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.

ATTORNEY-GENERAL'S SUBMISSIONS IN RESPONSE TO OTHER APPEALS

18 October 2024

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COUNSEL FOR THE ATTORNEY-GENERAL CERTIFY THAT, TO THE BEST OF THEIR KNOWLEDGE, THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE 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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INTRODUCTION

1. The Attorney-General responds to the following appeals that concern customary marine title under te Takutai Moana Act 2011 (**the Act**):

    1.1 Ngāti Muriwai and Kutarere Marae's appeals (SC123/2023 and SC124/2023), with respect to the correct interpretation of the first limb of s 58 of the Act;[1]

    1.2 Te Kāhui's appeal (SC128/2023), with respect to the correct interpretation of the second limb of s 58;[2] and

    1.3 Te Upokorehe's appeal (SC125/2023), with respect to the availability of separate, overlapping customary marine titles under the Act.[3]

2. Te Upokorehe has also appealed on the ground that the Court of Appeal erred in its interpretation of both limbs of the test in s 58,[4] but has not advanced any submissions in support of this ground of appeal.[5] The Attorney reserves her right to respond to those submissions when they are filed.

3. The Attorney-General does not intend to make submissions on the factual issues raised in the appeals.[6] Nor does she intend to make submissions on procedural issues that have been raised on appeal (although counsel can address these points orally if it would be of assistance to the Court).[7]

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1 See the submissions on appeal of Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [21]-[63]. See fn 13 below, however: Ngāti Muriwai and Kutarere Marae did not identify error in the Court of Appeal's approach to the first limb of s 58 as a ground of appeal in their notices of application for leave to appeal.

2 See the submissions on appeal of Te Kāhui dated 23 September 2024 (SC128/2023) at [4].

3 See the submissions on appeal of Te Upokorehe Treaty Claims Trust (SC125/2023) dated 20 September 2024 at [43]-[109].

4 Te Upokorehe's notice of application for leave to appeal (SC125/2023) dated 16 November 2023 at [1]; Te Upokorehe's submissions in support of leave application (SC125/2023) dated 14 December 2023 at [17]-[19].

5 See the submissions on appeal of Te Upokorehe Treaty Claims Trust (SC125/2023) dated 20 September 2024 at [8].

6 See the issues listed at [7(d)] and [7(e)] of the minute of Williams J dated 4 July 2024.

7 See the issues listed at [7(f)], [7(g)] and [7(h)] of the minute of Williams J dated 4 July 2024. The submissions of Ngāti Muriwai and Kutarere Marae also raise the issue of whether, as a matter of procedure, Ngāti Muriwai is entitled to appear in the rehearing of applications covering the area of CMT Order 1 as an applicant party "in its own right": submissions on appeal of Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [73]-[98]. With respect to the issue of the correct seaward boundary of CMT Order 1 (see the submissions on appeal of Whakatōhea Kotahitanga Waka (Edwards) (SC121/2023) dated 20 September 2024 at [63]-[80]), the Attorney-General continues to rely on her submissions responding to other parties' applications for leave to appeal dated 29 January 2024 at [12]-[14].

SUMMARY OF ARGUMENT

4. Customary marine title is the highest form of customary interest recognised under the Act. The two-limbed test for recognition in s 58 is therefore both deliberate and exacting.

5. The Attorney-General does not consider the Court of Appeal erred in its approach to limb one. Customary marine title is concerned with territorial rights, and so authority over an area as a matter of tikanga, rather than simply the operation of a system of tikanga in an area, is required.

6. Section 58 cannot be interpreted in a manner that effectively renders the second limb meaningless. However, Te Kāhui's submissions advance an interpretation of s 58 that is based solely on tikanga, with the second limb serving only as a "reminder" to a decision-maker about how to interpret the first limb. In essence, their submissions argue that the establishment of customary marine title is dependent only on "who belongs to a place" through whakapapa and ahi kā. The Attorney-General respectfully submits that that interpretation is untenable. It re-casts the test for customary marine title to the point where the plain terms of s 58(1)(b) are ignored entirely.

7. The Attorney-General also respectfully submits that Te Kāhui's reliance on the Act's purpose provision (s 4) and Treaty clause (s 7) is misplaced. As a matter of statutory construction, the purpose provision's acknowledgment of the mana tuku iho of iwi, hapū and whānau cannot alter the plain requirements of s 58. Nor does s 7 guarantee recognition for groups in all cases. In short, neither provision operates in a manner that assumes a particular substantive outcome for applicants. The provisions do not – and cannot – supplant or fundamentally alter the statutory test.

8. In response to Te Upokorehe's appeal, the Attorney-General submits that recognition of multiple, overlapping customary marine titles in respect of the same area is fundamentally inconsistent with the scheme of the Act. The rights granted to customary marine title holders under s 62 of the Act would not be able to be effectively exercised if granted to more than one holder. That cannot have been what Parliament intended.

THE TEST FOR CUSTOMARY MARINE TITLE

Limb one: "holds in accordance with tikanga" (SC123/2023 and SC124/2023)

9. Limb one of the s 58 test requires an applicant group to hold the specified area in accordance with tikanga.[8]

10. The majority held that the first limb requires a group to show that – as a matter of tikanga – it has "the authority to use and occupy the area, and to control access to and use of that area by others".[9] It agreed with the High Court that, in interpreting and applying the first limb, the focus should be on tikanga, and whether as a matter of tikanga the applicant group holds the relevant area. It also accepted that evidence of activities showing control or authority over an area (as opposed to simply carrying out a particular activity in that area) will be particularly relevant.[10] The majority emphasised that the focus of the inquiry should be on the group's "intention and ability to control access to an area, and the uses of resources within it, *as a matter of tikanga*", rather than on a group's ability to exclude others from the land.[11] Miller J largely agreed with the majority's approach to limb one.[12]

11. Ngāti Muriwai and Kutarere Marae submit on appeal that limb one does not contain any element of control, and that this requirement was wrongly imported into the first limb by the Court of Appeal.[13] They say that holding

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8 Section 58(1)(a) of the Act: "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".

9 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [**Court of Appeal Decision**] **[[BOA Tab 16]]** at [435(a)] per Cooper P and Goddard J.

10 Court of Appeal Decision at [401] per Cooper P and Goddard J **[[BOA Tab 16]]**.

11 At [403] per Cooper P and Goddard J **[[BOA Tab 16]]**. By way of example, the majority said that permitting others to access the area and to use resources within it, as an expression of manaakitanga, may demonstrate the exercise of authority in respect of the relevant area: at [403]. Conversely, the use by a group of a particular resource in a specific area is not of itself sufficient to establish that the area is "held" by that group in accordance with tikanga: at [404].

12 Court of Appeal Decision at [140] **[[BOA Tab 16]]**. Miller J emphasised that limb one is a contemporary inquiry, which looks to local tikanga regarding the area concerned. He agreed that "[e]vidence of activities that show control or authority over the area, as opposed to simply carrying out a particular activity in that area, will be of particular relevance in distinguishing 'holding' the area from use of it to gather a particular resource": at [140].

13 Submissions on appeal for Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [41]-[47]. The Attorney-General notes that this ground of appeal was not articulated in this way in either Ngāti Muriwai or Kutarere Marae's notices of application for leave to appeal or supporting leave submissions, contrary to the Supreme Court Rules 2004, s 15(1)(a) and s 20(2)(b): see Ngāti Muriwai's notice of application for leave to bring appeal (SC123/2023) dated 15 November 2023 at [2(a)]; Kutarere Marae's notice of application for leave to bring appeal (SC124/2023) dated 15 November 2023 at [2(d)]; and Ngāti Muriwai and Kutarere Marae's submissions in support of applications for leave (SC123/2023 and SC124/2023) dated 15 December 2023 at [17]-[24]. Te Kāhui similarly appear to suggest that the use of the word "holds" in limb one does not import connotations of control into the test (see the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.3]). However, their submissions go on to agree with aspects of the Court of Appeal's approach to the first limb (see at [4.7]), and error in respect of the first limb is not raised as a ground of appeal in Te Kāhui's notice of application for leave to appeal or supporting leave submissions: see Te Kāhui's notice of application for leave to bring appeal (SC128/2023) dated 16 November 2023 at [2]; and Te Kāhui's submissions in support of application for leave (SC128/2023) dated 14 December 2023 at [2.1]-[2.11].

in accordance with tikanga was "intended to operate as an initial threshold test for applications for a [customary marine title]"[14] and it is only in the second limb that proprietary concepts such as control are introduced.[15]

12. The Attorney-General does not consider the Court of Appeal erred in its approach to limb one.[16] Customary marine title is concerned with territorial rights.[17] The terminology of "holds" in accordance with tikanga compared with "exercised" in accordance with tikanga in s 51(1) of the Act intentionally reflects the common law distinction between territorial rights (interests in land) and non-territorial rights (rights to carry out activities over or in a certain area).[18] To elevate a group's "holding" of an area from the exercise of non-territorial use rights, limb one requires the applicant group to show that it retains customary authority over the area, demonstrated by evidence of customary activities showing control or authority as a matter of tikanga.[19] Authority over an area as a matter of tikanga, rather than simply the operation of a system of tikanga in an area, is required.[20]

13. The Attorney-General does not consider Ngāti Muriwai and Kutarere Marae are correct in relying on the departmental report on the Marine and

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14 Submissions on appeal for Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [45].

15 Submissions on appeal for Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [45]. Despite asserting the Court of Appeal's approach to limb one is incorrect, Ngāti Muriwai and Kutarere Marae do not advance an alternative interpretation of "holds… in accordance with tikanga". While they submit (as all parties agree) that tikanga must govern its recognition, they do not identify the indicia that they say would satisfy limb one.

16 As signalled in the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [37].

17 Customary marine title is an interest in land: s 60(1)(a) of the Act. See Court of Appeal Decision at [134] per Miller J ("[Customary marine title] is a territorial right, not merely a usage right") and at [417] per Cooper P and Goddard J ("it is clear from the language of s 58, and from the legislative history, that CMT is a territorial interest in an area. It is the statutory interest in land into which MACA translates interests that the common law would recognise as territorial in nature, not simply as use rights") **[[BOA Tab 16]]**.

18 *Te Weehi v Regional Fisheries Officer* [1986] NZHC 149, [1986] 1 NZLR 680 at 690-693; and Ministry of Justice *Departmental Report on Marine and Coastal Area (Takutai Moana) Bill* (4 February 2011) [**Departmental Report**] at [1032] and [1550] **[[Ngāti Muriwai and Kutarere Marae BOA Tab 9]]**.

19 See, for example, Court of Appeal Decision at [404] and [421] per Cooper P and Goddard J **[[BOA Tab 16]]**. A right may be exercised in accordance with tikanga even if the person or group exercising the right does not have territorial authority in the area where the activity occurs. For example, through the tikanga associated with whakapapa or whanaungatanga, members of a hapū may have use rights, such as a right to collect kaimoana, in an area of the takutai moana where the hapū does not have a territorial interest.

20 Contrary to the submissions on appeal for Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [44], this is not to import common law concepts of ownership (such as possession and exclusivity) into limb one (see *John da Silva v Maori Committee and Hauraki Maori Trust Board* (1998) 25 Tai Tokerau MB 212 at 217: "held" does not connote "ownership" **[[Ngāti Muriwai and Kutarere Marae BOA Tab 2]]**). Rather, customary authority is a necessary threshold to determine whether, at tikanga, an area is "held" by, or under the mana of, a particular group. See also the submissions for Te Rūnanga o te Whānau dated 4 October 2024 at [13], [16] and [18]: "Whilst 'holding an area in accordance with tikanga' must be looked at holistically, it imports an element of territoriality and mana as distinct from mere use": at [18].

Coastal Area (Takutai Moana) Bill as an indication that Parliament did not require customary control to be demonstrated in order to meet limb one.[21] In referring to the first limb as "the starting point" for investigating customary interests in the takutai moana, the report was simply explaining that "holds in accordance tikanga" is the first element of a two-part test.[22]

14. The Attorney-General considers control or authority according to tikanga may be demonstrated in a number of ways. For example, the following list of activities were identified by the High Court in *Re Reeder* as a useful guide for assessing whether the evidence demonstrates a group's customary authority over the common marine and coastal area according to tikanga:[23]

> (a) exercising manaakitanga;
>
> (b) acting as kaitiaki by protecting and looking after the takutai moana [for] future generations;
>
> (c) the ability to place customary restrictions on access and the taking of resources;
>
> (d) observing the tikanga associated with wāhi tapu as a way of restricting a specific act or use of an area;
>
> (e) knowledge that particular fishing grounds or rocks belong to a particular group by descent;
>
> (f) exercising mana and rangatiratanga, which encompasses a level of authority over a rohe;
>
> (g) acknowledgement of a group's customary authority in an area by other groups;
>
> (h) restricting or regulating access to the common marine and coastal area across abutting land in the ownership of, or under the control of, the applicant group or members of it, where that occurs in accordance with tikanga.

15. These matters share some similarities with those that go towards meeting the second limb of the test for customary marine title.[24] However, there is no inherent illogicality or impracticality in similar evidence being relied upon to establish the distinct thresholds in each limb of the test, as

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21 Submissions on appeal for Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [45], referring to Departmental Report at [1416] **[[BOA Tab 39]]**.

22 Departmental Report at [1416]: "The Government decided 'held in accordance with tikanga' should be the starting point for investigating customary interests in the cmca. It is therefore the first element of the test in clause 60. Government also decided it is appropriate to incorporate elements of common law customary title …" **[[BOA Tab 39]]**.

23 *Re Reeder* [2021] NZHC 2726 at [52] **[[BOA Tab 13]]**.

24 See the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [42].

suggested by Ngāti Muriwai and Kutarere Marae.[25] The two limbs have a distinct focus. Limb one is a contemporary inquiry focused on the relationship between the group and the relevant area of the takutai moana, as well as relationships between Māori inter se. Limb two is concerned with the historical as well as contemporary nature of a group's interactions vis-à-vis both Māori and non-Māori groups. The critical focus of limb two is on whether the group has demonstrated an intention and capacity to control the area as against third parties across time (from 1840 to the present day).[26]

Limb two: "exclusively used and occupied from 1840 to the present day without substantial interruption" (SC128/2023)

The concept of exclusive use and occupation

16. Te Kāhui submit that the majority misunderstand how tikanga bears on the concept of "exclusive use and occupation" when they refer to the need for groups to demonstrate a "strong presence" in an area, manifested by acts of occupation.[27] Te Kāhui say that, viewed through a tikanga lens, exclusive use and occupation is instead focused on "who the iwi/hapū are that belong to that place through whakapapa and ahi kā", and thereby hold mana whakahaere and kaitiaki obligations to protect the takutai moana.[28]

17. In essence, Te Kāhui submit that limb two's requirement of "exclusive use and occupation" merely "confirms" the requirement in limb one for mana or authority to be established.[29] They say that limb two is not intended to add "a hurdle over and above the position in tikanga".[30] Rather,

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25 Submissions on appeal for Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [46].

26 See the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [42]. To be clear, and because it has been suggested otherwise in the submissions for Ngā Hapū o Ngāti Porou dated 4 October 2024 at [26] and [53]-[54], the Attorney's position that s 58 requires a group to show an intention and capacity to control an area as against third parties is not a new approach. It is the approach the Attorney-General has taken in all proceedings under the Act to date, prior to the Court of Appeal Decision. See for example the submission recorded in *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025, [2022] 2 NZLR 772 at [149] **[[BOA Tab 12]]**.

27 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [1.4], referring to the Court of Appeal Decision at [421]-[424]. The Attorney-General notes that in this part of their judgment, the majority is outlining the test for exclusive use and occupation *as at 1840:* Court of Appeal Decision at [420]-[424] per Cooper P and Goddard J **[[BOA Tab 16]]**. The majority held that insofar as this limb relates to the position in 1840, it largely reflects the common law requirements for customary title as explained in the Canadian authorities: "the applicant group must have had the intention and ability as a matter of tikanga to control access to the relevant area by other groups … There must be a 'strong presence' in the area, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. This will be more difficult to demonstrate in relation to marine areas than in relation to coastal areas, because of their nature and the different ways in which such areas can in practice be used".

28 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [1.5].

29 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.8] and [4.26].

30 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.8]. They say that an additional hurdle would extinguish customary title by a "sidewind". In response, see the Attorney-General's submissions in

"exclusivity" is best understood "as a reminder to judges" about how to interpret limb one.[31] Further, according to Te Kāhui's submissions, s 58 involves an inquiry solely into the contemporary mana whenua/moana status of groups and does not examine the nature of groups' territorial interests across time (since 1840).[32]

The two limbs are distinct and cumulative requirements

18. The Attorney-General respectfully considers that such an interpretation is untenable as a matter of established statutory interpretation. It gives the second limb no work to do at all and re-casts the test for customary marine title to the point where it no longer bears any resemblance to the plain terms of s 58(1)(b). Limb two evidently requires something further than what is required by limb one.[33] Customary marine title is the highest form of customary interest recognised under the Act. The two-limbed test for recognition in s 58 is therefore both deliberate and exacting.

19. As set out in the Attorney-General's earlier submissions, Parliament chose to include two separate limbs in s 58(1), which use different terminology and draw on distinct legal concepts.[34] The Government's view (in a consultation document which described the key features of the proposed test for customary marine title) was that a test based solely on whether land is held by Māori in accordance with tikanga (limb one) "lacks the necessary clarity".[35] Rather, "both tikanga Māori and common law should be used" in the test for determining territorial interests in the takutai

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support of appeal (SC126/2023) dated 20 September 2024 at [33]-[34] (in respect of the terminology of "extinguishment").

31 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.15]. They suggest that "exclusivity" merely reminds a Judge to test whether a group has exclusive or shared mana or authority over an area (at [4.16]) and acts as a mechanism to filter customary rights that do not qualify for customary marine title to protected customary rights (at [4.17]).

32 This is clear from the absence of any mention of "1840" in the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.1].

33 See also the submissions for the Landowners' Coalition Inc dated 4 October 2024 at [3.3]: "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"; and the submissions for the Seafood Industry Representatives dated 4 October 2024 at [12]: "The conjunction 'and' in ordinary usage indicates that the subclauses impose cumulative requirements. It also follows from ordinary principles of English usage that the limbs have different meanings and therefore require different things" (footnotes omitted), citing *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2024] NZSC 111 at [80] **[[Seafood Industry Representatives BOA Tab 9]]**. See also Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 424 (observing that it is natural to assume that a drafter has used words carefully, and has meant every word to have significance) **[[Landowners' Coalition Inc BOA Tab 13]]**.

34 Namely, "holds in accordance with tikanga" in limb one, as found in Te Ture Whenua Māori Act 1993; and "exclusive use and occupation" in limb two, as found in the Canadian jurisprudence. See the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [21]-[22].

35 Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: Consultation Document* [**Consultation Document**] at 35 **[[BOA Tab 38]]**.

moana.[36] This was ultimately reflected in the statutory drafting of s 58(1) through the inclusion of the phrase "exclusively used and occupied".[37]

20. To be clear, while the second limb imports common law elements into the test for recognition, it is not the Attorney-General's submission that the relevance of tikanga is limited to the first limb and has no role to play in interpreting "exclusive use and occupation".[38] Both the common law from which limb two is drawn as well as tikanga Māori will inform the interpretation and application of limb two.[39] But it does not – and cannot – follow that the phrase "exclusive use and occupation" is to be read out of the test for customary marine title.[40] Nor is it to be understood as shorthand to capture tikanga-based concepts only.[41] "Exclusivity" is a clearly understood concept in the common law to describe incidents of property ownership[42] (and it is in this sense that it is used in the Canadian jurisprudence).[43] Where recognisable common law concepts are deliberately used in legislation, as a matter of statutory interpretation they are presumed to be interpreted consistently with the existing rules and principles making up that area of law.[44]

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36 Consultation Document at 36 **[[BOA Tab 38]]**. See also Departmental Report at [1416]-[1418] **[[BOA Tab 39]]**.

37 See Consultation Document at 35-36 **[[BOA Tab 38]]**. See also the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [21] and [38]-[40]; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 **[[BOA Tab 19]]**; *Tsilhqot'in Nation v British Columbia* [2014] SCC 44, [2014] 2 SCR 257 **[[BOA Tab 21]]**. The departmental report on the Bill explained that this limb would require an applicant to show "their interest in the area has qualities akin to that of a land owner – the capacity to exclude others from the area": Departmental Report at [1426] **[[BOA Tab 39]]**. See also *Re Reeder* [2021] NZHC 2726 at [29] **[[BOA Tab 13]]**: "The legislature has chosen to add a second part to the test, with s 58(1)(b)(i) of the MACA imposing additional qualitative and temporal components".

38 Compare submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.23].

39 As outlined in the Attorney-General's appellant submissions dated 20 September 2024 at [39]-[43]; and see also Court of Appeal Decision at [162] per Miller J **[[BOA Tab 16]]**. The Attorney-General's submission in this regard differs from the submissions of the Landowners' Coalition Inc dated 4 October 2024 at [3.17], [3.21] and [4.27]-[4.28].

40 Compare submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.15]: exclusivity is merely "a reminder to judges" of how to interpret and apply limb one.

41 See submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.26] and [4.10]. See also at [4.23]: "Proof of 'exclusivity' means 'proof of a *holding* of the area in accordance with tikanga'". In other words, the Attorney-General submits this is not a situation where tikanga can be said to be the "controlling" law (see, similarly, *Official Assignee v Honey* [2024] NZHC 2216 at [68]-[71]).

42 Exclusivity is a common law principle derived from the notion of fee simple ownership. See fn 130 of the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024. See also Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, 2017) at 13; and A M Honoré "Ownership" in A G Guest (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1961) 107 **[[Landowners' Coalition Inc BOA Tab 16]]** (relied upon by the Court of Appeal in *Hampton v Canterbury Regional Council* [2015] NZCA 509, (2015) 18 ELRNZ 825). Honoré's essay described 11 incidents of ownership, the first of which is the right to possess (a right to exclusive control and a claim that others ought not interfere with the property without permission).

43 See for example *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [155]-[156] **[[BOA Tab 19]]**; *R v Marshall; R v Bernard* [2005] 2 SCR 220 at [57] ("The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law"); and *Tsilhqot'in Nation v British Columbia* [2014] SCC 44, [2014] 3 SCR 257 at [32] and [47]-[49] **[[BOA Tab 21]]**.

44 Diggory Bailey and Luke Norbury (eds) *Bennion, Bailey and Norbury of Statutory Interpretation* (8th ed, LexisNexis, United Kingdom, 2020) at [25.3] **[[Supp BOA Tab 2]]**. See also Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 744.

Reliance on a post-Ngāti Apa *counterfactual*

21. Te Kāhui's interpretation is also unsupported by the wider context. They place considerable weight on what the position might have been at common law absent statutory intervention, submitting the existence of customary rights would have been determined as a matter of tikanga, according to evidence of that tikanga (only).[45] However, as the Attorney-General set out in her earlier submissions, the difficulty in predicting how the New Zealand courts would have developed the common law in respect of aboriginal or customary title immediately following *Ngāti Apa* should not be understated. It cannot be known with any certainty how the courts would have approached this issue.[46]

22. Critically, while it is not contested that at common law the existence of customary rights in the takutai moana would have been determined by reference to tikanga Māori, whether they would have been determined *solely* as a matter of tikanga[47] or alongside other common law principles is entirely uncertain.[48] The Waitangi Tribunal in its report on the policy underpinning the Foreshore and Seabed Act 2004 did not state that "the common law would have determined a tikanga test".[49] The Tribunal was clear in its view that whether and how customary interests in the takutai moana might have been determined at common law was uncertain.[50] It rejected a submission that the common law would take a "very liberal view of the survival of customary rights" such that nothing short of conscious

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45 See, for example, submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [2.4] and [4.50]. They assert that s 58(1) was intended to reflect that common law position: at [4.51]-[4.53]. This is similar to the approach taken by the majority in the Court of Appeal Decision at [373]-[378].

46 Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [25]-[30].

47 This appears to have been Elias CJ's view, demonstrated by a number of comments in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) [***Ngāti Apa***]: see [32], [49] and [53]-[54] per Elias CJ **[[BOA Tab 5]]**. There is nothing in the judgments of the other members of the Court in *Ngāti Apa* to suggest that, at common law, the existence of customary rights in the takutai moana must be determined as a matter of tikanga *only* (although tikanga would of course be a relevant factor in the assessment: at [145] per Anderson and Keith JJ; and [186] per Tipping J).

48 See in particular the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [27]-[30]. The question of whether and how customary rights in the takutai moana would be determined was not directly considered by the courts in New Zealand prior to the enactment of the Foreshore and Seabed Act 2004, including by the Court of Appeal in *Ngāti Apa*: "The extent of any customary property in foreshore and seabed is not before us" (at [34] per Elias CJ) and "It is not clear to what extent the [Māori Land Court jurisdiction] equips the Māori Land Court to recognise interests in land according to custom which do not translate into fee simple ownership. In New Zealand, the common law recognition of property interests in land under native custom is little developed" (at [46] per Elias CJ) **[[BOA Tab 5]]**.

49 Contrary to the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.59]-[4.60].

50 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.3] ("no one – neither Crown, claimants, nor this Tribunal – can predict with certainty how the New Zealand High Court would respond to applications to declare the existence, nature and holders of any customary rights in foreshore and seabed areas") and [3.3.3] **[[Seafood Industry Representatives BOA Tab 18]]**.

abandonment of customary rights would fail to meet the test for recognition.[51]

23. The Tribunal also did not accept the view put forward by some claimants that the Māori Land Court (if left to determine claims that parts of the foreshore and seabed were customary land immediately following *Ngāti Apa*) would have declared in all cases that, absent extinguishment, the land was customary land:[52]

23.1 Those claimants referred to the practice of the Native Land Court when investigating title in the nineteenth century in support of this view, whereby the Court would not typically focus on the "intensity" or "strength" of the association that would support a declaration of customary land.[53]

23.2 The Tribunal concluded that, while it was not possible to predict with certainty how the Māori Land Court would have approached the matter, it was most likely that the Court would have incrementally developed an approach that was more exacting than the approach advocated by those claimants.[54] The Tribunal considered it most likely the Court would have adopted an approach similar to that put forward by Richard Boast in that inquiry:[55] that is, the Māori Land Court would develop specific criteria for the establishment of rights, which would effectively become a court-developed gloss on what "held in accordance with

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51 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.3.3(3)] and [3.3.4] **[[Seafood Industry Representatives BOA Tab 18]]**. The Tribunal said, "[T]here is no disagreement that the New Zealand High Court would be influenced, within the constraints of the common law, by the Treaty of Waitangi and relevant human rights norms. We consider, however, that the inherent constraints of the doctrine of aboriginal title would preclude adoption by the court of the very liberal approach advocated by some claimant counsel": at [3.3.4].

52 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.5.1] and [3.5.4] **[[Seafood Industry Representatives BOA Tab 18]]**.

53 See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.5.1] **[[Seafood Industry Representatives BOA Tab 18]]**. The Tribunal observed that, if claimant counsel were correct that the Māori Land Court would follow the practice of the Native Land Court in the nineteenth century, the Māori Land Court would almost always declare land to be customary land where Māori maintained a connection with it in accordance with tikanga. There would not be a high threshold in terms of the strength of the connection that needed to be shown, and the Court's job would be "to determine to whom the tikanga connection belonged, and over what area the connection could be substantiated by evidence": at [3.5.1]. The Tribunal noted this approach would also accord no significance to the difference between status declarations and vesting orders under Te Ture Whenua Māori Act: "the two steps would effectively be conflated, and vesting would always follow hard on the heels of the declaration": at [3.5.1].

54 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.5.4] **[[Seafood Industry Representatives BOA Tab 18]]**.

55 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.5.4] **[[Seafood Industry Representatives BOA Tab 18]]**.

tikanga Māori" means for the purposes of the Court's jurisdiction over the foreshore and seabed.[56] Under the approach put forward by Professor Boast, the differing circumstances of applicants assessed in relation to the criteria would determine, first, whether their interests would justify a status order declaring the land to be customary land and, secondly, whether they would justify translation into the general law of land registration by an order vesting fee simple title to Māori freehold land.[57]

24. Similarly, the Ministerial Review Panel concluded "it is overly speculative to consider what the Māori Land Court might have done if it had the chance to pursue applications to the foreshore and seabed; or what it might have done, following the *Ngāti Apa* decision, had the [Foreshore and Seabed Act 2004] not been enacted".[58] As for how the High Court might have dealt with applications seeking declarations of aboriginal or native title at common law over defined areas of the foreshore and seabed, the Panel considered there was "just not enough New Zealand case law in existence" to allow it to make a reliable prediction on how the courts might have approached the issue.[59]

25. The Panel did not express a definitive view that the entire takutai moana extending to the outer limits of the territorial sea is subject to extant customary title.[60] The Panel expressly qualified statements in its report that the whole of the coastal marine area out to the outer limits of the territorial sea was subject to customary title[61] by stating that title would be "to such outer limit as customarily could be controlled".[62] The Panel also implicitly recognised that some parts of the coastal marine area were not

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56 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.5.2] **[[Seafood Industry Representatives BOA Tab 18]]**.

57 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [3.5.2] **[[Seafood Industry Representatives BOA Tab 18]]**.

58 Ministerial Review Panel *Pākia ki uta pākia ke tai: Report of the Ministerial Review Panel* Volume 1 (30 June 2009) [**Ministerial Review Panel Report**] at 102 **[[Seafood Industry Representatives BOA Tab 12]]**. See also at 101: "it is anyone's guess what that Court might have done since its jurisprudence in relation to the foreshore and seabed was never sufficiently developed for a prediction to be made".

59 Ministerial Review Panel Report at 112 **[[Seafood Industry Representatives BOA Tab 12]]**. Significantly, the Panel did not favour the option of letting *Ngāti Apa* run its course. It recognised that the issues involved were "not just legal" but also involved policy matters concerning "the ultimate apportionment of customary and public interests" which "should not be left to the Courts": at 13. Instead, it proposed "a specially-tailored legislative regime": at 117.

60 Contrary to the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.61]-[4.62].

61 Ministerial Review Panel Report at 101, 146 and 152 **[[Seafood Industry Representatives BOA Tab 12]]**.

62 Ministerial Review Panel Report at 146 and 152 **[[Seafood Industry Representatives BOA Tab 12]]**.

subject to customary title, through its acknowledgement that it would not be realistic to treat all customary rights and interests in the foreshore and seabed as amounting to full ownership.[63] For example, the Panel said that "it is easier for a hapū to enforce its authority over the dry land and, the further from the shore the less likely it is that a hapū could prevent use by strangers".[64] These statements necessarily admit that customary title may have ceased at some point inshore of the limits of the territorial sea.

26. The Attorney-General submits the views expressed by the Tribunal and Panel are consistent with similar observations made by the Tribunal in the past about how the nature and strength of customary interests in the takutai moana may vary depending on the circumstances:

26.1 In the *Muriwhenua Fishing Report*, for example, the Tribunal said that "[i]t seemed overly pretentious to us that a tribe should retain exclusive rights to the whole of its fisheries after land sales. Mana moana (authority over the seas) had depended on the exclusive possession of the adjoining land".[65]

26.2 In the Tribunal's *Fisheries Settlement Report*, the Tribunal said that "it is arguable that traditionally the mana, or authority, [of tribes] did not extend far from the shoreline … The authority went only as far as it could in practice be enforced, it could be said, and customarily, the open seas were open".[66]

Parliament deliberately altered the course

27. In any event, Parliament deliberately altered the hypothetical development of the common law of aboriginal title in New Zealand immediately following *Ngāti Apa* by enacting a bespoke statutory regime: first via the 2004 Act and then later via te Takutai Moana Act.[67] It is not the

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63 Ministerial Review Panel Report at 146 **[[Seafood Industry Representatives BOA Tab 21]]**: "[I]t does not follow that in every case those same rights and interests should translate to full ownership of the whole of the associated foreshore and seabed. That was done with regard to the dry land; but it is not realistic to treat most of the seabed in the same way".

64 Ministerial Review Panel Report at 146 **[[Seafood Industry Representatives BOA Tab 21]]**.

65 Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 207.

66 Waitangi Tribunal *Fisheries Settlement Report* (Wai 307, 1992) at 18.

67 Parliament chose not to leave to the courts the criteria for establishing customary rights over the takutai moana: Court of Appeal Decision at [192] per Miller J **[[BOA Tab 16]]**. See also the submissions for the Landowners' Coalition Inc dated 4 October 2024 at [4.26]; and the submissions for the Seafood Industry Representatives dated 4 October 2024 at [55]-[59].

case that "the approach in *Ngāti Apa* is largely incorporated into s 58".[68] Nothing in the Preamble or any other part of the statutory scheme indicates this.[69]

28. Nor does the Panel's criticism of overseas jurisprudence as the basis for a statutory test in New Zealand "strongly colour the meaning of s 58".[70] As set out in the Attorney's earlier submissions, Parliament explicitly drew on Canadian jurisprudence in developing the s 58 test.[71]

29. While the Act repealed the 2004 Act and differs from the 2004 Act in significant ways,[72] both statutes incorporate the concept of "exclusive use and occupation" into the test for the recognition of territorial rights. As Professor Boast has observed, "[t]he common law meaning of exclusivity is … imported into [the Act]" and overseas jurisprudence "will need to be drawn on" to determine what exclusivity means.[73]

Purported inconsistency between the test and tikanga Māori

30. Te Kāhui's submission that an intention and capacity to control an area as against other groups is "[in]apt from a tikanga perspective"[74] is contrary to the evidence heard by the High Court in this proceeding. As Miller J identified, there was both historical and contemporary evidence demonstrating that the applicant groups exercise control and have the capacity to exclude others from parts of the takutai moana, in accordance with tikanga.[75]

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68 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.51].

69 Nor did the majority suggest as much in the Court of Appeal Decision at [416] **[[BOA Tab 16]]**. Compare the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.51] and fn 149.

70 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.65], referring to Ministerial Review Panel Report at 139-140 **[[Seafood Industry Representatives BOA Tab 21]]**.

71 Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [21].

72 For example: the 2004 Act **[[BOA Tab 2]]** vested the foreshore and seabed in the Crown and thereby extinguished customary interests, whereas te Takutai Moana Act restores those customary interests and the Crown no longer owns the foreshore and seabed; s 58 includes tikanga Māori as a component of the test for customary marine title, whereas the 2004 Act's test for establishing territorial customary rights did not refer to tikanga Māori; unlike the 2004 Act, the test for customary marine title under te Takutai Moana Act does not include a requirement for an applicant group to hold continuous title to contiguous land; te Takutai Moana Act ensures that customary transfers of territorial interests between hapū and iwi post-1840 are recognised, whereas there was no such accommodation for customary transfers in the 2004 Act; and te Takutai Moana Act allows for "shared exclusivity" between coastal hapū/iwi as against other third parties, through the definition of "applicant group", whereas it was unclear whether shared exclusivity would have been available under the 2004 Act.

73 Richard Boast "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 at 281 **[[BOA Tab 25]]**.

74 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.9].

75 See Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [43] and footnote 150; and Court of Appeal Decision at [147]-[172] and [185] per Miller J **[[BOA Tab 16]]**.

31. It is also important to note that the concept of exclusivity is not seen as antithetical to tikanga by all groups, in the manner suggested by Te Kāhui.[76] For example, the submissions of Te Whānau a Apanui refer to evidence given in this proceeding of the existence of a complex set of cultural rules relating to control, access and use of the sea,[77] with the concept of exclusion seen as "a latent right" that can be invoked by the group that has mana over an area, if necessary.[78] Indeed, as noted above, the types of evidence that might demonstrate an intention and capacity to control an area against others may overlap considerably with the types of evidence that might demonstrate a group holds an area in accordance with tikanga.[79]

32. In some situations, it may be the case that customary authority in respect of an area is shared between one or more iwi, hapū or whānau, and an intention and capacity to control the area as against others is collectively demonstrated.[80] However, customary authority will not necessarily be shared in all areas of the coastline as a matter of tikanga.[81] By way of example, Ngāi Tai's application for customary marine title in respect of the area between Tarakeha and Te Rangi was recognised (at a recent rehearing) on the basis that Ngāi Tai alone has exclusively used and occupied the area.[82]

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[76] Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at, for example, [3], [4.9] and [5.20]. Te Kāhui rely on Palmer J's decision in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [443] to submit that, as a matter of tikanga, exclusivity is not a necessary corollary of mana. Te Kāhui's submission overlooks the fact that Ngāti Whātua's claim in that proceeding was for a declaration that it held exclusive ahi kā and mana whenua in relation to the area at issue (at [43]-[44]). The Court ultimately concluded that mana whenua *can* be exclusively held by one iwi or hapū, and it can also be shared (at [47]). Whether it is exclusive or shared will ultimately depend on the facts and the relevant tikanga. This is consistent with the Attorney-General's position as to the requirement of "exclusive use and occupation" in s 58(1)(b) ("exclusivity" may be established individually, or it may be shared amongst multiple constituent groups who together make up an "applicant group").

[77] Submissions for Te Rūnanga o Te Whānau dated 4 October 2024 at [17], referring to the evidence of Rikirangi Gage, who said, "It is not right … to assume there is no tenure system in relation to the lands and seas and recognition of the right to control use and access to areas or their resources" **[[203.01320]]**.

[78] Submissions for Te Rūnanga o Te Whānau dated 4 October 2024 at [23], referring to the evidence of Dayle Takitimu **[[203.01345]]**: "Exclusion is considered a latent right by the iwi because access and accommodation, if it is in accordance with the tikanga of the iwi, is typically permitted, but it remains at the ongoing discretion and/or license of the iwi".

[79] See for example Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [42]; and [14]-[15] above.

[80] In other words, multiple constituent groups who together comprise an "applicant group" as that term is defined in s 9 of the Act.

[81] Some aspects of Te Kāhui's submissions appear to suggest that it would only be tika for exclusivity to be demonstrated on a shared basis (and still then should not be determined by reference to an intention and capacity to control the area against third parties). See for example the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [3.7] (however, in contrast, see [4.12]).

[82] See *Re Ngāi Tai* [2024] NZHC 1373 at [24], [49] and [69]. At first instance, one of the Whakatōhea hapū, Ngāi Tamahaua, contended the boundary between Ngāi Tai and Whakatōhea was in fact Te Rangi not Tarakeha, and their counsel advocated for a shared customary marine title between Ngāi Tamahaua and Ngāti Tai. The High Court

33. To be clear, it is not the Attorney-General's submission that an applicant group must bring evidence to show they physically use and occupy all parts of an application area at all times,[83] and exclude all others from that area at all times,[84] in order to meet the test.[85] There may be situations, for example, where a group exercises use rights in an area in which another group has customary marine title. The fact that this occurs does not necessitate a conclusion that the customary marine title group does not possess an intention and ability to control the area. To the contrary, that type of arrangement might arise through the permission or acquiescence of the customary marine title group (consistent with tikanga values of manaakitanga and whanaungatanga). There is no reason why permission or acquiescence of this kind is not to be seen as a manifestation of the customary marine title group's intention and ability to control the takutai moana.[86]

Exclusivity in offshore areas

34. As for exclusivity in offshore marine areas,[87] the Attorney-General agrees with the majority that an intention and capacity to control such areas is likely to be more difficult to prove than in inshore coastal areas because of the nature of the environment and the different ways in which such areas are used (typically on a transitory basis and often for the purposes of gathering resources).[88]

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rejected that claim (and it was not appealed), noting that all of the other Whakatōhea hapū accepted Tarakeha as the boundary: *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025, [2022] 2 NZLR 772 at [586]-[588] **[[BOA Tab 12]]**. *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 is another example where customary marine title was awarded in respect of one group (Rakiura Māori with customary interests in Pohowaitai and Tamaitemioka islands).

83 See the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [41]: evidence of an intention and capacity to control the area is to be assessed in the round in light of other evidence and the wider context, and the Court is entitled to draw reasonable inferences, drawing together evidence across both time and location. As such, wāhi tapu areas, in respect of which physical access is prohibited, are to be assessed in light of the wider tikanga context and will likely demonstrate a group's intention and capacity to control an area (rather than being 'carved out' of a customary marine title area: compare the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.58]).

84 See the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [41]: the statutory scheme presumes the compatibility of exclusivity with the exercise of certain public rights in the same area. Similarly, protected customary rights may be exercised in an area where customary marine title is recognised in favour of another group (see Court of Appeal Decision at [444]-[445] per Cooper P and Goddard J: "That is consistent with the complex and often overlapping networks of resource rights that characterised customary Māori interests in land" **[[BOA Tab 16]]**).

85 Compare the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.58] and [4.27].

86 See, similarly, the Court of Appeal Decision at [424] per Cooper P and Goddard J **[[BOA Tab 16]]**.

87 See submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.63], in which Te Kāhui submit the Court of Appeal erred in "express[ing] scepticism about the possibility of CMT being held in offshore areas".

88 Court of Appeal Decision at [422]-[424] per Cooper P and Goddard J **[[BOA Tab 16]]**. See also *Re Reeder* [2021] NZHC 2726 at [36] **[[BOA Tab 13]]**; and *Ngāti Apa* at [55] per Elias CJ **[[BOA Tab 5]]**: "It may be that property interests according to Māori custom are less easily shown as a matter of fact in relation to seabed rather than foreshore (just as it may be easier to establish occupation and exclusion of others in relation to dry land than to foreshore)".

35. While the traditional relationship of Māori with the coastal and offshore marine area has been recognised in various sources,[89] as noted, the Waitangi Tribunal has cautioned that traditionally customary authority over the seas has depended on the exclusive possession of the adjoining land, and arguably did not extend far from the shoreline.[90] Similarly, the Ministerial Review Panel observed "it was not realistic to treat most of the seabed in the same way" as dry land because "the further from the shore the less likely it is" that a hapū could enforce its authority.[91] This distinction has also been reflected in some of the proceedings under the Act to date.[92]

36. That is not to say that the establishment of customary marine title out to the limits of the territorial sea will be "practically impossible".[93] The following matters are likely to be relevant (when considering limb two of the s 58 test) in assessing the seaward extent of any customary marine title:[94]

    36.1 the existence of (and customary regulation of) any named fishing grounds, reefs, rocks and islands offshore;

    36.2 whether group members query and/or stop recreational fishers out at sea in respect of overfishing or taking undersized catch;

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89 See submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [3.15]-[3.18], referring to *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [297] and various Waitangi Tribunal reports. Te Kāhui also include a quotation from *Ngāi Tahu Māori Trust Board v Attorney-General* HC Wellington CP559/87, 2 November 1987 at 6, where the Court said that, before 1840, Māori "had a highly developed and controlled fishery over the whole coast of New Zealand", but omit the remainder of the quote, where the Court said, "Having said that, the extent of these rights and fisheries seaward and along the coastline is not clear".

90 See these submissions at [26].

91 See these submissions at [25].

92 See for example, *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682, in which the Court recognised customary marine title "three or four" nautical miles offshore. The Court said at [371]: "the evidence supporting whether the applicants have proved that they have authority and control or a strong presence over the offshore fishing areas is not strong. The evidence, in my view, did not establish the same presence, authority and ability to control, (even by attempts) in the outer marine areas beyond the three to four nautical miles". See also [229]-[238] and [371]-[378]. In *Re Ngāti Pahauwera* [2021] NZHC 3599, the Court recognised customary marine title for Ngāti Pahauwera five kilometres offshore (at [401]-[405] and see also [508]-[511]). The Court said at [403]-[404]: "In most cases, the intensity and frequency of the use of the resources of the takutai moana will decrease the further one goes from the shore … The tikanga evidence satisfies me that the tikanga values that were practiced and which supported a finding that the applicant held the area in accordance with tikanga, extend well beyond the immediate foreshore. However, there was little evidence that they went as far as 12-nautical miles".

93 Compare the submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.63].

94 For example, as the Attorney-General submitted before the Court of Appeal, when viewed on a totality basis and through drawing reasonable inferences, there was sufficient evidence for the Court to have found that the six Te Whakatōhea hapū used and occupied the common marine and coastal area out to 12 nautical miles. There was evidence of the hapū imposing rāhui over the sea out to Whakaari, the existence and use of fishing grounds significantly offshore, mapping evidence which contained precise descriptions of fishing grounds and locations of underwater features (such as rocks, the nature of the sea floor and the particular types of fish caught in these locations), and historical evidence of Whakatōhea being involved in shipping and regular travel across the sea to both Whakaari (for muttonbirding) and Te Paepae o Aotea (which is Māori customary land vested for all of the Mataatua waka). In addition, a resource consent associated with the operation of a marine farm off the coast of Ōpōtiki was held by Eastern Sea Farms Mussel Farm, majority-owned by the Whakatōhea Māori Trust Board.

36.3 whether group members issue authorisations for customary take as tangata kaitiaki appointed under the Kaimoana Regulations;[95]

36.4 whether the group places rāhui out to and including offshore islands;

36.5 whether group members hold title in offshore islands;

36.6 evidence of group members working with agencies such as the Department of Conservation in respect of the control and management of offshore islands;[96]

36.7 whether group members hold resource consents to carry out activities in offshore areas (for example, to operate marine farms); and

36.8 whether strong evidence of exclusive use and occupation in the inshore area justifies the drawing of an inference that territorial control extends further offshore.

The meaning of "substantial interruption"

37. To the extent Te Kāhui (and Ngāti Muriwai and Kutarere Marae) appear to support the majority's interpretation of what may amount to a "substantial interruption", the Attorney-General has addressed the majority's approach in her earlier submissions.[97]

38. Te Kāhui also submit that any "substantial interruption" must be to the applicants' connection with the area (its "holding" of the area in accordance with tikanga).[98] However, this conflates the two limbs and

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95 Fisheries (Kaimoana Customary Fishing) Regulations 1998 and Fisheries (South Island Customary Fishing) Regulations 1999.

96 For example, where an offshore island has a reserve status, s 30 of the Reserves Act 1977 permits the Minister of Conservation to appoint a board to control and manage it.

97 Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [44]-[46]. For completeness, Ngāti Muriwai and Kutarere Marae submit that Miller J's approach to substantial interruption "seems essentially the same as the majority", and that both require "legislation expressly overriding Māori exclusive and occupation rights" for an activity to amount to a substantial interruption: submissions on appeal for Ngāti Muriwai and Kutarere Marae (SC123/2023 and SC124/2023) dated 20 September 2024 at [61]. This is incorrect. Miller J said that whether an event or activity amounts to a substantial interruption will depend on the facts, requiring consideration of the nature, extent, scale, duration and cause of any interruption. His Honour did not agree with the majority that a substantial interruption is confined to lawful activities carried out pursuant to statutory authority: see Court of Appeal Decision at [174] and [181] per Miller J; contrast with [433]-[434] per Cooper P and Goddard J **[[BOA Tab 16]]**. Further, unlike the majority, Miller J said that s 59(3) clearly contemplates that some level of third-party fishing or navigation is capable of amounting to a substantial interruption, depending on the facts: Court of Appeal Decision at [181] per Miller J; contrast [427] per Cooper P and Goddard J.

98 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.20(a)]. This is similar to how the phrase "substantial interruption" has been used in various Australian cases considering customary rights, where those rights were only found to have been substantially interrupted when a group's cultural connection was lost: *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, (2002) 214 CLR 422; and *Mabo v*

contradicts the clear text of s 58(1)(b):[99] substantial interruption applies to a group's exclusive use and occupation from 1840 to the present day, rather than a group's "holding" of an area in accordance with tikanga. As the High Court in *Re Reeder* identified, "the phrase 'without substantial interruption' is clearly a qualification to the requirement for exclusive use and occupation. As a qualification to the first part of the test in s 58(1)(b)(i) the phrase is not concerned with the nature of the connection itself (as in Australia)".[100]

39. While Te Kāhui appear to accept that a substantial interruption may arise from activities or events that do not amount to an extinguishment as a matter of law,[101] no example is provided in their submissions of what *might* amount to a substantial interruption absent extinguishment. Their submissions also seek to narrow the scope of what the majority considered could amount to a substantial interruption by asserting that activities that fall within the Act's definition of "accommodated activities" can never amount to a substantial interruption:[102]

    39.1 Under the Act, customary marine title holders are granted a Resource Management Act 1991 permission right, under which they may give or decline permission, on any grounds, for activities to be carried out under a resource consent within the customary marine title area.[103] The permission right does not apply to an "accommodated activity" (defined in s 64).[104] Te Kāhui's submissions disagree with the majority's identification of port facilities as a possible substantial interruption.[105] Te Kāhui submit that if port infrastructure (which can be an "accommodated

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*Queensland (No 2) (*1992) 175 CLR 1, 107 ALR 1 (HCA).

99 As well as Te Kāhui's later submission that "substantial interruption must logically be directed to the 'extra' 'exclusivity' criterion": submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.28].

100 *Re Reeder* [2021] NZHC 2726 at [43] **[[BOA Tab 13]]**. See also the Court of Appeal Decision at [117] per Miller J **[[BOA Tab 16]]**.

101 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.20(c)] and [4.28]-[4.31].

102 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.32]-[4.35]. See in particular at [4.33]: "Parliament exempted these activities [from the scope of the permission right in ss 66-70 of the Act] because it considered such activities could not amount to 'substantial interruption' and thus needed (in the wider public interest) to be protected from 'veto'".

103 Sections 62(1)(a) and 66.

104 Section 66(4).

105 See Court of Appeal Decision at [433] per Cooper P and Goddard J **[[BOA Tab 16]]**.

activity" under the Act)[106] could amount to a substantial interruption, "there would have been no need to exempt port infrastructure from the CMT veto [the permission right], as port infrastructure could not ever be located within a CMT area".[107]

39.2 The Attorney-General does not agree. Whether a substantial interruption has occurred is a question of fact.[108] The fact that an existing activity may fall within the scope of an "accommodated activity" under the Act is immaterial. The list of activities in s 64 says nothing about whether those activities have substantially interrupted a group's exclusive use and occupation from 1840 to the present day. Indeed, some of the activities listed in s 64 preserve the exercise of future activities that may not be taking place at the time a customary marine title application is determined.[109] In particular, the list of activities in s 64 includes "deemed accommodated activities" (new infrastructure and new minerals-related activities),[110] which can take place at any point after the commencement of the Act, including after the grant of a customary marine title.[111] The question of whether a substantial interruption has occurred is a prior distinct inquiry from the question of whether an activity is an "accommodated activity".[112] Moreover, in respect of the latter question, the Court has no jurisdiction to make specific findings or determinations as to

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106 The definition of "accommodated activity" in s 64 includes "accommodated infrastructure": s 64(2)(c). "Accommodated infrastructure" is defined in s 63 as including infrastructure that is lawfully established, owned, operated or carried out by a port company or operator, and which is reasonably necessary for national or regional social or economic well-being.

107 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.33].

108 Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [44].

109 For example, minimum impact activities under the Crown Minerals Act 1991 relating to petroleum are accommodated activities regardless of when a consent for that activity is granted: s 64(2)(b). Emergency activities and certain scientific research and monitoring activities are also exempted from the permission right as accommodated activities, regardless of when they occur: s 64(2)(f) and (g).

110 Section 64(2)(h). See also s 65. Specific safeguards in respect of deemed accommodated activities are included in the Act to protect the interests of the customary marine title holder, including the requirement for deemed accommodated infrastructure to be "essential" for national or regional, social or economic well-being, and the provisions in sch 2 that provide for compensation to be negotiated for the removal of the permission right in relation to new activities. The policy rationale for the inclusion of deemed accommodated activities in the Act was to provide nationally important exceptions to the exercise of the permission right: Departmental Report at [313] **[[Ngāti Muriwai and Kutarere Marae BOA Tab 9]]**.

111 Section 65 of the Act deems these activities to be accommodated activities.

112 See also the submissions on behalf of Crown Regional Holdings Ltd and Opotiki District Council dated 4 October 2024 at [47]. See also the submissions for the Seafood Industry Representatives dated 4 October 2024 at [71].

whether an activity or piece of infrastructure falls within the definition of "accommodated activity".[113]

40. Finally, Te Kāhui submit that because the Act provides for public access, navigation and fishing through ss 26-28, such factors cannot constitute a substantial interruption.[114] This submission runs counter to the plain words of s 59(3), which provides that third-party fishing and navigation does not, "of itself", preclude the establishment of customary marine title.[115] While the mere fact of these activities does not automatically amount to a substantial interruption, the nature, scale and duration of these activities may nevertheless lead to that result.[116] Reliance on s 24 of the Act does not take the submission any further.[117] While claims to the takutai moana by adverse possession are impermissible, it does not logically follow that third-party activities in the takutai moana cannot amount or contribute to a substantial interruption on the facts. The department report indicates that s 24 was included in the Act simply as an "avoidance of doubt" clause, consistent with the underlying position under the Act that no one is capable of owning the common marine and coastal area.[118]

The limits of statutory interpretation

41. Te Kāhui submit that the Act's purposes indicate that Parliament intended to recognise the existence of rights according to tikanga only in s 58, with the Act's role limited to delineating "the legal consequences" that flow from such recognition.[119] For the reasons set out above,[120] the Attorney-General respectfully submits that submission is untenable. As the learned author of *Burrows and Carter Statute Law in New Zealand* observes,

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113 The Minister for Land Information has the exclusive jurisdiction to determine any dispute between parties on whether an activity is an "accommodated activity" under the Act. See s 64(3) and (4). See also *Re Edwards (Whakatōhea Stage 2)* [2022] NZHC 2644 at [81] **[[BOA Tab 11]]**.

114 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.37]-[4.38].

115 See the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [46].

116 As Miller J said, it will depend on the facts: Court of Appeal Decision at [181] per Miller J **[[BOA Tab 16]]**.

117 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.13] and [4.36]. Section 24 of the Act provides that no person may claim an interest in any part of the marine and coastal area on the ground of adverse possession or prescriptive title.

118 See Departmental Report at [635] **[[Ngāti Muriwai and Kutarere Marae BOA Tab 9]]**: "The underlying policy of the Government's proposal is no-one can hold an ownership interest in the cmca. Accordingly, there would be no owner against whom a claim for adverse possession or prescriptive title could be made in relation to the cmca, nor could such an interest be granted. However, it was considered prudent to include clause 25 "to avoid doubt" in order to make it clear no such claims can be successful in the cmca. The inclusion of clause 25 is also consistent with the status quo as set out in section 24 of the 2004 Act".

119 Submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.41(b)]-[4.41(c)] and see generally [4.41]-[4.46].

120 See [18]-[19] above.

whatever the purpose of an Act may be, "[a]t the end of the day the court's task is to *interpret* the text of the Act and not to rewrite it; it cannot give that text a meaning that it is quite incapable of bearing".[121]

42. In *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd*, Palmer J articulated the limits of the purposive approach in this way:[122]

> [T]here are limits to the capacity of a purposive approach to expand on the text of law. Meaning is ascertained "from" its text and only "in light of" its purpose. I agree that "purpose is there to help ascertain the meaning of text and not to override or dominate it". The Supreme Court emphasises the starting point is the text. A court's view of Parliament's purpose is a cross-check. That can lead to ambiguity being interpreted in line with Parliament's purpose. But it cannot change the text itself and does not, in my view, justify judicial interpretation that is inconsistent with the text. The rule of law must still stand for the proposition that it is the law that rules, not those who make the law or apply the law or interpret the law. The law is the text. In the search for certainty of meaning the statutory text cannot be stretched beyond breaking point.

43. As a matter of statutory construction, the purpose provision's acknowledgment of the mana tuku iho of iwi, hapū and whānau cannot alter the plain requirements of s 58. Moreover, if the second limb were to be rendered redundant, one of the core purposes articulated in the Act would be undermined, namely the establishment of a *durable scheme* to ensure the protection of legitimate interests of all New Zealanders in the takutai moana.[123] Such an interpretation would upset the careful balancing of competing interests that is struck in the statutory scheme, as reflected in the test for customary marine title and its legal incidents.[124]

44. The Attorney-General emphasises that the Act's statutory purposes in s 4 are not expressed in a way that prioritise any particular purpose over the other,[125] or dictate any particular substantive outcome for an application

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121 Ross Carter (ed) *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 317-318 **[[Supp BOA Tab 3]]**: "Whatever the purpose of an Act may be, there is only so far one can "stretch" the meaning of the words of the provision under consideration. … At the end of the day the court's task is to *interpret* the text of the Act and not to rewrite it; it cannot give that text a meaning that it is quite incapable of bearing" (original emphasis). See also Ross Carter "Statutory interpretation new style revisited" in [2024] NZLJ 201 and [2024] NZLJ 232.

122 *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* (2017) 18 NZCPR 587 (HC) at [55] **[[Supp BOA Tab 1]]**, referring to *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; and Justice Susan Glazebrook "Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century" (2015) 14 Otago Law Review 61 at 67–68.

123 Section 4(1)(a).

124 Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [2], [13], and [15]-[16].

125 See Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [16].

for customary marine title. Nor, it seems, does tikanga dictate such an outcome.[126]

45. For the same reasons, the Attorney-General respectfully considers Te Kāhui's submissions on the relevance of the Treaty to the interpretation of s 58 to be misconceived.[127] Treaty principles do not prescribe a particular outcome and cannot be used to support an interpretation that the statute cannot reasonably bear.[128] The Attorney-General again emphasises that the statutory scheme reflects specific choices made by Parliament about how to reconcile and provide for Treaty principles. Parliament also chose to include a clause (s 7) that explains how the Act takes account of the Treaty. The section states that, to take into account the Treaty, the Act provides for customary marine title "to be recognised and exercised" in accordance with the provisions set out in subpart 3 of Part 3. That pronouncement cannot be taken as countenancing an interpretation of s 58(1) that is based solely on tikanga Māori,[129] or which renders the concept of "substantial interruption" meaningless.[130]

46. In short, neither the purpose provision nor the Treaty clause operates in a manner that assumes a particular substantive outcome for applicants. The provisions do not – and cannot – supplant or fundamentally alter the statutory test. Nor does reliance on s 20 of the New Zealand Bill of Rights Act 1990 assist.[131] Section 20 does not demand any particular policy model for the recognition of customary marine title to be favoured ahead of others,[132] and in any event recourse to s 6 of that Act cannot – for the

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126 For example, as Te Whānau a Apanui submit, "there are some tikanga relationships that will not satisfy either test [for customary marine title or protected customary rights]": Submissions for Te Rūnanga o te Whānau dated 4 October 2024 at [65].

127 Te Kāhui submit that the Treaty must be at the centre of any interpretation of s 58(1), and that this is confirmed in ss 4(1)(d) and 7 of the Act: submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.46] and [4.69].

128 See the Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [36] and footnotes 115-123.

129 Compare submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.46(b)].

130 Compare submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.46(c)].

131 Compare submissions on appeal of Te Kāhui (SC128/2023) dated 23 September 2024 at [4.67]-[4.68]. This Court also does not have the benefit of the lower courts' reasoning on this point. Section 20 is not addressed in the Court of Appeal or High Court judgment.

132 Moreover, the United Nations Human Rights Committee has recognised that if there has been significant engagement with cultural minorities in regard to matters that affect them, this tells strongly against a denial of cultural rights: see, for example, *Mahuika v New Zealand* UN Doc CCPR/C/70/D/547/1993 (27 October 2000) at [9.5] and [9.8]. As set out in the Attorney-General's earlier submissions, te Takutai Moana Act was the product of significant consultation and policy processes on the balance to be struck between Māori customary interests and the interests that all New Zealanders have in the takutai moana: Attorney-General's submissions in support of appeal (SC126/2023) dated 20 September 2024 at [7]-[14].

reasons set out above – give s 58 an interpretation that it cannot possibly bear.[133]

OVERLAPPING CUSTOMARY MARINE TITLE IS NOT AVAILABLE UNDER THE ACT (SC125/2023)

47. The Court of Appeal unanimously held that it would be inconsistent with the scheme of the Act to have two or more overlapping customary marine titles in respect of the same area.[134] The Court said that such an approach would be "unworkable",[135] because none of the customary marine title groups would be able to unilaterally exercise the rights that the Act confers on holders of customary marine title.[136]

48. Instead, the Court endorsed the availability of shared exclusivity under s 58 of the Act, whereby a single (joint) customary marine title may be recognised in favour of two or more whānau, hapū or iwi as a collective.[137] (The Court divided, however, on precisely how a finding of shared exclusivity might be reached.[138])

49. Te Upokorehe submit the Court erred, and that it is possible under the Act for multiple, overlapping customary marine titles to be issued to different groups with respect to the same area, as an alternative to (or in addition

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133 See Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 479 ("[Section 6] makes it clear that the interpretation placed on an enactment's words must be one that those words *can* bear") (original emphasis); and Jason Varuhas "The Principles of Legality in Aotearoa New Zealand" (2023) 34 PLR 296 at 321-322 **[[BOA Tab 26]]**, referring to the limits of rights-consistent interpretation identified by the English courts under the Human Rights Act 1998 (UK). See for example *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12 at [102] ("a Convention compatible interpretation … is not possible and would amount to impermissible judicial legislation rather than interpretation", "there is [no] single, obvious legislative solution that will ensure compliance" with the Convention while also balancing competing rights, and "to interpret section 146 in the way proposed by the appellant would contradict a fundamental feature of the legislation").

134 Court of Appeal Decision at [439] per Cooper P and Goddard J; [209] per Miller J **[[BOA Tab 16]]**.

135 Court of Appeal Decision at [439] per Cooper P and Goddard J **[[BOA Tab 16]]**.

136 Court of Appeal Decision at [209] per Miller J **[[BOA Tab 16]]**.

137 Court of Appeal Decision at [204]-[205] per Miller J and [439] per Cooper P and Goddard J **[[BOA Tab 16]]**. The concept of shared exclusivity has been recognised in the Canadian jurisprudence: *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [158] per Lamer CJ; at [196] per La Forest J **[[BOA Tab 19]]**.

138 Miller J appeared to be of the view that such groups must collectively apply for shared customary marine title in order for the Court to grant title based on shared exclusivity. His Honour stressed that it is for iwi, hapū and whānau to decide whether to apply as a collective for a single customary marine title, if they so choose, and that the Court should not impose that result where the parties have not "taken the opportunity to agree": at [204]-[205] **[[BOA Tab 16]]**. The majority considered a finding of shared exclusivity is "most likely" where the groups make a joint application, or where they make separate applications but each acknowledges the shared rights of use and occupation of the other groups: at [439]. However, the majority went further to find that shared exclusivity is available in the absence of an acknowledgment of one another's rights. It considered that two applicant groups might hold a specified area in accordance with tikanga vis-à-vis all other groups, and between them exclusively use and occupy the area, while at the same time vigorously contesting their mutual rights as between themselves: at [440]. In these circumstances, the majority considered the Court can grant customary marine title to both groups jointly, on the basis that "one or other or both together" meet the s 58 test, and resolution of entitlement as between the two groups can be resolved through a tikanga process over time: at [441]-[442]. The majority suggested that the order could be held by a neutral party such as the Māori Trustee in the meantime: at [442] and fn 466.

to) issuing a single (joint) customary marine title to one collective group.[139] Te Upokorehe say that the option of granting multiple, overlapping titles would recognise the mana tuku iho of groups such as themselves, who do not wish to be part of a single (joint) customary marine title as part of a wider, collective group.[140]

50. The Attorney-General submits that it is fundamentally inconsistent with the scheme of the Act for multiple, overlapping customary marine title orders to be held by different applicant groups in respect of the same area. Under the Act, the High Court can only grant a recognition order for customary marine title if it is satisfied *the* applicant group[141] has met the requirements of s 58.[142] The Act therefore envisages one customary marine title group exercising the rights afforded under s 62 of the Act in respect of any given area. This is most clearly reflected in the test for customary marine title, which requires "exclusive" use and occupation of the specified area. As a matter of legal construction, two groups cannot satisfy the test for customary marine title in respect of the same place (unless that exclusivity is shared and two or more groups are treated as constituent parts of a wider "applicant group").

51. Findings of shared exclusivity are permitted under the Act through the s 9 definition of "applicant group" (which provides that an applicant group comprises "1 *or more* iwi, hapū, or whānau groups"). In other words, a finding of shared exclusivity results in a single customary marine title because the constituent groups (who together make up the "applicant group") collectively meet the s 58 test.[143] The successful applicant group

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139 Submissions on appeal of Te Upokorehe Treaty Claims Trust (SC125/2023) dated 20 September 2024 at [43]-[44] and [50].

140 Submissions on appeal of Te Upokorehe Treaty Claims Trust (SC125/2023) dated 20 September 2024 at [54]-[56].

141 Which may include one or more iwi, hapū or whānau groups, per the definition of "applicant group" in s 9 of the Act.

142 Section 98(2)(b).

143 This is consistent with how the concept of shared exclusivity has been described in both the American and Canadian jurisprudence. See, for example, *United States v Pueblo of San Ildefonso* 513 F 2d 1383 (1975, Ct Cl); *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [158] per Lamer CJ; at [196] per La Forest J **[[BOA Tab 19]]**; and *R v Marshall; R v Bernard* [2005] 2 SCR 220 at [57] per McLachlin CJ ("[s]hared exclusivity may result in joint title"). See generally Kent McNeil "Exclusive Occupation and Joint Aboriginal Title" (2015) 48 UBC Law Rev 821. See also Departmental Report at [1445] **[[BOA Tab 39]]**: in response to a query as to whether the Bill allows for "shared exclusivity as the Canadian common law does", the response was, "The Bill allows for shared exclusivity between iwi/hapū/whanau within the definition of applicant group … That definition allows for one or more iwi, hapū or whānau groups to apply jointly as a single applicant group". The shared nature of the rights and interests of groups within a joint customary marine title area do not necessarily have to be of equal strength. The nature and extent of an individual group's interest in a shared customary marine title area would be a matter for the group itself and could be reflected within the customary marine title order. In other words, it would be up to the constituent groups that make up the wider "applicant group" to prescribe their own internal processes as to how exactly the rights would be exercised. See, for example, Kent McNeil "Exclusive Occupation and Joint Aboriginal Title" (2015) 48 UBC Law Rev 821 at 853: "control,

becomes a "customary marine title group", as that term is defined in the Act, once the recognition order has been sealed.[144]

52. The Attorney-General agrees with the Court of Appeal that it would be unworkable for multiple customary marine titles to be granted to separate applicant groups over the same area.[145] Among other things, customary marine title confers permission rights in respect of the Resource Management Act 1991, a conservation permission right, and ownership of certain minerals found in the marine and coastal area.[146] These rights would not function as intended if they were granted to multiple customary marine title groups (who may have competing interests). For example, if one customary marine title group wanted to exercise its Resource Management Act permission right under s 66 to decline permission for an activity to be carried out in an area, but another customary marine title group within the same area wanted to consent to the activity being carried out, there could be an impasse with neither group able to effectively exercise its right (unless the other acquiesced).[147] If more than one planning document was created in respect of the same area by more than one customary marine title group, this would generate significant uncertainty for regional councils in terms of their obligations to consider whether to alter their regional documents to recognise and provide for matters relating to the customary marine title area.[148] This cannot have been what Parliament intended.

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management, and use of Aboriginal title land is a matter for the titleholders themselves to determine, which must entail self-government and the application of their own laws. Where joint title is concerned, the internal relationship is between the joint Aboriginal titleholders … Accordingly, the legal systems of the Aboriginal titleholders and the interactions of those legal systems should inform the internal dimensions of joint title … their legal systems might give them different rights of occupation and use of their jointly-held lands" (footnotes omitted).

144 See the s 9 definition of "customary marine title group": "*an applicant group* to which a customary marine title order applies" (emphasis added); and the definition of "customary marine title order".

145 See Court of Appeal Decision at [209] per Miller J and [439] per Cooper P and Goddard J **[[BOA Tab 16]]**.

146 Section 62(1).

147 Section 67(3) and (4) of the Act requires the customary marine title group to notify its decision on whether to permit an activity within 40 working days. If a decision is not notified by then, the customary marine title group is to be treated as having given permission.

148 Section 93(6)(a). The Act imposes certain obligations on regional councils in respect of a planning document, including a requirement on regional councils to initiate a process to determine whether to alter their relevant regional documents in order to recognise and provide for matters in the planning document that relate to the customary marine title area: s 93(6)(a). The council can only decline to alter its relevant regional documents on the grounds specified in s 93(10). The "recognise and provide for" duty is the strongest type of obligation placed on decision-makers exercising functions and duties under the Resource Management Act 1991. The duty requires regional councils to do something more than "have particular regard to" or "take into account". See *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [26]; and *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at 235.

53. Te Upokorehe submit that the Court of Appeal failed to recognise that "similar [workability] issues are likely to arise as between joint CMT holders", and that these issues are not insurmountable.[149] However, there is an important difference in the way that a single (joint) customary marine title operates compared to multiple, geographically overlapping customary marine titles:

53.1 The rights conferred by customary marine title are exercised by "the customary marine title group". In a situation where an order has been made on the basis of shared exclusivity, it will be up to the constituent groups to work out – in accordance with tikanga – how they wish to exercise those rights. But importantly, the Act sets timeframes in respect of which those rights must be exercised (for example, the Act requires the group to notify its decision in respect of the exercise of the Resource Management Act permission right within 40 working days);[150] and the Act contemplates a united approach being taken by the customary marine title group. In this way, the durability of the statutory scheme is upheld.[151] Further, in some other proceedings to date, the constituent groups have created a separate legal entity[152] to hold the customary marine title order on their behalf and exercise the rights conferred by the order – for example, by establishing a trust and then prescribing decision-making processes in a trust deed.[153] As a matter of best practice, the establishment of a legal entity is likely to provide greater certainty and convenience

149 Submissions on appeal of Te Upokorehe Treaty Claims Trust (SC125/2023) dated 20 September 2024 at [48] and [73].

150 Section 67(3).

151 Section 4(1)(a).

152 Section 109(2)(c) requires every recognition order to specify "the holder" of the order. It follows that, where a single (joint) customary marine title is issued, the holder of the order will be either a legal entity or natural person appointed by the constituent groups that comprise the "applicant group" to hold the order on their behalf: see paragraph (b) of the definition of "applicant group" in s 9 of the Act. For completeness it is noted that both Churchman J in *Re Edwards* and Mallon J in *Re Tipene* have taken the view that the holder of an order can be a legal entity or *entities*, or a natural person *or persons:* see *Re Edwards (Whakatōhea Stage Two)* [2023] NZHC 1618 at [27]; and *Re Tipene* [2017] NZHC 2990, [2018] NZAR 150 at [26]-[29].

153 For example, this occurred in the Tokomaru Bay proceeding: see *Ngā Hapū o Tokomaru Akau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 at Part VIII: Findings (CMT findings, Directions (1(iii))). In the stage two processes for *Re Edwards*, support for the creation of a trust (with appointment and decision-making processes described in a trust deed) has not been unanimous by the successful applicant groups and so (in respect of draft orders prepared for the customary marine title areas) Churchman J has taken the approach to date of recording the identity and contact details of those applicant groups jointly awarded customary marine title: see *Re Edwards (Whakatōhea Stage Two)* No 7 [2022] NZHC 2644 at [188] and [550]-[551] **[[BOA Tab 11]]** and *Re Edwards (Whakatōhea Stage Two)* [2023] NZHC 1618 at [38].

(including for individuals and groups who are required to engage with the customary marine title group under the Act).

53.2 By contrast, Te Upokorehe's submissions propose an outcome whereby multiple customary marine title groups are each entitled to exercise the rights conferred by s 62 of the Act. This approach does not contemplate a unified approach or a durable solution: to the contrary, it anticipates individual groups exercising rights on their own terms,[154] and in a way that may directly conflict with how another group wishes to exercise those same rights.

18 October 2024

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

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The parties listed above.

[154] See, for example, the submissions on appeal of Te Upokorehe Treaty Claims Trust (SC125/2023) dated 20 September 2024 at [56]-[57] and generally at [78]-[106]. The Attorney-General also does not understand Te Upokorehe's submission that fewer grants of customary marine title would be made if separate, overlapping orders could be issued. The contrary is borne out in this proceeding: if each successful group were entitled to its own, individual customary marine title there would be at least eight individual customary marine titles. Instead, the High Court granted three (in respect of distinct, non-overlapping areas). Compare the submissions on appeal of Te Upokorehe Treaty Claims Trust (SC125/2023) dated 20 September 2024 at [74]-[76].

LIST OF AUTHORITIES

Legislation

1. Fisheries (Kaimoana Customary Fishing) Regulations 1998.
2. Fisheries (South Island Customary Fishing) Regulations 1999.
3. Foreshore and Seabed Act 2004.
4. Marine and Coastal Area (Takutai Moana) Act 2011.
5. Te Ture Whenua Māori Act 1993, s 129(2)(a).
6. Reserves Act 1977, s 30.

Cases

New Zealand

7. *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
8. *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC).
9. *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* (2017) 18 NZCPR 587 (HC).
10. *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.
11. *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
12. *Hampton v Canterbury Regional Council* [2015] NZCA 509, (2015) 18 ELRNZ 825.
13. *John da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212.
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