**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2011-485-817**
**[2021] NZHC 1025**

| | |
|---|---|
| UNDER | the Marine and Coastal Area (Takutai Moana) Act 2011 |
| IN THE MATTER | of an application for an order recognising Customary Marine Title and Protected Customary Rights |
| BY | the late Claude Augustin Edwards (deceased), Adriana Edwards and others on behalf of Te Whakatōhea |
| BY | Dean Flavell on behalf of Hiwarau C, Turangapikitoi Waiōtahe and Ōhiwa of Whakatōhea (CIV-2017-485-375) |
| BY | Larry Delamere on behalf of Pākōwhai Hapū (CIV-2017-485-264), and Te Whānau-a-Apanui (CIV-2017-485-278) |
| BY | Tracy Francis Hillier on behalf of Ngai Tamahaua Hapū (CIV-2017-485-262), and Te Hapū Titoko o Ngai Tama (CIV-2017-485-377) |
| BY | Muriwai Maggie Jones on behalf of Ngāi Tai (CIV-2017-485-270), and Muriwai Maggie Jones and Te Aururangi Davis on behalf of Ririwhenua Hapū (CIV-20170-485-272) |
| BY | Bella Savage and Waipae Perese on behalf of Te Whānau a Harawaka (CIV-2017-485-238) |
| BY | Te Ūpokorehe Treaty Claims Trust and others on behalf of Te Ūpokorehe (CIV-2017-485-201) |

BY Christina Davis on behalf of Ngāti Muriwai Hapū (CIV-2017-485-269)

BY Pita Tori Biddle and Karen Stefanie Mokomoko on behalf of Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)

BY Te Rua Rakuraku on behalf of Ngāti Ira o Waiōweka (CIV-2017-485-299)

BY John Hata, Te Ringahuia Hata and Antoinette Hata on behalf of Ngāti Patumoana (CIV-2017-485-253)

BY Whakatōhea Māori Trust Board on behalf of Whakatōhea Hapū (CIV-2017-485-292)

Hearing: 17 August–21 August 2020, 31 August–9 October 2020, 19 October–23 October 2020
Final written submissions received 15 December 2020

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A Sykes, J Chaney (17–21 August) and C Dougherty Ware (31 August–23 October) for Ngāti Ira o Waiōweka (CIV-2017-485-299)
T Bennion for Ngāti Patumoana (CIV-2017-485-253)
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K Feint QC for Ngāti Ruatakenga (CIV-2017-485-292)
C Finlayson QC, A Dartnall, P Cornegè and S Eldridge for Landowners Coalition Incorporated
H Irwin-Easthope and K Tarawhiti for Te Rūnanga o Ngāti Awa (CIV-2017-485-196)
M Mahuika and N Coates for Te Rūnanga o te Whānau-a-Apanui (CIV-2017-485-318)
R Roff, R Budd and S Gwynn for Attorney-General
M Jones for Whakatāne District Council
T Reweti for Bay of Plenty Regional Council and Ōpōtiki District Council
A Williams for Seafood Industries Representatives

Judgment: 7 May 2021

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**JUDGMENT (NO. 2) OF CHURCHMAN J**

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| | |
|---|---|
| ***Tangaroa piki ake*** | ***Tangaroa rise up*** |
| ***Tutara Kauika piki ake*** | ***Tutara Kauika rise up*** |
| ***Ruamano piki ake*** | ***Ruamano rise up*** |
| ***Taea ngā kino o te wai*** | ***Cleanse the impurities of the waters*** |
| ***Kia puta ki Rangiatea*** | ***So that they may rise to the heavens of Rangiatea*** |
| ***Ko te Marangī*** | ***To fall again*** |
| ***Tau atu e rea*** | ***Settling, sustaining the earth***[1] |

[1] This whakatauki was given in the affidavit of Ms Te Ringahuia Hata, who appeared as a witness for Ngāti Patumoana and Ngāti Ira o Waiōweka.

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## Introduction

[1] In these proceedings, the Court is required to determine whether any of the applicants are entitled to recognition orders for either customary marine title (CMT) or protected customary rights (PCRs) under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

[2] Many of the issues that arise have not previously been addressed by the Courts. Therefore, this decision has implications for some 200 other such claims currently before this Court.

[3] This decision is divided into seven parts. Part I is the introduction and description of the parties. Part II is a discussion of the background and legislative history of the Act, as well as its statutory purposes. Part III considers legal issues under the Act that have not arisen before. Part IV addresses issues of tikanga. Part V addresses technical matters. Part VI analyses the applications and whether the applicants have satisfied the relevant statutory tests. Part VII sets out the conclusions and a summary of the judgment.

**PART I – THE PARTIES**

**The priority application**

[4] The late Claude Edwards was a rangatira of Te Whakatōhea.[2] He was among the first to pursue litigation in respect of Māori rights in the coastal and marine area. Over many years he sought to advance claims on behalf of Whakatōhea and it is as a result of his actions and determination that these proceedings became the second proceedings seeking recognition orders under the Act to be heard.[3]

[5] In 1989, Mr Edwards filed a claim in the Waitangi Tribunal on behalf of Whakatōhea for the wrongs suffered as a result of Crown action, including raupatu and confiscation of the iwi's coastal lands.

[6] On 6 January 1999, Mr Edwards filed an application on behalf of Whakatōhea in the Māori Land Court (MLC) seeking recognition of customary rights in the takutai moana.[4]

[7] On 17 January 2005, Mr Edwards applied to the MLC for recognition orders under the Foreshore and Seabed Act 2004 (the Foreshore and Seabed Act).[5]

[8] Following the repeal of the Foreshore and Seabed Act and its replacement with the Act in 2011, Mr Edwards' application was transferred from the MLC to the High Court. In accordance with the Act,[6] Mr Edwards' application became a "priority" application. That meant that, because it was an application existing at the time the Act came into effect, it was accorded priority as to the allocation of a hearing. In all other respects it had the same status as other applications for recognition orders.

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2 His role in the affairs of Te Whakatōhea is described in Ranginui Walker *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea* (Penguin Books, Auckland, 2007). See in particular Chapters 7 and 8.

3 The first such proceedings were *Re Tipene* [2016] NZHC 3199.

4 *Application for Investigation of Māori Customary Land* A19990003 (6 April 1999). This application was originally signed by representatives of all Whakatōhea hapū including Mr Charlie Aramoana on behalf of Ūpokorehe although he withdrew his support on 7 September 1999.

5 *Application for Customary Rights Order* A20050001647 (17 January 2005).

6 Section 125(3) of the Act directs that the Court give priority to applications transferred to it from the MLC ahead of any other applications.

[9] An amended application was filed on 18 May 2015 and was, like the earlier applications, stated to be filed on behalf of all Whakatōhea hapū. It recorded that, at the date of filing, three mandated hapū representatives had been confirmed: Rita Wordsworth for Ngai Tamahaua, John Hata for Ngāti Patumoana (Ngāti Patu), and Robert Edwards for Ngāti Ruatakenga (Ngāti Rua). The application indicated that it was anticipated that other hapū representatives would join the application.

[10] The priority application remained the only Whakatōhea application for recognition orders until 2017 when there was a flurry of applications from some 12 separate hapū or whānau associated with the priority applicant, along with three applications which overlapped with the priority applicants on its eastern boundary.

[11] In a minute of 21 November 2018,[7] the Court made timetabling orders to facilitate a hearing of the priority application and all overlapping claims. The Court estimated, that, at that time, there were some 20 such claims.

[12] When the hearing of this matter finally commenced, two of the overlapping claims had been struck out,[8] and two other applicants chose not to proceed.[9]

[13] By minute of 27 May 2019,[10] the Court directed that some 15 claimants whose claims overlapped the priority application, but who had sought direct engagement with the Crown, be served with a copy of the priority application and given an opportunity of participating in the hearing of the priority application. One of the direct engagement applicants, Mr Kiwara on behalf of Kutarere Marae, played an active role in these proceedings.

[14] Throughout the various case management conferences held in respect of these proceedings, the Court encouraged applicants with overlapping claims to engage with other applicants whose claims were overlapping to see whether any agreement between applicants could be reached that might reduce the number of competing claims.

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[7] *Re Edwards* (Minute No 2 of Collins J) 21 November 2018.
[8] *Re Dargaville* [2020] NZHC 2028, and *Re Paul* [2020] NZHC 2039.
[9] *Te Uri a Tehapu* CIV-2017-404-562; and *Re Paul* CIV-2017-485-513.
[10] *Re Edwards* (Minute No 1 of Churchman J) 27 May 2019.

[15] In response to that encouragement, a number of hui and wānanga took place between the various applicants with the result that, when the hearing commenced, there were essentially three broad groupings of applicants as well as three neighbouring iwi who participated in the hearing. Ngāti Awa and Te Whānau-a-Apanui did not wish the Court to determine their claims but participated to oppose those aspects of the applicants' claims that overlapped their claims. The overlap areas involved were the western Ōhiwa Harbour, relating to Ngāti Awa and Whakaari Island and Te Paepae o Aotea (Volkner Rocks – hereafter referred to as Te Paepae o Aotea) relating to both Ngāti Awa and Te Whānau-a-Apanui.

[16] The other neighbouring iwi, Ngāi Tai, asked the Court to determine its claims, but only to the extent that those claims overlapped with the priority applicant's claims. The areas involved were at the eastern boundary of the priority application's specified area and Whakaari/White Island (hereafter referred to as Whakaari).

**The applicant groups**

[17] Several of the applicants co-operated with other applicants in the preparation of their cases. This resulted in three broad groupings of parties.

[18] The groups of applicants that ultimately presented their cases at the hearing were:

(a) Whakatōhea Kotahitanga Waka (WKW). This group consisted of:

(i) the Edwards Priority Application (CIV-2011-485-817);

(ii) D Flavell for Hiwarau C, Turangapikitoi, Waiōtahe, and Ōhiwa of Whakatōhea (CIV-2017-485-375);

(iii) C Davis for Ngāti Muriwai Hapū (CIV-2017-485-269);

(iv) L Delamere for Pākōwhai Hapū (CIV-2017-485-264);

(v) L Delamere for Te Whānau-a-Apanui Hapū (CIV-2017-485-278) (discontinued other than in respect of Whakaari on 7 October 2020); and

(vi) B Kiwara on behalf of Kutarere Marae (CIV-2011-485-817), who was associated with the WKW Group but as an interested party rather than an applicant.

(b) Te Kāhui Takutai Moana o Ngā Whānui Me Ngā Hapū (Te Kāhui):

(i) Ngāti Patumoana (CIV-2017-485-253);

(ii) Ngāti Ira o Waiōweka (CIV-2017-485-299);

(iii) Ngai Tamahaua Hapū (CIV-2017-485-262);

(iv) Te Hapū Titoko a Ngai Tamahaua (CIV-2017-485-377);

(v) Whakatōhea Rangatira Mokomoko (CIV-2017-485-355); and

(vi) Associated with Te Kāhui but not formally part of that group was the Whakatōhea Māori Trust Board who advanced claims on behalf of Ngāti Ruatakenga[11] and Ngāti Ngāhere (CIV-2017-485-292).

*Other applicants*

[19] Applicants that were not part of either the WKW or Te Kāhui groupings but wanted the Court to determine all or part of their claims were:

(a) Te Ūpokorehe (CIV-2017-485-201);

(b) Ngāi Tai (CIV-2017-485-270); and

11 Spelt Ruatakenga in the Whakatōhea dialect, Ruatakena in the Tūhoe dialect and Rua for short.

(c) Ririwhenua (CIV-2017-485-272) (effectively Ngāi Tai and Ririwhenua presented a joint claim).

*Applicants who participated as interested parties*

[20] Other interested applicants, who had claims that partly overlapped with WKW or Te Kāhui groupings, but did not want the Court to determine their claims were:

(a) Te Rūnanga o Ngāti Awa (CIV-2017-485-196) (Te Rūnanga o Ngāti Awa did not seek to have any part of its application determined by the Court through this proceeding, but instead participated on the basis of addressing and opposing parts of the applicants' claims that overlapped with Ngāti Awa's application and made claims of exclusivity, specifically the area between Maraetōtara and Ōhiwa Harbour. It ultimately accepted its interests at Whakaari and Te Paepae o Aotea were shared with the applicants other than Ngāi Tai but maintained that it exclusively held Moutohorā (Whale Island));

(b) Te Rūnanga o Te Whānau (CIV-2017-485-318) (representing Te Whānau-a-Apanui, Te Rūnanga also did not seek to have any part of its application determined by the Court through this proceeding, but opposed the applicants' claims of exclusivity over Whakaari); and

(c) Te Whānau a Harawaka (a hapū of Te Whānau-a-Apanui) (CIV-2017-485-238) (after amendment of the priority applicant's claim removing much of the overlap, this applicant was only interested in the applicants' claim regarding Whakaari/Te Paepae o Aotea).

*Other interested parties who were not applicants*

[21] Other parties who had an interest in the application and appeared in this proceeding included:

(a) the Attorney-General (the Attorney-General appeared in the "interests of all the public", recognising that his role is one of "independent

aloofness", but that given the untested nature of the legislation, he should appear to ensure the Court has all the relevant information before it and to assist in the interpretation and application of the Act through legal submissions);

(b) the Landowners' Coalition Incorporated (the Landowners' Coalition appeared as an interested party in a limited capacity, providing opening and closing submissions and cross-examining witnesses on what they considered to be critical issues for the Court, particularly focusing on the operation of s 106 of the Act, and taking the position that none of the applications had satisfied the requirements for a grant of PCR or CMT);

(c) Seafood Industry Representatives (the Seafood Industry Representatives played a minor role in the proceedings, providing evidence on behalf of the seafood industries in opposition to the Edwards application on the basis that exclusive use and occupation by the applicants was substantially interrupted by commercial fishing and marine farming activities in the Eastern Bay of Plenty);

(d) the Whakatāne District Council (the Whakatāne District Council also played a minor role in the proceedings, providing the Court with evidence of the various structures and assets owned by the Council in the coastal marine area claimed by the applicants, and seeking to ensure that its ongoing interests in the area, including over those structures and assets, were protected); and

(e) the Ōpōtiki District Council (the Ōpōtiki District Council appeared and provided evidence predominantly to inform the Court of the Council's Ōpōtiki Harbour Development Project, which is discussed in greater detail in Part V of this judgment which addresses the landward boundaries of the takutai moana relating to rivers and estuaries).

## PART II – THE LEGISLATION

### Statutory purposes, legislative history and legal concepts

*Statutory purposes*

[22] The purposes of the Act were summarised in the decision of *Re Tipene*,[12] and I adopt the analysis of Mallon J set out at [26]-[44] but, as a number of the matters in issue in these proceedings involve disputed points of statutory interpretation not addressed in *Re Tipene* it is necessary to once again examine the text and purpose of the Act.[13]

[23] As the Supreme Court has directed, in ascertaining the purpose of an Act, the Court must "have regard to both the immediate and the general legislative context" of the Act, as well as its "social, commercial, or other" objectives.[14]

[24] The legislative context and social objectives of the Act are clearly set out in the Preamble. The Preamble records that the predecessor legislation, the Foreshore and Seabed Act, was enacted, in part, by way of response to the decision of the Court of Appeal in *Attorney-General v Ngāti Apa* which had held that the MLC had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed.[15]

[25] It noted that in its *Report on the Crown's Foreshore and Seabed Policy*, the Waitangi Tribunal had found the policy underpinning the Foreshore and Seabed Act to be in breach of the Treaty of Waitangi,[16] and that a 2009 Ministerial Review Panel had come to the conclusion that the Foreshore and Seabed Act was severely discriminatory against whānau, hapū and iwi, and had recommended new legislation

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12 Above n 3.

13 Interpretation Act 1999, s 5.

14 *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]. In relation to the application of the Treaty of Waitangi to the interpretation see *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184. This case was later affirmed in *New Zealand Māori Council v Attorney-General* [2007] NZCA 269 and *Ngaronoa v Attorney-General* [2017] NZCA 351 at [44]-[46]. It is authority for the proposition that, for the purposes of the interpretation of statutes, the Treaty has a direct bearing, whether or not there is a reference to it in the statute.

15 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

16 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071, 2004) at 5.1.1-5.1.3.

to reflect the Treaty of Waitangi and to recognise and provide for the interests of whānau, hapū and iwi, and for public interests in the foreshore and seabed.

[26] The Preamble finishes by stating:

> This Act takes account of the intrinsic, inherited rights of iwi, hapū and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations.

[27] Although there is a significant focus on inherited Māori rights, the Preamble hints at the other objective, relating to the rights of all New Zealanders in the coastal marine area. This objective is articulated more clearly in the purpose section.

[28] The purpose of the Act is set out as being:

> **4 Purpose**
>
> (1) The purpose of this Act is to—
>
> (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
>
> (b) recognise the mana tuku iho[17] exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
>
> (c) provide for the exercise of customary interests in the common marine and coastal area; and
>
> (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).
>
> (2) To that end, this Act—
>
> (a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
>
> (b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and
>
> (c) gives legal expression to customary interests; and
>
> (d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and

[17] Section 9 of the Act defines this term as meaning "inherited right or authority derived in accordance with tikanga". "Tikanga" is defined in the same section as meaning "Māori customary values and practices".

> (e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—
>
> (i) for its intrinsic worth; and
>
> (ii) for the benefit, use, and enjoyment of the public of New Zealand.

[29] In addition to the purpose section of the Act, two other sections are relevant to the task of discerning the meaning of those sections in the Act that are challenged in these proceedings.

[30] Under the heading "Customary interests restored", s 6(1) states:

> Any customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with this Act.

[31] Section 7 of the Act states:

> In order to take account of the Treaty of Waitangi …, this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—
>
> (a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and
>
> (b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and
>
> (c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

[32] It is important to note that although s 6(1) of the Act states that customary interests in the common marine and coastal area that were extinguished in 2004 are "restored", the "restoration" is qualified by the words that immediately follow which explain that pre-existing customary rights are "given legal expression in accordance with this Act". The rights given by the Act are not the same as the inherited rights and interests referred to in the Preamble. As cl (4) of the Preamble states those rights are "translated" into the rights conferred by this Act.

[33] Mr Lyall, counsel for Ūpokorehe, in his opening, submitted that there was very little that was "customary" left in the concept of CMT in the Act. That observation

highlights the fact that although the Preamble and purpose sections of the Act refer to reinstating pre-existing customary entitlements and translating "inherited rights into legal rights and interests", the specific rights actually conferred by the Act are much narrower and more limited than the customary title and rights that Māori would have enjoyed and exercised in the foreshore and seabed as at 1840.

[34] I acknowledge that there is an argument that because the Act does not create customary title but merely reverses the extinguishment of customary title achieved by the Foreshore and Seabed Act, those aspects of customary title that traditionally existed but have not been replicated in the Act nonetheless continue to exist. This argument is based on the observations of Tipping J in *Ngāti Apa*, that if Parliament intended to extinguish customary title it would "need to make its intention crystal clear",[18] and arguably had not done so in the Act. The argument also draws support from the observations of Goddard J in the *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* case where he said:[19]

> Section 7 records that in order to take account of the Treaty, MACA recognises and promotes the exercise of customary interests of Māori in the common marine and coastal area. MACA does not bring the underlying customary interests into existence. Rather it provides a mechanism for recognising them. Where that recognition has taken place, those recognised interests qualify as existing interests by virtue of paragraph (f) of the s 4 definition of the term "existing interests". In the meantime, pending such recognition, tangata whenua with customary interests continue to have and enjoy those customary interests, and those customary interests qualify as existing interests under paragraph (a) of the definition.

[35] The contrary argument is that, the wording in s 11(2) of the Act which says:

> …neither the Crown nor any other person owns, or is capable of owning the common marine and coastal area, as in existence from time to time after the commencement of this Act.

indicates the "crystal clear" intention of Parliament to extinguish all Māori customary interests in the foreshore and seabed other than those specifically granted by the Act.

[36] As it is not necessary to resolve this issue in this case, I will leave it for consideration in a case where it directly arises.

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18 *Attorney-General v Ngāti Apa*, above n 15, at [185].

19 *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [168].

[37] In *Ngāti Apa*, the Court of Appeal did not attempt to define what attributes customary title to the foreshore and seabed might have. It did not attempt to make any comparison with the sorts of property rights or title, such as usufructuary rights or fee simple title recognised at common law. But the judgment makes two things clear: firstly, the Crown had not acquired ownership of customary title to the foreshore and seabed from Māori in 1840; and secondly, the existence and extent of customary property rights was not to be gauged from applying common law concepts but from applying tikanga. Elias CJ said:[20]

> Any prerogative of the Crown as to property in foreshore and seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law, unless such property interests have been lawfully extinguished. The existence and extent of any such customary property interest is determined in application of tikanga.

[38] A number of counsel submitted that the property rights created by the Act were "sui generis".[21] Such a submission is well-founded. While the Act repealed the provision in the Foreshore and Seabed Act 2004 which had vested ownership of the foreshore and seabed in the Crown as its absolute property,[22] it put ownership, at least in the sense akin to a fee simple title, beyond the reach of Māori by declaring:[23]

> Neither the Crown or any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.

[39] No Certificate of Title in respect of CMT is registrable under the Torrens Land Transfer System.

[40] The property rights in the common marine and coastal area available under the Act are limited to only three categories:

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20 *Attorney-General v Ngāti Apa*, above n 15, at [49].

21 *Black's Law Dictionary* (11th ed, Thomson Reuters, 2019) at 1734 defines this Latin term as meaning "Of its own kind or class; unique or peculiar".

22 Foreshore and Seabed Act 2004, s 13(1).

23 Section 11(2).

*(i) Conservation processes*

(a) a right for "affected iwi, hapū or whānau";[24] to "participate in conservation processes in the common marine and coastal area" as set out in s 47(3) of the Act;

(b) the rights conferred in subpart 1 of Part 3 of the Act also extend to creating an obligation on a marine mammals officer appointed under the Marine Mammals Protection Act 1978 to "have particular regard to the views of any affected iwi, hapū or whānau expressed to the officer";[25] and

(c) the rights to participate in conservation processes are not dependent upon an applicant group holding CMT or PCR. They are therefore not relevant to these proceedings and will not be further discussed.

*(ii) Protected customary rights (PCR)*

[41] For a PCR to be recognised, three requirements must be satisfied:[26]

(a) that right has been exercised since 1840;

(b) has continued to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it has been continued to be exercised in exactly the same or a similar way, or evolved over time; and

(c) is not extinguished as a matter of law.

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24 That term is defined in s 47(1) as meaning "iwi, hapū, or whānau that exercise kaitiakitanga in the part of the common marine and coastal area where a conservation process is being considered" to participate in certain conservation processes. The relevant processes are detailed in s 47(3).

25 Section 50(3).

26 Marine and Coastal Area (Takutai Moana) Act 2011, s 51.

[42] Notably, an applicant group does not need to have an interest in land in or abutting the specified part of the common marine and coastal area in order to establish a PCR.[27]

[43] However, s 51(2) sets out a range of activities that are excluded from the ambit of PCRs. These include activities:

(a) that are regulated under the Fisheries Act 1996;

(b) that are a commercial aquaculture activity (within the meaning of s 4 of the Māori Commercial Aquaculture Claims Settlement Act 2004);

(c) that involve the exercise of:

(i) any commercial Māori fishing right or interest, being a right or interest declared by s 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or

(ii) any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in s 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992;

(d) that relate to:

(i) wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act;

(ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978; or

(e) that are based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or

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[27] Section 51(3).

use related to a natural or physical resource (within the meaning of s 2(1) of the RMA).

[44] A PCR allows the applicant to exercise certain customary rights over the relevant takutai moana without a resource consent under the RMA and grants them exemption for payment of certain charges under that Act.[28] However, this may only occur if the PCR is exercised in accordance with:[29]

(a) tikanga;

(b) the requirements under subpart 2 of Part 3 of the Act;

(c) the specific PCR order or agreement that applies to the applicant group; and

(d) any controls imposed by and notified by the Minister of Conservation under ss 56 and 57 of the Act (set out in more detail below).

[45] Without the written approval of the group holding the PCR, a consent authority must not grant a resource consent for an activity (including a controlled activity) to be carried out in an area with PCR if the activity will, or is likely to, have adverse effects that are more than minor on the exercise of a PCR,[30] unless the relevant PCR group gives written approval for the proposed activity, or the exceptions in s 55(3) apply.

[46] An applicant group that has been granted a PCR may also:[31]

(a) delegate or transfer the rights conferred by a PCR order or an agreement in accordance with tikanga;

(b) derive a commercial benefit from exercising its PCRs, except in relation to the exercise of:

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28 Marine and Coastal Area (Takutai Moana) Act 2011, s 52.
29 Section 52(3).
30 Guidance on determining "adverse effects", "written approval" and other processes related to s 55 is set out in Part 1 of Schedule 1 of the Act.
31 Section 52(4).

(i) a non-commercial aquaculture activity; or

(ii) a non-commercial fishery activity that is not a right or interest subject to the declarations in s 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992;

(c) determine who may carry out any particular activity, use, or practice in reliance on a PCR order or agreement; or

(d) limit or suspend, in whole or in part, the exercise of a PCR.

[47] In terms of delegation and transfer of PCRs, this may only be made to a person identified within the relevant PCR order or agreement to whom that right may be delegated or transferred.[32] Any delegation or transfer of a PCR must be notified to the responsible Minister and Chief Executive (detailed in s 110 of the Act) and registered on the Marine and Coastal Area Register under s 114, with any delegation or transfer not taking effect until either the PCR order is varied under s 111, or the PCR agreement itself is varied.[33]

[48] Finally, if at any time the Minister of Conservation determines that the exercise of PCRs under a PCR order or agreement has or is likely to have a significant adverse effect on the environment, the Minister may impose controls, including any terms, conditions, or restrictions that they think fit, on the exercise of those rights.[34] Any person may apply to the Minister for controls to be imposed on the exercise of a PCR, stating the reasons for the application.[35]

*(iii) Customary marine title (CMT)*

[49] A CMT provides for an interest in land but does not include a right to alienate or otherwise dispose of any part of a customary marine title area.[36] A CMT effectively

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32 Section 53(1).
33 Section 53(3).
34 Section 56(1).
35 Section 56(2).
36 Section 60(1)(a).

provides for a bundle of rights that include RMA rights for controlled activities,[37] a conservation permission right,[38] right to protect wāhi tapu,[39] rights in relation to marine mammal watching permits and consultation about changes to coastal policy statements,[40] prima facie ownership of newly found taonga tūturu,[41] ownership of certain minerals,[42] and the right to create a planning document.[43]

[50] The requirements for a CMT to be recognised are that:[44]

(a) the applicant group holds the specified area in accordance with tikanga; and

(b) has, in relation to the specified area:

(i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or

(ii) received it, any time after 1840, through customary transfer.[45]

[51] Notably, there is there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between the commencement of the Act and the effective date.[46]

[52] Section 59 provides for a number of matters that this Court may take into account when determining whether CMT exists in a specific area of the common marine and coastal area. These include:[47]

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37 See ss 66-70.
38 See ss 71-75.
39 See ss 78-81.
40 See ss 76-77.
41 See s 82.
42 See s 83.
43 See ss 85-93
44 Section 58.
45 The definition of a customary transfer and its requirement is set out in s 58(3) of the Act.
46 Section 58(2).
47 Section 59(1).

(a) whether the applicant group or any of its members–

(i) own land abutting all or part of the specified area[48] and have done so, without substantial interruption, from 1840 to the present day;

(ii) exercise non-commercial customary fishing rights in the specified area, and have done so from 1840 to the present day; and

(b) if paragraph (a) applies, the extent to which there has been such ownership or exercise of fishing rights in the specified area.

[53] I discuss the relevance of ownership of abutting land to a grant of CMT in more detail at [171]-[187] below, but note that under s 59(3), the use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of CMT.

[54] Finally, like PCRs, CMT may also be delegated or transferred in accordance with tikanga.[49] Section 61 sets out the requirements and restrictions on delegation and transfer of CMT under the Act.

[55] The property rights conferred by the Act that have the closest similarity to conventional ownership rights are PCRs and CMT. However, they confer limited rights. The fact that the property rights conferred by the Act are so limited and so different to common law property rights of ownership is relevant to these proceedings in two respects:

(a) it means that attempting to interpret or define concepts used in the Act by reference to common law proprietorial rights is inappropriate; and

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48 This land is defined in s 59(4).
49 Section 60(3).

(b) it lessens the usefulness of reference to Canadian and Australian authorities in relation to Aboriginal title.

Notwithstanding the fact that some of the wording in the Act appears to reflect language used by the Canadian Supreme Court, the sort of Aboriginal title that the Canadian Courts were addressing is fundamentally different to the relatively limited property rights available as PCR and CMT, and the analogy between the Canadian cases and the New Zealand law should not be overstated.[50]

[56] A number of counsel submitted that their submissions in support of their clients' applications were without prejudice to the position of their clients that the truncation of rights to CMT in the foreshore and seabed in the way the Act has done, is unlawful and a breach of the Treaty of Waitangi. Those claims are being considered by the Waitangi Tribunal and they are not matters that the Court is called upon to decide in these proceedings.

*The Treaty, cession of sovereignty and customary title to the foreshore and seabed*

[57] As the focus of both s 51 (PCR) and s 58 (CMT) is on the rights exercised by applicant groups as at 1840 in accordance with tikanga and the continued use of those rights, it is useful to start with an examination of the situation that existed in the area subject to these applications prior to 1840.

[58] For the reasons that I now set out, I have concluded that, as at 1840, the applicant groups identified in Part VI of this decision who are entitled to recognition orders in this case had mana motuhake and tino rangatiratanga over the specified areas in question. They held customary title to the relevant parts of the takutai moana.

[59] For the last millennium, Māori have inhabited Aotearoa/New Zealand.[51] In respect of the area that is the subject of these proceedings, Te Moana-a-Toi (the eastern Bay of Plenty), radiocarbon dating of early occupation sites has confirmed occupation

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50 This topic is addressed in detail at [118]-[144] below.

51 See Atholl Anderson, Judith Binney and Aroha Harris *Tangata Whenua: A History* (Bridget Williams Books, Wellington, 2015) at 54.

and use of marine and coastal resources going back at least 700 years.[52] For example, an excavation in the 1990s of the Tokitoki Historic Reserve located in the Ōhiwa Harbour revealed a midden with an occupation layer dating back to approximately 700 years ago:[53]

> A series of exposed, eroding sections along the harbour's edge were cleaned down and drawn – over a distance of approximately 30m. The section revealed a deep midden layer, largely intact, which was up to 60cm thick and contained a wide range of faunal species, artefacts and intact hangi. A small area excavation was undertaken to provide additional material for the research project. While this was in progress a short section of the bank was cleaned down in that location, which revealed a deeper, and therefore earlier, occupation layer. More importantly, this early layer rested immediately on top of a layer of Kaharoa Ash – a very distinctive grey ash found throughout the north-eastern North island, originating from an eruptive event near Rotorua ca. 700 years ago, that provides an excellent chronological marker. The cleaned section also revealed postholes and other features cut through the ash, and a small number of artefacts and faunal material including: minnow lures of both stone and fossilised wood; adze fragments; bone fishhooks; and, seal and moa bone.

[60] Later in this judgment, and also in Appendix B, I set out an analysis of the evidence presented to this Court and to the pukenga of the whakapapa, history and background of the applicant groups and their neighbouring iwi and hapū.

[61] Prior to the end of the 18th century, Māori were the sole occupants of New Zealand. They held, and exercised, sovereignty over the whole country. In te ao and te reo Māori the notion of sovereignty is often referred to as mana motuhake and tino rangatiratanga.[54] As noted by the Waitangi Tribunal in its *Report on the Crown's Foreshore and Seabed Policy*, at the point at which Te Tiriti o Waitangi/The Treaty of

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[52] This was established in the evidence through a number of reports by expert witnesses called by the parties, including Dr Desmond Kahotea *Whakatōhea and the Common Marine and Coastal Area* (October 2019) at 75; Felicity Kahukore Baker *Mō Ake Tonu Atu – Te Ūpokorehe Takutai Moana Overview Report* (February 2020) at 2.0 referring to Ewan Johnson *Ōhiwa Harbour* (March 2003) at 21.2 and Rick McGovern-Wilson *Heritage assessment: Tokitoki Reserve Ōhiwa Harbour* (July 2012) at 2; Bruce Stirling *Te Mana Moana o Te Kāhui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea – Historical Issues* (January 2020), at [25] and Garry Law *Archaeology of the Bay of Plenty* (June 2008) at 29.

[53] Rick McGovern-Wilson *Heritage assessment: Tokitoki Reserve Ōhiwa Harbour*, above n 52, at 5.

[54] See for example, Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy*, above n 16 at 2.1.5; Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (WAI 262, 2011) at 24; and Waitangi Tribunal *Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims – Pre-publication Version Parts I and II* (WAI 898, 2018) at 6.11. I acknowledge however, that the English and Māori terms do not carry exactly the same meaning.

Waitangi was signed in 1840, Māori exercised the authority of tino rangatiratanga under tikanga Māori in their relationship with the coastal land and waters.[55]

[62] The advent of European colonisation commenced in Te Moana-a-Toi about 30 years after Lieutenant James Cook had first engaged with Māori in 1769.[56]

[63] When it was signed in 1840, there were critical differences in the wording of the English and Māori versions of Te Tiriti relating to sovereignty. The English version recorded that the Māori chiefs who signed it ceded to the Queen of England (sic) "absolutely and without reservation all the rights and powers of Sovereignty …" which they possessed. Whereas the Māori version reserved "tino rangatiratanga" and their many "taonga" (which included their fisheries) to Māori.[57]

[64] In addition to the original copies of Te Tiriti signed at Waitangi on 6 February 1840, some eight other copies (all but one were written in te reo) were transported around New Zealand for signing by local chiefs.[58] In May 1840, seven local chiefs signed a te reo version of the Treaty at Ōpōtiki.[59] Those chiefs were the tūpuna (ancestors) of a number of witnesses in these proceedings. For example, Mr Te Riaki Amoamo, a kaumatua and historian of Whakatōhea and specifically the hapū of Ngāti Rua, stated:

> I am the son of Tiwai Amoamo and Te Urututu Kui Gage. My paternal grandfather was Amoamo Te Riaki, who was a direct descendant of Aporotanga, a rangatira who signed Te Tiriti o Waitangi on behalf of Ngāti Ruatakenga hapū. My paternal grandmother came off Rangihaerepo, a rangatira who signed Te Tiriti on behalf of Ngai Tama, but he can also affiliate to Ngāti Patu and Ngāti Ruatakenga. Therefore, I descend from two of the signatories who signed Te Tiriti at Ōpōtiki on 27 and 28 May 1840.

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55 At 2.1.5. According to the Tribunal, this authority included a spiritual dimension, a physical dimension, a dimension of reciprocal guardianship, a dimension of use, manaakitanga and rights relating to manuhiri (loosely translated as guests) from across the seas.

56 For reference to Cook's engagement with Māori in the application area see: AC Lyall *Whakatōhea of Ōpōtiki* (Reed Publishing, Auckland, 1979) at 148-149 and Bruce Stirling *Te Mana Moana o te Kāhui Takutai Moana o Ngā Whenua me Ngā hapū o Te Whakatōhea Historical Issues*, above n 52, at [21].

57 Waitangi Tribunal *Te Mana Whatu Ahuru – Report on Te Rohe Pōtae Claims – Pre-publication Version Parts I and II*, above n 54, at 3.3.2.4.

58 See Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 2011) at 69.

59 Ranginui Walker *Ōpōtiki-Mai-Tāwhiti: Capital of Whakatōhea*, above n 2, at 58-59.

[65] On 21 May 1840, Lieutenant Governor Hobson proclaimed sovereignty on behalf of the British Crown over the whole country.[60]

[66] As at 1840, Māori had customary title (sometimes referred to as Aboriginal title) in relation to the foreshore and seabed.[61] That customary title did not automatically pass to the Crown on its assertion of sovereignty.[62] As noted by Keith and Anderson JJ in *Ngāti Apa*, the common law recognises two types of Crown title to real property or land, including land below the sea – *imperium* and *dominium*:[63]

> English law, consistently with much international practice, has also long recognised two different Crown interests in land areas, including land below the sea, sometimes referred to as imperium and dominium or in the words of a leading European international lawyer of the mid-18th century as "l'Empire" (or "Souverainété") and "le Domaine" (Vattel, *Droit des Gens* (1758) book 1, paras 204-205). Lord Chief Justice Hale in 1667 in *De Iure Maris* ch IV similarly distinguished between the King's right of jurisdiction or royalty and his right of propriety or ownership in marine areas. That right of ownership was however subject to the liberty of the common people of England to fish in the sea and its creeks and arms unless the King or some subject had gained a propriety exclusive of that common liberty.

[67] The New Zealand Courts have now accepted that while the Crown acquired the radical or underlying title to the whole of the territory of New Zealand upon the proclamation of British sovereignty over New Zealand, that title was subject to customary or Aboriginal title rights.[64] For example, in *Ngāti Apa*, Elias CJ stated that Māori customary land was not the creation of the Treaty of Waitangi or of statute (although it was confirmed by both), and that it was property in existence at the time Crown colony government was established in 1840.[65] Her Honour went on to state

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60 The North Island by Treaty and the South Island and Stewart Island by "discovery". See Claudia Orange *The Treaty of Waitangi*, above n 58, at 64.

61 *Attorney-General v Ngāti Apa*, above n 15, at [14].

62 At [47], [85] and [183].

63 At [132]. For an analysis of these concepts see Robert Makgill and Brianna Parkinson "The Commons, Common Law and Common Marine Coastal Area" (Continuing Legal Education Paper for Environmental Law Intensive, November 2019) at 92. Black's Law Dictionary above n 21 at 615 defines *dominium* as "…absolute ownership including the right to possession and use; a right of control over property that the holder might retain or transfer". It can be described as direct or beneficial ownership, or the Crown's absolute ownership of land. Black's Law Dictionary at 903, defines *imperium* as "…Power or dominion; esp., the legal authority wielded by superior magistrates under the Republic, and later by the emperor under the Empire". It can be described as sovereignty, territorial or radical title, namely the Crown's supreme legal and territorial authority over land.

64 See *Te Runanganui o te Ika Whenua Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 23-24 per Cooke P; *Attorney-General v Ngāti Apa*, above n 15, at [183] per Tipping J.

65 At [14].

that the common law has previously, recognised pre-existing property after a change in sovereignty, citing the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*, who stated:[66]

> A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.

[68] Tipping J affirmed this approach in his decision in the *Ngāti Apa* judgment, holding that:[67]

> When the common law of England came to New Zealand its arrival did not extinguish Māori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not therefore acquire wholly unfettered title to all the land in New Zealand. Land held under Māori customary title became known in due course as Māori customary land. So much is established by the judgment of the Chief Justice whose discussion I will not seek to emulate.

[69] It is important to briefly note that at the point in 1840 when the Treaty was signed, there was an intersection between what Williams J and others have termed as two separate legal systems in Aotearoa New Zealand.[68] According to Williams J and a number of academic commentators, tikanga Māori was brought across the Pacific Ocean and developed by Māori over the past millennium, forming the first law, sometimes referred to as "Kupe's Law", in Aotearoa New Zealand.[69] The second law of New Zealand, brought over by the British hundreds of years later, was the common law, sometimes referred to as "Cook's Law".[70] As noted by Williams J, the signing of the Treaty of Waitangi acted as the "point of contact" between the first and second laws; the "mechanism through which these two systems of law would be formally

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66 At [15]. See also *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 407-408.

67 At [183].

68 See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 12 Waikato Law Review 1; Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisted: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Melbourne, 2005) at 330-349; Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 New Zealand Yearbook of Jurisprudence 24 at 25; and Jacinta Ruru "First Laws: Tikanga Māori in/and the Law" (2018) Māori Law Review 29 at 34-36.

69 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 68, at 2-3.

70 At 5-6.

brought together in some sort of single accommodation".[71] The Courts have accepted this fact, and have started to engage in an analysis of the relationship between the first and second laws of Aotearoa New Zealand and their impact on the current legal system.[72]

[70] The Court of Appeal in *Ngāti Apa* was cognisant of this intersection. Tipping J stated:[73]

> It is also important to recognise that the concept of title, as used in the expression Māori customary title, should not necessarily be equated with the concepts and incidents of title as known to the common law of England. The incidents and concepts of Māori customary title depend on the customs and usages (tikanga Māori) which gave rise to it. What those customs and usages may be is essentially a question of fact for determination by the Māori Land Court.

[71] I consider the impact of tikanga Māori on the legislation, and in this case, in Parts III and IV of the judgment.

[72] In addition to being subject to native customary title, the Crown's right of *Dominium*, at common law, was also subject to certain public rights such as navigation and fishing. The concept of communal public rights in the foreshore and seabed is not novel and goes back to ancient Greek and Roman law such as the "Institutes of Justinian", a body of Roman law assembled in approximately 530AD.[74]

[73] Although initially the New Zealand Courts acknowledged and respected Māori customary title as something confirmed by the Treaty,[75] by 1877, in the case of *Wi Parata v Bishop of Wellington*,[76] the Courts rejected that approach. For more than a century Māori customary title in the whenua and takutai moana was denied.

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71 At 7.

72 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291 at [43]. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 19, at [177].

73 At [184].

74 See Makgill and Parkinson "The Common Law and Common Marine Coastal Area", above n 63, at 88.

75 See *R v Symonds* (1847) NZPCC 387 (SC) at 394.

76 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

[74] In 1963, the Court of Appeal in *Re The Ninety Mile Beach*,[77] specifically held that the foreshore and seabed below low water mark had been vested in the Crown in 1840 free of customary rights and title.

[75] As noted above at [24], the settled assumptions about Crown ownership of the foreshore and seabed and the extinguishment of customary title were turned on their head by the 2003 decision of the Court of Appeal in *Attorney-General v Ngāti Apa.*[78] The Court of Appeal in that case held that the MLC had jurisdiction to determine claims of customary title to the foreshore and seabed and that customary title was recognised at common law until lawfully extinguished.

[76] Elias CJ's comments on *Wi Parata* and *Re The Ninety Mile Beach* and *Ngāti Apa* are important. Together with other Judges in the case (with Gault J dissenting), Elias CJ held that *Re The Ninety Mile Beach* was wrongly decided, and that both cases represented "extreme views…not supported by authority".[79] Instead, the applicable common law principle in the circumstances of New Zealand was that the rights of property were respected and continued to exist on assumption of sovereignty, and could only be extinguished by consent or in accordance with statutory authority.[80] According to the Court of Appeal, the reasoning in *Re The Ninety Mile Beach* reflected an affirmation of the *Wi Parata* decision which rather than being consistent with precedent, was in fact something of an outlier, contrary to the reasoning in other judgments, including *R v Symonds*, *Re the Lundon and Whittaker's Claims Act 1871*, *Nireaha Tamaki v Baker*, *Manu Kapua v Para Haimona* and *Amodu Tijani v Secretary, Southern Nigeria*.[81]

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77 *Re The Ninety Mile Beach* [1963] NZLR 461.

78 *Attorney-General v Ngāti Apa*, above n 15, at [85]-[91].

79 At [85].

80 At [85].

81 At [87]. I acknowledge that there are contrary views to Elias CJ's reasoning: see David Williams *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland University Press, Auckland, 2011) at 144-145; and Mark Hickford "John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910-1920" (2007) 38 Victoria University of Wellington Law Review 853 at fn 93.

## PART III – LEGAL ISSUES

[77] There are a number of issues which did not arise in *Re Tipene* which do arise in this case. That is because this case involves multiple overlapping applications and contests between different applicant parties. Issues arising include:

(a) the standard and burden of proof;

(b) the meaning of the phrase "holds the specified area in accordance with tikanga" in s 58(1)(a) including the function of tikanga, and the role of pukenga in interpreting it, under the Act;

(c) the meaning of the terms "exclusively used and occupied" and "without substantial interruption" in s 58(1)(b)(i) including whether a concept of "shared exclusivity" may exist under the Act, as well as more technical issues such as where to measure the boundary of the takutai moana in relation to rivers and estuaries, and the effect of reclamations on CMT and PCR claims;

(d) questions about what sort of activities can support a grant of PCR under s 51;

(e) the nature of CMT under s 58, including whether a jointly held CMT can be issued; and

(f) the correct procedure to follow when there are overlapping claims being advanced in both the Court and pursuant to direct negotiations with the Crown in respect of the same or a similar area.

### Standard and burden of proof

[78] Section 106 of the Act specifically sets out the burden of proof:

**Burden of proof**

(1) In the case of an application for recognition of protected customary rights in a specified area of the common marine and coastal area, the applicant group must prove that the protected customary right–

(a) has been exercised in the specified area; and

(b) continues to be exercised by that group in the same area in accordance with tikanga.

(2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area–

(a) is held in accordance with tikanga; and

(b) has been used and occupied by the applicant group, either–

(i) from 1840 to the present day; or

(ii) from the time of a customary transfer to the present day.

(c) in the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

[79] The burden of proof set out in s 106 is significantly different from the corresponding provision in the Foreshore and Seabed Act. The test specified in that act for "territorial customary rights", which was the equivalent of customary title at common law, required that:[82]

> The area was used and occupied, to the exclusion of all persons who did not belong to the group, by members of the group without substantial interruption from 1840 until the present (and not taking account of any spiritual or cultural association unless that is manifested by a physical activity or use related to a natural or physical resource); and
>
> The group had continuous title to contiguous land (i.e. land abutting the foreshore).

[80] The requirement for an applicant group to hold continuous title to contiguous land has been removed. Furthermore, the requirement to prove that the specified area was used and occupied to the exclusion of persons who did not belong to the group has been amended so that, in relation to PCR what is required is proof that the PCR has been exercised in the specified area and continues to be exercised by the applicant

[82] Foreshore and Seabed Act 2004, s 32.

group in the same area in accordance with tikanga. In relation to CMT, the applicant group must prove that the specified area has been held in accordance with tikanga and that the area has been used and occupied by the applicant group from 1840 to the present day. The presumption that a customary interest has not been extinguished is new.

[81] Section 106 was amended during the Select Committee process. What is now s 106 in the Act was originally cl 105 in the Bill. On the issue of who has to prove extinguishment of customary rights, the then Minister in charge of the Bill responded to a question from Rahui Katene (a Māori Party MP) in this way:[83]

> Hon Christopher Finlayson (Attorney-General): Under clause 105 of the Bill, if the Crown does not accept that customary title exists in an area, then the Crown has to prove customary title has been extinguished. This requirement is consistent with what the Court of Appeal said in the *Ngāti Apa* case. Under the current legislation applicant groups have to prove the negative – namely that extinguishment has not occurred. The requirement is contrary to what the Court of Appeal said in *Ngāti Apa* and goes against the usual rules about the burden of proof.

[82] Minister Finlayson, in the Select Committee, also made a clear statement about what applicants did have to prove. He said:[84]

> Clause 105 is an important clause, and it is the subject of an amendment in the Supplementary Order Paper. This is the burden of proof clause, and it has been clarified to ensure that applicant groups are expected only to prove the positive elements in the tests.

[83] At the same Committee meeting, member Rahui Katene stated:[85]

> If the Crown cannot prove extinguishment then customary title will be recognised, provided the other elements of the test are met.

[84] Member Katene also said at the same Committee meeting:[86]

> The clause as redrafted is explicit that claimant groups must prove only the positive elements of the test – for example, the group has held the area or customary rights have been exercised since 1840, in accordance with tikanga. This means that the Crown is responsible for proving that the applicant group's use and occupation of the area has not been exclusive, that there has been a

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83 (21 September 2010) 667 NZPD 14107.
84 (17 March 2011) 670 NZPD 17393.
85 (17 March 2011) 670 NZPD 17405.
86 (17 March 2011) 670 NZPD 17405.

> substantial interruption to the group's occupation of the area, or that there has been extinguishment at law.

[85] It is immediately apparent that there is a disconnect between Ms Katene's statement that:

> …the Crown is responsible for proving that the applicant group's use and occupation of the area has not been exclusive, that there has been a substantial interruption to the group's occupation of the area, or that there has been extinguishment at law.

and the express wording of s 106(2). Section 106(2)(b) states that, in addition to the fact that the applicant group must prove that the specified area is held in accordance with tikanga, an applicant must also establish that the specified area "has been used and occupied by the applicant group" from 1840 to the present day.

[86] A problem also arises from the fact that s 106 does not address the three other provisions in the Act which set out what is required to be proved by an applicant for a recognition order.

[87] Section 98 of the Act provides:

> **Court may recognise protected customary rights or customary marine title**
>
> (1) the Court may make an order recognising a protected customary right or customary marine title (a **recognition order**);
>
> (2) the Court may only make an order if it is satisfied that the applicant–
>
> (a) in the case of an application for recognition of a protected customary right, meets the requirements of section 51(1); or
>
> (b) in the case of an application for recognition of customary marine title meets the requirements of section 58.

[88] The use of the words "The Court may only make an order …" indicates that it is mandatory for the Court to be satisfied that the specific requirements of ss 51 and 58 are met. Both the sections contain elements that are not referred to in s 106. In relation to PCR, s 106 omits the requirement in s 51(1)(a) that a PCR must have been exercised since 1840.

[89] In relation to CMT, s 106 omits reference to the requirement in s 58(1)(b)(i) that the specified area has been *exclusively* used and occupied *without substantial interruption*.

[90] Unsurprisingly, given the wording in s 106, a number of applicants have submitted that they are not obliged to prove, in relation to PCR, that the PCR has been exercised "since 1840" and, in relation to CMT, that they have held the specified area "exclusively" and "without substantial interruption".

[91] A variant on this submission was that of Mr Lyall, counsel for Ūpokorehe, who submitted, that in relation to a CMT recognition order: "It should not be until Stage 2, who should hold the orders, and the form they should take (that exclusivity comes to the fore)".

[92] Ms Roff, for the Attorney-General, submitted that while s 106(3) clearly shifted the burden away from applicants as to the issue of whether customary rights had been "extinguished", it was necessary to read s 106 together with ss 51, 58 and 98 and that, when this was done, it was clear that the Act required applicants for recognition orders to prove that the elements set out in ss 51 and 58 existed.

[93] Similar submissions were made by Mr Finlayson QC on behalf of the Landowners Coalition Incorporated.

*Analysis*

[94] In *Re Tipene*, the burden of proof was not discussed in detail with the Court simply stating:[87]

> The applicant group must prove that customary marine title exists in the specified area (as per the requirements of s 58). It is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

[95] The reference to "the requirements of s 58" supports the view that, in relation to an application for a recognition order of CMT, the Court saw the burden of proof

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[87] At [39] (footnotes omitted).

on the applicants as amounting to all of the elements set out in s 58, not the more limited matters set out in s 106(2).

[96] In the present case, the interpretation of the burden of proof advanced by some of the applicants to the effect that there is no onus on them to establish, in respect of a claim for PCR, that the rights claimed had been exercised "since 1840" or, in relation to CMT, that the rights claimed had been used "exclusively" and "without substantial interruption" creates significant practical problems. This arises from the fact that there are competing applications each asserting the exercise of rights on an exclusive basis and without substantial interruption.

[97] If there was an automatic assumption that the mere assertion of such rights was sufficient without the need for any proof, then the Court would have no way of determining whether the applicants asserting such rights in fact met the requirements of either ss 51 or 58.

[98] The concepts of exclusivity and without substantial interruption are different to the concept of extinguishment. They are positive elements of s 58. Proving that rights were exercised exclusively and without substantial interruption is not, as some counsel submitted, imposing a burden on applicants to prove a negative. Neither is there any justification for the submission that the issue of exclusivity only arises at the stage of considering who should hold the orders and the form they should take. Satisfaction of the elements of s 58 is a threshold or jurisdictional requirement to be established before the Court can consider whether CMT should be granted.

*Conclusion*

[99] I therefore reach the same conclusion that Mallon J did in *Re Tipene* that applicants for recognition orders are required by s 98 to prove all of the positive elements set out in ss 51 and 58 but have no obligation to prove that their customary rights have not been extinguished. As stated by Mallon J, it is assumed in the absence of proof to the contrary that customary interests have not been extinguished.

[100] As to the standard of proof, these are civil proceedings in the High Court and the starting point is that the civil burden of proof, on the balance of probabilities, is

applicable. Clearly, s 106(3) creates a presumption in favour of non-extinguishment and to that extent the normal standard of proof is altered.

[101] I note that the Māori Land Court in exercising similar powers assessing customary rights and interests in relation to land has adopted the position that such rights and interests must be established in accordance with the ordinary civil standard of proof.[88]

[102] In relation to the standard of proof, Mr Finlayson, for the Landowners Coalition submitted that despite the latitude expressed in s 105 as to the Court being able to accept in evidence, any oral or written statement, document, matter or information that the Court considers to be reliable "whether or not that evidence would otherwise be admissible", this did not override the obligation in s 7(2) of the Evidence Act 2006 that evidence that is not relevant is not admissible.

[103] He submitted that much of the evidence tendered by applicants established no more than that the applicant had mana tuku iho,[89] which he submitted was not directly relevant to the issues before the Court. He did not refer to any specific evidence. I accept that some of the evidence, particularly in respect of matters that could not be the subject of a PCR recognition order, was of limited relevance, however, such evidence was generally relevant to broader questions such as whether or not the applicant group had used or occupied the specified area or had held it in accordance with tikanga.[90] I therefore do not accept the submission that such evidence should be disregarded.

**Holds the specified area in accordance with tikanga**

[104] In *Re Tipene*, the Court held that the evidence "overwhelmingly" established that the specified area was held in accordance with tikanga. It therefore did not need to examine the meaning of that phrase.[91]

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88 See *Bristol v Ngāti Rangi Trust* [2017] Chief Judge's MB 269 (2017 CJ 269) at [24], and *Tau v Ngā Whānau o Morven & Glenavy – Waihao 903 Section IX Block* [2010] Māori Appellate Court MB 167 (2018 APPEAL 167) at [61].

89 Defined in s 9 as an inherited right or authority derived in accordance with tikanga.

90 See, for example, s 59(1)(a)(ii) in relation to the significance of the non-commercial customary fishing rights.

91 At [153].

[105] In the present case, there is a fundamental disagreement between the applicants on the one hand, and the Attorney-General and Landowners Coalition on the other hand, as to the true meaning of "held in accordance with tikanga".

[106] Counsel for the Attorney-General submitted:

> [15] The requirement that the specified area be held by the applicant group in accordance with tikanga requires something more than the operation of a system of tikanga in the area. This is because s 58(1)(a) is concerned with territorial rights and as such the Court must be satisfied the evidence shows a proprietary or proprietary-like holding of the specified area of the CMCA according to tikanga.
>
> [16] In order to satisfy the Court that this is the case, the applicant group needs to provide evidence that shows:
>
> 16.1 there is a system of tikanga in place;
>
> 16.2 which is widely understood and guides everyday behaviour; and
>
> 16.3 that the activities and practices of the applicant group amount to a proprietary or proprietary-like holding under that system. Of particular relevance will be evidence of activities that show an intention to control the CMCA according to customary rules and interests, as opposed to just the exercise of rights or carrying out [of] an activity.

[107] Ms Roff also distinguished the requirements of s 58 from those relating to s 51 and PCRs, noting that in respect of PCRs, the requirement in s 51(1)(b) was that the right must be "exercised … in accordance with tikanga" as opposed to s 58(1)(a) "holds … in accordance with tikanga". She submitted that it was significant that in respect of PCRs, the right may be exercised in accordance with tikanga even if the person or group exercising the right does not have a territorial interest in the area where the activity occurs.

[108] Mr Finlayson, for the Landowners Coalition, made similar submissions.

[109] In essence, counsel for the Attorney-General and Landowners Coalition sought to divide s 58(1)(a) into two parts and to consider the concept of "holds the specified area" separately to the concept of "in accordance with tikanga".

*Tikanga as at 1840*

[110] Up until the assertion of sovereignty by Great Britain in 1840, the sole system of law in New Zealand was tikanga Māori. Unsurprisingly, to the extent that it related to the foreshore and seabed, tikanga bore little resemblance to the legal system of Great Britain which had its origins in Greek and Roman law as developed by the common law. Tikanga reflected the belief systems, values and life experience of the tangata whenua. How the tangata whenua related to land differed fundamentally from concepts of land ownership and tenure that had been developed in feudal England and had led to a system where the monarch (the Crown) held absolute sovereign title to all land.

[111] The concepts of *Dominium* and *Imperium*[92] had no counterpart in tikanga Māori. In the Māori view of creation, the central figures are Papatūānuku (the earth mother) and Ranginui (the sky father) with the earth being created when these two were thrust apart by their children. They are regarded in tikanga as ancestors and one does not own one's ancestors. Ancestors are the source of whakapapa and whakapapa is a tikanga that dictates Māori societal norms and relationships.[93] In tikanga rather than there being an emphasis on exclusive individual or collective title to any part of land, the focus was on the use of and relationship with resources of the land and sea including manaakitanga.[94] Perhaps most importantly for this litigation the concept of exclusion was fundamentally inconsistent with the tikanga values of manaakitanga and whakapapa.

[112] As discussed above, both Ms Roff and Mr Finlayson sought to have the word "holds" infused with European proprietorial concepts. They both submitted that it was necessary for an applicant to establish more than that a system of tikanga existed in relation to the takutai moana, and further submitted that this could only be done if the

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92 Discussed above at [66] and [72].

93 Discussed in greater detail in Part IV of this decision.

94 Manaaki is derived from mana and aki portrays the idea that mana is fulfilled by reciprocal actions. That is, the giving and acceptance of kindness to others gives mana to both the host and the guest. See 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 205.

evidence established that the applicants held the specified area in a manner consistent with western proprietorial concepts.

[113] Ms Roff put the submission this way.

> This is because s 58(1)(a) is concerned with territorial rights and, as such, the Court must be satisfied the evidence shows a proprietary or proprietary-like holding of the specified area of the CMCA according to tikanga.

[114] Mr Finlayson submitted:

> Hold is not defined in MACA but is frequently utilised in other property legislation in relation to proprietary interests in land. For example, the Property Law Act 2007.

[115] He further submitted:

> A plain reading of this section (s 58(1)(a)) requires "hold" to be interpreted as having a similarly proprietary nature to the usage of the word in other property legislation.

[116] Counsel placed some emphasis on the importance of the concept of control, particularly in the sense of excluding others, when considering whether a specified area was "held".

[117] Counsel for the applicants sought to interpret s 58(1)(a) in a different way. They submitted that the phrase "Holds the specified area in accordance with tikanga" must be read as a whole and that the focus of the Court's inquiry should be on the concept of tikanga rather than any attempt to interpret the concept of "holds" in accordance with western notions of property law.

[118] The applicants referred to case law which cautioned against interpreting issues relating to customary land title by reference to common law concepts of property; they distinguished the Canadian and Australian decisions from which the concept of "control" was drawn; they noted that the rights conferred by the Act were far from standard property rights and were also subject to rights such as public access, navigation and recreational fishing rights; submitted that a restoration of a role for the Treaty was a central feature of the Act, and made extensive submissions as to how the takutai moana was "held" in accordance with tikanga.

*Analysis*

[119] As set out above at [28], the Act has four purposes. None of those stated purposes are consistent with an interpretation of the word "holds" in a way that would incorporate concepts of proprietorial interests as recognised either at common law or in other statutes dealing with land.

[120] The last three of the stated purposes (recognition of the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as tangata whenua, provision for the exercise of customary interests, and acknowledgement of the Treaty of Waitangi), favour an interpretation which focuses on tikanga and the exercise of that tikanga by the claimant groups rather than any reference back to common law or statutory property rights.

[121] In *Attorney-General v Ngāti Apa*,[95] the Court of Appeal endorsed the comments of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*,[96] in relation to the identification of customary property interests. The Court of Appeal said:[97]

> Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria* emphasised at p 404 that ascertainment of the right according to native custom "involves the study of the history the particular community and its usages in each case". He recognised, at p 403, the need for caution in applying English legal concepts to native property interests, speaking of the necessity for "getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle". The danger of such assumption cuts both ways: it may be dismissive of customary interests less than recognisable English legal estates; and it may cause lesser customary interests to be inflated to conform with familiar legal estates.

[122] This Court in *Re Tipene* acknowledged that customary interests to land and associated waterways including the sea, were different to English land law concepts. The Court quoted from a 2003 Waitangi Tribunal report its observations about such rights which concluded with the statement that such rights:[98]

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95 Above n 15.
96 *Amodu Tijani v Secretary, Southern Nigeria*, above n 66.
97 At [33].
98 *Re Tipene* above n 3, at [15] quoting the Waitangi Tribunal in *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (WAI 145, 2003) at 2.2.

> …they formed a complex web not easily understood by those familiar with a markedly different English system of land tenure.

[123] The wording in s 58(1)(a) is similar to the wording used to define Māori customary land in Te Ture Whenua Māori Act 1993 which defines such land as being "held by Māori in accordance with tikanga Māori".[99]

[124] This wording was considered by the Māori Land Court in the case of *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*.[100] Previously Te Ture Māori Whenua Act required the Court to make decisions not in accordance with tikanga Māori but in accordance with "the ancient customs and usages of Māori people" which, as a result of what became known as "the 1840 rule", had been interpreted by the Courts as being the customs and usages that existed as at 1840.[101]

[125] The Court held that it was not appropriate to:[102]

> …make its determination from a Pākehā or Court perspective of Māori customs and usages – from the outside looking in but was required to make its determination according to tikanga Māori – from the inside.

[126] Specifically, in relation to the word "held" in s 129(2)(a) of the Te Ture Whenua Māori Act, the Court said:[103]

> The important word here is "held". There is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Māori.

[127] Section 3 of the Te Ture Whenua Māori Act (as it existed at the time of the decision in *John da Silva*) defined tikanga as meaning "Māori customary values and practices". This is the same definition of tikanga as in s 9 of the Act.

[128] Because the types of recognition orders available under the Act relate to sui generis property interests that are very different to, and much more limited than the fee simple type of property rights available under western law, it is wrong to attempt

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99 Te Ture Whenua Māori Act 1993 at s 129(2)(a).

100 *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212 (25 TTK 212).

101 At 238.

102 At 215.

103 At 217.

to import into s 58(1)(a) a requirement that an applicant demonstrate something in the nature of a proprietorial interest that might be consistent with other interests in land recognised by common law or statute.

[129] Interpreting s 58(1)(a) in this manner would also be inconsistent with the stated purpose of the Act, particularly recognition of the mana tuku iho of applicant groups as tangata whenua, provision for the exercise of customary interests in the takutai moana and acknowledgement of the Treaty of Waitangi. It is also difficult to see how it would achieve the purpose of implementing a durable scheme to protect all the legitimate interests of New Zealanders in the takutai moana,[104] as it would severely restrict the possibility of a successful application.

[130] Holding an area of the takutai moana in accordance with tikanga is something different to being the proprietor of that area. Whether or not an applicant group has established that they held an area in accordance with tikanga is to be determined by focusing on the evidence of tikanga, and the lived experience of that applicant group. The exercise involves looking outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European legal concepts.

[131] I accept that an applicant must establish more than simply that a system of tikanga in relation to the takutai moana existed. However, the identification of that tikanga is the essential first step in the process. Whether a specified area can be said to be "held" in accordance with that tikanga, involves a factual assessment that will be heavily influenced by the views of those who are experts in tikanga.

[132] Williams J, writing extra judicially in "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law",[105] endorsed observations made by the Environment Court in *Ngāti Hokopu ki Hokowhitu v Whakatāne District*

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[104] Section 4(1)(a) of the Act.
[105] Above n 68, at 21.

*Council*[106] in relation to the ascertainment of particular Māori values, where the Court had said:[107]

> In our view there can be some meeting of the two worlds. We start with the proposition that the meaning and sense of a Māori value should primarily be given by Māori. We can try to ascertain what a concept is (by seeing how it is used by Māori) and how disputes over its application are resolved according to tikanga Ngāti Awa [the relevant iwi in the area]. Thus, in the case of an alleged waahi tapu we can accept a Māori definition as to what that is (unless Māori witnesses or records disagree among themselves).

[133] Counsel for the Attorney-General and the Landowners Coalition, in their closing submissions, both submitted that in order to establish that a specified area had been "held" in accordance with tikanga, it was necessary for the applicant to show an intention and ability to "control" the relevant area of the takutai moana.

[134] In support of this proposition, counsel relied on Canadian jurisprudence principally the decisions of the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*[108] and *Delgamuukw v British Columbia*.[109]

[135] Ms Roff submitted that:

> Canada has a similar test [to that in the Act] for proving Aboriginal title. It requires land to have been exclusively occupied by the Aboriginal group prior to British sovereignty and, where present occupation is relied on as proof of occupation pre-sovereignty, continuity of occupation between present and pre-sovereignty occupation.
>
> The Supreme Court of Canada has considered that to "sufficiently occupy the land for the purpose of title, the Aboriginal group … must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal". Those Acts must "indicate a permanent presence and intention to hold and use the land for the group's purposes". That Court stressed that "exclusivity of occupation" requires "intention and capacity to control the land". It is submitted that "capacity" means "ability".
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> Similarly, English common law cases relating to possessory title in the foreshore and seabed place considerable weight on acts of exclusion and

106 *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council* [2002] NZEnvC 421; (2002) 9 ELRNZ 111.
107 At [43].
108 *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256.
109 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

> physical control, or on occupation and use of the marine environment by the construction and control of structures (citations omitted).

[136] Counsel acknowledged that the Supreme Court of Canada was considering native title over dry land in British Columbia rather than New Zealand's marine and coastal area, but submitted that the approach taken could inform consideration of whether exclusive use and occupation of the takutai moana had been established.

[137] The main problem in relying on this Canadian Supreme Court decision is that what the Court was considering was customary or Aboriginal title to land. The consequences of a declaration of the existence of customary title to land in Canada are very different to the consequences of a declaration of CMT in Aotearoa/New Zealand.

[138] Ms Feint QC, counsel for Ngāti Ruatakenga, correctly submitted in her closing submissions:[110]

> The threshold at which the Canadian and Australian tests are set is influenced by the legal and constitutional consequences that flow from a finding of customary title in that jurisdiction. If an applicant group obtains customary title in Canada, they have the ability to exercise exclusive possession at common law of the area subject to their title; and the ability of the Canadian State to regulate that area or interfere with their rights is subject to fiduciary duties and a detailed proportionality test similar to that found in Article 1 of the Canadian charter (see *Tsilhqot'in Nation v British Columbia* at [85]-[88]).

[139] As explained at [33] above, CMT under the Act is not the equivalent of customary title to the takutai moana. It is not property that can be owned, it is subject to the exercise of substantial rights by others including access, navigation and fishing rights,[111] and whether the statutory test is met is to be decided not in accordance with common law or other principles addressing customary title to land, but in accordance with the tikanga that is applicable to the specified area of the takutai moana.

[140] In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, Cooke P (as he then was) said:[112]

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110 See also Chapter Three in Paul McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011) for a discussion of the different emphasis that the Canadian and Australian cases put on Aboriginal law and custom as opposed to common law concepts when determining customary title.

111 These rights are set out in detail in ss 26-28 of the Act.

112 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General,* above n 64, at 24.

> The nature and incidents of Aboriginal title are matters of fact dependent on the evidence in any particular case.

[141] Equally, the question of whether the requirements of s 58(1)(a) of the Act have been met is a question of fact, and the focus of the factual inquiry is on tikanga.

[142] As is discussed below, the concept of control of land by exclusion from it of others not of the applicant group, is not a concept that sits comfortably with core tikanga values such as manaakitanga and whanaungatanga.

[143] In Australia, rights to customary title are statutorily prescribed and not as strong as in Canada, but unlike under the Act, there is a right to statutory compensation if a State or the Federal Government has expropriated any land held by Aboriginal groups.[113]

*Conclusion*

[144] The task for the Court in considering whether the requirements of s 58(1)(a) of the Act have been met is therefore not to attempt to measure the factual situation against western property concepts or even the tests at common law for the establishment of customary land rights. It is also not particularly helpful to attempt to apply the Canadian and Australian jurisprudence on Aboriginal title. The critical focus must be on tikanga and the question of whether or not the specified area was held in accordance with the tikanga that has been established.

**Exclusivity**

*Shared exclusivity*

[145] Section 58(1)(b)(i) requires exclusive use and occupation of the specified area from 1840 to the present day. Such use and occupation must be without substantial interruption.

[146] Counsel for the Attorney-General, in closing, submitted that there was evidence to suggest that most, if not all of the applicant groups, could establish use

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113 See *Northern Territory v Griffiths* [2019] HCA 7 at [3].

and occupation in respect of at least part of the application area as at 1840. It was submitted that the issue for the Court was whether that use and occupation had been exclusive and continuous since 1840 without substantial interruption.

[147] It was further submitted that an objective assessment was required of:

(a) the nature of the use and occupation; and

(b) whether it was continuous exclusive use and occupation.

[148] Ms Roff submitted that this analysis would be "… likely to be influenced by tikanga Māori, including whakapapa, rāhui and the principle of ahi kā". It was further submitted that in undertaking this analysis, regard must be had to the context in which the claim was being bought. This was said to include geographical landscape, remoteness, environmental factors and changes in technology.

[149] Reference was made to the test in the Canadian jurisprudence relating to the proving of Aboriginal title. Relying on the Canadian jurisprudence, it was submitted on behalf of the Attorney-General that the words "exclusive use and occupation" in the Act required the applicant to show an intention and ability to control the specified area against third parties. The submissions expressly referred to *Tsilhqot'in Nation v British Columbia* where the Supreme Court of Canada had said "Exclusivity of occupation "requires" intention and capacity to control the land".[114]

[150] For the reasons discussed at [55] and [118]-[144] above, tests promulgated in Canadian cases considering a different type of property right to CMT are of limited relevance.

[151] The Attorney-General's submissions went on to assert:

> …English common law cases relating to possessory title in the foreshore and seabed place considerable weight on acts of exclusion and physical control or on occupation and use of the marine environment by the construction and control of structures.

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114 Above n 108, at [48].

[152] Again, as discussed, English common law cases about possessory title relate to a concept very different to the much more limited property right conferred by CMT in the Act, let alone the concepts in tikanga Māori.

[153] Counsel for the Attorney-General acknowledged the possibility of the existence of a concept of "shared exclusivity" in relation to the use and occupation of the takutai moana, and further submitted that a positive act which might indicate exclusivity in the specified area was the placing of rāhui. It was conceded that there was extensive evidence put forward by the applicant groups in relation to the placing of rāhui within their customary rohe and that this evidence showed generally that rāhui were complied with by both Māori and non-Māori.

[154] Counsel for the Attorney-General also acknowledged that the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* raised the possibility of several groups holding an area of dry land on the basis of "shared exclusivity".[115] It was submitted that shared exclusivity was permitted under the Act.

[155] On the evidence in this case, counsel for the Attorney-General conceded that there were areas of shared interest in the application area relating to the seaward boundary, Ōhiwa Harbour and Whakaari. However, this concession was qualified by a significant caveat. It was submitted by counsel for the Attorney-General that before the Court could find that a number of applicants shared exclusivity to all or part of the application area, it was necessary that their applications be formally combined or joined so as to form one "applicant group".

[156] Conversely, counsel for Te Rūnanga o Ngāti Awa, Ms Irwin-Easthope, contended that if shared exclusivity is available under the Act, then it must be the case that it can be shared among the applicant groups as otherwise, other than on amendment to the pleadings, shared exclusivity would hardly ever be able to exist under the Act as it would only be able to apply to within one applicant group.

[157] Counsel for the Attorney-General submitted that the nature of the rights and interests of these groups for the purpose of recognising CMT may not necessarily be

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[115] Above n 109, at [158].

of equal status if there was recognition and agreement amongst the group as to the different interests. However, Ms Roff stated that:

> The inability of one iwi, hapū or whānau to recognise the rights and interests of another to the same shared specific area will frustrate a shared exclusivity claim for CMT.
>
> In the present case, whilst there is general acknowledgement that other iwi, hapū and whānau occupy and use overlapping areas, such as around Ōhiwa Harbour, there remains disagreement between some of the applicant groups as to the nature of the occupation and use and whether it was exclusive.

[158] In particular, counsel relied on the evidence given by Felicity Kahukore Baker on behalf of Te Ūpokorehe Treaty Claims Trust which asserted that Te Ūpokorehe held mana over Ōhiwa Harbour, and that any rights other groups claim to exercise in the area are done so under the mana of Te Ūpokorehe.

[159] Counsel also noted that there was no recognition or acceptance by Ms Baker that groups other than Te Ūpokorehe held mana in that area. It was submitted that "This creates a fundamental issue for the application of shared exclusivity across this area.".

[160] The other difficult area identified by counsel was the area from Maraetōtara to Ōhiwa Harbour. Ms Roff noted the position of Te Rūnanga o Ngāti Awa that, although they acknowledged shared customary interests in Ōhiwa Harbour, they claim to hold exclusive customary interests from Maraetōtara to Ōhiwa Harbour.

[161] Although the conclusion of the availability of "shared exclusivity" for the purposes of CMT is driven by a consideration of whether the specified area is held in accordance with tikanga rather than the application of Canadian or Australian jurisprudence, such a conclusion is not inconsistent with that jurisprudence.

[162] Even in the context of considering customary title to land, the Canadian Supreme Court in *Delgamuukw*, the Court accepted that multiple groups could share title. Chief Justice Lamer, speaking for himself and Cory and Major JJ said:[116]

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116 *Delgamuukw*, above n 109, at [158].

In their submissions, the appellants pressed the point that requiring proof of exclusive occupation might preclude a finding of joint title, which is shared between two or more Aboriginal nations. The possibility of joint title has been recognised by American courts: *United States v Santa Fe Pacific Railroad Co.,* 314 US339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognising that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two Aboriginal nations lived on a particular piece of land and recognised each other's entitlement to that land but nobody else's.

[163] In the same judgment, La Forest J, speaking for himself and L'Hureux-Dube J said:[117]

…The way I see it, exclusivity means that an Aboriginal group must show that a claimed territory is indeed *its* ancestral territory and not the territory of an unconnected Aboriginal society. On the other hand, I recognise the possibility that two or more Aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy. The result may be different, however, in cases where one dominant Aboriginal group has merely permitted other groups to use the territory or where definite boundaries were established and maintained between two Aboriginal groups in the same territory.

[164] Lamer CJ noted in *Delgamuukw*:[118]

…Aboriginal title has been described as sui generis in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also sui generis in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

[165] Similarly, at [190], La Forest J noted:

It follows from these cases that the aboriginal right of possession is derived from the historic occupation and use of ancestral lands by aboriginal peoples. Put another way, "aboriginal title" is based on the continued occupation and use of the land as part of the aboriginal peoples' traditional way of life. This sui generis interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts.

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117 At [196].
118 At [109]. See also Lamer CJ's observations at [156].

[166] In terms of the Canadian jurisprudence, it is also clear that where competing claimant groups completely deny each others' history in claims to title, shared exclusivity, on the facts, cannot exist. This does not require the differing applicant groups to have necessarily been amicable throughout their history but does entail some acknowledgment of the other's interest. As noted by one of the leading Canadian scholars on shared exclusivity, Professor Kent McNeil:[119]

> But why is amicability even a requirement? Surely the issue to be determined is whether two or more Aboriginal groups together made exclusive use of the land and excluded others who did not have their permission to enter. They could be in exclusive occupation even if their relationship was not free of conflict.

[167] In *Ahousaht Indian Band v Attorney-General of Canada*, the Supreme Court of British Columbia said:[120]

> The Claim Map sets out the Territories that each of the plaintiff nations individually claims Aboriginal title to … there are large areas of overlap …
>
> The problem with these areas of overlap is that while resource rights … are non-exclusive and can legally overlap, Aboriginal title is exclusive so cannot legally overlap.
>
> Although it is possible to have areas of shared Aboriginal title, no such areas exist on these facts and shared title has not been pled. Instead each band believes that they have title exclusively and that the opposing band is wrong …

*Conclusion*

[168] Unlike the Western proprietary concepts that counsel for the Attorney-General and the Landowners Coalition sought to import from the Canadian jurisprudence into the Act (and which, as discussed above, were inconsistent with the Act and the notion of holding the area in accordance with tikanga), it is consistent with the purpose of the Act and the focus in s 58(1) for the concept of shared exclusivity to be available in New Zealand. Therefore, on this particular issue, I will follow a similar approach to that taken by the Canadian Courts.

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119 Kent McNeil "Exclusive Occupation and Joint Aboriginal Title" (2014) 48 University of British Columbia Law Review 821 at 855.

120 *Ahousaht Indian Band v Attorney-General of Canada* 2007 BCSC 1162 at [28]-[29].

[169] I have concluded that the structure of the Act is consistent with a jointly held CMT rather than two overlapping CMTs for the same area each held by different parties. If there were multiple CMTs for the same area then there would be practical problems with the exercise of the rights which flow from the grant of CMT. CMT confers on an applicant group the right to use, benefit from or develop a CMT area including deriving a commercial benefit. CMT rights can also be delegated and transferred. There would also be practical problems if two groups held CMT and wanted to exercise the various rights conferred by s 62.

[170] Jointly holding CMT avoids some of these problems. There will clearly need to be co-operation and agreement between the holders of joint CMT but these are not insurmountable issues. Tikanga has in the past provided for the exercise of a complex web of overlapping rights.[121] It should be able to assist in parties holding CMT on a joint or shared exclusive basis working out how to jointly exercise the rights conferred by a grant of CMT.

*Ownership of abutting land*

[171] Mr Finlayson, counsel for Landowners Coalition submitted that an important question was whether the applicant was able to exercise control of a specified area against any third party. He gave an example of an applicant who owned land abutting the foreshore and seabed being able to control access to that part of the foreshore and submitted that this "… would be very good evidence of an intention to control the area against a third party, in this case a stranger." He then submitted that this could:

> be contrasted with a public beach near Ōpōtiki to which everyone has access and where no person would be able to indicate to a third party that they would not have access.

[172] The issue of ownership of abutting land is one significant difference between the Act and its predecessor, the Foreshore and Seabed Act. The Act modifies the position existing under the earlier legislation,[122] by stating that ownership of land abutting all or part of the specified area is only a matter which may be taken into account in determining whether CMT exists rather than a prerequisite. Its relevance

121 See [122] above.
122 Section 59(1)(a)(i).

will depend very much on the facts. Here, it is of minimal significance. To the extent that the applicant groups no longer own abutting land, it was as a result of confiscation rather than voluntary sale. As discussed at [193]-[207], loss of abutting coastal land did not sever the applicants' connection with the takutai moana.

[173] It is also difficult to see how the ability to control access to abutting land could be determinative of the existence of CMT. That is because the Act provides that CMT is specifically subject to extensive general rights of access as well as navigation and fishing rights.[123]

[174] In urging upon the Court the same western proprietary approach to that taken by the Canadian Courts, counsel overlooks the fact that the takutai moana is not used or occupied in anything like the same way that land is. More importantly, such an interpretation would undermine the test in s 58(1)(a) to the effect that the specified area was held in accordance with tikanga. The ability to exclude others in the sense propounded by counsel for the Attorney-General and the Landowners Coalition, is at odds with the important tikanga values of whanaungatanga and manaakitanga.

[175] The evidence of Ngāti Ruatakenga tohunga and kaumatua, Mr Te Riaki Amoamo, on the topic of exclusivity was:

> We have the right to exercise our customary authority (mana and rangatiratanga) in relation to our own seascape. For the same reason, we would not go onto other tribal (iwi) seascapes because we would be challenged. Our customary areas are not as rigid as Western boundaries however. Other Whakatōhea hapū can come into our sector, for instance, we wouldn't stop Ngāti Patu coming to fish in our area. The tikanga is that we share the kai because our hapū of Whakatōhea are related to each other by whakapapa, and it is part of our collective responsibility to care for our whānaunga, as they do for us (this is known as manaakitanga). In that respect we are a tribal collective.

[176] Mr Amoamo went on to explain that within the Whakatōhea takutai moana, different hapū had different rights and responsibilities. He gave an example through the fact that if there was a drowning within a particular part of the rohe associated with his hapū then he would have the mana to conduct the necessary karakia and to impose and lift a rāhui. He also acknowledged that different hapū would have responsibilities

[123] See ss 26-28.

as kaitiaki. This was illustrated by the fact that Ngāti Rua would go to Ōhiwa to gather kaimoana, but that other hapū performed the role of kaitiaki in this area. He emphasised that within the Whakatōhea takutai moana, there were no hard lines and that hapū did not have exclusive areas. He specifically stated: "Our sea territory is shared in Whakatōhea". That was one reason why he supported the six Whakatōhea hapū (those identified by the pukenga in their poutarāwhare) as jointly holding CMT.

[177] The evidence before the Court was that the sharing of access to resources was not limited just to the six hapū of Whakatōhea but in certain areas (for example, Whakaari and Western Ōhiwa Harbour) extended to other iwi.

[178] Mr Finlayson was dismissive of the concept of "shared exclusivity". He submitted:

> On the face of it, a claim to shared exclusivity is oxymoronic. One can however theoretically conceive a situation where two whānau, as at 1840, agreed that they should share exclusively a specified part of the common marine and coastal area and that together they shall represent to any other person that they have a shared exclusive use and occupation. There would of course have to be evidence for such an arrangement, and it cannot be said that the default position for competing applicant groups is that, if they cannot show [that] a specified area has been exclusively used and occupied by an applicant group on its own, then there may be a shared exclusivity as a consolation prize. Competing applicant groups cannot be said by default to have shared exclusivity.

[179] It is correct to submit that shared exclusivity is not a "default" outcome where two competing applicant groups are each claiming they have exclusive rights.

[180] However, it goes too far to suggest that there must have been some express agreement in 1840 of which there is evidence before there could be a finding of shared exclusivity. That submission ignores the context and also the role of tikanga. The pukenga have found that as a matter of tikanga, the takutai moana between Maraetōtara and Tarakeha and out to Whakaari, was shared between the six Whakatōhea hapū. That is consistent with the evidence given by tohunga such as Te Riaki Amoamo referred to above.

[181] As I have discussed earlier in this judgment, the nature of joint title or shared exclusivity under CMT must also be considered from a tikanga perspective. In the Canadian context, this is usefully described by Professor McNeil:[124]

> …the Chief Justices' characterization of Aboriginal title as sui generis also implies that, whether unshared or joint, the title needs to be considered internally as well as a unique property interest that has to be defined on its own terms. We therefore should not expect joint Aboriginal title to conform internally to the common law concepts of joint tenancy or tenancy in common.
>
> Chief Justices Lamer and McLachlin have told us that, as Aboriginal title arises from the historic relationship between the Crown and Aboriginal peoples, both their legal systems have to be taken into account. This is the approach they have taken to defining Aboriginal title externally. But internally, it seems to me that the common law is not relevant because control, management, and use of Aboriginal title land is a matter for the titleholders themselves to determine, which must entail self-government and the application of their own laws. Where joint title is concerned, the internal relationship is between the joint Aboriginal titleholders, not with the Crown. Accordingly, the legal systems of the Aboriginal titleholders and the interactions of those legal systems should inform the internal dimensions of joint title. This approach is consistent with the way the rights of the members of an Aboriginal group having unshared Aboriginal title govern distribution and use of lands among themselves in accordance with their own internal laws.

[182] Taking this approach to the concept of shared exclusivity, the "evidence for the arrangement" is that which was accepted by the pukenga in arriving at their conclusions. There is no need for evidence of some formal agreement or understanding that goes beyond the tikanga findings.

[183] As discussed above, Ms Baker of Te Ūpokorehe Treaty Claims Trust has a different view to the other five Whakatōhea hapū as to the basis upon which certain areas were held in accordance with tikanga. It is open to both the pukenga and the Court to come to a different view from Ms Baker as to what the facts established.

[184] A finding of shared exclusivity amongst the six Whakatōhea hapū is not of a "contemporary arrangement entered into for the purposes of this proceeding". That, as Mr Finlayson rightly submits, would not meet the requirements of the Act. Five of the six hapū identified in the poutarāwhare of the pukenga accepted that the takutai

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124 Kent McNeil "Exclusive Occupation and Joint Aboriginal Title", above n 119, at 863. (footnotes omitted).

moana was shared in accordance with tikanga. Ūpokorehe did not dispute the fact that the other hapū shared the area, their dispute was the basis upon which this was done.

[185] The original application by Claude Edwards was filed on behalf of all of the Whakatōhea hapū. It included Ūpokorehe.[125] The application filed on behalf of the Whakatōhea Māori Trust Board also proceeded on a similar basis. There are therefore applications before the Court consistent with the conclusion that there was shared exclusivity as between the six hapū.

[186] On this basis, it cannot be asserted that the conclusion that six hapū shared exclusivity of the specified area is some sort of 'default' position manufactured by the Court to deal with the fact that no single applicant exclusively held the specified area.

[187] As noted by the pukenga in their report, the issue of how any CMT is to be held is a matter for future discussion between the parties and finalisation in the second hearing. The pukenga were hopeful that the poutarāwhare adopted by them might allow for the recognition of different interests as between the hapū. That is possible. It is also possible that Ūpokorehe might not accept the Court's adoption of the pukenga findings and not wish to be part of any CMT which they jointly held with other hapū. That would obviously be a matter for them. However, the Court hopes that, as the pukenga encouraged, there might be discussions between parties leading to an agreed outcome in accordance with tikanga.

**Substantial interruption**

[188] Although s 58(1)(b) sets the test for CMT as requiring the applicant to have exclusively used and occupied the specified area from 1840 "without substantial interruption", the Act does not define what substantial interruption might mean.

[189] Counsel for the Attorney-General submitted that the following matters might, in the present case, amount to substantial interruption of the applicants' exclusive use of the takutai moana:

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[125] See n 4 above.

(a) raupatu;

(b) resource consents in the application area granted prior to 1 April 2011;

(c) permanent structures in the application area; and

(d) third party use and occupation.

[190] Relevant factors in assessing whether any or all of these matters constituted a substantial interruption were submitted as being the:

(a) duration of the matter being considered;

(b) frequency with which an interrupting activity took place;

(c) overall extent of the activities; and

(d) nature of the activity itself and how it affected (or affects) the applicant groups.

[191] Mr Finlayson noted that the phrase "substantial interruption" had been taken from jurisprudence on Australian native title. He accepted that the Australian jurisprudence was "quite distinct" from the New Zealand test because, in Australia, the concept really deals with interruption of a cultural connection whereas in New Zealand, "…any substantial interruption must relate to exclusive use and occupation".

[192] He submitted that factors relevant to considering whether there had been substantial interruption included the development of harbours, wharves, jetties, and other infrastructure such as pipes; the regulation of the relevant part of the coast by either local or regional government, and the effect of raupatu. He did acknowledge that raupatu related to dry land but not land below the mean highwater mark.

*Raupatu*

[193] Extensive evidence was given by all applicants on the subject of raupatu and the effect that it had on the relationship of the applicants and the takutai moana.

[194] The particular raupatu referred to was that which occurred in 1866. The Crown confiscated some 448,000 acres of land in the eastern Bay of Plenty which included all the best agricultural land and all of the land abutting the coastline.[126] Nominally the purpose of the New Zealand Settlements Act 1863 was to punish "rebels" for participating in the land wars although land belonging to rebel and loyal Māori alike was confiscated and subsequently returned, although the groups to which the land was "returned" were not necessarily those from whom the land had been confiscated. In reality, as well as "punishing" Māori, this strategy provided the Crown with land it could either sell for a profit or dispose of as a reward to settlors who had participated as members of the various "irregular" forces who had fought in the land wars on the side of the Crown.[127]

[195] The practice of confiscation was not unique. Writing about the invasion of Waikato in 1863, Vincent O'Malley has stated:[128]

> Plans for the invasion were agreed between Grey and Colonial Ministers in June 1863. An integral part of the scheme involved confiscating the lands of all Māori who resisted the invading troops. Not only would this ensure that the war turned a profit, through the sale of confiscated territory to settlers, but it would also cement Crown control of the newly conquered areas, which would have military settlers planted on them. The British had first adopted a model of confiscation and occupation in Ireland in the 17th century. Grey had served in Ireland as a young officer in the army and between his two New Zealand governorships had also implemented a similar policy during his time in charge of the Cape Colony (now part of South Africa).

[196] The submissions on behalf of the Attorney-General noted the recent decision in *Te Ara Rangatū O Te Iwi O Ngāti Te Ata Waiohau Incorporated v The Attorney-General*,[129] where the High Court held that the confiscation of land under the 1863

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126 Ranginui Walker *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 2, at 125.
127 At 123.
128 Vincent O'Malley *The New Zealand Wars Ngā Pakanga o Aotearoa*, (Bridget Williams Books, 2019), at 105.
129 *Te Ara Rangatū O Te Iwi O Ngāti Te Ata Waiohau Incorporated v The Attorney-General* [2020] NZHC 1882.

Act in the Waikato area was not invalid on account of failing to comply with the terms of the 1863 Act, nor ultra vires, because such actions were subsequently validated by the New Zealand Settlements Acts Amendment Act 1866.

[197] However, whether the raupatu was lawful when it took place, ultra vires its empowering legislation or subsequently validated by amending legislation is not a matter that needs to be resolved in this case. Neither is the issue of whether or not the raupatu was in breach of the Crown's obligations under the Treaty of Waitangi.

[198] Whakatōhea do not yet have a Tribunal decision on their raupatu claims. However, neighbouring iwi do. In its *Ngāti Awa Raupatu Report*, the Waitangi Tribunal described the Crown confiscation of Ngāti Awa lands as a breach of the Treaty of Waitangi.[130] Similarly, the Ngāti Awa Claims Settlement Act 2005 specifically acknowledges that confiscation of Ngāti Awa lands as part of the raupatu was unjust, unconscionable and a breach of the Treaty of Waitangi. The Tūhoe Claims Settlement Act 2014 contains similar wording.

[199] There is no doubt that the raupatu resulted in severe and enduring economic consequences on Whakatōhea. Up until the 1860s, Whakatōhea iwi and rangatira had been heavily involved in the coastal trade, both owning and crewing a number of sailing vessels that traded between Ōpōtiki and Auckland (and other places). Evidence was produced at the hearing of Hira Te Popo of Ngāti Ira, who owned a flour mill that processed local wheat into flour for transport to Auckland.

[200] The confiscation, with its associated extensive looting and destruction of Māori assets, clearly produced widespread economic hardship.[131] However, it did not substantially disrupt the relationship that the applicants had with the takutai moana.

[201] Although many of the hapū of Whakatōhea were displaced from their traditional coastal settlements as a result of the confiscation, reservations were allocated at Ōpape, the Hiwarau Block and Hokianga Island in Ōhiwa Harbour.

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130 Waitangi Tribunal *The Ngāti Awa Raupatu Report* (WAI 46, 1999) at 1.4.

131 *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 2, at 141-142; Ewan Johnston *Ōhiwa Harbour* (WAI 894, A116, 2003) at 134; and Judith Binney *Encircled Lands: Te Urewera 1820-1921* (Bridget Williams Books, 2009) at 110.

[202] Mark Derby, the historian called by the Attorney-General, acknowledged the evidence given on the part of the applicants to the effect that far from interrupting the use and occupation of the takutai moana by the various applicant groups, the raupatu increased their dependence on the takutai moana particularly as a source of food given the confiscation of all of their cultivated lands and the destruction of the other assets such as the flour mill and farm machinery that had been used to produce food.

[203] In closing submissions, counsel for the Attorney-General acknowledged that there was no evidence to suggest that any of the applicant groups living in the application area at the time of raupatu and subsequently, were denied access to the takutai moana, or its resources as a result of raupatu. The submissions note that with the creation of the Ōpape Reserve and the Ōhiwa Harbour Reserves, Ngāti Rua and Ūpokorehe were not, in fact, displaced from their traditional tribal lands.

[204] Given the consistency of the conclusions drawn by all of the expert historians, and the evidence of the applicants, I am satisfied that raupatu did not substantially interrupt the holding by the applicants of the takutai moana in accordance with tikanga.

[205] The raupatu did not physically remove hapū from the coast, but even the destruction of the larger waka used for offshore fishing, had relatively short-term consequences.

[206] In terms of tikanga, the confiscation of lands and destruction of property would not have severed the connection with the takutai moana. That is because Whakatōhea hapū continued to exercise their rights in respect of the takutai moana.

[207] The issue of the rights that a people subjected to raupatu who remained in the area was considered by the Waitangi Tribunal in the *Rekohu Report*.[132] That report dealt with the subjugation and enslavement of Rekohu Moriori by Ngāti Mutunga and Ngāti Tama. The report supports a conclusion that unless the group were all killed, rights were likely to remain where the group remained in the area and continued to exercise ahi kā.[133]

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[132] Waitangi Tribunal *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (WAI 64, 2016).

[133] At 143.

*Resource consents granted prior to 1 April 2011*

[208] The existence of resource consents issued prior to 1 April 2011 and the fact that Local or Regional Councils had regulated part of the coastal marine area are appropriately dealt with together. Section 58(2) of the Act provides:

> For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between–
>
> (a) the commencement of this Act; and
>
> (b) the effective date.

[209] Counsel for the Attorney-General submitted that the wording of s 58(2) gave rise to an inference that a resource consent for an activity granted before the commencement of the Act could amount to a substantial interruption of the applicant groups' use and occupation of the takutai moana.

[210] Attached as an appendix to the Attorney-General's closing submissions was a list of all current resource consents relating to the specified area that was the subject of the applications, together with a summary of those consents.

[211] The summary showed that the majority of the resource consents related to Ōhope, Ōhiwa Harbour, Ōpōtiki Harbour, and Waiōtahe Beach. Reference was also made to the resource consents held by Eastern Sea Farms for the operation of a 3,800 hectare marine farm, situated approximately 8.5 kilometres offshore from Ōpōtiki. The summary noted that there were no resource consents at Tirohanga and none at Ōpape.

[212] The resource consents relating to Ōhope are for facilities which support the Ōhope township such as resource consents controlling streams, for erosion protection, and for the provision of stormwater and sewerage outlets. Other resource consents relate to recreational activities and commercial fishing off Ōhope. The most contentious resource consent was said to relate to the sewerage outfall 550 metres offshore from the mean highwater springs off Ōhope Beach, and the Ōhope sewerage

plant. The information provided showed that there had been extensive involvement of local iwi and hapū in relation to these and other resource consents.

[213] In relation to the Ōhiwa Harbour, it was noted that various consents were held by local councils, the Bay of Plenty Regional Council and third parties such as the proprietor of the Ōhiwa Marine Oyster Farm. The oyster farm consent allowed occupation of 20,100 square metres in Ōhiwa Harbour.

[214] In relation to Ōhiwa Harbour, there are resource consents relating to wharf construction, the construction of slipways and boat ramps, and the construction of other structures in the takutai moana including for the laying of cables, the building of a café over the foreshore and seabed, and the creation of sea walls.

[215] There was evidence that, at least from the 1990s, in relation to applications for resource consents involving the takutai moana, local authorities consulted with local iwi and hapū, including Whakatōhea, Ūpokorehe, Ngāti Awa and Tūhoe. The information indicated that many of the local iwi and hapū had carried out a kaitiakitanga role in relation to Ōhiwa Harbour with Ūpokorehe being prominent and having two resource consents themselves, one relating to erosion protection works in respect of the Tokitoki midden site and the other relating to mangrove management in Ōhiwa Harbour.

[216] In relation to Waiōtahe Beach, Ngai Tamahaua were noted as having opposed, along with Ūpokorehe, a subdivision which cut across the urupā and wāhi tapu known as Te Arakotipu.

[217] In relation to the Eastern Sea Farms, marine farm consents information showed that although the Whakatōhea Māori Trust Board were the 54 percent owners of Eastern Sea Farms Limited, and the application was expressly supported by Ngāti Ngāhere, Ngāti Ira, Ngāti Rua and Ngāti Patu, there had been opposition from Ūpokorehe, Ngāti Awa, and Ngāti Hokopu ki Wairaka.

[218] The resource consents relating to Ōpōtiki Harbour had mainly been granted to the Ōpōtiki District Council to facilitate the use of Ōpōtiki Harbour, including

constructing a pipeline across the river and constructing a jetty and pontoon for swimming activity. The most significant resource consent related to reclamation of more than one hectare of the coastal marine area at Pakihikura (at the Waiōweka river mouth).[134]

[219] Mr Bennion, counsel for Ngāti Patumoana, submitted that the grant of a resource consent under the RMA, did not operate to extinguish property rights as a matter of law. He referred to the Court of Appeal in *Ngāti Apa* rejecting an argument from the New Zealand Marine Farming Association that claims of ownership of property in the foreshore and seabed were inconsistent with the controls of the coastal marine area under the RMA. The Court had said:[135]

> The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.

[220] Mr Bennion went so far as to submit that "no activities authorised by resource consents issued under the 1991 Act can amount to a substantial interruption as a matter of fact." He based this argument on the fact that in s 6 "matters of national importance", the RMA provided that all persons exercising functions and powers under the Act were obliged to recognise and provide for, as a matter of national importance:

> (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga.

[221] Mr Bennion submitted that the coastal marine area is "ancestral land and waters" subject to s 6(e) of the RMA. He also relied on s 7 of the RMA which provided that in achieving the purposes of the act, all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources, were obliged to have particular regard to kaitiakitanga.

[222] Mr Bennion also referred to the New Zealand Coastal Policy Statement 2010 (NZCPS). Policy 2 of the NZCPS lists seven principles required to be taken into

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134 Reclamation as a source of substantial interruption is dealt with below at [231]-[250].
135 *Attorney-General-Ngāti Apa*, above n 15, at [75] and [76].

account in relation to the coastal environment. The first three of those principles provide:

> **Policy 2: The Treaty of Waitangi, tangata whenua and Māori**
>
> In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:
>
> (a) recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;
>
> (b) involve iwi authorities or hapū on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with the tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;
>
> (c) with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes.

[223] As set out at [208] above, s 58(2) of the Act dictates that the issue of a resource consent in the marine and coastal area at any time between the commencement of the Act and the effective date of the Act does not amount to substantial interruption of the exclusive use and occupation of a specified area. It is not clear why resource consents issued prior to those dates should not also have that effect. There is nothing the RMA or its predecessor Acts that would indicate Parliament intended that the grant of a resource consent in the takutai moana would extinguish customary rights. There is certainly nothing that could be described as a "crystal clear" expression of intention to that effect.[136]

[224] I adopt comments of the Court of Appeal in *Ngāti Apa* referred to at [219] above. While the physical activities authorised by a grant of resource consent may have the practical effect of amounting to a substantial interruption to the exclusive use and occupation of part of a particular specified area, the fact that a Council has issued a resource consent does not automatically have that effect.

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[136] See the discussion at [34] above.

[225] There is force in Mr Bennion's argument that ss 6 and 7 of the RMA actually support a finding that it was the Act's intention to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, wāhi tapu and other taonga.

[226] Although the Court was not provided with any examples of other forms of regulation of the takutai moana by local authorities amounting to substantial interruption, there is no obvious reason why such regulation should be treated differently to the grant of resource consents, unless there is a clear intention to extinguish customary rights. One such activity which would have this effect is reclamation.[137] I note that the High Court of Australia has made it clear that regulating what can happen within an area does not extinguish native title rights. In *Yanner v Eaton*, the Court said:[138]

> …Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, "you may not hunt or fish without a permit", does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.

*Conclusion*

[227] I accept the arguments advanced by Mr Bennion discussed above. Nothing in the RMA shows an intention to extinguish Māori customary rights. The Court of Appeal decision in *Ngāti Apa* confirmed that the statutory system of managing resources set out in the RMA did not have that effect.

[228] There are many provisions in the RMA and in documents created pursuant to it such as the NZCPS that are supportive of customary Māori interests in the coastal marine area. I also note that many of the resource consents granted in the relevant area prior to the commencement of the Act were granted either after consultation with Māori or with active participation by Māori in the process of considering the consent application.

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[137] The consequences of reclamation are discussed at [231]-[250] below.

[138] *Yanner v Eaton* [1999] HCA 53 at [38].

[229] I therefore do not accept that the Court can draw an inference that because an activity in the coastal marine area is carried out pursuant to a resource consent that pre-dates the commencement of the Act, that it automatically amounts to a "substantial interruption" of the exclusive use and occupation of the takutai moana by the applicant groups.

[230] The activity itself, depending on its nature, scale and intensity may have that effect. Activities relating to port infrastructure such as wharves, jetties or slip ways may well amount to substantial interruption. The same for sewerage or other outfall pipelines. But whether they do is to be determined by an examination of the facts in each case, not by applying a presumption.

*The effect of reclamation on CMT and PCR claims*

[231] Subpart 3 of Part 2 of the Act sets out a comprehensive regime relating to the vesting of reclaimed land. The purpose of this subpart is, as set out in the Act, to provide certainty to business and development interests in respect of investments in reclamations and to balance the interests of all New Zealanders, including their interests in conservation.[139] Under s 29 of the Act, reclaimed land is defined as permanent land formed from land that formerly was below the line of mean high-water springs and that, as a result of a reclamation is located above the line of mean high-water springs, but does not include:

> (a) land that has arisen above the line of mean high-water springs as a result of natural processes, including accretion; or
>
> (b) structures such as breakwaters, moles, groynes, or sea walls.

[232] Section 13 of the Act is also relevant on this point. That section provides:

> **13 Boundary changes of marine and coastal area**
>
> (1) This Act (other than section 11(4)) does not affect any enactment or the common law that governs accretions or erosions.

[139] Section 29(2).

> (2) However, if, because of a change caused by a natural occurrence or process, any land, other than a road, that is owned by the Crown or a local authority becomes part of the marine and coastal area, then that land becomes part of the common marine and coastal area (even if that land consists of or is included in a piece of land defined by fixed boundaries).
>
> (3) If land has, because of a change caused by a natural occurrence or process, ceased to be part of the common marine and coastal area, and the title to that land is not determined by an enactment or the common law, then the land vests in the Crown as Crown land and is subject to the Land Act 1948.

[233] The terms "accretion" and "erosion" are described by the authors of *Hinde McMorland & Sim Land Law in New Zealand* as follows:[140]

> Accretion occurs where the sea, or tidal water, or lake water recedes gradually and imperceptibly from the land, or where a river gradually and imperceptibly moves away from one bank, adding to the land by depositing shingle and silt, or where, by gradual and imperceptible means, wind-blown sand is deposited along the water boundary thus increasing the area of the land. In such cases the new land belongs to the owners of the parcels of land to which it is added. Erosion is the opposite process. It occurs where the sea, tidal water, or, no doubt, lake water, gradually and imperceptibly encroaches on the land, or where a river gradually and imperceptibly washes away one of its banks. In such cases the owners of the parcels of land which are being eroded lose those parts of their land which have been washed away.

[234] Returning to subpart 3 of Part 2, s 30 dictates that land that has been either lawfully or unlawfully reclaimed from the common marine and coastal area is vested in the Crown, and thus held by the Crown as its absolute property.[141]

[235] Where a lawful reclamation has occurred, the reclaimed land vests in the Crown when a Regional Council approves a plan of survey under s 245(5) of the RMA.[142]

[236] Where it is an unlawful reclamation, the reclaimed land vests when the relevant Minister signs a certificate that:

(a) describes the position and extent of the reclaimed land; and

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140 Donald William McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (online ed, LexisNexis) at 9.139(a) (footnotes omitted).

141 See subs (1)-(4) of s 30.

142 Section 30(1) and (2).

(b) states that s 30(4) of the Act applies to the reclaimed land.

[237] Section 31 provides that all land that:

(a) immediately before the commencement of this Act was–

(i) part of the public foreshore and seabed under the Foreshore and Seabed Act 2004; or

(ii) vested in the Crown under the Land Act 1948; or

(iii) subject to the Foreshore and Seabed Endowment Revesting Act 1991; or

(iv) otherwise owned by the Crown; and

(b) is not set apart for a specified purpose

is now vested in the Crown absolutely, as the full legal and beneficial owner of that land.

[238] However, s 31 does not affect any lesser interest held, immediately before the commencement of the Act by a person other than the Crown in existing reclaimed land; or the ownership in structures fixed to, or under or over, existing reclaimed land.[143]

[239] This subpart therefore sets out a range of provisions which comprehensively vest reclaimed land from the common marine and coastal area as the absolute property of the Crown, outside of the limited exceptions in subpart 3 of the Act. It will be apparent that applications for PCR and CMT over reclaimed land that is subject to the subpart cannot succeed, given that such land is entirely vested in the Crown.

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143 See also s 18, which dictates that a person who, immediately before the commencement of the Act, had an interest in a structure fixed to, or under or over, any part of the common marine and coastal area, continues to have that interest in the structure as personal property until the person's interest is changed by a disposition or by operation of law.

[240] This subpart also enables a "developer" of reclaimed land to apply to the relevant Minister for a "grant to the developer of an interest in that reclaimed land". Essentially, under s 34, the relevant Minister may grant interests in reclaimed land, and under s 35, a "developer" (a person which could include a CMT group who holds the resource consent for the reclamation by which the land is formed, whether or not that resource consent was obtained after the commencement or completion of the reclamation) is an eligible applicant who may apply for those interests.

[241] Section 36 articulates the matters that the Minster must take into account in determining what interest in the reclaimed land should be granted. They are:[144]

> (a) whether the applicant is to be granted an interest in the reclaimed land and, if so, whether that interest should be a freehold interest or a lesser interest:
>
> (b) if a lesser interest is to be granted, the terms and conditions of that lesser interest;
>
> (c) any conditions that must be fulfilled before any interest in the reclaimed land is granted;
>
> (d) the encumbrances, restrictions, or conditions (if any) that should attach to any interest (including a freehold interest) to be granted.

[242] The Minister must also take into account the following matters:[145]

> (a) the minimum interest in the reclaimed land that is reasonably needed to allow the purpose of the grant to be achieved;
>
> (b) the public interest in the reclaimed land, including existing or proposed public use of the reclaimed land;
>
> (c) whether, and the extent to which, the public is benefiting, or is to benefit, from the use or proposed use of the reclaimed land;

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144 Section 36(1).
145 Section 36(2).

(d) any conditions or restrictions imposed on the resource consent that authorised the reclamation;

(e) whether any historical claims have been made under the Treaty of Waitangi Act 1975 in respect of the reclaimed land or whether there are any pending applications under Part 4;

(f) the cultural value of the reclaimed land and surrounding area to tangata whenua;

(g) the financial value of the reclaimed land to the Crown;

(h) any natural or historic values associated with the reclaimed land;

(i) the potential public access, amenity, and recreational values of the reclaimed land;

(j) any special circumstances of the applicant, including the amount of any investment made by the applicant in respect of the reclaimed land.

[243] Section 37 introduces a presumption that certain applicants (including port companies and port operators) who make an application under s 35 for interests in reclaimed land are presumed to be granted a freehold interest unless they do not wish to be granted that interest or the Minister is satisfied that there is a good reason not to grant that interest. The existence of such a freehold interest would preclude the grant of CMT.

[244] Finally, ss 44 and 45 establish a right of first refusal: if the freehold interest is sold by the owner of that interest at any point in the future, it must first be offered to the Crown, and then to any iwi and hapū that exercise customary authority in the area.

[245] One particular reclamation which was the subject of considerable evidence was the Ōpōtiki Harbour Entrance Proposal. In a memorandum dated 22 October 2020, counsel attached a full copy of the decision of the Bay of Plenty Regional Council's committee on resource consent applications for the Ōpōtiki Harbour Entrance Proposal (dated 29 July 2009). In the decision, the proposal is summarised as follows:

> Ōpōtiki District Council (the Applicant) has applied for resource consents to undertake a variety of activities associated with the establishment of a new Ōpōtiki Harbour Entrance approximately 400 m east of the existing Waiōweka/Otara Rivers entrance. The new entrance will comprise a new 120 m channel, two river training walls (approximately 500 m in length) and scour protection works. The existing river mouth will be closed.

[246] The activities relating to this proposal that are likely to have the greatest effect on an order for CMT or PCR under the Act include the reclamation of more than one hectare of foreshore and seabed, erection of training walls, removal of more than 50,000 $m^3$ of material from the foreshore and seabed (to create the new entrance channel), and deposition of more than 50,000 $m^3$ of material from the foreshore and seabed. These are all restricted coastal activities under the New Zealand Coastal Policy Statement. Other relevant activities include:

(a) discharge of sediment, slurry water and sediment-laden stormwater into the coastal marine area;

(b) take of coastal water;

(c) diversion of coastal water; and

(d) erection and removal of temporary structures (including in the coastal marine area).

[247] The decision of the Regional Council's committee on resource consents details that Mr Te Riaki Amoamo appeared at the resource consent hearing, and on behalf of Te Whakatōhea, expressed his support for the proposal:

> [Mr Amoamo's] evidence provided an outline of Whakatōhea history and that the proposed site lies solely within the Whakatōhea rohe. He also outlined important Whakatōhea taonga within the vicinity of the proposal. Overall, he stated that Whakatōhea support the proposal as it was important in helping to re-establish their social and economic wellbeing.

[248] Further on in the decision, it is stated that:

> The Tangata Whenua (Whakatōhea) supports this application and presented evidence in support of the applicant. The main basis on which the application is supported is that it is likely to help re-establish Whakatōhea's economic base – something that has previously been significantly undermined. Also the

> proposal does not affect any areas of significance, such as waahi tapu, sites of cultural significance or other taonga.

[249] The affidavit of Mr Gerard McCormack (an employee of Ōpōtiki District Council overseeing the proposal) provides additional background on the proposal. Although approved by the Bay of Plenty Regional Council committee in 2009, the project was only recently granted funding (in the form of some $79 million from the Provincial Growth Fund) in 2019, with additional funding being granted in February 2020. Mr McCormack deposes that the implementation phase commenced in March 2020:

> The first part of the implementation phase during 2020 includes design, modelling and trials. Training wall construction is due to commence in mid-2021, with dredging and river closure to follow in 2022 and through into 2023.

[250] For the reasons that relate to other reclamations, the part of this proposal that results in the issue of a certificate of title on the basis that the land involved has arisen above the line of mean high-water springs, means that it is no longer within the takutai moana and therefore no longer falls within the area in respect of which CMT can be issued. That leaves those aspects of the proposal that fall outside the definition of reclaimed land in s 29 of the Act and could be described as "structures such as breakwaters, moles, groynes or seawalls". Such structures need to be considered on the same basis as other third-party structures in the takutai moana such as pipelines.

*Third-party structures*

[251] Whether a structure in the takutai moana has the effect of amounting to a substantial interruption to the part of the specified area in which the structure is located, is a question of fact.

[252] The Act provides that such structures are effectively the personal property of the entity that has been granted resource consent to place them in the takutai moana. Some structures, such as sewerage outfall pipelines will amount to a substantial interruption of the exclusive use and occupation of that part of a specified area. They limit the ability of an applicant group to undertake activities such as fishing and navigation in the area immediately around the structure. Other structures such as navigation buoys or markers, breakwaters, seawalls or similar structures, may actually

enhance the use of the relevant parts of the takutai moana not only by applicant groups but also others.

[253] Where the applicant groups support the creation and maintenance of such structures such as is clearly the case in relation to aspects of the Ōpōtiki Harbour Entrance Proposal, it is difficult to see why the fact that the structures physically exist should be said to amount to a substantial interruption of exclusive use and occupation so as to require the exclusion of such structures from any grant of CMT.

[254] I approach this matter on the basis that structures such as sewerage outfall pipelines which should be excluded from a grant of CMT will be able to be identified at the next stage of this hearing where the form of the CMT is to be determined.

[255] In relation to some structures (for example working wharves), obligations arising under the Health and Safety at Work Act 2015 or issues relating to the commercial activities undertaken in or around such structures mean that the they should also be excluded from CMT. Examples of the latter may well be the Eastern Sea Farms Limited 3,800-hectare marine farm and the three oyster farms in Ōhiwa Harbour. However, because the submissions of the parties did not squarely address the issue of which structures should be excluded from any grant of CMT that will need to be the subject of further submissions at the next stage of this hearing.

*Third-party use and occupation*

[256] Whether any third-party use or occupation of the takutai moana is sufficient to amount to a substantial interruption or to otherwise preclude the grant of CMT is also a question of fact. There has been insufficient evidence provided to the Court to allow the Court to conclude that third-party use had, in fact, amounted to substantial interruption.

[257] As a grant of CMT is expressly subject to rights of navigation, fishing and access, the fact that third parties, for example, use boat launching ramps, access the foreshore or sea for recreational activities, or go fishing from or in the takutai moana is not sufficient of itself to exclude CMT.

[258] As discussed, the presence of some third-party activities such as the operation of marine farms may be sufficient to mean that in respect of the area where those activities are undertaken, CMT should not issue on the basis that the presence of these activities amount to a substantial interruption in the use and occupation of the takutai moana. However, that is also a matter that will need to be addressed in the next part of the hearing in this case.

[259] There is no doubt that there is extensive commercial and recreational fishing undertaken in that part of the takutai moana that is the subject of applications for CMT and PCR (including around Whakaari).

[260] Seafood Industries Representatives took part in the hearing. Daryl Sykes, giving evidence for the Seafood Industries, noted that the holder of CMT had "a powerful veto right over future aquaculture activities in the area" and the holder of PCR in an area that was potentially adversely affected by a proposed marine farm was required to give their approval before a coastal permit could be granted. The implication was that the possibility that the holder of a CMT or PCR might be able to limit or control the granting or renewal of a coastal permit was a bad thing or at least something that the Court should have regard to in determining whether CMT or PCR should be issued.

[261] The Act specifies what the consequences of a grant of CMT or PCR are. That includes giving the holders of CMT and PCR clear rights in relation to applications for activities such as permits for marine aquaculture. If applicants for CMT or PCR meet the tests for such recognition orders, then the fact that this has implications for existing or potential holders of coastal permits for aquaculture activities cannot justify the Court refusing to award CMT or PCR.

[262] After detailing the various types of commercial fishing and aquaculture activity that occurred in the specified area, Mr Sykes concluded his affidavit by saying:

> I find it difficult to reconcile those circumstances with the apparent claims in these proceedings of the exclusive use and occupation of the Edwards application area from 1840 to the present day without substantial interruption.

[263] This is essentially a legal submission to the effect that the applicants have not met the test set out in s 58(1)(b)(i) of the Act for CMT in relation to exclusive use and occupation from 1840 without substantial interruption. Legal questions, including the meaning of the phrase "without substantial interruption" are not matters where the Court is greatly helped by the views of witnesses for interested parties as opposed to submissions from counsel.

[264] In the present case for the reasons I now set out, I conclude that the fact that third parties undertake both commercial and recreational fishing activities in the specified area does not amount to a substantial interruption of the holding of the specified area in accordance with tikanga by the applicant group identified by the pukenga in their poutarāwhare.

[265] One of the consequences of holding an area in accordance with tikanga is the obligation of manaakitanga. That obligation can extend as far as sharing the resources of the takutai moana with non-Māori.

[266] The Court heard evidence that at times when commercial fishing interests sought to abuse or over-exploit the resource (such as the close inshore fishing by trawlers dramatically affecting the resource available to the tangata whenua) Māori would protest. That is not inconsistent with holding the specified area in accordance with tikanga, and in fact demonstrates the tikanga obligation of kaitiakitanga or the duty to conserve or safeguard the resource.

[267] I am also guided by s 59(3) which specifically states that:

> The use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.

[268] The fact that third parties access the takutai moana for navigation and a variety of recreational activities, can also be analysed in the same way. In accordance with tikanga, the applicant group has extended manaakitanga. They have appropriately objected when third parties breached tikanga by doing things like desecrating wāhi tapu such as urupā. That is also consistent with their role as kaitiaki.

[269] Given the fact that any grant of CMT is expressly subject to third-party rights of navigation, fishing and access, it is unlikely that Parliament intended the test of "substantial interruption" to have been met if the activities said to amount to substantial interruption relate to navigation, fishing or access. That would not be consistent with the purposes of the Act discussed above.

*Conclusion on substantial interruption*

[270] By way of conclusion on the general topic of substantial interruption, I hold that raupatu did not have the effect of substantial interruption and neither did the granting of resource consents prior to 1 April 2011, or the fact that local authorities may have regulated the takutai moana.

[271] Reclamation, where a title has been issued, or will be issued, will have that effect as the land in question is no longer in the takutai moana. Whether a structure lawfully constructed in the takutai moana has the effect of amounting to a substantial interruption so that the area covered by the structure or relating to the activities undertaken on or around such structures, should be excluded from CMT, is a matter of fact which the Court will not be able to make final determinations on until the next part of the hearing has been held.

**PART IV – TIKANGA**

**Tikanga and the Courts and tikanga values**

[272] Given the significant role that tikanga plays in applications and decisions under this Act, I will briefly discuss some recent jurisprudence which articulates the relationship between tikanga Māori and the common law. I reiterate here that it is not the role of the Court to define the tikanga of the applicants. As I discuss at [308] below, the proper authorities on tikanga are those who have been tasked or honoured with the mātauranga of their tīpuna – the knowledge and wisdom passed down to them by their ancestors. The Court has discretion under s 99 of the Act to appoint experts of this nature in the form of pukenga, and their role in this case is more generally discussed in greater detail below at [308]-[310].

[273] A useful starting point in considering the relationship between tikanga Māori and the common law, is the case of *Takamore v Clarke*. In that case, the Supreme Court indicated that often evaluation of a case within the common law of New Zealand requires reference to tikanga, and that tikanga is part of the values of the common law particular to this country.[146] Elias CJ observed:[147]

> Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only "so far as applicable to the circumstances of the … colony". It is the approach adopted in *Public Trustee v Loasby* and, in Australia, in *Manktelow v Public Trustee*. Māori custom according to tikanga is therefore part of the values of the New Zealand common law.

[274] Similarly, Tipping, McGrath and Blanchard JJ held that the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluations.[148]

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146 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95] per Elias CJ, [150] and [164] per Tipping, McGrath and Blanchard JJ. See also Natalie Coates "What does *Takamore* mean for tikanga?" (2013) Māori Law Review 14 at 19-20.

147 At [94].

148 At [164].

[275] As discussed above, in *Ngāti Apa*, the Court of Appeal observed that the scope of Māori customary property rights and interests depended on the customs and usages, such as tikanga Māori, which gave rise to those rights and interests.[149] Tipping J explicitly stated that "Māori customary law is an ingredient of the common law of New Zealand".[150]

[276] More recently, in *Ngāti Whātua Ōrakei Trust v Attorney-General*, Elias CJ observed that rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation.[151]

[277] In the recent case of *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, the Court of Appeal observed that it is, or should be, "axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand".[152] Following this conclusion, the Court held that the tikanga Māori that governs the relationship between iwi and relevant taonga must be taken into account as an "applicable law" under s 59(2)(l) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, and that consideration of tikanga required engagement with key concepts (such as whanaungatanga and kaitiakitanga) "as they are understood and applied by Māori: that is the only perspective from which tikanga concepts can be meaningfully described and understood".[153]

[278] Finally, I note that Palmer J observed in his recent decision of *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)*, tikanga is recognised within the common law, and within Acts of Parliament.[154]

[279] Section 9 of the Act defines tikanga as "Māori customary values and practices". The use of the word "tikanga" in s 58(1)(a) is obviously intended to refer

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149 At [13]-[20].
150 At [185].
151 *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSC 84; [2019] 1 NZLR 116 at [77].
152 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 19, at [177].
153 At [178].
154 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)*, above n 72, at [43].

to the principles of customary law that govern the relationship between iwi, hapū, whānau and the takutai moana, and the rights and responsibilities that flow from that.

[280] The Māori customs and values that the Act defines tikanga as meaning, do not produce an exactly parallel legal system to that of western law. As Williams J said:[155]

> …tikanga and law are not co-extensive ideas. Tikanga includes customs or behaviours that might not be called law but rather culturally sponsored habits.

[281] Williams J quoted from a paper by Sir Hirini Moko Mead that said:[156]

> Tikanga embodies a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or individual is able to do …
>
> Tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and provide some predictability and how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed. Sometimes tikanga help us survive.

[282] After noting that there was some debate about the number of core values at the centre of tikanga, Williams J suggested the following list:[157]

- *whanaungatanga* or the source of the rights and obligations of kinship;
- *mana* or the source of rights and obligations of leadership;
- *tapu* as both a social control on behaviour and evidence of the indivisibility of divine and profane;
- *utu* or the obligation to give and the right (and sometimes obligation) to receive constant reciprocity; and
- *kaitiakitanga* or the obligation to care for one's own.

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[155] "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 68, at 2-3.

[156] Hirini Moko Mead "The Nature of Tikanga" (paper presented to Mai I Te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) as cited in Law Commission *Māori Customary Values in New Zealand Law* (NZLC SP9, 2001) at [72].

[157] At 3.

[283] Williams J specifically identified whanaungatanga out of these core values as the glue that held the system together, particularly in relation to the use of resources, and noted that no right in resources could be sustained without the right holder maintaining an ongoing relationship with the resource (sometimes referred to as ahi kā). He further observed:[158]

> The point is that whanaungatanga was, in traditional Māori society, not just about emotional and social ties between people and with the environment. It was just as importantly about economic rights and obligations. Thus rights depended on right holders remembering their own descent lines as well as the descent lines of other potential claimants to the right.

[284] The Court of Appeal has accepted that whanaungatanga and whakapapa were very broad concepts. In *R v Taulapapa*, the Court said:[159]

> …whakapapa refers to the interconnectedness of communal knowledge and relationships past, present and future ... [and] includes genealogy, spiritual connections, and a person's interconnectedness with their environment.

[285] As noted above, the Court of Appeal has also said, in a different context, that when a Court is attempting to analyse tikanga, specifically including whanaungatanga and kaitiakitanga:[160]

> That analysis needed to engage with those concepts as they are understood and applied by Māori: that is the only perspective from which tikanga concepts can be meaningfully described and understood.

[286] In addition to the claimant groups giving detailed evidence about their tikanga and how they held the specified areas in accordance with that tikanga, Ngāti Ruatakenga also called Professor Emeritus David Vernon Williams who, among other things, explained the differences between tikanga and law. He said:

> Western law no doubt arose out of social norms which reflected fundamental values accepted in the wider community, or at least the law-makers' perception of what the shared community values were. Nevertheless, there is a clear distinction in conventional Pākehā understandings between the body of the rules of law on the one hand and the underlying values on the other hand. Tikanga Māori does not draw such a clear distinction. Tikanga Māori includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. In tikanga Māori, the

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158 At 4.

159 *R v Taulapapa* [2018] NZCA 414 at [13].

160 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [178].

> real challenge is to understand the values because it is these values which provide the primary guide to behaviour and not necessarily any "rules" which may be derived from them. Without an understanding of these values, the prescriptions may appear to be contradictory. Thus, it is considered important to articulate these underlying values first before dealing with the various categories within which tikanga Māori applies.

[287] Professor Williams identified the same five underlying values of tikanga that Williams J had.[161] He also acknowledged that his list was not a definitive one and referred to the seven values identified in the list prepared by (then) Judge E. T. Durie in the paper *Custom Law*.[162] Judge Durie's seven values were:

- whanaungatanga;
- mana;
- manaakitanga;
- aroha;
- mana tūpuna;
- wairua; and
- utu.

[288] Professor Williams noted that whanaungatanga meant that neat lines could not be drawn between groups or between kin groups, or between humans and the physical world. This evidence was relevant to the consequences of drawing straight lines on a map delineating an applicant's "specified area" and the concept of "exclusivity" discussed below. He said:

> Within iwi, hapū and whānau – the collective entities of Māori society – whanaungatanga operates like a magnet. The most notable orators are always able to emphasis commonality of whakapapa and interconnectedness, thus downplaying the separation between groups. It is accordingly extremely difficult to exclude individuals from collective membership because of the pervasiveness of the whanaungatanga ethic. Thus, the definition of membership of one hapū rather than another and of one iwi rather than another is always somewhat vague – broad and grey definitions rather than black and white distinctions. This also contributed to the difficulty Māori have in laying down territorial boundaries with the precision which might be required for the borders of a nation State. Whanaungatanga emphasises the inclusiveness

161 At [282] above.

162 See Eddie Durie *Custom Law* (Discussion paper presented to the Waitangi Tribunal, January 1994), available at www.wgtn.ac.nz/stout-centre/research-units/towru/publications/Custom-Law.pdf.

> which permeates Māori values – an inclusiveness which extends to whakapapa links with non-human resources and beings. Whanaungatanga is opposed to exclusiveness.

[289] Another element of tikanga identified by Professor Williams which is relevant to claims under s 58(1)(a) is in his statement at [96]:

> - resource boundaries were conceived of lineally, and radially with rights or authority radiating from a central heart to uncertain fringes;
> - the authority of a hapū in an area was not necessarily exclusive. Hapū claimed the resources of territories exclusively or conjointly with others. Many resources were shared by several hapū – not all hapū areas were contiguous but were intersected by the use rights of others.

[290] According to Professor Williams, Māori property rights in accordance with tikanga are "particularly overlapped and intertwined".

[291] The Waitangi Tribunal has echoed this view:[163]

> A difficulty occurs today when people, both Māori and Pākehā, try to translate this customary network of rights and connections into an environment of "straight-line" boundaries. Resource rights were complex, convoluted, and overlapping. They almost never phased cleanly from hapū to hapū as one panned across the customary landscape. Instead most resource complexes had primary, secondary and even tertiary right holders from different hapū communities, all with individual or whānau interests held in accordance with tikanga, and therefore by consent of their respective communities. All rights vested and were sustained by the currency of whakapapa.

[292] Ms Feint, in her opening submissions for Ngāti Ruatakenga submitted:[164]

> Customary rights in land or sea were sourced in a number of ways, the most common of which are take tūpuna (ancestral inheritance); take taunaha (the discovery and naming of places by ancestors); take raupatu (victory and battle); and take tuku (inter-group transfers carrying reciprocal obligations). All take had to be consummated by the regular exercise of rights held, i.e. ahi kā roa.

[293] She also referred to a Waitangi Tribunal report where it was stated:[165]

> A Māori person is only "Māori" in relation to tauiwi (non-Māori): in relation to other Māori they are tribal, and their tribe is connected to a rohe (tribal

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163 Waitangi Tribunal *Tūranga Tangata, Tūranga Whenua: The Report on the Turanganui a Kiwa Claims* (WAI 814, 2004) at 18.

164 At [29]. See *Tūranga Tangata, Tūranga Whenua: The Report on the Turanganui a Kiwa Claims*, above n 163, at 17.

165 At 17.

> territory). Their stories and their whakapapa confirm their roots in the places occupied by their forebears and their membership of a particular hapū. Who they are and where they come from are thus inextricably intertwined: whakapapa and rohe are like the weft and the warp of a whāriki (woven flax floor mat).

[294] In relation to the nature of boundaries, as noted at [77] of the closing submissions of Ngāti Patumoana, the *Ngāti Awa Raupatu Report* said:[166]

> The point is that hapū were defined not by land boundaries but by whakapapa and allegiance. Though sometimes depicted as permanent, they in fact changed shape over time through amalgamation, incorporation, migration, or lateral division. They could also include persons of separate descent group.
>
> Further, the land itself was not seen to be dissected by lines on plans. It was viewed not as a combination of enclosed allotments but in terms of resource sites that the hapū, or particular families of the hapū, habitually used. The question was not where the boundary lay between hapū but which hapū could access a particular resource and what time and for what purpose. Resources could thus be shared and persons from distant hapū could have use rights in a particular resource, like a mussel-bearing rock in a harbour. Access was based simply upon respect for immemorial user and historical relationships with the users.
>
> To complicate matters, individual Māori travelled and used resources for as far as their whakapapa lines would take them and were acknowledged by local people. Then, because of earlier migrations and wars, there were also sites of particular ancestral significance for some hapū in lands that stood clearly within the areas occupied by other hapū.

[295] This approach was endorsed by the Waitangi Tribunal *Te Tau Ihu o te Waka a Maui* Report:[167]

> Although boundaries were sometimes mentioned, we believe that Ngai Tahu and various Te Tau Ihu iwi had overlapping rights in the statutory takiwā, though to different degrees on the East and West Coasts. Rights did not depend on one factor alone, such as conquest or occupation, and could vary over time. We think it more appropriate to think in terms of "bundles" and "layers" of rights. Rights recently established by conquest could be strengthened by continuing acts of use and occupation. Those who lost their rights by conquest and enslavement, could regain them later, though only by peaceful arrangements after 1840.

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166 Above n 130, at 132.

167 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on the Northern South Island Claims* (WAI 785, 2008) at 153-154.

[296] The Crown has always taken the approach that all areas of land as at 1840 had Māori owners, even areas heavily contested between traditional groups. At [75] of his closing submissions for Ngāti Patumoana, Mr Bennion submitted:

> In 1847, Chief Justice Sir William Martin commented, "So far as yet appears, the whole surface of these islands, or as much of it as is of any value to man, has been appropriated by the natives".

[297] Even though I am satisfied that there has been no 'substantial interruption' to the use and occupation of the takutai moana, in accordance with tikanga not every interruption would have severed the connection.

[298] In the case of *Bell v Churton*, the Māori Land Court considered what was sufficient to "hold" land under Te Ture Whenua Māori Act 1993. The test is whether an area is "held by Māori in accordance with tikanga Māori" under ss 129(2)(a) and 132(1)-(2).[168]

[299] At [12], the Court said:

> In any event, as I set out in a previous decision, the authorities confirmed that, while evidence of occupation is invariably a pre-condition, it is not necessary to demonstrate uninterrupted physical possession. Ahi kā – periodical or regular use consistent with ownership could also be sufficient to maintain the connection."

[300] I endorse that observation.

*Whakapapa/whanaungatanga*

[301] Because the establishment of descent lines (whakapapa) and familial relationships (whanaungatanga), are critical in identifying which applicant group or groups held a specified area in accordance tikanga, it is necessary to set out the evidence given by the various applicants on this topic. I acknowledge the tapu nature of the whakapapa to the applicants, and stress that it is for the applicants to define and describe their own whakapapa, while it is the Court's role to consider whether, based partly on the whakapapa evidence provided by the applicants, the tests for CMT and

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[168] *Bell v Churton* – Mataimoana (2019) 410 Aotea MB 244 (410 AOT 244) (footnotes omitted). See also Minhinnick – Maioro Lands (1994) 18 Waikato Maniapoto Appellate Courtr MB 220 (18 AWMN 220).

PCR have been met. Put simply, the Court does not act as a final arbiter defining the whakapapa of the applicants.

[302] I preface these comments by noting that a number of witnesses emphasised the tapu nature of the evidence about whakapapa and the importance of treating whakapapa with care. An example is the evidence of Tracy Francis Hillier who gave evidence for Ngai Tamahaua and stated:[169]

> As Ngai Tamahaua we would not ordinarily present this kōrero outside the walls of our whare tīpuna, Muriwai. It is my firm view that we have been forced to engage in this process to uphold the mana motuhake and tino rangatiratanga of Ngai Tamahaua to protect the rights over this taonga for Ngā Uri Whakaheke o Ngai Tamahaua of this time and for the future of our mokopuna.

[303] Other witnesses emphasised the importance of starting whakapapa from the beginning and proceeding through to the end (from Io to Ranginui/Papatūānuku down). It is not possible in this decision, to set out in full all of the extensive whakapapa evidence given, and no disrespect is intended by paraphrasing or summarising the evidence. Attached as Appendix B to this decision is a more detailed account of the whakapapa evidence from which this summary is drawn.

[304] It is important to remember that although many of the applicant groups can trace their whakapapa back over 700 years, what is now recognised is the Whakatōhea iwi, or even the hapū that are presently recognised as making up that iwi, have been called by other names over the centuries. Ancient iwi such as Ngariki, Te Wakanui, Te Hapū Oneone, and Panenehu have evolved into the entities that are applicants in these proceedings.

[305] As various waka arrived from Hawaiki (Takitimu, Rangimatoru, Pakihikura, Nukutere, and Mātaatua all feature in the evidence),[170] the identity and make up of existing groups changed. Tūpuna including Tārawa, Tautūrangi, Tūnamu, Muriwai, Toroa, Tutāmure, and Hine-i-Kauia were described by the applicants as an integral

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[169] Affidavit of Tracy Francis Hillier dated 20 February 2020 at [2].

[170] Mr Wallace Aramoana also gave evidence stating that the principal lines of descent for Te Ūpokorehe were not from the Mātaatua waka, but other early roopu, tūpuna and waka in the area, including the Hapūoneone peoples, Hape ki Tuarangi (who Mr Aramoana said captained the Rangimatoru waka) and the Oturereao waka captained by Tairongo.

part of the whakapapa and whanaungatanga connections of the different entities of Whakatōhea. Over generations, intermarriage between neighbouring groups resulted in the distinct identities of each group being merged or blurred, and the numbers of some groups dwindled so that the groups ceased to exist independently or were absorbed into other larger groups. The evidence presented by the applicants and interested parties indicated that the neighbouring iwi of Ngāti Awa, Ngāi Tai and Te Whānau-a-Apanui also had whanaungatanga and whakapapa connections to Whakatōhea, through waka such as the Mātaatua, tūpuna such as Toi, and through intermarriage. It is these complex and evolving relationships that contribute to the concept of whanaungatanga.

[306] Williams J, in his extrajudicial writing on the concept of "whanaungatanga", has observed:[171]

> A great deal has been written about Māori cultural understandings and connections with wai. I do not have time to engage with that material in the depth I would have wanted but it is useful for my purposes to hit the highlights. As I have written elsewhere, the values that Kupe's descendants applied in the very new circumstances of Aotearoa were tried and true Polynesian values. The unifying idea of tikanga was whanaungatanga, the principle of kinship. This was the infrastructure around which the Māori values and legal system hung. Not just as between people, but also as between people and their dead, their as yet unborn, their environment and their conceptual world. This is true still. Relationships are not contractual or proprietorial. They are not freely entered into. They are blood relationships in which the relationship itself dictates its terms and conditions. Other values such as mana, tapu, utu and kaitiakitanga should really be seen as effects or consequences of whanaungatanga. This is important to understand.

[307] I draw a number of conclusions from the evidence set out in Appendix B to this decision:

(a) the various applicant groups whose evidence is detailed in the appendix have been able to establish their whakapapa links going back to the earliest Māori settlement of Te Moana-a-Toi;

(b) in terms of tikanga, they have been able to establish their mana in respect of the whenua and takutai moana by that whakapapa, but also

171 Joseph Williams "He Pukenga Wai" (lecture delivered at the Resource Management Law Association's Annual Salmon Lecture, September 2019) at 7-8.

through discovery, the naming of and relationship with geographical features, long and continuous occupation, and raupatu;

(c) although individual hapū may choose to emphasise one line of descent over another, all of the hapū of Whakatōhea share common whakapapa. That whakapapa gives rise to rights and obligations of whanaungatanga; and

(d) the hapū of Whakatōhea also share whakapapa with Ngāti Awa, Te Whānau-a-Apanui, and Ngāi Tai. One consequence of this is that, at the boundaries of the Whakatōhea rohe, it is not possible to draw straight lines on a map where it could be said that Whakatōhea ceased to hold an area in accordance with tikanga in favour of another iwi or hapū. In practice, this means that at the border areas (Ōhope, West Ōhiwa Harbour, Te Rangi and Whakaari), there may be more than one applicant entitled to a recognition order.

*Pukenga*

[308] The proper authorities on tikanga are those living persons who retain the mātauranga, which is the knowledge or wisdom passed down to them by their ancestors. Many of the applicants called pukenga from within their own hapū to give evidence. There was little disagreement between these witnesses as to the tikanga relating to the takutai moana. Extensive evidence was given by Mr Te Riaki Amoamo called on behalf of Ngāti Ruatakenga. His evidence was endorsed or adopted by a number of other applicants.

[309] The Court also utilised the discretion given by s 99 of the Act to appoint two pukenga to provide advice to the Court on the issue of which group or grouping of applicants could be said to have held a specified area or areas of the takutai moana in accordance with tikanga.

[310] The two pukenga appointed were Dr Hiria Hape and Mr Doug Hauraki. Their appointment was made in consultation with all applicants, and without opposition from any party to the proceedings.

*The pukenga report*

[311] The Court appointed pukenga gave advice to the Court on four specific questions:

(a) What tikanga does the evidence establish applies in the application area?

(b) Which aspects of tikanga should influence the assessment of whether or not the area in question is held in accordance with tikanga?

(c) Which applicant group or groups hold the application area or any part of it in accordance with tikanga?

(d) Who, in fact, are the iwi, hapū, or whānau groups that comprise the applicant groups?

[312] The pukenga produced a detailed written report, a copy of which is attached as Appendix A. They were also cross-examined and provided answers to written questions submitted to them about their report.

[313] The pukenga adopted a poutarāwhare, which they described as a "construct", in response to the questions that they were asked. This poutarāwhare comprised Te Whakatōhea and Ūpokorehe. One of the issues of conflict in the evidence heard by the Court was whether Ūpokorehe was an iwi in its own right or a hapū of Te Whakatōhea. In devising their poutarāwhare, the pukenga did not purport to determine that question, nor did they feel that it was necessary to answer the questions asked about this issue. In this judgment, I see no need to make a ruling on whether Ūpokorehe are a hapū or iwi and the use of the terms hapū or iwi to describe them should not be interpreted as supporting a finding either way.

[314] The six entities constituting the poutarāwhare were identified by the pukenga as being Ngai Tamahaua, Ngāti Ruatakenga, Ngāti Ira, Ngāti Ngāhere, Ngāti Patumoana, and Ūpokorehe. They recommended the issue of a single CMT to the six named entities of the poutarāwhare.

[315] In respect of the other applicants, specifically Whakatōhea Rangatira Mokomoko, Hiwarau C Block, Kutarere Marae, and Pākōwhai, the pukenga concluded that their interests could be accommodated as a result of their inclusion within one or more of the component entities of their poutarāwhare.

[316] In terms of identifying the tikanga applicable to the application area, the pukenga concluded that although there were some differences in the tikanga described by the various applicants, these were minor and related to the "practical application and the detail of how they were implemented". They noted that the same tikanga "applies and exists across [the rohe of] Te Whānau-a-Apanui, Ngāi Tai, Tūhoe, [and] Ngāti Awa".

[317] The aspects of tikanga which the pukenga suggested should influence the assessment of whether or not the specified area was held in accordance with tikanga, were identified as being "mana, tino rangatiratanga, kaitiakitanga, utu, tapu and take-utu-ea". Various examples of those concepts were set out in the report.

[318] The pukenga acknowledged the benefit they received from the wisdom of tohunga and kaumatua such as Dr Te Kei o Te Waka Merito (Ngāti Awa), Wallace Aramoana (Te Ūpokorehe), Te Riaki Amoamo (Ngāti Ruatakenga, Te Whakatōhea), Te Rua Rakuraku (Ngāti Ira), Arapeta Mio (Ngāi Tai), and Danny Poihipi (Te Whānau-a-Apanui).

[319] The area identified as that being held in accordance with tikanga by the entities making up the poutarāwhare was described by the pukenga as being from Maraetōtara in the west to Tarakeha in the east.

[320] The pukenga noted that there was some "flexibility and fluidity" within traditional boundaries and that most of the tangata whenua affiliated to more than one Whakatōhea hapū, and also more than one waka and iwi.

[321] In relation to neighbouring iwi, the pukenga identified areas which neighbouring iwi either held exclusively in accordance with tikanga or jointly with the members of the poutarāwhare. These included:

(a) Ngāti Awa:

(i) Whakaari, Maraetōtara West, Tauwhare Pa, West Ōhiwa Harbour;

(ii) Ngāti Awa holds the customary interests for Moutohorā (Whale Island), Te Rurima, Turuturu Roimata (Wairaka Rock);

(iii) Ōpihi Whanaungakore (cemetery of the unnamed relatives), Te Ana o Muriwai (cave of Muriwai), Kapū Te Rangi, Toikairaku Pa;

(b) Te Whānau-a-Apanui (and Te Whānau a Ehutu):

(i) Whakaari, Hāwai, Motu River;

(c) Ngāi Tai:

(i) shared customary interests with Te Kāhui o Ngā Hapū o Te Whakatōhea out to the fishing rocks over to Whakaari and Te Paepae o Aotea.

[322] The pukenga concluded that the western boundary of the area which Ngāi Tai held in accordance with tikanga was Tarakeha and the eastern boundary was Taumata o Apanui. Some of the areas where the pukenga found that neighbouring iwi had established interests were outside of the specified areas claimed by the applicants. They are therefore not matters which the Court, in these proceedings, should make findings about.

[323] In relation the applicants represented in the poutarāwhare, the pukenga identified that Ūpokorehe had customary interests in Maraetōtara East, Cheddar Valley, Ōhiwa Harbour, Waiōtahe, Hokianga, Hiwarau C, Waiōweka, Paerāta, and Ōpōtiki-Mai-Tawhiti. These areas are either in or abutting the takutai moana.

[324] The pukenga did not accept the claim that Ūpokorehe's interests were exclusive to them but considered that they were interests shared with the other five Whakatōhea hapū: Ngāti Ira, Ngāti Patu, Ngāti Ruatakenga, Ngai Tamahaua, Ngāti Ngāhere.

[325] Although the Court is not bound by the findings of pukenga, where the recommendations of pukenga directly relate to questions of tikanga, they are likely to be highly influential.

[326] In this case, the tikanga values identified by the pukenga were consistent with the values identified by the experts discussed above at [280]-[290] and also with the evidence given by the applicants' witnesses. An example of this is the affidavit evidence of Te Rua Rakuraku who, after describing Māori customary rights said:

> Those rights are based in whakapapa; are built on ancient foundations that have evolved to meet changing circumstances; precede Te Tiriti o Waitangi and the common law definitions of Māori Rights which were introduced after 1840.

[327] Extensive evidence was tendered to the Court by all applicants of the tikanga which each applicant said applied to the takutai moana. The applicants contended that this evidence established that they held the specified area in accordance with tikanga. That evidence of tikanga is too voluminous for the Court to detail. The Attorney-General's closing submissions had attached to it as Appendix 3, a summary of the tikanga evidence in relation to each of the applicants. That summary ran to some 107 pages. The summary is an accurate description of the evidence given on tikanga. A number of the applicants referred to the tapū nature of aspects of their tikanga evidence. It is therefore not appropriate for the Court to reproduce that evidence in this decision.

[328] The written submissions on behalf of the Attorney-General also specifically stated that the Attorney-General does not challenge the findings of the pukenga in their report on the question of which applicant groups held the application area or any part of it in accordance with tikanga. The submissions did however note that the evidence set out in the summary primarily related to the intertidal areas or harbours within the specified area, and that there was a lack of detailed evidence in relation to areas of the

takutai moana distant from the shore, including Whakaari. This observation is correct. However, it is unsurprising that the bulk of the tikanga evidence related to the most intensively used parts of the takutai moana which were the intertidal, estuary and immediate coastal areas.

[329] There was, however, some evidence relating to the use of the sea as far as Whakaari. The applicants (and neighbouring iwi) presented maps which contained precise descriptions as to fishing grounds which also included detail as to the location of underwater features such as rocks or the nature of the sea bottom, as well as details of the particular types of fish to be caught in these locations. The importance of this evidence was expressly noted by the pukenga in their report.[172] This evidence established that it was not just the intertidal or estuary areas of the takutai moana that were held in accordance with tikanga.

[330] The pukenga concluded that five applicants (Mokomoko Whānau, Hiwarau C Block, Kutarere Marae, Pākōwhai and Ngāti Muriwai) had not established that they held a specified area in accordance with tikanga.

[331] For the reasons set out at [413]-[465] below, I am satisfied that the evidence supports such a conclusion and I adopt it. I also accept the pukenga's poutarāwhare approach and their conclusions that, in accordance with tikanga the six Whakatōhea hapū hold the area from Maraetōtara to Tarakeha. The findings are expressly subject to the qualification that the interests of the poutarāwhare were shared with Ngāti Awa in west Ōhiwa Harbour. The precise form of the CMTs for this area will be determined at the next hearing.

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172 *Pukenga Report* at [5](d)(ii)-(iv).

## PART V – TECHNICAL MATTERS

### Landward boundaries of the takutai moana relating to rivers and estuaries

*Rivers*

[333] The Bay of Plenty Regional and Ōpōtiki District Councils and many of the applicants were uncertain as to where the landward boundary of an application area could be effectively defined when such an application extended across the mouth of a river.

[334] There are many rivers of significant importance to a number of applicants under the Act, and it is therefore necessary to clarify where the boundaries of CMT or PCR are in relation to rivers, and also to explain the source of the Court's jurisdiction in respect of such boundaries. Because of the way the Act defines marine and coastal area, it is first necessary to look at the RMA and documents created pursuant to that Act.

[335] Section 9 of the Act defines "marine and coastal area" as follows:

> **Marine and coastal area**
>
> (a) means the area that is bounded,—
>
> (i) on the landward side, by the line of mean high-water springs; and
>
> (ii) on the seaward side, by the outer limits of the territorial sea; and
>
> (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
>
> …
>
> (d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b).

[336] Section 2 of the RMA defines the "coastal marine area" as:

> coastal marine area means the foreshore, seabed, and coastal water, and the air space above the water—
>
> (a) of which the seaward boundary is the outer limits of the territorial sea:

> (b) of which the landward boundary is the line of mean high-water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
>
> > (i) 1 kilometre upstream from the mouth of the river; or
> >
> > (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.

[337] Section 2 of the RMA also provides a definition of "mouth" for the purpose of the landward boundary of a coastal marine area:

> mouth, for the purpose of defining the landward boundary of the coastal marine area, means the mouth of the river either—
>
> (a) as agreed and set between the Minister of Conservation, the regional council, and the appropriate territorial authority in the period between consultation on, and notification of, the proposed regional coastal plan; or
>
> (b) as declared by the Environment Court under section 310 upon application made by the Minister of Conservation, the regional council, or the territorial authority prior to the plan becoming operative,—
>
> and once so agreed and set or declared shall not be changed in accordance with Schedule 1 or otherwise varied, altered, questioned, or reviewed in any way until the next review of the regional coastal plan, unless the Minister of Conservation, the regional council, and the appropriate territorial authority agree.

[338] The Bay of Plenty Regional Council has defined the landward boundaries in the coastal marine area in relation to river mouths within the region by agreement with the Minister of Conservation and the relevant territorial authorities under s 2(a) of the RMA. This is set out in an agreement dated 1 August 2008 between the Minister for the Environment, the Bay of Plenty Regional Council and the District Councils of Western Bay of Plenty, Tauranga City, Whakatāne and Ōpōtiki (the Agreement).

[339] The Agreement dictates that for the purposes of defining the landward boundary of the coastal marine area within the Bay of Plenty Region, the mouth of each river (all set out in the First Schedule of the Agreement) which enters the coastal marine area between Orokawa Bay and Potikirua Point, is described in Part One of the Second Schedule to the Agreement. The specific width of the agreed and set mouths of each river is set out in Part Two of the Second Schedule to the Agreement.

[340] The Agreement also states that:

> For rivers not identified in the First Schedule to this agreement, the agreed and set "mouth" for the purposes of s 2 of the Act [the RMA] shall be a straight line representing a continuation of the mean high-water springs on each side of the river.

*Conclusion*

[341] For the purpose of CMT and PCR, the landward boundary of the river mouths in the application area can be defined as:

> The lesser of either one kilometre upstream from the mouth of the river or the point upstream that is calculated by multiplying the width of the river mouth by 5, including within that boundary (pursuant to s 9 of the Act), the bed of the river, with the exact location of the mouth of the rivers in the application area being defined by the Agreement, specifically schedules one or two, or for rivers not identified in the schedule, the "mouth" being a straight line representing a continuation of the mean high-water springs on each side of the river, and taking into consideration that the mouth of the Waiōweka and Otara rivers will be changed in the near future as a result of the Ōpōtiki Harbour Entrance Proposal.

*Navigable rivers*

[342] I now turn to considering the Court's ability to grant CMT over an area which includes the mouth of a navigable river. As with the boundaries of river mouths, the issue of the availability of river mouths for recognition in a CMT is determined by legislation other than the Act. Section 58(4) of the Act provides that, without limiting subs (2) of that provision, CMT does not exist if that title is extinguished as a matter of law.

[343] Section 261(2) of the Coal Mines Act 1979 dictates that:

> Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

[344] "Navigable" is defined in s 261(1) as "a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts".

[345] While the Coal Mines Act 1979 has been repealed, s 261(2) has been enshrined within s 354 of the RMA, which states:

> **354 Crown's existing rights to resources to continue**
>
> (1) Without limiting the Interpretation Act 1999 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular—
>
> …
>
> (c) section 261 of the Coal Mines Act 1979,—shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

[346] Therefore, an issue arises: if a river can be defined as "navigable", then the bed of it has vested in the Crown, and if it is vested in the Crown, then CMT could be said to have already been extinguished, precluding the applicants from having the mouth of the river included in a CMT or PCR order.

[347] The starting point in considering the definition of what is "navigable" in this context is the Supreme Court decision in *Paki v Attorney-General*.[173]

[348] The critical issue in that case was whether a 32 kilometre stretch of the Waikato River, adjoining land at Pouākani (near Mangakino) could be defined as a navigable river and so vested in the Crown under s 14 of the Coal Mines Amendment Act 1903.[174] The plaintiffs in that case were kaumatua of Ngāti Wairangi, Ngāti Moe, Ngāti Korotuohu, Ngāti Ha, Ngāti Hinekahu and Ngāti Rakau and descendants of the original owners of five blocks along the left bank of the Waikato River which were transferred to Crown ownership between 1887 and 1899.

[349] The plaintiffs brought proceedings to the High Court against the Attorney-General on behalf of the Crown, seeking a declaration that Crown ownership of the riverbed to the middle of the river was subject to a constructive trust in favour of the Māori owners, arising because the Crown obtained the riverbed in breach of fiduciary

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173 *Paki v Attorney-General* [2012] NZSC 50; [2012] 3 NZLR 277.
174 At [1].

duties owed to the Māori owners out of the circumstances of the alienations and the Treaty of Waitangi.

[350] The Court restricted its focus to determining whether s 14 of the Coal Mines Act applied in the circumstances. A majority of the Court, led by Elias CJ (with Tipping and Blanchard JJ concurring), held that the river adjacent to the Pouākani lands was such that it was not navigable within the meaning of the legislation.[175]

[351] The majority first acknowledged that both parties accepted the Crown as being the owner of the riverbed adjoining the Pouākani blocks since it acquired those riparian lands. This was because, according to the parties, ownership of the bed of the river to the middle of the stream (known as usque ad medium filum aquae) was included in the land obtained by the Crown, through application of a conveyancing presumption of the English common law.[176]

[352] The Court made the following observation about that presumption:[177]

> The English common law conveyancing presumption applied to non-tidal rivers (irrespective of whether they were used for navigation or not), to lakes, and to roads (in which case it carried the ownership ad medium filum viae). In tidal rivers and estuaries, it was ousted by a further presumption of the common law (more properly, a prima facie rule of evidence) that, where navigable, the bed belonged to the Crown (although the strength and antiquity of the presumption has been questioned by scholars). In reality, in England much tidal land (including that under navigable waters) was owned privately (either because of Crown grant or because of presumed grant based on immemorial assertion of ownership). Similarly, the beds of inland waters (including lakes, and irrespective of whether the watercourse was navigable in fact or not) were the subject of extensive private property interests from mediaeval times. Rights of navigation for the public were however also extensive both under statutes and as established by user time out of mind, and could not be interfered with by the riparian landowner. Given the scale of private ownership of land covered by water in England, the principal application of the presumption was in the conveyance of land between vendors and purchasers. It was rebutted by showing that the grantor did not intend to part with the land under water or that the land was not his to grant. Public use rights to navigate or (less commonly) to fish, where secured by statute or user, were not inconsistent with private ownership of the land beneath the water.

175 At [89].
176 At [15].
177 At [16] (footnotes omitted).

[353] The majority placed particular focus on the case of *Mueller v The Taupiri Coal-Mines Ltd*.[178] They found that in that case, the Court of Appeal had "authoritatively established" that the ad medium filum aquae presumption applied in New Zealand but that the presumption was rebuttable on the basis of the surrounding circumstances which might show that the grantor (and in particular the Crown) had not intended to part with the riverbed.[179]

[354] The majority stated (and this was accepted by the other members of the Court) that the Coal Mines Act Amendment Act was passed in 1903 as a legislative response to the decision in *Mueller*, in order to vest the beds of navigable rivers in the Crown.[180] The majority also held that the section to be properly considered in terms of navigability was the section "currently in force", namely s 261 of the Coal Mines Act 1979, as enshrined in s 354(1)(c) of the RMA,[181] and that both the character of the river and its susceptibility for future use for the purposes of navigation should be assessed as at 1903.[182]

[355] In relation to the issue of navigability, the majority determined that a "whole of river" approach could not have been intended as the assessment by Parliament, and that a segmented approach should be followed instead, for four principal reasons:[183]

> Four principal reasons lead us to conclude that s 261 of the Coal Mines Act, like s 14 of the Coal-mines Act Amendment Act 1903 before it, requires the question of "navigability" to be assessed in respect of particular stretches of a river: a "whole of river" assessment of navigability is inconsistent with the text of the legislation; assessment of particular stretches is consistent with the common law context; the legislative history confirms the textual indications that the legislation sought to strike a balance between private and public interests which would be seriously disturbed by a "whole of river" assessment; an interpretation which required the river as a whole to be classified as navigable or not would be highly inconvenient, suggesting that it could not have been envisaged and ought not to be adopted.

[356] The majority then turned to the definition of "purposes of navigation". Navigability "in fact" of particular stretches of a river could be assessed according to

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178 *Mueller v The Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA).
179 At [22].
180 At [28].
181 At [33].
182 At [50].
183 At [56].

actual use and (where there is no actual use and potential use must be assessed) according to the physical characteristics of the river in the particular place.[184]

[357] The ability to float on the particular section of river at issue would not render it navigable, unless it provides a connection for the purposes of transportation. Thus (and contrary to the dissenting view of William Young J), river crossings by vessels such as ferries, do not make the river crossed "navigable". A "bare possibility of accommodating occasional craft", or "the fact that some stretch of water is navigable by some acrobatic tour de force" does not support a general finding of navigability.[185] Recreational use on its own would not constitute navigability, but could count as evidence of the capacity of a river to support navigation for the purposes of transport and trade.[186]

[358] The majority made the following observation as to evidence of a river's use for commerce and trade in determining its navigability:[187]

> The vessels described in the s 14 definition ("boats, barges, punts or rafts") are all types of craft which had been used for commerce in New Zealand. Use for the purposes of commerce or trade is the best evidence that a river is navigable. Such use was significant in *Mueller*. Whether it is necessary to show commercial use or its potential was doubted by two members of the Court of Appeal in *Leighton*. It is not necessary to go as far. But if not for commerce or trade, the use of the river must be for the purpose of transport connection to a terminus on the river or to the sea. Purely local use, not for trade or transportation purposes (because the stretch able to be used is too short), was held not to render the river navigable in *Maclaren v Attorney-General for Quebec*. The use by rowboats of a stretch of water leading nowhere, to which there was no public access and which had not been used "for the purposes of commerce" or by "any wayfarer" was insufficient to establish a public right to use the river in *Bourke v Davis*. Still less does the sort of "messing about in boats" involved in use of the Waiwhetu Stream in *Leighton* constitute use "for the purposes of navigation". We agree with the view expressed in that case in the Court of Appeal by Fair J that "navigation" is not appropriately used to cover "slight, intermittent, and restricted use" of a kind only jocularly referred to as "navigation".

[359] Having considered what might constitute the "purposes of navigation", the majority ultimately found that the stretch of the Waikato River adjoining the Pouākani blocks was not capable of use for the purpose of navigation. The only evidence was

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184 At [70].
185 At [74].
186 At [75].
187 At [76] (footnotes omitted).

of “sporadic, extremely sparse, and local use” of this stretch and no evidence to suggest it was “susceptible of use or future use for the purposes of navigation” – there was no record of any continuous journey along the length of the Waikato River linking the Pouākani stretch of river with the upper and lower reaches, and there were only four accounts of river use by watercraft in the stretch of river adjoining those blocks, with that use being slight, intermittent and restricted with no record of transportation of people or goods.[188]

[360] While agreeing with the majority’s overall decision, McGrath J wrote a separate judgment, observing that while the “whole of river” approach should not be taken, there should be a focus on the width and depth of the segment of river at issue when considering navigability.[189] He also noted that in relation to s 14 of the Coal Mines Act, by legislating to acquire or affirm Crown ownership of riverbeds according to a concept of the navigability of the river, Parliament was assuming control of those rivers which were used, or might frequently be used, for purposes of travel and transport.[190]

*Conclusion*

[361] I am bound to follow the decision of the Supreme Court in *Paki v Attorney-General*. If a river was navigable as at 1903 then its bed is deemed to have been vested in the Crown. That vesting would extinguish CMT. There was extensive evidence provided to the Court about navigation on the Waiōweka River. That evidence established that as at 1903 there were wharves at Ōpōtiki on the Waiōweka River and that the river between Ōpōtiki and its mouth was regularly used for travel and trade. The mouth of the Waiōweka River has therefore become vested in the Crown and is not available for a grant of CMT. The boundary of the CMT at the Waiōweka/Otara river mouths therefore runs in a straight line across the mouth of the river representing a continuation of the mean high-water springs on each side of the mouth of the river.

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188 At [84], [87] and [89].
189 At [103](c).
190 At [111].

*Estuaries*

[362] The bed of an estuary and its foreshore are defined for the purposes of the RMA as part of the coastal marine area under that Act.[191] As discussed above, s 2 of the RMA defines the landward boundary of the coastal marine area as the line of the mean high-water springs (with the exception of rivers). Therefore, estuaries within the mean high-water springs are part of the coastal marine area and can be included with the marine and coastal area under s 9 of the Act and may be subject to orders for CMT and PCR. However, any reclaimed land within an estuary will be subject to Subpart 2 of Part 3 of the Act.[192]

**PCR issues**

*Activities that can support a grant of PCR under s 51*

[363] There are some 11 separate applications for recognition orders of PCR.

[364] The sorts of activities in respect of which PCR has been sought fall generally into the following categories:

(a) harvesting kaimoana (to feed whānau, kaumatua, hapū and to provide kai for hui, tangihanga and marena/weddings);

(b) fishing (to feed whānau, kaumatua, hapū and to provide kai for hui, tangihanga and marena);

(c) exercise of kaitiakitanga (for conservation of kaimoana and fish stocks, resources and the environment, protection from erosion, marine farming, caring for plant and mineral resources and sustainable management of resources);

(d) exercise of mana motuhake and rangatiratanga;

(e) use of resources for medicinal and healing purposes; and

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191 See *Laws of New Zealand – Water: Part III* (online ed, LexisNexis), at [56].
192 As discussed at [231]-[250].

(f) resource extraction (including shells/fossils, wood, bones, sulphur, seaweed, stones and sand).

[365] Many of these activities are not able to support a grant of PCR because they are specifically excluded by the Act.

*Ambit of PCRs*

[366] Section 52(2) explicitly places restrictions on certain activities which cannot be subject to a PCR order. Section 52(2)(a) dictates that a PCR does not include an activity that is regulated under the Fisheries Act 1996. Fishing is defined under the Fisheries Act as follows:[193]

> **fishing—**
>
> (a) means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and
>
> (b) includes—
>
> (i) any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed; and
>
> (ii) any operation in support of or in preparation for any activities described in this definition.

[367] Under s 89(1) of the Fisheries Act, no person shall take any fish, aquatic life, or seaweed by any method, unless the person does so under the authority of and in accordance with a current fishing permit.

[368] Section 2(1) of the Fisheries Act 1996 provides definitions of fish, aquatic life, and seaweed. "Fish" includes all species of finfish and shellfish, at any stage of their life history, whether living or dead. "Aquatic life" means any species of plant or animal life that, at any stage in its life, must inhabit water, whether living or dead, and includes seabirds (whether or not they are in the aquatic environment). "Seaweed" includes all kinds of algae and sea-grasses that grow in New Zealand fisheries waters at any stage of their life, whether living or dead.

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193 Section 2(1).

[369] The vast majority of fishing practices are regulated under the Fisheries Act. This includes many of the fishing activities relied upon in support of applications for PCR by the applicants in these proceedings. A PCR cannot be granted in respect of these activities, save for a few limited exceptions. These exceptions are set out in s 89(1) of the Fisheries Act. The relevant exceptions include:

(a) the taking of fish, aquatic life, or seaweed by any natural person otherwise than for the purpose of sale and in accordance with any Māori customary non-commercial fishing regulations made under, and any other requirements imposed by, this Act; or

(b) any seabirds or protected species (seabirds, although excluded from the ambit of s 89(1) of the Fisheries Act are covered by the Wildlife Act 1953 as discussed at [372] below); or

(c) any whitebait, sports fish, ornamental fish, or unwanted aquatic life;[194] or

(d) seaweed of the class Rhodophyceae while it is unattached and cast ashore. (It is possible that karengo, a type of seaweed referred to in evidence is part of this class but there was no evidence on this point).

[370] However, a number of comments need to be made about these exceptions.

[371] In relation to (a), the Fisheries (Kaimoana Customary Fishing) Regulations 1998, Fisheries (South Island Customary Fishing) Regulations 1999, and Fisheries (Amateur Fishing) Regulations 2013 recognise and regulate non-commercial customary gathering of kaimoana, precluding the granting of PCR over this activity.[195]

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194 "Unwanted Aquatic Life" is defined in s 2(1) of the Fisheries Act 1996 as including fish species such as Walking Catfish, European Carp, Japanese Koi, Pike, Piranha, Rudd and Tilapia.

195 Regulation 2 of the Fisheries (Kaimoana Customary Fishing Regulations) 1998 defines customary food gathering as the traditional rights confirmed by the Treaty of Waitangi and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, being the taking of fish, aquatic life, or seaweed or managing of fisheries resources, for a purpose authorised by Tangata kaitiaki/Tiaki, including koha, to the extent that such purpose is consistent with Tikanga Māori and is neither commercial in any way nor for pecuniary gain or trade. The activity of customary food gathering is regulated under the Fisheries (Kaimoana Customary Fishing Regulations) 1998 in the North Island and the

[372] In relation to (b), certain seabirds are regulated under the Wildlife Act 1953. Under that Act, "wildlife" is defined as any animal that is living in a wild state,[196] while "animal" is defined to include any bird that is not a domestic bird. Under s 2(1), "domestic bird" is defined as:

> …any domestic fowl, duck, goose, or turkey, or any pheasant kept, held, raised, or bred on premises for which the predominant purpose is the sale of pheasant meat or live pheasants for human consumption; but does not include any such bird that is living in a wild state, or any other bird not referred to in this definition notwithstanding that it may be living in a domestic state…

[373] The two seabirds which are of relevance in this case are tītī (muttonbird) and tōroa (albatrosses). A number of parties gave evidence that in areas such as Whakaari, the applicants engaged in the hunting of tītī, and also gathered feathers from tōroa in the takutai moana.

[374] However, both of these birds do not fit within the definition of "domestic bird" under s 2(1) and are therefore defined as "wildlife" under the Wildlife Act, precluding their species from being included within a PCR order under s 51(2)(d)(i) of the Act.

[375] In relation to (c), non-commercial whitebait fishing may be included within the grant of a PCR (commercial whitebait fishing is regulated under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and therefore is precluded from being recognised in a PCR order under s 51(2)(c)(ii)).

[376] Marine mammals, such as whales and dolphins are also subject to their own statutory regime. Marine mammals are defined under the Marine Mammals Protection Act 1978 as:[197]

> (a) any mammal which is morphologically adapted to, or which primarily inhabits, any marine environment; and
>
> (b) all species of seal (Pinnipedia), whale, dolphin, and porpoise (Cetacea), and dugong and manatee (Sirenia); and
>
> (c) the progeny of any marine mammal; and

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Chatham Islands and regulated in the South Island by the Fisheries (South Island Customary Fishing) Regulations 1999.

196 Wildlife Act 1953, s 2(1).

197 Section 2(1).

(d) any part of any marine mammal.

[377] Section 51(2)(d)(ii) of the Act excludes marine mammals within the meaning of the Marine Mammals Protection Act 1978 from being included within a PCR order, precluding the grant of a PCR over activities relating to marine mammals such as whales. This includes activities relating to the removal of marine mammals, alive or dead, from the takutai moana.[198] However, exercising kaitiakitanga in relation to stranded marine mammals is specifically provided for in the Act as a conservation practice.[199] The Act provides that iwi, hapū and whānau who are affected by the stranding must have their views taken into account by the marine mammals officer in charge of treating the marine mammal.[200]

[378] Section 51(2)(e) states that a PCR cannot include an activity that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource (within the meaning of s 2(1) of the RMA). Counsel for the Attorney-General submitted that as a result of this provision, purely spiritual and intangible practices which may be linked to the exercise of kaitiakitanga, rangatiratanga, and mana motuhake cannot meet the test for a PCR.

[379] While a general and intangible exercise of maintaining rangatiratanga, or acting as kaitiaki, without manifestation of any physical activity or relation to any natural or physical resource, is precluded from being recognised as a PCR under s 51(2)(e), this does not undermine the right of mana whenua/tangata whenua to assert those practices within tikanga and te ao Māori. It merely means that they cannot be made the subject of a recognition order for PCR.

[380] As counsel for the Attorney-General acknowledged, an exercise of these practices relating to kaitiakitanga, rangatiratanga and mana motuhake that *can* be connected to a natural or physical resource and manifested by the relevant group in a physical activity is able to be recognised by a grant of PCR, provided they meet the statutory test. Examples could include exercise of kaitiakitanga, such as through

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198 Marine Mammals Protection Act 1979, s 4(1)(b).

199 See s 50.

200 Section 50(3)(b).

planting resources (counsel for the Attorney-General gave the example of planting pīngao to protect and strengthen sand dunes), or rangatiratanga through use of the takutai moana for cultural practices such as communicating mātauranga Māori, waiata, practice of rongoā, wānanga, tangihanga and other practices that involve physical activity connected to physical resources of the takutai moana.

[381] I do not accept the submission of counsel for the Attorney-General that karakia cannot be recognised through a PCR. Provided that it is connected to a natural or physical resource and manifested by the relevant group in a physical activity (such as members of the applicant group going down to the takutai moana to perform a karakia or going to the takutai moana for the purpose of wānanga, tangihanga or sharing mātauranga Māori) and satisfies the other elements of the statutory test, the practice of karakia may be recognised by the grant of a PCR.

[382] Turning to taonga tūturu. Rights in respect of taonga tūturu are conferred on holders of CMT rather than PCR. Under the Act, taonga tūturu has the meaning given in s 2(1) of the Protected Objects Act 1975. The section provides that:

> taonga tūturu means an object that—
>
> (a) relates to Māori culture, history, or society; and
>
> (b) was, or appears to have been,—
>
> (i) manufactured or modified in New Zealand by Māori; or
>
> (ii) brought into New Zealand by Māori; or
>
> (iii) used by Māori; and
>
> (c) is more than 50 years old.

[383] The process for the protection and preservation of taonga tūturu found in an application area is set out in s 62(1)(e) which provides that a group holding CMT has the prima facie ownership of any taonga tūturu found within the area that the group holds CMT over from the date on which a recognition order is sealed or agreement brought into effect. Section 82 of the Act reinforces this.

[384] In terms of planting and harvesting plant resources, such as for rongoā and kai, the collection of plant material in the takutai moana (with the exception of seaweed as

discussed at [368] above) does not appear to be precluded from a PCR recognition order under the Act.

[385] In terms of resource extraction, use of resources in the takutai moana such as certain stones and plants (for practices such as rongoā, and practices more generally or for tangihanga) may be recognised through a PCR order, subject to two limitations. Firstly, s 51(2)(b) of the Act restricts removal of fossils, rock, sand or minerals for commercial aquaculture;[201] and secondly, all petroleum, gold, silver, and uranium existing in its natural condition in land is the property of the Crown under s 16(1).

[386] In terms of transportation, for example launching and using waka for accessing fishing grounds and sites of cultural importance, these activities may be recognised as PCR provided the relevant statutory test is met.

[387] In respect of the exercise of rāhui, I make two observations. Firstly, the structure of the Act is more consistent with the imposition of rāhui, and the consequent creation of an area that is subject to tapu, with the holding of CMT rather than PCR. Section 78(1) provides:

> A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area.

[388] Sections 78(3) and 79 provide further detail about what wāhi tapu conditions are required to be set out in a CMT order.

[389] If the applicants are able to prove both the statutory tests for CMT, as well as providing evidence which on the balance of probabilities proves that specific, defined locations within that CMT area are capable of meeting the wāhi tapu threshold under

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[201] Section 4 of the Māori Commercial Aquaculture Claims Settlement Act 2004 defines a commercial aquaculture activity as "an aquaculture activity undertaken for the purpose of sale". Section 4 also defines "aquaculture activities" as having the same meaning as in s 2(1) of the Resource Management Act 1991. The removal of sand, shells or natural material from the coastal marine area for the purpose of breeding, hatching, cultivating, rearing or growing fish, aquatic life or seaweed for harvest under s 2(1) of the Resource Management Act, undertaken for the purpose of sale pursuant to s 4 of the Māori Commercial Aquaculture Claims Settlement Act (provided that the removal meant taking material in such quantities that, but for national environmental standards, regional coastal plan rules or resource consents, a licence or profit á prendre would be necessary) is therefore precluded as a PCR. Given the qualification under s 12(4) of the Resource Management Act however, this would only apply in very limited circumstances.

s 78(2), then CMT-holders may be able to exclude the public or public activities from that particular area through wāhi tapu conditions in s 79, which may include exercise of rāhui within those locations. One qualification would be that wāhi tapu conditions in relation to rāhui would need to comply with the identification of boundary requirements in s 79.

[390] Secondly, I note while the opportunities for a recognition order in respect of the exercise of rāhui under the Act are relatively limited, rāhui may be imposed and adhered to through tikanga. There is nothing preventing the applicants from exercising their own rangatiratanga over the entire area through imposing a rāhui when they consider that it is appropriate to do so, but such a rāhui will not necessarily be enforced under the Act, but through the laws and norms of tikanga. As Te Rua Rakuraku of Ngāti Ira said in his affidavit evidence:

> It is important to remember in the context of the present issues that iwi and hapū rights in relation to the marine and coastal area are derived from our own traditions and customs.

*Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act*

[391] In the recent Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (the Ngāti Porou Act), the exercise of customary fishing rights, practices and management are included as part of the customary marine title granted to the applicants. This may have encouraged some applicants to assume that recognition orders made under this Act can contain similar provisions. The Ngāti Porou Act differs from the Act in that under s 6 of that Act, Part 3 of the Marine and Coastal Area (Takutai Moana) Act 2011 (which sets out the definition and scope of CMT and PCRs) ceases to apply to ngā hapū o Ngāti Porou and is essentially replaced by the provisions in that Act.

[392] The reasoning for this was explained by Minister for Treaty Settlements, the Hon Andrew Little, in the First Reading of the Bill:[202]

> This bill will provide a legislative regime for the recognition of their customary interests in the common marine and coastal area. In providing this regime, the Crown honours its commitment to the 2008 agreement. I am dedicated to seeing that the Crown does this. The bill's mechanisms for

[202] (10 May 2018) 729 NZPD (Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill (No 2) – First Reading, Andrew Little).

> recognising the customary interests of ngā hapū o Ngāti Porou are similar to those found in the Marine and Coastal Area (Takutai Moana) Act. However, they have some unique features that reflect the agreement reached with the hapū in 2008. It provides for mechanisms that have been negotiated and agreed between ngā hapū o Ngāti Porou and the Crown that require legislation to bring them into effect.
>
> …
>
> There are provisions within this legislation that are not available under the Marine and Coastal Area (Takutai Moana) Act. These provisions reflect the Crown's commitment to the original deed of agreement, in so far as possible. I would like to draw to members' attention some of the instruments that this bill provides which are not available under the Marine and Coastal Area (Takutai Moana) Act. The first of these provisions is that ngā hapū o Ngāti Porou have up to two years from enactment to apply for customary marine title. The Marine and Coastal Area (Takutai Moana) Act had a deadline of 3 April 2017. This variance ensures that ngā hapū o Ngāti Porou have sufficient time to apply for recognition of rights.
>
> Secondly, wāhi tapu or wāhi tapu areas can be agreed or ordered by the court across the whole application area, not only in the customary marine title areas. However, tests must be met for wāhi tapu or wāhi tapu areas to be applied and are the same as the Marine and Coastal Area (Takutai Moana) Act. There is a customary fishing regulation-making power, at clause 49. Hapū-based fisheries management committees will be created. These committees can prepare fisheries management plans and propose by-laws in customary marine title areas—similar to that under the Fisheries (Kaimoana Customary Fishing) Regulations) 1998 – but it is the Minister who then approves those plans.

[393] The Hon Christopher Finlayson, the Minister originally in charge of the Bill, made a similar clarification in the first reading, stressing that this was effectively a "one-off" piece of legislation:

> This has been accurately summarised by the Minister in his speech. It is very much a one-off piece of legislation, a sui generis piece of legislation reflecting the intent, on the part of the Crown, to honour the original deed of settlement which was signed, as the Minister said, on October 2008 and reflecting all the changes that have occurred since then…

[394] Accordingly, it is not permissible for applicants for recognition orders to invite the Court to grant orders similar to those available to ngā hapū o Ngāti Porou under the Ngāti Porou Act. The Court can only award CMT and PCR as those concepts are defined in the Act.

*Can PCR and CMT co-exist?*

[395] The extent to which PCR and CMT can co-exist was a matter of contention. Counsel for the Attorney-General and Te Rūnanga o Ngāti Awa submitted that an applicant group may be granted a PCR over a part of the marine and coastal area that is subject to CMT held by a separate group, because there is no exclusivity requirement in the test for PCRs. As I have set out in Part V above, the statutory test for a PCR is that the right or activity in question must have been exercised since 1840, continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group (whether it continues to be exercised in exactly the same or a similar way, or evolves over time) and is not extinguished as a matter of law.

[396] The statutory test therefore does not require any applicant group to show exclusivity or absolute control over the customary rights and activities that they are exercising, but rather proof that those rights were and are grounded in tikanga (and have been exercised since 1840 without extinguishment by law).

[397] In relation to the possibility of multiple overlapping PCRs, I reiterate Professor Williams' observation at [288] above, and the evidence of Mr Te Riaki Amoamo at [175] above that the principle of whanaungatanga emphasises an *inclusiveness* and collectiveness which is contrary to the *exclusionary* exercise of rights which often forms the basis of the common law legal system, suggesting here that if those rights were grounded in tikanga, recognising them on a purely exclusionary basis by refusing to grant a PCR to more than one group when it is established on the evidence that multiple groups exercised these rights, would be unreasonable.

[398] The very nature of the activities sought to be recognised as PCRs suggest that it would be illogical to limit a recognition order to one applicant group only, when there are a number within the application area. For example, the landing and transport of vessels, collection of traditional resources for practices such as rongoā,[203] and traditional practices at sites within the takutai moana, such as tangihanga and sharing

[203] The traditional Māori system of healing.

of iwi/hapū/whānau mātauranga, occurred and continue to occur across a number of the applicant groups, as opposed to a single group. I therefore conclude that the fact that another group holds CMT in an area does not automatically preclude a different group from obtaining an order for PCR in respect of the same area.

**The "dual pathway" problems and the potential conflict between direct engagement and litigation**

[399] Section 94 of the Act provides what counsel for the Attorney-General described as a "dual pathway" for recognition of PCRs and CMT. Under s 94(1), a PCR or CMT relating to a specified part of the common marine and coastal area may be recognised by:

(a) an agreement made in accordance with s 95 and brought into effect under s 96; or

(b) an order of the Court made on an application under s 100.

[400] The first pathway, often referred to as the "direct engagement" pathway, is described in ss 95 and 96 of the Act. Under s 95(1), the applicant group and the responsible Minister on behalf of the Crown may enter into an agreement recognising either PCRs and/or CMT.[204] The Crown must not enter into an agreement unless it is satisfied that the applicant group has met the requirements of s 51 in the case of a PCR, and s 58 in the case of CMT.[205] A decision to enter into negotiations for an agreement, or an agreement itself, is at the discretion of the Crown under s 95(3).

[401] Section 96 provides that an agreement with the Crown under s 95 is of no effect unless and until it is brought into effect either:

> (a) In the case of an agreement to recognise a PCR, on the date prescribed by an Order in Council, which must also specify—
>
> (i) the applicant group in sufficient detail to identify it; and

[204] However, s 95(1) does not apply unless the applicant group, not later than six years after the commencement of the Act, has given notice to the responsible Minister of its intention to seek an agreement recognising a PCR or CMT, see s 95(2).

[205] Section 95(4).

(ii) the area to which the agreement relates, with a map or diagram that is sufficient to identify the area; and

(b) In the case of an agreement to recognise CMT, by an Act of Parliament on the date specified in the enactment, introduced by the responsible Minister and containing the full text of the agreement.

[402] The second pathway, the High Court application pathway, allows an applicant to apply to this Court for a recognition order under s 100(1). In *Re Tipene*, Mallon J gave useful guidance as to the procedure for a recognition order under the second pathway in the High Court:[206]

> An order for recognition of customary marine title begins with an application filed in the High Court. The Act provides that an "applicant" may make the application. It does not specifically define who qualifies as an applicant.
>
> The Act specifies what an application must include. This includes a description of "the applicant group", identification of the particular area to which the application relates, the grounds on which the application is made and the name of a person to be "the holder of the order as the representative of the applicant group." It must be supported by an affidavit (or affidavits) setting out the basis on which the applicant claims to be entitled to the recognition order.
>
> The applicant group must serve the application on local authorities with statutory functions in or adjacent to the specified area, the Solicitor-General on behalf of the Attorney-General and any other person who the Court considers is likely to be directly affected. Additionally the applicant group must give public notice of the application.
>
> Any interested person may appear and be heard on the application if they file a notice of appearance by the due date. The Court may receive as evidence any oral or written statement, document, matter, or information it considers to be reliable, whether or not it would otherwise be admissible.

[403] The last two paragraphs of the above quote are important. Given the "dual" nature of applications under the Act, there are a number of proceedings before this Court in which there are parties with interests in the takutai moana that overlap with the applicants, but have chosen to take the direct engagement pathway, rather than seeking a High Court order.[207] It is critical that the rights and interests of these parties involved in direct engagement are maintained by ensuring that they have the ability to appear before the Court, as an interested party or cross-applicant, in proceedings concerning applications that overlap with their own area of interest.

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[206] *Re Tipene*, above n 3, at [40]-[43] (footnote omitted).

[207] Estimates of the number of applicants who have chosen the direct engagement pathway are as high as 300.

[404] In its Stage 1 Report on the Act, the Waitangi Tribunal indicated that the legislation engaged the principle of active protection – that is, the Crown's Treaty obligation to actively protect Māori rights and interests.[208] I make no comment on the findings of the Tribunal in relation to the Act in its Stage 1 Report, but note that, as acknowledged by counsel for the Attorney-General in closing submissions, the measures in the Act under ss 102-104 are important in ensuring that those groups opting for Crown engagement, but who may be affected by an application in this Court, are not prejudiced by that choice.

[405] Although the Act provides that applications for recognition orders may proceed under either of the "dual pathways", it does not specifically address the question of how to proceed when a claim for recognition orders being advanced through litigation overlaps a different claim by another applicant group for recognition orders which is proceeding by way of direct engagement. This situation arises in the present case. Ngāti Awa are seeking direct engagement with the Crown and part of their claim for recognition orders overlaps the western edge of the claims in these proceedings and the area around Whakaari.

[406] A finding that an applicant group in these proceedings held CMT in the overlapping area would arguably have the effect of prohibiting the Crown from coming to an agreement with Ngāti Awa for a grant of CMT in respect of the same area. This may produce an injustice. The potential for injustice is lessened where the party pursuing direct engagement has participated in the Court hearing as an interested party but the problem is that the Court will not always hear from such overlapping parties or even be aware that they exist.

[407] When I raised this issue with counsel, Mr Finlayson suggested that a solution may be to adjourn that part of these proceedings where there were such overlapping claims to allow the direct engagement process to be completed.

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[208] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (WAI 2660, 2020) at 3.3. See also *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.

[408] Mr Pou, counsel for the Whakatōhea Māori Trust Board, drew to the Court's attention the power in s 107(5) to stay all or part of an application.

[409] Neither option in my view, provides a durable solution. The parties who have chosen to come to Court are entitled to expect that the Court will determine their application. They are also entitled to expect that such a determination will occur reasonably promptly following the conclusion of the hearing.

[410] The draft Direct Engagement strategy promulgated by the Attorney-General extends as far out as 2045. The Attorney-General has complete control over when any direct engagement will occur and even a discretion as to whether he is prepared to entertain an application for direct engagement at all. The Court would lose control over such an adjourned application. It would also not have any influence on the ultimate outcome. Potential rights of appeal may continue for years after the hearing had taken place.

[411] In the present case, because Ngāti Awa participated in the hearing by calling evidence and having their counsel cross-examine and make submissions, the potential for injustice is reduced although not eliminated. I will therefore determine the applications for CMT notwithstanding the fact that Ngāti Awa's direct engagement overlaps, in part, with the specified area that is the subject of these proceedings.

[412] As an interested party who participated in the first part of these proceedings, Ngāti Awa are entitled to participate in the second part. It may be that, between then and now, there may be an opportunity for the parties to communicate directly with each other in accordance with tikanga to explore whether they can reach any common ground on resolution of overlapping boundary issues.

## PART VI – ANALYSIS OF THE APPLICATIONS

### CMT

*Whakatōhea Rangatira Mokomoko*

[413] I have adopted the advice of the pukenga that the Mokomoko whānau do not meet the test for grant of any order of CMT. The members of the applicant group Whakatōhea Rangatira Mokomoko whakapapa to all hapū of Te Whakatōhea, and in particular, they share an important whakapapa with Ngai Tama as descendants of Tamahaua and Kura-a-Wherangi and to Ngāti Patumoana.

[414] In his closing submissions on behalf of Whakatōhea Rangatira Mokomoko, Mr Warren had said that the "key motivation" for the applicant in filing a whānau application for CMT was:

> The historical and ongoing stigma faced by the uri [descedants] of Mokomoko, as opposed to any claim that they are above or on par with the hapū they connect to.

[415] The stigma referred to was the fact that the rangatira Mokomoko was hung for the murder of the CMS missionary, C S Volkner.[209] The Crown used Volkner's murder as a pretext for confiscating some 448,000 acres of land belonging to Whakatōhea and neighbouring iwi.[210]

[416] Subsequent to the confiscation, Te Whakatōhea hapū (and others) were resettled on small portions of the confiscated land at Ōpape and Ōhiwa. Their economic base was destroyed resulting in a legacy of intergenerational poverty.[211]

[417] Mokomoko was posthumously pardoned,[212] but that did not result in the return of any more of the confiscated land. Neither did it entirely erase the stigma that the whānau felt.

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209 Ranginui Walker *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 2, at 103 and 110-117.
210 At 125.
211 At 172.
212 See s 3 of the Mokomoko (Restoration of Character Mana and Reputation) Act 2013, Te Ture mō Mokomoko o Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga. See also: Craig Coxhead "Bring them Justice" (2000) 4 New Zealand Yearbook of Jurisprudence 43.

[418] Mr Warren submitted that Whakatōhea Rangatira Mokomoko supported the poutarāwhare construct advanced by the Court appointed pukenga, in particular the concept of shared exclusivity, and the suggestion that there be one CMT order to be held by the six hapū covering the area from Maraetōtara to Tarakeha.

[419] It was submitted that any order for CMT utilising the pukenga's poutarāwhare construct should reflect "where the whānau fits within the construct". There was also a submission that the solution might involve "… preamble in the order reflecting the role of the rangatira Mokomoko as the protector of the western boundary of Te Whakatōhea."

[420] The exact form of the CMT will be decided at the next hearing but given the general support of the Whakatōhea Rangatira Mokomoko claim by the six Whakatōhea hapū, it seems likely that an agreement can be reached that would achieve the outcome sought by Whakatōhea Rangatira Mokomoko.

*Kutarere Marae*

[421] Kutarere Marae participated in the hearing as an interested party on the basis that they had applied for direct engagement with the Crown and the area of their claim overlapped the Whakatōhea claim.

[422] Barry Kiwara gave evidence on behalf of Kutarere Marae. He explained that the marae was founded by his grandfather, Hurae Ihaia, and his grandmother, Mere Rakai, both of whom were of Ngāi Tūhoe descent.

[423] His evidence was that Hurae Ihaia established a Kainga at Kutarere in the 1930s and that the first Wharenui was opened in 1943. Mr Kiwara rejected a suggestion that Kutarere Marae was an Ūpokorehe marae and expressed an understanding that Ūpokorehe was a hapū of Whakatōhea and said that Kutarere "aspires" to be a hapū of Whakatōhea. He noted that his grandfather had been a foundation trustee of the Whakatōhea Māori Trust Board.

[424] On its own evidence, Kutarere Marae is not a whānau, hapū or iwi. It was not in existence until the 1930s. It therefore cannot meet the statutory test in s 58 of the

Act as having exclusivity held and occupied a specified area of the takutai moana from 1840 to the present day.

*Hiwarau C*

[425] Dean Flavell, on behalf of Hiwarau C, Turangapikitoi, Waiōtahe and Ōhiwa of Whakatōhea, sought a grant of CMT.

[426] Several of the witnesses called in support of the application[213] identified as being members of the Ūpokorehe Hapū of Whakatōhea iwi.

[427] The Hiwarau C Block is situated near Kutarere adjacent to Ōhiwa Harbour. The land is administered as an ahu whenua trust called Hiwarau Lands Trust. The Court received two different accounts as to exactly how the block came into existence. The evidence of Ms Josephine Hinehou Mortenson was that it contained some 375 hectares and came into existence as a result of confiscation of the 448,000 acres of western Bay of Plenty land in 1866 pursuant to the New Zealand Settlements Act. Referring to this evidence, counsel for Hiwarau C stated, in their closing submissions, that the block was granted by the Crown to some 30 women with whakapapa links predominantly to Whakatōhea, but also to Te Whānau-a-Apanui and Tūhoe.

[428] A slightly different account was given in the evidence of Mr Tony Walzl, a historian engaged by WKW, who stated that the Hiwarau C Block was granted to 66 members of the "Ūpokorehe tribe" pursuant to ss 4 and 6 of the Confiscated Lands Act 1867 and that the block then contained 1073 acres. Mr Walzl also stated that the Crown grant was not completed until 1886.

[429] No citations were given by Ms Mortenson in support of her account and it therefore seems more likely that the detail set out in the evidence of Tony Walzl is correct. In any event, it is not necessary for the Court to determine the exact legislation under which the block was established, the precise number of original owners or exact amount of land involved. What is undisputed is that the establishment of the block occurred in the second half of the 19th century as a result of colonial land confiscation.

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213 Josephine Hinehou Mortenson, Josephine Takamore, Keita Hudson, and Bruce Pukepuke.

It is therefore not possible for Hiwarau C to meet the statutory test set out in s 58(1)(b) as it did not exist as an entity at 1840.

[430] While some who gave evidence on behalf of the Hiwarau C application expressed the "aspiration" to be recognised as a hapū of Whakatōhea, there was no evidence of widespread support of their claim to hapū status from witnesses for other hapū.

*Pākōwhai*

[431] Although this claim for CMT was advanced on the basis that Pākōwhai were a hapū, it was acknowledged that it had a number of unusual features.

[432] Dr Kahotea, in support of the application, stated:[214]

> The Whakatōhea Pākōwhai hapū claim for the Takutai Moana is a claim of a special community that emerged at Pākōwhai from the late 1830s to the dismantling of this community by the military action taken against Whakatōhea in Ōpōtiki in response to the death of Rev. Volkner in 1865.

[433] He also said:[215]

> Speaking with Larry Delamere and others of the Whakatōhea Pākōwhai hapū they all have a passion for a Māori community where they were raised, which was based in the township of Ōpōtiki. They have a specific identity of place within the Ōpōtiki township, which had a strong sense of history which was communicated and passed on orally by memory, this was Pākōwhai. For the Pākōwhai hapū this came from residence with the same as the Te Whakatōhea hapū communities of Kahikatea, Kutarere, Hiwarau, Waiōweka, Ōmarumutu, Ōpape, Maromahue, and Waiaua. The difference between Pākōwhai and the other hapū of Te Whakatōhea, it was not hapū specific such as Ngāti Rua [or] Ngai Tama but "Whakatōhea whanui" that is it was a locality which included all of the Whakatōhea hapū.

[434] Counsel for Pākōwhai, in their closing submissions, acknowledged that one way of proving hapū status is that a hapū has its own marae. Counsel set out a quotation from Hirini Moko Mead where he said:[216]

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214 Desmond Kahotea *Whakatōhea Pākōwhai Hapū and the Common Marine and Coastal Area Kotahitanga Claims* (January 2020) at 1.0.
215 At 2.0.
216 Hirini Moko Mead *Tikanga Māori: Living by Māori Values (Revised Edition)* (Huia Publishing, 2016) at 168-169.

> Every well-established hapū has at least one marae which it has managed for a very long time. … For an urban hapū the marae is much more recent. The meeting house at the marae is a point of focus for all members. … A hapū without a marae is not recognised by others as being real. Tikanga demands that a hapū must have a marae, or some building that substitutes for a marae such as a cultural centre.

[435] Counsel then submitted that the Pākōwhai Memorial Hall:

> …substituted for a marae in more recent times and that it may be inferred that the larger pā at Ōpōtiki and/or at least six other pā sites served as marae for Pākōwhai hapū in earlier times.

[436] There is no doubt that from the 1830s until the 1860s there was a large pā at Pākōwhai which was situated at the northern end of what is now the Ōpōtiki township. That pā was a focus of interaction between Māori and early Pākehā colonists, both missionaries and traders. The people who lived at the pā were drawn from all Whakatōhea hapū and from other iwi.

[437] The evidence was also clear that the pā that once existed there disappeared after the 1860s. The construction of the Pākōwhai Memorial Community Centre did not start until 4 January 1956 and its purpose was as a memorial to Māori and European soldiers who fell in both world wars.

[438] Absent from the evidence tendered in support of the Pākōwhai claim was any detailed whakapapa evidence. This distinguished the claim from those of the six hapū of Whakatōhea who were identified by the pukenga as having held a specified area in accordance with tikanga. There was also no widespread recognition of a separate Pākōwhai hapū by the Whakatōhea hapū. This claim therefore does not meet the requirements of s 58 of the Act.

*Ngāti Muriwai*

[439] A claim for CMT was advanced on behalf of Ngāti Muriwai on the basis that they were currently a hapū of Whakatōhea and had continuously been so since 1840, and that they had exclusively and continuously held a specified area from the mouth of the Waiaua River east to Tarakeha and that "as part of the iwi they are able to exclude other groups using the area".

[440] In support of these contentions, it was asserted that Ngāti Muriwai:

> …were a group of people sharing common descent. Like Whakatōhea hapū they claim descent through the coming together of the Mātaatua and Nukutere waka through the marriage of Muriwai's son, Repanga, to Ngapouperata … and of Muriwai's daughter Hineikauia to Tutamure with these lines coming together in the Panenehu tribe from which the Whakatōhea hapū evolved.

[441] It was asserted they were independent of Ngāti Rua although conceded that:

> …they had a close association and lived with that hapū for a long period and during that time were collectively known as "Ngāti Muriwai-A-Rua" before the two hapū split and went their own way following the raupatu.

[442] It was alleged that they shared Ōmarumutu Marae with Ngāti Rua.

[443] They referred to evidence that, at an unspecified time prior to 1840, a group known as Ngāti Muriwai had gone from within the Whakatōhea rohe to Te Kaha within the Whānau-a-Apanui rohe to assist Whānau-a-Apanui but had returned at some unspecified time in the early 19th century to live in the Waiaua area.

[444] In closing submissions, counsel for Ngāti Muriwai submitted:

> There is not a great deal of evidence of how Ngāti Muriwai lived immediately after they returned to the Waiaua area in the early 19th century.

[445] There was in fact no evidence relating to Ngāti Muriwai at Waiaua or elsewhere in the Whakatōhea rohe between 1840 and the 1870s.

[446] Considerable emphasis was placed on the fact that Ngāti Muriwai were allocated a block of land at the Ōpape Reservation in the processes that followed the raupatu confiscation.

[447] A historian called in support of the Ngāti Muriwai case, Tony Walzl, had explained that the initial list of Whakatōhea hapū produced by Land Commissioner Wilson in 1870 for the purposes of allocating portions of the confiscated land back to the Whakatōhea hapū, did not include Ngāti Muriwai but the list prepared by Native Lands Commissioner Brabant in 1881, had allocated Lot 3A in the Ōpape Reservation to Ngāti Muriwai.

[448] The evidence also noted that the creation of the 3A Block from the larger 3 Block which had been allocated to Ngāti Rua, occurred after a dispute between Paku Eruera and Ngāti Rua about the grazing of his sheep on the Ōpape 3 Block and a subsequent agreement that "Paku's people" should be allocated a separate block. The evidence noted that the 3A Block was allocated to 22 individuals made up of Paku Eruera and his immediate family.

[449] In terms of the existence of a Ngāti Muriwai Marae, the witnesses for Ngāti Muriwai claimed that for much of the period since the 1870s, they had shared Ngāti Rua's marae at Ōmarumutu.

[450] In closing submissions, counsel for Ngāti Muriwai noted the outcome of the 1976 Māori Land Court hearing which supported the conclusion that Ōmarumutu was a Ngāti Rua marae. It was submitted by counsel that:

> As a result of this, Ngāti Muriwai have in effect been isolated from their own marae even though they are part of the ownership of the reserve.

[451] It was submitted that what was described as the "practical exclusion" of Ngāti Muriwai in "recent times" from the Ōmarumutu Marae did not mean that they were not a hapū.

[452] Reference was also made to the Whakatōhea Mandate Waitangi Tribunal hearings where the Tribunal had recommended that Ngāti Muriwai be allowed to vote on mandate together with the other six Whakatōhea Trust Board hapū.

[453] In closing submissions, counsel submitted that Ngāti Muriwai had:

> … been a separate hapū from the very least since the split of Ngāti Muriwai-a-Rua in the 1870s.

[454] Counsel also sought to invoke s 58(3) of the Act which refers to the transfer of a customary interest between or among members of an applicant group or to an applicant group if the transfer was in accordance with tikanga.

[455] The requirement under s 58(3) is that the group making the transfer has held the specified area in accordance with tikanga and exclusively used and occupied it

from 1840 without substantial interruption, and further that the group or some members of the group to whom the transfer was made had:

> (i) held the specified area in accordance with tikanga; and
>
> (ii) exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.

[456] In this regard, counsel submitted:

> It is unclear if Ngāti Muriwai-a-Rua was a combined or single hapū. But for the present purposes it is submitted it is irrelevant if in fact the two hapū did combine into one hapū pre-1840 and later split. If that did occur, then further to s 58(3) of the Act any takutai moana rights held by the combined hapū at 1840 would be the division (sic) of the group (sic) be transferred in accordance with tikanga between the two new groups.

[457] However, no evidence of any such transfer between Ngāti Rua and Ngāti Muriwai was provided to the Court and the submission is also contradicted by counsel's submission that they shared the rohe (including the marae) with Ngāti Rua rather than used it exclusively.

[458] Counsel also asserted that the claim that Ngāti Muriwai is a hapū is "not inconsistent with" the advice of the pukenga. What is relied on is the reference in the pukenga report to Ngāti Muriwai having the potential to achieve recognition at some unspecified future time through an appropriate Whakatōhea process.

[459] Implicit in this finding by the pukenga is that Ngāti Muriwai does not presently have the status of a hapū of Whakatōhea.

[460] Notwithstanding the evidence relied upon by Ngāti Muriwai, it is clear that the other hapū of Whakatōhea do not accept their claimed status.

[461] Witnesses from three hapū: Ngāti Rua, Ngāti Ira and Ngāti Patumoana, gave evidence of the reasons why they did not accept Ngāti Muriwai's claim. By way of example, Te Riaki Amoamo considered that Ngāti Muriwai were a subdivision of Ngāti Rua, noting that their whakapapa was Ngāti Rua whakapapa and that the witnesses for Ngāti Muriwai did not know their historical traditions.

[462] Evidence that was clearly incorrect was also pointed out including Nepia Tipene's evidence that Ngāti Muriwai lived at Ōmarumutu Pā and invited Ngāti Rua to come and live with them after the Ngāti Rua marae burnt down. Te Riaki Amoamo's evidence was that the pā that burnt down was at Puketapu. It was Puketapu Pā at Ōpape, not a marae at Whitikau as claimed by Mr Tipene. It was also noted that the wharenui prior to the current wharenui of Tūtāmure, which had been opened in 1901, had been called Ruatakenga and that it would clearly not have been called that if it was a Ngāti Muriwai wharenui.

[463] Reference was also made to the evidence of Tony Walzl under cross-examination conceding that, without whakapapa evidence connecting the two groups, there was no way of knowing whether the Ngāti Muriwai group that had been at Te Kaha had any connection with the Ngāti Muriwai group recognised in the 1870s, and that there was more than one Ngāti Muriwai group (another being in the Tūhoe rohe) because of the fame of the ancestress Muriwai.

[464] In closing submissions, counsel for Ngāti Rua referred to evidence that supported the proposition that the Ngāti Muriwai identity fell into abeyance and had only recently been revived, and reference was made to Dr Ranginui Walker in *Ōpōtiki-Mai-Tawhiti* as to Claude Edwards reviving the "moribund Ngāti Muriwai hapū as the tūrangawaewae for himself and his followers" in the 1990s after the failure of the Treaty settlement process which saw him losing his Whakatōhea Māori Trust Board seat as the Ngāti Patumoana representative.[217]

*Conclusion*

[465] For the reasons discussed above, I share the conclusions reached by the pukenga that the claimants Whakatōhea Rangatira Mokomoko, Hiwarau C, Pākōwhai and Ngāti Muriwai have not established that they, along with the six hapū of Whakatōhea, held a specified area in accordance with the requirements of s 58(1)(a). I also agree with and adopt the pukenga's conclusions discussed at [311]-[331] above that the six entities who hold the specified area in accordance with tikanga are

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217 Ranginui Walker *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 2, at 276.

Ngai Tamahaua, Ngāti Ruatakenga, Ngāti Ira, Ngāti Ngāhere, Ngāti Patumoana and Ūpokorehe.

*Whakaari and Te Paepae o Aotea*

[466] The pukenga report identified customary interests in the takutai moana around Whakaari and Te Paepae o Aotea of the six hapū making up the poutarāwhare as well as Ngāi Tai, Ngāti Awa and Te Whānau-a-Apanui.

[467] Ngāti Awa and Te Whānau-a-Apanui are not applicants in these proceedings and did not invite the Court to make any orders in respect of their claims to CMT in this area. However, the Court does need to consider whether a case has been made out for the Whakatōhea applicants and Ngāi Tai in relation to an order for CMT.

[468] The starting point is to consider the original applications. This is particularly relevant in light of the decision in *Re Ngāti Pāhauwera* which indicates that material amendments which fundamentally extend the nature or extent of an application after the limitation period has expired are not appropriate.[218]

[469] In their original applications, only two of the hapū in the pukenga's poutarāwhare (Ngai Tamahaua and Te Ūpokorehe) clearly identified a claim for CMT in the takutai moana around Whakaari and Te Paepae o Aotea.

[470] Ngāti Ruatakenga originally identified their claim area as being in the form of a triangle with Whakaari at its apex. However, on 4 August 2020, an amended map was filed to include a much broader claim around Whakaari and Te Paepae o Aotea.

[471] Ngāti Ira did not originally claim CMT in this area but amended their application on 5 August 2020.

[472] Ngāi Tai (and Ririwhenua) originally sought PCR in respect of Whakaari and Te Paepae o Aotea and this continued to be their position even as at 30 September 2020 in relation to a map filed on that date. However, in closing submissions, counsel

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218 *Re Pāhauwera* [2020] NZHC 1139.

appeared to extend the application to one for CMT. Ngāti Patumoana did not at any stage make a claim for CMT around Whakaari and Te Paepae o Aotea, and there was no evidence in support of such a claim for Ngāti Ngāhere.

[473] No doubt encouraged by the observations of the pukenga, several of the applicants made late amendments to their applications. I am satisfied that the amendments made which are detailed above amount to a substantial extension of the claims and a fundamental change to their nature. Applying the decision of *Re Ngāti Pāhauwera*, it is too late for such amendments to be made.

[474] It also appears, from the additional information provided by the pukenga during the course of cross-examination that the rights they had identified in their report held by these applicants were in the nature of resource rights. Resource rights are more appropriately dealt with by way of PCR. The resource rights that were supported by the evidence were rights in relation to the gathering of tītī at Whakaari and fishing in the sea around Whakaari and Te Paepae o Aotea.

[475] For the reasons already explained, these could not support an order of PCR. The only other basis for PCR was the reading of the tohu of Whakaari from various places on the mainland. For the reasons set out at [648], such activity is precluded from justifying the grant of PCR by s 51(2)(e).

[476] Another difficulty in implementing the pukenga's suggestion in relation to CMT, is that it would involve a finding of joint exclusivity in circumstances where there was no agreement among all relevant parties as to its existence. Te Whānau-a-Apanui and Ngāti Awa both asserted primary rights. There was an acknowledgement that Whakatōhea hapū gathered resources from the area but no acknowledgement of a joint holding of mana moana. For the reasons discussed at [166]-[167] above, the Court would not have been able to find joint exclusivity in these circumstances.

[477] The situation is different to that at west Ōhiwa Harbour where counsel for Ngāti Awa, in closing submissions, expressly accepted that customary interests there had, since 1840, been shared with Whakatōhea and Ūpokorehe and that mana was held collectively. Counsel for Te Whānau-a-Apanui made no such concession in respect of

Whakaari and Te Paepae o Aotea and counsel for Ngāti Awa also rejected any possibility of joint exclusivity if it involved Ngāi Tai.

[478] Because neither Te Whānau-a-Apanui (including its hapū) or Ngāti Awa invited the Court to rule on their claims in respect of Whakaari and Te Paepae o Aotea, nothing in this decision inhibits them from continuing to advance those claims as they see fit.

*Ngāi Tai*

[479] Ngāi Tai sought CMT in respect of the area between Tarakeha and Te Rangi. The pukenga's report supported that claim. Ultimately, it was only Ngai Tamahaua who did not accept that the boundary between the Whakatōhea Hapū and Ngāi Tai should be of Tarakeha rather than Te Rangi. For the reasons discussed at [578]-[588] below, I do not accept Ngai Tamahaua's contention. I have concluded that Ngāi Tai have satisfied the tests in s 58 that they hold that area in accordance with tikanga and have exclusively used and occupied it from 1840 to the present day without substantial interruption.

[480] As acknowledged by counsel for Ngāi Tai in submissions, there was a period of disruption in the early 1840s where Whakatōhea hapū encroached east of Tarakeha but I conclude that did not amount to substantial interruption nor was it sufficient to extinguish Ngāi Tai's ahi kā.

[481] In relation to the question of whether Ngāi Tai use and occupy the area between Tarakeha and Te Rangi, there was evidence that the abutting land was owned by Ngāi Tai. They had been granted 2,411 acres at Awaawakino in 1867 under the Confiscated Lands Act. This block runs along the coastline from Tarakeha to just before Te Rangi point. Subsequently, that block was consolidated into the Torere Block and is now known as Torere 41 and Torere 42. These blocks are still in Ngāi Tai ownership.

[482] Subject to the final resolution of overlapping boundaries out at sea, the CMT extends out to the 12 nautical mile limit.

**PCR**

[483] I will now address each of applications for PCR separately and indicate whether or not PCR is available for the type of activities in respect of which it is sought and, if it is, whether the application has met the statutory tests.

[484] In order to avoid repetition, where I have set out why an activity that one applicant has applied for cannot support an order for PCR, I will not repeat those comments in relation to other applications in respect of the same activity.

*CIV-2011-485-817 – Edwards priority application*

[485] The third amended application filed on 31 July 2020 sought PCR in an area from Maraetōtara to Tarakeha including Ōhiwa Harbour and the Nukuhou, Waiōtahe, Waiōweka, Otara and Waiaua Rivers extending one kilometre upstream from the applicable river mouth and extending out to the 12 nautical mile territorial limit.

[486] They sought a PCR for two activities: the harvesting of kaimoana and fishing for various named species of fish, as well as collecting feathers from tītī (mutton birds) and toroa (albatross).

[487] All of the kaimoana listed are regulated species under the Fisheries Act 1996 and, cannot be recognised by the grant of a PCR. The tītī and toroa fall within the definition of "wildlife" under the Wildlife Act 1952, and therefore activities connected with them can also not be recognised by PCR orders. That does not mean that members of the applicant group cannot continue their non-commercial/harvesting/fishing activities in respect of the kaimoana or continue to gather bird feathers, it just means that the Court is not able to grant a PCR in respect of them.

*CIV-2011-485-264 – Application by Larry Delamere on behalf of Pākōwhai*

[488] Larry Delamere sought PCR orders for fishing and kaimoana gathering, transport, rongoā collecting, communicating hapū mātauranga, bird snaring, and collecting firewood stones and aquatic plants. The application was made on behalf of

what was described as the Pākōwhai hapū. The application area was from the left bank of the Ōpōtiki estuary to a point two kilometres east.

[489] As set out above, the pukenga concluded that Pākōwhai were not a hapū. Section 51(1)(b) of the Act refers to a PCR being exercised by an "applicant group". Section 9 defines applicant group as being an iwi, whānau or hapū. Pākōwhai do not meet that definition.

[490] Some of the activities in respect of which Pākōwhai sought PCR orders could have been the subject of such orders. For example, the catching of whitebait is not an activity regulated by the Fisheries Act 1996.

[491] However, the places where the whitebait were said to be caught was Ōpōtiki Harbour, the lower Waiōweka and Otara Rivers and Huntress Creek. For the reasons detailed above, the takutai moana ends at the mouth of the Ōpōtiki River therefore the areas where the whitebaiting was said to take place do not fall within it.

[492] Section 51(1)(b) requires that activities in respect of which PCR is sought are activities which continue to be exercised in a particular part of the common marine and coastal area in accordance with tikanga. Although there was some evidence of the takutai moana being used for transport purposes particularly in the 19th century, there was no evidence of how that activity currently takes place or what aspects of tikanga are involved with it.

[493] In this case, there was no evidence of a natural or physical resource being used in relation to communicating mātauranga. Rongoā collecting could potentially form the basis for a grant of PCR but here there was a lack of evidence as to exactly what material was currently being collected for the purposes of rongoā and which particular part of the common marine and coastal area was involved.

[494] The activity of communicating hapū mātauranga can potentially be the subject of a PCR provided it complies with the requirements of s 51(2)(e) which, as discussed above at [378]-[381] says that a PCR does not include an activity:

> …that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource.

[495] Bird snaring and hunting for tītī would involve wildlife as defined by the Wildlife Act 1953 and would therefore be excluded.

[496] In relation to the collecting of firewood, stones and aquatic plants, these potentially could perform the basis of an application for PCR, but there was a lack of evidence as to the particular part of the common marine and coastal area where the activity of collecting firewood occurred, what tikanga was involved and whether the activity was still being carried out. There was no evidence of the collection of stones and aquatic plants.

*CIV-2017-485-269 – Application of Christina Davies on behalf of Ngāti Muriwai Hapū*

[497] The application area was amended during closing submissions to extend from the mouth of the Maraetōtara Stream to Tarakeha including Ōhiwa Harbour and the tidal aspects of rivers, streams, estuaries, as well as the islands in Ōhiwa Harbour. To the extent that an island is beyond mean high-waters springs, it is not the marine and coastal area, and therefore cannot be subject to a recognition order.

[498] The activities in respect of which an order of PCR was sought were identical to the activities specified in the Pākōwhai application.

[499] Although the pukenga found that Ngāti Muriwai were not a hapū and could not be said to have exclusively used and occupied the specified area from 1840 to the present day, which precluded them from being granted CMT, s 51 does not require an applicant group to have exclusively used and occupied the relevant area from 1840 without substantial interruption.

[500] It is possible that Ngāti Muriwai are a whānau group even though that is not how they identify themselves. A whānau group can be an applicant group for an order of PCR.

[501] I will not repeat the comments made in relation to the Pākōwhai application as to those parts which cannot be the subject of an order for PCR but focus on whether there is evidence to support the claims in respect of other activities.

[502] One problem is that there is relatively little evidence about the particular part of the common marine and coastal area the activities took place, what tikanga was involved or whether the activities were continuous. The Court is effectively being asked to draw inferences from the available relevant evidence. I approach this task bearing in mind that the burden of proof is on the balance of probabilities. In other words, does the evidence satisfy me that it is more probable than not that the activity took place in a particular part of the common marine and coastal area in accordance with tikanga, has been exercised since 1840 and has not been extinguished.

[503] In relation to the collection of firewood, stones, shells and aquatic plants, there is little evidence of particular tikanga associated with these activities but there was evidence of tikanga followed generally when venturing into the takutai moana. This included the saying of karakia before and after activities, the exercise of manaakitanga by way of sharing resources with others in the groups and not taking more of a resource than was required to meet immediate needs.

[504] The evidence in support of the collection of driftwood, stones and shells, is summarised in the evidence of Tony Walzl.[219] He refers in particular to the evidence of Ms Julie Lux and to evidence given by the late Claude Edwards in 2005. That evidence confirms that stones were collected for hangi, pumice was collected for rongoā (used in respect of bruises or rubbing cracked feet), driftwood was collected for use as firewood, and shells collected for use on driveways and paths, as well as being used as fill for gardens.

[505] Although the specific locations at which these activities took place is not given, within the context of the evidence overall, I am able to infer that they took place within the application area. I note that a number of the activities referred to took place at the

[219] Tony Walzl *Ngāti Muriwai and the Common Marine and Coastal Area 1865-2019* (23 January 2020) at 62-63.

Motu River, which is not within the application area, but these activities refer to fishing rather than the collection of firewood, stones and shells.

[506] There was evidence of whitebaiting. Julie Lux, in her affidavit of 15 November 2019, referred to whitebaiting in the application area. Marcia Tutbury, in her evidence confirmed that her whānau had always whitebaited on the Waiaua River. The other evidence referring to whitebait was the 2005 statements of the late Claude Edwards of catching whitebait in the Waiōtahe estuary. I am prepared to infer that the tikanga practices relating to the gathering of kaimoana generally also applied in relation to catching whitebait, and that the catching of whitebait at the particular places of the Waiaua River and the Waiōtahe estuary had been exercised since 1840. Nepia Tipene, in his affidavit, referred to catching whitebait at the Otara River bridge. However, this activity did not appear to be happening currently and in any event the Otara River is outside the coastal marine area.

[507] In relation to aquatic plants, Julie Lux gave evidence that harakeke (flax) used for raranga (weaving) and as rongoā (medicine) was grown along the coast as was pingao (a strong grass that grows in sand dunes). There was no direct evidence that the practice of growing harakeke continued. The evidence in relation to the pingao was that it had disappeared over years although some efforts were being made to re-establish its presence. On this evidence, I cannot infer that these activities continue to be exercised presently.

[508] The affidavit evidence of Nepia Tipene and Carol Anne Stevens referred to gathering and drying a type of seaweed called karengo which was used as food.

[509] Nepia Tipene gave evidence of collecting karengo. This is something that seemed to have happened in the past. There was also no evidence about what particular part of the common marine and coastal area this occurred in. There did not seem to be any evidence that the collecting and drying of karengo continued currently.

[510] Carol Anne Stevens also gave evidence about karengo but it was limited to saying "Karengo [seaweed] was gathered for food". On this evidence, I cannot conclude that this activity continues to occur.

[511] In relation to communicating hapū mātauranga, this is a spiritual or cultural association and s 51(2)(e) requires that the association be manifested by a physical activity or use related to natural or physical resource. There was evidence of communication of hapū mātauranga but no evidence of how that was connected to a natural or physical resource.

[512] For the reasons, I find that Ngāti Muriwai whānau have established an entitlement to PCR in respect of collecting firewood, stones and shells, as well as fishing for whitebait at the Waiaua River and Waiōtahe estuary. Because there was no limitation placed on where they collected firewood, stones and shells, I infer it took place on the foreshore of the whole area claimed.

[513] There is insufficient evidence to establish an entitlement to PCR in respect of the other matters discussed above, and also the collection of material for rongoā and transport.

*CIV-2017-485-375 – Dean Flavell on behalf of Hiwarau C, Turangapikitoi, Waiōtahe and Ōhiwa o Whakatōhea*

[514] The application area sought was from Maraetōtara Stream to Haurere Point (amended to be Tarakeha) including Ōhiwa Harbour. The activities in respect of which PCR was sought were identical to the activities in the Pākōwhai and Ngāti Muriwai applications. This application also suffered from a lack of detail.

[515] The affidavit of Josephine Takamore of 21 February 2020 provided some evidence about the gathering of wood from the beach to burn, getting seaweed, and getting mud from the mudflat to dye piupiu. The relevant paragraph of her evidence said:

> A lot of people gather the wood off the beach. There was wood they could utilise for burning. The [sic] got the seaweed too. If [sic] go back to Kutarere I recall my kuia and them using the mud when they did piupiu [grass skirts]. It's part of the mud flat, they'd use a harakeke [flax] they'd do it for their piupiu. I think it stained it when they do piupiu.

[516] The affidavit also talked about using harakeke for the making of kete but it was not clear where the harakeke was located or whether this practice still continued.

[517] Although Ms Takamore did not specify the particular part of the common marine and coastal area where these activities took place, the rest of her affidavit refers to having returned to live at Hiwarau near Kutarere. She also talked of gathering cockles from near Hokianga Island in Ōhiwa Harbour.

[518] I draw the inference that the activities Ms Takamore is referring to took place at the southern end of Ōhiwa Harbour. Trying to establish whether the activities continue to be carried out is more difficult. The reference to gathering firewood off the beach to be burnt is phrased in the present tense. So, I am able to infer it continues today. However, the other activities seem to be referred to only in the past tense.

[519] There did not appear to be any evidence specifically referring to use of the common marine and coastal area in relation to transport, the collection of stones and collection of rongoā.

[520] The issue also arises as to whether an applicant group engaging in collecting firewood was an iwi, hapū or whānau. An ahu whenua trust or a marae does not meet the definition of an applicant group. In the absence of any qualifying applicant group being identified, I am unable to make an award of PCR.

*CIV-2017-485-253 – Application by John Hata on behalf of Ngāti Patumoana*

[521] The application area was from Maraetōtara to the western side of Ngawaikui Stream including the Ōhiwa Harbour. The Ngawaikui Stream is to the east of Tarakeha. However, in her affidavit of 29 January, Te Ringahuia Hata described the application area as being from Maraetōtara to Tarakeha rather than Ngawaikui. I will therefore treat the eastern boundary as being Tarakeha.

[522] The application lists seven separate activities in respect of which an order for PCR is granted:

(a) taking of kaimoana;

(b) taking of aquatic plants and seabirds;

(c) navigation and passage, and the landing of waka along the coastline;

(d) recreational use;

(e) collection of sand, stones, shingle and detritus;

(f) designation of wāhi tapu in the takutai moana;

(g) rāhui;

(h) allowing others to undertake activities in the takutai moana; and

(i) all ways of life and cultural practices associated with the above takings and uses including cultural practices founded in spiritual beliefs including the saying of karakia tawhito, karanga, imposition of rāhui, exercise of kaitiakitanga and mana, naming of places in the sea and foreshore to specify fishing areas, reefs and people who had authority over them by Ngāti Patumoana.

[523] However, it is not clear from the affidavits and submissions presented by Ngāti Patumoana that there is evidence of karanga being practised in relation to the takutai moana. It is not discussed in closing submissions, and the only reference to karanga by the Ngāti Patumoana applicants is by Mr John Hata, who in setting out a list of uses of the takutai moana by Ngāti Patumoana, includes "use of karakia and karanga in relation to our rohe moana and other customary practices".

[524] There is little evidence of the specific naming of places by Ngāti Patumoana themselves. In closing submissions, Mr Bennion does note there are many place names within the application area that are centuries old, but still in daily use, and these names "relate to historic and/or mythical individuals and events that can be explained by persons living now, based on oral traditions passed to them". The applicants also discussed the origin of the name of Ngāti Patumoana and certain sites around the rohe but did not articulate in detail the process of naming and/or how that might apply as a PCR.

[525] However, Ms Te Ringahuia Hata did briefly refer to the process of karakia, noting that:

> Ancient karakia rituals before the taking of resources to make rongoā were normal practice. We continue these rituals today. The ill or sick would be led to the water to bathe their wounds and karakia recited to assist them.

[526] Kaitiakitanga, namely in the context of rāhui, was also discussed. Ms Hata noted:

> Ngāti Patu tohunga would place Rāhui on the sea (or rivers) concerned whenever a drowning would occur. They would discuss the Rāhui with other hapū affected and neighboring iwi who are involved and their Kaitiakitanga would be supported in the placing and removal of a Rāhui.

[527] Ms Hata's affidavit also gave evidence of fishing for whitebait in the Waiōweka River but, as explained above, that river is not part of the takutai moana. There did not appear to any evidence of specific types of seaweed being collected. I am therefore unable to determine if it was seaweed of the type that may support a grant of PCR. The only seabird referred to in the evidence was the tītī which cannot be the subject of PCRs.

[528] As to the use of the common marine and coastal area for navigation, passage and the landing of waka, the evidence of Ms Hata was:

> Our Rohe Moana also acted as a mode of transport, landing places for the waka, sea vessels also landed along the coastline, and kaitiaki or taniwha also dwell in areas to protect the sea. When vessels are stranded, washed ashore or damaged in the weather they are all warning signs.

[529] There was no evidence relating to how those activities might continue to be exercised at present. Had there been, such activities could potentially have supported a PCR.

[530] In relation to the request for PCR in connection with designation of wāhi tapu, as discussed above, this is a matter to be dealt with in relation to CMT rather than PCR. Section 79 of the Act stipulates the conditions in relation to wāhi tapu, it must be set out in a CMT order or agreement.

[531] It is possible that kaitiaki activities relating to a wāhi tapu such as an urupā (caretaking or conservation activities) could be the subject of PCR. Although there was evidence of an urupā at Onekawa, there was no evidence of any activities in relation to this particular wāhi tapu.

[532] The implementation of rāhui is, for the reasons discussed above, a matter appropriately dealt with by way of CMT rather than PCR.

[533] As Ngāti Patumoana are one of the six hapū in the poutarāwhare identified by the pukenga issues such as designation of wāhi tapu and/or rāhui can be dealt with when the terms of the CMT are finalised.

[534] Although Ngāti Patumoana sought PCRs in respect of recreational use and the collection of sand, stones, shingle and detritus, no evidence of the particular recreational activities in question was provided, nor was there evidence about the collections of stones, sand, shingle and detritus. I am therefore not able to grant an order for PCR.

*CIV-2017-485-299 – Application by Te Rua Rakuraku on behalf of Ngāti Ira o Waiōweka*

[535] The application area is from Maraetōtara to Tarakeha. It includes Ōhiwa Harbour and Ōpōtiki Harbour including the lower Waiōweka and Otara Rivers, and the estuaries of the Waiōtahe, Tirohanga and Waiaua Rivers. The six activities referred to are:

(a) hapū fishing (including gathering shellfish);

(b) collecting traditional material for cultural practices including mud, plants, perished mammals, seabirds, rocks, shells and other materials from wetlands, estuarine margins and the sea;

(c) diving (free and bottle);

(d) hunting for eels, birds;

(e) landing vessels and making sea passage to the islands and fishing grounds;

(f) hunting for edible aquatics and plants; and

(g) accessing marine areas that have a cultural connection to Ngāti Ira.

[536] Evidence as to whitebaiting was provided by Hemaima Hughes and Carlo Gage. Hemaima Hughes said that whitebait were gathered mainly from the Waiōweka, Otara and Waiaua Rivers. Carol Gage also gave evidence that whitebait were gathered at Waiaua, Otara, Waiōtahe and Waiōweka Rivers. He also gave evidence that the seaweed karengo was gathered for use as fertiliser in the maara kai (gardens) and would be dried for eating. In cross-examination, Carlo Gage said that karengo was also collected from around Ōpape.

[537] As to collecting traditional material for cultural practices, I accept that driftwood was gathered and used for firewood including for hangi; sand was gathered for a variety of purposes including to assist with gardening and food storage, as well as, in more recent years, to make concrete; and flax was gathered to make things like bowls and baskets for hangi.

[538] The evidence confirmed that these activities still took place and, so far as the gathering of sand was concerned, the place was identified, during answers given by Carlo Gage while being cross-examined, as being from the left side of the mouth of the Waiōweka River out into the takutai moana and also at Waiōtahe.

[539] Mud, rocks, shells and other materials were said to still be gathered from wetlands, estuarine margins and the sea. The remains of mammals and seabirds cannot be the subject of PCR but the other materials just mentioned can be.

[540] There was no direct evidence in support of the claim for a PCR in respect of diving (free and bottle). Presumably this is a reference to recreational diving as opposed to diving for kaimoana. The lack of detail provided means that the Court

cannot be satisfied that the tests for PCR have been met in respect of this part of the application.

[541] Indeed, beyond the gathering of kaimoana and other resources, there was no evidence in relation to the recreational use of the common marine and coastal area.

[542] In relation to landing vessels and making sea passage to the islands and fishing grounds, there was evidence that this practice continues. There was also evidence (particularly from Te Rua Rakuraku) as to the tikanga involved including the importance of reading the tohu (signs) from Whakaari before venturing out to sea.

[543] The evidence as to the particular parts of the common marine and coastal area that were used was vague. For example, in relation to the use of the takutai moana for cultural purposes, Te Rua Rakuraku simply stated that that the moana and foreshore were where the Ngāti Ira people watched and studied the stars and the sea. His evidence was also similarly vague about using the takutai moana as a place of prayer, a place to conduct rituals or a place where people would go to if they were in need of purification.

[544] Reading the evidence as a whole, it seems that Ngāti Ira regarded all of the area within the boundaries of their application area as being available to them for the activities they mentioned.

[545] I conclude that Ngāti Ira have met the tests in s 51 in respect of whitebaiting at the Waiaua and Waiōtahe Rivers; gathering driftwood throughout their claims area; gathering sand off the mouth of the Waiōweka River, gathering mud, rocks and shells from wetlands estuarine margins and the sea throughout their claimed area, and landing vessels and making passage throughout the claimed area.

*CIV-2017-483-355 – Application by Te Uri o Whakatōhea Rangatira Mokomoko*

[546] The application area is from the mouth of the Maraetōtara Stream to the mouth of Ngawaikui Stream out to the territorial sea including the entirety of the Ōhiwa and Ōpōtiki Harbours and to Moutohorā (Whale Island) and Whakaari.

[547] PCR is sought in respect of 13 different activities:

(a) fishing and kaimoana gathering;

(b) collection and gathering of natural resources including rongoā collecting;

(c) bird snaring;

(d) transport;

(e) transfer of knowledge of mātauranga Māori about hapū, marine culture, trade, communications such as waiata, weaving practices and whakanoa;

(f) seasonal kaimoana exchange;

(g) access to gardens on land;

(h) tangihanga, social interaction, manaakitanga and ope mara;

(i) use of certain areas for various types of traditional practices such as wānanga, hui and tangihanga;

(j) exercising kaitiakitanga;

(k) protectors of the western boundary of Whakatōhea and protectors of the natural resources and wāhi tapu;

(l) launching waka; and

(m) exercising rangatiratanga and the right to control and have a voice.

[548] Other than for whitebait, fishing and gathering kaimoana cannot be the subject of PCRs.

[549] Karen Mokomoko gave evidence of being taught how to whitebait at Waiaua and of gathering inanga (whitebait) "within our coastal takiwā". Much of the evidence relating to this application referred to things that happened in and around Te Moana o Tairongo (Ōhiwa Harbour). I therefore conclude that whitebaiting occurred at Waiaua and in and around the Ōhiwa Harbour.

[550] In relation to collecting traditional material and rongoā, Raiha Ruwhiu's evidence was that wai tai (sea water) was used for "many medicinal, health, protection, blessings and wellness properties and uses". She recorded going to the moana and putting wai tai on her head to protect herself on a journey. She noted that when wai tai was used as an internal or external medicine, there was a ritual that had to be followed including karakia and collecting the wai tai from behind the fifth wave and also explained the reason for that practice.

[551] In her affidavit evidence, she did not refer to any particular location at which wai tai for human consumption was collected but during cross-examination she said that the use of wai tai at Hokianga Island and Onekawa for bathing and healing continued today. There was no evidence of use of wai tai for such purposes around Moutohorā or Whakaari.

[552] Evidence of the use of resources in the takutai moana for rongoā purposes seemed to be limited to wai tai. I find that this applicant has meet the test in s 51 in relation to the taking of wai tai for rongoā throughout their application area to 100 m from mean high-water springs, and its use for bathing and healing purposes within Ōhiwa Harbour.

[553] In relation to the use of the takutai moana for transport, there was evidence about the historical use of waka and the more recent activities of members of the Mokomoko Whānau in relation to Ōpōtiki Harbour and Whakaari. The submissions on behalf of the Attorney-General suggest that there was no evidence that use of the takutai moana for transport purposes was "done in accordance with tikanga".

[554] Raiha Ruwhiu addressed this issue directly in her written evidence. She said:

> [32] I understand that the Marine and Coastal Area (Takutai Moana) Act 2011 does not provide for protected customary rights to be granted in relation to a spiritual and cultural associations specifically. I am aware that the protected customary rights must relate instead to the physical manifestation of those spiritual and cultural associations through physical activities.
>
> [33] For me, and for our whānau, understanding the whakapapa and the spiritual basis upon which are tūpuna and the uri of the rangatira, Mokomoko, carried out various activities within the takutai moana, is central to understanding the significance of those practices for us.

[555] In her affidavit of evidence, Karen Mokomoko referred to traditional knowledge or mātauranga relating to the moana including knowledge of tide patterns being "passed down from the old kōrero of our tūpuna". She also referred to utilising other tohu (signs) and what she described as "traditional talisman". I am satisfied that in using the takutai moana for the purposes of navigation that tikanga was applied and that in respect of this activity, the requirements of s 51 have been met.

[556] Karen Mokomoko also referred to the continuing practice of maramataka. She described this as "…the knowledge of the stars, moon phases, weather patterns and animal behaviour." She said that this knowledge was utilised in relation to navigation including the stars providing bearings at night to navigate the way home.

[557] In relation to the transfer of mātauranga Māori, the same approach for karakia would apply. If the transfer of mātauranga Māori is manifested in a physical activity or use relating to a natural or physical resource, it will fall within the ambit of s 51. If members of the applicant group travel to the takutai moana and use the foreshore or the sea as part of the process of transferring mātauranga Māori to younger generations, the Court needs to be satisfied that this activity continues to be exercised "in a particular part of the common marine and coastal area".

[558] Karen Mokomoko referred in her affidavit evidence to trips to Hokianga Island for wānanga to teach and pass knowledge to the new generation. That activity falls within s 51 and can be included in a grant of PCR. However, no other specific locations seem to have been mentioned.

[559] In relation to seasonal kaimoana exchange, it is clear that this is a cultural practice that has been exercised since 1840 and continues to be exercised today. However, there was no evidence that it took place in a particular part of the marine and coastal area. Indeed, it appears that kaimoana is taken and exchanged with hapū who reside in inland areas and have no access to the takutai moana. Accordingly, it does not meet the requirements of s 51.

[560] In relation to access to gardens on land, bird snaring, tangihanga, social interaction, manaakitanga and ope mara, beyond the reference to trips to Hokianga Island for wānanga, there is no specific evidence about activities which take place in a particular part of the marine and coastal area.

[561] In relation to using areas for various types of traditional practices such as wānanga, hui and tangihanga, there was clear evidence (particularly from Raiha Ruwhiu) of returning whenua (placenta) to the foreshore at Taiharuru and placing the umbilical cord in crevices of the rocks on the seashore. Ms Ruwhiu confirmed that these practices have been carried out since 1840 and were ongoing. No particular site other than Taiharuru was mentioned. The applicant group is entitled to a PCR in respect of this practice at Taiharuru.

[562] In relation to exercising kaitiakitanga by protecting the western boundary of Whakatōhea and the natural resources of the takutai moana as well as wāhi tapu, acting as a kaitiaki or exercising kaitiakitanga is clearly an important cultural activity. The issue is whether, in this case, it is manifested in a physical activity or use relating to a natural and physical resource.

[563] Although it is clear that kaitiakitanga has been exercised in relation to fishing and the gathering of shellfish, PCR is not available because of the provisions of s 51(2)(c)(ii) which excludes activities that involve the exercise of "any non-commercial Māori fishing right or interest".

[564] In her affidavit of 19 April 2018 at [56], Karen Mokomoko said:

> Our tūpuna planted (which we continue to do) pohutukawa, harakeke, pingao, spinifex and toitoi. These plants were utilised for both weaving and rongoā

> as well as a method of protecting the dunes and the takutai moana generally. We continue to plant pingao and spinifex to preserve the health of our sand dunes. The planting and regeneration of ngāhere for the health and wellbeing of the wai (water) has been a current activity of importance.

[565] This is a kaitiakitanga activity that meets the requirements of s 51. It appears to occur at various locations in the claimed area of the takutai moana. It therefore meets the test in s 51 for an order of PCR throughout the claimed takutai moana area. There was no other specific evidence about a physical activity or use of a natural or physical resource in relation to the discharging of the obligations of kaitiakitanga.

[566] In relation to the claimed exercise of kaitiakitanga as the protector of the western boundary of the Whakatōhea rohe, there is evidence that this was an activity undertaken by Mokomoko in the 19th century. It is also obvious that the Mokomoko whānau see that they have inherited this legacy. However, there was no evidence as to how they might go about this by way of physical activity or use of a natural or physical resource. It therefore cannot fall within s 51.

[567] Exercising kaitiakitanga over wāhi tapu located in the takutai moana could support an order for PCR under s 51 if there was some physical activity associated with it. For example, if an urupā was located in the takutai moana and an applicant group demonstrated that they took steps to physically protect the area or to arrange for archaeological conservation.

[568] Karen Mokomoko in her affidavit of 30 January 2020 at [46], stated that Kōiwi (human remains) that had been buried at a place called Akeake had recently begun to be revealed as a result of a housing development in the area.

[569] The housing development will not be in the takutai moana but above mean high-water springs. Therefore, the Court cannot make an order of PCR in relation to it.

[570] In relation to the launching of waka, the main evidence came during the cross-examination of Karen Mokomoko who confirmed that the applicants launch boats from Ōpōtiki and Ōhiwa. For the reasons discussed above, Ōpōtiki is not within the

takutai moana but Ōhiwa Harbour is. It is clear that the launching of boats in Ōhiwa Harbour was occurring at 1840 and continues today.

[571] Section 51(1)(b) provides that it does not matter whether the activity occurs in exactly the same way or evolves over time. The boats launched today will not be waka but it is the activity of launching that is important. The applicant group is entitled to an order of PCR relating to the launching of boats in the Ōhiwa Harbour.

[572] The final activity in respect of which the Mokomoko Whānau sought a PCR was "exercising rangatiratanga and the right to control and have a voice". The exercise of rangatiratanga is an important cultural concept. Whether or not it falls within the ambit of s 51 does not stop an applicant group from continuing to exercise rangatiratanga (or mana motuhake). Neither does the unavailability of a PCR restrict an applicant group from expressing their voice.

[573] There was no evidence addressing the question of how a PCR regulating the exercise of rangatiratanga or providing a voice would actually operate or what section in the Act might address these issues.

[574] In relation to the right to control, it is assumed that this is a reference to the right to control the activities of third parties in a particular part of the takutai moana. In terms of a right to exercise control by excluding third parties, the only provisions in the Act which come close to this are those set out in ss 78 and 79 in relation to prohibitions and restrictions regarding a wāhi tapu area. It is clear that wāhi tapu protection rights are something that flow from CMT rather than PCR.

[575] Other than in that limited context, the Act does not give a "right to control". That is unsurprising given that one of the purposes of the Act is to "…establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand …".[220]

[576] PCR is therefore not available for "exercising rangatiratanga and the right to control and have a voice".

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[220] Section 4(1)(a).

*CIV-2017-485-253 – Application by Tracy Francis Hillier on behalf of Ngai Tamahaua Hapū; and*
*CIV-2017-485-262 – Application by Tracy Francis Hillier on behalf of Te Hapū Titoko o Ngai Tama and Te Uri o Te Hapū o Titoko Ngai Tama*

[577] The two applications by Tracy Hillier were essentially presented to the Court as one with all of the evidence being relevant to both applications.

[578] The application area in CIV-2017-485-262 was from Maraetōtara to Te Rangi, out to 12 nautical miles including Moutohorā,[221] Te Paepae o Aotea, Ōpōtiki and Whakaari. Te Rangi is a point further east than Tarakeha. Ngai Tamahaua were ultimately, the only Whakatōhea applicant group that did not accept Tarakeha as the eastern boundary for the purposes of the recognition applications. It is appropriate to address this point now.

[579] The pukenga in their report concluded that, "…based on Tikanga, our view is that Ngāi Tai have mana whenua from Tarakeha in the west to Taumata o Apanui".

[580] In her oral closing submissions on behalf of Ngai Tamahaua, Ms Linstead-Panoho said that Ngai Tamahaua maintained that their eastern boundary was Te Rangi rather than Tarakeha because this was the boundary for their rohe moana cited by Te Hoeroa Horokai in the 1920s. She also referred to Ngai Tamahaua as the eastern-most hapū of Whakatōhea who had a duty to protect Whakatōhea's interests on the eastern border.

[581] Ms Linstead-Panoho also noted that the "buffer zone from Tarakeha to Te Rangi" that John Wilson had negotiated in 1844 to separate the tribes of Ngāi Tai and Whakatōhea was not consented to by Whakatōhea.

[582] In respect of the dispute as to the area between Tarakeha and Te Rangi, Ms Linstead-Panoho's oral submission was:

> The fact that it was and continues to be a disputed area of land means in tikanga terms, that is a matter which either needs to be agreed to between the two hapū and iwi groups or if a determination is to be made in the absence of

[221] In closing submissions counsel for Ngai Tamahaua indicated they were no longer seeking CMT at Moutohorā.

> agreement, the only reasonable outcome must be for the area to be shared in order to uphold each group's mana and relationship to the area.

[583] In respect of an application for CMT, there is nothing before the Court in the nature of a joint application by the Whakatōhea hapū and Ngāi Tai for shared CMT in respect of the area between Tarakeha and Te Rangi.

[584] As noted earlier in this decision, the awarding of shared recognition orders is not a default option where the Court can make such an order if it believes the area was shared, notwithstanding that the parties involved have not all sought a shared order.

[585] The issue is slightly different in relation to PCR orders as there is no requirement as to exclusivity and, if established on the facts, there can be more than one PCR order relating to the same area.

[586] In rejecting Ngai Tamahaua's claim that they shared mana moana with Ngāi Tai for the area between Tarakeha and Te Rangi, the Court is influenced by the position taken by the other Whakatōhea hapū who have accepted Tarakeha as the boundary.

[587] The Court (and the pukenga) are also influenced by the evidence of Te Riaki Amoamo who referred to seeking Ngāi Tai permission for a visit to Te Rangi. While Ngai Tamahaua are able to say that they were not involved in that request by Mr Amoamo, the Court is entitled to take into account his views as a senior and respected kaumatua of Whakatōhea.

[588] I therefore do not accept Ngai Tamahaua's argument that, as at the present day, it has mana moana east of Tarakeha.

[589] Ngai Tamahaua applied for PCR in respect of some 26 different activities. As with a number of the other applications, PCR is not available for many of the nominated activities, and in respect of some of the other activities there was a very little, if any, evidence to support the claim. The list of activities is:

(a) full undisturbed access to walk, play and enjoy the land and coastal areas and waterways;

(b) hunting and fishing on the land or in the waterways;

(c) customary fishing rights, including the gathering of kaimoana and manu (birds) to sustain the whānau and hapū, for cultural activities including, but not limited to, social events, hui and tangihanga, fishing at traditional taunga ika (fishing grounds);

(d) protecting traditional maara (cultivation or garden) sites;

(e) customary rights in respect of flora and fauna and other resources including for traditional rongoā and other tikanga practices;

(f) gathering of natural resources from the land and waters including digging and using minerals and quarry materials such as flints, clays, soil, sand, gravel, rock, stones, shells, wood, bone, stone, sand, seaweed and sulphur;

(g) the taking, collecting and using rākau (trees) for whakairo (carving), creation of structures and building waka;

(h) living on the land including building and/or erecting dwellings (temporary or permanent);

(i) navigating the land and waterways including protection of waka launching sites;

(j) swimming, sailing, boating, launching and other associated activities;

(k) applying or reinstating traditional place names;

(l) establishing kaitiaki pou;

(m) appointing kaitiaki in accordance with tikanga to oversee the management and protection of the rohe moana and waterways;

(n) utilising resources and locations for educational purposes including undertaking training activities about the proper use and protection of resources, environmental benefits and protection and research into species;

(o) rights to derive commercial benefits;

(p) disposing of, trading or exchanging natural and other resources;

(q) imposition of customary practices such as Toitū te Mana Motuhake, Toitū te Mana Whenua, Toitū te Mana Tangata and Toitū te Tiriti o Waitangi;

(r) all things instrumental to and involving the performance of kaitiaki roles within the common marine and coastal area according to Ngai Tamahaua tikanga including management of fisheries, the environment, planning, access, use and occupation, and health and safety;

(s) protecting wāhi tapu sites (including caves, urupā and pito/whenua burial sites) and performing karakia and other rituals at those sites;

(t) performing karakia at whale strandings and sites of historical significance;

(u) protecting the mauri of the waterways;

(v) imposition and relief of rāhui;

(w) preserving tauranga waka (landing sites);

(x) protecting and preserving any taonga of Ngai Tamahaua including artefacts found through archaeological digs;

(y) carrying out other customary practices such as the practice of placing and burying pito at Ōpape; and

(z) prohibiting vehicle access to Ōpape Beach to prevent the degradation of the mauri of the beach and taonga.

[590] As is immediately obvious, many of the activities are not capable of being recognised by way of an order for PCR because they either are not activities that take place in the takutai moana, they do not meet the requirements of s 51 of the Act, or they are matters more appropriately dealt with in relation to an order for CMT.

[591] Rights of access to the takutai moana (including walking, playing and enjoying the takutai moana) are preserved by the Act for all New Zealanders along with rights of fishing and navigation. It is not clear what the use of the word "undisturbed" in the PCR application was meant to convey. If it was intended to suggest that, by means of a PCR, Ngai Tamahaua would be able to exclude others from accessing the takutai moana for activities such as walking or engaging in other recreational activities either in the area of the beach below mean high-water springs or in the moana itself, then that is clearly contrary to the provisions of the Act.

[592] In relation to fishing, there was evidence that members of the applicant group went whitebaiting in the Otara, Waiōweka and Ōpape Rivers and at Waiōweka, Pakihi, Kutarere, Waiōtahe and Wainui. To the extent that those activities take place in the takutai moana (and that would exclude activities in the Waiōweka and Otara Rivers), Ngai Tamahaua meet the requirements of s 51 and are entitled to a PCR.

[593] There was no evidence that "traditional maara" were located in the takutai moana as opposed to on land near the takutai moana.

[594] In relation to the use of flora and fauna in the takutai moana, in her affidavit of 20 February 2020, Tracy Hillier stated that right along the coast from Maraetōtara to

Te Rangi, there were many indigenous plants which were used for a number of different practices including weaving and tukutuku panels. She said that Te Roto was one of the main areas to grow and gather pingao.

[595] Other than pingao and spinifex, no other flora or fauna were specifically identified as being gathered. There was no challenge to Ms Hillier's evidence as to the use of indigenous plants or to the fact that that practice occurred at 1840 and continues today. I accept that Ngai Tamahaua are entitled to an order for PCR entitling them to continue the practice of gathering indigenous plants from the takutai moana for use in cultural activities and traditional cultural activities in the areas between Maraetōtara and Tarakeha. The order will also cover shells given the evidence that shells were collected for a variety of purposes.

[596] In relation to the gathering of natural resources such as flints, clays, soil, sand, gravel, rock, stones, wood, bone, seaweed and sulphur, other than the gathering of driftwood between Ōpape and Ōmarumutu and driftwood for artwork at Ruatuna, Waiōtahe, Tawhitinui, Hukuwai, Tirohanga and Waiaua, there was no evidence identifying such activities as having been exercised since 1840, in a particular part of the marine and coastal area in accordance with tikanga.

[597] Ngai Tamahaua are entitled to an order for PCR in respect of gathering firewood between Ōpape and Ōmarumutu and collecting wood for artwork from the places identified above.

[598] There was no evidence relating to the use of rākau (trees) in relation to carving, the creation of structures or the building of waka. It seems unlikely that any trees useful for these purposes would have been growing below mean high-water springs.

[599] The claim relating to "living on the land" including erecting dwellings, clearly does not relate to the takutai moana below high-water springs.

[600] In relation to navigating waterways including protection of waka launching sites, there was no evidence that explained exactly where the launching sites were. Toni Ngoungou-Martin, in her affidavit of 20 February 2020, referred to a group called

"Te Toi o Mātaatua Waka Group" which had built waka and re-enacted ancient waka journeys using old techniques and methods. It appears this group was still active but there was no information about where it launched waka from. This absence of detail precludes a finding of PCR.

[601] The application seeking PCR in respect of "applying or reinstating traditional place names" is not something that falls within s 51(1) in that it is a right that has been exercised since 1840 and continues to be exercised today. There is nothing stopping Ngai Tamahaua or any other hapū or iwi to call locations by their traditional place names. However, the Act does not provide a mechanism that would compel others (whether they are other hapū/iwi or non-Māori) to use such names.

[602] There was no direct evidence of Ngai Tamahaua "establishing kaitiaki pou". Hetaraka Biddle, in his affidavit of 20 February 2020, after referring to six wāhi tapu along the coast said:

> Today, many of these sites are considered to be important sites to conduct kawa (protocols) such as karakia. The sites are also used as tohu (signs) and pou (markers) for fishing spots, gathering kaimoana.

[603] There is no information in the evidence as to what the intended meaning of the words "establishing kaitiaki pou" is. It is unclear whether this is intended to refer to the erection of posts or poles which would act as "pou". Given the lack of certainty about what this claim relates to, it is not possible to grant PCR in respect of it.

[604] In relation to the application for PCR for "appointing kaitiaki in accordance with tikanga to oversee the management and protection of the rohe moana and waterways", relevant evidence came from both Tracy Hillier and Toni Ngoungou-Martin. This evidence included the monitoring of the activities of other users of the takutai moana, rubbish collection, environmental projects such as those for planting of pingao and spinifex in the marine and coastal area.

[605] There was also evidence that such activities constituted the exercise of kaitiakitanga and of its cultural significance. These types of activities are clearly physical activities relating to the use of a natural or physical resource as contemplated by s 51(2)(e).

[606] Ngai Tamahaua are therefore entitled to an order of PCR authorising them to continue to undertake the sorts of kaitiaki activities referred to in the evidence of Tracy Hillier and Toni Ngoungou-Martin. However, such rights are not exclusive. There is evidence of other hapū undertaking similar physical activities throughout the specified area and the grant of this PCR to Ngai Tamahaua does not restrict or curtail the activities of others. Should there be a conflict between different hapū as to the appropriate kaitiaki activity to be carried out in a particular location, then resolution of that would be a matter for the entity holding CMT in respect of that area.

[607] There was no specific evidence relating to the request for PCR for "utilising resources and locations for educational purposes".

[608] There was also no specific evidence relating to the claim for an order of PCR for "rights to derive commercial benefits". There was no evidence that commercial benefits had been obtained from an activity since 1840 and continued to be so derived. Section 51(2)(c) specifically excluded from a grant of PCR the exercise of "any commercial Māori fishing right or interest". Section 60(2) of the Act seems to place deriving a commercial benefit as something consequent upon a grant of CMT rather than PCR.

[609] There was no evidence that would support a PCR in relation to "disposing of, trading or exchanging natural or other resources".

[610] Similar comments apply in relation to the request for PCR for:

> …all things instrumental to and involve in the performance of kaitiaki roles within the common marine and coastal area according to Ngai Tamahaua tikanga including management of fisheries, the environment, planning, access, use and occupation, and health and safety.

[611] Ngai Tamahaua do not currently have legal rights to manage fisheries or the environment. Nor do they have rights in relation to planning, use and occupation or health and safety. To the extent that the Act grants rights in relation to involvement in conservation processes, such rights are governed by ss 46-50 and not subpart 2 of Part 3 of the Act.

[612] Section 55 of the Act also specifies the rights of PCR holders in respect of resource consent applications by third parties. There is nothing in these provisions that anticipates the sort of very broad controls sought by the applicant.

[613] In relation to the environmental and planning rights sought, s 62 of the Act indicates such rights are consequence of being awarded CMT not PCR.

[614] As discussed above, the protection of wāhi tapu sites is something that s 78 of the Act specifies follows from a grant of CMT not PCR.

[615] The Act also has a separate provision (s 50) in relation stranded marine mammals. There is nothing to stop the applicant performing karakia at whale strandings or at sites of historical significance, but such activities cannot be recognised by way of PCR.

[616] There was no evidence explaining what the request for PCR for the purpose of "protecting the mauri of the waterways" might involve. In order for such an activity to avoid the exclusion in s 51(2)(e), it would need to relate to a physical activity or use involving a natural or physical resource. In the absence of evidence, the Court cannot conclude that such a practice meets the test for the grant of PCR.

[617] To the extent that the "imposition and relief of rāhui" might anticipate a power to exclude third parties from parts of the takutai moana, as already explained, this would be governed by s 79 of the Act and be a right to exercise by holders of CMT. Again, that does not mean that Ngai Tamahaua is restricted from imposing and lifting rāhui as they have historically done, it just means that an order for PCR is not available in respect of such an activity.

*CIV-2017-485-201 – Application by Te Ūpokorehe Treaty Claims Trust on behalf of Te Ūpokorehe*

[618] Ūpokorehe sought PCR in respect of six specified activities. These were: harvesting kaimoana, fishing, exercising kaitiakitanga, exercising mana motuhake and tino rangatiratanga, using resources for medicinal and healing purposes, and resource extraction and recovery. The eastern extremity of their claim was the mid-point of the

Waiōweka river mouth and the western extremity, the mid-point of the Maraetōtara stream mouth.

[619] The seaward boundary of the claimed order was "…to the 200 nautical mile exclusive economic zone". The landward boundaries seemed to encroach inland up river valleys some distance.

[620] The Act defines the area within which the Court grant recognition rights.

[621] The seaward boundary of the marine and coastal area is defined in the Act as being "…the outer limits of the territorial sea".[222]

[622] The same section defines territorial sea as "territorial sea of New Zealand as defined by s 3 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977". Section 3 of that Act defines the seaward boundary of the territorial sea as being "…every point of which line is distant 12 nautical miles from the nearest point of the baseline".

[623] Section 5 of Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act provides that the baseline of the territorial sea "…shall be the low watermark along the coast of New Zealand, including the coast of all islands". The Act therefore does not permit the Court to grant recognition orders in respect of areas out to 200 nautical miles.

[624] There was evidence of Ūpokorehe catching whitebait. However, the only particular location identified was in Ōhiwa Harbour, specifically at the Awaawaroa River. Given that the focus of much of the Ūpokorehe evidence was on Ōhiwa Harbour, I am prepared to infer that whitebait were, and are, caught at various locations around the Ōhiwa Harbour, and to grant an order of PCR in respect of that activity at that particular location. For the reasons discussed above in this judgment, Ūpokorehe are precluded from being granted a PCR over gathering kaimoana or fishing species other than whitebait.

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222 Section 9(1).

[625] The exercise of kaitiakitanga is something based on a cultural association. There was significant evidence given on the part of Ūpokorehe witnesses that detailed physical activities that related to the exercise of kaitiakitanga. Examples of such physical activities include:

(a) engaging with the Department of Conservation and Bay of Plenty Regional Council regarding conservation initiatives (including preservation of archaeological sites);

(b) actively undertaking the control of mangroves in Ōhiwa Harbour including obtaining a resource consent;

(c) establishing a Resource Management Team which liaised with central and local government and also undertook its own conservation initiatives;

(d) participating in a number of Regional and District Council environmental initiatives including participation in the Ōhiwa Harbour Implementation Forum and the Ōhiwa Harbour Strategy Co-ordination Group; and

(e) undertaking regular site visits including checking on waste management issues and interference with wāhi tapu as well as activities in relation to stranded whales.

[626] The majority of the evidence relating to conservation activities engaged in by Ūpokorehe involved the Ōhiwa Harbour but there was also some evidence of activities relating to the wider takutai moana including the Waiōtahe estuary.

[627] I am satisfied that the Ūpokorehe have and continued to discharge their obligations as kaitiaki by engaging in physical activities in the takutai moana and relating to the use of natural and physical resources (including such activities as weaving cages from traditional resources to attempt to protect mussels from predating starfish).

[628] Ūpokorehe are entitled to an order for PCR relating to these physical activities throughout those parts of their claimed rohe moana that falls within the takutai moana as defined in the Act. The rights recognised by the PCR are not exclusive to Ūpokorehe and other hapū/whānau may also exercise such rights in the same area.

[629] In relation to the claim for a PCR for "exercising mana motuhake and tino rangtiratanga", other than where physical activities are involved or natural and physical resources used, s 51(2)(e) precludes the making of an order for PCR.

[630] It is not clear from either the opening or closing submissions on behalf of Ūpokorehe what exactly is meant in relation to the claim for a PCR for the exercise of mana motuhake and tino rangatiratanga. As abstract concepts, they would not meet the requirements of s 51(2)(e). The Court is therefore unable to make a recognition order.

[631] Ūpokorehe seek an order for PCR in respect of "using resources for medicinal and healing purposes". There was evidence that kaimoana and various plants were used for rongoā. The use of fish like stingray and shark to address winter colds or to help people who were ill to breathe better (as referred to in the evidence of Wallace Aramoana) cannot be the subject of an order for PCR because they relate to fishing. There was also evidence of collecting plants such as harakeke, the root of the fern and parts of some varieties of trees for medicinal purposes. It seems unlikely that, other than harakeke, these plants grow in the takutai moana.

[632] To the extent that Ūpokorehe gather flora and fauna from the takutai moana that is not otherwise excluded from being the subject of an order for PCR, they are entitled to an order for PCR within that part of their claimed specified area that falls within the jurisdiction of the Court. A draft order would have to specify what of the various flora and fauna covered in their evidence is actually found in the takutai moana as opposed to in adjacent areas of land.

[633] In relation to resource extraction and recovery, in her affidavit of 3 April 2017 at [73]-[98], Ms Felicity Kahukore Baker gave relatively detailed evidence on the

activity of resource extraction and recovery within the application area. This activity included gathering of the following resources:

(a) Whales (alongside DOC), orca, seal and similar species, shark, bones of marine animals, teeth of marine animals, shells, wood, seaweed, sulphur, paru, stones, sand, gravel shellfish and fossils (where and if possible for research purposes both scientific and per mātauranga Maori principles).

[634] Ms Baker said that the scale of the activity depended on the sustainable requirements set by Ūpokorehe, as well as its tikanga and traditional practices.

[635] Ms Baker discussed the recovery of tohorā/whales (precluded under s 51(2)(d)(ii) of the Act), and then recovery of resources more generally. She firstly discussed the recovery of a number of types of wood from the takutai moana, including Pohutukawa, Matai, Rata, Kahikatea and Nikau, used for purposes such as carving, dye, cooking, and rope-making.

[636] Teeth and bones of deceased marine mammals (precluded under the Act) were recovered for cultural purposes, while shells were collected for use as jewellery and ornaments, as well as practical purposes (for example mussel shells were used for scraping harakeke).

[637] Sulphur and other mineral deposits were used as fertilizer, with seaweed similarly being harvested for garden purposes. Stones were used as a source of fire, as well as for adzes, ornamental purposes, hangi stones and as foundation support for contemporary and traditional building.

[638] Paru (mud) was gathered and used as a staining and preserving agent for carving and weaponry, while fossils were recovered for research, mātauranga Māori or to protect the taonga from destruction.

[639] According to Ms Baker, this activity of resource extraction and recovery occurred in “all river mouths from Maraetōtara in the West to Waiōweka River in the East and all those within the Ōhiwa Harbour and Te Ahi Aua Estuary”.

[640] In terms of frequency, Ms Baker deposed that resource extraction and recovery can take place on a daily basis provided that stocks are maintained and the activity is sustainable, but could also be a weekly or monthly activity, or less regularly, such as after a storm has unearthed taonga such as wood, bones and stones, yearly or seasonally, or not for several years.

[641] Ms Baker stressed that the tradition of extracting or recovering natural resources had been uninterrupted since 1840 and had been handed down from generation to generation, and was an active part of Ūpokorehe society.

[642] Other than Ms Baker’s affidavit, there was little evidence of resource extraction and/or recovery by the Ūpokorehe witnesses. However, such evidence as was presented to the Court does seem to indicate that certain activities do appear to continue today (and also are not precluded under the Act), including the collection and use of shells, mud, wood on the foreshore, and stones. Other activities (such as any activities relating to marine mammals) are precluded under the Act. I conclude that Ūpokorehe are entitled to a PCR for the collection shells, mud, wood on the foreshore, and stones within the application area.

*CIV-2017-485-270 – Application by Muriwai Maggie Jones on behalf of Ngāi Tai Iwi and Te Uri o Ngāi Tai; and*
*CIV-2017-485-272 – Application by Muriwai Maggie Jones on behalf of Ririwhenua Hapū*

[643] These two applications were progressed jointly with the same evidence and submissions being relied upon for both.

[644] As discussed at [579]-[588] above, the pukenga, in their report, determined that the boundary between Whakatōhea and Ngāi Tai was Tarakeha. In response to questions, the pukenga acknowledged that Te Rangi was a place of significance for Whakatōhea hapū given that the Nukutere waka landed there but were also of the view that this did not mean that the Whakatōhea hapū had mana moana over the area

between Tarakeha and Te Rangi. They indicated that they believed there were other tikanga ways of acknowledging the significance of Te Rangi to the Whakatōhea hapū.

[645] From counsel's closing submissions, it is not clear exactly what customary practices Ngāi Tai want recognised by way of PCR in relation to their amended application for the area between Tarakeha and Te Rangi. The closing submissions focused on mana moana. This is dealt with by way of the grant of CMT in respect of this area.

[646] In their amended application, Ngāi Tai (and their hapū Ririwhenua) continued to seek PCR recognition orders around Whakaari and Te Paepae o Aotea. The activities referred to in counsel's closing submissions as supporting such a recognition order were "signs, harvesting tītī birds, deep-sea fishing and collecting resources for gardening and rongoā".

[647] Counsel conceded that activities such as harvesting tītī and collecting resources for gardening and rongoā had not occurred for some time. Section 51(1)(b) requires activities in respect of which an order for PCR is sought to currently be continuing to be exercised. That leaves the activities of deep-sea fishing, collecting resources for gardening and rongoā, and the use of Whakaari in providing tohu, as the remaining claimed customary rights.

[648] However, I am not able to grant PCR in respect of fishing, and there was no evidence of collecting resources from within the takutai moana. That leaves the reading of the tohu (signs) from Whakaari by Ngāi Tai as the remaining customary right for consideration. The evidence in respect of this was that the cloud patterns and other tohu generated by Whakaari would be observed from land. Section 51 requires that a customary activity needs to be exercised in a particular part of the marine and coastal area. Observing signs from the land and then engaging in a physical activity or use of a natural or physical resource would not seem to meet the requirements of s 51.

*CIV-2017-485-292 – Application by the Whakatōhea Māori Trust Board on behalf of Whakatōhea*

[649] The amended application area showed the eastern boundary as being Te Rangi but counsel appeared to accept that it should be Tarakeha. The western boundary was Maraetōtara.

[650] The application was said to be bought on behalf of all of the hapū of Whakatōhea and in particular Ngāti Ngāhere, Ngāti Patumoana and Ngāti Ruatakenga. Ngāti Patumoana and Ngāti Ruatakenga were separately represented and counsel for the Trust Board adopted the submissions of their counsel. Ngāti Ngāhere were not separately represented and did not call their own witnesses. The Trust Board relied on and adopted the evidence given by witnesses for other Whakatōhea hapū.

[651] The amended application for PCRs sought recognition orders in respect of eight matters:

(a) collection of rongoā material;

(b) bird snaring;

(c) transport;

(d) transfer of knowledge of hapū marine culture;

(e) seasonal kaimoana exchange;

(f) access to gardens on land;

(g) customary rituals such as tangihanga; and

(h) manaakitanga and ope mara (labour movement).

[652] I have already separately addressed Ngāti Patumoana's claim for PCR and will not further discuss it.

[653] As there was no specific evidence presented on behalf of Ngāti Ngāhere as to their exercise of PCRs in a particular part of the marine and coastal area, I am not able to consider their claim for PCR further. That leaves Ngāti Ruatakenga.

[654] In relation to the claim for PCR for collecting rongoā materials, the evidence of Te Riaki Amoamo was that sea water was gathered and used (accompanied by karakia) to cure physical ailments. Mr Amoamo also referred to performing baptisms in the sea. As these activities, in addition to their spiritual association, are manifested by a physical activity and the use of the natural resource of sea water, they are not excluded by s 51(2)(e) of the Act from being the subject of an order for PCR. I am satisfied that these activities were being undertaken in 1840 and continue to be exercised today.

[655] Ngāti Ruatakenga is entitled to an order for PCR in respect of these activities. In accordance with the boundaries set out in the map that was Appendix A to the amended application of 4 August 2020, the western boundary of the particular part of the marine and coastal area is Pakihikura (east bank) and the amended eastern boundary is Tarakeha. This is the area to which the PCR relates.

[656] There was no evidence in the relation to the claimed activities of using the takutai moana for transport, seasonal kaimoana exchange, access to gardens on land or labour movement. Accordingly, there is no basis to grant orders of PCR in respect of these activities.

[657] There was evidence about matters such as transfer of knowledge of hapū and marine culture and customary rituals such as tangihanga. Mandy Hata gave evidence of involving the Ōmarumutu School and Nukutere Kōhanga Reo in the Waiaua Estuarine Restoration Project restoring the coastal sand dunes. The activities take place on the Ōmaramutu Marae Papakainga and around the wetlands beside Te Rangimatanui urupā. There was also evidence of a map of customary fishing spots in the moana. The map was created by traditional methods of using landmarks. The creation of a map of such sites is not necessarily limited to commercial or non-commercial fishing but is relevant to kaitiaki or conservation activities. It is also a physical activity and therefore not caught by s 51(2)(e).

[658] Ngāti Ruatakenga are therefore entitled to an order for PCR in respect of their conservation activities in the area around the Ōmaramutu Marae Papakainga and Waiaua estuary, as well as their kaitiaki activities such as the creation of a map detailing the resources of the takutai moana in their claimed application area.

[659] The evidence in relation to the conducting of customary rituals such as tangihanga in the coastal marine area was sparse but, as noted, there was evidence of Ngāti Ruatakenga's tohunga and kaumatua conducting customary rituals such as baptisms in the takutai moana. To the extent that tangihanga also occur in part of the takutai moana, they would also support a grant of PCR on the basis that the physical activity is involved (going into the takutai moana) and/or a natural or physical resource (sea water) is used as part of the ritual. Accordingly, a recognition of PCR is granted for these activities between Pakihikura and Tarakeha.

## PART VII – CONCLUSIONS AND SUMMARY

### CMT

[660] There are three different areas of CMT where the applicants have met the tests set out in s 58 of the Act. These are:

(a) a jointly held order for Ngāti Ira, Ngāti Patumoana, Ngāti Ruatakenga, Ngai Tamahaua, Ngāti Ngāhere and Ūpokorehe from Maraetōtara in the west to Tarakeha in the east and out to the 12 nautical mile limit;

(b) in relation to the western part of Ōhiwa Harbour, a jointly held CMT between the six Whakatōhea hapū and Ngāti Awa; and

(c) between Tarakeha and Te Rangi and out to the 12 nautical mile limit an order of CMT for Ngāi Tai.

[661] The area where the applicants have not met the tests for CMT is in the takutai moana around Whakaari and Te Paepae o Aotea.

[662] The exact boundaries of the area subject to the CMT orders will be determined following the next hearing, which currently is set down for 14 February 2022. A number of applicants in these proceedings provided maps of their application areas with boundary lines running perpendicular from the coast. Some provided triangular shaped maps. However, Ngāti Rua produced an application area map with curved boundary lines between Pākihikura and Te Rangi running parallel from each other out to sea.

[663] When cross-examined on why the Ngāti Rua application contained curved boundary lines, Mr Amoamo described the application area as curving "like the waves of the ocean", and appeared to concede to Mr Mahuika, counsel for Te Rūnanga o Te Whānau, that the application area curved in order to avoid overlap with the rohe of the neighbouring iwi of Ngāi Tai and Te Whānau-a-Apanui.

[664] Therefore, one factor that the Court will need to take into consideration during the next hearing is the exact direction and extent of the boundary lines on each side of the CMT area. I draw counsel's attention to s 109 of the Act. An applicant group in whose favour the Court grants recognition of a PCR or CMT must submit a draft order for approval by the Registrar of the Court.

[665] I direct that counsel file and exchange proposed draft orders no later than **30 August 2021**. Where there are issues of disagreement between parties as to the contents of proposed draft orders, I expect the parties to engage in a tikanga-based process of kōrero prior to the second part of the hearing in this matter in an attempt to resolve such differences.

[666] The Court has reserved leave for those parties potentially affected by the grant of recognition orders to participate in such a hearing. This includes the various interested parties such as the Bay of Plenty Regional Council and the Whakatāne and Ōpōtiki District Councils, as well as those interested parties who have structures in the takutai moana or conduct activities in the takutai moana that are potentially affected.

[667] This hearing will also need to address the nature of the joint CMT proposed for the western part of Ōhiwa Harbour. It is to be hoped that prior to the second hearing, the parties with shared interests in the western part of Ōhiwa Harbour will have engaged with each other in accordance with tikanga to see if agreement can be reached on the terms of that proposed CMT.

**PCR**

[668] As detailed in Part VI of this decision, a number of the applicants have also been successful in advancing claims for recognition by way of PCR.

[669] In summary, the following claims for PCRs have been successful:

(a) Ngāti Muriwai:

(i) collecting firewood, stones and shells in their claimed area; and

(ii) fishing for whitebait at the Waiaua River and Waiōtahe estuary.

(b) Ngāti Ira o Waiōweka:

(i) whitebaiting at the Waiaua and Waiōtahe Rivers;

(ii) gathering driftwood throughout their claimed area;

(iii) gathering sand off the mouth of the Waiōweka River and at Waiōtahe;

(iv) gathering mud, rocks, and shells from wetlands, estuarine margins and the sea throughout their claimed area; and

(v) landing vessels and making passage throughout their claimed area.

(c) Te Uri o Whakatōhea Rangatira Mokomoko:

(i) whitebaiting at Waiaua and in and around the Ōhiwa Harbour;

(ii) taking of wai tai for rongoā purposes in the claimed area, and using wai tai for bathing and healing purposes within Ōhiwa Harbour;

(iii) using the takutai moana within the claimed area for transport and purposes of navigation;

(iv) travelling to Hokianga Island for wānanga to pass down mātauranga to future generations;

(v) traditional practices such as wānanga, hui, tangihanga and burying of whenua at Taiharuru;

(vi) planting of pohutukawa, harakeke, pingao, spinifex and toitoi within the claimed takutai moana area as an exercise of kaitiakitanga; and

(vii) launching of boats and waka at the Ōhiwa Harbour.

(d) Ngai Tamahaua:

(i) whitebaiting in the Ōpape River and at Waiōweka, Pakihi, Kutarere, Waiōtahe and Wainui, to the extent that those activities take place in the takutai moana;

(ii) gathering of indigenous plants and shells between Maraetōtara and Tarakeha;

(iii) gathering firewood between Ōpape and Ōmarumutu;

(iv) collecting wood for artwork from Ruatuna, Waiōtahe, Tawhitinui, Hukuwai, Tirohanga and Waiaua; and

(v) exercising kaitiakitanga activities in the takutai moana including the monitoring of the activities of other users of the takutai moana, rubbish collection, and environmental projects such as those for planting of pingao and spinifex.

(e) Te Ūpokorehe:

(i) catching whitebait in the Ōhiwa Harbour;

(ii) exercising kaitiakitanga within the takutai moana in relation to the activities set out at [625]-[627]; and

(iii) gathering flora and fauna that is not otherwise excluded from being the subject of an order for PCR within their claimed area.

(f) Whakatōhea Māori Trust Board (specifically Ngāti Ruatakenga):

(i) collection of rongoā materials within the claimed area;

(ii) performing baptisms within the claimed area;

(iii) conservation activities in the area around the Ōmaramutu Marae Papakainga and Waiaua estuary;

(iv) kaitiaki activities such as the creation of maps for sites in the takutai moana using customary methods; and

(v) customary rituals, as well as tangihanga, within the claimed area.

[670] All successful applicants (whether for CMT or PCR) should prepare draft recognition orders and circulate those to all other parties. Again, the applicants are encouraged to engage in kōrero with each other, in accordance with tikanga, prior to filing and serving draft orders.

[671] Leave is reserved to all applicants and interested parties to make such interlocutory applications as may be required for directions regarding matters arising from this decision.

**Churchman J**

Solicitors:
Legal Hub Lawyers, Auckland for the late Claude Edwards (CIV-2011-485-817); Hiwarau C, Turangapikitoi, Waiōtahe, and Ōhiwa of Whakatōhea (CIV-2017-485-375); Pākōwhai Hapū (CIV-2017-485-264); and Te Whānau-a-Apanui (CIV-2017-485-278)
Wackrow Williams & Davies Ltd, Auckland for Ngai Tamahaua Hapū (CIV-2017-485-262) and Te Hapū Titoko o Ngai Tama (CIV-2017-485-377)
Kāhui Legal, Wellington for Te Rūnanga o te Whānau-a-Apanui (CIV-2017-485-318)
Oranganui Legal, Paraparaumu for Ngāi Tai (CIV-2017-485-27) and Ririwhenua Hapū (CIV-2017-485-272)

Te Mata Law Ltd for Te Whānau a Harawaka (CIV-2017-485-272)
Lyall & Thornton, Auckland for Te Ūpokorehe Trust (CIV-2017-485-201)
Te Haa Legal, Otaki for Ngāti Muriwai (CIV-2017-485-269)
McCaw Lewis, Hamilton for Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)
Whāia Legal, Wellington for Te Rūnanga o Ngāti Awa (CIV-2017-485-196)
Annette Sykes & Co, Rotorua for Ngāti Ira o Waiōweka Rohe (CIV-2017-485-299) and
Ngāti Ruatakenga (CIV-2017-485-292)
Bennion Law, Wellington for Ngāti Patumoana (CIV2017-485-253)
Tu Pono Legal Limited, Rotorua for Whakatōhea Māori Board Trust (CIV-2017-485-292)
Ranfurly Chambers Ltd, Auckland for Ngāti Huarere ki Whangapoua (CIV-2017-404-482)
Greig Gallagher & Co, Wellington for Ngāi Taiwhakaea (CIV-2017-485-185)
Franks Ogilvie, Wellington for Landowners Coalition Incorporated
Cooney Lees Morgan, Tauranga for Bay of Plenty Regional Council and Ōpōtiki District Council
Chapman Tripp, Wellington for Seafood Industry Representatives
Crown Law, Wellington for Attorney-General

Counsel:
C Finlayson QC
K Feint QC
R Roff
M Sharp
B Tupara
C Hirschfeld
T Castle

## APPENDIX A – PUKENGA REPORT

**BEFORE THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O**
**AOTEAROA TE WHANGANUI-**
**A-TARA ROHE**

**CIV-2011-485-817**

| | |
|---|---|
| **IN THE MATTER OF** | **the Marine and Coastal Area (Takutai Moana) Act 2011** |
| **AND IN THE MATTER OF** | **an application for an order recognising Customary Marine Title and Protected Customary Rights by the LATE CLAUDE AUGUSTIN EDWARDS (DECEASED), ADRIANA EDWARDS AND OTHERS on behalf of Te Whakatōhea** |
| | **The Applicants** |

**PUKENGA REPORT ON THE TIKANGA PROCESS**

**He Whakatauāki**

"Whakahokia mai te mana o te iwi ki te iwi, o te hapū ki te hapū,
o te whānau ki te whānau, o te tangata ki te tangata, me tana rau kotahi"

"Return the authority of the tribes to the tribes, of the hapū to the hapū,
of the whānau to the whānau, of the individuals to the individuals representing
as they do, the generations of the past and the present"

[W. Tibble, Submission 58, Hui Taumata, 1984]

**He Whakamārama**

We have chosen this whakatauāki as a lead statement to this report because it proposes several matters of tikanga significance. The first is that it can apply to any iwi at any point in time. As such, and despite the "ao hurihuri" we live in at present, it is a challenge and reminder of where we are from and our DNA being philosophically more oriental rather than, occidental.

Secondly it denotes our basic conviction that all applicants can resolve the issues on a truly tikanga basis and encourage you all to do so. You have the appropriate tikanga Māori resources to achieve a win – win outcome in the most appropriate way. Koina te wero kia koutou katoa – *[that is the challenge we leave with you*]. We propose it as a way ahead which basically says this current High Court process could have been resolved differently had a te ao Māori lens been applied. We go as far as to say that it can still work, going forward.

Thirdly, the whakatauāki readily guided us to making a very simple decision on tikanga. We have used the tikanga, experiences and processes of all the applicant groups involved in this High Court process as the basis for our recommendations. This we considered most important. However, and having made that decision, we also acknowledge referring to the works of outstanding scholars and tohunga tikanga such as Hirini Moko Mead

[1] [Tikanga Māori – Living by Māori Values, 2016], Ranginui Walker [Ōpōtiki-mai-tawhiti – The Story of Whakatōhea's Struggle, 2007], Sir Peter Buck, [The Coming of the Māori, 1949], Ewan Johnston, Wai 203/339 – Scoping Report for the Waitangi Tribunal, 2001], and Jeffrey Sissons – [The Post – assimilationist Thought of Sir Apirana Ngata, 2000]. In this context we also acknowledge the expert and historians who both filed and spoke to their affidavits. There are also numerous other references available for consideration and are listed in the references section.

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[1] Hirini Moko Mead is a kaumātua from Ngāti Awa and Tūhoe descent. Professor Sir Hirini Moko Mead had a very successful career as an Academic for some of the lead universities in the world, a distinguished gentleman that master minded an education institution for Higher Education. Te Whare Wānanga o Awanuiārangi has a main campus at Whakatane with other campuses around the country, Whangarei, Manukau, Heretaunga, Wellington, Taranaki. The wānanga offers a wide range of tikanga Maori programmes from certificates through to Undergraduate and Post Graduate studies.

Fourthly, the whakatauāki further indicates what is in fact tikanga that are common to all iwi. There are also nuances particular to iwi rohe and as such cannot be used to resolve tikanga issues in another tribal area unless there are possible whakapapa and waka origins. That does not mean that no inter- hapū or inter-iwi adaptation, occurs.

Finally, the whakatauāki espouses the principles of **I** as meaning **WE / US** and that the focus should be on the WE as in whānau, hapū and when required, iwi. Despite what was espoused several times during the tikanga hui, this element was not fulfilled. This is not a criticism ***but*** a basic observation of what is not tikanga. Whakamahia ngā tikanga – extol the opportunities that tikanga, offers.

Furthermore, and to illustrate this point, we use one of two quotations made by Robert Tuahuru Edwards. One at paragraph 58 of his affidavit of 15 November 2019 and this one from his affidavit of 7 September 2020, ***"what we do today will define the future and so it is that we must learn to stand united, one voice, one mind and one people under Whakatohea. Can I say …that it is possible to reclaim your future to build a happy fulfilling life despite an imperfect past. If we are unable to agree and unite about the past and the present, we shall find ultimately that we are in danger of losing the future".***

## 1. Introduction:

a. While we could have used other and appropriate whakatauāki, this one serves as a very good indicator of the essence of tikanga. One based on whakapapa and how it is referenced at the respective levels of our social system. That is iwi, hapū, whānau[2] and individual[s].

b. The whakatauāki[3] also clearly shows that one can traverse all levels either individually or across all simultaneously. This is exactly what we have experienced in the evidence presented plus our combined observations both in and outside the formal court sitting.

c. However, we have nevertheless gleaned sufficient evidence to respond to the following questions posed of us:

   i. *What tikanga does the evidence establish applies in the application area?*

   ii. *Which aspects of tikanga should influence the assessment of whether or not the area in question is held in accordance with tikanga?*

   iii. *Which applicant group or groups hold the application area or any part of it in accordance with tikanga? And*

   iv. *Who, in fact, are the iwi[4], hapū or whānau groups that comprise the applicant groups?*

d. From the beginning of this High Court case and through the visits of observation there was a key resource available to us and no doubt for all applicants. I n our case it helped us not only put into perspective the history of Te Whakatōhea and its tragic history it provided us with a tool to paint a picture of what happened and when. It knitted together those kōrero and histories that were relayed to us, verbally. It is titled Chronology 21 August 2020.

e. Finally, and although this report promotes a notion of simplicity, the reality is that this High Court process was very complicated. This is acknowledged by us and remained a challenge throughout this hearing. This however further substantiates why we have used our lead whakatauāki. This is also done with the knowledge that what we report will not be receptive to everyone and that is the downside of it being our

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2 Ann Salmond (1975) HUI: A Study of Maori Ceremonial Gatherings, has a wide reference on whānau, hapū and iwi.

3 Mead, H.M. (2003). *Tikanga Māori: Living by Māori Values,* Wellington Huia & Te Whare Wānanga.

4 MACA, claimant groups all mentioned whakapapa linking them to whānau, hapū and iwi.

report, even though it is based on the tikanga of all the applicants.

2. **Our Tikanga Based Solution**

   a. As Pukenga[5], we see a simple solution to the applicant iwi, hapū, whānau groups, marae and individuals. More importantly, it is still available to them although time may be the only restraint on it being applied. However, the solution is available for the consideration of any other hapū and iwi who are in a similar position, as a way forward.

   b. Our simple solution is to go to a tikanga based poutarāwhare[6] comprising Te Whakatōhea and Ūpokorehe for the rohe from Maraetōtara in the west to Tarakeha in the east. In choosing that poutarāwhare, we do not designate or deem it appropriate for us to determine who is an iwi. Our poutarāwhare in our opinion, already exists and is supported by whakapapa, mana whenua, mana moana, ahikāroa, taunga ika, toka kaimoana, tapu, rāhui, tohu moana, tohu whenua, practices, experiences and incidents and the like. E hika ma, ngā momo tikanga katoa. Accordingly, the base references for our poutarāwhare are Te Riaki Amoamo's Te Whakapapa o te Whakatōhea filed in the High Court as Exhibit 26 on 23 September 2020 and endorsed by that produced in the High Court on 29 September 2020 by Wallace Aramoana and titled Te Whakapapa o Te Ūpokorehe. The latter introduced the origin of Te Ūpokorehe from the Oturereao waka.

   c. The similar basis applied to Te Whānau-a-Apanui, Ngāi Tai and Ngāti Awa and the Te Whakatōhea – Ūpokorehe poutarāwhare. While this is the case, there is also reality that there are overlapping interests as encapsulated by R. Cage on 5 October 2020 in his illustration of the manaakitanga accorded neighbouring iwi with regards access to kahawai and moki. The former at the Motu River and the latter at Whangaparaoa. They are welcomed to the resource that is available but they have no mana whenua and mana moana.

   d. The poutarāwhare we suggest comprises Ngai Tamahaua, Ngāti Ruatakenga, Ngāti Ira, Ngāti Ngāhere, Ngāti Patumoana and Ūpokorehe. We go further to say that there should be one title [kākahu] issued and our reasoning for that is as follows:

      i. the Whakatohea Māori Trust Board, an existing governance structure, was established for a specific

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5 Pukenga are Maori cultural experts in all matters pertaining to Te Ao Māori.

6 Poutarāwhare is our word for construct.

purpose and its relevance into the future is for the component parts of our poutarāwhare to determine. Furthermore, while elements of the Board are tikanga based, its legal status is legislated under the Māori Trust Boards Act 1955. Despite the main thrust of our recommendation, we nevertheless acknowledge the intention of the original application and that was that no one from Maraetotara to Tarakeha would be excluded. And although the motivation may have been different at the time of the application, our recommendation fulfils the original intention. – kāore e koa atu, kāore e ko mai – *no further, no less*.

ii. our poutarāwhare can also in the future, determine how best to address the position where there were once up to twenty-two hapū within the previously mentioned rohe. For example, Ūpokorehe have five existing hapū and that is to say that there are others who were referred to as no longer existing. The position we take is that they should not be written off unless there is total agreement between all parties motivated to consider this matter. We clarify this by saying that a decision at this time to discontinue the recognition of such hapū predetermines a pathway ahead for future uri who may discover their waka, tīpuna and whakapapa birth rights. Perhaps a good opportunity for some further, appropriate and in-depth research. We hasten to mention the facilities to accommodate this position as contained at paragraph 5.7 and titled The Process for Recognising Additional Hapū – [The Whakatōhea Mandate Inquiry Report www.waitangitribunal.govt.nz, pages 46-47].

iii. our poutarāwhare also does not determine who is a whānau, a hapū or an iwi. For us that is a tikanga that has been in place mai rāno – for ever and a day and fulfils certain criteria of tikanga. Some are these are whakapapa, whenua and ahikāroa status as well as mana whenua, mana moana, marae and tikanga around the full gambit of kaimoana gathering across all rohe and takutai-moana under discussion.

iv. our poutarāwhare also addresses the position regarding the Mokomoko whānau, the Hiwarau C Block, Kūtarere Marae the Pākowhai and other similar applicants. That is, their interests can be accommodated by the component part or parts of our poutarāwhare. That is for example, by their relationship to one or more parts of the poutarāwhare or their inclusion within existing ones.

v. our poutarāwhare have a long history of occupation in and proximity to Ngāti Awa to the west, Ngai Tūhoe, Te Aitanga-ā-Mahaki and other eastern iwi to the south and Ngāi Tai to the east. Our recommendations for a single title with governance at the poutarāwhare level while acknowledging their rangatiratanga, may not solve all issues. It does however mandate their mana whenua and mana moana and allows it to make meaningful decisions in respect their interactions with regard the previously mentioned iwi or hapū. While there is a great measure of tino rangatiratanga in such a decision there is still a need to work through matters of definite and shared boundaries as well as mandated access and the appropriate exchange of kai and other resources. Further hui are encouraged and should not be curtailed by the issue of the High Court's decisions.

e. The rationale for these recommendations, are also simple. Our poutarāwhare can then decide how it addresses the interests of all other applicant groups as well as each hapū's affairs going forward. At the same time, our poutarāwhare can decide how, if deemed appropriate, to unite to conduct business at any level. Whatever the nature of that level and whether it is in one or two parts, me hui kanohi ki te kanohi.

f. We also acknowledge the contributions made by all applicants as well as those who completed and spoke to their affidavits. There was a wealth of information proffered and we are more enriched by attending all sittings of the High Court, separate hui, reading affidavits and exhibits as well as map books that were filed. While our focus has been on the tikanga, experiences and incidents we acknowledge all expert witnesses engaged and their reports filed.

g. Finally, and with regards all applicants, there were repeated suggestions and requests for all applicant interests to work as an **IWI**. What we witnessed was a strong focus on **I**wi **and not** i**WI**. This observation motivated our use of the lead whakatauāki used to open this report.

h. The rest of this report focusses on a commentary about the Tikanga base for this assignment, the full responses to the questions posed in paragraph 3.1-4 above as well as the details and examples of tikanga applied to this report.

3. **The Tikanga Base:**

a. There was no lack of evidence that tikanga drove everything in days gone by as there is still a lot of evidence that those tikanga

survive and are vibrant today. Glaringly so from our perspective, and in this ever challenging and changing world. There were many examples available throughout the sitting and some we identified as being classic illustrations of tikanga. In fact, exceptional, with their affidavits being greatly enhanced by the personal delivery and is something that we totally admired and encourage. In the same way, we extoll a more expansive use of te reo Māori as translating and asking people to speak in English or have things translated, greatly detracts from the impact of the presentation.

b. To properly identify the elements of tikanga, we rely on the framework developed by the Late John Rangiāniwaniwa Rangihau and titled ***He Whakaaturanga Tikanga Māori – Appendix I***. It has not yet been rejected by any of the applicants and appears to form a common area of agreement. We have elaborated on that framework with some brief explanations and these are included as ***Appendix II: He Whakamāramatanga I Te Whakaaturanga Tikanga Māori***. Furthermore, and although our intention is to leave any detail of the elements of tikanga to the practitioners, there will be some instances where we will drill down in order to illustrate certain aspects.

c. More importantly we have adapted the He Whakaaturanga Tikanga Māori – Appendix I and portray how these and the tikanga moana, originated. These are contained in ***Appendix III titled Tikanga Relevance***.

d. Also in Appendix III Tikanga Relevance, we trace the origins of our tīpuna from "te Hononga o Wairua, Hawaiki pāmamao, Hawaiki roa, Hawaiki nui, to Aotearoa. This was achieved by waka and heightens the relevance of tikanga inclusive of whakapapa and the place reconnecting to land played. Consequently, elements like sighting clouds being formed as the result of convection, noticing the presence of different and certain birds and the distance they were from the clouds were indications of the presence of land. Consequently, the landing and exploring of the whenua and subsequent naming of outstanding geographical features, the establishment of pā tūwatawata, kaenga and marae once landfall was made, were tikanga based. This also included the various types of events which initiated the journeys being continued through the various identified Hawaiki. Events such as war, famine, over population and natural disasters and perhaps creativity and adventure.

e. Furthermore, and for the major part of that migration, the sea was their world. A world which initiated all of the disciplines required for our people to survive. A factor which John

Rangihau used to “refute the professionslism of an academic qualification as being three years of study as opposed to the Māori survival ethic which was instilled long before an individual was born and was passed down from generation to generation to generation”. We describe this as the future, behind. Moreover, it was an intellectual ability that Sir Apirana Ngata describes as “originating on the basis that our Māoritanga is and was not just a passing phase. It is ancient and is a phenomenon that was handed down by our ancestors and through the numerous generations. It comprised the language, the traditions, the unifications of the people, the thoughts, the recollections of the power of the memory – these are the qualities they left to us. Qualities that were imbued in each of the iwi by the mighty creator”.

f. That is why, and again in Appendix III, a great deal of significance is accorded the moana. It is, we profer, the origin of a lot of tikanga around karakia, wairua, mauri, whakapapa, whanaungatanga, mauri tangata, tangihanga, manaaki, awhi, tapu, noa, as well as things like the use of mimi and also the use of waitai as a means of safeguarding and cleansing, respectively. Finally, we have for reasons of simplicity, identitied that there are three main spheres, physical applications or basis of origin for tikanga. They are waka, whanaungatanga and whakapapa and whenua. The latter includes other tikanga elements of tūrangawaewaea and marae. All of the elements of tikanga apply equally across all those spheres and according to appropriate circumstances with there also being a lot of interactions and at the same time.

g. Mātauranga Māori (Māori knowledge) is the overarching framework that explains tikanga in a broader Māori world view. Within mātauranga Māori are the knowledge, culture and customs, rituals and incantations which are embodied through te reo Māori and tikanga Māori. Tikanga Māori brings many concepts, that may be unique and have authenticity only to all of the tribal peoples of the Mataatua region, like whakapapa, traditional food gathering, traditional preservation of food, traditional times and seasons for going out to sea, and rāhui to protect the living.

h. The tikanga also relates to the belief systems of Māori where they have genealogical ties dating back to Ranginui [Father sky] and Papatuanuku [Mother earth] and also the belief system of belonging to an ancestor that was already living here in Aotearoa way before the Greet Fleet (the canoes) landed . Mātauranga Māori includes a dynamic and evolving range and knowledge base. It is not limited to Te Ao Tawhito and includes

everything in Te Ao Māori and sometimes referred to as “te ao hurihuri” or something we refer to as “what we do today, is a tikanga for tomorrow”.

4. **The High Court Questions**:

   a. As an openning statement, our observation is that there is a flexibility and fluidity regarding the tikanga that exists “mai i a Ngā Kuri-ā-Whārei ki Tihirau”. A Mātaatua waka wide sharing of various types of kaimoana according to seasons and types of kaimoana that are available. There is no exception within the rohe from Maraetotara [in the west] ki Tarakeha [in the east].

   b. Our further impression is that there is a similar flexibility and fluidity within that traditional boundary as it appears that people went wherever kai was available or an event of social significance was to happen and a lot of this had to do with whakapapa. Most people affiliated to more that one Whakatōhea hapū and also more that one waka and iwi. Similarly, there were also tikanga around working with your neighboring hapū and iwi on the exchange of and access to the different food resources and also appropriate overlaps in access.

   c. The other introductory statement we make is that all tikanga as identified in APPENDIX I: He Whakaaturanga Tikanga Māori, applies and exists across Te Whānau-a-Apanui, Ngāi Tai, Tūhoe, Ngāti Awa and the rohe occupied by our poutarāwhare of Te Whakatōhea and Ūpokorehe. The differences, although minor, are in the practical application and the detail of how they are implemented. An example of the flexibilty and fluidity we observed is the access to Whakaari for fishing and titi or kuia hunting as well as other physical resources. There is an unwritten acknowledgement of the order of access to that resource and it appears that is a practice that was common knowledge to all applicants. Nevertheless, the responses to the four questions posed are and the principal tikanga we detail, is as follows:

      i. **What tikanga does the evidence established applies in the application area?**

      ii. **Which aspects of tikanga should influence the assessment of whether or not the area in question is held in accordance with tikanga?**

         1. As an overall introduction, all tikanga included in **APPENDIX I: HE WHAKAATURANGA TIKANGA MĀORI** and their detailed manifestations apply either as a basic necessity or as a

motivator or both, at the same time. That is you cannot consider any element of tikanga as a straight line concept but as a kākahu rāranga, a blending of numerous elements interacting. In terms of these two questions posed, an appropriate and example only, follows:

a. **Mana** as described in **APPENDIX II: HE WHAKAMĀRAMA I TE WHAKAATURANGA TIKANGA MĀORI** [Paragraph 1. d. i] with an example of the detail being as follows. However, the full detail will be as covered in paragraph 5, **The Details and Examples of Tikanga Applied to this Report.**

b. **Mana** therefore

i. **Tino rangatiratanga** is guaranteed to Māori under article two of Te Tiriti o Waitangi, as a means of inherent sovereignty over our land, freshwater and marine and in accordance with tikanga Māori, striving wherever possible to ensure that those resources are protected for the use of future generations. The protection of all of our traditional resources.

ii. **Kaitiakitanga** is guardianship and protection. It is managing the environment, based on tikanga Māori. Hapū communities looking after, managing the cleaning and caring for the takutai moana, and creating awareness in communities to stop polluting the rivers and streams that flow straight into our beaches and seabeds. The sea is the food basket for all people and managing the risk of development and pollution has created kaitiaki groups from hapū and the ahikaa.

iii. **Utu** in accordance to tikanga Māori, are disputes that arise from

a breach of tikanga Māori that require some form of utu to be paid to a wronged party. The utu itself can take many forms depending on the circumstances; however, "utu" has a compensatory role in restoring a breach of tikanga Maori. Professor Hirini Moko Mead describes "utu" as part of a three-stage process of take (issue), utu (cost) and ea (resolution), which aims to restore the relationship between a wronged party and an offender.

iv. **Tapu** relates to the sacredness of the person, land or te takutai moana. We must consider if there is a breach of tapu, and if there is, to ascertain what the gain or outcome is. Māori had no concept of Christian 'sin' as Māori 'hara' can be the infringement of tapu. Tapu is binding as well as bonding with repercussions for the future if transgressed with 'hara'.

v. **Take-utu-ea** as a three-way approach that requires resolution. Identify the issue, mutually agree upon cost or action to reach an agreed resolution by all parties involved.

iii. **Which applicant group or groups hold the application area or any part of it in accordance with tikanga?**

1. All groups consider their right according to the tikanga they feel applies. However, and with more hui between them being essential to determine and agree on tikanga, it is only sufficient of us to make a commentary on this question. Furthermore, with numerous positive hui still taking place, this aspect may be resolved in a positive and appropriate way. However, and from the papers available to us the following applies:

a. **Ngāti Awa**

   i. Whakaari, Maraetōtara west, Tauwhare Pā, West Ōhiwa Harbour;

   ii. Ngāti Awa holds the customary interests for Moutohorā (Whale Island), Te Raurima, Turuturu roimata (Wairaka rock);

   iii. Opihi Whanaungakore (cemetary of the unnamed relatives), te anga o Muriwai cave of Muriwai), Kapu Te Rangi (Toikairakau Pa).

b. **Ūpokorehe**

   i. Customary interests in Maraetōtara East, Cheddar Valley, Ōhiwa Harbour, Waiōtahe, Hokianga, Hiwarau C, Waiōweka, Paerāta, Ōpōtiki mai tawhiti.

c. **Te Whānau-a-Apanui**

   i. Whakaari, Hawai, Motu river.

d. **Nga Kāhui Hapū o Te Whakatōhea**

   i. One customary and shared customary orders with all hapū in Te Whakatōhea. The Kāhui is made up of nominated hapū members from each respective 6 hapū of Te Whakatōhea that was originally recognised as hapū) Ngāti Ira, Ngāti Patu, Ngāti Ruatakenga, Ngai Tamahaua, Ngāti Ngāhere, Ūpokorehe.

   ii. Hiwarau C, Turangapikitoi, Waiōtahe, Ōhiwa, Pākōwhai, Whānau-a-Apanui, Ōpape Native Reserve, Whakaari, Moutohorā, Te Paepae Atea, Kermedics.

e. **Ngāi Tai** Shared customary interests withTe Kāhui o nga hapū o

Te Whakatōhea out to the fishing rocks over to Whakaari and Te Paepae Atea. However, and based on Tikanga, our view is that Ngāi Tai have mana whenua from Tarakeha in the west to Taumata o Apanui.

iv. ***Who, in fact are the iwi, hapū and whānau groups that comprise the applicant group?***

1. Again this is a response compiled from the papers where again the the main applicant iwi, hapū, whānau and groups are:

    a. Te Whakatōhea (CIV-2011-485-817); Hiwarau C, Turangapikitoi, Waiōtahe, and Ōhiwa of Whakatōhea (CIV-2017-485-375); Pākōwhai Hapū; and Whānau-a-Apanui (CIV-2017-485-278) – T Sinclair and B Cunningham:

    b. Ngāti Muriwai Hapū (CIV-2017-485-269) – M Sinclair, M Sharp and J Waaka:

    c. Ngai Tamahaua (CIV-2017-485-262) and; Te Hapū Titoko o Ngai Tamahaua (CIV-2017-485-377) – C Linstead-Panoho and T K Williams:

    d. Te Whānau-a-Apanui (CIV-2017-485-318) – M Mahuika and N Coates:

    e. Ngāi Tai (CIV-2017-485-270) and Ririwhenua Hapū (CIV-2017-485-272) – E Rongo:

    f. Whānau a Te Harawaka (CIV-2017-485-238) – C Leauga:

    g. Te Ūpokorehe Trust (CIV-2017-485-201) – B Lyall:

    h. Whānau a Mokomoko (CIV-2017-485-355) – R Siciliano and K Ketu:

    i. Te Rūnanga o Ngāti Awa (CIV-2017-485-196) – H Irwin-Easthope:

    j. Ngāti Ira o Waiōweka Rohe (CIV-2017-485-299) – A Sykes and J Chaney:

k. Ngāti Patumoana (CIV-2017-485-253) – T Bennion:

l. Whakatōhea Māori Trust Board (CIV-2017-485-292) – J Pou:

m. Ngāti Ruatakenga (they don't have a CIV as they don't have another application before the High Court but come under the gambit of the application by the Whakatōhea Māori Trust Board) – K Feint QC:

2. Summarised, these are as follows:

a. Ngāti Awa-Whakaari

b. Whakatōhea-Maraetōtara [West] to Tarakeha [East]

c. Ngāi Tai-Te Rangi [East] to Tarakeha [West]

d. Te Whānau-a-Apanui [Te Whānau a Ehutu]-Whakaari

**5. The Details and Examples of Tikanga Applied to this Report:**

a. As an opening statement we are convinced that the applicant iwi in particular and at that level, could have provided the Pukenga for this hearing. And but for the requirements of "conflicts of interest" this may not have been acceptable. But as things have progressed and our making a basic decision to use the tikanga of the iwi involved, we are not bringing anything new to the table rather than returning their tikanga koha, to them. It is hoped that they receive it on the basis offered by us.

b. Having said that we acknowledge the ilk of tohunga and kaumatua that we met and spent some time with. In most cases they would readily acknowledge their whānau and hapū members for everything, there is an ilk of Rangatira seldom assembled on a single kaupapa. Furthermore and as we greatly appreciated them we are motivated to use a tikanga based description as follows "whakakau he tipua, hi, whakakau he tanwha, hi". This was mainly on our visits of observation and accordingly appreciate the high esteem we rekindled, enhanced or developed as a result of our tikanga interactions with Dr Te Kei O Te Waka Merito [Ngāti Awa], Wallace Aramoana [Te Ūpokorehe], Te Riaki Amoamo [Ngāti Ruatakenga, Te Whakatōhea], Te Rua Rakuraku [Ngāti Ira], Arapeta Mio [Ngāi Tai] and Danny Poihipi [Te Whānau-a-Apanui].

*Kōia nei te hiahia ki te whakaara ake i te puna whakatō, e komingō ai ngā mahara ki te katoa i tuku kōrero ki roto i ēnei huihuingā. Ka maia ka pakari ake ngā whakairo i ngā huarahi maha e tutuki ai ngā uimākihoe kia rapua te ia o te kōrero, he*

*huarahi wātea mo te taha ki ēnei taongā tuku iho. Ka tangi ake mo te kaupapa i whakakao mai ai tātou ki tēnei whare nui te tawhiti mai i ō tātou marae, ka tuku i ngā kōrero tapu, i ngā kōrero tukuiho, mai i ngā pūkōrero, ngā whare pūkenga o ia whānau, hapū me ngā iwi, inā rā, te kore e tāea e te Kaiwhakapākeha te kapo ake i te ia o te kōrero me te nako o taua kōrero.*

c. This is the part of our report that displays the diversity and holistic existence of tikanga and its many composite parts and how these interact all at the same time and how they are triggered and released both into and out of existence, in response to numerous stimuli. If you cannot appreciate this dynamic then do not read on as any attempt to require a straight line interpretation of an element, immediately detracts from te ao Māori.

d. What follows is our attempt to encapsulate thousands of years of migrations and tikanga development and adaptation to survive in the various Hawaiki and how what was an idyllic set of rules has been manipulated and in some cases totally compromised by the requirements of a foreign administration and despite Te Tiriti O Waitangi. We also say this and at the same time acknowledge the previously mentioned Pukenga [Kaumātua, Tohunga]. The korowai tikanga is reflected in the following ways:

   i. Wairua –

      1. traverses all iwi and takutai moana activites and varies according to keeping one safe, to preservation of resources to a rāhui

      2. tapu – rāhui re Muriwai who imposed one from Ngā Kuri-ā-Whārei ki Tihirau. Followed on from the drowning of Johnny Hayes and more recently the Whakaari eruption. It is a practice of all of the people from Whakatane through to Te Whānau-a-Apanui and other iwi.

   ii. Fishing grounds TWAA / page 10 with the link to uta being in terms of geographic proximity and also the location of pouwhenua [Te Kāhui Takutai Moana O Nga Whānau Me Ngā hapū O Te Whakatōhea Mapbook and our understanding that most of the fishing grounds are named after mountains and significant peaks and or wāhi tapu. This map appears to be based on traditional information and as well as naming the rocks it also details the types of fish caught there. Just as important are the pouwhenua detailed for the location of the fishing ground, or pouwhenua. A more up-to-date map is located at page 11. There is also a map of the resources located in Ōhiwa Harbour including traditional place names at

maps at pages 12-13. All these maps are significant in that the traditional names are used and this intimately also encapsulates the real meaning of that place. That is tikanga proper as a lot of recent names do not reflect any history and in most cases is colonialization all over again. The marae are also named and these are the real keepers of tikanga – kāore e koa atu, kāore e ko mai".

iii. Te Whānau-a-Apanui also filed their map of traditional fishing grounds on 5 October 2020. Titled Ngā Kaitiaka O Te Rohe Te Whānau-a-Apanui. More importantly and under cross examination, respected tohunga and kaumātua Danny Poihipi mentioned the significance of Whakaari beyond the resources available there. It is the beacon light for Te Whānau-a-Apanui and this is by way of the plume of smoke that it exudes. Winds from the north and west signalled poor fishing. The matter of the ownership and the transfer of Whakaari has remined unanswered for over a hundred years.

iv. Te Whānau-a-Apanui also filed their map of their rohe and hapū and the boundaries were as presented in Ms D Takitimu's presentation also on 5 October 2020; AFFIDAVIT OF DAYLE LIANNE TAKITIMU 24 FEBRUARY 2020 where the boundary is from Te Taumata O Apanui to Potikirua.

v. Tapū – finally and as part of establishing tikanga based applications is the location of pa, midden ovens and other traditional sites. Located at pages 28 and 29. And covers Whakatōhea and Ōhiwa Harbour. Those on pages 30-33 provides more detail information from Whakatāne east to Tarakeha.

vi. An agreed determination of the boundaries between Ngāti Awa and Te Whakatōhea was signed on 4 April 1991 between Charlie Aramoana and Hirini Moko Mead in a motion as "begins at Te Rae o Kanawa and proceeds to the mouth of the Nukuhou River, follows the river to Matekerepu, crosses to Tirotirowhetu and thence to Te Roto O Matamoe thence follows the confiscation line to Maunga Whakamanawa. That this line determines Mana Whenua and Mana Moana of Whakatōhea which lies to the east of the line and the mana whenua and mana moana of Ngāti Awa which lies west of the line.

vii. A similar motion as follows was passed as to "Whakatōhea, Tūhoe and Ngāti Awa agreeing to share equally in the protection and management of the fish, shellfish and all marine life within Ōhiwa. That motion

was signed by representatives from Tūhoe, Whakatōhea and Ngāti Awa.

viii. Ko Te Ipu O Te Mauri – by Charles Aramoana on the boundaries of Te Ūpokorehe.

ix. The matter of land occupation as well as mana, whakapapa descent, by conquest or gift as well as the range of tikanga as is described at pages 784-786 and throughout the article by Professor Evelyn Stokes, A Review of the Evidence in the Muriwhenua Lands Claims, Volume II, Waitangi Tribunal Review Series 1997, No.1.

x. Where the oneness of whenua with moana and described by Te Whakatōhea hapū Ngāti Rua Takenga as "Ngāti Rua ki uta, Ngāti Rua ki tai" which is supported by an unrelated and similar case as contained at pages 127-128 of the Muriwhenua Fishing Report, Waitangi Tribunal 1, 1988.

xi. In the www.waitangi-tribunal.govt.nz article, pages 5-13 the definition of tikanga from a Te Ao Māori lens greatly enhances our understanding of the origins of tikanga, their dynamism, reach and the linking of all of the elements is a phenomenon where the interaction of the wairua, practical and spiritual elements co-exist.

xii. The original and main hapū of Te Whakatōhea as contained in A.C. Lyall, 1979, pages 94-95 and the map with their location.

xiii. Te Ehutu claim to Whakāri which was a matter of an utu was sold by Ngāti Awa chiefs Apanui and Te Keepa Toihau was a travesty.  Page 2, A Report to the Waitangi Tribunal on Behalf of Te Whānau ā Ēhutu on the Whakaari Claim [Wai-225], Lawrence Tūkaki-Millanta, May 1995.

xiv. Whakatōhea boundaries as contained in the article Mandated iwi organizations in the Māori Fisheries Act 2004 both by description ad maps.

xv. Evidence on the origins of Ngāti Muriwai as endorsed by Riki Gage's affidavit [Affidavit of Te Kou Rikirangi Gage on behalf of Te Runanga o Te Whānau dated 21 February 2020].

xvi. A rejection of the notion of a Ngāti Muriwai by Ngāi Rua memo dated 13 August 2018 from Mereaira Hata and Linda Grave.

xvii. The map of the allocation of lands after confiscation and used by Te Riaki Amoamo illustrates his comment that true Whakatōhea hapū had two pieces of land allocated to them. One development block and one hill block. If you had two blocks you could stand on two legs. Ngāti Muriwai couldn't as it only had one block and therefore only one leg.

xviii. Ūpokorehe origins and Tūhoe boundary at pages 31 and pages 13-16 respectively from Statement of Evidence of Tamaroa Raymond Nikora – Ko Wai A Tūhoe? 2003, Wai 894#B11 and WAI 36#A30.

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## APPENDIX B – WHAKAPAPA

### Introduction

[1] Whakapapa is the most important tikanga value in establishing which applicant group holds a specified part of the takutai moana. The various applicant groups gave detailed evidence as to the whakapapa which they each said justified their claim that they held the specified areas of the takutai moana.

[2] In an attempt to reduce the length of the judgment, I have summarised that evidence in the judgment itself. However, recognising the importance of this evidence to the parties and the need for them to understand the basis upon which the summary set out in the judgment was arrived at, I now set out a more detailed analysis of the whakapapa evidence upon which I have relied.

[3] This evidence focuses on the whakapapa of the applicants, specifically those who were identified by the pūkenga in the poutarāwhare, namely:

(a) Ngāti Ira o Waiōweka;

(b) Ngāti Ruatakenga;

(c) Ngāti Patumoana;

(d) Ngai Tamahaua;

(e) Ngāti Ngāhere; and

(f) Te Ūpokorehe.

[4] This appendix will consequently be split into three parts. Firstly, I will provide a summary of certain important tūpuna in the Whakatōhea whakapapa. Secondly, I will discuss of the early development and evolution of the different entities within Whakatōhea. Finally, I will provide a brief summary of the whakapapa of the individual hapū referred to above.

**The tūpuna of Whakatōhea**

[5] This section is designed to give a general but not authoritative summary of Whakatōhea. It is important to reiterate that warning at this point, because a number of the sources referred to below are dependent on Native Land Court minutes, and in particular, the whakapapa presented to that Court by Tuakana Te Aporotanga, a Rangatira of Whakatōhea. Descendants of other iwi and hapū may have slightly different variations as to the whakapapa of these tūpuna. A separate, but interrelated issue was discussed several times in the hearing: caution should be taken to not rely too heavily on the Native Land Court minutes, as, while they provide useful information about the whakapapa of individuals and their hapū, the Native Land Court process sometimes encouraged the individuals involved to emphasise certain ancestors and not discuss others. Ballara summarises this point as follows:[1]

> The format of evidence suggests that witnesses were usually asked to identify the 'large tribe' to which the descent groups they were discussing belonged. Failure to do so, perhaps because the hapū in question belonged genealogically to more than one iwi, or had split in sections living in different communities and localities, damaged their credibility.

[6] A similar point is made by Parsonson:[2]

> There were many [claimants] who might have claimed through more than one line of descent, depending on how they chose to explain the derivation of their rights, and their choice might also be influenced by the way in which other claimants were shaping their cases.

[7] With this in mind, I turn to some of the significant early tūpuna who were discussed during the hearing.

*Tārawa*

[8] One of Whakatōhea's early ancestors was Tārawa. Lyall and Kahotea (both referring to Tauha Nikora's statements in the Native Land Court, recorded in Ōpōtiki Minute Book Five 1889) describes him as one of the most important ancestors for

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1 *Iwi: The Dynamics of Māori tribal organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998) at 90. (Footnote omitted).

2 Ann Parsonson *Stories of land: Oral narratives in the Maori Land Court* in B Attwood and F Magowan, (eds) *Telling Stories: Indigenous history and memory in Australia and New Zealand* (Allen & Unwin, Sydney, 2001) at 26.

Whakatōhea, as Ngāti Ruatakenga, Ngāti Patumoana, Ngai Tamahaua and Ngāti Ngāhere can all show descent from him,[3] while Walker describes him as the "earliest recognised ancestor of Whakatōhea".[4]

*Tautūrangi*

[9] Another significant waka of the Whakatōhea hapū/iwi is the Nukutere. This was either commanded by Whiro or, as described by Te Riaki Amoamo (of Ngāti Ruatakenga),[5] Te Whironui, an ocean-going navigator. According to Ranginui Walker, the Nukutere landed at Awaawakino, east of Ōpape, circa 1250 CE:[6]

> The *Nukutere* made landfall at Awaawakino, east of Ōpape, circa 1250 CE. The vessel threaded its way carefully between rocks into an isolated cove named Te Rangi after the white rock to which the *Nukutere* was moored.

[10] Mr Amoamo also describes the journey of the Nukutere when it reached its destination, and the significance of its landing place, as follows:

> When it arrived in Aotearoa it landed at Te Rangi, a rocky cove four to five chains wide on the eastern side of Awaawakino Bay. The Nukutere anchored at a good depth from the shore, such was the size of the Nukutere. A karakia was performed to give thanks to the Atua for the safe arrival of the Nukutere waka and its passengers. Their offering was so sacred that the little beach became tapu, and they had to walk in the footsteps of those in front of them so there was only one set of footsteps on the beach. Tautūrangi named the cove Te Rangi, after his wife Tauaterangi.
>
> The anchor was turned into a white stone, and thrown into the bay when the Nukutere departed. It is said that a white rock is still there under the water today.
>
> The Nukutere then sailed west around the headland to Ōpape and Tautūrangi disembarked at Kotukutuku, at the then-mouth of the Waiaua River (the river mouth has moved since then). Tautūrangi and his followers stayed and lived at Ōpape and Ōmarumutu…

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3 AC Lyall *Whakatōhea of Ōpōtiki* (Reed Publishing, Auckland, 1979), at 1; and Desmond Kahotea *Whakatōhea and the Common Marine and Coastal Area in relation to CIV-2011-485-817* (October 2019) at 65. This whakapapa line was also confirmed in the affidavits of Te Ringahuia Hata of Ngāti Patu and Ms Hetaraka Biddle of Ngai Tamahaua.

4 Ranginui Walker *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea* (Penguin Books, Auckland,2007) at 11.

5 In his affidavit at 1.2, Mr Amoamo also signalled that he had whakapapa connections to Ngai Tamahaua and Ngāti Patumoana.

6 *Whakatōhea of Ōpōtiki*, above n 3, at 14. Lyall, at 21, also states that the arrival of the Nukutere occurred around the mid-13th century.

[11] A significant tūpuna of Whakatōhea, Tautūrangi, was on board the Nukutere waka. Some accounts indicate that it was Tautūrangi, rather than Whiro, who captained the Nukutere waka.[7] Tautūrangi settled at Ōpape, developing a kāinga overlooking the beach. His descendants, down until Tūtāmure, were known as Te Wakanui, an early iwi from which Whakatōhea descend.[8] Their tribal rohe was described by Walker as follows:[9]

> Their territory extended inland from Waiaua to the mountain forests at Toatoa, Takapūtahi and Whitikau. The route inland to these places crossed over from the Waiaua River to the Rāhui Valley and up the steep confines of the Meremere Gorge.

*Tūnamu*

[12] Tūnamu is described by Walker as "generations down" Tautūrangi.[10] Taking into account Mr Amoamo's evidence, and Lyall, Walker and Kahotea's texts, Tūnamu seems to be between five and ten generations after Tautūrangi (the texts all appear to be based off the Ōpōtiki Minute Books of the Native Land Court in 1895, particularly the statements made by Tuakana Te Āporotanga).[11] As discussed above, the peoples residing in the area were then known as Te Wakanui, and by Tūnamu's time, their population had increased significantly for them to claim the use of the land and its resources in defined localities against other competing groups.[12] Although Walker uses the term Panenehu to describe the peoples living in this area during Tūnamu's time, Lyall states that "traditions of Tūtāmure himself indicated that the latter title [Panenehu] pertains "to the descendants of Te Wakanui from Tūtāmure down".[13]

[13] It appears that the dispute between the neighbouring iwi to the east of the modern-day rohe of Whakatōhea, began during Tūnamu's time, which led to the occupation of the Waiaua area (including the pā at Ōmarumutu, Ōtānemutu and

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7 *Whakatōhea of Ōpōtiki*, above n 3, at 21.
8 *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 15.
9 At 15.
10 At 16-17.
11 *Whakatōhea of Ōpōtiki*, above n 3, at 21; *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 19; *Whakatōhea and the Common Marine and Coastal Area in relation to CIV-2011-485-817*, above n 3, at 64.
12 *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 16.
13 *Whakatōhea of Ōpōtiki*, above n 3, at 20.

Puketaro) by Ngāi Tai, who in turn were then driven out of the area by Tūnamu and the Te Wakanui/Panenehu people, causing them to retreat back to Tōrere.[14]

*Muriwai and Toroa*

[14] Muriwai and Toroa are important tūpuna for the iwi and hapū of the Bay of Plenty. They arrived on the Mātaatua waka, some nine generations after the Nukutere waka, according to Walker,[15] possibly at some point during the 14th century, according to Lyall.[16] The iwi of Whakatōhea, Ngāti Awa and Ngāi Tūhoe all have whakapapa links back to the Mātaatua waka. It was commanded by Toroa and made landfall at Whakatāne. Walker describes the story of the landing of the Mātaatua, and the subsequent naming of Whakatāne, as follows:[17]

> Toroa and his crew entered the Whakatāne River and moored their vessel to Te Mānukatūtahi, a lone manuka tree on the foreshore of the present township of Whakatāne. In doing so, they had no idea of the high rise and fall of the tide in this new land compared to Hawaiki. The men left their women behind while they went inland to explore the country. With the rising tide the Mātaatua slipped its mooring and started drifting downstream as the tide went out. Seeing the danger to the vessel, Toroa's sister, Muriwai, decided she would have to secure the Mātaatua. Although Muriwai was the tuakana (senior member) of her family, she approached the task with some trepidation, because all matters pertaining to the navigation and management of ocean-going vessels belonged to the domain of men. Although she knew the appropriate karakia for the occasion, Muriwai fortified her courage by exclaiming, Me whakatāne au i ahau'. (I must acquit myself like a man).

[15] Walker also notes the drowning of Muriwai's son, and the rāhui imposed on the coast after his death:[18]

> Muriwai took up residence in Te Ana-o-Muriwai, a rock cave at Whakatāne, where she became reclusive in old age after her son Tānewhirinaki drowned. The tribes in the Whakatāne district placed a rāhui on the sea, a restriction on taking seafood for the period of mourning for Tānewhirinaki. As the news spread along the coast to the tribes east and west of Whakatāne, they extended the rāhui to take in their shoreline as well. Eventually the boundaries of the rāhui extended 'Mai i Ngā Kurī-a-Whārei ki Tihirau (from the [petrified] dogs of Whārei [near Katikati] to Tihirau). The latter is a distinctive cone-shaped hill near Cape Runaway. This rāhui, taking in most of Te Moana-a-Toi (Bay of Plenty) was a tribute to Muriwai's mana from the tribes that claim descent

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[14] *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 18.
[15] At 23.
[16] *Whakatōhea of Ōpōtiki*, above n 3, at 5-6.
[17] At 23-24.
[18] At 24.

> from the Mātaatua. Consequently the extent of the rāhui is synonymous with the boundaries of the tribes of the Mātaatua waka.

[16] It should be noted that other iwi consider that it was Waiaraka, Toroa's daughter, who made the utterance while saving the Mātaatua.[19] As noted in the Waitangi Tribunal's *Ngāti Awa Raupatu Report*:[20]

> Kakahoroa (the Whakatane township) is important in Mataatua tradition as the landing place of the Mataatua canoe. In fact, the town is named for Wairaka, the daughter of the captain Toroa, in memory of her famous effort in saving the waka from being washed out in the tide, and derives from her plea 'Kia whakatane ake au i ahau' (Let me act the part of a man). She is commemorated in a monument on the rock Turuturu-Roimata, near the landing place, and at Wairaka Marae.

[17] Two of Muriwai's children have an important connection to Whakatōhea. Muriwai's eldest son, Rēpenga, journeyed from Whakatāne to Ōpōtiki, where he married Ngāpoupereta, from whom descended Ruatakena – the founding tūpuna of Ngāti Rua.[21] Muriwai's daughter Hineīkauīa followed her brother Rēpenga to Ōpōtiki.

[18] The dual whakapapa of a number of Whakatōhea hapū to both the waka of Nukutere and Mātaatua is described in a tauparapara that was recited by Mr Amoamo as a witness before the Court,[22] and separately discussed and translated in the affidavit of Ms Anna-Marei Kurei, who gave evidence for Ngāti Ira. It was described by Ms Kurei as originally being a waiata with the name Te Tapu o Muriwai, which was adapted by Te Kahautu Maxwell into a tauparapara. In his affidavit, Mr Amoamo deposed that the tauparapara was known as Maruhia Atu, and that it was used to describe the rohe and whakapapa of Whakatōhea, as well as the rāhui imposed on the area by Muriwai. Importantly, it quite distinctly sets out the connection of Whakatōhea to the Nukutere waka and its landing place at Te Rangi, to Muriwai, and to a number of important locations within the Whakatōhea rohe, including Ōhiwa, Waiōtahe and Waiaua.

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19 *Whakatōhea of Ōpōtiki*, above n 3, at 7.
20 Waitangi Tribunal *The Ngāti Awa Raupatu Report* (WAI 46, 1999) at 9.10.3.
21 *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 25.
22 A tauparapa is an opening utterance, chant or incantation that often contains references to whakapapa.

[19] Because the tauparapara contains ancient and tapu mātauranga Māori which gives it its own mana, I will not attempt to replicate it but acknowledge its importance.

*Tūtāmure and Hine-i-Kauia*

[20] Tūtāmure is acknowledged as one of the predominant ancestors of Whakatōhea; Walker describes him as the "most illustrious chief of the Te Wakanui people",[23] while Lyall notes:[24]

> Every tribal group has its historical giants, those whose feats and personalities were such that their light still blazes while others, have failed. In the Whakatōhea story, such a man was Tutamure, of whom it could probably be said that he was the last of Te Wakanui, the almost mystical ancestors of Whakatōhea.

[21] Tūtāmure was between six and twelve generations removed from Tautūrangi and was the grandson of Tūnamu.[25] He was born at some point in the 14th century, before the arrival of the Mātaatua waka. His life is considered to have signalled the beginning of the Panenehu people, from the earlier Te Wakanui people. Walker and Kahotea noted that Tūtāmure was responsible for establishing the eastern boundaries of the Te Wakanui/Panenehu people, described by Walker as follows:[26]

> The eastern boundary laid down by Tūtāmure commenced on the coast at Te Rangi and ran inland south to Ōroi, on to Opikoki, to Ngāūpokotangata (Kapuārangi) on to Opiti, to Peketūtū, then to the Mōtū River. The boundary followed the upper Mōtū River to Taunga Kākāriki, then to Kaitaura. There, the boundary left the river and doubled back towards the coat to Terewa, to Korakōnui, to Hanaia, and rejoined the coast at Tirohanga and back east along the coast to Te Rangi.

[22] Tūtāmure gained fame and prominence through his battle with Kahungungu and his iwi at Maunga-a-kāhia in Māhia, in order to avenge the death of his sister Taneroa. The name "Panenehu" is alleged to have its origins in this battle, articulated in more detail in the section discussing Te Panenehu below.

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23 At 19.

24 At 36.

25 *Whakatōhea of Ōpōtiki*, above n 3, at 36; *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 19.

26 At 21.

[23] Following his victory over Kahungungu, Tūtāmure returned to Whitikau, and secured the area with a number of strongholds, including on Mākeo mountain, overlooking Ōmarumutu Marae.[27]

[24] Tūtāmure married Hine-ī-kauia, the daughter of Muriwai, and their union laid the foundation for the iwi of Whakatōhea on the mana whenua of Te Panenehu and the mana ariki of the Mātaatua waka.[28] According to Walker, over the succeeding generations the names Te Wakanui and Te Panenehu were subsumed by the new iwi of Whakatōhea.[29]

[25] The union of Tūtāmure and Hine-ī-kauia also signified the union of two separate lines of whakapapa: that of the Nukutere waka and that of the Mataatua waka. As noted by Mr Amoamo, this is signified at Ōmarumutu Marae (a marae principally connected to Ngāti Ruatakenga), where the wharenui is named Tūtāmure, and the whare kai is named Hine-ī-kauia.

**The early entities of Whakatōhea**

[26] In this part, I describe the evolution of the early entities which eventually evolved into Whakatōhea and Te Ūpokorehe. The evidence discussed below, concerning the iwi/hapū groupings from which Whakatōhea descend, leads to the conclusion that arguably, from at least the 13th century onwards, there was occupation of the Whakatōhea rohe by early peoples from waka such as Nukutere, Tauira, Rangimatoru, and (later) Mātaatua, with those early peoples and ancestors eventually evolving into the confederation of hapū and groups known today as Te Whakatōhea.

*Ngariki*

[27] The Ngariki people were identified by Lyall as early peoples dwelling around Ōhiwa, Ōpōtiki, Tunapahore/Hawai and Poverty Bay.[30] They are also referred to as "Ngā Ariki, Ngariki-Tahaehae, Ngariki Rotoawa, Ngariki-a-Pō, Ngariki-kai-Putahi".[31]

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[27] At 23.
[28] At 25.
[29] At 25.
[30] *Whakatōhea of Ōpōtiki*, above n 3, at 12.
[31] At 12.

They contribute to several branches of Whakatōhea hapū whakapapa although Lyall notes that whether they maintained a strong and separate identity for a significant period is a matter for conjecture.[32] Lyall's discussion on these peoples appears to be derived from notes written by Native Land Court Judge Wilson and his father (Ōpōtiki's first Anglican missionary), who believed they arrived from Hawaiki on the Pakihikura waka, landing at Ōpōtiki but being driven away eastwards by local people already residing in the area.

*Hapūoneone*

[28] Hapūoneone are described by Lyall, quoting Best, as early inhabitants of the territory from Ōpōtiki to Whakatāne. It appears that Lyall's information on Hapūoneone and Te Tini-o-Toi is derived from the writing of Elsdon Best, which should be approached with some caution as to its accuracy.[33] A useful resource to counteract the possible inaccuracy of Best's writing for this purpose is a scoping report written in 2007 by a Waitangi Tribunal researcher on the Te Hapū Oneone Claims in the East Coast District Inquiry.[34] Ivory does note however, that more recent researchers, including Rongowhakaata Halbert (who authored an influential text on the Horouta waka) have "agreed with one of Best's main claims regarding Te Hapū Oneone; that they were a group with early origins who were active in Waimana and Ruatoki in Te Urewera, and Ōhiwa in the Eastern Bay of Plenty".[35]

[29] According to the scoping report, Best and Halbert disagree on the origins of Hapūoneone, particularly whether they descended from a tūpuna known as Hape, and their relationship with Te-Tini-o-Toi (discussed further below).[36] However, both appear to agree that Hapūoneone had some connection to the Rangimatoru waka, which Halbert considered to have landed at Ōhiwa in the 1300s.[37]

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32 At 12.

33 See for example, Angela Ballara's comments in *Iwi: The Dynamics of Māori tribal organisation from c.1769 to c.1945*, where she states that early researchers such as Best were driven by theories that led them to distort "Māori history and custom in ways which fitted what they saw as the inner structure or grand design of Māori and Pacific history and the tribal system", above n 1, at 103.

34 Andrew Ivory *Te Hapū Oneone: A Scoping Report on the Te Hapū Oneone Claims (Wai 1020, 1282) in the East Coast (Wai 900) District Inquiry* (Wai 900, A12, 2007).

35 At 9.

36 At 12-13.

37 At 21.

*Te Tini-o-Toi*

[30] As discussed above in respect of Hapūoneone, the origin and scope of Te Tini-o-Toi peoples is disputed and unclear, given the reliance of Lyall and Kahotea on the evidence of Best. Best considers Te Tini-o-Toi and Hapūoneone to be "separate and distinct" peoples, with Toi being a single ancestor living between Whakatāne and Ōhope as the "progenitor of many tribes in the region …collectively known as the Tini-o-Toi".[38] Conversely, Halbert considers that the name "Toi" referred to a number of ancestors, and that Hapūoneone descended from a "Toi" known as Toirangaranga who should not be confused with other individuals such as Toikairakau and Toitehuatahi (the two names Dr Kahotea uses to refer to "Toi").[39]

*Te Wakanui*

[31] As discussed above, the term Te Wakanui was used to describe the peoples residing in the Whakatōhea area, specifically around Waiaua and Ōpape, between the time of Tautūrangi and the time of Tūnamu. Lyall provides the following discussion of the Te Wakanui peoples:[40]

> Volume 59 (p 339) of the *Journal of the Polynesian Society* contain some interesting comments by the late Sir A.P. Ngata on the gathering of the peoples in the East Coast area from Ōpōtiki to Gisborne. He states that the most considerable element in the settlement of this area came from the Cook group; a secondary Hawaiki he calls it. The canoes which brought them were Tauira and Mangarara, and when later canoes came, like Nukutere under Whironui, their occupants knew who the local people were. They had related ancestors.
>
> From Nukutere canoe, sprang Te Wakanui, one of the very early tribal entities from whom Whakatōhea descend. The limited existing references to these people cover a period of eight generations to Tūtāmure. Although the people of this era have often been referred to as Panenehu, traditions of Tūtāmure himself indicate that the latter title pertains from the descendants of Te Wakanui from Tūtāmure down. Despite the much publicised descent from Muriwai of Mātaatua, Whakatōhea origins are clearly more ancient on the Nukutere line…

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38 Kahotea *Whakatōhea and the Common Marine and Coastal Area in relation to CIV-2011-485-817*, above n 3, at 67.

39 *Te Hapū Oneone: A Scoping Report on the Te Hapū Oneone Claims (Wai 1020, 1282) in the East Coast (Wai 900) District Inquiry*, above n 34, at 14.

40 At 20.

[32] A key aspect of the relevance of the Te Wakanui peoples is that they appear to be a critical whakapapa link between Whakatōhea and the Nukutere waka, which predated Muriwai and the Mātaatua waka (at least according to Lyall and Walker). It appears that, according to Lyall and Mr Te Amoamo, after the landing of the Nukutere waka, the Te Wakanui people settled and continued to expand from the time of Tautūrangi down to Tūtāmure.[41] Mr Amoamo deposed that Tautūrangi and the people that landed ashore with him (and settled the area) became known as Te Wakanui because of the ocean-going waka they used, which would have been much larger than the waka used for coastal fishing or war.

*Te Panenehu*

[33] The origins Te Panenehu are disputed, but as noted by Lyall, "[i]n any attempt to define the origins of Whakatōhea, research leads back to the people named Pane-Nehu".[42] Some sources including Mr Amoamo, consider that the name "Te Panenehu" appears to have been derived from Tūtāmure's battle with Kahungungu at Maunga-a-Kāhia. Walker describes the origin as follows:[43]

> Undeterred by the formidable defences of Maunga-a-kāhia, Tūtāmure mounted a vigorous assault on the outer palisade. He used his taiaha to destroy the lashings of the palisade. But before a breach was made, the taiaha snapped in half. Tūtāmure then grasped a weapon made of whalebone to finish the battle, saying, 'Slay the fish, the proverbial fish of Tū. Kāore nei tama ka nehua.' (Eliminate the young men and bury them.) This exhortation to 'bury the enemy' at Maunga-a-kāhia, like the burying of Ngāi Tai at the battle of Te Ruruārama, was thought to be the origin of the name Te Panenehu for Tūtāmure's people. But this seems to be an a posteriori explanation for the origin of the Panenehu name, since the descendants of Tūnamu who inhabited Waiaua and Takapūtahi were referred to by that name before the time of Tūtāmure. Despite that contradiction, the name Te Wakanui was subsequently replaced by Te Panenehu after the battle at Maunga-a-kāhia.

[34] Lyall details the conflicting origins, suggesting that Te Panenehu may have either come from the Tauira waka or the Nukutere waka, potentially having some connection to the early Ngariki people discussed earlier:[44]

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41 Although, as discussed above, Walker considers that the term "Te Panenehu" was used as early as the time of Tūnamu.
42 At 25.
43 At 22.
44 At 25-26.

> A clue to the origin of the Pane-Nehu is given by Gudgeon, who states that one Marupapanui came to this land in Tauira canoe and that he was an ancestor of Pane-Nehu of Ōpōtiki district. In this area it is claimed that Marupapanui was the son of Tiki who came in Nukutere…
>
> The foregoing makes it appear that Te Wakanui (mentioned elsewhere) and Pane-Nehu had a common origin and could in fact have been the same people, for in another chapter Tūtāmure is seen as probably the last of Te Wakanui. After him, appeared the tribe Pane-Nehu whose name has been attributed to an expression of Tūtāmure at Maunga-a-Kāhia…
>
> Even the conflicting opinions on Marupapanui are helpful. Tauira was the canoe of Motatau mai Tawhiti, the Ngariki ancestor who occupied Tunapahore. So we have a picture of individual immigrants from either Tauira or Nukutere, or both, moving into the hinterland and establishing a tribal identity.

[35] Both Walker and Lyall indicate that the era of the Te Panenehu people was characterised by continuing strife with Ngāi Tai. Lyall describes the boundaries of the Te Panenehu people at that time as follows:[45]

> Their territory was, in general, the Whitikau and Toa Toa, later Rahui and Waiaua with probably some ebbing and flowing over the generations. There is also some evidence they lived further west on the Otara River.

[36] According to Lyall, the era of Te Panenehu and the beginning of Te Whakatōhea occurred during the time of Ūpokohapa (some five generations down from Tūtāmure):[46]

> In connection with the coastal Waiaua area, reference to Panenehu ceases in the time of Ūpokohapa. From his time the people referred to become Whakatōhea.
>
> …
>
> As a people in their own right they would seem to occupy the period from Tūtāmure, who is said to have named them, to Ūpokohapa. From Ūpokohapa, at which time they probably commenced their westward drift, they fused as remnants, either in the Whitikau hinterland or fusing with other branches of the now-evolving Whakatōhea.

[37] Conversely, Walker considers the transition and evolution of Whakatōhea from Te Panenehu to have occurred in the era of 'uneasy peace' between Ngāi Tai and Te Panenehu until the time of Kāwhata, some ten generations after Tūtāmure.[47]

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45 At 27.
46 At 27 and 34.
47 At 28.

Around this period, according to Walker, a number of hapū, including Ngāti Rua, Ngāti Ira, Ngāti Ngāhere and Ngai Tama evolved out of the base population of Te Panenehu into the iwi of Whakatōhea.[48]

[38] During the hearing, Mr Amoamo emphasised Ngāti Ruatakenga's connection to Te Panenehu, reciting his whakapapa from the time of Tūtāmure when the name Panenehu originated, down to Ruatakenga, down to himself.

**Whakapapa of Whakatōhea hapū/iwi**

[39] I now turn to the whakapapa of each of the separate entities included by the pukenga within the poutarāwhare – namely five Whakatōhea hapū and Te Ūpokorehe. The history of Te Whānau a Mokomoko is already discussed earlier in the judgment.

*Ngāti Ruatakenga*

[40] Ngāti Ruatakenga are a coastal-dwelling hapū located mainly on the eastern side of the Whakatōhea rohe. The whakapapa of Ngāti Ruatakenga was set out in the evidence of Mr Te Riaki Amoamo and Ms Mandy Mereaira Hata. Reference was also made throughout the hearing to the Lyall and Walker texts.

[41] Mr Amoamo's evidence was that the Ngāti Ruatakenga whakapapa 'mingles' with both the Nukutere and Mātaatua waka, stemming from both the union of Tūtāmure and Hine-ī-kauia, as well as Hine-ī-kauia's brother (and Muriwai's first son), Rēpanga. Mr Amoamo described Rēpanga's journey from the Whakatāne district to the Ōpōtiki district, following the smoke coming from the fires in Ōpōtiki, eventually arriving at Kohipawa pā on the eastern bank of the Ōtara River where Ranginui-ā-te-Kohu gave his daughter, Ngāpoupereta, in marriage to Rēpanga.[49] It is from their union that the eponymous ancestor of the hapū, Ruatakenga, is derived. The whakapapa provided by Mr Amoamo places Ruatakenga seven generations down from Ngāpoupereta and Rēpanga, while Walker, who gives a very similar version of events,

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48 At 28.

49 At 4.12. Historian Bruce Stirling, commissioned by Ngāti Ira, states in his report that Ngapoupereta descends from the Rangimatoru waka. See Bruce Stirling *Te Kāhui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea: Historical* Issues (January 2020) at [10].

places Ruatakenga five generations down.[50] Mr Amoamo was able to describe his own whakapapa from Tautūrangi, down to the union of Hine-ī-kuia and Tūtāmure, to Aporotanga, a tūpuna of Ngāti Ruatakenga who signed the Treaty of Waitangi, down to himself, as the thirtieth generation since Tautūrangi's arrival.

[42] In her affidavit, Ms Hata emphasised the importance of understanding the whakapapa of wai (water) stemming from Ranginui and Papatūānuku, in order to properly understand the spiritual connection with the coast and whakapapa of Ngāti Ruatakenga themselves:

> The genesis of all forms of water, freshwater or saltwater is linked to the creation story when Tane separated his parents Ranginui the sky father and Papatūāanuku the earth mother. When separated, the perpetual grief between the two lovers is understood to be the first instances of water; rainfall is embodied as the tears of Ranginui for his wife, while the well springs and mist are the weeping of Papatūāanuku for her husband. It is this bond and spiritual connection to Rangi and Papa that explains why iwi Māori have a close relationship with the takutai moana.
>
> In the creation story of Rangi and Papa, the Sky Father and Earth Mother came together and begat over 70 children who eventually thrust their parents apart and populated the world. Each of the children became an atua or god in a particular domain of the natural world. For example, Tangaroa, god of the sea, had a son called Punga. Punga then had two children: Ikatere, who became the ancestor of the fish of the sea, and Tūtewehiwehi, who became the ancestry of the fish and amphibians lizards of inland waterway. Māori are able to trace their ancestry back to Rangi and Papa and therefore there is an ancestral connection. The responsibility to care, nurture and protect our primordial parents and their offspring (one of which is Tangaroa) is a tikanga or customary practice. Ngāti Rua can demonstrate how our customary practices have not only been exercised but also maintained since 1840 to the present day.

*Ngāti Ira o Waiōweka*

[43] Ngāti Ira o Waiōweka, or Ngāti Irapuaia (known as Ngāti Ira for short) are a hapū that originally settled around the Waiōweka and Ōtara Rivers. Te Rua Rakuraku, a kaumatua and kaikōrero for Ngāti Ira, describes their tribal rohe moana as follows:[51]

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50 *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 25.

51 Alongside Mr Rakuraku, other witnesses who gave evidence of the Ngāti Ira whakapapa included Ms Hemaima Hughes, Mr Tama Hata, Ms Te Ringahuia Hata and Ms Anna-Marei Kurei. Others gave useful evidence of the history and tikanga of Ngāti Ira.

> The Ngāti Ira rohe moana includes Te Moana a Tairongo, the Ōhiwa Harbour (and the islands within that Harbour) the Waiōtahe and Waiōweka river mouth, the Waiōtahe and Hikuwai Beaches and the eastern parts of Ōhope Beach.

[44] In her affidavit, Ms Anna-Marei Kurei also summarised the tribal rohe of Ngāti Ira:

> …Matiti is one of our many maunga within our rohe and stands on the western side of our awa and marae. Our river, Waiōweka, which was originally called te awa o Tamatea was named after our ancestor Tamatea Matangi who travelled through it on his waka Tuwhenua giving names to landmarks significant to our rohe. Our awa begins at the conjoint of the Motu, Waiōweka and Araroa river, runs through the Waiōweka gorge stretching out to Pakihikura where it continues out to sea. Ōpeke is our marae where our whare tīpuna Irapuaia, and whare kai Kurapare continue to provide shelter and sustenance for our people and manuhiri. We are a hapū of Te Whakatōhea and Mātaatua is one of our ancestral waka that carried our tīpuna Muriwai to Aotearoa. Hira Te Popo is our Rangatira who was of great mana and influence in helping to build the economy and led our people into prosperity.
>
> Ngāti Ira presently occupy the area at the entrance to the Waiōweka gorge east of Ōpōtiki, however, this was not always our primary area of occupation. Ngāti Ira were involved in battles that took place along the coastal area and also occupied marae located on the western side of the Waiōweka river where the current bridge stands…

[45] Mr Rakuraku states that Ngāti Ira descend from four waka: Mātaatua, Nukutere, Rangimatoru, and Takitimu. In his amended application on behalf of Ngāti Ira, Mr Rakuraku also stated that Ngāti Ira descend from the Tuwhenua waka.[52] Mr Stirling (in his broader report for the Te Kāhui group of applicants) also observes that the Tuwhenua waka descent line is through Tamatea Matangi, the husband of Muriwai.[53] The eponymous ancestor of Ngāti Ira is Irapuaia; the grandson of Tamatea Matangi and Muriwai.[54]

[46] A number of the Ngāti Ira witnesses spoke of Hira Te Popo, an important tūpuna and Rangatira for the hapū in the 19th century, and his involvement in the battle at Te Tarata. While giving evidence, Ms Hemaima Hughes noted that Hira Te Popo was the rangatira of Ngāti Ira during the time of the land confiscations at Ōhiwa and Ōpōtiki between the 1840s and 1880s. Ms Hughes described how Ngāti Ira, as a hapū,

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52 *Second Amended Application of Te Rua Rakuraku for Orders Recognising Customary Marine Title and Protected Customary Rights* CIV-2017-485-299, 5 August 2020 at [11].

53 *Te Kāhui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea: Historical Issues*, above n 49, at [10].

54 *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 166-167.

were a thriving and self-sustaining community under his mana, occupying several pā all the way up Waiōweka river into the Tūranga District, but were severely displaced as a result of the Crown's actions in 1865.

[47] Ms Anna-Marei Kurei described the battle at Te Tarata as follows:

> Our raupatu claim concerns the confiscation of approximately 165,247 acres of ancestral lands within the Ngāti Ira rohe following the Scorched Earth Policy. Amongst that allegation are the assertion of the significant loss of life of Ngāti Ira men, women and children at the Battle of Te Tarata, October the 4th 1865; the destruction of Te Tarata Pā at Orongoiti where the battle took place, the destruction of the Ngāti Ira flour mill in 1865, the loss of capital and destruction of the economic base of rangatira Hira Te Popo and the peoples of Ngāti Ira following the hostilities inflicted on them. Actions of the Crown and its military force, the claimants allege, which were prompted by the killing of Reverend Volkner.

[48] While giving evidence, Mr Rakuraku described from his own perspective the events at Te Tarata:

> My mother is from Waiōweka. She was a direct descendant of Hira Te Popo who was the prominent rangatira for our people of Ngāti Ira during the 1800s. He fought courageously in the Battle of Te Tarata in October 1865 against the only cavalry charge ever seen in the history of the New Zealand.
>
> …I would like to just touch on that battle at Te Tarata. As far as we know, only 45 Ngāti Ira people were killed at Te Tarata. Yes, other hapū came in to help us. Ngāti Rua came in Ngāti Ngāhere came in. Ngai Tama came in to support Ngāti Ira. After a while they all went back to their – to their specific areas. Ngāti Ira was left there to fight Te Tarata. The sad thing about Te Tarata, the Crown and the Government already knew that Hira Te Popo and Ngāti Ira had nothing to do with the killing of Reverend Volkner. But when they came in *ka kite rātou i te momona o te whenua ā Ngāti Ira*, when saw what was on the grounds of Ngāti Ira 'cos you would have heard by now how we had market gardens, how we had animals, which Hira Te Popo used to take to Auckland to the markets in Auckland. When they saw that by this time half of them starving 'cos they had been sitting here on the coastal waters of – on the mouth of our river. When they came in and saw what was on the land of Ngāti Ira of Hira Te Popo they thought they'd change. They wanted it, they took it no matter what the cost was and that's the mamae here with the *ō mātou ō Ngāti Ira*. [Interpreter: And that is the cause of the pain that Ngāti Ira feels.]

*Ngāti Patumoana*

[49] Ngāti Patumoana are a hapū of Whakatōhea that have strong links to Ngāti Ngāhere,[55] and derive their name from an incident that occurred at the mouth of the Waiōtahe River at or around 1830, where Hine-ī-ahua of Ngāti Ngāhere was captured by Ngāpuhi and killed at sea.

[50] At the hearing, the whakapapa of this hapū was set out by Ms Te Ringahuia Hata, who derived her evidence from a combination of sources, namely the research of Ranginui Walker, and the whakapapa of her elder relative Tairongo Amoamo. Mr John Hata, kaumatua of Ngāti Patumoana, and Mr Tuariki John Delamere, former representative of the hapū on the Whakatōhea Māori Trust Board, also gave evidence. Ms Hata described the historical evolution of Ngāti Patumoana's rohe as follows:

> From the 1800s to the 1840s, Ngāti Patu had been operating separately from Ngāti Ngāhere during this period claiming Ruamoko as their tīpuna. By 1850s, the hapū moved from Paerāta, Ahirau and Onekawa along the coast to Onehu, and along the Tutaetoko stream and the Otara river on the east with Ngāti Ngāhere. They remained there up until the Hauhau disturbances in the early 1860s.
>
> Ngāti Patu had exercised their customary rights over Ōhiwa since pre-1840 due to Ruamoko. Ruamoko's territory from Waiōweka to Ōhope and Ōhiwa Harbour was the most valuable resource of kai in Ruamoko's rohe moana. The boundary that Ruamoko established ran from Te Wana up the Kahūnui Stream to the Waiōweka river then followed the river northwards to the coastline where the boundary ran west along Ōhope Beach then inland to Ōruakani.
>
> Key pā sites of significance are Onekawa pā, lrirangi pā and Paerāta. There were other areas and sites occupied by Ngāti Patu that were temporary sites during the fishing season in summer only. Then Ngāti Patu would move inland back to their papakāinga along the Otara river in the off-seasons. Despite these movements, Ngāti Patu maintained our use and occupation of our Rohe Moana from season to season and settlement to settlement.

[51] Mr Hata noted that the original settlements of Ngāti Patumoana were at Paerāta, Ahirau, Waiōtahe, Onekawa and Ōpōtiki. The current rohe moana was described as aligning with other Whakatōhea hapū; being the area as defined by the land at Maraetōtara in Ōhope to Tarakeha in Ōpape.

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[55] See *Whakatōhea of Ōpōtiki*, above n 3, at 87; *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 44.

[52] Ngāti Patumoana descend from Tārawa, an early ancestor of Whakatōhea discussed above, who came to the area on the Te Aratauta waka. Stirling also notes that Ngāti Patumoana can claim descent from the Nukutere and Mātaatua waka through the union of Hine-ī-kauia and Tūtāmure.[56] In her affidavit, Ms Hata discussed Ruamoko, an important tūpuna for both Ngāti Ngāhere and Ngāti Patumoana. Ruamoko was the younger brother of Tahu (from whom Ngāti Ngāhere descend), both of whom were the sons of Hau-o-Te-Rangi. Both Ruamoko and Tahu directly descended from Tārawa. Walker observes that Ruamoko gained fame for his battles with and victories over Te Whakatāne (who he describes as a hapū cohabiting the area around Paerāta, Waiōtahe and Ōhiwa at the time),[57] which led to his control over territory from Waiōweka to Ōhope, described as a "substantial estate rich in resources".[58] Ruamoko was some four generations before Tiwai Pihama, who set out Ngāti Patumoana and Whakatōhea's whakapapa in the Compensation Court, and was granted land at Ōhiwa spit, where Ōnekawa pā is located, as a result of an out-of-court settlement with Crown agent James Wilson.

[53] All three witnesses also referred to Waiaua Marae as an importance location for Ngāti Patumoana. According to Mr Delamere, it was built in the late 1800s:

> The Ngāti Patumoana marae, Waiaua was established in the late 1800s after the atrocities of the war and raupatu.
>
> The brothers Apanui and Eria Tairua decided to build the marae for Ngāti Patumoana. The land belonged to Te Ro-kī-ao of Ngāti Tama, the wife of Mikaere of Ngāti Patumoana. Te Ro-kī-ao gave the land to her husband's hapū for the marae.
>
> The wharenui, Ruamoko, was completed in 1899 which sits at the base of the maunga Makeo.

*Ngāti Ngāhere*

[54] Although the hapū of Ngāti Ngāhere did not directly give evidence at the hearing, their whakapapa is discussed by Walker and Lyall. Lyall notes that Hau-o-Te-Rangi, a key ancestor for Ngāti Ngāhere was a descendant of both Tārawa and

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56 *Te Kāhui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea: Historical Issues*, above n 59, at [11]. Lyall states that Hau-o-Te-Rangi, the father of Ruamoko, descended from Muriwai.

57 At 36-37.

58 At 37.

Muriwai,[59] while Walker describes him as being seven generations removed from Tārawa, whose name, meaning divine wind was "highly evocative of the tapu, mana and prestige of a rangatira".[60] According to Walker, Hau-o-Te-Rangi was regarded as the founding ancestor of Ngāti Ngāhere, who succeeded the earlier Ngāi Tū hapū, as well as having origins in Ngāti Kahu, a hapū that inhabited the forested interior of Whakapau Pākihi.[61]

[55] The origins of Ngāti Ngāhere's name appear to be somewhat contentious. Walker considers the name to have been derived from the fact that the hapū lived in a forested area:[62]

> A section of Ngāti Kahu took the name Ngāti Ngāhere after one of their chiefs, Te Ranituaiwa, died in the forest. Ngāti Ngāhere occupied the forested lands from the west of the Waiōweka River to the downlands of Paerāta so the name, meaning people of the forest, was highly appropriate for their territory.

[56] Conversely, Lyall considers that the name arose from the death of Hau-o-Te-Rangi, who had been killed by Te Whakatāne, who suspended his body in a tree in a forest,[63] with Ruamoko eventually avenging his father's death with his victory over Te Whakatāne, discussed at [52] above.

*Ngai Tamahaua*

[57] Ngai Tamahaua are a hapū located in and around Ōpape, east of the Ōpōtiki township.[64] At the hearing, a number of Ngai Tamahaua witnesses gave evidence, with Ms Tracy Hillier and Mr Hetaraka Biddle in particular focusing on the whakapapa of the hapū.

[58] Mr Biddle deposed that Ngai Tamahaua have whakapapa back to Tārawa, being the earliest recognised ancestor from which the hapū descend. In his affidavit, he set out a pātere[65] written by his brother placing Ngai Tamahaua within the area of

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59 At 77.
60 At 34.
61 At 34.
62 At 34-35.
63 At 79.
64 Tracy Francis Hillier *Amended application for order of recognition of customary marine title and for protected customary rights of Ngai Tamahaua hapū* (5 August 2020) at [5].
65 A pātere is a rhythmic incantation.

Ōpōtiki, and their whakapapa back to Tārawa. He noted that Ngai Tamahaua acknowledged Te Tapuwae ō Tārawa (The Footprint of Tārawa) as being part of the rohe passed down to the hapū, which was set out in Mr Biddle's affidavit as follows:

> Beginning at Paerāta – along the Coast to Tawhitinui to the other side of the Waiōweka river to the township of Pa-Kowhai (Ōpōtiki) crossing to the other side of Ōtarawa (Otara awa) to Oroi before heading inland to Motu, Motuhora, Pokaikai and Tapaona.

[59] According to Mr Biddle, the early peoples of Ngai Tū were a descent group of Tārawa, from which Ngai Tamahaua eventually derived.[66] Walker also notes that the people and descendants of Tārawa were known collectively as the Ngāi Tū hapū, down to the era of Hau-ō-Te-Rangi, ten generations down from Tārawa.

[60] Ngai Tamahaua also have whakapapa to the Mataatua waka and Muriwai, through one of Muriwai's children, Rangikurukuru. According to Mr Biddle, Kura-a-whe-rangi, who married Tamahaua (the eponymous ancestor of the hapū) was a direct descendant of Rangikurukuru. Mr Biddle noted that the whare tīpuna of Ngai Tamahaua's marae was named Muriwai in respect and acknowledgment of this ancestor.

[61] A number of the Ngai Tamahaua witnesses referred to Tītoko as an important Rangatira and tūpuna in the whakapapa of the hapū, with Ngai Tamahua also representing Te Hapū Tītoko o Ngai Tama (the descendants of Tītoko) in their application under the Act. Tītoko was famed for his leadership and ability in dealing with inter-tribal conflict: he was able to procure firearms to negate the threat of raids from Ngāpuhi and Ngāti Maru following the Musket Wars,[67] and was responsible for encouraging the hapū of Whakatōhea to live together for greater security:[68]

> Once back at Ōpōtiki, Tītoko advised Whakatōhea to live together for greater security. He built a pā name Te Papa on the west side of the Waiōweka River not far from the location of the present bridge. Ngāti Ira, Ngāti Ngāhere, Ngāti Patu, Ngai Tama and Te Ūpokorehe helped with the construction of Te Papa. Ngāti Rua also came from Tarakeha to strengthen their position…

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66 During the hearing, Mr Te Amoamo also confirmed that Ngai Tamahaua, Ngāti Patumoana and Ngāti Ngāhere all had whakapapa connections back to Ngāi Tū.

67 *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*, above n 4, at 47-48.

68 At 47.

*Te Ūpokorehe*

[62] Te Ūpokorehe are an iwi/hapū group based around the Ōhiwa Harbour. At the hearing, Mr Wallace Aramoana, a kaumatua of Te Ūpokorehe and Roimata Marae, presented a report authored by himself and Mr Lance Reha (also of Te Ūpokorehe).

[63] Notably, Mr Aramoana's report (also emphasised in closing submissions for Te Ūpokorehe) focused on Te Ūpokorehe's connection to waka other than Mātaatua. Mr Aramoana noted:[69]

> By way of intermarriage, Te Ūpokorehe acknowledge our relationships to the descendants of Mataatua and other waka. However these waka are not considered part of the principal descent lines of the whakapapa of the Ūpokorehe peoples.

[64] Instead, Mr Aramoana discussed three lines of descent for Ūpokorehe. Firstly, Ūpokorehe can show their descent back to Hapūoneone, the early peoples living in the Whakatōhea rohe, particularly the Ōhiwa Harbour area.[70] According to Ūpokorehe, Hapūoneone are a distinct people from Te Tini-o-Toi, and were present in the area to welcome Toi when he arrived. Ūpokorehe consider 'Hapūoneone' to be representative of a people, rather than a single tūpuna. Lyall also makes a similar comment as to Te Ūpokorehe's whakapapa and their connection back to the Mātaatua waka, noting that "there is an element of Mātaatua origin", but also descent from Hapūoneone.[71]

[65] Secondly, Ūpokorehe descend from the Rangimatoru waka, which was captained by Hape ki Tuarangi, and landed at Ōhiwa, with descendants of this waka intermarrying with Hapūoneone.[72] Hape was a famous navigator and was also known as an accomplished carver of pounamu.

[66] Finally, Mr Aramoana discussed the Oturereao waka, which arrived some generations after the Rangimatoru.[73] The waka was captained by Tairongo, and landed

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69 Wallace Aramoana *Ūpokorehe Iwi Marine and Customary Area: Traditional and Customary Practices and Sites of Significance* (24 February 2020) at 5.

70 At 5.

71 Felicity Margaret Kahukore Baker, at 68. See also *Mō āke tonu atu: Te Ūpokorehe Takutai Moana Overview Report* (17 February 2020) at 2.2.

72 At 5.

73 At 5.

at Ōhiwa, with the harbour eventually being named Te Kete Kai a Tairongo (also known as Te Moana a Tairongo).[74] Over time, the descendants of Hapūoneone, Rangimatoru and Tairongo intermarried and became known as Te Whānau a Tairongo.

[67] According to Mr Aramoana (and Ms Kahukore Baker, who gave evidence at the hearing), Tairongo's daughter was Ani-i-Waho, an important tūpuna in the Ūpokorehe whakapa, for whom the whare kai at Kutarere marae (one of the three marae with Ūpokorehe whakapapa) is named.[75] Ani-i-Waho appears to have married Tuamutu, the son of Repanga and grandson of Tamatea and Muriwai. While being questioned by Ms Sykes during the hearing, although recording his concern as to the way the whakapapa presented to him was structured, Mr Aramoana acknowledged the connection to Muriwai (and therefore Mataatua) through the marriage of Tuamutu and Ani-i-Waho.

[68] From Ani-i-Waho descended Raumoa, from whom the descendants of Te Whānau a Tairongo, known as Ngāti Raumoa, were named (Ngāti Raumoa were located at Ōhiwa and Waiōtahe, as well as at Waimana).[76] Mr Aramoana also discussed Panekaha as a principal descendant and leading rangatira of Te Whānau a Tairongo at Ōhiwa, setting out his whakapapa as follows:[77]

> Another principal descent line of Te Whanau-a-Tairongo is that of Panekaha, a leading Chief at Ōhiwa. His daughter Rangi-paroro married Rongopopoia, son of Rongowhakaata and Uetupuke. Kahuki, grandson of Panekaha and son of Rongopopoia and Rangi-paroro grew to be a famed War Chief who sought revenge for the killing of his father Rongopopoia. In doing so, his Mana and actions cemented many historical place names in and around the Ūpokorehe rohe, or tribal area.

[69] Kahuki appeared to be a key leading/unifying figure for the people of Ōhiwa at the time. Walker states that after Kahuki returned from exacting revenge on Tuamutu (who Walker names as the person responsible for killing Kahuki's father Rongopopoia),[78] he gathered the peoples living in the area under his mana:[79]

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74 At 5.
75 At 40.
76 At 5.
77 At 5.
78 At 33.
79 At 34.

> Kahuki returned to Waiōtahe and built a strongly fortified pā close to the Waiōtahe River. He gathered all sections of Te Whakatāne and unified them under his mana. His own hapū, Te Panekaha, moved to Waiōtahe from where they had been living on the other side of Ōhiwa. Kahuki defined the western boundary of his territory at Ōhope. The boundary ran inland from Ōhope southwards along the ridgeline to Te Teko, then on to Paetawa, to Tuanui then, swinging back east, to Rangakapua, to Te Wana and ended at Kaharoa.

[70] Lyall's view is that the name "Ūpokorehe" originated from the time of Kahuki.[80] Mr Aramoana did not explicitly state that the name originated from this time but noted that: "following the death of a man known as Taikurere, the descendants of Ngāti Raumoa became known as "Te Ūpokorehe".[81] From then on, those in the Ōhiwa, Waiōtahe and surrounding lands and south to Te Kaharoa became known as Te Ūpokorehe". Walker describes the origin of the name as follows:[82]

> The name Ūpokorehe (wrinkled head) refers to a man named Taikūrere whose head had been preserved by smoke-drying. A mistake was made in the process when the skin at the base of the neck was not kept taut while it was stitched together. Consequently the skin on the head wrinkled up. In another version of the name's origin, Taikūrere's head was dropped in the sea. By the time the head was recovered the skin was found to be 'reherehe', torn and made ragged by crabs.

[71] During the hearing, Mr Reha summarised the evolution of the name:

> So to sum that up, as I was told, the history of Ūpokorehe dates back to Te Hapūoneone. After time it shifted in to Te Whānau-a-Tairongo. Then it morphed or transformed in the time of Tairongo's grandson to Ngāti Raumoa. It was only after an incident that occurred with the tīpuna Taikurere that the name changed from Ngāti Raumoa to Ūpokorehe. But we are the same people.

**Neighbouring iwi**

[72] Finally, I will briefly describe the neighbouring groups of Whakatōhea and Te Ūpokorehe who appeared in this hearing, and their relationship to Whakatōhea. These groups are:

(a) Te Whānau-a-Apanui;

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80 At 5. Mr Reha took a similar view in his affidavit.
81 At 68.
82 At 168-169.

(b) Ngāi Tai; and

(c) Ngāti Awa.

[73] Te Whānau-a-Apanui are a neighbouring iwi (or confederation of 12 hapū) of Whakatōhea on the eastern boundary. They are an interested party in the Whakatōhea proceeding, with its main focus concerning its intention to protect what it considers to be a primary customary interest in Whakaari. Mr Te Kou Rikirangi Gage, the Chief Executive Officer of Te Rūnanga o Te Whānau, provided affidavit evidence of the Whānau-a-Apanui whakapapa and rohe to the Court on behalf of his iwi.

[74] While Te Whānau-a-Apanui have no overlapping boundaries with Te Whakatōhea (aside from the overlapping interests in Whakaari), they have some whakapapa connections to the iwi. Mr Gage specifically noted the connection of Te Whānau-a-Apanui to Toi, who he referred to as the "tāhuhu" or "backbone" that links all the iwi from Whakatāne through to Ngāti Porou. Mr Gage also referred to Toi as the "foundation" ancestor for the mana over the iwi's moana and whenua, and his descendants being attributed as key primary ancestors, also being sources of mana of the iwi's tribal territories. Mr Gage also referred to Te Whānau-a-Apanui's connection to Ngariki, as well as to Mataatua and Muriwai through the marriage of Hinemahuru's (the grandmother of Apanui Ringamutu, the eponymous ancestor of Te Whānau-a-Apanui) son Taikorekore to Kawe-kura-tawhiti (a descendant of Muriwai) and Uhengaparaoa (also a descendant of Muriwai) to Rakaipikirarunga.

[75] Te Whānau-a-Apanui assert primary customary interests in Whakaari due to customary transfer – Mr Gage described this as follows:

> Te Whānau a Te Ehutu, and Te Whānau a Tukāki owned Whakaari. They were the last owners of the island according to Maori customary law. Whakaari was originally owned by Ngāti Awa. The island was given to Te Whānau a Te Ehutu and Te Whānau a Tukāki as "utu" or compensation for traveling to Whakatane at the behest of Purahokino a Ngāti Awa chief to avenge the death of his beloved son Te Whakapakina.
>
> Te Whakapākina had been killed by a neighboring faction of that tribe. In situations where intra-tribal killing took place, it was customary (and strategic) to invite a third party, a party not too closely related to intercede as part of "utu" process. This avoided the spiralling out of control of killings if the broader tribal network became involved in the utu.

> In the above situation, Te Ehutu and Te Whānau a Tukāki grouping met the bill - they were related but not too close. This also happened another time when two Ngāti Awa hapū (lkapuku and Taiwhakaea) travelled from Whakatāne all the way to Hāwai in the Te Whānau a Apanui territory to settle their scores. A saying is remembered by Te Whānau-a-Apanui as on that occasion, when the forces eventually shaped up to each other, the lkapuku faction who were joined by some Te Whānau-a-Apanui kin called out to the other side "Tera pahi roa ki tenei pahi poto" the appellation "Te Pahipoto" remains with the people of Kōkōhinau to this day.

[76] Ngāi Tai are a neighbouring iwi of Whakatōhea, located to the east, from Tarakeha along the coast to Hāwai, the area in which they hold mana whenua.[83]

[77] Mr Arapeta Mio was one of the witnesses that gave evidence for Ngāi Tai. He described the arrival of Tainui to New Zealand, captained by Hoturoa. Tōrere-nui-a-rua, a daughter of Hoturoa, also travelled to New Zealand on the Tainui waka, and married Manaakiao, who according to Mr Mio, descended from Te Tini-o-Toi (indicating Ngāi Tai's connection to these early people of the area).

[78] Mr Mio described Tōrere's journey, marriage to Manaakiao and their setting of the traditional rohe for Ngāi Tai:

> When Tōrere Nui A Rua left the islands she gathered sands and stones from home and brought it with her. When she got here to Tōrere she sprinkled the sand and stones out here. That started a special connection to the rohe that her descendants, the people of Ngāi Tai, continue to have today.
>
> Tōrere Nui A Rua then travelled inland following the Wainui River to her first resting spot, Hawaiki. That is where some of her kumara and taro were planted. She travelled on from there coming to a track inland entering into the bush. That place is known as Maraetaha. There she performed karakia to hide her path and continued travelling up the river to a place where she decided to bathe. While she was doing that a person from that area came and saw her, his name was Manaakiao. Manaakiao was from Te Tini o Toi. He took her home and she agreed to marry him.
>
> …
>
> At that time Tōrere and Manaakiao laid down the boundary for our Ngāi Tai people. The boundary extends from Tokoroa which is our rock in the sea down to the East, to Te Ana o Hinetekahu. Then you ascend to the top of a hill called Rakaukatihi. From Rakaukatihi you go to Ōtaitapu then to Pukehou. From Pukehouto Puketoitoi to Te Pāretu, these are all peaks. From Te Pāretu there is a stream that goes towards the Motu River called Mangakirikiri. From there you follow the Motu River inland to a place called Te Paku. From Te Paku to

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83 See Application by *Muriwai Jones on behalf of Ngāi Tai Iwi, Te Uri o Ngāi Tai* (CIV-2017-485-270) and *Ririwhenua* (CIV-2017-485-272) (2 April 2017).

> Tawharenga and on to Tahinahina to te wahapu o Takaputahi. From Takaputahi to Peketutu then onto Taungakakariki to Maramauku to Te Rere o Kaitaura to Taumata Karete. Then you go on to Te Rewa Onukuroa, Tahunatoroa, Papamoa, Mangakakaho, Te Ropiha to Hanaia to Tirohanga. From Tirohanga to Tokangawekaweka to Turangaanui then returning along the coast to Tokaroa. Our tīpuna Wetini Taku gave this korero to the Māori Land Court.

[79] Ngāti Awa are a neighbouring iwi on the western boundary of Whakatōhea's rohe. It is also an interested party that seeks to address or oppose any overlapping claims, specifically between Maraetotara and Ōhiwa Harbour, and Whakaari.[84] A brief of evidence given by Sir Hirini Moko Mead, Hohepa Mason, and Te Kei Merito provided detailed evidence of Ngāti Awa's whakapapa and tribal rohe, particularly their interests in the three abovementioned overlapping areas.

[80] In terms of Ngāti Awa's whakapapa, the brief stated that the Ngāti Awa traditions begin with Maui and Tiwakawaka, arriving on the Te Aratauwhāiti waka and establishing a settlement at Kākahroa (Whakatāne). Ngāti Awa also descended from Toi (termed as Toi Te Huatahi), who formed the people of Te Tini-o-Toi, discussed above.[85] Toi's son, Awanuiārangi I, occupied territory from Whakatāne to Ōhiwa, and his people became known as Te Tini o Te Awa, an early formation of Ngāti Awa. According to the brief, a number of other groups stemmed from Te Tini-o-Toi, including Hapūoneone, Te Wakanui, Panenehu and Ngariki.[86] Ngāti Awa also has a connection to the Mataatua waka.

[81] In relation to Ōhiwa, Ngāti Awa assert a longstanding connection to the harbour, as asserted in the brief:

> The name Ōhiwa was given to the area by Awanuiārangi II. From Paparoa pā, he proclaimed that the land and sea before him was the "standing platform" of Awanuiārangi. The full name is Te Ohiwa o Awanuiārangi in Ngāti Awa tradition. The taniwha/guardian of Ōhiwa is Tutara Kauika who is physically manifested as a shark.
>
> Ngā Ariki would then become one of the principal groups occupying around Ōhiwa. In time, Ngā Ariki became the Ngāti Awa hapū, Ngāti Hokopu and Te Wharepaia. They maintained prominence in the Ōhiwa and Ōhope region supported by Ngāti Awa whānui.

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84 See *Te Rūnanga o Ngāti Awa on behalf of Ngāti Awa* CIV 2017-485-196 (29 March 2017).

85 At [41].

86 At [45].

[82] In relation to Whakaari, Ngāti Awa also assert strong connections to Whakaari, as discussed in the brief of evidence:

> Ngāti Awa hold strong connections to Whakaari (White Island). Whakaari was held by Ngāti Awa Rangatira Wepiha Apanui and Te Keepa Toihau and was subsequently awarded by the Native Land Court to Retireti Tapsell and Katherine Simpkins (his wife) following an examination in the Native Land Court of purported ownership rights transferring to Tapsell. Our kōrero, supported by our research, confirms that this transaction was unlikely to have been one that took the form of a transfer of property but rather an allowance to use the land. Whakaari remains in private ownership.