IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2011-485-806
[2016] NZHC 3199

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application by Denis Wiremu Tipene

Hearing:	23-26 November 2015 (Heard at Invercargill)
Appearances:	C Batt for Mr Tipene C Linkhorn and S Eccles for the Attorney-General R Brown for Te Rūnanga o Ngāi Tahu
Judgment:	22 December 2016

JUDGMENT OF MALLON J

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Introduction

[1] The marine and coastal area begins at the high-water mark that is daily wet by the sea when the tide comes in and ends at the outer limits of the territorial sea.[1] Māori customary interests in that area may be recognised by this Court under the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Act**). Denis Tipene is the first applicant under the Act to seek such an order.

[2] He seeks an order over a small marine and coastal area to the south west of Rakiura (Stewart Island). The area is a 200 m radius surrounding a rock in front of the landing area, which provides the only access to two small islands, Pohowaitai and Tamaitemioka islands (**the specified area**). The area is remote. The waters surrounding the islands are inhospitable and the journey by sea to the islands can be hazardous.

[3] Pohowaitai and Tamaitemioka are part of the Tītī Islands (also known as the Muttonbird Islands). Use of the Tītī Islands has always been confined to gathering the Tītī (defined as one word: **muttonbirding**). It is carried out on a seasonal basis between March and May each year. Outside of that season the islands are not inhabited. Those who go to these islands whakapapa to them. Anyone else wanting to go needs permission from a committee (the Rakiura Tītī Islands Committee (**the Rakiura Committee**)) established under the Tītī (Muttonbird) Islands Regulations 1978 as amended by Tītī (Muttonbird) Islands Amendment Regulations 2007 (collectively defined as **the Regulations**).[2]

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1 Marine and Coastal Area (Takutai Moana) Act, s 9.
2 Regulation 3.

[4] Mr Tipene's whānau has the only house on Tamaitemioka. There are 11 families with houses on Pohowaitai Island. The houses are used during the muttonbirding season. On both Tamaitemioka and Pohowaitai, fishing from the shores has always been an essential part of the existence during the muttonbirding season. That fishing takes place in and around the landing area near the rock.

[5] Mr Tipene brings his application for a customary marine title on behalf of all Rakiura Māori with customary interests in the islands of Pohowaitai and Tamaitemioka (**the applicant group**). He says this comprises the beneficial owners of these two islands and their descendants.[3]

[6] His application was heard in the High Court at Invercargill before me. The principal evidence was given by Mr Tipene, Jane Davis (a pūkenga appointed under the Act),[4] Michael Skerrett and Sandra Cook (representatives of Te Rūnanga o Ngāi Tahu (**Te Rūnanga**)), and two historians – Anthony Pātete (instructed by Mr Tipene) and David Armstrong (instructed by the Crown). There was also evidence from Stephen Halley (an inshore fisheries manager for the Ministry of Primary Industries) and informal evidence gathered from others who have an interest in the area.

[7] An order recognising customary marine title may be made under the Act if Mr Tipene establishes the applicant group holds the specified area in accordance with tikanga and has exclusively used and occupied that area from 1840 to the present day without substantial interruption.[5] By the close of the hearing, on the basis of the evidence before the Court, the Attorney-General accepted the Court could be satisfied that members of the applicant group held the specified area in accordance with tikanga and exclusively used and occupied it from 1840 to the present day without substantial interruption.

[8] The Attorney-General nevertheless opposes an order recognising customary marine title in the specified area on two grounds. First it is said the applicant group is insufficiently specified and further evidence is required to establish the full list of whānau on whose behalf the application is brought. Secondly it is said Mr Tipene

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3 Refer [62]-[64] below.
4 *Re Tipene* [2015] NZHC 2923, [2015] NZAR 1796.
5 The Act, ss 58 and 98. There is an alternative basis under s 58 but it is not relevant for present purposes.

does not have the mandate to bring the application on behalf of the applicant group. It is said he is required to secure support from those on behalf of whom he brings this application and he has failed to establish that he has that support.

[9] Te Rūnanga takes a similar position to the Attorney-General that Mr Tipene does not have the mandate to make the application on behalf of the applicant group. It also submits the applicant group is wider than the whānau who currently have houses on Pohowaitai and Tamaitemioka although, as noted above, Mr Tipene does not contend otherwise.[6]

[10] I have concluded that an order recognising customary marine title should be made. The applicant group is appropriately defined as Rakiura Māori with customary interests in the islands of Pohowaitai and Tamaitemioka.[7] The evidence establishes the beneficial owners of these two islands and their descendents have such interests.[8] That group is wider than the whānau who currently have houses on the two islands. However those whānau have a sufficient mandate to bring the application on behalf of the applicant group. Mr Tipene's mandate arises from the support he has from those whānau. This is the way of these two islands. Those who exercise the fires of occupation make the decisions. They do so on behalf of all those who whakapapa to the islands.

Background to the Act

Customary title

[11] Customary title (also called aboriginal title) is a concept recognised by the common law in New Zealand and other jurisdictions. It is explained in *Te Runanganui o te ika Whenua Incorporated Society* as follows:[9]

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country

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6 Refer [5] above.

7 Rakiura Māori is defined in the Regulations, reg 2, as meaning "a person who is a member of the Ngaitahu Tribe or Ngatimamoe Tribe and is a descendent of the original Māori owners of Stewart Island."

8 The Regulations, reg 2, define Pohowaitai and Tamaitemioka as two of the beneficial islands and a beneficiary of those islands means a "Rakiura Māori who holds a succession order from the Māori Land Court entitling him to any beneficial interest in [those] beneficial island[s]."

9 *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 23-24.

> up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.

[12] In short, customary property arises from the prior occupation of land by indigenous peoples.[10] A transfer of sovereignty does not affect customary property. Customary interests are preserved by the common law until extinguished in accordance with the law.[11] The existence and content of customary property is determined as a matter of custom and usage of the particular indigenous community.[12] Its content is a question of fact discoverable, if necessary, by evidence.[13]

[13] According to the custom on which they are based, a customary interest in land may extend from usufructuary rights,[14] to exclusive ownership with rights essentially equivalent to those recognised by a fee simple title.[15] Sometimes these are described as non-territorial and territorial rights. Non-territorial rights are less than full ownership, and are the rights that may continue to exist in land, even where the customary title (or territorial title) to land has been extinguished. Territorial rights are those which are equivalent to full ownership of the land.[16]

[14] Māori customary rights prior to 1840 were extensive. Bennion, *New Zealand Land Law* puts it this way:[17]

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10 P A Joseph *Constitutional and Administrative Law in New Zealand* (online ed, Thomson Reuters) at [4.11.1].

11 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [13].

12 At [32]. See Kent McNeil "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison" in Louis Knafla and Haijo Westra (ed) *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, Vancouver, 2010) at 146. The author discusses the potential sources that can give rise to aboriginal title and the effect this can have on the content of the rights of that title.

13 At [31].

14 That is, rights of use and enjoyment.

15 At [31].

16 Valmaine Toki "Adopting a Māori Property Rights Approach to Fisheries" (2010) 14 NZJEL 197 at 203-204.

17 Bennion, Brown, Thomas and Tooley *New Zealand Land Law* (2nd ed, Brookers Ltd, Wellington, 2009) at [5.2].

> Anthropologists agree that Māori occupied the whole of Aoteoroa at least 1,000 years before contact with Europeans, and that they exercised a complete regime of rights over the land, which varied considerably between tribal districts.

[15] The Waitangi Tribunal, in a 2003 report on interests around Te Whanganui-a-Tara (the great harbour of Tara – Wellington), said this:[18]

> Māori customary rights to land and associated waterways and to the sea were complex, fluid, and multilayered. Physical occupation and cultivation created only one layer of rights, albeit an important one. This was evidenced by ahi ka, or the lighting of fires of occupation; such fires were both symbolic and physical emblems of mana over the land. The ability to light fires, and so to prove strength of tenure, established rights to land. Where a group abandoned the land so that their fires died out and were not rekindled, such rights were disestablished. Occupation by establishing kainga and cultivations was evidence of association with the land, but the use of the land's resources was another important sign of association. Such uses could include birding, taking berries, collecting firewood, taking trees for waka, and gathering ingredients for rongoa (traditional medicines) in the forest or fishing and collecting food from waterways and the sea. The use of such resources was just as important as the occupation of the land, because kainga could not survive without these resources.
>
> Other evidence of association with the land could be kin links, an ancient association through long historical occupation (ahi ka roa), having named a particular area, or spiritual associations owing, for example, to the birth or death of kin there. A group could retain such historical associations with an area even when its ahi ka had been extinguished there and it had lost all rights over the land.
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> Interwoven rights and associations, including ahi ka, were all held together by the ability to defend one's rights. Together, they formed a complex web, not easily understood by those familiar with a markedly different English system of land tenure.

[16] Māori customary title received early recognition in New Zealand.[19] The early approach to its recognition was a legislative process by which customary title

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[18] *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Waitangi Tribunal Report Wai 145, 2003) at [2.2] as cited in Bennion above n 17 at [5.2].

[19] For example see *R v Symonds* (1847) NZPCC 387 (SC) at 394 "[I]t cannot be too solemnly asserted that [Māori aboriginal title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers"; and *Re Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 at 49 "The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it." As is discussed in *Ngāti Apa* above n 11 at [23] to [26], this early recognition suffered a setback with *Wi Parata v Bishop of Wellington* (1877) 2 NZ Jur (NS) 72 (SC) but the approach in that case was later rejected by the Privy Council as wrong in *Nireaha Tamaki v Baker* [1901] AC 561.

was converted into freehold estates.[20] This involved an investigation by the Land Court of the claim and that the land had not been subsequently sold or otherwise changed its status. If the claim was established the land became Māori freehold land. Later legislation up until the enactment of Te Ture Whenua Māori Act 1993 continued this approach. Te Ture Whenua Māori Act continued to provide for the conversion of customary land into Māori freehold land, but it also provided for a process by which the status of customary land could be recognised (Māori customary land),[21] without it needing to be changed into Māori freehold land.[22]

[17] In addition to these territorial rights, non-territorial rights have also been recognised in this country. For example customary fishing rights provided a defence against conviction under the Fisheries Act 1983 in *Te Weehi v Regional Fisheries Officer*.[23] The Fisheries Act provided that nothing in that Act shall affect Māori fishing rights and evidence established that Ngāi Tahu had exercised a customary fishing right along the Motunau foreshore since pre-European times.[24]

[18] However questions remained as to whether there could be customary title over the foreshore and seabed.

The foreshore and seabed

[19] The foreshore is the area of beach frontage between the mean high-water mark and the mean low-water mark (that is, the intertidal zone that is daily wet by the sea when the tide comes in).[25] The seabed refers to the area from the mean low-water mark to the outer limits of the territorial sea. The marine and coastal area, as

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20 The Native Land Act 1894. Prior to this it was possible for the ownership of land held according to Māori custom to be ascertained on application to the Native Land Court: *Ngāti Apa* above n 11 at [44].

21 In legal terms Māori customary land is a property right that has remained in existence since 1840 and which has not been altered by Crown purchase, Māori Land Court conversion or any other process. It is not created by the Treaty of Waitangi or by statute; it was property in existence at the time the Crown colony government was established. See *New Zealand Land Law* above n 17 at [5.4.02] and *Ngāti Apa v AG* above n 11 at [14].

22 *Ngāti Apa* above n 11 at [40] to [45].

23 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC). Discussed in Joseph above n 10 at [4.11.5].

24 Fisheries Act 1983, s 88(2).

25 *Ngāti Apa* above n 11 at [131]; and *Report on the Crown's Foreshore and Seabed Policy* (Waitangi Tribunal Report, Wai 1071, 2004) at xi.

defined in the Act, extends from the mean high-water mark to the outer limits of the territorial sea.[26]

[20] In 2004 the Waitangi Tribunal said this:[27]

> We find, therefore, on the basis of the evidence available to us, that the Treaty of Waitangi recognised, protected, and guaranteed te tino rangatiratanga over the foreshore and seabed as at 1840. The foreshore and sea were and are taonga for many hapū and iwi. Those taonga were the source of physical and spiritual sustenance. Māori communities had rights of use, management and control that equated to the full and exclusive possession promised in the English version of the Treaty. This promise applied just as much to the foreshore and seabed as, in 1848, it was found to apply to all dry land. There is in our view no logical, factual, or historical distinction to be drawn. In addition to rights and authority over whenua, Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing. This is not liberal sentiment of the twenty-first century but a matter of historical fact.
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> The Crown's duty under the Treaty, therefore, was actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga.

[21] The Waitangi Tribunal went on to discuss what occurred in the 164 years following the Treaty in relation to the Crown's duty under the Treaty. In short it concluded the Crown had not protected Māori tino rangatiratanga over the foreshore and seabed.[28]

[22] For present purposes there are two decisions of the Court of Appeal which are of particular relevance. The first is *In re Ninety-Mile Beach*.[29] It was decided in 1963. The Court of Appeal was of the view that after 1840 all titles to land had to be derived from the Crown and it was for the Crown to determine the nature and incident of the title it would confer. By enacting the Native Lands Act 1862, the Crown had decided to honour the promises made in the Treaty of Waitangi by conferring on the Māori Land Court the jurisdiction to investigate Māori title to land. Where land abutting the foreshore had been investigated, and title had been issued which extended to the high-water mark, there was no separate title in the foreshore to be investigated. Moreover, pursuant to s 150 of the Harbours Act 1950, the

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26 The Act, s 9.
27 At [2.1.8].
28 At Chapter 2.
29 *In Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

jurisdiction of the Māori Land Court to investigate title below the high-water mark was removed, regardless of whether title abutting the land had been granted. The Court considered that, as all title was required to emanate from the Crown, there was no common law right to Māori customary title below the high-water mark that could be investigated by the Court.

[23] The second decision is *Attorney-General v Ngāti Apa*.[30] It was decided by the Court of Appeal forty years later, in 2003. It concerned the foreshore and seabed in the Marlborough Sounds.[31] It considered that, when the Crown acquired sovereignty under the Treaty, it acquired territorial authority over New Zealand, not ownership. Customary rights in land endured until they were extinguished in accordance with the law. This did not occur when the contiguous rights in land changed status. It required consent of the right-holder or clear statutory authority. None of the legislation considered had this effect.[32] The Court of Appeal, taking a different view from *In re Ninety-Mile Beach,* concluded therefore that the Māori Land Court had jurisdiction to determine the status of the foreshore and seabed under Te Ture Whenua Māori Act.

[24] *Ngāti Apa* was not met with universal approval.[33] Some feared it would prevent public access to New Zealand's foreshores. In response to this decision, the Foreshore and Seabed Act 2004 was enacted.[34] This legislation vested the public foreshore and seabed (defined as not including land that is subject to a specified freehold interest) [35] in the Crown.[36] It provided rights of access and navigation in the

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30 *Ngāti Apa* above n 11.

31 It is sometimes referred to as the *Marlborough Sounds* case in recognition that a number of iwi brought the case. See Waitangi Tribunal report above n 25 at Chapter 3.

32 The Court considered the Harbours Acts 1878 and 1950; the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977; the Foreshore and Seabed Endowment Revesting Act 1991; and the Resource Management Act 1991.

33 See, for example, Joseph above n 10 at [4.11.6].

34 In introducing the Foreshore and Seabed Bill, the Minister said "Until last year, the great majority of New Zealanders understood it to be a settled principle that the public foreshore and seabed was owned by the Crown on behalf of all New Zealanders, with free access for recreational purposes under the appropriate safeguard of the Resource Management Act and other Acts of Parliament. … What changed last year was the Court of Appeal's decision in June that the Māori Land Court could hear claims to and investigate the ownership of the foreshore and seabed. … [t]he Te Ture Whenua Māori Act … was not intended to apply to the foreshore and seabed."

35 Meaning an estate in fee simple for which a certificate of title of computer freehold register has been or is to be issued or Māori freehold land as defined in Te Ture Whenua Māori Act 1993, or land subject to the Deeds Registration Act 1908.

public foreshore and seabed for all natural persons.[37] It removed the High Court's jurisdiction to determine native title claims.[38] Similarly it removed the Māori Land Court's jurisdiction to consider applications relating to an area of the public foreshore and seabed.[39] It did, however, provide for customary rights orders to be made by the Māori Land Court.[40] The High Court retained a residual discretion in relation to applications which could not be brought before the Māori Land Court[41] and it could also make territorial customary rights orders.[42]

[25] The Foreshore and Seabed Act was itself controversial and did not survive.[43] It was replaced by the Marine and Coastal Area (Takutai Moana) Act. The preamble to the Act sets out some of this history and the criticisms of the Foreshore and Seabed Act. Specifically, the preamble states:

> (1) In June 2003, the Court of Appeal held in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed. The Foreshore and Seabed Act 2004 (the 2004 Act) was enacted partly in response to the Court of Appeal's decision:
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> (2) In its *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071), the Waitangi Tribunal found the policy underpinning the 2004 Act in breach of the Treaty of Waitangi. The Tribunal raised questions as to whether the policy complied with the rule of law and the principles of fairness and non-discrimination against a particular group of people. Criticism was voiced against the discriminatory effect of the 2004 Act on whānau, hapū, and iwi by the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Special Rapporteur:
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> (3) In 2009, a Ministerial Review Panel was set up to provide independent advice on the 2004 Act. It, too, viewed the Act as severely discriminatory against whānau, hapū, and iwi. The Panel proposed the repeal of the 2004 Act and engagement with Māori and the public about their interests in the foreshore and seabed, recommending that new legislation be enacted 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:

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36 Foreshore and Seabed Act 2004, s 13.
37 Sections 7 and 8.
38 Section 10.
39 Section 12.
40 Section 50.
41 Sections 67, 68 and 73.
42 Section 32, 33 and 36.
43 See, for example, Joseph above n 10 at [4.11.6].

(4) 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:

The Marine and Coastal (Takutai Moana) Act 2011

Purpose

[26] Against this background the Marine and Coastal (Takutai Moana) Act seeks to achieve a scheme that is durable, and which protects the legitimate interests of all New Zealanders in the marine and coastal area, while also recognising customary Māori rights or authority and providing for Māori to exercise their customary interests.

[27] This is set out in the Act as follows:

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[44] 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

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[44] Defined in the Act, s 9, as meaning "inherited right or authority derived in accordance with tikanga. "Tikanga" is defined as meaning "Māori customary values and practices".

(d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and

(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.

Overview

[28] The Act relates to the "marine and coastal area". It is defined as the area bounded by the line of mean high-water springs on the landward side and the outer limits of the territorial sea on the seaward side. It includes the air space, the water space (but not the water), the subsoil and bedrock in this area.[45]

[29] More particularly, it relates to the "common marine and coastal area". This is defined as the marine and coastal area which is not "specified freehold land",[46] a conservation area, a national park, a reserve, or the bed of Te Whaanga Lagoon in the Chatham Islands.[47]

[30] The Act gives the common marine and coastal area a special status. Neither the Crown nor any other person owns or is capable of owning the common marine and coastal area. However this special status does not affect customary interests recognised under the Act nor any lawful use or activity of the marine and coastal area.[48] Nor does the Act affect the Crown's ownership of all minerals existing in their natural condition in the land.[49] Any structures on the common marine and coastal area are personal property (not an interest in land) and do not form part of the common marine and coastal area.[50] The Act does not affect resource consents granted before the Act commenced, nor activities that can be lawfully undertaken

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45 Section 9.
46 In turn defined as Māori freehold land, a Māori reservation, or estates in fee simple under the Land Transfer Act 1952 or the Deeds Registration Act 1908.
47 Section 9.
48 Section 11.
49 Section 16.
50 Section 18.

without a resource consent or other authorisation.[51] Interests under a lease, licence, permit, easement or statutory authorisation granted in respect of any land within the common marine and coastal area continue to have effect.[52]

[31] The Act provides for ongoing public rights and powers in the common marine and coastal area. These are rights of access, navigation and fishing. Specifically:

(a) Every individual has the right, without charge, to enter[53] or pass over,[54] and to engage in recreational activities in, the common marine area, subject to prohibitions or restrictions imposed by a wāhi tapu[55] or under any other enactment.[56]

(b) Every person has the right to enter, pass and repass through the marine and coastal area by ship; to temporarily anchor, moor, and ground within the marine and coastal area, to load and unload cargo, crew, equipment, and passengers within the marine and coastal area; to remain in the common marine and coastal area for a convenient time; and to remain temporarily in the common marine and coastal area until wind or weather permits departure or until cargo has been obtained or repairs completed.[57]

(c) Nothing in the Act prevents the exercise of fishing rights conferred or recognised under any enactment or a rule of law.[58]

[32] The Act provides for three types of customary interests that may be recognised in the common marine and coastal area:

(a) participation rights in conservation processes;[59]

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51 Section 20.
52 Section 21.
53 Or stay in, on or leave.
54 Pass or repass in, on, over and across.
55 Section 79, and defined in s 9 as having the same meaning as in s 6 of the Heritage New Zealand Pouhere Taonga Act 2014.
56 Section 26.
57 Section 27.
58 Section 28.

(b) protected customary rights;[60] and

(c) customary marine title.[61]

[33] The second of these (protected customary rights) recognise non-territorial rights.[62] The third of these (customary marine title) is an interest in land but the Act stipulates which rights attach to that interest.[63] Both protected customary rights and customary marine title can be recognised by an agreement with the Crown (through the responsible Minister) or by an order from the High Court.[64] Mr Tipene's application is for a recognition order from the High Court of customary marine title.

What is customary marine title

[34] The Act defines the scope and effect of customary marine title as follows:

> **60 Scope and effect of customary marine title**
>
> (1) Customary marine title—
>
> (a) provides an interest in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area; and
>
> (b) provides only for the exercise of the rights listed in section 62 and described in sections 66 to 93; and
>
> (c) has effect on and from the effective date.
>
> (2) A customary marine title group—
>
> (a) may use, benefit from, or develop a customary marine title area (including derive commercial benefit) by exercising the rights conferred by a customary marine title order or agreement, but is not exempt from obtaining any relevant resource consent, permit, or approval that may be required under another enactment for the use and development of that customary marine title area; and
>
> (b) is not liable for payment, in relation to the customary marine title area, of—

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59 Part 3, Subpart 1.
60 Subpart 2.
61 Subpart 3.
62 Section 51.
63 Section 60.
64 Section 94.

(i) coastal occupation charges imposed under section 64A of the Resource Management Act 1991; or

(ii) royalties for sand and shingle imposed by regulations made under the Resource Management Act 1991.

(3) A customary marine title group may—

(a) delegate the rights conferred by a customary marine title order or an agreement in accordance with tikanga; or

(b) transfer a customary marine title order or an agreement in accordance with tikanga.

[35] The Act sets out the rights conferred by a customary marine title order:

62 Rights conferred by customary marine title

(1) The following rights are conferred by, and may be exercised under, a customary marine title order or an agreement on and from the effective date:

(a) a Resource Management Act 1991 (RMA) permission right (see sections 66 to 70); and

(b) a conservation permission right (see sections 71 to 75); and

(c) a right to protect wāhi tapu and wāhi tapu areas (see sections 78 to 81); and

(d) rights in relation to—

(i) marine mammal watching permits (see section 76); and

(ii) the process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement (see section 77); and

(e) the prima facie ownership of newly found taonga tūturu (see section 82); and

(f) the ownership of minerals other than—

(i) minerals within the meaning of section 10 of the Crown Minerals Act 1991; or

(ii) pounamu to which section 3 of the Ngāi Tahu (Pounamu Vesting) Act 1997 applies (see section 83); and

(g) the right to create a planning document (see sections 85 to 93).

...

The test for recognising customary marine title be made

[36] A court may only make an order recognising customary marine title if it is satisfied the applicant meets the requirements of s 58 of the Act.[65] Section 58 provides (insofar as presently relevant):

> **58 Customary marine title**
>
> (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—
>
> (a) 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;
>
> …

[37] Matters that may be taken into account in determining whether customary marine title exists (insofar as presently relevant) are as follows:

> **59 Matters relevant to whether customary marine title exists**
>
> (1) Matters that may be taken into account in determining whether customary marine title exists in a specified area of the common marine and coastal area include—
>
> (a) whether the applicant group or any of its members—
>
> (i) own land abutting all or part of the specified area 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.
>
> …
>
> (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

[65] Section 98(2).

> coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.
>
> …

[38] The Act defines "applicant group" as follows:[66]

> **applicant group**—
>
> (a) means 1 or more iwi, hapū, or whānau groups that seek recognition … of their … customary marine title …
>
> … and
>
> (b) includes a legal entity (whether corporate or unincorporate) or natural person appointed by 1 or more iwi, hapū, or whānau groups to be the representative of that applicant group and to apply for, and hold, an order … on behalf of the applicant group

[39] The applicant group must prove that customary marine title exists in the specified area (as per the requirements of s 58).[67] It is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.[68]

The procedure for a recognition order

[40] An order for recognition of customary marine title begins with an application filed in the High Court.[69] The Act provides that an "applicant" may make the application. It does not specifically define who qualifies as an applicant.

[41] 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."[70] 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.[71]

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66 Section 9.
67 Section 106(2).
68 Section 106(3).
69 Section 100.
70 Section 101.
71 Section 101.

[42] 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.[72] Additionally the applicant group must give public notice of the application.[73]

[43] Any interested person may appear and be heard on the application if they file a notice of appearance by the due date.[74] 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.[75]

Form of recognition order

[44] If an order recognising customary marine title is made, the applicant group must submit a draft order for approval by the Registrar of the Court.[76] Once sealed there are requirements for notification of the order.[77] There are also provisions for variation or cancellation of the order.[78]

Procedural background to the present application

The application and its amendments

[45] This application was originally brought in the Māori Land Court under the Foreshore and Seabed Act 2004. Mr Tipene sought a customary rights order for the harvest of tītī on the island of Tamaitemioka. The application was deemed to be an application for protected customary rights and was transferred to this Court.[79]

[46] Following the transfer to this Court, Mr Tipene's application went through a number of revisions. The revisions related to the applicant group, the holder of any

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72 Section 102.
73 Section 103.
74 Section 104. The Court may also permit interested parties to appear and be heard even if they have missed the due date for filing a notice of appearance: *Re Tipene* [2014] NZHC 2046 at [22]-[23].
75 Section 105.
76 Section 109(1).
77 Section 110.
78 Section 111.
79 The Act, s 125(2).

customary marine title order, and the area over which a recognition order was sought. Specifically:

(a) The application dated 14 November 2011 was brought by Mr Tipene on behalf of the Tipene family. It sought an order recognising customary marine title of the foreshore and seabed surrounding Tamaitemioka and Pohowaitai islands.

(b) The amended application dated 28 October 2013 was also brought on behalf of the Tipene family. It proposed that Mr Tipene's daughter be the holder of the recognition order. The specified area was described as extending from the line of mean high-water springs on the entire coast of the islands, to the outer limits of the territorial sea. The order was sought "to protect customary rights to gather seafood, land vessels and make sea passage to the islands".

(c) The second amended application dated 23 January 2015 amended the applicant group, the proposed holder of any customary marine title order, and the specified area.[80] The applicant group was described as being "Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka". The proposed holder was the supervisor(s) of Pohowaitai and Tamaitemioka appointed under reg 6 of the Regulations. The application referred to the area as "the foreshore and seabed surrounding Tamaitemioka and Pohowaitai islands, to the south-west of Stewart Island". It further specified:

> The application relates to the foreshore and seabed:[81]
>
> (a) to a distance of 12 nautical miles offshore from the line of mean high water springs in the area generally to the West of bearings 29º 08' 50" and 138º 07' 50" taken from impact point coordinate NZGD2000 Bluff Circuit, 323285.6mE/ 730315.9mN, shown on the attached map; and
>
> (b) to a distance of 0.5 nautical miles offshore from the line of mean high water springs in the area generally to the

[80] This amendment was permitted over the Attorney-General's objection: *Re Tipene* [2015] NZHC 169.

[81] These points/coordinates were depicted on a map attached to the application document.

> East of bearings 29º 08’ 50” and 138º 07’ 50” taken from impact point coordinate NZGD2000 Bluff Circuit, 323285.6mE/ 730315.9mN, shown on the attached map.

[47] The application area was further amended on the first day of the hearing when Mr Tipene’s counsel presented their opening submissions. The order is sought over the area encompassed within a 200 m radius of the rock in front of the landing area used to access Pohowaitai and Tamaitemioka.

Service and public notices

[48] Mr Tipene served his 14 November 2011 application on Crown Law (for the Attorney-General), Environment Southland, Southland District Council and Te Rūnanga, although Te Rūnanga later raised an issue as to whether it received a copy. He also gave public notice of that application in the *Southland Times* on 10 December 2011. The Attorney-General, and a person who subsequently withdrew that appearance, filed the only notices of appearance at this stage.

[49] Mr Tipene also held hui in Christchurch on 28 September 2013 and in Invercargill on 5 October 2013. The Christchurch hui was advertised on 21 September 2013 in the *Christchurch Press* and the *Timaru Herald*. The Invercargill hui was advertised in the *Otago Daily Times* and *Southland Times* on 28 September 2013. Attendance at these hui were limited. In addition to officials from the Ministry of Justice, one person attended the hui in Invercargill and two people attended the hui in Christchurch. These were Nash Norton (a beneficial owner with a house on Pohowaitai), Colin Hunter (a beneficial owner, tītī hunter and cousin of Mr Tipene), and Nicole Lettington (a person assisting Mr Tipene). Following these hui the 28 October 2013 amended application was filed. No further notices of appearance were filed in response to these hui. Some months later, on 16 May 2014, Te Rūnanga applied to appear and be heard on the application. That application was granted.[82]

[50] Following Te Rūnanga’s successful application to appear and be heard, it conducted an engagement process with members of Ngāi Tahu Whānui with interests

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82 *Re Tipene*, above n 74.

in the islands. Ms Cook, a representative of Te Rūnanga, arranged for two hui which were held at the Waihōpai Marae in Invercargill. Members of the Rakiura Committee (referred to earlier) and the Rakiura Tītī Islands Administering Body (**the Rakiura Administering Body**)[83] were invited to attend. The hui took place on 18 September 2014 and 3 October 2014. At the hui Ms Cook endeavoured to explain the nature of Mr Tipene's application. She also prepared a questionnaire and arranged for that to be sent to the attendees of the hui and to other people identified as being active birders on Pohowaitai and other islands. No further notices of appearance were filed following this process.

[51] Public notice of the 23 January 2015 application was given on 21 February 2015 in the *Southland Times* and *Christchurch Press*. The public notice gave any interested parties until 8 June 2015 to file a notice of appearance. It was also served on the Southland District Council and Environment Southland. Those parties were also advised that they had until 8 June 2015 to file a notice of appearance. This extended date for filing any notice of appearance was because of the muttonbirding season. Individuals who went muttonbirding on the Tītī Islands would be away from March to mid-May and would potentially be interested in the application. The extended date was to ensure they would not miss the date for filing a notice of appearance. However no further notices of appearance were filed.

Interested parties

[52] As a result of the above process there were just two interested parties seeking to appear and be heard: the Attorney-General and Te Rūnanga.

[53] The Attorney-General initially opposed the application on all grounds, including that there was insufficient evidence to satisfy the Court that the specified area was held by the applicant group in accordance with tikanga. With the narrowing of the specified area, the broadening of the applicant group, and the evidence presented at the hearing, the Attorney-General's opposition is now confined to Mr Tipene's mandate to bring the application on behalf of the applicant group and the constituents of the applicant group.

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[83] Described below at [61].

[54] Te Rūnanga neither supported nor opposed the application. It agrees with Mr Tipene that Rakiura Māori have customary rights in relation to the Tītī Islands which have existed, uninterrupted, to the present day. It wished to ensure that any order made by the Court properly recognised the rights of all who are entitled to exercise customary rights in the specified area. It also wished to make submissions on the test, under s 58 of the Act, for determining whether customary marine title exists in an area.

[55] Arising out of the Te Rūnanga's engagement process described above,[84] in August 2015 the Court received a folder of material from parties associated with Ngāi Tahu but who were not represented by Te Rūnanga. These parties wished to put forward their views to the Court but did not seek to appear at the hearing. Mr Tipene, Te Rūnanga and the Attorney-General did not object to the Court considering this material. Some of the views included in this material were opposed to Mr Tipene's application. However the opposition was not on the basis that customary rights did not exist in the specified area. Rather the concerns related to Mr Tipene's mandate to represent the applicant group, the wide specified area at that time (which overlapped with areas of neighbouring islands in which others had customary rights),[85] who should hold any customary title and some uncertainty about the benefits of a customary marine title under the Act.

Other consultation

[56] Subsequent to the hearing, further consultation took place to seek to obtain the views of those which may have an interest in the application. Additional information about support for Mr Tipene's application from those with houses on Pohowaitai and Tamaitemioka was formalised and provided to the Court. This is discussed in more detail below.[86]

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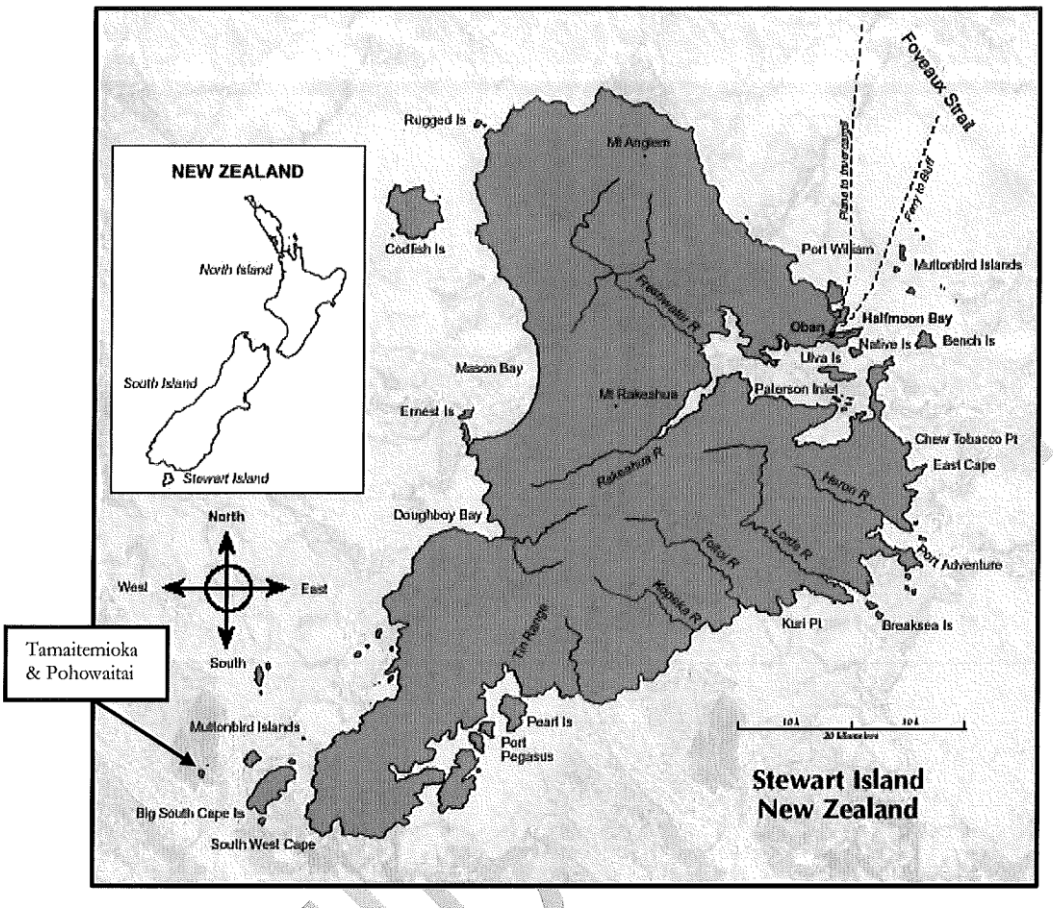
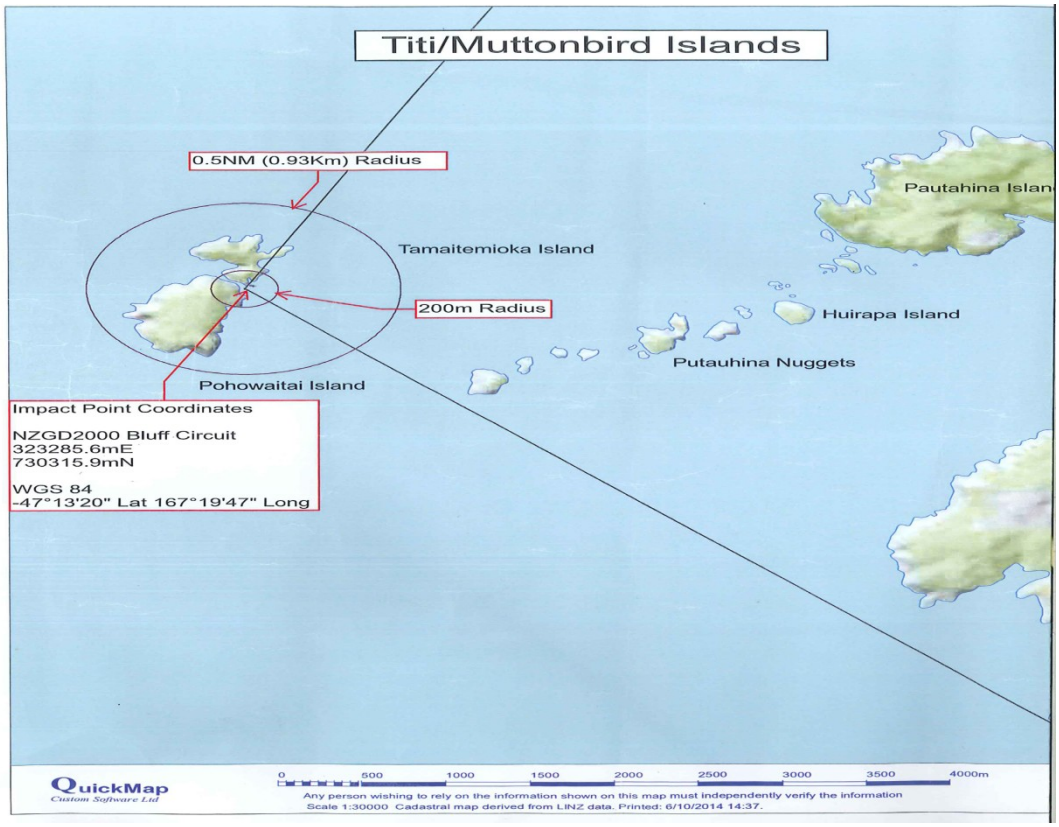
84 At [50].
85 The specified area was subsequently considerably amended.
86 At [165]-[168] below.

Evidence

The geography of the islands

[57] There are three chains of Tītī Islands around Rakiura. Pohowaitai and Tamaitemioka lie to the south-west of Rakiura. Pohowaitai comprises approximately 38 hectares. Tamaitemioka comprises 14 hectares. The two islands are only a few metres apart. There is a landing place located on the eastern side of Pohowaitai and a wire, erected in the 1930s, connects the two islands and provides access to Tamaitemioka. The coastline of the two islands is otherwise dominated by steep cliffs and slopes. The islands are located in an area which experiences some of the roughest weather in New Zealand.





[58] The islands are the seasonal home of the tītī (muttonbird, or sooty shearwater) on their annual migration to the northern hemisphere. Use of the Tītī Islands, including Pohowaitai and Tamaitemioka, has always been confined to muttonbirding. Muttonbirding on the islands was part of the complex pattern of seasonal food gathering for Southern Māori. This included sealing, hunting ducks, gathering fern roots and berries, birding in inland areas, fishing for lamprey, eeling, sea-fishing and collecting shellfish.

Ownership and administration of the Tītī Islands

[59] The Tītī Islands are divided into two groups: 18 "beneficial" islands and 18 "Crown islands". The division occurred pursuant to an 1864 Deed of Cession for Rakiura between the Crown, Ngāti Māmoe and Ngāi Tahu.[87] Tamaitemioka and Pohowaitai are two of the beneficial islands.

[60] At that time the beneficial islands were classified as Crown land and vested in the Governor to protect and administer on behalf of the beneficial owners.[88]

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87 In 1852 the Crown purchase agent, W Mantell, acquired Murihuku from Māori, but had not negotiated a purchase of Rakiura.

88 Refer [62]-[64] below.

Pursuant to the Māori Purposes Act 1983 the beneficial islands were deemed to be Māori Freehold Land and were vested in the beneficial owners.[89] Administration of the 18 beneficial owners has been regulated since the Land Act Regulations 1912. It is currently regulated by the Tītī (Muttonbird) Islands Regulations.

[61] The 18 Crown islands were returned to Māori pursuant to the Ngāi Tahu Claims Settlement Act 1998. They are vested in Te Rūnanga. The former Crown islands are now known as the Rakiura Tītī Islands. They are administered by the Rakiura Administering Body.[90]

The beneficial owners

[62] The beneficial owners were originally those listed by the Land Purchase Commissioner, HT Clarke, who was sent to negotiate the Deed of Cession, in 1864. Pohowaitai and Tamaitemioka were both allocated to Rawiri Mamaru and Riria Paitu. Following dissatisfaction, the Native Land Court was empowered by Order in Council in 1909 to determine the beneficial owners. It did so in 1910 and 1922 and each time additional owners were added. An amended schedule of beneficial owners was gazetted in 1924. The Native Land Court also appointed as beneficial owners the successors to the original beneficial owners. The Māori Land Court now has exclusive jurisdiction to determine succession. Relative interests are not defined and the owners have no power to deal with their interests by will, transfer or exchange.

[63] As at 1 December 2012 Pohowaitai had 2,243 owners and Tamaitemioka had 713 owners.[91]

Beneficial owners for Pohowaitai		
Year	Number of owners/ beneficial owners	Names of beneficial owners
1864	2	Rawiri Mamaru
		Riria Paitu
1910	11	Paitu
	(names of all owners	Teone Topi

89 There is no certificate of title issued under the Land Transfer Act 1952.
90 Refer [50] above.
91 It is unclear why the numbers in this table do not match the total number of beneficial owners as referred to elsewhere in the evidence.

	listed)	Wi Potiki
		Henare Potiki
		Maika Neera
		Pakawera
		Hopa Paura
		Rawiri te Mamaru
		Mere Pi
		Tikini Pahau
		Riria Paitu
1922	18 *(names of additional owners listed)*	Elizabeth Williamson
		James Fife
		George Fife
		Charles Fife
		Marine Newton
		Ivy Harwood
		Ellen Bradshaw
1924	182	
1978	748	
1 December 2012	2,191	

Beneficial owners for Tamaitemioka		
Year	Number of owners/ Beneficial Owners	Names of beneficial owners
1864	2	Rawiri Mamaru
		Riria Paitu
1910 and 1922	4	Rawiri te Mamaru
		Riria Paitu
		Mere Pi
		Tikini Pahau
1924	74	
1978	223	
1 December 2012	695	

[64] Mr Tipene is a descendant of the Ngāti Māmoe iwi of Rakiura/Murihiku. He is a descendent of Wiremu Potiki, who was a signatory to the 1864 Rakiura Deed. Descendants of Wiremu Potiki were named as beneficial owners by the Native Land Court in 1910 and 1922. Mr Tipene's rights come from his grandmother, Sarah Mary Tai Newton (Mrs Thomas Cross), who was a Mokopuna of Wharetutu Tahuna and George Newton. Mr Tipene's mother is Gwendolyn Elizabeth Adams or Rehu or Tipene.

The regulations

[65] Mr Pātete[92] discusses the long history of Government administration of the Tītī Islands. In 1886 legislation authorised regulations for the protection and management of the Tītī Islands, to protect the tītī in order to conserve them for the exclusive use of those "Native beneficially" entitled. Similar powers were found in legislation in 1892 and 1908. However it was not until after the Native Land Court sat in 1910 to determine the beneficial owners that, in consultation with those owners, the first regulations for the beneficial islands were promulgated. These were the Land Act Regulations 1912. Regulations have remained in force ever since. Changes in administration and alterations to the regulations were carried out after consultation with representative groups and often reflected their wishes. Certain rules have remained fairly consistent over the years that the regulations have been in place, including that:

(a) no individual shall land on the islands earlier than 15 March in any year;

(b) birding shall not begin earlier than 1 April and shall cease by 31 May in each year;

(c) no person can take tītī at any other time;

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92 Mr Pātete holds degrees in physical geography and New Zealand history. He has worked as a historian and policy advisor for the last 20 years. Prior to that he worked at National Archives as an archivist and conservation technician. Prior to that he worked for the Department of Conservation and Department of Lands.

(d) appointment of supervisors for both beneficial and Crown islands are made; and

(e) beneficiaries do not require a permit to enter a beneficial island.

[66] Mr Armstrong[93] discusses the development and role of the supervisors in more detail. He refers to the Commissioner of Crown Lands who in 1925 suggested the appointment of supervisors chosen by the beneficiaries from among their number. Their role would be to enforce the regulations, generally oversee operations on the various islands and compel Māori to work systematically and harmoniously together. Thereafter, supervisors were chosen by the people and appointed by the Commissioner of Crown Lands at an Invercargill hui in February each year. If the people could not agree, the Commissioner would make the necessary appointments. If a dispute could not be resolved by the supervisors, the Commissioner of Crown Lands could make a binding decision.

[67] Mr Armstrong says the supervisors were operating on most of the islands by the late 1920s. They had many specific duties. They were, among other things, authorised to take full control of the organisation on each island, allot defined areas to families or groups, arrange an appropriate work plan for each area, take measures to control dogs, eradicate rats and organise parties to clean out damaged burrows.

[68] Mr Armstrong says that by the 1960s muttonbirding was "big business". The Ngāi Tahu Trust Board considered that fresh regulations were needed to enable the supervisors to check the whakapapa bona fides of birders and ensure that any non-beneficial owners went to the islands only with the permission of a majority of beneficiaries. This led to the formation of a muttonbirders committee in 1963. With the approval of the Commissioner of Crown Lands, the committee nominated 10 rangers (for five year terms) to ensure that no breach of the regulations took place.

[69] In the 1970s there were concerns that island supervisors were not asserting their authority or were not listened to when they did. This led to the formation of a

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[93] Mr Armstrong holds an honours degree in history and a law degree. From 1988 to present he has worked as a researcher and historian specialising in New Zealand race relation history.

Rakiura Muttonbirders Committee (RMBC) in 1976. Its role was given official status through a 1978 change to the regulations. Its key roles at this time were cooperating with the Commissioner of Crown Lands over issues concerning muttonbirding, working with the Health Department on such matters as grading birds and general hygiene, negotiating transport of muttonbirders to the islands, operating and maintaining radio equipment on the islands, administering an emergency fund to assist birders who became ill or injured on the island and needed to return home early, and undertaking pest eradication. In 2007 management was handed over to the Rakiura Committee. This committee consisted of 10 persons: nine Rakiura Māori and one member nominated by Te Rūnanga.

[70] Today the administration of the beneficial islands is regulated by the Tītī (Muttonbird) Regulations 1978 and the Tītī (Muttonbird) Islands Amendment Regulations 2007 (collectively defined earlier as **the Regulations**). The Department of Conservation has the statutory responsibility for administering the Regulations. The Regulations lay down rules for the management and control of birding on the islands and the relevant conservation purposes to ensure the survival of the tītī.

[71] The Regulations define a beneficiary as a Rakiura Māori who holds a succession order from the Māori Land Court entitling him to any beneficial interest in any beneficial island. They define Rakiura Māori as meaning a person who is a member of the Ngāti Māmoe or Ngāi Tahu tribes and who is a descendant of the original Māori owners of Stewart Island.[94]

[72] The Regulations include the following provisions relating to entry:

(a) A non-Rakiura Māori must not enter any beneficial island without first obtaining a permit and they must not, at any time, search for, pursue or take muttonbirds or their eggs from that island.[95]

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[94] Refer [10] above. See also reg 2. Mr Armstrong agrees with an author of a thesis on the islands that the term Rakiura Māori is an "umbrella" legal or administrative term that first arose in the early 20th century to describe southern Māori who had customary interests in one or more of the Tītī Islands and it has been adopted since: MJ Stevens *Muttonbirds and Modernity in Murihiku: Continuity and Change in Kai Tahu Knowledge* (December 2009, University of Otago PhD thesis).

[95] Regulation 3(1).

(b) There is an exception to this prohibition for a non-Rakiura Māori who is a family member of a beneficiary, if the beneficiary has issued the family member with an authorisation to enter a beneficial island and the authorisation has been issued in accordance with the traditional customs and practices associated with the island.[96]

(c) The Rakiura Committee may issue a permit to any person and impose conditions on that permit.[97]

(d) A beneficiary does not require a permit to enter any beneficial island in which he has a beneficial interest, and may be accompanied by his children or grandchildren, and they may take muttonbirds on behalf of the beneficiary if he does not want to take muttonbirds during any season and he provides written authority for them to do so.[98]

(e) No other Rakiura Māori may enter any beneficial island in any year without the consent of the majority of beneficiaries entitled to a beneficial interest in that island.[99]

[73] The Regulations set out rules in order to protect the island. These include when muttonbirds may be taken, refilling holes made in burrows, controls on dogs, a prohibition on cats, restrictions on fires, precautions to exclude and destroy predators, the manner in which rubbish should be disposed, and a prohibition on firearms.[100] They also provide that the manus (bird catching areas) are allotted to persons "by the majority of the beneficiaries present on their island in the year the manus are allotted" and if there is no majority agreement it is allotted by the supervisor of the island.[101]

[74] Similarly, no beneficiary or any other person may build a house or other building "other than on a site approved in writing by the majority of the beneficiaries

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96 Regulation 3(1A).
97 Regulation 3(2A).
98 Regulation 3(3).
99 Regulation 3(3).
100 Regulation 4.
101 Regulation 4(9).

present on their island in the year the site is selected" and if there is no majority agreement approval in writing from the supervisor of the island is required.[102]

[75] The Regulations also provide for how the Rakiura Committee and supervisors are to make decisions.[103]

Evidence as to history of occupation

[76] Those who gave evidence about the history of Pohowaitai and Tamaitemioka are agreed there is little formal recorded history, particularly in relation to the marine and coastal area. However, as shown in the following summary of their evidence, their understanding of the history is essentially consistent.

(a) Mr Tipene

[77] Mr Tipene went to the islands for the first time when he was seven months old. His earliest memory of the islands is from when he was six years old. He is now 66 years old. He started off on Bird Island with his grandfather, mother, aunty and uncles. He later went to Piko Island. In 1988 he started going down to Tamaitemioka and Pohowaitai. At that time, he and his cousins built a new house on Tamaitemioka. That house was built a couple of metres away from an old house built by his cousin's father, Len, and other elders of their family. The new house is now the only house on Tamaitemioka. Mr Tipene spends most of his time during muttonbirding season on this island.

[78] Mr Tipene has been studying the history of the islands for many years. He has read many books on this subject. There is no record as to when Pohowaitai and Tamaitemioka were first visited. The stories of his people going to the islands are centuries old. The history he has been told is that the muttonbirders came from Te Hua a Hatu Pā (approximately one mile from the Waiau River). In 1989 an adze was found near the river mouth. It was carbon dated. It showed occupation of the area as early as 700 years ago.

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102 Regulation 5.
103 Regulations 6 - 9.

[79] Mr Tipene has been told that the people at Te Hua a Hatu Pā noticed muttonbirds circling around the lower part of the south island. They investigated and found the nesting places of the muttonbirds on the Tītī Islands. Following this exploration annual trips to the islands to catch and preserve muttonbirds became part of the way of life of the people from the area.

[80] Mr Tipene understands that the hapū at the pā would have selected people from the village to go to the islands. The waka would have had around 50 to 60 people in it. It would stop off in different places to drop off and pick up people. The waka could not be left on some islands because of the weather, so people would jump out. People would establish themselves in different places by being dropped off there. In time places would be named after those people. The chief of a particular island would give rights to the ones that went after him. The names of particular islands were individual names, not hapū or iwi names.

[81] Mr Tipene describes the islands as isolated and the journey there as hazardous. The sea is the same as it has always been. These days, travel is by boats with motors, not waka, but the same dangers still exist. People drown going to the islands. In the old days there was hardship and deprivation. Hardship remains today, although it is more comfortable than it was 100 years ago and help is not far away by boat or helicopter.

[82] Mr Tipene says it feels to him as though there has never been a time when the islands have not been visited by his people. The very existence of his people revolve around their annual journeys to these islands to gather the muttonbirds which were their livelihood. Mr Tipene says:

> Those of us who go to the islands are driven to go. It is our life and breath. Every year we do the same thing. The dates are the same; the way we harvest the birds is the same.
>
> …
>
> … I have to go to the islands. I am driven to go to the islands by cultural and spiritual forces that are too powerful for me to properly describe.

(b) Ms Davis

[83] Jane Davis, the appointed pūkenga,[104] is a descendant of Rakiura Māori. She has been a muttonbirder all her life. Her grandmother and mother birded on various Crown islands until approximately 1930. From then her tīpuna settled on Putauhinu Island. This is a larger island to the north east of Pohowaitai and Tamaitemioka and one of the 18 "Crown islands". Her whānau has remained on Putauhinu since then.

[84] Ms Davis gives the following account of the history of muttonbirding as follows. In pre-European times prior to 1840, Rakiura Māori were nomadic people who lived from time to time on the coasts of Te Ara-a-Kewa (Foveaux Strait). They were hunters and gatherers, splendid tool makers and workers of pounamu and argillite. They lived a seasonal lifestyle. Permanent kāika (villages) existed on the coasts which were unfortified villages. These kāika were used as a base to access other places, including the southern Tītī Islands, to gather kai and other necessities. When on shore, Rakiura Māori fished from the sea and gathered kaimoana from the shore. When the kaiaka (adult tītī) were sighted returning to the shores, the people understood it was time to make preparations for the journey to the islands. The hīkoi o te tītī was a natural and essential part of their lives. Preparing for the hīkoi was a communal effort by all of the hapū. The fundamental reason for the hīkoi to the islands was to gather kai. Fishing from landings was a huge part of that and it was a huge part of their survival. Once the waka departed, it would stop at places like Rarotoka and Whenua Hou. From there, they would make their way to a landing place on Rakiura where they would replenish supplies and rest before heading further south to the Tītī Islands. This is evident from the human remains which continue to be found along the coasts of Rakiura.

[85] Ms Davis says travelling to the islands was never an easy task due to the wild weather of the strait. In traditional waka the journey took many days and not everyone made it. Transportation then moved to charter boats. When the weather was rough the boat would anchor overnight at Easy Harbour on Rakiura. The boat

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[104] Appointed under s 99 of the Act. See *Re Tipene*, above n 4. Ms Davis has been a member of the Trust Board, a submitter to the Waitangi Tribunal advocating for the return of the Crown Tītī Islands to Rakiura Māori, a member of the Rakiura Tītī Island Administering Body, and a member of the Rakiura Tītī Committee. She has held or served on various other bodies. She has been involved in research investigating the sustainability of the tītī.

would drop off whānau at their various destinations along the way. As time went on many Rakiura men accumulated enough capital to purchase their own fishing vessels. With this, the way people travelled to the islands has fundamentally changed. They no longer travelled to the islands as one hapū instead travelling as individual whānau.

(c) Mr Pātete

[86] Mr Pātete says that for the 19th century, the information on use and occupation mostly relates to the Tītī Islands generally, rather than Pohowaitai and Tamaitemioka or its marine and coastal area in particular. One source describes the harvesting of Tītī as a "culturally defining and economically important tradition of Rakiura Māori". He refers to a 1969 study on Foveaux Strait which has reference to muttonbirding in pre-historic records.[105]

[87] Another source referred to by Mr Pātete considers the exploitation of tītī on the western islands may not have begun until the arrival of the pākehā, stating "[i]t is only since the pakehas came that the muttonbird industry has got so big that all the islands are visited."[106] Māori were attracted into the sealing and whaling industries and the growth of muttonbirding appeared to be complementary to this.

[88] The 1969 Foveaux Strait study refers to Captain Kent calling in at Ruapuke on June 17 1823 and at Bluff on July 1 of the same year and finding that most of the villagers were away muttonbirding. There is a record of Māori from the Foveaux Strait area in whaleboats exchanging muttonbirds for eels in the 1840s, and in 1843 of a fleet of whaleboats being assembled at Waikouaiti in order to take muttonbirds to the Ngāi Tahu settlements around Banks Peninsula. The Foveaux Strait study describes Stokes, a visitor to Stewart Island in April 1850, finding a Māori village on the neck deserted because its occupants were all away muttonbirding. The study describes the muttonbirding industry as still being a basic part of the economy of the Ruapuke Māori in 1852. It also says that, in 1863, a general meeting of Māori chiefs

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105 JF Coults "Merger or takeover: a survey of the effects of contact between European and Māori in the Foveaux Strait Region" (1969) 78 JPS 495.

106 H Beattie "Traditions and legends. Collected from the natives of Murihiku (Southland, New Zealand) Part XII" (1920) 29 JPS 128.

at Riverton, to discuss the sale of Stewart Island, was delayed because most of the chiefs were away muttonbirding.

[89] Mr Pātete describes the Land Court records as providing scant information on use and occupation of Pohowaitai and Tamaitemioka. At the 1910 hearing into the Tītī Islands James Rickus claimed to have been taken to Pohowaitai by Riria Paitu in 1858 to 1862. His answers in cross-examination about birding after this time were unclear. At the 1921 Land Court hearing Fred Cross and Flora Theo claimed occupancy rights on Pohowaitai, having been birding there for eight years between 1906 and 1914. At the same hearing JH Wixon testified that his father, aunt and uncle "used to visit" Pohowaitai. And Mary Ann Newton (Mr Tipene's great great grandmother) stated she had been muttonbirding on the Crown islands and had spent one season at Tamaitemioka.

[90] Mr Pātete goes on to refer to other records of muttonbirding in the late 19th century. Access to the islands was dependent on weather. A party of "natives" reported delays in 1881 due to waiting for a break in the weather. And in 1906 it was said:[107]

> Until a few years ago the embarkation was made in open boats, an exploit which can only be properly appreciated by those who have witnessed a heavy 'sea rolling up to the South-west Cape of Stewart Island, for the islets that lie beyond the wildest extremity of the land are the favourite haunts of the mutton bird.

[91] Mr Pātete refers to another source which refers to the *Loyalty* taking the "Wests" party to Pohowaitai in March 1917.[108] He refers to muttonbirding continuing throughout the 20th century, describing the use of fishing and oystering vessels, the Government's steamer (*G.M.V. Wairua*) which became the main means of transport to the Tītī Islands from the 1940s until the early 1970s and provided access to Pohowaitai, fishing boats or other means of transport from the 1970s, and today helicopters are an available option.

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107 "The Mutton Bird" *Poverty Bay Herald* (6 April 1906).

108 Wilson "Muttonbirders' concern over Ship's Withdrawal" *Otago Daily Times* (1 February 1958).

(d) Mr Armstrong

[92] Mr Armstrong refers to local Ngāi Tahu tradition that Māori have been birding on the Tītī Islands for centuries. There is carbon dating evidence found on Poutama Island (located south east of Pohowaitai and Tamaitemioka and south of Taukihepa/Big South Cape Island), that muttonbirding had occurred between 1470 and 1666 AD. Mr Armstrong says he has "no doubt at all" that the Tītī Islands were accessed from the "dawn of history".

[93] However there is scarce evidence of systematic muttonbirding on the more remote islands in these early times. There have been no archaeological finds on Pohowaitai or Tamaitemioka although, because of the restrictions on access, the scope for such finds is limited. Authors of one paper describe the coastal areas of Pohowaitai as "the resting places of our ancestors, with the koiwi secured in caves and clefts in the cliffs".[109]

[94] Mr Armstrong reviewed the evidence about the use of waka and other craft up until the 1830s, when whale boats became increasingly available. He says it indicates that, although southern Māori possessed large waka which were capable of reasonably long sea journeys, the risks involved in travelling far from the coast would have dissuaded most from making the journey to the more remote islands, including Pohowaitai and Tamaitemioka. That was not to say they were not accessed in the times of the waka. The archaeologist, Professor Atholl Anderson, had referred to the possibility that access may have extended throughout the southwest islands from the beginning.

[95] Mr Armstrong says that, with the arrival of Europeans and seal and whale boats in the 1830s and 1840s, the use of waka for longer distance sea travel was largely abandoned by around the mid-1840s. Southern Māori were able to extend their maritime activities and increase exploitation of natural resources, including tītī. The tītī harvest expanded considerably. By the 1900s whale boats had been largely replaced by fishing boats or oystering vessels. Access to the more remote Tītī

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[109] M Goodall (ed) *Whakatau Kaupapa o Murihiku: Ngāi Tahu Resource Management Strategy for the Southland Region, Compiled from information supplied by Kai Tahu Whānau Whanui* (1997).

Islands, including Pohowaitai and Tamaitemioka, was now easier. However transferring people and supplies to the islands by means of dinghies remained hazardous.

[96] Mr Armstrong notes that when the Crown took ownership of the Crown Islands under the 1864 Deed, those were said to have been the more remote and less used islands. Although Pohowaitai and Tamaitemioka were also remote, "they had been visited in the years leading up to the purchase, and were no doubt included as beneficial islands for this reason". Because birding rights on those islands were recognised in 1864 this indicated that tītī were certainly being taken from them at this point.

[97] Mr Armstrong says the use of the tītī resource on Pohowaitai and Tamaitemioka during the decades after 1864 seems not to have been extensive, despite increasing commercialisation of tītī. Other more accessible islands seem to have been favoured. Mr Armstrong accepts, however, that it is "more likely than not there would have been people on [Pohowaitai and Tamaitemioka]" right through this period.

[98] Mr Armstrong sets out in detail the events leading to the Native Land Court hearings and the Judge's instructions and views at the hearings. The Judge considered that little evidence had been provided relating to the customary position or how rights had been originally gained and maintained. Instead most claimants stressed their whakapapa links to those named by Clarke and/or incidents of their occupations from the late 1850s. The witnesses had described "imperfectly" the history of the lands down to the completion of the Ngāi Tahu conquest (about 1680), but from then on the Judge considered the Court had been left "in darkness". As a result the Court had to "rely [on] what may be termed modern occupation; that is occupation somewhere about or since 1840".

[99] Mr Armstrong also refers to the Land Court records Mr Pātete discussed. Mr Armstrong's discussion included the following additional information:

(a) The evidence of birder named Matthew Cross in 1905 who told the Commissioner of Crown Lands that no other person had been birding Pohowaitai for about 40 years.

(b) An *Otago Daily Times* article dated 24 February 1910 referred to Pohowaitai having an annual yield of around 20,000 birds, but "its claimants are so few that not more than half the yield is worked, the other half is allowed to escape wild".

(c) In May 1911 it was reported that the trawler *Loyalty*, with five parties of muttonbirders on board, had returned to Bluff with their tītī catch from several islands, including Pohowaitai.

(d) Annie Ashwell gave evidence to the Native Land Court in 1921 that she had been muttonbirding on the Crown Islands, but had only spent one season on Tamaitemioka.

(e) Elisabeth Williamson gave evidence to the Native Land Court in 1921 that her father, aunt and uncle used to visit Pohowaitai before her father's death in 1907.

[100] Mr Armstrong says that in March 1911 there was an unusually large exodus to the Tītī Islands. He considers the evidence suggests that the tītī resource on Pohowaitai and Tamaitemioka were more or less fully exploited by this time.

[101] In the 1940s the government steamer, the *Wairua*, was made available to transport birders. The *Wairua* became one of the main means of transport to the islands. Travel on this vessel was much more comfortable, and birders could take timber, building supplies, and other necessary goods. By the 1950s some 200 Māori were birding on the islands. About half of the people used government vessels to get to the islands and the remainder made their own travel arrangements. The *Wairua* was taken out of service in 1972. The birders then resorted back to using private fishing vessels to access the islands. In more recent times helicopters are sometimes

hired to transport birders. The first helicopter visit to the islands is said to have occurred in April 1973.

(e) Mr Skerrett

[102] Michael Skerrett is a member of the Rakiura Administering Body and a past member of the Rakiura Committee. He has rights to a number of Tītī Islands and his whānau have birded on Taukihepa for generations. Mr Skerrett says that in the days of travelling by waka the weather played a big part in determining which islands were frequented in any given tītī season. He says Te Rūnanga considers that all Rakiura Māori have customary rights in the Tītī Islands and that these customary rights have existed, uninterrupted, since 1840. He says there is no evidence that anyone other than Rakiura Māori generally use these islands.

Tikanga

(a) Mr Tipene

[103] Mr Tipene says the tītī has provided a bountiful source of food and trade for Rakiura Māori for many generations. Groups of owners travel to the islands every season between mid March and the end of May to harvest the tītī. The islands are not visited at any other time as it is important that human presence does not overwhelm the resource. Technology brought by the pākehā has modified things slightly but the traditions have not changed greatly for centuries.

[104] Only Mr Tipene and his family presently go to Tamaitemioka. It would be unusual for there to be more than five people on Tamaitemioka. Sometimes it is only Mr Tipene, or Mr Tipene and his daughter. The Tipene family have been the only occupiers of Tamaitemioka for as long as Mr Tipene can remember. There are more families that go to Pohowaitai. In an average season there would be up to 36 people, from up to 10 families, on that island. The Tipene whānau share the landing spot with those on Pohowaitai.

[105] Mr Tipene says the methods for harvesting muttonbirds have remained largely unchanged. The eggs are laid in September/October. The chicks hatch in

November and on 1 April of each season the muttonbirders start taking the chicks from their holes. This is called the nanau. It is cold, wet work. The muttonbirders crawl around in wet weather gear pulling the chicks from the holes. On 22 or 23 April the torching time starts. This is when the chicks leave their holes and start to fly. During this time the muttonbirders sleep during the day and work all night. The birds are chased with torches, killed and carried back to the whare where the birds are plucked and preserved.

[106] It is important to those who go to the islands to care for the land. They burn less wood, maintain tracks and generally tidy up. Guardianship and conservation involved "everything really". It was about protecting the resource itself, both land and sea. They do so "for the benefit of those people who have come and are coming and we're just in the middle". Once you leave the wharf at Bluff, you were no longer a main-islander, and "your whole attitude, everything changes when you get to the Tītī Islands. … You're part of it, you're one with it."

[107] Mr Tipene says that they use the coastal area to catch fish and gather seafood to sustain them while they are on the islands. They take dry food and vegetables but are sustained from the resources that the area provides. They rely heavily on seafood, including pāua, greenbone, blue cod, kina, moki, conger eel, shark and crayfish. They fish from the shore with lines and dive for shellfish and crayfish.

[108] As discussed above,[110] Mr Tipene accepts that in the days of the waka the hapū decided who would go to the Tītī Islands. However, over time people established themselves in different places (the islands were named after those individuals) and the chief of a particular island would give rights to the ones that would go after him. In this way he accepted that when the first people went down to the islands it came from a collective effort. But from there it fractioned to the particular families. As Mr Tipene said, "so the chief was in part still there, but not so significant now as all those islands [had] people on them".

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110 At [80].

[109] Mr Tipene refers to an age-old established wakawaka[111] that controls where people have their house sites and harvesting grounds on the islands. These sites relate only to the land. Everyone owns all of the foreshore and seabed and there is no concept of an individual claiming those areas for his or her exclusive use. Each owner has the exclusive use of the whole of the foreshore and seabed.

[110] Mr Tipene refers to Te Rūnanga's position that customary rights are collective rights. He strongly opposes this in respect of Pohowaitai and Tamaitemioka. He notes that Te Rūnanga has ownership of the Crown Tītī Islands and a collective approach to customary marine title in those islands may be appropriate. He does not consider this to extend to the beneficial islands of which Pohowaitai and Tamaitemioka are part. People not named as owners of these islands have no rights to go to the islands to harvest tītī, or for any other reason, and no right to access the resources in the coastal marine area.

[111] If people can show they have whakapapa, then they could go to the islands. He would not be able to prevent that and, in fact, he would welcome it. Everyone on the list of approximately 2,000 people had whakapapa. But it was only the ones who had houses that made the decisions. People on the mainland could participate in the hui and would be listened to. However the people who had the houses on the islands ultimately had the say. Their decisions would hopefully be for the betterment of all those with whakapapa to the islands. If someone who had not been coming to the island wanted to have a house on the island, they would have to show their whakapapa. If they could show that, then the people on the islands would show them "where to put their whare". They would go to the Rakiura Committee to show their whakapapa rights. No one can go on the islands except those people who own them. It is tapu to go on the island unless you are an owner or a beneficial owner. Even the helicopter has to get permission from the Rakiura Committee to land.

[112] There are many people listed as owners of the islands who have never been there. As Mr Tipene puts it:

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[111] Sections of ground exclusive to one whānau or hapū.

> For those people the fires of occupation have gone out, and those people have lost their rights according to custom, but they still have their whakapapa rights.

[113] As is apparent from his other evidence, Mr Tipene does not mean that the beneficial owners have lost all their customary rights. Rather he is referring to their rights to make guardianship decisions on the islands. I understand him to mean that they could rekindle their fires of occupation. Mr Tipene sees his application as being for the benefit of all those who have whakapapa rights and tītī rights to the two islands. Mr Tipene puts it this way:

> It is for the benefit of those people who have come and are coming and we're just in the middle.

[114] Mr Tipene is applying for customary marine title to uphold the wairua spiritual value of his people's taonga. His whānau have used waka to reach the islands and have done so for hundreds of years. He wishes to protect the pāua and kina stock in the sea surrounding the islands as these dwindle more and more.[112] He wishes to protect the sea roads on which his whānau, as tītī hunters, have to travel each year and which provides the main sources of food for them and the seabirds that frequent the waters and the island yearly.

[115] Mr Tipene says:

> The oceans and island go hand in hand for us. They cannot be separated. My people and I are part of both.

(b) Ms Davis

[116] Ms Davis says she spent a lot of her early childhood with her grandmother. She learnt the traditions and tikanga pertaining to the islands from her grandmother and mother. They respected the tītī and the island. They said "if you look after the island, the island will look after you". She has continued to practise these traditions and has passed on the tikanga and traditional knowledge to her children. Caring for

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[112] Mr Tipene is also concerned that trawlers, big and small, may encroach on the area, causing pollution to add to the pollution from other sources in the mainland (industrial activity, effluents from farms, etc). He also believes that the customary marine title would enable owners to have more ability to be involved in other issues relating to the islands. For example, he has concerns about oil drilling taking place in the Big South Basin. He considers it necessary to take steps now to prevent the repercussions of an oil disaster if drilling were to take place

the natural habitat was a very important part of her upbringing. Firewood was gathered where trees had fallen and live trees were only cut when necessary. The grounds where the birds nest was soft and could easily be broken. If that happened, it needed to be repaired. At night the adult birds feed the chicks. They then needed their sleep so she was taught never to disturb the birds at night. The whānau on the Tītī Islands fish from their landing places during their time on the islands. This has been the way since the gathering of kai during te hīkoi o te tītī – fishing from landings was a huge part of their survival. She refers to middens being found where her people had lived in past times and piles of pāua shell where hāngi were cooked.

[117] She says the tikanga of care and looking after each other applied to the sea as well as the land. If you took food from the sea you would share it with others who needed it. The land and sea are one continuum and the people were dependent on both. They still are in a sense, not only for the return of money but for their minds and hearts. To go down and catch a fish was and remains part of normal life on the islands. She described her own experience cleaning the birds with her family, and her husband would say to the boys "Come on you boys, hurry up, finish these birds, we'll go down and get a fish for tea." On their island, some people would come over to their part of the island and tell them they were going to get a fish. If they caught enough they would give a fish to Ms Davis' family, but if they did not catch enough they would not do so and the family never expected them to. The fishing grounds were for everybody.

[118] On Putauhinu there were two landings which were used by everybody. Manu (muttonbirding territory) on the islands were firmly allocated to one whānau or another. She did not know if this was the same as on Pohowaitai and Tamaitemioka because different islands had different rules. She had been to the rock at the Pohowaitai landing once. It was a hard landing, and from the boat looking up, it looked like it would be quite a jump out of the dinghy. It was her understanding that all the whānau on the island came and shared the fishing ground at the landing, in the same way that any whānau on Putauhinu can go to any fishing ground.

[119] It was her view that fishing in the landing area did not need approval from any wider whānau. Everyone had the right to feed their family. To declare a rāhui

over fishing in an area, the people on the island would make the decision.[113] So if, for example, Mr Tipene wished to declare a rāhui on the taking of pāua at the Pohowaitai landing, Ms Davis believed he would need to consult with the rest of the people on the island and they would make the decision together. They would not need to consult any wider group. Decisions of that nature, over the landing area, were exercised by the group of whānau on the island rather than Rakiura Māori as a whole. She says this was "how it would be done" and "how it has been done."

[120] Ms Davis was pressed in cross-examination about whether this would still be the case if a rāhui was for a long time, such as three years. She said people would be sensible because people needed to eat. It was not like the mainland where you could move to another place to find food. But even if it was to be closed for a long time this would still be a decision for the people on the island. Tikanga was that it was a decision for these people. She was asked if any decision regarding the landing area would need discussion with a wider group. She said that in the 200 m area of the application "they could [make] the decisions on their own". It was a matter of mana whenua and those people held the mana whenua there. This did not mean that the mana whenua had left the hapū forever. In a wider sense Rakiura Māori held the mana whenua, and those on the island were the guardians, but this did not mean they needed to refer uses of the area under the claim to Rakiura Māori. It might be wise, but the decision is with the people "on the ground" who can see what is happening.

[121] Ms Davis compared this with her own island. This was a collective island which had never been owned by individuals. The five families were the kaitiaki (guardian or custodian) of the mana whenua of the island, but not the direct holders of it. The mana whenua was with Rakiura Māori. That said the practices were driven by the practical realities. The people on the island made decisions when they needed to be made because you cannot "call up a series of committees and ask advice" all the time. People have to make decisions, and to live them whether they are good or bad, through the generations.

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[113] Ms Davis says rāhui has traditionally been practised by Rakiura Tītī whānau. This can be for various reasons. For example, for whānau that drowned. There have been rāhui on manu, to conserve an area for research. They have had rāhui to conserve rātā. In recent times, the Ministry of Fisheries has allocated areas to conserve pāua and kina for the Tītī Islands whānau.

[122] On the beneficial islands, under the Regulations if a person wanted to build a house they would need permission from the habitual people on that island. A person wanting to build a house would usually discuss this with others before deciding to seek permission, but the decision was made by those on the island at the time.[114] The discussion with others was a courtesy that lends to mana. The Regulations about this reflected changes that had occurred with the influence of the Māori Land Court.

(c) Mr Pātete

[123] Mr Pātete says there is little available data on fishing in the marine and coastal area around the two islands. Rock lobster and blue cod are harvested in considerable quantities within "very close proximity" of Tamaitemioka. Otherwise, pāua and kina can be exploited. He notes there is a large number of seals which are reported to be present on the two islands, and there was a report in 1948 of "one old Māori known as 'Bull King'" who killed two seal pups for food claiming a right to do so under custom.

(d) Mr Armstrong

[124] Mr Armstrong notes that prior to the 1840s access to tītī were not confined to Ngāi Tahu Māori resident on Rakiura and the northern shores of Foveaux Strait. Ngāi Tahu travelled from further afield, including as far away as Kaikōura. One of the few early sources of information is the sealer, John Boultbee, who lived in the south for a period in the early 1820s. He recorded that "each chief has a particular island which he and his tribe keep for their own use, and [no one] else are allowed to take birds from it".

[125] Mr Armstrong says that when beneficial ownership was awarded (in 1864, 1910 and 1922) it was confined to only Southern Māori with connections to Rakiura.[115] No claims were promoted by others living further north who had previously accessed the resource. It appears they were content to obtain tītī through trade or gift exchange (once it became more widely available with the advent of

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114 Regulation 5.
115 M J Stevens above n 94.

whaleboats). It is his view that as a consequence, their customary rights to tītī may have lapsed by 1910.

[126] Mr Armstrong says that in 1911, according to Ngāi Tahu tikanga, all resources, including tītī, were managed and allocated by the hapū or iwi collective. While whānau and individuals may have enjoyed exclusive access to resources including tītī, this required the on-going sanction of the collective, and the underlying "title" remained with the hapū.

[127] Mr Armstrong refers to evidence from Mr R Tau presented at the Waitangi Tribunal's inquiry of Ngāi Tahu's claim (Wai 27). Mr Tau, prior to his death, was a beneficial owner of several Tītī islands, including Pohowaitai. He said that historically allocations were made by rangatira. These were referred to as wakawaka. He said that under the higher authority of the tribe, certain wakawaka would become resources for hapū and whānau, or for a regional and related groups of the tribe, for them to use exclusively, and these rights would be strongly defended against any intrusions. He also said that the wakawaka were always subject to the tribal rangatiratanga.

[128] Mr Tau referred to decisions as to the allocation of catching areas, the siting of houses, the welfare of the muttonbirders and the protection and rules governing the environment, as being decisions determined by those who possess whakapapa and these are collective decisions. He referred to unwritten laws, laws that the people live by, that are taught to learner birders, that are the reason the environmental and manukai are maintained. From this point, each individual is at liberty to exercise his skills in hunting the tītī.

[129] Mr Armstrong's view is that the identification and award of individual interests by the Native Land Court cut across traditional collective hapū/iwi control of resource which had previously prevailed. He says:

> … any overarching form of collective hapū or iwi control of the resource was largely removed once individual beneficiaries had been identified by the Court, and the extent to which this is consonant with tikanga may be questioned.

[130] Once the beneficial owners had been identified the islands were subject to strict regulations governing their occupation and use, and access was confined to beneficiaries (and their spouses and children). Mr Armstrong says:

> Those named as beneficiaries were given exclusive right of entry to the islands each year for a strictly defined period. In that sense the beneficiaries can be said to have exclusively held and occupied the islands, at least since the regulations were promulgated in 1912. It therefore follows that since at least 1912 island-based used of the marine and coastal area associated with Pohowaitai and Tamaitemioka has been confined exclusively to the named beneficiaries and their successors as determined by the Native Land Court, subject of course to the regulations.

[131] He says:

> Moreover, given that access to and use of the marine and coastal area was (and is) closely and inextricably linked to birding activities, the award of exclusive tītī gathering rights to individual beneficial interests in 1910 would necessarily have an impact on how the tikanga described by Tau and others might apply to the coastal and marine area surrounding the islands.

[132] Mr Armstrong says that in former times kaumātua determined the particular area within which each whānau group could take birds. The current practice on Pohowaitai is for representatives of each whānau to take a card from a deck, and the highest card gets the first choice of manu for the nanao (the initial stage of birding) phase. In the rama (torching) phase these boundaries are apparently dispensed with. He notes the responses from P and N Pohio, in the questionnaires arranged by Te Rūnanga,[116] that there is no relationship between manu allocation and rights to the adjoining marine area.

[133] Mr Armstrong says fishing around Pohowaitai and Tamaitemioka appears to be confined to a relatively small area around the Pohowaitai landing area. All those who visit the islands appear to use this area for fishing activities, and there is no demarcation of the marine and coastal area for fishing or any other purposes associated with birding. Fish and shell fish, taken from the foreshore around the islands, formed and still forms an important part of the muttonbirders' diet. It is taken from the areas of the shoreline which allow suitable access for fishing purposes.[117]

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116 At [50] above.

117 As stated by Mr Tipene in connection with his mātaitai application.

[134] Mr Armstrong says that there is evidence from Ngāi Tahu fishermen that they have caught cod and hāpuka from the waters surrounding Pohowaitai and Tamaitemioka. He says they do so partly because of their strong association of the islands. However they:

> appear to be commercial fishermen first and foremost and are not exercising a customary right or interest. They do not hold marine area according to tikanga, and nor are they using the area exclusively.

(e) Mr Skerrett

[135] Mr Skerrett says the tikanga of the islands at the time of the waka was generally consistent. Of paramount importance was the right to gather kai and customary resources for oneself and one's own. This was done not only on the islands but also in the sea surrounding the islands and on the journey to and from the islands.

[136] He and Ms Cook also refer to the steps taken by Te Rūnanga, and its predecessor the Trust Board, to support the recognition and exercise of customary interests of Rakiura Māori in the Tītī Islands. This has involved petitioning the government to make its ferry available to transport Rakiura Māori to the Tītī Islands; working with the Rakiura Committee to secure the return of the full ownership of the beneficial islands to the descendants of the original owners in 1983; taking a number of claims to the Waitangi Tribunal in respect of the Tītī Islands, including seeking improved recognition for Rakiura Māori to regulate their own affairs; securing the ownership of the former Crown Tītī Islands; working with Rakiura Māori to establish fisheries management tools to help protect and enhance access to mahinga kai for Rakiura Māori when they are on the Tītī Islands; and providing financial and other support to the Rakiura Committee and the Rakiura Administering Body. They regard these steps as a recognition of the collective nature of customary rights.

(f) Information from other birders

[137] Ms Cook's questionnaire[118] was considered at a meeting on 12 October 2014 between Dr Te Maire Tau, Mr Pat Hutana and Christopher Brankin. Dr Tau and Mr Hutana have whare on Pohowaitai. Mr Brankin is a Te Rūnanga representative.

[138] Dr Tau has rights to go to a number of islands but goes to Pohowaitai because his mother's family had maintained their rights and active ahi-kā upon the island. Likewise his father would "mahinga-tītī" on Pohowaitai. Similarly, Mr Hutana has rights to a number of islands but goes to Pohowaitai because his whānau have their whare there. It is therefore the only island he intends to go to. Dr Tau and Mr Hutana feel a sense of responsibility to the island. Mr Hutana is responsible for getting his whānau to the island and back, and feels a responsibility to the resource to maintain and protect it. Dr Tau feels a responsibility to take his kids to the islands to show them what tika is.

[139] They say the practice on Pohowaitai is that the resource on the island is managed by the active birders. The principles for the islands are the same, but the particular expressions of them differ among the islands. The owners do not exist on their own simply because they are the land owners or beneficiaries. They are the land owners and beneficiaries because of their iwi and hapū identity. When they are on the islands they are tribal members expressing their traditions and customs as individuals.

[140] Paul and Natalie Karaitiana also completed the questionnaire arranged by Ms Cook. Paul was 84 years old when he completed the questionnaire. He and his brother first went to Pohowaitai in the 1950s and birded there most years until 1985. Depending on the weather, they would choose which of the two sites to fish off. Fishing was by line fishing or diving. The catch was blue cod, groper, yellow tail tuna, pāua, kina and crayfish. They consider that if ahi-kā can be applied to the Tītī Islands, then the Tipenes are holding ahi-kā for all those who have recognised rights to go there. It could also be said that by tikanga the families regulate the

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[118] Refer above at [50].

sustainability of the islands, especially on Tamaitemioka, by not all going there at once.

[141] Lowana Clearwater is a beneficial owner in respect of Pohowaitai and Tamaitemioka. She refers to the history of ownership of the islands. She says her uncle John Hampstead moved to Tamaitemioka in the late 1960s and stayed until the 1970s. The Tipene whānau came later. She believes the Tītī Islands need protection from commercial fishing. The resource has always been highly valuable to the people on their annual hīkoi to the Tītī Islands. The gathering of kaimoana went hand in hand with the harvesting of tītī.

[142] Rua McCallum is the daughter of John Hampstead. She says that her father first began birding on Tamaitemioka in 1967. Her father built the house they occupied on the island. Their staple diet on the island was tītī. They often fished from the landing for blue cod or groper and there was an area at the back of the lower island where pāua could be harvested. Kaimoana was an important supplement to their diet. While birding on Tamaitemioka, they had exclusive occupation of the island as it is a small island only big enough to sustain three or four adults birding there, or one small to average sized family.

[143] There are others who submitted material to the court. They refer to the traditions of fishing around the islands.

Other measures protecting the specified area

[144] Mr Tipene's wish to protect the marine and coastal area around the islands has been longstanding. In May 2002 he submitted a mātaitai reserve application to the Ministry of Fisheries. The application concerned the embayment between Tamaitemioka and Pohowaitai. His purpose in doing so was to conserve pāua and kina. He believed these were being depleted by commercial divers. He subsequently amended his application to include only the Pohowaitai landing site and surrounding area. In support of the application he said the area had historically been a place for taking kaimoana by tāngata whenua during the muttonbird season, and the harvesting of kaimoana was critical for the birders' sustenance.

[145] Mr Tipene put much time and effort into the mātaitai application. It was ultimately unsuccessful, but not because protection of the area was unnecessary. The evidence indicates that initially his application was supported by locals, birders and some kaumātua. However Te Rūnanga were looking to effect similar protections around the Tītī Islands more generally. Progress with Mr Tipene's application stalled at least partly because of Te Rūnanga opposition, while it worked on a broader application for all Tītī island landing areas. Mr Tipene lost support. It seems he had personal issues (the details of which were not adduced as evidence) and may have lost speaking rights on the marae. The mātaitai regulations[119] were specific about who could apply for a mātaitai. In accordance with the regulations Mr Tipene had originally been nominated Tāngata Tiaki/Kaitiaki for Hokonui Rūnanga. However this was subsequently cancelled. His application was therefore declined on 22 October 2009.

[146] Stephen Halley, an inshore fisheries manager with the Ministry for Primary Industries, provided an affidavit. He notes there are a range of means by which customary non-commercial fishing can be recognised and provided for, and that these tools have been used around the Tītī Islands to varying degrees. In addition, muttonbirders are able to take fish under the recreational bag limits. Pāua, rock lobster and kina are species of importance to customary fishers in the Tītī Islands. These species are generally only taken by the birders in the immediate vicinity of the islands.

[147] Mr Halley says that commercial fishers have generally respected muttonbirders' customary fishing areas around the Tītī Islands. There have been "gentlemen's agreements" not to commercially fish in areas identified by birders as important for customary fishing. These "voluntary rāhui" have now been recognised through areas/species closures around specified parts of the Tītī Islands, including around Pohowaitai and Tamaitemioka.

[148] Specifically, on 9 July 2015, 31 areas around the Tītī Islands were closed to commercial fishing, under the fisheries regulations,[120] including an area around

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119 The Fisheries (South Island Customary Fishing) Regulations 1998.

120 Fisheries (Southland and Sub-Antarctic Areas Commercial Fishing) Regulations 1986 as amended by Fisheries (Southland and Sub-Antarctic Areas Commercial Fishing) Amendment Regulations 2015, reg 14B and 14C.

Tamaitemioka and Pohowaitai islands which is closed for kina and pāua. These regulations were made to recognise and provide for customary, non-commercial food gathering and the special relationship the Tītī Islands birding community has with the areas, by restricting commercial fishing around the islands. All of the closed areas are relatively small, totalling approximately 1.9 km^2. The location of these customary fishing areas aligns with the physical nature of the marine and coastal area – they are adjacent to safe landing areas and sheltered coves around the Tītī Islands, including the closed area between Tamaitemioka and Pohowaitai.

Applying the statutory test to the evidence

Has the area been exclusively used and occupied from 1840 without substantial interruption

[149] The evidence that has been presented of exclusive use and occupation of the Tītī Islands by Rakiura Māori from 1840 without substantial interruption is overwhelming. This makes it unnecessary to consider in detail what may or may not constitute exclusive use and occupation without substantial interruption for the purposes of s 58 of the Act. It is sufficient to note, as the submissions for Te Rūnanga put it, that the clear words of the Act need to be applied with an appreciation for the context in which the particular claim arises.[121] Remoteness, the environment and changes in technology are all relevant when considering notions of occupation, use and continuity.[122] These may explain periods of no or occasional use while nevertheless maintaining a connection to the land.[123]

[150] The Tītī Islands were utilised by Rakiura Māori as part of the seasonal gathering of kai. There is no suggestion in the evidence that any other community had a substantial connection to the land. Northern Ngāi Tahu, who may at one time have travelled to the Tītī Islands, had not sought to make any claim to beneficial ownership when this was awarded. The Deed of Cession and the processes undertaken by the Native Land Court were a recognition of the entitlement of Rakiura Māori based on use and occupation. Regulations provided oversight and reinforced the exclusivity of use and occupation by the beneficial owners.

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121 *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256 at [37].
122 *Akiba v Queensland* (No 2) [2010] FCA 643, (2010) 270 ALR 564, at [251] and [254].
123 *Tsilhqot'in Nation* above n 121 at [37] and [38]; *Akiba* above n 122 at [254].

[151] The stories that have been passed on to Mr Tipene, Ms Davis and others are confirmed by the historians' evidence. Southern Māori had exclusive use and occupation from 1840, and for a long time prior to this, over the Tītī Islands. Te hīkoi o te tītī was a hapū effort in the days of the waka. People were dropped off and picked up at different islands and in time islands were named after them. Remoteness and weather conditions were a likely factor in which islands were utilised more systematically than the others. The location, weather, steep cliffs and difficult landing area for Pohowaitai and Tamaitemioka may have made them less favoured. The arrival of pākehā and seal and whale boats improved access and increased utilisation of the tītī resources. The Deed of Cession and the Native Land Court processes recognised the use and occupancy of the beneficial islands at that time. Thereafter, as the muttonbird industry continued to grow, beneficial owners exercised their rights on Pohowaitai and Tamaitemioka regularly and systematically. Although it is possible there may have been seasons when birding on Pohowaitai and Tamaitemioka did not occur there was no substantial period of interruption from 1840 to the present day and the Regulations have reinforced this. It follows from the connection of the landing area to the two islands and its importance for sustenance and survival on the islands, that exclusive use and occupancy of Pohowaitai and Tamaitemioka also establishes exclusive use and occupancy of the specified area. The voluntary rāhui over commercial fishing reinforced now by closures underline this.

Is the specified area held in accordance with tikanga

[152] Tikanga is defined in the Act as "Māori customary values and practices".[124] In the Waitangi Tribunal's 2004 report on the foreshore and seabed, tikanga was described as:[125]

> In addition to forming the body of Māori customary law, tikanga includes the cardinal ethics and values of Māori society. Dr Manuka Henare explained that it underpins customary obligations, rights, and interests, and indeed the whole Māori worldview…
>
> Tikanga is not necessarily the same across tribal groups. Hirini Mead stressed in *Tikanga Māori*:

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124 Section 9.

125 *Report on the Crown's Foreshore and Seabed Policy* (Waitangi Tribunal Report, Wai 1071, 2004) at [1.1].

> ideas and practices relating to tikanga Māori differ from one tribal region to another. While there are some constants throughout the land, the details of performance are different and the explanations provided may differ as well. There is always a need to refer to the tikanga of the local people.

[153] In this case the Court had the benefit of Ms Davis' expertise and knowledge of local tikanga. Her evidence was consistent with the other evidence of tikanga in the area. The evidence overwhelmingly establishes that Pohowaitai and Tamaitemioka are held in accordance with tikanga, and that the 200 m area around the landing rock are part and parcel of that. Muttonbirding, fishing and the way of life on the islands are Māori customary values and practices and that is how it has always been. This tikanga has been adapted by the Māori Land Court processes and the overlay of regulations (which can be seen as enhancing the kaitiakitanga of the islands), but it nonetheless has remained the way of the birders who go to Pohowaitai and Tamaitemioka.

[154] I therefore conclude that the specified area is held in accordance with tikanga and it has been exclusively used and occupied from 1840 to the present day without substantial interruption. The only issue is whether it is held by all Rakiura Māori or only the beneficial owners of Pohowaitai and Tamaitemioka and whether those with houses on those islands represent the beneficial owners.

Who is the applicant group

[155] The evidence shows that at least from the time of the Native Land Court process in 1910 the specified area was held by the beneficial owners of Pohowaitai and Tamaitemioka and represented by those with houses on the islands. Only beneficial owners have rights to go to Pohowaitai and Tamaitemioka. Few of the owners exercise those rights. Those that go the islands fish in the specified area and that is part of the way of life on the islands. The active birders are guardians for the other owners. They make the decisions on allocation of territory for muttonbirding, house sitting, and rāhui. They are the guardians for those who have been, those who are there, and those who will come after them. That is, they make these decisions on behalf of the beneficial owners of the islands and their descendants.

[156] The evidence suggests this differs a little from the former Crown islands. Ms Davis' evidence refers to the people on her island as the kaitiaki of the mana whenua of the island, but not the direct holders of it. The mana whenua was with Rakiura Māori. In her view the position in relation to Pohowaitai and Tamaitemioka was different because they had been vested in the beneficial owners. It might be wise for the active birders on Pohowaitai and Tamaitemioka to consult more widely on decisions but in her view they were not required to.

Does Mr Tipene represent the applicant group

[157] Mr Tipene initially commenced his application on behalf of his own family.[126] He did this because "someone had to start it" and no one else had come forward. Mr Tipene travelled to Wellington on the first call of the application in the High Court, following its transfer from the Māori Land Court, to convey the importance of the application to him. At this time he was unrepresented, without means to pay for a lawyer, and did not believe he could find a lawyer. He was frustrated by the years of work he had put into his mātaitai application (which also sought to protect customary rights), which stalled and was eventually declined. He was distrustful of Te Rūnanga for what he regarded as its interference in that application.

[158] In bringing the application in his name, this did not mean other people's involvement was unwelcome because in the end, as he said, "it wasn't going [to] be for me". While he had at one stage proposed his daughter would hold the title, he was not fixed on that. He believed the holder of the title should be one (or more) of the beneficial owners. But he had no right, desire or wish to prevent any other owners of the islands from exercising their rights of ownership.

[159] Mr Tipene initially sought customary marine title over a wide area. He explained the evolving nature of his application. He started by defining the area as large as possible under the terms of the Act. This was in part because he was concerned about the possibility of oil drilling in the future. He thought that if the order was made that would give the owners advance notice of any proposed oil

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126 Refer [46] above.

drilling. However he also recognised that, by drawing the area too widely, he was extending into areas used by those who went to neighbouring Tītī islands. His primary concern was the depletion of the fish stock. The landing is where the people on Pohowaitai and Tamaitemioka get their kai. The application is about "preserving the landing for those that are going to come after us … that's where they fish."

[160] Mr Tipene says that bringing the application to Court has been a long and difficult journey. The evolution of his application does not diminish his claim. It is reflective of his learning process in understanding what could be achieved under the new Act. I accept the submission of Mr Tipene's counsel that he has approached the application with determination and passion, reflecting his commitment to preserving these islands for the benefit of the people who use them, and to put in place whatever controls may be available to protect the island from outside influences. He is to be commended for his commitment and passion which have enabled his application to reach a substantive determination. Ms Davis described it as "returning to his own mana".

[161] There is no doubt that Mr Tipene followed the Act's processes in bringing his application to the attention of anyone likely to be interested. Public notices were given in appropriate newspapers at appropriate times. In the interim hui were called in appropriate locations. It must be said that beneficial owners who wished to become involved in the application had every opportunity to do so. Nevertheless no other person or group sought to become directly involved to support Mr Tipene's application or to seek to substitute themselves as applicant if appropriate.

[162] Moreover, only the Attorney-General formally opposes the application, and its opposition is now confined to only Mr Tipene's authority to represent the applicant group and further defining the applicant group. Te Rūnanga's formal position is that it neither opposes nor supports the application. However part of this is because Te Rūnanga does not believe the Act delivers proper recognition of rights due to any successful group under Māori customary interests. It is also concerned that any title awarded under the Act must be awarded in a way that recognises the rights are collective, does not exclude people from exercising their customary rights in the specified area and does not impact upon other Tītī Islands.

[163] Following the hui referred to by Ms Cook, at which members of the Rakiura Committee attended, the secretary (writing on behalf of the committee) provided a letter setting out its views on Mr Tipene's application as at 9 October 2014. At this time Mr Tipene's application was for an area around the entire coast of the two islands, from the high-water springs to the outer limits of the territorial sea. The application was made for the benefit of the Tipene family. Not surprisingly, the Rakiura Committee opposed the application because Mr Tipene's whānau had not occupied that area since 1840 to the exclusion of others with customary interests in that area. All beneficial owners were entitled to access to the foreshore and seabed surrounding the islands and the Rakiura Committee was upset that one whānau might have customary marine title vested in it. The Committee said "[i]f the Court was to grant a customary marine title then all Beneficial Owners/successors to these Islands should be party to any title obtained."

[164] An updated position of the Rakiura Committee was provided by letter dated 30 August 2015. This was following Mr Tipene filing his second amended application on 23 January 2015.[127] This application related to the area comprising 12 nautical miles to the west and 0.5 nautical miles to the east and proposed that the supervisor(s) under the Regulations hold the order.[128] The Committee's views were as follows:

(a) It acknowledged Mr Tipene had followed due process for progressing his application to the Court. However the Committee considered he had not undertaken full consultation with persons with rights and interests in the specified area.

(b) The area subject to the application covered the coastal waterways and coastlines of other Tītī islands, so that those with interests in those other islands would be prejudiced if the order sought by Mr Tipene were granted.

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127 Refer [46](c) above.
128 Regulation 6.

(c) It was inappropriate for the supervisors to hold any title because they were elected annually and were not necessarily beneficial owners or Rakiura Māori.

(d) The applicant group already had all the rights and privileges that might be accorded under a customary marine title order because of the Ngāi Tahu Claims Settlement Act 1998.

[165] At the time of the hearing in the High Court before me there was information showing support for Mr Tipene from at least some of those with houses on Pohowaitai and Tamaitemioka and other beneficial owners, but this information was informal and unclear. Mr Tipene was given an opportunity to formalise the information after the hearing. He took that opportunity. The position of those with houses on Pohowaitai and Tamaitemioka is as follows:

Houses on Pohowaitai	**Position in relation to Mr Tipene's application for CMT**
Paul John Kemp	**Supports**: Agrees it should be for the benefit of all Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka. Agrees the holder should be the Supervisor or Supervisors of Tamaitemioka and Pohowaitai.
Te Whe Phillips	**Does not support**: there is a dispute between Te Whe Phillips and the other owners on Pohowaitai, because her children have been banned from the island for their involvement in activities, on the island, of which the other owners do not approve.
Aran Rewaka	**Neither supports nor opposes**: Mr Tipene understands he is not prepared to sign a statement in support because of family matters, and not because he opposes the application.
Meri Atareta Jacobs	**Supports**: Agrees it should be for the benefit of all Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka. Agrees the holder should be the Supervisor or Supervisors of Tamaitemioka and Pohowaitai. Meri's sons, Maru Hamua Tau and Rawiri Te Maire Tau similarly support the application.
Patrick (Pat) Phillip Hutana	**Supports**: Agrees it should be for the benefit of all Rakiura Māori with customary interests around

	Pohowaitai and Tamaitemioka. Agrees the holder should be the Supervisor or Supervisors of Tamaitemioka and Pohowaitai. Pat's sons, Leon Shane Hutuna and Ropiha Kidwell similarly support the application. Pat's brother, Edward, has died. His children and grandchildren are entitled to go to the island. Edward's whangai child, Reitimana Karaitiana, and his grandchildren, Jordan Albert McDowall and Robyn Hinemoana Wallace, similarly support the application.
Merania Dawson	**Neutral**. The house was owned by Harry Dawson who died around eight years ago. Harry's wife, Merania Dawson has a life interest in the house. The children are the beneficiaries. She does not consider it is her place to sign anything in relation to the application given her limited interest. Mr Hutuna has sought the views of her children. However they have not been to the island and appear not to be interested in the application.
Oliver Saint Andrew Dawson	**Supports:** Agrees it should be for the benefit of all Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka. Agrees the holder should be the Supervisor or Supervisors of Tamaitemioka and Pohowaitai.
George Edward Dawson	**Supports:** Agrees it should be for the benefit of all Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka. Considers the "interested owners" should decide between them who should be the holder of the title.
Martin Hawkins	**Supports:** He is a regular birder on the island. He considers the recognition of customary marine title will be to the benefit of all Rakiura. He has witnessed the depletion of fish stocks and kaimoana and this is a real concern for him.
Hori Te Marino (Nash) Norton	**Supports:** Agrees it should be for the benefit of all Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka. Considers the "interested owners" should decide between them who should be the holder of the title. Nash's son, Houston Myron Norton, similarly supports the application and considers the "interested owners" should decide between them who should be the holder of the title.
Reginald (Reg) Walter Ruru Hutana	**Supports:** Agrees it should be for the benefit of all Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka. Agrees the holder should be the Supervisor or Supervisors. Reg has resided in Australia for the last 35 years. He still makes the journey across the Tasman to

	part-take in the gathering of the tītī with his whānau. He has been doing this since he was born.
Houses on Tamaitemioka	
Dennis Tipene	**Applicant:** Mr Tipene's children, Maakiti Joseph Tipene and Jasmine Tui Tipene support the applicant. The following members of Mr Tipene's family also support the application: Matthew Brian Adams (Mr Tipene's brother), Sally Ann Adams (Mr Tipene's sister), Donna Shirley Garthwaite (Mr Tipene's sister), Hera Tai Low (Mr Tipene's sister), Hera Marion Harland (nee Tipene) (Mr Tipene's Aunt, now deceased), Rawiri Karika (Mr Tipene's nephew, Hera's son), Leilah Nadia Karika (Mr Tipene's niece, Hera's daughter), and Victor Colin Hunter (Mr Tipene's cousin). The above family members are able to come to Tamaitemioka and stay at Mr Tipene's house.

[166] In addition Mr Tipene has received signed statements of support from the following beneficial owners, who do not have houses on Pohowaitai or Tamaitemioka but who would be allowed to stay on the islands if they wished to go: Grenville Tewera Pitama, Michael Taituha Pohio, Stephen Grant Reuben and Jonathon Teina Craig Reuben. They agree the application should be for the benefit of all Rakiura Māori with customary interests around Pohowaitai and Tamaitemioka. They also agree the holder should be the supervisor(s) of Tamaitemioka and Pohowaitai pursuant to the Regulations.[129]

[167] Further views were canvassed at a hui held on 30 January 2016 and again on 9 March 2016 at Tuahiwi Marae. This location was chosen because the active birding families on Pohowaitai are from that marae. The chair of the marae is Te Maire Tau. A letter was provided to the Court from Te Maire Tau reporting on the hui. At the first meeting Mr Tipene and representatives of Te Rūnanga discussed the case. The general view of those present was as follows:

> [W]hile they were sympathetic to the claims and aspirations of Mr Tipene they simply did not know enough about the 2011 Act and whether such a

[129] Regulation 6.

> claim was worthwhile and if it in fact compromised their belief that they inherently held a customary right to the whole island and the takutai-moana.

[168] Nineteen persons attended the second meeting. The following two resolutions were passed.

> **Resolution One:**
>
> On the matter of mandate, it is our view that Mr Tipene did not consult widely enough to have mandate to apply for title to Pohowaitai. We do not oppose his application to Tamaitemioka, or to his claim to title around that island.
>
> On this matter of mandate however we do wish to note that just as we are reluctant to acknowledge the mandate of Mr Denis Tipene we also have concerns with the assumptive roles the [Rakiura] Committee and [Te Rūnanga] have taken upon themselves. The beneficial owners see themselves as owners that stand under their own authority. However, we do understand that [Te Rūnanga] has brought this matter to our attention because of their concern for absentee owners.
>
> **The Issue of Title**
>
> **Resolution Two:**
>
> We wish to note our concerns of the idea of a marine title group. We are reluctant to acknowledge a particular group as possessing the right to title to manage. It is our view that if any title was to be confirmed under the Act, the title would include all beneficial owners which would then be managed by house owners upon the island resident during the season.

[169] Against this background the Attorney-General's position is that Mr Tipene has not shown he has been "appointed" by the relevant customary collective groups, being the whānau with interests in the two islands, to pursue the application on their behalf as the applicant group. He submits there is no evidence identifying the whānau who comprise the applicant group. He further submits there is evidence that some of those with relevant interests do not support the application. He refers to the letter from Te Maire Tau, and notes that he is a person who has lent his individual support to the application. He submits Mr Tipene ought to have given evidence of his engagement with customary groups at Tuahiwi. He submits Mr Tipene has not complied with tikanga to discuss island matters with the wider collective. He therefore submits the application cannot be granted.

[170] Te Rūnanga refers to the evidence of Ms Davis that, in order to represent a group in relation to a particular take (cause), it is important to ask people to meet

together and decide who they would like to appoint. Te Rūnanga submits there is no evidence that Mr Tipene has taken those steps. It submits the Act requires support from customary collective groups in order to overcome weaknesses that existed in determining the title to dry land. This requires the applicant group to be clearly identified, particularly when the application is brought by an individual. It submits the evidence has not demonstrated this.

[171] Mr Tipene's position is:

(a) The application is for the benefit of all people who whakapapa to the islands, that is the owners of the islands and their descendants.

(b) There is no formal structure for representation of owners of the islands but the owners of the houses on the islands are the kaitiaki of the islands. The majority of the house owners support the application. The remaining house owners have not signed statements in support of the application because of personal matters, rather than because they oppose the application.

(c) The marine area and adjacent land are indistinguishable and the owners of the land should also own the title to the marine area. Broader interests, such as those represented by Te Rūnanga, the Rakiura Committee or the Tuahiwi Marae Trustees do not prevent the grant of customary marine title for the benefit of the beneficial owners and their descendants.

[172] I accept Mr Tipene's position as correct. In doing so, I find it instructive to return to Ms Davis' view and to set them out in her words:

> … there's different ways of looking at mana. This is my own perspective. I think each person, no matter who they are, and what they've done each of us we still hold our own mana and there may be times all of us will make wrong decisions and – but all of us keep going and in some way stay true to who we are. That's one part of mana. … We can talk about rangatiratanga. Well, how can we describe it? That's when – that's also part of who we are but it's also part of a group as well, and when a council meets, they make a decision, they're actually behaving in the way that Māori do when Māori meet and make a decision. They make a decision pertaining to their

rangatiratanga and that belongs to all of us as well. … So having said that, there were times when I know that, and understand that, Mr Tipene tried and did his best to get other people to come and for whatever reason they didn't. There were also the opportunity in the beginning to join with the collective, and for reasons that only he knows and are not really our business, he decided to go alone. Well I guess in my estimation that was he was then returning to his own mana and he decided that he would move on. … I just felt I needed to say that, that each one of us has their own mana. How we display it is always different. I'm not sure that's helpful. I hope it's helpful to you.

… what we talk about in the rangatiratanga of the collective, of when the decision is made, and I think too that within that group there still is that individual with their own mana. Just as there is in any group of councils. They each of them come with their own mana to that group. [There are individual sections with authority and there is also the wider group.]

[173] And under cross examination on behalf of the Attorney-General, her views were expressed as follows:

Q. Has the mana of the whenua for Pohowaitai passed to the whanau who were listed as the owners and by passed I mean has it left the hapu collective forever and travelled to be held now by those whanau of the island?

A. No, I don't see that either. I see that when we're there that's when we are practicing that mana whenua role. I don't see that it leaves any one in or out.

Q. So the people on the island are demonstrating mana whenua, is that correct?

A. Yes, that's how I see it.

Q. But my question is do they hold it to the exclusion of the people who do not go to that place or is the mana whenua really that of all Rakiura Maori?

A. That is a difficult question. There will be many answers. As I said before I think in a sense Rakiura Maori hold the mana whenua in a wider sense and the people who are on Pohowaitai they're the kaitiaki in their lifetimes, the same as we are the kaitiaki on [Putauhinu] in our lifetimes. We hold that for others just as those who are on other islands hold it for us so we are one.

Q. I take your answer to mean that the people on each island are kaitiaki, guardians, if you like?

A. That's right.

Q. And they are guarding that particular island for the bigger group known as Rakiura Maori?

A. That's how I see it.

Q. So I do not want to labour the point but just to then conclude on this issue of whether when we look at this inner circle do the people who are kaitiaki need to refer any decision about the use of this inner circle, did they need to refer that decision out to Rakiura Maori at all?

A. I think it will depend on the people and the group who are there on their decision making. I don't think it is something we could just impose on them and say they must do but I think perhaps it is wiser, some may wish to. They need to talk among themselves and decide then, make a decision what shall we do? Shall we go wider on this? Are you all happy or will we make that decision now or should we consult with the wider group? I don't see that as something that – they have to be the people who want to do that.

Q. So they exercise the initiative?

A. I don't think we should impose that on them.

[174] The Act does not define "applicant". The applicant is the person who brings the application on behalf of the applicant group. The applicant group is the whānau, hapū or iwi that seeks recognition of the customary marine title. A legal entity or natural person can be "appointed" to be the representative of the applicant group and to apply for and hold an order on behalf of the group.

[175] It is clear that an applicant must have authority to bring the application on behalf of the applicant group. The Act does not, however, specify how that authority must be shown. In this case Mr Tipene has demonstrated his authority in a number of ways:

(a) First, he has done so by the opportunity he gave throughout the process to notify interested parties of his application and to discuss it with them. By not engaging in that process, beneficial owners of Pohowaitai and Tamaitemioka have allowed Mr Tipene to assume that authority.

(b) Secondly, he has done so through the majority support he has obtained from the house owners. Ms Davis' evidence confirms this as consistent with tikanga of the islands. Mr Tipene has, in accordance with tikanga, endeavoured to engage the wider group of those with customary interests in the two islands (the beneficial owners and their

descendants) and more widely with Rakiura Māori both before and after the hearing as described above. That has also provided the opportunity for all those who may have an interest to present their views. The amendments to the application show Mr Tipene's willingness to take into account those views but in the end it is those present on the two islands that make the decisions on behalf of all.

(c) Thirdly, he is a member of the applicant group, and he has demonstrated a long and close association with Tamaitemioka, knowledge of the area and an understanding of the tikanga, and his efforts and long standing commitment to the area and to this application have meant that this is the first application under the Act to be substantively determined. He and the people he represents have the rights they seek to have recognised. The position of Te Rūnanga is influenced by its view that the legislation is flawed. This view should not deny the owners of Pohowaitai and Tamaitemioka the opportunity for recognition of their customary rights.

[176] The position is that Mr Tipene has established there is an entitlement to the recognition order on behalf of the applicant group.

Constituents of group and holder of title

[177] The Attorney-General submits further evidence is needed as to the constituents of the applicant group. This is because it is said it is not possible for the Court to determine the affected whānau from the ownership lists of individual beneficial owners to the two islands. I do not accept this submission. The beneficial owners have customary interests in the islands. They are recognised in legislation and there is a legislative process for determining their successors.

[178] The parties were agreed at the hearing that if a customary marine title order is to be made the Court should not decide at this point who will hold the order. I understand that still to be the position notwithstanding the further opportunity to consult after the hearing. In the course of bringing the application to a hearing, Mr Tipene proposed the supervisor(s) of the two islands, as appointed from time to time,

could hold the title. The information before the Court at present is that they do not wish to be the holder of the title. Mr Tipene believes that the order should be in the hands of an owner(s) steeped in the traditions of the islands. It would be consistent with the way decisions are made about other matters on these two islands for the beneficial owners who have houses on the two islands to make the decision about who holds the title. The holder should be defined in a way that encapsulates the concept that the person(s) who hold the title may from time to time change, just as the beneficial owners may change with succession. These are matters upon which the parties are invited to make submissions. A timetable can be put in place in the new year. The parties may wish to file a joint memorandum setting out an agreed timetable.

Result

[179] I find that Mr Tipene has established the applicant group meets the requirements under s 58 of the Act in relation to the specified area. The applicant group holds the specified area in accordance with tikanga and has exclusively used and occupied it from 1840 to the present day without substantial interruption. The applicant group is Rakiura Māori with customary interests in Pohowaitai and Tamaitemioka. The evidence establishes the beneficial owners of Pohowaitai and Tamaitemioka and their descendants have these interests. An order recognising customary marine title is to be made. The holder of the order is yet to be determined. The parties are to make further submissions on that issue. The application is adjourned for that remaining issue to be determined. The nominal date for the adjournment is 6 February 2017, although this date may be further adjourned depending on the agreed timetable for making submissions. I am uncertain whether costs are an issue. If they are, the parties have leave to also make submissions about that.

Mallon J