IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV--2017-485-247, 255, 302
[2024] NZHC 682

UNDER	The Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	An application for orders recognising Customary Marine Title and Protected Customary Rights
BETWEEN	NGĀ HAPŪ O TOKOMARU ĀKAU Applicant
AND	TE WHĀNAU A RUATAUPARE KI TOKOMARU Applicant
AND	NGĀ WHANAŪ O HAUITI Interested Party
AND	SEAFOOD INDUSTRY REPRESENTATIVES Interested Party
AND	ATTORNEY-GENERAL Interested Party

Hearing:	5-9, 12-16, 19-23, 28 September and 7 and 12-14 October 2022
Appearances:	D C F Naden, S M Yogakumar and M Sreen for Applicant Ngā Hapū L A O'Gorman QC, R A Siciliano and C T Mataira for Te Whanau A Ruataupare B R Lyall and H L B Swedlund for Whanau Hauiti B Scott and S Cvitanovich for Seafood Industry (via AVL) D A Ward and C C Barnett for Attorney-General
Judgment:	25 March 2024
Reissued Redacted Version:	1 May 2024

JUDGMENT OF CULL J
[Reissued Redacted Version]

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APPENDICES

[Redacted].

Introduction

[1] For over 400 years, two hapū, sharing the same tīpuna, have lived north of Gisborne in Tokomaru Bay. The hapū Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare have lived, side by side, in the north and south of Tokomaru Bay to the present day. They now seek recognition for customary marine title (CMT) and/or protected customary rights (PCRs) to the common marine and coastal area in and around Tokomaru Bay under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA).

[2] There are two separate applications in these proceedings, one overlapping the other. Ngā Hapū o Tokomarua Ākau (Ngā Hapū) claims to represent both hapū. Its application area for CMT and PCRs spans the length of Tokomaru Bay from the north to the south. Te Whānau a Ruataupare ki Tokomaru (Te Whānau) challenged Ngā Hapū's representation of Te Whānau a Ruataupare hapū and brought its own CMT claim for the southern end of Tokomaru Bay. The applications, therefore, overlapped. From the outset of these proceedings, and throughout the hearing, the unresolved representation issue meant that the two applicant groups could not agree on which group should hold title and how it should be held, if granted.

[3] The Court-appointed pūkenga (tikanga expert), Dr Robert Joseph, addressed the vexed issue of representation and recommended that its resolution be undertaken in accordance with tikanga Māori, separate from these proceedings. The Court endorsed that approach and urged the parties to follow Dr Joseph's recommendation of a marae-based tikanga mediation subsequent to the hearing.

[4] Three important events have occurred since the hearing of this proceeding and the initial draft of the judgment. The first is the agreement reached by the applicants. On 14 August 2023, the applicants notified the Court that they, and the respective hapū, had reached an agreement at mediation, that they hold the application area jointly and that the two hapū would jointly hold such title or rights if granted, through an entity yet to be established. The current applications from Ngā Hapū and Te Whānau do not reflect that agreement.

[5] Second, since the hearing of the evidence and before the delivery of this judgment, counsel for Ngā Hapū advised the Court that, with great sadness, Mr Roger Tichborne, the applicant for Ngā Hapū, passed away on 3 October 2023. I wish to acknowledge his passing and extend my condolences to his whānau and hapū.

E te Kaumatua, Roger Tichborne, moe mai, okioki mai rā, te hunga mate ki te hunga mate, tatou to hunga ora ki a tatou.

[6] Third, on 18 October 2023 the Court of Appeal delivered the first appellate decision on substantive proceedings under MACA in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* (*Re Edwards* (CA)).[1] It provides guidance on the statutory interpretation of MACA and, in particular, on the tests for recognition of CMT and PCRs.

[7] As this judgment awaited the Court of Appeal's decision, I granted all counsels' requests to file supplementary submissions, which were received as timetabled. Those submissions have been considered in this judgment.

The issues

[8] The issues for this proceeding arise out of the legal tests for recognition of CMT and PCRs under MACA. They are informed by the fact-specific evidence from, and context of, the two applicant hapū of Tokomaru Bay.

[9] The issues are:

(a) Who is entitled to represent the applicant hapū Te Whānau a Ruataupare?

(b) Do the applicants, separately or jointly hold the specified area in accordance with tikanga?

(c) Did they have exclusive use and occupation of the area at 1840?

(d) Have they had the use and occupation of the area, in full or in part, since 1840 to the present day?

(e) If so, was their use and occupation exclusive?

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1 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [*Re Edwards* (CA)].

(f) Has there been substantial interruption to their exclusive use and occupation of the relevant area?

(g) Should CMT recognition orders be made and over which area?

(h) Is there a basis for recognising wāhi tapu sites in the specified area?

(i) Should PCR orders issue and in respect of which activities?

[10] This judgment is divided into eight parts:

(a) **Part I** describes the parties, the original claims, and the application area and boundaries.

(b) **Part II** addresses the representation issue between the two claimants, their subsequent agreement, and identifies the further clarification required on representation and the application area.

(c) **Part III** explains the legislative framework of MACA, the legal tests for CMT, and the findings of *Re Edwards* (CA).

(d) **Part IV** analyses the first limb of the CMT test; whether the applicants hold the area in accordance with tikanga.

(e) **Part V** deals with the second limb of the CMT test; whether the applicants had exclusive use and occupation of the area at 1840, post-1840 to the present, and, if so, whether it was substantially interrupted.

(f) **Part VI** describes and analyses the wāhi tapu claim and evidence.

(g) **Part VII** deals with the claim for PCRs.

(h) **Part VIII** summarises the conclusions and orders.

PART I – THE PARTIES

The original claims

[11] The hearing proceeded on the basis of the two original applications, which both sought CMT over specified areas which overlapped, as described below. As a result of their subsequent agreement, the applicants and the two hapū of Tokomaru Bay now agree that if CMT and/or PCR recognition orders were granted, they would hold CMT and the PCRs jointly over the recognised area by a representative entity, yet to be established.

[12] The agreement is an important development for the determination of the applications before the Court. It is relevant, however, to describe the original applications and the claims over the specified area to provide context to the evidence the Court received and the subsequent agreement reached by the two hapū.

[13] The first application was from the late Mr Roger Tichborne on behalf of Ngā Hapū. Ngā Hapū is an entity so named because it contends that it represents the two hapū of Tokomaru Bay: Te Whānau a Ruataupare and Te Whānau a Te Aotāwarirangi. Mr Tichborne, along with Mr "Danny" Delamere and Mr Kemara Pēwhariangi, sought CMT for the whole application area, being the marine and coastal area from Koutunui Head south to Māwhai Point and out 12 nautical miles from all points along the named coastline. Ngā Hapū also sought PCRs in that area.

[14] In its original application of 3 April 2017, Ngā Hapū applied for recognition of CMT for both hapū in the area from the Waikawa Stream in Orange Bay in the north to Te Māwhai Point in the south. The northern boundary, however, was amended because part of the area in its original application was included as part of Ngāti Porou's rohe moana in the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill (No 2).[2] After strong objection about its inclusion in Ngā Hapū's application, an agreement was eventually reached between Ngāti Porou and Ngā Hapū. As a result of this agreement, Ngā Hapū changed their northern boundary for the purposes of their application from

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[2] Ngā Rohe Moana Hapū o Ngāti Porou Bill (No 2) 2018 (31-3). Later passed into legislation as the Ngā Rohoe Moana on Ngā Hapū o Ngāti Porou Act 2019.

Waikawa Stream to Koutunui Head. The 2017 map, originally filed with its application, was therefore replaced with an amended map.

[15] Annexed as Appendix 1(a) is the map of the current Ngā Hapū application area and Appendix 1(b) shows the relevant sites marked in the Ngā Hapū application area. As marked on the map, the northern boundary line is Koutunui Head and the southern boundary line is in the middle of Te Māwhai. The specified area extends out 12 nautical miles and encompasses the whole of Tokomaru Bay.

[16] The second application, also filed on 3 April 2017, was from the late Mr Tate Pēwhariangi, on behalf of Te Whānau. Te Whānau seeks CMT over the common marine and coastal area in the southern half of Tokomaru Bay that "extends from Waitakeo to Te Puka, and then to Te Māwhai, from a landward boundary of the mean high water springs and extending 12 nautical miles in a seaward direction". The area as claimed, with the landward place names, is shown in a map annexed to its application and is annexed to this judgment as Appendix 2(a). Appendix 2(b) is a Fisheries Management map of the area with relevant fishing sites.

[17] There were two problems arising from these applications. The first was that Te Whānau's application area fell entirely within Ngā Hapū's application area, being the southern half of Tokomaru Bay. Both applications were being heard concurrently. The Court was then faced with overlapping claims.

[18] The second was the representation issue, with both applicants claiming the authority to represent Te Whānau a Ruataupare. While the parties' agreement on shared exclusivity ameliorates the prohibitory effect of overlapping claims under MACA, the representation issue remains. I deal with each of these issues under Part II.[3]

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[3] Part II — Representation of Claimants at [48]–[69].

Other parties

Interested parties

[19] Alongside the two applicants, Ngā Hapū and Te Whānau, there were a number of interested parties involved in the proceedings:

(a) Ngā Whānau o Hauiti, whose rohe borders the application area at the southern end of Tokomaru Bay, near Māwhai Point. They did not seek to have their application determined by the Court at this point in time, as they are progressing their application through direct Crown engagement. They did not file any evidence in this proceeding but filed a notice of appearance and were represented by counsel throughout the hearing.

(b) The Gisborne District Council, who filed a notice of intention to appear, adopted a neutral position on the applications, and was participating in the proceedings in a watching brief capacity only. The Council did not file any evidence in this proceeding, although it prepared and circulated a set of maps showing the Council's assets within or directly adjacent to the application area. The Attorney-General advised that in respect of the land above the mean highwater springs, the Council is currently exploring whether any of that land can be returned to the former owners under the Public Works Act 1981.[4]

(c) New Zealand Rock Lobster Industry Ltd, Paua Industry Council Ltd, Fisheries Inshore New Zealand Ltd and the New Zealand Federation of Commercial Fisherman Inc, together known as the Seafood Industry Representatives (Seafood Industry), appeared as an interested party. They filed and called evidence, attended the hearing throughout, and made submissions in opening, closing, and subsequent supplementary submissions.

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[4] All counsel were circulated with an email from the Council dated 21 April 2022.

(d) The Landowners' Coalition, having filed a notice of appearance, filed no evidence and made no appearance. Similarly, the Council of Outdoor Recreation Associations of New Zealand Inc also made a general notice of appearance but did not participate in this proceeding and nor did they file any evidence.

(e) The Attorney-General appeared as an interested party.

The role of the Attorney-General

[20] The Attorney-General appeared and participated fully in the proceedings in the interests of all the public, including Māori. This is consistent with this Court's description of the Attorney-General's role in hearings under MACA in *Re Rihari (on behalf of Ngāti Torehina ki Maraka Hapū/Iwi of Niu Tireni)*:[5]

> The public interests that the Attorney-General represents as an interested party are the interests of all the public, such as assistance to the Court in the interpretation and application of novel legislation in an important area of the law. Such interests cannot appropriately be categorised as "non-Māori interests". All New Zealanders, including the applicants, have an interest in seeing that the law is carefully developed, applied consistently and fairly, and that the purposes of the statute are met by the granting of such orders as meet the criteria in the Act.

[21] The Attorney-General saw her role therefore as one of "independent aloofness" without taking a formal position on whether the applicants had met the test for rights in the application area.[6] Dr Ward, on behalf of the Attorney-General, reinforced that the Attorney-General did not advocate for any sectional interest but provides submissions that must be "accurate, objective and restrained, and founded firmly on a tenable exposition of the applicable legal principles," as this Court has previously directed. [7]

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5 *Re Rihari (on behalf of Ngāti Torehina ki Maraka Hapū/Iwi of Niu Tireni)* [2019] NZHC 2658 [*Re Rihari*] at [97].

6 At [97].

7 At [110] citing John McGrath QC "Principles of Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1988) 18 NZULR 197 at 206.

Other applications affecting Tokomaru Bay

[22] There have been other applications in respect of Tokomaru Bay that involve either a different process under MACA or applications under a different statute.

Crown engagement under MACA

[23] There are two pathways for recognition of CMT and PCRs under MACA.[8] The first is by application to the High Court under s 100, as the two applicants in this proceeding have done. The other is an engagement in a process for reaching an agreement with the Crown under s 95.[9]

[24] An application on behalf of Ngā Whānau o Hauiti, which has been listed above as an interested party in this proceeding, is being progressed under the Crown engagement route at present. The Court is not asked to determine their claim in this proceeding. The two applicants in these proceedings, Ngā Hapū and Te Whānau, are also pursuing Crown engagement under MACA in respect of the specified area.

Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019

[25] Under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (Ngāti Porou Act), there is a similar recognition of customary interests in the common marine and coastal area of the East Coast of New Zealand.[10] However, there are differences between the Ngāti Porou Act and MACA.

[26] The Ngāti Porou Act provides that Parts 3 and 4 of MACA do not apply to "ngā hapū o Ngāti Porou" in respect of "ngā rohe moana".[11] Thus, "ngā hapū o Ngāti Porou" may instead make applications for customary rights orders in respect of "ngā rohe moana" under the Ngāti Porou Act, which provides mechanisms for hapū management of CMT areas.

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8 The Marine and Coastal Area (Takutai Moana) Act 2011, s 94.
9 Sections 94(a) and 95.
10 *Re Edwards (Te Whakatōhea) (No.2)* [2021] NZHC 1025 [*Re Edwards (No.2)*] at [392].
11 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 6. "Ngā hapū o Ngāti Porou" is defined in s 10 and "ngā rohe moana" is defined in s 11.

[27] The statutory definition of "ngā hapū o Ngāti Porou" includes groups who had ratified an agreement with the Crown prior to the Ngāti Porou Act coming into force. It also provides mechanisms for non-ratifying hapū to decide to either accede to its regime and be added to the definition of "ngā hapū o Ngāti Porou" or not. A non-ratifying hapū of Ngāti Porou is defined in s 6(5) to mean:

> the hapū of Ngāti Porou who are entitled to, but have not, become party to the deed of agreement and become part of ngā hapū o Ngāti Porou under section 124.

[28] Thus, for non-ratifying hapū, the Ngāti Porou Act does not apply to them, and instead the MACA may apply to them in respect of "ngā rohe moana".

[29] Neither Te Whānau a Ruataupare nor Te Whānau a Te Aotāwarirangi have become a party to the Ngāti Porou deed of agreement, so do not fall within the definition of "ngā hapū o Ngāti Porou". The Ngāti Porou Act does not apply to them. The area from Koutunui Head to Māwhai Point, encompassing Tokomaru Bay, is not included within the definition of "ngā rohe moana".[12] On the evidence presented in this hearing, the issue of whether the hapū should enter into this alternative scheme was, and still is, a topic of considerable debate in Tokomaru Bay. It led to the conflict between Ngā Hapū and Te Whānau and their overlapping claims. It is not necessary for the purposes of this judgment to traverse this conflict in detail. What is important to record is that the Ngāti Porou Act does not apply to the two applicants in this case.

[30] Several areas of CMT within "ngā rohe moana" have been recognised by the Crown under the Ngāti Porou Act and have been given legal effect by secondary legislation.[13] For example, On 1 February 2021, CMTs came into effect in respect of the area between Mataahu and Koutunui Head out to three nautical miles.[14] The listed CMT holder was Ngā Hapū o Waipiro Takutai. The maps of these CMT areas are annexed to this judgment in Appendix 3. This raised an issue of a potential overlap between Ngā Hapū's application area and the recognised CMT under the Ngāti Porou Act. This issue was resolved when Ngā Hapū clarified at the hearing that their

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12 Section 11 and sch 2.

13 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary and Marine Title) Order 2020, schs 1–5.

14 Schedule 5.

application is from Koutunui Head, not north of it, and is therefore not overlapping with Ngā Hapū o Waipiro Takutai Kaitiaki Trust.

[31] There are two further High Court applications for CMT, PCRs, and wāhi tapu protection rights filed under the Ngāti Porou Act that overlap the application area. They are applications by Ngā Hapū Takutai Kaitiaki Trust and Ngāti Wakarara – Ngāti Hau Takutai Kaitiaki Trust. Counsel for the Attorney-General recorded that the areas which overlap with the application area before this Court fall outside of "ngā rohe moana" and are therefore invalid under the Ngāti Porou Act. Those applicants have not filed notices of appearances as interested parties nor attended this hearing. Their applications, therefore, do not affect the claims by the applicants before the Court in this proceeding.

The application area and boundaries

[32] Before assessing the applications, I deal with some more technical boundary issues that the applications in this proceeding raised. I will first deal with the definition of "common marine and coastal area" under MACA, its relevant exclusions and the boundary dispute, which was alive at the hearing but now appears to be resolved as a result of the parties' agreement. I describe the dispute nevertheless.

Common marine and coastal area

[33] There are a number of definitions and exclusions specified in MACA which have relevance to the application area.

[34] The first is the definition of "common marine and coastal area", under s 9 of MACA which is:

> the marine and coastal area other than—
>
> (a) specified freehold land located in that area; and
>
> (b) any area that is owned by the Crown and has the status of any of the following kinds:
>
> (i) a conservation area within the meaning of section 2(1) of the Conservation Act 1987:

(ii) a national park within the meaning of section 2 of the National Parks Act 1980:

(iii) a reserve within the meaning of section 2(1) of the Reserves Act 1977; and

(c) the bed of Te Whaanga Lagoon in the Chatham Islands.

[35] The "marine and coastal area" is defined under s 9 as:

(a) … the area that is bounded,—

(i) on the landward side, by the line of mean high-water springs; and

(ii) on the seaward side, by the outer limits of the territorial sea; and

(b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and

…

[36] The Attorney-General drew the Court's attention to a number of exclusions, identified in the meaning of "common marine and coastal area".

Specified freehold land

[37] The first exclusion is "specified freehold land". It is defined under s 9 of MACA as land that, immediately before the commencement of MACA, is Māori freehold land,[15] is Māori reservation,[16] is registered under the Land Transfer Act 2017 as being held in an estate in fee simple by a person other than the Crown or a local authority, or is subject to the Deeds Registration Act 1908 as being held in an estate in fee simple by a person other than the Crown or a local authority.

[38] As a result of the Māori freehold land and Māori reservation exceptions, two sites contained in the application area are not a part of the common marine and coastal area. The first is the Kakepō tauranga waka site which is currently held by the Te Ariuru Marae Trustees. It is Māori freehold land and set apart as a Māori reservation by the Māori Land Court under the Te Ture Whenua Māori Act 1993. The reservation has been gazetted. As Māori freehold land, it is exempt from the common marine and coastal area. In addition, the part set aside as a Māori reservation is also above the

15 As defined under Te Ture Whenua Māori Act 1993, s 4.
16 As defined under Te Ture Whenua Māori Act, s 4.

mean high water mark, which is another reason why it is excluded from the common marine and coastal area. Thus, CMT and PCR cannot be recognised over any part of the Kakepō tauranga waka site.

[39] Second, the Waimahuru Bay Scenic Reserve, being an estate in fee simple, has been vested in Te Runanga o Ngāti Porou to be administered as a scenic reserve.[17] Again, it comes within the definition of specified freehold land and is exempt from the common marine and coastal area. It too does not go below mean high water mark. Thus, CMT and PCR cannot be recognised over any part of the Waimahuru Bay Scenic Reserve.

Reserves, conservation land and roads

[40] There are no conservation areas managed by the Conservation Act 1987 within the application area and nor are there any reserves under the Reserves Act 1997 within the application area.

[41] CMT and PCRs cannot be recognised over roads.[18] Although roads abutting the common marine and coastal area may be relevant to the s 58 tests, as the Attorney-General notes, it does not appear that there are any roads within the application area nor abutting it.

Rivers

[42] The "marine and coastal area" includes the beds of rivers that are part of the "coastal marine area" as defined in the Resource Management Act 1991 (RMA). Section 2(1) of the RMA defines the landward boundary for the marine and coastal area as the line of the mean high water springs, except for where that line crosses a river. In the case where the landward boundary crosses a river, the boundary shall be the lesser one of: one kilometre upstream from the mouth of the river; or the point upstream that is calculated by multiplying the width of the river mouth by five.

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17 Ngāti Porou Claims Settlement Act 2012, s 16(9).
18 Marine and Coastal Area (Takutai Moana) Act, s 14.

[43] A mouth of a river is defined either by agreement amongst the Minister of Conservation, the Regional Council, and the appropriate territorial authority or as declared by the Environment Court.[19]

[44] Mr Richard Jennings, an expert cartographer called by the Attorney-General, presented evidence of a landward boundary of the common marine and coastal area at the mouth of the Mangahauini river in Tokomaru Bay. Mr Jennings, however, identified a discrepancy in the data from the Gisborne District Council, which provided for two different locations of the Mangahauini river mouth.[20] Although there is a discrepancy, it is not material to the arguments advanced by Ngā Hapū nor Te Whānau. As the Attorney-General accepts, the precise landward boundary at the Mangahauini river mouth may be determined as part of finalising the detail of any order with surveyor assistance at the Stage Two hearing.

The boundary dispute

[45] At the hearing, there was an issue over the boundary between the two hapū. Given the claimants' agreement post the hearing, I understand that this is no longer an issue for this Court. The issue arose as part of Te Whānau's application over the southern Tokomaru Bay area. Te Whānau claims there has been a well-known boundary between the two hapū at the Waitakeo Stream. That boundary was recognised in the Native Land Court hearings in 1897–1900 and was incorporated and recorded in the Huiteananui Fisheries Management Plan.

[46] In any event, the decision as to whether the two hapū are autonomous and recognise a boundary at the Waitakeo Stream is a matter which should be resolved not by the Court but by well-informed, and well-advertised tikanga based Māori hui on their respective Tokomaru Bay marae, as Dr Joseph proposes.

[47] Similarly, the issue of the entity or person designated to hold any CMT title jointly, if granted, on behalf of the two hapū is to be a matter to be agreed by the two

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19 Resource Management Act, s 310.

20 There is a difference in data held by the Gisborne District Council between the Council's online mapping tool and the co-ordinates of the 12 May 1994 agreement with the Minister of Conservation.

claimant groups under their mediated agreement. This should be done before the Stage Two hearing.

PART II – REPRESENTATION OF CLAIMANTS

[48] As noted, a significant issue in these proceedings was validity of representation of the hapū interests. Specifically, which claimant group had the authority to represent the hapū Te Whānau a Ruataupare and whether Ngā Hapū had that right. The pūkenga gave advice on the most appropriate way to resolve the dispute in a tikanga Māori way. I set his advice out below.

The pūkenga advice

[49] Dr Joseph was asked by the parties to address the problem of representation in applying tikanga, by the following agreed questions:

> …
>
> d. Can the conflicts in the whakapapa ancestry and the mana of the two applicant groups be reconciled with tikanga Māori to assist with resolving the issue of representation of the two applicant groups?
>
> e. If not, what is the appropriate tikanga Māori to be observed and/or applied in relation to the representation of the applicant groups?
>
> …

[50] Dr Robert Joseph, who listened to the evidence on representation, considered both applicants were in breach of tikanga. He gave the parties, and this Court, expert advice by way of report and oral evidence, on how the representation of hapū interests should be resolved in accordance with tikanga Māori process and protocols. His report is attached at Appendix 16.

[51] He addressed directly how the conflicts in the whakapapa ancestry, and the mana of the two applicants, could be reconciled with tikanga Māori processes to assist with resolving the issue of representation of the two applicants. He said:[21]

> Whether the conflicts in the whakapapa ancestry and the mana of the two applicant groups can be reconciled with tikanga Māori to assist with resolving the issue of representation is fully dependent upon the political will of the two applicant groups agreeing to abide by tikanga Māori, such as the tikanga institutions of hohou i te rongo and he tatau pounamu, and the tikanga concept of ea.

[52] Dr Joseph then proposed a framework for applying tikanga to the representation dispute:[22]

> To appropriately resolve the current disputes between Te Whānau a Ruataupare ki Tokomaru and Te Whānau a Te Aotāwarirangi under tikanga Māori is for them to go back and engage civilly in a number of well-advertised, well informed and well organised tikanga Māori based hui through decision-making processes by consensus on their respective Tokomaru Bay marae. Mana rangatira facilitating consensus-based discussions along with majority-based voting are the only viable processes for reconciling the tribal differences and historic mamae between the claimant groups.

[53] By reference to history of resolving conflicts in a tikanga appropriate way, and by reference to evidence in this proceeding, Dr Joseph sets out how ea, or peace, may ensue after conflict:[23]

> Tikanga Māori then is about what is appropriate human conduct in accordance with the tāhuhu values and principles noted above of Māori groupings for their circumstances at a particular point in time. Tikanga Māori then must be understood in context and will draw on precedents and the right and wrong actions of tūpuna (ancestors) to determine appropriate action.
>
> …
>
> By entering into tikanga Māori institutions such as he tatau pounamu and hohou i te rongo kawenata (agreements), conflict is ended and ea or peace ensues. Ea is a traditional socio-legal concept of having brought a process or series of transactions or past grievances to completion, to have avenged, reconciled differences, requited, satisfied or paid for past debts or grievances.[24] The state of ea achieves balance.

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21 Robert Joseph *Pūkenga report* (6 October 2022) at [49].
22 At [91].
23 At [29] and [61]–[62].
24 Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Herenga Waka Victoria University Press, Wellington, 2013) at 58.

> Hence the conflicts in the whakapapa ancestry and the mana of the two applicant groups can be reconciled with resolving the issue of representation through tikanga Māori institutions such as hohou i te rongo and he tatau pounamu, and the tikanga concept of ea can be achieved but they are fully dependent upon the political will of the two applicant groups agreeing to abide by tikanga Māori.

[54] Dr Joseph supported the suggestion of the Attorney-General that the applications could be amended to define the applicant group at a broader level, but such amendment must be done by agreement of the applicants. Dr Joseph urged the two applicant groups to resolve their differences on the marae in accordance with tikanga Māori practice.

Post-hearing agreement

[55] At the conclusion of the hearing, the Court also urged the applicants to attend mediation, which they did on 14 August 2023. As noted, by joint memorandum dated 29 August 2023, counsel for the applicants provided an update to the Court and all parties.[25] It records that at mediation, the applicants agreed that the two hapū, "both Te Whānau a Ruataupare and Te Whānau a Te Aotāwarirangi jointly hold and exclusively used and occupied (together) Tokomaru Bay, that being the coastal area from Waimahuru south to Te Māwhai." It was also agreed that, if the Court made joint orders for CMT and PCRs, a new entity would be established to represent the two hapū and hold CMT on behalf of the two hapū. There was agreement in principle about the nature of such an entity.

[56] Without such agreement, the Court was faced with overlapping claims. The Court of Appeal, in *Re Edwards* (CA), unanimously concluded that overlapping claims are inconsistent with the scheme of MACA.[26] The Court agreed that such an outcome would be unworkable. The Court was divided, however, on whether there can be a grant of recognition of a shared CMT, where neither group acknowledges the rights of the other.[27] The majority held that the Court can appoint a person to hold CMT for the group until a resolution can be reached in accordance with tikanga.[28]

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25 Joint memorandum of counsel updating the Court regarding mediation and applications for Tokomaru Bay dated 29 August 2023.

26 *Re Edwards* (CA), above n 1, at [208]–[209] per Miller J and [439] per Cooper P and Goddard J.

27 At [205] per Miller J dissenting and [440] per Cooper P and Goddard J.

28 At [442] per Cooper P and Goddard J.

[57] As a result of the applicants' mediated agreement here, the problem has been resolved. Both applicants have agreed that, if CMT is granted, the two hapū can jointly hold CMT in the area from Waimahuru South to Te Māwhai by way of a new entity yet to be established. The agreement enables the Court to consider shared exclusivity, based on the claims of the two hapū applicants, to exclusive use and occupation of areas held in accordance with tikanga. As Miller J observes, a joint application may succeed if they can show they together hold the area to the exclusion of others.[29] However, on the current applications, there is still a need for clarification of representation and the area claimed by each of the current applicants.

The current applications

[58] In their joint memorandum following the mediation, counsel for the applicants considered that the agreed basis for holding a joint CMT could be made on the original applications but awaited the Court's direction on whether amended applications were required. I directed the claimants to file amended applications to reflect the mediated agreement.

[59] Te Whānau filed an amended application, in which it seeks joint CMT with Te Whanau a Te Aotāwarirangi for the southern area of Tokomaru Bay (south of Waitakeo stream) only. The application does not however claim shared CMT north of Waitakeo. Counsel for Te Whānau explains in the supplementary submission that Te Whānau considers they have met the relevant test on the evidence adduced at the hearing, notwithstanding the agreement to jointly hold the entire specified area with Te Whānau a Te Aotāwarirangi.

[60] Te Whānau a Ruataupare's evidence focussed on the area from Te Māwhai Point to the Waitakeo Stream as the stronghold and rohe of the hapū, where they assert the exercise of customary and tikanga practices. It appears that in wanting to ensure their amended application was consistent with the evidence they had adduced, Te Whānau made no further amendment to include their agreed joint interests in the area.

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[29] At [208] per Miller J.

[61] Ngā Hapū has not filed an amended application but relies on its August 2022 application because it considers that its application reflects the mediated agreement.[30] The application was made for the whole of the specified area (north and south) on the basis that the applicant entity represented both hapū.

[62] The Attorney-General correctly highlights the inconsistencies in the current applications. Dr Ward submits that the mediated agreement provides that both hapū have interests in the area north and south of Waitakeo and there are two claimants purporting to represent Te Whānau a Ruataupare. In the absence of clarification over the representation issue, the Attorney-General suggested that the Court should approach the application for recognition orders by focusing on the rights of the *two hapū* and determine whether the *two hapū* have met the relevant test for joint CMT in the area specified in the mediation agreement. I consider that is appropriate.

Inconsistencies in current applications

[63] To assist the claimants, I set out the three matters arising from the mediation agreement, which require clarification. The first is the area claimed. The agreement specifies the application area to be from Waimahuru south to Te Māwhai. The northern point in the original application is Koutunui Head. Waimahuru Bay is north of Tokomaru Bay and just south of Koutunui Head and north of Koutunui Point. The defining boundaries and survey points of the area will need to be clarified.

[64] The second issue arising in respect of the specific area, is that Ngā Hapū seeks CMT and PCRs, in respect of the area north and south of Waitakeo, whereas Te Whānau a Ruataupare seeks CMT for the area south of the Waitakeo Stream. Even on the amended application, Te Whānau seeks the same southern area, despite the joint agreement to jointly hold and share the area north of Waitakeo.

[65] Third, and most significantly, remains the issue of representation. The Court of Appeal in *Re Edwards* (CA) reinforced that the applicant must have the authority to seek an order on a group's behalf. Unanimously, the Court held it was implicit in s 101 of the Act, and the definition of "applicant group", that the applicant has the authority

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30 This application is discussed at [13]–[15] of this judgment.

to seek an order on behalf of an applicant group. The Court reinforced that the applicant will need to be satisfied that they do represent the applicant group in the event of any controversy.[31] The representation of Te Whānau a Ruataupare, must therefore be resolved before final orders are made, as the current applications describe both Ngā Hapū and Te Whānau as representing the hapū Te Whānau a Ruataupare

[66] During the hearing a substantial amount of evidence had canvassed the meetings that were held to select the representatives of the two hapū to make the current application on behalf of Ngā Hapū. I have not traversed the evidence on how the representatives for Te Whānau were appointed by Ngā Hapū or the detail concerning the various meetings. The history of the process is now redundant as the parties have mediated an agreement that the grant of recognition orders can be held by the two hapū jointly. This is a welcome outcome, and the parties are to be commended for engaging with the mediation process.

[67] I accept that there may have been an oversight or misunderstanding by counsel about the effect of amendment on their respective applications. If so, they should be given an opportunity to clarify and amend the applications to reflect the mediated agreement. If there has not been a misunderstanding, any final resolution of the representation issue, if outstanding, should follow the pūkenga's advice and be achieved following a tikanga-consistent process.

[68] For the above reasons I accept the Attorney-General's proposal that the Court should focus on the rights and interests of the two hapū, as a practical way of dealing with the substantive issues.

Conclusion

[69] I consider the appropriate course is for the Court to determine whether the two hapū have satisfied the relevant test for CMT. In the absence of any agreement on which applicant group represents the hapū Te Whānau a Ruataupare, the representation issue remains unresolved. It will need to be addressed before final orders are made, as the Court must be satisfied that the holder of the CMT represents the applicant

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31 *Re Edwards* (CA), above n 1, at [203(b)] per Miller J and [360] per Cooper P and Goddard J.

group.[32] Such an approach is consistent with *Re Edwards*, where the majority held that the Court can grant recognition of CMT, where both jointly or severally meet the s 58 test.[33]

PART III – LEGISLATIVE FRAMEWORK

An overview

[70] Since the hearing, the Court of Appeal's decision in *Re Edwards* delivered the first substantive judgment on the MACA legislation. The legislative history of MACA is detailed in Miller J's judgment,[34] with which the majority agree.

[71] In summary, the Court of Appeal's decision in *Ngāti Apa v Attorney-General*, which held that the Māori Land Court had jurisdiction to determine customary ownership of the foreshore and seabed,[35] triggered the enactment of the Foreshore and Seabed Act 2004. The Foreshore and Seabed Act vested ownership of the foreshore and seabed in the Crown, preventing the recognition of Māori customary ownership. This caused controversy and the Foreshore and Seabed Act was repealed and eventually was replaced by MACA.

[72] The preamble to MACA, in addition to reciting an abridged summary of the steps to the enactment of the Act, concludes by stating:

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

[73] Thus, as the Court of Appeal confirmed in *Re Edwards*, MACA introduces a statutory regime for the recognition of customary interests but also protects the legitimate interests of all New Zealanders in the marine and coastal area. It accords special status to the common marine and coastal area such that no one, including the Crown, owns or is capable of owning it and thus has a status that is fundamentally

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32 At [203(b)] and [275] per Miller J and [360] per Cooper P and Goddard J.
33 At [441]–[442] per Cooper P and Goddard J.
34 At [39]–[60] per Miller J.
35 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

different from the common law.[36] Specifically, the special status does not affect the recognition of customary interests or any lawful use of any part of the common marine and coastal area.[37]

[74] As the majority in *Re Edwards* observed, the purpose statement in s 4 of MACA is central to the interpretation of s 58.[38] The recognition of Māori customary rights, and the rights of all New Zealanders, in the common marine and costal area is furthered in the four purposes of MACA:[39]

> **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 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).

[75] There are two other sections that are relevant to the determination of the rights granted under MACA. First, under s 6(1), customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and "given legal expression in accordance with [the] Act". As noted in the other authorities, the rights conferred by MACA are "much narrower and more limited than the customary title and rights that Māori would have enjoyed and exercised in the foreshore and seabed as at 1840".[40]

[76] Second, s 7 sets out the three rights that are provided for under MACA:

> In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—

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36 Marine and Coastal Area (Takutai Moana) Act, s 11.
37 Sections 11(5)(a) and 11(5)(b).
38 *Re Edwards* (CA), above n 1, at [381] per Cooper P and Goddard J.
39 Note that no priority is attached to any single purpose in particular.
40 *Re Edwards (No.2)*, above n 10, at [33].

(a) … for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and

(b) … for customary rights to be recognised and protected; and

(c) … for customary marine title to be recognised and exercised.

[79] The majority of the Court of Appeal in *Re Edwards* identified the consistent theme of these provisions: [41]

> … MACA is intended to restore customary interests in the common marine and coastal area that were extinguished by [the Foreshore and Seabed Act]. Those interests are to be "given legal expression" in accordance with MACA … Section 7 makes the link with the Treaty of Waitangi: MACA recognises and promotes the exercise of customary interests of Māori in the common marine and coastal area "in order to take account of the treaty of Waitangi". It does so by providing, among other things, for PCRs to be recognised and protected and for CMT to be recognised and exercised.

[80] The statutory entitlements are subject to a number of express limits. The majority in *Re Edwards* defined the limits as twofold. First, none of the statutory entitlements amounts to ownership of any area of the common marine and coastal area.[42] This, however, does not affect the recognition of customary interests, so a group that holds a PCR or CMT does not own the area in question but has a bundle of rights and interests described in MACA.

[81] Second, MACA provides for the public to have certain rights in relation to the common marine and coastal area, even if that area is subject to a CMT. Those rights include rights of access,[43] rights of navigation (including temporary anchoring and grounding),[44] and rights of fishing.[45] Thus, a holder of CMT does not have many of the rights that are commonly associated with ownership of land.[46] Short of ownership, a CMT provides an interest in land. It does not include a right to alienate or otherwise dispose of any part of a CMT area.[47]

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41 Marine and Coastal Area (Takutai Moana) Act, s 6(1); and *Re Edwards* (CA), above n 1, at [384] per Cooper P and Goddard J.

42 Marine and Coastal Area (Takutai Moana) Act, s 11(2) states that "neither the Crown nor any other persons owns, or is capable of owning, the common marine and coastal area"; and see *Re Edwards* (CA), above n 1, at [386] per Cooper P and Goddard J.

43 Marine and Costal Area (Takutai Moana) Act, s 26.

44 Section 27.

45 Section 28.

46 *R Edwards* (CA), above n 1, at [387] per Cooper P and Goddard J.

47 Marine and Coastal Area (Takutai Moana) Act, s 60(1)(a).

[82] Despite CMT not being an ownership right, it is nevertheless a non-alienable interest in land and the most extensive form of statutory right provided for under MACA.[48] It is a territorial right, not merely a usage right. Under s 62(1) of MACA, the following rights are conferred, and may be exercised under, a CMT order:

(a) a RMA permission right for controlled activities;

(b) a conservation permission right;

(c) a right to protect wāhi tapu and wāhi tapu areas;

(d) rights in relation to marine mammal watching permits;

(e) rights in relation to the process for preparing or changing a New Zealand coastal policy statement;

(f) prima facie ownership of newly found taonga tūturu;

(g) ownership of certain minerals;

(h) and the right to create a planning document.

[83] A PCR is a right that has been exercised in a particular area since 1840 and continues to be exercised in a part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same way, or a similar way that it evolves over time, and has not been extinguished as a matter of law.[49]

[84] Importantly, a PCR does not include any activity that is regulated under the Fisheries Act 1996, is a commercial aquaculture activity, or involves the exercise of any commercial or non-commercial Māori fishing right or interest under s 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[50]

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48 *Re Edwards* (CA), above n 1, at [134] per Miller J and [391] per Cooper P and Goddard J, citing Marine and Coastal Area (Takutai Moana) Act, s 60(1).

49 Marine and Coastal Area (Takutai Moana) Act, s 51(1).

50 Section 51(2).

[85] Tikanga Māori is integral to both the tests for CMT and PCRs. It is also a part of New Zealand's legal framework. Tikanga is defined by s 9 of MACA as "Māori customary values and practices". It is not for this Court to determine or define the tikanga of the applicants.

[86] Tikanga plays a pivotal role in MACA, particularly in respect to the first limb of the test for CMT under s 58(1)(a), where the Court must assess whether the applicant group "holds the specified area in accordance with tikanga". Similarly, under the second limb of the test for PCRs in s 51(1)(b), the Court must consider whether the right continues to be exercised "in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way or evolves over time".

[87] Tikanga also informs the interpretation of other provisions of MACA. Tikanga and its application to the legal tests under MACA are described in more detail in Parts IV and V and in the application of the tests for CMT and PCRs in Part VII.

The legal tests for CMT

[88] The Court of Appeal in *Re Edwards* canvassed the legal tests to be applied for CMT under s 58(1) and, in particular, the requirements of exclusive use and occupation. But, the Court was divided on the interpretation of the statutory language. Both interpretations deserve careful consideration in the assessment of the evidence in this case.

[89] In this section, I canvass the relevant CMT sections, the effect of the Court of Appeal's majority and minority decisions in *Re Edwards* on determining CMT applications, and the framework I propose to adopt in applying the Court of Appeal's findings and analysis to these CMT applications in Tokomaru Bay.

Section 58 MACA

[90] Section 58 of MACA governs applications for CMT. As its provisions are the predominant focus of these applications, I set it out in full:

> **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; or
>
> (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).
>
> (2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between–
>
> (a) the commencement of this Act, and
>
> (b) the effective date.
>
> …
>
> (4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

[91] Importantly, s 59 identifies relevant matters to be considered when determining whether CMT exists in a specified area of the common marine and coastal area. Of particular relevance is the consideration of the applicant groups' ownership of land abutting the specified area since 1840 to the present day,[51] and the exemption of use by the public for fishing or navigation:[52]

> **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—

[51] Section 59(1)(a).
[52] Section 59(3).

(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.

(2) To avoid doubt, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does not limit subsection (1)(a)(ii).

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

(4) For the purpose of subsection (1)(a)(i), land abutting all or part of the specified area means—

(a) land that directly abuts the specified area; or

(b) land that does not directly abut the specified area, but does directly abut any of the following:

(i) a marginal strip (as defined in section 2(1) of the Conservation Act 1987) that directly abuts the specified area:

(ii) an esplanade reserve (as defined in section 11 of the Natural and Built Environment Act 2023), but only to the extent that it directly abuts the specified area:

(iii) a reserve (as defined in section 2(1) of the Reserves Act 1977), but only to the extent that it directly abuts the specified area:

(iv) a Māori reservation (as defined in section 2(1) of the Reserves Act 1977) that directly abuts the specified area:

(v) a road that directly abuts the specified area:

...

The Court of Appeal findings in *Re Edwards*

[92] The Court of Appeal was divided in two respects: first, the legislative requirements to prove exclusivity of use and occupation of the application area; and second, how to deal with shared exclusivity in the absence of the applicants' agreement. I set out the Court's findings in relation to the legal requirements for the tests under s 58(1) of MACA.

First limb — holds the specified area in accordance with tikanga Māori

[93] The first limb of s 58(1) requires the applicant group to show that it holds the specified area in accordance with tikanga. Noting that this requirement appears to reflect the definition of "Māori customary land" in s 129(2)(a) of Te Ture Whenua Māori Act, under s 129(2)(a), the majority Court cited the Māori Land Court's observation that "the important word here is 'held'. There is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Māori."[53] The Court was unanimous in finding that the focus should be on tikanga.[54]

[94] In interpreting and applying the first limb, the majority said the focus should be on tikanga, and whether as a matter of tikanga the applicant group holds the relevant area. They considered that evidence of activities that showed *control* or *authority* over the area, as opposed to simply carrying out a particular activity in that area, will be of particular relevance in distinguishing a "*holding*" of the area from the *use* of the area to gather a particular resource.[55] The Court noted that this is a contemporary inquiry with the term "holds" being in the present tense. Thus, they reasoned, the applicant group must currently use and occupy the area, in a manner consistent with the nature of that area, and must have control or authority over the area according to tikanga.

[95] The majority applied a tikanga lens to the Canadian test of a group's "intention and ability" to exclude others from land as follows:[56]

> However in the context of Māori customary relationships with land, and the principles of whanaungatanga and manaakitanga, we consider it is more helpful to focus on the group's intention and ability to control access to an area, and the use of resources within it, *as a matter of tikanga.* Permitting others to access the area and to use resources within it, as an expression of manaakitanga, is not inconsistent with control: rather, it demonstrates the exercise of authority in respect of the relevant area … The fact that permission is invariably granted, in particular to whanaunga (relatives) and others with whom there are reciprocal relationships, does not call into question the group's control of the area. Rather, it is a manifestation of that control.

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53 *Re Edwards* (CA), above n 1, at [140] per Miller J and [397] per Cooper P and Goddard J citing *da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212 (25 TTK 212) at 217.

54 At [140] per Miller J and [401] per Cooper P and Goddard J.

55 At [401] per Cooper P and Goddard J.

56 At [403] per Cooper P and Goddard J.

[96] The majority concluded that an applicant group must have had the intention and ability as a matter of tikanga to *control access* to the relevant area by other groups. In this way there is a distinction between the areas *held* by the group at that time from areas in respect of which the group could assert specific resource rights but did not otherwise control the use of the area. The majority cautioned that *the use by* a group of a particular resource in a specified area, coupled with an intention and ability to control the use of that resource by others, is not sufficient to establish that the area is held by that group in accordance with tikanga.[57]

[97] Miller J reinforced that identification of tikanga is the first step in the process. He said that whether an applicant *holds* the specified area in accordance with tikanga, requires evidence of the local area concerned, with activities that show *control* or *authority* over the area, as opposed to simply carrying out a particular activity, such as gathering a particular resource:

> [141] The group's use and occupation must be exclusive. That is … a high standard. It is not synonymous with possession at common law, but it is concerned with the intention and ability to exclude others from the specified area. This distinguishes areas *held* by the group at that time from areas in respect of which the group held only specific resource rights. Use rights which are not accompanied by territorial control cannot sustain CMT.

[98] Although he used a more stringent test than the majority, I consider it is important to set out Miller J's approach, as it is relevant to the application area in Tokomaru Bay given the evidence that the Court heard: [58]

> [142] The court must further inquire into the group's past use and occupation, asking whether exclusivity has been continuous from 1840 to the present day. Any interruption during that period must have been substantial if it is to defeat the group's claim to continuity of use and occupation. Resource consents granted between MACA's commencement and its effective date are deemed not to amount to substantial interruption (by implication, other resource consents may do so).
>
> [143] When deciding whether CMT exists in a specified area, relevant considerations include ownership by the applicant group or any of its members of abutting land without substantial interruption since 1840, and the exercise of non-commercial customary fishing rights in the area since 1840. Use of the area by others, not being members of the applicant group, of a specified area for fishing or navigation does not, of itself, preclude the applicant group from establishing CMT; that is to say, such activities do not mean, of themselves,

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57 At [404] per Cooper P and Goddard J.

58 Footnote omitted.

> that the area is not held in accordance with tikanga or that the applicant group's exclusive use and occupation has been substantially interrupted.

[99] It can be seen from the above that both judgments require elements of territorial control and authority to meet the requirement in the first limb of "holds" a relevant area in accordance with tikanga. Miller J considered that s 58(1) established "a composite test" with the same elements required for "holds" as required for exclusive use and occupation,[59] which is the second limb of s 58(1). I set out each of the respective considerations of the judgments under the second limb.

Second limb — use and occupation

[100] The starting point, the majority held, in analysing whether the requirements of s 58(1)(b) have been met is to consider the situation that existed prior to the Proclamation of British Sovereignty in 1840.[60] Customary rights must have existed as at 1840 and the applicant group must be the successor of the group that exercised those rights:

> [419] The requirement that the applicant group *has used* and *occupied* the area from *1840 to the present day* emphasises the need to trace the relevant customary rights back to 1840, before the British proclamation of sovereignty. The customary rights must have existed as at 1840, and the applicant group must be (or be the successor of) the group that exercised those rights at that time.

[101] The majority distinguished "use" rights from a group's ability to "hold" an area, and linked such "control" of an area with exclusive use and occupation when they said:

> [421] As discussed above, the applicant group must have had the intention and ability as a matter of tikanga to control access to the relevant area by other groups. This distinguishes areas *held* by the group at that time from areas in respect of which the group could assert specific resource rights, but did not otherwise control the use of the area, especially where other groups also independently used the area or accessed other resources in that area. The group could not be said to exclusively use and occupy the area in such circumstances.

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59 *Re Edwards* (CA), above n 1, at [145] per Miller J.

60 At [419] per Cooper P and Goddard J.

[102] Helpfully, the majority concludes that there must be *a strong presence* in the area, manifesting itself in acts of occupation demonstrating the area belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.[61]

[103] This, they said, is not defeated by access from other Māori groups:

> [424] The ability of a group to meet this requirement will not necessarily be defeated by evidence of access to the area and use of resources in that area by other Māori groups. Full account will need to be taken of the core tikanga values of whanaungatanga and manaakitanga in order to understand the basis on which other groups were present in the area. As we explained above in relation to the first limb, where a group permits access by other groups to its land and to its resources, that will reflect the exercise of its mana/control in respect of that land, and (as a result) supports rather than undermines a claim to CMT.

[104] It is plain that evidence of assertions of control needs to be assessed "in the round" and are context specific. The Court, therefore, needs to have regard to the context in which the claim is brought, a consideration of the applicants' tikanga, and the additional features of the geographical landscape, remoteness, and environmental factors. Nor should the Court overlook the tikanga Māori concept of ahi kā roa, being the long burning fires, symbolising occupation or similar concepts such as hau kainga, which may be relevant to assessing interruption to use and occupation. The involvement of the applicants in Resource Management Act decisions and their ownership or control of land abutting the foreshore since 1840 are also relevant.

Second limb — exclusivity and substantial interruption

[105] The majority rejected a literal interpretation of the words "exclusivity" and "substantial interruption" as those interpretations would be inconsistent with the Treaty/Te Tiriti, the assurances given in the Government's 2010 consultation document that preceded MACA, and the purposes of MACA set out in s 4 — recognising mana tuku iho in the marine and coastal area and providing for the exercise of the customary interests in the common marine and coastal area. Further, they said, it would be inconsistent with s 7 of MACA, which recognises and promotes the exercise of customary rights in order to take account of the Treaty/Te Tiriti.

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61 At [422] per Cooper P and Goddard J.

[106] The majority accepted the Attorney-General's submission that CMT is a territorial interest in an area and concluded that it was possible to interpret the text of s 58 in a manner that is consistent with the purpose of MACA by reading it in a manner that is sensitive to the materially different legal frameworks that applied before the Proclamation of Sovereignty in 1840 and of British Sovereignty onwards.[62]

[107] The majority nevertheless addressed the relevant considerations to a determination of whether a group has exclusive use and occupation of an area without substantial interruption. They said:

> [426] The requirement that a group must have exclusively used and occupied the area from the proclamation of British sovereignty to the present day, without substantial interruption, needs to be approached having regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga, and having regard to the scheme and purpose of MACA. Relevant factors include:
>
> (a) The nature of the customary rights in issue, which in many cases will have been consistent with access by others to the area …
>
> (b) The frequent and generous exercise of manaakitanga by whānau, hapū and iwi in favour of other Māori groups, and in favour of European settlers. …
>
> (c) The Crown's promise, contained in art 2 of the Treaty/te Tiriti, that Māori would continue to enjoy the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties. …
>
> (d) The Crown's arrogation to itself of the power to control access to customary lands, by prohibiting (in the exercise of kāwanatanga) the use of force to prevent incursions into an area controlled by a relevant group, and (from 1909 onwards by preventing customary owners from bringing their own proceedings in the courts to prevent unauthorised access to their customary land. …
>
> (e) The longstanding and widely held (but incorrect) view that there could be no customary rights or interests in the common marine and coastal area, ultimately dispelled by this Court's decision in *Ngāti Apa*. …
>
> (f) The express provision in s 59(3) of MACA that use at any time by persons who are not members of an applicant group of a specified area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of CMT. … This confirms that activities engaged in by third parties in coastal areas, whether as a result of manaakitanga on the part of relevant groups or as a result of Anglocentric assumptions on the part of those third parties about their

[62] At [417]–[418] per Cooper P and Goddard J.

> right to do so that Māori were unable to resist, should not be seen as relevant interruptions of the customary rights that found CMT.

[108] The Court then considered what the applicant had to prove for CMT by addressing the burden of proof.

Burden of proof

[109] MACA makes specific provision for the burden of proof for CMT. Under s 106(2), the applicant group has the burden of proving that the specified area:

> (a) is held in accordance with tikanga; and
>
> (b) has been used and occupied by the applicant group, either—
>
> (i) from 1840 to the present day; or
>
> (ii) from the time of a customary transfer to the present day.
>
> (c) in the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

[110] Miller J found that s 106 does not specify that the applicant group must prove that its use and occupation since 1840 has been exclusive. As he observed, nor does the section specify who is to prove absence of substantial interruption, both of which were statutory requirements under s 58(1).[63] He considered, however, that exclusivity of use and occupation requires both an intention and capacity to control the area:

> [162] In my view exclusivity of use and occupation requires both an externally-manifested intention to control the area as against other groups and the capacity to do so. Exclusivity is a question of fact, heavily dependent on the characteristics of the specified area, the kinds, frequency and intensity of use, and the circumstances of claimant groups. The inquiry must be sensitive to the methods that were and are available to assert mana. It must also be sensitive to the practice of whanaungatanga and the existence of whakapapa linkages which mean that other groups may not have been physically excluded from the specified area but rather used its resources with permission of the applicant group.

[111] However, Miller J reinforced that Māori groups have not lost exclusive use and occupation because they cannot in law prevent public access to the area for purpose of recreation, fishing and navigation.[64]

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63 At [224] per Miller J.

64 Footnotes omitted.

> [163] It should not be assumed that exclusivity has everywhere been lost, for two reasons. First, the mere existence and exercise of public rights secured under MACA is not inconsistent with exclusivity; put another way, Māori groups have not lost exclusive use and occupation merely because they cannot in law prevent public access to and use of the common marine and coastal area for purposes of recreation, fishing and navigation.

[112] As Miller J explained, although the words "exclusively" and "without substantial interruption" in s 58(1)(b)(i) are omitted from s 106(2)(b), exclusivity is intimately connected with the requirement that the applicant group has held the area in accordance with tikanga since 1840.[65] He observed that mana tuku iho incorporates the intention and ability to exclude others according to the dictates of tikanga and deduces that MACA assumes that as a matter of fact that applicant groups may have enjoyed exclusive use and occupation of the common marine and coastal area before 1840.[66]

[113] The majority differed in their interpretation of s 106. They held that the burden of proof on the applicants is prove the elements of the test for CMT specified in s 106(2) of MACA only — without having to prove exclusivity of occupation and use. Thus, to satisfy the burden of proof, an applicant group must call evidence to satisfy the Court that:[67]

> (a) The specified area is currently held by that group in accordance with tikanga. That is, the group will need to show that as a matter of tikanga it has the authority to use and occupy the area, and control access to and use of that area by others.
>
> (b) The use and occupation of the area by that group has been continuous from 1840 to the present day (allowing for tuku, and for changes in composition and identities of customary groups.

[114] To prove the contrary, that the inference under the s 58 test is not met, the opposing party must establish:[68]

> 1. that the customary interests of the applicant group were not sufficient to establish effective control over the relevant area as at 1840; or

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65 At [227] per Miller J.
66 At [185] per Miller J.
67 At [435] per Cooper P and Goddard J.
68 At [437] per Cooper P and Goddard J.

2. after 1840, the applicant groups customary interests ceased to have the "necessary character" and

3. the applicant groups effective control over the relevant area was substantially interrupted after 1840.

[115] The majority concluded that if the matters specified under s 106(2) are established by the applicant, the Court is entitled to infer the other requirements of s 58, namely "exclusively" and "without substantial interruption" are satisfied unless a party alleges and establishes the contrary.[69]

Ingredients of CMT test

[116] In summary, the majority of the Court of Appeal in *Re Edwards* found that "the best available reading of s 58, which respects its text and its purpose," is to require the applicants to prove:[70]

(a) that the applicant group currently holds the relevant area as a matter of tikanga.

(b) that in 1840 prior to the proclamation of British Sovereignty, the group (or its tikanga predecessor(s)) used and occupied the area, and had sufficient control over that area to exclude others if they wished to do so. This inquiry essentially parallels the inquiry required by common law to establish customary title as at 1840.

(c) Whether post-1840 that use and occupation ceased or was interrupted because the group's connection with the area and control over it was lost as a matter of tikanga, or was substantially interrupted by lawful activities carried on in the area pursuant to statutory authority.

[117] The majority held that in order to meet the test of s 58, an applicant group will need to call evidence to satisfy the Court that:[71]

(a) The specified area is currently held by that group in accordance with tikanga. That is, the group will need to show that as a matter of tikanga it has the authority to use and occupy the area, and to control access to and use of that area by others.

(b) The use and occupation of the area by that group has been continuous from 1840 to the present day (allowing for tuku, and for changes in composition and identities of customary groups).

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69 At [437] per Cooper P and Goddard J.
70 At [434] per Cooper P and Goddard J.
71 At [435] per Cooper P and Goddard J.

[118] The majority said further, that such evidence:[72]

> … will be sufficient for the Court to draw an inference that the s 58 test is met, unless some other party takes it on themselves to demonstrate that the customary interests of the applicant group were not sufficient to establish effective control over the relevant area as at 1840, or have ceased to have the necessary character or been substantially interrupted after 1840…

[119] I propose to adopt the following approach to the CMT test and analysis of the evidence adduced at the hearing. Adopting the majority approach in the Court of Appeal but incorporating Miller J's considerations of exclusivity,[73] I adopt the two limb test, with the second limb comprising four parts. My approach is as follows:

First limb

(i) Do the applicant groups currently hold the relevant area in accordance with tikanga?

Second limb

(i) In 1840, did the applicants (or their tīpuna) use and occupy the area to exclude others if they wished to do so?

(ii) Post-1840 to the present time, did the applicants maintain the use and occupation of the area?

(iii) If so, did the applicants have exclusive use and occupation, by maintaining territorial control over that area as a matter of tikanga?

(iv) Was there substantial interruption of the applicants' exclusive use and occupation by lawful activities carried on in the area under statutory authority or was the exclusivity lost as a matter of tikanga?

[120] The first step is to identify the concepts of tikanga, mana tuku iho and the values to be applied to this application area. From the evidence in this case, a merger of the two approaches in the Court of Appeal seems appropriate in applying the

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72 At [436] per Cooper P and Goddard J.
73 At [146] per Miller J.

concepts of exclusivity and substantial interruption. Those factors are the authority to use and occupy the area, a strong presence in the takutai moana, and territorial control of access to the area as a matter of tikanga. Such control must be exercised lawfully.

PART IV: FIRST LIMB – HOLDS in accordance with TIKANGA

[121] I now assess the applications for CMT and the application of the CMT test to the evidence adduced in respect of Tokomaru Bay. This first involves a consideration of whether the applicant groups hold the relevant area in accordance with tikanga.

[122] In these proceedings, the Attorney-General submits that the term "held" contrasts with the term "exercised", which applies to PCRs in s 51(1) of MACA. I accept that submission because CMT is a territorial right, not merely a usage right as the Court of Appeal have confirmed.[74]

[123] As the Court of Appeal judgments reinforced, the applicant groups need to establish the elements of territorial control. It has to be more than just the practice of tikanga in relation to the takutai moana or use of a particular resource in the area. The applicant groups must adduce evidence of activities that show control or authority in the area, as a matter of tikanga. This evidence must be assessed with tikanga concepts such as whanauntanga and manaakitanga at the forefront of the Court's consideration. It must also be assessed in a contemporary context given the present tense of "holds" in s 58.

[124] Both the majority and minority judgments stressed that that *the use by* a group of a particular resource in a specified area, even coupled with an intention and ability to control the use of that resource by others, is not sufficient to establish that the area is held by that group in accordance with tikanga.[75]

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74 At [134] per Miller J and [391] per Cooper P and Goddard J citing Marine and Coastal Area (Takutai Moana) Act, s 60(1).

75 At [142] per Miller J and [404] per Cooper P and Goddard J.

Application of tikanga concepts to land

[125] The Court was assisted by expert evidence on the application of tikanga concepts to land and foreshore and their connection to Māori. Mr Paul Meredith, an historian, lawyer and researcher in Māori treaty claims and tikanga, was called by Te Whānau to give evidence on the integrity of tikanga. He stated that in the past, tangata whenua was the phrase applied to the local people and tribes, not mana whenua or mana moana.

[126] Of importance to claims under MACA, he drew a distinction between the effects of Western legal requirements for absolute accuracy in land description boundaries and the Māori custom of claiming an area as rohe. He describes this as follows:[76]

> The invocation of mana whenua and mana moana is in part to defend territorial rights to the exclusion of others. The confusing effects of Western legal requirements for absolute accuracy in land description boundaries have had a major impact on the delineation of tribal boundaries. This was evident in the workings of the Native Land Court and other early commissions of inquiry. Many Māori witnesses before such bodies voiced their frustration with the need for definitive boundaries. My ancestor, Ngatoko Kupe of Ngāti Taiwa, offered these instructive words to the Native Land Court during the course of a discussion into the boundaries of a land block under investigation:
>
> > According to Māori custom after a rohe is laid down, people may cross the rohe and occupy the other side providing they do not so in an aggressive spirit, that would not affect the validation of the rohe laid down.
>
> This occupation would, of course, require agreement from those already in occupation.

[127] He notes that, in some instances, some occupation and use may be expressed as kai huihui (the gathering together of food) and noho huihui (common occupation) which align with the notion of groups being allocated temporary occupation or use rights. These are distinct from mana huihui (gathering of mana), which describes instances where hapū and iwi come together and share the mana over land and resources, particularly around those lands lying contiguous to tribal boundaries where interests were more fluid than patrolled and delineated.

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[76] Footnotes omitted.

[128] Mr Meredith describes the crucial element of mana huihui as follows:

> Sharing of land and resources was often the result of strategic alliances formed through whakapapa. It could also be the result of a conflict resolution process of maungārongo or houhou ki te rongo. This demonstrated that issues of overlapping claims could be negotiated and settled where the parties were willing.
>
> The crucial element of mana huihui is that it required consent or acquiescence by all parties in the sharing arrangement. Unless there is evidence that parties agreed to share their mana, there was no mana huihui. This should be contrasted with merely sharing resources or use rights. That is not the same as sharing jurisdiction or authority over an area and together excluding others.
>
> I do want to make one point that mana huihui do not necessarily mean a convergence of identity. Indeed, it more so suggests that independent identities were maintained but there was an agreement to come together as an alliance of sorts over a particular area. Those alliances could wax and wane over time depending on relationships and personalities.

[129] As a cautionary conclusion, he urges that there is a need to maintain the integrity of tikanga. He notes that while tikanga evolves, "we need to be careful so that we don't stray so far that customary practices are no longer premised on those underlying te ao Māori values and principles described".

Tikanga values – the pūkenga report

[130] As noted above, tikanga is defined by s 9 of MACA as "Māori customary values and practices". There are a number of values that underlie tikanga Māori and these have been articulated both in writing from authorities and witnesses.[77] Drawing on both the evidence, and the scholarship on tikanga Māori, Dr Joseph described what tikanga Māori means.

[131] Māori as a people lay claim to a set of abstract cultural values and ways of organising social life that are distinctively Māori. They refer to these ways as Māori customary law or tikanga Māori. Tikanga Māori is sometimes described as values, principles or norms that determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just and correct.

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77 Joe Williams "Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev at 3; Hirini Moko Mead *Tikanga Māori*: *Living by Māori Values* (Huia, Wellington, 2003) at 29–38; and Eddie Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago LR at 452.

> "Tika" means correct, right or just and the suffix "nga" transforms "tika" into a noun thus denoting the system by which correctness, justice or rightness is maintained. The late and highly respected Te Arawa Anglican Bishop, Manuhuia Bennett, in an interview in 2000 by the author and other colleagues defined tikanga as "doing things right, doing things the right way, and doing things for the right reasons".

[132] Dr Joseph drew on Tā (Sir) Hirini Moko Mead's writings on tikanga Māori. He describes tikanga as embodying:[78]

> … a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do.

[133] Tikanga Māori, as Dr Joseph concludes, is the traditional body of values and ethics developed by Māori to govern themselves personally and collectively, privately and publicly, and govern their decision making.

[134] Dr Joseph was asked by the parties to give advice on tikanga as it related to the applications by the following agreed questions:

> a. What tikanga does the evidence establish or support in the application area?
>
> b. What aspects of tikanga should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga?
>
> c. Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?
>
> …

[135] As to question (a), Dr Joseph said that the evidence in these proceedings established and supported the following tikanga values being practised in the application area:

> a. **Wairuatanga** - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;
>
> b. **Whakapapa** — genealogy and the intergenerational and interconnectivity of all humans and the natural world including the two claimant groups to each other and the takutai moana claimant area;

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[78] Hirini Moko Mead "The Nature of Tikanga" (paper presented to Mai i te Ata Hāpara Conference, Ōtaki, 11–13 August 2000) at 3–4.

c. **Whānaungatanga** — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;

d. **Mana** — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;

e. **Tapu** — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;

f. **Noa** — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;

g. **Utu** — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;

h. **Mauri** — recognition of the life-force of persons and objects in the takutai moana claimant area;

i. **Hau** — respect for the vital essence of a person, place or object;

j. **Rangatiratanga** — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;

k. **Manaakitanga** — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;

l. **Aroha** — charity, generosity;

m. **Kaitiakitanga** — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations including in the takutai moana claimant area.

[136] As to question (b), Dr Joseph cited the following, non-exhaustive, indicia that could assist the Court in determining whether an applicant group has "held the area in accordance with tikanga Māori", as required by the test for CMT:

a. Whakapapa identifying a cosmological connection with the takutai moana;

b. Exercised mana or rangatiratanga over the takutai moana;

c. Exercised kaitiakitanga;

d. It has a mauri – life force;

e. Performance of rituals central to the spiritual life of the hapū and whānau;

f. Identified taniwha [guardians] residing in the takutai moana;

g. Is celebrated or referred to in waiata [songs];

h. Is celebrated or referred to in whakatauki [proverbs];

i. The takutai moana was relied on as a source of food;

j. A source of textiles or other materials;

k. For travel or trade; and

l. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to 'some, if not all of the takutai moana area'.

[137] As to question (c), Dr Joseph explained that the following tikanga values are relevant to the PCRs being claimed by the applicants:

a. Whakapapa identifying a cosmological connection with the particular takutai moana;

b. Exercised mana or rangatiratanga over the particular takutai moana area;

c. Exercised kaitiakitanga over the particular takutai moana area;

d. Performance of rituals central to the spiritual life of the hapū and whānau;

e. Identified taniwha residing in the takutai moana;

f. The specific takutai moana area was relied on as a source of food;

g. The specific takutai moana area was relied on as a source of textiles or other materials;

h. For travel or trade; and

i. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to 'some, if not all of the takutai moana area'.

[138] Dr Joseph cautions that the above lists are appropriate *starting points and* are not exhaustive indicia. It is also important to note that this Court cautioned in *Ngāti Whātua Ōrākei Trust v Attorney-General* that in recognising tikanga Māori, Courts must hold "in check closely" any unconscious tendency to see tikanga Māori in terms of the English law heritage of the New Zealand law and be open to seeing tikanga

Māori on its own terms, as a distinct framework.[79] I will take the values presented by Dr Joseph, along with the above cautions, as useful guidance in assessing the applications.

Whakapapa of Te Aotāwarirangi and Te Whānau a Ruataupare

[139] The establishment of whakapapa and whanaungatanga are significant in identifying which applicant groups established their rohe in Tokomaru Bay. The whakapapa and whanaungatanga of the applicant groups help inform whether they hold the relevant area in accordance with tikanga. It is important that the Court acknowledges the tapu nature of the whakapapa to the applicants. It is for the applicants to define and describe their own whakapapa.[80]

[140] The importance of the whakapapa of each hapū was evident from the way in which the witnesses addressed their whakapapa, from their arrival through to the present day. Mr Tichborne provided an account of whakapapa, entitled *Ngā Hapū Whakapapa — the Hauiti Ancestry chart*, annexed in Appendix 5, which traces the arrival of the Takitimu waka in Tokomaru Bay in 1350.

[141] Similarly, Ms Karen Pēwharangi provided the whakapapa of Te Whānau a Ruataupare and the Pēwharangi whānau, annexed in Appendix 6(a) and 6(b), showing the whakapapa lines traced back to Ruataupare, the daughter of Te Aotaki and Hinemaurea.

[142] As the ancestral lines show, both hapū agree that Kahukuranui defeated the Wahineiti people and thus gained mana over the entire application area and beyond in or about 1600 – well before 1840. Kahukuranui had two sons: Kapihoromaunga, the grandfather of Ruataupare; and Tautini, the father of Te Aotāwarirangi. Those named tīpuna appear on both whakapapa charts and demonstrate the whakapapa connections of both hapū to their shared tīpuna and the application area. However, the whakapapa traditions of the two hapū diverge, with differing accounts of the histories of Kapihoromaunga and Tautini.

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79 *Ngāti Whātua Ōrākei Trust v Attorney-General*, [2022] NZHC 843 at [310]–[322] and [325].
80 *Re Edwards (No.2)*, above n 10, at [301].

[143] I acknowledge that these histories are very important to the hapū members before the Court and to the hapū identity in Tokomaru Bay, including the respective areas over which each hapū appear to acknowledge more association. For example, Te Ariuru marae is associated with the descendants and hapū of Te Aotāwarirangi in the north end of Tokomaru Bay, while the Tuatini marae (the main communal marae) is associated with Te Whānau a Ruataupare in the south end of Tokomaru Bay.[81] The whakapapa evidence of both hapū establishes their connection with the application area since at least 1840.

[144] Mr David Armstrong, an historian and research expert in NZ race relations history, was called by Ngā Hapū. He confirmed the significance of the whakapapa connection in that both hapū descend from Te Aitanga a Hāuiti iwi and trace their customary rights in Tokomaru Bay to Hāuiti's son, Kahukuranui. He considered that it is evident from the whakapapa charts that Kahukuranui defeated the Wahineiti iwi and gained mana over the entire application area prior to 1840.[82]

[145] Kahukuranui had two sons: Kapihoromaunga, the great grandfather of Ruataupare; and Tautini — the father of Te Aotāwarirangi. Te Aotāwarirangi and Ruataupare, the two ancestors from whom the hapū derive their names, are therefore whanaunga. Their shared whakapapa, and iwi affiliation expresses hapū whanaungatanga. Mr Armstrong acknowledged that the ancestries of both hapū are illustrated by the whakapapa charts. The whakapapa traditions and histories then diverge as each hapū places different emphasis on the mana of different ancestors.

[146] There is no challenge to the evidence that both hapū have been able to establish their whakapapa links going back to the Takitimu waka arriving in 1350 and the earliest Māori settlements in Tokomaru Bay. It is not necessary, therefore, for the Court to reconcile any conflict in the histories of the whakapapa of the two hapū and nor can the Court assume the role of a final arbiter defining the applicants' whakapapa. It is not only inappropriate and contrary to tikanga Māori principles identified by Dr Joseph, but it is unnecessary.

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81 Currently the marae associated with Ruataupare are Tuatini Marae, Waiparapara and Pākirikiri.

82 There are differences of opinion in the evidence about whether the Wahine-Iti iwi were finally conquered during the time or whether further attacks on their people took place at later dates.

[147] What is clear from the whakapapa evidence, and what is important for these proceedings, is that the connection of both hapū to Kahukuranui, and to Tokomaru Bay, favours a finding that the two hapū both hold the relevant area in accordance with tikanga.

[148] And there is further evidence demonstrating the application of tikanga values and practices in Tokomaru Bay by the two hapū.

Tikanga in Tokomaru Bay

[149] In ascertaining what tikanga applies to the rohe moana, the subject of an application for a recognition order, this Court followed the process advocated by the Court of Appeal. The appointment of a pūkenga expert in this case enabled the Court to understand and ascertain how the central values of tikanga, as described in the previous section may apply to the rohe moana of Tokomaru Bay.

[150] The following tikanga values and indicia, discussed below, were provided in the evidence of Dr Joseph to assist the Court in its analysis under the first limb of the CMT test and their application to Tokomaru Bay.

<u>Kaitiakitanga</u>

[151] Kaitiakitanga, as Dr Joseph confirms, is the principle of stewardship and protection. It is often used in relation to natural resources but can also be used in relation to community and governance responsibilities and obligations. Witnesses from both hapū gave cogent evidence about their responsibilities to the moana and to the whenua to which they belong, especially in relation to the application area. The witnesses saw their role as providing education to whānau and visitors about the protocols for using the takutai moana and the tikanga that is observed in Tokomaru Bay.

[152] Several witnesses detailed the tikanga practices and protocols for using the takutai moana handed down through the generations. Mr Tichborne summarised them, confirming the evidence of others who followed the same practices:

> Through korero from the older generations, I know that the kaitiaki role is one that members of Ngā Hapū having been practicing for a long time. I see this role as vitally important in a world governed by greed and over-consumption. I ensure that visitors and whānau obey the laws of gathering kaimoana in accordance with the Pakēha law as well as Māori lore.
>
> In order to this, I teach those using the rohe moana the following:
>
> a. Do not yell at the sea or on the foreshore;
>
> b. Do not turn your back to the ocean;
>
> c. Ensure that you only take what you will eat, and extra needed for the elders as they cannot gather kaimoana like they used to;
>
> d. If you turn over a rock, you should put the rock back as you found it because embedded on the underside of the rock are infant spores of specific marine species. If left upward exposed, radiation from the sun will bake them and therefore the cycle of life will end;
>
> e. Clean rubbish off the beaches;
>
> f. Warn people about drinking on the beach areas and let them know of the tapu nature of our tauranga waka and other significant sites;
>
> g. Do not gut and clean fish on the beach;
>
> h. Do not eat kaimoana on the beach. All waste including shells and fish bones was taken and spread over the gardens as compost.

[153] Mr Quintin Whakataka described the method he employs to prevent the depletion of resource. He told the Court that he gathers kina from an area where they are plentiful, loads them into his boat and redistributes them where there have been depleted. He also tells members of the public not to gather kaimoana in certain areas or to catch and release some of the fish they catch as they do not always need to catch the limit.

[154] A number of witnesses confirmed that they have approached visitors to advise them and educate them about the importance of respecting "the moana". This includes telling people not to collect or fish in breeding seasons or advising them when they were doing things incorrectly, such as using pots to collect soft shelled crayfish. This has resulted in confrontation at times.

[155] The evidence of the stewardship and protection over the takutai moana demonstrates that both hapū have an enduring relationship and spiritual connection to the claimant area.

Rāhui

[156] The practise of imposing rāhui was confirmed by a number of witnesses. It is a way to impose tapu, restricting access to, or use of, an area or resource. The evidence, (which I canvass below in more detail) reveals rāhui are placed on areas for a number of reasons, including respect for any drownings in a particular area but also for the protection of the kaimoana such as crayfish and other fish in the breeding season to prevent depletion. It is also imposed to notify and warn of hazards.

Foreshore sites, rocks and customary fishing grounds

[157] It is evident, as Te Whānau submit, that the purpose of naming the rocks of significance, the fishing grounds and places on the foreshore is an acknowledgement of the mana of tīpuna, events or places. In this way, tīpuna kōrero is maintained and ahi kā and mana are passed down the generations. For example, Pito Rock, originally named Te Pito Turangakawa, commemorated the birth of the son of Tamateakūhākauri. It is now known as Te Pito o Piuta after this chiefly tipuna.

[158] The knowledge of customary fishing grounds was kept within families. These grounds are referred to in the maps of Mr Stuart Halliday, a witness called by Ngā Hapū, and the Huiteananui Fisheries Management Plan, the map of which accompanied Te Whānau's application. Such plans contain a record of traditional customary fishing places, methods, principles, practices and tools. Ms Pēwhairangi described this plan as part of the goal of her father, Mr Tate Pēhwairangi, to ensure that future generations would follow tikanga Māori and sustainable practices when it came to fishing. These customary fishing grounds also demonstrate how the takutai moana was, and is, relied on as a source of food.

Rituals

[159] Evidence was given by Te Whānau about their practise of ancient karakia to the atua for whānau hui, for collecting seafood, planting vegetables, fishing and harvesting. A number of witnesses also attested to their ancestors using maramataka, the Māori calendar which is based on the cycles of the moon, for fishing, planting, recognising the seasonal changes. The maramataka is still used to this day for the same purposes. These rituals not only show a spiritual connection to the takutai moana, but also shows that the takutai moana is used as a source of food and for other materials.

Moteatea and waiata

[160] Both hapū commenced their evidence with traditional waiata. In addition, evidence was given of traditional chants, poems and songs which reflected hapū connection with Tokomaru Bay. The celebration of whakapapa and the takutai moana in moteatea and waiata show the unique and enduring relationship that both hapū have with the application area.

Wāhi tapu

[161] There are a number of wāhi tapu sites within the claimant areas. These are recorded in Mr Halliday's map of significant sites, and some are marked in the Huiteananui Fisheries Plan. The evidence concerning their spiritual and cultural significance is explored in more detail in Part VI. The evidence revealed the recognition of an inherent sanctity for certain sites and by reference to certain areas, a code based on keeping safe and avoiding risk as well as protecting the sanctity of revered persons.

Seaweed harvesting and collection of shellfish

[162] Many witnesses described how they have partaken in their whānau traditions of collecting seaweed (parengo) and the tikanga about how it is collected — to preserve the root and base of the plant. The collection of pūpū was also discussed as

a traditional gathering of food source.[83] Mr Jack Chambers, a witness for Ngā Hapū, described that the practice was so prolific that the pulpit of the local Church is adorned with pūpū shells.

[163] The practices which have been followed since 1840, by both hapū have involved seaweed harvesting, particularly agar harvesting, for rongoā purposes,[84] food sources and as a means of producing a source of income.

Archaeological sites, urupā and pā

[164] Evidence was provided by two witnesses, Mr Stuart Halliday and Mr Richard Jennings, by way of maps detailing sites of significance. Mr Halliday's map annexed at Appendix 7, shows 117 sites of significance, which include the tauranga waka sites at the sites of Tuatini and Whekeua, burial caves, historical and current marae, wāhi tapu sites, sacred pathways, sacred alter and fishing ground markers and/or landmarks for fishing sites.

[165] Mr Jennings' map details archaeological sites which had been recorded with the New Zealand Archaeological Association Archsite only. This is annexed as Appendix 8 and a map with marae sites is annexed as Appendix 9. He accepted that it was not an exhaustive list of urupā sites, fishing grounds and pā sites within the application area. Nevertheless, his maps show pā sites, historical and current, burial and cemetery sites, middens, agricultural and pastoral sites, pits and terraces, artefact sites, fishing sites and Māori horticulture sites. Although many of the registered archaeological sites are not within the takutai moana their presence in the land near the foreshore demonstrates the continuing occupation and claim to the land or territory near where the takutai moana is situated.

[166] Of the historical pā sites, three were located on the foreshore, south of the Waikawa Stream at Te Waipuna and at Māwhai Point. The current marae sites at Te Ariuru, Waiparapara Pā, Pākirikiri and Tuatini are located directly above the foreshore in the specified area.

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83 Pūpū is the te reo Māori word for bubu/catseyes.
84 Rongoā is a traditional Māori health and healing system.

Taniwha or kaitiaki

[167] Several witnesses gave evidence of kaitiaki or spiritual guardians that exist in the waters of Tokomaru Bay. They are considered part of the hapū of Tokomaru Bay, illustrating a spiritual connection between the hapū and the moana.

[168] Kaitiaki known as Mangomutu or Mangoroa can be a white shark, a little dogfish or a stingray, the latter of which known to patrol Tokomaru and Waipiro. Another kaitiaki is Te Kekeno, a seal that lives near Te Ariuru at a place called Kopuanui. The last two kaitiaki live near the islands of Motuaiuru and Motuahiauru. One of these kaitiaki is a hammerhead shark and the other is described as being "an eye". Mrs Margrette Ryland-Daigle explained that each kaitiaki has a story or history, which the hapū pay heed as a sign of respect to their takutai moana and as a sign of warning.

Do the applicants hold the application area in accordance with tikanga Māori?

[169] Having listened to the extensive evidence given by the witnesses for both claimants, Dr Joseph gave evidence that in his opinion, the evidence throughout the hearing readily and easily established and supported the local tikanga Māori values over the Tokomaru Bay takutai moana area. The evidence demonstrates that there is a set of beliefs, practices and values which are widely known to both hapū and their members who follow these practices to this day. The range of practices that are based on customary values and principles include:

(a) undertaking sustainable fishing and other kaimoana gathering practices;

(b) exercising kaitiakitanga by restocking a depleted area with kina and educating the hapū and outsiders about the foreshore, the importance of respecting the moana, and the tikanga associated with Tokomaru Bay;

(c) observing personal health or rongoā practices in the takutai moana;

(d) exercising manaakitanga, for example by gathering kaimoana and sharing what is gathered;

(e) observing the tikanga associated with rāhui as a way of restricting the use of an area, particularly event of drownings or breeding season for crayfish and other species and whale strandings;

(f) exercising mana and rangatiratanga, ensuring customary authority over the rohe for the benefit of the people, resources and general welfare. This included ensuring the return of the land at Kakepō to be vested in the Te Ariuru Marae Trustees;

(g) preserving the tikanga protocols passed down through the generations for using the takutai moana, such as ensuring that you take only what you will eat and extra needed for the elders who cannot gather kaimoana; if you turn over a rock you put the rock back to preserve the spores of specific marine species; do not yell at the sea or on the foreshore; do not turn your back on the ocean; and respect the kaitiaki; and

(h) advising the public not to gather kaimoana in certain areas and to ensure that fish catch limits are complied with.

[170] During the hearing, witnesses for both hapū demonstrated their knowledge and familiarity with the sites of significance in Tokomaru Bay. They identified site markings in the application areas, by marking them on the Exhibit annexed as Appendix 4. In applying the tikanga indicia to decide whether the applicants hold the application area in accordance with tikanga Māori, I am satisfied they do. The evidence of hapū customary fishing further supports this conclusion.

[171] There was an acknowledgement by witnesses from each hapū of the other hapū and their customary authority in Tokomaru Bay. Mr Armstrong, an expert called by Ngā Hapū, canvassed the familial relationship of Te Aotāwarirangi and Te Whānau a Ruataupare and their mutual occupation of Tokomaru Bay since 1840. He told the Court:

> I think that, as I've said before, my view is that all of these people occupy Tokomaru Bay under the mana of Kahukuranui. The land is open to the descendants of Kahukuranui and that is the basis of their occupation. Be they Te Aotāwarirangi or Ruataupare.

[172] There is sufficient evidence to support findings that Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare individually hold discrete parts of the application area in accordance with tikanga, north and south of the Waitakeo Stream, despite the use by each hapū of the whole of the specified area of Tokomaru Bay. While the Ngā Hapū witnesses did not accept there was a distinct boundary between the two hapū, there was nevertheless an acknowledgement that Te Whānau a Te Aotāwarirangi may have stronger interests in the northern part of the application area from Koutunui Point to Koutunui Head. Equally, Te Whānau a Ruataupare has stronger interests in the southern part of the application to Te Māwhai Point.

[173] The evidence supporting that there are separate areas being held by the two hapū in accordance with tikanga are the associations to different marae in the area. Te Ariuru marae, north of the Waitakeo Stream, is associated with Te Whānau a Te Aotāwarirangi while Pākirikiri, Waiparapara and Tuatini marae, south of the stream, are associated with the interests of Te Whānau a Ruataupare. Many witnesses could state to which marae they had whakapapa connections, despite shared whakapapa lines with both hapū.

[174] I accept the Attorney-General's submission that this ability of the claimants to trace their whakapapa to a marae indicates that each hapū may have a stronger level of authority in distinct parts of the Bay, near or where their primary marae is located, but the evidence discloses that both hapū members use the area jointly in accordance with tikanga Māori values. Evidence from both sets of claimants confirm there are shared wāhi tapu sites, such as Pito Rock, which have been acknowledged and respected by both hapū and their ancestors since 1840, as well as shared fishing sites, tauranga waka, and other sites of importance in Tokomaru Bay.

[175] In light of the Court of Appeal's findings regarding the first limb of the test for CMT, the Attorney-General has acknowledged that there is good evidence that both hapū, Te Whānau a Ruataupare and Te Whānau Te Aotāwarirangi observe and operate a system of tikanga that influences behaviours and practices across the application area, with varying levels of interests. The Attorney-General accepts that some of the evidence goes towards establishing that the applicant group/hapū currently use and occupy the relevant area and have the intention and ability to control access to the

areas and the resources within them, as a matter of tikanga. The Attorney-General acknowledges that there is extensive evidence of both hapū exercising kaitiakitanga, manaakitanga, and, with less extensive evidence, rangatiratanga, particularly in the coastal and intertidal areas. I deal with this submission further under the second limb of the CMT test.

[176] It is relevant in my view that no other third party or other hapū have pursued a claim in respect of the Tokomaru Bay foreshore area. It is also relevant that the whakapapa of the two hapū has been recognised by three neighbouring hapū, to the north and south of the specified area, by two memoranda of understanding. This reinforces the applicants' claims that the two hapū hold the foreshore area in Tokomaru Bay in accordance with tikanga.

Conclusion on first limb

[177] I find that both hapū, Te Whānau a Ruataupare and Te Whānau Te Aotāwarirangi (and both applicant groups accordingly) hold the application area in accordance with tikanga, applying tikanga values and practices in the relevant area of Tokomaru Bay.

PART V: SECOND LIMB — EXCLUSIVE USE AND OCCUPATION

[178] The second limb of the CMT test involves four considerations. I propose to deal with them as follows:

1. Was there exclusive use and occupation by the applicant groups as at 1840?

2. Did the applicant groups have use and occupation post-1840 to the present day?

3. Was the use and occupation post-1840 exclusive?

4. Was there substantial interruption to the applicants' exclusive use and occupation of the area?

(i) Was there exclusive use and occupation as at 1840?

[179] The first requirement is that the applicant group must show it had customary rights as at 1840 and the group, or the group's tīpuna, must have exercised those rights at that time.[85] That means, as the majority of the Court of Appeal in *Re Edwards* held, the applicant group must have had "the intention and ability as a matter of tikanga to control access to the relevant area by other groups", reflecting the holding of the area rather than resource or use rights only.[86] There must have been a "strong presence" in the area to demonstrate that the area was occupied, belonged to, or was controlled by, or under the exclusive stewardship of the applicant group.[87]

[180] The majority in *Re Edwards* reinforced that the ability of a group to meet the requirement of a "strong presence" or control will not necessarily be defeated by evidence of access to the area and use of resources in that area by other Māori groups. Full account will need to be taken of the core tikanga values of whanaungatanga and manaakitanga, in order to understand the basis on which other groups were present in the area. It may reflect the exercise of the group's mana and/or control in respect of that land and therefore supports rather than undermines a claim to CMT.[88]

[181] Miller J's consideration of the test for "holds in accordance with tikanga" aligns with the need for the applicant to show evidence of activities that show control or authority over the area. The groups' use and occupation, as he found, must be exclusive, being concerned with the intention and ability to exclude others from the specified area.[89] In that way, he reasoned, this distinguishes the area *held* by the group at that time from those areas in which the group held only specific resource rights. The key difference is the territorial control to be demonstrated by the applicants.

[182] Miller J's approach merges the first limb with the requirements of exclusivity under the second limb, reinforcing that the finding in the first limb has particular relevance to the second. As the Attorney-General submits, both the common law and tikanga Māori are relevant to the second limb of the test for CMT. The evidence of

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85 *Re Edwards* (CA), above n 1, at [419] per Cooper P and Goddard J.
86 At [421] per Cooper P and Goddard J.
87 At [422] per Cooper P and Goddard J.
88 At [424] per Cooper P and Goddard J.
89 At [141] per Miller J.

the application of core values of tikanga Māori, outlined by Dr Joseph and Mr Meredith, is relevant in considering whether the applicant groups have demonstrated a sufficient level of control as at 1840.

Tīpuna control

[183] As the whakapapa of the two hapū discloses, both Te Whānau a Ruataupare and Te Whānau Te Aotāwarirangi derived their customary rights in the specified area from Hauiti's son, Kahukuranui. Over 400 years ago, he conquered the ancient Wahine-Iti people, the original inhabitants of Tokomaru Bay, thus establishing his mana over a territory extending from the Ūawa district to Ngutu-o-Ngore. In doing so, the evidence of the historian, Mr Armstrong, confirms that he extended the mana of his father.[90]

[184] Ngā Hapū witnesses say the ancestress Te Aotāwarirangi avenged her father Tautini's death by defeating the forces of Tutemangarewa at Hātea-a-Rangi, which is located in Tokomaru Bay. Te Whānau witnesses say that Tautini's death was avenged by Tuterangikatipu and his people. As noted, Tautini married Hinetamatea and their daughter was Te Aotāwarirangi. Tautini established his daughter at the northern end of Tokomaru Bay. When Ruataupare came to Tokomaru Bay, she settled in the south end of Tokomaru Bay next to her great aunt, Te Aotāwarirangi and her children joined her over time and inhabited the specified area as claimed by Te Whānau a Ruataupare.

Hapū control at 1840

[185] In his evidence to the Waitangi Tribunal, Mr Tichborne contended that the level of control exercised by the two hapū in the days of rangatira such as Pāoa, Tautini and Tama i Whakanehua i Te Rangi was absolute. He maintained there was no concept of a right of public access to the takutai moana in those days.

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90 Ngutu-o-ngore or the lips of Ngore is also known as Orange Bay.

[186] The claimants assert that the two hapū were the only hapū occupying and controlling the specified area by 1840. It is submitted by Mr Naden, for Ngā Hapū, that their evidence in this regard was extensive, namely:

> 22.1 The defensive 'walls of Tokomaru' were a feature of Roger Tichborne's evidence. They are a series of maunga and high hills that form a naturally-formed protected area;
>
> 22.2 Numerous pā sites were evidenced. They represent long-term habitation on the land adjacent to the specified area. Mr Tichborne's evidence was that the location of the great pā tūwatawata known as Te Ariuru along the foreshore area at Waima demonstrated perhaps most clearly the will and the ability of the hapū to exercise mana rangatira and the protection of their fishing grounds.
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> 22.3 Margarette Ryland-Daigle presented evidence indicating that the hapū constructed permanent kainga along the coastal area. Her evidence includes an extensive list of the names of these kainga, serving as an indication of the large population that resided in Tokomaru Bay over the centuries.
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> 22.4 Abundant evidence was presented showcasing the presence of numerous tauranga waka, which not only predate 1840 but have also been consistently preserved thereafter. Noteworthy among these Tauranga waka are Kakepō, Torotika, Wheke Ūa (Te Ihi o Te Kura), and Wheke Ūa.
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> 22.5 There was a multitude of wāhi tapu in the specified area where access is restricted or prohibited.

[187] Further evidence was provided by the applicants' witnesses on the grant of permission by the hapū to other groups. Mr Whakataka, for Ngā Hapū, addressed the issue of how his tīpuna protected the whenua and moana. He said:

> Our tīpuna were resolute in protecting our whenua and our moana. Strangers couldn't just come into Tokomaru. You had to have permission. That is how much our ancestors controlled the land and the sea around them.

[188] He concluded that both hapū were in the rohe before 1840 and "[they] hold it to this day". He said:

> People should not forget about those of us who were here originally – not through marriage, but through ancestral right. Back in the day, no one was allowed to go into parts of our rohe unless you had talked to the rightful whānau or hapū. If you did enter without authorisation, you would get killed.

[189] Mr Tichborne reinforced the concept of permission from the hapū being sought before others could enter or be buried in the rohe.

[Redacted].

[190] He described the period of mourning [and] the significance of the sacred sites.

[Redacted].

[191] [Redacted]. He traced the significance of the marae reservations that are situated adjacent to the foreshore being Tuatini, Pākirikiri and Waiparapara and how their history connections to the whenua have shown the connections to the takutai. He considered it is wrong to treat them as distinct different things.

[192] I consider it is also relevant to the consideration of territorial control that the two hapū signed Te Tiriti o Waitangi at Tokomaru in 1840 by four Rangatira affiliated to both Te Aotāwarirangi and Te Whānau a Ruataupare.[91]

Third party whaling pre-1840

[193] It is important to consider the historical evidence given by Dr Ashley Gould, an expert historian witness for the Crown, who said that a European coastal whaling station was established at Te Māwhai Point and the foreshore and beach was used by Europeans for shore whaling and commodities trade, both prior to and as at 1840. He informed the Court that commercial shore whaling began at Te Māwhai Point around 1837 or 1838.

[194] Mr Tate Pēwhairangi deposed that Māori were whaling before the Pākehā arrived, that it was part of their staple diet then, and formed part of their seasonal practices. There were times when the hapū members caught hapuka or kahawai without ill-treating or jeopardising the resource. In the same way, Māori caught whales at the right times. He referred to the whole peninsula area as Māwhai with Henare Potae's pā was on top of the peninsula overlooking the sea. He surmised that

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[91] They were Tama i Whakanehua i Te Rangi, Enoka Te Potae-Aute, Paratene Te Mokopuorongo and Tamitere Tokomaru (Tamati Waaka).

it was probably used for spotting whales, but it was also security for the hapū against invaders or any "ope taua".

[195] Mr Armstrong confirmed that a whaling station was established by Mr Robert Espie at Te Māwhai in the 1830s. Māori gained employment as well as boat crew or at the shore station. Several of those who had learned the necessary skills from Mr Espie later engaged in whaling on their own account based at Whakapatukakaha, Kakepō, Waiokaha and Te Māwhai. He noted that there were tauranga waka where Māori based their whaling activities. Mrs Ryland-Daigle also confirmed that hapū members were heavily involved in the whaling industry during the nineteenth century and confirmed that a major whaling station was at Te Māwhai.

[196] Of particular relevance to the question of exclusivity, Mr Armstrong confirmed that Tokomaru Bay Māori encouraged Europeans to settle among them because of the trading and employment opportunities they provided. He noted that those men did not purchase land in fee simple in a European legal sense but occupied it conditionally under a traditional form of tenure often referred to as tuku whenua, a form of gift exchange. The tuku imposed reciprocal obligations on both parties.

[197] Mr Armstrong confirmed that the European settler would be secure on the land that he occupied while commercial and other benefits associated with his presence continued to accrue to local Māori. He noted that in virtually every case, these arrangements "required" the European settler to take a Māori wife, with the result that they effectively became part of the local Māori community.

[198] Dr Joseph, when cross-examined, confirmed that the establishment of the whaling station at Te Māwhai was an example of manaakitanga in that Mr Espie was able to establish his commercial activity of whaling with the approval of the hapū, which, in turn, obtained benefits too. In Dr Joseph's terms, that manaakitanga shown by the hapū towards Mr Espie, enabling him to settle at Te Māwhai is a manifestation of hapū mana and kaitiakianga of the resources. They permitted those activities to flourish in their rohe. Dr Joseph also confirmed that there were examples of the hapū members "showing a lot of manaaki to settlers too and the missionaries".

Analysis

[199] The majority of the Court of Appeal found that exclusivity as at 1840 may be inferred if the applicant group can demonstrate continuous use and occupation from 1840 to the present day. I accept, as the Attorney-General submits, that the Court must nonetheless be satisfied there is sufficient evidence to permit such an inference of exclusivity as at 1840.

[200] There was extensive evidence presented by both Te Whānau and Ngā Hapū as to their respective presence control and exclusive stewardship of the relevant area. The Attorney-General acknowledged initially that much of the evidence spans the period generally from 1840 to the present day and, in the supplementary submissions, refers to the evidence of Mr Tichborne about the exercise of control over the area as set out above.

[201] While the evidence does disclose that a European coastal whaling station was established at Te Māwhai Point and that the foreshore and beach was used by Europeans for shore whaling and commodities trade, both prior to and as at 1840, a number of those activities were undertaken with the permission of the hapū. The activities were also undertaken by the members of the hapū, who were benefitting from the employment and financial opportunities such commercial activities offered.

[202] The integration of European settlers, such as Mr Espie, by intermarriage with local Māori women, demonstrates the inclusivity and manaakitanga shown by the hapū and its adaptation to the inclusion of foreigners, for the mutual benefit of the hapū members. The use of the foreshore for whaling and commodity traders, as I canvass in the next section, increased by dint of colonisation and the arrival of Europeans.

[203] The whalers integrated with local Māori by sealers and whalers marrying local Māori women. The presence of the whaling station was encouraged by the hapū, as its members worked for the whalers and became whalers themselves.

[204] There was no legal ability for the two hapū to prevent or impede access to the foreshore of Tokomaru Bay, as to do so would have resulted in criminal penalty. The evidence shows that the opportunity for work and trade was welcomed by the hapū, as

it gave the hapū economic benefits. It did not, however, impede hapū control over the area.

Conclusion on exclusive use and occupation as at 1840

[205] I am satisfied on the evidence before the Court that the two hapū exclusively used and occupied the area as at 1840, permitting and/or excluding others from the area if they wished and controlling the territory as a matter of tikanga. There were no other neighbouring hapū and iwi exercising such territorial control in the area. Following the arrival of the settlers, there was no legal basis upon which the hapū could prevent non-Māori groups use of the area. Nevertheless the hapū demonstrated their strong presence in the area by permitting the settlement of these groups on their terms, for the mutual benefit of the settlers and the hapū.

(ii) Have the claimants used and occupied the area since 1840?

Use and occupation since 1840

[206] Much of the evidence adduced under the first limb of "holding the area in accordance with tikanga" also informs the second limb under s 58(b)(i) of "use and occupation from 1840 to present day". The core values of tikanga Māori are of relevance to the overall assessment of whether the use and occupation was exclusive, as Miller J found.[92]

[207] There was no substantial challenge to the claimants' evidence of their use and occupation of the area from 1840 to the present. Counsel for the Attorney-General has helpfully acknowledged that the evidence from members of both hapū of Tokomaru Bay indicate the use and occupation of the area between Koutunui Head and Te Māwhai Point since 1840, by reference to the following factors:

(a) marae and historical pā, midden ovens, urupā, wāhi tapu sites close to the coast;

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92 *Re Edwards* (CA), above n 1, at [162] per Miller J.

(b) historical tauranga waka at Kakepō (Te Ariuru), Te Puka (Torotika), Whekeūa North, Whekeūa South (Waihoa) and Tuatini;

(c) customary fishing evidence, including customary fishing practices and identified customary fishing grounds;

(d) acting as kaitiaki by protecting and looking after the takutai moana;

(e) the implementation of rāhui;

(f) the protection of knowledge regarding fishing grounds and other sites;

(g) the involvement of both hapū in developing customary fishing plans; and

(h) the development of customary fishing management plans involving both hapū.

[208] The contentious issue, however, is whether the applicants have proved their continuous use and occupation of the whole of the specified area, the extent of that use from 1840 to the present, and whether it was exclusive. The most significant of these is the extent of use of customary fishing and fishing grounds. I deal first with the applicants' use and occupation from 1840 to the present.

Customary fishing

Customary fishing grounds

[209] Section 59(1)(a)(ii) of MACA provides that the exercise of non-commercial customary fishing rights in the specified area, from 1840 to present day, may be relevant to the assessment of whether CMT exists.

[210] Witnesses from both respective hapū gave cogent and credible evidence of the fishing and collection of terakihi, snapper, kina, moki, trevalley, pūpū, kahawai, paua, pipi, ngākahi, toitoi and koura. A summary of the evidence of use and occupation relating to the fishing locations, timing and stocks was prepared by counsel for Ngā

Hapū and is appended to this judgment as Appendix 12. Te Whānau also completed a summary of examples of tikanga use and occupation which is Appendix 13.

[211] The fishing grounds in the application area were identified by a map provided by Mr Halliday. The map marks out locations of fishing sites or marks the locations on dry land that are used to orientate the fishing ground. Although there was some difference in the location of the named fishing grounds, the evidence suggested that many of those grounds were shared between the hapū and were available to both to use according to tikanga.

[212] For example, Mr Kemara Pēwhairangi told the Court that Kakepō, for instance, "belongs to both [hapū] actually but usually the people that stay in that area … usually frequent that more". Other witnesses confirmed that members of both hapū fish in all areas of Tokomaru Bay. Indeed, the fishing grounds identified in Mr Halliday's map are marked as the customary fishing grounds of both Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare.

[213] More telling was the evidence of Mrs Ryland-Daigle, who said:

> We share much of Te Ao's rohe moana with Te Whānau a Ruataupare.
>
> …
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> However, within our rohe moana, and the specified area to which this application relates, tikanga governs the interactions between the two hapū within the marine environment. Much of this tikanga would remain in place if our application for CMT is successful and would continue to be practised between both Te Ao and Ruataupare.

[214] Many witnesses gave evidence of how they learned traditional ways to fish and gather kaimoana. Mr Wiremu Ryland confirmed that much of his fishing knowledge had been handed down from his elders. After sitting and listening for years, he learned where and how to dive for kaimoana and fish. He spent a lot of his life in the sea.

[215] He described how they gathered every type of shellfish in Tokomaru Bay, how they had to dive 65 feet to get mussels and how they caught large crayfish, crabs and the big pūpū, which come out at night. The crabs that were caught at night and maomao would be trapped in rock pools, which he and his father would then collect. As with other witnesses, there were fishing spots where particular species were caught

and the timing of catching fish, the tides and the methods were all part of a way of life for both hapū.

[216] Witnesses gave examples of traditional fishing methods, which included using a meshed onion bag, or a kete, attached to a manuka stick to gather crayfish, or making "flappers" from old wooden banana and tomato boxes with nails on the bottom to catch flounder. Others recalled using chicken wire to make a trap to catch herrings, which were later used for bait, and tying a net to a bicycle wheel rim to make a pouraka (fishing box), which was dropped to the bottom of the seabed from the wharf with bait in the net to catch crayfish.

[217] The evidence was testament to the importance of fishing to the lives of hapū members and the traditional methods that they used to catch different fish species, albeit with more modern materials. Hapū members living in Tokomaru Bay had used and practised them and continue to do so.

[218] In describing the methods of fishing and the fishing grounds no distinction was drawn by the hapū as to which hapū used which fishing spots. No submissions were made about territorial rights across the specified area. The evidence shows that the fishing grounds were shared between the hapū members, permitting fishing in areas that hapū members might have characterised as "their own."

[219] The evidence reveals that both hapū in Tokomaru Bay exercise their customary fishing practices jointly over the same specified area. These activities are not under the control of one hapū only. Although the Huiteananui Fishing Management Plan, which was prepared by Te Whānau a Ruataupare, designated a three to four nautical mile site with fishing grounds south of the Waitakeo Stream to Māwhai Point, no specific sites were claimed by Te Whānau as exclusive to their hapū. Indeed, the evidence shows they were shared with Te Whānau a Te Aotāwarirangi and favours the finding that both applicant groups have territorial rights across the area.

Inshore fishing grounds

[220] In describing the customary fishing practices and methods, the witnesses referred to foreshore collection, fish traps set in amongst the rocks on the foreshore

and other inshore fishing sites. For example, Mr Whakataka described how fish traps were an important kai gathering practice. To trap the fish, rock walls were built to create a large pool of seawater when the tide went out. A funnel was built that allowed the water to run out as the tide went out, the tide would also run out through the holes in the rock wall. Any fish that swam into the pool during high tide and had stayed there as the tide went out would get trapped in the funnel if they tried to escape. Mr Whakataka explained that these practices were handed down by his father.

[221] The descriptions, like Mr Whakataka's, largely relate to inshore fishing. The inshore fishing spots he described included diving spots for crayfish, kina and paua often found in the rocky outcrops within the three to four nautical miles from the Tokomaru Bay foreshore.

Customary fishing plans

[222] Both hapū gave evidence about their customary fishing plans for their rohe. They are the 1998 Customary Fisheries Management Plan, created by Te Whānau a Te Aotāwairangi, and the 2017 Huiteananui Customary Fisheries Management Plan, which had representation from both hapū, but was prepared and adduced by Te Whānau a Ruataupare.

[223] For Ngā Hapū, Mrs Ryland-Daigle confirmed that in 1998, and in accordance with tikanga, Te Whānau a Te Aotāwairangi participated in a Customary Fisheries Management Plan in conjunction with the Ministry of Fisheries. The advantage of the Customary Fisheries Plan was to allow Te Whānau a Te Aotāwairangi to become more directly involved with the management of their foreshore and seabed interests. The plan was not produced in this hearing.

[224] Nevertheless, Mrs Ryland-Daigle describes it as being designed to ensure the sustainability of customary fish stocks by:

(a) enforcing a seasonal take over depleted species;

(b) enforcing rāhui for recovery purposes over threatened areas;

(c) imposing tapu over nurseries to allow for growth and development;

(d) imposing tapu to protect endangered species;

(e) enforcing rāhui to allow for the natural migration of fish species;

(f) imposing tapu to protect identified species during spawning while at the laval stage;

(g) improving the monitoring of the use of the foreshore and seabed by both customary and non-customary stakeholders through collective whānau participation;

(h) implementing a whānau roster to monitor the marine and coastal area; and

(i) utilising traditional methods for collecting kaimoana in order to avoid damaging customary fishing areas by prohibiting knives, or other implements, for gathering parengo, ensuring that rocks are turned back over when gathering paua, ensuring that debris is removed from the rua koura and holding education seminars to improve the understanding of fisheries tikanga.

[225] For Te Whānau, Ms Kody Pēwhairangi acknowledged that the rohe moana of Te Whānau a Ruataupare extends to about three or four nautical miles from mean highwater springs and that the Huiteananui Customary Fisheries Management Plan lists all of the historically important fisheries for Te Whānau a Ruataupare. The plan, however, does not identify fishing grounds past three or four nautical miles from shore.

[226] When cross-examined, Ms Pēwhairangi said that the specified area in the application extending out to 12 nautical miles "was a mistake" given the area shown in the Fisheries Plan, but it reflected her father's wishes. Appropriately she agreed however, that her father was comfortable with the fishing grounds listed in the Huiteananui Customary Fisheries Management Plan, which extended out to three or four nautical miles only, because those were the ones which are in the rohe moana of Te Whānau a Ruataupare.

[227] Neither hapū has filed their customary fishing plans with the Ministry of Primary Industries. Although the 1998 Customary Fisheries Management Plan, created by Te Whānau a Te Aotāwairangi, was not produced, the customary fishing grounds were identified by description and by reference to Te Whānau a Ruataupare's map within three to four nautical miles of the foreshore.

[228] Although the Huiteananui Customary Fisheries Management Plan differs from a MACA application and only relates to fishing interests, the identification of the customary fishing interests in those plans reinforce the evidence given by both hapū that they have used and occupied the inshore fishing grounds and foreshore as their rohe moana well before 1840 to the present day.

Deep sea fishing grounds

[229] The evidence in respect of the onshore grounds, namely within the three to four nautical miles from the shore, was stronger for fishing sites within Tokomaru Bay than the offshore fishing sites. The knowledge of sites for offshore grounds beyond the three to four nautical mile mark were not so easily identified. For example, Mr Whakataka and others referred to additional fishing areas that were not recorded in Mr Halliday's produced map book but were recorded on a confidential map supplied to the Court.

[230] A number of witnesses gave evidence of the use of deep sea fishing grounds. They included grounds which were respectively 30 kms, 56 kms and 80 kms offshore. The witnesses were challenged by Mr Scott, for the Seafood Industry, as to whether the outer limits of the specified area were sites of customary fishing practices.

[231] Mr Whakataka said that the return trip by motorboat to some of the fishing grounds can take hours to complete, but he emphasised that the practice of deep sea fishing was one practised by their ancestors well before 1840. Mr Richard Clarke, a witness for Ngā Hapū, conceded that the Koutunui fishing site was approximately 24 nautical miles offshore, that he needs GPS to find that fishing ground, and that he learned of the site from other recreational fishermen, not through his family. He also confirmed that a fishing line would need to drop 300–400 metres at Koutunui as a boat

could not anchor there because it is too deep. He conceded that modern nylon fishing equipment is needed to be able to fish at that spot.

[232] Mr Whakataka disagreed that Koutunui could only be located with a GPS. He considered that despite the distance of 30 kms, he could still, by the use of the sun and reference points on the land, find the area. He did not agree that modern nylon equipment was needed to fish at 400 metres but conceded that he was not aware of any tikanga or mātauranga passed down from his ancestors as to how they fished at a depth of 300–400 metres.

[233] Mr Gilman Tichborne stated there was one fishing ground which is six to seven nautical miles out from the shore. He said there are others that are approximately 14 nautical miles out from the shore and confirmed the species which are caught at this depth. He recalled his uncles, the late Mr Tate Pēwhairangi and Mr John Chaffey, each had their own boats and would use them to get to the deep sea fishing grounds. Mr Gilman Tichborne claimed that those fishing grounds were approximately 12 nautical miles out from the shore.

[234] A number of witnesses confirmed Koutunui as a 12 nautical mile spot and, apart from those named fishing areas in the confidential map supplied to the Court, there were several other fishing grounds that were deep sea fishing grounds off the coast of Tokomaru Bay. Mr Clarke confirmed that at 24 nautical miles offshore at Koutunui, there are other recreational fishermen going to the same spots. Mr Clarke said "it's quite comforting to know you have got other boats around you."

[235] I am in no doubt that with the advent of GPS combined with local knowledge, the other deep sea fishing grounds identified on a confidential basis are known to the hapū and are used by them to fish. There was a reluctance on the part of witnesses to disclose those fishing grounds publicly but there was an open acceptance by the witnesses that the GPS coordinates are relied on to locate them. However, those sites have not been named and were not able to be properly tested in cross-examination.

[236] It is important to note that for both hapū, the ocean was not only used for deep sea fishing but was the means of travel and voyaging between the islands of the South

Pacific. The knowledge of ocean currents to travel from the Pacific Islands to the shores of Aotearoa was knowledge handed down to the current hapū members from their ancestors.

[237] The evidence from witnesses from both Ngā Hapū and Te Whānau demonstrates that their respective hapū, and particular families within those hapū, have extensively used the ocean both within 12 nautical miles and beyond. Although those families clearly have fishing knowledge, and have used fishing sites that have been used by their predecessors, I consider the evidence at best is inferential that these fishing practices were in use in 1840 and continue to the present day. The nature and extent of the deep sea fishing sites, particularly at depths of 300–400 metres, and how fishing was achieved at such depths, was unclear.

[238] What is clear however, is that a number of specific fishing grounds or sites within the three to four nautical miles of, and within, Tokomaru Bay were identified by numerous witnesses and clearly have been used and occupied for customary fishing from at least 1840 to the present day.

Waterways and puna

[239] Performance of rituals important to the spiritual life of the hapū and whānau, although mainly used to identify whether an area is being held in accordance with tikanga, can also help inform whether the applicant have used and occupied the application area since 1840. Evidence was given by Mr Whakataka about the waterways of Tokomaru Bay. His evidence was that he had been taught by his father that the waterways in Tokomaru Bay are sacred and cleansing. He was taught the history (described in the evidence as the kōrero) of how each of the waterways became to be named, showing a clear connection to the hapū in the area.

[240] For example, the Waihoa Stream was where Ruataupare was given safe passage into Tokomaru Bay. However, before she could enter the Bay, Ruataupare had to become noa or free from tapu. Her garments and any taonga she was wearing had to be fully submerged and washed in the water. There was then the lighting of the fire upon her arrival which was kept going through the welcoming ceremony.

[241] Another example is the Waikare Stream. Mr Whakataka explained that it is actually named the Mākaka Stream, which was named after Mr Whakataka's tīpuna — Mākaka-i-te-Rangi, Huiwhenua's first wife. Mr Whakaktaka's father used to wash his face in the stream, out of respect and to ensure Mākaka-i-te-Rangi watched over them in their travels. The same tradition is continued to this day out of respect for Mr Whakataka's father and his tīpuna. These rituals, and kōrero, shows how integral the area is for the applicants in their everyday lives.

Wāhi tapu

[242] The identification of wāhi tapu sites is further evidence of the use and occupation of the common marine and coastal area, as the right to protect these sites are recognised under CMT. I analyse the claimed sites in further detail under Part VI below. The Waiwhakaata Stream exits near the Pito Rock. The rock is tapu. It is where the tohunga laid the bodies of chiefs at low tide to clear any tapu or to weaken the tapu. The tohunga would make a cut through the belly button, pull the intestines out through the hole in the belly button, and wrap it around the rock. It would be left there through the high tide to clear the tapu. Once that was done the rest of the burial process could continue.

[243] There is another practice associated with Pito Rock. After the birth of a child to a chief or noble, their whenua (placenta) is inserted into the rock. There was no distinction drawn by any of the witnesses as to which hapū had access to, or preserved the customs of tapu, around Pito Rock. Both hapū acknowledged and observed the tapu of Pito Rock.

[244] The waipuna [redacted] was a mineral rich water supply and the top pools were used for the preparation of flax. [Redacted]. The significance of these springs [redacted] shows their inherent spiritual and tapu nature.

[245] Mr Tichborne produced a dedication prayer which is chanted over the awa, streams and springs of the rohe to make them tapu. He, and Ms Ryland-Daigle, gave detailed evidence on the wāhi tapu sites in the application area. Those wāhi tapu sites, together with the tikanga observed around the waterways and puna, reinforce the

respect and sacredness of the relationship of Te Whānau a Ruataupare and Te Whānau a Te Aotāwarirangi with the takutai moana in Tokomaru Bay.

Pā sites

[246] The location of pā sites is another factor, which assists in helping establish use and occupation of the application area. As noted under the analysis for the first limb of CMT, both hapū had built and occupied numerous pā that were and are located in close proximity to the coastal area. The pā sites were mapped as sites of significance by both Mr Halliday and Mr Jennings which are attached to this judgment at Appendices 7 and 8 respectively.

Tauranga waka

[247] The tauranga waka, being the landing sites of the waka of the ancestors of the hapū who arrived in Tokomaru Bay, have particular significance to the use and oversight of the application area by both hapū. There were five tauranga waka in the application area. They are Whekeūa (at Ihi-o-te-Kura), Kakepō, Torotika, Tuatini and Whekeūa (at Waiho). Mr Armstrong told the Court that the Kakepō tauranga waka "was the main terminus for seaborne travel and makes a channel that leads to shellfish beds and fisheries in the open sea".

[248] The site of the Kakepō tauranga waka was compulsorily acquired by the Crown and vested in the Waiapu District Council in the early twentieth century. After much protest from the hapū, the Māori Land Court vested the land in the Te Ariuru Marae Trustees. The current trustees of Te Ariuru Marae, Mr Gilman Tichborne and Mr Ondre Te Hau, confirmed that commercial fishers are required to pay a fee to the marae for using Kakepō.

[249] The tauranga waka are still used to launch and land the boats from both hapū members when they go fishing and collecting kaimoana, showing continuous use of these significant sites since at least 1840 to present day.

Ownership of abutting land

[250] One of the factors that may be taken into account when assessing CMT is whether the applicant group, or its members, own land abutting all or part of the specified area and have done so without substantial interruption from 1840 to the present day.[93] It allows an inference to be drawn that will inform the extent to which an applicant group has used and occupied the common marine and coastal area, and, in some cases, support that this use is exclusive.

[251] "Land abutting all or part of the specified area" includes land that does not directly abut the specified area but does directly abut a marginal strip, an esplanade reserve, a reserve, a Māori Reserve, a road, or a railway line that directly abuts the specified area.[94] From the maps supplied by Mr Jennings, a significant amount of land abutting the application area remains in Māori control. The areas marked in red, showing Māori land abutting the specified area from Moutahiauru Island to Māwhai Point in the maps annexed as Appendices 10 and 11 illustrate the sizeable tracts of abutting land in Māori control. There was almost unanimous agreement among the various witnesses for both applicants, and from the Crown, that a high proportion of the land abutting or near the application area still remains under Māori ownership and control.

[252] Ms O'Gorman KC, for Te Whānau, submitted that the three marae within the rohe of Te Whānau a Ruataupare near the foreshore have been, and remain, the source of tūrangawaewae, ahi kā, and the focus of cultural identity for Te Whānau a Ruataupare. Te Whānau relies on Dr Ngata's report identifying whare wānanga sites, pā sites, and other places of significance for Te Whānau a Ruataupare.

[253] Counsel for Ngā Hapū submitted that the evidence of Mrs Ryland-Daigle shows that the members of Te Whānau a Te Aotāwarirangi have significant beneficial interests in Tawhiti One, Tawhiti Two, Mangahauini One, Mangahauini Incorporation, Tuatini Māori Township, Tokomaru B5–B10 blocks, Waihoa 1, 1A, 2, 2A, 2B and

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93 Marine and Coastal Area Act (Takutai Moana), s 59(1)(a)(i).
94 Section 59(4)(b).

Nuhiti Incorporation. But for the Tawhiti Blocks, all of the land interests are south of the Waitakeo Stream.

[254] Dr Ward conceded that while the evidence of abutting land ownership does not support a particular status of one hapū in relation to the other, the broad continuation of Māori freehold land ownership supports the continuation of Māori use and occupation of the adjacent common marine and coastal area, relevant to an assessment for CMT.

[255] I consider it is significant that in addition to the large tracts of abutting Māori land, the land at Kakepō is Māori freehold land, designated as a Māori reservation, which directly abuts part of the specified area. Under ss 59(1)(a) and 4(b)(iv) of MACA, this is a relevant matter to be taken into account in determining CMT.

Source of food, trade and voyaging

[256] There was no challenge to the claimants' evidence that the takutai moana was both a source of food and a thoroughfare for trade and voyaging pre-1840 and that it continues to be used for the same, or similar, purposes today.

Conclusion on post-1840 use and occupation

[257] I am satisfied that the extensive evidence presented by both hapū clearly establishes their presence, control, mana and stewardship of the inshore fisheries area, to the exclusion of other Māori groups in the territory, from 1840 to the present day.

(iii) Was the applicants' occupation since 1840 exclusive?

[258] It is not sufficient for the claimants to show use and occupation without addressing exclusivity. This takes two forms. The first is whether each of the claimant groups can show exclusivity from each other. The second is whether they have exclusive use and occupation against third parties, Māori and non-Māori. I deal first with what were initially overlapping claims, but with the parties' agreement, are now claims for shared exclusivity.

Shared exclusivity

[259] In the hearing, Ngā Hapū challenged Te Whānau's application for CMT because both hapū had used the marine and coastal area south of the Waitakeo Stream to Māwhai Point and there was no exclusive use and occupation of that area by Te Whānau.

[260] In *Re Edwards*, the Court unanimously held that it would be inconsistent with the scheme of MACA to have two or more overlapping CMTs in the same area. It confirmed, however, that the concept of shared exclusivity, resulting in the issue of a single (joint) CMT in favour of two or more groups, is available.[95] The majority went further to find that shared exclusivity as between groups can exist even in the absence of an acknowledgement of one another's rights and saw no contradiction in a finding that two applicant groups hold a specified area in accordance with tikanga as against other groups or individuals, despite a vigorous contest over their respective rights to exclusive use and occupation.

[261] The parties have resolved their respective challenges of each other's rights by agreeing to have the relevant area jointly held on behalf of the two hapū. The representation of Te Whānau a Ruataupare by Ngā Hapū and the relevant area still requires to be resolved, as noted in this judgment at the outset.[96]

[262] As the Attorney-General submits, the nature and extent of the rights and interests of groups in a shared area area matter for the group itself and this should be clarified at the Stage Two hearing.

[263] For completeness, however, the evidence from the witnesses for both respective hapū of Tokomaru Bay clearly demonstrates that they have shared the resources and undertaken tikanga practices within the northern and southern areas claimed.

[264] For example, Mr Gilman Tichborne said:

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95 *Re Edwards* (CA), above n 1, at [169] per Miller J and [439] per Cooper P and Goddard J.
96 See this judgment above at [62]–[66].

> Te Whānau a Te Ao and Te Whānau Rua have combined that much as a family together that there is no defined boundary. It is a defined politic, it is a defined management structure that they have. Rather than a rohe boundary. Inside those two hapū are recognised boundary holders and so you would break it down into smaller groups.

[265] Mr Tichborne contested aspects of whakapapa between the two hapū but considered there was no boundary between the two hapū as claimed by Te Whānau. The evidence of the other witnesses reinforced the fact that both hapū are inter-related, have lived in the area for more than 400 years, have defined the full specified area as their rohe and have had access to both the north and south areas of Tokomaru Bay. Each hapū has defined areas by their respective pā sites, with Te Ariuru being the principal marae of Te Whānau a Te Aotāwairangi at the northern end at Waima and the Tuatini marae being an important marae for Te Whānau a Ruataupare at the southern end.

[266] The evidence clearly discloses that both hapū jointly used the specified area from Koutunui Head in the north to Te Māwhai in the south of Tokomaru Bay. Each retains their control and use of defined areas, such as their respective pā sites, in the north and south of Tokomaru Bay, but their use of the takutai moana was joint. This is now reflected in the agreement, which the parties have reached, that any grant of CMT would be held jointly by the two hapū, Te Whānau a Te Aotāwairangi and Te Whānau a Ruataupare, through a new entity to be established.

Control and permission

[267] In describing the application of the principles of tikanga, the witnesses from both hapū gave evidence of the steps they took in carrying out their perceived role as kaitiaki of the takutai moana and their attempts to exert control over the area in accordance with their tikanga. The following examples illustrate the authority, which the respective hapū believed they could exercise over their rohe moana. In MACA terms, these examples provide attempts by the hapū to exert control and their authority over the area in accordance with their tikanga.

Control of access

[268] The Court heard evidence of hapū members asserting control over the common marine and coastal area in response to third-party activities, particularly in relation to fishing.

[269] Mr Tichborne gave evidence about the steps he took to protect the fisheries. He described the return of Kakepō to the hapū in 1996, namely the return of the land as as Māori reservation to the Te Ariuru Marae Trustees. He described a hui at Te Ariuru between hapū members and commercial cray fishermen. He was the Marae Chairman at that time and convened a hui to discuss access to and from the marine and coastal area for the commercial fishermen. In his capacity as Marae Chairman, he imposed conditions of access by requiring a fee from the commercial fishermen for work to be done on the area of launching of boats. Although they agreed to do that, there was some difficulty in enforcing their debts.

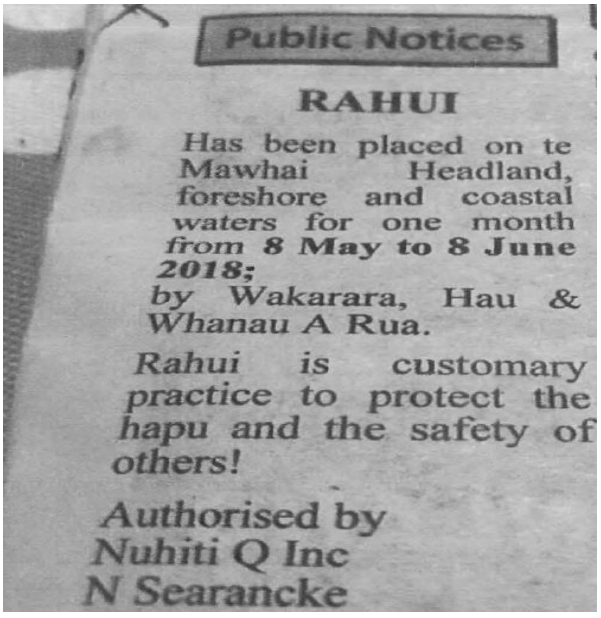
Rāhui

[270] Rāhui are imposed in Tokomaru Bay, in accordance with particular tikanga regarding rāhui, to control or manage activities relating to the sea (including third-party fishing) within the application area. There was evidence of rāhui being placed on an area when people were missing at sea, when drownings at sea occurred, and for management of marine resources. There is a regular rāhui preventing all fishing from Te Puka to Waima from the end of November to December every year, to preserve fish stocks in breeding season. A rāhui was also imposed for COVID-19 management.

[271] Rāhui have been imposed by marae committees, or by elders with the necessary authority, which defies boundaries between the hapū. Several witnesses noted that rāhui were observed by residents in Tokomaru Bay. Mr Delamere told the Court that rāhui signs on the beach are taken seriously and "most people respect the placing of a rāhui". Mr Clarke considered the public response to rāhui imposed is "pretty good" and Mr Gilman Tichborne said commercial fishing industry members

have generally complied with rāhui.[97] The placing of rāhui and its observance by the majority of people in Tokomaru Bay supports a finding that the two hapū exercise their authority and control as kaitiaki of their takutai moana.

[272] In one example, a public notice was placed in the *Gisborne Herald* recording that a rāhui has been placed on Te Māwhai headland, foreshore and coastal waters from May to June 2018 by Te Whānau a Ruataupare, in conjunction with Nuhiti Q Inc, to protect the hapū and the safety of others.



[273] Mr Tichborne confirmed the practice of imposing rahui on the area:

> Placing rāhui on accessing the takutai moana is common. We place rāhui from October to December to allow the kaimoana to breed without interruption.
>
> Placing a rāhui completely restricts fishing, gathering kaimoana, swimming, boating and diving. Anything to do with marine activity is banned.
>
> Rāhui have been placed for many years over many generations and they were always respected. During the years that the freezing works were in operation in Tokomaru, the fisheries were never depleted. There was always plenty of kaimoana. These days, even the local Pākeha tell visitors

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97 I record the Attorney-General's observation that there was some evidence of non-compliance with rāhui. For example, Gilman Tichborne said the "general public are not too bad" at following rāhui for people missing or drowned at sea, but that rāhui for resource management is more difficult, even amongst the hapū themselves. For example, when a whale was stranded at Te Hāhā in October 2021, some locals were (in Mr Gilman Tichborne's words) "pillaging the carcass" with the result that Department of Conservation officials were unable to ascertain the cause of death. A rāhui had been "placed on Te Hāhā by Jack Chambers … [but] those people ignored the rāhui and so what they were doing had to be stopped" by Mr Tichborne. The party that was butchering the whale only ceased when threatened with prosecution.

> that they cannot go out on their boat if there is a rāhui. If someone disrespects the rāhui, the consequences can be dire for them. We usually tell those types of visitors to stay away and never come back.

[274] Mr Whakataka addressed the concept of rāhui in the context of preservation of the ocean floor and resources:

> Rāhui are implemented to prevent the depletion of a resource. Siltation is a big problem for us. It has had significant impact on our fishing. It's a relentless current of silt that comes down from the hills. Commercial fishing is another problem for our fisheries. It's probably the main problem. Commercial fishing is a relentless assault on our fish stocks.
>
> We are constantly looking out for the moana and our kaimoana. When I go diving, I'm not just diving for kaimoana, I'm also looking to see if there have been any changes to the ocean floor or to the amount of kaimoana available. Recently, I noticed that the parengo is in a poor state. It's not like how it used to be. There's only a quarter to a third of the amount that there used to be. Rāhui are important for protecting our moana and the kaimoana within it. When a rāhui is put in place, you are not to collect any kaimoana. You had to have permission from the kaumatua and tohunga. In the old days, certain families had the job of looking after the moana and the kaimoana.

Permission

[275] Mr Tichborne confirmed that permission had been sought by rock lobster operations to fish in the application area, though he did not provide specific details. Ms Nikki Searancke from Te Whānau a Ruataupare however, told the Court that she married a fisherman, who was based at Tokomaru Bay and fished in and around "our ancestral lands at Tokomaru Bay". But her husband fished "under the tikanga that had been laid down by Ms Searancke's mother and Mr Tate Pēwhairangi". She described the process for his obtaining permission to fish commercially. Ms Searancke's mother checked with her "Uncle Tate" to get approval for Ms Searancke's husband to launch his boat there. She described it as follows:

> This was our tikanga. Even though Mum and I had interests in whakapapa at Tokomaru Bay, we needed approval from those who held ahi ka – Uncle Tate.

[276] In exchange for the ability to launch his boat at Tokomaru Bay, Ms Searancke told the Court that her husband had reciprocal obligations. Her husband was one of the people asked by Mr Tate Pēwhairangi to get rock lobster for Pākirikiri Marae for tangi and hui. Other members of the hapū, like Mr Gilman Tichborne and Mr Whare

Pahina also started to rely on her husband during this period to fish for them, given he had permission to do so from Mr Tate Pēwhairangi. Her husband knew he was never to trawl in the bay, because of the damage it would do to the seabed. She said:

> Whether this was the most commercially viable approach was irrelevant. We followed tikanga, we did what was right.

[277] Mr Tichborne was cross-examined about the necessity for third parties to seek permission to fish in their area. He said:

> Q. And you said it was necessary for, if someone was coming in from outside they needed to seek approval or permission before they fished in those grounds. Do you recall that?
>
> A. Yes, it's common sensical, yes, I said that.

[278] He was then cross-examined about this practice in recent times:

> Q. But you agree with me that they haven't, over the decades, they haven't come to the hapū or whānau and sought approval to fish within your rohe moana, correct?
>
> A. The only time they come is to ask us for the fishing rocks.

[279] Further evidence of requiring permission to take kaimoana from the area was contained in the brief of the late Mr Tate Pēwhairangi. His brief stated:

> I have chased people away or given them a talking to if they have been doing things they should not do. For example, not long ago I was driving out to Waima when I saw two young men bringing in a little punt loaded with kina. The young men were not from Tokomaru and as soon as they got to shore, one of them ran up to me saying ·uncle, uncle, you're related to my parents... ". So immediately he made a whakapapa connection. But still, he was not from this area and should have asked for permission before taking the kaimoana. I told him so and he accepted that.
>
> I am older now so I have to be careful fronting up to a boatload of people. Every now and again there is someone who will ignore you. Those are the times when we need our younger ones beside us to enforce our tikanga. It is encouraging that so many young people want to be marae trustees and kaitiaki so that they have the authority to start taking over these roles.

[280] Mr Pēwhairangi's brief also addressed the control of access to boat landings at Te Māwhai. It read:

> In the 1940s and 1950s, there was no public road through there, but the old wagon trail from Gisborne remained. The land was owned by the Potae whanau and leased out to a pakeha farmer. One pakeke, Enoka

> Potae, lived at the end of the beach and controlled who went through that area to the kaimoana beds beyond. If anybody tried to go through, he would stop and question them and ask for their whakapapa. Some years prior to that, his tipuna Henare Potae, who was the last person to occupy the pa site at Māwhai, controlled access to one of the boat landings in the same way.

Kaitiakitanga

[281] Mr Tichborne's summary of the hapū kaitiaki role is described at [152] above. In his role as a kaumatua of Te Whānau a Te Aotāwarirangi, Mr Tichborne gave evidence of his practice of kaitiakitanga:

> I practice kaitiakitanga over the takutai moana from Te Ngutu a Ngore in the north to Te Māwhai Point in the south in accordance with the seasons and the maramataka. I was taught to preserve the taonga for generations to come. To be a kaitiaki, one must be actively involved in protection and conservation by implementing best practices. Through kōrero from the older generations, I know that the kaitiaki role is one that members of Ngā Hapū have been practicing for a long time. I see this role as vitally important in a world governed by greed and over-consumption. I ensure that visitors and whānau obey the laws of gathering kaimoana in accordance with the Pākēha law as well as Maori lore.

As he said, the practices of kaitiakitanga range across a number of measures adopted by the hapū to control and sustain the resource. Examples included, "rāhui, sustainable use, by preventing or restricting access and by reseeding fish stocks".

[282] He also gave evidence on reseeding:

> Taking kina and cockles from one part of the bay to re-seed another part of the bay with kina and cockles. The constant re-seeding helps keep the channels clear for crayfish and fish to transit through and this keeps the circle of life going. These efforts were successful, but outsiders would come into the bay and harvest from the spots that we re-seeded. When this happens, we start the re-seeding cycle all over again.
>
> My kaitiakitanga right was passed from Io Te Matua to my ancestors and from them to me so that I may hand it on. As a member of Ngā Hapū, the right to act as kaitiaki has been passed down through many generations for over 600 years.

Third-party use

[283] The parties called expert evidence on the history of Tokomaru Bay. Ngā Hapū called Mr Armstrong, a research historian, on the nature and extent of customary rights and interests exercised by the hapū of Tokomaru Bay. The Attorney-General called

expert historical evidence from Dr Gould on third-party use and occupation of Tokomaru Bay from 1840 to the present day. The Seafood Industry called Mr Daryl Sykes as their expert witness on the nature and extent of commercial fishing activities within the specified area and the wāhi tapu areas sought.

[284] Counsel for both the applicants urged that the third-party use in Tokomaru Bay must be assessed with a tikanga Māori lens and in light of the Crown's Treaty obligations. Ms O'Gorman specifically submitted that the ability to allow third parties into the rohe moana demonstrated the manaakitanga of Te Whānau.

[285] From the evidence adduced, four factors require consideration:

(a) third-party use and occupation of the application area;

(b) activities and use by third parties;

(c) exercise of customary practice and control by hapū;

(d) resource consents granted within the application area; and

(e) was there extinguishment by vesting of the foreshore?

[286] Extensive evidence was adduced in relation to each of the above factors. I canvass that evidence in some detail before assessing whether any of the activities described amounted to a substantial interruption of the applicants' exclusive use and occupation of the application area.

[287] Tokomaru Bay is an open and accessible part of the coastline, as Mr Tate Pēwhairangi said when comparing Tokomaru Bay to other parts of the Ngāti Pōrou coastline. Its geographical location explains in part why Tokomaru Bay became a significant place of commercial trading since 1840. The Attorney-General provided a timeline, which charts the significant events relating to third-party use and occupation of the application area. This is annexed in Appendix 14.

Commercial activity

[288] Dr Gould produced copies of historical records and photos from this documentation. Dr Gould concluded that it appears that by the mid-1870's, Torotika

was the primary landing area for third-party activity. The historical evidence, canvassed by both Dr Gould and Mr Armstrong, pointed to significant coastal trade involving Tokomaru Bay throughout the latter nineteenth century.

[289] Dr Gould observed that, as with most areas of New Zealand, the beach along Tokomaru Bay was the site for early contact between Pākehā and the local people including episodes of violence, trade and exchange. By 1840, vessels were calling in to Tokomaru Bay and various coastal hapū had invested in larger schooner or cutter style vessels to capitalise on trade with Auckland and other locations. Dr Gould drew on the records of voyages to and from the east coast and Auckland in the 1850's. Te Māwhai and Tokomaru Bay were featured in those records.

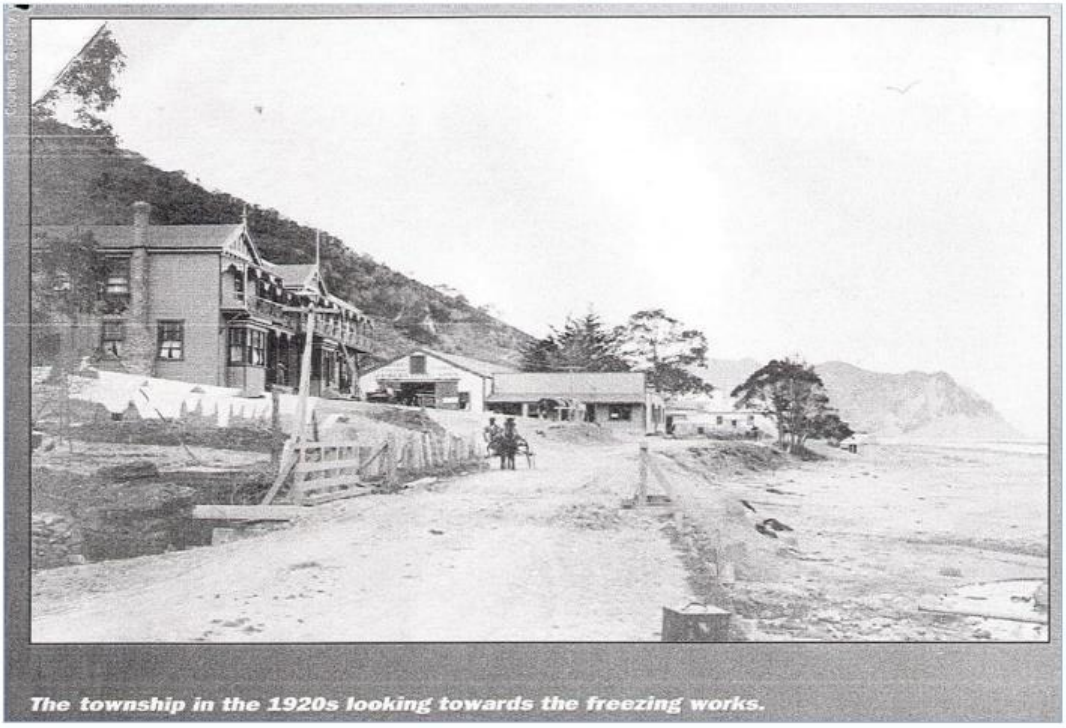
[290] There appeared to be no dispute that in the post-1840 period, the Māori population in Tokomaru Bay embraced the European economy, primarily upon trade in dressed flax, maize, wheat, and other foodstuffs to Auckland and Wellington. This enabled trans-Tasman trade to the Australian colonies, with foodstuffs and flax being exported from the east coast and, in return, clothing items, specialty food items, alcohol, tools and building supplies, horses and tack, were imported.

[291] By the late 1850's, the east coast Māori commodities economy, of principally wheat and maize, was in decline. From around 1860, coastal shipping became dominated by private European vessels and by the mid-1870's the commodity outflow consisted almost entirely of wool and livestock.

[292] Dr Gould produced photographs from Waipiro Bay of materials being moved down the beach, loaded into smaller craft and transported to larger vessels in deeper water. Many of the early photos show the foreshore of Tokomaru Bay and the neighbouring area of Waipiro Bay, depicting horses and carts alongside the waters' edge, loading out wool.

[293] In the above photo of Waipiro Bay, north of Tokomaru Bay, Dr Gould describes Koutunui Head in the right of the frame and most relevantly, in the foreground, still hoisted on the mast of the fishing vessels, he points to the first catch of fish honouring Tangaroa, placed there by the Māori fishers.[98] The juxtaposition of commercial interests (loading out wool onto steamers) with the customary fishing practices in this photo, is both poignant and telling. The customary practices continued, notwithstanding the transitory commodity trading along the adjoining foreshore.

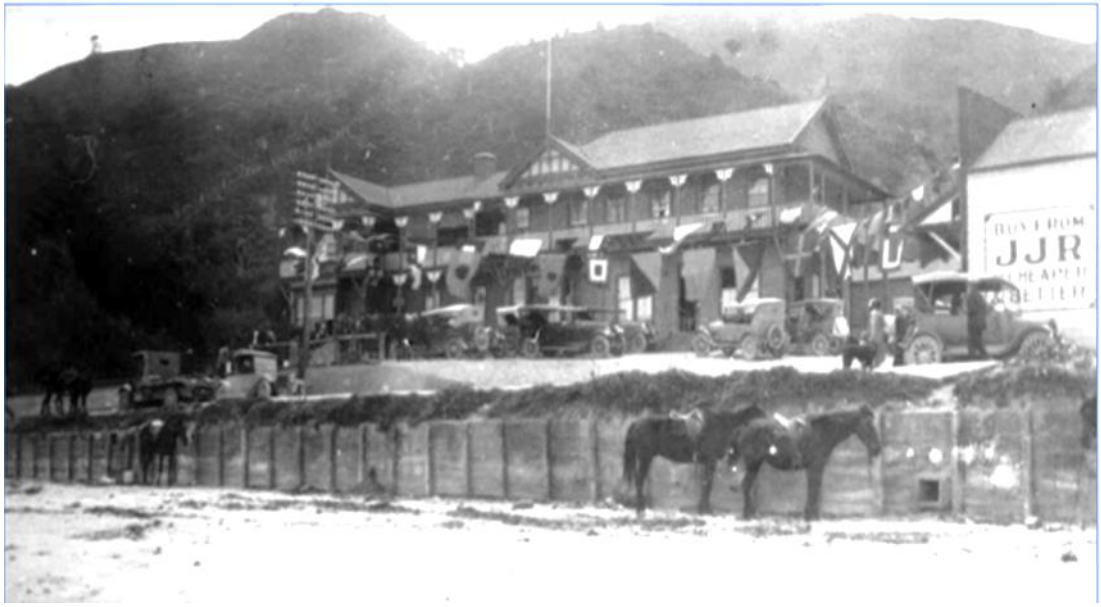
98 Tairawhiti Museum Collection: "Waipiro Bay loading-out wool with Māori fishers in foreground".



The township in the 1920s looking towards the freezing works.

[294] A press report on 14 January 1903 recorded that Walker's mail coach connected Gisborne to Tolaga Bay, delivering goods and transporting people to Tokomaru Bay, Te Puia and Waipiro Bay. The coaching company, Redstone, later maintained its Tokomaru Bay terminus and stables near the Te Puka Hotel. An early image above shows the Te Puka Hotel with coach stables. It has no seawall or landing shed visible but there is a ramp leading onto the beach. Although labelled "1920's", it appears from the photos that it is likely circa 1910's, as Dr Gould opined.

[295] The above photo is thought to show the coach team horses bathing in the surf at Te Puka, in front of the Te Puka Hotel. In another photo from around 1900–1914, the Te Puka Hotel is shown with the mail coach and boat ramp stretching out in front.



[296] Dr Gould considered that Te Puka may have been used for timber or log export. The timber was milled at a site on the mouth of the Waikōkō Stream and from there taken to a loading ramp at Te Puka so it could be loaded onto ships. By the mid-1920's, a wooden seawall was erected on the breach front, with the photo above showing horses tethered to it. A power pole was also erected immediately above the seawall, and a culvert was also created.[99]

[297] Mr Tichborne agreed that from 1840 to 1905, sealers, whalers and early settlers, followed by farmers, tourists and traders used the foreshore at Tokomaru Bay on a daily basis. He also agreed that in the early twentieth century for a period of time, there was a substantial community living and working in that area using the foreshore. They were not tangata whenua but there was a need "for all of those outsiders, those non-tangata whenua, to be able to use the seabed and the foreshore".

[298] He also accepted that all commerce, including fishing, would have occurred "across the beach" and that the foreshore was "the gateway" to Tokomaru Bay. He believed that cargo ships and commercial fishing vessels "would have been mooring

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[99] Hocken Collection, University of Otago, image of the Te Puka Hotel with coach stables in the 1910s.

on the seabed or tying up on the Waima wharf, in the same way as the customary waka sat on the seabed at Kakepō".

[299] Mr Armstrong agreed that over a 50–60 year period, the beach along Tokomaru Bay was used "by third parties and local Māori" to move and transport goods in and out of the bay. He considered this use did not seem to have "had any impact upon customary Māori use of the marine and coastal area". His evidence was that the two hapū have accessed the foreshore and seabed without impediment since 1840, despite the third-party activity and use and despite the legal vesting of title to the foreshore and other lands in local authorities.[100]

[300] There are three landing areas in Tokomaru Bay which provided access to and from the marine and coastal area. The construction of a ramp at Torotika/Te Puka facilitated the use of the marine and coastal area in Tokomaru Bay by third parties. Third-party boat launching and activity occurred along the foreshore of Tokomaru Bay before any jetty was constructed in 1905.

[301] The first European estimate of the Māori population of Tokomaru Bay indicates that 600–800 people lived in the district in 1838, divided among eight pā and kainga. Te Ariuru was the largest. A missionary from the Church Missionary Society was based at Tolaga Bay and, in 1844, he recorded that the Society had built a church capable of holding a congregation of 400–500 people. Dr Gould considered that it was probable the pre-contact population of the district was significantly higher than 600–800 people but the numbers were reduced from the 1820s due to the introduction of diseases and muskets.

[302] Since 1840, open access to Tokomaru Bay and its marine resources by third parties was prevalent. Commercial whaling commenced in the area in 1837 and in 1838 the first missionaries visited the area. Voyages were recorded from 1843, when *Nimrod*, a cutter of 20 tonnes owned and operated by east coast Māori, sailed into Wellington from Tolaga Bay and voyages were recorded from Auckland to Te Māwhai and Tokomaru from early to mid-1850's. Sealers, whalers and early settlers operated

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100 This vesting is discussed later in this judgment at [349]–[359].

in and inhabited the east coast, including Tolaga Bay, with a whaling station established on the southern side of Te Māwhai Point.

[303] I focus then on the places of third-party use on the foreshore, commencing with the landing areas and wharves and freezing works.

Landing areas and wharf

Torotika (Te Puka landing)

[304] The modern landing ramp at Torotika/Te Puka appears to have been, and continues to be, an important public access point to the marine and coastal area. It has facilitated use and occupation by third parties in and around the landing area and, I infer, across the marine and coastal area of Tokomaru Bay and offshore.

[305] By 1875 the area was "the usual landing spot" for coastal traffic, including the transporting of wool bales, as Dr Gould describes. A landing shed at Te Puka, just above the high-water mark, was licensed in 1901 and the Te Puka Tavern was built nearby. From the historical records and the evidence of Dr Gould and others, there was significant third-party use of the surrounding beach and foreshore in the early 1900s.

[306] Currently, the Te Puka boat ramp is used by local fishing clubs as well as by hapū members and other members of the public. In 1965, a concrete boat ramp that extends into the foreshore was put in place by Awhina Fishing Club. The Club was then granted a licence in December 1971 by the Crown to occupy "part of the foreshore and seabed" for 14 years. When the licence was renewed in the 1990s, it contained a special condition that required public access to the ramp, making it a public amenity. The ramp has been widened to better facilitate commercial cray-fishers' use of the ramp and commercial users continue to launch from the ramp today.

[307] The Attorney-General submits there is no record of local hapū objecting to the Club's use or control of the landing area. It appears that in 1990, a "Māori Committee" of Tokomaru supported the boat ramp to give ready access for all boat users, tourists and the public.

[308] Mr Tichborne explained that when the Te Puka Hunting and Fishing Club sought a coastal permit from the Gisborne District Council in 2018 to undertake work on the Te Puka boat ramp, "whānau and hapū members objected". He said the representatives met with the Gisborne District Council and the Hunting and Fishing Club representatives to discuss the nature of the repairs. Mr Tichborne asserted that although the hapū members "allowed the boat ramp repairs to proceed", there was a compromise reached that the plans to demolish a large rock in the middle of the channel were not undertaken, at the request of the hapū.

Kakepō (Te Ariuru jetty)

[309] As already described, the Kakepō landing area has particular significance for the hapū of Tokomaru Bay. It was the landing area, described as a "boat harbour," and was part of the former Te Ariruru Pā complex.

[310] In May 1905, the Crown took the land at Kakepō, above the mean highwater mark under the Public Works Act 1894, to construct a jetty. The Crown then granted licences to the Tokomaru Farmers' Cooperative Company to occupy the adjacent foreshore, seabed and the wharf itself. In 1906, further extensions and alterations were made to it, and it appears to have been the main third-party commercial launching spot in Tokomaru Bay before the construction of the Waima wharf.

[311] It is relevant to the assessment of substantial interruption whether the vesting of the land in the Crown or other third-party as its absolute owner extinguishes customary title. Here, the land was taken under the Public Works Act, then sold by the Waiapu County Council in 1949 to a third-party, and was then further alienated to another entity. Dr Gould said, "commercial rock lobster fishers used this area from 1946 through to the 1990s without restriction or charge".

[312] In 1993, however, the Gisborne District Council acquired the land and vested it in the trustees of Te Ariuru Marae in 1996. The Māori Land Court then vested the land at Kakepō as a Māori reservation for the benefit of the descendants of Te Aotāwarirangi. The trustees, as vested owners in the land, can exercise rights over the reserve.

[313] The Kakepō land which has been vested in the Te Ariuru Marae Trustees falls outside of the scope of MACA, as it is above the mean highwater mark and is not part of the common marine and coastal area. But, I accept the Attorney-General's submission that the exercise of the rights over the reserve may give rise to an inference that the descendants of Te Aotāwarirangi have evinced an intention and ability to control its use at Kakepō. I consider it does. Currently, the area remains the main launching area for commercial crayfishers in Tokomaru Bay. Mr Delamere believed that there was no "ability or capacity or need to stop commercial fishers from using that area to launch vessels". This acknowledgement does not detract from the control of the reservation area by the hapū trustees.

Waima freezing works and wharf

[314] Dr Gould described how land was acquired from Māori ownership by the Tokomaru Sheep Farmers' Freezing Company Ltd, authorised by an Act of Parliament in 1909.[101] The land acquired was above mean highwater mark and the Freezing Company occupied land in the foreshore and seabed under a licence from the Marine Department. It appears some of that land was reclaimed land and other parts of the land were used for a seawall and to assist in the construction of an extensive wharf that extended well below low water mark. This was known as the Waima wharf.

[315] The Waiapu County Council (Tokomaru Harbour) Empowering Act 1910 authorised the County Council to buy the Freezing Company's wharf, construct harbour works, borrow funds and levy a rate on local ridings. In 1912, the Waima wharf was transferred to the Waiapu County Council.

[316] From 1913–1916, Dr Gould estimates that these were the peak years for the use of the Waima wharf, measured by the number of vessels. Dr Gould's evidence indicates significant volumes of trade and people using the wharf beyond the First World War and well into the 1950s. Despite the 1930s Depression, and the Second World War, Dr Gould noted that the Harbour Board reconstructed the wharf in the 1920s, replacing it entirely in the late 1930s. This reinforced the importance of the

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101 Tokomaru Freezing-Works Site Act 1909.

wharf facility. The Board also reclaimed land at the wharf site and altered the seabed to allow longer and larger vessels to dock.

[317] The 1940's saw economic changes, which affected the port's use, led to the closure of the freezing wharf in 1952 and, ultimately, reduced the use of the Waima wharf. Dr Gould however says that the wharf was still used by fishing boats through to the 1970's. Mr Sykes told of one commercial vessel which continued to operate regularly from the Waima wharf as part of "the Watties fleet" and tied up at the wharf from 1972. However, the evidence demonstrates that commercial activity in Tokomaru Bay waned significantly with no such similar activity being undertaken today.

[318] Dr Gould noted that despite the operation of the wharf as a significant structure and facility for third-party use and occupation of the Waima Cove area, it co-existed with the public use of the wharf for "swimming, fishing and moonlight walks". There was no evidence before the Court that pointed to the interruption of customary fishing practices and collection of kaimoana as a result of the wharf structures and activities. Indeed, Mr Whakataka spoke of fishing from the wharf, using the homemade constructions of a pouraka.

[319] The evidence reveals that the Waima Wharf proved to be an ideal place, from which the hapū members could carry out their customary fishing practices by the use of home-made constructions. The following are apt illustrations, again reinforcing the juxtaposition of the modern with the customary. The customary practices were not interrupted.

[320] Mr Kemara Pēwhairangi recalled making pouaka by tying a net to a bicycle wheel rim:

> When we were kids, we used to fish quite a bit. We used to make our own pouraka. We'd tie a net to a bicycle tyre rim and hang the net underneath. All the spokes had been taken out so you just had the tyre rim. You'd know the net at the bottom to make it as big as you wanted. Then you'd tie rope to the tyre rim, *put some bait in the net and drop the pouraka in the water down at the wharf*. It would lie flat on the bottom. You'd leave it ther so that the crays could come over and eat the bail. After about half an hour, you'd use the rope to quickly pull the pouraka up.

[321] He also recalled using chicken wire to make a trap to catch herrings:

> We'd bend the chicken wire into a box-like shape that was open at the top. Some rope would be tied to each of the four corners and joined in the middle. *In those days, the wharf was in a much better condition and so you could get down the piles close to the water and hang the trap in there with some bread in it*. You'd hang it about two or three feet below the surface so that the fish could swim into the trap. The herrings would come in and eat the bread. When you had enough in there, you'd quickly pull the trap out of the water and now you've got some bait to go fishing with. You'd only do it two or three times because the fish got a bit wise after a while.

[322] The evidence of third-party fishing and its impact on exclusive use was the predominant feature of the evidence on third party activities. The other activities of tourism and gravel extraction, while addressed, did not assume the same importance in the hearing as fishing by third parties.

Fishing by third parties

[323] The focus for this analysis is on exclusivity, namely whether evidence of third-party fishing establishes that the use and occupation by the hapū members in the area is not exclusive.

[324] Several witnesses asserted that third-party fishing has not prevented hapū members exercising their fishing rights. However, there is tension between that evidence and evidence that customary fishing has been impeded and diminished by overfishing by commercial fishers. As noted, the relevant legal question under s 58(1)(b)(i) of MACA is not simply whether customary fishing has continued. Rather, the Court must consider whether the level and nature of third-party fishing means the applicant groups cannot establish "exclusive use and occupation" or that it contributes to substantial interruption of any exclusive use and occupation established by the applicant groups.

[325] There is a long history of recreational and commercial fishing by third parties in the Bay. Mr Roger Tichborne agreed that commercial trawling and longlining had been occurring in the rohe moana since at least the 1930s.

[326] Mr Duncan Petrie's evidence was that the application area is a "high use zone" for recreational fishing over the summer period, with high numbers of visitors. It has

relatively high levels of commercial fishing and throughout the year there is also "high fishing activity" from the local population for sustenance purposes.

[327] Witnesses from both Ngā Hapū and Te Whānau made broad statements about the absence of state controls over fishing relating to rock lobster,[102] trawlers and longline vessels,[103] and recreational fishing.[104] In relation to offshore fishing grounds, the evidence indicates there was limited or no ability of the two hapū to control access to fishing grounds by third parties for recreational fishing, even where hapū members were fishing using traditional markers.[105] Several witnesses also accepted that non-Māori fishers were not required to follow, and generally did not feel bound by, tikanga Māori when fishing, though local non-Māori would generally observe rāhui and the tikanga customs.[106]

[328] There is conflicting evidence of other interactions by Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare in relation to fishing by third parties. Mr Tichborne agreed with Mr Scott that if there was some legal or practical ability to prevent or control commercial fishing, that ability had not in fact been exercised. The candid evidence from witnesses, however, acknowledged that hapū members had taken the law into their own hands by challenging both Māori and non-Māori fishers at the ramps, in relation to their rights to fish or the enforcement of rāhui. This involved direct confrontation. Those witnesses expressed their frustration that such challenges were necessary and often unsuccessful.

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102 For example, Kody Pēwhairangi considered rock lobster fishermen were not required to get permission or approval from Te Whānau a Ruataupare before fishing in the Bay (although Ms Pēwhairangi qualified her response to say that Tate Pēwhairangi, her father, had "relationships with those people at that time"). Ms Pēwhairangi agreed that Ruataupare had no legal or practical way of controlling rock lobster fisherman fishing within the rohe moana, except through "the permit system" (referring to the Fisheries (Amateur Fishing) Regulations 2013 which manage customary fishing).

103 Kody Pēwhairangi agreed with counsel for the Seafood Industry that Te Whānau a Ruataupare had never sought to control the trawlers. Ms Pēwhairangi agreed that none of the trawlers needed to seek approval or permission from Ruataupare and did not do so. Mr Roger Tichborne considered that trawlers and longline operators did not seek approval or permission from Tokomaru Bay hapū.

104 Fishing club members and others from outside of Tokomaru Bay use Te Puka ramp without being required to get permission or approval from hapū.

105 For example, Kemera Pēwhairangi accepted there was not much fishers could do about other fishers following them out and fishing in their areas. Mr Wiremu Ryland also gave evidence that fishers would be watched or followed, suggesting an inability to control fishing in those grounds.

106 For example, Roger Tichborne agreed that commercial and recreational fishers had not fished in accordance with tikanga.

Fishing regulation

[329] Mr Scott, for the Seafood Industry, submits that the fisheries in New Zealand have been substantially regulated and authorised by increasingly complex regulation of the business and activity of fishing from the early 1900s onwards. He provided a summary of the fisheries legislation and the essential features of it as it evolved. As this is not in dispute, I do not set out the detail of the dates and contents of such legislation. However, it is plain that since 1894, any person wishing to use a fishing boat to take fish for the purpose of sale had to obtain a necessary licence.[107]

[330] From 1932 more detailed regulations were promulgated imposing size and weight restrictions on inshore species (for both commercial and non-commercial take) as well as restrictions on where fishing could occur. From 1945 through to 1983, commercial fishing was more heavily regulated for commercial and non-commercial fishing and in 1963, fishing permits were introduced as the primary management tool governing access to right to take fish for the purpose of sale.[108] In 1977, a statutory regime applied in respect of rock lobster covering all fishing for that species in the claimed area and no new rock lobster licences were issued from that time.

[331] In 1986, the Fisheries Act 1983 was amended to introduce the quota management system (QMS), granting to quota owners rights in perpetuities to harvest.

[332] In 1989, Crown and Māori agreed and interim fisheries settlement which provided for the allocation to Māori of 20 per cent of all new species entering the QMS and for the Crown to acquire a 50 per cent stake in Sealord for Māori. There was a final settlement in 1992, that progressively supplied Māori through the Māori Fisheries Commission.

[333] In 1998, the Fisheries (Kaimoana Customary Fishing) Regulations 1998 gave effect to the non-commercial component of the 1992 fisheries settlement. This enabled the establishment of rohe, the issuing of authorisations to take for customary purposes and the creation of customary fishing (mātaitai) reserves.

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107 See Fisheries Act 1894.
108 Fisheries Amendment Act 1963.

[334] The Seafood Industry submit that the legislative scheme prevents the applicants from establishing that they have retained exclusive use and occupation. It is also submitted that this forms the basis of substantial interruption. I deal with the submissions related to substantial interruption in the next section. The thrust of the Seafood Industry's submission in relation to exclusivity is that the right of access for commercial use and non-commercial take has been "exclusively controlled and authorised by Parliament, initially through vessel licensing and registrations systems and then progressively through more prescriptive and invasive regimes" resulting in the removal from the fisheries of many part-time fishermen when the QMS was being imposed in 1996. Mr Scott acknowledges that the legislative scheme itself does not prevent the applicants from establishing that they have retained exclusive use and occupation without substantial interruption. But he says, the scheme provides the statutory context in which the evidence of lawful third-party fishing activities authorised by Parliament should be considered by the Court.

[335] Mr Scott points to the absence of evidence that the applicant groups have the necessary control of third-party access in areas outside of the immediate coastline, whether at 1840 or otherwise. He acknowledges Mr Delamere's evidence that persons who were not descendants of Te Whānau a Te Aotāwarirangi were excluded from gathering seafood, but he says, that that was limited to the collection of kina, pāua and parengō from the bay. He observes that no similar evidence was given of exclusion of others in deep water areas out to the 12 nautical mile limits. He submits that in the absence of evidence that the applicant groups have controlled access of third parties to the marine area, evidence of a spiritual or whakapapa connection to the moana is insufficient. He relies on the Court of Appeal majority's observation that it will be more difficult for applicants to demonstrate control of access in offshore marine areas than in shallower areas close inshore, being a use/resource right rather than a territorial one.[109] I deal with these submissions in the analysis on exclusive use since 1840 below.

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[109] *Re Edwards* (CA), above n 1, at [423] per Cooper P and Goddard J.

Other activities by third parties

[336] There are two other third-party activities, which were the subject of evidence in the hearing. The first was tourism, specifically the impact of freedom camping areas on exclusive use and occupation, and the second is gravel extraction. I cover these for completeness as they were not pursued as grounds for (a lack of) exclusive use and occupation or substantial interruption in the supplementary submissions after the Court of Appeal's decision in *Re Edwards* by either the Attorney-General or the Seafood Industry.

Tourism

[337] The freedom camping areas or camp sites appear to be above the mean highwater spring mark. This takes them outside of the specified area and MACA. However, the Attorney-General submits that those areas are relevant in showing ongoing access points for third-party use of the takutai moana because freedom campers have easy access to the beach from the camping areas.[110]

Gravel extraction

[338] The second activity is gravel extraction. Two witnesses described gravel extraction from the beach and foreshore, including the Tuatini Native Township Gravel Reserve. In 1899, the Tuatini Native Township was established and the land gazetted as part of the Township was above mean high-water mark.[111] Dr Gould confirmed that the land within the Township was vested in the Crown under the Native Townships Act 1895, and included land designated as reserves. [112]

[339] In 1909–1910, the gravel reserve was gazetted as being under Waiapu County Council control and, Mr Armstrong confirmed, the gravel reserve is currently held by the Gisborne District Council under a registered certificate of title.[113] Customary interests in respect of the gravel reserve, which fall within the takutai moana, had been

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110 814 permits for camping were issued in the summer of 2021-2022; and 80-100 permits were issued in 2005. Dr Gould estimates that represents 140 individuals.

111 Customary title had already been converted to freehold estates with highwater mark boundaries by the Native Land Court.

112 Native Townships Act 1895, ss 14–22.

113 Record of Title GS5C/342.

extinguished by registration under the Land Transfer Act. The hapū witnesses did not address this issue and the Court has not been provided with any detail as to how this impacts the specified area sought.

[340] Both Dr Gould and Mr Armstrong refer to gravel extraction by local authorities and contractors in areas close to the mouth of the Mangahauini River and along the foreshore. Both witnesses were in agreement that the Harbour Board's aim in securing the vesting of the foreshore was to gain access to sand and gravel.

[341] Dr Gould acknowledged there was evidence that members of the Pēwhairangi whānau protested over gravel extraction near the mouth of the Maungahauini River but was "not clear" about what influence this had on Council behaviour. Ms Kody Pēwhairangi confirmed that Te Whānau a Ruataupare were not consulted or included in any discussions about gravel extraction. Dr Gould said that significant quantities of sand and shingle were removed from the area through to the late 1970's at least and that where royalties were paid for such mineral extraction, they went to the Crown or to the local authorities, but not to Māori.

[342] The gravel reserve held in a registered Certificate of Title is exempt from inclusion in the specified area and in a CMT. Under s 58(4) of MACA, customary marine title cannot exist, if customary title is extinguished as a matter of law. This was not addressed by the parties, and I reserve the position for clarification at Stage Two hearing.

Resource consents

Prior to 1 April 2011

[343] Section 58(2) of MACA provides:

> (2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—
>
> (a) the commencement of this Act; and
>
> (b) the effective date.

[344] In this case, the resource consents have been granted before the commencement of MACA and therefore are not excluded in the assessment of substantial interruption to exclusive use. However, it is questionable whether the Court can draw an inference that because an activity in the marine and coastal area is carried out pursuant to a resource consent that pre-dates the commencement of MACA, it automatically amounts to a "substantial interruption" of the exclusive use and occupation of the takutai moana by applicant groups.[114]

[345] I accept Dr Ward's submission that a group's involvement in resource management processes may demonstrate a recognition of that group's kaitiakitanga and be relevant as evidence of that group's status or authority across an area. It is clear from the authorities that consented activities need to be considered in the context of the evidence overall, including the applicant's tikanga, the circumstances of the applicant's use and occupation of the takutai moana, and the nature and overall extent of the consented activity, including its duration.

Consented activities

[346] Helpfully, Mr Jennings provided maps showing the relevant consents in the area, including those within 100m of the high-water mark. His maps are annexed at Appendix 15 (a)–(c). It appears most of the consents include work undertaken by non-hapū groups or entities on structures in the takutai moana, including the Waima wharf, to repair seawalls and other "coastal protection works". Similarly, there are other consents for boat ramp repairs.

[347] The witnesses evidence addressed how the hapū have been involved in resource consent processes in the application area, particularly in relation to kaitiakitanga responsibilities and mana whenua status under the RMA. Although neither hapū brought direct evidence that they are treated as mana whenua by Gisborne District Council for the purposes of plan making or consent decisions regarding Tokomaru Bay under the Resource Management Act, Mr Roger Tichborne was involved in resource consent processes regarding the Te Puka boat ramp and the construction of rock groynes along the Maungahauini River.

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114 *Re Edwards (No 2),* above n 10, at [229]–[230].

[348] The Attorney-General submits it was not clear whether the latter application was within the takutai moana, but concedes, however, that the attempt on behalf of the hapū groups to control third-party use in the application area, through involvement in the RMA process, may be relevant and indicative of their intention and ability to control the area. I agree.

Statutory vesting of the foreshore

[349] A significant factor in relation to the foreshore of Tokomaru Bay occurred in 1917, when the foreshore from Koutunui Point to Te Māwhai Point was vested in the Waiapu County Council under the Tokomaru Bay Harbour Board Act 1915 (the 1915 Act). As Dr Gould's evidence revealed, two certrificates of title were issued to "the Chairman, Councillors and Inhabitants of the County of Waiapu, a body corporate, for Harbour Purposes". By virtue of the 1915 Act, the titles were held by Waiapu County Council, acting in its capacity as the Tokomaru Bay Harbour Board.[115]

[350] In *Attorney-General v Ngāti Apa*, Elias CJ confirmed that the issue of a certificate of title under the Land Transfer Act extinguishes any customary title or rights relating to the land.[116] Further, the provisions of the Land Transfer Act remove any legal recognition of customary property in the land by virtue of indefeasible title.[117] The exceptions to indefeasible title under the Land Transfer Act do not apply. Thus, any customary property interests in the foreshore vested in the Waiapu County Council were therefore extinguished.

[351] Following the statutory vesting in 1915, the Tokomaru Bay Harbour Board controlled the foreshore.[118] Bylaws were passed regulating activities along the

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115 Tokomaru Bay Harbour Board Act 1915, s 2 and sch 1.

116 *Attorney-General v Ngāti Apa*, above n 35, at [58] per CJ Elias. The Attorney-General refers also to *Western Australia v Ward* (2002) 191 ALR 1 (HCA) at [78]; and *Akiba v Queensland (No.3)* [2010] FCA 643 at [190] and [193], to reinforce that whether the right or property interest is inconsistent with the continuance of customary rights and interests is an objective inquiry, which requires identification of and comparison between the legal nature of the two sets of rights.

117 Land Transfer Act 2017, s 51; Land Transfer Act 1952, ss 62, 63(1) and 64; Land Transfer Act 1870, ss 39 and 46; and see *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC).

118 Tokomaru Bay Harbour Board Act 1915 (the 1915 Act). In 1916 and 1917 the Harbour Board acquired several parcels of land abutting the foreshore for harbour purposes under the Public Works Act 1908. These takings were to facilitate anticipated developments around the Waima wharf and for roading purposes. These takings were certain parcels in Waima Cove and other parcels to the south of Waima, along the beach (above high-water mark). These takings extended the area of legal control and possession by the relevant local bodies over the foreshore area in

foreshore, signs were erected under the authority of the Harbour Board, and the Board received royalties for mineral extraction from the Tokomaru Bay foreshore.

[352] As noted earlier, the Harbour Board was involved in reclaiming land, in constructing and maintaining seawalls along the edge of the beach, and extracting gravel. The Attorney-General's submission, that these steps are consistent with the physical exercise of property rights and control by third parties, is uncontentious. This leads to a consideration of extinguishment of title.

Extinguishment

[353] Section 58(4) of MACA stipulates that CMT does not exist if that title is extinguished as a matter of law. At the conclusion of the hearing, Dr Ward submitted that there is a distinction between extinguishment and substantial interruption. Extinguishment, as MACA makes clear, is a question of law. Substantial interruption on the other hand, is a consequence of the *de facto* loss of exclusive use and occupation.

[354] The Court of Appeal decision, delivered subsequent to this hearing, clarified the position. Miller J for the Court held that under s 11(3) of MACA any previous vesting of the common coastal and marine area in the Crown under the Coal Mines Act was reversed. He records that the Crown was "divested of every title as owner, whether under any enactment or otherwise, of any part of the common marine and coastal area".[119] Neither the Crown nor any other person owns or is capable of owning, the common marine and coastal area following MACA's commencement and the marine and coastal area is defined to include the beds of rivers forming part of that areas, as well as the airspace above and the water space (but not the water).[120]

Waima Cove. Dr Gould does not record any public protest or comment relating to the takings. While Dr Gould considered all land taken was above mean high-water mark, one part of these takings was surveyed with a straight- line boundary across an unnamed creek near Te Ariuru. To the extent this included land that may be in the common marine and coastal area, the taking under the Public Works Act extinguished any customary title in that land. There is no question the statutory language and purpose of the Public Works Act is sufficient to extinguish customary property, and the property taken is clearly identifiable through the survey and gazette documents.

119 *Re Edwards* (CA), above n 1, at [244] per Miller J.

120 At [244] per Miller J and [360] per Cooper P and Goddard J; and Marine and Coastal Area (Takutai Moana) Act, s 9(1): definition of "marine and coastal area" paras (b)-(c).

[355] The Attorney-General accepted the burden of proving extinguishment, with the submission that whether customary interests have been extinguished will depend on the effect of the legislation or actions relied upon as having that effect.[121] As the Court of Appeal in *Ngāti Apa* held, extinguishment requires a "clear and plain intention" to create an interest contrary to the customary rights or interests.[122] The intention may be implied from a statutory scheme or expressed in legislation. Extinguishment occurs when a customary title cannot survive the creation of a legal property interest, such as indefeasible title under the Land Transfer Act, or a vesting by statute.

Revival of customary rights and interests in the foreshore

[356] Of importance to Tokomaru Bay, s 4 of the 1991 Act applied to foreshore and seabed vested in a harbour board or a local authority. Because the Tokomaru Bay foreshore land was vested in the Gisborne District Council, being a local authority under the 1991 Act, it fell within the definition of land deemed to have been alienated from the Crown and vested in a harbour board or local authority under s 4(3).

[357] Despite the vesting of the foreshore in the Tokomaru Bay Harbour Board under the 1915 Act, the Attorney-General maintains the original submission that the customary property interests extinguished by the fee simple titles issued in 1917 were revived by the Foreshore and Seabed Endowment Revesting Act 1991 (the 1991 Act). Following the Court of Appeal's decision in *Re Edwards*, the Attorney-General confirms that view, that customary property interests in the foreshore at Tokomaru Bay were revived either by the 1991 Act or on the Court of Appeal's approach under s 11(3) of MACA.

[358] Dr Ward observes that the Court of Appeal's assessment relies entirely on the divestment of Crown ownership under s 11(3) and he submits, that the same assessment applies, taking a principled approach, in respect of local authorities. Section 11(3) divests the Crown and "every local authority" of title to any part of the common marine and coastal area. He concludes therefore that where customary rights

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121 *Attorney-General v Ngāti Apa*, above n 35, at [47] and [49]; and *Akiba v Queensland (No.3)*, above n 116, at [190].

122 *Attorney-General v Ngāti Apa*, above n 35, at [148]–[149], [154], [161]–[162] and [170].

in the common marine and coastal area have been extinguished by reason of Crown or local authority ownership, s 11(3) effects statutory revival of such rights.

[359] For completeness, s 5 of the 1991 Act revoked all of the original vesting of land to which MACA applied and under s 5(b), revested the land in the Crown "as if it had never been alienated from the Crown and free from all subsequent trusts, reservations, restrictions, and conditions". Following the Court of Appeal's approach, such rights were revived by s 11(3) of MACA on the divestment of title to the foreshore under that section. It follows that s 58(4) of MACA is therefore not engaged. I accept that the 1991 Act reverses the 1917 extinguishment. I accept the 1991 Act reverses the 1917 extinguishment and there has been no extinguishment of customary title accordingly.

Analysis on exclusive use since 1840

[360] In making an assessment of the evidence of the use and occupation by the two hapū in the takutai moana of Tokomaru Bay, the overriding consideration under s 58(1)(b)(i) is whether the applicant group has shown it has the authority to use and occupy the area and to control access to and use of that area by others from 1840 to the present time.[123] However, such "control" since 1840 needs to be viewed through a tikanga lens and must be lawful.

[361] Having already found that the applicant groups hold the relevant area in accordance with tikanga, I consider the evidence on their use and occupation since 1840 confirms that the use and occupation of the relevant area by both hapū has been continuous since 1840. There is no suggestion that the hapū have lost ahi kā. They have continued their application of tikanga values in their use of the resources and coastal areas.

[362] Both applicant hapū have established a territorial interest in the relevant area and have exercised their authority as kaitiaki, to protect the resource and require others, as far as the law permits, to abide by the tikanga values practised in their area. This is supported by the other relevant considerations of abutting lands in Māori

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123 *Re Edwards* (CA), above n 1, at [435] per Cooper P and Goddard J.

ownership and control, the exercise of non-commercial fishing rights in the area since 1840,[124] the placement of marae above the foreshore and the continuation of customary fishing and tikanga practices to the present day.

[363] Dealing then with the statutory control of fisheries, there is no question that the imposition of the fisheries legislation, in all its forms, informs the statutory context for all New Zealanders in the commercial and non-commercial fisheries in New Zealand. While the legislative framework provides context for a consideration of the applicants' claims to exclusive use and occupation, the imposition of the fisheries legislation does not extinguish customary fishing interests. The customary practices of fishing and collecting coastal resources have continued, albeit with fish stock restrictions imposed nationally and the depletion of resource over time. Some of the statutory enactments were aimed at protecting customary fishing practices.[125]

[364] However, I do not uphold the Seafood Industry submission that the applicants' evidence amounts to "use rights only". The thrust of the Seafood Industry's submission is that the applicants have not demonstrated the necessary control of third-party access outside the immediate coastline, whether at 1840 or otherwise. In my view, this misconstrues the concept of control, is an over-reach of the Canadian cases and undermines the work of the first limb of s 58(1), by focusing on whether the applicants can exclude others after the Proclamation of Sovereignty in 1840 and Sovereignty since.[126]

[365] There were instances given by certain witnesses that unlawful means had been employed to stop people fishing in certain areas of Tokomaru Bay. Examples also reveal that hapū members questioning third party divers and told others to put fish back, where under-sized. The most telling are the examples of commercial fishermen lawfully authorised to take crayfish from the inshore waters of Tokomaru Bay, seeking permission from the relevant hapū. To focus on control and permission, however, is to overlook the other manifestations of exclusivity, namely the applicant groups' *authority* over the territory and their *presence* in it.

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124 At [143] per Miller J.

125 See for example: Māori Fisheries Act 2004; and Fisheries (Kaimoana Customary Fishing) Regulations.

126 *Re Edwards* (CA), above n 1, at [417]–[418] per Cooper P and Goddard J.

[366] The applicant groups' authority and presence in the relevant area since 1840 is evidenced not only by all the factors discussed above but by their knowledge of and names for sites of significance, spiritual and wāhi tapu areas, together with their oversight of resources within their coastal foreshore and their attempts to preserve them. These include the imposition of rāhui to ensure no fishing occurs within breeding seasons of certain species and the reseeding of kina and other species within the coastal and foreshore areas to protect the seafloor environment, the permission given by hapū leaders to commercial fishers to fish within the inshore coastal areas, and the issuing of permits by Marae Committees to allow collection of seafood.

[367] Both Court of Appeal judgments reinforce that exclusive occupation means that the applicant group must have the intention and ability to control access to the relevant area by other groups and take from the two approaches that they must have the authority to control the territory. "Other groups" is not defined but in the context of their reasoning, the majority viewed the groups' "intention and ability to control access to an area and use resources within it, as matter of tikanga". I infer that other groups must mean other Māori groups. This is consistent with the applicant group having "a strong presence" in the area demonstrating their control or their exclusive stewardship.[127] The majority said further that the ability of a group to meet the exclusive use and occupation test will not necessarily be defeated by access and use of resources in that area by other Māori groups.[128]

Inshore fisheries

[368] I am satisfied that the hapū members have exclusively used and occupied the inshore fishing grounds such that both hapū maintain their tikanga and customary practices, including fishing grounds at known and named places within the three to four nautical mile limit. They have done so in relation to the inshore area since 1840. Although the hapū members have not engaged with the Customary Fishing Regulations or sought to make the area a mataitai reserve (where they can exercise control over commercial fishing), there have been attempts to control and objections made by hapū members when third parties fail to observe rāhui or the seasons for

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127 At [422] per Cooper P and Goddard J.
128 At [424] per Cooper P and Goddard J.

taking certain species of fish. As noted, this is consistent with the hapū members' role as kaitiaki and with the concept of exclusivity.

[369] The Huiteananui Fisheries Plan recognises traditional customary taonga ika (fishing grounds), mahinga kai (food gathering places), and tikanga practices for gathering fisheries resource in southern Tokomaru Bay. That plan extends three to four nautical miles from the Tokomaru Bay foreshore between the Waitakeao Stream and Te Māwhai although the seaward boundary is unclear. The plan acknowledges areas that overlap and fisheries resources that are shared with Te Whānau a Te Aotāwairangi but states that Ngā Marae o Te Whānau a Ruataupare continue the practice of manaaki and acknowledge neighbouring hapū and shared fishing grounds within their takiwā (space).

[370] Although no fisheries plan was provided by the hapū of Te Whānau a Te Aotāwarirangi, the evidence from their witnesses reinforces that the traditional customary taonga ika (fishing grounds) and mahinga kai (food gathering places) are similarly within the three to four nautical miles from the Tokomaru Bay foreshore, including northwards from the Waitakeao Stream to Koutunui Head. There is no evidence to show that these practices have been stopped or that the hapū have ceded their tikanga presence or control.

Offshore fisheries

[371] However, the evidence supporting whether the applicants have proved that they have authority and control or a strong presence over the offshore fishing areas is not strong. The evidence, in my view, did not establish the same presence, authority and ability to control, (even by attempts) in the outer marine areas beyond the three to four nautical miles. This is shown in the Huiteananui Fisheries Plan, for example.

[372] I acknowledge that there was evidence of hapū members fishing in the outer areas four to twelve nautical miles from the foreshore and that they had fishing spots (disclosed on a confidential basis to the Court only) that they accessed. However, as noted, the evidence did not extend to proving that they had a presence at 1840 in those

particular fishing sites, nor could the witnesses provide evidence about how their forbears fished at depths of 300-400 metres at that time.

[373] I consider the majority of the Court of Appeal's guidance in *Re Edwards* on inshore and offshore areas has application here. They held that the use of a particular resource in an area, without more, will not amount to exclusive use and occupation of that area. They envisaged a difference between hapū presence and control in inshore coastal areas as opposed to offshore marine areas. They said:

> [422] The use of a particular resource in an area will not, without more, amount to exclusive use and occupation of that area. There must be a "strong presence" in the area, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. This will be more difficult to demonstrate in relation to marine areas than in relation to coastal areas, because of their nature and the different ways in which such areas can in practice be used. And it will be more difficult to demonstrate in respect of offshore areas visited only occasionally (for example, to fish) than shallower areas close inshore that could be (and were) observed and controlled from coastal settlements, and used on a regular basis (for example, coastal inlets frequently used for collection of shellfish and shallow-water fish species, transport, rongoā (medicine) and other activities).
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> [423] The result may be that it is more difficult to establish CMT in respect of marine areas other than inlets and shallow coastal waters. That is because the ways in which such areas are used is often more akin to a use/resource right than a right of exclusive occupation of the kind that founds customary title of a territorial nature. At common law those rights could have been translated into strong (non-territorial) rights exercisable against third parties to protect access to the resource. But MACA precludes this: only territorial rights translate into CMT, with other rights protected through PCRs (or other mechanisms, for example in relation to customary and commercial fisheries).

[374] I am not satisfied that the applicant groups have met the test of exclusive use and occupation of the offshore marine area from three to four nautical miles to twelve nautical miles at or since 1840, as the evidence does not support such a finding.

Conclusion on exclusive use and occupation since 1840

[375] I am satisfied that the evidence demonstrated that both hapū, Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare, have exclusively used and occupied the relevant area since 1840 by the continuation of their customary fishing and tikanga practices in their inshore fishing grounds to the present day, the imposition of rāhui, the recognition of wāhi tapu sites, tauranga waka, waterways, puna and the location

of pā sites above the foreshore. The geographical landscape of Tokomaru Bay, its remoteness and environmental factors, together with the abutting land ownership held in Māori ownership, all attest to both hapū having a strong presence and exercising territorial control and authority from 1840 to the present day in the inshore fishing sites, within three to four nautical miles from mean highwater springs on the Tokomaru Bay foreshore.

[376] The evidence detailing the hapū exercise of tikanga and their customary fishing practices, was compelling. Even in the transitory commercial boom of third-party use at Tokomaru Bay in the mid-1900's, customary fishing practices continued, as starkly demonstrated by the photo of the Māori fishers' first catch hoisted on their boat's mast acknowledging Tangaroa, amidst the busy commercial trading activity surrounding them on the foreshore. The commercial activity came and went but the hapū and their customary practices remained to the present day. As kaitiaki of the area, they used what methods were available to them to ensure third parties respected the takutai moana and their customary practices. There was no clear differentiation between the two hapū in their use and occupation of the customary fishing sites and the sites of significance.

[377] Although there is evidence of members of whānau and hapū having used and currently using fishing grounds and the marine area out to the 12 nautical mile limit, there is insufficient evidence of their exclusive use or occupation of such sites at or since 1840 to the present.

[378] Accordingly, I am satisfied that the the two hapū, have demonstrated their exclusive use and occupation since 1840 to the present time in the inshore area, within three to four nautical miles from mean highwater springs, of the Tokomaru Bay foreshore. However, I am not satisfied that the hapū have demonstrated exclusive use and occupation beyond three to four nautical miles from the foreshore. The inshore area needs further specificity as to the extent of its boundaries and this should be clarified at the Stage Two hearing.

(iv) Has the exclusive use and occupation been substantially interrupted?

[379] The question I must now consider is whether the claimants' exclusive use and occupation in the relevant area has been substantially interrupted.

[380] Following the Court of Appeal's decision in *Re Edwards*, Mr Scott accepts that the Seafood Industry bear the burden of showing that the Seafood Industry's activity has substantially interrupted the applicants' exclusive use and occupation of the area. Similarly, the Attorney-General in her supplementary submissions, raises matters that may constitute a substantial interruption to the applicant groups' use and occupation of the application area such as lawful permanent structures in the application area, physical infrastructure or lawful activities around them, such as port facilities, wharves or processing factories owned by third parties, which exclude applicant groups from access to certain parts of the common marine and coastal area.

[381] The majority of the Court of Appeal in *Re Edwards* provided some guidance for the fact-specific and contextual assessment of substantial interruption. Those factors are:[129]

(i) where a group, after 1840, no longer has ahi kā roa and they have ceased to use and occupy an area for an extended period;

(ii) where a group has ceased to have the relevant control and authority over an area after 1840, because they have been displaced by other Māori groups and are no longer the primary groups occupiers and kaitiaki of the area; and

(iii) use or occupation by another person in a manner expressly authorised by an Act of Parliament.

[382] From the judgment, such structures and consented activities, as the Attorney-General suggests, may amount to a substantial interruption where they physically exclude or prevent applicant groups from using and occupying parts of the marine and coastal area. It was accepted by both counsel that on the Court of Appeal's

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[129] At [432]–[433] per Cooper P and Goddard J.

majority approach, the fact that third-party access to or activities carried out in the application area, such as commercial fishing and recreational use, without the consent of the applicant group, is not itself fatal to an application for CMT. However, those matters may remain relevant to the second limb assessment of whether the applicant group has continuously used and occupied an area from 1840 to the present day.

[383] I approach these claims, which I view are in the nature of a positive defence, adopting the guidelines from the Court of Appeal. I deal firstly with the impact of lawful commercial fishing and the effect of lawful structures owned by third parties in the application area.

The impact of lawful commercial fishing

[384] Mr Daryl Sykes was called by the Seafood Industry as an expert on the nature and extent of commercial fishing activities within the specified area. He provided evidence including his own calculations on the quantities of fish caught in the east coast area and, in particular, the rock lobster fishing catch from the "lobster statistical area 909". He estimates that recently, the majority of the 909 area catch by rock lobster fishermen comes from the specified area. He asserts that the area, being part of the east coast above Gisborne, was consistently fished by inshore trawl vessels since the 1930's, with catch including a variety of species, the most important being snapper, terakihi, trevally, gurnard and jemfish. The fishing vessels fished out of ports to the south of Tokomaru Bay, principally Gisborne, which was an important port for inshore vessels from the 1960's to the 1980's.

[385] He considers that the introduction of the QMS led to a reduced number of inshore trawl vessels with those landing approximately 100 tonnes of catch from the applicant area per year. From his own calculations and such of the records available, he considers the catches of rock lobsters within statistical area of 909 peaked in the early 1980's, at around 100 tonnes per annum, but has been much lower in the last 10 years, now being between 20 and 37 tonnes per annum.

[386] He also attests that Tokomaru Bay has always been and remains an important safe anchorage for fishing vessels operating on the east coast in rough weather. For

many decades previously, some of the fish caught by those vessels were landed at Tokomaru Bay, with supplies being picked up at the wharf. This is no longer the case.

[387] Mr Petrie, a fishing expert called by the Crown, challenges Mr Sykes' figures in a number of respects but confirms that the QMS and the rock lobster area 909 are included within the application area. Since 1986, commercial fishermen have been lawfully entitled to fish within the applicant area without restriction and rock lobster fishermen, also holding quota, have been lawfully entitled to take rock lobster from the specified area, including the close inshore rock fisheries.

[388] The Seafood Industry submits that due to the lack of legal and practical ability to exclude third party use of the specified area since 1840, combined with the commercial fishing problem which has been a "long-standing problem" for Tokomaru Bay, there has been a substantial interruption to the exclusive use and control of the applicant area.

[389] Mr Scott in his supplementary submissions addressed the evidence of substantial commercial activity in two ways. The first, he submits, is that commercial fishing was not undertaken with the consent of the applicant groups and secondly, was authorised by an Act of Parliament. He accepts that whether the activity has substantially interrupted the applicant groups' own use and occupation will depend on what area they can establish as being used and occupied.

[390] The starting point for the Seafood Industry is that commercial fishing has had a material impact on the size of the fish stocks, which is not contested by the applicants, who expressed their concern that fish stocks in the application area have been "depleted." Mr Scott specifically points to the following passages of evidence from:

> (i) Quintin Whakataka (Ngā Hapū o Tokomaru): "*The significant depletion of our kaimoana over the years angers and saddens me … Commercial fishers have plundered our kaimoana. These days we can only get a couple of crayfish. The commercial fisheries have taken the best and freshest stock that we had, and now we are struggling just to get a couple."*
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> (ii) Gilman Tichborne (Ngā Hapū o Tokomaru): *"There's much less kaimoana around now … The commercial crayfishermen have gone through and taken all the legal crays."*

(iii) Richard Clarke (Ngā Hapū o Tokomaru): *"In the last few years, I have noticed the crayfish numbers going down. I am concerned with the commercial fishing in the area."*

[391] The Seafood Industry accepts that since the 1930's, the size of fish stocks have been "fished down", 30–40 per cent of that which existed when commercial fishing commenced. They also accept that many inshore fish stocks were over-fished during the 1960's through to the 1980's, ultimately leading to the introduction of the QMS to place control on the total amount of fish that could be caught each year.

[392] On the basis of the above evidence, the Seafood Industry contends that the applicants' evidence of the use of the marine and coastal is closely linked to particular locations in the inter-tidal area or coastal reefs very close to the shoreline where fishing has historically been able to be undertaken with some ease. It says that while the overall resource is fished sustainably by commercial fishing, the reduction in biomass or "abundance", as the applicants term it, has materially interrupted the applicants' ability to take fish in the relatively accessible areas in which they have traditionally fished. Thus, they submit, that the more intensive commercial fishing activity undertaken lawfully with Parliamentary authorisation in the broader application area, but in particular the coastal reefs has substantially interrupted the applicants' ability to use those parts of the application area.

Analysis

[393] The evidence of third-party use must be considered "in the round" with the evidence already traversed of the applicants' use and occupation of the application area and their holding of the area in accordance with tikanga. It cannot be overlooked that occupation and use of Tokomaru Bay was required to be lawful after 1840, which gave third parties rights to use and occupy the takutai moana around the New Zealand coastline, including Tokomaru Bay. The Canadian authorities recognise that exclusive use was only feasible prior to sovereignty.[130] I also keep in mind that s 59(3) of MACA does not preclude a grant of CMT where there has been third-party use of the area for fishing or navigation.

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130 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38]; and *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1018.

[394] I consider the Seafood Industry's submission confuses depletion of fishery stock with the applicants' ability to continue their customary fishing practices as part of their use and occupation of the application area. The "substantial interruption" relied on by the Industry relates to how much fish or fish stocks can be obtained, not that they can no longer use those parts of the area that were historically used for fishing. Those areas are still accessed by the hapū members and they have taken what measures they can, lawfully, to prevent further depletion.

[395] Plainly, the applicants cannot stop commercial fishermen fishing their quota, but they can take steps, as they have given evidence of doing, to prevent any person taking resource in the breeding season. I consider that is an exercise of "control" or more relevantly, a manifestation of their authority arising from their "strong"[131] presence in the area. I adopt the Court of Appeal's majority reasoning in *Re Edwards* that the language of s 58(1)(b) does not require that it demonstrates an ability to exclude others, when that ability was taken away from Māori customary owners by law.[132] In the absence of an ability to exclude others, an intention to do so would be futile.

[396] I respectfully agree with Miller J's rejection of the depletion argument from the Seafood Industry's submission, when he said that "even regular commercial fishing is a transitory use. If the resource is properly managed, it seems unlikely that fishing would so deplete the resource as to cause an applicant group to abandon the area."[133]

[397] I have already found that commercial fishing has not stopped the applicant groups' use and occupation of the area, as they still continue to undertake their customary fishing and tikanga practices. It is illogical, as the majority in *Re Edwards* said, to require an applicant group to demonstrate a level of control from 1840 to the present day that extends to precluding access, navigation and fishing by settlers and others in order to qualify for statutory rights under CMT, which do not in themselves confer that level of control over the area.[134]

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131 *Re Edwards* (CA), above n 1, at [422] per Cooper P and Goddard J.
132 At [429] per Cooper P and Goddard J.
133 At [182] per Miller J.
134 At [429]–[430] per Cooper P and Goddard J.

[398] But there is another factual impediment to the Industry's submission. The complaints of depletion of resources and the adverse impact on the seafloor environment of the inshore coastal area is also due to the continuing impact of afforestation, heavy rainfall, and sedimentation. Ms Pēwhairangi expressed the concern of her hapū "about the state of our takutai moana, the continuing impact of heavy rainfall adding more mud and silt into our rohe moana and the state of our capita kai". The build up of silt on the coastal seafloor was described by a number of witnesses, who talked of the state of the seafloor and the need to reseed kina and other species in different parts of the Bay.

Conclusion on commercial fishing

[399] I find that the fact that the fisheries resource is depleted does not amount to a substantial interruption of the applicants' customary practices or their authority. The express provision of s 59(3) of MACA, that use at any time by third parties for fishing or navigation does not, of itself, preclude the applicant groups from establishing the existence of CMT, is relevant. Importantly, the depletion of the fisheries resource has not caused the hapū applicants to abandon the areas where the fishing resource is less. Commercial fishing activity, therefore, in quota management areas does not amount to substantial interruption.

[400] I have already found that the applicants have proved their exclusive use and occupation of the inward coastal area out to three to four nautical miles, the boundaries of which need to be clarified but I have found that they did not have exclusive use and occupation for the area out to 12 nautical miles.

[401] The substantial interruption assessment in relation to the outer marine areas therefore is not required. Both the claimants and the Seafood Industry access that area for fishing the resource but neither exercise control over it nor have the authority to exclude any other fisher. The position is therefore neutral and no finding is necessary.

The effect of wharf structures

[402] Dr Ward, without taking a formal position on the issue, submits that there is a real question about substantial interruption, given the construction and use of the Waima wharf, at least in relation to the Waima cove area.

[403] Dr Ward acknowledges that permanent structures such as a jetty or boat ramp or wharf may constitute a physical intrusion into the common marine and coastal area but whether its activity amounts to a substantial interruption will depend on the impact it has on the applicants' group continued use and occupation of the specified area. He accepts that the consented activities in the area, the Te Puka Landing or the Te Ariuru jetty have not had the effect of physically excluding or preventing applicant groups from their use and occupation. Helpfully, he acknowledges that on the contrary, the landing and jetty appear to have facilitated customary (as well as third-party) use.

[404] The issue which Dr Ward raises however is the construction of the Waima Wharf and whether the Waima Cove area was most directly impacted by it. He accepts that this assessment may be finely balanced.

[405] Mr Tichborne explained the significance of Waima. Waima was named by tōhunga as a result of all the streams that were tapu. The Waima Stream is a pukakiwai of importance. I could find no separate reference to, or designation of, the Waima Cove.

[406] Dr Gould, in relating the history of the Waima Wharf, confirmed it is the largest structure in the Bay today and was originally constructed by the Tokomaru Sheep Farmers' Freezing Company Limited. The Freezing Company was licensed under the Harbours Act to use and occupy a portion of the foreshore and land below the low water mark as the site for wharf accommodation. It is to this wharf that by 1910, shipping reports reveal regular visits to Tokomaru Bay, the small coastal steamers delivering wool and material, refrigeration equipment, and coal for the freezing works.

[407] It formed part of a critical network of transportation reaching around New Zealand and back to the United Kingdom in the first half of the twentieth century. The use of the port and Waima Wharf decreased towards the mid-twentieth century with

the centralisation of international shipping and the closure of the freezing works in the 1940's and 1950's respectively.

[408] The wharf proved to be of beneficial assistance to members of the two hapū in Tokomaru Bay. With the encouragement of their Member of Parliament, the Hon Apirana Ngāta, the wharf and freezing work infrastructure was welcomed into the Bay. It is clear from the history, that the sheep farming interests of Māori land owners was assisted by a readily available means of transportation of meat and wool directly from Tokomaru Bay. The wharf was clearly of mutual benefit to the Māori population as it was to the settlers.

[409] With the introduction of the wharf, the hapū members adapted their customary fishing practices. As noted, the references to the use of the wharf and particularly fishing off the piles of the wharf in deeper waters was of significant benefit to the local hapū. As already noted, the juxtaposition of the wharf structures with the home-made customary fishing equipment, such as the pōuraki, being the bicycle wheel with bread in the centre, continued.

[410] There was no evidence from any of the hapū members that the wharf had impeded their customary practices or interrupted their ability to carry out their customary fishing practices. While the applicants could not control the activity on the wharf, they clearly adapted their tikanga and practices by using it.

Analysis on wharf structure

[411] Although an analysis of substantial interruption is one of fact, it is useful to draw examples where substantial interruption was found. For example, in *Re Ngāti Pāhauwera*,[135] customary rights were found to be substantially interrupted. Churchman J determined that the outfall pipe from the Pan Pac Paper Mill had caused significant pollution in the area surrounding the pipe at Whirinaki, preventing Maungaharuru-Tangitū Trust members from gathering kaimoana or swimming in the area.[136] Thus, while Maungaharuru-Tangitū Trust still held the area in accordance

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135 *Re Ngāti Pāhauwera* [2021] NZHC 3599.
136 At [230].

with tikanga, their exclusive use and occupation of the area was found to have been substantially interrupted.

[412] There was also evidence that discharge of sewerage into the inner harbour had caused significant pollution and those hapū members had given evidence in the Waitangi Tribunal that they were no longer collecting kaimoana in that area — showing their use and occupation had been substantially interrupted.

[413] The Court also found significant recreational use and boat use in its totality amounted to a substantial interruption of Ngāti Pāhauwera's exclusive use and occupation of that area. Intensive third-party use of a marina and a boat ramp since the 1900's together with third-party use of walking tracks, highways and roads interrupted the ability of the hapū to exercise tauranga waka rights. The Court held this constituted a substantial interruption of exclusive use and occupation by the applicant group.

[414] Napier Harbour's third-party use and occupation appears to have been longer and in places more intensive than the third-party use in Tokomaru Bay. In Napier, the use of the area as a port or as a public space was continuing up until the time of the judgment. By contrast, the most intensive period for use of the Waima wharf, which is the place which seemed to have the most intensive third-party use, appears to have been from 1910 until around 1950.

[415] The evidence reveals that despite the third-party use of the Tokomaru Bay foreshore, even in its heyday in the 1950's, the hapū members still fished, used the boat ramp, (albeit that it was replaced and reconstructed from the original waka landing), and their kaimoana gathering practices continued.

[416] No evidence was adduced that customary practices ceased, or that the hapū authority and/or presence in the area waned. The only significant change was the practice of washing of the dead in the customary way at Kakepō. In all other respects, the traditional rules about access to the foreshore, the observation of tikanga principles and the observance of respect for the kaitiaki of the bay have been followed to the

present day. Most predominant of the practices, indicating an intention to control the takutai moana, is the placement of rāhui by the hapū as discussed above.

[417] There are also a number of examples where hapū members had sought to be engaged with reconstruction of boat ramps and resource management decisions. The Torotika boat ramp licensing is one of these examples, showing an intention on behalf of both hapū exercising an intention to control, and to an extent actually controlling, third-party use of the application area. There have also been other assertions of control by informal, and sometimes unlawful, means which I have described earlier.

Conclusion on wharf structure

[418] I find that the construction of the Waima Wharf did not substantially interrupt the exclusive use and occupation of the claimants.

Conclusion on CMT applications

[419] The hapū and the tīpuna of Te Whānau Te Aotāwarirangi and Te Whānau a Ruataupare have held the inshore application area, within three to four nautical miles from mean highwater springs of the foreshore in Tokomaru Bay, in accordance with tikanga for over 400 years and by 1840, were holding the area in accordance with tikanga at the time of the settlers' arrival. Tokomaru Bay is in a relatively isolated location on the east coast. The land abutting the foreshore is largely Māori freehold land, on which are located three pā sites of significance to the hapū of Tokomaru Bay. Both hapū have used and occupied the inshore area exclusively, subject to tikanga principles of manaakitanga and kaitiakitanga, exercising their customary practices since 1840 to the present.

[420] This can be seen through their spiritual connection with the takutai moana, their customary fishing practices out to three to four nautical miles, their kaitiaki role, and their protection of wāhi tapu sites. They have also shown that once third parties began to use and occupy the bay, they still evinced an intention to hold the area in accordance with tikanga. The strongest example of this is their imposition of rāhui for protection and conservation purposes. Other examples include the early depictions of the Māori fishers with the catch acknowledging Tangaroa juxtaposed with the

commercial traders on the foreshore; the collection of resources, such as parengo, agar and pūpū's continuing despite third party access and regulations; and their involvement in licensing and RMA processes.

[421] However, the applicants have not met the test for exclusive use and occupation of the marine application area from three to four nautical miles out to twelve nautical miles.

[422] I am satisfied that a recognition order may be issued for a joint CMT over the inshore application area extending out to three to four nautical miles, subject to both hapū reaching agreement on the representaion of each hapū applicant, providing the name of an agreed entity or person to hold the joint CMT on their behalf and specifying the precise location of the inshore area boundaries. Directions for draft orders are made at the close of this judgment. The finalisation of the order and the boundaries of the CMT area remain to be addressed by the Stage Two hearing.

PART VI: WĀHI TAPU CLAIMS

[423] Under s 78(1) of MACA a "customary marine title group" may also seek to include protection of a wāhi tapu, or a wāhi tapu area, in a CMT order.[396] "A "customary marine title group" means a group that has been awarded CMT, which in turn means the requirement of s 58 and is a prerequisite for the recognition of wāhi tapu. As I have found that a CMT can be issued for the specified area out to three to four nautical miles, I will now assess the wāhi tapu protection right applications.

[424] Ngā Hapū sought wāhi tapu protection rights in its application for CMT on behalf of the two hapū of Tokomaru Bay. Te Whānau did not seek wāhi tapu protection rights in its application for CMT but in counsel's opening submissions and in the reply affidavit of Ms Searancke, Te Whānau identified a number of wāhi tapu in their specified area and sought that those sites be included in any CMT order.

[425] In Ngā Hapū's application, seven wāhi tapu sites were identified by Mrs Ryland-Daigle. Mr Roger Tichborne plotted 117 sites of significance, designated on Mr Halliday's map, 12 of which he categorised as wāhi tapu or marine wāhi tapu. The sites are shown at Appendix 7.

[426] On the maps produced by Te Whānau, Ms Searancke identifies 31 sites, severally described as pā sites, battle grounds, tauranga ika, kapata kai, tauranga waka and punawai. Five sites of significance are noted, one of which is outside the specified area.

Statutory threshold for wāhi tapu protection

[427] A wāhi tapu protection right may be recognised if there is evidence to establish:[137]

> (a) the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga; and
>
> (b) that the group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or a wāhi tapu area.

[428] "Wāhi tapu" and "wāhi tapu area" have the meanings given to those terms in s 6 of the Heritage New Zealand Pouhere Taonga Act 2014 (Heritage Act). Those definitions are:

> *wāhi tapu* means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense
>
> *wāhi tapu area* means land that contains 1 or more wāhi tapu

[429] "Land" is defined under the Heritage Act as including "land covered by water and the airspace above land".[138]

[430] If a CMT is recognised by the Court, a CMT order or agreement "must set out the wāhi tapu conditions that apply".[139] These are specified as:[140]

> (1) The wāhi tapu conditions that must be set out in a customary marine title order or an agreement are–
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> (a) the location of the boundaries of the wāhi tapu or wāhi tapu area that is the subject of the order; and
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> (b) the prohibitions or restrictions that are to apply, and the reasons for them; and

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137 Marine and Coastal Area (Takutai Moana) Act, s 78(2).
138 Heritage New Zealand Pouhere Taonga Act 2014, s 6.
139 Marine and Coastal Area (Takutai Moana) Act, s 78(3).
140 Section 79(1).

(c) any exemption for specified individuals to carry out a protected customary right in relation to, or in the vicinity of, the protected wāhi tapu or wāhi tapu area, and any conditions applying to the exercise of the exemption.

[431] Because wāhi tapu conditions may affect the exercise of fishing rights, it is essential that the location of boundaries of wāhi tapu are clearly identified and specified. It must be noted, however, that the conditions must not limit the exercise of fishing rights to the extent that the conditions prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area.[141] Nor can it affect the exercise of kaitiakitanga by a CMT group in relation to a wāhi tapu or wāhi tapu area in the CMT area of that group.[142]

[432] Enforcement provisions are also prescribed to ensure compliance with a prohibition or restriction imposed under s 79 of MACA. Wardens may be appointed by a CMT group with an interest in a wāhi tapu or wāhi tapu area,[143] and fishery officers and/or honorary fishery officers may enforce wāhi tapu conditions imposed under s 79, any fishing in a wāhi tapu or wāhi tapu area breaches those conditions.[144]

[433] A local authority, that has statutory functions in the location of a wāhi tapu or a wāhi tapu area subject to a protection right under MACA must, in consultation with the relevant CMT group, take any appropriate action that is reasonably necessary to encourage public compliance with any wāhi tapu conditions.[145] Any person who intentionally fails to comply with a prohibition or restriction notified for the wāhi tapu or wāhi tapu area commits an offence and is liable to a fine not exceeding $5,000, unless the offence provisions of the Heritage Act apply, where the wāhi tapu protection right is protected by a heritage covenant under s 39 of the Heritage Act.

[434] The definition given to "wāhi tapu" under MACA is in contrast with broader definitions given to "wāhi tapu" under Te Ture Whenua Māori Act. Both the Attorney-General and the Seafood Industry see this contrast as deliberate. They submit that the use of the word "sacred" in the MACA definition of wāhi tapu indicates

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141 Section 79(2)(a).
142 Section 79(2)(b).
143 Section 80(1).
144 Section 80(3).
145 Section 81(1).

that something more than a place of significance to Māori is required, as there needs to be associations of a religious, quasi-religious or spiritual dimension in a tikanga Māori context.

[435] Emphasis has been placed on the Māori Land Court case of *Taueki v McMillan*, where Tā Hirini Moko Mead gave evidence in relation to wāhi tapu, which was adopted by Judge Harvey:[146]

> Professor Hirini Mead provided evidence as the historical and cultural meaning of "wāhi tapu". He examined the plain meaning of the words "wāhi tapu" and in doing do said it can be considered a place or site under religious or superstitious restrictions, beyond one's power, inaccessible or sacred. It could thus be described as a "restricted zone" or as a site of very special cultural significance or as a protected zone which has a religious sanction over it and is identified or marked in some way. He said that it is expected that such a restricted zone demands a different sort of behaviour due to the sacred aspect of the restriction.

[436] Relying on the description of a "different sort of behaviour" contained in Tā Hirini Moko Mead's evidence, the Attorney-General submits that even though a site might be important or be held to be a taonga, evidence of noa activities such as kai gathering or the preparation of kai at a site or fishing spots, gathering kai moana, would tend to suggest that the site is not wāhi tapu.[147]

[437] Dr Joseph also described "tapu" as being restriction laws, the recognition of an inherent sanctity or a sanctity established for a purpose, to maintain a standard, for example, a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects. "Noa" is described by Dr Joseph as being free from tapu, or any other restriction or liberating a person of situation from tapu restrictions usually through karakia and water.

[438] In *Taueki*, the Māori Land Court stated: [148]

> "Wāhi tapu" are, by definition, strictly set apart from daily life.

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146 *Taueki v McMillan – Horowhenua 11 (Lake) Block* (2014) 324 Aotea MB 144 (324 AOT 144) at [85] and [94].

147 Citing *Peters – Oriwa 1B1 (2010)* 8 Taitokerau MB 210 (8 TTK 210) at [16]; *Serenella Holdings Ltd v Rodney District Council* EnvC Auckland A100/2004, 30 July 2004 at [55] and [56]; *Hemi v Waikato District Council* [2010] NZEnvC 216 at [166]–[167]; and *Verstraete v Far North District Council* [2013] NZEnvC 108 at [62]. See also Benton, Frame and Meredith, above n 24, at 266.

148 *Taueki v McMillan*, above n 146, at [97]–[100].

[439] However, Tā Hirini Moko Mead acknowledged that some things may be wāhi tapu, like wharenui on marae, despite noa activities being carried out there (eg. being a place of community activity).[149] The important aspect of wāhi tapu is having a clear set of rules for the defined area due to the spiritual connection to that area.

[440] In *Re Ngāti Pāhauwera*, the Court observed that areas which may be capable of being classified as being wāhi tapu are the sites of previous pā, battles, or kōiwi within the application area.[150]

[441] Some tapu sites are not permanent. It is important to distinguish wāhi tapu from temporary tapu that is imposed for example, when a rāhui is placed over water for a specific period of time either because kaimoana stocks have depleted or a drowning or death has occurred.

What evidence is required for wāhi tapu?

[442] As Counsel for Ngā Hapū acknowledge, the onus is on the applicants who are seeking wāhi tapu conditions to prove the connection of the group with the wāhi tapu in accordance with tikanga. The applicants must provide evidence of the location of the boundaries, the prohibitions or restrictions that are to apply and their reasons, and any exemption for specified individuals to carry out a PCR right.[151]

[443] In approaching the evidence for this hearing, counsel for Ngā Hapū submitted that the information required by s 79(1), the boundaries, the prohibitions, their reasons and any exemptions, can be made available to the Court during Stage Two of the proceeding. They submit that at that stage survey evidence can be provided to show the exact location of the wāhi tapu boundaries.

[444] Counsel for the Attorney-General and for the Seafood Industry submit that Ngā Hapū has not adduced clear evidence that restrictions are required to protect any of the sites claimed as wāhi tapu or wāhi tapu areas. Further, in light of the meaning of wāhi tapu, the word "sacred" in MACA's definition of wāhi tapu indicates that something

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149 At [87].
150 *Re Ngāti Pāhauwera*, above n 135, at [130]–[132].
151 Marine and Coastal Area (Takutai Moana) Act, s 78(2).

more than a place of significance to Māori is required and that there is a need for the wāhi tapu to have associations of a religious, quasi-religious or spiritual dimension in a tikanga Māori context. Both Dr Ward and Mr Scott made reference to a number of judicial decisions and scholarship on the definitions of "wāhi tapu", which Churchman J considered at length in *Re Ngāti Pāhauwera.*[152]

The evidence on wāhi tapu claims

[445] The wāhi tapu protection rights sought by Ngā Hapū are detailed in the evidence of Roger Tichborne, which have been mapped by Mr Halliday, and the evidence of Mrs Ryland-Daigle.

[446] I deal first with Mr Roger Tichborne's evidence and the 117 "sites of significance" within the application area. The sites are identified in Appendix 7. As the table illustrates, the sites are numbered, named and given a description. Fourteen of the sites are categorised as either "wāhi tapu" or "marine wāhi tapu". However, under cross-examination, Mr Tichborne asserted that the whole of the application area is wāhi tapu and Ngā Hapū is seeking wāhi tapu protection orders in respect of the entire application area.

[447] There are four issues arising from Mr Tichborne's evidence, which weigh against the finding of wāhi tapu sites as sought. They are:

(a) Ngā Hapū asserts that the entirety of their claim area or specified area is either wāhi tapu or a wāhi tapu area despite the 117 sites listed and mapped in Mr Halliday's map;

(b) the 117 sites listed as wāhi tapu include sites in which noa activities occur;

(c) the 13 waterway sites are subject to a confidentiality order; and

(d) of the 14 sites identified as wāhi tapu in Mr Halliday's map, two are inland and not part of the common marine and coastal area.

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152 *Re Ngāti Pāhauwera*, above n 135, at [73]–[82].

[448] I deal with each of these in turn. First, although it is conceivable that the entirety of an application area could be considered wāhi tapu,[153] there is insufficient evidence before the Court to satisfy the definition of wāhi tapu or to support a finding that the entire area is wāhi tapu, being a place sacred to Māori in the traditional, spiritual, religious or mythological sense.

[449] In reaching that conclusion, I acknowledge that the takutai moana is obviously of major importance and significant to the two hapū in Tokomaru Bay. From the detailed evidence of the connection of each of Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare with the whenua and with the takutai moana, including the voyaging and landing at Tokomaru Bay by their ancestors many years before 1840, the specified area is of great significance to them.

[450] Second, consistent with the definitions of wāhi tapu sites, there are certain areas and places, marked on Mr Halliday's map and identified by Mrs Ryland-Diagle, that are of heightened significance or are tapu for a variety of factors, not least of which are burial grounds or areas of spiritual safety. What becomes problematic is the inclusion of noa sites. They are incompatible with the claim that the entire application area is wāhi tapu. Numerous references have been made to Tā Hirini Moko Mead's writings and evidence in *Taueki*, as well Māori Land Court and Environment Court decisions, which reinforce that food gathering,[154] food processing,[155] and preparation of kai is incompatible with a wāhi tapu site.[156]

[451] Of the 117 sites in Mr Halliday's map and table in Appendix 7, the sites including food gathering or food cultivation grounds or tauranga waka relating to everyday use or noa, do not qualify as wāhi tapu. Although the areas may be culturally and historically significant and spiritually important to the hapū in Tokomaru Bay, fishing spots and tauranga waka do not qualify as sites of wāhi tapu. It is relevant to record Mr Pēwhairangi's evidence, where sites marked within the application area

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153 At [126].

154 *Serenella Holdings Ltd v Rodney District Council*, above n 147, at [55] and [56]. The expert, Mr Mikaere, "was certain in his view that food could be associated with wahi tapu because food – particularly cooked food – would destroy or pollute the tapu, removing its spiritual efficacy": at [56]. See also *Verstraete v Far North District Council*, above n 147, at [62].

155 *Hemi v Waikato District Court* [2010] NZEnvC 216 at [166].

156 *Peters – Oriwa 1B1*, above n 147, at [16].

were described as kapata kai (food cupboards) and taunga ika (known or familiar fishing spots). These designations count against the entire specified area being wāhi tapu.

[452] Third, Mr Tichborne identified waterways by name as being wāhi tapu sites, but they are subject to a confidentiality order as sought by counsel for Ngā Hapū. This raises a tension, noted by this Court in *Re Ngāti Pāhauwera*,[157] between the requirements for wāhi tapu conditions under MACA for sites to be identified and described on the one hand, and the publication of the tapu nature of wāhi tapu, with the potential for the sites to become vulnerable to attack on the other.

[453] There must be cogent evidence, however, about the tapu nature of a particular defined area and the reasons for its particular spiritual or cultural significance for the Court to be able to order wāhi tapu area conditions. If wāhi tapu conditions are granted, there are considerable enforcement rights available, which require specificity, particularly as criminal penalties may result.

[454] Finally, MACA can only grant wāhi tapu protection rights that are placed within the common marine and coastal area. That does not mean that the two inland sites are not, in fact, wāhi tapu but they, unfortunately, cannot be given protection under the provisions of MACA.

[455] I now address the areas which have been specifically identified in the evidence as potentially meeting the definition of wāhi tapu under MACA.

Particular wāhi tapu sites

[456] Subject to clarification that the sites are within the takutai moana area, it appears, as the Attorney-General suggests, that of the 16 sites identified by Mr Tichborne and Mrs Ryland-Daigle, ten of them may meet the definition of wāhi tapu under MACA. The evidence of the connection of the two hapū members with those sites in accordance with tikanga, and the observance of rituals performed by those members relating to the wāhi tapu, are relevant to this assessment.

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157 *Re Ngāti Pāhauwera*, above n 135, at [131].

[457] The sites which I consider are capable of being recognised as wāhi tapu under MACA are:

(a) **Te Rua o Mutu** – site 10. This is a cave in the island of Motuhiaiuru. Mrs Ryland-Daigle gave evidence that "[t]he cave in the island is the dwelling place of the [kaitiaki] Mutu". A kaitiaki is a spiritual guardian in accordance with tikanga.[158] She said that "[t]ikanga must be strictly adhered to when procuring mussels. Accordingly, only certain privileged members of Te Whānau a Te Aotāwarirangi know the rituals required to safely enter the cave". Being the home of the kaitiaki Mutu, the evidence of the tapu influencing how members of the hapū behave in that area, and the discrete location in respect of which those particular restrictions apply, suggest that this site may be capable of being recognised as a wāhi tapu under MACA.

(b) **Paretaniwha** – site 18. Paretaniwha is a large rock near Hautanoa. Mrs Ryland- Daigle gave evidence that "Pare Taniwha is a large imposing rock that nestles against the cliff face and it is the home of the kaitiaki Mangaroa. A deep narrow channel surrounds its base and acts as a natural barrier to those venturing further north. Mangaroa guards over the area and when sighted, you must return home immediately. To remain is to court disaster". Being the home of the kaitiaki Mangaroa, the absence of any noa or everyday activities taking place in the area, and evidence of the tapu influencing how members of the hapū behave in that area suggests that this place is capable of being recognised as a wāhi tapu but I note it is a place of noa activity, namely food collection.

(c) **Ruataniwha** – site 34. This is a cave just north of Koutunui Point. Mrs Ryland-Daigle explained that "[t]his cave is inhabited by [kaitiaki] and it is a very tapu place. It is a big long rock with a channel around it". Again, being the home of kaitiaki and the absence of positive evidence of any noa or everyday activities taking place here suggest this place may be a wāhi

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158 See, for example, Joseph, above n 21, at [45(h)].

tapu under MACA, but it is not clear whether this cave is within the common marine and coastal area.

(d) **Pukekaahu –** site 38. This is a rock on Koutunui Point. Mrs Ryland-Daigle gave evidence that the rock "is a very tapu area. Diving and fishing of any sort is not recommended. This area is also referred to as Nga Wai Tohu o Te Aotāwarirangi. The learned fisher people are able to determine the forthcoming sea conditions from the rumbling sounds made by Pukekaahu". Fishing and diving is not recommended because of the tapu nature of the area. This suggests it may be a wāhi tapu site, though there is limited evidence explaining the nature of the tapu and fishing activities to take place around it.

(e) **Taruheru and Otairi Point urupā** - sites 55 and 57. These ancient urupā are situated beside the tauranga waka, Kakepō. They do not appear to be in the common marine and coastal area, but it is not clear. While urupā themselves fall within the definition of wāhi tapu under MACA, the areas around them generally do not. For example, Otairi Point is mentioned in the evidence as a fishing ground. Such a noa activity is inconsistent with the nature of a wāhi tapu.

(f) **Kopuanui** – site 58. Mrs Ryland-Daigle and Mr Tichborne gave evidence that Kopuanui is the home of the kaitiaki Te Kekeno and is at Kakepō. Mrs Ryland-Daigle stated that "Te Kekeno is a seal [kaitiaki] that lives around Te Ariuru at a place called Kopuanui. This is where the prow of the Ariuru waka is and where the Waitakeo flows out into the sea to the tauranga waka (waka launching area), Kakepo". Mr Tichborne too gave evidence of "the sacred area of Kopuanui… the home of the kekeno". Being the home of kaitiaki and the evidence of the tapu influencing how members of the hapū behave in that area suggests this place may be a wāhi tapu site. However, there was also evidence of noa activities taking place at Kopuanui. For example, Mr Tichborne gave evidence of picking agar "along Kopuanui". As the Attorney-General submits, Kopuanui may be a term used to refer to both a wider place that is not completely a wāhi tapu

area, where the gathering of agar occurs, as well as referring to a discrete part of Kopuanui where the kaitiaki Te Kekeno lives. This site needs to be identified with specificity to be protected under MACA.

(g) **Tama i Whakanehua i Te Rangi tomb** – site 59. This is the burial ground of Tama i Whakanehua i Te Rangi, a Te Aotāwarirangi rangatira and signatory to te Tiriti o Waitangi at Pukehapopo on 9 June 1840. As the burial ground of this significant tipuna, it is capable of being a wāhi tapu under MACA. There is a clear connection with the hapū to the area in accordance with tikanga but further detail is required as to its location.

(h) **Te Rua Ariuru** – site 60. This is a rock near Kakepō. Ms Ryland-Daigle gave evidence that Te Rua Ariuru "is a sacred rock that represents the petrified remains of the prow of the waka Te Ariuru". There does not appear to be any evidence of fishing or other noa activities at this specific locality and given its discrete and sacred nature, Te Rua Ariuru may be capable of being a wāhi tapu but this needs further description and a precise location.

(i) **Te Toka a Turangakawa** – site 78. A pito rock just north of Torotika. Mr Pēwhairangi confirmed that a "pito rock" is a rock with placenta placed into it, by drilling a hole into the rock. Pito rocks are generally recognised as capable of being a wāhi tapu under MACA because of their sacred nature, and the spiritual connection to life and death. Mr Pēwhairangi explained it would usually be chiefs and "people of real mana" whose pito were buried into the rock and sealed, hence the name "pito rock". Other witnesses too gave evidence of the spiritual and cultural importance of this pito rock. The site of this rock will need to be specified, particularly if it is on the sandy beach of the foreshore.

(j) **Kopuatai** – site 99. A pito rock out and south of Tuatini marae. As outlined above, pito rocks are generally recognised as capable of being a wāhi tapu under MACA. Various witnesses gave evidence of the spiritual and cultural importance of this pito rock, although care must be taken not

to confuse Kopuatai, the pito rock, with Kopuatai, the fishing ground. Only the former is capable of falling within the definition of wāhi tapu under MACA.

[458] Although these sites above may be capable of being considered wāhi tapu, they are subject to further evidence on whether their tapu nature is consistent with noa resource and collection. Evidence is required to confirm that they are within the takutai moana, such that MACA applies to them and evidence of precise locations and boundaries are required. For the reasons already set out above, the areas, locations and boundaries of the wāhi tapu area must be specified, so the public in the area are aware of restricted access or activity, as penalties can be imposed for non-compliance with any imposed conditions.

[459] The sites which do not appear to fall within the definition of wāhi tapu are the following five:

(a) **Waimahuru burial caves** – site 6. While burial caves are capable of meeting the statutory definition of wāhi tapu, the evidence before the Court is in respect of Waimahuru Cove in general. There is no specific evidence of the Waimahuru burial caves. In respect of the Cove, Mrs Ryland-Daigle gave evidence that it provides an ideal ecological habitat for all species of kaimoana, suggesting it is used for fishing. This appears to indicate the Cove itself is not a wāhi tapu or a wāhi tapu area under MACA. There may be specific burial caves in the area which meet the statutory test for wāhi tapu under MACA, but that evidence is not before the Court.

(b) **Tahito beach** – site 13. Mrs Ryland-Daigle gave evidence that the beach is "an isolated area" abundant with "all species of kaimoana. The lagoons and deep channels there are good for rock fishing, for rama koura, rama kehe, rama papaka, rama moki and others". The use of this beach for noa activities, such as fishing and gathering kaimoana, in the absence of any other evidence about its nature, status or use according to tikanga, suggests that Tahito is not a wāhi tapu under MACA.

(c) **Motuahiauru island** – site 17. This island is described by Mrs Ryland-Daigle as a "sacred island". However, it is unclear whether Mrs Ryland-Daigle is referring to the tapu nature of the entire island itself or Te Rua o Mutu — a cave in the island of Motuhiaiuru. Aside from Mrs Ryland-Daigle's evidence, which appears to be about the cave itself, there is no evidence to suggest that the whole island is a wāhi tapu. Mr Whakataka said he has dived and taken mussels there.

(d) **Kopuatahangahanga** – site 77. This is described as a "kaimoana rock", specifically for Te Whānau a Te Aotāwarirangi. Mrs Ryland-Daigle gave evidence that when the hapū took kai from this area, "we did so in a sustainable way". There is no other evidence about this rock or fishing ground. The use of the area as a fishing ground, in the absence of any other evidence about the area's nature, status or use according to tikanga, indicates it is not a wāhi tapu site under MACA.

(e) **Tahuna Roa** – site 95. This is the sandy beach heading south from Torotika to Te Tapatai. Mrs Ryland-Daigle gave evidence that this area is "mainly used by the whanau and manuhiri for surf fishing and swimming". Its use for everyday noa activities and the lack of evidence about its nature, status or use according to tikanga indicates it is not wāhi tapu under MACA. For completeness, Mr Tichborne was asked about the tapu nature of this site, and gave evidence that "to go into areas such as that, your personal karakia would be sufficient to access those areas, if you do it on a daily basis".

[460] There are five other sites mentioned by Mrs Ryland-Daigle and they are:

(a) **Tawhiti** is a battle site. This is where the ancestor Pāoa fought against his adversary Rongokako and is a commemorative site where ancestors drank from the sweet waters of Te Wharau.

(b) **Parekarangaranga**, which is another site of spiritual significance because it features the petrified remains of Paoa's son within its formations.

(c) **Pare Taniwha**, a rock that nestles against the cliff. Its tapu is derived from its spiritual significance as the guardian and as a natural barrier against harm. It gave rise to the hapū superstition of disaster occurring unto a person who does not heed the rock's warning.

(d) **Ngā Tapuwae**, which refers to the place where Rongokako's footprint has been indented into the rock.

(e) **Ko Atua Nui Point**, a rock formation that forewarns of changes to the weather. Mrs Ryland-Daigle explained this place is very tapu. This place is very tapu to the point that fishing and diving near it is not recommended. It has a distinctive echo that has inspired a haka.

[461] It is unclear whether these sites, while respected as wāhi tapu, can be specifically protected by restriction of access under MACA. More information is required.

Analysis

[462] Sections 26 and 27 of MACA enables access and navigation rights to be subject to restrictions imposed under a wāhi tapu protection right and in that way, can restrict public access rights in a marine and coastal area. For that reason, any public access or navigation rights that are to be limited or prohibited, must be specified. Evidence must describe the protected measures sought, the reasons for them, and how such protective measures are required to protect the wāhi tapu site or area.

[463] Mrs Ryland-Daigle did address the issue of protection but did so in a general way suggesting that an "official" ability to prohibit and restrict access to the sites "would be both warranted and welcomed".

[464] Mrs Ryland-Daigle's evidence was similar to a number of witnesses, who considered that a CMT would give rights to control commercial fisheries. As the MACA provisions make clear, it is beyond the scope of MACA to provide controls over areas of the takutai moana without the statutory requirements being met. This

involves providing specific locations and the reasons for their protection, if the public's access is to be restricted, either for navigation or other activities.

[465] Both counsel for the Attorney-General and the Seafood Industry have challenged the ability of the Court to make wāhi tapu protection orders in the absence of evidence that demonstrates why wāhi tapu protection rights are required. Both assert that the reasons for the wāhi tapu *protection* should have been addressed and without them, the Court cannot make such orders.

[466] Counsel for Ngā Hapū submitted that it is the Stage Two proceedings that are used for assessing boundaries, with mapping and surveys where the precise boundaries of the wāhi tapu sites have not been agreed or proved, as has occurred in other MACA cases.

Conclusion

[467] It is plain that the witnesses before the Court are committed to the protection of these sites, which are sites of spiritual, cultural and historical significance to Te Whānaui a Te Aotāwarirangi and Te Whānau a Ruataupare. The non-inclusion of wāhi tapu in a CMT order does not preclude the hapū from seeking recognition and protection of wāhi tapu under the RMA, the Heritage Act or Te Ture Whenua Māori Act. Thus, any sites which do not fall within the common marine and coastal area or have not met the evidential test for recognition under MACA, may be recognised under the alternative legislative enactments.

[468] Given the uncertainty over the finality of boundaries and reasons for wāhi tapu protection orders, which must be supplied and outlined in draft orders, I propose to give Ngā Hapū and Te Whānau an opportunity to address their reasons for seeking such protection orders, to specify the boundaries of the wāhi tapu sites and to address the requirement for their protection in Stage Two of these proceedings.

[469] I also direct that counsel for the applicants address the issue of reconciling noa food collection practices with and wāhi tapu restrictions at the Stage Two hearing to be convened.

PART VII: PROTECTED CUSTOMARY RIGHTS

The application sought

[470] Ngā Hapū initially sought a PCR for kaitiakitanga. By an amendment, Ngā Hapū applied for the following PCR in relation to the following activities: kaitiakitianga over customary fisheries; taking, using, gathering and managing all natural and physical resources; utilising, managing and/or preserving tauranga waka sites; and traditional maramataka practices. In counsel's opening submissions, Ngā Hapū sought a further PCR in relation to using rongoā materials, such as starfish, pāua, sea moss and agar, although the activity of use was not included in its amended application. I granted the amendments and now deal with each PCR in turn.

Legal test for protected customary rights (PCRs)

[471] Section 51 of MACA defines the requirements that must be met for a Court to be satisfied to issue a recognition order for a PCR under s 98 of MACA.

[472] Section 51(1) defines a protected customary right, as follows:

> 51 **Meaning of protected customary rights**
>
> (1) A protected customary right is a right that—
>
> (a) has been exercised since 1840; and
>
> (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
>
> (c) is not extinguished as a matter of law.

[473] The Court of Appeal in *Re Edwards* confirmed that the activity, use or practice must both be established by the applicant group in accordance with other provisions of MACA and must be recognised by a PCR order or an agreement. A PCR may be exercised without a resource consent.[159] The existence of a PCR must be taken into account when considering any application for a resource consent in the area if the

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[159] *Re Edwards*, above n 1, at [72]–[74] per Miller J; and Marine and Coastal Area (Takutai Moana) Act, s 52(1).

relevant activity is likely to have adverse effects on the PCR that are more than minor.[160] A PCR must be exercised in accordance with any conditions imposed on its scale, extent and frequency as identified in s 54.

[474] Unlike the test for CMT, the test for a PCR does not require exclusive use and occupation over a specific area in the common marine and coastal area. Instead, a PCR must have been exercised since 1840 and continues to be exercised, either as it was exercised or as it has evolved over time in a particular part of the marine and coastal area. For a PCR, the applicant group must prove that the right claimed continues to be exercised in the same area in accordance with tikanga.

[475] The courts have granted PCR in two cases.[161] Examples of the PCRs that have been granted include: collecting and gathering flora, fauna, firewood, and rongoā materials; protecting, managing and using boat and tauranga waka launching areas; planting specific flora; and burying whenua.[162] Customary rights which are no longer being practised or continued means a PCR cannot be granted. For example, in *Re Edwards (No 2)*, growing pīngao and harakeke (flax) for weaving and medicinal purposes, was not granted because there was no direct evidence that the practice of growing harakeke continued.[163] The authorities on PCRs shows that, unlike CMT, multiple PCRs exercised by different groups can be recognised in the same area.[164]

[476] The location of a PCR must identify the "particular part" of the common marine and coastal area over which the right is being sought.[165] Because the PCR order has implications for third parties seeking to apply for resource consents in a particular area, the location needs to be clearly defined.[166]

[477] There is no customary right if it has been extinguished as a matter of law. Although no party to this proceeding has contended that the PCRs sought have been extinguished as a matter of law, a number of activities contained in Ngā Hapū's

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160 Section 55.
161 *Re Edwards (No 2)*, above n 10; and *Re Ngāti Pāhauwera* above n 135.
162 *Re Edwards (No 2)*, above n 10, at [669]; and *Ngāti Pāhauwera*, above n 135, at [599].
163 *Re Edwards (No 2)*, above n 10, at [396]–[398].
164 At [396]–[398].
165 Marine and Coastal Area (Takutai Moana) Act, s 51(1)(b).
166 Section 55.

application cannot be recognised as a PCR by virtue of s 51(2) of MACA. Section 51(2) specifies which activities are not included as a PCR:

> (2) A **protected customary right** does not include an activity—
>
> (a) that is regulated under the Fisheries Act 1996; or
>
> (b) that is a commercial aquaculture activity (within the meaning of section 4 of the Maori Commercial Aquaculture Claims Settlement Act 2004); or
>
> (c) that involves the exercise of—
>
> (i) any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or
>
> (ii) any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; or
>
> (d) that relates to—
>
> (i) wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act:
>
> (ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978; or
>
> (e) that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource (within the meaning of section 2(1) of the Resource Management Act 1991).
>
> (3) An applicant group does not need to have an interest in land in or abutting the specified part of the common marine and coastal area in order to establish protected customary rights.

[478] There are several other provisions which define the scope and effect of a PCR and the limitations on their exercise. Section 52 of MACA sets out the scope and effect of a PCR. Section 54 places limitations on the extent to which PCRs can be exercised. These limitations are set out as follows:

> **54 Limitations on exercise of protected customary rights**
>
> (1) A protected customary right does not include any right or title over the part of the common marine and coastal area where the protected customary right is exercised, other than the rights provided for in section 52.

(2) A protected customary right must be exercised in accordance with—

> (a) any terms, conditions, or limitations on the scale, extent, and frequency of the activity specified in the order or in the agreement; and
>
> (b) any controls imposed by the Minister of Conservation under section 56.

[479] It is apparent from the activities listed in Ngā Hapū's amended application, that a number of the activities are capable of being recognised as a PCR provided the requirements in s 51 of MACA are met. However, several of the activities are caught by the excluded activities listed in s 51(2). I deal with these exclusions below.

Exclusions under the Fisheries Act 1996

[480] Of significance to this case, s 51(2)(a) of MACA precludes the recognition of a PCR, if it is an activity that is regulated under the Fisheries Act 1996. The starting point is the definition of "fishing" which is defined under the Fisheries Act as:

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

[481] "Fish" includes all species of finfish and shellfish, at any stage of their life history, whether living or dead.[167] Similarly, "aquatic life" means: any species of plant or animal life that, at any stage in its life, must inhabit water, whether living or dead, and includes seabirds.[168] "Seaweed" includes all types of algae and seagrasses that grow in New Zealand fishery waters at any stage of their life, whether living or dead.[169]

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167 Fisheries Act 1996, s 2(1).
168 Section 2(1).
169 Section 2(1).

[482] Section 89 of the Fisheries Act regulates the taking of fish, aquatic life or seaweed generally by requiring that a person can do so only under the authority of a current fishing permit.[170] There are a number of exceptions specified under s 89(2), allowing the taking of fish, aquatic life or seaweed for non-commercial purposes being authorised under the Amateur Fishing Regulations or any Māori customary non-commercial fishing regulations.[171]

[483] To implement the requirement on the Minister of Fisheries to make regulations recognising and providing for customary food gathering, a permit moratorium was imposed under s 93 of the Fisheries Act for all stock or species of fish, aquatic life or seaweed listed in sch 4C of that Act. The stocks and species named in sch 4C include species of shark, lamprey and seahorse; shellfish, including catseye, limpets, sponges, whelks and crabs; and seaweeds including named species of kelp and sea lettuce.

[484] Activities regulated under the Fisheries Act therefore affect Ngā Hapū's PCR application in two fundamental ways. First, commercial fishing cannot be controlled or managed through the recognition of a PCR. In the opening submissions for Ngā Hapū, it was submitted that a PCR should be recognised to "limit and/or prohibit commercial fishing and recreational fishing". This sentiment was echoed by several witnesses suggesting that commercial fishing could be controlled or managed through the grant of a PCR.

[485] As Dr Ward submits, MACA specifies that any rights granted under MACA cannot impact the commercial fishing rights, in the ways the witnesses envisaged. However, there are regulations under the Fisheries Act, such as the Fisheries (Kaimoana Customary Fishing) Regulations (the Kaimoana Regulations), which provides for the appointment of a Tangata Kaitiaki/Tiaki and honorary fishery officers that have a role in regulating customary fishing in a defined rohe moana.[172] A mātaitai reserve may be declared over traditional fishing grounds, with the sustainable utilisation of the fishery being one of its aims.[173] In a mātaitai reserve, a Tangata

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170 Section 89(1).
171 Section 89(2)(a), (b) and (f). The latter relates to seaweed of the class rhodophyceae while it is unattached and cast ashore.
172 Fisheries (Kaimoana Customary Fishing) Regulations 1998, regs 9, 11 and 17.
173 Regulation 23.

Kaitiaki/Tiaki can restrict or prohibit fishing including commercial fishing.[174] The tools available to a Tangata Kaitiaki/Tiaki to manage commercial fishing in the customary fisheries, which can be gazetted as a rohe moana, have not been exercised by either hapū of Tokomaru Bay. These options, therefore, still remain available.

[486] The second impact of the Fisheries Act is that the resources sought in the PCR application are already regulated by ss 89, 93 and sch 4 of the Fisheries Act and regulations under MACA.[175] Those named resources are parengo, kelp, and pūpū/catseyes.

[487] Counsel for Ngā Hapū provided in closing a diagrammatic analysis of PCR's and the Fisheries Act provisions, submitting that the Fisheries Act does not control behaviour over the collection of crabs, seaweed, agar or parengo. Ngā Hapū submits that although the above species are covered by the definitions in s 2 of the Fisheries Act and the gathering of such species is controlled by the Fisheries Act, customary collection has continued. It has not been impacted by MACA, they say, and is therefore not controlled or regulated by the Fisheries Act. This submission, despite being carefully articulated and well-illustrated in diagrammatic form, is not sustainable.

[488] All the species identified in sch 4C are regulated by the Fisheries Act and its secondary or subsidiary legislation, namely the regulations. The reason for the moratorium being imposed under s 93 of the Fisheries Act, on permits for species listed under sch 4C, is the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (Settlement Act), which provided a full and final settlement of all Māori claims to commercial fishing rights.[176] Non-commercial customary fishing and food gathering were then regulated under the Fisheries Act by the enactment of the Kaimoana Regulations and the Amateur Fishing Regulations.

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174 Regulations 28 and 31.

175 These regulations are Fisheries (Amateur Fishing Regulations) 2013 and Fisheries (Kaimoana Customary Fishing) Regulations.

176 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, preamble (l)(viii).

[489] The exercise of any commercial fishing right or interest cannot be recognised as a PCR if it is declared by s 9 of the Settlement Act, or it is a non-commercial Māori fishing right or interest being subject to the declarations in s 10 of the Settlement Act.[177]

[490] Section 10 prescribes the effect of settlement on non-commercial Māori fishing rights and interests. It provides:

> **10 Effect of Settlement on non-commercial Maori fishing rights and interests**
>
> It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983—
>
> (a) shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto
>
> (b) the Minister, acting in accordance with the principles of the Treaty of Waitangi, shall—
>
> (i) consult with tangata whenua about; and
>
> (ii) develop policies to help recognise—
>
> use and management practices of Maori in the exercise of non-commercial fishing rights; and
>
> (c) the Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade; but
>
> (d) the rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly—
>
> (i) are not enforceable in civil proceedings; and
>
> (ii) shall not provide a defence to any criminal, regulatory, or other proceeding,—

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177 Marine and Coastal Area (Takutai Moana) Act, s 51(2)(c).

> except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.

[491] Counsel for Ngā Hapū urges the Court to apply the PCR provisions under MACA in a manner which serves Māori, taking into account the principles of the Treaty of Waitangi and adopting the principle of legality to the context of customary rights, consistent with previous Senior Court authority.[178] Ngā Hapū seeks an interpretation of s 10 of the Settlement Act to apply to customary *fishing*, the activity, not customary *fisheries*, the resource. Counsel points to the distinction between "fishing" and "fisheries" in s 6(7) of the Treaty of Waitangi Act 1975, which was inserted by s 40 of the Settlement Act, where the Waitangi Tribunal does not have jurisdiction to enquire into, or make recommendations in respect of commercial fishing, the activity, or commercial fisheries, the resource. By contrast, they say, there is no reference to "fisheries" in s 10 in the Settlement Act and, therefore, customary *fisheries* are not subject to the declarations in s 10 of the Settlement Act and are not excluded by s 51(2)(c)(ii) of the Marine and Coastal Area (Takutai Moana) Act.

[492] The second part of Ngā Hapū's submission is that the Waitangi Tribunal has found that although the Settlement Act had settled all Treaty right claims to commercial fishing, it did not affect claims to the Crown's obligation to Māori in respect of non-commercial fishing and fisheries. By this reasoning, counsel for Ngā Hapū submit that the impact of commercial fishing on customary fishing is still open to the Tribunal's consideration. Therefore, this Court is not precluded from recognising a PCR in relation to the impact of commercial fishing on customary fisheries by s 51(2)(c)(ii).

[493] I am unable to uphold Ngā Hapū's submission. Section 51(2)(c)(ii) plainly refers to any non-commercial Māori fishing right or interest subject to s 10 of the Settlement Act. I accept the Attorney-General's submission that on its ordinary meaning, a "fishing right or interest" captures all activities relating to fisheries. It would be inconsistent with the statutory scheme as a whole for the Fisheries Act and its definition of "fishing" to be read down as being distinct from "fisheries". Fishing

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[178] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 644; *Ngāti Apa v Attorney-General*, above n 35, at [154]; and *Ellis v R* [2022] NZSC 114 at [108]–[110], [171]–[174] and [279].

is the act of taking, harvesting or catching fisheries.[179] The regulations, such as the Kaimoana Regulations, refer to fisheries resources and thus regulates fisheries.[180] The Court of Appeal in *Noble v Minister for Primary Industries* has confirmed that "customary fishing rights" are extinguished by the Fisheries Regulations, except to the extent provided for by the Fisheries Act and the Regulations made under it.[181]

[494] Further, the correlation of the Waitangi Tribunal's jurisdiction with the High Court's jurisdiction is misplaced. The Waitangi Tribunal, established under the Treaty of Waitangi Act, is to enquire into claims brought by Māori against the Crown for Treaty of Waitangi *breaches*. Here, the High Court must determine an application for CMT and PCRs under MACA. The Attorney-General is not a respondent and the High Court's focus is not on claimed breaches of the Treaty and its principles. This distinction was reinforced by Miller J in *Re Edwards* that MACA is not concerned with redress for Treaty breaches.[182]

[495] Although the Waitangi Tribunal may consider claims on the impact of commercial fishing on customary fishing, its jurisdiction is limited to whether the Treaty has been breached. This is distinct from the statutory requirement on the High Court to determine whether the PCR is either recognised or excluded under s 51(2) of MACA.

Kaitiakitanga of customary fisheries

[496] Ngā Hapū seeks a PCR for kaitiakitanga of customary (non-commercial) fisheries, relying on the evidence that kaitiaki practices in relation to customary fishing have been exercised by hapū members from 1840 to the present day. Mr Tichborne gave evidence of practices passed down through the generations of the hapū in relation to managing the kapata kai "carefully". Mr Tichborne and Mr Whakataka gave examples of the activities involved in exercising kaitiakitanga over customary fisheries. These included:

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179 Fisheries Act, s 2.
180 Fisheries (Kaimoana Customary Fishing) Regulations, reg 2.
181 *Noble v Minister for Primary Industries* [2020] NZCA 100 at [14]–[15].
182 *Re Edwards* (CA), above n 1, at [196] per Miller J.

(a) taking kina, kutai and koura only when they are fat or in season;

(b) not taking small crayfish or small paua;

(c) gathering or taking only what is needed and not gathering more kaimoana than required; and

(d) fishing in accordance with the seasons, so that species are given a chance to replenish and different species are gathered at different times of the year.

[497] No issue has been taken by the Attorney-General that both Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare have exercised and continue to exercise kaitiakitanga in respect of their customary fisheries. The Attorney-General does not dispute that their practices will of course continue, in accordance with tikanga, even if it is not recognised as a PCR under MACA.

[498] For reasons already canvassed above, the exercise of kaitiakitanga over customary (non-commercial) fisheries is expressly excluded from being recognised as a PCR under s 51(2) on two grounds. First, it is an activity that "it is regulated under the Fisheries Act 1996". Secondly, it involves the exercise of a non-commercial Māori fishing right or interest subject to the declarations in the Settlement Act.

[499] Having regard to the legislative framework, MACA clearly precludes the recognition of kaitiakitanga of customary fisheries as a PCR. This PCR, therefore, cannot be granted.

Taking, using, gathering, managing natural and physical resources

[500] The application seeks PCRs in relation to taking, using, gathering, managing and/or preserving all natural and physical resources. Each of the respective resources named is dealt with below.

Seaweed, agar and parengo

[501] Ngā Hapū seeks a PCR in relation to gathering or taking agar, parengo and kelp, all of which are defined under the definition of "seaweed" in s 2 of the Fisheries

Act. The species of parengo and kelp are also included in the definition of "harvestable spat", defined in s 2 of the Fisheries Act and specified in sch 8A of the Fisheries Act. Section 89 of the Fisheries Act regulates the taking of seaweed generally and the exceptions in s 89(2) allows the taking of seaweed in accordance with the Amateur Fishing Regulations and the Kaimoana Regulations. There is an exemption in s 89(2)(f) to seaweed of the class rhodophyceae, while it is unattached and cast ashore.

[502] The Crown acknowledges that in *Re Edwards (No 2)*[183] and *Re Ngāti Pāhauwera*,[184] class rhodophyceae was not regulated by the Fisheries Act and therefore could be recognised as a PCR. Having given further consideration to the issue, Dr Ward submits that his former position was incorrect and that the taking of all seaweed, including seaweed of the class rhodoyphyceae that is unattached and washed ashore, is regulated under the Fisheries Act and requires a current fishing permit.

[503] There was considerable evidence given by Ngā Hapū witnesses of the traditions preserved through the generations of both hapū of Tokomaru Bay of the gathering of kelp to cook crayfish and to make garden fertiliser; parengo for its mineral rich addition to the diet of the hapū, being treated as a delicacy and rongoā for stomach ailments; and agar, a type of algae, used for rongoā purposes and for commercial sale.

[504] The regulation of seaweed being the genus of the species sought by the application, is caught by s 10 of the Settlement Act and the Minister of Fisheries, pursuant to the obligations under s 10, has recommended the Kaimoana Regulations and the Fisheries (South Island Customary Fishing) Regulations 1999 to give effect to that obligation.

[505] The Kaimoana Regulations apply to Tokomaru Bay and as set out above, reg 2(i) defines the term "customary food gathering purposes" to mean:

> … the traditional rights confirmed by the Treaty of Waitangi and the Settlement Act, being the taking of fish, aquatic life or seaweed or managing of fisheries resources, for a purpose authorised by tangata kaitiaki/kiaki for such purpose that is consistent with tikanga Māori and is neither commercial nor obtained for pecuniary gain or trade.

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183 *Re Edwards (No 2)*, above n 10.
184 *Ngāti Pāhauwera*, above n 135.

Regulation 2(i) specifically defines the term "fisheries resources" to mean "any one or more stocks of species of fish, aquatic life, or seaweed".

[506] I agree with Dr Ward's interpretation that the Kaimoana Regulations regulate the taking of seaweed. It follows that the taking of seaweed, parengo and agar, cannot be the subject of a PCR under s 51(2)(c)(ii) as it is under the regulation of the Fisheries Regulations and involves the exercise of a non-commercial Māori customary fishing right or interest that is subject to the declarations in s 10 of the Settlement Act. This includes the class rhodophyceae.

Kaimoana – kelp, crabs, ngā kihi, tuna kāpō, pūpū

[507] The kaimoana resources sought in the application, are regulated by the Fisheries Act. Under s 51(2) of the Act, they cannot be the subject of a PCR recognition order. For completeness, the collection of agar, kelp (including bull kelp), red crabs, ngā kihi, tuna kāpō and pūpū all fall within the Fisheries Act broad definition of fishing and these species are specifically named and regulated under the relevant provisions of ss 89, 93 and/or sch 4C of the Fisheries Act.

Whitebait

[508] Ngā Hapū seeks a PCR for the taking, utilisation, gathering and management of whitebait. There are three issues that arise in relation to a recognition order for a whitebait PCR.

[509] The first is whether non-commercial whitebait fishing is caught by the Fisheries Act and s 10 of the Settlement Act. Whitebait is regulated under the Conservation Act 1987.[185] It was a political agreement, confirmed at the second reading of the Treaty of Waitangi (Fisheries Claims) Settlement Bill, where the Minister confirmed the Government's intention that the Conservation Act provisions on freshwater fishing rights would be unamended.[186] Māori customary fishing rights and freshwater non-commercial whitebait fishing are preserved under that Act.[187]

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185 Conservation Act 1987, s 26ZH.
186 (8 December 1992), 532 NZPD 12931.
187 Whitebait is defined in the Whitebait Fishing Regulations 1994, s 2.

Thus, while the Fisheries Act protection of customary fishing rights was repealed by the Settlement Act and replaced as described earlier by the Kaimoana and Amateur Fishing Regulations, whitebait fishing is not regulated by the Fisheries Act and does not fall within s 10 of the Settlement Act. Therefore, activities in relation to whitebait fishing may be the subject of a PCR. This was confirmed in *Re Edwards (No 2)* and *Re Ngāti Pāhauwera*.[188]

[510] The second issue is whether the evidence discloses the non-commercial collection of whitebait as a customary practice in Tokomaru Bay. Mr Whakataka gave a description of how he catches whitebait and Mr Roger Tichborne described how he caught whitebait at multiple locations along the coastline, including Rukumoana along the Mangahauini River, the Waiotū, Waihi, Waitākeo and Mangaroa Streams, as follows:

> We catch whitebait at Rukumoana in the Mangahauini, in the Waiotū, or up the Waitākeo and Mangaroa streams. We would form a narrow channel of rocks that the whitebait had to swim through. The old people taught us how to do this with channels in the sea as well. We would set mutton cloth, or muslin, over the mouth of the channel and chase the whitebait into it. There was no escape.

[511] The way in which both witnesses described how the whitebait were trapped in a long narrow channel beside the stream indicates that this is a practice specific to the area. There was no other evidence of the use of whitebait nets, for example. It falls to be considered therefore as a non-commercial customary fishing practice exercised by the hapū in Tokomaru Bay.

[512] However, it raises the third question and that is how long have these practices been exercised and are the hapū members still collecting whitebait? When cross-examined about whether hapū members were still collecting whitebait, Mr Roger Tichborne acknowledged he was not collecting whitebait at the moment and he was not sure whether other members were still collecting whitebait. He also responded that the "old practices" for collecting whitebait were no longer being used.

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188 *Re Edwards (No 2)*, above n 10, at [669]; and *Re Ngāti Pāhauwera*, above n 135, at [599].

[513] It is clear from both witnesses that whitebaiting has occurred by the unique method they have described. However, the whitebaiting practices appear to have stopped and there is no evidence before me that there is a continuity of whitebaiting practices. Accordingly, the Court cannot order a PCR over whitebait, when the practice of its collection no longer takes place. However, leave is granted to the applicants to address this issue further, if there is evidence that whitebaiting continues, at the Stage Two hearing.

Sand and driftwood

[514] Activities in relation to sand and driftwood can be recognised as PCRs and orders were made in *Re Edwards (No 2)* and *Re Ngāti Pāhauwera*.[189] Dealing first with sand, there was limited evidence of the collection of sand or its importance from any part of the application area from 1840 to the present. Although Mr Whakataka gave evidence that beach sand can be used for concreting and gardens and for growing kumara shoots, it is unclear whether Mr Whakataka or members of either hapū carry out this practice in the application area and if so, since when and from where. It is unclear whether there has been a continuous practice from 1840 to the present day.

[515] In relation to driftwood however, the evidence reveals that driftwood has been collected for many generations to make tokotoko (carved walking sticks) and dog trail sticks as well as for firewood. Several witnesses confirmed that driftwood is still being collected along the foreshore at Tokomaru Bay by members of both hapū and that the collection of driftwood occurs between Kakepō down to Tokomaru Bay and in the further stretch from Tokomaru Bay to Ongarūrū Beach. Mr Tichborne described the location of driftwood as being from "Ta Patai in the south to Te Koau in the north". He described that the driftwood is collected "right up on the highwater mark" and that it "always sits above the highwater mark".

[516] It is unclear whether driftwood can only be collected above the highwater mark. If that is the case, it is not within the common marine and coastal area and therefore not available as a PCR under MACA.

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189 *Re Edwards (No 2)*, above n 10, at [669]; and *Re Ngāti Pāhauwera*, above n 135, at [599].

[517] There is a further consideration and that is whether a PCR for the protection and preservation of resources such as driftwood may operate to prevent any public rights of access and/or navigation specified under ss 26 and 27 of MACA. I am satisfied that driftwood collection below the highwater mark does not prevent access to the public or navigation.

[518] The application for a PCR to collect driftwood is granted, subject to the caveat that a recognition order for a PCR covers the marine and coastal area only. In so far as it protects the right of the two hapū to collect driftwood for tikanga purposes, the PCR may be exercised without a resource consent, despite s 12(2)(b) of the RMA. The scope and the effect of the PCR is governed by s 52 of MACA.

Utilising, managing and/or preserving tauranga waka

[519] Ngā Hapū is seeking a PCR in relation to using, managing and/or preserving tauranga waka or seacraft launching and landing sites within Tokomaru Bay. The applicants seek a PCR for the following four tauranga waka:

(a) Kakepō;

(b) Torotika (also known as Te Puka boatramp).

(c) Whekeūa, near Te Ihi o Te Kura in the northern part of the application area; and

(d) Whekeūa at Waihoa, known as the Waihoa landing, in the southern part of the application area.

[520] There is precedent for granting PCRs in respect of tauranga waka. In *Re Ngāti Pāhauwera*,[190] the Court made an order recognising a PCR for the use of tauranga waka in two areas, the specific areas of which were to be finalised in the stage two hearing.

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190 *Re Ngāti Pāhauwera*, above n 135.

[521] Detailed evidence was given in respect of each of the four named tauranga waka listed above, demonstrating that they have been utilised, managed and preserved in accordance with tikanga.

[522] The Kakepō tauranga waka, the full title of which is Kake mai te Pō, translates to "spirits waiting to ascend". [Redacted]. The tauranga waka has significant ancestral links, as the Hourouta waka landed at Kakepō, carrying the ancestors of Ruapani.

[523] Te Aotāwarirangi resided near Kakepō for much of her life. Kakepō is situated near Te Ariuru marae and formerly was located within the palisades of the marae with palisades going down to the seawater and foreshore. It includes the channel which stems from the launch area out into the bay and is used by both hapū currently. It was the main terminus for sea travel into and out of Tokomaru Bay. As noted earlier,[191] the title was compulsorily acquired in 1905, although it was still frequently used as a port by hapū members. However, it was returned to Te Whānau a Te Aotāwarirangi by order of the Maori Land Court in 1996,[192] which vested the land at Kakepō in the Te Ariuru Marae Trustees as Māori freehold land, which was set aside as a Maori Reservation for the descendants of Te Aotāwarirangi.

[524] As a result of the vesting of Kakepō in the Te Ariuru Marae Trustees and the fact it is a Māori Reservation, the land is outside the common marine and coastal area and is already under the control and subject to access by Te Whānau a Te Aotāwarirangi members. What needs to be stressed here, given some of the witnesses' views about the scope and ambit of recognition orders, is that any exercise of a PCR cannot limit the public rights of access in navigation. These are specifically reserved under ss 26 and 27 of MACA.

[525] If what is claimed is more than the Kakepō site, the boundaries of the Kakepō tauranga waka are unclear. Whilst witnesses were able to refer to Kakepō as a precise location, the maps prepared by Mr Halliday give broader areas with greater boundary extension. More clarification and precision is needed if any recognition orders were to be made.

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191 See this judgment at [311] above.
192 See this judgment at [313] above.

[526] In relation to Torotika, Ms Kody Pēwhairangi confirmed that hapū members continue to use the area "then as we do now" and others were able to use the area and have done so in the past. While Torotika has been the landing place of many waka historically, Te Puka boat ramp was placed over Torotika, which has been used by members of both hapū of Tokomaru Bay as well as members of the public. As with Kakepō, Torotika is an important tauranga waka connecting the hapū to their tīpuna. Torotika is surrounded by sites of significance, such as the sacred altar of Karanga a Te Atua, the Wairūrū Stream and Pito Rock. Ms Karen Pēwhairangi, giving evidence for the Te Whānau application, confirmed the significance of the Torotika tauranga waka and accepted that the tauranga waka is a place of significance for both Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare.

[527] Although the tauranga waka at Tuatini was mentioned in evidence, this is not a site sought to be recognised as a PCR. In relation to the Whekeūa, both north and south, there is little evidence of the significance of the site in terms of tikanga or the exact location of the tauranga waka, the period it was in use and what it was used for. There is no specific evidence that either site remains in current use or has been used for some time, apart from the popular summer camping area located at Hautanoa.

[528] There are no precise boundaries for all four tauranga waka sites as claimed. There is no evidence on the specific reasons for why and how a PCR should be recognised. I note that the scope and effect of PCRs under s 52 of MACA may be exercised without a resource consent but there needs to be an adequate basis for making a PCR.

[529] On the current state of the evidence, I am not satisfied that the requirements of s 51(2) have been met for any of the tauranga waka sites. In the case of the Kakepō tauranga waka, access and control has already been granted to the Te Ariuru Trustees for the land above the mean highwater mark so a PCR cannot be granted. If there is a basis for a wider area justifying recognition of a PCR for the Kakepō Tauranga waka site, I grant leave to the parties to provide detailed evidence and specific boundary survey markings for further consideration at the Stage Two hearing.

Traditional practices

Maramataka

[530] Ngā Hapū seeks a PCR for the traditional practices of maramataka. As Mr Kemara Pēwhairangi explained, the maramataka is a traditional Māori calendar that uses the moon to provide for the best times to fish and plant. Several witnesses described how the maramataka had been used for generations for fishing and planting, based on the cycles of the moon.

[531] Mr Pēwhairangi said that he learned about the maramataka from older whānau and hapū members when he was young and his nanny always fished by the moon and could tell which particular species of fish would be prominent on a particular day. She also planted her garden in accordance with the maramataka.

[532] Mr Tichborne confirmed that the maramataka acted as a guide for all of his fishing activities and his whānau had taught him about its importance. In following the maramataka, other tikanga practices such as rāhui, karakia, caring for the taiao (natural world), preventing unnecessary waste and correctly fishing and gathering kaimoana at the appropriate time prevents the digestion of toxins accumulated by kaimoana out of season. He considers the protection of the environment is aided through following maramataka. Mr Whakataka gave evidence of using maramataka for planting, although this was above the highwater mark and outside the takutai moana.

[533] Although the evidence confirmed that the practice of using maramataka for fishing and some planting purposes, there was no evidence specifying the type of plants and whether planting occurs in any particular part of the takutai moana. It appears that the use of the maramataka has waned more recently, as Mr Pēwhairangi confirmed he does not use it so much now. Mr Whakataka gave evidence that he is in the process of creating a maramataka calendar for use in relation to both planting and fishing in Tokomaru Bay.

[534] As Churchman J said in *Re Edwards (No 2),*[193] there must be some physical activity involved or a natural or physical resource being used to support an order for a PCR. It is plain that hapū members have used maramataka, based on traditional practices.

[535] However, what is required for a PCR to be recognised in relation to either the fishing or planting activities has not been specified. Without an activity or a physical resource being identified, maramataka cannot be recognised as a PCR as a generic concept. Nevertheless, members of both hapū can still carry out the activities of fishing and planting by the use of maramataka, without the need for a PCR.

Using rongoā materials

[536] From Ngā Hapū's Counsel's opening submissions, Ngā Hapū appeared to be seeking a PCR in respect of using seahorse, starfish, pāua, sea moss and agar for rongoā (medicinal) purposes. This PCR was not sought in Ngā Hapū's amended application for recognition orders. For completeness, no PCR can be recognised as these activities are regulated under the Fisheries Act and thus are excluded from being granted as PCRs.

PART VIII: FINDINGS

CMT findings

(1) The two hapū, Te Whānau a Te Aowārirangi and Te Whānau a Ruataupare, have met the test for a joint CMT under s 58 of the Act in the areas from Waimahuru south (the northern boundary) to Te Māwhai (the southern boundary) and out to three to four nautical miles from the mean high-water springs of the foreshore of Tokomaru Bay.

(2) The areas where the applicants have not met the test is in the offshore area from three to four nautical miles to twelve nautical miles of the application area.

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193 *Re Edwards (No 2)*, above n 10, at [567], [590] and [659].

Directions

(1) Before any final orders can be made, the applicants must provide the Court with:

(i) A draft order for approval by the Registrar of the Court describing and depicting the exact location of the boundary lines of the CMT area and the precise nautical mile limit of the inshore customary fishing areas, as shown for the southern area in Appendix 2(b) in the Huiteananui Fisheries Management Plan.

(ii) The name of the person or entity to hold the joint CMT order on behalf of both hapū.

(iii) A signed acknowledgement from each hapū that the named person/entity has the authority to represent each of them as the holder of the joint CMT order.

Wāhi tapu sites

Leave and directions

(4) Leave is granted to the applicants to address the reasons for wāhi tapu protection within the CMT area and their precise locations.

(5) I direct that a Stage Two hearing take place on 29 April 2024 to 3 May 2024 at the High Court in Wellington to address the CMT boundary lines, and the wāhi tapu leave considerations.

PCR

Finding

(6) A PCR is granted for the applicant groups to collect driftwood below the mean high tide mark of the application area.

Leave and directions

(7) Leave is granted to the applicant to address the issues as set out in [513] and [529] in relation to the PCR claims for whitebaiting and the Kakepō tauranga waka site.

(8) I direct that the parties can be heard on the above leave matters at the Stage Two hearing on 15 July 2024 to 19 July 2024.

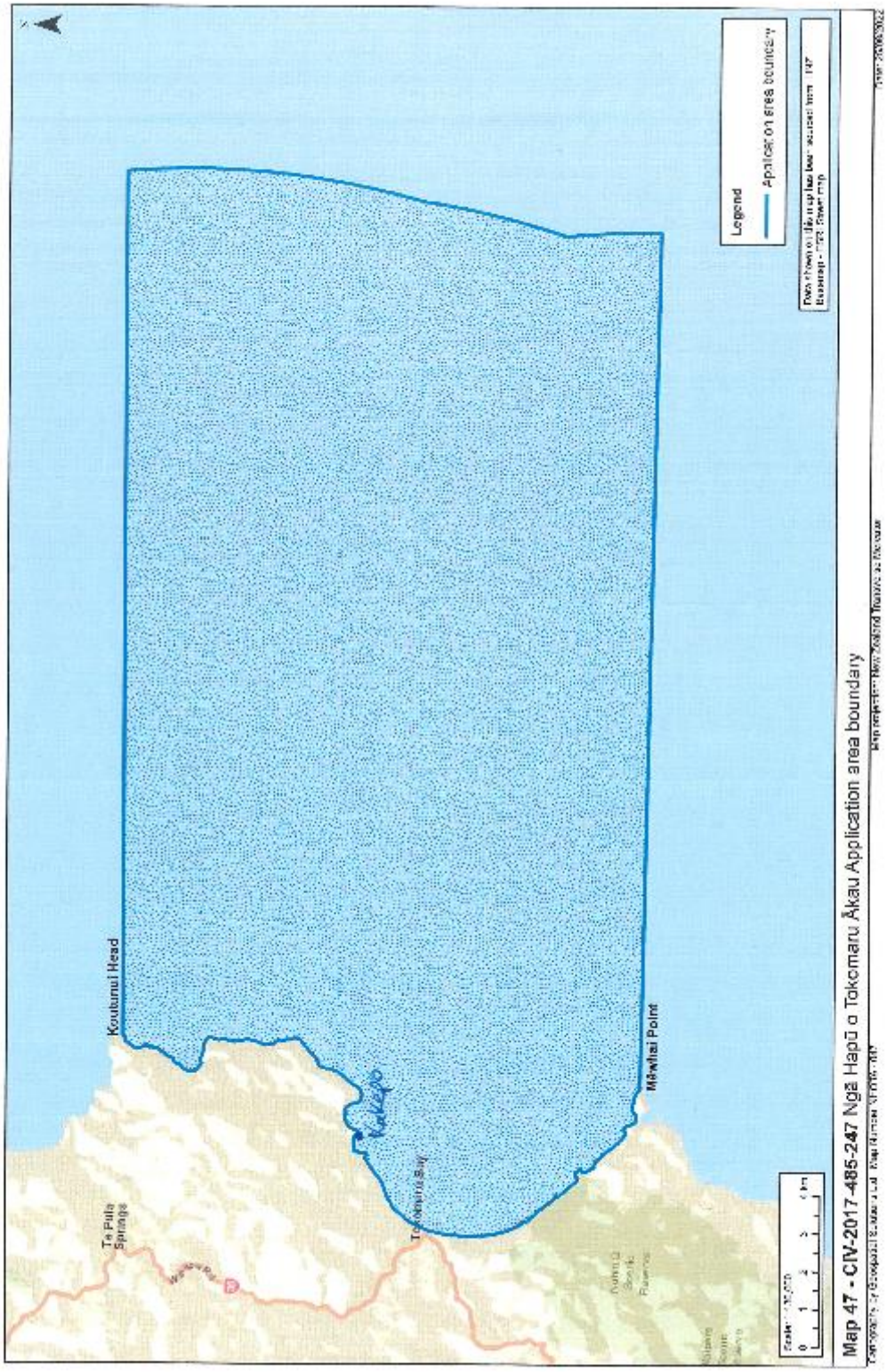
Addendum

[537] The applicants were given an opportunity to address any corrections, additions or redactions to the judgment for confidentiality or cultural sensitivity reasons before delivery of the judgment. Those redactions appear in the redacted delivered judgment in accordance with this Court's confidentiality orders. This judgment also corrects errors or omissions pursuant to r 11.10 of the High Court Rules 2016. The judgment has effect from 1 May 2024 (pursuant to r 11.5 of the High Court Rules).

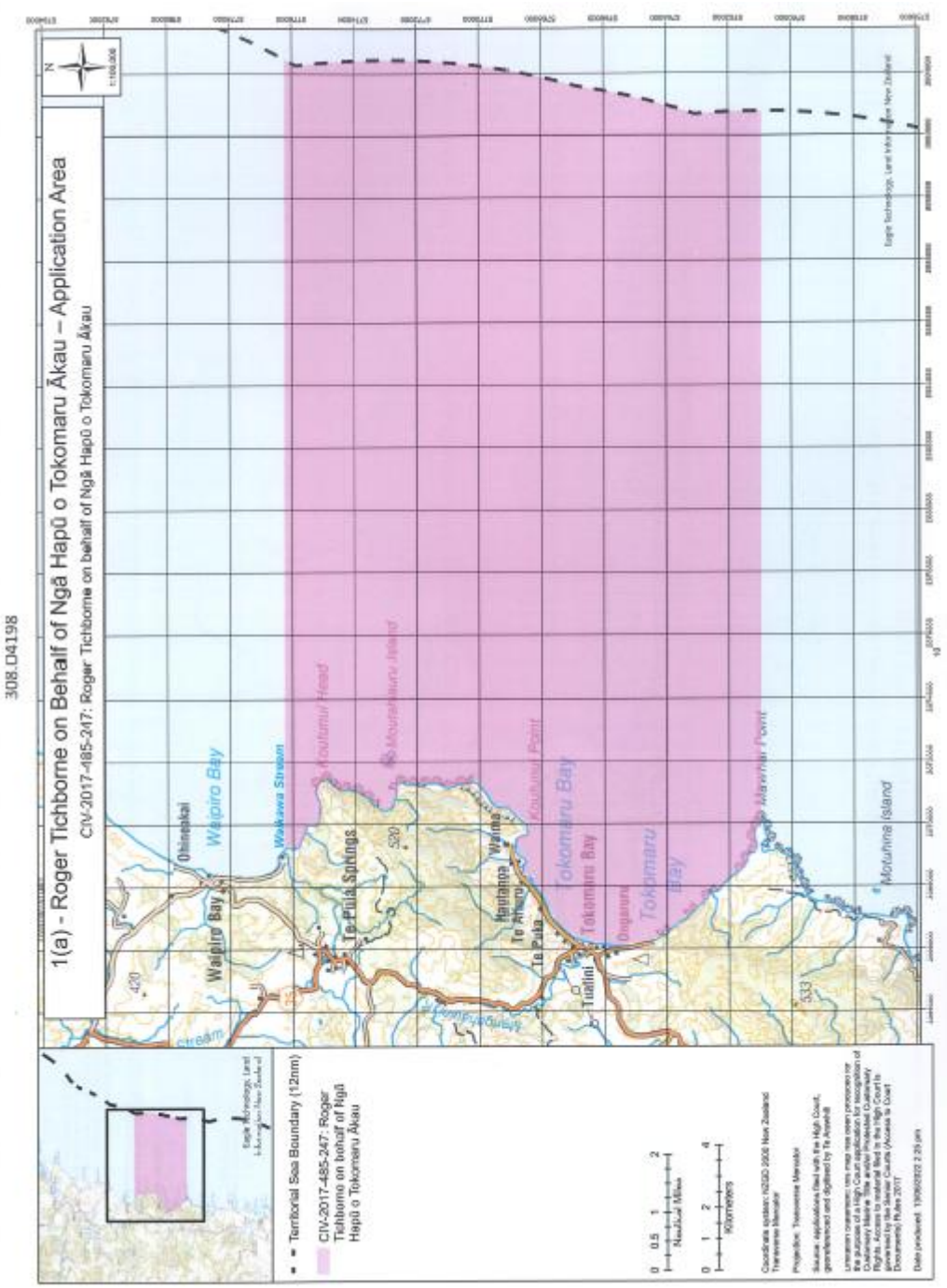
Cull J

Solicitors:
TamakiLegal for Ngā Hapū o Tokomaru Ākau
McCaw Lewis, Wellington for Te Whānau a Ruataupare Ki Tokomaru
Lyall and Thornton, Auckland for Ngā Whānau o Hauiti
Crown Law Office, Wellington, for Attorney-General
Chapman Tripp, Wellington for Seafood Industry

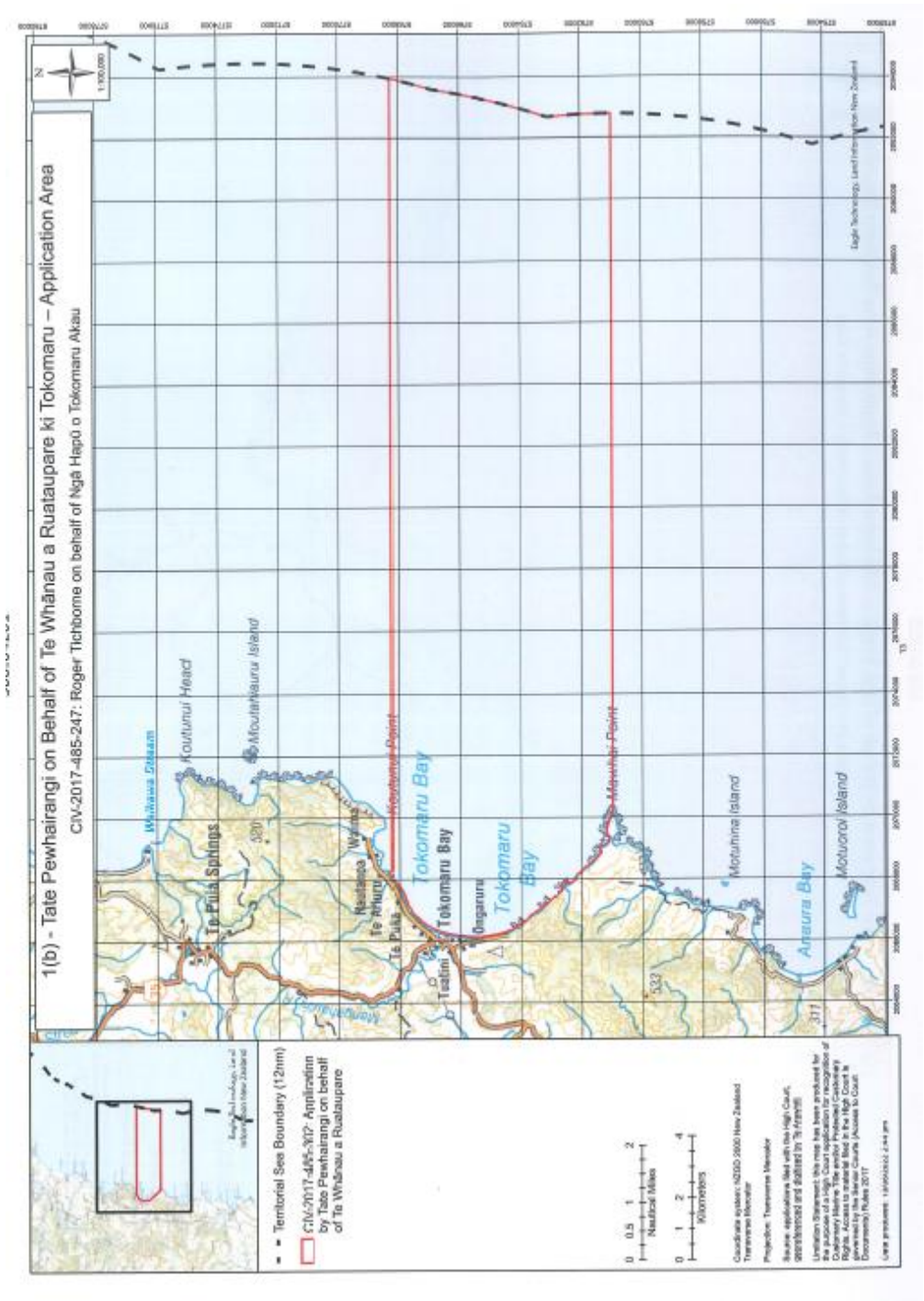
Appendix 1(a): The application area for Ngā Hapū.



Appendix 1(b): Application area for Ngā Hapū with relevant sites.

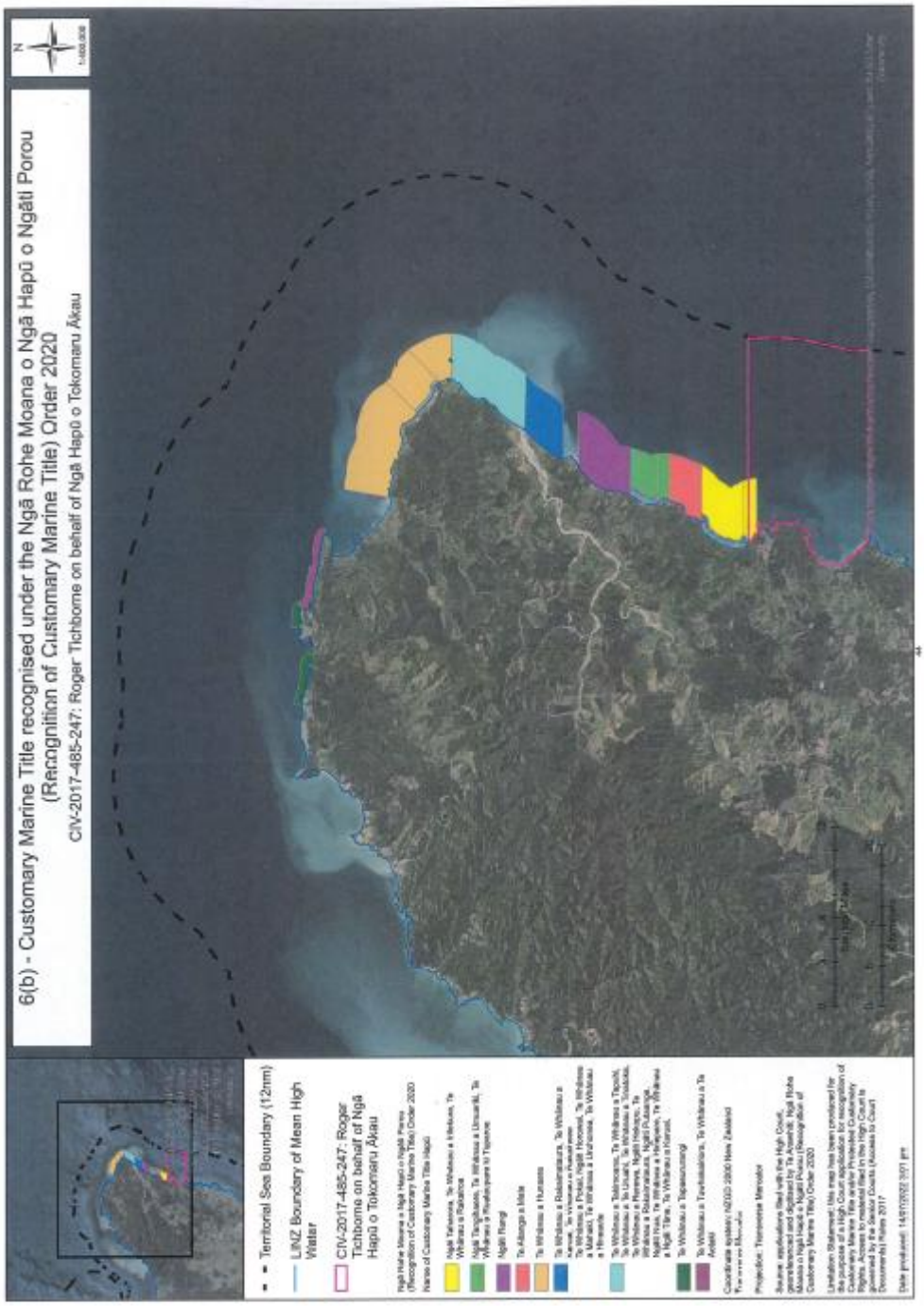


Appendix 2(a): Application area for Te Whānau a Ruataupare.

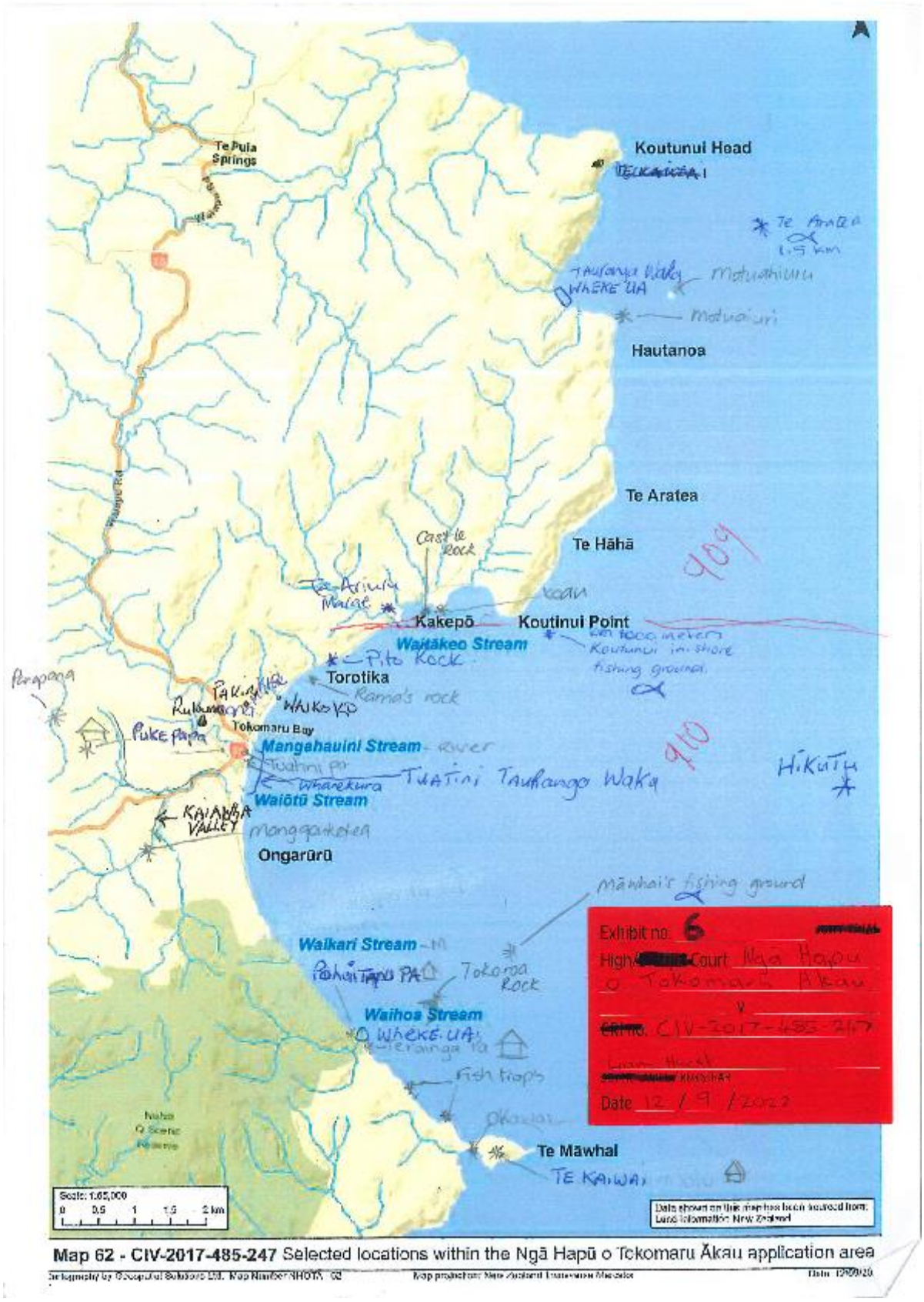


Appendix 2(b): Customary Fisheries Management area for Te Whānau

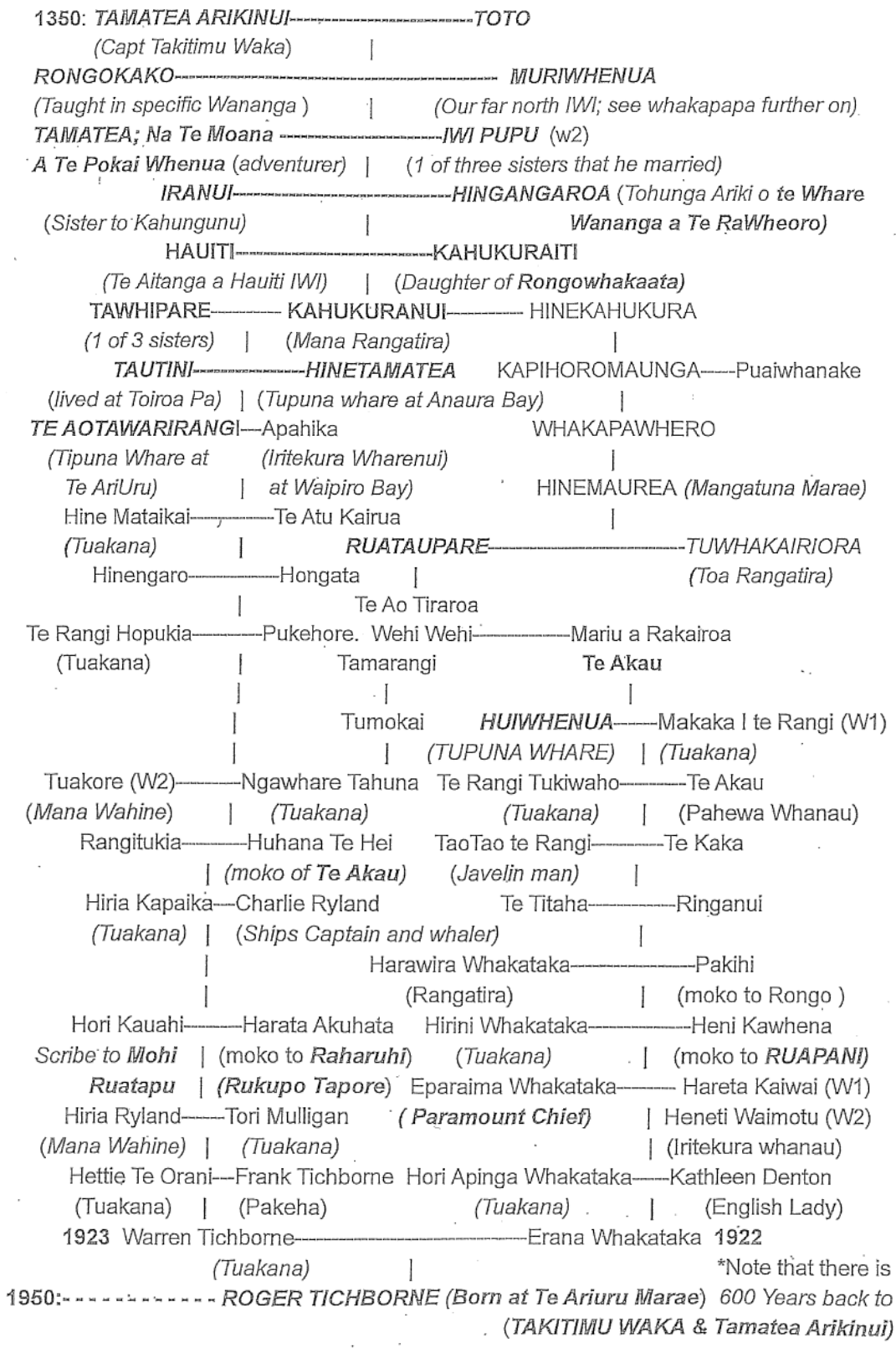
Appendix 3: CMT areas recognised under the Ngāti Porou Deed



Appendix 4: Site markings by witnesses in specified area on Exhibit 6.



Appendix 5: Ngā Hapū o Whakapapa – the Hauiti Ancestry Chart

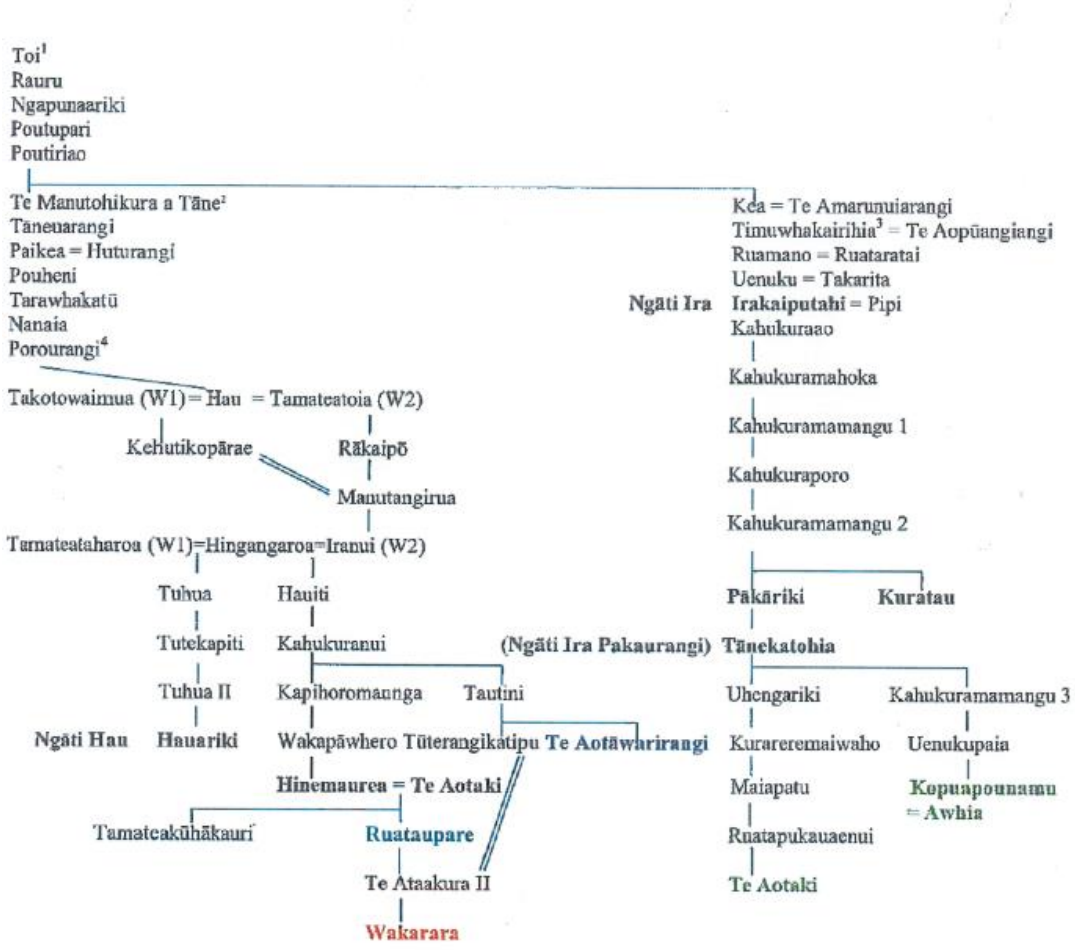


Appendix 6(a): Te Whānau a Ruataupare Whakapapa Ancestry Chart

SCHEDULE C

WHAKAPAPA CHART

Ngāti Ira, Te Whānau a Te Aotāwarirangi, Te Whānau a Ruataupare, Ngāti Wakarara, Ngāti Hau



Te Whānau a Ruataupare Ngāti Wakarara Te Whānau a Te Aotawarirangi Ngāti Ira

taken from Dr Wayne Ngata, *Historical Report Mārau-Waitakeo* at p 8

Appendix 6(b): Whakapapa chart of Pēwhairangi whanau

WHAKAPAPA CHART 1

Pewharangi Whanau Whakapapa

HINEMAUREA = **TEAOTAKI**

Ruataupare (3)	**Tamateakuhakauri (1)**
Wehiwehi	Turangakawa
Tamarangi	Te Rakanuru
	Panana
	Pahiko

Te Whanau a Pakoko — **Tumokai II** — **Maroro** Te Whanau a Kaipakini

Tataahi (w3) = **Rerekohu-iti** = Koromatai (wl)

1800 Iraia Tutakaro — Makauriki

1820 Te Hira = Harata Tangikuku — Honana = Ihakara Tihei Ngati Awhia

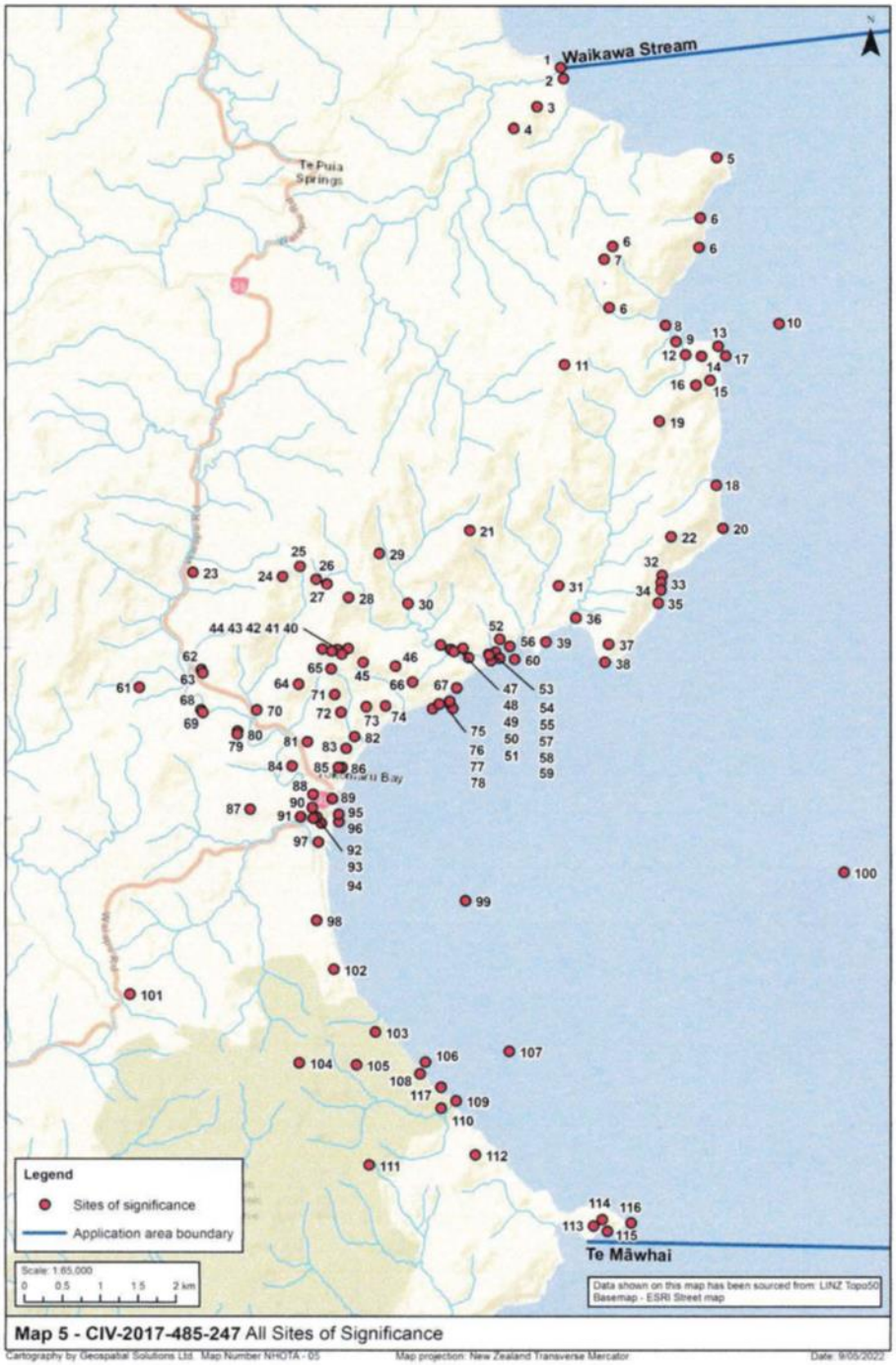
Wi Pewhairangi — Ani Ngahuia

1840 Wi Pewhairangi — Te Kooro Kiriahuru Waikapakapa (dni) — Mere Waimariuka

	= Ani Ngahuia				= Pera Te Weri
1860	Mikaera Raniera		Te Aorere	Tamati Wi	Raiha Kamau
1880	Erekana	Parekura	Tutaawa	Rerekohu	Paumea Ferris
1900	Horomona I	Nikora Wi	Tate	Ngaronoa	Ingrid Searancke
1940-1960	Horomona II	Karen	Koromatai	Rerekohu	Nikki Searancke

Pewhairangi P Manuscript, 193D.

Appendix 7: Sites of significance with table



Map 5 - CIV-2017-485-247 All Sites of Significance

Cartography by Geospatial Solutions Ltd. Map Number NHOTA - 05 Map projection: New Zealand Transverse Mercator Date: 9/05/2022

Table 1 - CIV-2017-485-247 Sites of Significance

Site Number	Name	Category
1	Waikawa Stream	MACA Act application boundary
2	Pōkurakura wānanga	Kura wānanga
3	Takarangi pā	Pā tūwatawata
4	Maungaroa	Maunga
5	Ko-Atua-Nui	Sacred altar/tūāhu
6	Waimahuru	Burial cave
6	Waimahuru	Burial cave
6	Waimahuru	Burial cave
6	Waimahuru	Burial cave
7	Ngapunarua	Pā tūwatawata
8	Whekeua	Tauranga waka
9	Te Ihi o Te Kura	Burial cave
10	Te Rua o Mutu	Marine wāhi tapu
11	Te Arai Ara pā	Pā tūwatawata
12	Rua o Hinemataikai	Burial cave
13	Tahito	Wāhi tapu
14	Ta Uri Kura	Pā tūwatawata
15	Te Karaka	Landmark
16	Urehoi	Pā tūwatawata
17	Motuahiauru	Wāhi tapu
18	Paretaniwha	Marine wāhi tapu
19	Burial Caves	Burial cave
20	Te Aratea	Fishing ground marker - inshore and offshore
21	Taikorihi pā	Pā tūwatawata
22	Burial Caves	Burial cave
23	Maungatio pā	Pā tahora
24	Maungatio	Burial cave
25		Sacred pathway
26	KIMIPIRAU	Sacred pathway
27	Te Rau a Te Keteiwi	Sacred pathway
28	Ana Pihau	Sacred pathway
29		Sacred pathway
30		Sacred pathway
31	Pā Whakataka	Pā tūwatawata
32	Te Hāhā	Landmark
33	Te Papaki	Landmark
34	Ruataniwha	Marine wāhi tapu
35	Te Whārau	Landmark
36	Te Aohaki pā	Pā tahora
37	Pōkeno pā	Pā tahora
38	Pukekaahu	Sacred site/wāhi tapu
39	Te Koau	Landmark
40	Marotiri Maunga	Landmark
41	Marotiri	Burial cave
42	Pā Harakeke	Pā tūwatawata

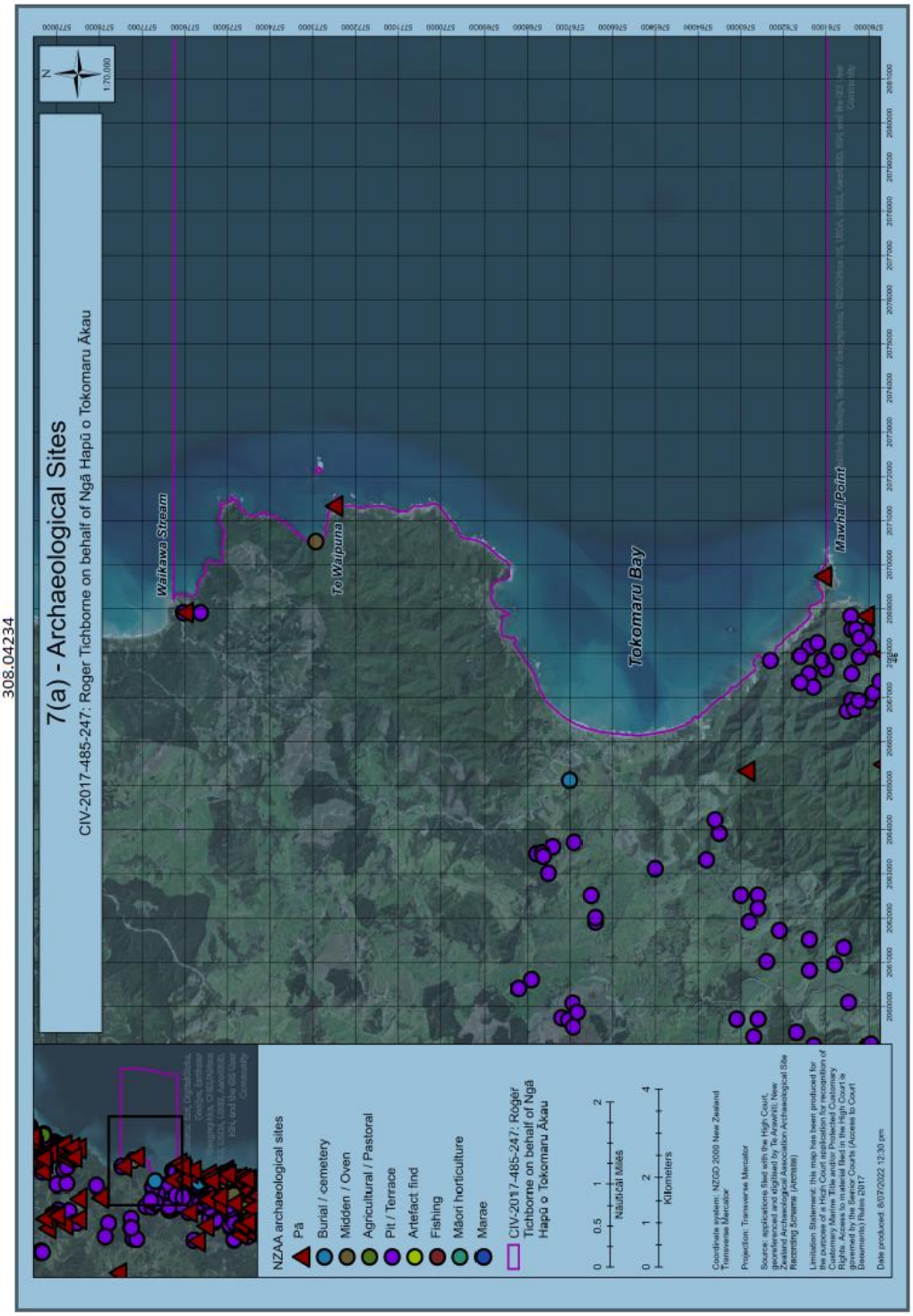
Table 1 - CIV-2017-485-247 Sites of Significance (continue)

Site Number	Name	Category
43		Sacred pathway
44	Marotiri pā	Pā tūwatawata
45	Horo a Te Karoro	Sacred pathway
46	Hue-a-Kane-a-Ha	Sacred pathway
47		Sacred pathway
48	Waiparuparu	Puna
49	Waipapa	Puna
50	Waipapa and Waiparu	Puna
51	Pukehāpōpō pā	Pā tahora
52	Te Taratara a Te Koura	Pā tūwatawata
53	Te Ariuru	Kura wānanga
54	Te Ariuru Marae	Current marae
55	Taruheru urupā	Urupā
56	Kakepō	Tauranga waka
57	Otairi Point urupā	Urupā
58	Kopuānui	Marine wāhi tapu
59	Tamati i Whakanehua i Te Rangi tomb	Urupā
60	Te Rua Ariuru	Marine wāhi tapu
61	Pukepapa Rotokoro pā	Pā tūwatawata
62	Ahititī pā	Pā tahora
63	Pakaru pā	Pā tahora
64	Wharangi	Pā tahora
65	Te Anapōuri	Sacred pathway
66	Karanga a Te Atua	Sacred altar/tūāhu
67	Waiwhakaata	Puna
68	Taumani a Tutua	Sacred site/wāhi tapu
69	Paeraute pā	Pā tahora
70	Koroki pā	Pā tahora
71	Waimanu	Sacred site/wāhi tapu
72		Sacred pathway
73	Whatianga	Pā tahora
74	Hamapu pā	Pā tahora
75	Torotika	Tauranga waka
76	Kopuatai	Marine wāhi tapu
77	Kopuatahangahanga	Marine wāhi tapu
78	Te Toka a Turangakawa	Sacred site/wāhi tapu
79	Te Kura o Harakeke	Kura wānanga
80	Whakatū pā	Pā tahora
81	Māūi pā	Pā tahora
82	Kiore Whatinga	Sacred pathway
83	Waiparapara Marae	Current marae
84	Rukumoana pā	Pā tahora
85	Te Ngai o Papa urupā	Urupā
86	Pākirikiri Marae	Current marae
87	Kairangi pā	Pā tūwatawata

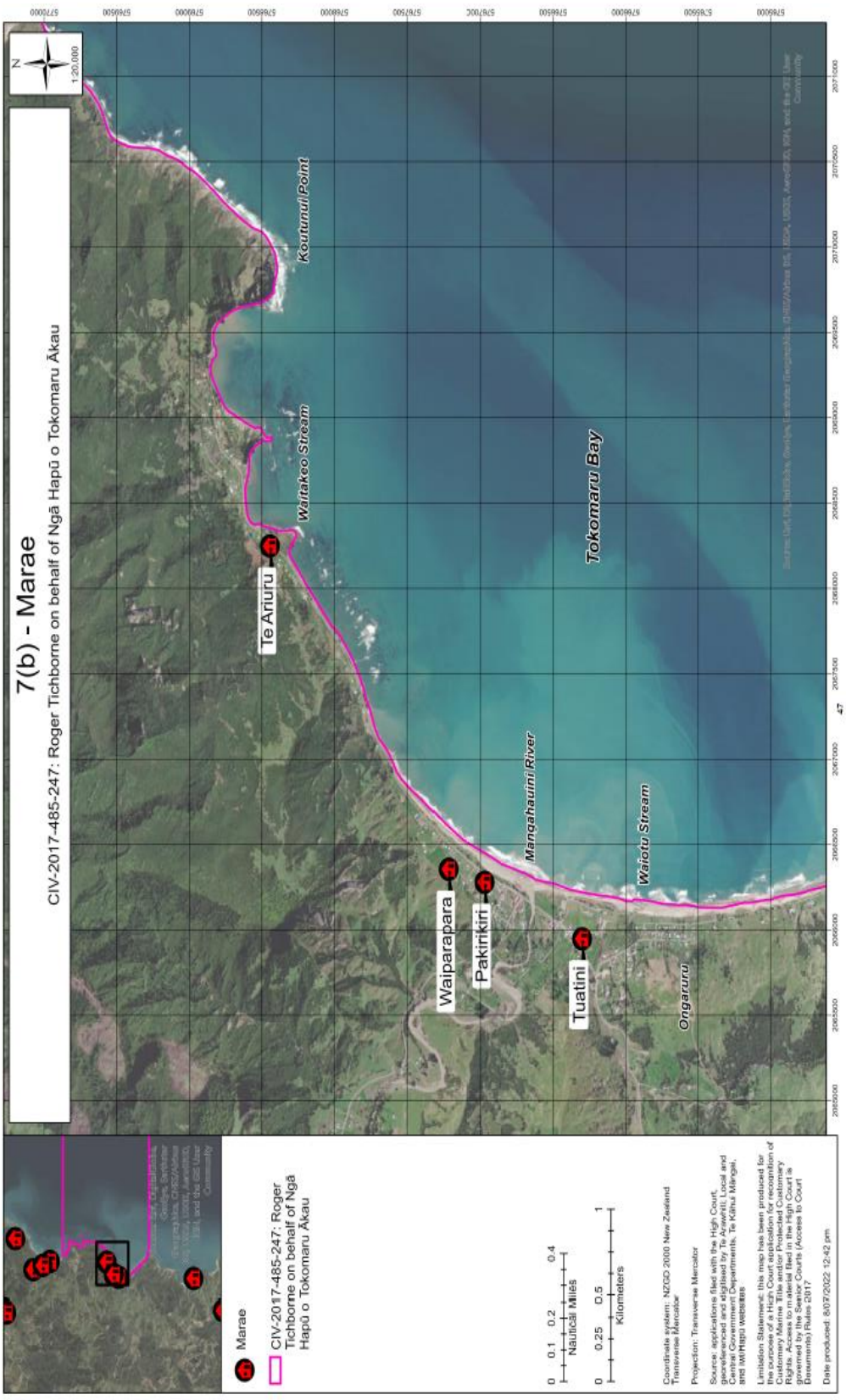
Table 1 - CIV-2017-485-247 Sites of Significance (continue)

Site Number	Name	Category
88	Kao Kao Mahaki	Pā tahora
89	Ruatepupuke (No1)	Pā tahora
90	Enihau	Pā tahora
91	Hekerangi pā	Pā tahora
92	Waho ko Te Uru urupā	Urupā
93	Tuatini Marae	Current marae
94	Te Taputapu Ātea a Rangi a Whatukura	Kura wānanga
95	Tahuna Roa	Marine wāhi tapu
96	Tuatini	Tauranga waka
97	Pā Wharu	Pā tahora
98	Ongarūrū urupā	Urupā
99	Kopuatai	Landmark
100	Hikutū	Landmark
101	Te Pā-ū-Āriki	Pā tūwatawata
102	Tā Patai	Pā tahora
103	Pōhaitapu	Pā tahora
104	Huiarua	Burial cave
105	Tūwairua pā	Pā tūwatawata
106	Waipūpū	Marine puna
107	Tokaroa	Landmark
108	Mihimarino	Pā tahora
109	Waihoa	Pā tahora
110	Te Paenga pā	Pā tahora
111	Tarainga	Pā tūwatawata
112	Maraeke	Pā tūwatawata
113	Te Tihi o Kaimutu	Sacred altar/tūāhu
114	Te Māwhai	MACA Act application boundary
115	Kaiwai	Puna
116	Te Ure a Pāoa	Landmark
117	Whekeua	Tauranga waka

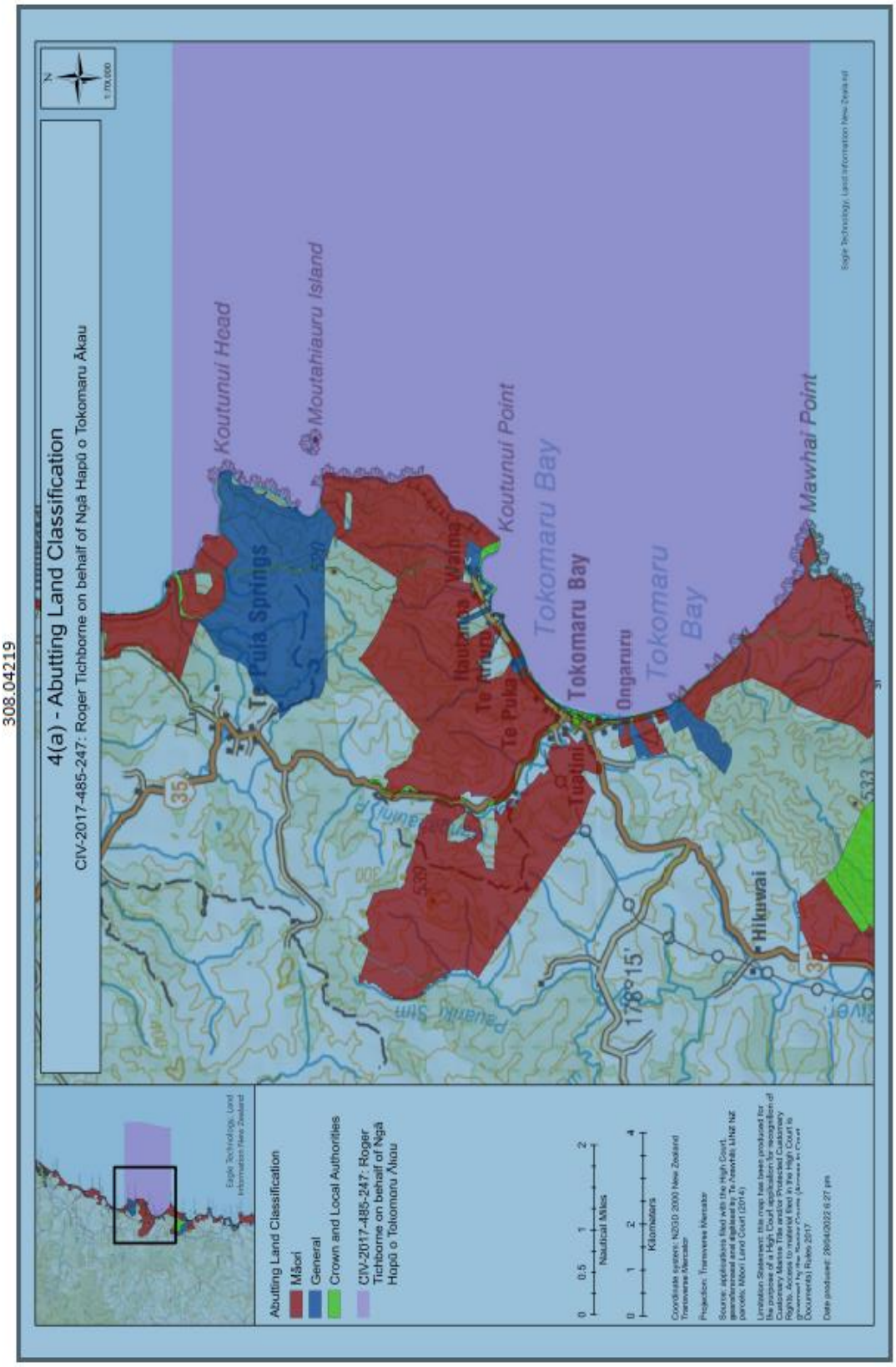
Appendix 8: Archaeological Sites.



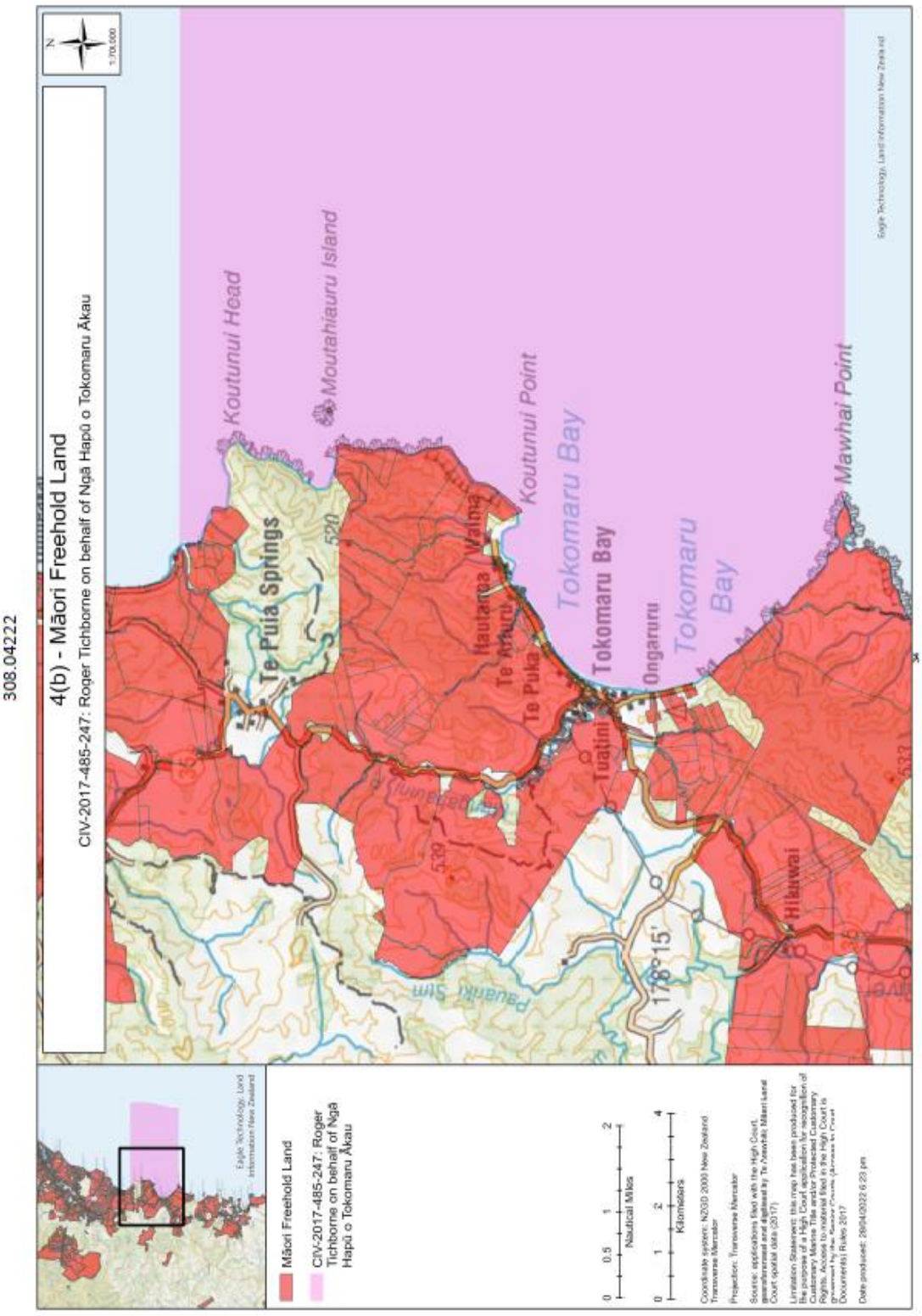
Appendix 9: Marae sites map.



Appendix 10: Abutting land classification.



Appendix 11: Māori Freehold Land



308.04222

Summary of evidence of use and occupation

	1840 onwards	1900 onwards	2000 onwards

[Redacted]

Tikanga	Example of Use and Occupation	Evidence Ref.

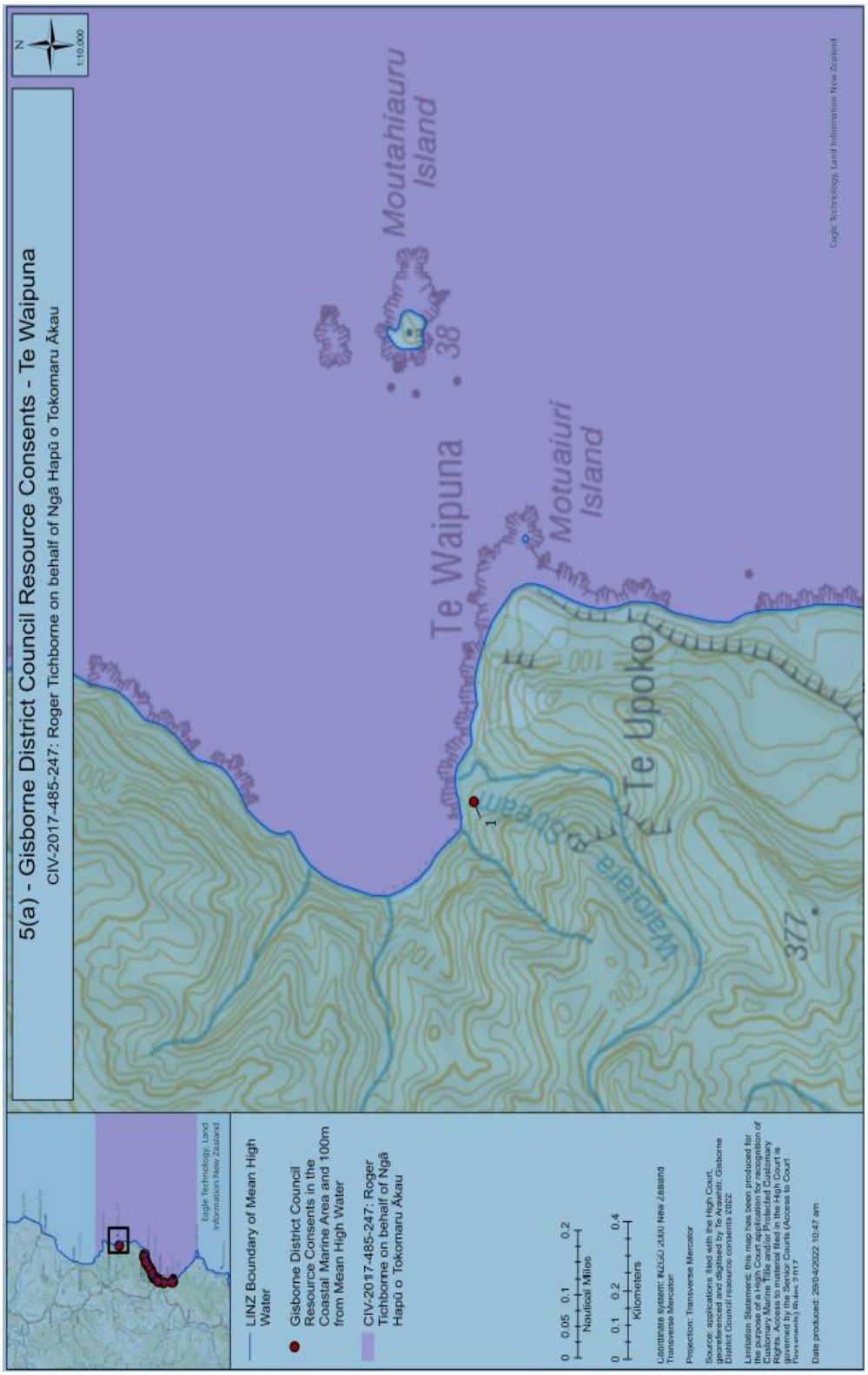
[Redacted]

Appendix 14: A-G's Chronology of historical events from 1837

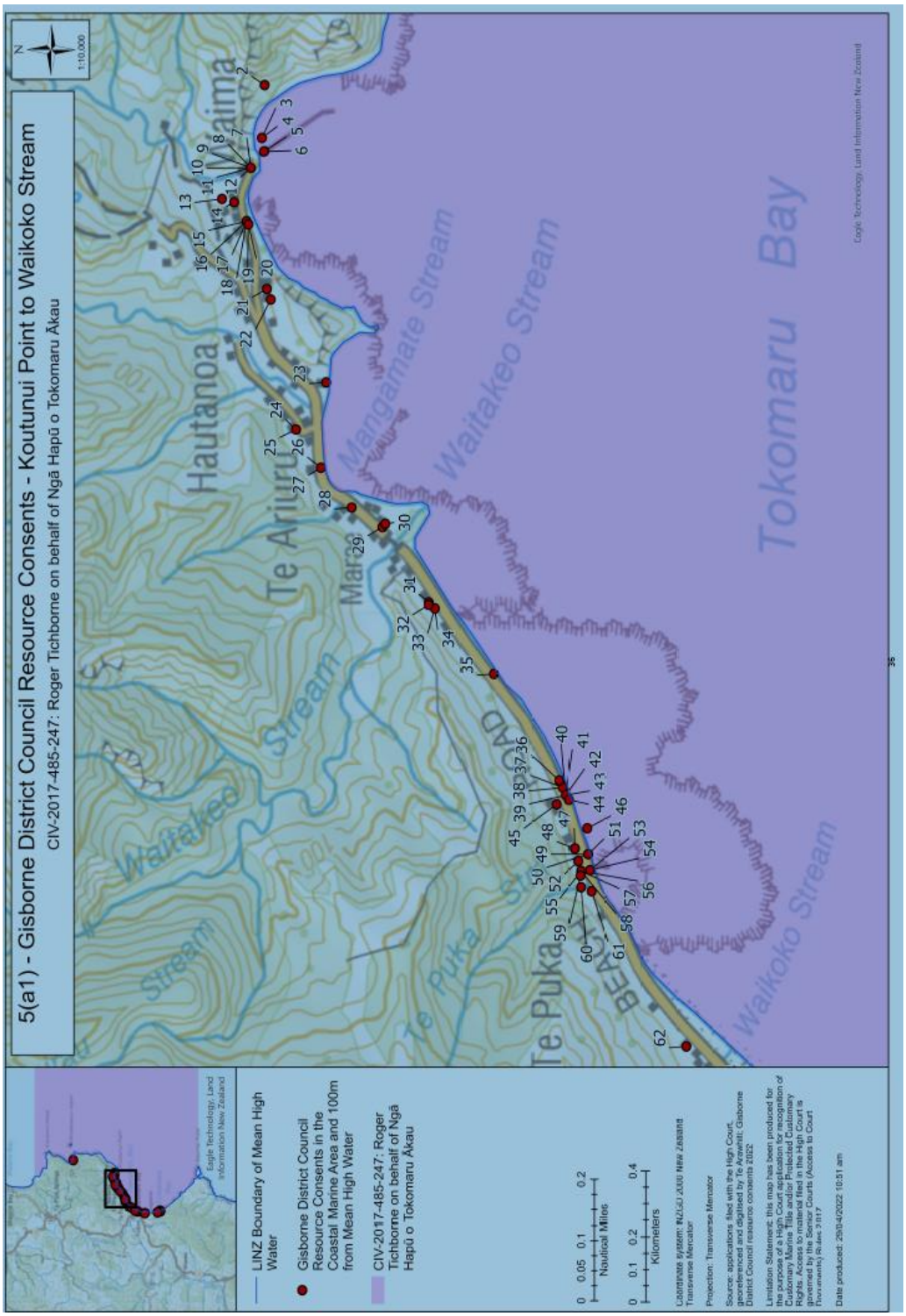
Date	Event
1837	Commercial whaling commenced in the area
1838	First missionaries visited the area
17 March 1843	*Nimrod*, a cutter of 20 tons, (owned and operated by East Coast Māori) was recorded as sailing into Wellington from Uawa/ Tolaga Bay, under command of Captain Waddy
Late 1840s	Māori owned more than 30 vessels over a 20-year period
Early to mid-1850s	Voyages recorded from Auckland to Te Māwhai and Tokomaru
December 1861	Stores were operating at Te Puka, Te Ariuru and Waima
Early 1870s	Māori hapū along the East Coast began to undertake the public work contracts for creating horse or bridle road between Turanga and Te Araroa and extending to the Eastern Bay of Plenty.
Around 1890	AC Arthur acquired a freehold title of his block on the foreshore of Tokomaru Bay in the vicinity of modern Ongaruru
1890s	The final line of coastal road between Tolaga Bay and Gisborne was built. Beach was no longer needed to be used as a road.
14 September 1899	Tuatini Township was proclaimed under the Native Townships Act 1985
1901	Licence for a landing shed at Te Puka was granted
1905	Licenced jetty and wool dumping shed erected at Ariuru
9 September 1907	Licence granted for an extension to Ariuru Jetty
1909-1910	Waima Wharf was built to accompany Tokomaru Bay freezing works
24 January 1911	Freezing works at Tokomaru Bay was opened
21 April 1911	Council took a portion of Māori-owned land for a gravel reserve (close to the mouth of the Mangahauini Stream).
1913 to mid-1920s	Land compromising the Tuatini Township was being purchased by the Crown
1914	Wharf head reconstruction and extension
15 June 1916	The Waiapu County used the Public Works Act to take 16 acres, 20 perches from Tawhiti 1F, Block IVa, Tokomaru Survey District, together with another parcel of nine and sixteenths perches from Tawhiti 1F, Block IV, Tokomaru Survey District for road and harbour purposes
11 January 1917	The Waiapu County also used the Public Works Act to acquire three further parcels of land– being two parcels of Tawhiti 1A Block and one parcel of Tawhiti 1F on the foreshore in the vicinity of the wharf - from the Tokomaru Sheep Farmers' Freezing Company
18 July 1917	"Cross Beacons" were approved
1920	First aircraft to land on the beach at Tokomaru Bay
Early to mid-1920s	Timber seawall was constructed
Mid to late 1920s	Ariuru wharf was potentially demolished or allowed to degrade into the sea
1937-1940	The present-day Waima wharf was constructed
December 1941	Domestic market for agar emerged

27 October 1949	Ariuru landing station was sold to Mr Tautuki Pakarau Northover
1952	Freezing works at Tokomaru Bay closed
1954	Navigation buoys aid by the Harbour Board were removed
1960s	The seawall was replaced to a concrete slab design
1962	Two vessels per week were trading in and out of Uawa/Tolaga Bay
1965	Te Puka Landing was developed into a concrete boat ramp around 1965
19 March 1970	Ariuru landing station was sold to Mr Guy Charles Richard
1971	Awhina Fishing Club was granted a licence to occupy Te Puka Landing. The licence is still in place.
1974 and 1975	Permits were sought for removing sand from Tokomaru Bay beach
1980s	Crayfishing boats and some other commercial fishing operations were using the Waima wharf and harbour area until now.
1986	Crown-owned general titles at Waimahuru Bay were designated stewardship areas managed by the Department of Conservation
1993	Gisborne District Council repurchased Ariuru Landing Area
1996	The Māori Land Court vested the Ariuru landing reserve in Te Aotawarirangi and declared the land to be Māori freehold land pursuant to section 134(1)(c) of Te Ture Whenua Māori Act 1993
1998	Te Whanau a Te Aotawarirangi entered into a customary fishing management plan with the then Ministry of Fisheries
2012	Crown-owned general titles at Waimahuru Bay were transferred to Te Runanganui o Ngāti Porou Trustee Limited as part of its Treaty Settlement redress.

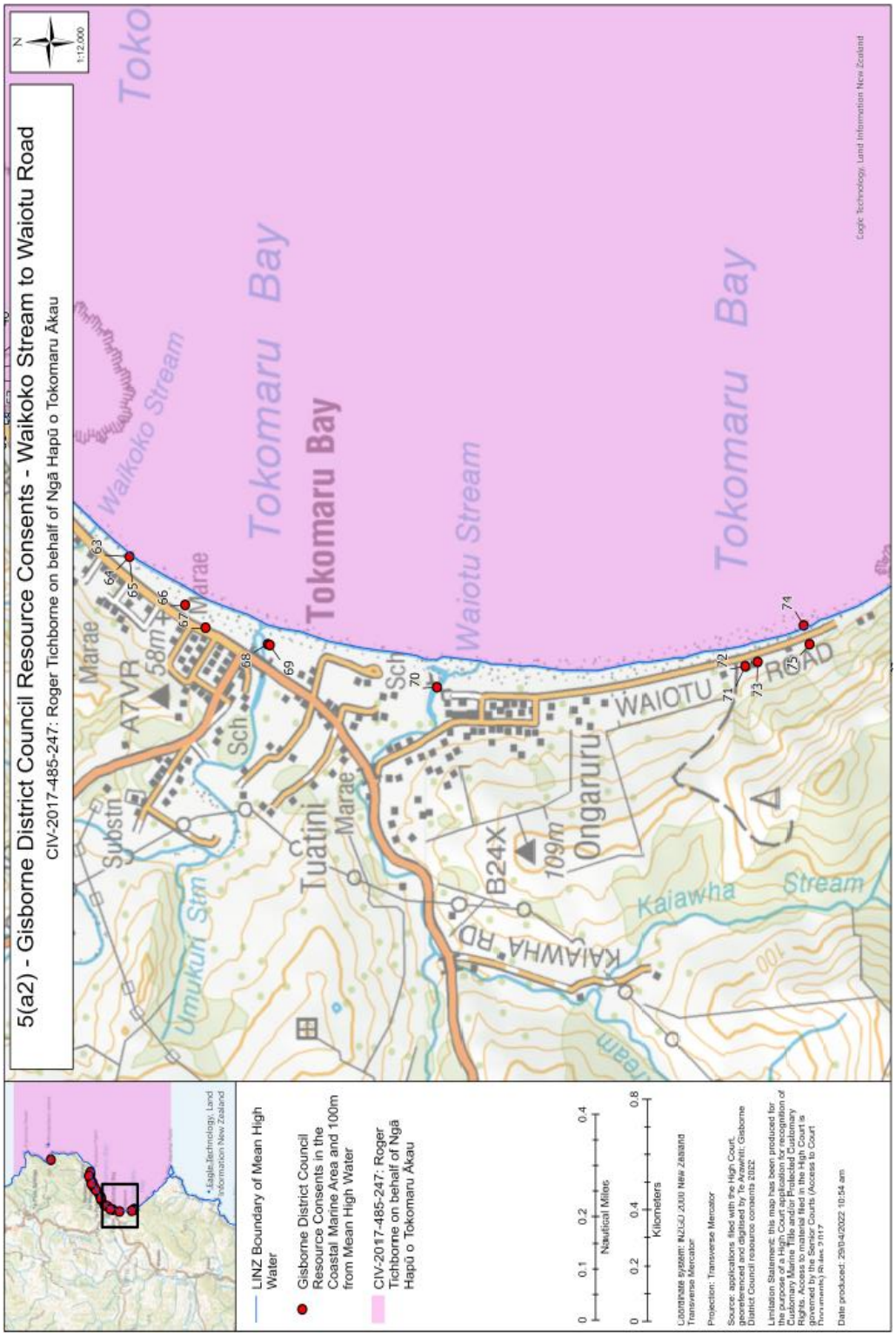
Appendix 15(a): Consented activities: North of Koutinui Point



Appendix 15(b) Consented activities: From Koutunui Point–Waitakeo Stream



Appendix 15(c): Consented activities: Waitakeo Stream to Waiotu Road



Appendix 16: Full Pūkenga Report of 6 October 2023

IN THE HIGH COURT OF NEW ZEALAND **CIV-2017-485-247**
WELLINGTON REGISTRY **CIV-2017-485-302**

I TE KŌTI MATUA O AOTEAROA
TE WHANGĀNUI-Ā-TARA ROHE

UNDER THE	**Marine and Coastal Area (Takutai Moana) Act 2011**
IN THE MATTER OF	**applications by Roger Tichborne and others, on behalf of Ngā Hapū o Tokomaru Ākau, and Tate Pewhairangi and others, on behalf of Te Whānau a Ruataupare ki Tokomaru, for orders recognising Customary Marine Title and Protected Customary Rights**

PŪKENGA REPORT OF DR ROBERT JOSEPH:
DATED 6 October 2022

Judicial Officer: Cull J

MAY IT PLEASE THE COURT

I ROBERT ANDREW JOSEPH of Hamilton, University of Waikato Associate Professor of Law affirm:

Introduction

1. I have been appointed as a pūkenga by the High Court in this proceeding pursuant to s. 99(1)(b), Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA"**) and the High Court Rules 2016.

2. I have read and agree to comply with the Code of Conduct in Rules 9.36-9.43 and Schedule 4 of the High Court Rules 2016.

3. I have been asked to answer the following questions put forward by the parties to this application.

    a. What tikanga does the evidence establish or support in the application area?

b. What aspects of tikanga should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga?

c. Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

d. Can the conflicts in the whakapapa ancestry and the mana of the two applicant groups be reconciled with tikanga Māori to assist with resolving the issue of representation of the two applicant groups?

e. If not, what is the appropriate tikanga Māori to be observed and/or applied in relation to the representation of the applicant groups?

4. I wish to note from the outset that I do not profess to be an expert on the tikanga of the Tokomaru Bay applicants for this hearing. However, and with the deepest respect, it has been an absolute privilege to read the respective briefs of evidence and to listen to the evidence of the Ngā Hapū o Tokomaru Ākau and Te Whānau a Ruataupare ki Tokomaru witnesses which has broadened my appreciation for and understanding of some of the tikanga of the Tokomaru Bay claimants.

5. My role in these proceedings however, is to not advocate for either parties' versions of tikanga Māori but to provide an independent report on the relevant general tikanga Māori and specific localised tikanga for answering the above 5 questions.

6. I have drawn on some lengthy scholarly and historical research as well as some oral sources to inform my opinion in answering the above questions.

Report Outline

7. This report will answer each of the above 5 questions in the following manner: Section A will address question a) above by providing important context to understand tikanga Māori by first briefly highlighting the importance of Māori worldviews and tikanga Māori generally. The report then discusses the key tāhuhu – fundamental signpost values and principles of tikanga Māori. Section A then proceeds to discuss tikanga Māori over the takutai moana to bring it within the context of the Marine and Coastal Area (Takutai Moana) Act 2011 .

8. Section B addresses question b) above by referring to what I consider to be the key aspects of tikanga Māori that should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga with reference to specific tikanga Māori laws and institutions.

9. Section C addresses question c) above by referring to specific tikanga questions relevant to the protected customary rights claimed by the applicants.

10. Section D answers question d) above by addressing whether the conflicts in the whakapapa ancestry and the mana of the two applicant groups can be reconciled with tikanga Māori to assist with resolving the issue of representation of the two applicant groups.

11. Section E then answers question e) above on what is the appropriate tikanga Māori to be observed and/or applied in relation to the representation of the applicant groups if the two applicant groups cannot reconcile their differences? The section commences in some detail with a discussion on the complex layers of representation within a tikanga Māori context, then offers some tikanga suggestions for reconciliation.

12. Accordingly, section A will now deal with question a) on what tikanga the evidence establishes or supports in the application area by first discussing the importance of Māori worldviews.

Section A: What tikanga does the evidence establish or support in the application area?

Worldviews

13. As noted above, this section will first briefly discuss the importance of Māori worldviews and tikanga Māori generally. The section then discusses the key tāhuhu values and principles of tikanga Māori generally followed by a brief discussion of tikanga Māori within the Marine and Coastal Area (Takutai Moana) Act 2011 context and then assesses what tikanga the evidence established or supported in the application area.

14. Worldviews generally orientate the human being and their community to their world so that it is rendered understandable and their experience of it is explainable. The Reverend Maori Marsden, a late 20th century Ngāpuhi tohunga (expert), scholar and philosopher, articulated an economical definition of a culture's worldview when he opined:[194]

> "Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be, of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'world view' of a culture. The world view is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The worldview lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture."

15. Marsden's definition notes that a worldview grows according to individual and community experiences. As a group experience and perceive their reality, they go about the task of understanding it, of forming views and ideas about the

[194] CT Royal, *The Woven Universe: Selected Writings of Rev. Maori Marsden* (Estate of Rev. Maori Marsden, 2003) at 56.

reality they perceive. These perceptions and conceptualisations form a cultural worldview that is something subscribed to, is carried by, and assented to by the group. If you see the world in a certain way, this view will determine what you value in the world or not and how, through behaviour. By understanding the worldview of a culture, we can come to an understanding of its values and behaviour. Worldviews then, are invisible sets of ideas about the world that lie deep within a culture.[195]

16. A traditional Māori cultural worldview was based on the Māori cosmogony (creation stories) that provided a blueprint for life setting down innumerable precedents by which communities were guided in the governance and regulation of their day–to–day existence.[196] Māori tribal worldviews generally acknowledged the natural order of living things and the kaitiakitanga (stewardship) rights, responsibilities and relationships to one another and to the environment. The overarching principle of balance underpinned all aspects of life. Māori worldviews are ones of holism and physical and metaphysical (spiritual) realities where the past, the present and the future are forever interacting. The maintenance of the worldviews of life — including within a Marine and Coastal Area (Takutai Moana) Act 2011 context — are dependent upon the maintenance of the culture and its many traditions, values, practices and rituals.

17. By trying to understand Māori culture, worldviews, te reo (language), rich tribal histories, oral traditions, mātauranga Māori (knowledge systems), kawa (rituals) and tikanga Māori (customary law), one may be able to bridge the cultural divide.

Tikanga Māori

18. Māori as a people lay claim to a set of abstract cultural values and ways of organising social life that are distinctively Māori and refer to these ways as Māori customary law or tikanga Māori which is sometimes described as values, principles or norms that determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just and correct.

19. "Tika" means correct, right or just and the suffix "nga" transforms "tika" into a noun thus denoting the system by which correctness, justice or rightness is maintained.[197] The late and highly respected Te Arawa Anglican Bishop, Manuhuia Bennett, in an interview in 2000 by the author and other colleagues

[195] Above.

[196] See Te Rangi Hiroa in P Buck, *The Coming of the Māori* (Whitcoulls 1949, Reprint 1977); and Pei Te Hurinui Jones, *He Tuhi Mārei-kura* (Aka & Associates Ltd, 2013).

[197] J Williams "Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law" (2013) 21 *Wai L Rev* 2; and R Joseph "Re-Creating Space for the First Law of Aotearoa-New Zealand" (2009) 17 *Wai L Rev* 74.

defined tikanga as "doing things right, doing things the right way, and doing things for the right reasons".[198]

20. Professor Hirini Mead, respected Ngāti Awa kaumātua (elder) described tikanga Māori as embodying: [199]

> "… a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do."

21. Professor Mead added: [200]

> "Tikanga are tools of thought and understanding. They are packages of ideas which help to organize behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us ... They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed."

22. Early Colonial officials even had no difficulty in accepting that tikanga Māori customs and usages had the character and authority of law.[201]

23. Tikanga Māori then, is the traditional body of values and ethics developed by Māori to govern themselves personally and collectively, privately and publicly, and governed decision-making regarding, inter alia:

    a. "leadership, governance and management concerning all matters including Māori land and other natural resources including the takutai moana area;[202]
    b. intra- and inter-governance relationships and decision-making with whānau (extended families) hapū (sub-tribes), iwi (tribes/nations) and other groups;[203]

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[198] Cited in R Benton, A Frame and P Meredith, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, Victoria University Press, 2013) at 431. The author was one of the interviewers of Bishop Bennett for this interview in April 2000.

[199] H Mead "The Nature of Tikanga" (Unpublished Manuscript Paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) at 3–4.

[200] Above.

[201] See for example the instructions of James Stephen to Governor Hobson 9 December 1840, *GBPP*, (1841, No. 311) at 24, cited in AH McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 393–394. In addition, in 1832, after a stay in New Zealand, RW Hay reported to the Colonial Office in London: "The property of the soil is well defined, their jurisprudence extensive, and its penalties are submitted to without opposition, even from the stronger party." "Notices of New Zealand" from Original Documents in the Colonial Office, communicated by RW Hay, Esq., reported in (1832) 2 *The Journal of the Royal Geographical Society*.

[202] R Boast and others, *Māori Land Law* (Butterworths, Wellington, 1999) at 30–37.

[203] Above at 33–41.

c. governance relationships with Pākehā[204] missionaries, traders, settlers and politicians;[205]
d. determining rights to land and other resources based on take tūpuna (discovery and ancestry), take tukua (gift), take raupatu (confiscation) and ahi kā (occupation);[206]
e. the exercise of kaitiakitanga (stewardship) governance practices including the imposition of rāhui (bans on the taking of resources or the entering into zones within a territory) and other similar customs and exercising responsible stewardship governance over the community on all matters;[207]
f. regulating governance use rights for hunting, fishing and gathering, and sanctioning those who transgressed tikanga Māori or Māori rights and responsibilities (or both);[208]
g. regulating tribal citizenship rights, responsibilities and relationships to resources."[209]

Key Tikanga Māori Values

24. I submit that there are several underlying core values and principles that underpin and inform the broader legal system of tikanga Māori as articulated by such authorities as Justice Joseph Williams,[210] Professor Hirini Mead[211] and Sir Taihākurei Eddie Durie.[212]

25. In the 2021 High Court decision of *Ngāti Whātua Ōrākei Trust v Attorney-General* ,[213] the pūkenga referred to the 'tāhuhu he aratohu – fundamental signposts[214] - that guide Māori approaches to tikanga Māori and allow for some shared understandings and mutual interactions.

26. From these Māori worldviews come the cardinal – albeit non-exhaustive - customary tikanga Māori tāhuhu values of:

    a. "Wairuatanga — acknowledging the metaphysical world — spirituality — including placating the departmental Gods' respective realms;

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[204] Pākehā is the Māori term for newcomer, non-Māori or European. The term is used respectfully throughout this report.

[205] Above at 28–30.

[206] A Erueti, "Māori Customary Law and Land Tenure" in R Boast and others *Māori Land Law* (Butterworths, Wellington, 1999) at 42–45; G Asher and D Naulls, *Māori Land* (New Zealand Planning Council, Wellington, 1987) at 5–6; and H Kawharu, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 55–56.

[207] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, 1988) at 181.

[208] Above at 58–61.

[209] H Kawharu, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 39; and E Durie, "Custom Law" (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994) at 5.

[210] J Williams ,"Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law" (2013) 21 *Wai L Rev* at 3.

[211] H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) 29-38. Mead adds tika - right or correct; and pono – true or genuine.

[212] E Durie, 'Will the Settlers Settle? Cultural Conciliation and Law,' in *Otago Law Review,* (Vol. 8, 1996) at 452.

[213] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 per Palmer J.

[214] Above at paras 319-320.

b. Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world;
c. Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;
d. Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group;
e. Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects;
f. Noa — free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually ritually through karakia and water;
g. Utu — maintaining reciprocal relationships and balance with nature and persons;
h. Mauri — recognition of the life-force of persons and objects;
i. Hau — respect for the vital essence of a person, place or object;
j. Rangatiratanga — effective leadership; appreciation of the attributes of leadership;
k. Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires;
l. Aroha — charity, generosity;
m. Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations."

27. Tikanga Māori also includes adherence to a proper form and process in karakia (incantations), waiata (songs), whakapapa (genealogical recitations), whaikōrero (oratory) and debate.[215] Accordingly, the value system on which tikanga Māori is based is aspirational and idealistic, setting desirable standards to be achieved.[216]

28. Fundamental to tikanga Māori is a conception of how Māori should relate to land, water, all lifeforms and to each other. It is a conception based on:
    i. Whakapapa or the physical descent of everything; and
    ii. Wairuatanga or the spiritual connection of everything.

    It is a legal system that recognises a legal responsibility to care for people and the world in which we live, and to constrain its exploitation.[217]

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[215] H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–32.
[216] See John Patterson, *Exploring Māori Values* (Dunmore Press, 1992) and H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–32.
[217] See M Orbell, *The Natural World of the Māori* (William Collins Publishers, Auckland, 1985) at 215–217.

29. Tikanga Māori then is about what is appropriate human conduct in accordance with the tāhuhu values and principles noted above of Māori groupings for their circumstances at a particular point in time. Tikanga Māori then must be understood in context and will draw on precedents and the right and wrong actions of tūpuna (ancestors) to determine appropriate action.

Tikanga Māori and the Marine and Coastal Area (Takutai Moana) Act 2011

30. Applying an English common law approach over the New Zealand marine and coastal estate is not appropriate for our country that depends on our coastal marine estate. Elias CJ affirmed in the 2003 Court of Appeal decision of *Attorney-General v Ngāti Apa*[218] that the common law in New Zealand is different to other common law countries when she noted:

> "But from the beginning of the common law of New Zealand as applied in the Courts, it differed from the common law of England because it reflected local circumstances."[219]

31. Chief Justice Elias continued:

> "Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage [tikanga] recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga."[220]

32. The Marine and Coastal Area (Takutai Moana) Act 2011 ('**MACA'**) was enacted to repeal the controversial Foreshore and Seabed Act 2004[221] which was a political response to the *Attorney-General v Ngāti Apa*[222] decision that severely limited Māori property rights in the marine foreshore and seabed areas based on pre-existing historic aboriginal rights. MACA introduced a new framework for recognising customary rights in the marine and coastal area based on tikanga Māori which is referred to in s. 9, MACA as: 'Māori customary values and practices.'

Tikanga Māori in the Tokomaru Bay Application Area

33. With reference to evidence supporting takutai moana claims for recognising the doctrine of aboriginal title in the Kauaeranga area (modern day Thames), Chief Judge Francis Fenton concluded in the 1870 *Kauaeranga Judgment:*

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[218] [2003] 3 NZLR 577.
[219] Above, at 652, para. 17.
[220] Above, at 660, para. 49.
[221] Marine and Coastal Area (Takutai Moana) Act 2011, s. 5.
[222] [2003] 3 NZLR 577.

> "I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts **o**f ownership, especially when I consider *how readily they may prove such*, and how impossible it is to contradict them if they only agree amongst themselves."[223] [emphasis added]

34. The evidence of all of the Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare ki Tokomaru claimants through Ngā Hapū o Tokomaru Ākau and the respective marae whānau witnesses has highlighted, as Chief Judge Fenton articulated in 1870, how readily they may prove their claims in the takutai moana area, and how impossible it is to contradict them if they only agree amongst themselves. The latter has been the challenge for this hearing with the two claimant groups disagreeing among themselves.

35. However, the witness evidence throughout the hearing readily established and supported the above noted tikanga Māori values of:

    a. "Wairuatanga - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;
    b. Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including the two claimant groups to each other and the takutai moana claimant area;
    c. Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;
    d. Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;
    e. Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;
    f. Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;
    g. Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;
    h. Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;
    i. Hau — respect for the vital essence of a person, place or object;

[223] Chief Judge Fenton, *Kauaeranga Judgment,* (1870) reprinted in *VUWLR (*Vol. 14, 1984) 227 at 244.

j. Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;
k. Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;
l. Aroha — charity, generosity;
m. Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations including in the takutai moana claimant area."

Section B: What aspects of tikanga should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga?

36. This section will refer to the specific tikanga Māori laws and institutions I believe should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori to answer question b) above.

37. The section will first briefly refer to the relevant MACA statutory tests that, inter alia, mention tikanga Māori in ss. 58, 78 and 51 MACA for–
    a. Customary marine title (CMT),
    b. Wāhi tapu protection (WTP) and
    c. Protected customary rights (PCR):

Customary Marine Title (CMT)

38. Customary marine title refers to customary interests based on the common law doctrine of aboriginal title established by a Māori applicant group in a specified location of the common marine and coastal area as long as the Māori applicant group can pass the stringent statutory tests[224] in s. 58, MACA which states:

"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*; [emphasis added] and

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

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

(ii) received it, any time after 1840, through a customary transfer in accordance with subsection (3)

[224] For an early academic analysis of the MACA tests, see Joseph, R, 'Frozen Rights? The Right to Develop Māori Treaty and Aboriginal Rights,' in *Waikato Law Review,* (Vol. 19, Issue 2, 2011) at 117-133. For a recent assessment of the MACA tests, see *Re Tipene* [2016] NZHC 3199, *Re Tipene* [2017] NZHC 2990, *Re Edwards (Whakatohea (No. 2))* [2021] NZHC 1025, *Re Clarkson & Ors* [2021] NZHC 1968, *Ngā Potiki & Ors – Stage 1 – Te Tāhuna o Rangataua* [2021] NZHC 2726 and *Re Ngāti Pāhauwera, Ngāti Pārau, Ngāi Tahu ō Mōhaka Waikare & Maungaharuru-Tangitū Trust* above n [135].

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

(a) the commencement of this Act; and

(b) the effective date.

(3) For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—

(a) a customary interest in a specified area of the common marine and coastal area was transferred— and

(b) *the transfer was in accordance with tikanga*; [emphasis added] and

(c) the group or members of the group making the transfer—

(i) *held the specified area in accordance with tikanga*; [emphasis added] and some members of a group who were not part of the applicant group; and

(ii) exclusively used and occupied the specified area from the time of the (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and

(d) the group or some members of the group to whom the transfer was made have— (i) between or among members of the applicant group; or

(ii) to the applicant group or some of its members from a group or

transfer to the present day without substantial interruption.

(4)Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law."

Wāhi Tapu Protection

39. Establishing wāhi tapu will provide local Māori groups the opportunity to issue legally binding restrictions on public access to specific wāhi tapu areas within a CMT area which is a strong enabling provision for applying tikanga Māori, pursuant, inter alia, to s. 78 MACA**s.**

"78 Protection of wāhi tapu and wāhi tapu areas

(1) A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area –

(a) in a customary marine title order, or

(b) in an agreement.

(2) A wāhi tapu protection right may be recognised if there is evidence to establish –

(a) the connection of the group with the wāhi tapu or wāhi tapu area *in accordance with tikanga*; [emphasis added] and

(b) that the group requires the proposed prohibitions on access to protect the wāhi tapu or wāhi tapu area."

Protected Customary Rights

40. Protected customary rights (PCRs) refer to any activity, use or practice established by a Māori applicant group. PCRs are recognised by a protected

customary rights order or an agreement. A protected customary rights order means an order of the Court granted in recognition of the protected customary rights of a group pursuant to s. 113, MACA. PCRs are established in accordance with s. 51, MACA:

"51 Meaning of protected customary rights
(1) A protected customary right is a right that –
(a) has been exercised since 1840 and
(b) continues to be exercised in a particular part of the common marine and coastal area *in accordance with tikanga* [emphasis added] by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
(c) is not extinguished as a matter of law."

41. To be able to establish CMT, wāhi tapu and PCRs under MACA as noted above, the key aspects of tikanga Māori in my opinion that should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori are similar to those articulated by the Waitangi Tribunal in the 2011 WAI 262[225] and the 2012 Water and Geothermal Resources Reports[226] that referred to certain indicia or signposts of Māori 'stewardship' over fresh waterways that I believe also resonate for the takutai moana of the Tokomaru Bay claimants in this case.

42. Some of these relevant stewardship signposts were noted by the Waitangi Tribunal who commented on what it termed a 'taonga test' for, and proofs of proprietary interests, or more appropriately 'stewardship' in our MACA context, over the waterways:

> "In assessing whether a waterway was a taonga [treasured possession] to any particular group, the Waitangi Tribunal took into account the intensity of the Māori association with the waterway including originating ancestral relationship [whakapapa and take tupuna] and an ongoing cultural and spiritual relationship with the waterway [ahi kā roa]; the exercising of control and authority over the resources [mana whenua and mana moana], and the fulfilment of obligations to conserve, nurture and protect the waterway [kaitiakitanga]."[227]

43. The Tribunal earlier in its 2011 Wai 262 Report also referred to the taonga test when it opined:

> "Whether a resource or place is a taonga can be tested … Taonga have mātauranga Māori [inherited knowledge] relating to them, and whakapapa [genealogy] that can be recited by tohunga [experts]. Certain iwi or hapū will say they are kaitiaki [stewards]. Their tohunga will be able to say what events in the history of the community led to

[225] Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.
[226] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).
[227] Above, at 51.

that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested."[228]

44. The Waitangi Tribunal's specific signposts to test whether an iwi, hapū or even whānau have a taonga relationship with reciprocal 'stewardship' responsibilities over the waterways and for the takutai moana marine coastal area for the Tokomaru Bay claimants in the current MACA hearing includes the following indicia:

    a. "Whakapapa identifying a cosmological connection with the takutai moana;
    b. Exercised mana or rangatiratanga over the takutai moana;
    c. Exercised kaitiakitanga;
    d. It has a mauri – life force;
    e. Performance of rituals central to the spiritual life of the hapū and whānau;
    f. Identified taniwha [guardians] residing in the takutai moana;
    g. Is celebrated or referred to in waiata [songs];
    h. Is celebrated or referred to in whakatauki [proverbs];
    i. The takutai moana was relied on as a source of food;
    j. A source of textiles or other materials;
    k. For travel or trade; and
    l. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to 'some, if not all of the takutai moana area."

45. Professor Hirini Mead provided an additional useful list of tikanga questions for assisting with determining some aspects of tikanga Māori that should influence whether any takutai moana area is held in accordance with tikanga Māori which includes the following:

    a. "How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand], take kite [discovery], other?
    b. If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?
    c. The land [and takutai moana] are actually occupied by people and kāinga are established;
    d. A rohe is marked out in some way. How? Provide a map.
    e. Over time urupa are established over land, tuahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.
    f. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?
    g. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].

[228] Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.

h. The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.
i. The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.
j. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.
k. The new iwi is able to defend its rohe and can call on allies to help to defend the estate.
l. The new iwi is approved by the neighbours and its presence is validated by the experience."[229]

46. It is important to also acknowledge that the above tikanga Māori indicia and tikanga Māori question lists are not exhaustive but are at least appropriate as starting points for answering what specific tikanga Māori laws and institutions I believe should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori.

Section C: Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

47. Having discussed tikanga Māori extensively already earlier, this section will be brief.

48. The specific tikanga that is relevant to the protected customary rights claimed by the applicants should include the following:

a. "Whakapapa identifying a cosmological connection with the particular takutai moana;
b. Exercised mana or rangatiratanga over the particular takutai moana area;
c. Exercised kaitiakitanga over the particular takutai moana area;
d. Performance of rituals central to the spiritual life of the hapū and whānau;
e. Identified taniwha residing in the takutai moana;
f. The specific takutai moana area was relied on as a source of food;
g. The specific takutai moana area was relied on as a source of textiles or other materials;
h. For travel or trade; and
i. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to 'some, if not all of the takutai moana area."

[229] H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 314,

Section D: Can the conflicts in the whakapapa ancestry and the mana of the two applicant groups be reconciled with tikanga Māori to assist with resolving the issue of representation of the two applicant groups?

49. Whether the conflicts in the whakapapa ancestry and the mana of the two applicant groups can be reconciled with tikanga Māori to assist with resolving the issue of representation is fully dependent upon the political will of the two applicant groups agreeing to abide by tikanga Māori, such as the tikanga institutions of hohou i te rongo and he tatau pounamu, and the tikanga concept of ea.

Hohou i te Rongo

50. The key traditional tikanga Māori concepts and institutions for peace-making of recent and long-standing feuds historically included hohou i te rongo – peace after war conflict rituals that were accompanied by mana tangata (strong leadership), awhina (assistance, help), aroha (affection, love), manaakitanga (hospitality, respect), utu (reciprocity through gift exchange), mana wahine (the authority of women) and the institution of hākari (large political feasts).

51. Peace-making was often brought about by the takawaenga or mediation of a woman. High-ranking women in addition to their role as takawaenga (mediators) were often given in marriage to their former adversaries as a means of sustaining a durable peace settlement. And gifts of pounamu (greenstone jade) often formed a tangible part of peace-making arrangements and were frequently exchanged to also cement the peace kawenata (agreement).

Wahine Takawaenga – Women as Peace Mediators and He Tatau Pounamu

52. Pounamu was highly valued traditionally because it was durable, rare and beautiful to behold. Pounamu is found only on the West Coast of the South Island and was used historically as a means of exchange. In times of trouble, peace could be secured ending incessant warfare and tribal feuds through a political marriage and pounamu gift exchange. Te Waaka Tamaira, a noted Tuwharetoa rangatira, recorded how women were often takawaenga emissaries in abating protracted conflict in 1905:

> "In times past … if a woman went to mediate a conflict, she would not be touched by either side, for the saying associated with her was the breaking of a lasting peace is wrong."[230]

53. Dr Pei Te Hurinui Jones, the Tainui luminary, commented on the important role of women and the exchange of pounamu in tatau pounamu peace-making ceremonies to end the protracted wars between Ngāti Tuwharetoa, Waikato, Raukawa and Maniapoto against the Rongomaiwahine and Ngāti Kahungunu tribes of Te Tairāwhiti at Te Mahia, (now northern Hawkes Bay) during the turbulent Musket Wars in the second decade of the 19th century:

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[230] Te Waaka Tamaira, *Te Puke ki Hikurangi,* (Vol. 6, No. 10, 29 April 1905) at 5.

> "The peacemaking was carried out on the elevated ground at Whakarewa, overlooking Okura-a-renga pa. A young chieftainess named Te Rohu was given in marriage to Toiroa, and the Rongomaiwahine high chief in turn handed over to Pikihuia, the wife of Papaka, Te Heuheu's younger brother, a tangiwai greenstone tiki, which was then named Whakarewa."[231]

54. Te Rohu was the daughter of the great Ngāti Tuwharetoa rangatira Mananui Te Heuheu and his senior wife Nohopapa. The late Dr Angella Ballara recorded that Te Rohu negotiated the lifting of the siege with the help of Pikihuia, and Te Toiroa, the Rongomaiwahine and Kahungunu matakite (spiritual leader).[232]

55. Later, Te Pareihe of Ngāti Whatuiapiti, and Nukupewapewa of Wairarapa Moana, prepared an expedition of 1,600 warriors against Mananui Te Heuheu of Ngāti Tuwharetoa and Ngāti Raukawa at Waitahanui pā on the eastern side of Lake Taupo. In this tense situation and as a show of mana wahine, Te Rohu again succeeded in making peace with Te Pareihe and Nukupewapewa by first meeting the attackers outside the pā, defying and then challenging them. Te Pareihe and his warriors contented themselves by firing off their muskets, brandishing the heads of those killed at Omakukura pā on the western shores of Lake Taupo, and then performing a haka. Mananui subsequently emerged from the pā and confirmed the tatau pounamu peace agreement.

56. Te Rohu's peace was subsequently extended to Waikato and Ngāti Raukawa when each sent a woman of rank, including Te Paea, niece of Potatau Te Wherowhero, [233] to confirm the tatau pounamu.[234] The following year, Mananui took a party of Ngāti Tuwharetoa to Pa-whakairo in Hawkes Bay to cement the peace and, Dr Ballara noted, Te Rohu may have been given in marriage to Te Pareihe, but she seems to have continued to accompany her father rather than remain in Heretaunga.[235] But as illustrative of mana wahine and the important takawaenga (mediator) role of women for tatau pounamu peace agreements, the word of Te Rohu was binding on her Ngāti Tuwharetoa people.

57. The bravery of Te Rohu (although not the tatau pounamu agreement) was mirrored at Tokomaru Bay by Te Aotāwarirangi as recorded by the Ngā Hapū o Tokomaru Ākau witness Jack Chambers who noted:

> "Tautini was killed and beheaded by Tutemangarewa. Upon hearing of the fall of Toiroa and her father's death, Te Aotāwarirangi was stricken

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[231] Pei Te Hurinui Jones Papers, (ATL, MS-Papers-0358).
[232] Ballara, A, 'Te Rohu,' in Orange, C, (Gen. Ed.), *The People of Many Peaks: The Maori Biographies from the Dictionary of New Zealand Biography, 1769-1869,* (Vol. 1, Bridget Williams Books, Department of Internal Affairs, Wellington, 1990) at 280.
[233] Potatau Te Wherowhero was subsequently anointed the first ariki or Māori King of the Kīngitanga movement in 1858 by Wiremu Tamihana Tarapipipi Te Waharoa – the King maker.
[234] Above at 281.
[235] Above.

with grief. Then, with quiet resolve, she gathered a fishing net nearby and set off for Toiroa to her father's killers.

On Toiroa, her father's pā was now under the control of Tutemangarewa and his people. Knowing she could be killed, Te Aotāwarirangi entered the pā and awaited her fate. When her father's killers recognised her, they screamed at her and demanded that she be killed. She held her resolve and asked for her father's head so that she could perform the proper burial rites and have the tapu lifted. Tutemangarewa acknowledged her bravery by giving Tautini's head to her. She wrapped it in the fishing net she had with her, left Toiroa and travelled immediately to Wharekahika where her brother Tūterangikatipu was living amongst the people of Tūwhakairiora and Hinerupe. Upon showing her brother their father's head, Tūterangikatipu lifted the tapu and then he committed to avenging their father's death.

Tūterangikatipu gathered his forces and trekked hastily to Tokomaru Bay. Upon arrival. he attacked and killed Tūtemangarewa and his warriors to avenge Tautini's death and to regain the mana over the land. Ever since that day, the mana in the land has been held by the descendants of Te Aotāwarirangi."[236]

58. Dr Pei Te Hurinui Jones recorded details of another tatau pounamu peace agreement between Te Wherowhero of Tainui and Hongi Hika of Nga Puhi following the major defeats of Waikato at Mātakitaki and Mangauika and then the successful offensive at Otorohanga during the turbulent Musket Wars period:

> "Immediately following the defeat of Huiputea at Otorohanga and the precipitate retreat of Hongi Hika and his Ngapuhi army from Kawhia, overtures for peace were made by the Ngapuhi leader to Te Wherowhero. The result of the meeting which subsequently took place was the giving in marriage of Matire (a senior cousin of Hongi Hika in the aristocracy of northern tribes), to Takiwaru or Kati, Te Wherowhero's younger brother. This was intended to be a permanent peace-making or, as the Māori term has it, a tatau pounamu (greenstone door)."[237]

59. Matire Toha who was given in marriage to Kati was the daughter of a senior Ngapuhi rangatira, Rewa.[238] To further cement the agreement, Te Wherowhero's son Tawhiao Matutaera married Hera of Ngapuhi, from the

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[236] Brief of Evidence of Jack McLean Chambers, an application by Roger Tichborne on behalf of Ngā Hapū o Tokomaru Ākau for orders recognising customary marine title and protected customary rights, (High Court, Wellington Registry, CIV-2017-485-247, 26 August 2022) para 130 at 40.

[237] Jones, P.T, *King Potatau,* (Polynesian Society, Wellington, 1959) at 148.

[238] See Fenton, F.D, *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866-1879,* (Native Land Court, Auckland, 1879) at 70.

Rongopatutaonga hapū that had close whakapapa connections to many notable northern ariki (leaders) and war leaders.[239]

60. Te Whānau a Ruataupare ki Tokomaru witness Karen Pewhairangi similarly referred to strategic political alliances in her reply evidence which appears to have been tatau pounamu agreements to end conflict. Ms Pewhairangi stated:

> "Ngati Tutemahuta is an example of a strategic political marriage between the son of Huiwhenua, Te Ruru of Te Whanau a Te Akau, and Te Akahurangi of Ngati Ira, according to Wi Pewhairangi Ngati Ira gained an important ally.
>
> In the last battle between Te Whanau a Ruataupare and Ngati Porou, Te Ruru, known as Pango and Rerekohu-iti known as Whero, played a pivotal role in settling that matter.
>
> From my perspective strategic political marriages and alliances are the reason why Te Whanau a Ruataupare uphold and maintain mana in Tokomaru today."[240]

61. By entering into tikanga Māori institutions such as he tatau pounamu and hohou i te rongo kawenata (agreements), conflict is ended and ea or peace ensues. Ea is a traditional socio-legal concept of having brought a process or series of transactions or past grievances to completion, to have avenged, reconciled differences, requited, satisfied or paid for past debts or grievances.[241] The state of ea achieves balance.

62. Hence the conflicts in the whakapapa ancestry and the mana of the two applicant groups can be reconciled with resolving the issue of representation through tikanga Māori institutions such as hohou i te rongo and he tatau pounamu, and the tikanga concept of ea can be achieved but they are fully dependent upon the political will of the two applicant groups agreeing to abide by tikanga Māori.

Section E: If not, what is the appropriate tikanga Māori to be observed and/or applied in relation to the representation of the applicant groups?

63. If the two Tokomaru Bay applicant groups cannot reconcile their differences, the appropriate tikanga Māori to be observed and/or applied in relation to the

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[239] McCann, D, *Whatiwhatihoe: The Waikato Raupatu Claim,* (Huia Publishers, Wellington, 2001) at 26.

[240] Reply Affidavit of Karen Hiraina Pewhairangi, in the Marine and Coastal Area (Takutai Moana) Act 2011 application, and an application by Tate Pewhairangi and others on behalf of Te Whānau a Ruataupare ki Tokomaru, (High Court, Wellington Registry, CIV-2017-485-302, 16 August 2022) para 9.0 at 21.

[241] R Benton, A Frame and P Meredith, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, Victoria University Press, 2013) at 58.

representation of the applicant groups include the tikanga Māori institutions mentioned above of tatau pounamu and hohou i te rongo - although perhaps excepting marriages - to achieve ea (reconciliation) and utu (reciprocity); mana rangatira, mana tangata, and mana wahine where key rangatira take the lead in making amends between the two claimant applicant groups so they can work together going forward to process and govern their MACA claims with shared exclusivity over the takutai moana.

64. The section commences in some detail with a discussion on the complex layers of representation within a tikanga Māori context.

Representation

65. The notion of representation is the difficulty experienced at all levels of a society in agreeing upon a person, group and/or entity that will appropriately represent the point of view of a collective. Political representation is a person or body who, by custom or law or both, has the status or role of a representative within a political system.[242] The first main challenge for representation then is determining which person or body carries the authorised voice and right to speak for a particular group in specific situations and contexts. Establishing appropriate forms of representation for Māori communities is not simply a matter of drawing up boundaries on a map and nominating representatives to speak[243] as noted in the current Te Whānau a Ruataupare ki Tokomaru and Te Whānau a Te Aotāwarirangi briefs of evidence.

66. Chief Judge (as he was then) Eddie Durie even opined in 1996 that Māori representation has at least three specific and important aspects to it that are germane to the current MACA hearing:

    a. "customary representation – which whānau, hapū or iwi groupings have customary interests in any particular area and its natural resources in accordance with tikanga Māori;
    b. level of representation – what matters should be settled at a whānau, hapū, iwi or national level?; and
    c. modern institutional representation – what bodies or associations should represent any Māori grouping with the outside world of the respective grouping?"[244]

67. The first question to ask regarding contemporary Māori representation for Treaty settlements, MACA claims and customary ownership of any resource is who controlled, occupied or utilised the resource traditionally? Who had the customary rights in accordance with tikanga Māori? Māori recognised a range

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[242] Birch, A.H, *Representation* (Pall Mall Press, London, 1971) at 19.

[243] Stokes, E, 'Representation' in Stokes, E *Bicultural Methodology and Consultative Processes in Research: A Discussion Paper* (Hamilton: Department of Geography, University of Waikato, 1998) at 36.

[244] Durie, E, 'The Process of Settling Indigenous Claims' (Indigenous Peoples: Rights, Lands, Resources, Autonomy International Symposium and Trade Show, Vancouver Trade & Convention Centre, British Columbia, Canada, 20 – 22 March, 1996) at 6.

of interests in natural resources that are usually based on korero tuku iho - traditions passed on by word of mouth. Professor Alan Ward discussed the importance of customary rights in the Waitangi Tribunal in 1993 when he asked:

> "… which Māori groups held the customary rights to land at the time of Crown acquisition, which therefore were injured by the Crown's actions, and in what degree, what relationship those groups have to modern Māori social organisation and who has the right to represent them?"[245]

68. In terms of representation level, some matters are local issues and should be managed locally, while others should be handled regionally, nationally and, perhaps, even internationally within a particular context. A specific claim to a particular piece of land or other natural resource such as the takutai moana area may fall in that category. The Waitangi Tribunal decided for example that the 1992 Māori commercial fisheries settlement for political efficacy (among other reasons) be dealt with at no less than an iwi regional level which has its strengths and challenges.

69. A plethora of Māori legal entities for institutional representation emerged in anticipation of the devolution of social services to iwi pursuant to the now defunct Rūnanga Iwi Act 1990, while other entities were already established pursuant to the Māori Social and Economic Advancement Act 1945, the Māori Trust Boards Act 1955 and the Māori Community Development Act 1962. Treaty of Waitangi settlements from 1992 to the present-day have also resulted in an explosion of Māori legal entities seeking institutional representation. A 2019 Government report for example confirmed the existence of more than 10,000 Māori-owned businesses and legal entities in New Zealand.[246]

70. Consequently, several legal governance bodies may be perceived to represent whānau, hapū, iwi, confederations of tribes and pan-Māori groups, including:

    a. Māori trusts and incorporations under the Te Ture Whenua Māori Act 1993;
    b. trust boards;
    c. incorporated societies;
    d. private and charitable trusts;
    e. private statutory bodies;
    f. Māori councils;
    g. federated Māori authorities, and
    h. rūnanga.

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[245] Ward, A 'Historical claims under the Treaty of Waitangi' in *Journal of Pacific History* (Vol. 28, 1993) at 181.

[246] Te Puni Kōkiri and Nicholson Consulting *Te Matepaeroa Looking Toward the Horizon: Some Insights into Māori in Business* (Te Puni Kōkiri and Nicholson Consulting, Wellington, 2019) at 3.

71. Another plethora of Māori legal entities will emerge for processing the 200 or more claims under MACA.

72. Hence, there is much diversity in name, number, structure and use of legal entities and institutions that allege they represent whānau, hapū, iwi and other Māori group interests in different places and contexts.

73. Customary representation, the appropriate representation level, and institutional representation as noted above were discussed by most, if not all, of the Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare ki Tokomaru claimants through Ngā Hapū o Tokomaru Ākau and the respective marae whānau witnesses.

Mana Rangatira

74. One key element that is required to assist the two claimant groups to reconcile their differences to move together to process and then govern their Tokomaru MACA claims is effective rangatira leadership that can weave Te Whānau a Ruataupare ki Tokomaru and Te Whānau a Te Aotāwarirangi together by blending the mana of these respective whānau, hapū and iwi groupings.

75. There is much literature on traditional rangatiratanga for effective governance leadership. Dr Hirini Mead, for example, provided a thorough analysis of traditional Māori rangatira criteria based on tikanga Māori by examining the rangatiratanga of two prominent 19th century rangatira — Te Rangikaheke of Te Arawa and Himiona of Ngāti Awa.[247] Dr Mead listed the following criteria for the mandate and legitimacy of a traditional Māori rangatira that included:

    a. "whakapapa (genealogy);
    b. ngā pumanawa — talents;
    c. acceptance and confirmation by the people;
    d. identity being known by other iwi (tribes);
    e. tūrangawaewae (having a place to stand on the traditional tribal homeland);
    f. gender;
    g. mana (inherited and achieved spiritual authority, influence, status); and
    h. tapu (spiritual sanctity, avoiding risk, intrinsic sacredness, setting apart from the unclean)."[248]

76. Illustrious whakapapa ancestry, although important, was not enough for being an effective rangatira. Felix Keesing, the New Zealand anthropologist, commented on Ngāti Porou leadership in 1928 and stressed the distinction between descent (ascription) and meritocracy (achievement) or what he termed the mana of dignity and the mana of business when he opined:

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[247] HM Mead, The Mandate of Leadership and the Decision-Making Process (Te Puni Kokiri, Wellington, 1992).

248 Above.

> "But in Ngati Porou, from some eight generations back the "mana" of dignity has been quite severed from the "mana" of business. In all matters of ceremonial, the leadership of the hereditary chiefs of highest lineage is unquestioned; but in all matters of wisdom and business, those most competent to do so direct the tribal affairs."[249]

77. While whakapapa continues to be a practical reality for ascriptive Māori leadership, rangatira are also expected to possess a range of relevant skills for achieved Māori leadership in accordance with tikanga Māori and the respective tasks at hand. Mana rangatira are those leaders who can weave the people together and who acknowledge and can blend the mana of the respective groups.

78. Dr Wi Repa of Ngāti Porou provided an interesting synopsis of a rangatira in 1926 in an obituary to his wife as a wahine rangatira:

> "… The chief is someone who can bind the people at both hapū and iwi level in their endeavours. S/he is a leader. S/he starts and finishes tasks and is followed by people. S/he is described as a chief whose chiefly lines are held in regard, increased and distinguished, by other tribes."[250]

79. Professor Mead also listed the required ngā pumanawa (talents) of a mana rangatira, namely:

    a. "knowledge and industriousness;
    b. mediation and dispute resolution abilities; [emphasis added]
    c. having courage and being a good strategist in war;
    d. knowledge of the arts of carving;
    e. knowledge of looking after the people;
    f. command of the knowledge and the technology to build large canoes or houses; and
    g. a sound knowledge of the boundaries of tribal lands."[251]

80. In a similar manner, Mahuika,[252] and Te Ua[253] analysed some of the credentials for traditional Māori rangatira selection and effectiveness based on ascription and achievement. Mahuika and Te Ua analysed rangatiratanga in a specific Ngāti Porou, East Coast context. Bowden in contrast, attempted to delineate

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249 Keesing, F, The Changing Maori, (New Zealand Board of Maori Ethnological Research, Thomas Avery & Sons, New Plymouth, 1928, Vol. 1, No. 2).

250 *Te Toa Takitini,* (No. 57, 1 May 1926) at 400.

251 HM Mead, *The Mandate of Leadership and the Decision-Making Process* (Te Puni Kokiri, Wellington, 1992).

252 A Mahuika, "Leadership: Inherited and Achieved," in M King (ed) *Te Ao Hurihuri: Aspects of Māoritanga* (Reed Books, Auckland, 1992) at 42.

253 H Te Kani Kerekere Te Ua, "Notes on Māori Chieftainship" (1955) 64(4) *Journal of the Polynesian Society* 488.

the different types of Māori leadership based on the principle of tapu for spiritual leadership and mana for secular leadership.[254]

81. Professor Ranginui Walker on the other hand, traced the changing model of Māori leadership from ascription and achievement to state and self-appointment.[255] After the turn of the 20th century, achievement became more influential than ascription in the assumption of mana rangatira leadership roles.

82. Traditional leaders – mana rangatira - under tikanga Māori then had ascribed mana leadership through whakapapa but also achieved mana by developing numerous ngā pumanawa (skills) and ngā huanga (attributes) for the tasks before them that required self-discipline, self-mastery and visionary inter-generational leadership.

83. The two Tokomaru claimant groups Te Whānau a Ruataupare ki Tokomaru and Te Whānau a Te Aotāwarirangi need these types of mana rangatira governed by tikanga Māori to process the current MACA claims more efficiently by blending the mana of these respective whānau, hapū and iwi groupings to lead them effectively into the future.

84. One other important specific tikanga Māori leadership skill that mana rangatira need to blend the mana of the two claimant groups going forward is the ability to facilitate consensus decision making.

Rangatira Consensus Decision-making

85. Professor Mason Durie noted that contemporary Māori governance requires a level of organisation that incorporates both tikanga Māori customary practices and the application of democratic principles, and that the two are not incompatible nor should their juxtaposition be discounted.[256] The author respectfully suggests that an element of democracy through consensus decision making was customary tikanga Māori law.

86. For example, Francis Dart Fenton was the resident magistrate in the Waipa and Waikato from 1857–1858, then was civil commissioner for Waikato in 1861, and the first Chief Judge of the Native Land Court from 1865-1881.[257] While resident magistrate, Fenton was impressed by the spontaneous efforts of Waikato hapū to establish rūnanga governance committees to settle grievances and punish wrongdoers for breaching law. In 1857, Fenton, writing from Whaingaroa, sent his official report on Native Affairs in the Waikato District

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254 R Bowden, "Tapu and Mana: Ritual Authority and Political Power in Traditional Māori Society" (1979) 14(1–2) *The Journal of Pacific History* 50.

255 R Walker, "Changes to the Traditional Model of Māori Leadership" (Unpublished, Auckland, 1992).

256 M Durie, *Te Mana Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 238.

257 Francis Dart Fenton was subsequently the first Chief Judge of the Native land Court from 1865 until 1882.

and recorded an interesting observation regarding tikanga Māori governance and democracy when he opined:[258]

> "No system of government that the world ever saw can be more democratic than that of the Maoris. The chief alone has no power. The whole tribe deliberate on every subject, not only politically on such as are of public interest, but even judicially they hold their 'komitis' [committees] on every private quarrel. In ordinary times the vox populi [opinions or beliefs of the majority] determines every matter, both internal and external. The system is a pure pantocracy [all powerful system], and no individual enjoys influence or exercises power, unless it originates with the mass and is expressly or tacitly conferred by them. In case of war, the old chief would be a paramount dictator: in times of peace he is an ordinary citizen. 'Ma te runanga e whakatu i a au, ka tu ahau.' 'If the assembly constitutes me, I shall be established,' is an expression I heard used by a chief of rank, and perfectly represents the public sentiment on the question."

87. An 1861 Māori newspaper article similarly referred to this notion of tikanga Māori consensus decision-making and democracy within rūnanga, which stated:[259]

> "But with the Maori Runanga, all must assemble together, the small and the great, the husband, the wife, the old man, the old woman and the children, the knowing and the foolish, the thoughtful and the presumptuous: these all obtain admittance to the Runanga Maori, with all their thoughts and speeches: this woman gets up and has her talk and that youth gets up and has his, and the headstrong carry off the debate, whilst the elder men sit still in silence."

88. Joel Polack, the Jewish trader in the Poverty Bay East Coast area similarly commented on Māori consensus decision making in 1840 when he observed:

> "The affairs domestic and foreign are discussed by the principal chiefs in open assembly (Star Chambers or Select Committees, the terms are synonymous being as yet unknown among them) but the females are allowed to deliver their sentiments on subjects in which they are interested, and children tender of years are permitted to ask questions, and even add their mite to the discussion, and are listened to by the venerable elders, with patience and attentive gravity."[260]

89. The Te Aitanga a Mahaki rangatira Te Kani Kerekere Te Ua also referred to consensus decision making in 1955 when he opined:

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258 FD Fenton "Reports from Mr Fenton, R.M, as to Native Affairs in the Waikato District" AJHR (1860, Session 1, E-01c) at 11.

259 Te Manuhiri Tūarangi: The Maori Intelligencier (No 10, August 1861) at 10.

260 Polack, J, *Manners and Customs of the New Zealanders,* (James Madden & Co, London, 1840) at 61.

> "Chieftainship is the prerogative of the tribe. They may depose any members of the tribe from that rank where he has been indiscreet or has been unworthy to hold the position."[261]

90. Te Ua added:

> "Chieftainship is best described [as] a) mana tangata – where a chief has authority, influence, prestige and power over the people; b) mana whenua – where a chief inherits vast territories by ancestral rights or by conquest (ringa kaha) rules over land and people; and c) mana korero – where a chief is capable of reciting the tribal lore and history and is a pacificator in settling tribal disputes."[262]

91. To appropriately resolve the current disputes between Te Whānau a Ruataupare ki Tokomaru and Te Whānau a Te Aotāwarirangi under tikanga Māori is for them to go back and engage civilly in a number of well-advertised, well informed and well organised tikanga Māori based hui through decision-making processes by consensus on their respective Tokomaru Bay marae. Mana rangatira facilitating consensus-based discussions along with majority-based voting are the only viable processes for reconciling the tribal differences and historic mamae between the claimant groups.

92. With respect, seeking redress through litigation in the High Court and other Courts are generally unhelpful especially given the fact that the claimant groups are still connected relationally through shared whakapapa, shared whenua and the shared takutai moana which means they will still be living close by and interacting with each other as the hau kāinga of Tokomaru Bay which, along with the possibility of being granted CMT and PCRs under MACA, should provide some impetus to appropriately deal with and reconcile these historic and contemporary internal community grievances

93. Dr Ward for the Attorney-General made a respectful and perfectly legitimate tikanga Māori recommendation in his opening submission for the two claimant groups Te Whānau a Ruataupare ki Tokomaru and Te Whānau a Te Aotāwarirangi to reconcile their differences when he referred to shared exclusivity for CMT areas when he noted:

> "There can only be one customary title holder in a particular area. The requirement of exclusive use and occupation without substantial interruption in s. 58 [MACA] precludes different applicant groups who completely deny each other's claims to exclusive use and occupation of the same area, each being granted a separate customary marine title over that area. … The Act does not support multiple customary marine title groups having separate customary marine title over the same area.

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261 K Te Kani Kerekere Te Ua, 'Maori Leadership,' 'Notes and Queries,' in *Journal of the Polynesian Society* (Vol. 64, No. 4, Auckland, 1955) at 488-490.

262 Above.

> Shared exclusivity refers to a situation where 2 or more groups share an area between themselves in accordance with tikanga to the exclusion of others."[263]

94. Dr Ward then recommended:

> "If applicant groups agreed to do so and if it was consistent with the evidence before the Court, it may be possible for them to amend their applications so that the applicant group is defined at a broader level (or in a different way) to bring their claims on a shared basis. Any such decision should be reflected in amended pleadings before any order is made."[264]

Section F: Concluding Comments

95. The witness evidence throughout the hearing readily and easily established and supported over the Tokomaru Bay takutai moana area the local tikanga Māori values of:
    a. Wairuatanga - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;
    b. Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including the two claimants' groups to each other and the takutai moana claimant area;
    c. Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;
    d. Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;
    e. Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;
    f. Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;
    g. Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;
    h. Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;
    i. Hau — respect for the vital essence of a person, place or object;

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263 Ward, D, 'Opening Submissions of the Attorney-General,' in the Marine and Coastal Area (Takutai Moana) Act 2011, Tichborne Ngā Hapū o Tokomaru Ākau for orders recognising customary marine title and protected customary rights, (High Court, Wellington Registry, CIV-2017-485-247, 26 August 2022) para 130 at 40.

264 Above, para 133 at 41.

j. Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;
k. Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;
l. Aroha — charity, generosity;
m. Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations including in the takutai moana claimant area.

96. The specific tikanga Māori laws and institutions that should influence the assessment of whether or not the area in question, or any part of it for these MACA hearings, is held in accordance with tikanga Māori includes the following indicia:

a. Whakapapa identifying a cosmological connection with the takutai moana;
b. Exercised mana or rangatiratanga over the takutai moana;
c. Exercised kaitiakitanga;
d. It has a mauri – life force;
e. Performance of rituals central to the spiritual life of the hapū and whānau;
f. Identified taniwha residing in the takutai moana;
g. Is celebrated or referred to in waiata;
h. Is celebrated or referred to in whakatauki;
i. The takutai moana was relied on as a source of food;
j. A source of textiles or other materials;
k. For travel or trade; and
l. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to ‘some, if not all of the takutai moana area.

97. An additional useful list of tikanga questions for assisting with determining some aspects of tikanga Māori that should influence whether any takutai moana area is held in accordance with tikanga Māori which includes:

a. How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand], take kite [discovery], other?
b. If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?
c. The land [and takutai moana] are actually occupied by people and kāinga are established;
d. A rohe is marked out in some way. How? Provide a map.
e. Over time urupa are established over land, tuahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.
f. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?

g. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].
h. The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.
i. The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.
j. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.
k. The new iwi is able to defend its rohe and can call on allies to help to defend the estate.
l. The new iwi is approved by the neighbours and its presence is validated by the experience.

98. It is important to also acknowledge that the above tikanga Māori indicia and tikanga Māori question lists are not exhaustive but are at least appropriate as starting points for answering what specific tikanga Māori laws and institutions should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori.

99. In terms of the conflicts in the whakapapa ancestry and the mana of the two applicant groups and whether they can be reconciled in resolving the issue of representation (and other issues for that matter), the relevant tikanga Māori institutions such as hohou i te rongo and he tatau pounamu, and the tikanga concept of ea can be achieved, but they are fully dependent upon the political willingness of the two applicant groups agreeing to abide by tikanga Māori.

100. Whatever the outcomes of the current MACA hearing, maintaining the mana of Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare ki Tokomaru and the integrity of tikanga Māori are imperative.

101. As outlined throughout this report, tikanga Māori is about "doing things right, doing things the right way, and doing things for the right reasons" within a mātauranga and tikanga Māori worldview underpinned by wairuatanga and whānaungatanga relationships.

102. From my perusal of the claimant documents and by listening intently to the evidence briefs and cross examination by counsel, and without wanting to undermine the mana of any individual witness, the Te Whānau a Te Aotāwarirangi and Te Whānau a Ruataupare ki Tokomaru claimant groups through Ngā Hapū o Tokomaru Ākau and the respective marae whānau groups in my opinion have not fully adhered to tikanga Māori in the lead up to and processing of these MACA claims in terms of "doing things right, doing things the right way, and doing things for the right reasons". Tikanga Maori breaches appear to have occurred with both claimant groups.

103. While tikanga Māori inevitably adapts and evolves in time and space, we need to ensure that we do not stray so far that our contemporary tikanga Māori customary institutions and practices are no longer premised on those underlying fundamental tāhuhu –Te Ao Māori values and principles outlined earlier such as whānaungatanga, whakapapa, wairuatanga, mana, and manaakitanga.

104. In conclusion and with utmost respect, I would encourage Ngā Hapū o Tokomaru Ākau, Te Whānau a Ruataupare ki Tokomaru and Te Whānau a Te Aotāwarirangi claimant groups to return to the marae and hold a number of inclusive, well publicised and well organised hui to first resolve and reconcile your differences through inclusive consensus decision making processes, and then to process and subsequently co-govern your MACA claims on a shared basis grounded in shared wairuatanga, shared whakapapa, shared whānaungatanga, shared whenua, and a shared takutai moana area, as your tūpuna did historically before the Native Land Court hearings at the end of the 19th century.

Ko te heke mai kei runga i tēnei rā me te aha e mahia ana koutou.
The future depends on today and what you do with it.

DATED this 6th day of October 2022

Dr Robert Joseph

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