IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 67 / 2023

BETWEEN	**PAKI NIKORA on behalf of TE KAUNIHERA KAUMĀTUA O TŪHOE** Appellant
AND	**TĀMATI KRUGER on behalf of TŪHOE TE URU TAUMATUA TRUST** Respondent

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SUBMISSIONS IN SUPPORT OF THE APPEAL

Dated: 30 November 2023

Counsel for the appellant certify that these submissions contain no suppressed information and are suitable for publication.

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A. SUMMARY OF TKKOT'S POSITION ON APPEAL

1. This appeal raises three key questions of law:

   (a) First, is the general land that is held by Tūhoe — Te Uru Taumatua (the **Trust**) "general land owned by Māori"? The appellant (**TKKoT**) submits that it is.

   (b) Second, was the Trust "constituted in respect of" that land? TKKoT submits that it was.

   (c) Third, is the Māori freehold land that the Trust additionally holds relevant to determining whether the Trust is subject to the jurisdiction of the MLC? TKKoT submits that it is.

2. As is elaborated below, TKKoT's case is that the Trust – as a Māori trust that legally owns and governs general land that is culturally and spiritually important for Tūhoe peoples collectively, and that can be expected in the future to purchase, own on trust and govern more such land for Tūhoe collectively – fits comfortably under the *korowai* [cloak] of Te Ture Whenua Māori Act 1993 (**TTWMA**). It follows that it is appropriate for the Trust to be supervised by the Māori Land Court (the **MLC**). The Tūhoe Iwi Members and kaumatua that TKKoT represents not only support that outcome, they see it as the outcome that best accords with the beneficiaries' *rangatiratanga* and *mana motuhake* rights and that best protects the beneficiaries' interests in holding the Trustees accountable.

3. TKKoT accordingly seeks orders allowing the appeal, reinstating the orders the MLC[1] made (and the Māori Appellate Court[2] (**MAC**) affirmed) in relation to elections of Trustees, and awarding costs to TKKoT.

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1 *Nikora v Trustees of Tūhoe - Te Uru Taumatua* (2021) 252 Waiariki MB 157 (252 WAR 157) [**MLC judgment**], **[[101.0175]]**.

2 *Kruger v Nikora* [2021] Māori Appellate Court MB 444 (2021 APPEAL 444) [**MAC judgment**], **[[101.0283]]**.

B. RELEVANT FACTUAL CONTEXT

(B.1.) An overview of Tūhoe's Te Tiriti settlement

4. In consequence of the Te Tiriti o Waitangi / the Treaty of Waitangi (**Te Tiriti**) settlement between Tūhoe and the Crown in 2013, the Trust holds and governs ancestral lands on behalf of the whānau and hapū of Ngāi Tūhoe (**Tūhoe**).[3] That was an important reason for the establishment of the Trust, as these submissions elaborate at **Section B.2.** below.

5. The violations of Tūhoe's *rangatiratanga* rights that required the Crown to vest those ownership and governance rights in the Trust, as a step in the process of Crown atonement to the end of achieving *utu* and *ea*,[4] are well traversed in the Waitangi Tribunal's eight volume Te Urewera report. Perhaps there exists no more succinct statement encapsulating relevant report findings than those by the Presiding Officer in his letter transmitting the third volume to the Minister for Māori Development. It states:[5]

> To the peoples of Te Urewera, particularly Tūhoe, the national park is the symbol of all that has gone wrong in their relationship with the Crown. To them, it is just a further stage in their dispossession, an extension of the raupatu of their northern lands in the 1860s, the brutal war that followed it, the work of the Native Land Court and large-scale land alienation in the 'rim' blocks, the defeat of their promised self-government, predatory purchasing in their Native Reserve and the resulting consolidation scheme, which further reduced their remaining core lands. And with that has come an embittered relationship with a Crown which has failed to honour its Treaty obligations and repeatedly broken explicit promises.

6. As the Tūhoe Claims Settlement Act 2014 (the **TCSA**) acknowledges in ss 8-10, that dishonourable Crown conduct greatly harmed the whānau and hapū of Tūhoe socially, culturally, politically and economically.[6] Loss of ancestral lands through Crown laws, policies and practices having that intent and effect was a particularly egregious breach of Tūhoe's

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3 CA Judgment at [2].

4 Mead has described *utu* as the principle that determines what response is necessary to achieve *ea*, a state of balance: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia, Wellington, 2016) at 31. This Court has described *ea* as "the successful closing of a sequence and the restoration of relationships, or the securing of a peaceful outcome": *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [135].

5 Quoting Waitangi Tribunal *Te Urewera Report* (Wai 894, 2017, Vol 1) at li (19 October 2012 letter of transmittal).

6 The gravity of the historical injustices Tūhoe has suffered at the hands of the Crown was acknowledged in *Baker v Waitangi Tribunal* [2014] 3 NZLR 390 (HC) at [65].

rangatiratanga. The return of land lost to Tūhoe in these circumstances, and as a means of restoring Tūhoe's *rangatiratanga* interests in ancestral lands, should therefore be seen to be at the heart of the settlement.[7]

7. In addition to acknowledging its dishonourable past conduct and returning ancestral lands to Tūhoe, the Crown through the TCSA and Te Urewera Act 2014 (together **the settlement legislation**)[8] paid financial redress that is to be used (inter alia) to re-acquire over time further ancestral lands.

8. Practically, ownership and governance rights and responsibilities in respect of the land and money that Tūhoe collectively received through the settlement legislation had to be vested in a representative entity legally capable of owning and governing land. Tūhoe collectively chose the Trust as that entity. The culturally important land Tūhoe agreed the Trust, through the settlement, would receive and govern for Tūhoe, included not just the then Te Urewera National Park, but also seven culturally significant[9] properties – being Kōhanga Tāheke; Korokoro o Te Huatahi; Ngā Tī Whakaaweawe; Waitehouhī; Onini; Waikokopu; and Te Tii. They together comprise 802.8960 hectares.[10] The TCSA vested ownership of that land in fee simple in the Trust as cultural redress properties.[11]

9. In addition to vesting that land in the Trust, the settlement legislation:[12]

   (a) Conferred on the Trust the exclusive right to receive deferred selection (**DSP**) properties on behalf of Tūhoe.[13] These include

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7 Land redress was an important component of Te Tiriti settlement package due to Tūhoe's historic loss of its ancestral lands and the significance of the whenua at tikanga: it provides whānau and hapū with identity, belonging, continuity; it is turangawaewae.

8 The inter-connectedness of the settlement legislation is reflected in the fact that it was originally envisaged that the TCSA and Te Urewera Act would be enacted in a single statute. Refer to the draft Te Urewera-Tūhoe Claims Settlement Bill that is included in the Deed of Settlement: Attachments at 29*ff*.

9 Relevantly recognised in the Deed of Settlement at 163, [4.352]-[4.357].

10 Being the sum of the land areas for the parcels recorded at Schedule 2 of the TCSA.

11 Refer to TCSA, ss 23(1), 24(2), 25 and 26(2). The seven properties are defined in s 22 and Schedule 2 of the TCSA.

12 In addition to conferring on the Trust these land-related ownership and governance rights, the settlement legislation vested in the Trust assets and liabilities of the Tūhoe-Waikaremoana Māori Trust Board. They were vested in the trustees of the Trust "as trustee on the same trusts as apply to that [i.e. the Tūhoe-Waikaremoana Māori Trust Board] trust". Refer to TCSA, s 90(3). This is further discussed at **[21]** below.

13 Refer to TCSA, s 52. This gives the Trust the opportunity to purchase specified Crown owned properties within a deferred selection period after settlement date.

leaseback properties owned by the Ministry of Education, which are as agreed with the Crown in a Property Redress Schedule.[14]

(b) Conferred on the Trust the exclusive right to acquire on behalf of Tūhoe right of first refusal (**RFR**) properties,[15] if and to the extent that properties meeting that definition come available in a 172 year period.[16] RFR properties are defined as being owned by the Crown and Crown bodies within a specified geographic area.[17]

(c) Conferred on the Trust the exclusive right, again on behalf of Tūhoe collectively, to appoint members (currently 6 of the 9 members; initially 4 of the 8[18]) to Te Urewera Board, which acts on behalf of, and in the name of, and provides governance for, Te Urewera. Te Urewa Act constitutes Te Urewera as a place and a unique legal entity; the "centrepiece"[19] of the agreed settlement.

(d) Enabled and empowered Tūhoe, through the cash redress of $106,040,247[20] that the Trust received on behalf of Tūhoe, over time to re-acquire from the market (i.e. from private ownership) further general land that is culturally significant to Tūhoe.

10. The Trust's beneficiaries, Tūhoe Iwi Members,[21] have legally enforceable tikanga rights, interests and responsibilities in the important whenua in the categories at **[8]** and **[9]** above. That is through the beneficiaries' whakapapa connections to their ancestral whenua. Those connections have not been broken through historic losses of that land; in tikanga terms, the

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14 Refer to Deed of Settlement Schedule: Property Redress at 5-7.

15 Refer to TCSA, ss 61-65, noting the right of the Trust pursuant to ss 65(3)-(6) of the TCSA to nominate a person other than the trustees to receive RFR land.

16 Refer to the definition of "RFR period" in s 58 of the TCSA. The effect of this is that the trust will have an exclusive right of first refusal over Crown-owned properties located within a specified area for 172 years from settlement date.

17 Refer to the definitions of "RFR landowner" and "RFR land" in ss 58-59 of the TCSA.

18 Refer to Te Urewera Act, ss 21(1)-(2).

19 Quoting *Baker v Waitangi Tribunal* [2014] 3 NZLR 390 (HC) at [2]. The Deed of Settlement at 9 describes Te Urewera as "the heart of the settlement".

20 Refer to Deed of Settlement at 161, [4.342]. Interest was payable on top of this sum: refer to Deed of Settlement: General Matters at 7, [4.1].

21 As defined in cl 1.1 of the Trust's current Trust Deed dated 13 December 2013 (the **Deed**), at **[[101.0008]]**.

fires burn as strongly for the whenua today as they did pre-colonisation.[22] And it is a key principle of that tikanga that the concept of *matemateaone*[23] – nurturing relationships, between people, and with the whenua which nurtures them; a tikanga concept that encapsulates Tūhoe, and the indigenous heritage of Te Urewera, as people, as place – is recognised and respected, including when the concept of 'ownership' is being considered.

(B.2.) The Trust as a creation of the settlement process

11. Tūhoe peoples comprise themselves collectively as whānau and hapū[24] who together whakapapa to land located in Te Urewera, in the eastern North Island. Tūhoe did not sign Te Tiriti, and the Crown had no official presence in Te Urewera before the 1860s.[25] Tūhoe remained in full control of its ancestral lands until 1865, when the Crown confiscated much of its most productive land, even though Tūhoe was not in rebellion against the Crown and confiscation was not directed at Tūhoe.[26] The prejudice created by that confiscation was exacerbated by further dishonourable Crown conduct, including further confiscations of Tūhoe ancestral lands.[27]

12. The tragic results of over a century of dishonourable Crown conduct resulting in large losses of Tūhoe land had the result that:[28]

> Today, around 85% of Tūhoe live outside Te Urewera. Those who remain struggle to make a living and face various restrictions placed on the land and resources in the area. Many suffer from socio-economic deprivation of a severe nature.

13. Following the extension of the Waitangi Tribunal's jurisdiction in 1985, Tūhoe in 1987 made its first claim – the Wai 56 claim – in respect of Crown wrongdoing dating back to 1840. The Te Urewera Tribunal was appointed in 2002 and it held hearings between 2003 and 2005.[29] Wai 56 was amongst the claims that it investigated. Ultimately, the Tribunal

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22 As the Crown has acknowledged through its apology in s 10(6) of the TCSA.
23 Recognised in the Deed of Settlement at 42, [2.5].
24 The hapū are listed in Schedule 1 to the TCSA and in the definition of "Hapū" in cl 1.1 of the Deed, at **[[101.0005]]**.
25 TCSA, s 8(1).
26 TCSA, s 8(1).
27 TCSA, ss 8(2) and 8(5)-(10).
28 Quoting TCSA, s 8(11).
29 Refer to Deed of Settlement at 92, [3.7]-[3.8].

produced an eight volume district inquiry report on Te Urewera. Relevantly for present purposes the presiding officer, Judge Savage, stated in his letter transmitting the third volume report to the Minister:[30]

> The Wai 262 Tribunal, in its recent report, stated that title-return and joint management arrangements have been carried out successfully for national parks in Australia, and could also be carried out here in appropriate situations. We can think of no more appropriate situation than that of Te Urewera National Park.

14. After the Tribunal had concluded its Te Urewera inquiry hearings, the Crown and Tūhoe began negotiating a settlement of Tūhoe's historical claims. Tūhoe's mandated negotiating body was Te Kotahi ā Tūhoe.[31] It was ultimately responsible for negotiating and initialling the Deed of Settlement.[32] Notably, Te Kotahi ā Tūhoe and the Crown identified, at the outset of their negotiations, that an entity that Tūhoe and the Crown both agreed to adequately represent Tūhoe, to have transparent decision-making processes, and to be accountable to Tūhoe, would need to be in place prior to the conclusion of the parties' settlement negotiations.[33]

15. The Trust was chosen by Tūhoe peoples as that entity, and that choice was acknowledged and accepted by the Crown. The Trust was established in 2009 as the Tūhoe Establishment Trust.[34] It is currently governed by the Deed dated 13 December 2013. Tūhoe in ratifying the Deed of Settlement approved the Trust – which was acknowledged to have been established for purposes that included to enter into and comply with the Deed of Settlement and to receive settlement assets from the Crown – and the

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30 Quoting Waitangi Tribunal *Te Urewera Report* (Wai 894, 2017, Vol 1) at li (19 October 2012 letter of transmittal).

31 The Crown recognised Te Kotahi ā Tūhoe to have a mandate to undertake these negotiations in September 2007, and terms of negotiations were subsequently agreed in July 2008. Refer to Deed of Settlement at 93, [3.10]-[3.12].

32 Refer to Deed of Settlement at 93, [3.10]-[3.12].

33 Refer to Terms of Negotiation at 9, [33].

34 Cf. CA Judgment at [13]. The Trust was originally constituted as the Tūhoe Establishment Trust by trust deed dated 23 May 2009. It was restated by trust deed dated 5 August 2011, and further restated and amended by trust deed dated 13 December 2013 (i.e. the current Deed). Refer to recital J and cl 1.1 (definitions of "2009 Deed" and "2011 Deed") of the Trust Deed, at **[[101.0004]]**. And see similarly Deed of Settlement: General Matters at 26, [8.7] (definition of "Tūhoe Trust").

Crown agreed that the Trust was appropriate to receive Tūhoe's settlement redress.[35] The Deed itself acknowledges and reflects that. In particular:

(a) The recitals to the Deed relevantly include:[36]

> G. Tūhoe wishes to create the Tūhoe Trust to act as their iwi authority and post-settlement governance entity (that is transparent, accountable and representative of the iwi)…

(b) The Trust's purposes relevantly include:[37]

> (c) The maintenance and establishment of places of cultural and spiritual significance to Tūhoe and marae of Tūhoe, including restoring the connection of Tūhoe with Te Urewera through the operation of the Te Urewera Board

(c) And the Trustees' powers relevantly include:[38]

> (c) To receive hold and manage, and/or to establish Trust Entities to receive hold and manage, Property transferred from the Crown directly or indirectly to the Trust on behalf of the Iwi in settlement of any claims of the Iwi arising from actions and omissions of the Crown in breach of the Treaty of Waitangi / Te Tiriti o Waitangi (including under the CNI DOS) or otherwise;
>
> (d) To receive hold and manage, and/or to establish Trust Entities to receive hold and manage any other Property received by or on behalf of the Iwi;

16. The policy settings by which the Crown agreed that the Trust was appropriate to receive settlement redress are reflected in the "Red Book".[39] It relevantly refers to the Māori entities that receive settlement assets as "post-settlement governance entities", or PSGEs for short. PSGEs are charged with receiving settlement assets from the Crown and managing

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35 Refer to Deed of Settlement at 168, [4.366]-[4.369] and recital G to the Trust Deed, at **[[101.0004]]**. As a matter of policy, the Crown's position is that it "cannot transfer settlement assets to a claimant group until their governance entity has been ratified and established": Office of Treaty Settlements *Ka Tika ā Muri, Kā Tika ā Mua: Healing the past, building a future* (June 2018) [**Red Book**] at 68. And similarly at 69.

36 Quoting recital G to the Deed, **[[101.0004]]**. See also the express provision in cl 1.3(e) of the Deed that entry by the Trust into the Deed of Settlement did not constitute a "Major Transaction" (at **[[101.0008]]**), and the acknowledgment in Schedule 1 cl 1(b) that Te Kotahi ā Tūhoe is permitted to negotiate settlement terms (at **[[101.0025]]**).

37 Quoting cl 3.1(c) of the Deed, at **[[101.0010]]**.

38 Quoting Schedule 1 cl 1(c) and (d) of the Deed, at **[[101.0025]]**.

39 This Court has previously recognised the Red Book to set out the Crown's negotiating stance for Te Tiriti settlements. Refer to *New Zealand Māori Council v Attorney-General ['MOM Case']* [2013] 3 NZLR 31 (SC) at [99]. Similarly see *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] 3 NZLR 601 (HC) at [502]-[503].

them for the benefit of the intended beneficiaries of Te Tiriti settlement.[40] The Crown's principles for PSGEs, relevantly to this appeal, include that PSGEs must have transparent decision-making and dispute resolution procedures and that they must be "fully accountable to the whole claimant group".[41] As a matter of policy, the Crown will not approve a PSGE to receive settlement assets unless it is satisfied the entity "meets the principles of representation, accountability and transparency".[42] Recital G to the Deed, which is quoted at **[15]** above, clearly reflects this policy.

17. The Tūhoe settlement was agreed on 4 June 2013.[43] It was given effect to through the TCSA and Te Urewera Act, both enacted in July 2014. The Deed, dated 13 December 2013, was therefore executed after the Deed of Settlement had been signed but before the settlement legislation was enacted. As the Deed envisaged (refer to **[15]** above), enactment of that legislation resulted in a vesting in the Trust on behalf of Tūhoe collectively of the land ownership and governance rights set out at **[8]** and **[9]** above.[44]

18. Notably, the Deed of Settlement (which the TCSA must be read consistently with[45]) shows that cultural redress properties vested in the Trust – such as Onini, Waikokopu and Te Tii – all lie within Tūhoe's *ahikāroa*, assuming this to be the "Tūhoe Area Acknowledgment" that the Crown has recognised in the Deed of Settlement.[46] Te Urewera, and RFR and DSP properties (as defined), also lie within the Tūhoe *ahikāroa*. This is important because the Deed provides for the permanent inalienability of land that the Trust owns within that area:[47]

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40 Refer to MAC judgment at [1]-[3], **[[101.0285]]**.
41 Red Book at 67.
42 Quoting the Red Book at 69, elaborated at 70-72.
43 Refer to the "deed of settlement" definition in s 12 of the TCSA.
44 CA Judgment at [25].
45 Refer to the TCSA, ss 3 and 11.
46 Refer to Deed of Settlement: Attachments at 13, 16 and 17, which shows the geographic locations of these three properties. Those locations, in turn, all fall within the "Tūhoe Area Acknowledgment", which is mapped at 4 of the Deed of Settlement: Attachments. The "Tūhoe Area Acknowledgment" is in turn defined in the Deed of Settlement at cl 4.352 in terms that indicate that it is the Tūhoe ahikāroa.
47 Quoting cl 3.5, at **[[101.0010]]**.

> All land that is part of the Trust Fund and that is situated within the Tūhoe ahikāroa shall not be sold or otherwise disposed of by the Trustees.

19. TKKoT accepts that Te Urewera the place and entity are not owned by the Trust. So the clause just quoted is not directly relevant to her. But the Trust is the exclusive appointer of the Tūhoe representatives on Te Urewera Board. That right underscores the significant governance-related rights and responsibilities that Tūhoe has conferred on the Trustees. It is also notable that, consistently with Trust owned land that lies within the Tūhoe *ahikāroa*, land comprising Te Urewera the place is inalienable by statute.[48]

(B.3.) The land the Trust owns for Tūhoe collectively

20. While the Trust has acknowledged that it owns general land, the approach it took to the MLC's jurisdiction meant that it did not file any evidence (not even on this point) for the hearings that produced the MLC and the MAC judgment. Nor has it, to date, identified in legal submissions that it has filed exactly what general land the Trust owns (in its own right, or through entities it wholly owns or controls[49]); how many general land parcels are there, from when has the Trust held them, in what locations, and of what aggregate area? These details currently remain unclear.

21. The Trust did acknowledge in the lead up to the Court of Appeal hearing that it presently owns parcels of Māori freehold land.[50] TKKoT accepts that if the Trust owns those parcels of land pursuant to s 90(3) of the TCSA, then as the Court of Appeal reasoned, those parcels are not held on the trusts set out in the Deed.[51] The Trust's ownership of Māori freehold land, in those circumstances, does not directly assist TKKoT's position. But it is contextually relevant in again underscoring the significant property rights and responsibilities Tūhoe has conferred on the Trustees.

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48 Refer to Te Urewera Act, s 13.

49 As is envisaged in the Deed: see e.g. cl 16 (at **[[101.0018]]**) and Schedule 1 cl 1(c)-(d) (at **[[101.0025]]**).

50 Refer to CA Judgment at [125]. The timing of the Trust raising this explains why this issue was not considered in the courts below, as is noted in the CA Judgment at [127]. The issue was, however, raised in the MAC but not resolved: refer to **[[101.0271]]**.

51 Refer to CA Judgment at [129].

(B.4.) Trustee elections problems trigger this proceeding

22. The Trust is administered by up to seven elected Trustees.[52] The important responsibilities the Trustees of the Trust have relevantly include to govern properties that are owned by the Trust for the benefit of Tūhoe collectively, and over time to re-acquire ancestral lands Tūhoe has lost. The election of Trustees, and oversight of Trustee conduct, are important to beneficiaries in respect of the exercise of those Trustee responsibilities.

23. In that context, Trustee election problems arose in 2018-19.[53] That led to Paki Nikora, on behalf of TKKoT,[54] applying to the MLC for various orders in relation to the Trust. Mr Nikora was a beneficiary of the Trust,[55] and the orders he sought for TKKoT included orders for elections to be held for two Trustees in consequence of alleged breaches of the Deed. The proceedings were necessitated by the Trust's failure to respond to concerns raised by TKKoT's solicitors about a number of breaches of the Deed in connection with Trustee elections processes and a proposal to address the concerns through the dispute resolution regime in the Deed.[56]

24. The Trust elected not to participate in the MLC in 2019-21,[57] as it was not in its view subject to the MLC's jurisdiction. The Trust's view, reflecting that position, was articulated to the MLC in 2019 in this way:[58]

> … TUT [i.e. the Trust] is a private common law trust and is surprised to hear of the Māori Land Court's interest in it. …

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52 Trust Deed, cl 4.1, at **[[101.0010]]**.

53 Refer to CA Judgment at [28]-[31].

54 TKKoT's trust deed is at **[[101.0001]]**. It records TKKoT was established with the aim of providing kaumatua stewardship and leadership for Tūhoe (cl 2.1). TKKoT's objectives include ensuring the health and wellbeing of Tūhoe hapū and whānau (cl 4.1), upholding and giving practical effect to maintaining hapū and whānau *rangatiratanga* (cl 4.2), and promoting and advocating for Tūhoe beneficiaries (cl 4.4).

55 Refer to **[[101.0122]]** at [1].

56 Refer to **[[101.0122]]** at [6]-[15]. TKKoT's letter raising concerns is at **[[301.0014]]**. The Trust's failure to respond to this is noted at **[[101.0079]]** at [2].

57 CA Judgment at [3]. The procedural history is relevantly outlined in the MLC judgment at [8]-[17], **[[101.0177]]**.

58 Quoting **[[101.0124]]** under [14].

25. The MLC ultimately proceeded in the Trust's absence.[59] Relevantly, it found that the Deed was breached in a number of respects.[60] It granted orders for the fresh election of two Trustees, Tāmati Kruger and Patrick McGarvey.[61] The Trust then sought and was granted by the MLC a partial stay of these orders, resulting in the election for one of those Trustees (Mr McGarvey) being put on hold.[62] The stay enabled the Trust to appeal the finding that it had jurisdiction to make orders in respect of the Trust.

26. The MAC dismissed the Trust's appeal.[63] The Trust appealed to the Court of Appeal. The issue for determination was whether the Trust fell within s 236(1)(c) of TTWMA. The Court of Appeal held that it did not. In consequence, the orders that the MLC had made, based on its findings that the Deed was breached in a number of material respects, were set aside.

27. TKKoT has appealed to this Court. The approved question is whether the Court of Appeal erred in allowing the Trust's appeal to that Court.

C. THE ISSUES OF STATUTORY INTERPRETATION

28. The approved question requires a consideration of s 236 of TTWMA. Its significance for present purposes is in providing a statutory gateway to the MLC's jurisdiction in respect of trusts. Section 236 relevantly provides:

> **236 Application of sections 237 to 245**
>
> (1) Subject to subsection (2), sections 237 to 245 shall apply to the following trusts:
>
> (a) Every trust constituted in this Part:
>
> (b) Every other trust constituted in respect of any Māori land:
>
> (c) Every other trust constituted in respect of any General land owned by Māori.
>
> [underlined emphasis added]

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59 Refer to MLC judgment at [34]-[37], **[[101.0184]]**.
60 MLC judgment at [85], **[[101.0197]]**. For the detailed findings of breaches of the Deed, refer to the MLC judgment at [54]-[55], [59]-[60], [64] and [70].
61 MLC judgment at [81] and [85], **[[101.0196]]**.
62 Refer to MAC judgment at [5], **[[101.0285]]**.
63 CA Judgment at [5].

29. Section 4 of TTWMA defines "General land owned by Māori" as "general land that is owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori" (emphasis again added).

30. It is not in dispute that the Trust has legal ownership of parcels of general land, or that the Trustees and the beneficiaries of the Trust are by definition registered members of Tūhoe[64] and therefore Māori.[65] The issues that require determination are, first, whether the beneficiaries "own" a beneficial estate in the general land that the Trust owns the legal estate of; and, second, whether the Trust was "constituted" in respect of the parcels of general land that the Trust holds for the beneficiaries.

31. These issues fundamentally raise questions of statutory interpretation.

32. The starting point in any exercise of statutory interpretation is s 10 of the Legislation Act 2019. Section 10(1) states that "the meaning of legislation must be ascertained from its text and in the light of its purpose and context". By ss 10(3)-(4), the legislative text includes indications provided within TTWMA, such as headings and the organisation of the legislation.

33. Turning to statutory purpose, Parliament has included general purpose statements in the Preamble, s 2 and s 17 of TTWMA.[66] They state:

> **Preamble**
>
> Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana.

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64 Refer to Deed, cl 1.1 (definition of "Tūhoe Iwi Members") and cl 4.2(b), **[[101.0008]]**.

65 CA Judgment at [83]. Noting too MAC judgment at [FN 6], **[[101.0286]].**

66 The interpretive weight of the Preamble and s 2 was particularly emphasised by Lord Cooke of Thorndon, writing for the Board in *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [6].

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

...

2 Interpretation of Act generally

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

...

17 General objectives

(1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

(2) In applying subsection (1), the court shall seek to achieve the following further objectives:

(a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:

(b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:

(c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:

(d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:

(e) to ensure fairness in dealings with the owners of any land in multiple ownership:

(f) to promote practical solutions to problems arising in the use or management of any land.

34. Read together, these sections fundamentally frame TTWMA and the way that it is to be interpreted and applied. The primary objective of TTWMA is clearly the retention and effective use of land by Māori and, implicitly, maintenance and management of the human relationships that are associated with whenua. These principles are echoed in s 2(2) and also in s 17(1), which sets out the primary objectives of the MLC. Notably, s 17(1) expressly refers to both Māori land and general land owned by Māori. The Preamble and the emphasis placed on it by the s 2 interpretive obligation makes clear that the s 17 objective is also underpinned by the broader purpose of affirming the *rangatiratanga* of the persons comprising iwi, hapū and whānau[67] and recognising the special collective relationship that Māori have with land as a *taonga tuku iho*. In other words, the statutory purpose of upholding the exercise of *rangatiratanga* is expressed through the statutory objective of the retention and development of land by Māori.

35. Turning finally to the context that is relevant to statutory interpretation, this includes the immediate and general statutory context and the social or other relevant objectives of the statute.[68] Notably, this Court has recognised the need to interpret and apply statutes with reference to Te Tiriti setting in which the statute was enacted and/or falls to be applied.[69] This Court has also established that statutes must be interpreted in light of

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67 The alienation of land out of control of iwi, hapū and whānau, whether via confiscation or the operation of the Native Land Court, directly contributed to the fracturing of Māori communities and the ability of iwi, hapū and whānau to exercise their *rangatiratanga*. This provides important context to why the retention and effective use of land is the primary objective of legislation underpinned by the purpose of *rangatiratanga*.

68 See e.g. *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22].

69 See e.g. *Ririnui v Landcorp Farming Ltd* [2016] 1 NZLR 1056 (SC) at [43]-[52] and [98] and *New Zealand Māori Council v Attorney-General ['MOM Case']* [2013] 3 NZLR 31 (SC) at [60]-[64]. A relatively recent application of this approach can be seen in *Pouākani Claims Trust v Attorney-General* [2023] NZHC 1336 at [142]-[149].

and consistently with tikanga, where tikanga values or principles are relevant,[70] and with the principles and text of Te Tiriti, where those are relevant.[71] Given the inter-dependencies between Te Tiriti and tikanga,[72] it makes sense for these interpretive principles to have converged and flow the same way in respect of these foundations to our constitutional order.

D. ADDRESSING THE TWO LEGAL ISSUES IN TURN

(D.1.) First issue: "... *constituted in respect of...*"

36. The first issue is whether the Trust falls within the TTWMA wording "every other trust constituted in respect of" general land, so as to satisfy this pre-condition to MLC jurisdiction in s 236(1)(c) of TTWMA.

37. The Court of Appeal held that the concept of constituting a trust in respect of land requires that the trust be established in respect of one or more identified parcels, with a view to providing for the ownership and administration of that land.[73] The Court concluded that the Trust did not satisfy that test, because it was not possible to identify specific land in respect of which it was constituted at the time the Trust was constituted.[74]

38. That conclusion runs contrary to the history and context outlined above.

39. The effect of the Crown's Te Tiriti settlement policies – generally, and for Tūhoe specifically – was that a Crown-approved PSGE had to be set up and exist before the Crown would transfer settlement assets to Tūhoe as a collective; and, further, that that entity had to receive both the ancestral general land that the Crown returned through the settlement legislation, and the associated cash redress. As noted above, the intention is for the

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70 See e.g. *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [98]-[102] and [175].

71 See e.g. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [151].

72 One function of Te Tiriti was to recognise and provide for the continued place and significance of tikanga in Aotearoa. That was done through the guarantee in Art 2 of Te Tiriti, which is generally taken to import Māori rights to live by and benefit from tikanga – either as a matter of "tino rangatiratanga" as in self-determination, or as an incident of the concept of "taonga". See e.g. *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [98] and n 106 per Glazebrook J and *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] 3 NZLR 601 (HC) at [326] and [582].

73 CA Judgment at [116].

74 CA Judgment at [8] and [116]-[118].

cash redress to be used for Tūhoe, at least in part, to re-acquire over time more ancestral general lands within the Tūhoe *ahikāroa*. In that context, while technically it is correct to say – as the Court of Appeal did[75] – that the Trust as Tūhoe's PSGE did not own ancestral general land at the time that it was established, the Trust was clearly established in part to receive, own and govern such land, some of which was to be and remain inalienable thereafter through cl 3.5 of the Deed (which prevents the Trustees from alienating land inside the Tūhoe *ahikāroa*[76]). It is, in TKKoT's submission, artificial in this context to conclude that the Trust was not constituted in respect of general land that TTWMA is suitable to protect and preserve.

40. That conclusion is also contrary to the maxim that 'Equity looks to Intent [i.e. substance] rather than Form'. An application of that maxim is appropriate where, as here, we are concerned with equitable ownership.

41. For all these reasons, TKKoT submits that the Trust was "constituted in respect of" general land so as to satisfy this requirement of s 236(1)(c).

(D.2.) Second issue: *"... owned for a beneficial estate in fee simple..."*

42. The second issue is whether the beneficiaries of the Trust "own" a beneficial estate in general land the Trust holds, for s 236(1)(c) purposes.

43. Notwithstanding the position the Trustees formally took before the MAC that they "do not dispute that as trustees of [the Trust] they hold General land on behalf of beneficial owners the majority of whom are Māori",[77] the Court of Appeal held that the beneficiaries do not beneficially "own" general land the Trust holds.[78] It reasoned that (i) the Trust is a discretionary trust, and the established legal position is that beneficiaries of such a trust do not own trust assets;[79] (ii) TTWMA uses technical legal terms consistently with that established legal meaning;[80] (iii) the purposes of TTWMA are promoted by the beneficiaries not owning the general land

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75 Refer to CA Judgment at [116]-[118].
76 Refer to CA Judgment at [19].
77 Quoting the Trust's notice of appeal to the MAC at [3.5], **[[101.0203]]**.
78 CA Judgment at [7].
79 CA Judgment at [86]-[90] and [105]-[106].
80 CA Judgment at [91]-[93].

that the Trust presently holds because "there is no reason to think that retention of that land in the hands of the trustees as part of the trust's assets should be a priority" and there is not likely to be any need for the MLC "to bring to bear its special expertise concerning Māori land and collective or multiple ownership";[81] and (iv) Te Tiriti principles of active protection and options were not engaged for the same reasons as at point (iii) above.[82]

44. In summary, TKKoT submits that the Court of Appeal has erred in taking the Anglocentric law on discretionary trusts as the starting point and then interpreting and applying TTWMA to accord with that. This approach has meant that Te Tiriti settlement context, and the tikanga lens that settlement redress must be viewed through, have not received the weight they deserve in assessing whether the Trust should be subject to the MLC's oversight.

45. TKKoT's supporting analysis is elaborated under the sub-headings below.

Tikanga / purpose

46. *First*, the Court of Appeal's approach to the concept of 'ownership' is at odds with tikanga, which TTWMA should be interpreted and applied consistently with.[83] To TKKoT, it makes no sense, through a tikanga lens, to say that Tūhoe's beneficiaries do not "own" the ancestral general land that the Trust holds and governs for them collectively. That is because the ancestral whenua only exists in the hands of the Trust today through Te Tiriti settlement because of its importance to the beneficiaries' identity. Yet the practical effect of the Court of Appeal's decision is that the beneficiaries do not now and never will 'own' that whenua. The awkwardness of that conclusion, from a tikanga perspective, is underscored by the statutory ouster of the rule against perpetuities in s 19 of the TCSA,[84] which means that, on the Court of Appeal's reasoning, no beneficiary will ever 'own' the inalienable land that the Trust holds and

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81 CA Judgment at [94]-[103], quoting from [98].

82 CA Judgment at [104].

83 The Preamble to the Act relevantly emphasises the connection between "owners, their whānau and their hapū", which implies (consistently with a Māori worldview) that ownership should not be viewed narrowly or through an overly Anglocentric lens.

84 Refer to CA Judgment at [21]-[22], [86] and [106].

governs for Tūhoe within the Tūhoe *ahikāroa*. This is a situation where tikanga provides a different way to think about 'ownership',[85] enabling the avoidance of a problematic outcome if Anglocentric trust law is applied.

47. TKKoT accepts that the inclusion of trusts that hold "general land owned by Māori" in the MLC's jurisdiction must be given some meaning rationally connected to the statutory scheme. TKKoT's position is that focus should be given to the underpinning purpose of *rangatiratanga* as stated in the Preamble to TTWMA and from which the statutory objectives of retention and use arise. On TKKoT's approach, the inclusion of trusts that own general land within the jurisdiction of the MLC can be rationalised by connecting TTWMA's underlying purpose of supporting *rangatiratanga* with trusts that have an underlying purpose of affirming *rangatiratanga* through land holding for a collective of Māori who have agreed that retention of inalienable land is important. On this approach the trusts hypothesised at [97]-[103] of the Court of Appeal decision will not fall within the concurrent jurisdiction of the MLC. But the Trust does.

48. That is because the Trust holds general land as part of the pursuit of *rangatiratanga* for Tūhoe, regardless of whether it holds other assets as well. It holds that land against a background of Crown Te Tiriti breaches that are acknowledged as having left Tūhoe with insufficient land to support its population;[86] breaches whose redress, under the settlement legislation, includes the return to Tūhoe, through the Trust, of ownership (for the cultural redress, DSP and RFR properties) and/or governance of land (for Te Turewera as a place and a legal entity), and an asset base enabling the Trust's re-acquisition, for Tūhoe, of other lost ancestral lands. Significantly, cl 3.5 of the Deed stipulates that all land that is part of the trust fund and that is situated within the Tūhoe *ahikāroa* shall not be sold or otherwise disposed of by the Trustees.[87] In other words, land, people and *rangatiratanga* are inherently and inseparably intertwined in

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85 See e.g. *Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [118].
86 Refer to the acknowledgments in s 9 of the TCSA.
87 Refer to CA Judgment at [19].

connection with the trust that the Trust is responsible for.[88] A trust born in this context fits very comfortably within the trusts jurisdiction of the MLC.

Statutory context / history

49. *Second* and related, the Court of Appeal wrongly[89] gives no real weight to Te Tiriti settlement context, which explains why the Trust had to, and today does, own and govern culturally and spiritually significant ancestral lands for Tūhoe collectively. This, rather than Anglocentric trust law (which conceptually sees relationships between people and place different to a Māori worldview[90]), should be the starting point;[91] particularly in circumstances where TTWMA was enacted some two years prior to the first modern Te Tiriti settlement, between the Crown and Waikato-Tainui in 1995, which meant that unique concepts and incidents of 'ownership' reflected in Te Tiriti settlements today were not in contemplation. Taking all of that into account, the correct question to ask is whether the beneficiaries of the Trust – having regard to the history of the peoples, the inalienable whenua the Trust holds, the relationship that the peoples of Tūhoe collectively have with that whenua, and the reasons for creating the Trust – have an ownership interest in general land the Trust holds that makes MLC jurisdiction appropriate? The answer to that question is 'yes'.

Accountability / access to justice

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88 Refer to Waitangi Tribunal *The Muriwhenua Land Report* (Wai 45, 1997) at 21-30.

89 At 6-7 of the Deed of Settlement is the whakatauki "Rūrea taitea kia toitu taikākā: Strip away the sapwood to reveal the heartwood". It reminds the reader, before they set out to understand Te Tiriti settlement arrangements, that Tūhoe commenced negotiations with well over a century of legitimate grievances against the Crown. Those grievances, which are recorded in detail in the Deed of Settlement, include executions, 'scorched earth' warfare, collective punishment, and land confiscation and alienation.

90 See e.g. Waitangi Tribunal *The Muriwhenua Land Report* (Wai 45, 1997) at 21-23, [2.3.1]: "The fundamental purpose of Māori law was to maintain appropriate relationships of people to their environment, their history and each other. … There was no equivalent to the English common law whereby people could hold land without concommitant duties to associated community… For Māori, the benefits of the lands, seas, and waterways accrued to all of the associated community and the individual's right of user was as a community member. Similarly, rangatira held chiefly status but might own nothing. It was their boast that all they had was for the people. As the proverb went, the most important thing in the Māori world was not property but people".

91 Refer by analogy to *Ryan v Health and Disability Commissioner* [2023] 1 NZLR 77 (SC), which interpreted statutory terms in a purposive-driven, non-technical way.

50. The correctness of that 'yes' answer is reinforced by the more accessible route the MLC offers to holding the Trust accountable to the beneficiaries; an outcome whose importance is written into the Deed: refer to **[15]** above.

51. The MLC provides for better access to justice, and therefore accountability of Trustees, than the High Court.[92] Proceedings brought in the MLC are eligible for aid from the Special Aid Fund[93] (which, notably, was relied on to support the advancement of TKKoT's case in the MLC and in the MAC[94]). The costs of filing and hearing fees in the MLC are, in addition, significantly lower than equivalent High Court fees.[95] All of this makes the MLC much more accessible as a forum to beneficiaries, who may have limited financial resources; as well as to the Trustees, who should not be forced to expend Tūhoe's settlement redress resources to access the High Court on all matters. The present day 'justice gap', which is a by-product of the costs of access to justice at the present time, must not be discounted in this context. Quoting Judge Wainwright at the MAC hearing:[96]

> It is quite often that, actually, applicants before the Māori Land Court are wanting to engage the Māori Land Court on their general land matters and that is for a number of reasons to do with cost. You can get the purview of this Court at much lower costs than other courts and also because there are, you know, lots of Māori people for whom the Māori Land Court is known and familiar and getting something before us does not seem like the big deal that it is going to the High Court.

52. As these observations bear out, the constitutional interest in access to justice[97] is engaged by the jurisdictional question posed. So too is Te Tiriti principle of active protection,[98] and the right to culture that is affirmed in s 20 of NZBORA. That is on the basis that readier access to a more tikanga

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92 The more accessible and cost-effective MLC concurrent jurisdiction is illustrated by the proceedings concerning the Shelly Bay housing development: see e.g. *Gilbert et al v Mulligan – Part 3 Lot DP 3020* (2023) 466 Aotea MB 164.

93 Refer to s 98 of TTWMA.

94 Refer for instance to **[[101.0206]]** at [3.1] and **[[101.0216]]** at [7].

95 See e.g. Michelle Chen, "Choice of Forum in the Post-Settlement Era: the Māori Land Court's Jurisdiction over Post- Settlement Governance Entities after Moke v Trustees of Ngāti Tarāwhai Iwi Trust", (2021) NZ Law Rev 367 at 383-384.

96 Quoting **[[101.0244]]**.

97 Recognised for instance in *FMV v TZB* [2021] 1 NZLR 466 (SC) at [129] and *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91 (SC) at [41].

98 The seminal statement of principle is that of Cooke P in *New Zealand Māori Council v Attorney-General ['Lands Case']* [1987] 1 NZLR 641 (CA) at 664: "the duty of the Crown 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".

fluent court[99] better advances the interests that that right exists to protect. The engagement of these constitutional rights is important, because it supports a broader interpretation and application of "owns".[100]

53. *Rangatiratanga*[101] is also enhanced by an interpretation of TTWMA that provides a choice of forum and offers the accessible and specialist expertise of the MLC to supervise the Trust. *Rangatiratanga* can only be exercised by virtue of community mandate,[102] and so tikanga-fluent oversight is critical to achieving *mana* and *whanaungatanga* enhancing outcomes where, as here, disputes between whanaunga about representation issues arise. The Trust's beneficiaries should have the choice to challenge the Trust in a forum responsive to their specialist tikanga needs, and financially accessible to them. The MLC provides that.

54. The practically greater access to justice afforded by the MLC resonates particularly strongly here, as the Deed acknowledges (consistently with the preceding process for mandating the Trust, which is discussed at **[14]** to **[16]** above), that the Trust must be fully accountable to its beneficiaries. The concurrent availability of a more accessible forum, in the form of the MLC, better accords with that important Trust object and with the beneficiaries' interests that explain and inform that object. Such an outcome is also consistent with the legislative history to what is now Part

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99 MLC judges have the expertise and ability to understand te ao Māori background and context, and the tikanga values and principles that will be relevant, when a dispute regarding a PSGE trust like the Trust arises. The MLC's unique jurisdiction with particular expertise in tikanga and te ao Māori is reflected in s 7(2A) (specifying judicial appointment criteria) and in s 61(1)(b) (allowing the High Court to state a case to the MAC where any question of tikanga arises). Notably, the Māori Affairs Committee has also acknowledged the expertise of the MLC's judges "who have a close understanding of the dynamics of whānau, the wider Māori community, and the Māori connection to whenua": quoting Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 (179-2) at 5.

100 See e.g. *Fitzgerald v R* [2021] 1 NZLR 551 (SC) at [48]-[63].

101 On *rangatiranga* as a motivator behind this proceeding, refer to **[[201.0003]]** at [11]. And see also **[[101.0156]]**; **[[201.0005]]** at [f]; and **[[201.0007]]** at [4].

102 While the Trust exercises authority as a conduit for the *rangatiratanga* of Tūhoe, its authority derives from the hapū that elect the Trustees. This is not merely a technical procedure but is grounded in the tikanga Tūhoe conception of *rangatiratanga*. The highly respected Tūhoe kaumatua, John Rangihau, noted that "rangatira was people bestowed" (quoting Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 187, [11.5.15]). The authority of the Trust to act on behalf of Tūhoe, in furtherance of their *rangatiratanga / mana motuhake* to live according to their Tūhoetanga, must therefore be firmly grounded, and maintained, in community support.

12 of TTWMA, which indicates an intent to ensure through Part 12 that the MLC had a wider and more flexible jurisdiction in respect of trusts, and that that jurisdiction would be used to ensure that trusts were administered in a manner that meant that trustees were accountable to beneficiaries and acted consistently with Māori concepts of stewardship.[103]

55. Conversely, the Court of Appeal's decision giving sole jurisdiction to the High Court potentially diminishes the ability of tikanga to play a meaningful role in resolving disputes relating to a PSGE like the Trust.[104] In contrast, parties to a trust dispute, on TKKoT's approach, will retain the ability to choose the High Court as their preferred forum, if necessary through a transfer under s 18(2) of TTWMA. That interplay recognises and enhances the *rangatiratanga* of beneficiaries and trustees alike.

Wider statutory scheme

56. As the MAC recognised,[105] Part 12 of TTWMA allows for five different types of statutory trusts over Māori land or general land owned by Māori. Section 236(1)(a) then specifically confers jurisdiction over those trusts; s 236(1)(b) deals with every other trust constituted in respect of Māori land; and s 236(1)(c) deals with every other trusts constituted in respect of general land owned by Māori. There is a clear pattern designed to capture

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103 Refer to Māori Affairs Bill (124-1) at xxxiv. The Explanatory Note to the Māori Affairs Bill can also be noted for observations at xxxiv that "Of all the concepts of English law, the trust is the one that most approximates the Māori concept of rangatiratanga, that is wise administration of assets possessed by a group for the group's benefit", and that trusts have consequently played an "important part" in the administration of Māori land. The Explanatory Note referred to the *Murihiku Lands* case (*Re Invercargill Hundred Block II Section 73D and others (Murihiku Lands)*, 2 Te Waipounamu Appellate Court MB 1 (2 APTW 1) (per Judge Russell (dissenting)), 2 Te Waipounamu Appellate Court MB 1A (2 APTW 1A) (per Judge McHugh) and 2 Te Waipounamau Appellate Court MB 1B (2 APTW 1B) (per Judge NF Smith)) in that connection. The *Murihiku Lands* case can be noted for its observations about the flexibility historically accorded by the MLC to its trusts jurisdiction: refer, in particular, to 10 of Judge Russell's judgment. This legislative history material is relevant because it indicates that use of the trust structure for land holding purposes has long been seen as a *rangatiratanga* affirming mechanism. It should also be noted that TTWMA provisions address limits to the MLC's trusts jurisdiction recognised in the *Murihiku Lands* case: refer to *Far North District Council - Okahu 3B2B2* (2014) 91 Taitokerau MB 284 at [87]-[93].

104 Although the High Court may appoint pūkenga to assist in questions of tikanga (*Ellis v R (Continuance)* [2022] 1 NZLR 239 (SC) at [125]), this is a potentially time consuming and costly process and is consequently inconsistent with – or at least, worse at promoting – Te Tiriti principle of active protection.

105 Refer to MAC judgment at [31], **[[101.0293]]**.

any trust holding Māori land or general land owned by Māori, including those trusts not constituted under Part 12. That is the intent of s 236, having regard to the internal scheme of the provision as a whole. This scheme does not support reading s 236(1)(c) as a narrow catch-all, as the Court of Appeal does. That approach is contrary to its position as the last of three ever-expanding gateways to MLC jurisdiction in respect of Māori trusts.

57. The rationality of that position, in terms of the overall scheme of s 236, is underscored by s 18(2) of TTWMA. It gives the MLC the discretionary power to remove proceedings to another court of competent jurisdiction. As a result, the inclusion of a matter within the jurisdiction of the MLC does not automatically exclude the jurisdiction of another court.[106] In practical terms, this means that it is always open to trustees and/or to beneficiaries of a Māori trust to seek the removal of a proceeding into a more appropriate court, if the applicant can persuade the respondent who has commenced the proceeding in the MLC that such an outcome is appropriate or, failing that, if it can persuade a MLC judge to order it.

58. The existence and application of that power respects and promotes Te Tiriti principle of options,[107] which TTWMA should be interpreted and applied consistently with. That is because s 18(2) enables and empowers Māori trustees and beneficiaries alike to exercise rights of the kind envisaged in both Art 3 of Te Tiriti (e.g. High Court trusts supervision) and Art 2 of Te Tiriti (i.e. MLC trusts supervision, uniquely available to and for Māori). TKKoT submits that *rangatiratanga* is recognised and promoted, in this context, by an interpretation and application of TTWMA that provides choice to both trustees and beneficiaries on the supervisory forum that they access. A narrow interpretation limiting jurisdiction to the High Court and removing the expertise and accessibility of the MLC for any and all trusts issues, does not best promote the principle of options.

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106 Refer to *Grace v Grace* [1995] 1 NZLR 1 (CA).

107 The principle of options is that while Māori culture and tikanga would be respected and protected under Art 2 of Te Tiriti, Māori would also have the option to pursue their rights as British subjects under Art 3. Refer for instance to Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 195 and to Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report* (Wai 27, 1992) at 274.

59. The power in s 18(2) of TTWMA has a further significance. It provides an answer to the Court of Appeal's concern about the unsuitability of the MLC's wider powers[108] in respect of some trust issues. A second answer to that concern is that the mere existence of broad powers does not mean they will be exercised broadly. There is no such thing in law as an unfettered discretion. And MLC judges can be expected to – and as Judge Coxhead's decision in the MLC judgment shows, they do[109] – appropriately respect trust deed terms when they exercise their powers.

Collateral damage

60. *Finally*, it is important to consider the wider implications for discretionary trusts if "general land owned by Māori" is interpreted narrowly to exclude such trusts, given the broader use of this term across TTWMA. Examples include s 26 (Fencing Act 1978 issues), s 298 (partition orders), s 311 (exchange orders) and s 325 (vesting orders); powers whose benefit will also be lost to discretionary trusts on the Court of Appeal's approach. There can also be tax advantages associated with discretionary trusts as asset holding entities.[110] As the Court of Appeal's decision has 'upset' a previously settled understanding as to the availability of a more accessible MLC jurisdiction for Māori discretionary trusts, it might operate to prejudice asset planning strategies, and expectations, held to date. It will also deny these benefits for the future. This suggests that it is better for Parliament to take the lead and legislate to limit the MLC's jurisdiction over specific trusts, as it has sometime done.[111]

61. For all these reasons, TKKoT submits that beneficiaries "own" the general land the Trust holds, satisfying this additional s 236(1)(c) requirement.

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108 Refer to CA Judgment at [53]-[57] and [104].
109 Refer to MLC judgment at [79]-[80], **[[101.0196]]**.
110 Refer to *Garrow and Kelly Law of Trusts and Trustees* (8ed, 2022) at [2.30].
111 One example is the Wi Pere Trust. Refer to Māori Purposes Act 2017, particularly s 9 (relevantly inserting new s 5(3)).

E. OUTCOME AND COSTS

62. The MLC and the MAC were correct. This Court should allow the appeal, and reinstate the MLC's orders in relation to elections of Trustees.

63. As to costs, TKKoT submits that, as in the Court of Appeal,[112] this Court should order that TKKoT's reasonable legal costs and disbursements should be reimbursed out of the assets of the Trust. As this appeal will finally determine the legal position for the current Trustees, as well as for all future Trustees, and all current and future beneficiaries of the Trust, there is no principled reason why the Trust should not meet both parties' costs, irrespective of the outcome of the appeal.[113] As the Court of Appeal recognised, this approach to costs is also appropriate in circumstances where the need for TKKoT to bring proceedings before the courts only arose because the dispute resolution regime was not complied with.[114]

Dated: 30 November 2023

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112 Refer to CA Judgment at [135].
113 Refer to CA Judgment at [130]-[131].
114 Refer to CA Judgment at [132].

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