Developments in the MACA space moving at pace

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In a lightning fast judgment issued earlier this week, just two weeks after the hearing closed, the Supreme Court released the first of two decisions relating to claims to customary rights in the harbours, river mouths, beaches and seascape of the Eastern Bay of Plenty. The first judgment comes against the background of the Coalition Government's Bill, intended to clarify the legal tests for customary rights in the marine and coastal area, expected to become law by Christmas.

The Supreme Court's decision (*Whakatōhea Kotahitanga Waka (Edwards)*) is the

first case to be heard by our highest court under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). The case involves seven appeals, by the Attorney-General and tangata whenua groups, which raise novel and important constitutional issues, primarily regarding the tikanga-based rights of whānau, hapū and iwi and the rights and interests of the wider community in the common marine and coastal area (formerly referred to as the "foreshore and seabed").

In this article, we look at the background to these appeals, the Government's Bill seeking to clarify the legislative intent of the MACA, and some practical implications of the Supreme Court's decision, which cannot be appealed and therefore forms part of our law unless amended by Parliament.

The Test

The key issue before the courts has been the test for obtaining customary marine title (CMT) under the MACA. Section 58 (relevantly) provides that CMT exists if the applicant group:

- Holds the specified area in accordance with tikanga; and
- Has exclusively used and occupied the area from 1840 to the present day without substantial interruption.

In contention are what constitutes "exclusively used and occupied" and what amounts to "substantial interruption".

Court of Appeal decision

Appeals against the High Court's decision granting CMT orders to a number of tangata whenua parties in the Eastern Bay, which you can read about in our article here, were heard in the Court of Appeal in early 2023. In a judgment released in October 2023, the Court of Appeal looked carefully at the s 58 issues. The two judge majority found it exceptionally difficult to reconcile the second part of the s 58 test relating to exclusive use and occupation with the purpose of MACA which is to:

a. establish a durable scheme to ensure the protection of the legitimate interests of

all New Zealanders in the marine and coastal area of New Zealand; and

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

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

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

On a literal reading , the majority considered that there would be few areas where CMT could be made out. Incursions by third parties would deprive a group of CMT, and MACA would extinguish customary interests "by a side wind". On that basis, the majority concluded that the ability to exclude others was not required; the question was whether a group had "sufficient control" over the area to exclude others if they wished to do so. This required a strong presence in the area, resulting in acts of occupation that demonstrated that the area was under the exclusive stewardship of the claimant group.

In a minority judgment Justice Miller dissented, concluding that "exclusive use and occupation" requires the applicant group to prove "both an externally manifested intention to control the area as against other groups *and the capacity to do so*".

The majority concluded that a substantial interruption occurred where the group's connection with the area and control over it was lost *as a matter of tikanga*, or was substantially interrupted by lawful activities carried on in the area *pursuant to statutory authority*.

Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill

The majority judgment faced some critique that it materially reduced the threshold in the second limb of the s 58 test. Some parties in the Coalition Government disagreed with the majority's interpretation of Parliament's intention for the tests for obtaining CMT. An agreement to introduce a Bill to amend MACA and "clarify the interpretation of s 58" was included as part of the 2023 coalition agreement between National and NZ First.

The Amendment Bill was introduced in September 2024. The stated aims of the Bill are to provide direction to decision-makers (the High Court and Minister for Treaty of Waitangi Negotiations) to ensure that the test is interpreted and applied accurately and in line with Parliament's original intention.

The Bill proposes two key definitions to accompany s 58:

- "Exclusive use and occupation" is defined in the Bill as the intention *and ability* to control an area *to the exclusion of others*. This concept is based on evidence of a physical activity or use related to natural and physical resources rather than spiritual or cultural association (unless this manifests in a resource use). The requirements to demonstrate the ability to control an area and exclude others with evidence of a physical nature appear to set a higher bar for CMT than the current test as interpreted by the courts.
- "Substantial interruption" would require a substantial interruption to either a group's use and occupation *or* to the *exclusivity* of that use and occupation. A substantial interruption may be caused by any activity in the area, by anyone, with or without authorisation, which on the evidence (determined by the court) is a substantial interruption. This definition broadens the majority's apparent restriction of the concept to activities that are authorised by statute.

Another important matter addressed in the Bill is the transitional provisions. Under the Bill, MACA in its current form will apply to applications that have not had High Court decisions prior to the Minister's announcement of the Bill on 25 July 2024. Any decisions made after that date will be subject to the Bill, and (once enacted) the new s 58 test.

The Select Committee released its report on the Bill on 3 December 2024 and the Bill appears on track for becoming law by the end of 2024.

Supreme Court decision

A hearing of appeals against the Court of Appeal's decision was held over the first two weeks of November 2024. Just two weeks after the hearing closed, the first judgment was delivered on 2 December 2024. The unanimous judgment of the five member bench focusses on s 58, and whether the Court of Appeal majority's

interpretation was correct. A second judgment to come will consider discrete and fact specific issues.

On “exclusive use and occupation”, the Supreme Court concluded that use and occupation does not require actual physical occupation of the seascape. Rather, “occupation” means control as opposed to residence. Further, “exclusive” cannot literally mean to the exclusion of all others, which would be culturally incompatible with tikanga. The Court held that exclusive use and occupation is “a practical question of fact and degree considered in light of the Act’s context and purpose.” The decision includes a list of circumstances that may demonstrate exclusive use and control, including ownership of abutting land, existence of coastal marae, evidence of exercise of kaitiakitanga and promotion of tika, engaging in tikanga based ceremonies (such as rahui), and involvement in resource management / other regulatory processes.

On “substantial interruption”, the Supreme Court found that the Court of Appeal majority erred in its apparent conclusion that only interferences expressly authorised by statute are capable of substantially interrupting exclusive use and occupation. This is aligned with the clarified test contained in the Bill. The Supreme Court concluded that substantial interruption is intended to be flexible and sensitive to specific facts – essentially a factual inquiry. Interruption is required, interference is not enough. For example, the presence of pipes and boat ramps are likely only to be “interferences”, but intensive use of the area by major port infrastructure, involving not just reclamation and structures at scale but also associated intensification of activity in the immediate vicinity, may well amount to substantial interruption. Ultimately, what constitutes substantial interruption is a matter of fact and degree.

Comments

The Supreme Court decision closes the gap between the Court of Appeal majority’s s 58 interpretation and the Bill’s proposed changes. However, there are still some notable differences – primarily the Bill’s requirement that “exclusive use and occupation” be demonstrated by the ability to control an area to the exclusion of others, and evidence of physical resource use. Given the transitional provisions, and timing of the Supreme Court decision, the Bill, if passed in its current form as anticipated, will also mean that different parts of the Takutai Moana may be subject to different tests depending on when the CMT orders were granted by the High

Court – those under MACA as interpreted by the Supreme Court, and those under MACA as amended by the Bill.

You can find the Supreme Court judgment here, and the Bill here. If you have any questions about the issues examined in this article feel free to get in touch with a member of our Resource Management Team. We are representing Ōpōtiki District Council and Crown Regional Holdings Ltd in these proceedings, with barrister Mary Hill.

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