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ARTICLE

"Fish Don't See Lines on a Map": Expressing Customary Rights Through the Marine and Coastal Area (Takutai Moana) Act 2011

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The Marine and Coastal Area (Takutai Moana) Act 2011 is a unique approach to recognition of customary rights in the foreshore and seabed in Aotearoa New Zealand, which has considerable potential to provide benefits to successful applicants. Despite this, it has not gone without controversy and criticism. The courts have struggled to reconcile outcomes under the Act with its purposes, and the Waitangi Tribunal has concluded that the Act breaches Te Tiriti o Waitangi 1840 | Treaty of Waitangi 1840. Due to this some have argued a pause in the implementation of the Act is needed, or for repeal and replacement. This article considers new legislation is required, with the Act remaining in place while a replacement is developed. Practical changes can be made to Act in the interim, allowing it to function while a replacement regime is developed. Recognition of customary rights is politically and legally complex. While there is no easy way forward, the least prejudicial pathway for those seeking recognition of their rights is for Parliament to place trust in a tikanga test and allow broad and meaningful expression of customary rights.

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I Introduction[1]

The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act) established a bespoke regime that allows Māori to apply for recognition of their customary rights in the foreshore and seabed in Aotearoa New Zealand. The Act must be acknowledged as a genuine and unique attempt to allow for the inalienable and enduring recognition of customary rights.[2] However, it has since been the subject of many criticisms some valid, others overstated.

While some applicants have been granted recognition orders to date, the courts have had difficulty in interpreting the Act to ensure it does not create a test that cannot possibly be met.[3] The Waitangi Tribunal has found that the Act breaches Te Tiriti o Waitangi 1840 (te Tiriti)[4] and that the administrative regimes established for the recognition of rights under the Act are complex and "painfully slow".[5] The Government has signalled an intention to amend a key part of the Act. These issues have led some to advocate for repeal and replacement of the Act,[6] or at least a pause in its implementation.[7]

Repeal or amendment prior to the legal tests in the MACA Act being settled appears premature, as the Act is the result of a balance struck by Parliament. This article argues that the existing appeals to decisions under the Act should be allowed to run their course prior to advancing any amendments or moves to repeal the Act. If amendments are to be made, this article suggests that a more restrictive test is not required. There are practical changes to the Act that should be made which will avoid applicants being prejudiced while seeking recognition of their rights.

Part II examines the political background that led to the enactment of the MACA Act and reviews the Act, its operative provisions and the rights available to successful applicants. Part III then focuses on customary marine title (CMT), reviewing the bundle of rights available to CMT holders, the test that must be met before a CMT will be recognised and surveys the approach of the courts to date. The purpose of this review is not to provide

1 The landscape has changed significantly since the paper that this article is based on was produced in 2023. This article does not consider subsequent developments, such as the introduction of the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024 (83-2), the decision of the Supreme Court in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana O Ngā Whānau Me Ngā Hapū O Te Whakatōhea* [2024] NZSC 164, [2024] 1 NZLR 857 or the Waitangi Tribunal *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (Wai 3400, 2024) concerning the Coalition Government's proposed amendments to the Marine and Coastal Area (Takutai Moana) Act 2011 [MACA Act]. Some of the questions posed in this article have been at least partly addressed by the above. However, this article provides a reflection of a particular point in time and highlights issues such as exclusivity, which the Crown and the Supreme Court have, in the author's view, failed to properly grapple with. While the Coalition Government's proposed amendments and the Supreme Court's decision purport to provide clarity, it is the author's view that very little will actually have changed when the dust from the continuing political furore settles and the burden of setting a practical and predictable test will once again fall on the applicants. It is hoped that this article might be of some use in meeting that burden.

2 MACA Act, preamble at (4).

3 *Ngā Pōtiki Stage 1 Te Tāhuna o Rangataua* [2021] NZHC 2726, [2022] 3 NZLR 304 at [31]–[41].

4 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) [*MACA Stage 2 Report*] at 81 and 221–222.

5 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) [*MACA Stage 1 Report*] at 124.

6 *Closing Submissions for the Ngāi Te Rangi Settlement Trust* (Wai 2660, doc #3.3.166) at [7.3]; and *Closing Submissions for the New Zealand Māori Council* (Wai 2660 doc #3.3.154) at [32].

7 Season-Mary Downs "Nga Taumata o te Moana: A return to rangatiratanga over the takutai moana" (PhD Thesis, University of Waikato, 2019) at 220 and 230.

case histories, but a survey of the decisions so far. This is necessary because proposals for reform or repeal cannot be properly assessed without an understanding of how the Act functions in practice. Part IV then applies possible approaches to the CMT test to three of the available rights from within the CMT bundle to show the real-world implications of potential approaches for CMT holders. It then suggests a pathway forward and a possible amendment to the test for CMT that will allow the Act to operate in a way that maximises the expression of customary rights, in line with its purpose. Part V concludes by noting the Crown, working with Māori as Tiriti partners, must continue to review and implement a practical pathway forward for recognition of Māori rights and interests in the takutai moana in order to give customary rights meaningful expression and recognition if not through the MACA Act, then by another practical and achievable pathway which does justice to the customary rights that are being recognised.

II The MACA Act

A *The road to the MACA Act*

The Act and its operation cannot be properly understood without knowledge of its whakapapa its legal and political history.[8] Twenty years ago, the Court of Appeal issued the landmark decision of *Attorney-General v Ngati Apa*,[9] that potentially opened the way for Māori to seek exclusive ownership of areas of the foreshore and seabed through the Māori Land Court (MLC) based on pre-existing customary rights, although without any guarantee of success.[10]

It is an understatement to say that the decision of *Attorney-General v Ngati Apa* "was not met with universal approval".[11] The Crown chose to legislate, rather than taking an appeal.[12] To pave the way, the Government released a policy seeking to secure Crown ownership of the foreshore and seabed.[13] The Waitangi Tribunal inquired into the Crown's policy under urgency, finding breaches of te Tiriti and its principles. It set out a range of options that the Crown might take up instead.[14] Fundamentally, the Tribunal thought a "longer conversation" was required.[15] These options were not adopted and shortly thereafter, the Foreshore and Seabed Act 2004 (FSA) was passed into law.

The FSA explicitly extinguished customary rights in the foreshore and seabed, vested ownership of the area in the Crown and restricted the jurisdiction of the courts concerning the foreshore and seabed.[16] This prompted widespread protest.[17] The Waitangi Tribunal has since described the FSA as leaving "a damaging imprint on Māori–Crown relations and

8 See generally David Grinlinton "Private Property Rights versus Public Access: The Foreshore and Seabed Debate" (2003) 7 NZJEL 313 at 315–316, which sets out a timeline of events to the 2004 Waitangi Tribunal hearing on the foreshore and seabed policy.

9 *Attorney-General v Ngati Apa* [2003] NZCA 117, [2003] 3 NZLR 643.

10 At [196].

11 *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 at [24].

12 *MACA Stage 2 Report*, above n 4, at 22–23; and Margaret Mutu "Māori Issues" (2005) 17(1) Contemp Pac 209 at 210.

13 See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at xii and 147–150; and *MACA Stage 2 Report*, above n 4, at 22–23.

14 Waitangi Tribunal, above n 13, at xiv–xv and 127–143.

15 At 139–140.

16 Foreshore and Seabed Act 2004, ss 13(1) and 10 respectively.

17 See Mutu, above n 12, at 209–210.

the social fabric of Aotearoa New Zealand".[18] In 2008 the FSA was placed on hold, with a Ministerial Review Panel established to undertake an independent review.[19] That panel concluded that the FSA should be repealed and replaced with an interim measure until a more detailed legislative regime could be enacted.[20] Although the Government announced in 2010 that the FSA would be repealed, the suggested interim measure was not progressed. The MACA Act passed into law in 2011.

B *The MACA Act*

The MACA Act repealed the FSA and restored all customary interests extinguished by the FSA.[21] It established the marine and coastal area (MCA), which is defined as the area bounded by the line of mean high water springs and the outer limits of the territorial sea.[22] As a subset of that area, a new category of land was created; the common marine and coastal area (CMCA). The CMCA is made up of all of the MCA excluding land in private title, certain Crown land and other specified exceptions.[23] In contrast to the FSA, no one, including the Crown, can own the CMCA.[24] The Act created new statutory rights that Māori could apply for in the CMCA.[25] These statutory rights are now the only way Māori can seek legal recognition of their customary rights and interests.[26]

Despite the fact that some applicants have been able to meet the legal tests in the Act to date, the bulk of these await the result of appeals, and both applicants and the courts remain critical about aspects of the Act and the procedural regime set up to progress applications.[27] A major source of criticism of the Act is that while it restores all customary interests that existed prior to the FSA, the rights are not given full expression. Instead, Māori customary rights and interests are filtered through the MACA Act, balanced against other interests and given "legal expression" through much more limited statutory rights.[28] The Waitangi Tribunal found that the Act did not strike a fair and reasonable balance between Māori and other interests in the takutai moana.[29] As the Court of Appeal has noted, the Act seeks to shoehorn "the diverse range of customary Māori relationships with land into two statutory boxes: CMT and protected customary rights (PCRs). Unsurprisingly, some things are lost in this translation".[30] This does not sit well with the Canadian

18 *MACA Stage 1 Report*, above n 5, at x.
19 *MACA Stage 2 Report*, above n 4, at 24–26.
20 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 at 151–152.
21 MACA Act, ss 3(2)(b) and 6.
22 Section 9.
23 Section 9. RP Boast "Foreshore and Seabed, Again" (2011) 9 NZJPIL 271 at 279 considered the creation of the CMCA the Act's "most interesting feature", noting that it was the first category of land created in New Zealand since the Land Transfer Act 1870.
24 MACA Act, pt 2. Note that areas acquired through the enactments in ss 11–12 are excluded. Roads (s 14) and structures (ss 18–19) are also excluded.
25 See pt 3 subpts 1–3.
26 Section 94(2) confirms that protected customary rights [PCR] or customary marine title [CMT] can only be recognised by an agreement between an applicant group and the Crown, or an order of the High Court and "may not be recognised in any other way".
27 See Downs, above n 7, at ch 8; and *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252 [*Edwards* (CA)] at [139], [184] and [416].
28 At [33] and [38]–[39]; and MACA Act, s 6(1).
29 *MACA Stage 2 Report*, above n 4, at 170.
30 *Edwards* (CA), above n 27, at [376]–[378].

jurisprudence which the Act was in part modelled upon. As noted in *Tsilhqot'in Nation v British Columbia*: "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", or equally, statutory concepts.[31]

The Waitangi Tribunal has reported on the MACA Act, finding that the Act prejudices Māori and is in breach of te Tiriti and its principles. The Tribunal did not recommend repeal of the Act, preferring to set out a suite of targeted interim recommendations that it considered must be "implemented as a package to restore a fair and reasonable balance between Māori interests and those of the public in te takutai moana".[32] Once all appeal rights have been exhausted and the tests have been settled, the Tribunal will hear further submissions and, if necessary, issue final recommendations.[33]

Despite not being mentioned in the political manifestos of any of the coalition parties prior to the 2023 election, the Government has signalled an intention to amend s 58 of the MACA Act. The stated purpose is to "to make clear Parliament's original intent" in light of the Court of Appeal judgment in *Re Edwards Whakatōhea*.[34] While it is not clear how this "original intent" is to be gauged, the motivation can be seen through the stated purpose of amendment being to: "reverse measures taken in recent years which have eroded the principle of equal citizenship".[35] It is not stated anywhere what "the principle of equal citizenship" is or what it requires. The Crown's proposed amendments to the MACA Act arising from this were decided, without consultation with Māori, by Cabinet on 8 July 2024 and announced publicly on 25 July 2024.[36] What is clear is that the preferred approach is a narrower, more "exacting" CMT test, that has already resulted in applicants seeking an urgent intervention of the Waitangi Tribunal.[37]

Procedurally, applicants had until 3 April 2017 to file an application under the Act in the High Court, to apply to engage directly with the Crown, or both.[38] A funding scheme implemented for applicants by the Office for Māori Crown Relations (Te Arawhiti) has allowed applicant groups to participate in litigation which would have been beyond their means.[39] Despite this, progress has been slow. At the time of writing, the High Court has finalised and sealed one CMT, and granted several other orders which remain subject to appeal or are yet to be completed.[40] The Court of Appeal has confirmed one other CMT,

31 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [32].

32 *MACA Stage 2 Report*, above n 4, at 238.

33 At 103.

34 *Coalition Agreement between the National Party and the New Zealand First Party* (24 November 2023) at 10.

35 At 10.

36 See *Closing Submissions of the Crown* (Wai 3400, doc #3.3.38) at [25].

37 Waitangi Tribunal *Reasons for Granting an Urgent Inquiry into the Marine and Coastal Area (Takutai Moana) Financial Assistance Scheme and Proposed Amendments to the Act* (Wai 3400, doc #2.5.4).

38 MACA Act, s 100(2). This statutory time limit has had prejudicial repercussions for applicants seeking to vary applications following the deadline: see *Re Ngāti Pāhauwera Development Trust* [2020] NZHC 1139 at [72]; *Paul v Attorney-General* [2022] NZCA 443 at [37]; and *Re Muaūpoko Tribal Authority* [2024] NZHC 536 at [59]–[62]. The Waitangi Tribunal has recommended that the deadline be repealed: *MACA Stage 2 Report*, above n 4, at 116.

39 *MACA Stage 1 Report*, above n 5, at 127–136. At the time of writing, the future viability of the Scheme is in doubt, as set out in *Re Elkington* HC Wellington CIV-2017-485-218, 15 May 2024 (Minute of Churchman J). While this is beyond the scope of this article, without access to the Scheme many applicants will not be able to progress their applications. At the time of writing, the Waitangi Tribunal was set to hear the matter urgently in early 2025.

40 *Re Tipene*, above n 11.

however, this is subject to appeal.[41] Further, a number of High Court applications have been allocated hearing dates. Progress looks set to accelerate, subject to funding being provided.[42] By contrast, the Crown pathway has not seen any recognition orders finalised.[43] On current estimates, it will take at least 25 years for the Crown to engage with all applicants.[44] The Crown also appears to have adopted a stricter test than the Court,[45] and the process for obtaining an agreement with the Crown lacks a clear foundation in policy, in breach of te Tiriti.[46] Logically, this disincentivises applicants from pursuing the Crown pathway. For this reason, this article focuses on obtaining recognition of rights through the High Court pathway.

C *Rights available under the Act*

Three classes of legal rights "give expression to customary interests" under the Act: conservation process rights, PCRs and CMT.[47] Conservation process rights are not the focus of this article as iwi, hapū and whānau have the right to participate in conservation processes whether or not they have applied for or been granted recognition orders under the Act.[48]

PCRs are the next class of rights available under the Act. These statutory rights give expression to activity or "use"-based customary rights.[49] Applicants seeking recognition of PCRs must prove that the activity has been carried out since 1840[50] and that the applicants continue to exercise the activity in a particular part of the CMCA in accordance with tikanga today.[51] The Waitangi Tribunal has concluded that the test for PCRs "strikes a reasonable balance between Māori interests and other public and private interests" and given this, did not consider the PCR test or regime a breach of te Tiriti.[52] Even so, the exclusion of legal enforceability of rāhui, or customary restrictions, was seen as problematic and the Tribunal recommended that rights of this nature be confirmed as available PCRs.[53] Ultimately, the test as to whether PCRs will allow for meaningful expression of customary rights depends on the ability to enforce their rights. While PCRs have been granted in decisions to date, all remain subject to appeals or further interlocutory processes. Given the level of comfort that the Tribunal has shown concerning the PCR test, the lack of direct

41 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea* [2024] NZSC 33.

42 See 28 July 2023 (Minute of Churchman J) at [1]–[5].

43 Although 14 CMT areas were recognised in September 2020 under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020, this was the result of a specific Treaty settlement between the Crown and Ngāti Porou. See generally *MACA Stage 2 Report*, above n 4, at 82, 91, 100 and 235–237.

44 At 130–131.

45 See *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [29]–[32]; and Downs, above n 7, at 214.

46 *MACA Stage 2 Report*, above n 4, at 131–132.

47 MACA Act, pt 3.

48 See *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 [*Edwards* (HC)] at [40](i)(a)–[40](i)(c).

49 Examples of PCRs that have been granted to date include non-commercial whitebaiting, collection of hangi stones, extraction of resources, and tauranga waka (waka launching) sites. See also *Edwards* (HC), above n 48, at [483]–[659] for further examples.

50 *Edwards* (CA), above n 27, at [337].

51 MACA Act, s 51.

52 *MACA Stage 2 Report*, above n 4, at 93.

53 At 226–227.

appeals to the legal tests concerning PCRs and the lack of current detail as to their enforceability, PCRs do not form the focus of this article.[54]

The final category of rights and the closest analogue to common law aboriginal title available under the Act is CMT.[55] CMT provides recognition of customary rights within a particular area. While a CMT provides an interest in the CMCA, this does not equate to fee simple ownership of the CMT area.[56] Instead, a CMT confers a bundle of rights to its holders, explored more fully below. CMT has been the focus of litigation and Tribunal recommendations and the correct approach to the test for CMT is not yet settled law. Due to these factors, the primary focus of the rest of this article is on CMT.

III Customary Marine Title

CMT will be granted when the Court determines that the applicant group has held an application area in accordance with their tikanga and exclusively used and occupied it, without substantial interruption, from 1840 to the present day.[57] A CMT confers a "bundle of rights" on a CMT holder and allows the holder to use, develop and derive a commercial benefit from the CMT area.[58] Once granted, all sealed CMT orders are recorded on a register maintained by Land Information New Zealand (LINZ).[59]

A *The CMT bundle of rights*

The CMT "bundle of rights" consists of a Resource Management Act 1991 permission right (RMA permission right); a conservation permission right; a wāhi tapu protection right (where granted);[60] rights in relation to permits for watching marine mammals and for coastal policy statements; prima facie ownership of newly found taonga tūturu;[61] ownership of non-Crown minerals in the CMT area; and the right to create a planning document.[62]

While a CMT provides rights which "could be really valuable", the rights are subject to significant carve outs and caveats.[63] A CMT holder cannot alienate or sell any part of the CMT area and must allow free public access, navigation and fishing in the CMT area.[64] The CMT rights are subject to "accommodated activities", "proprietary interests" and infrastructure such as roading, as well as interference by government ministers.[65] Despite these limitations on the CMT rights and in stark contrast to the FSA, the fact that multiple

54 At 93.
55 MACA Act, pt 3 subpt 3.
56 Section 60; and *Edwards* (HC), above n 48, at [38]–[39].
57 MACA Act, s 106(3) also provides that the CMT must not have been extinguished at law.
58 *Edwards* (HC), above n 48, at [49]. The rights are set out at pt 3 subpt 3 of the Act.
59 MACA Act, ss 114–116.
60 Under s 9 of the MACA Act, wāhi tapu is given the same meaning as s 6 of the Heritage New Zealand Pouhere Taonga Act 2014: "a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense".
61 Under s 9 of the MACA Act, taonga tūturu is given the same meaning as s 2(1) of the Protected Objects Act 1975: an object that relates to Māori culture, history, or society; and was, or appears to have been, manufactured or modified in New Zealand by Māori; or brought into New Zealand by Māori; or used by Māori; and is more than 50 years old.
62 MACA Act, s 62(1).
63 Section 60(2)(a); and Boast, above n 23, at 281.
64 MACA Act, ss 26, 27, 28, and 71 respectively.
65 Sections 64–65, 21, and 14 respectively.

applications have progressed through the courts is evidence that applicants view the rights available under the Act as being worth the time and resources to pursue. Te Arawhiti's funding regime for applicants has been vital in enabling this to occur,[66] although there are serious questions about whether this will continue in light of recent Crown funding limits.[67] Below, three rights from within the CMT bundle are highlighted: the Resource Management Act (RMA) permission right; the wāhi tapu protection right; and the ownership of non-Crown minerals. These rights will be returned to in reviewing the impact of various interpretations of the test for CMT later in this article.

(1) RMA permission right

The RMA permission right allows a CMT holder to give or decline permission for many activities that require resource consents in the CMT area in real terms a veto right over most resource consents in that area. A decision must be made by the CMT holders within 40 working days from the date of an application for a resource consent, or permission is treated as having been given for the duration of the resource consent.[68] Once made, the CMT holder's decision is not subject to appeal or objection[69] and a grant of permission cannot be revoked.[70] The RMA permission right is subject to significant statutory limitations,[71] the scale and extent of which prompted the Waitangi Tribunal to conclude that "the value and effectiveness of [the right is] significantly undermined".[72] While the Tribunal acknowledged that some of the limitations were justifiable, it has recommended changes to those that were unjustifiable.[73] Despite these issues, the RMA permission right is an important right with direct accountability: if an activity is started prior to permission being granted, or in defiance of a refusal, then the offender may be subject to fines, imprisonment and enforcement orders under the RMA.[74]

(2) Wāhi tapu protection right

A wāhi tapu protection right is the most potent right available. It allows actionable protections and restrictions to be placed over wāhi tapu or wāhi tapu areas,[75] representing the only available limitation on the rights of public access, navigation and fishing in the CMT area guaranteed under the Act.[76] Grafting "Pākehā concepts of enforcement for breach of legal obligations onto the jural system of tikanga",[77] fines may be issued to anyone who intentionally fails to comply with the wāhi tapu prohibitions or restrictions.[78] Additionally, the RMA prohibits resource consents being issued if they are contrary to any wāhi tapu conditions included in a CMT order or agreement.[79]

66 *MACA Stage 1 Report*, above n 5, at 129–130.
67 Waitangi Tribunal, above n 37, at [31]–[62].
68 MACA Act, ss 67(3)–67(4).
69 Section 68(2).
70 Section 66(3).
71 Sections 64–70.
72 *MACA Stage 2 Report*, above n 4, at 165.
73 At 169–170.
74 MACA Act, ss 69–70.
75 Section 62(1)(c).
76 *Re Edwards Te Whakatōhea (No 7)* [2022] NZHC 2644 [*Edwards (No 7)*] at [108].
77 At [149].
78 MACA Act, s 81.
79 Resource Management Act 1991, s 104(3)(c)(iv).

Unlike other CMT rights within the bundle, which flow with a grant of CMT, gaining a wāhi tapu protection right requires a higher bar be met. The additional requirements are that an applicant is required to establish the connection of the CMT group with the wāhi tapu or wāhi tapu area in accordance with tikanga; must convince the Court that the CMT group requires prohibitions or restrictions to protect the wāhi tapu or wāhi tapu area; and provide the reasons for those restrictions.[80] In the absence of process guidance in the Act, the High Court has developed a framework for recognition of wāhi tapu protections,[81] noting that "tikanga must be the principal guiding determinant in establishing whether or not a particular area is wāhi tapu".[82] Wāhi tapu protection rights are the only way that a rāhui, or a customary prohibition over an area or resource, is able to be given legal effect under the Act.[83]

The Court requires the boundaries of the wāhi tapu to be crystal clear so that the public can identify the area with certainty, as these rights are enforceable through patrols by wardens appointed under the Act and fines for intentional breaches of prohibitions.[84] This creates challenges due to the practical difficulties of providing notice of boundaries which may be at sea and the flexible nature of the concept of tapu.[85] If applicants cannot or will not provide certainty as to boundaries then wāhi tapu protection rights will not be granted.[86] Wāhi tapu protection rights are subject to statutory limitations. For example, the rights may affect commercial fishing, but any restrictions placed cannot prevent fishers from taking their lawful entitlement in a quota or fisheries management area.[87] The Court has also held that wāhi tapu are not available where the restrictions seek to prevent actions that are subject to pre-existing legal prohibitions, such as bylaws or the RMA.[88]

The Waitangi Tribunal was unable to identify any reason why wāhi tapu protections are treated as an incident of CMT, noting that Māori should have the ability to seek wāhi tapu protections regardless of whether they can successfully establish CMT to that area. This, the Tribunal concluded, breaches the principle of active protection.[89] Likewise, the Tribunal concluded that the inability to prevent fishing in wāhi tapu areas breaches te Tiriti.[90] Finally, the Tribunal considered that the requirement to disclose the reasons for wāhi tapu prohibitions or protections is "unnecessary and unreasonable, as it places sensitive mātauranga Māori at risk".[91] The Tribunal recommended separation of the wāhi tapu right from CMT, allowing prohibition of all fishing in wāhi tapu areas and removing the requirement to show reasons for prohibitions or restrictions.[92]

No wāhi tapu protection rights have been finalised by the courts to date, although several wāhi tapu protection rights have been given approval in decisions which are either

80 MACA Act, ss 78–81.
81 *Edwards (No 7)*, above n 76, at [156].
82 At [115].
83 See *Edwards* (HC), above n 48, at [387]–[390]; and *Re Edwards (Whakatōhea Stage 2) No 8* [2023] NZHC 1618 [*Edwards (No 8)*] at [63](c), [138], [145], and [151].
84 Sections 80–81.
85 *Edwards (No 7)*, above n 76, at [18].
86 *Re Ngāti Pāhauwera*, above n 45, at [92].
87 Section 79(2)(a).
88 *Edwards (No 7)*, above n 76, at [147]; and *Edwards (No 8)*, above n 83, at [111]–[112].
89 *MACA Stage 2 Report*, above n 4, at 181.
90 At 183.
91 At 183.
92 At 184.

yet to be finalised because further information is required, or are awaiting appeals to be disposed of.[93]

(3) Ownership of minerals found in the CMT area

Section 83 of the MACA Act confers ownership of minerals in the CMT area to successful applicants for CMT. While transfer of the ownership of minerals from the Crown to private parties is relatively novel, precedent can be found in the settlement of historical claims under te Tiriti. In the Pare Hauraki Collective Settlement, ownership of Crown-owned non-nationalised minerals in Crown land was transferred to the settling iwi where land passed to the settling group.[94] The obvious distinction is that a CMT holder cannot own the CMT area, while a settling group owns the land and the minerals beneath it.[95] How ownership of minerals will be managed jointly if CMT is awarded on a shared basis between overlapping groups remains uncharted territory.

This grant of ownership in minerals is subject to significant carve outs, including that petroleum, gold, silver and uranium existing in its natural condition in land are deemed property of the Crown.[96] The Waitangi Tribunal considered that royalties should be explored for Māori to compensate for this.[97] In addition, any mining privileges continue if they were in existence at the date that a CMT comes into force, which may provide certainty to mining interests but represents a significant limitation on the rights of successful applicants.[98]

B *The CMT Test*

(1) Overview

The test to determine if an applicant can gain CMT in the CMCA is found at s 58 (CMT test) and is divided into two limbs. Unless extinguished by law, CMT will be found to exist in a specified area of the CMCA if the applicant group holds the specified area in accordance with tikanga; and has exclusively used and occupied it from 1840 to the present day without substantial interruption.[99]

"Holds", "exclusively", "used and occupied" and "substantial interruption" are not defined in the Act. This left the courts with a difficult interpretive exercise to define the terms, many of which have assumed the status of terms of art in other jurisdictions, with decisions to be made on the way in which the limbs interact.[100] Tikanga is loosely defined under the Act as "Māori customary values and practices".[101] This leaves considerable and

93 See *Edwards (No 8)*, above n 83, at [158]–[160].

94 *Pare Hauraki Collective Redress Deed 2018* (Te Arawhiti | Office for Māori Crown Relations, 2 August 2018), cl 17.11; and *Pare Hauraki Collective Redress Deed Schedule: Documents* (Te Arawhiti | Office for Māori Crown Relations), pt 2.

95 MACA Act, s 11(2).

96 Sections 16(1) and 83(2). This reflects longstanding common law precedent. See Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006) vol 1 at 257–262; Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003); and Tom Bennion "Access to Minerals" (2011) 7(1) PQ 7 at 8.

97 *MACA Stage 2 Report*, above n 4, at 230–231.

98 See MACA Act, s 84(1).

99 Section 58(4).

100 Section 59 sets out matters that may be taken into account including ownership of land abutting the specified area, and exercise of non-commercial customary fishing rights in the specified area.

101 Section 9.

appropriate space for applicants to provide evidence of the system of tikanga that applies to them in their respective rohe (region). The courts consider "tikanga" in s 58 to refer to the "principles of customary law that govern the relationship between iwi, hapū, whānau and the takutai moana, and the rights and responsibilities that flow from that".[102] Both the courts and Parliament recognise tikanga as a source of law; as recently noted, "Parliament cannot change tikanga itself. Iwi do that, exercising their rangatiratanga".[103]

The CMT test incorporates an exclusivity requirement reflective of overseas jurisprudence, particularly the Supreme Court of Canada's approach in *Delgamuukw v British Columbia*. There, exclusivity was found to mean "the intention and capacity to retain exclusive control", although that intent and capacity was not negated by occasional acts of trespass or the presence of other aboriginal groups.[104] The requirement to show exclusive use and occupation of an area to meet the s 58 test appears to create a logical inconsistency within the test. The language appears to invoke the Australian approach in *Commonwealth of Australia v Yarmirr (D7 of 2000)* where a claim to exclusive use of the sea and seabed was rejected due, in part, to large groups of people using the area for four to seven months each year to gather resources.[105] While the statutory scheme appears to have been largely modelled on this framework,[106] unlike the MACA Act, the Australian test required proof of exclusive use and enjoyment before the acquisition of British sovereignty, and the position has moved on since that point.[107] Furthermore, the addition of tikanga to the CMT test makes it a distinctly "Aotearoan" test, and distinguishes overseas authorities and approaches.

Exclusivity as defined in western legal systems does not sit well with tikanga, with its grounding in whanaungatanga and manaakitanga.[108] As Te Upokorehe Kaumatua Wallace Aramoana told the author, "fish don't see lines on a map". A key difficulty for applicants in meeting the CMT test and the availability of CMT depends on the meaning that the courts give to the word "exclusively" under the Act, or how the term is treated. Untangling this inconsistency is an important part of establishing a test which aligns with the purposes of the Act, and accords with tikanga and te Tiriti.

The Waitangi Tribunal issued a suite of interim recommendations in its 2023 report, which it considered must be implemented as a package.[109] Concerning the CMT test, the Tribunal considered that the most effective way to avoid prejudice to applicants was for Parliament to remove the "without substantial interruption" requirement from the CMT test completely. The Tribunal saw that this requirement was motivated by a desire to "protect existing interests in te takutai moana",[110] but given the exceptions to CMT (which explicitly protect those interests), the Tribunal could not see any reason why those same interests may constitute a substantial interruption preventing a grant of CMT.[111] The Tribunal concluded that the substantial interruption element of the test "is not the result

102 *Edwards* (HC), above n 48, at [279].

103 *Ngāti Whātua Ōrākei Trust v Attorney-General* (No 4) [2022] NZHC 843, [2022] 3 NZLR 601 at [33]. A full definition of tikanga is outside of the scope of this article. See generally Law Commission *He Poutama* (NZLC SP24, 2023).

104 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [155]–[156].

105 *Commonwealth of Australia v Yarmirr* (D7 of 2000) [2001] HCA 56, (2001) 208 CLR 1 at [90].

106 *Edwards* (CA), above n 27, at [192].

107 See Richard Bartlett "Native Title Rights to Exclusive Possession, Use and Enjoyment and the Yindjibarndi" (2018) 43 UWAL Rev 92.

108 *Edwards* (HC), above n 48, at [111].

109 *MACA Stage 2 Report*, above n 4, at xix and 238.

110 At 98–99.

111 At 99.

of a legitimate balancing exercise, and will likely cause prejudice for some applicants if their applications fail".[112] As this article explains below, the Tribunal's concerns about substantial interruption were potentially overstated given the approach that the courts have taken. The author is unaware of any applications that have failed in their entirety due to substantial interruption being raised as an issue. What has been observed in practice is that some small areas have been "carved out" of CMT areas otherwise granted. Just because a party raises an issue about substantial interruption does not mean that the courts will accept that they have met the burden of proof.[113]

(2) Setting the CMT test

CMT was first granted in the 2015 case of *Re Tipene*, which was the first application for CMT to be heard in the High Court.[114] This application was for CMT in a remote 200-mile radius near small islands southwest of Rakiura Stewart Island. The decision did not consider exclusive use and occupation without substantial interruption, as the evidence was considered overwhelming.[115]

Re Edwards Whakatōhea was the first time that the High Court grappled with overlapping, contested applications brought by a range of whānau, hapū and iwi who did not accept the rights of others in their areas. The applications being heard covered an area where there has historically been significant use, overlapping occupation and infrastructure. In Churchman J's decision, his Honour considered that given the fundamental differences between the rights available under the Act and the rights of aboriginal title holders in other jurisdictions, the approaches in other jurisdictions could only be of limited relevance.[116] Additionally, the Judge looked to the four purposes of the Act, noting that three of the purposes point to a focus on tikanga "rather than any reference back to common law or statutory property rights".[117] This approach is broadly analogous with Australian precedent, which requires the Court to view evidence from the universe of traditional laws and customs. By way of example, in *Banjima People v Western Australia* the Court found that what was relevant was not evidence of Europeans accessing Banjima country without seeking permission, but evidence of other indigenous people, who are not Banjima but "nevertheless stand within the universe of traditional laws and customs", seeking permission to enter the area.[118] Churchman J therefore granted CMT to multiple overlapping parties, allowing for orders to be granted on a "shared exclusivity" basis for the first time under the Act. On the evidence, the successful applicant groups were jointly awarded title from the mean high water springs out to a distance of 12 nautical miles the maximum under the Act.[119]

The *Ngā Pōtiki Stage 1 Te Tāhuna o Rangataua* decision was the second occasion where the Court was faced with overlapping applications, although these were much less contested between the applicants. While largely adopting the analysis of Churchman J, the

112 At 102.
113 For example, the Court agreed that an outfall for treated effluent did not constitute substantial interruption; rather, it changed the nature of the use of the area, rather than totally eradicating use. See *Edwards (No 7)*, above n 76, at [37]–[43].
114 *Re Tipene*, above n 11.
115 At [149].
116 *Edwards* (HC), above n 48, at [55], [118]–[144] and [139].
117 At [120].
118 *Banjima People v Western Australia* [2015] FCAFC 84, (2015) 231 FCR 456 at [22].
119 *Edwards* (HC), above n 48, at [660].

Court differed in its approach to the second limb of the test.[120] Powell J considered that exclusive use and occupation from 1840 to the present day without substantial interruption imposes "qualitative and temporal components" which must be present if the test is to be met.[121] While cautioning against over-reliance on existing Canadian jurisprudence due to the central importance of tikanga and the context of an application for CMT,[122] Powell J considered that those decisions were helpful when considering use, occupancy and exclusivity.[123] This approach required:[124]

> … evidence of authority giving rise to an ability or intention to exclude others … [as] tikanga may not in fact require the actual exclusion of third parties at any point.

The decision then set out a non-definitive guide of the types of evidence applicants would be expected to provide the Court to show an intention on the part of an applicant group to control an area of the takutai moana at tikanga, and ultimately awarded CMT on a "shared exclusivity" basis.[125] Despite these two decisions taking slightly different routes, they both arrived at the same destination; establishing that the CMT test could be met in populated or urban areas, that tikanga was a unique feature which infuses the s 58 test in its entirety and that overlapping applicants could be successful in obtaining shared orders despite the requirement for exclusivity.

The Court of Appeal then heard and determined appeals to the *Re Edwards Whakatōhea* decision and modified the approach to the s 58 test. The decision comprises a long (partially dissenting) judgment from Miller J. This is followed by a majority judgment from Cooper P and Goddard J. The majority judgment focused on context, identified areas where the two Judges disagreed with the approach of Miller J and set out the current approach to the CMT test. The structure of the judgment makes it difficult to find a clear and consistent legal test. The legal position can be found by reviewing first the majority opinion at the end of the judgment; then parts of the longer and more detailed minority opinion; and finally parts of the High Court approach that survive from previous decisions. Nevertheless, as the leading decision on the CMT test, the applicant group must now show that as a matter of tikanga, it "has the authority to use and occupy the area, and to control access to and use of that area by others".[126] The applicants will then have to show that their use and occupation has been continuous from 1840, "allowing for tuku, and for changes in composition and identities of customary groups".[127] Once this evidence has been provided, the Court can then draw an inference that the CMT test has been met. If another party raises a potential substantial interruption, then the onus shifts to that party to prove that substantial interruption on the balance of probabilities.[128]

The Court considered that the first limb is a contemporary inquiry; the language used is "holds", rather than "has held".[129] Once this has been proved, applicants move to the second limb and must establish the existence of customary rights at 1840 through a

120 *Ngā Pōtiki Stage 1 Te Tāhuna o Rangataua*, above n 3, at [16].
121 At [29]–[30].
122 At [31] and [38].
123 At [38]–[39].
124 At [41].
125 At [52]–[53].
126 At [434]–[435].
127 At [397] and [435].
128 At [228].
129 At [402].

"strong presence" in the area at that time, evidenced by historical acts or incidents of occupation.[130] In a departure from the High Court approach, evidence of use of resources unaccompanied by evidence of territorial control is not enough to meet the CMT test.[131] The Court reached this conclusion despite evidence that in Māori customary law, rights of control are linked to resources and that the inquiry into CMT "must recognise resource boundaries".[132] Particularly for offshore areas, use of resources is an obvious way to evidence a holding at tikanga. Yet this approach affords much less weight to that evidence. This change in approach makes the Court of Appeal's CMT test more difficult to meet than the approach in the High Court prior to the decision, particularly as applications move away from the mean high water springs out to sea. As evidenced by High Court decisions since the Court of Appeal judgment, the CMT test is now much more difficult to meet where applicants seek rights towards the 12 nautical mile limit.

There is a strong argument that the Court of Appeal has in part fallen into the position of viewing the indicia of control from a Eurocentric perspective, rather than looking outward from a tikanga perspective. The latter would see holding an area less in terms of resource use and more in alignment with a broad definition of tikanga, in which Māori saw themselves "not as masters of the environment but as members of it" and resource use is but one part of that.[133] On the current approach, "exclusive use and occupation" is awkwardly folded into the test, without commentary to clarify the meaning of exclusivity.[134] However, this may be partially explained by exclusivity being a component of tikanga itself. A broad view of tikanga embraces external manifestations of holding an area, such as through the cultural exchanges or practices referenced by Miller J in his judgment. Examples may include placing of rāhui, ritual engagement between tangata whenua and manuhiri, manaakitanga and even the fact of filing a separate application for CMT.[135] These indicia of holding an area in accordance with tikanga are very similar to those endorsed by Powell J in *Ngā Pōtiki Stage 1 Te Tāhuna o Rangataua*. However, there is potential for this evidence to be overlooked or minimised on the majority approach where the exclusivity requirement, not fitting well within the test, is incorporated into the "holds" part of the test and yet does little.[136]

Nevertheless, on the current approach, if applicants can adduce evidence that they have had authority to use and control access, and evidence that they have continually done so from 1840, the court can draw an inference that the test is met and the burden falls to any other party to prove substantial interruption.[137] The Court considered that this interruption may take three forms: the customary interests of the applicant group were not sufficient to establish effective control over the relevant area as at 1840; the applicant group has ceased to have the necessary character since 1840; or their holding has been substantially interrupted after 1840 by lawful activities.[138] It is difficult to see that an

130 At [422].

131 *Edwards* (CA), above n 27, at [141] and [421]–[424].

132 At [320].

133 ET Durie "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325 at 328 as cited in *He Poutama*, above n 103, at 12.

134 Hannah Z Yang "Exclusivity, substantial interruption and the burden of proof in *Re Edwards (Te Whakatōhea No 2)*" (2021) 27 Auckland U L Rev 415 at 426 noted that "in practice, the exclusivity inquiry is likely to collapse into the substantial interruption inquiry". On the Court of Appeal's approach, the exclusivity requirement assumes even less prominence.

135 *Edwards* (CA), above n 27, at [165]–[172].

136 At [187].

137 At [434].

138 At [436].

applicant group whose customary interests were insufficient to establish effective control over the relevant area as at 1840, or that ceased to have the necessary character since 1840, would be able to meet the first two limbs of the CMT test. Since this would mean that no inference would be drawn, substantial interruption need not be raised.

The third class of substantial interruption a group whose holding has been substantially interrupted after 1840 by lawful activities appears the only occasion where substantial interruption is likely to be raised in practice. While the language of the Act is silent on the lawfulness of the interruption, the majority read in lawfulness as a requirement, noting that it is "exceptionally difficult to reconcile the text of s 58(1)(b) with the purpose of MACA", considering that the literal reading of the terms in the test would simply extinguish customary interests in many cases.[139] The Court therefore concluded that s 58(1)(b) "can and should be read as requiring that the applicant group's use and occupation of the area was not substantially interrupted by *lawful* activities carried on by others".[140] Reading a lawfulness requirement into the s 58 test means that applicant groups do not need to demonstrate an ability to physically exclude others in circumstances where the operation of the law has deprived them of that ability.[141] Further, as the MACA Act allows for public rights of access, navigation and fishing, the majority considered such actions by third parties will not necessarily interrupt the customary rights that found CMT.[142] Notably, the High Court had not experienced difficulty in reaching the same end point on the test as set out by Churchman and Powell JJ.

There have been two High Court decisions issued since the Court of Appeal judgment in *Re Edwards Whakatōhea*, the first by Gwyn J in *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, which was shortly followed by the decision of Cull J in *Ngā Hapū o Tokomaru Ākau*.[143] These decisions adopted similar reasoning, working through the two-limbed test as set by the Court of Appeal. Notably, they arrive at a very similar outcome as it appears they would have prior to the Court of Appeal decision. Broadly, for the first limb, these decisions require applicants to show current use and occupation (consistent with the nature of the area); an intention and ability to control access to the area and use of its resources as a matter of tikanga; and evidence of activities showing control or authority drawn from tikanga, such as the implementation of rāhui, observance of wāhi tapu and the tangible exercise of rangatiratanga, kaitiakitanga and manaakitanga, rather than simply carrying out a use or activity.[144] This shows that it is sufficient for Māori to be members of the environment, rather than masters of it.

To satisfy the second limb, Gwyn J considered that applicants must first show that at the year 1840 they exercised use and occupation with sufficient control to exclude others if they wished. Her Honour considered this to mean showing acts of occupation, including "control and regular use (for fishing/kaimoana gathering, transport, rongoā and other activities)".[145] To show continuity to the present day, what is required is evidence that that connection or control has not been lost as a matter of tikanga, in terms of ahi kā over time, or between groups, accounting for factors that substantially disrupted the operation of

139 At [416].
140 At [428].
141 At [429].
142 At [426].
143 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309; and *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare ki Tokomaru* [2024] NZHC 682.
144 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 143, at [180]; and see also *Ngā Hapū o Tokomaru Ākau*, above n 143, at [139] and [151]–[169].
145 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 143, at [192].

tikanga.[146] Cull J framed the approach to the second limb differently to Gwyn J, although this did not vary the outcome reached, requiring four inquiries to be made.[147] On both approaches there was a clear and consistent pathway to applicants reaching the point where the Court could draw an inference that the test has been met. However, each decision faced the issues identified above with awarding CMT to 12 nautical miles, Gwyn J making awards of CMT to between three and 10 kilometres offshore depending on the evidence,[148] and Cull J to three to four nautical miles.[149] It might have been considered that the test was all but impossible to meet towards the 12 nautical mile limit but for the recent decision in *Re Jones on Behalf of Ngāi Tai Iwi*.[150] In that decision, Churchman J surveyed the evidence specific to the applicants and concluded that their CMT should extend to 12 nautical miles, as "[a]ny attempt to define a boundary short of the 12 nautical mile limit would be arbitrary and would have no connection with tikanga".[151] Notably, the Crown has chosen to appeal this conclusion.

These decisions also make it clear that substantial interruption is a high hurdle for parties to meet and where substantial interruption is raised, a fact-specific analysis should be undertaken. While infrastructure or fishing might amount to substantial interruption,[152] in these latter decisions no substantial interruption was found where it was raised based on commercial fisheries,[153] remoteness,[154] or wharves.[155]

(3) Holding orders regarding shared exclusivity

Whether overlapping groups could obtain CMT in the same area remained an open question at the time of the *Re Edwards Whakatōhea* decision. Churchman J decided that it was consistent with the purposes of the Act and tikanga for the concept of "shared exclusivity" to be available to successful applicants.[156] This meant that multiple groups could share CMT orders where they agreed. The Court has shown considerable flexibility in granting orders, reflecting the flexibility of tikanga itself. Although *Re Edwards Whakatōhea* did not set out an explicit framework for addressing overlapping applications, *Re Ngāti Pāhauwera*, also decided by Churchman J, did. On that approach, once applicants meet the test, they must acknowledge their shared interest with overlapping groups. The overlapping groups must reciprocate. The consequence where applicants do not or cannot agree to share an area was that no CMT could issue. Notably, Churchman J reserved room to make findings of fact about the existence of shared exclusivity, even where applicants had given evidence that shared exclusivity was not their experience.[157]

The Court of Appeal confirmed that jointly holding CMT orders on the basis of shared exclusivity is an available outcome for applicants.[158] It appears the *Re Ngāti Pāhauwera* framework set out by Churchman J remains largely fit for purpose, except for the

146 At [193].
147 *Ngā Hapū o Tokomaru Ākau*, above n 143, at [119].
148 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 143, at [437] and [544].
149 *Ngā Hapū o Tokomaru Ākau*, above n 143, at [422].
150 *Re Jones on Behalf of Ngāi Tai Iwi* [2024] NZHC 1373.
151 At [122].
152 *Ngā Hapū o Tokomaru Ākau*, above n 143, at [411].
153 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 143, at [662].
154 At [674].
155 *Ngā Hapū o Tokomaru Ākau*, above n 143, at [418].
156 *Edwards* (HC), above n 48, at [168].
157 At [183].
158 *Edwards* (CA), above n 27, at [425] and [439].

requirement that the shared interest needs to be acknowledged by all parties, and the unavailability of CMT where there is a complete denial by an applicant group of any shared interest. This change is required as the majority held that shared CMT should be available to groups, even where they may not agree to that sharing.[159] The Court of Appeal considered that a current dispute in tikanga ought not to result in a loss of customary rights and interests under the Act, considering that "resolution of entitlement as between those two groups is best achieved through a tikanga process over time".[160]

In the interim, the Court considered that an independent party might hold the CMT until a tikanga-based resolution could be reached, potentially by the Māori Trustee.[161] It is difficult to see how a third party holding a CMT order aligns with the purposes of the Act, including to recognise the mana tuku iho of iwi, hapū and whānau in the takutai moana.[162] Additionally, as evidenced in *Hart v Director-General of Conservation*, resolution of tikanga processes can take a significant (if not indefinite) amount of time.[163] One immediate concern is that this may prevent any variations to orders being made, which may include changes to wāhi tapu conditions, or even potentially adding or removing parties in the future.[164] This suggestion was not considered by the Waitangi Tribunal, as its report was released before the Court of Appeal decision.

In contrast to this position, Miller J considered that where groups do not agree to shared exclusivity, the Court must decline the applications.[165] This more closely aligns with the approach of Churchman J in *Re Ngāti Pāhauwera*.[166]

(4) Shared or separate orders?

In *Re Edwards Whakatōhea*, several applicants accepted shared exclusivity, but argued that it was best expressed through separate but overlapping CMTs. While allowing for shared CMT orders, all courts have concluded that separate but overlapping CMTs are not available under the Act.[167] Churchman J ruled this approach out, considering that the structure of the Act was consistent with a jointly held CMT rather than overlapping CMTs and that if there were multiple CMTs for the same area, practical problems would arise where two groups seek to exercise their rights in different ways.[168] In the Judge's view:[169]

> Tikanga has in the past provided for the exercise of a complex web of overlapping rights. It should be able to assist in parties holding CMT on a joint or shared exclusive basis … .

This seems a lot like passing on the uncertainty created by the Act to successful applicants to deal with later, rather than the Court being decisive and conclusive on the issue. Nevertheless, the Court of Appeal agreed. Miller J found that separate but overlapping titles would not be possible as neither CMT holder would hold the specified area to the

159 At [440].
160 At [442].
161 At [442], n 466.
162 Section 4(1)(b).
163 See *Hart v Director-General of Conservation* [2023] NZHC 1011, [2023] 3 NZLR 42 at [120].
164 *Re Ngāti Pāhauwera*, above n 45, at [501] contemplates future variation of an order under s 111 of the Act to add a party.
165 *Edwards* (CA), above n 27, at [205].
166 *Re Ngāti Pāhauwera*, above n 45, at [425].
167 *Edwards* (HC), above n 48, at [169].
168 At [169].
169 At [170] (footnotes omitted).

exclusion of the other and as a result, the CMT bundle of rights could not be effectively utilised.[170] The majority simply considered that it would be unworkable.[171] It is not clear whether the courts have fully appreciated that these same issues arise between CMT holders on the basis of shared exclusivity.

IV Application

As explained above, the courts have arrived at an approach which makes the CMT test work, despite difficulties in reconciling it on its plain language. Yet the MACA Act still comes under considerable criticism, and from different directions. On the one hand, applicants, armed with the Waitangi Tribunal's recommendations, seek amendments or repeal of the Act in favour of a regime which allows for a "fair and reasonable balance between Māori rights and other public and private rights".[172] On the other hand, some interest groups, with support from the current government, seek a narrower or literal reading of the test, which would mean there would be few areas where CMT would be capable of being awarded.[173]

Below, two possible interpretations of the CMT test are examined to test their real-world effect on three of the available CMT rights: the RMA permission right, wāhi tapu protection rights and ownership of minerals. This analysis is then relied upon in Part V to draw conclusions about a possible new pathway forward, which proposes the least prejudicial pathway for those that stand to lose the most: whānau, hapū and iwi.

A *Test one: the current approach of the courts*

If a CMT is granted to one applicant on the current approach, the order would be relatively simple to hold and administer. Where a CMT order is awarded to two or more applicants on the basis of shared exclusivity, it may be more complex.

Where CMT is granted on a shared exclusivity basis, the RMA permission right will be conferred on the CMT holders jointly. Exactly how this will work in practice is yet to be tested. It may be that the process for when a resource consent is lodged is regulated through an agreement between the CMT holders which sits behind the CMT. What happens where there are differences of opinion between the CMT holders remains an open question. There is also uncertainty about what will happen when one group seeks a consent to make use of the CMT area but another objects. However, the Court certainly did not think this issue to be insurmountable if parties look to tikanga, as they have done in the past.[174] On the Court of Appeal's suggestion that an order be held by a third party where successful applicants disagree, there is considerable uncertainty as to how decisions would be made when a consent application is received and how parties would communicate their wishes to the holder.

Shared exclusivity also presents an issue for groups seeking wāhi tapu protection rights. The Court requires evidence that there is no opposition from joint CMT holders as to the location or protections sought before the protections can be granted. [175] This means

170 *Edwards* (CA), above n 27, at [208]–[209].
171 At [439].
172 *MACA Stage 2 Report*, above n 4, at xviii.
173 *Edwards* (CA), above n 27, at [416].
174 *Edwards* (HC), above n 48, at [170].
175 *Edwards (No 8)*, above n 83, at [101]–[105] and [132].

that shared CMT holders must agree on all details of any wāhi tapu protection rights despite the real potential for differences in tradition concerning the status or location of wāhi tapu as between neighbouring or overlapping groups.[176] If the shared groups cannot agree on the fact of a shared CMT, it appears unlikely that they will be able to agree on wāhi tapu protection rights. These considerations favour the uncoupling of wāhi tapu protections and CMT that the Waitangi Tribunal has recommended.

Where CMT is granted on the basis of shared exclusivity, the ownership of minerals passes to all CMT holders jointly. While it may be the case that the tikanga supporting the shared order allows groups to determine how the minerals ought to be managed or used, this is again uncharted territory. If parties find themselves in the position of tenants in common, no single CMT holder will be able to assert a separate entitlement to any part of the jointly owned property.[177] If a neutral holder is appointed, such as the Māori Trustee, decisions on how the minerals ought to be dealt with would raise considerable concerns about undermining the mana of the CMT groups. Due to the potential for the appointed holder to be viewed by Māori as an agent of the Crown, the Māori Trustee may therefore be an inappropriate choice to hold orders.[178] There may also be issues with distribution of royalties to the CMT holders.[179] On the face of it, if there is no agreement between the groups on the CMT, then the ownership of minerals is an illusory right, as nothing may be done with them.

B *Test two: narrowing the approach to give effect to exclusivity*

If the s 58 test is amended as contemplated in the Coalition Agreement, or if the Supreme Court adopts a literal reading of the test, then the two limbs would be distinct, with separate functions requiring different evidence from applicants. The first limb would look to tikanga; the second to western proprietary rights. The likely result is that any substantial third party access to an area would demonstrate a lack of exclusivity and CMT could therefore not exist.[180] This "exclusive means exclusive" approach is the strictest interpretation of the CMT test and would likely result in one group per title where, and if, the CMT test could be met. Aside from the possibility that multiple whānau, hapū or iwi who agreed to shared exclusivity as at 1840 filed a joint application prior to the 2017 deadline on that basis,[181] the fact of overlapping applications would likely prevent CMT being granted, meaning that shared exclusivity would not be available.[182] On this approach, only the most remote applications would succeed. The facts in *Re Tipene* may be one rare example.

If an applicant or applicants could meet this test, then the CMT rights bundle would be relatively simple to hold and administer. Each title would cover a discrete area, have clear representation and there would be no overlap with other CMTs. The RMA permission right

176 *Edwards (No 7)*, above n 76, at [438].
177 *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2010] NZHC 1134 at [159].
178 See Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 2 at 872.
179 MACA Act, s 84(2).
180 See the approach of the Landowners Coalition Inc in *Edwards* (CA), above n 27, at [409]–[410]; and *Edwards* (HC), above n 48, at [171].
181 *Edwards* (HC), above n 48, at [178]. There are instances of hapū and whānau groupings filing jointly, or of coming together at tikanga to seek a holding based on shared exclusivity. *Ngā Pōtiki Stage 1 Te Tāhuna o Rangataua*, above n 3, is a clear example of the latter.
182 Downs, above n 7, at 214.

would require applicants for resource consents to contact the single CMT holder. A clear answer could then be expected. If the CMT holder sought a resource consent to develop the CMT area there would be a low chance of potential veto from within the CMT holding group.

Where wāhi tapu protection rights are sought, the holder of the CMT would be able to design the conditions or restrictions to be set and to describe the location and reasons. The group would then hold and exercise the wāhi tapu protection right over the wāhi tapu or wāhi tapu areas where they have met the Court's criteria. If the wāhi tapu protection right is to be varied or revoked, the process would be relatively simple, as the CMT group could apply to do so without requiring agreement as between shared CMT holders. The holder of the wāhi tapu protection right would be able to directly appoint wardens under the Act.

Ownership of minerals would pass to the holder of the CMT for the discrete CMT area. Privilege or right holders would have certainty over the group to engage with, and there would be no complexity over distribution of any royalty payments from local bodies or the Crown. Although this approach might appear more simple for holding and administering the bundle of rights, the trade-off is that very few applicants would be successful in gaining those rights.

C *Seeking a less prejudicial pathway*

Although the Act provides benefits for successful applicants, it remains "difficult and complex".[183] The MACA regime has led to perverse outcomes for individual groups where they are required to participate in orders on a joint basis or receive no recognition order at all.[184] There are also a host of issues to be navigated by successful applicants, particularly where they are to be a party to a shared CMT.

The Waitangi Tribunal has found significant breaches concerning the Act, but has not recommended repeal. This is not necessarily their last word on the subject, as the Tribunal has reserved leave for claimants to seek final findings and recommendations once all appeal rights have been exhausted and the legal tests have been settled.[185] The Court of Appeal has already raised issues that the Tribunal has not considered, such as the appointment of an independent holder. It can be anticipated that this will be raised in further submissions to the Tribunal.

In the meantime, the limbs of the CMT test remain difficult to reconcile and have the potential to create illogical outcomes. This potential is reflected in the Court of Appeal judgment of *Re Edwards Whakatōhea*, which expends considerable effort in crafting the "best available reading of s 58, which respects both its text and its purpose", yet then arrives at a conclusion that CMT may largely be unavailable outside of inlets and shallow coastal waters.[186] Parliament, on this approach, has set out a test that cannot be met in deeper waters.[187] This appears to cut across the presumption in statutory interpretation that Parliament will not have intended absurdity or injustice.[188] While the majority note

183 *Edwards* (CA), above n 27, at [184].

184 At [260] the decision references Te Ūpokorehe's wish to proceed on an exclusive basis. Likewise, Ngāti Awa sought to participate in the courts as an interested party only, but was compelled to have its application part-determined: see at [289].

185 *MACA Stage 2 Report*, above n 4, at 103.

186 *Edwards* (CA), above n 27, at [434].

187 *Ngā Pōtiki Stage 1 Te Tāhuna o Rangataua*, above n 3, at [32].

188 *Commissioner of Inland Revenue v Alcan New Zealand Ltd* [1994] 3 NZLR 439 (CA) at 444.

that the s 58 test can be met in certain circumstances, it is hard to escape the conclusion that the test for CMT has been drafted in a way that restricts the possibility of success to all but a handful of iwi, hapū and whānau, while failing to recognise the tikanga and rights of the majority of iwi, hapū and whānau. Miller J did not consider that this showed the statutory scheme was unfit for purpose, noting:[189]

> Rights which have been lost to the practical and legal effects of colonisation may be the subject of redress negotiated and authorised by the other branches of government through the Treaty settlement process.

It is difficult to reconcile this statement with the purposes of the Act, and reliance on the Tiriti settlement process to remedy the prejudicial outcomes of a flawed test would be a difficult proposition. This is particularly so for groups who have already settled and therefore may be prevented from seeking further redress by a "full and final" clause in the deed of settlement, which have been included in most settlements to date.[190] The Court of Appeal did not confront this difficulty.

Ultimately the solution lies with Parliament, which can refer to existing examples of approaches that may be adopted in place of the MACA Act.[191] Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (Ngāti Porou Act) is a parallel example of an approach to granting rights in the takutai moana which resulted from a negotiated settlement between the Crown and Ngāti Porou. It is the only other example of a statute capable of providing rights in the takutai moana in New Zealand today. Under the Ngāti Porou Act, rights are granted on the basis of the continued existence of the mana of the applicants, rather than by reference back to customary rights.[192] Key points of difference between the MACA Act and the Ngāti Porou Act are that the statutory deadline was later than under the MACA Act; where granted, CMT is subject to fewer exceptions; CMT holders under the Ngāti Porou Act have stronger rights where national policy statements are being developed; there is a right of appeal for CMT holders concerning their environmental covenant, which is the rough equivalent of the planning document under the MACA Act; and customary fishing regulations made under the Ngāti Porou Act prevail over non-customary fishing regulations.[193] The Waitangi Tribunal observed that the hapū of Ngāti Porou who were able to receive rights under the Ngāti Porou Act did not receive those rights under the MACA Act. The Tribunal found this to breach the Treaty principle of equal treatment.[194]

Given the scale of the issues identified, this article suggests that rather than repeal, or rushing to amend s 58, a more careful approach should be adopted. Only once the courts have disposed of appeals and after any further Waitangi Tribunal findings and recommendations are received and analysed, a more detailed and coherent regime for recognition of rights could be developed jointly between Māori and the Crown. Beyond the changes recommended by the Waitangi Tribunal and potentially incorporating elements from the Ngāti Porou Act, this author considers that the change which would most align with the purposes of the Act would be to remove the exclusivity requirement from the CMT test. The Tribunal noted that this requirement has "created new tensions and exacerbated

189 *Edwards* (CA), above n 27, at [196].
190 *MACA Stage 2 Report*, above n 4, at 100.
191 *Paul v Attorney-General* [2023] NZSC 135 at [14].
192 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 3(1).
193 *MACA Stage 2 Report*, above n 4, at 235–237.
194 At 237.

existing ones among many Māori who filed overlapping applications".[195] Boast considered that the exclusivity requirement "remains intractable".[196] Powell J noted that the requirement for exclusive use and occupation does not sit easily with the rest of the Act,[197] and the Court of Appeal considered the limbs of the test to be exceptionally difficult to reconcile.[198] Furthermore, as exclusivity must be addressed in the "holding at tikanga" limb of the test in any case, and as this is a part of the tikanga of holding, it is worth questioning why the exclusivity requirement is needed at all.

(1) Rationale for removing the exclusivity requirement

The requirement for exclusive use and occupation can be traced from Australian and Canadian decisions, through to the FSA test for territorial customary rights and into the MACA Act.[199] This is despite the criticism of the Ministerial Review Panel on the FSA concerning incorporation of these foreign concepts into the law of Aotearoa New Zealand that:[200]

> … there would be a wide departure from the New Zealand jurisprudence if the overseas tests were applied here. There was no proper basis on which the government in 2004 could assume that the rules made there should apply here.

If true in 2004, this must also have been true in 2011. Looking simply at the ability to exclude others, or evidence of "exclusive stewardship",[201] is overly simplistic and has been recognised as "archaic, one dimensional and too prescriptive relying … on … a 'western lens' and approach to customary tenure".[202] The CMT test as reinterpreted by the Court of Appeal strays very close to an argument that "might is right". This is an outdated and reductionist view of systems of customary land holding.[203]

The Court of Appeal appears to have felt compelled to reach this conclusion due to the exclusivity requirement in the test. Tikanga is simply more complex and flexible than what their interpretation and the exclusivity requirement allow for. Tikanga incorporates principles similar to a proprietary holding within concepts including ahi kā (continuous occupation) and mana whenua (hapū authority over a place).[204] A group may be considered to have ahi kā and mana whenua over an area, even in the face of disagreement from neighbouring groups.[205] Despite these exclusive concepts, multiple groups can hold an area in accordance with tikanga.[206] Therefore, exclusivity is a part of tikanga, so reducing the CMT test to a hunt for the indicia of exclusivity adds little and causes prejudice.

195 At 101.
196 Boast, above n 23, at 282.
197 *Ngā Pōtiki Stage 1 Te Tāhuna o Rangataua*, above n 3, at [41].
198 *Edwards* (CA), above n 27, at [416].
199 See Foreshore and Seabed Act 2004, s 32.
200 Durie, Boast and O'Regan, above n 20, at 140.
201 *Edwards* (CA), above n 27, at [422].
202 *Bell v Churton Mataimoana* [2019] 410 Aotea MB 244 (410 AOT 244) at [11].
203 Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 24.
204 *He Poutama*, above n 103, at 72.
205 See *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, above n 103, at [431]–[434]; and *Ngāti Whātua Orākei Trust v Attorney-General (No 5)* [2023] NZHC 74 at [55].
206 See *Bell*, above n 202, at [62].

A group cannot be said to hold an area in accordance with tikanga without some elements of exclusivity in the context of tikanga. Therefore, removing the explicit requirement for exclusivity would allow tikanga to be brought to the fore, which would, given the nature of tikanga, still require analysis of tikanga as it is understood through a tikanga lens, and ensure that trust is placed in tikanga to guide the outcome.[207] This would displace the artificial and unnecessary requirement for exclusivity that currently exists. At best, this additional requirement creates a tautology. At worst, it may end up creating a virtually unattainable test.

(2) The benefits of allowing for separate and overlapping titles

Removing the requirement of exclusivity would also allow for separate but overlapping titles where sought. Then, where applicants meet the CMT test, the customary interests of successful applicant groups could be expressed by the grant of a single CMT, a jointly held CMT (whether held by one entity, or multiple entities), multiple overlapping CMTs in respect of the same area, or a combination of these arrangements. As things stand, the Court is required to award CMT at the level where all rights are recognised while avoiding giving joint CMT holders rights over greater areas than they may be individually entitled to. In other words, the current approach to shared CMT orders results in CMT being set at the scale of the "lowest common denominator". If separate and overlapping CMTs were available then parties would be entitled to an order which exactly tracks the area which they have shown they hold in accordance with tikanga, reducing the complexity for CMT holders and those required to engage with them.

Removing exclusivity from the test would not substantially change the practical nature of how the courts have recognised interests. Rather than consolidating groups into a single order, agreements or orders could be layered, with areas of shared and sole interests reflecting the tikanga of the applicants. Successful applicants could then decide how co-management works over any shared areas in accordance with their tikanga. Separate but overlapping CMT orders could then, where tikanga allows it, be granted within the same area to different groups at different times and by different decision makers. Like the Waitangi Tribunal recommended concerning removal of the "without substantial interruption" requirement, this change would require an opportunity for parties to re-submit their application if they have been previously unable to meet the CMT test due to the exclusivity requirement.[208]

(3) Impact on CMT rights

Removing the exclusivity requirement would create very similar outcomes in terms of how orders are held to those for shared CMTs, except where separate but overlapping orders may be granted. For the RMA permission right, separate but overlapping CMTs would mean that a party seeking a resource consent would need to consult the register held by LINZ and contact all CMT holders in the area, whether they may be shared orders or separate overlapping orders. Where one or more of the CMT holders objects, the consent will not be granted. This would not appear to increase the complexity for those seeking

207 See *Kaikōura and Hurunui Landowners Association Inc v Minister of Fisheries* [2022] NZHC 2677 at [100]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [297] per Williams J.

208 *MACA Stage 2 Report*, above n 4, at 102.

consents, or for CMT holders. In fact, separate orders may assist in clarifying which exact CMT holders declined permission for a consent, meaning the party seeking consent can work with that specific holder directly to address any issues raised for future applications. This is in contrast to a shared order where permission may be declined, but the party seeking consent may never be aware of which of the shared holders specifically took issue with the application.

Allowing for separate but overlapping titles would also help to simplify the issue with wāhi tapu protection rights, where on a shared title one group may hold a veto over the recognition of wāhi tapu sites of other groups. Where the wāhi tapu test and framework can be met by individual CMT holders, they would be able to directly protect their wāhi tapu. The Court would retain discretion to award protections on a shared basis where the evidence leads to that conclusion. Separate and overlapping orders would also allow individual groups to appoint their own wardens under the Act. There does not seem to be an issue with one group having a wāhi tapu protection in another group's CMT area, since if the Crown acts on the Tribunal's recommendation to decouple CMT and wāhi tapu protections, the rights would presumably be held in a similar way to PCRs.[209]

Removing the exclusivity requirement and allowing for a tikanga analysis of the applications may result in less CMT ending up in shared title, but more CMT being awarded to iwi, hapū and whānau overall. This would likely simplify ownership of minerals and the payment of any royalties accruing to CMT holders. However, this does not provide a perfect answer. It may be that the Act is amended so that minerals are held jointly by parties where separate titles overlap. In that case, successful parties would have to trust in tikanga to resolve any disputes which may arise, as is the case with shared exclusivity on the current approach.

V Conclusion

The MACA Act and the decisions that have flowed from it continue the pattern of increasing recognition of tikanga in the law of Aotearoa New Zealand.[210] While the Crown has failed to advance direct engagement applications, the High Court has now heard and determined dozens of applications.[211] For successful applicants there is real benefit to be obtained through the awarding of CMT and PCRs, yet there are considerable issues with the MACA regime which need to be addressed.

This article has surveyed the way in which the courts have made the MACA Act work. This has necessarily involved a close survey of decisions to date. Having reviewed the careful work that the courts have undertaken in making the Act function, this article urges caution before making radical amendments to, or repealing, the Act. There is an unmistakable parallel here between the decision to legislate following *Attorney-General v Ngati Apa* and the signalled intent to amend the MACA Act "to make clear Parliament's original intent" rather than let appeals to decisions under the Act run their course.[212] The spectre of the practical extinguishment of customary rights, whether directly or through a sidewind, looms once again.[213]

209 At 184.
210 Shown clearly in *He Poutama*, above n 103, at Appendix 4.
211 *MACA Stage 2 Report*, above n 4, at 36.
212 *Coalition Agreement between the National Party and the New Zealand First Party*, above n 34, at 10.
213 *Ngati Apa*, above n 9, at [154].

While there is no easy pathway here, further legislative intervention to amend the s 58 test will only lead to protest, further litigation and issues in interpretation. This is especially so if those changes are undertaken without the consent of Māori; the Waitangi Tribunal has found that, in situations where Crown actions' effects on tino rangatiratanga are concerned, Māori consent is required for "intrusions into the realm of tino rangatiratanga".[214]

The least prejudicial pathway may be to let the law develop and then assess how the CMT test works in practice. While the package of amendments recommended by the Waitangi Tribunal must be adopted if the Act is to be consistent with te Tiriti and its principles, a further amendment may be needed to remove the unnecessary requirement of exclusivity from the CMT test. This approach would allow for overlapping but separate CMTs and may better protect wāhi tapu, potentially simplifying the way RMA permission rights are held and how ownership of minerals is managed. Overall, the regime must place trust in tikanga if it is to allow for expression of customary rights as:[215]

> … 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.

214 Waitangi Tribunal *He Whenua Karapotia, He Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape Inquiry District* (Wai 2180, 2024) at 77–78; and Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 235.

215 MACA Act, preamble.