IN THE SUPREME COURT
OF NEW ZEALAND **SC 67/2023**

I TE KŌTI MANA NUI
O AOTEAROA

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

SUBMISSIONS OF TE HUNGA RŌIA MĀORI O AOTEAROA AS INTERVENOR

DATED 13 FEBRUARY 2024

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

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TĒNĀ E TE KŌTI –

1. These submissions are filed on behalf of Te Hunga Rōia Māori o Aotearoa (**Te Hunga Rōia**) as intervenor, pursuant to the Court's minute dated 23 January 2024. They address tikanga, particularly that relating to ownership of land, and how tikanga may impact consideration of ownership of land by a trust in the circumstances raised by the appeal. Te Hunga Rōia acknowledges the mana motuhake of the parties involved in this matter and accordingly does not take a position on the substantive disposition of the appeal.

2. In summary, Te Hunga Rōia submits that:

   2.1. Tikanga appropriately plays a role in one of the questions of statutory interpretation raised by this appeal; that is, the meaning of "owned by Māori" for the purposes of s 236(1)(c) of Te Ture Whenua Māori Act (**the Act**). Tikanga can assist,[1] including by providing an "integral strand"[2] and another "vocabulary"[3] in considering the issue. This is especially the case given the nature of the legal issues and the parties at the centre of this appeal.

   2.2. The approach tikanga takes to 'ownership' of land is very different to that under the common law and equity. It is submitted that when tikanga is considered it may provide a perspective that means 'ownership' could be broader than how that term is used under traditional common law and equity.

3. Te Hunga Rōia recognises that this is not necessarily determinative of the appeal. The exercise of statutory interpretation requires consideration of the text in the light of its purpose and its context,[4] which include but are not limited to tikanga considerations.

4. These submissions are in four parts:

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1 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 [*Ellis*] at [263] per Williams J.
2 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [177]–[178].
3 *Ellis*, above n 1, at [176] per Winkelmann CJ, and [118] per Glazebrook J.
4 Legislation Act 2019, s 10(1).

4.1. First, Te Hunga Rōia submits as to why tikanga should be considered as part of the interpretation of s 236(1)(c) of the Act.

4.2. Secondly, principles of tikanga in relation to whenua are discussed.

4.3. Thirdly, the traditional common law and equitable approach to ownership in the context of trusts is reviewed.

4.4. Finally, the significance of tikanga for interpreting the meaning of 'ownership' in the context of s 236(1)(c) is addressed.

Consideration of tikanga is appropriate in this case

5. Te Hunga Rōia submits that, although none of the Courts below did so, this Court should take account of tikanga as a central part of the interpretive exercise required for s 236(1)(c) of the Act.

6. This is appropriate for the following reasons:

6.1. Tikanga, as the first law of Aotearoa New Zealand, needs to be considered where, as here, it is relevant to the circumstances and context of the case.[5] This appeal concerns an important question as to the status and governance of land, which tikanga treats as fundamental to Te Ao Māori — something the Act itself recognises, describing land as "a taonga tuku iho of special significance to Māori people"[6] — and which is held on behalf of a large group of Māori as part of a Treaty settlement package.

6.2. Tikanga forms part of the values of New Zealand's common law,[7] and generally legislation should be interpreted consistently with the common

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5 *Ellis*, above n 1, at [117] per Glazebrook J; *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at [103]; and *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 at [187].

6 Te Ture Whenua Māori Act 1993 [TTWMA], preamble.

7 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ, [150] and [164] per Tipping, McGrath and Blanchard JJ.

law where the words of a statute permit.[8] Tikanga is to be taken into account in the common law where it has not been abrogated by statute.[9]

6.3. Legislation should also be interpreted consistently with Te Tiriti o Waitangi and, it is argued, tikanga, as an implication of the tino rangatiratanga guarantee contained in Article Two for Māori to live by and benefit from tikanga.[10]

7. In addition, the Act's broader textual context reflects the fact that tikanga is an integral part of its operation. It is a statute about whenua Māori, a core part of Te Ao Māori and tikanga, and as such tikanga ought to provide an important interpretative overlay to the whole Act. Supporting this, the Act also makes specific reference to tikanga throughout, for example:[11]

7.1. The requirements for judges of the Māori Land Court to have knowledge and experience of te reo, tikanga, and the Treaty of Waitangi,[12] and lay members may be appointed for certain matters having regard to their knowledge and experience of tikanga.[13]

7.2. Part 3A of the Act provides for dispute resolution processes to resolve issues "in accordance with the relevant tikanga of the whanau or hapū".

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8 The Legislation Design and Advisory Committee Legislation Guidelines: 2021 Edition (September 2021) at [5.3] state that all new legislation should, as far as practicable, be consistent with "fundamental common law principles and tikanga (which may require appropriate consideration of Maori language, customs, beliefs and the importance of community, whānau, hapū and iwi). See further Ross Carter *Statute Law in New Zealand* (5th ed, Lexis Nexis NZ Ltd, Wellington, 2015) at chapters 11 and 16.

9 *Te Ara Rangatu o te Iwi o Ngāti Te Ata Waiohua Inc v Attorney General* [2018] NZHC 2886, [2019] NZAR 12 at [14].

10 See further *Ellis*, above n 1, at [98] per Glazebrook J. See also *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [154] where the Court of Appeal held that legislation will not be interpreted to have extinguished native title rights of Māori unless this is made explicit through 'clear and plain intention'.

11 Te Hunga Rōia notes also the following other references to tikanga: the definition of "preferred class of alienees" (s 4); permitting the High Court to state a case on tikanga Māori for the Māori Appellate Court (s 61); provision for additional members who know relevant tikanga Maori to be appointed for certain proceedings relating to Māori land (s 32A); succession rules that recognise tikanga, especially in relation to whangai (ss 114-116) and orders relating to the changing of Crown land to Māori customary land (s 131A(6)).

12 Section 7(2A).

13 For example, see TTWMA, ss 26E–G, 32–32A and 62.

7.3. Section 129(2)(a) of the Act recognises land held by Māori in accordance with tikanga as having the status of "Māori customary land".

8. Accordingly, the Act should be read in a manner that recognises and promotes tikanga. It follows, in Te Hunga Rōia's submission, that tikanga — particularly that relating to whenua — should be carefully considered when interpreting the meaning of the words used in s 236(1)(c).

9. Before setting out what Te Hunga Rōia regards as relevant tikanga, it is acknowledged that this is an issue on which the Court has no evidence. It is also acknowledged that not all hapū or iwi have exactly the same tikanga: there are differences, and there may be tikanga specific to Ngai Tūhoe that are relevant and not addressed in this proceeding. What follows is a brief summary of what Te Hunga Rōia considers are generally accepted principles that the Court may wish to bear in mind in its interpretive task.

Tikanga and whenua

10. At tikanga, whenua possesses special significance; it is something to which Māori belong.[14] This relationship is expressed in the myriad of whakatauākī, whakataukī, pūrākau, mōteatea, and other oral traditions handed down from generation to generation.[15] For example:

> Toitū te kupu, toitū te mana, toitū te whenua[16]
>
> Whatungarongaro te tangata, toitū te whenua[17]
>
> He wahine, he whenua, ka ngaro te tangata[18]
>
> Tukua mai he kapinga oneone ki ahau, hai tangi[19]

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14 Hirini Moko Mead *Tikanga Māori, Living By Māori Values* (Revised Edition, Huia Publishers, Wellington, 2016) at 289.

15 Whakatauākī, whakataukī – proverb, significant saying, aphorism; pūrākau – myth, ancient legend, story; mōteatea – lament, traditional chant, sung poetry.

16 Hirini Moko Mead and Neil Grove *Ngā Pēpeha a ngā Tūpuna - The Sayings of the Ancestors* (revised ed, Victoria University Press, 2003), at 405. "'The permanence of the language, prestige and land'. The translation is due to Ihaka who credits the proverb to Tinirau of Whanganui. The meaning is that without Māori language, prestige and land, Māori culture will cease to exist."

17 At 425. "People are lost from sight but the land remains".

18 At 134. "Women and land cause the death of men".

19 Mead, *Tikanga Māori*, above n 14, at 299. "Send me a handful of soil that I may weep over it".

11. The word "whenua" carries a range of meanings: it can mean placenta, ground, country and state.[20] Whenua as the placenta sustains the life of a baby in the kōpū (womb) and that lifesaving value of whenua is also the basis for the high value placed on land by Māori.[21] At birth, the first act in every child's life was the burying of his or her whenua in their ancestral land. This was a means of proclaiming their right to stand on their land and the reciprocal relationships the child would have within their whānau, hapū and iwi.[22]

12. The atua, Ranginui and Papatūānuku, were the parents of all resources and the patrons of all things tapu.[23] As descendants of Papatūānuku, Māori see ourselves not only 'of the land' but also 'as the land':[24]

> Māori saw themselves as users of the land rather than its owners … They were born out of it, for the land was Papatūānuku, the mother earth who conceived the ancestors of the Māori people … In all, the essential Māori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group … Such was the association between land and particular kin groups that to prove an interest in land, in Māori law, people had only to say who they were …

13. The nature of the relationship is put by Tā Hirini Moko Mead as follows:[25]

> This relationship is about bonding to the land and having a place upon which one's feet can be placed with confidence. The relationship is not about owning the land and being master of it, to dispose of as the owner sees fit … The land cannot be regarded as a personal asset to be traded.

14. While no one individual or kinship group owned or could own land in the sense that they held virtually all rights to the exclusion of others,[26] that does not mean tikanga had no concepts of property holding. Māori customary title included (amongst others) take tipuna (ancestral land passed down according to custom), take raupatu (land acquired by conquest and followed by occupation), and take

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20 At 285.

21 At 285.

22 Moana Jackson "Tipuna title as a tikanga construct re the foreshore and seabed" (March 2010) <www.converge.org.nz>; see also Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 40–41.

23 Mead *Tikanga Māori*, above n 14, at 299.

24 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23–24.

25 Mead *Tikanga Māori*, above n 14, at 289.

26 Andrew Erueti "Maori Customary Law and Land Tenure: An Analysis" in Richard Boast and others *Maori Land Law* (2nd ed, LexisNexis NZ Limited, Wellington, 2004) at 42.

tuku (gifted land).[27] These land rights were held collectively rather than individually; and were privileges held by a member of a community to use resources to maintain obligations to the community and advance the interests of the community.[28] As Tā Taihakurei Edward Durie put it, at tikanga land rights were "inseparable from duties to the associated community, from being part of it, contributing to it, and abiding by its authority and law".[29]

15. Moana Jackson applied the concept of "tipuna title" to explain iwi and hapū relationships to whenua as follows:[30]

> Tipuna title may be described as the physical and spiritual interests that collectively vested in Iwi or Hapū as part of their mana or rangatiratanga in regard to whenua. It is title that exists within what may be termed "relational interests" that is the interests that inhered in the relationships of a particular whakapapa and the willingness of our people to develop existing or potential relationships with others.
>
> Our law is a way of maintaining relationships, where processes and entitlements are based upon kinds of obligations associated with the receipt of any gift. We sometimes define these entitlements as "rights", however these do not stem from the grant of a political body but from the rites of our birth and the whakapapa that makes us unique…
>
> The relational rights that flow from tipuna title are not the same as Pakeha property rights. Those rights are predicated on an individual exclusivity. Relational rights presuppose individual entitlements within a collective exclusivity.

16. The relational and collective aspect is also reflected in take tuku. This is akin to the gifting or transfer of land, but the main difference from the Western understanding of those concepts is that the rights of the party transferring the land did not extinguish or cede to the other party receiving the land. Rather the relationship between the "donor" and "donee" is maintained. To that end, such 'transfers' or 'gifts' were likely to have been subject to certain norms and conditions (for example, residence within the hapū locality, participation in group activities and compliance with group norms).[31] More fundamentally, just as there

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27 At 54.

28 E T Durie "F W Guest Memorial Lecture: Will the Settlers Settle? Cultural Conciliation and the Law" (1996) 8 Otago LR 449 at 454.

29 At 453.

30 Moana Jackson "Tipuna title as a tikanga construct re the foreshore and seabed", above n 22; see also Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 23, at 40–41.

31 Erueti "Maori Customary Law and Land Tenure: An Analysis", above n 26, at 44.

was no notion of outright 'ownership' in the Western sense, neither could whenua be transferred absolutely or in perpetuity.[32]

17. This specific way of looking at and dealing with land 'ownership' is a reflection of the broader tikanga values, with which the Court will be well familiar:

17.1. **Whakapapa** functions as an underlying structural norm within tikanga.[33] Whakapapa, literally means 'to lay one thing upon another', that is, to lay one generation upon the next.[34] Acquisition and maintenance of rights to land were primarily based on whakapapa — a blood link to the community exercising authority over the land.[35] Ani Mikaere explains:[36]

> Whakapapa necessitates a focus on relationships: between people; between people and their non-human relatives; between past, present and future generations. It reminds us that relationships must be carefully managed because everything in our world is connected. Failing to nurture key relationships will result in imbalance which will ultimately be to the detriment of all.

17.2. **Whanaungatanga** is also an underlying structural norm within tikanga.[37] It refers to kinship in the sense of familial connection and relationships, and demands that those relationships be maintained.[38] The whānau is the basic building block of the whole Māori social system,[39] and the whānau is the primary source of support.[40] The collectivist rather than individualistic nature of Māori society, and the centrality of whakapapa and whānaungatanga in Te Ao Māori is reflected in its conceptions of land ownership.

17.3. **Mana** is one of the fundamental principles of tikanga. It refers to the source of rights and obligations of leadership. Under tikanga, power or authority is conditional upon the discharge of responsibilities associated with the

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32 At 44; and Mead *Tikanga Māori*, above n 14, at 289.

33 Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) [*He Poutama*] at [3.48].

34 Hirini Moko Mead and Pou Temara "Statement of Tikanga" as appended to *Ellis*, above n 1, [Statement of Tikanga] at [90].

35 E T Durie "Will the Settlers Settle?", above n 28, at 452–453.

36 *He Poutama*, above n 33, at [3.27].

37 At [3.48].

38 At [3.36]–[3.37].

39 Mead *Tikanga Māori*, above n 14, at 224.

40 Ani Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) Waikato Law Review 125 at 127.

source of that power, for example, mana may refer to chiefly mana in respect of the whenua or of people. Mana reflects responsibilities to sustain the wellbeing of the whenua and of the people. Mana may increase or diminish depending on the success or failure to discharge associated responsibilities.[41] Two forms of mana are of particular relevance here:

17.3.1. mana whenua, which refers to the power and authority exercised by whanau, hapu and iwi, is sourced from occupying and sustaining the land for several generations (ahikāroa);[42] and

17.3.2. mana motuhake, which refers to Maori independence and self-determination, and which the Tūhoe Claims Settlement Act 2014 (**the Settlement Act**) recognises in Tūhoe.[43]

17.4. **Kaitiakitanga** refers to the obligation of whānau, hapū and iwi to protect the spiritual and physical wellbeing of environmental resources, and in particular the whenua, in their care.[44] This has been referred to as an "intrinsic duty to safeguard" the environment's mauri, and is linked to whakapapa and mana.[45]

17.5. **Tapu** is also closely allied with the concept of mana, and works to regulate, protect and preserve mana by imposing behavioural restrictions or requiring that certain actions or processes be followed.[46] Mikaere notes that tapu recognises the inherent value of each individual and the sacredness of each life and acts to protect people, property and sacred

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41 *He Poutama*, above n 33, at [3.86].

42 Te Hunga Rōia notes, only briefly, that there is some debate about the concept of mana whenua. In particular the Waitangi Tribunal in *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001) at [2.6.1] noted the linking of authority with English concepts of imperium and dominium did "not fit comfortable with Maori concepts". See further Mead *Tikanga Maori*, above n 14, at ch 17; Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 178–179; and for a helpful summary, *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [423]–[450]. See also *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [74]–[95].

43 Tūhoe Claims Settlement Act 2014, s 10(6).

44 *He Poutama*, above n 33, at [3.116].

45 At 88.

46 At [3.87].

sites, and to maintain social discipline.[47] Some land carries particular significance and has a heighted status of wāhi tapu (the confiscation and destruction of which is acknowledged by the Settlement Act.[48])

18. As can be seen from that brief overview of some applicable tikanga principles, tikanga places a heavy importance on land and the collective right to share and belong to it, as well as the collective obligation as custodians to care for it. Land is something to which people belong, not something that can be 'owned' or sold in the Western sense.[49] If viewed solely through a Western lens a reading of s 236(1)(c) of the Act that confines ownership to the orthodox conception of ownership at common law/equity would, it is submitted, not accommodate the tikanga view.

19. Te Hunga Rōia recognises that tikanga depends on the circumstances of the situation in which it applies. This will depend on the tikanga of the iwi, hāpu or whānau, and so that the application of a tikanga consistent interpretation could see different results for different hāpu. It may be, for example, that a whakapapa connection to the whenua is required before tikanga would view the rights and obligations as 'ownership', but it may not. This supports why, especially in the absence of specific tikanga evidence in this case, Te Hunga Rōia does not consider it appropriate to make a submission as to the substantive disposition of the appeal. Te Hunga Rōia's submission is that consideration of tikanga is a necessary part of the interpretative exercise. Te Hunga Rōia knows of no tikanga that would require the ability to permanently alienate and dispose of all interests in the land to be fundamental to 'owning'.

Ownership in the context of trusts as a matter of traditional common law/equity

20. The approach to land 'ownership' under tikanga can be contrasted with the traditional approach at common law and equity.

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47 Ani Mikaere "Cultural invasion continued: the ongoing colonization of tikanga Māori" (2005) 8(2) Yearbook of New Zealand Jurisprudence 134 at 137–138, as cited in *He Poutama*, above n 33, at [3.87].

48 Tūhoe Claims Settlement Act, s 9(2)(d).

49 *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [509].

21. As the Court of Appeal recognised, the beneficiaries of the Tūhoe Te Uru Taumatua Trust (**the Trust**) do not, having regard to the "established legal meaning" at common law of the "technical" meaning of the phrase, own a "beneficial estate" in the fee simple of the land held in the Trust.[50] The individual personal beneficiaries (being Tūhoe Iwi Members) do not currently have a vested interest in the land. Further, the abolishment of the perpetuity period by statute[51] means that at no point will the Trust assets vest in specified beneficiaries having an entitlement to such vesting under the Trust deed.[52]

22. This creates a situation that the common law does not usually address, because the common law did not generally permit property, especially land, to be eternally restricted from being disposed of. The common law turned its face against property being held in such a manner that could be prevented from coming into the absolute ownership of a person (with the power to then alienate that property).[53] Because trusts could act as a mechanism through which absolute ownership could potentially be indefinitely restricted, the common law developed in such a way to ensure accessibility of capital notwithstanding ownership in trust. A trust was invalid if a person or persons would not ultimately become absolutely entitled to trust property on or before the passing of a perpetuity period (the rule against remoteness of vesting);[54] or if the use of income for a particular purpose continues for too long a period (because that would make the capital that is producing the income inalienable).[55]

23. A reason the common law created the rule against perpetuities[56] was because if capital was subject to conditions that meant it never was subject to the absolute

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50 *Kruger v Nikora* [2023] NZCA 179 [CA decision] at [86].

51 Tūhoe Claims Settlement Act, s 19.

52 CA decision, above n 50, at [86].

53 Underhill and Hayton *Law of Trusts and Trustees* (20th ed, LexisNexis, Croydon, 2022) [Underhill and Hayton] at [13.1]. The rule has been in place since at least the 17th century: *Duke of Norfolk's Case* (1683) 3 Ch Cas 1.

54 At [13.3]. The rule against remotemenss of vesting is also known as the rule against perpetuities: *Lewin on Trusts* (20th ed, Sweet & Maxwell, 2020) at [6-037].

55 Underhill and Hayton, above n 53, at [13.2] and [13.4].

56 It was not until the Perpetuities and Accumulations Act 1964 that the distinction between the rules of vesting and inalienability assumed importance and cases usually simply referred to voiding settlements for perpetuity: Underhill and Hayton, above n 53, at [13.1]. For the purposes of this matter the difference between the two rules does not matter, and the Court can safely examine the matter from the perspective of perpetutities, though the distinction between the rules explains the wording of s 19(1(a)(i) and (ii) of the Tūhoe Claims Settlement Act.

ownership of a person or persons then it would not be able to be freely used as part of the economic system.[57] Capitalism, by its nature, requires access to capital and the common law is based upon an individualistic capitalist system.[58] In this way the traditional common law's approach reflected the underlying structure of the society it operated in and was governing — a society premised upon individual rights, individual property ownership and the importance of access to and flow of capital, including land. In contrast, tikanga reflects the underlying structure of the society it operates in and governs –and reflected a society premised on collectivism and collective responsibility, and the fundamental and ongoing importance of land.

How tikanga may inform interpretation in this matter

24. As noted, the Courts below did not address what effect tikanga might have on the interpretation of s 236(1)(c) of the Act. The Court of Appeal approached the question only considering the traditional common law approach to the question of 'ownership'. Te Hunga Rōia submits that it is necessary and appropriate for tikanga to also inform the interpretation. A requirement for an owner to have an absolute right to dispose of land is, in accordance with the principles and approach set out above, contrary to tikanga.

25. In the context of the Act, Te Hunga Rōia submits that the definition of "owned by Māori" for the purposes of s 236(1)(c) can properly recognise the broader concepts of 'ownership' at tikanga and therefore not require a vested interest or absolute right to dispose of the freehold. In circumstances where all the beneficiaries of a trust are Māori, and land is held by the Trust for those who whakapapa to the land (including both living and not-yet-born), recognising that this is 'owned' by Māori could accord with the way tikanga viewed the rights and obligations inhering in control of the land. In the context of a statute designed to address, at least in part, the relationship between Māori and their land a tikanga-consistent reading of the statute is appropriate and available.

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57 See further the explanation of the rule in Te Aka Matua o Te Ture | Law Commission *Perpetuities and the Revocation and Variation of Trusts* (NZLC IP22, 2011) at [1.5]–[1.19].

58 Catherine Comyn *The Financial Colonisation of Aotearoa* (Economic and Social Research Aotearoa, Tāmaki Makaurau Auckland, 2022) at 14.

26. Te Hunga Rōia notes that a broader reading of terms in an Act than may apply to the same terms in other contexts is not unusual. This Court has confirmed, for example, in relation to the Property (Relationships) Act 1976 that the fact that it is "social legislation" means that a broader reading of traditional concepts than may apply in other contexts was appropriate.[59] It is submitted that the context of the Act requires that greater consideration be given to tikanga as part of the interpretative exercise than may be appropriate in some other contexts.

27. Moreover, the notion that traditional common law concepts as used in the Act may be applied or thought of slightly differently to avoid frustrating tikanga is not new. In *Kusabs v Staite* the Court of Appeal considered that tikanga and the whanaungatanga context were relevant in applying the traditional *Boardman v Phipps* test for conflict in respect of a trustee of a Māori land trust.[60] The Court observed that:[61]

> If fiduciary duties are applied to Māori land administration without due regard to whanaungatanga, the former may frustrate the positive expression of the latter. This would be contrary to the underlying values of equity which, after all, developed as a response to the rigid formalism of the common law courts.

28. There has also been recognition in the context of land that tikanga concepts may not fit well with Western concepts, and that care must be taken in assessing the two. The discussion of the High Court in *Re Edwards Whakatōhea*,[62] including its coverage of the Court of Appeal's discussion in *Attorney-General v Ngāti Apa*[63] is, respectfully, a helpful reminder the courts will have regard to approaches to land holding/ownership concepts of Māori and not solely look at the Western conceptual ownership matrix.

29. Furthermore, s 2 of the Act expressly provides that Parliament's intention is that the Act's provisions are to be interpreted in a manner that "best furthers" the principles set out in the Preamble. The Preamble contains clear principles regarding the ownership of land:

> … 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

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59 *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].
60 *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144.
61 At [124].
62 *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 at [120]–[128].
63 *Attorney-General v Ngāti Apa*, above n 10.

> 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 hapū …

30. The reo Māori version of these phrases is:

> … 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 …

31. In *Mercury NZ Ltd v Māori Land Court*, Cooke J in the High Court accepted that the English version's adoption of the reo Māori expression "taonga tuku iho" in reference to land recognises the need to consider the relationship with land through the lens of a Māori worldview.[64] Te Hunga Rōia agrees with that approach.

32. The reo Māori version's equivalent words to "owners" are "iwi nōna" and "hunga nōna". "Iwi" is defined as extended kinship group, tribe, nation, people, nationality or race, and often refers to a large group of people descended from a common ancestor and associated with a distinct territory; and "hunga" is defined as group, people, company of people or party.[65] He Pātaka Kupu provides the following definition of "nōna":[66]

> [Tāne] tkp . He kupu e tohu ana nō tētahi tangata i tua atu i te kaikōrero me te kaiwhakarongo te mea e kōrerotia ana.

33. Te Aka (the Māori Dictionary) provides the following definition of "nōna":[67]

> belonging to him or her, hers - used when the possessor did not, or does not, have control of the relationship or was subordinate, passive or inferior to what was/is possessed.

34. Section 2 of the Act also provides that the powers, duties, and discretions conferred by the Act shall be exercised, as far as possible, in a manner that

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64 *Mercury NZ Ltd v Māori Land Court* [2023] NZHC 1644 at [34].

65 Te Aka Māori Dictionary, <https://www.maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=hunga>

66 He Pātaka Kupu, <https://hepatakakupu.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=n%C5%8Dna>

67 Te Aka Māori Dictionary, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=nona>

facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapū, and their descendants, and that protects wahi tapu (s 2(1) and (2)). In the event of any conflict between the Māori and English versions of the Preamble, the Māori version shall prevail (s 2(3)).

35. Te Hunga Rōia respectfully submits that the use of these kupu in the Preamble reflects tikanga in relation to land. This was recognised in *John da Silva v Aotea Māori Committee* where the Māori Land Court stated:[68]

> Guidance in understanding these provisions is found in the Māori version of the Preamble. The principal theme is to "determine" the interests of "owners".
>
> In the Preamble the concept of ownership is expressed thus:
>
> "... kia mau tonu taua whenua ki te iwi nona, ki o ratou whanau, hapu hoki ..."
>
> The word "iwi" (being both singular and plural) in relation to "whanau" and "hapu" may express a tribal identity (or tribal identities) with land. Alternatively, the word could mean 'owners' and the whanau and hapu of those owners. A little later in the Preamble the word "iwi" is replaced by the word "hunga":
>
> "... i te whakamahitanga o taua whenua hei painga mo te hunga nona, mo o ratou whanau, hapu hoki ..."
>
> This use of "hunga" clarifies the meaning of the earlier "iwi" as applying in that context to tribal identity (or identities) rather than the alternative 'owners'.
>
> …
>
> In the first instance, the Preamble recognises the traditional relationship of Māori with their land in its tribal significance rather than ownership in an individualised sense.

36. Te Hunga Rōia submits that the strong directives in the Preamble are a further reason that a tikanga-consistent interpretation should be considered and is available in the rubric of the Act.

37. In a statute that expressly recognises whenua as a taonga tuku iho and promotes retention of whenua (both consistent with tikanga) there would be an incongruity if tikanga had no role in the interpretation of an important term in that statute. The incongruity would be heightened where statute[69] (with the goal of promoting

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68 *John da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212 at 237–238.

69 In this case, the Tūhoe Claims Settlement Act 2014.

retention and control by Tūhoe) has expressly done away with the traditional common law requirement that land be available for unrestricted trading.

38. There may also be some level of historical incongruity. When European colonisation of New Zealand occurred it seems accepted, at least to some extent, that Māori 'owned' land to European eyes (hence the desire to seek to acquire that ownership from Māori).[70] There may be tension in a regime that seeks to restore land to be held by Māori in a way underpinned by tikanga but for Māori not to be considered owners of that same land under that regime.[71]

Conclusion

39. Te Hunga Rōia submits that having regard to tikanga the terms of this Trust are such that it could properly mean that the land is 'owned by Māori' for the purposes of s 236(1)(c). However, Te Hunga Rōia does not submit that this interpretation must be adopted. The Court is without any evidence of Tūhoe tikanga. Further, Te Hunga Rōia recognises that there are broader matters of context, identified in both parties' submissions, that need to be considered. It also does not address the question of whether the Trust is "constituted in respect of" land owned by Māori.

40. Te Hunga Rōia does, however, submit that consideration of tikanga when addressing the issue of whether the land is "owned by Māori" is an important part of the statutory interpretation exercise, and that this Court should give it due consideration.

Dated 13 February 2024

Mokotā: B R Arapere / I T F Hikaka / J T Kohu-Morris
Counsel for Te Hunga Rōia Māori o Aotearoa

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70 Treaty of Waitangi, Article Two (English version); and *Proprietors of Wakatu v Attorney-General*, above n 49, at [10], [96], [98]–[99] and [507].

71 Though it is not suggested that it would occur here, Te Hunga Rōia notes that individualisation of land title vested in the collective mana of Māori was an underlying principle of the Native Lands Act, whose implementation resulted in significant harm to Māori: see, for example, Catherine Comyn *The Financial Colonisation of Aotearoa*, above n 58, at 103–105.

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