IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 128/2023
SC 129/2023
[2024] NZSC 164

BETWEEN	WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) NGĀTI MURIWAI KUTARERE MARAE TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE UPOKOREHE IWI ATTORNEY-GENERAL NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) NGĀTI RUATĀKENGA Appellants
AND	NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) TE TĀWHARAU O TE WHAKATŌHEA (FORMERLY WHAKATŌHEA MĀORI TRUST BOARD) NGĀI TAI AND RIRIWHENUA TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE

		UPOKOREHE IWI TE RŪNANGA O NGĀTI AWA WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) NGĀTI RUATĀKENGA LANDOWNERS COALITION INCORPORATED NGĀTI MURIWAI KUTARERE MARAE Respondents
	AND	ATTORNEY-GENERAL TE WHĀNAU-Ā-APANUI SEAFOOD INDUSTRY REPRESENTATIVES CROWN REGIONAL HOLDINGS LIMITED ŌPŌTIKI DISTRICT COUNCIL BAY OF PLENTY REGIONAL COUNCIL LANDOWNERS COALITION INCORPORATED WHAKATĀNE DISTRICT COUNCIL TE RŪNANGA O NGĀTI AWA Interested Parties

Hearing:	4–7 November 2024 12–15 November 2024
Court:	Glazebrook, Ellen France, Williams, Kós and French JJ
Counsel:	R J B Fowler KC, A J Sinclair and B M Cunningham for Whakatōhea Kotahitanga Waka (Edwards) M J Sharp for Ngāti Muriwai and Kutarere Marae J S Cooper KC, B R Lyall and H L B Swedlund for Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi A J Williams, R L Roff and Y Moinfar-Yong for Attorney-General

A T I Sykes and S W H Fletcher for Ngāti Ira o Waioweka
M S Smith and T H Bennion for Ngāti Patumoana
K S Feint KC and N A T Udy for Ngāti Ruatākenga
C M T Panoho-Navaja for Ngāi Tamahaua
J M Pou for Te Tāwharau o Te Whakatōhea (formerly Whakatōhea Māori Trust Board)
B R Arapere, A E Gordon and E K Rongo for Ngāi Tai and Ririwhenua
D M Salmon KC, H K Irwin-Easthope and R K Douglas for Te Rūnanga o Ngāti Awa
M K Mahuika and N R Coates for Te Whānau-ā-Apanui
T D Smith and R J J Wales for Seafood Industry Representatives
M H Hill and J L Hollis for Crown Regional Holdings Limited and Ōpōtiki District Council
A M Green and E S Greensmith-West for Whakatāne District Council
J E Hodder KC, B E Morten and S O H Coad for Landowners Coalition Inc
M K Mahuika, T N Hauraki and H L P Ammunson for Ngā Hapū o Ngāti Porou as Intervener

Judgment: 2 December 2024

JUDGMENT OF THE COURT

A The appeal (by the Attorney-General in relation to s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011) is allowed.

B Costs are reserved.

REASONS OF THE COURT

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Introduction

[1] This is the first of two judgments relating to claims to customary rights in the harbours, river mouths, beaches, and seascape of the eastern Bay of Plenty.[1] It arises from seven separate appeals, the first to come to this Court under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA)—the most recent iteration of

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1 *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 (Churchman J) [HC judgment]; and *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252 (Cooper P, Miller and Goddard JJ) [CA judgment].

bespoke legislation governing the subject. These appeals raise complex and interrelated issues primarily, but not only, about the balance MACA strikes between prior tikanga-based marine and coastal rights of whānau, hapū and iwi on the one hand, and the rights, interests and expectations—whether private or public—of the wider community on the other.

[2] Nineteen parties appeared and presented argument in support of, or in opposition to the appeals.[2] They represented iwi, hapū, whānau and marae, private landowners, fishing and port infrastructure interests, local government and the Crown. Despite that array of perspectives, it was common ground that in 1840, Māori held pre-existing customary rights in what MACA refers to as the common marine and coastal area, and that these rights were protected by the Treaty of Waitangi. It was also common ground that at least some of those rights were still held by their descendants in 2004 immediately before the enactment of the Foreshore and Seabed Act 2004 (FSA) which extinguished them and replaced them with a limited system of statutory recognition. Seven years later, MACA formally revived the rights and comprehensively reformed the statutory recognition system.

[3] The other side of the narrative is that in the years since the Treaty of Waitangi, a whole complex of other rights and interests in the beaches and marine spaces of Aotearoa evolved as the new political economy grew. These included, but went beyond, rights of access and navigation recognised in the common law and tikanga. And an expectation gradually developed that these areas should be available for all to enjoy or (provided the necessary authorities are obtained) to exploit for economic benefit.

[4] It can be no surprise that tensions persist between rights and expectations under the prior Māori customary legal order and those under the (relatively) new state legal order. Nor is it surprising that writing modern laws for their reconciliation, and applying them to particular cases, has proved difficult and controversial. This has also been the experience in cognate jurisdictions such as Canada and Australia.

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[2] Bay of Plenty Regional Council | Toi Moana is an interested party to the appeals but has maintained a watching brief.

[5] In this judgment, we address the meaning of s 58 of MACA which contains the test that must be met to obtain an award of customary marine title (CMT). This was the key area of contention between the parties to these appeals. Our focus here will be on the issues of general import regarding CMTs, and whether the majority decision of the Court of Appeal was correct in its analysis and interpretation of s 58. More discrete or fact-specific issues arising under s 58, such as the disputed status in tikanga of specific applicant groups or marine areas, will be dealt with in a second judgment. Issues relating to the lesser form of right in MACA (protected customary rights (PCRs) under s 51), the application of s 58 to navigable rivers, the mandate of applicant groups, procedural questions and the application of MACA to the present case will also be addressed in our second judgment.

[6] We will begin by summarising as briefly as is consistent with the needs of the case, the history of customary rights and interests in the marine and coastal area up until the enactment of the FSA in 2004. We then situate the present appeals within that history. From there we set out the MACA framework in detail, and then discuss the four core elements of the s 58 test for CMT.[3]

History of rights and interests in the marine and coastal area

Ngāti Apa *and* Ninety-Mile Beach

[7] In 1997, Ngāti Apa and seven other iwi of the Marlborough Sounds applied to the Māori Land Court for a status order under s 131 of Te Ture Whenua Māori Act 1993 (the TWMA) declaring the foreshore and seabed in the Sounds to be Māori customary land belonging to them.[4] In *Attorney-General v Ngāti Apa*, a full court of the Court of Appeal comprising Elias CJ, Gault P and Keith, Anderson and Tipping JJ, found that the Māori Land Court had jurisdiction to entertain the application.[5] In coming to that conclusion, the Court of Appeal reversed its own long-standing authority in *Re the Ninety-Mile Beach.*[6] In that case in 1963, the Court had held that where prior Māori Land Court terrestrial awards ended at the mean high-water mark,

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3 See below at [133]. We do not need to address the meaning of s 58(1)(b)(ii) of the Marine and Coastal Area (Takutai Moana) Act 2011 [MACA] as to tuku or customary transfer.

4 *Marlborough Sounds* (1997) 22A Nelson MB 1 (22A NE 1).

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

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

any rights below mean high-water were necessarily extinguished.[7] Further, even where the Māori Land Court had not previously investigated title to the adjoining land, s 147 of the Harbours Act 1878 for practical purposes precluded any grant of such land except by "special Act of Parliament".[8]

[8] After analysing the cases on customary rights recognition in New Zealand law during the colonial period, Elias CJ in *Ngāti Apa* rejected the reasoning in *Ninety-Mile Beach* as wrong, even in 1963.[9] She concluded that the transfer of sovereignty gave the Crown radical title to the land but did not affect prior customary rights.[10] Instead, the common law preserved those rights until they were lawfully extinguished.[11] Keith and Anderson JJ emphasised that the Crown bore the onus of proving extinguishment: "the necessary purpose must be clear and plain".[12] Similarly, Tipping J noted Māori customary rights existed unless "lawfully abrogated" and "Parliament's purpose would need to be demonstrated by express words or at least by necessary implication".[13]

[9] In addition to citing in support (then recent) leading New Zealand decisions,[14] the judgments in *Ngāti Apa* also referred to leading contemporary aboriginal title decisions of the Australian High Court and the Canadian Supreme Court. These, it was said, demonstrated the common law's continuing recognition of customary rights, and suggested New Zealand courts too should not lightly interpret statutory language as excluding such recognition.[15] The Court found that relevant legislation: the Harbours Acts 1878 and 1950, the Territorial Seas Acts of 1965 and 1977,[16] the

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7 At 473–474 per North J. Gresson J concluded that the Māori Land Court previously had the jurisdiction to investigate title relating to the foreshore. However, he found that s 12 of the Crown Grants Act 1866 required the boundary to be fixed at the line of the high-water mark: at 478–479.

8 At 474 per North J and 479–480 per Gresson J.

9 *Ngāti Apa*, above n 5, at [77]–[89].

10 Elias CJ noted that radical title was a "technical and notional concept" and also described it as the "underlying" title which goes with sovereignty: at [21] and [29]–[30] citing, among others, *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 23–24.

11 *Ngāti Apa*, above n 5, at [13].

12 At [148].

13 At [185].

14 At [29] per Elias CJ citing *Te Rūnanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA); and *Te Rūnanganui o Te Ika Whenua Inc Society*, above n 10.

15 *Ngāti Apa*, above n 5, at [31] and [87] per Elias CJ, [148] per Keith J and Anderson JJ citing, among others, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

16 Territorial Sea and Fishing Zone Act 1965; and Territorial Sea, Contiguous Zone, and Exclusive

Foreshore and Seabed Endowment Revesting Act 1991 and the Resource Management Act 1991 (RMA), did not express an intention to extinguish customary interests or otherwise exclude their recognition.

[10] It should however be borne in mind that the appeal in *Ngāti Apa* was against a decision of the High Court on a question of jurisdiction, in the context of an appeal from the Māori Land Court to the Māori Appellate Court. The core issue before the High Court had been whether the Māori Land Court lacked jurisdiction because all customary rights in the foreshore and seabed had been extinguished by operation of law. No evidence in support of the claim to customary rights had, by that stage, been heard. The Court of Appeal did not therefore purport to articulate a test or tests to establish customary interests of any kind in the marine area and it refused to answer questions posed in relation to the extinguishing effect of nine relevant local Acts. They could not, the Court held, be answered in the absence of facts.[17] And although it suggested that customary interests might range from mere usufructuary rights[18] through to entitlement to exclusive possession, the Court's view was evidence would be required to establish the content, if any, of such interests.

Canada and Australia

[11] As noted above, *Ngāti Apa* referred to, and in part relied on, the relatively extensive contemporary Australian and Canadian jurisprudence on what is variously called aboriginal rights, aboriginal title or native title. Because British colonisation of Australia and the Canadian province of British Columbia proceeded without resolving—by treaty or other means—what rights under the pre-existing order would survive into the new, the case law there developed late. It was not until the end of the 20th century that these questions came to be resolved authoritatively by the courts there.

[12] Certain aspects of the tests they propound were picked up in MACA provisions. Importantly for present purposes, the s 58 test for CMT adopts language

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Economic Zone Act 1977.

17 *Ngāti Apa*, above n 5, at [90] per Elias CJ.

18 A usufructuary right is a right to enjoy and use another's property without damaging it. See the definition of "usufruct" in Bryan A Garner (ed) *Black's Law Dictionary* (12th ed, Thomson Reuters, St Paul (Minnesota), 2024) at 1864.

employed in the leading Australian and Canadian authorities. These authorities are, for example, the source of the s 58 requirement that applicant groups demonstrate exclusive use and occupation in the claim area; and they are also the source of the disqualifying concept of "substantial interruption". They therefore provide important background in terms of construction of the statutory test.

[13] That said, caution is required. It is important to keep in mind that the legal and factual contexts of the Canadian and Australian cases are different—and in some respects, very different—to those applicable in this country. As we come to when we summarise the jurisprudence of the Native Land Court, New Zealand enacted bespoke legislation for the recognition of customary title a 130-odd years before the Australians and Canadians addressed the issue through case law.[19] The relative homogeneity of applicable tikanga principles and the comprehensive nature of the official record of Māori coastal rights and Māori right holders in lands adjacent to the coast are also distinctive to this country.

Canada

[14] Although existing aboriginal rights are given constitutional protection in s 35 of the Canadian Constitution Act 1982, the content of aboriginal rights law in that country is entirely governed by the common law. The Canadian approach holds that aboriginal rights exist on a spectrum from exclusive, territorial aboriginal title at one end, to non-exclusive, non-territorial rights of use at the other.[20] Aboriginal *title* is sui generis, collective and inalienable.[21] It consists in:[22]

(a) the "right to exclusive use and occupation of the land held pursuant to that title" (the positive proposition); but

(b) the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (the negative proposition).

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19 Native Lands Acts 1862 and 1865.

20 *Delgamuukw*, above n 15, at [138] per Lamer CJ, Cory and Major JJ. This spectrum is also reflected in the provision for non-territorial protected customary rights [PCRs] and territorial customary marine title [CMT] in MACA.

21 At [112]–[115] per Lamer CJ, Cory and Major JJ.

22 At [117] per Lamer CJ, Cory and Major JJ.

[15] The remedy in a successful aboriginal title claim is the recognition of exclusive rights to the area in which the claim has been made out.

[16] The claimants must establish that occupation of the area claimed was sufficient, continuous and exclusive.[23] But these three requirements are lenses through which to assess a group's claim, rather than "ends in themselves".[24] Whether occupation is sufficient must be considered as at the time of the Crown asserting sovereignty, and from both a common law and aboriginal perspective.[25] When considering the aboriginal perspective, the focus is on the claimant group's laws, practices, customs and traditions. Conversely, the common law perspective requires consideration of possession and control of the lands. This inquiry is context-specific and culturally-sensitive, taking into account the characteristics of the claimant group and the particular lands in question.

[17] The Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia* held that the claimant group must demonstrate "that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes".[26] This requires:[27]

> … evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.

[18] The Court explained the second requirement of continuity in these terms:[28]

> Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

[19] In *Delgamuukw v British Columbia* the Supreme Court of Canada noted that colonial rejection of aboriginal title may have led to disruption of use and occupation

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23 At [143] per Lamer CJ, Cory and Major JJ; and *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [25].

24 *Tsilhqot'in*, above n 23, at [32].

25 *Delgamuukw*, above n 15, at [144] and [147] per Lamer CJ, Cory and Major JJ; *Tsilhqot'in,* above n 23, at [34] citing *R v Van der Peet* [1996] 2 SCR 507.

26 *Tsilhqot'in*, above n 23, at [38].

27 At [38].

28 At [46].

of an area for a time. But a strict interpretation of continuity could undermine the purpose of the aboriginal rights protection in s 35(1) of the Constitution Act with the effect of perpetuating historical injustice. Consistent with the approach of the High Court of Australia decision in *Mabo v Queensland (No 2)*, the majority considered that "substantial maintenance of the connection" between the applicant and land would meet the requirement.[29]

[20] The third and final requirement is that the claimants must demonstrate that at the time of the assertion of British sovereignty, their occupation was exclusive, meaning they must have manifested "the intention and capacity to control the land".[30] As with the first inquiry, exclusivity requires consideration of aboriginal and common law perspectives. Examples that may found a claim for exclusivity include evidence of excluding others from the land or others requiring permission to enter.

[21] Not all Canadian authorities relate to terrestrial aboriginal rights claims. In *Saugeen First Nation v Canada (Attorney General)*, the Court of Appeal of Ontario concluded the applicant group had failed to establish aboriginal title regarding submerged lands in a section of a lake and bay (although it allowed the group to remit an alternative claim with further evidence to the trial Judge regarding a smaller area).[31] Although it is understood that claims have been made to marine spaces in and around the British Columbian coast, there has, as yet, been no adjudication of claims in relation to marine spaces.[32]

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29 *Delgamuukw*, above n 15, at [153] per Lamer CJ, Cory and Major JJ citing *Mabo (No 2)*, above n 15.

30 *Tsilhqot'in*, above n 23, at [48]; see also *Delgamuukw*, above n 15, at [156] per Lamer CJ, Cory and Major JJ.

31 *Saugeen First Nation v Canada (Attorney General)* 2023 ONCA 565, [2023] OJ 3905. But as to lake bed claims in the New Zealand context see *Korokai v Solicitor-General* (1913) 32 NZLR 321 (CA).

32 In 2024, the Supreme Court of British Columbia recognised aboriginal title over an area of Vancouver Island: *The Nuchatlaht v British Columbia* 2024 BCSC 628. However, to avoid the long trials associated with aboriginal title cases, the applicant group chose not to claim the foreshore and seabed: *The Nuchatlaht v British Columbia* 2023 BCSC 804 at [2]; and *The Nuchatlaht v British Columbia* 2020 BCSC 252 at [22]. See also Nigel Bankes "Modern Land Claims Agreements in Canada and Indigenous Rights with Respect to Marine Areas and Resources" in Stephen Allen, Nigel Bankes and Øyvind Ravna (eds) *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing, Oxford, 2019) 149 at 156 who notes that as at 2019, the Canadian Courts had failed to provide any definitive rulings on claims to marine spaces; and see Benjamin Ralston "Aboriginal Title to Submerged Lands in Canada: Will Tsilhqot'in Sink or Swim" (2016) 22 Indigenous L Bull 22 at 22.

Australia

[22] Australia has rehoused common law aboriginal title into legislation which applies to all land in Australia including the marine and coastal area.[33] Section 223 of the Native Title Act 1993 (Cth) sets out the key elements to establish native title. While not intended to fully codify the prior common law, the foundation of the section was the opinion of Brennan J in *Mabo (No 2)*.[34]

[23] In *Mabo (No 2)* the High Court of Australia concluded that the acquisition of sovereignty and radical title by the Crown had not extinguished native title. Brennan J said that native title as a burden on the Crown's radical title was a convenient description of "the interests and rights of indigenous inhabitants in land, … possessed under the traditional laws acknowledged by and the traditional customs observed" by those inhabitants.[35] The nature and incidents of native title had to be ascertained "as a matter of fact" by reference to the relevant laws and customs.[36]

[24] As will be seen from the later approach of the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria*,[37] Brennan J used the concept of substantial interruption in addressing loss of cultural connection with an area, rather than interference with use and occupation.[38] Of the concept of substantial interruption, Brennan J noted that where a group:[39]

> … has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that … group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that … group can be said to remain in existence.

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33 Paul McHugh "From Common Law to Codification – The Foreshore and Seabed Act 2004" in Foreshore and Seabed Act, the RMA and Aquaculture (New Zealand Law Society seminar, April 2005) 1 at 34.

34 Australian Law Reform Commission *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report 126, April 2015) at [2.61]; and *Mabo (No 2)*, above n 15.

35 *Mabo (No 2)*, above n 15, at 57.

36 At 58.

37 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, (2002) 214 CLR 422.

38 See CA judgment, above n 1, at [117] per Miller J; and Shaunnagh Dorsett "An Australian Comparison on Native Title to the Foreshore and Seabed" in Andrew Erueti and Claire Charters (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) 59 at 75–76.

39 *Mabo (No 2)*, above n 15, at 59–60.

The situation was different when "the tide of history [had] washed away any real acknowledgment of traditional law and any real observance of traditional customs".[40] In that situation, the foundation of native title had disappeared.

[25] These various themes are apparent in s 223(1) of the Native Title Act which states:

> (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

[26] The section does not make a distinction between territorial rights and rights to carry out particular activities. Instead, the general doctrine of native title includes both and, as is apparent from the excerpt above at [23] from the judgment of Brennan J, the content of native title is determined by looking at the particular customs and traditions of the applicant group in each case.[41] In practice, the courts have preferred to recognise rights to engage in particular activities rather than territorial rights.[42]

[27] It is useful to refer to two of the decisions of the High Court of Australia subsequent to *Mabo (No 2)* and the introduction of the Native Title Act.[43] The first of these cases is *Commonwealth of Australia v Yarmirr*.[44] The decision is relevant for the finding that native title was capable of being recognised in relation to the sea and seabed below the low-water mark. However, the Court considered that a fundamental

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40 At 60.

41 Dorsett, above n 38, at 63; and see *Mabo (No 2)*, above n 15, at 58 per Brennan J.

42 Dorsett, above n 38, at 63; and see also Nin Tomas "Māori Land Law: The Coastal Marine (Takutai Moana) Act 2011" [2011] NZ L Rev 381 at 396.

43 The High Court also discussed the concept of exclusive use, while focusing on the relationship between the applicant group and the land, in *Western Australia v Ward* [2002] HCA 28, (2002) 213 CLR 1 at [89] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

44 *Commonwealth v Yarmirr* [2001] HCA 56, (2001) 208 CLR 1.

difficulty for the claimants' assertion of exclusive offshore rights in that case was that there were common law public rights to navigate, to fish, and the international right of innocent passage which could not coexist with the claimed rights.[45] As we come to, MACA addresses this problem.[46]

[28] The second decision, *Yorta Yorta*, illustrates the way in which the various concepts, namely, traditional laws and customs, substantial interruption and that of continuity have been developed in Australia.[47]

[29] In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ said that all of the elements of the definition of native title had to be given effect.[48] Taking first the word "traditional", in the context of the Native Title Act, that word conveyed a number of matters, including "an understanding of the age of the traditions".[49] That is, the origins of the content of the law or custom were to be found in "the normative rules" of the indigenous societies existing before the assertion of sovereignty by the British Crown.[50] Further, the reference to rights or interests in land or waters being "*possessed*" under traditional laws acknowledged and traditional customs observed:[51]

> … requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. Any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.

[30] Much of the judgment in *Yorta Yorta* was devoted to considering the effect of changes to or adaptation of traditional laws and customs or some interruption of the enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present. The Judges did not see such a change or

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45 At [98] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. Kirby J dissented and would have found these rights did not extinguish native title rights: at [285].

46 Below at [109].

47 *Yorta Yorta*, above n 37.

48 At [33].

49 At [46].

50 At [46].

51 At [47] (emphasis in original). By contrast see the discussion of the subject in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [113]–[116] per Glazebrook J.

interruption as necessarily fatal to a native title claim. But, and this flows from the meaning given to "traditional", both change and interruption in the exercise of rights may in an individual case take on particular significance. The Court said:[52]

> The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?

[31] As to the concepts of substantial interruption and continuity, the Court said that "acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty".[53] If that was not the case, the laws and customs could not properly be described as the "traditional" laws and customs of the peoples concerned.

[32] The Court said that the qualification "substantially" uninterrupted was not unimportant. That was because:[54]

> It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society.

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52 *Yorta Yorta*, above n 37, at [83] per Gleeson CJ, Gummow and Hayne JJ.

53 At [87] Gleeson CJ, Gummow and Hayne JJ. Professor Kent McNeil says *Yorta Yorta* establishes a "rigid" application of continuity and the approach "can facilitate" loss of rights and interests through the impact of, for example, cultural assimilation: Kent McNeil "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison" in Louis A Knafla and Haijo Westra (eds) *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, Vancouver, 2010) 146 at 151–152. The Australian Law Reform Commission, above n 34, at [5.78] says this is a high bar and, at [5.59], that arguably the effect of the approach to continuity has the effect of countering "any real acknowledgement of the ensuing, and in many cases, insurmountable, difficulties".

54 *Yorta Yorta,* above n 37, at [89] Gleeson CJ, Gummow and Hayne JJ.

Māori customary rights to land and the Native Land Court

[33] As a starting point, it is difficult to improve upon the following summary by Associate Professor Andrew Erueti as to the nature of tikanga-based land rights held by whānau and hapū prior to the Treaty:[55]

> According to Māori land custom, no one individual or kinship group owned land in the sense that they held virtually all rights in land to the exclusion of other levels of kinship or adjacent groups. Rather, different levels of the hapū social order exercised different kinds of rights in the same area of land. The right to traverse a stretch of land could extend to the hapū as a whole, but the right to cultivate particular garden plots within the same area could be exercised by smaller entities: individuals, chiefs, ope [outside groups] of kin, nuclear families (mum, dad, and the kids), and whānau (the extended family).
>
> These rights were transferred by a number of customary means. Major transfers could occur through war or threat of war. However, the rights to specific resources, such as the right to fishing-stands, trees attractive to birds, or small garden plots, were commonly transferred from, by, and to individuals, through gifting and inheritance. Specific rights were transferred in this way to other hapū members and also to members of adjacent groups without necessarily conferring with the hapū as a whole or its ruling chief or chiefs. As a result, "the rights of individuals of different hapū came to intersect on the ground", resulting in a crazy patchwork of use-rights.[56] These rights were ordered and prioritised according to well-recognised principles but with a marked emphasis on context so that the solution chosen best suited the demands of the moment.
>
> It was common for an area of land occupied by hapū to be subject to a number of competing claims of right made by groups that had occupied the land in the past. These could be recently defeated peoples forced off the land by the present occupants, or groups that had migrated to new lands. They may no longer occupy the land but in their eyes they retained "mana" (authority, control) in the land, and could advance a variety of "take" (bases) to support their claim.
>
> These competing claims of right coupled with the intricate system of intersecting rights held by the members of different kinship groups makes it difficult to say who "owned" the land, or waters of lakes, lagoons, rivers, and the open seas.
>
> A major hapū occupying a particular territory undisturbed by war and migration for several generations could hold something akin to ownership in the common law sense described above, inviting in migrating hapū, and permitting defeated hapū to remain on the land. However, it was much more common for several different groups to hold interests in the same area of land. Also, time altered all relationships and degrees of right. Māori descent groups

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55 Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 41 at 42–43 (some footnotes omitted, emphasis in original).

56 Angela Ballara *Iwi: the Dynamics of Māori Tribunal Organisation from c1769–c1945* (Victoria University Press, Wellington, 1998) at 195.

> in the eighteenth century were in a constant state of mutation, waxing and waning according to the vicissitudes of customary life. If a group asserting authority over a locality waned over time through political misfortune a new group could replace it. It therefore makes more sense to speak of different groups and individuals *owning rights in the land*, rather than owning the land itself.

[34] These rights—or more accurately, rights complexes—were protected by Article 2 of both the English and Māori versions of the Treaty. So, just how much of that pre-existing Māori order could or should survive the arrival of a new post-Treaty, settler-dominated order has also been a preoccupation of the law in New Zealand.[57] But, as we have noted, that preoccupation surfaced much earlier here than it did in Australia and British Columbia; and the response in New Zealand was primarily legislative rather than judicial. These are important differences.

[35] Specifically, the New Zealand Settlements Act 1863 (in relation to the hapū whose lands would be confiscated following the New Zealand Wars) and the Native Lands Act 1865 (in relation to the hapū whose remaining lands were not affected by the Wars),[58] set the rules as to what lands held in tikanga would be retained under the new order, by whom and in what legal form. Designed to speed transition from the old order to the new, the effect of each was, in its own way, unjust—the New Zealand Settlements Act because it effected the confiscations, and the Native Lands Act 1865 because it was premised on wholesale alienation through the individualisation of land

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[57] As we have said, it was common ground between the parties that in 1840, Māori held customary rights in what MACA refers to as the common marine and coastal area, and that these rights were protected by the Treaty of Waitangi: above at [2]. Professor Paul McHugh states that on acquiring sovereignty over New Zealand, the Crown "did not bring with it any legal confiscation of pre-existing tribal property rights. It acquired the … (right to govern) without displacing the tribes' private rights of land ownership … . This state of affairs was recognised by the Treaty of Waitangi, but in making such provision and securing the Crown's so called 'pre-emptive right', the Treaty did no more than declare what would have been the legal position anyway": Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 97. Professor McHugh also notes that the character of these property rights remains subject to the definition given by the customary law: at 97.

[58] It is important to note that the Preamble of the Natives Lands Act 1862 expressly referred to the Treaty of Waitangi: "Wheareas by the Treaty of Waitangi entered into by and between Her Majesty and the Chiefs of New Zealand it was among other things declared that Her Majesty confirmed and guaranteed to the Chiefs and Tribes of New Zealand and the respective families and individuals thereof the full exclusive and undisturbed possession of their lands and estates which they collectively or individually held so long as it should be their desire to retain ..." The Preamble of the subsequent Native Lands Act 1865 recognised that New Zealand land law was "still subject to Māori proprietary customs".

interests.[59] Their effect on iwi and hapū has been the subject of multiple Treaty settlements.[60]

[36] But that history should not obscure this important point: the starting premise of both Acts was that every part of Aotearoa was held by hapū under the prior legal order—that is, according to tikanga. And the hapū retained their prior entitlements unless and until lawfully extinguished by or under legislation, or by prior purchase effected or ratified by the Crown.[61] The difference between that approach and the approach taken much later by courts in Australia and Canada is very significant indeed.

[37] Of necessity, the 1863 and 1865 Acts gave courts a key role. The former established the Compensation Court (to award limited reserves to hapū whose lands were otherwise confiscated) and the latter, the Native Land Court (to inquire into customary title claims and, where they were made out, to award titles "cognisable" at English law).[62] In terms of volume, the Native Land Court was the dominant forum. Using tikanga Māori as its touchstone, the Court investigated customary entitlements to the bulk of the land in the North Island and developed a considerable body of jurisprudence on the subject.[63] The correctness (and consistency) of that jurisprudence

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59 As to the effect of raupatu (land confiscation) see, for example, Waitangi Tribunal *The Taranaki Report Kaupapa Tuatahi* (WAI 143, 1996); and Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (WAI 215, 2004). As to the impact of the Native Land Court under the Native Lands Act 1865 (and later legislation) see, for example, Waitangi Tribunal *The Hauraki Report* (WAI 686, 2006) vol 2; and Waitangi Tribunal *Tūranga Tangata Tūranga Whenua: The Report on the Tūranganui a Kiwa Claims* (WAI 814, 2004) vol 2.

60 For example, see Ngāti Whātua Ōrākei Claims Settlement Act 2012; and Whakatōhea Claims Settlement Act 2024.

61 Article 2 of the Treaty of Waitangi relevantly states: "… but the Chiefs of the United Tribes and the individual Chiefs, yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate". Article 2 of Te Tiriti o Waitangi states: "Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua". See also *R v Symonds* affirming the Crown monopsony until the Native Lands Act 1865: *R v Symonds* (1847) NZPCC 387 (SC). As to Crown purchases between 1840–1865 see, for example, Waitangi Tribunal *The Ngāi Tahu Report* (WAI 27, 1991) vol 2. As to Crown ratification of pre-1840 purchases see, for example, *Stafford v Attorney-General* [2024] NZHC 3110; and Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997).

62 Native Lands Act 1862, s 2. See also Richard Boast "The Evolution of Māori Land Law 1862– 1993" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 65 at 68–70.

63 Historical cases on customary title include (but are not limited to): *R v Symonds*, above n 61; *Ōrākei* (1868) 2 Ōrākei MB 355 (2 OTOK 355); *Ōmāhu* (1890) 20 Napier MB 131–134 (20 NA MB 131–134); *Ōmāhu* (1892) 26 Napier MB 7–8 (26 NA MB 7–8); *Korokai v Solicitor-General*, above n 31; *Mangaohane* Native Land Court, 24 April 1893 reported in *Hawke's Bay Herald* (Hawkes Bay, 25 April 1893); *Owharoa* (1870) 5 Hauraki MB 165–166 (5 H MB 165–166); *Re Pukehāmoamoa* Native Land Court, 13 November 1880 reported in *Hawke's Bay Herald*

has been the subject of much scholarly criticism and comment by the Waitangi Tribunal in recent times, but, it must be accepted, this reconsideration has been possible because of the scale and relative comprehensiveness of the record of that Court's work.

[38] It is certainly clear that to ensure a ready supply of land to meet settler demand, the Court over-simplified tikanga's complexities and cut corners to expedite the process of title investigation.[64] For example the Court consistently over-valued rights derived by conquest at the expense of pre-existing ancestral rights because that helped to simplify the evaluative task.[65] That said, there is agreement that the Court's explication of the four essential sources of tikanga rights in land was sound. They are:[66]

(a) take taunaha—right by discovery and claim;

(b) take tūpuna—ancestral right;

(c) take raupatu—right by conquest; and

(d) take tuku—right by transfer.

[39] Reflecting a Polynesian legal order in which kinship is the organising principle, the most important source of right was take tūpuna. Where the land holding hapū was "displaced" by conflict, the leadership of the conquering hapū would inevitably intermarry with that of the pre-existing right holder to obtain the necessary whakapapa for take tūpuna.[67] This would be relied upon in addition to the mana derived from the conquest itself. Over time, the conqueror's presence and the melding of whakapapa

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(Hawkes Bay, 15 November 1880) 3; "Ōakura" [1866] AJHR A13; and *Mōhakatino Parinīnihi* (1882) 1 Mōkau-Waitara MB 48–53 (1 MWA MB 48–53). See also Richard Boast *The Native Land Court 1862–1887: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2013); Richard Boast *The Native Land Court, 1888–1909: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2015) vol 2; and Norman Smith *Māori Land Law* (AH & AW Reed, Wellington, 1960) at 84–144.

64 See generally Boast *The Native Land Court 1862–1887*, above n 63; and Boast *The Native Land Court, 1888–1909*, above n 63.

65 See Erueti, above n 55, at 55; and Waitangi Tribunal *Rēkohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (Wai 64, 2001).

66 See generally Smith, above n 63, at 87–88 and 98–106; and Erueti, above n 55, at 54.

67 Erueti, above n 55, at 54.

would lead to the later hapū claiming take tūpuna in its own right, but the older lines, with their additional potency would continue to be remembered and relied on. In a different context, the continuing strength of take tūpuna may also be seen in the fact that a right held by tuku would revert to the prior right holder by take tūpuna if, for any reason, the tuku was abandoned.[68]

[40] These four take were, however, insufficient on their own to sustain rights in land. Each of them had to be accompanied by continuous occupation or ahi kā. Literally translated, this was a requirement to keep one's fires burning on the land. Just how many fires were required, and to what intensity, depended on context, reflecting the varied nature of the resource complexes whose use tikanga regulated. Some areas such as cultivations, riparian and inshore fisheries were intensively used and closely held. In other areas such as inland forests and offshore fisheries, only occasional use during the birding and gathering seasons might satisfy ahi kā requirements. Spiritual or cultural sites such as wāhi tapu, and particularly urupā, were also important markers of the intensity of the wider right. Physically protecting them and maintaining them in tribal memory was a priority.

[41] Mana, too, played a key role as an expression of right. In all these resource complexes, the mana of the right-holder was expressed by controlling access to particular places and resources through the institution of rāhui. These may have been imposed to protect the physical sustainability of a limited resource, or to protect its spiritual health from, for example, the effects of an injury or death connected in some way to it.

[42] In addition to the intensity of use and expressions of control required to maintain ahi kā, tikanga also spoke to ahi kā's temporal requirements. Ahi kā could become ahi teretere (merely flickering) through neglect, and liable to be lost without active steps being taken to re-enliven it. A significant discontinuity of use would lead to the rights becoming ahi mātaotao—a right whose fires have become cold.

[43] The Native Land Court generally took the approach that an absence of three generations would lead to loss of the right, but this is almost certainly another example

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[68] See discussion of tuku in Waitangi Tribunal *Muriwhenua Land Report*, above n 61, at [3.3.5].

of that Court's preference for oversimplification to better achieve its mission of making land available.[69] The preferable view is that the degree of discontinuity sufficient to end a take in land was contextual. That context included the relationship between the prior right-holder whose continuing right was subject to doubt and any more recent counter-claimant, the nature and use of the area in question, and the nature of the right or rights claimed over it.

[44] The fact that it is possible today, to summarise in broad terms, the essential elements of tikanga in relation to whenua with relative confidence, is a distinctive feature of the New Zealand experience. This is due in part to the maintenance to the present day of tribal memory, practice and tikanga in relation to place, and in part to the Native Land Court's work at the end of the 19th and early 20th centuries.

[45] As to the latter, it must be understood that contests over title in the Native Land Court were generally not between Māori and Pākehā, or Māori and the Crown, unless, as occasionally happened, there was a suggestion that the customary title had already been extinguished by prior sale or confiscation.[70] Rather, disputes in the Court were almost invariably *between* hapū. In hard fought cases the Court's Minute Books might record evidence and argumentation mostly in te reo Māori and running to many weeks of hearing time.[71] The Court recorded which hapū claimed rights and where; and which claim or claims should be preferred.

[46] Together, the quality of modern tribal memory and of the historical record make the work of contemporary judicial inquiry somewhat easier in this country than elsewhere.

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69 Smith, above n 63, at 94.

70 See, for example, *Tāmaki v Baker* [1901] AC 561 (PC).

71 Professor David Williams notes that the expense of attending lengthy court hearings that were far from the claimant group's rohe meant the claimant group often incurred large debts to defend their land interests: David V Williams *Te Kooti Tango Whenua: The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999).

[47] Finally, it should be noted that s 129 of the TWMA reformed the statutory test for Māori customary title. Its predecessor, s 161(2) of the Māori Affairs Act 1953, provided that:

> Every title to and interest in customary land shall be determined according to the ancient customs and usages of the Maori people, as far as the same can be ascertained.

[48] Meanwhile s 2(1) provided the following definition:

> "Customary land" means land which, being vested in the Crown, is held by Maoris or the descendants of Maoris under the customs and usages of the Maori people…

[49] These provisions can be traced back to the Native Lands Act 1865.[72] Section 129 of the TWMA takes a shorter route. It simply provides "land that is held by Māori in accordance with tikanga Māori shall have the status of Māori customary land".[73] It is to be doubted that this change in wording was intended to effect any substantive change. Rather it appears simply to modernise the language of the old test, but it did lead the modern Māori Land Court to suggest that the new language highlighted the importance of determining ownership through a tikanga lens rather than making determinations through a court or Pākehā perspective.[74]

[50] We make these points because as we come to, the s 129 definition was adopted as the model for the first part of the s 58 test for CMT. That formulation was thus a known quantity.

The Native Land Court's approach to marine title specifically

[51] As befits a nation of islands whose original peoples are Polynesian, terra firma was not the only focus of the Native Land Court. Claims to customary ownership of the foreshore and seabed were made within five years of the Court's establishment. And they continued to be made until well into the 20th century, long before the application by Ngāti Apa and the Tauihu tribes of the Marlborough Sounds.

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72 Section 2 of the Native Lands Act 1865 defined "[n]ative land" as "lands in the Colony which are owned by Natives under their customs or usages".

73 Te Ture Whenua Māori Act, s 129(2)(a).

74 See *da Silva v Aotea Māori Committee* (1998) 25 Taitokerau MB 212 (25 AT 212) at 215.

[52] The Court of Appeal in *Ngāti Apa* referred to *Kauwaeranga*, the 1870 judgment of Chief Judge Fenton of the Native Land Court, in relation to a claim to customary title to the Thames foreshore.[75] Because it was the first adjudication in this country of a claim to customary rights in the marine area, it is appropriate to spend a little time considering its terms. Much of the *Kauwaeranga* judgment is a "lengthy and erudite"[76] discussion of the background to British colonisation of New Zealand, relevant imperial and local legislation, and the development of the English common law in relation to fisheries and foreshore rights. But of particular relevance in the present appeals is Chief Judge Fenton's discussion of the evidence adduced in support of the application. He said:[77]

> In the case now before the Court, consistent and exclusive use of the locus in quo has been clearly shown from time immemorial. As far as the evidence goes, no persons except the claimants and their ancestors have, at any time, appropriated to their use this land, nor has the exclusive right of the claimants to enjoy it, as they always have enjoyed it, ever been disputed by anyone up to the present contention. That the use to which the Maoris appropriated this land was to them of the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much greater value and importance to their existence than any equal portion of land on terra firma. It is easy to understand then why the word "fisheries" should appear so prominently in the [Treaty of Waitangi] instrument by which they admitted a foreign authority to acquire rights of sovereignty over their country.

[53] Ordinarily, evidence of this quality would have produced an award that could be converted into "[n]ative freehold title", the new form of Māori title said to be cognisable at English law. But, in a manner that prefigured concerns that came to the fore 135 years later, the Chief Judge expressed uneasiness at the effect on wider settler

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75 Alex Frame "Kauwaeranga judgment" (1984) 14 VUWLR 227 [*Kauwaeranga* reprint] at 229 and following as cited in *Ngāti Apa*, above n 4. This is a reprint of *Kauwaeranga* (1870) 4 Hauraki MB 236.

76 So described by the Court of Appeal in *Re the Ninety-Mile Beach*, above n 6, at 471 per North J.

77 *Kauwaeranga* reprint, above n 75, at 240. Two years later, the Governor issued a proclamation pursuant to s 4 of the Native Lands Act 1867 suspending the jurisdiction of the Native Land Court over any land within the Auckland Province situated below the mean high-water mark. The government of the time explained that Māori claims to the foreshore would proliferate unless the prospect of marine title was suspended. The 1872 proclamation lapsed with the repeal of the 1867 Act and enactment of the Native Lands Act 1873. Five years later, s 147 of the Harbours Act 1878 was enacted which, until *Ngāti Apa*, was treated as resolving the matter. See the full discussion of the background in *Re the Ninety-Mile Beach*, above n 6, at 471; and Fergus Sinclair "Kauwaeranga in Context" (1999) 29 VUWLR 139 at 147–148 and 152.

interests of awarding to the applicant a fully exclusive foreshore title.[78] The Court awarded the customary owners a fishing easement instead.

[54] Although, the 1957 first instance decision of Chief Judge Morrison in the *Ninety-Mile Beach* case was, as noted, set aside by the Court of Appeal in 1963, that Judge's factual findings in relation to customary title to that much larger seascape are consistent with those of Chief Judge Fenton, 87 years earlier, in *Kauwaeranga*. The later Chief Judge summarised his conclusions on the nature of the claimants' use and occupation of the Ninety-Mile Beach circa 1840 succinctly:[79]

> The evidence established the following:
>
> (a) That the Northern portion was within the territory occupied by Te Aupouri and the Southern portion was within the territory occupied by Te Rarawa.
>
> (b) That the members of these tribes had their kaingas and their burial grounds scattered inland from the beach at intervals along the whole distance.
>
> (c) That the two tribes occupied their respective portions of the land to the exclusion of other tribes.
>
> (d) That the land itself was a major source of food supply for these tribes in that from it the Maoris obtained shellfish, namely toheroa, pipi, tuatua, and tipa from the beach itself, and kutai from the rocks below high water mark at the part known as the Maunganui Bluff.
>
> (e) That the Maoris caught fish in the sea off the beach, and for this purpose went out in canoes. The fish caught were mullet, schnapper, flounder, kahawai, parore, herrings, rock cod, yellow-tail, kingfish and shark.
>
> (f) That for various reasons from time to time "rahuis" were imposed upon various parts of the beach and the sea itself.
>
> (g) That the beach was generally used by the members of these tribes.
>
> It is clear beyond doubt that the land was exclusively occupied by the two tribes under their customs and usages …

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78 One of the reasons for such uneasiness was the implications regarding ownership of gold: See Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006) vol 3 at [22.3]–[22.4].

79 *Te Whaaro Oneroa a Tohe (90 Mile Beach*) (1957) 85 Northern MB 126 (85 NMB 126) 15 November 1957 at 126–127.

Conclusions on the different New Zealand approach

[55] As we noted at the outset, New Zealand's experience of early legislative engagement with customary title is in marked contrast to the Australian and Canadian experience. It seems clear that the Native Land Court applied what it considered were orthodox and well-tested principles of tikanga to the marine title claims that came before it. And relying on apparently detailed evidence, the Court readily accepted that marine areas, including but not only the inter-tidal zone, contained key sources of food and materials and so were subject to tikanga rights.

[56] It may be inferred therefore that what was true in 1840 for the Hauāuru hapū of the Thames foreshore and for Te Aupōuri and Te Rarawa of the Ninety-Mile Beach, was also true for the rest of the country. In other words, it may be taken, at least as a starting proposition, that through acts of reverence, exploitation, control and memory in accordance with tikanga, relevant places were named and located, the ancestors belonging to those places were identified, the whakapapa which conveyed their rights through the generations was remembered, and the rights themselves were exercised, by the generation of Māori then living when the Treaty of Waitangi was signed in 1840.

[57] Finally, it is clear that by inserting the TWMA definition of customary land into the s 58 test in MACA, the legislature opted for a familiar formulation which did not just invoke the TWMA experience, but also prior formulations of the test and jurisprudence under them. There are, nonetheless, relevant differences between the schemes of MACA and the TWMA. First, unlike the TWMA, MACA contains a carefully constructed gradient of options for recognition—from participation rights, to PCRs, to CMTs. And second, the TWMA definition is only part of the s 58 test.

From Ngāti Apa *to the FSA*

[58] We circle back now to pick up the narrative of events following the delivery of *Ngāti Apa* in 2003. That decision sparked concern that the foreshore and seabed might become "enclosed" by Māori applications for marine titles under the TWMA. Parliament's response was to enact the FSA. It is helpful to sketch out the approach

taken to the controversy in that Act because it contains some structural similarities to MACA as well as important differences.

[59] The object of the FSA was to:[80]

> … preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū, and iwi with areas of the public foreshore and seabed.

[60] Section 4 set out the FSA's purposes:

> The Act gives effect to the object stated in section 3 by—
>
> (a) vesting the full legal and beneficial ownership of the public foreshore and seabed in the Crown; and
>
> (b) providing for the recognition and protection of ongoing customary rights to undertake or engage in activities, uses, or practices in areas of the public foreshore and seabed; and
>
> (c) enabling applications to be made to the High Court to investigate the full extent of the rights that may have been held at common law, and, if those rights are not able to be fully expressed as a result of this Act, enabling a successful applicant group—
>
> (i) to participate in the administration of a foreshore and seabed reserve; or
>
> (ii) to enter into formal discussions on redress; and
>
> (d) providing for general rights of public access and recreation in, on, over, and across the public foreshore and seabed and general rights of navigation within the foreshore and seabed.

[61] The FSA vested all public foreshore and seabed in the Crown "as its absolute property".[81] However, s 13(3) stated that: "Subsection (1) does not affect customary rights that are able to be recognised and protected under Part 3 or Part 4." Section 13 purported to both extinguish all customary rights and allow for their (albeit limited) recognition through statute-based negotiated or court-awarded territorial customary rights (TCRs) and customary rights orders (CROs).

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80 Foreshore and Seabed Act 2004 [FSA], s 3.
81 Section 13(1).

[62] A TCR was a territorial right, focusing on the nature and quality of the *relationship* of the applicant group to the specified area, rather than the *activities* they carried out there. It was the predecessor to MACA's CMT, though its practical effect was less substantive. The High Court could:[82]

> … make a finding that the group (or any members of that group) would, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown by section 13(1), have held territorial customary rights to a particular area of the public foreshore and seabed at common law.

[63] The key elements of the test to establish a TCR were in s 32. The test was "complex".[83] Professor Richard Boast KC helpfully summarises it as follows:[84]

> An applicant must show that the title is one that could be recognised at common law … and which is founded on exclusive use and occupation in fact and an *entitlement* to such use and occupation in customary law. The exclusive use and occupation must be without substantial interruption since 1840 and the group seeking the TCR must have continuous title to contiguous land. Mere spiritual and cultural association is of itself insufficient. The wording of the provision does not appear to exclude all kinds of overlapping interests, provided that such interests are exclusive and continuous.

[64] Broadly the group had to establish in relation to the area:[85]

(a) the title could be recognised at common law;

(b) exclusive use and occupation as a matter of fact;

(c) entitlement to exclusive use and occupation;

(d) that the use and occupation has been "without substantial interruption" since 1840; and

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82 Section 33.

83 Taihākurei Edward Durie, Richard Boast and Hana O'Regan *Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel — Ministerial Review of the Foreshore and Seabed Act 2004* (30 June 2009) vol 1 [*Ministerial Review Panel Report*] at 126.

84 Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at [16.10] (emphasis in original). See also FSA, s 32; and Richard Boast "The evolution of the Marine and Coastal Area (Takutai Moana) Act 2011" in Marine and Coastal Area Act — demystifying the hype (New Zealand Law Society Seminar, August–September 2011) 1 at 13.

85 FSA, s 32; see also McHugh, above n 33, at 12–19.

(e) possession of continuous title to contiguous land.

[65] A finding that the applicant group met the test would not, however, result in an award of title. Instead it gave the applicant group the right to negotiate with the Crown for recognition or to apply to the High Court for an order establishing a foreshore and seabed reserve under s 43.[86] The Crown's proposals for redress were non-justiciable and further recourse to the Court was limited.[87] But if negotiations failed, the applicant group could return to the High Court and, by means of the complex procedures in ss 40–45, seek orders establishing a foreshore and seabed reserve.[88]

[66] The FSA was criticised as hastily enacted, and a step backward for recognition of Māori rights.[89] It appears no CROs or TCRs were ever awarded.[90]

From the FSA to MACA

[67] In November 2008, following a general election, a new minority government was formed, led by the National Party, with confidence and supply support from the Māori, ACT and United Future parties. As part of their Relationship and Confidence and Supply Agreement, the Government agreed to review the FSA.[91] In 2009, the Government announced it would establish a ministerial review panel to review the FSA. The Panel, comprising former High Court Judge and chair of the Waitangi Tribunal, the Hon Sir Edward Durie, leading legal academic, Professor Boast and Hana O'Regan (a specialist in Ngāi Tahu tikanga), concluded the FSA should be repealed and replaced.[92] The Government then published a consultation document

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86 See FSA, ss 36(1) and 38(1). A reserve would be subject to public rights of access and navigation: s 40(3).

87 Section 38(3).

88 Section 37(4).

89 For example, see Committee on the Elimination of Racial Discrimination *Decision 1 (66) on Foreshore and Seabed Act* LXVI, UN Doc CERD/C/66/NZL/Dec.1 (11 March 2005) at [4]; and Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* UN Doc E/CN.4/2006/78/Add.3 (13 March 2006) at [55].

90 *Ministerial Review Panel Report*, above n 83, at [6.3.3]; and Boast, "The Evolution of the Marine and Coastal Area (Takutai Moana) Act 2011", above n 84, at 15. By March 2010, only one group had successfully directly negotiated with the Crown, but the agreement had yet to be confirmed by the High Court: Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: Consultation document* (March 2010) at 14.

91 "Relationship and Confidence and Supply Agreement between the National Party and the Māori Party" (16 November 2008) at 2.

92 *Ministerial Review Panel Report*, above n 83, at 13.

containing proposals for the FSA's repeal and replacement.[93] The resulting Marine and Coastal Area (Takutai Moana) Bill closely followed these proposals.[94]

[68] MACA was passed without amendment as recommended by the Māori Affairs Select Committee.[95] It received royal assent on 31 March 2011 and came into force the following day. At this point it is necessary only to sketch out MACA's key elements in a general way. We will come back to a detailed discussion of specific provisions later in this judgment.

[69] MACA repealed the FSA[96] and restored any customary interests in the "common marine and coastal area" that the FSA had extinguished.[97] The phrase "foreshore and seabed" is replaced by the more spatially oriented "marine and coastal area". This area is defined as the area bounded by the line of the mean high-water springs and the outer limits of the territorial sea.[98] A central feature of the way in which MACA goes about defusing the ongoing controversy is that it declares no one owns the common marine and coastal area, not even the Crown,[99] while, at the same time, expressly preserving public rights of access, navigation and fishing,[100] and protecting the right of Māori to seek to exercise customary rights through recognition orders.

[70] As foreshadowed, there are two types of recognition order: customary marine title (CMT) and protected customary right (PCR) orders. The former is territorial in nature whereas the latter focuses on discrete activities and uses in an area. For completeness, we note that MACA also recognises rights to participate in statutory processes affecting customary marine areas but these are not relevant to the appeals.[101]

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93 Ministry of Justice, above n 90.
94 See CA judgment, above n 1, at [60] per Miller J.
95 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) (select committee report) [Select Committee Report]. For completeness we note that changes were made through supplementary order papers but, unless otherwise stated, these are immaterial for present purposes.
96 MACA, s 5.
97 Section 6.
98 Section 9 definition of "marine and coastal area". The "common marine and coastal area" refers to the marine and coastal area that is not specified freehold land located in that area and is not any land owned by the Crown that has a specified status.
99 Section 11(2).
100 Sections 26–28.
101 Sections 47–50.

[71] In contrast to the FSA, under MACA, applicant groups can apply to the High Court or enter direct negotiations with the Crown to obtain PCRs and CMTs.[102] But like the FSA, there is a strict time bar—applications had to have been made within six years, that is, by or before 3 April 2017.[103] To be clear, recognition orders (that is, PCRs and CMTs) are not the source of customary rights. Those rights predate both the FSA and MACA. Rather, MACA restores them completely, and then provides for their limited statutory *recognition* where the criteria are met. Apart from MACA's restorative effect, those rights remain in existence quite independently of its provisions.

[72] A successful CMT application leads to a formal recognition order with automatic rights.[104] Broadly, these include rights to: allow or prevent certain activities; be notified and consulted regarding various decisions; protect wāhi tapu; own certain minerals; own newly discovered taonga tūturu (protected objects); and create a planning document having particular and bespoke effect under the RMA's planning processes.[105] As can be seen, while CMT rights are clearly substantive in nature, the label "customary marine *title*" is not intended to imply that the applicant group *owns* the claim area in any proprietorial sense.

MACA's legislative history

[73] One common thread running through MACA's legislative history is that those who drove it saw it as a second attempt to recognise and reconcile competing interests in the marine and coastal area, this time with the benefit of distance from the controversy of 2003–2004. The courts must ascertain the meaning of legislation from its text and in light of its purpose and context.[106] The very particular history and context of MACA made recourse to a wide range of legislative materials useful in this case, because those materials had considerable influence on the final text. Specifically, they confirm that Parliament consciously drew on the considerable body of jurisprudence, to which we have referred, when making drafting choices. For that

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102 Section 94.
103 Section 100(2). We note that the time bar in the FSA only related to CROs: see FSA, ss 48(2) and 68(2).
104 MACA, ss 60, 62 and 94(1)(b). See also (15 September 2010) 666 NZPD 14002.
105 MACA, s 62(1).
106 Legislation Act 2019, s 10.

reason all parties agreed that reference to this material was necessary to ascertain MACA's purpose.

[74] The theme of reconciliation was reiterated in the Ministerial Review Panel's report, referred to in the Preamble of MACA. The Panel advised that a Treaty-based approach meant "it [was] time to expect that both cultural views should be recognised in law and to the extent practical, reconciled".[107] The Panel recognised that such reconciliation could be challenging in light of the "two strikingly different views about property and access".[108] The question was not "whose law should prevail" rather "whether both laws [could] be accommodated in a bicultural legal regime".[109] The Panel hoped its report would catalyse further dialogue to resolve this question.[110]

[75] In his Foreword to the consultation document that followed, the Hon Christopher Finlayson KC MP, then Attorney-General, put it this way:[111]

> It cannot be over-emphasised that the aim of all this work is to find a just and enduring solution. A significant number of New Zealanders think the [FSA] has been divisive and should be repealed. As we work to develop a solution, the challenge for us will be to avoid dogmatic responses to a complex issue and, instead, to seek to reconcile various interests for the benefit of all New Zealanders.

[76] Subsequently, in a regulatory impact statement, the Ministry of Justice noted the Government's objective was to "achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed".[112] The identified interests were customary interests, recreation and conservation interests, business and development interests, and local government interests.[113]

[77] Finally, with the Bill before the House, the parliamentary debates confirm that balance and reconciliation were key aims underpinning the enactment of MACA.

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107 *Ministerial Review Panel Report*, above n 83, at 12.
108 At [3.1].
109 At [3.1].
110 At 13.
111 Ministry of Justice, above n 90, at 1.
112 Ministry of Justice | Tāhū o te Ture [Ministry of Justice] *Review of the Foreshore and Seabed Act 2004: Analysis of Replacement Regimes* (6 September 2010) at [34]. See also Ministry of Justice *Marine and Coastal Area (Takutai Moana) Bill: Departmental Report* (4 February 2011) [*Departmental Report*] at [30].
113 Ministry of Justice, above n 90, at 9.

The Hon Tariana Turia MP introduced the Bill on behalf of the Attorney-General. In her introductory speech, she said:[114]

> The Marine and Coastal Area (Takutai Moana) Bill creates a new regime that recognises and provides for the legitimate association of w[h]ānau, hapū, and iwi with the common marine coastal area while ensuring that the interest and rights of all other New Zealanders in this area are also recognised and protected.

[78] The Attorney-General affirmed that CMTs and public rights in the marine and coastal area "can, and do, coexist" and this was recognised in the Bill.[115] Similarly, the Hon Simon Bridges MP described the Bill as "a principled compromise".[116] Subsequently, the Hon Bill English MP (then Deputy Prime Minister) asserted the Bill was a "pragmatic approach" and:[117]

> … just another step that this Parliament and Governments in New Zealand over the last 20 or 30 years have taken, following a long process of balancing and incorporating different views of history, justice, and property rights into the legislative and constitutional structure of New Zealand …

[79] As we come to, this thread of reconciling rights and interests is expressly referred to in the Preamble and s 4 of MACA. It is key to understanding how Parliament intended the Act to work.[118]

[80] The legislative history suggests too that the Bill's architects gave careful consideration to the role modern Canadian and Australian jurisprudence should play in its provisions. The Government thought it was "inappropriate" to base MACA *entirely* on another country's jurisprudence.[119] This was particularly in light of:

(a) the nature of New Zealand's culture, history and constitutional framework;[120] and

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114 (15 September 2010) 666 NZPD 13998–13999.
115 (15 September 2010) 666 NZPD 14003.
116 (15 September 2010) 666 NZPD 14017.
117 (8 March 2011) 670 NZPD 16991–16992.
118 See below [102]–[126].
119 Ministry of Justice, above n 90, at [4.5.3].
120 Ministry of Justice *Regulatory Impact Statement Review of the Foreshore and Seabed Act 2004: Post Consultation Decisions* (6 September 2010) at 16.

(b) the Ministerial Review Panel's critique that Australia only recognises rights short of a title in the seabed and that Canada was yet to determine whether title could be recognised in the seabed.[121]

[81] However, the Government noted that some aspects of the overseas authorities were helpful as they had developed in a considered way over many years and provided valuable insights into how to recognise and protect customary rights.[122] Further, drawing on overseas jurisprudence was consistent with New Zealand's legal tradition, and was especially useful in light, it was considered, of the perceived lack of New Zealand common law in this area.[123] The Government concluded that overseas common law should be incorporated to the extent that it related to the New Zealand context.

[82] There are insights in the Parliamentary debates as to what legislators had in mind in the test for recognition of customary title (noting that what became s 58 of MACA did not change materially between introduction and third reading). For instance, Ms Turia, introducing the Bill to the House, observed:[124]

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

[83] The Attorney-General's remarks were to similar effect:[125]

> The bill also provides for the right to seek customary title to specific parts of the common marine and coastal area if the area has been used and occupied by a group according to tikanga without substantial interruption from 1840 to the present day.

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121 See Office of the Attorney-General *Review of Foreshore and Seabed Act 2004: Principles, Bottom Lines and Next Steps* (21 October 2009) at [90].

122 Ministry of Justice, above n 90, at 34.

123 Office of the Attorney-General, above n 121, at [91]. At [93] the authors acknowledge the "wealth of jurisprudence" in the Māori Land Court in relation to tikanga and customary land status, but do not appear to consider this to be the local equivalent of "common law customary title jurisprudence".

124 (15 September 2010) 666 NZPD 13999.

125 (15 September 2010) 666 NZPD 14003.

In Committee the Attorney-General emphasised the desirability of codifying the test for customary title—in contrast to Canada—to avert protracted legal arguments likely to defeat "the purpose of what many are seeking—namely, certainty and equity".[126] In the third reading, he returned to his earlier theme as to the thrust of the legislation:[127]

> It allows for the recognition of customary rights associated with the exercise of longstanding activities, and it gives iwi, hapū, and whānau the right to seek customary title to specific parts of the common marine and coastal area to which they have had longstanding and continuing connections, subject to the continuing right of access.

[84] Thus, the Bill was to provide guidance for the courts:[128]

> … based on the remarks of the Court of Appeal in the *Ngāti Apa* case, the experience of Commonwealth jurisdictions such as Canada, and our shared understanding as New Zealanders of the importance of beach culture and manaakitanga.

The present appeals

[85] Te Whakatōhea is an iwi whose rohe is situated in eastern Bay of Plenty around Ōpōtiki. For more than 20 years, the iwi has sought recognition of its customary rights in this area. Here, we provide a brief overview of the procedural history of the appeals before us, the marine and coastal area to which they relate, and the parties involved.

[86] In 1999, the late Claude Edwards and other hapū representatives of Te Whakatōhea applied to the Māori Land Court to declare that the specified land (including the foreshore and seabed) was customary Māori land under s 131 of the TWMA.[129] Subsequently, and upon the enactment of the FSA, Mr Edwards and other representatives applied to the Māori Land Court on behalf of the iwi for CROs.[130] We call this application the Edwards application.

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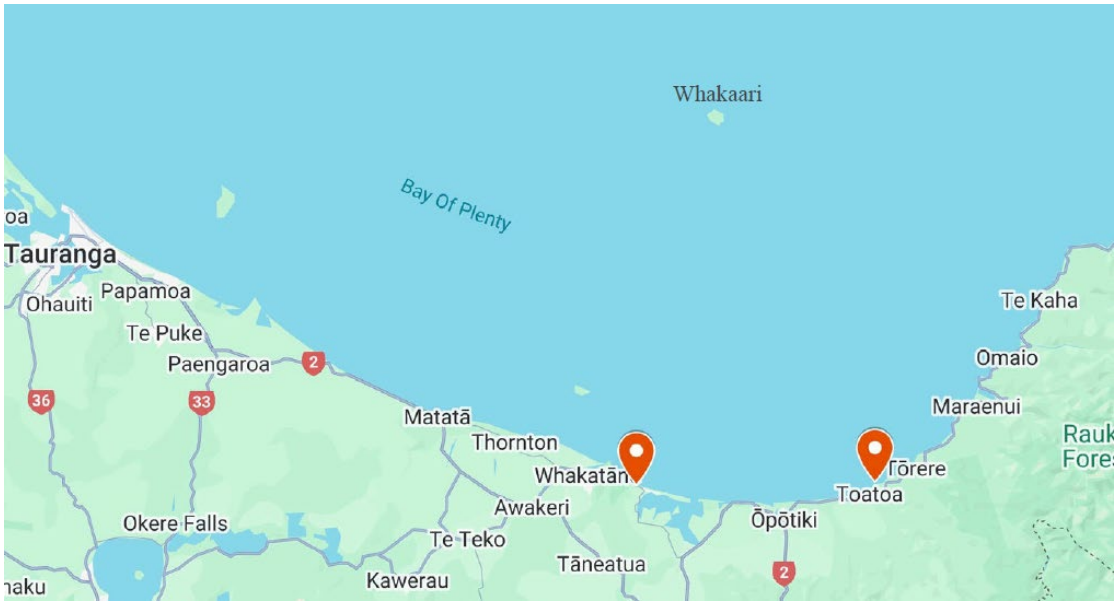
126 (16 March 2011) 670 NZPD 17315.
127 (22 March 2011) 671 NZPD 17649.
128 (22 March 2011) 671 NZPD 17650 (emphasis added).
129 See HC judgment, above n 1, at [6]. This was likely prompted by the interim decision of the Māori Land Court in 1997 that the foreshore and seabed could be Māori customary land: *Re Marlborough Sounds Foreshore* (1997) 22A Nelson MB 1 (22A NE 1). This was the first instance decision in the *Ngāti Apa* proceedings.
130 See HC judgment, above n 1, at [7].

[87] After the enactment of MACA in 2011, the Edwards application was transferred to the High Court to be determined under the new regime.[131] Section 125 of MACA transferred pending proceedings under the FSA to the High Court and prioritised them. Subsequently, and in accordance with a High Court minute, the applicants amended the Edwards application on 18 May 2015. The amended application sought a recognition order for PCRs (the new CROs) and/or CMT. At this stage there was still only one application on behalf of Te Whakatōhea. The application proposed that recognition orders would be held by a trust which would be formed in due course.

[88] The area claimed by the Edwards application is situated in the eastern Bay of Plenty, covering a coastline of approximately 35 km from Maraetōtara in the west to Te Rangi in the east,[132] and extends out to the 12 nautical mile limit of the territorial sea. The area includes Ōhiwa and Ōpōtiki Habours; the mouths of the Nukuhou, Waiotahē, Waioweka, Ōtara, and Waiaua rivers; Whakaari (White Island) and Te Paepae o Aotea. The below map indicates the land-based boundaries of the claimed area (as shown by the markers):



[89] In 2017, several hapū and other groups within Te Whakatōhea objected to the Edwards application, arguing recognition orders should be held at hapū, rather than

131 At [8].
132 This approximation does not include Ōhiwa and Ōpōtiki Harbours.

iwi, level.[133] This has led to two umbrella groups forming within the proceedings. Whakatōhea Kotahitanga Waka (Edwards), called WKW, consists of those within Te Whakatōhea who support the original Edwards application. The members of WKW are:

(a) Claude Augustin Edwards (deceased) and, his daughter, Adriana Edwards (claiming to act on behalf of Te Whakatōhea iwi);

(b) Christina Davis for Ngāti Muriwai;

(c) Dean Flavell for Hiwarau C, Turangapikitoi, Waiōtahe, and Ōhiwa o Whakatōhea;

(d) Larry Delamere for Pākōwhai Hapū; and

(e) Barry Kiwara for Kutarere Marae.

[90] The other umbrella group is Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (Te Kāhui). Te Kāhui is a coalition of four of the hapū of Te Whakatōhea who no longer support the Edwards application and would prefer recognition orders be made at the hapū level. The four hapū are Ngāti Ira o Waioweka, Ngāti Patumoana, Ngāti Ruatākenga and Ngāi Tamahaua.[134] While they presented a coordinated case, at the oral hearing each hapū made its own submissions through its own counsel on discrete aspects. It should be noted that WKW do not agree that Te Kāhui represents its constituent hapū. These matters will be addressed in the second judgment.

[91] A third iwi-wide party—Te Tāwharau o Te Whakatōhea (Te Tāwharau)—appeared generally in support of Te Whakatōhea-related applications. Te Tāwharau replaced the Whakatōhea Māori Trust Board as Te Whakatōhea's post-settlement governance entity under the Whakatōhea Claims

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133 HC judgment, above n 1, at [10].

134 While Ngāti Ruatākenga is not formally part of Te Kāhui, as its CMT application was under the Whakatōhea Māori Trust Board, it now works with and supports Te Kāhui. Te Kāhui also includes Te Whānau a Mokomoko and Te Whānau a Tītoko, who support the appeal but are not parties.

Settlement Act 2024 and inherited the Trust Board's 2017 MACA application.[135] Unrelated to any MACA application, and as part of its land claims settlement, Te Tāwharau acquired the reservation of 5,000 hectares of marine space for aquaculture.

[92] A further party is Te Upokorehe. It says it is an iwi in its own right with the predominant interest in Ōhiwa Harbour. Te Kāhui asserts that Te Upokorehe is a hapū of Te Whakatōhea.

[93] As the area claimed by Te Whakatōhea-related applications overlaps with areas claimed by neighbouring iwi, these iwi also became involved in the proceedings. They are Ngāti Awa on Te Whakatōhea's/Te Upokorehe's western flank, Ngāi Tai on the eastern flank,[136] and Te Whānau-ā-Apanui to the east of Ngāi Tai. Those iwi sought to protect their own interests in the overlapping areas.

[94] Various third parties who may be impacted by the interpretation of MACA also became involved in the proceedings. These include:

(a) the Attorney-General;

(b) Bay of Plenty Regional Council | Toi Moana, Ōpōtiki District Council, and Whakatāne District Council;

(c) Crown Regional Holdings Ltd (CRHL), which holds resource consents for port infrastructure in the claimed area;

(d) Landowners Coalition Inc (LCI) and Seafood Industry Representatives (SIR), which are advocating for private property rights and the commercial fishing industry's inshore sector respectively; and

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135 The Whakatōhea Māori Trust Board had made an application to the High Court to ensure that any hapū that had not applied would not be excluded. As the proceedings progressed, the application supported the inclusion of Ngāti Ngahere, Ngāti Patumoana and Ngāti Ruatākenga in any recognition orders.

136 Ririwhenua is a hapū of Ngāi Tai who has also been involved in the proceedings. However, the High Court treated Ngāi Tai and Ririwhenua's applications as a joint application and they have provided a single set of submissions to this Court.

(e) Ngā Hapū o Ngāti Porou (by an Order in Council in 2020 under Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, they currently hold 18 separate CMT areas and are in the process of seeking further recognition).[137]

[95] The High Court granted several PCRs as well as three CMT orders, namely:[138]

(a) CMT Order 1: Incorporating the western-most coastal area from Maraetōtara in the west to Tarakeha in the east, and out to the 12 nautical mile limit. This order would be jointly held by the four hapū within Te Kāhui, Ngāti Ngāhere (also a hapū of Te Whakatōhea) and Te Upokorehe.

(b) CMT Order 2: Incorporating the western part of Ōhiwa Harbour.[139] This order would be jointly held by the CMT Order 1 applicant groups with the addition of the Ngāti Awa, the iwi whose rohe is on Te Whakatōhea's western flank.

(c) CMT Order 3: Incorporating a narrow corridor on the eastern edge of CMT Order 1 between Tarakeha and Te Rangi and out to the 12 nautical mile limit. The order was granted to Ngāi Tai.

[96] The map below indicates the extent of the CMTs. However, we note that the boundaries of CMT Order 1 are an issue on appeal.

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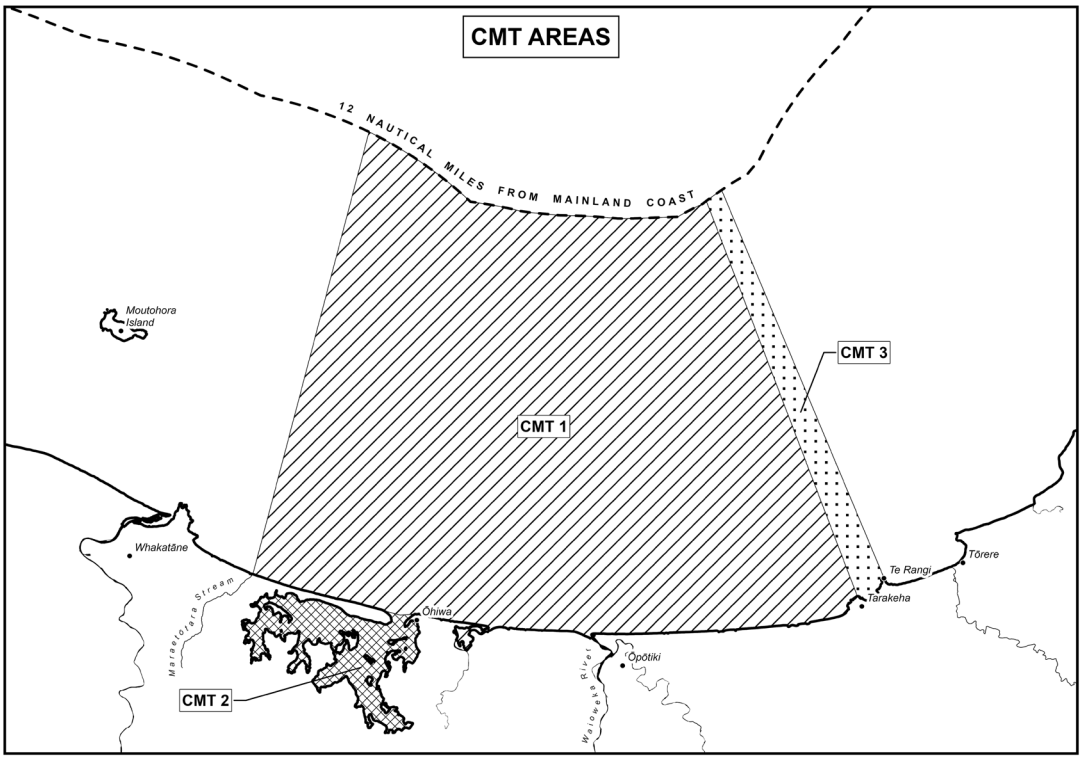
137 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020. Ngāti Porou has a bespoke MACA agreement with the Crown that is affirmed by Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

138 HC judgment, above n 1, at [660].

139 We note that the boundaries of CMT Order 2 are yet to be resolved. We will address this in the second judgment.



[97] The applications for CMT in respect of Whakaari and Te Paepae o Aotea were dismissed.[140]

[98] Various parties appealed and cross-appealed to the Court of Appeal. Broadly speaking, the successful applicant groups supported the High Court judgment (though cross-appealed on specific points such as Whakaari and Te Paepae o Aotea). The unsuccessful applicant groups appealed on a range of issues of fact and law. Finally, LCI's appeal largely challenged the High Court's interpretation of s 58.

[99] The Court of Appeal allowed the appeals in respect of CMT Orders 1 and 3 and remitted them to the High Court for rehearing.[141] However, the Court concluded it had sufficient evidence to address CMT Order 2 and, on considering that evidence, the Court reached the same conclusion as the High Court.[142] Finally, the Court of Appeal agreed that the applicant groups had not met the test for CMT regarding Whakaari and Te Paepae o Aotea.[143] Although the Court was unanimous as to the

140 HC judgment, above n 1, at [661].
141 See CA judgment, above n 1, at [294], [319], [321] and [356] per Miller J, and see at [360] per Cooper P and Goddard J.
142 At [324] and [353] per Miller J, and see at [360] per Cooper P and Goddard J.
143 At [314] and [354] per Miller J, and see at [360] per Cooper P and Goddard J.

disposition of the appeals,[144] it was divided as to aspects of the reasons. Cooper P and Goddard J formed a majority on those aspects, with Miller J dissenting. The key points of difference related to the correct approach to s 58 and when it will be appropriate for the court to award a shared CMT. However, much of Miller J's analysis was adopted by the majority so where his reasons reflect the unanimous view of the Court, we will refer to the Court as a whole. Where the reasons address a disputed point, we will signal this.

[100] The Supreme Court received eight applications for leave to appeal the Court of Appeal decision. On 17 April 2024, these applications were granted on the question of the correctness of the judgment of the Court of Appeal.[145]

Statutory framework

[101] It has been necessary to set out the legislative history of MACA and the much longer history of customary rights recognition (including customary marine rights recognition) in considerable detail because that background greatly assists in understanding the Act's text, purpose and context.[146] Having addressed those matters and summarised the appeals themselves, we now turn to discuss the relevant provisions of the Act.

Purpose provisions

[102] The Preamble explains that MACA emerged from concerns that the policy underlying the FSA breached the Treaty of Waitangi and had "severely discriminatory" effects.[147] It is convenient to set the Preamble out in full:[148]

> **Preamble**
>
> (1) In June 2003, the Court of Appeal held in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore

144 At [351] per Miller J and [360] per Cooper P and Goddard J.
145 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau Me Ngā Hapū o Te Whakatōhea* [2024] NZSC 33 (Glazebrook, Ellen France and Williams JJ). We note that one of the appeals—that brought by Crown Regional Holdings Ltd—has since been abandoned.
146 Legislation Act, s 10(1).
147 MACA, Preamble subss (2)–(3).
148 Emphasis in original.

and seabed. The Foreshore and Seabed Act 2004 (the **2004 Act**) was enacted partly in response to the Court of Appeal's decision:

(2) In its *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071), the Waitangi Tribunal found the policy underpinning the 2004 Act in breach of the Treaty of Waitangi. The Tribunal raised questions as to whether the policy complied with the rule of law and the principles of fairness and non-discrimination against a particular group of people. Criticism was voiced against the discriminatory effect of the 2004 Act on whānau, hapū, and iwi by the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Special Rapporteur:

(3) In 2009, a Ministerial Review Panel was set up to provide independent advice on the 2004 Act. It, too, viewed the Act as severely discriminatory against whānau, hapū, and iwi. The Panel proposed the repeal of the 2004 Act and engagement with Māori and the public about their interests in the foreshore and seabed, recommending that new legislation be enacted to reflect the Treaty of Waitangi and to recognise and provide for the interests of whānau, hapū, and iwi and for public interests in the foreshore and seabed:

(4) This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations:

[103] Section 4 sets out MACA's purposes in comprehensive terms. It focuses throughout on the need to reconcile potentially competing rights and interests for the benefit of all:

4 Purpose

(1) The purpose of this Act is to—

(a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and

(b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and

(c) provide for the exercise of customary interests in the common marine and coastal area; and

(d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

(2) To that end, this Act—

(a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and

(b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and

(c) gives legal expression to customary interests; and

(d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and

(e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—

(i) for its intrinsic worth; and

(ii) for the benefit, use, and enjoyment of the public of New Zealand.

[104] This reconciliation of potentially conflicting rights and interests begins with four premises upon which the Act is built, these forming a kind of baseline on which the reconciliation work of the Act is done.[149] Reconciliation is then achieved at two levels—the first having general effect upon enactment and the second taking effect case by case as required. At the general level, the Act sets out conflict-minimising rules applicable to the entire marine and coastal area. The second level provides the machinery by which the courts (or the parties through negotiation) must then resolve fact-specific tensions that remain unaddressed.[150] This structure recognises that some potential tensions are resolvable at a general level and at the outset to provide much needed certainty; but others, by their nature, can only be truly resolved with the assistance of facts, case by case. In this latter respect, the best that can be achieved in a statute whose purpose is reconciliation is to enact language that provides guiderails with as much clarity as the subject matter will permit.

[105] Our focus in this judgment will ultimately be on the fact-specific level—in particular, the machinery relating to CMT claims. But it is important to keep in mind that the machinery depends for its efficacy on MACA's baseline premises and general rules for reconciliation. We turn to those matters now.

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149 These premises are broadly consistent with the Government's assurances prior to MACA's enactment: Ministry of Justice, above n 90, at 7. See below from [106].

150 In this judgment, our focus is on the machinery provided for CMT claims.

Baseline premises

[106] The first premise is the removal of legal and beneficial Crown ownership as previously vested by s 4(a) of the FSA. Section 11(3) divests the Crown and every local authority of ownership of any part of the common marine and coastal area and, as noted, s 11(2) accords the common marine and coastal area a special status whereby no person, including the Crown, can own it. The removal of Crown ownership was a necessary precondition to allow MACA to revisit the reconciliation of competing interests.[151]

[107] The second premise is the revival of customary interests. Section 6 restores the customary interests extinguished by the FSA and explains that, while they have independent existence, they are to be given legal expression in accordance with MACA. Section 7 further explains that providing for participation rights, PCRs and CMTs under the Act is a Treaty matter.

[108] The third premise is the protection of vested property rights and expressly authorised activities in the common marine and coastal area, according to their own terms. Some vested property rights are protected through the definition of the "common marine and coastal area".[152] The word "common" does some work, as privately held freehold land otherwise located in the marine and coastal area is deemed to be excluded from the *common* marine and coastal area.[153] Other vested property rights and expressly authorised activities are protected through specific provisions. For example, s 18 protects the rights of owners of structures, s 20 protects pre-MACA resource consents and any otherwise lawful activities from impairment,[154] and s 21 protects certain other proprietary interests (including such interests expressed as statutory authorisations).[155]

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151 But see, for example, s 74 under which the Minister of Conservation and Director-General have limited ability to override CMTs for protection purposes; and s 30 and following for vesting Crown ownership in the case of reclamations.

152 MACA, s 9(1) definition of "common marine and coastal area".

153 Section 9(1) definition of "common marine and coastal area", para (a).

154 Note, however, that s 58(2) provides that the grant of a resource consent at any time between MACA's commencement and a CMT coming into effect does not constitute substantial interruption for the purposes of the s 58 test.

155 Sections 64 and 65 also provide some measure of protection for accommodated activities and infrastructure.

[109] The fourth and final premise concerns public access, navigation and fishing rights. As a consequence of New Zealand being an island nation, certain cultural expectations have developed as to the public's access to and activities in the marine and coastal area. Sections 26–28 protect these expectations by guaranteeing public rights of access to, and navigation and fishing in, the marine and coastal area, including within CMT areas—subject only to wāhi tapu exclusions under ss 78–79.[156] Relatedly, s 8 provides that rights and obligations under international law are also expressly unaffected. These include the right of innocent passage through a nation's territorial sea, which is clearly provided for under MACA. In this way, MACA avoids some of the difficulties identified by the High Court of Australia in *Yarmirr*.[157]

General reconciliation rules

[110] There is, of course, potential for continuing tension between these premises. Customary rights could, in particular cases, come into tension with the third and fourth premises (vested property rights and expressly authorised activities, and public access, navigation and fishing rights). MACA reconciles some of these tensions at a general level. For example, MACA accepts that customary and public rights can coexist without the latter usurping the former. Section 59(3) provides that public use of an area for fishing or navigation does not "of itself" preclude the grant of a CMT. This reflects comments of the Attorney-General in the Bill's first reading debate:[158]

> The rights of customary marine title and the public rights of free access, fishing, and navigation can, and do, coexist. I am satisfied that this legislation recognises those facts and that all New Zealanders can be confident that their interests in the common marine and coastal area are recognised and protected.

[111] As to vested property rights and expressly authorised activities, MACA addresses potential tensions with customary rights in two main ways beyond the protections in ss 18 and 20–21. First, the Act narrows the scope for potential conflict by limiting the rights of CMT holders under s 62.[159] As explained above at [72], CMTs

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156 It may be suggested that rights of navigation and access would have been recognised anyway both in tikanga and in the common law. For example, Professor Richard Boast KC argues that Kirby J's dissent in *Yarmirr* was correct and fit best with the law and practice in England and in British colonies: RP Boast "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 at 281.

157 See *Yarmirr*, above n 44, at [98] per Gleeson CJ, Gaudron, Gummow and Hayne JJ but see at [285] Kirby J dissenting.

158 (15 September 2010) 666 NZPD 14003–14004.

159 We note in this context that the argument for the Crown was that CMT rights were in some respects

confer only the rights set out in s 62 and not ownership (that possibility is expressly excluded by s 11(2)). As noted, these rights include (among other things) RMA and conservation permission rights, the right to protect wāhi tapu, ownership of certain minerals[160] and newly found taonga tūturu, and the right to create a marine title planning document; we set out the provision in full below:[161]

> **62 Rights conferred by customary marine title**
>
> (1) The following rights are conferred by, and may be exercised under, a customary marine title order or an agreement on and from the effective date:
>
> (a) a Resource Management Act 1991 (**RMA**) permission right (*see* sections 66 to 70); and
>
> (b) a conservation permission right (*see* sections 71 to 75); and
>
> (c) a right to protect wāhi tapu and wāhi tapu areas (*see* sections 78 to 81); and
>
> (d) rights in relation to—
>
> (i) marine mammal watching permits (*see* section 76); and
>
> (ii) the process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement (*see* section 77); and
>
> (e) the prima facie ownership of newly found taonga tūturu (*see* section 82); and
>
> (f) the ownership of minerals other than—
>
> (i) minerals within the meaning of section 10 of the Crown Minerals Act 1991; or
>
> (ii) pounamu to which section 3 of the Ngai Tahu (Pounamu Vesting) Act 1997 applies (*see* section 83); and
>
> (g) the right to create a planning document (*see* sections 85 to 93).

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greater than those held by owners of freehold titles. Reference was made in particular to the right under s 62(1)(g) to prepare a potentially influential planning document. While that may be the case, it is clear that in other respects, CMT rights are fewer and weaker than freehold title. This is a key aspect of MACA's reconciliation purpose. SIR emphasised the significance of the CMT group's veto right over RMA consents (s 62(1)(a)). Owners of freehold titles also have that veto as (unlike CMTs) freehold titles are exclusive.

160 Subject to existing privileges: s 84.

161 Emphasis in original. These rights' full particulars and relevant qualifications are set out in ss 60–93.

(2) Subsection (3) applies if a person applies for a resource consent, a permit, or an approval in relation to a part of the common marine and coastal area in respect of which—

(a) no customary marine title order or agreement applies; but

(b) either—

(i) an applicant group has applied to the Court under section 100 for recognition of customary marine title and notice has been given in accordance with section 103; or

(ii) an applicant group has applied to enter negotiations under section 95.

(3) Before a person may lodge an application that relates to a right conferred by a customary marine title order or agreement, that person must—

(a) notify the applicant group about the application; and

(b) seek the views of the group on the application.

[112] Likewise, an important qualification on CMT rights is that an "accommodated activity" may still be carried out in an area that is subject to a CMT and such activity is unaffected by the CMT holder's RMA or conservation permission rights.[162] Accommodated activities include specified types of infrastructure,[163] activities authorised under a resource consent (provided the consent application was accepted by the relevant authority before the CMT officially came into effect) and emergency activities.[164] It is also possible for certain activities to be "deemed accommodated activities" provided they meet the relatively strict statutory definition in s 65—for example, specified infrastructure that "cannot practicably be constructed or operated" in another location and is in the regional or national interest may be shielded from the effect of CMT rights.[165]

[113] The second way MACA addresses potential tensions between customary rights on one hand, and vested private property rights and activities authorised by law on the other, is this: where conflict nevertheless arises between these rights, the private rights are likely to prevail according to their terms. This is the effect of s 20 as to prior

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162 Section 64(1).
163 See s 63 definition of "accommodated infrastructure".
164 Section 64.
165 Section 65(1)(a).

consents and lawful activities ("[n]othing in this Act limits or affects"), and s 21(2) as to prior property ("[a] proprietary interest … continues … to have effect according to its tenor").[166] That is to be expected considering the primacy afforded to property rights in western law. That said, it is implicit in MACA that the precedence of private rights will be strictly to the extent of the conflict and no more. Given the centrality of reconciliation in this statute and the importance of all the rights and interests concerned (and particularly prior Treaty rights), the courts will be slow to conclude that one set of important rights will override another—and, when that cannot be avoided, they will allow such override only to the extent necessary. As we come to, these are tensions that can only be resolved case by case, by reference to the fact-specific machinery of the Act.

[114] Finally, it should be noted that MACA's reconciliation of these multiple tensions covers the entire field. This is because s 98 provides that the only avenue for customary rights and interests to be recognised in the marine and coastal area is by application (or negotiation with the Crown) under MACA. The jurisdiction of the High Court to hear and determine "any aboriginal rights claim" is removed:[167]

> **98 Court may recognise protected customary right or customary marine title**
>
> (1) The Court may make an order recognising a protected customary right or customary marine title (a **recognition order**).
>
> (2) The Court may only make an order if it is satisfied that the applicant,—
>
> (a) in the case of an application for recognition of a protected customary right, meets the requirements of section 51(1); or
>
> (b) in the case of an application for recognition of customary marine title, meets the requirements of section 58.
>
> (3) No other court has jurisdiction to make a recognition order.

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166 Section 18 has a similar effect regarding structures fixed to, or under or over, any part of the common marine and coastal area. Under subs (2), such structures are to be regarded as personal property not forming part of the common marine and coastal area. Subsection (3) then provides that any person who, before MACA's commencement, had an interest in the structure "continues to have that interest in the structure as personal property until the person's interest is changed by a disposition or by operation of law".

167 Subsection (4). Emphasis in original.

(4) On and after the commencement of this Act, the jurisdiction of the Court to hear and determine any aboriginal rights claim is replaced fully by the jurisdiction of the Court under this Act.

(5) In subsection (4), **aboriginal rights claim** means any claim in respect of the common marine and coastal area that is based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, titles, or duties of a similar nature, whether arising before, on, or after the commencement of this Act and whether or not the claim is based on, or relies on, any 1 or more of the following:

(a) a rule, principle, or practice of the common law or equity:

(b) the Treaty of Waitangi:

(c) the existence of a trust:

(d) an obligation of any kind.

(6) Nothing in this section limits section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

(7) Subsection (3) does not limit section 112.

[115] The jurisdiction of the Māori Land Court recognised in *Ngāti Apa* is also removed by excluding the common marine and coastal area from the definition of land in s 4 of the TWMA.[168]

Fact-specific reconciliation rules: s 58 and supporting provisions

[116] Having summarised MACA's baseline premises and rules of general application, we now turn to the working machinery of the Act where the courts must play a key role. The test for CMT is set out in s 58. The relevant parts for present purposes are as follows:

(1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—

(a) holds the specified area in accordance with tikanga; and

(b) has, in relation to the specified area,—

(i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or

168 See MACA, s 128 and Schedule 3, Part 1.

(ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

(2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—

(a) the commencement of this Act; and

(b) the effective date.

…

(4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

[117] As can be seen, this section does a lot of work. It refers to the concept of holding an area according to tikanga, and to exclusive use and occupation.[169] It introduces a requirement of continuity by providing that exclusive use and occupation must continue from 1840 to the present without substantial interruption.[170] Likewise, extinguishment as a matter of law may preclude the grant of CMT.[171] The previous FSA test for TCRs also contained concepts of exclusive use and occupation, from 1840 to the present,[172] and substantial interruption.[173] But the tests are distinct, with s 58 simplifying the requirements and explicitly recognising the importance of tikanga.

[118] Section 59 sets out potentially relevant considerations for the court's inquiry under s 58—namely, whether the applicant group owns land contiguous to the claim area[174] or exercises non-commercial fishing rights.[175] On the other hand, third-party fishing or navigation in the area does not "of itself" prevent the establishment of CMT.[176]

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169 MACA, s 58(1)(a)–(b)(i).
170 Section 58(1)(b)(i).
171 Section 58(4).
172 The timeframe in the FSA was from 1840 until the commencement of Part 2 of the Act to recognise applicant groups could not meet the test for the period after rights were extinguished under the FSA: s 32(2)(a).
173 Section 32.
174 MACA, s 59(1)(a)(i). Under the FSA, this was a requirement for territorial customary rights: FSA, s 32(2)(b). Ownership of contiguous land, while relevant, is no longer required under MACA.
175 MACA, s 59(1)(a)(ii).
176 Section 59(3).

[119] Section 58 must also be read in light of s 106. Section 106 distributes the burden of proof between applicants and contradictors in CMT applications as follows:

> (2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area—
>
> (a) is held in accordance with tikanga; and
>
> (b) has been used and occupied by the applicant group, either—
>
> (i) from 1840 to the present day; or
>
> (ii) from the time of a customary transfer to the present day.
>
> (3) In the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

[120] This provides the framework for applying s 58 in practice. Applicant groups must prove they hold the specified area in accordance with tikanga (which, as we will point out shortly, itself requires proof of some control and continuity)[177] and have "used and occupied" the area "from 1840 to the present day".[178] It is then left to contradictors to adduce evidence of non-exclusivity or substantial interruption. Thus, for the purposes of s 98(2)(b), it is presumed, absent proof to the contrary, that the applicant's use and occupation has been exclusive and not substantially interrupted. That is clear from the fact that substantial interruption and exclusivity are omitted from the s 58 elements an applicant group must prove to the court's satisfaction in s 106.

[121] The legislative history demonstrates that omission is deliberate. Clause 105 of the original Bill required an applicant group to prove it was "entitled to the customary interest" and established a presumption that the interest "has not been extinguished" absent proof to the contrary.[179] Clause 105 was amended to the final form of what became s 106 following the Departmental Report's recommendation below:[180]

> Amend to provide further clarity that:

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177 See below at [140]–[142].

178 Section 106(2)(b)(i).

179 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1), cl 105(1)–(2).

180 *Departmental Report*, above n 112, at 426. This extract was quoted in the Select Committee Report, above n 95, at 36. We note that the legislative history often conflates non-exclusivity and substantial interruption with extinguishment as a matter of law, even though those three terms are used in separate parts of the s 58 test. This may have been no more than convenient shorthand as

- applicant groups must prove the positive aspects of their claim (held in accordance with tikanga and continuous use and occupation); and

- the Crown is responsible for proving extinguishment of the customary interest by fact or law.

[122] The Departmental Report confirms that the intention was to clarify the onus on applicants extends only to use and occupation from 1840 to the present day, and not substantial interruption or exclusivity:

> 2353. It is intended the Crown be responsible for proving extinguishment of the customary interest by fact or law. This means the Crown is responsible for showing that the claimant's use and occupation of the area has not been exclusive or there has been a substantial interruption or it has been extinguished at law.

[123] Likewise, when what is now s 106 was introduced via supplementary order paper,[181] the Attorney-General explained to the House:[182]

> Clause 105 is an important clause, and it is the subject of an amendment in the Supplementary Order Paper. This is the burden of proof clause, and it has been clarified to ensure that applicant groups are expected only to prove the positive elements in the tests. Some people have complained that that shows favouritism to applicants. It does nothing of the sort. The Court of Appeal in the *Ngāti Apa* case made it very clear, based on Canadian and Australian authority, that the onus of proving extinguishment lies on the Crown and that the necessary purpose must be clear and plain. Those authorities are well established.

[124] While the merits of this change were hotly debated—it being suggested both that it was "untenable to Māori"[183] and a "massive transfer of wealth"[184] to them—it is plain that members understood the effect of the clause was as the Attorney suggested.[185]

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s 106 concerns both PCRs and CMTs, while only the latter refers to "exclusive" and "substantial interruption". In any event, the intention that non-exclusivity, substantial interruption and extinguishment are matters for contradictors to prove, however, remains clear throughout the legislative history.

181 Supplementary Order Paper 2011 (207) Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) at 40.

182 (17 March 2011) 670 NZPD 17394.

183 (17 March 2011) 670 NZPD 17399.

184 (17 March 2011) 670 NZPD 17402.

185 See, for example, (17 March 2011) 670 NZPD 17398–17399 per Hone Harawira MP (Independent—Te Tai Tokerau), 17400 per the Hon Parekura Horomia MP (Labour—Ikaroa-Rāwhiti), 17402–17403 per the Hon John Boscawen MP (ACT), 17404–17405 per Rāhui Katene MP (Māori Party—Te Tai Tonga) and 17425–17427 per the Hon Mita Ririnui MP (Labour).

[125] Stepping back, it may be seen that requirements that ahi kā be maintained, that use and occupation be exclusive and substantially uninterrupted, and that consideration be given to the guiding factors in s 59, all do case-specific reconciliation work, while s 106 makes further balancing adjustments at the procedural level. There are other relevant provisions to which we will return in due course, but the foregoing provisions fairly reflect the approach adopted in MACA to achieve its purpose of reconciling a variety of highly valued, but competing, rights and interests on specific facts.

[126] We note, for completeness, the important reconciliation work done at a procedural level by ss 102–104. Sections 102 and 103 provide that applicant groups must give public notice of their application and serve the application on specified local authorities, the Solicitor-General and persons likely to be directly affected by the application. Section 104 enables "[a]ny interested person" to appear and be heard in applications for recognition orders. These procedural provisions provide a platform for reconciliation through broad rights of participation.

The parties' submissions

[127] Against this background, we turn now to the parties' submissions. Again, as discussed above at [85]–[100], the present appeals concern the interpretation of MACA in the context of competing and overlapping claims to CMT in the eastern Bay of Plenty. While there are other issues arising on appeal, these will be addressed in a separate judgment.[186] Our focus, therefore, will be on the parties' submissions as they relate to the interpretation of s 58.

[128] The language of s 58 is important, so we repeat the relevant parts here:[187]

(a) under s 58(1)(a), the applicant group must hold the area in accordance with tikanga; and

(b) under s 58(1)(b)(i), they must have exclusively used and occupied it from 1840 to the present day without substantial interruption.

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186 As explained above at [5].
187 See above at [116] where the section is reproduced more fully.

[129] In this Court, the interpretation of s 58(1)(a) was relatively uncontroversial.[188] The core of the argument related to the interpretation of s 58(1)(b)(i). On that point, three broad positions emerged during the hearing. At a high level, the parties differed as to how stringent a threshold s 58(1)(b)(i) imposes and what its conceptual underpinnings are.

[130] The first position was advanced by iwi, hapū and whānau groups, with Te Kāhui carrying the bulk of the argument. Te Kāhui submitted that s 58(1)(b)(i) is driven by tikanga and imposes little more on applicants than what they would otherwise need to show under s 58(1)(a). The purpose of s 58(1)(b) is to demonstrate that the applicant group has sufficient mana to establish customary title (as opposed to merely having a claim to a PCR, for example);[189] the meaning of "exclusively used and occupied it from 1840 to the present day without substantial interruption" is determined by tikanga. Imposing a higher threshold than this would be to extinguish customary rights by a side wind, which would be inconsistent with the text and purpose of MACA. Parliament instead intended its compromise to be reflected in the limited nature of the rights afforded by CMT, and the protection of existing property and public access, navigation and fishing rights.

[131] The second position was advanced by parties that coalesced around the Attorney-General's submissions. The Attorney-General accepted that tikanga is relevant to s 58(1)(b)(i) but argued that the threshold for recognition imposed by s 58 is not solely driven by tikanga. Instead, the various components of "exclusively used and occupied it from 1840 to the present day without substantial interruption" are an additional hurdle for applicant groups. The compromise Parliament intended is contained both in the test for CMT and what rights CMT provides.

[132] LCI, while largely supporting the Attorney-General's submissions, advanced a third position. It emphasised the fact that s 58(1)(b)(i) does not include a reference to tikanga and is structurally separate from s 58(1)(a). This, in LCI's submission, means that s 58(1)(b)(i) is focused on European property law concepts and not tikanga.

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188 Only Ngāti Muriwai and Kutarere Marae disputed the Court of Appeal's approach, as we come to below at [138].

189 Te Kāhui submitted that this was the purpose of the Canadian cases from which the requirement was drawn.

Therefore, it was submitted, the overall test imposes a higher threshold for recognition than that advocated for by iwi, hapū and whānau groups and by the Attorney-General.

Our approach

[133] Our analysis is grounded in the statutory framework—that is, MACA's reconciliation of rights and interests through its four baseline premises, general reconciliation rules and fact-specific reconciliation rules. Our focus in this judgment is on the fact-specific machinery provided by s 58; we interpret the text of the section in light of the Act's purpose and context, including the four baseline premises on which the section rests.[190] Section 58 ensures that the balance struck by Parliament is reflected in the court's case-by-case assessment of specific facts. Four key elements in the section reflect that intention. We will come to the precise wording of each element shortly, but generally speaking, none of them is novel. They invoke the experience of courts in Australia and Canada in grappling with similar issues, and/or our own experience of customary rights investigations in the Native Land Court and, later, the Māori Land Court.[191] We address the interpretation of each of the following phrases in turn:

(a) "holds … in accordance with tikanga";[192]

(b) "exclusively used and occupied";[193]

(c) "from 1840 to the present day without substantial interruption";[194] and

(d) "extinguished as a matter of law".[195]

[134] Before we do, however, a note of caution. These components are not just interconnected, but overlapping. As will be seen they sometimes express the same idea but from a different perspective. Of necessity, we discuss them as distinct

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190 Legislation Act, s 10(1); and see above at [106]–[109].
191 See discussion relating to Australia and Canada above at [11]–[32]; and discussion of Native Land Court jurisprudence above at [33]–[57].
192 MACA, s 58(1)(a).
193 Section 58(1)(b)(i).
194 Section 58(1)(b)(i).
195 Section 58(4).

components of the s 58 test, but it is also important to understand how they interact and overlap both conceptually and evidentially. To avoid confusion and unnecessary repetition, however, we have found it helpful to discuss aspects relevant to multiple headings under just one of them.

[135] Note also that we have included a table as an Appendix to summarise how the Act's four baseline premises are reconciled at a general and fact-specific level—in particular, how customary rights are reconciled with the other three premises.

"[H]olds … in accordance with tikanga"

The Courts below

[136] In the High Court, Churchman J rejected the argument that "holds" should be infused with European proprietorial concepts of land.[196] He concluded that holding an area in accordance with tikanga is a question of fact,[197] which must focus "on the evidence of tikanga, and the lived experience of that applicant group".[198] It will, he considered, be "heavily influenced by the views of those who are experts in tikanga".[199]

[137] The majority in the Court of Appeal reiterated the connection between s 58(1)(a) of MACA and s 129(2)(a) of the TWMA.[200] They agreed with the High Court that the focus should be on tikanga. However, they found that evidence demonstrating *control* or *authority* with respect to the area (rather than evidence of carrying out certain activities or controlling a particular resource in the area) is of particular relevance for CMT.[201] The majority determined it is helpful to consider "the group's intention and ability to control access to an area, and the use of resources within it, *as a matter of tikanga*".[202] Such an approach is consistent with Māori customary relationships with land and the tikanga of whanaungatanga and manaakitanga. Allowing others to access an area and use its resources may express

196 HC judgment, above n 1, at [119]–[144].
197 At [141].
198 At [130].
199 At [131].
200 CA judgment, above n 1, at [397].
201 At [401] and [404].
202 At [403] (emphasis in original).

manaakitanga and authority rather than a lack of control.[203] In his separate reasons, Miller J adopted a similar approach.[204]

The parties' submissions

[138] Ngāti Muriwai and Kutarere Marae were the only parties to dispute the Court of Appeal's approach. They argued that by requiring customary control, the Court of Appeal infused the test with property law concepts; this was an error resulting in the Court adopting too strict a test.

Our analysis

[139] We have discussed the principles of tikanga in relation to resources both terrestrial and marine in some detail above, and it is unnecessary to repeat that material here. We have also noted that this component of the test is drawn from s 129 of the TWMA and so invokes the customary land jurisprudence of the Māori Land Court, but that the TWMA does not provide the gradient of recognition options contained in MACA.[205] We emphasise that the operative verb is "holds" in accordance with tikanga. This has two important implications.

[140] The first may be seen by comparing that language with that applied to PCRs. PCRs are, according to s 51, *exercised* in accordance with tikanga but CMTs are *held* in accordance with tikanga. This suggests that the required relationship with the claimed area is more significant for a CMT both in nature and extent. That is, the customary interest cannot just be a collection of unconnected activities or uses. It must instead amount to an integrated or holistic relationship with a seascape. Such a requirement is, frankly, unsurprising. As the findings of Chief Judges Fenton and Morrison demonstrate, that more holistic approach is tikanga's preference anyway.[206] To reiterate our earlier conclusions in that regard: through acts of reverence, exploitation, control and memory, relevant places within a seascape were named and located, the ancestors belonging to those places were identified, the whakapapa that

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203 At [403].
204 At [140]–[141].
205 See above at [47]–[50] and [57].
206 See *Kauwaeranga* reprint, above n 75; and *Te Whaaro Oneroa a Tohe (90 Mile Beach)*, above n 79.

conveyed their rights through the generations was remembered, and the rights themselves were exercised.[207]

[141] Another way of expressing this idea is that "holds" suggests that, in addition to the claim of a special relationship with a seascape and the carrying out of activities there, *mana* over the relevant area is claimed and exercised. We also agree with the Court of Appeal that the exercise of mana as control and as the practical expression of the claimed take, or source of right, will be a focus. Contrary to the submissions of Ngāti Muriwai and Kutarere Marae, we do not consider that control is necessarily a western proprietorial concept. Mana—a quintessentially Māori principle—also carries with it notions of control. That said, as a guard against the common law's tendency to disaggregate for the purpose of analysis, it is important to understand that maintaining what might, in western terms, be called a spiritual relationship with place, and carrying out activities in that place, are themselves expressions of mana. Mana, being the corollary of kaitiakitanga, is about the *way* these things are remembered, maintained and done.

[142] The second implication follows from "holds" being in the present tense. Demonstrating that the seascape was held in the past (as tikanga generally requires) will not be enough. It must be demonstrated that the tikanga relationship with the claim area is a continuing one. This is consistent with the tikanga principle of ahi kā, as we have discussed.[208] It follows that "holds" must require that the customary interest has not become ahi mātaotao in accordance with tikanga. Relevant to that inquiry will be whether connection with the claim area has been lost, merely impaired (ahi teretere) or even facilitated through the effects of colonisation. An example of the last-mentioned outcome is the evidence given by historian Mark Derby for the Attorney-General, and noted by Churchman J in his judgment, that the loss of adjoining land through raupatu increased Te Whakatōhea's reliance on fisheries and therefore strengthened its relationship with the takutai moana.[209]

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207 Above at [56].
208 Above at [40] and [42].
209 HC judgment, above n 1, at [202].

[143] An interesting question arises as to the relationship between the ahi kā requirement in tikanga and the substantial interruption exception in s 58(1)(b)(i). It is not a focus of the present appeals but may arise more squarely in later cases. As we have already noted, different elements of the test can express similar ideas albeit from a very different perspective.

"[E]xclusively used and occupied"

[144] We now turn to the requirement in s 58(1)(b)(i) for an applicant group to have "exclusively used and occupied" the specified area.

The Courts below

[145] Churchman J did not discuss the meaning of exclusive use and occupation in great detail. The Attorney-General had submitted that exclusive use and occupation had parallels with Canadian jurisprudence, which requires an "intention and ability to control the specified area against third parties".[210] But Churchman J noted that the Canadian approach is too different to the New Zealand context, in light of the more limited rights associated with CMT and the values of whanaungatanga and manaakitanga.[211]

[146] In the Court of Appeal, the majority found that exclusive use and occupation requires:[212]

> … 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.

[147] However, account must be taken of tikanga principles such as whanaungatanga and manaakitanga when considering the presence of others in the area.[213]

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210 At [149] citing *Tsilhqot'in*, above n 23, at [48].
211 At [174].
212 CA judgment, above n 1, at [422].
213 At [424].

[148] Ultimately, the majority formulated the test as:[214]

> Whether in 1840, prior to the proclamation of British sovereignty, the group (or its tikanga predecessor(s)) used and occupied the area, and had sufficient control over that area to exclude others if they wished to do so. This inquiry essentially parallels the inquiry required by common law to establish customary title as at 1840.

[149] We note here that majority focused on pre-colonisation use and occupation. We discuss the Court of Appeal's approach to the requirement for continuity below at [178]–[184].

[150] Leaving continuity to one side, Miller J took a similar approach to exclusive use and occupation. Drawing on Canadian jurisprudence, he concluded that exclusivity requires "both an externally-manifested intention to control the area as against other groups and the capacity to do so".[215] This is a factual inquiry that is context-specific and culturally sensitive. There must be evidence of activities that are consistent with exclusive use and occupation, which are "regularly done through cultural exchanges or practices" (such as rāhui).[216]

The parties' submissions

[151] All except LCI agreed tikanga is relevant to exclusive use and occupation.[217] Otherwise, two broad positions emerged amongst the parties' submissions. One position was advanced by iwi, hapū and whānau groups. Te Kāhui considered the inquiry is tikanga-driven, placing particular emphasis on mana whakahaere to distinguish CMT from the use rights protected in PCRs.[218] Te Kāhui's submissions on this point were adopted by Te Upokorehe at the oral hearing. Ngāti Awa, Te Tāwharau, and Ngāi Tai and Ririwhenua also broadly agreed with Te Kāhui. Te Whānau-ā-Apanui likewise emphasised the relevance of tikanga and argued shared exclusivity is a matter of fact. Ngāti Muriwai and Kutarere Marae, and Ngāti Porou

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214 At [434(b)].
215 At [162].
216 At [165].
217 LCI argued exclusive use and occupation is not driven by tikanga, but rather is oriented around common law concepts of property.
218 Mana whakahaere refers to concepts of authority and governance: Te Aka Māori Dictionary "mana whakahaere" <https://maoridictionary.co.nz>.

supported the Court of Appeal majority's interpretation while opposing the Attorney-General's position.

[152] The second position was advanced by the Attorney-General, with support from SIR. The Attorney-General argued the test is intention and ability to control, though absolute exclusivity is not required; the test is fact-sensitive. Tikanga is relevant but does not take precedence over common law concepts and does not permit elements of the statutory test to be disregarded.

Our analysis

[153] As we have noted the s 58 requirement for exclusive use and occupation is drawn from the Canadian decision in *Delgamuukw*, which was subsequently developed in *Tsilhqot'in*. It is also referred to in the High Court of Australia's decision in *Western Australia v Ward*.[219] And it is, of course, the subject of the express guarantee to Māori of "full exclusive and undisturbed possession of their Lands and … Fisheries" in art 2 of the Treaty of Waitangi.

[154] Common law concepts of exclusive use and occupation are plainly relevant to the inquiry, both because the overseas authorities say that and because the parliamentary material invokes them. The articulation in *Tsilhqot'in* is apposite. What is required is a "strong presence on or over the land claimed, manifesting itself in acts of occupation" and an "intention and capacity to control the land".[220] But these general propositions can only take the inquiry so far. Just what those acts of occupation must be and how this intention and capacity to control is expressed will depend on context. That context will include the nature of the place claimed and of the community claiming it, the nature of the customary relationship with the place, including its use, and the prior law—tikanga—regulating both relationship and use.[221]

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219 *Ward*, above n 43, at [89] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

220 *Tsilhqot'in*, above n 23, at [38] and [48]. See also above at [16]–[20].

221 We note that the Canadian authorities stress the importance of considering the geographical nature of the place claimed and the characteristics of a particular applicant group. For example, in *Tsilhqot'in*, the Supreme Court of Canada took into account the fact the applicant group was small in number and the land was extensive but harsh, only capable of supporting a limited number of people. Exclusive use and occupation had to be considered in light of these factors: see *Tsilhqot'in*, above n 23, at [37], [41]–[42] and [49].

[155] So, the Australian and Canadian cases, appropriately, caution against imposing purely western concepts of property on the court's inquiry in relation to this aspect of the CMT test. They emphasise the relevance of the applicant group's perspective when assessing exclusive use and occupation. For example, *Delgamuukw* suggests that both the common law and the claimant group's perspective on land are relevant.[222] Similarly, the Court in *Tsilhqot'in* held:[223]

> … the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

[156] In a similar way, the majority of the High Court of Australia in *Ward* concluded the court's task is "to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms".[224] The danger of imposing common law views of property on systems that have a very different concept of the relationship between people and land was acknowledged.[225] MACA reflects this experience.

[157] The Native Land Court cases confirm in the context of New Zealand and MACA that there will, of necessity, be substantial factual and conceptual overlaps between demonstrating a place is held in accordance with tikanga and showing its exclusive use and occupation. In addition to the s 58(1)(a) tikanga inquiry, s 58(1)(b)(i) applies a common law lens (drawn from the Canadian cases) to the evidence of use and occupation according to tikanga. Without this weaving together of tikanga and the common law, the court (or the parties in negotiation) cannot finally determine whether the customary rights expressed in the evidence are such as to require recognition by way of a CMT. This too reflects the reconciliation purpose of the Act. We accordingly reject the submission of LCI that tikanga has no place in the assessment of exclusive use and occupation.

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222 *Delgamuukw*, above n 15, at [147]–[149] per Lamer CJ, Cory and Major JJ, and see at [190] and [194] per La Forest and L'Heureux-Dubé JJ concurring.

223 *Tsilhqot'in*, above n 23, at [32].

224 *Ward*, above n 43, at [89] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

225 At [90] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

[158] Under MACA, the context of place is particularly significant. Canada and Australia have struggled in applying their tests to the marine and coastal area. Potential inconsistency with rights of navigation, fishing and innocent passage has complicated matters.[226] MACA has avoided these barriers by declaring that customary rights and public rights of access, navigation and fishing may coexist.[227] The acceptability of this kind of coexistence must colour what it meant by "exclusive".

[159] It must also be remembered that the seascape is not dry land. It cannot be fenced off, built up or otherwise occupied in the same way that dry land can be. Nor, until relatively recently, was it possible (or even necessary) to farm areas or resources within the seascape. It follows that the indicia and intensity of use and occupation will be distinctive to the seascape.

[160] A connected point is that this component should not be read as requiring applicant groups to demonstrate that their use and occupation from 1840 were unaffected by colonisation, including the post-*Ninety-Mile Beach* understanding that customary title to the foreshore and seabed had been extinguished. As we have said, MACA is about reconciliation, not usurpation. And as noted by the majority in the Court of Appeal, historically (and currently) Māori have been prevented from controlling access to marine areas over which they claim mana, including through raupatu and the prohibition of recourse to the courts.[228] MACA acknowledges this reality by removing the prior FSA requirement to hold "continuous title to contiguous land".[229] Instead, it is merely a relevant consideration.[230] Further support may be found in the fact that, as mentioned, ongoing public use of a claimed area is not "of

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226 *Yarmirr*, above n 44, at [98] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; and see *Saugeen First Nation v Canada (Attorney General)*, above n 31; and *Saugeen First Nation v Canada (Attorney General)* 2021 ONSC 4181, [2021] OJ 4201.

227 See s 59(3). We suggest, in any event, that protecting public access, navigation and fishing rights would likely accord with principles of tikanga and the common law. We agree with the Court of Appeal that public access and recreational uses must be treated in the same way as fishing and navigation: see CA judgment, above n 1, at [120] per Miller J and [426(f)] per Cooper P and Goddard J.

228 CA judgment, above n 1, at [426(d)] citing Native Land Act 1909, s 88.

229 FSA, s 32(2)(b).

230 See MACA, s 59(1)(a)(i). In particular, the removal of this requirement was to recognise that applicant groups may have lost title to contiguous land through Treaty-breaching raupatu and that such a loss should not automatically preclude recognition of CMT: *Departmental Report*, above n 112, at [1437].

itself" disqualifying.[231] And as we come to below, the distribution of evidential burdens under s 106 acknowledges the difficulties for applicants presented by their experience of colonisation. These important provisions reflect practical legislative respect for Treaty-guaranteed rights of exclusive and undisturbed possession of lands and fisheries.

[161] Considering all of the above, use and occupation cannot mean actual physical occupation of the seascape is required. Occupation is clearly meant in the sense of control rather than residence. Likewise, as acknowledged by the Attorney-General, exclusive cannot mean literally to the exclusion of all others. The Act's context (seascape) and purpose (reconciliation) are quite inconsistent with that construction. Instead, making extensive use of the space (in light of its nature and resources) coupled with an intention and some capacity to assert control over it, to the extent permitted by law, is what is intended by the test and supported in the cases. This will be consistent with the existence of the holistic or integrated tikanga-based relationship with the area required by the first component of the CMT test.[232] So, where whānau, hapū or iwi have maintained a strong cultural connection with an area, harvested and protected its resources, and asserted mana in a practical way in relation to it, that may be sufficient on the mix of facts in a particular case. That may be so notwithstanding third-party use of the area. We discuss the potential for third-party incursion to substantially interrupt an applicant group's exclusive use and occupation below at [188]–[204]. Rather than cover the same or similar material twice, we will address the substantive points there.

[162] In written submissions, counsel for the Attorney-General helpfully set out relevant factors that may support a conclusion that the applicant group has demonstrated sufficient use and control of an area as against third parties. These were drawn in the main from existing MACA decisions. They were:

(a) ownership of abutting land and in particular control over access points to the takutai moana;

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231 MACA, s 59(3).
232 See above at [140]–[141].

(b) the exercise of non-commercial customary fishing rights;

(c) the presence of fishing grounds that "belong to" a group and which may be used exclusively and kept confidential by that group;

(d) the existence of coastal marae and tauranga waka within the area;

(e) the observance of tikanga associated with wāhi tapu as a way of restricting access;

(f) the imposition of rāhui, and their observance by third parties;

(g) evidence of members of the applicant group educating and correcting the way third parties carry out activities within the area; and

(h) the applicant group's involvement in resource management and other regulatory processes concerning the takutai moana.

[163] We agree that these indicators will all be relevant, but emphasise that the list is neither exhaustive nor cumulative. But it is what they must share in common that is important. Rather than isolated acts or circumstances, they must reflect that the applicant group still uses and relates to the claimed seascape in a way that is integrated or holistic—that is, as part of a continuing order within the applicant group community. If that is their true context, such acts or circumstances will be properly seen as practical expressions of mana or control over the seascape. They will accordingly contribute to satisfying the exclusive use and control requirement. Alongside the examples provided by the Attorney-General, the following may also be seen as relevant to that wider assessment:

(a) engaging in tikanga-based ceremonies in relation to the area including, but not only, the imposition of rāhui;

(b) organising or being involved in fora, events or collective activities that reflect practical kaitiakitanga of the claim area—for example,

environmental clean ups or public discussions in relation to the health of an aspect of the seascape

(c) educating members of the iwi or hapū about tikanga and the claim area—for example, by holding wānanga on the subject and facilitating practical exercises of kaitiakitanga in the area;

(d) maintaining deep cultural and spiritual connection with the area—for example, through regular performance of karakia, and regular repetition of place-based kōrero, waiata and so forth at hui or other public occasions;

(e) appointing kaitiaki and exercising powers under customary fishing regulations in relation to the area; and

(f) establishing formal relations and maintaining ongoing consultations with public authorities having regulatory power over the area.

[164] There will be many other ways in which mana as use and control may be demonstrated in terms of s 58(1)(b)(i) and communicated to the wider community.[233] But we stress it is a question of being satisfied that particular acts or circumstances are part of a wider context of use and control. Ultimately whether sufficient use and control of the area has been established can only be a practical question of fact and degree considered in light of the Act's context and purpose.

[165] Before leaving this subject, we should refer to the evidence and submissions provided by the intervener, Ngā Hapū o Ngāti Porou. As noted above Ngāti Porou hold 18 CMTs pursuant to a special Act: Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act. These are contiguous CMTs covering the entire coastline from Pōtikirua Point in the North (the northern edge of Ngāti Porou territory near Hicks Bay) to Koutunui Head (at the southern end of Waipiro Bay) to the South. These CMTs were the result of negotiations between Ngā Hapū o Ngāti Porou and the Crown, rather than litigation.

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233 See *Tsilhqot'in*, above n 23, at [38].

[166] As counsel for Ngāti Porou noted in written submissions, Ngāti Porou hapū continue to hold much of the land abutting the CMTs and continue to exercise their tikanga and assert their mana in the takutai moana. We were advised however that issues of substantial interruption had been raised around the location of a coastal township and associated infrastructure, and in relation to coastal roading. These were resolved in favour of granting CMTs. The particular location and context of these CMTs, combined with the level of inter-hapū coordination required to reach both internal and external agreements, suggest many of the practical indicators of use and control listed above, were present to the satisfaction of the multiple parties involved—including, of course, the Crown. Ngāti Porou advised that negotiations for further CMTs were ongoing, and the iwi was concerned that the test for CMT would be made more stringent than had, in its view, been applied by the parties in negotiations to date. This is because, while there is bespoke legislation for Ngāti Porou, it contains the same test for CMT as in MACA.[234]

[167] We have taken from Ngāti Porou evidence and submissions that the MACA regime can work well to produce practical outcomes consistent with its reconciliation purpose. To be sure, the more difficult cases are those where the non-mana whenua presence is greater and interferences in customary relationships with the marine and coastal area are more significant. But that can come as no surprise. These will be the places where the task of reconciliation through application of the CMT test will be the most difficult.

Shared exclusivity

[168] We briefly turn to shared exclusivity, recognising that we will deal with it more fully in the subsequent judgment. As noted by Miller J in the Court of Appeal:[235]

> … shared exclusive possession is the right to exclude others except those with whom possession is shared. There might be cases in which two groups lived on a particular piece of land and recognised each other's entitlement to it but nobody else's.

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234 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act, s 111.
235 CA judgment, above n 1, at [112].

[169] Shared exclusivity arises in the context of the present appeals as various applicant groups acknowledge that other groups also share CMT with respect to the same area. The most obvious example of this is Te Kāhui: a party consisting of multiple individual hapū that assert they all share CMT in the claimed area.

[170] Associate Professor Erueti's description of customary rights (discussed above at [33]) highlights that shared exclusivity in New Zealand is the rule rather than the exception. In tikanga there is a complex interweaving of rights and interests among iwi, hapū and whānau with respect to the common marine and coastal area. It would be surprising if MACA were intended to apply in a manner that cuts across tikanga in such a fundamental way.

[171] In fact, the legislative history demonstrates that MACA expressly contemplated the finding of shared exclusivity. In the Ministry of Justice's consultation document, it noted the proposed test for CMT was different to TCR under the FSA as it "allows for 'shared' exclusivity between coastal hapū/iwi as against other third party interruptions".[236]

[172] This means it is not arguable that the presence of other applicant groups who also express mana within the claimed area precludes a finding of exclusivity. Whether shared exclusivity is possible when one or more of the applicant groups assert CMT to the exclusion of all others, and whether a finding of shared exclusivity should result in a joint CMT or separate overlapping titles will be addressed in our later judgment.

Whanaungatanga and manaakitanga

[173] One further matter requires comment at this stage. That is the effect on the assessment of exclusivity of whanaungatanga and manaakitanga. These may be translated as the kin-based ethic of mutuality and the value of generosity. Much was made of these in evidence, and they were the subject of comment in the judgments below. For example, Churchman J referred to the evidence of Te Riaki Amoamo of

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[236] Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: Consultation document*, above n 90, at 36.

Ngāti Ruatākenga who spoke of the history and importance of sharing marine resources among the hapū of Te Whakatōhea.[237] A similar point was made by Te Kou Rikirangi Gage of Te Whānau-ā-Apanui:

> As with the fishing of kahawai at the Motu and Moki at Whangaparaoa, when the fish were plenty, outsiders (non-owners) distant relatives would be invited or welcomed to partake in the bounty but that in no way created rights of any sort. It was a privilege extended to outsiders … so long as they followed the rules.

[174] This, we apprehend, may be a context where legal cultures clash, and reconciliation is required. What is distinctive about the tikanga system of rights is that it is kinship-based and therefore constructed on ideas of reciprocity. Status—mana—is derived not from the acquisition of wealth and resources, but from the ability to demonstrate generosity with them. The exclusivity requirement must not ignore this kind of tikanga-sanctioned behaviour. Rather, western and Māori values may be reconciled through the concept of exclusion as control. In other words, if the evidence demonstrates that others, whether kin or not, were permitted to share in the resources of the claim area as a matter of tikanga, then exclusivity is not logically compromised. On the contrary, as the majority in the Court of Appeal put it:[238]

> … where a group permits access by other groups to its land and to its resources, that will reflect the exercise of its mana/control in respect of that land, and (as a result) supports rather than undermines a claim to CMT.

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

[175] This component of the s 58 test is the most difficult to apply. That is because it bears the major burden of the Act's reconciliation purpose in the context of CMT applications. It requires the courts to determine whether, despite the impacts of colonisation, customary rights have been exercised with sufficient continuity to be recognised by a CMT order. It is unsurprising, therefore, that the interpretation of this element of the test is the key point of divergence in the judgments of the Courts below and in the parties' submissions.

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237 HC judgment, above n 1, at [175].
238 CA judgment, above n 1, at [424] per Cooper P and Goddard J.

The Courts below

[176] Churchman J focused on whether certain activities constituted "substantial interruption" on the facts. He concluded that raupatu of the adjoining tribal territory did not amount to substantial interruption.[239] On the contrary, the evidence showed it caused Te Whakatōhea to rely to a greater degree on their marine resources. Nor, the Judge found, did pre-2011 resource consents constitute substantial interruption. He found however that reclamations did constitute substantial interruptions as the reclaimed land would no longer be in the takutai moana.[240] No final determinations about the effects of third-party structures in the area could be made,[241] but third-party commercial and recreational fishing activities were insufficient.[242]

[177] Churchman J approached substantial interruption by asking whether the applicant group's holding of the specified area in accordance with tikanga had been substantially interrupted.[243] The Court of Appeal found this to be incorrect.[244] Rather, the test is whether there has been substantial interruption of the exclusive use and occupation component of the s 58 test.

[178] The Court of Appeal was split as to what constitutes exclusive use and occupation from 1840 to the present day without substantial interruption.

[179] The majority found it "exceptionally difficult to reconcile the text of s 58(1)(b) with the purpose of MACA".[245] A "literal" interpretation of the words would lead, the majority considered, to few successful recognition orders, and so would effectively extinguish customary interests "by a side wind".[246] The majority considered that outcome would be inconsistent with the Treaty, the Government's assurances prior to the enactment of MACA, the purposes of MACA and the statement in s 7 that MACA takes account of the Treaty.

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239 HC judgment, above n 1, at [270].
240 At [271].
241 At [271].
242 HC judgment, above n 1, at [264].
243 At [204] and [264].
244 CA judgment, above n 1, at [408] per Cooper P and Goddard J and [178] per Miller J.
245 At [416].
246 At [416].

[180] However, the majority thought it possible to interpret s 58 in a more consistent way by considering the "different legal frameworks" that applied before and after the proclamation of British sovereignty.[247] The majority stated that exclusive use and occupation from 1840 to the present day highlights the requirement to "trace the relevant customary rights back to" before the proclamation of British sovereignty.[248] The applicant group must show the claimed customary rights existed in 1840 and that they were the group (or the successor of the group) that exercised those rights. That involves consideration of common law requirements for customary title, but in a culturally sensitive manner with a focus on the "customs and usages" of the group.[249]

[181] When considering whether exclusive use and occupation had continued without substantial interruption, the majority considered it necessary to have "regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga", as well as to the scheme and purpose of MACA.[250] Relevant factors include:[251]

(a) the nature of the particular customary rights involved, which will often have been consistent with third-party access to the area in a way that did not impact the use of resources within that area;

(b) the "frequent and generous exercise of manaakitanga by whānau, hapū and iwi in favour of other Māori groups, and in favour of European settlers";[252]

(c) art 2 of the Treaty, promising full exclusive and undisturbed possession of Māori lands, estates, forests, fisheries and other properties;

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247 At [418].
248 At [419].
249 At [420] citing *Tsilhqot'in*, above n 23, at [35], [41]–[42] and [50], and *Delgamuukw*, above n 15, at [148] per Lamer CJ, Cory and Major JJ.
250 CA judgment, above n 1, at [426].
251 At [426].
252 At [426(b)].

(d) "[t]he Crown's arrogation to itself of the power to control access to customary lands", depriving Māori of mechanisms to protect their rights;[253]

(e) the historically longstanding misapprehension that there were no customary rights in the common marine and coastal area; and

(f) s 59(3), which states third-party fishing or navigation does not, of itself, prevent the finding of a CMT.

[182] The majority concluded that a test where substantial third-party access would preclude the recognition of CMT would not take the above matters into account and would effectively extinguish many customary rights; the courts should be slow to attribute such an intention to Parliament.[254] Instead, only lawful activities constitute substantial interruptions;[255] activities permitted in the exercise of manaakitanga do not; nor do activities unauthorised "by legislation capable of overriding those rights".[256] Such an approach is consistent with the limited rights conferred by a CMT order, especially given that they are subject to rights of access, navigation and fishing.[257]

[183] The majority summarised the test as follows:

> [434] In summary, it seems to us that the best available reading of s 58, which respects both its text and its purpose, focuses on:
>
> (a) Whether the applicant group currently holds the relevant area as a matter of tikanga.
>
> (b) Whether in 1840, prior to the proclamation of British sovereignty, the group (or its tikanga predecessor(s)) used and occupied the area, and had sufficient control over that area to exclude others if they wished to do so. This inquiry essentially parallels the inquiry required by common law to establish customary title as at 1840.
>
> (c) Whether post-1840 that use and occupation ceased or was interrupted because the group's connection with the area and

253 At [426(d)].
254 At [427].
255 At [428].
256 At [428].
257 At [430] referring to ss 26–28 of MACA.

> control over it was lost as a matter of tikanga, or was substantially interrupted by lawful activities carried on in the area pursuant to statutory authority.

[184] Miller J disagreed with the majority's approach. He noted that its interpretation made the test easier to meet, but, in his view, no applicant group had contended for it and he did not believe it was an available interpretation under MACA.[258] The interpretation would leave "no work" for "exclusive use and occupation since 1840" and "substantial interruption" to do.[259] He also considered that the majority's approach rested on two unjustified assumptions—namely, that it would otherwise be too difficult to demonstrate exclusivity and that, in the absence of legislation, the common law would have recognised customary title in the common marine and coastal area regardless of "lawful third-party incursions over the last 180 years".[260] He suggested it was unclear what would have happened if the common law had been left to develop. Additionally, it was not inevitable that applicant groups would fail on the narrower test, as shown by the Court of Appeal effectively upholding CMT Order 2.[261] It was wrong to conclude no group could demonstrate exclusivity, particularly as public rights recognised under MACA do not prevent exclusive use and occupation, and Māori "did not abandon their claims to exclusivity following *Re Ninety-Mile Beach*".[262] MACA was also only one part of the wider scheme to govern Treaty obligations, with Treaty settlement processes aimed at addressing rights lost through colonisation.[263]

The parties' submissions

[185] Two broad positions emerged as to continuity, coalescing around the submissions of the Attorney-General and Te Kāhui respectively.

[186] The Attorney-General argued some level of third-party access is compatible with the continuity requirement but considered the Court of Appeal majority excessively narrowed the criteria for what may amount to a substantial interruption.

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258 At [188].
259 At [187].
260 At [189].
261 At [195].
262 At [163]–[164].
263 At [196].

The question of whether a substantial interruption has occurred requires an overall consideration of the evidence and so is highly fact sensitive. SIR supported the Attorney-General, with particular emphasis on the potential for commercial fishing to constitute substantial interruption. CRHL and Ōpōtiki District Council also adopted the Attorney-General's submissions, with an additional focus on the argument that substantial interruption and the accommodated activity provisions provide separate pathways for challenging a CMT application where there is infrastructure in the relevant area. LCI and Whakatāne District Council also largely agreed with the Attorney-General.

[187] In contrast, Te Kāhui considered the threshold for substantial interruption is very high, as a lower threshold would lead to extinguishment of rights by a side wind. By providing protections outside s 58 for certain public activities, Parliament contemplated that these activities would generally not constitute substantial interruption. Te Kāhui also argued that what is being substantially interrupted is the mana whakahaere exercised by the group. Te Upokorehe and Ngāti Awa broadly agreed with Te Kāhui. Ngāi Tai and Ririwhenua, Ngāti Muriwai and Kutarere Marae, and Ngāti Porou likewise supported the Court of Appeal majority's interpretation.

Our analysis

[188] We said at the beginning of this section that the continuity requirement in "from 1840 to the present day without substantial interruption" is the key reconciliation mechanism in the context of CMT and therefore the most difficult element of the test to apply. In what follows we provide the framework for deciding when, exactly, the courts are to recognise customary rights in specific cases, despite colonisation's negative effects.

Continuity

[189] We use the term "continuity" to convey the subject matter of this section as it sheds light on how the different elements of the test work together. To explain why that is, it is helpful, at this stage, to repeat how s 106 envisages the test will work in practice. First, applicant groups must prove they hold the area according to tikanga and have used and occupied it from 1840 to the present day; from their different

perspectives, both the common law and tikanga inquiries import notions of continuity and control. Second, if those hurdles are cleared, the burden shifts to contradictors to prove that use and occupation was not exclusive, or that there has been a substantial interruption.[264]

[190] We start with use and occupation from 1840 to the present day. The phrase "from 1840 to the present day" expressly introduces the requirement of continuity, but as we explained earlier in this judgment, the components of s 58 overlap significantly.[265] At times they approach the same issue but from a different perspective. Continuity is perhaps the most important example of this layering. It is reflected in tikanga, as we have discussed, because, in that very different legal framework, rights will be lost if ahi kā is not maintained.[266] While ahi kā and "from 1840 to the present day" are not necessarily the same thing, evidence used to demonstrate one element will often go to establishing the other. In a different part of the test, the use of *has* in "has … exclusively used and occupied" also implies that use and occupation must be continuous and not merely historical or merely current. Unsurprisingly, the continuity requirement parallels the Australian jurisprudence which emphasises that an applicant group must substantially maintain its connection to the specified area.[267]

[191] We turn now to substantial interruption and exclusivity. Again, while these are not coextensive ideas either, evidence used to prove that a substantial interruption has occurred will likely also go to establishing the applicant group's use and occupation was not exclusive or lost its exclusive character due to intervening events. Evidence of substantial interruption will, of course, also suggest that the use and occupation has not been sufficiently maintained from 1840 to the present—that is, that the use and

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264 We address extinguishment in the next section: below at [205]–[207].

265 Above at [134].

266 Above at [40], [42] and [142]. One can understand Churchman J's approach in that context.

267 See *Mabo (No 2)*, above n 15, at 59–61 per Brennan J; and *Yorta Yorta*, above n 37, at [47], [87] and [89] per Gleeson CJ, Gummow and Hayne JJ. See also the Canadian cases of *Delgamuukw*, above n 15, at [151] Lamer CJ, Cory and Major JJ; and *R v Marshall* 2005 SCC 43, [2005] 2 SCR 220 at [67] per McLachlin CJ, Major, Bastarache, Abella and Charron JJ. Developing doubt about the applicability of the continuity requirement in Canada led to Parliament expressly including such a requirement in the FSA and subsequently in MACA: Department of the Prime Minister and Cabinet *Foreshore and Seabed Bill: Departmental Report* (8 October 2004) at 11–12; and McHugh, above n 33, at 16.

occupation has not been continuous. Evidence of substantial interruption is therefore, in practice, the entry point to the continuity and exclusivity inquiries.

[192] As the disagreement in the Court of Appeal demonstrates, continuity may be approached from opposite ends of a spectrum of possible factual impacts on pre-existing rights. At one end, it might be suggested that any non-trivial impairment of the prior right will be fatal to its continued recognition. That would mean effectively that only areas untouched by colonisation would qualify. There are no such places in Aotearoa. At the other end of the spectrum, reading a continuity requirement out of s 58 would require the courts to assume that colonisation did not happen at all. This is just as unrealistic. These extremes cannot be found in the words of s 58, nor in MACA's purpose, which is, we repeat, to reconcile prior Treaty-guaranteed rights with long-held rights and expectations of other New Zealanders.

Substantial interruption

[193] "Substantial interruption" is not further defined in MACA. That is deliberate. It is intended to be flexible and sensitive to specific facts. The Departmental Report confirms this:[268]

> 1419. Many submitters seek further clarity and definitions of the term "without substantial interruption" in the Bill. Aquaculture New Zealand submits "without substantial interruption" is open to interpretation and needs to be more tightly defined. Talley's Group submits "substantial interruption" is a critical phrase in the Bill which must be defined in order to provide the certainty which government has stated lies at the heart of this whole exercise.
>
> *Commentary*
>
> 1420. The Government has endeavoured to provide a test which creates certainty in terms of how customary interests will be recognised but also allows enough flexibility to look into the facts of each situation. While it may be possible to include further guidance in the Bill on what constitutes a 'substantial interruption' to exclusive use and occupation this could significantly alter the nature of the test, including the flexibility of the court or Crown to balance the overall level of activity in the area by both the claimant group or third parties over 170 years.
>
> *Recommendation*
>
> 1421. No change.

[268] *Departmental Report*, above n 112.

[194] "Substantial interruption" has spatial and temporal elements. In other words, both the physical extent and the duration of any interruption will be relevant. Moreover, "interruption" is required. Mere interference will not be enough. And the interruption must be "substantial". These words acknowledge that, since 1840, some impairment of prior rights will have been inevitable and should not necessarily be disqualifying. And, as with the provisions of s 59(3) in relation to the effect of third-party fishing and navigation, they are intended to enable MACA's reconciliation purpose and its recognition that Treaty rights are in play.[269] Relevant also, as the Court of Appeal majority noted, is the fact that from 1870–2003 and from 2004–2011 the law did not recognise the customary rights of hapū and iwi in their marine spaces so they could not lawfully prevent others from crowding them out. Likewise, the distribution of the burden of proof under s 106 means that the applicant group is not required to provide a perfect evidential narrative of uninterrupted and exclusive use and occupation. Given the 185-year time span, gaps in the narrative are to be expected. If continuous use and occupation is able, fairly, to be inferred on the evidence, it will be for contradictors to show that it has not been sufficiently exclusive or that it has, in fact, been substantially interrupted.

[195] That does not mean the continuity requirement should be de-powered but it does mean that an approach that is sensitive to these historical realities is required. In submissions before this Court, the Attorney-General accepted this was the correct approach. If substantial interruption is a live issue in any case, the court's task will be to undertake a factual assessment as to the extent of the interruption spatially and/or temporally, in the context of the particular claimed area and in light of the applicant group's particular relationship with the area and its resource complex. What must be substantially interrupted is that which must have been inferentially established at stage one of the evidential inquiry: the continuing integrated or holistic order under which the applicant community uses and controls the claim area.

[196] In written submissions, counsel for the Attorney-General provided a list of matters which may contribute to or constitute a substantial interruption (depending on their nature, extent and duration), namely:[270]

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269 MACA, s 7. See our earlier point regarding access, above n 227.
270 Footnotes omitted.

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

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

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

[197] As the Attorney-General responsibly accepted with reference to fishing and navigation, activities of the kind referred to above may, but need not necessarily, constitute substantial interruption.

[198] Activities that interfere with but do not interrupt exclusive use and occupation will not be enough. Nor will activities that interrupt but only temporarily or intermittently. Neither case will meet the "substantial" requirement. But the court cannot be satisfied that continuous exclusive use and occupation of the area from 1840 to the present day has been established if the evidence is that the applicant group has, for a sufficiently substantial period, been crowded out of the claimed space by competing structures or activities. In such a case there has been substantial interruption and a CMT may not be granted.

[199] We differ from the Court of Appeal majority on this point as the majority appears to have limited interferences only to those *expressly* authorised by a statute capable of overriding customary rights.[271] That approach is too narrow. The substantial interruption inquiry is primarily a factual one, subject only to the requirement that unlawful interferences must be disregarded. In other words, lawful

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[271] We say appears to have because, as noted above at [182], the crucial passage at [428] of the majority reasons provides that substantial interruption may be caused by lawful activities and then discusses activities expressly authorised by legislation. These are not necessarily the same thing. We take express legislative authority to be the intended effective limitation; but would note that if the legislation in question had also to meet the *Ngāti Apa* test for general statutory extinguishment of customary rights, then that would be a considerable hurdle. For completeness, we note the existence of s 354(3) of the Resource Management Act 1991 [RMA], which provides: "Any person may use or occupy any part of the common marine and coastal area without obtaining consent, unless consent must be obtained under [the RMA, another Act, or an instrument or order made under an enactment.]" That section has existed in various forms since the RMA's enactment in 1991. We need not decide the implications of this section, but also note s 144 of the TWMA (as enacted)—whereby actions for recovery of possession, trespass and other injury in respect of customary land could only be brought by or on behalf of the Crown, or by the Māori Trustee on behalf of the beneficial owners of the land—and with predecessor provisions dating back to 1909: see, for example, Native Land Act 1909, Part 4; and Māori Affairs Act 1953, Part 14.

activities and structures that interfere with the exercise of customary rights will be relevant whether they are expressly authorised by statute, or simply not *un*lawful. On the other hand, unlawful activities or structures will not be relevant.[272]

[200] Substantial interruption will always be a matter of context and degree. For example, without more, a reclamation is unlikely to prevent the grant of a CMT for the wider area in which it is located, even if the reclamation itself must be excluded. Nor will the mere presence of limited infrastructure such as pipes or boat ramps. These are likely to be seen as interferences only, and may, in some cases, actually facilitate tikanga-based use and occupation.[273] On the other hand, intensive use of the area by commercial shipping or occupation of an area by major port infrastructure, involving not just reclamation and structures at scale but also associated intensification of activity in the immediate vicinity, may well amount to substantial interruption if it is of sufficient duration. In this context s 59(3) should also be mentioned. While, as it provides, third-party fishing and navigation are not necessarily disqualifying, that does not mean they will be irrelevant to the interruption assessment. They are unlikely to preclude the existence of CMT on their own, but there may be cases in which, in combination with other activities, fishing and navigation may help to crowd out the applicant group's exclusive use and occupation, and so contribute to substantial interruption.

[201] But whether exclusive use and occupation has been substantially interrupted (as opposed to merely interfered with) will still be a question of fact, to be considered rather than assumed. As *Ngā Pōtiki* demonstrates, hapū ownership of much of the adjoining land, combined with a major bridge being advantageously located in a place that reduced access to the upper harbour area from the sea, sufficiently limited third-party use even in the urban or semi-urban setting of eastern Tauranga.[274]

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272 Note also s 24, which precludes adverse possession or prescriptive title within the marine and coastal area. This confirms that permanent occupation of the area by structure or other means must be lawful. That said, s 30(4) provides a pathway for unlawful reclamations to pass into the full legal and beneficial ownership of the Crown. This is achieved when the Minister responsible for the administration of the Land Act 1948 signs a certificate to that effect: see MACA, s 29(1) definition of "Minister".

273 For example, infrastructure may be supported or even established by iwi and hapū to enable more intensive use of the resources within the area. And other structures within a seascape may actually enhance fisheries. See also the evidence in the High Court that the loss of abutting land by raupatu led to greater reliance on the applicant group's fisheries: HC judgment, above n 1, at [202].

274 *Ngā Pōtiki Stage 1 — Te Tāhuna o Rangataua* [2021] NZHC 2726, [2022] 3 NZLR 304.

[202] It is also worth noting that s 58 does not limit who (or what) can cause a substantial interruption. Māori and non-Māori alike can substantially interrupt an applicant group's exclusive use and occupation (assuming the purported interrupter, if Māori, is not themselves exercising shared customary rights). Prior to the Treaty, raupatu between Māori groups was the customary example of this kind of interruption. Moreover, customary rights can, in theory, be abandoned in a way that substantially interrupts exclusive use and occupation, as the principle of ahi kā contemplates. The question, ultimately, is not who caused the substantial interruption but whether, in fact, a substantial interruption occurred.

[203] The temporal dimension of substantial interruption has yet to be considered in argument, but it too will be context specific. Assuming physical interruption has been established, issues such as whether the infrastructure will be truly permanent, how long ago it was constructed, how many generations deep the prior tikanga-based connection was, and the overlap with concepts of ahi kā, are matters to be considered.

[204] Finally, to reiterate, the substantial interruption inquiry is fundamental to MACA's reconciliation of rights and interests, including, as we have said, Treaty rights and interests. Again, that reconciliation is premised on the idea that rights and interests should be allowed to coexist as far as possible. It follows that the courts should be slow to conclude that continuity is so broken or exclusivity so compromised as to preclude the grant of CMT.

Extinguishment

[205] The final piece of the s 58 test is extinguishment. Subsection (4) provides that "customary marine title does not exist if that title is extinguished as a matter of law". We note at the outset there is a logical difficulty with s 58(4). MACA distinguishes between common law-based customary rights which are re-enlivened under the Act, and CMT which is only those rights' statutory "recognition". It is hard to see how CMT can be extinguished at law if it has not yet been granted. It is equally hard to see how a CMT once granted, being an interest in land (per s 60(1)(a)) can be extinguished at law other than by voluntary surrender. We therefore assume that what Parliament intended to refer to in s 58(4) was extinguishment of the underlying

customary title, and not the CMT itself. As we discussed above at [71], customary rights and recognition orders are not the same thing; the effect of s 58(4) is to make the obvious point that a recognition order cannot be made where the underlying customary rights have already been extinguished.

[206] Leaving that issue to one side, it is well established that customary title and rights can only be extinguished by clear and plain statutory authority to that effect; extinguishment only occurs where Parliament's purpose is demonstrated by express words or at least necessary implication.[275] This qualification is an important one. It is not lightly to be presumed that a statute has that effect. Customary rights are not to be extinguished by a "side wind".[276] According to *Ngāti Apa*, as explained above at [7]–[9], the common law preserves customary rights until they are lawfully extinguished. MACA reflects this position in s 106(3), which establishes a presumption that customary interests have not been extinguished, absent proof to the contrary.

[207] For the purposes of this judgment, little more needs to be said on extinguishment. We will, however, return to the issue in the next judgment when addressing whether customary title and rights in and around the bed of a navigable river (here, the Waioweka River) are extinguished by coal mines legislation and not revived by MACA, such that they cannot be the subject of any recognition order.[277]

Conclusion on Court of Appeal decision

[208] The correct approach to s 58(1)(b)(i) and to the meaning of "substantial interruption" was a key issue dividing the parties. On this aspect, we consider that the majority of the Court of Appeal erred in that they appear to have concluded that only interferences expressly authorised by statute are capable of substantially interrupting exclusive use and occupation. The majority considered any other interpretation would

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275 *Ngāti Apa*, above n 5, at [13] per Elias CJ, [148] per Keith and Anderson JJ and [185] per Tipping J. This is not, however, to be confused with substantial interruption, which is factual, as we discuss above: see, in particular, above at [199].

276 See *Ngāti Apa*, above n 5, at [154] per Keith and Anderson JJ.

277 See Coal Mines Act 1979, s 261(2). This Act has since been repealed, but the effect of s 261(2) is preserved by s 354(1)(c) of the RMA. See also Coal-mines Act Amendment Act 1903, s 14(1).

result in few successful CMT applications and so, effectively, extinguish customary rights in many marine areas deserving of recognition.

[209] We consider this conclusion to be incorrect in two ways. First, apart from re-enlivening customary rights, MACA's system of recognition orders does not affect them. While, as s 98 provides, prior customary rights cannot at present be given effect other than to the extent provided for under MACA, they nonetheless exist quite independently of MACA. Second, this view undervalues MACA's reconciliation purpose. The general and fact-specific rules for achieving that purpose were carefully constructed to take proper account of the negative effects of colonisation on the customary rights of whānau, hapū and iwi. The balance they strike is not to require the court to ignore evidence of factual impairment, but to require it to view that evidence through the Treaty rights-preserving lens of the Act; one that will be slow to conclude coexistence is not possible. This approach is consistent with the constitutional nature of those rights.[278] It is not an easy task, but it has the virtue of being a transparent one. The three-stage test adopted by the majority of the Court of Appeal does not transparently confront the reconciliation task mandated by the Act.[279] The submissions received in this Court suggest it may also have caused a level of confusion.

[210] Given the importance of a correct statement of the test, we have concluded that the appeal by the Attorney-General against the judgment of the Court of Appeal on the interpretation of s 58 should be allowed so that, to better reflect the text, purpose and legislative history of MACA, this Court can state the test afresh.[280]

A brief summary of the correct approach to s 58

[211] What follows is a brief summary of our reasons on the interpretation of s 58. It does not provide full coverage of the reasoning. Further, as we have said, the

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278 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150]–[151] per William Young and Ellen France JJ and [296] per Williams J.

279 See above at [180]–[183]; and CA judgment, above n 1, at [434] per Cooper P and Goddard J.

280 To the extent other parties challenge the interpretation of s 58 by the Court of Appeal, those challenges, along with the application by Ngāti Muriwai and Kutarere Marae for leave to file reply submissions out of time and the applications to adduce new evidence made by Te Kāhui and Whakatāne District Council, will be addressed in the second judgment of the Court.

elements of the s 58 test overlap considerably. It will therefore be necessary to consider this summary in the context of the full, detailed reasons set out in this judgment.

[212] The text and legislative history of MACA make clear its purpose is to recognise and reconcile competing interests in marine and coastal areas.[281] The Act achieves this purpose by identifying and then addressing potential tensions. For example, it guarantees public rights of access to, and navigation and fishing rights in, the marine and coastal area, including within CMT areas, while on the other hand, acknowledging that the exercise of such rights within a CMT application area will not necessarily preclude the grant of CMT.

[213] There are four key premises underpinning the Act, as follows: the removal via s 11(3) of Crown legal and beneficial ownership in the common marine and coastal area; the revival via s 6 of Māori customary interests that had been extinguished by the FSA, which are to be given legal expression in accordance with MACA; the protection of vested property rights and expressly authorised activities in the common marine and coastal area; and the protection of expectations as to the public's access to and activities in the marine and coastal area.

[214] MACA then acknowledges that there will be ongoing tension between these premises, and so seeks to further reconcile them at two levels. At a general level it sets out conflict-minimising rules applicable to the entire marine and coastal area. For example, except where necessary to protect wāhi tapu, public rights of access, navigation and fishing may not be curtailed within a CMT area. Another example is that specified activities and infrastructure are expressly permitted within CMT areas. The second level is case specific. This level reconciles tensions via the tests for customary rights recognition under ss 51 (PCRs) and 58 (CMTs).[282]

[215] The Act also makes it plain that the reconciliation of the various tensions affected by the Act covers the entire field. That is because s 98 provides that the only

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281 Above at [1], [73]–[84] and [103]–[105].
282 Above at [104]–[126] and see table in Appendix below.

avenue for recognition of customary rights in the marine and coastal area is through MACA—either by application to the High Court or negotiation with the Crown.[283]

[216] Section 58 is the machinery by which the courts (or the parties by negotiation) can resolve fact-specific tensions arising on CMT applications. Generally, the concepts forming part of the test in s 58 are not novel. Rather, they invoke the experience of courts in Canada and Australia in grappling with similar issues and our own experience of customary rights investigations in the Native Land Court.[284]

[217] In terms of how the s 58 test will work in practice, s 106 of the Act provides that applicant groups must prove that they hold the claim area in accordance with tikanga and have used and occupied it from 1840 to the present day. If those hurdles are cleared, the burden shifts to contradictors to prove that use and occupation is not exclusive, or there has been a substantial interruption in exclusive use and occupation.[285] Interpreting the words in s 58 in the context and scheme of the Act, we make a number of findings in terms of the various, overlapping, parts of the s 58 test.[286]

[218] We have included a table as an Appendix to summarise how the Act's four baseline premises are reconciled at a general and fact-specific level—in particular, how customary rights are reconciled with the other three premises.

"[H]olds ... in accordance with tikanga"

[219] The use of the word "holds" in s 58(1)(a) demands a more significant relationship with the claimed area than is the case for PCRs where the word used is "exercised". The customary interest must amount to an integrated or holistic relationship with a seascape.[287]

[220] As s 58(1)(a) makes plain, "holds" is informed by tikanga. Reflecting the centrality of kinship, take tūpuna (ancestral right) is the most important source of right

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283 Above at [114].
284 Above at [133].
285 Above at [119]–[124] and [189].
286 Above at [134], [157] and [190].
287 Above at [140].

in this context.[288] In addition to the claim of a special relationship with a seascape and carrying out activities there, "holds" suggests the question is whether mana is claimed and exercised over the relevant area.[289] We have also found that it must be demonstrated that the tikanga relationship with the claim area is a continuing one as "holds" is in the present tense and tikanga requires that the right be ancestral. Factors relevant to the inquiry are set out in the judgment.[290]

"[E]xclusively used and occupied"

[221] This part of the test is a contextual one informed by common law concepts and tikanga.[291] Various factors are identified as colouring what is meant by exclusive use and occupation in this context. We refer, amongst other matters, to the fact that MACA expressly envisages coexistence between third-party access and use whilst providing recognition of the Treaty-guaranteed right to exclusive and undisturbed possession of lands; and to the intrinsically different nature of the seascape from that of dry land so that the indicia and intensity of use of the seascape will be distinctive to that environment.[292]

[222] Drawing the various factors together, we have concluded that use and occupation cannot mean actual physical occupation of the seascape is required. Rather, occupation is meant in the sense of control rather than residence and exclusive cannot mean literally to the exclusion of all others.[293] Extensive use of the space (in light of its nature and resources) coupled with an intention and some capacity to assert control over it to the extent permitted by law is what is intended by the test and supported in the cases. Where applicant groups have maintained a strong cultural connection with an area, harvested its resources and asserted mana in some practical way, that may be sufficient depending on the mix of facts in a particular case.

[223] We have endorsed the list of relevant indicators in the Attorney-General's written submissions that may support a conclusion that this part of the test is met, and

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288 Above at [39].
289 Above at [141].
290 Above at [140]–[142].
291 Above at [154]–[157].
292 Above at [153] and [158]–[160].
293 Above at [161].

we have listed other possible indicators that may also be relevant to the inquiry.[294] We stress however that these lists are neither exhaustive nor cumulative. Rather, the question is whether they suggest the applicant group still uses and relates to the claimed seascape in a way that is integrated or holistic—that is, as part of a continuing order within the applicant group community.

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

[224] "[F]rom 1840 to the present day" expressly introduces the requirement of continuity, but there is overlap with other components in s 58, for example ahi kā.[295] While ahi kā and "from 1840 to the present day" are not necessarily the same thing, evidence used to demonstrate one element will often go to establishing the other.[296]

[225] We have held that substantial interruption has both spatial and temporal elements so both the physical extent and the duration of any interruption will be relevant. What is required is "interruption"; interference is insufficient. The requirement of "substantial" interruption acknowledges the inevitability, since 1840, of some impairment of prior rights and that should not be disqualifying.[297] If continuous use and occupation is able, fairly, to be inferred on the evidence, the effect of s 106 of the Act is that it will be for contradictors to show that it has not been sufficiently exclusive or that it has, in fact, been substantially interrupted.[298]

[226] This does not mean the continuity requirement has no teeth but rather requires an approach sensitive to the historical realities. A factual assessment will be required as to the spatial and temporal extent of the interruption, in the context of the particular claimed area and in light of the applicant group's particular relationship with the place, keeping in mind the context of MACA's reconciliation of rights and interests.[299] We have accepted that an applicant group's use and occupation of an area may be so crowded out in fact as to be substantially interrupted.[300] The judgment discusses a range of matters which may contribute to or constitute substantial interruption but

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294 Above at [162]–[164].
295 Above at [134].
296 Above at [190].
297 Above at [194].
298 Above at [194]. See also at [120] in relation to MACA, s 98(2).
299 Above at [195] and [201].
300 Above at [198].

whether they do in fact is a matter of context and degree.[301] That said, only lawful interferences are relevant to the s 58 test.[302]

Disposition

[227] The appeal by the Attorney-General in relation to s 58 of MACA is allowed.

[228] Costs are reserved.

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Kāhui Legal, Wellington for Te Whānau-ā-Apanui, and Ngā Hapū o Ngāti Porou as Intervener
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301 Above at [196]–[203].
302 Above at [199].

Appendix: Table summarising reconciliation in the statutory scheme

[229] The table below summarises how the Act's four baseline premises are reconciled at a general and fact-specific level—in particular, how customary rights[303] are reconciled with the other three premises:

Premise	Reconciliation of competing rights and interests
Crown ownership: above at [106]	*General reconciliation rules* • Crown and local authorities divested of ownership: s 11(3). • No one owns the common marine and coastal area (CMCA): s 11(2). • But Crown retains limited ability to override CMTs: see, for example, s 74 for protection purposes and s 30 and following for reclamations. *Effect* • No conflict with customary rights.
Customary rights: above at [107]	• Interests (extinguished by FSA) restored and given legal expression under MACA: s 6. • Participation rights, PCRs and CMTs provided for.
Vested property rights and expressly authorised activities: above at [108]	*General reconciliation rules* • Freehold titles excluded from CMCA: s 9(1). • Structures excluded from CMCA; owners' rights unaffected: s 18. • Pre-MACA resource consents unaffected: s 20. o But activities under resource consents granted between MACA's commencement and the effective date not substantial interruption: s 58(2). • Activities that are otherwise lawful unaffected: s 20 • Certain proprietary interests unaffected: s 21 • Protections for accommodated activities: ss 63–65. • CMT rights more limited than freehold title: s 62. • Once application for CMT lodged, those seeking permissions within CMT area must consult with applicant group: s 62–62A. • But after effective date of CMT: o permission of CMT group required to carry out any new activity under resource consent or to grant new conservation consent (unless accommodated activity): ss 62(1)(a)–(b) and 66–73;

[303] Again, the focus here is on CMT.

	○ CMT group has special rights in relation to marine mammal permits, taonga tūturu and the New Zealand coastal policy statement, and to prepare plan to influence policies, rules or authorisations by relevant public authorities: ss 76–77, 82 and 85–93; and ○ CMT group owns non-Crown minerals subject to existing privileges: ss 16 and 83–84. *Fact-specific reconciliation rules* • Applicant must show they hold the area in accordance with tikanga and have used and occupied it from 1840 to the present day: s 58. ○ Relationship with area must be integrated and holistic, demonstrating mana and ahi kā. ○ Occupation requires intention and some capacity (as far as the law permits) to control, not actual physical occupation in the nature of residence. • Burden shifts to contradictors to prove non-exclusivity or substantial interruption: s 106 and see s 98(2)(b). ○ Exclusive does not require exclusion of all others. ○ Interruption must go beyond mere interference. ○ Interruption must be substantial and lawful. • Broad participation rights: ss 102–104. *Effect* • Private rights prevail insofar as they conflict with customary rights—but strictly to the extent of the conflict. • Section 58 test must still be met.
Public access, navigation and fishing rights: above at [109]	*General reconciliation rules* • Public access, navigation and fishing rights guaranteed: ss 26–28. • Public and customary rights generally coexist: see s 59(3). • But public rights subject (only) to wāhi tapu exclusions: ss 78–79. • International law rights and obligations unaffected: s 8. *Fact-specific reconciliation rules* • As above for vested property rights and expressly authorised activities, but note also: ○ fishing and navigation do not "of [themselves]" preclude CMT, but could contribute to substantial interruption: see s 59(3).

	Effect • Customary rights generally coexist with public rights except in the case of wāhi tapu: ss 78–79. • Section 58 test must still be met.