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To what extent does the Marine and Coastal Area (Takutai Moana) Act 2011 give effect to te Tiriti o Waitangi or the Treaty of Waitangi? A critical analysis of tikanga Māori, customary marine title, and Treaty principles.

Introduction

The Marine and Coastal Area (Takutai Moana) Act 2011 (MCAA/Act) was enacted to replace the Foreshore and Seabed Act 2004 (FSA), which had been widely criticised for being inconsistent with te Tiriti o Waitangi.[1] Implemented as a legislative attempt to redress Māori rights in the coastal marine area, the Act aimed to recognise customary marine title and acknowledge tikanga Māori. However, while the legislation illustrates a rhetorical shift toward greater Treaty recognition in our legal system, its practical application raises critical questions about the extent to which it genuinely gives effect to the Treaty principles under te Tiriti o Waitangi and the Treaty of Waitangi.

Te Tiriti o Waitangi reaffirms the authority of Māori to exercise control over their taonga and presumes a relationship of partnership and mutual respect between Māori and the Crown. However, the Crown's continued use of state-centric legal thresholds to give effect to Māori customary rights suggests that substantive Tiriti partnership remains elusive. This tension is particularly evident in the MCAA, where Māori must prove exclusive use and occupation of marine areas since 1840. This standard appears misaligned with collective Māori understandings of land, water, and kinship responsibilities under tikanga.

This essay critically examines whether the MCAA truly gives effect to te Tiriti o Waitangi. It explores how tikanga Māori and customary marine titles have been treated under the Act, regarding key judicial interpretations in *Re Edwards (No 2), Re Edwards (Whakatōhea)* and *Re Tipene*.[2] It also evaluates whether the Act, in a general sense, upholds Treaty principles such as partnership and active protection. These are the central issues examined in this

[1] Marine and Coastal Area (Takutai Moana) Act 2011; Foreshore and Seabed Act 2004.
[2] *Re Edwards (dec'd) (on behalf of Te Whakatōhea) (No 2)* [2021] NZHC 1025; BC20216194; *Re Edwards Whakatōhea* [2023] NZCA 504; [2023] 3 NZLR 252; *Re Tipene* [2017] NZAR 559.

discussion. For the purposes of this essay, the Supreme Court decision and the proposed Amendment Bill fall outside the scope of analysis and are referred to only in passing.[3]

The Historical and Legal Context

The New Zealand courts initially acknowledged and respected Māori customary title as something affirmed by the Treaty.[4] However, in 1877, in the Court decision of *Wi Parata v Bishop of Wellington,* the Courts rejected that approach and extinguished any possibility of acknowledging customary title.[5] For more than a century, customary title in land and the marine coastal area had been denied to Māori.

In 2004, the FSA was enacted, and it was a direct response to the Court of Appeal's decision in *Ngāti Apa v Attorney-General*, which affirmed the possibility that Māori could hold customary title to parts of the foreshore and seabed under common law and tikanga Māori.[6] The FSA worked to prevent Māori claims from proceeding through the courts, and the Crown legislated to vest ownership of the entire foreshore and seabed in the Crown, extinguishing any existing Māori customary interests without compensation.[7]

The Waitangi Tribunal's 2004 Report on the Crown's Foreshore and Seabed Policy (WAI 1071) found that the Crown's actions breached both express terms and the principles of te Tiriti o Waitangi.[8] It concluded that the Crown had undermined the guarantee of tino rangatiratanga under Article 2 and the rights of all citizens to equal treatment under the law under Article 3.[9] In respect of the principles of the Treaty, the Crown failed in its obligation of partnership and active protection.[10] The Foreshore and Seabed Act was widely seen as a profound betrayal of Treaty principles, sparking mass protest movements, including the 2004 hīkoi to Parliament and the formation of the Māori Party.

Following a 2009 Ministerial Review, which also found that the Act was discriminatory, and in response to widespread public opposition and ongoing political and legal pressure, the

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3 *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira O Waioweka* [2024] NZSC 164; BC202464438.
4 *R v Symonds* (1847) NZPCC 387 (SC) at 394.
5 *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur (NS) 72.
6 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).
7 Foreshore and Seabed Act 2004, s 32-36.
8 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071, 2004).
9 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* at 5.1.1–5.1.3.
10 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* at 5.1.4–5.1.5.

Crown repealed the 2004 Act and introduced the MCAA.[11] This legislation ostensibly restored the ability of Māori to seek legal recognition of their customary marine title, while removing the notion of Crown ownership by declaring the marine and coastal area as publicly owned and incapable of private ownership.[12]

However, the shift in language masked the persistence of embedded structural issues. The MCAA replaced outright extinguishment with a regime that imposed strict legal and evidential hurdles on Māori applicants. In particular, claimants must prove exclusive use and occupation of the claimed area from 1840 to the present day according to tikanga and without substantial interruption.[13] Although this test is framed to balance Māori rights and public access, it imposes Western property concepts inconsistent with collective Māori relationships to land and water under tikanga.

Understanding the Crown's obligations under te Tiriti is critical to evaluating the MCAA. Article 2 of the Treaty, particularly in its Māori text, guaranteed tino rangatiratanga over taonga katoa or treasured resources, which include the coastal and marine environment. In the English version, article 2 affirms full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties. It imposes a duty on the Crown to actively protect these rights, not merely to refrain from extinguishing them.

The MCAA thus emerged in a context where the Crown's legitimacy was already questioned regarding its treatment of Māori marine and coastal rights. While it represents an attempt to correct the most egregious breaches of the 2004 Act, it must be evaluated against the higher standard of whether it gives complete, practical and meaningful effect to the Treaty, especially to genuine Tiriti partnership and active protection of Māori interests. The historical context reveals that the issue is not simply one of recognising Māori rights, but of confronting more profound questions of constitutional authority, and the proper relationship between tikanga Māori and state law.

Tikanga Māori and Customary Marine Title under the Act

[11] Taihakurei Edward Durie, Richard Boast and Hana O'Regan *Pakia ki uta, pakia ki tai: Report of the Ministerial Review Panel* (30 June 2009) vol 1 at [6.3.1].
[12] The Marine and Coastal (Takutai Moana) Act 2011, s 6 and 11.
[13] Section 58.

The MCAA aimed to restore Māori customary rights to the common marine and coastal area, through "legal expression in accordance with [the MCAA] Act" where that legal expression comprises customary marine title (CMT) under s 58.[14] However, its approach to tikanga Māori and customary marine title reflects an uneasy compromise between acknowledging indigenous legal traditions and preserving Crown sovereignty. This section critically analyses how tikanga and customary marine titles are defined and operationalised under the Act, drawing on judicial interpretation in cases such as *Re Edwards (No 2), Re Edwards (Whakatōhea), and Re Tipene.*[15]

Central to the MCAA is the legal category of CMT, where under s 58, CMT may be recognised if a group can demonstrate that it has held the specified area in accordance with tikanga Māori and that it has exclusively used and occupied the area since 1840 without substantial interruption.[16] While the statutory recognition of tikanga Māori marks a significant shift, Parliament's intentions behind the legislation and its practical application reveal the persistence of Western colonial frameworks. When Parliament enacted the legislation in 2011, Christopher Finlayson, the Minister responsible stated that the intentions of the Act were to set a high bar for a court to grant CMT to an area. Additionally, the requirement of "exclusive use and occupation" is particularly foreign and problematic when examined through a tikanga lens. According to Joe Williams, the then Chief Judge of the Māori Land Court, Māori conceptions of rights in land, water and territories are based on tikanga principles of whanaungatanga (relationship) and kaitiakitanga (stewardship).[17] These principles encompass inclusiveness and collectiveness which is often contrary to the rather individualised or exclusionary ownership that underpins the common law system.[18] Therefore, by prioritising colonial structures and importing Western property concepts into the statutory test, the MCAA imposes concepts that are unrealistic, foreign and incompatible to tikanga Māori and Māori understandings of their relationship with the marine and coastal environment.

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[14] The other two categories of rights under the MCAA Act are protected customary rights (PCRs) under s 51 (which protect certain customary activities) and the right to participate in conservation processes under s 47.
[15] *Re Edwards (dec'd) (on behalf of Te Whakatōhea) (No 2)*, *Re Edwards Whakatōhea*, *Re Tipene*, above n 2.
[16] The Marine and Coastal (Takutai Moana) Act 2011, s 58.
[17] Joe Williams, "He Aha Te Tikanga Maori", New Zealand Law Commission, Wellington, 1996
[18] *Re Edwards (dec'd) (on behalf of Te Whakatōhea) (No 2),* above n 2, at [397].

Yet, given the intentions of Parliament behind the MCAA, judicial interpretations have been relatively liberal than intended, ruling that holding an area in accordance with tikanga takes precedence over exclusive use. *Re Edwards* is the first significant High Court ruling under the MCAA where the Courts recognised the centrality of tikanga Māori in determining CMT.[19] Churchman J recognised tikanga, through the expertise of pūkenga (Māori cultural advisors), as the critical basis for evaluating whether an area was held in accordance with Māori customary law, rather than rigidly applying the Western-derived s 58(1)(b) requirement of exclusive use and occupation.[20] According to the Judge, "*The critical focus must be on tikanga and the question of whether or not the specified area was held in accordance with the tikanga that has been established."*[21] This marked a notable shift in legal reasoning, as it allowed for a tikanga-informed notion of "shared exclusivity" enabling overlapping claims to be accepted where they may have otherwise failed under a plain reading of the Act. Despite the MCAA appearing to preclude overlapping claims by requiring evidence of exclusive occupation, the Court applied a liberal interpretation of the provision, embedding tikanga as the primary lens of analysis.

Additionally, the Court of Appeal in *Re Edwards (Whakatōhea)* highlighted the tension between the literal wording of s 58(1)(b) and the MCAA's broader purpose in s 4 of the Act.[22] The Court noted that requiring strict, uninterrupted exclusive occupation since 1840 would likely bar many valid claims, and this would risk extinguishing rather than recognising customary rights, contrary to the Treaty, and the purposes of the Act, including the recognition of mana tuku iho and the promotion of customary interests in the common marine and coastal area.[23]

Furthermore, the majority approach in *Re Edwards (Whakatōhea)* illustrated the possibility of interpreting the text of s 58 in a manner that is consistent with the purpose of the MCAA through a sensitive approach to the different legal frameworks that existed before the

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[19] *Re Edwards (dec'd) (on behalf of Te Whakatōhea) (No 2),* above n 2, at [7]. The first was *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559, where the Courts considered a relatively small-scale application regarding CMT.
[20] The Marine and Coastal (Takutai Moana) Act 2011, s 58(1)(b).
[21] *Re Edwards (dec'd) (on behalf of Te Whakatōhea) (No 2),* above n 2, at [144].
[22] *Re Edwards Whakatōhea* [2023] NZCA 504, above n 2, at [416]; Marine and Coastal (Takutai Moana) Act 2011, s 4 and 58(1)(b).
[23] *Re Edwards Whakatōhea* [2023] NZCA 504, above n 2, at [416]; Marine and Coastal (Takutai Moana) Act 2011, s 4 and 58(1)(b).

proclamation of sovereignty in 1840 and from the proclamation of British sovereignty onwards.[24] Additionally, in the High Court decision Churchman J interpreted "substantial interruptions" not as grounds for dismissing a claim entirely, but rather as requiring the exclusion of specific areas from an otherwise valid claim. While these approaches have been praised as a landmark decision for upholding tikanga Māori, it has also drawn criticism for significantly lowering the threshold, making the test easier to meet than Parliament intended, and creating practical difficulties when trying to merge concepts of "shared exclusivity" and "overlapping interests", revealing the tension inherent in applying tikanga within a statutory framework grounded in Western legal concepts. Nevertheless, the decisions significantly contributed to changing the nature of the s 58 test and materially reduced the threshold. Although the Supreme Court, which is outside the scope of this essay, has resolved the test for customary marine title, that interpretation of s 58 may be short lived.[25] This is due to the recently introduced Amendment Bill which seeks to address this by clarifying that the mere exercise of customary rights according to tikanga over a particular area will not, on its own, be sufficient.[26]

Treaty Principles and the Crown's Obligations

The Treaty principles of partnership, active protection and tino rangatiratanga form the cornerstone of the Crown's obligations to Māori. While tino rangatiratanga underpins Māori authority and rights to taonga such as te takutai moana or the marine and coastal area, this section focuses on principles of partnership and active protection. An assessment of the Marine and Coastal Area (Takutai Moana) Act 2011 must therefore consider whether these obligations of the Crown are upheld in both the form and function of the legislative framework. The principles of partnership derive from the Treaty relationship between Māori and the Crown and entail a duty to engage in dialogue to resolve issues where their respective authorities overlap or affect each other and in doing so act reasonably, honourably, and in good faith.[27] The principle of active protection is strongly tied to partnership, and was considered in early Tribunal reports, and affirmed in the *New Zealand Māori Council v*

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[24] *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira O Waioweka*, above n 3, Cooper and Goddard JJ at [419] - [421].
[25] *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira O Waioweka*, above n 3.
[26] 'Section 58 – Preliminary Options and Process', 30 January 2024 (TA.003.0323) (doc A52, p 530).
[27] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA); Waitangi Tribunal, Ngā Mātāpono – The Principles : The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version (Wellington : Waitangi Tribunal, 2024) at 74.

Attorney-General case, where the Court held that 'the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties', and that the Crown's duty to protect Māori rights and interests 'is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable'.[28]

However, the development and implementation of MCAA has fallen short of true and meaningful partnership and active protection. With respect to an unparalleled resource and taonga interest such as te takutai moana, the Waitangi Tribunal in its 2023 Stage 2 Report stated that "on the sliding scale that determines the appropriate standard of consultation, the Crown's obligation to consult with Māori in developing the Takutai Moana Act is at the highest end."[29] Although the Crown did consult with important focus groups and implemented some suggestions from these groups, the Waitangi Tribunal still found that the Crown failed to adequately consult with Māori during the development of the Act and breached the Treaty principles of partnership and active protection.[30] This was because the Crown's consultation with Māori on the Act had limited engagement with affected Māori, offered no ability to engage with the operational details of the Act beyond written submissions, and was conducted over a short period.[31] Additionally, in terms of the function of MCAA, the practical implications of the Act in terms of active protection of the moana and coast remain uncertain.[32] Therefore, when assessing whether the Crown's obligations are upheld in both the form and function of the legislative framework, the Act remains structurally constrained in its ability to give meaningful effect to Treaty principles.

Conclusion

Ultimately, while MCAA purports to accommodate Māori customary rights, it does so within a legal framework that remains structurally grounded in Crown sovereignty and state control. The MCAA reflects a rhetorical shift away from the extinguishment model of the FSA.

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[28] *New Zealand Maori Council v Attorney-General*, above n 27.
[29] Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wellington : Waitangi Tribunal, 2023) at 52.
[30] *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report,* above n 29, at 59.
[31] *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report,* above n 29, at 59.
[32] Taylor Lara, Tania Te Whenua, and Bonny Hatami. "How current legislative frameworks enable customary management & ecosystem-based management in Aotearoa New Zealand - the contemporary practice of rāhui." (Discussion paper for Sustainable Seas National Science Challenge, 2018).

However, its practical operation imposes procedural burdens that continue to constrain the expression of tikanga Māori and the exercise of mana whenua.

While significant in principle, the statutory recognition of tikanga is limited by the requirement that Māori prove their rights through courts, on terms defined by legislation incorporating Western property concepts such as exclusive occupation. Even as recent jurisprudence, notably *Re Edwards (Whakatōhea)*, signals a more tikanga-informed approach, these developments remain precarious, particularly in light of proposed legislative amendments aimed at narrowing the scope of recognition.

Furthermore, the Crown's consultation processes during the development of the Act fell short of the high standard required by the principles of partnership and active protection. The Tribunal's findings highlight that Māori were not meaningfully included in shaping the regime's operational details that directly affect their rights and relationships with te takutai moana.

In that sense, the MCAA neither fully realises the transformative potential of te Tiriti o Waitangi nor reflects a genuine commitment to shared constitutional authority. True Tiriti partnership would require not merely recognising Māori rights but reconfiguring legal frameworks to reflect tikanga Māori as an autonomous and coexisting source of law, as the majority acknowledged in *Ellis v R*, where they recognised that tikanga was the first law of Aotearoa New Zealand and that it continues to shape and regulate the lives of Māori.[33]

[33] *Ellis v R* [2022] 5 LRC 584 at [22].