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	**TAMATI KRUGER ON BEHALF OF TŪHOE TE URU TAUMATUA TRUST**
	Respondent

Respondent's submissions

21 December 2023

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A. WHAKARĀPOPOTOTANGA | SUMMARY OF ARGUMENT

1. This appeal concerns the interpretation of s 236(1)(c) of Te Ture Whenua Māori Act 1993 (**Act**) and, as a consequence, whether the Māori Land Court has jurisdiction over Tūhoe Te Uru Taumatua (**Te Uru Taumatua**), the post-settlement entity for Ngāi Tūhoe. The central issue is whether Te Uru Taumatua is a "trust constituted in respect of General land owned by Māori".

2. The respondent submits the proper scope of s 236(1)(c) does not encompass Te Uru Taumatua for three reasons:

    2.1. Take tuatahi: General land is not "owned" by Māori where Māori are discretionary beneficiaries in a wholly discretionary common law trust.

    2.2. Take tuarua: The General land owned by Māori to which the Act (and, by extension, s 236(1)(c)) is directed is those existing traditionally held but individualised and fragmented Māori landholdings that require the Māori Land Court's assistance for their retention, use and management. It is not directed at land that is unburdened by those policy concerns, where there is no prospect of similar fragmentation of interests, and where Tūhoe have chosen the way in which land in the Tūhoe ahikāroa will be protected from alienation.

    2.3. Take tuatoru: Te Uru Taumatua is not constituted in respect of land. Te Uru Taumatua is constituted in respect of a constitutional compact between Tūhoe and the Crown, to reestablish the foundational relationship between Te Tiriti partners, to receive and manage redress for Te Tiriti breaches for the benefit of Tūhoe, and—importantly—to uphold mana motuhake o Tūhoe via its preferred tribal structures.

B. NGĀ MEKA MATUA | RELEVANT FACTUAL BACKGROUND

3. The factual background is set out at paragraphs [12] to [31] of the Court of Appeal judgment[1]. In summary:

    3.1. Te Uru Taumatua was established in August 2011 to be Ngāi Tūhoe's post-settlement governance entity. That is, to receive settlement assets and be Ngāi Tūhoe's legal representative.

[1] [COA 101.0302].

3.2. The settlement assets included four Central North Island forests and three other fee simple properties.

3.3. Te Uru Taumatua also holds some parcels of Māori freehold land on a transitional basis pending the establishment of permanent ownership arrangements.

3.4. In 2019 the appellant sought to challenge the outcome of a trustee election in the Māori Land Court. Te Uru Taumatua took no steps in that Court as the trustees did not consider it had jurisdiction.

3.5. The Māori Land Court upheld the appellant's challenge.

3.6. Te Uru Taumatua appealed to the Māori Appellate Court on the basis that the Māori Land Court did not have jurisdiction over it. This appeal was unsuccessful.

3.7. Te Uru Taumatua then successfully appealed to the Court of Appeal.

C. TAKE TUATAHI: LAND HELD BY TE URU TAUMATUA IS NOT GENERAL LAND "OWNED" BY MĀORI

Principles of statutory interpretation and summary of argument

4. The issue for determination is one of statutory interpretation: is Te Uru Taumatua a trust constituted in respect of any General land owned by Māori? Section 10 of the Legislation Act 2019 provides that the meaning of legislation must be ascertained from its text in light of its purpose and its context. These submissions undertake a purposive analysis of the Act and how it applies to Te Uru Taumatua—having regard to Te Uru Taumatua's trust deed, the post-settlement context within which it operates, and the relevant Te Tiriti and tikanga principles that should guide the court. Read in this light, s 236(1)(c) does not bring Te Uru Taumatua within the Māori Land Court's jurisdiction.

5. The General land held by Te Uru Taumatua is not General land owned by Māori for the purposes of the Act.

6. "General land owned by Māori" has two definitions in the Act. Section 4 (interpretation) provides that it means:

> 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

7. Section 129(2)(c), which requires all land to have particular status for purposes of Act, defines the phrase in slightly different terms, introducing a

temporal component based on whether its is beneficially owned by Māori at a particular point in time, as follows:[2]

> land (other than Māori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while the estate is beneficially owned by Māori or by a group of persons of whom a majority are Māori, have the status of General land owned by Māori

8. Read together, land must satisfy three criteria in order to qualify as General land owned by Māori for the purposes the Act:

   8.1. it must be General land, i.e. land other than Māori freehold land that has been alienated from the Crown for an estate in in fee simple;

   8.2. the estate in the land must amount to beneficial ownership; and

   8.3. the beneficial owners at the time must be Māori, or a majority thereof.

9. There is no dispute that Te Uru Taumatua holds General land and that both the trustees and beneficiaries of Te Uru Taumatua are Māori.[3] The issue for determination is therefore whether the beneficiaries have an estate in the relevant parcels of land that amounts to beneficial "ownership". The respondent submits that they do not. This conclusion is supported by the clear statutory language of the Act, including its deliberate use of technical trust terminology, and by the sui generis nature of Te Uru Taumatua.

Beneficial ownership in the context of Te Ture Whenua Māori Act

10. The first issue is whether it is the trustees' or the beneficiaries' estate in the land that is relevant for assessing whether the land is General land owned by Māori. The respondent submits that it is the latter.

11. In the Māori Land Court, Judge Coxhead relied on the trustees' legal ownership of General land on behalf of the beneficiaries, the majority of whom are Māori, to support his conclusion that Te Uru Taumatua was constituted in respect of General land owned by Māori.[4] The Court of Appeal

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[2] This addition confirms that land status is not static. In other words, a parcel can shift between being General land held by Māori and General land depending on its ownership structure at a particular point in time.

[3] The beneficiaries of the Tūhoe Trust are present and future Tūhoe iwi members, who are by definition Māori. See Trust Deed at cls 1.1 (definition of Tūhoe Iwi Members) and 3.1 [COA at 101.0008 and 101.0010]. Trustees must be Tūhoe Registered Members. See Trust Deed at cl 4.2(b) and 1.1 [COA at 101.0008 and 101.0011].

[4] Māori Land Court decision at [46]–[47] [COA 101.0186]. See also the Court of Appeal's discussion of the Māori Land Court analysis at [64]–[67] [COA 101.0320–101.0321]. The Māori Appellate Court did not make a finding on whether it is the trustees' or the beneficiaries' interest that is relevant for

overturned this finding, holding that the statutory language demonstrates it is the beneficiaries' interests in land that must be scrutinised to determine whether it is owned by Māori.

12. The two definitions of General land owned by Māori are expressly concerned with the beneficial ownership of the land, rather than legal title. It is axiomatic that while legal ownership of trust property vests in the trustees, this is distinct from a beneficial interest.

13. That the trustees' interest in trust land does not amount to beneficial ownership is demonstrated by the definition of "beneficial estate or beneficial interest" in the Act. Section 4 provides that "beneficial estate or beneficial interest does not include an estate or interest vested in any person by way of trust, mortgage or charge".[5] This is one of only two instances where "beneficial estate" is used in the Act, the other being the definition of General land owned by Māori in the same section. The only available interpretation is that Parliament's express intention was to exclude trustees' legal interests from determining whether General land is owned by Māori.

14. Focusing on the beneficiaries' interests in the landholdings rather than that of the trustees is also consistent with the representative role of the trustees as conceptualised in the Trust Deed Recitals. Te Uru Taumatua is the "conduit" by which Tūhoetanga is restored to whānau and hapū.[6] It acts on the authority of the people as the iwi authority and post settlement entity; it serves and is "powered by the people".[7] To the extent that the trustees legally "own" the trust assets, this is with the authority of, on behalf of, and for the benefit of, Tūhoe as a collective.

15. The next issue is whether the beneficiaries' interest in the trust's general landholdings amounts to beneficial "ownership" i.e. an estate. The respondent submits that it does not.

16. The focus of s 236(1)(c) is on beneficial ownership of an estate, not on any mere beneficial interest in the land. This is apparent from the two definitions of General land owned by Māori, which describe, respectively, "land that is *owned for a beneficial estate* in fee simple" and a subsisting estate in fee

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assessing whether land is General land owned by Māori. The focus of the Māori Appellate Court hearing was primarily on whether the Tūhoe Trust was *constituted in respect of* such land.

5 Definition of beneficial estate or beneficial interest.

6 Recital C [COA 101.0004].

7 Recitals F and G [COA 101.0004].

simple "while the *estate is beneficially owned* by Māori".[8] It is also elucidated by the distinction within the Act between beneficial ownership[9] and a beneficial interest.[10]

17. As the Court of Appeal recognised, the Act uses technical terms drawn from property law and trust law, so the starting point is whether, reading the definitions in light of the established legal meaning of the technical terms employed, the beneficiaries can be said to own a beneficial estate in fee simple in the land.[11]

18. The Tūhoe Trust is a discretionary trust. The trustee powers,[12] including any potential distributions to Tūhoe iwi members,[13] are wholly discretionary. In these circumstances, no individual beneficiary or group of beneficiaries can be said to have beneficial ownership of the trust property.

19. It has long been understood that an object of a discretionary trust holds a mere hope or expectation and has no proprietary interest in the trust assets and no right to a definable part thereof unless and until an appointment is made.[14] Viscount Radcliffe described the non-proprietary nature of a discretionary beneficiary's interest in trust assets in the following way in *Commissioner of Stamp Duties (Queensland) v Livingston*:[15]

> If "by beneficial interest in the items" it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental. It is, as has been shown, contrary to the principles of equity. But, on the other hand, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with and the rights that they hope will accrue to them in the future are safeguarded, the proposition is no doubt correct. They can be said, therefore, to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word "interest" is used in such a context.

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8 Above at [6]–[7].

9 Used in ss 122 and 141.

10 Used repeatedly including, for example, in ss 214 and 216.

11 Court of Appeal Judgment at [84]–[98] [COA 101.0326–101.0330].

12 Clause 6.2 [COA 101.0012].

13 Clauses 3.1(h) and 12 [COA 101.0010 and 101.0016].

14 Jessica Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" [2010] NZ L Rev 541 at 548; and *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) at 712–713.

15 *Livingston*, above n 14, at 712-713. The principle in *Livingston* has been adopted widely in respect of discretionary beneficiaries. For instance, see *Hunt v Muollo* [2003] 2 NZLR 322 (CA); and *Johns v Johns* [2004] 3 NZLR 202 (CA).

20. All beneficiaries of Te Uru Taumatua are also—contingently—residual beneficiaries, but this residual interest does not support beneficial ownership because the trustees will never be required to distribute the balance of the trust fund to beneficiaries. The residual entitlement under cl 2.3 of the Trust Deed is contingent on the rule against perpetuities applying in respect of Te Uru Taumatua on the relevant date, the trust property still being in existence at that time, and the trustees not having exercised their power to resettle all or some of the trust fund.[16] Section 19 of the Tūhoe Claims Settlement Act 2014 provides that limits on the duration of the trust in any rule of law, including s 16 of the Trusts Act 2019, do not restrict the period during which Te Uru Taumatua may exist in law or during which the trustees may hold or deal with property or income derived from the property. In other words, Te Uru Taumatua can continue indefinitely for the benefit of current and future Tūhoe iwi members. Clause 2.3 of the Trust Deed is not, and will not be, engaged.

21. It is no answer to say that while beneficiaries of Te Uru Taumatua may not have a proprietary interest in any definable part of the trust assets, equitable ownership vests in the beneficiaries collectively. The difficulty with this approach is that such "ownership" would be divorced from any practical application. How could the rights of "ownership" be exercised by an open-ended class of beneficiaries—being any current *and future* Tūhoe iwi members?[17] By way of demonstration, the rule in *Saunders v Vautier* cannot apply because it is impossible for all beneficiaries to reach an agreed position. Additionally, the use of the word "estate" confirms that Parliament was intending a formal and traditional interest not something more abstract.

22. Te Uru Taumatua beneficiaries do not have a beneficial estate in the trust assets.

23. Although their rights fall short of "ownership", the beneficiaries of Te Uru Taumatua have important and recognised interests in the trust, its operations and its assets. There are various mechanisms by which discretionary beneficiaries can protect these rights, such as through the entitlement to disclosure of trust documentation,[18] utilising the internal

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16 Clause 17.1 [COA 101.0019].

17 Patrick Parkinson "Reconceptualising the Express Trust" (2002) 61 CLJ 657 and 660-661; Jessica Palmer "Theories of the Trust", above n 14, at 548.

18 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 at [54]. See discussion in *Erceg v Erceg* [2016] NZCA 7, [2016] 2 NZLR 622 at [10]–[19].

dispute resolution mechanisms within the Trust Deed, and where necessary, by calling upon the High Court's supervisory jurisdiction.

24. It would be dangerous to erode the established meaning of technical property and trust terminology within the Act to achieve the appellant's desired outcome (Māori Land Court jurisdiction). As Tipping J observed in *Hunt v Muollo*, the rule that a discretionary beneficiary's interest in a normal discretionary trust is no more than a mere expectancy must be:[19]

> … construed and applied in the context of the general law of property. If the position were otherwise, the ambit of the Rule would have no clear or principled boundary.

Beneficial ownership in the context of Te Uru Taumatua

25. The sui generis nature of Te Uru Taumatua provides further support for the proposition that the beneficiaries do not beneficially "own" the trust assets, and consequently, that the general land held by Te Uru Taumatua does not qualify as General land owned by Māori for the purposes of the Act.

26. Te Uru Taumatua is in many respects functionally distinct from traditional private trusts. It is perpetual, and as explained below, uniquely future-focused with obligations to all of Tūhoe—that is, its people (both living and future iwi members), its land and assets. This special character arises from the post-settlement context in which the trust emerged, Te Uru Taumatua being the legal entity through which Ngāi Tūhoe reached its Te Tiriti settlement with the Crown.

27. Te Uru Taumatua is charged with receiving, holding, managing and administering the trust assets on behalf of all present and future Tūhoe iwi members—which includes future generations not yet born. The Trust Deed does not distinguish between living and future Tūhoe members, they are of equal status as beneficiaries. Importantly, the Tūhoe Trust will continue perpetually.[20]

28. Te Uru Taumatua aspires towards the collective advancement of Tūhoe—its people (present and future iwi members), ideology, and culture—and the preservation and advancement of Tūhoetanga. The focus is communal and there is little regard for individual interests; consistent with how whenua is

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19 *Hunt v Muollo,* above n 14, at [11]–[13].

20 As described above at [20], by virtue of s 19 of the Tūhoe Claims Settlement Act 2014, the rule against perpetuities does not apply.

conceptualised in Tūhoetanga. The collective character of Te Uru Taumatua is reflected in its recitals and in the purpose clause.

29. The Trust Deed recitals set out key aspects and principles of Tūhoetanga and the role of Te Uru Taumatua. The recitals include:[21]

    29.1. "The Tūhoe Trust will be the conduit by which this ideology and principles are restored to the whānau and hapū."

    29.2. "The Tūhoe Trust serves our kinship and our culture, real things of innate and greater value held in common and holding the iwi together. The Tūhoe Trust affirms Tūhoe values, beliefs and way of life vital to our sense of wellbeing … The Tūhoe Trust is powered by the people."

    29.3. "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) and for the Trustees to hold property upon the trusts and with the duties, powers and discretions set out in this Deed."

30. The Trust Deed identifies eight non-exhaustive purposes towards which the trustees may receive, hold, manage and administer the fund, which largely prioritise the collective interests of Ngāi Tūhoe. These include, inter alia:[22]

    30.1. leading and serving the cultural permanency and prosperity of Tūhoetanga by way of re-enacting te mana motuhake o Tūhoe;

    30.2. the promotion and advancement of the social and economic development of Tūhoe, including by way of business, commercial and vocational training and enhancement of community facilities;

    30.3. the maintenance and establishment of places of cultural or spiritual significance for Tūhoe;

    30.4. the promotion of tribal forums to hear and determine matters affecting Tūhoe; and

    30.5. establishing a new generation relationship between Tūhoe, the Crown, and other iwi.

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21 Recitals C, F and G [COA 101.0004].

22 Clauses 3.1(a)-(d) and (f) [COA 101.0010]. There is provision for distributions to be made to Tūhoe Iwi Members, for instance in cl 3.1(h), but the purposes the trustees are required to advance are largely aimed at collective benefits [COA 101.0010].

31. The future-focused collective purposes of Te Uru Taumatua, coupled with its perpetuity and equal obligations to all Tūhoe iwi members both current and future, is incongruous with the creation of individual estates over trust assets for current beneficiaries. The better view is that there is no beneficial estate in the trust's landholdings. Current and future Tūhoe iwi members share equal and inseparable interests in the trust property, but those interests fall short of beneficial "ownership" or a beneficial "estate" in conventional trust terms. In that respect, Te Uru Taumatua can be seen to be analogous to a purpose trust, with defined aspirations for Tūhoe as a collective, now and in the future.

32. This analysis is also consistent with tikanga and the paramountcy of communal interests over those of the individual. As Eddie Durie explained, for Māori, people belong to the land (as distinct from land belonging to the people) and individual rights in respect of land derive from membership within the community.[23] The concept of "ownership" does correspond with Māori connections with land.[24] The principle of ancestral continuity means interests in the land are shared by ancestors, the living generation, and future generations yet unborn.[25]

33. The Law Commission in its *Waka Umanga* report described how it is tribal bodies—"the keeper of the culture, the body that maintains Māori values and lifestyle"—that are the appropriate beneficiaries of Crown redress for land and cultural losses, rather than individual members:[26]

> We think property and cultural rights are at stake and, that in terms of those rights, the tribe must be the primary beneficiary of most historical, Treaty claim settlements. In examining the property right, there appears to be a consensus amongst anthropologists that the resources of lands and waterways were held communally by the tribe. It follows that where compensation is due for land loss and the effects of land tenure reform, it is due to the tribe, as a corporate entity. […]
>
> As for the cultural right, the starting point is again that the tribe was pre-eminent and the individual right to enjoy those resources depended upon support for the tribe. The further obligation was to ensure that tribal resources were passed on to future generations. Accordingly, what mattered in tribal culture was not what one could get from the tribe but what one gave to it. The individual reward was in

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23 ET Durie, "Custom Law" Waitangi Tribunal 2013 Reprint, May 2013 at 62.

24 At 66–70.

25 At 63–64. Durie describes Māori as "transient sojourners conscious of responsibilities to past and future generations behind and before them in unbroken succession".

26 Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at [4.42] and [4.43].

the mana that came from supporting the group. These rights are important in assessing the rights now claimed by tribal members to benefit from Treaty claim settlements.

D. TAKE TUARUA: THE ACT IS CONCERNED WITH RETAINING AND ADMINISTERING TRADITIONAL, FRAGMENTED MĀORI LANDHOLDINGS

34. The respondent submits the Act is intended to protect and facilitate management of those small amounts of traditional yet fragmented landholdings that have managed to remain in Māori hands. Section 236(1)(c) is aimed at protecting those landholdings where they have, by virtue of flawed legislative policy, been converted to General land and are at risk of further fragmentation or outright loss. It is not aimed at what is already Crown or General land which is returned as redress as part of present-day Crown settlement policy, particularly in Tūhoe's specific settlement. Such land is untrammelled by fragmented interests, without the attendant administration issues and—in the case of land in Tūhoe's ahikāroa—absent concerns for lack of controls against future alienation. It ought not to be the foundation of the Māori Land Court's jurisdiction over Te Uru Taumatua.

Te Ture Whenua Māori Act is focused on retaining traditional Māori land holdings and mitigating impact of individualised title

35. The legislative history demonstrates the Act's focus on the dual objectives of retaining traditional, communally held Māori land, and mitigating the adverse impact of fragmented individualised title on the administration and use of that land. Nothing in the history indicates it was intended to interfere with General land held in trust by a post-settlement entity.

36. There have been numerous attempts to reform Māori land law in modern times. The first attempt to fully reform the previous regime was the Māori Affairs Bill 1978. At the request of Māori, the Bill was withdrawn, and the Government instead invited the New Zealand Māori Council to consider the existing legislation governing Māori land and to make recommendations for its revision.[27] In February 1983, the New Zealand Māori Council submitted its report, *Kaupapa Te Wahanga Tuatahi*. The Government accepted in principle the Council's recommendations, which formed the foundation of the Māori Affairs Bill 1983—later passed, with amendments, as Te Ture Whenua Māori Act.[28]

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27 Māori Affairs Bill 1983 (124-1), explanatory note.

28 Māori Affairs Bill 1983 (124-1); (12 November 1992) 531 NZPD 12237.

37. The Māori Council's position in *Te Wahanga Tuatahi* was to focus on retaining and best utilising Māori land that was "traditionally owned" and jointly held. The intention was not to control or interfere with Māori landholdings more generally:[29]

> We do not intend that the rights of Maori owners of general land should be in any way interfered with. But we emphasise the significance of our traditionally owned land and we seek to ensure that the law continues to provide for the retention, use and management of jointly owned Maori land.

38. That intention is consistent with lawmakers' understanding of the reforms as they progressed through Parliament. Hon Peter Tapsell (Eastern Māori) made the point directly during the third reading of the Bill:[30]

> I want to make it clear that the Bill relates to the ownership of Maori land—not the Maori ownership of land but the ownership of Maori land. One must remember that many Maoris own general land. More and more Maoris own general land, and I suspect that in the future many more will own general land.

39. These intentions are reflected in the Act's preamble, its statutory objectives, and its predominant focus on Māori freehold land. Section 2 records Parliament's intention that the Act be interpreted to best further the preamble, and applied in a manner that "facilitates and promotes the retention, use, development and control of Māori land as taonga tuku iho by Māori owners, their whanau, their hapu and their descendants, and that protects wahi tapu". Section 17 provides that the Court's primary objective in exercising its jurisdiction and powers is to promote and assist in the retention of Māori land and General land owned by Māori; and the effective use, management and development of that land.

40. Parliament could not have been clearer. The Act is focussed on the retention by Māori of land, particularly that taonga tuku iho of existing fragmented interests in traditional lands.

The Act creates sui generis statutory trusts and a residual—not broad—trust jurisdiction

41. As a result of the focus on Māori land, a large part of the Act institutes controls over the use and transmission of Māori freehold land. In addition,

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29 New Zealand Māori Council *Kaupapa Te Wahanga Tuatahi* (February 1983) at 10.

30 (4 March 1993) 533 NZPD 13742.

the Act provides the Māori Land Court with exclusive jurisdiction to create and oversee certain types of trusts. These are:

41.1. Pūtea trusts, which the Court can constitute in respect of interests in Māori land, General land owned by Māori, or shares in a Māori incorporation.[31] These are designed to allow multiple owners to manage together otherwise uneconomical shares in a block or multiple blocks, with the benefits held for Māori community purposes.

41.2. Whānau trusts, which the Court can constitute in respect of interests in Māori land, General land owned by Māori, or shares in a Māori incorporation.[32] These are used for managing a whānau's beneficial interests in land, in the interests of descendants of a specified tipuna and/or specified Māori community purposes. They enable whānau to consolidate their interests for the benefit of the whānau, and also prevent fragmentation by preventing succession to the interests held in the trust.

41.3. Ahu whenua trusts, which the Court can constitute in respect of interests in Māori land, or General land owned by Māori.[33] These are typically used for managing whole blocks of Māori freehold land in the interests of the beneficial owners. They are by far the most common type of trust constituted under the Act, and trusts established under s 438 of the Māori Affairs Act 1983 are now also ahu whenua trusts.[34]

41.4. Whenua tōpū trusts, which the Court can constitute in respect of interests in Māori land, or General land owned by Māori.[35] These are

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31 Te Ture Whenua Māori Act 1993, s 212. As at 2012, there were 3 pūtea trusts: see Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [1.15].

32 Section 214. As at 2012, there were 9,230 whānau trusts: see *Review of the Law of Trusts*, above n 31, at [1.15].

33 Section 215. As at 2015, there were 5,572 ahu whenua trusts: see *Te Ture Whenua Māori Reform Consultation Document* (May 2015) at 46. Examples of this type of trust range from small whānau-based trusts owning single blocks of land, to trusts with significant assets such as the Wellington Tenths Trust and Palmerston North Māori Reserve Trust. They typically have a significant number of beneficiaries—often in the many thousands—even when the landholding is small: see the Tikitere Trust the subject of this Court's judgment in *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354.

34 Section 354.

35 Section 216. Examples of this type of trust include: the Pakaitore whenua tōpū trust (constituted initially to receive Pakaitore / Moutoa Gardens and the Whanganui Court House for Whanganui iwi); the Rotoehu Forest whenua tōpū trust (constituted to receive former Crown forest lands as part of Ngāti Awa's settlement for the benefit of specific hapū: Ngāti Hikakino and Ngāi Te Rangihouhiri II); see *Matuku Ngati Maru Wharanui Pukehou Trust* (2009) 245 Aotea MB 15 (245 AOT 15) at [61]. They also include the Ngae Farm Trust (constituted to receive farm assets as initial redress for Ngāti Rangiteaorere hapū, later settled in the Ngāti Rangiteaorere Claims Settlement Act 2014): see *Pirika v Eru - Te Ngai Farm Trust* [2013] Maori Appellate Court MB 127 (2013 APPEAL 127).

designed to manage whole blocks of land for the benefit of iwi or hapū, rather than only those with a beneficial interest in the land. Like whānau trusts, they prevent fragmentation by preventing succession to the interests. They were seen as a possible vehicle for settlement purposes (although not without controversy).[36] In any event, they have been only modestly used.[37]

41.5. Kai Tiaki trusts, which the Court can constitute in respect of interests in Māori land or General land, shares in a Māori incorporation, or any personal property.[38] These are designed to protect the property interests—real and personal—of any Māori person under a disability and unable to manage their affairs.

42. Section 211(1) provides that the Māori Land Court's jurisdiction to constitute such trusts in accordance with the Act is exclusive. Subsection (2) nonetheless provides that s 211(1) does not prevent a person or body from constituting those same types of trusts under any other Act or instrument.

43. In s 236, Parliament vested oversight jurisdiction in the Māori Land Court over the trusts outlined above, and two additional types of trust:

43.1. under s 236(1)(b): "every other trust constituted in respect of any Maori land"; and

43.2. under s 236(1)(c): "every other trust constituted in respect of any General land owned by Maori".

44. The former is not at issue in these proceedings. In respect of the latter, there are two reasons why a general jurisdiction in those terms is necessary, neither of which support a reading of s 236(1)(c) to extend to post-settlement entities:

44.1. First, the ability for persons and bodies to create trusts similar to ahu whenua, whenua tōpū, whānau and other trusts outside of the Act suggests that, in order to give effect to the protective purposes

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36 *Matuku Ngati Maru Wharanui Pukehou Trust* (2009) 245 Aotea MB 15 (245 AOT 15) at [61]–[63].

37 As at 2015, there were 33 whenua tōpū trusts: see *Te Ture Whenua Māori Reform Consultation Document* (May 2015) at 46. See also *Naera v Fenwick – Whakapoungakau 24 Block* (2010) 15 Waiariki MB 279 (15 WAR 279) at [56], and at [72] where Judge Harvey comments that such trusts would be unsuitable for land that is of cultural and historic significance to more than one iwi. This observation indicates whenua tōpū trusts are not compatible with the Crown's policy of large natural groupings where it encompasses multiple iwi in one settlement.

38 Section 217.

of the Act, the Court ought to have oversight over such trusts where they concern administration of existing fragmented landholdings.

44.2. Secondly—as is detailed under the following heading—despite the fact the Act was not intended to regulate General land in Māori ownership comprehensively, the historical context means it is necessary for the Court to have jurisdiction over *some* trusts holding General land owned by Māori to mitigate the adverse impact of prior compulsory conversion from Māori land to General land.

Historical context explains inclusion of s 236(1)(c) jurisdiction for General land owned by Māori

45. The Māori Land Court's jurisdiction in respect of common law trusts ought to be viewed in the context of the widespread alienation of Māori land—right up until the 1980s—that predated the Act. The Waitangi Tribunal has described how the Act emerged as part of a "long evolution" of Māori land law, for most of which the courts were a mechanism to alienate, rather than protect, Māori land. Of particular importance was the conversion of communally held land to individualised and fragmented title, to facilitate that alienation:[39]

> At a much deeper level … the Act emerged from the long evolution of Māori land legislation, dating back to the mid-nineteenth century and – in particular – the way in which that legislation for many decades facilitated the alienation of Māori land to the Crown and settlers. … Of particular and lasting importance was the nature of the new, individualised titles that emerged from the Native Land Court process. This form of title, coupled with the Crown's determination to open Māori land for settlement, helped facilitate the large-scale alienation of land in many parts of the country. Even in the early twentieth century, when only a relatively small proportion of the original holdings remained in Māori ownership, legislative amendments continued to promote alienation over retention.

46. In the 60 years prior to the introduction of the Bill, approximately 802,000 hectares of land were converted from Māori land to General land.[40] As at 31 March 1979, Māori land (that is, Māori freehold and customary land) constituted just 4.5 per cent of the total area of New Zealand.[41]

47. A notorious cause of this mass conversion of land from Māori land to General land was the Māori Affairs Amendment Act 1967. Part 1 of that Act

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39 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 11.

40 The Māori Land Courts: Report of the Royal Commission of Inquiry [1980] AJHR H-3 at 24.

41 At 23.

provided that the registrar was to compulsorily convert Māori land owned by up to four owners to General land via a status declaration. Owners did not have to be consulted, and were not given the opportunity to choose what status their land should have.[42] Williams J, writing for the Court of Appeal, has described how this process is regarded as being the trigger for major Māori land protests and the policy reversal ultimately leading to the Act:[43]

> Such status declarations were routinely made by the Registrar of the Māori Land Court pursuant to s 6 of the Māori Affairs Amendment Act 1967. Where the provisions were satisfied, a status change was mandatory. No application was required for such status change and the owners were unlikely to know of it beforehand. Rather, the Amendment Act provided that any Māori land owned by not more than four owners could cease to be Māori land simply by administrative action of the Registrar of the relevant Māori Land Court district. The Amendment Act is generally regarded as having triggered the major Māori land protests of the 1970s and the policy reversal that ultimately led to the enactment of Te Ture Whenua Māori Act 1993.

48. This historical context was front of mind for Parliament as the Bill progressed. Indeed, the Act can be seen through a Treaty lens as a means of rectifying the Crown's role in facilitating significant deprivation of tino rangatiratanga over land across the 19th and 20th centuries. The Act is a statute giving effect to the principle of active protection for those fragmented interests in land that, against all odds, managed to remain in Māori hands.

49. Introducing the Bill for its third reading, the Hon Doug Kidd (Minister of Māori Affairs) described how the "kaupapa of retention" must be understood in the context of the significant land takings Māori suffered following the European arrival in New Zealand—including upwards of 96,000 hectares of compulsorily converted land:[44]

> The facts and figures associated with former "bleaching" processes demonstrated by previous legislation are well worth repeating here. Under the Māori Affairs Amendment Act 1967 more than 96,000 hectares of land were compulsorily converted from Māori freehold land to general land. It was 7 years later, under the 1974 amendment Act, that a mere 4500 hectares were all that was reconverted back from general land to Māori freehold. At the present time, Māori freehold land comprises an estimated 1,250,000 hectares out of New Zealand's total land area of approximately 27,000,000 hectares – in

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42 Māori Affairs Amendment Act 1967; and *He Kura Whenua ka Rokohanga*, above n 39, at 36.

43 *Nicholas v Commissioner of Police* [2017] NZCA 473, [2018] NZAR 172 at [14], citing: Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006) at 878; and Waitangi Tribunal *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claim* (Wai 215, 2010) at 345–346.

44 (3 March 1993) 533 NZPD 13656–13657.

> other words, less than 5 percent of the nation's total land. In this context the kaupapa of retention may readily be understood.

50. Parliament authorised the Māori Land Court to exercise jurisdiction in respect of General land owned by Māori precisely because of this context. If Parliament had not included some General land within the Court's jurisdiction, swathes of land would fall outside the scope of its jurisdiction: land which had until recently been communally owned as Māori freehold land, which had been compulsorily converted to General land, at least some of which was likely held on trust for purposes consistent with the Act. Precluding jurisdiction to that land would be contrary to the kaupapa of retention that is central to the Act.

51. The Act was amended to allow for status changes to be made for General land owned by Māori, and broadening the definition of General land owned by Māori so that more owners of such land could seek reconversion to Māori freehold land.[45] The report of the Māori Affairs select committee makes plain that the those amendments were aimed at rectifying the history of compulsory conversion.[46]

52. This does not, however, require a reading of s 236(1)(c) that affords jurisdiction over any and all trusts which hold General land that happens to be owned by Māori. In light of the Act's purpose, and its focus on traditional Māori land still in Māori hands, the appropriate scope of s 236(1)(c) is narrower. The Court must undertake an assessment to determine whether a trust is "constituted in respect of" General land owned by Māori, or in other words, whether the central purpose of the trust is to retain existing and fragmented Māori landholdings and facilitating their occupation, development and use.

53. The scope of s 236(1)(c) does not extend to Te Uru Taumatua. It is not a trust established for the purpose of retaining and better utilising existing fragmented landholdings. It is a post-settlement entity established for the purpose of Tūhoe's settlement, to receive settlement redress that includes the return of land that had already been taken from Māori hands, with such

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45 Te Ture Whenua Māori Act 2002, ss 5(3), 19 and 20(2) amending ss 4, 129(2)(c) and 133 of the Act respectively.

46 Te Ture Whenua Maori Amendment Bill 2000 (336-2) (select committee report) at 6–7. The select committee commented: "We understand that it was never the intention of many owners that their land blocks, now in the category 'General land owned by Maori', should have had their status changed from Maori freehold land. In many cases this was done without their knowledge or consent. … [W]e have recommended an amendment to the definition of 'General land owned by Maori' in clause 4 … This is to make it easier for Maori to seek a status change back to Maori land and offers the machinery and protective provisions within the principal Act to a greater number of land blocks."

land being held in titles that are not—and have no prosect of becoming—fragmented and thus not in need of the Act's protections. Moreover, as is explained in section E below, Tūhoe's settlement is predicated on tino rangatiratanga and mana motuhake o Tūhoe—matters incompatible with an interventionist supervisory jurisdiction.

The Act was intended to reduce Māori Land Court's interventionist role

54. The legislative history also demonstrates that the Act and subsequent amendments were intended to reduce the Māori Land Court's interventionist role in Māori land holdings. The expansionist approach adopted in *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* and by the Māori Land and Appellate Courts in this proceeding is inconsistent with that aim.[47]

55. In presenting the Māori Affairs select committee report to the House in 1992, Hon Doug Kidd (Minister of Māori Affairs) described the central challenge of the Bill as being the evolving role of the Māori Land Court from "an instrument of alienation" and a "very paternalistic organisation, in less than the best sense of the word" to a body designed to ascertain and give effect to the views of the owners.[48]

56. As noted above, the Act was, to a significant extent, a reversal of earlier Māori land policy. Nevertheless, its purpose dictated that it maintain "extremely conservative" provisions to retain Māori land in Māori hands.[49] Unsurprisingly, the Court can still be described as "arguably a very paternalistic body".[50]

57. Reducing the Court's interventionist role has been a continuing theme. For instance, the changes adopted in the 2002 Amendment Act acknowledged that owners desired a reduced level of judicial supervision and intervention, and reserved the Court's supervisory role for where the risk to Māori land was at its greatest.[51]

58. In the respondent's submission, the risk to Māori land is not relevant in the context of post-settlement trusts. The Act is designed to protect existing

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47 *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* 197 Waiariki MB 141–217 (197 WAR 141–217); and *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* [2019] NZMAC 6, [2019] NZAR 1465. The Court of Appeal summarised the decision in *Moke* and in the courts below at [58]–[75] [COA 101.0319]

48 (12 November 1992) 531 NZPD 12244.

49 RP Boast "Māori Land and Land Tenure in New Zealand: 150 Years of the Māori Land Court" (2016) 22 NZACL 77 at 110.

50 At 110.

51 Te Ture Whenua Māori Amendment Bill 1999 (336-1), explanatory note at ii. The Bill became Te Ture Whenua Māori Amendment Act 2002.

fragmented holdings that remain in Māori hands. It is not concerned with the administration of land that is returned to Māori via settlements, unburdened by those policy concerns, with the relevant iwi then free to deal with that land as it wishes. The step change in settlement policy that occurred subsequent to the Act's development, the significant post-settlement entities that have since been established, and the significant landholdings now held by those entities without the same problems of fragmentation all signal against enlarging the Court's jurisdiction under s 236(1)(c) to encompass Te Uru Taumatua.

E. TAKE TUATORU: TE URU TAUMATUA NOT "CONSTITUTED IN RESPECT OF" LAND, BUT IN RESPECT OF TE TIRITI AND MANA MOTUHAKE

59. The respondent submits that the statutory text, the purposes of the Act, the broader settlement context, and Te Tiriti principles are inconsistent with a wide jurisdiction under s 236(1)(c). They instead support an interpretation that narrows the jurisdiction to those traditional, fragmented landholdings in need of active protection. The result of such an interpretation is that, while Te Uru Taumatua holds land as part of Tūhoe's settlement, it is not "constituted in respect of" that land. Rather, Te Uru Taumatua is constituted, rangatira ki te rangatira, in respect of a constitutional compact between Tūhoe and te Karauna, in respect of te wairua o Te Tiriti, and—importantly—in respect of mana motuhake o Tūhoe.

Statutory text and purpose mean Te Uru Taumatua is not constituted in respect of land

60. The starting point is the clear wording of s 236. Parliament could have, but did not, say that the Māori Land Court jurisdiction was engaged simply by holding or owning certain land. Instead, Parliament used the words "constituted in respect of" to emphasise that the holding or owning of land had to be the raison d'etre for the establishment of the trust. This reflects the purposes of the Act.

61. The phrase "constituted in respect of" must be read as a whole. The Māori Appellate Court focused on the word "constituted", with definitions such as "be a part of a whole", or "established by law", and that it was of wider import than "incorporated" and equivalent to "established".[52] The Court did

[52] [COA 101.0290] at [18]. The Māori Appellate Court did not consider these interpretative issues afresh, but concurred with the analysis undertaken in *Moke*.

not consider such definitions in the context of the complete phrase in light of the Act's purpose and the statutory scheme.

62. Dictionary definitions provide limited assistance. The words "in respect of" can mean "in regard to" or "with reference to". They primarily serve to reinforce a focus on the object, namely the land. It is therefore the purpose and scheme of the Act that indicate the jurisdiction is limited.

63. As set out above, aside from s 236(1)(b) and (c), s 236(1) applies to sui generis trusts created by the Act, which are (almost exclusively) established in respect of, and for the purpose of, holding interests in land. Section 236(1)(c) must be read consistently with those trusts:[53] that is, it must be directed at a trust established exclusively or primarily in respect of, and for the specific purpose of, holding interests in land.

64. The mere inclusion of General land owned by Māori in the corpus of trust assets cannot be determinative of jurisdiction. Rather, it is the *purpose* for which the trust was constituted. Delineating the Māori Land Court's jurisdiction in the way the appellant contends would enable oversight of trusts that are established for purposes that are unconnected to those of the Act. It could, for instance, result in supervision of charitable trusts which have purposes focused on social issues such as whānau wellbeing,[54] or investment trusts that have Māori beneficiaries and are established for the purpose of trading in commercial buildings and other land.

65. As set out in section D above, allowing such an extension of jurisdiction strays from the core focus of the Act: to retain, and facilitate the administration of, traditional fragmented landholdings. It brings with it a level of judicial oversight that has been considered by the legislature as appropriate in the context of those lands. But that same oversight is otherwise an unjustified intervention in the context of land returned to post-settlement entities.[55] That intervention includes the ability to:

    65.1. Add, remove, or replace trustees, similar to the High Court.[56]

    65.2. With or without an application, investigate trustees, and require them to file reports and appear for questioning on any matter

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53 Applying the *noscitur a sociis* (associated words rule) and *ejusdem generis* (limited class rule), which are not determinative but are useful aids in interpreting the text of a provision.

54 For example, Te Whānau o Waipareira, or the various Taiwhenua of Ngāti Kahungunu.

55 For a brief summary of the Māori Land Court's trust jurisdiction compared to that of the High Court, see *Fenwick v Naera*, above n 33, at [121] per Glazebrook J (writing for the majority) and [150]–[152] per William Young J.

56 Te Ture Whenua Māori Act, ss 239 and 240 (compare Trusts Act 2019, ss 112 and 114).

relating to administration of the trust. The High Court requires an application which must first show a genuine dispute, and it is not empowered to require reports or appearance for questioning.[57]

65.3. With or without an application, direct the application of trust assets. The High Court has no similar standalone power.[58]

65.4. Terminate a trust. The High Court has no similar power absent agreement of all beneficiaries.[59]

66. The better interpretation of s 236(1)(c) is that the supervisory jurisdiction of the Māori Land Court is demarcated by the primary purpose of the trust at the point of its establishment. If the trust's primary purpose—the reason for its establishment—is the retention, use, development, and control of land held by Māori, then it is properly "constituted in respect of" that land. If, however, the primary purpose of the trust lies elsewhere, it is inappropriate to extend the Māori Land Court's supervisory jurisdiction to that trust.

67. The respondent therefore says that s 236(1)(c) must be interpreted by inquiring, at the time the trust is established, whether its primary purpose—its very reason for being—is to hold Māori land or General land owned by Māori. Accordingly, and for the reasons that follow, Te Uru Taumatua cannot be considered as "constituted in respect of" that land.

68. Te Uru Taumatua is constituted in the context of a broader programme of Te Tiriti settlements, and in the context of Tūhoe's particular history of mana motuhake o Tūhoe.[60] As outlined above, Te Uru Taumatua is constituted:[61]

68.1. to be the legal embodiment of Tūhoe to represent Tūhoe to the Western world;

68.2. to achieve broad goals associated with advancing Tūhoetanga and mana motuhake;

68.3. to promote and advance the social and economic development of Tūhoe;

68.4. to allow for the governance of Tūhoe including the creation of a tribal structure with each group having input into that governance; and

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57 Section 238 (compare Trusts Act 2019, ss 126 and 127).

58 Section 242 (compare Trusts Act 2019, s 64(4)(b)(ii)).

59 Section 241 (compare Trusts Act 2019, s 121).

60 See for example Waitangi Tribunal *Te Urewera* (Wai 894, 2017), vol 1 at [2.3.1].

61 Trust Deed, recitals B, C, D, E, G [COA 101.0004] and cl 3.1 [COA 101.010].

68.5. to receive settlement assets and to achieve broader goals associated with advancing Tūhoetanga and mana motuhake.

69. The Māori Appellate Court pointed to two clauses in the Trust Deed which it considered supported its finding that Te Uru Taumatua was constituted in respect of land, namely recital D and cl 3.5 as follows:[62]

> 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) and for the trustees to hold property upon the Trusts and with the duties, powers and discretions set out in this Deed.
>
> All land that is part of the of the Trust Fund and that is situated within the Tūhoe ahikāroa shall not be sold or otherwise disposed of by the Trustees.

70. Clearly, one of Te Uru Taumatua's functions is to receive, hold and manage settlement assets (predominantly cash). But the fact that Te Uru Taumatua is tasked, among other things, with holding property on trust and performing the duties, powers and discretions set out in the Trust Deed does not support the argument that it is a trust "constituted in respect of" land. Those tasks are basic functions of most trusts. They do not answer the broader, purposive question of whether the retention of land by a post-settlement trust is sufficient to engage the Māori Land Court's jurisdiction. Moreover, land is just one aspect of Te Uru Taumatua's broad mandate to advance Tūhoe interests. Accordingly, Te Uru Taumatua is not constituted in respect of it such that s 236(1)(c) is engaged.

71. Tūhoe, in forming Te Uru Taumatua, has made an informed decision about the classes of land it is important to retain, and it has codified that decision in the Trust Deed. That exercise of mana motuhake ought not to serve as an invitation for the Māori Land Court to exercise its jurisdiction over all General land Te Uru Taumatua holds on trust for the purpose of advancing Tūhoe's political, cultural, financial, and relational interests. Rather, Tūhoe has established a wholly standalone regime for protecting the unfragmented land that comes within its ahikāroa, which dissipates the need for the Māori Land Court to engage in its protective jurisdiction.

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[62] Trust Deed, recitals D [COA 101.0004] and cl 3.5 [COA 101.010].

72. The distinction was recognised by Williams J (then Chief Judge of the Māori Land Court), writing ex-judicially in 2001:[63]

> Since the 1990s, successive governments have had a policy of settling Treaty grievances by calling on a pool of publicly owned cash or other assets for the purpose. There is a new kin-owned asset being created to replace (in small part at least) that which was lost following the policy underpinning the creation of the Native Land Court itself. The assets are untrammelled by the problems of individualised title and by a Court whose statutory mandate was to be *parens patriae*.

73. In Treaty policy terms, the Act is a tool whereby the Crown can meet its obligations to continue to protect Māori land from fragmentation and alienation. The specific objective is to ensure the Crown discharges its Treaty obligations to ensure Māori can *retain* existing Māori land holdings that have managed to survive in Māori hands despite past Crown policy.

74. In contrast, the purpose of Te Tiriti settlements is to repair the Treaty relationship and meet Crown obligations to enable Māori to fulfil the Treaty promise of tino rangatiratanga—and, specifically in this case, mana motuhake o Tūhoe. The objective is the *restoration* of a tribal estate (which is not subject to the same fragmentation concerns) and other assets, and affording Māori the ability to rebuild Māori social and cultural institutions on their own terms.

75. For these reasons, the respondent submits the text and purpose of the Act supports the interpretation that Te Uru Taumatua is constituted not in respect of land, but in respect of te wairua o Te Tiriti and of mana motuhake o Tūhoe.

Post-settlement entities are not uniformly created as trusts

76. It is not submitted that there is a clean distinction between trusts subject to the Act and post-settlement trusts such that the former are clearly within the Māori Land Court's jurisdiction and the latter are clearly out. So much is not borne out by the history of Te Tiriti settlements. But that history indicates again that being subject to Māori Land Court jurisdiction cannot—and should not—be drawn in wide terms to encompass all post-settlement entities that happen to be trusts that hold General land. A more careful and nuanced assessment is required, one that looks to the broader scheme of Te Tiriti settlements and the specific objectives of the settlement itself.

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[63] Joe Williams "The Maori Land Court—A Separate Legal System?" (2001) NZCPL occasional paper no 4 at 10.

77. The range of post-settlement entities, and the express clarifications that have been made to some of those entities in respect of the application of the Act, do not support the appellant's contended jurisdiction. The consequence of a general rule that all post-settlement trusts ought to fall within s 236(1)(c) would be to create an unintended inconsistency amongst settled groups, which is not consistent with the Treaty principle of tino rangatiratanga.

78. Early settlements under the modern settlement era do not permit a consistent approach to Māori Land Court oversight.[64] The current process for settling with large natural groupings was not yet the norm, with settlements often involving specific blocks of land or financial redress to smaller claimant groups, sometimes representing an initial phase of a wider settlement, and adopting a range of mechanisms:

    78.1. Some were legislative, like the Orakei Act 1991 which followed an earlier attempt to settle the issue via offering back land under the Public Works Act. The Orakei Act vested specific land in the Ngāti Whātua o Ōrākei Māori Trust Board, and was accompanied by financial redress. It was repealed in 2012, and incorporated into Ngāti Whātua Ōrākei's wider settlement.[65] A Māori trust board is a statutory body corporate,[66] rather than a trust simpliciter, and no beneficiaries of a board have or are able to acquire an interest in the assets.[67] Thus, up until repeal, the post-settlement entity was not a trust subject to s 236(1).[68]

    78.2. Some were given effect via orders of the Māori Land Court. For example, the 1990 settlement of the Wai 51 claim regarding land blocks at Waitomo saw the creation of the Ruapuha Uekaha Hapū Trust. This was achieved via s 438 of the Māori Affairs Act 1953—initially for the purpose of investigating the future use and management of the land, but latterly for the ongoing preservation of

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64 Settlements of disputes between Māori and the Crown—successful or otherwise, and even those considered "full and final"—are not solely a modern phenomenon. For example: the £5,000 annuity promised to the Tainui Māori Trust Board following the 1928 Sim Report (and many similar settlements with other iwi, often administered through trust boards); Urewera District Native Reserve Act 1896; and Lake Waikaremoana Act 1971.

65 Ngāti Whātua Ōrākei Claims Settlement Act 2012, s 100.

66 Māori Trust Boards Act 1955, s 13.

67 Section 35.

68 Māori Trust Boards subject to the oversight of the Minister of Māori Affairs: s 33.

the Wai 51 settlement and retention of the land for beneficiaries.[69] The Māori Land Court's jurisdiction continues to apply to the Trust; however, the Court's ability to terminate trusts is specifically proscribed in the Act with respect to Ruapuha Uekaha Hapū Trust.[70]

78.3. Still others were settled in respect of financial assets alone, without the return of any land. One example is the financial compensation paid by the Crown to the Waimakuku Whānau Trust Board Inc (later the Thomas Baker Whānau Trust), for the Wai 147 claim concerning the wrongful cancellation of title of whānau land.[71] That trust is not subject to s236(1), and instead the beneficiaries have—frequently—sought recourse to the High Court.[72]

79. Amongst the settlements that fall into the rubric of modern settlement policy are again a range of approaches, none of which support a broad interpretation of s 236(1)(c). For instance, some settlement legislation expressly states that the Māori Land Court does not have jurisdiction. The first to do so appears to be the Waikato Raupatu Claims Settlement Act 1995, which provides that neither the landholding trust (nor the land it obtained) is subject to the Act.[73] The landholding trust was created to receive certain raupatu lands some of which had, in 1992, been vested in the Tainui Trust Board pursuant to ss 437 and 438 of the Māori Affairs Act 1953.[74] The 1992 vesting was an interim measure put in place to protect the land before the full settlement (and any post-settlement entity) was agreed.[75] Once the land was vested in the landholding trust under the Waikato Raupatu Claims Settlement Act, the Māori Land Court's lack of continued jurisdiction was confirmed by express statutory exclusion.

80. This is not to suggest there was understood to be a general jurisdiction which would otherwise apply; rather it reflects the particular complex path Waikato raupatu settlement took. Further emphasising that a general jurisdiction was not intended, between 1995 and the Māori Appellate Court decision in *Moke*,

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69 See *Ruapuha-Uekaha Hapu Trust – Hauturu East 8 Block* (2016) 125 Waikato Maniapoto MB 91 (125 WMN 91); and *Ruapuha and Uekaha Hapu Trust v Tane – Hauturu East 8 Block* [2010] Māori Appellate Court MB 512 (2010 APPEAL 512).

70 Sections 231(4), 241(3) and 351(3).

71 *Baker v Waimakuku Whanau Trust Board Inc* [2013] NZHC 2530 at [3]–[6].

72 *Baker - Part Lot 1 DP 13787 (formerly Pt Tarawera 5A)* (2015) 41 Tākitimu MB 281 (41 TKT 281) at [9], and the cases cited at n 6.

73 Waikato Raupatu Claims Settlement Act 1995, s 22.

74 *Re Hopuhopu and Te Rapa Blocks* (1993) MAC Waikato Maniapoto Appeal 1993/15, 27 October 1993.

75 See Martin Fisher "'I riro whenua atu me hoki whenua mai': The return of land and the Waikato-Tainui raupatu settlement" (2016) Journal of New Zealand Studies NS23 19.

no other settlement appears to have anticipated any need to exclude the Māori Land Court's jurisdiction in respect of post-settlement trusts.

81. To the contrary, some settlements in that period saw the need to confer expressly Māori Land Court jurisdiction. For example, under the Maraeroa A and B Blocks Claims Settlement Act 2012, the Māori Land Court is given the same jurisdiction as the High Court in respect of the Maraeroa A and B Trust, in essence replicating the effect of s 237(1) of Te Ture Whenua Māori Act.[76] If the s 236(1)(b) or (c) jurisdiction were as wide as the appellant contends, no such provision would be necessary.

82. Settlements following *Moke* tend to indicate that the jurisdiction is not acceptable to settling groups. Although not all recent settlements engage directly with the issue,[77] it is apparent that when the negotiating parties turn their minds to the prospect of the Court's jurisdiction, such prospect is rejected. For example, the Maniapoto Claims Settlement Act 2022 provides that the settlement entity, Te Nehenehenui, is not a trust for the purposes of s 236(1):[78]

> **23 Limits on effect of Te Ture Whenua Maori Act 1993**
>
> (1) Te Nehenehenui is not a trust constituted in respect of—
>
> (a) any Maori land for the purpose of section 236(1)(b) of Te Ture Whenua Maori Act 1993; or
>
> (b) any General land owned by Māori for the purpose of section 236(1)(c) of that Act.

83. Clause 21 of the Whakatōhea Claims Settlement Bill is to similar effect in respect of the settlement trust Te Tāwharau o Te Whakatōhea:[79]

> **21 Treatment of Te Tāwharau o Te Whakatōhea under Te Ture Whenua Maori Act 1993**
>
> Te Tāwharau o Te Whakatōhea must not be treated as a trust constituted in respect of any General land owned by Māori,

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76 Maraeroa A and B Blocks Claims Settlement Act 2012, s 79(1). See also ss 85 and 86.

77 Some recent deeds of settlement and/or legislation do not address the Māori Land Court's jurisdiction explicitly. This is explained by the fact that settlements often have long gestation periods between agreements in principle, deed initialling and ratification, and the introduction of legislation. The settlements that do not address the issue tend to be those of smaller iwi groupings with less bargaining power—particularly at the end stages of settlement negotiations. See for example: Te Korowai o Wainuiārua Claims Settlement Bill 2023 (286-1) (a product of an agreement in principle signed in November 2018); Ngāti Tara Tokanui Deed of Settlement (initialled on 1 June 2017 and signed following ratification on 28 July 2022); and the Moriori Claims Settlement Act 2021 (the result of a deed initialled in August 2019 and signed in February 2020). One large iwi group that has recently reached a settlement milestone without addressing the issue is Te Whānau a Apanui, which signed an agreement in principle in August 2019 and initialled the deed Te Whaakaetanga o Ngā Kereme Tawhito on 26 September 2023 (now awaiting ratification).

78 Maniapoto Claims Settlement Act 2022, s 23.

79 Whakatōhea Claims Settlement Bill 2023 (261-1), cl 21.

> for the purposes of section 236(1)(c) of Te Ture Whenua Maori Act 1993.

84. Te Ruruku Pūtakerongo, the Taranaki Maunga Collective Redress Deed of Settlement, also stipulates that settlement legislation giving effect to the deed will provide that the settlement entity, Te Tōpuni Ngārahu, is not a trust for the purposes of s 236(1)(b) or (c).[80]

85. Finally, not all post-settlement entities are trusts. For example, two settlements—those of Ngāti Awa and Ngāi Tahu—are given effect not through trusts but through Rūnanga established as statutory bodies corporate under private legislation.[81] Both Rūnanga are required to operate under a charter to hold assets on trust for the benefit of iwi members,[82] and the assets so held are expressly not subject to the Trusts Act 2019.[83] Nor are they subject to the Māori Land Court's s 236(1) jurisdiction.

86. Contemporary Crown policy has resulted in most post-settlement entities being established in the form of common law trusts. The examples above show that there are exceptions to that rule which, on the argument presented by the appellant, would mean the s 236(1)(c) jurisdiction is inconsistently applied to settled groups. In the respondent's submission, it cannot be an accident of the Crown's settlement policy—which is resistant to any other structure than a trust—that determines whether a post-settlement entity is by default subject to the Māori Land Court's jurisdiction. No such jurisdiction was contemplated in this case, and it is inconsistent with the settlement reached between Tūhoe and te Karauna.

Te Tiriti analysis consistent with Te Uru Taumatua not being subject to s 236(1)(c) jurisdiction

87. Te Tiriti and its principles are relevant to the statutory interpretation of legislation, particularly where the statutes at issue—such as the Act and the Tūhoe Claims Settlement Act—touch so profoundly on the interests of Māori.[84] In addition to that general principle, the Act's preamble describes several principles to be implemented by the Act, and s 2 affirms that

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80 Te Ruruku Pūtakerongo, cl 17.8 (and see cl 7.1.104 for the definition of Te Ture Whakatupua mō Te Kāhui Tupua, which means the resulting Act if the proposed Bill is passed).

81 Te Runanga o Ngai Tahu Act 1996, s 6; and Te Runanga o Ngati Awa Act 2005, s 5.

82 Te Runanga o Ngai Tahu Act 1996, s 14(1); and Te Runanga o Ngati Awa Act 2005, s 8(2)(a).

83 Te Runanga o Ngai Tahu Act 1996, s 14(2); and Te Runanga o Ngati Awa Act 2005, s 8(4).

84 See for example the comments of Ellen France J in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151] with whom other judges agreed: Glazebrook J at [237], Williams J at [296], and Winkelmann CJ at [332].

Parliament intended the Act to be interpreted in a manner that best furthers those principles.[85]

88. The preamble principles frequently emphasised by the Māori Land Court are promoting the retention of land in the hands of iwi, whānau and hapū as a taonga tuku iho, and facilitating occupation and use of that taonga tuku iho for the benefit of its owners. However, it is the first two principles in the preamble that are of particular significance in this appeal. They are:

    88.1. the special relationship created by Te Tiriti o Waitangi—"i motuhake ai te noho a te iwi me te Karauna"; and

    88.2. the reaffirmation of te wairua embodied in Te Tiriti—"riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga"—the protection of tino rangatiratanga in exchange for kāwanatanga.

89. Those first two preamble principles point to a narrower frame for interpreting the Māori Land Court's jurisdiction over trusts established as post-settlement entities. Adopting an expansive jurisdiction does not reaffirm the protection of tino rangatiratanga, nor does it recognise the special relationship that Te Tiriti (and, by extension, Treaty settlements) creates between te iwi me te Karauna. These preamble principles support the jurisdiction in respect of post-settlement trusts being limited to where it is expressly provided for in settlement legislation.

90. Moreover, the Act requires an interpretation consistent with the constitutional context of Te Tiriti principles and Treaty settlements. As outlined above, the Act is in a sense an embodiment of the Crown's obligations under the Treaty principle of active protection and the principle of redress: the Māori Land Court's jurisdiction is a response to the loss of tino rangatiratanga in respect of large tracts of Māori land. The Act establishes a system to mitigate the loss of tino rangatiratanga in the past and to avoid continued erosion of existing Māori landholdings now and in the future.

91. But active protection in the manner contended for by the appellant is in tension with the foundational bargain envisaged by Te Tiriti—that of partnership and preserving tino rangatiratanga. It is also in tension with the settlement Tūhoe has negotiated, rangatira ki te rangatira, with the Crown—itself a reflection of Te Tiriti's foundational bargain. Where tino

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[85] Section 2(1). The preamble is produced in both te reo Māori and te reo Pākehā, and s 2(3) provides the preamble in te reo Māori prevails to the extent there is a conflict in meaning.

rangatiratanga is actively being exercised through direct negotiations and settlement, it would breach the Treaty principle of tino rangatiratanga to intrude into that exercise with active protection in the shape of intensive judicial oversight—however well-meaning that oversight is intended to be.

92. Treaty settlements seek to enable and support tino rangatiratanga of the settling iwi. The goal is to address past wrongs, to restore an economic and cultural base, rebuild tribal political structures, and establish direct relationships between iwi and various kāwanatanga entities. In that context, the emphasis shifts from active protection over Māori interests by kāwanatanga entities, to prioritising other Treaty principles—tino rangatiratanga, the Treaty partnership, and mutual recognition and respect between iwi and te Karauna.

93. The Waitangi Tribunal has recently reaffirmed this approach to Te Tiriti principles. In *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, the Tribunal noted that the principle of active protection has "served a very useful purpose precisely because the Crown's commitment to tino rangatiratanga was often absent".[86] It described active protection as a duty to "restore balance to a relationship that became unbalanced", and considered the Crown's duty is "heightened so long as the imbalance remains".[87] That duty was (and is) useful to assess past omissions and the prejudice Māori have suffered—particularly in relation to land loss. In the respondent's submission, the principle of active protection is of particular importance in the context of existing fragmented Māori landholdings that require the Māori Land Court's assistance for their use and management. It is also important in the context of Treaty settlements in that the Crown takes extensive steps to satisfy itself that the post-settlement entity has a mandate, is representative, and is accountable to its people.

94. But, as the Tribunal noted, to focus on that principle alone is to misunderstand the framework of Te Tiriti, which does not allow the Crown to take steps to "undermine or usurp Māori autonomous control of their people, land resources and taonga".[88] In that context, the Crown "cannot paternalistically 'protect' what it has no authority over".[89] In the

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86 Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2022) at 81.

87 At 81.

88 At 81.

89 At 81.

respondent's submission, that is particularly so in the context of an iwi that has reached settlement with the Crown for the Crown's historical Treaty breaches, established a governance framework for the settlement assets it received as redress, and strived to ensure that a central component of its post-settlement governance framework is mana motuhake o Tūhoe.

95. Fundamentally, as the Tribunal reaffirmed it is not active protection, but *partnership* and respect for the Māori sphere of authority that is the framework of Te Tiriti.[90] While the Crown enjoys kāwanatanga, kāwanatanga is to be exercised while ensuring its laws and policies give effect to Tiriti rights and guarantees[91]—and in particular while fostering tino rangatiratanga.[92] The Tribunal emphasised that the Crown could not unilaterally decide what the sphere of tino rangatiratanga encompasses—that is for Māori to negotiate in partnership with the Crown.[93] This reflects a long-standing tenet of Tribunal jurisprudence: the principle of rangatiratanga envisages that Māori should shape their own institutions.[94] Tūhoe have done so in the shape of Te Uru Taumatua.

96. This is not to say active protection does not still have a role, but it is more properly refocused on a different target. In respect of post-settlement trusts, therefore, active protection is not achieved by unilaterally imposing on Māori specific restrictions on their General land holdings and oversight of their governance entities via kāwanatanga bodies such as the Māori Land Court in the guise of facilitating tino rangatiratanga. Rather, in the context of post-settlement entities, the Crown's active protection obligation is achieved by providing āwhina/support to tino rangatiratanga of Māori in two ways:

    96.1. by turning the focus of that oversight onto itself—that is, ensuring te Karauna and kāwanatanga entities are meeting their obligations to āwhina/support tino rangatiratanga of Māori as expressed through their chosen post-settlement structure; and

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90 At 79, 80 and 81. See also Waitangi Tribunal *Ko Aotearoa Tēnei, Te Taumata Tuarua* (Wai 262, 2016) vol 1 at 19.

91 At 48 and 75–76. See also Waitangi Tribunal *He Maunga Rongo* (Wai 1200) vol 2 at 428–429 and vol 4 at 1239; *The Mokai School Report* (Wai 789, 2000) at 10; *The Petroleum Report* (Wai 796, 2003) at 58; *Ko Aotearoa Tēnei, Te Taumata Tuarua* (Wai 262) vol 1 at 17.

92 At 84.

93 At 76.

94 See for example Waitangi Tribunal *Taranaki Report – Kaupapa Tuatahi* (Wai 143, 1996) at 5; *Muriwhenua Fishing Report* (Wai 22, 1988) at 187; *Mangonui Sewerage Claim Report* (Wai 17, 1988) at 47; and *Ngawha Geothermal Resource Report* (Wai 304, 1993) at 101.

96.2. by ensuring te Karauna and kāwanatanga entities continue to āwhina/support the partnership between iwi me te Karauna.

97. Through its Treaty settlement, Tūhoe has expressed its tino rangatiratanga/mana motuhake and defined its preferred model for exercising that tino rangatiratanga/mana motuhake. In doing so, Tūhoe has not consented to the Crown extending kāwanatanga over Te Uru Taumatua through an accident of a generally worded provision in the Act.

98. Interpreted consistently with Te Tiriti and tino rangatiratanga/mana motuhake o Tūhoe, the kāwanatanga jurisdiction of the Māori Land Court cannot extend to supervision of Te Uru Taumatua without such jurisdiction being expressly negotiated for as part of Tūhoe's settlement, and provided for in its settlement legislation.

F. KUPU WHAKAMUTUNGA | CONCLUSION

99. For the foregoing reasons, the respondent submits Te Uru Taumatua is a trust constituted in respect of mana motuhake o Tūhoe, and not a trust constituted in respect of General land owned by Māori. Accordingly, the respondent submits the Māori Land Court has no jurisdiction under s 236(1)(c) of Te Ture Whenua Māori Act 1993, and the appeal should be dismissed.

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Counsel certify they have made appropriate inquiries to ascertain whether these submissions contain any suppressed information, and certify that, to the best of their knowledge, the submissions are suitable for publication (that is, the submissions do not contain any suppressed information).

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