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## THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 AND TIKANGA: SOME CHALLENGES ARISING

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### Abstract

The following article is based on a speech delivered by Justice Powell on 3 May 2023 on the challenges of applying the Marine and Coastal Area (Takutai Moana) Act 2011. Justice Powell discusses the background and history of the current legislation. He then considers the challenges of applying tikanga under the statutory tests for customary marine title and protected customary rights.

**Keywords:** tikanga; customary rights; High Court of New Zealand.

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Thanks to the New Zealand Asian Lawyers and Buddle Findlay for putting on this very worthwhile and topical event. Thank you, Yvonne Mortimer-Wang, Barrister at Shortland Chambers and member of the New Zealand Asian Lawyers Board, for your warm introduction, and I join the other presenters in acknowledging Mai Chen for her persistence and potent persuasive skills in organizing the presenters.

Mai asked if I could talk a little about tikanga and the Marine and Coastal Area (Takutai Moana) Act 2011, commonly known as the MACA.

I do not intend to talk about the difficulties of ascertaining tikanga and whether its identification is properly considered as a matter of law, or a fact to be proved in evidence, or a mixture, although these are issues in MACA cases as in other areas of the law. Instead, my focus is on specific issues thrown up by the MACA itself, and the light these issues throw on other legislation where issues of tikanga are specifically referred to.

Most of you will be aware that the MACA is the current legislative response to Māori claims for recognition of customary rights over the foreshore and seabed, having replaced the unlamented Foreshore and Seabed Act 2004 (FSA). The FSA was the controversial response to the Te Tau Ihu Iwi claims for recognition of customary ownership of the foreshore

and seabed in the Marlborough Sounds and the decision of the Court of Appeal in *Ngāti Apa v Attorney-General* (2003) allowing the Māori Land Court to investigate those claims.

As enacted the MACA provides mechanisms for determining whether identified customary rights can then be recognized as either customary marine title (CMT) in sections 58 and 59 or protected customary rights (PCR) in section 51 of the Act. It is an important addition to the jurisdiction of the High Court. Each application is substantial and in many ways puts a High Court judge into the position of becoming a one-person Waitangi Tribunal without the backup, while the number of applications means it will take many years for all of the applications to be determined.

Included in the many challenges are:

- ◇ the fact that the generation of tribal experts, the kuia and koroua who led the Treaty claims for their respective groups, are now passing and a new generation is having to take over; and
- ◇ the fact that the applications deal with fundamental issues of iwi and hapū identity and their relationships with adjoining groups place a heavy responsibility upon the High Court.

There are two pathways for recognition for both types of rights: either through direct negotiations with the Crown or through an application to the High Court.<sup>1</sup> To date, in the limited number of applications considered by the High Court, applicants generally are content to take the opportunity to negotiate PCR directly with the Crown, and as a result the focus of the High Court has overwhelmingly been upon CMT. Building on earlier judgments of the High Court, for example in *Re Tipene* (2016) and *Re Edwards (No 2)* (2021), I have set out how I think the CMT jurisdiction works in my judgment in *Ngā Pōtiki Stage 1–Te Tāhuna O Rangataua* (2022).

In summary, the criteria for the issue of CMT are set out in sections 58 and 59 of the MACA. The key elements of the test are outlined in section 58(1), which provides:

**58 Customary marine title**

- (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—
  - (a) Holds the specified area in accordance with tikanga; and

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<sup>1</sup> Separate applications were required for both within six years of the commencement of the MACA (ss 95(2) and 100(2)) so an applicant group that has applied for recognition of CMT through direct negotiations with the Crown has not filed an application in the High Court and its application cannot be considered by the Court.

- (b) has, in relation to the specified area,—
- (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
  - (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

At first glance it appears tikanga is front and centre of the test. This you might think should make things easier: one of the challenges thrown up by the Supreme Court in *Ellis v R* (2022) is understanding where tikanga fits in to any particular area of New Zealand law and how it is to be applied. Just because there is an explicit reference to tikanga in a statute does not necessarily make its application any easier and instead throws up a range of issues that need to be worked through.

Part of the difficulty stems from the fact that the test is not limited to tikanga, while the outcome of the test, the CMT itself, does not fit easily into a tikanga paradigm.

In relation to the test, the MACA followed the FSA in bolting on additional components to the test so that unlike the situation on dry land (above the high-water mark), tikanga by itself is not determinative of whether title can be issued.

To explain this issue I need to go back a bit.

The obligation to recognize the customary rights (including property rights) of indigenous people first arose in western legal thought following colonization of Mexico and Peru in the 16th and 17th centuries. After considerable debate the Spanish Crown accepted that it had an obligation to protect the property rights held by indigenous people. That obligation developed into what is known as the doctrine of aboriginal rights/aboriginal title and became part of the English common law. By the date of the Treaty of Waitangi in 1840 there was a clear acceptance of this obligation in the British Colonial Office. As the High Court of Australia noted in *Mabo v Queensland (No 2)* (1992), in many respects the guarantees contained in article 2 of the Treaty of Waitangi are simply a restatement of the common law obligation to protect the property rights of indigenous people.

As a result, when such rights have been shown to exist, they cannot be ignored by the Crown.<sup>2</sup> The rights of indigenous peoples framed in New Zealand by tikanga need to be considered on their own terms.

The focus, as Whata J observed, has often been on those rights identified as being proprietary in nature. This is not so much about the nature of the customary right itself. Rather, it is an issue of categorization by the colonial legal system due to the potential effect on particular customary rights on the property rights claimed by colonists at the point at which the customary rights come up for consideration.

In any event the obligation upon the Crown goes further than simply recognizing and protecting such rights where they have been proved. The Crown must also ensure that it has either provided a mechanism by which Māori are able to prove such rights themselves or, alternatively, put on notice that such rights are claimed to exist. The Crown must, as part of the obligation to actively protect the Māori interest, undertake an appropriate investigation to determine the nature and extent of such rights.

Section 58(1)(b)(i) of the MACA changes this approach by not simply limiting the investigation to the nature of the tikanga but requires investigation of the tikanga in conjunction with other matters. The section therefore sits uneasily outside of tikanga, particularly in relation to the requirement that a specified area of common marine and coastal area is “exclusively used and occupied”. This is a term used in overseas jurisdictions and case law, and, as I explained in *Ngā Potiki–Stage 1* (2021), fits better with claims to dry land rather than areas of foreshore and seabed given the limited number of transitory uses that are possible within the common marine and coastal area.

The effect of the additional requirements contained in section 58(1)(b)(i) of the MACA is that applicants are required to meet a statutory threshold that goes beyond tikanga in order to meet the requirements for issue of a CMT. One of the challenges for counsel working in this jurisdiction is to ensure that the other elements of the test are not neglected, particularly when it comes to establishing the continuity requirements.

The additional components are important. If not met, a group can be excluded from CMT notwithstanding they may clearly retain customary rights in the specified area, with no mechanism in the statute for those

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<sup>2</sup> See, for example, *Mabo v Queensland (No 2)* (1992) which cited the New Zealand cases of *R v Symonds* (1847) and *Nireaha Tamaki v Baker* (1901) with approval, and see also *Tamihana Korokai v Solicitor-General* (1912).

lesser customary interests to be recognized. The second form of customary rights, the PCRs, may provide recognition in some cases but are unlikely to be broad enough to cover the type of rights that may be in issue. A PCR cannot include an activity that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource.

It is noted that the approach taken in the MACA contrasts with historical recognition of customary rights in New Zealand prior to this point (or at least prior to the FSA). Since the introduction of the Native Land Court in 1862, through to the present Te Ture Whenua Māori Act 1993, customary land has always been identified according to tikanga, first as being land held in accordance with the customs and usages of Māori and rephrased since 1993 as “land held in accordance with tikanga Māori”. Throughout tikanga has been determinative, with the primary issue in case law being the identification of those who hold the customary rights rather than whether the land was customary land. This reflected the objectives of successive colonial governments which were to ensure that title could be issued to specified owners and thereby facilitate the more efficient alienation of Māori interests to that land.

If the inputs required to establish CMT are problematic, in the event that groups are found to have CMT the outputs can be even more so.

This is because the MACA, like Te Ture Whenua Māori Act and preceding Māori land legislation since 1862, is a statutory translation mechanism which takes customary rights originally defined by tikanga and fits them into an essentially alien legal framework.<sup>3</sup>

For example, identifying the extent of a particular CMT poses difficulties. Tikanga may establish that a group is entitled to a CMT to seaward of land remaining in the ownership of that group. That group then becomes one of a number of groups “sharing exclusively” in a CMT further offshore. The question that the court needs to determine is where that boundary in between those two CMT should be drawn? Tikanga, while able to provide guidance on exclusive or shared exclusive areas is less useful in determining where exactly the boundary should be crystallized to enable a title to be issued. The reason for this is obvious, as tikanga never had to draw boundary lines in the open sea and is far better able to accommodate gradual changes in intensity of customary rights. If CMT is to be issued, however, the court must grapple with the

<sup>3</sup> In Te Ture Whenua Māori Act 1993, for example, in the event land is identified as Māori Customary Land, as soon as owners are identified the status of the land changes to Māori Freehold Land for the purposes of that Act. See particularly ss 129(2)(a) and (b) and 132.

need to conceptualize the boundaries of the CMT in accordance with tikanga rather than simply drawing arbitrary lines on charts.

The difficulty in drawing boundary lines also complicates governance arrangements for the holders of CMT that are ultimately recognized by the court. The fact that different areas of sea will have multiple different customary owners the further one travels along the coast means that in many cases an applicant group's post-settlement governance entity as utilized for Treaty settlements will be unable to hold any CMT. At the same time, any attempt to create a new governance entity for each CMT issued to reflect the different groups with interests raises the unattractive and draining possibility of the proliferation of cumbersome and expensive governance entities. To date the only alternative appears to be the vesting of the CMT in individuals identified as representative of the customary owners, although it must be remembered that this too was problematic for much of the history of the Native Land Court and raises questions of accountability when it comes to making decisions as provided for in the MACA.

Without legislative change, these issues must be worked through in order to achieve outcomes that are consistent with the original tikanga that necessarily underpins the CMT issued.

It also provides a broader challenge at the law reform level. If it is decided to give effect to tikanga through legislation, care must be taken in legislative drafting to ensure the tikanga at issue is cared for and protected throughout the statute and not distorted in implementation.

### ***About the author***

*For further details of the **Honourable Justice Powell's** legal career, see the [Courts of New Zealand Judges page](#).*

## Legislation, Regulations and Rules

Te Ture Whenua Māori Act 1993

Treaty of Waitangi 1840

Marine and Coastal Area (Takutai Moana) Act 2011

Foreshore and Seabed Act 2004

## Cases

### **Australia**

*Mabo v Queensland (No 2)* (1992) 66 ALR 408

### **New Zealand**

*Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239

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

*Ngāti Apa v Attorney-General* [2003] 3 NZLR 643

*Nireaha Tamaki v Baker* [1901] NZPCC 371

*R v Symonds* [1847] NZPCC 387

*Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772

*Re Tipene* [2016] NZHC 3199, [2017] NZAR 559

*Tamihana Korokai v Solicitor-General* (1912) 15 GLR 95