Foreshore and Seabed Report at 60 **[SIR BOA Tab 18]**.

87 MACA Act, ss 85 and 91 **[AG BOA Tab 4]**.

88 Ministerial Consultation Document, at 38 and 41 **[AG BOA Tab 38]**.

89 MACA Act, s 112 **[AG BOA Tab 4]**.

90 MACA Act, ss 63–65 **[AG BOA Tab 4]**.

91 See Part (B).

customary interest to be required to demonstrate that this interest provides a current ability to regulate in practice, through an intention and ability to control the use of the application area in fact.

71 For completeness, the exclusion of accommodated activities and accommodated infrastructure from the exercise of rights by holders of CMT orders does not imply that the presence of those activities or infrastructure cannot amount to a substantial interruption. That is because, depending on the facts, the presence of that infrastructure may not be inconsistent with an ability to control in fact (for example, if the applicant group was consulted and consented to that activity or infrastructure). The effect of the protections in ss 63 – 65 is to preserve those activities and infrastructure from a change in position by an applicant group.

(D) Relevance of fishing activities

72 The Court of Appeal majority mischaracterises the SIRs' submission as "*any substantial third party access to (or fishing in) an area claimed by a group demonstrates that the group did not hold the area exclusively (or that exclusivity was substantially interrupted*".[92] That is not the SIRs' position.

73 The SIRs accept that evidence of fishing in an area does not "*of itself*" preclude an award of CMT under the Act. This is clear from the terms of s 59(3) of the Act. Instead, what is required is an assessment of "*the extent and nature of any third party access*" in the context of the applicant group's relationship with those activities and the relevant area.[93] This is a fact-specific inquiry. The Departmental Report explains this point in the following way:[94]

> The test provides access (i.e. navigation and fishing) by third parties does not necessarily preclude a finding of CMT. This allows consideration of the extent and nature of any third party access in line with the group's relationship with the area. **If, for example, access was permitted by the group**, in line with manaakitanga, and **that was understood and acknowledged by both parties**, under the current test in the 2004 Act such access could support rather than undermine the group's claim. [Emphasis added]

74 Accordingly, it is submitted that on a proper interpretation of s 58(1)(b) and s 58(3), and consistent with the position of the Attorney-General:[95]

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92 *Re Edwards Whakatōhea (CA)* at [427] **[AG BOA Tab 16]**.

93 Departmental Report, at [1427] **[NM&KM BOA Tab 9]**.

94 Departmental Report, at [1427] **[NM&KM BOA Tab 9]**.

95 Written submissions of the Attorney-General dated 20 September 2024 at [45.3]; citing *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [272], which found that significant recreational use and boat use in its totality had amounted to a substantial interruption in part of the application area **[SIR BOA Tab 7]**.

74.1 evidence of fishing, navigation and access by third parties does not of itself prevent the applicant from satisfying the test for CMT orders;

74.2 the core requirement of *"exclusive use and occupation"* are that the applicant group must show both intention **and** ability to control the area in question. Accordingly, the extent to which the group permitted a particular activity occurring within the applicant area, in accordance with its tikanga, is relevant. On the other hand, evidence of protest without successful recognition or result that affects the full area to which the application relates may indicate a lack of intention and/or capacity to exercise authority over that area; and

74.3 the intensity, nature and terms of use are relevant to whether there has been *"exclusive use and occupation"* without *"substantial interruption".* Evidence of occasional use will be less relevant than evidence of extensive, systematic and regular use.

75 The Court of Appeal majority appears to have accepted that third party activity could in principle amount to a substantial interruption where those activities were authorised by legislation, and inconsistent with the applicant group's own use of the application area.[96] The majority noted that what amounted to substantial interruption would need to be explored in particular cases,[97] but provided "broad indications" in two scenarios:[98]

75.1 first, rights that existed in 1840 will have been substantially interrupted where a group has ceased to use and occupy a relevant area for such an extended period that ahi kā roa is no longer maintained by that group as a matter of tikanga;[99]

75.2 second, an Act of Parliament could authorise use or occupation of the area by another person without the permission of the customary owner. This could substantially interrupt the use and occupation of the area, depending on the nature and extent of the interruption to the groups' use and occupation. The example given by the majority is of the construction and operation of port facilities pursuant to resource consent, in a manner that excludes the applicant's access to that part of the marine and coastal area.

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96 *Re Edwards Whakatōhea (CA)* at [428] **[AG BOA Tab 16]**.

97 *Re Edwards Whakatōhea (CA)* at [431] **[AG BOA Tab 16]**.

98 *Re Edwards Whakatōhea (CA)* at [431] **[AG BOA Tab 16]**.

99 *Re Edwards Whakatōhea (CA)* at [432] **[AG BOA Tab 16]**.

76 The majority does not expressly address the relevance of third-party fishing, and whether this can fall within the second scenario identified. However, the fact that they remitted the factual issues back to the High Court for a rehearing and that, in doing so, they did not say that evidence of commercial fishing would be irrelevant at the rehearing, suggests clearly that it is relevant. As Miller J said, the question is as to the scale, extent and duration.[100] The key difference between the interpretation of the majority and that proposed by the SIRs is whether what must be shown is substantial lawful disruption of the applicant group's own use of the area, or substantial lawful disruption of the applicant groups' *intention and ability to control third party use* of the area.

77 To be clear, the SIRs accept that tikanga will be relevant to that assessment. Third party use that is permitted by the applicant group, in accordance with manaakitanga, and that was understood and acknowledged by both parties, will not amount to a substantial interruption. However, that tikanga cannot be assumed: it should be a matter of evidence in respect of the particular application area.

(D1) Fishery activities are lawful and regulated

78 Although the question of whether fisheries are authorised by statute is not, on the SIRs' interpretation of the s 59(1)(b)(i) test, necessary to be relevant to the issue of substantial interruption of exclusive use and possession, fisheries have in fact been substantially regulated and authorised by increasingly complex regulation of the business and activity of fishing from the early 1900s onwards.

79 As a result of this legislation:

79.1 the right of access for **commercial use** has been exclusively controlled and authorised by Parliament, initially through vessel licencing and registrations systems and then progressively through more prescriptive and invasive regimes (the licencing of both vessels and individuals after the war from 1945 by a new Authority, the new permitting and controlled fisheries regimes of the 1960s, 70s and 80s (the last of which resulted in the removal from the fishery of many part-time fishermen) and then the QMS in 1996; and

79.2 the right of access for even **non-commercial take** has been largely controlled and authorised by Parliament, beginning progressively in the 1930s and increasing over time.[101]

80 Currently, s 89(1) of the Fisheries Act 1996 provides that no person shall take any fish, aquatic life, or seaweed unless in possession of a

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[100] *Re Edwards Whakatōhea (CA)* at [181] **[AG BOA Tab 16]**.

[101] Waitangi Tribunal *Ngāi Tahu Sea Fisheries Report* (Wai 27, 1992) at 211-212.

current fishing permit, subject to certain exceptions set out in s 89(2). Pursuant to s 91(3), a fishing permit authorises the taking of stocks. In short, in practice all lawful commercial fishing activity in New Zealand is undertaken pursuant to a statutory authorisation.

81 A range of other requirements also currently apply to fishing activity, depending on its nature. In particular:

81.1 a fishing vessel cannot be used in New Zealand fisheries waters to take fish or aquatic life for sale unless registered.[102] The registration of the vessel thus authorises its use for those purposes; and

81.2 no commercial fisher may take any stock listed in Schedule 8 to the Fisheries Act unless, at the time of the taking, the fisher holds a minimum amount of annual catch entitlement.[103] The annual catch entitlement thus authorises the commercial fishing of the relevant species.

82 This position of control and permitting of commercial fishing can be traced back to at least 1894. From that time, anyone wishing to use a fishing boat to take fish for the purpose of sale could only do so if they obtained the necessary licence: Sea-Fisheries Act 1894. This regime continued when the entirety of the fisheries legislation was consolidated in the Fisheries Act 1908. This Act set out in s 77(2) that nothing in its Part I "*shall affect any existing Māori fishing rights*", but did not provide for control over fisheries to those with customary rights.[104]

83 In 1945, following the end of World War II, commercial fishing became more heavily regulated. This included creation of a new Sea-Fisheries Licensing Authority to administer a new licensing regime for both commercial fishing boats and fishermen individually.

84 In 1983, a new Fisheries Act 1983 was enacted. It largely continued previous fisheries permitting and controlled fisheries regime. In 1986, the 1983 Act was amended to introduce the quota management system (**QMS**). This granted to quota owners' rights in perpetuity to harvest.

85 In 1989 the Crown and Māori agreed an interim settlement for fisheries rights that progressively supplied Māori through the Māori Fisheries Commission with 10% of quota rights (or financial equivalent) to those fisheries already introduced into the QMS. In 1992, the Crown and Māori entered into a deed of settlement, the

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[102] Fisheries Act 1996, s 103(1) **[SIR BOA Tab 3]**.

[103] Fisheries Act 1996, s 74(1) **[SIR BOA Tab 3]**.

[104] This can be regarded as the precursor of s 88(2) of the Fisheries Act 1983 **[SIR BOA Tab 2]**.

implementation of which through legislation and regulation constituted a full and final settlement of all Māori claims to commercial fishing rights.

86 In 1996, the new Fisheries Act 1996 was enacted, which continued and strengthened the QMS. It also introduced a range of new sustainability measures and the new ACE trading system used by fishers to balance catch.

87 The SIRs do not say that this legislative scheme itself prevents the applicants from establishing that they have retained exclusive use and occupation, without substantial interruption. However, the SIRs say that the scheme provides the statutory context in which the evidence of lawful third-party fishing activities authorised by Parliament is to be considered.

(D2) Evidence of fisheries in this case

88 This Court is not being asked by the Attorney-General to determine facts as part of this appeal. The appeal should be remitted back to the High Court. However, for context, this section summarises the evidence of commercial fishing in the application area.

89 The High Court accepted that there was evidence of "*extensive commercial and recreational fishing*" in the application area, including out to Whakaari.[105] The Crown called largely uncontested evidence from the historian Mark Derby that provided a very detailed analysis of third-party use and occupation, including fishing. This evidence was only referenced once in the High Court judgment, in the context of raupatu,[106] and only once in the Court of Appeal judgment, in a footnote commenting that the High Court judge had not discussed Mr Derby's evidence.[107]

90 Mr Derby also provided evidence regarding the general scale of infrastructure and commercial activity over decades. His evidence showed that the foreshore was the front door to the region, through the presence of wharves, ports and shipping.[108]

91 The SIRs called evidence from Daryl Sykes, who has over 50 years' experience in the seafood industry, including in the Bay of Plenty and particularly with regard to rock lobster.[109] Mr Sykes' evidence

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[105] *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 at [259] **[AG BOA Tab 12]**.

[106] At [202] **[AG BOA Tab 12]**.

[107] *Re Edwards Whakatōhea (CA)* at fn 390 **[AG BOA Tab 16]**.

[108] Mark Derby "Report on Customary Interests and Third-Party Use and Occupation" "MD-02", dated June 2020 **[326.11768]** at [30]-[34] **[326.11827]-[326.11828]**.

[109] Affidavit of Daryl Sykes dated 1 May 2020 **[203.01384]**.

was directed to the history and scope of marine farming and commercial fishing activities in and around the specified area.

92 Both Mr Derby and Mr Sykes provided evidence regarding the significant commercial fishing that has taken place in the application area for over 100 years, including both finfish and shellfish fishing. Mr Sykes' evidence was that Sanford trawlers from Tauranga and Auckland have seasonal presences in the specified area,[110] and these commercial longline vessels fishing for Sanford and Leigh Fisheries have operated in the specified area for decades.[111] In the close inshore area, the commercial fishing activity is predominantly for rock lobster.[112] In the High Court, Mr Sykes was not cross examined on the key evidential point that substantial commercial fishing has been taking place in the application area.[113]

93 The evidence was also that this activity did not reflect manaakitanga and, in many cases, occurred over the objection of the applicant groups. For example, Mr Derby describes records of fishermen systematically fishing the application area by 1900;[114] a record of local Māori asking Pakeha commercial fishermen to cease all activity on the grounds that no commercial fishing was permitted in 1918;[115] and records of a lack of fish and requests for restriction.[116]

(E) Conclusion

94 For the above reasons, the SIRs respectfully submit that the Attorney-General's appeal should be allowed, and the matter remitted to the High Court for rehearing in light of this Court's judgment.

Dated: 4 October 2024

B A Scott / T D Smith / R J J Wales
Counsel for the Seafood Industry Representatives

[110] Affidavit of Daryl Sykes dated 1 May 2020 **[203.01384]** at [49] **[203.01392]**.

[111] At [51] **[203.01384]** at **[203.01393]**.

[112] At [69] **[203.01384]** at **[203.01395]**.

[113] Notes of Evidence taken in front of Churchman J on 6 October 2020 at **[108.04349]**-**[108.04359]**.

[114] At [134] **[326.11929]**.

[115] At [129] **[326.11994]**.

[116] At [133] **[326.11996]**, [139] **[326.11998]**, [147] **[326.12000]**, [150] **[326.12001]**, [155] **[326.12003]**, [157]–[158] **[326.12004]**, [164] **[326.12006]**, [184] **[326.12012]**, [190] **[326.12016]**, and [205] **[326.12022]**. See also Notes of Evidence taken in front of Justice Churchman dated 17 August 2020 at 32–33 **[102.01149]**-**[102.01150]**.

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