IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-821
[2020] NZHC 1139

IN THE MATTER OF	the Marine and Coastal Area (Takutai Moana) Act 2011
AND	an application by the Trustees of the Ngāti Pāhauwera Development Trust TORO WAAKA, TUREITI MOXON, CHAANS TUMATAROA-CLARKE, REX ADSETT, GERALD ARANUI, AMIRIA TOMOANA and TOM KEEFE on behalf of NGĀTI PĀHAUWERA for Customary Marine Title, Wahi Tapu Protection and Protected Customary Rights

On the papers:

Counsel:	K Anderson and M Dicken for Maungaharuru-Tangitū Trust R N Smail and E A James for Ngāti Pāhauwera Development Trust M Mahuika, L Underhill-Sem and M Tukapuna for Ngāti Parau S J Roughton for Ngai Tahu o Mōhaka Waikare
Judgment:	27 May 2020

JUDGMENT OF CHURCHMAN J
[Ngāti Pāhauwera strike-out application]

Introduction

[1] The Maungaharuru-Tangitū Trust (the applicants) have applied to this Court to strike-out part of the application for recognition orders made by the Ngāti Pāhauwera Development Trust (the respondents) under s 107 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act), filed on 15 March 2017. The strike-out application relates to a map included within a memorandum filed by counsel for the respondents on 13 December 2018, labelled "Ngāti Pāhauwera High Court Application Area".

[2] The applicants allege that the application area detailed in this map is much larger than the boundaries detailed by the respondents in their original 2017 application. They contend that the enlarged boundaries constitute a new application that is barred under the Act.[1] As a result, the applicants submit that the part of the respondents' application that details the enlarged boundaries should be struck out on the basis that it is statute-barred, an abuse of process, and prejudicial to the applicants and other parties (as the enlarged boundaries now have a greater overlap with the applicants' own claims and the claims of others).

[3] The respondents submit that the 2018 map does not materially change their application under the Act, but rather more accurately reflects the description of the application area described in their 15 March 2017 application, and that it is consistent with the evidence filed in support of that application. They oppose the application to strike-out.

[4] I have reached the conclusion that the part of the respondents' application that comprises the extended application area should be struck out. This amendment effectively constitutes a fresh cause of action that is sufficiently and clearly statute-barred to the point that it can be struck out as an abuse of process under s 107(3)(d) of the Act and r 15.1(1)(d) of the High Court Rules 2016 (HCR). The amendment may also be struck out on the basis that it is likely to cause undue prejudice and delay under s 107(3)(b) and r 15.1(1)(b).

[5] I now set out the reasons why I have reached this conclusion.

Background

Foreshore and Seabed and Marine and Coastal Area applications

[6] In June 2005, the respondents applied to the Māori Land Court for customary rights orders under s 48 of the Foreshore and Seabed Act 2004. In 2006, the southern boundaries of this application were amended. To support the amended application, an affidavit of Mr Toro Waaka, a kaumātua of Ngāti Pāhauwera and Chair of the Ngāti Pāhauwera Development Trust, was filed in 2007.

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[1] The deadline in which a new application could be made expired on 3 April 2017 under s 100(2) of the Act.

[7] Mr Waaka's affidavit included two maps. The first map (Map One) detailed the immediate Ngāti Pāhauwera foreshore and seabed area under discussion for the purposes of the amended application (an area between the Poututu Stream and Waikari River Mouth), while the second map (Map Two) detailed the remaining area of Ngāti Pāhauwera interests south of the Waikari River Mouth, stretching down to the Esk River Mouth. The title of Map Two stated that it was "for historical and geographical context only".

[8] Following the repeal of the Foreshore and Seabed Act and the passing of the Marine and Coastal Area (Takutai Moana) Act in 2011, the Ngāti Pāhauwera claim was transferred to the High Court under s 125 of the Act and adjourned for engagement between Ngāti Pāhauwera and the Crown.

[9] In March 2017, the respondents on behalf of Ngāti Pāhauwera, filed an application for recognition of customary marine title and rights under the Act. This application differed from the Foreshore and Seabed application in that the southern boundary of the application area had formally been extended down to the Esk River Mouth, rather than being used as a pointer for "historical and geographical context only". An additional affidavit by Mr Waaka was filed in support of this application. In his affidavit, Mr Waaka acknowledged the amendment and extension of the application area to the Esk River Mouth as the southern boundary, stating that this was consistent with, and supported by, his previous evidence given in the Māori Land Court Foreshore and Seabed Act application, including his 2007 affidavit (containing Map One and Map Two), which were annexed to the current affidavit.

[10] On 2 June 2017, the Crown filed a series of maps setting out the approximate geographical area of each application under the Act. These maps were revised on 30 June 2017. In the map provided on 2 June 2017, the southern boundary of the respondents' application was the Esk River. No change was made to this boundary in the revised map provided on 30 June 2017.

[11] In March 2018, as a result of a minute of Collins J dated 21 March 2018, this Court required all applicants to file memoranda with a map which showed accurate boundaries of the application area so that the location of boundaries and the compass bearings of the boundary lines between seaward and landward boundaries was identifiable.[2]

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2 *Minute (No.2) of Collins J* HC Wellington CIV-2017-485-000218, 21 March 2018.

[12] On 13 April 2018, in response to the minute of Collins J, the respondents filed a memorandum informing the Court that they would provide a map and that they were in the process of engaging a contractor to complete the work. The memorandum also referred to Map One and Map Two included in Mr Waaka's March 2017 supporting affidavit and his original 2007 affidavit. The respondents stated in the memorandum that these maps "together generally comprise the application area", although they did note that the maps were originally prepared as evidence before the Māori Land Court, and the points cited were therefore not necessarily accurate.

[13] On 25 May 2018, the Crown filed a further memorandum detailing the approximate boundaries of each application area. The map for the respondents sets out the southern boundary of their applications as the Esk River Mouth. The applicants submit that the respondents never raised any issues with the application area identified in these maps, and given that they showed the respondents application area as being significantly smaller than intended, it would have been expected that the respondents would have raised this issue. The respondents contend that they were never asked or given an opportunity to provide feedback on the maps.

Procedural history of strike-out application

[14] As discussed above, on 13 December 2018, counsel for the respondents filed a memorandum which included a map labelled "Ngāti Pāhauwera High Court Application Area". The boundaries of the application area on this map had been extended further south than the maps that the respondents had previously used in evidence, with the southern boundary now extending to Bluff Hill in Napier. The applicants noted that the respondents provided no explanation for the enlarged boundary, although it was later explained in an affidavit of Mr Waaka dated 17 February 2020, where he stated:

> 21. As I have said our application area is from the Esk River mouth as Te Kahu o Te Rangi knew it. I believe the evidence is very clear that when Te Kahu o Te Rangi walked his boundary, the Esk River mouth flowed into the sea from the Te Whanganui o Orotu Lagoon.
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> 22. The Court said, I believe partly at the insistence of the Crown, that we needed precise mapping showing the line and angle from the point on land to the outer limits of the territorial sea, which was our line out in the ocean. From the former mouth of the Esk River, we had to draw a line. Because of the location of Bluff hill, the line cuts across the hill to reach the edge of the territorial sea.
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> 23. We chose a line as we were required to. We don't feel that this line is inappropriate. Wepiha Wainohu spoke about the taniwha Moremore which is located near to Napier. In 2005

> the Ministry of Fisheries created a Moremore Mātaitai Reserve which includes an area of reef to the east of Westshore. A map of this area is annexed and marked "F". We have a strong connection to Napier and most Ngāti Pāhauwera today live in Napier because of this.
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> 24. Again, this Pākehā process of drawing maps is difficult for us as Māori. Just because we have been required to file a map, it does not mean that we ignore the interests of others in that area. Unfortunately, this is feeding into a long process of opposition we have faced from MTT.
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> …
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> 32. At paragraph 16 Ms Hopmans says that we are saying the Esk moved to south of Bluff Hill after the 1931 earthquake. Ngāti Pāhauwera does not say this at all. As I have explained, before the earthquake the Esk flowed into the sea near to the current mouth of the Ahuriri estuary. We have drawn a line out to sea as required, which because of the location of Bluff Hill cuts across the hill, but as I have already said we do not think that this line is inappropriate.

[15] On 31 January 2019, the applicants filed a memorandum seeking that their application be heard with the respondents' application, noting that as opposed to the maps in their amended application of 2017, the boundaries of the respondents' application area had extended further south of the Esk River, and that the applicants opposed this extension.

[16] Several days later at the first Case Management Conference specifically for the Ngāti Pāhauwera claim on 4 February 2019, counsel for the respondents noted that their application extended to the "historical Esk River" further south of where the current Esk River Mouth is located.

[17] On 20 December 2019, the respondents completed filing and service of evidence for their application. In response, on 31 January 2020, the applicants filed a strike-out application, stating:

> The consequence of this amendment to the Ngāti Pāhauwera application is it now purports to completely overlap the MTT application area, and partially overlap the Ngāti Pārau application area (CIV-2017-485-000246) further south. As set out in the affidavit of Tania Hopmans, sworn on 30 January 2020 in support of this application to strike-out, the extended area is 50,924 hectares larger than the area described in their application, and represents an increase in size of 55%. The extent of the extension is shown in the maps exhibited to her affidavit.

[18] The applicants indicated that the part of the respondents' application that they seek to have struck out relates to:

> …the purported amendment to the proceedings to enlarge the application area from finishing at the current Esk River to a point significantly further south of the Esk River.

Position of the parties – the applicants

Jurisdiction to strike-out

[19] In their submissions on the jurisdiction of this Court to strike out the relevant part of the respondents' application, counsel for the applicants firstly referred to s 107(3) of the Act:

> (3) The Court may strike out all or part of an application for a recognition order or a notice of appearance filed under section 104 if it—
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> (a) discloses no reasonably arguable case; or
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> (b) is likely to cause prejudice or delay; or
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> (c) is frivolous or vexatious; or
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> (d) is otherwise an abuse of the Court.

[20] Counsel for the applicants then noted that the same criteria for strike-out is set out in r 15.1, which have been summarised and endorsed by the Court of Appeal in *Attorney-General v Prince* and by the Supreme Court in *Couch v Attorney-General.*[3] In particular, counsel referred to the observation of the Court of Appeal in *Prince*, where the Court noted:[4]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas and Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 294-295*; Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314, 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[21] Counsel also referred to *Trustees Executors Ltd v Murray*, where Tipping J held that:[5]

> In order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process.

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3 *Attorney-General v Prince* [1998] 1 NZLR 262; *Couch v Attorney-General* [2008] NZSC 45.
4 *Attorney-General v Prince*, above n 3, at 267.
5 *Trustees Executors Ltd v Murray* [2007] NZSC 27 at [33].

[22] Counsel's position was that the amended application was in fact statute barred because it brought "into play" a new area that was not included in the 2017 application. Counsel further submitted that the respondents' claim was so clearly statute-barred that it amounted to an abuse of process because a plain and ordinary meaning of the reference to the Esk River would reflect its current location, as opposed to a disputed historical location not identified in the original application. Therefore, the amended application introduced an entirely new area that would require investigation of new factual matters different from what was raised in the original application. As a result, these were appropriate circumstances for this Court to apply its s 107 powers.

Defining the Esk River and material change to application

[23] Counsel also disputed the assertion of the respondents that when referring to the Esk River, they were always referring to its historical location. Their key arguments against this assertion were:

(a) That there was nothing in the respondents' application prior to the December 2018 amendment to suggest that they did not mean the current location of the Esk River when they were referring to it. In their 2006 Foreshore and Seabed application for customary rights (and 2007 supporting affidavit from Mr Waaka), their 2017 amended application under the Act (also supported by an affidavit from Mr Waaka) and their memorandum in response to the minute of Collins J in April 2018, the respondents used maps (specifically Map One and Map Two) which indicated the southern boundary of the application as being the Esk River in its current position. While the respondents asserted that these maps were only meant to "generally comprise the application area" and were not intended to be an absolutely accurate depiction of the boundaries, counsel for the applicants submitted that given that the application referred to the Esk River Mouth as the southern boundary and the maps delineated this as the *current* location of the River mouth, if the respondents had intended to refer to a different specific historic location – namely the 'location of the Esk River mouth described in the boundary of Te Kahu o Te Rangi prior to the Treaty of Waitangi and prior to the Napier Earthquake of 1931', they were required to explicitly state that.

(b) Building on this first argument, counsel also submitted that the plain and ordinary meaning of the Esk River was the River in its current location, and referring to the affidavits of Ms Hopmans and Mr Hawaikirangi dated 30 January 2020 and 18 February 2020 respectively, noted that the Esk River mouth was a well-known location, and that therefore the meaning that the term "Esk River" would reasonably convey is the River in its current location. This assumption was further strengthened, according to counsel, by the fact that the Esk River in its current location is referred to in the maps as such.

(c) Finally, counsel noted that the applicants disputed the statements in Mr Waaka's affidavit of 17 February 2020 where he said:

> At the time of Te Kahu o Te Rangi, the Esk was called Te Wai o Hinga anga and it flowed out to sea through the Whanganui a Orotu Lagoon. The lagoon had a long narrow strip of land along its coastal side and the water both seeped out to sea all along this strip and through the open mouth of the lagoon. Historically this mouth moved north and south at different times, but on maps seems to be shown as near to the current mouth of the Ahuriri Estuary…
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> The Tutaekuri, Ngaruroro and Tukituki Rivers also flowed into the Whanganui a Orotu and then to the sea.
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> When the Treaty of Waitangi was signed in 1840, Te Wai o Hinga anga still flowed into the sea through Te Whanganui a Orotu.

(d) While disputing this statement and disputing that there ever was a former Esk River Mouth, the applicant had not produced evidence to disprove this statement on the basis that this was a strike-out application. Citing *Attorney-General v McVeagh*, counsel for the applicants submitted that a strike-out application is not for determining disputed facts,[6] and that this issue, given that it may require the applicants to commission further historical work, would have to be heard in a substantive hearing.

Amended application statute-barred

[24] Counsel for the applicants submitted that the part of the respondents' application that extended the southern boundary of the application area was barred under the Act. Counsel noted that the final day for filing applications for recognition orders under the Act was 3 April

6 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 564.

2017, while the respondents' amendment to their application occurred in December 2018. This amendment was characterised by counsel as 'analogous to a fresh cause of action', referring to *Transpower New Zealand Ltd v Todd Energy Ltd*, where the Court of Appeal held that:[7]

> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 at 273 (CA) citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 at 961 (SC) per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and
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> (d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR 779 at 785 (SC) per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 at 1151 (CA)).

[25] Counsel also sought to distinguish this case from the circumstances of *Re Tipene*.[8] In that case, Mr Tipene (the applicant) sought to amend his application under the Act to broaden the applicant group and to refine and reduce the application area. The Crown opposed these changes by way of amendment, submitting that the amended application had materially changed such that it was now an altogether different application (comparable to a new cause of action) and therefore it should be withdrawn or struck out and a fresh application should be made.[9] Mallon J rejected this approach, holding that the essence of the application had not changed.[10] The subsequent amendments by Mr Tipene represented refinements to the application as it had progressed, and the Court should not take an unduly narrow approach to permissible amendments.[11]

[26] Counsel for the applicants submitted that the circumstances in this case differed to *Re Tipene*, in that case the amendments to the application occurred before the final filing date, and were intended to narrow, reduce and refine the application area. Also, in the current case, the extension of boundaries would require further investigation and evidence, unlike in *Re Tipene*, where Mallon J noted "that the evidence filed in support of the application remains relevant

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7 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].
8 *Re Tipene* [2015] NZHC 169.
9 *Re Tipene,* above n 8, at [13].
10 At [16].
11 At [21].

confirms that the essence of the application has not changed".[12] This led counsel for the applicants to submit:

> In light of the decision in *Re Tipene*, it is submitted that the widening of the application area by tens of thousands of hectares cannot be considered a 'refinement'. To 'refine' the application would be to make subtle adjustments to the application as it progresses. The Court's direction to applicants to file topographical maps of the applications area should not, it is submitted, be allowed to provide an opportunity for applicants to substantially amend the extent of their application areas in this way.

Prejudice and floodgates argument

[27] Counsel for the applicants referred to *Waitakere City Council v Estate Homes Ltd* as setting out the test for determining whether an applicant seeks to have an application granted on a materially different basis from that put forward.[13] In that case, the Supreme Court held that whether an application is "materially different" is a question of degree, and that the question of any prejudice to other parties and the general public is always relevant.[14]

[28] Turning to the issue of prejudice, counsel firstly asserted that the applicants themselves were prejudiced by the respondents' amended application. This was due to two factors. Firstly, it would make proving their own application significantly more complex, due to the respondent's proposed amendment complete overlapping the applicants' area. Secondly, and as a result of the first factor, the applicants would have to undertake further historical research into the legal and customary history of the expanded area, which would also significantly expand the range of evidence that this Court would have to consider.

[29] Counsel then addressed the prejudicial effect of the amendment of the other groups, noting:

> An accurate definition of the area being claimed is of particular importance to other groups and interested parties. Other parties cannot have known that when Ngāti Pāhauwera stated that their application went to the Esk River, that this could later change to being significantly further south. Ngāti Pāhauwera have effectively acknowledged this point, at paragraph 105 of their submissions.

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12 At [16].
13 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112.
14 *Waitakere City Council v Estate Homes Ltd*, above n 13, at [35].

[30] In particular, counsel referred to Ngāti Pārau, a claimant group whose application area now overlapped with the respondents' amended application area. Counsel noted that Ngāti Pāhauwera had not filed a notice of intention to appear as an interested party, despite counsel's contention that Ngāti Pāhauwera, if it truly had always maintained that the extended boundaries were part of its original application, would have been aware of the overlap between the two claims and would have sought to be an interested party. Ngāti Pārau's opposition to the application of the respondents is addressed below.

[31] Counsel also referred to other roopu, including Ngāti Hinepare, Ngāi Tawhao and Ngāti Mahu, who as a result of the extended application, may have sought to be included as an interested party to the current application had they been notified. The respondents, through an affidavit of Mr Waaka, have expressed willingness to serve their application on these hapū in order to allow them to appear as an intervenor or interested party.

[32] The respondents opposed this approach on the basis that this is not how the Act was intended to apply. Under s 103 of the Act, the applicant group applying for a recognition order must give public notice of the application not later than 20 working days after filing the application, which has long since passed.[15] They submitted that additional public notice and service, as well as allowing additional parties to file notices of appearance, would undermine both the certainty of the Act provided by the time limits, and also likely have a consequential effect on the timetable of the current Ngāti Pāhauwera hearing.

[33] Finally, counsel emphasised the precedential effect of allowing the respondents' application to be amended. It was submitted that allowing this form of amendment, despite being statute-barred due to time constraints, would open the floodgates to a "swathe of similar applications around the country where applicants have second thoughts about the extent of their applications".

Position of the parties – the respondents

Jurisdiction to strike-out

[34] Counsel for the respondents also referred to s 107 of the Act and r 15.1, and the cases of *Attorney-General v Prince* and *Couch v Attorney-General* as setting out the principles of strike-

15 Marine and Coastal Area (Takutai Moana) Act 2012, s 103(2).

out applications. Counsel also referred to Kós J (as he then was) in *Siemer v Judicial Conduct Commissioner*, where he observed that:[16]

> The jurisdiction is exercised sparingly. Causes of action may be struck out only if so untenable that they cannot succeed. Facts pleaded are treated as true unless self-evidently speculative or false. These principles apply to judicial review as much as to general proceedings.

Defining the application area

[35] It was submitted that the applicants had distorted and exaggerated the size of the expanded application area and that in fact, there had been no material change to the application. The main focus of the respondents' argument concerned Ms Hopmans' affidavit of 30 January 2020, which counsel considered to be misleading.

[36] In particular, the respondents disputed Ms Hopmans' assertion that the amended application increased the application area by 55 per cent. Instead, it was asserted that the alleged additional overlapping coastline was "negligible". According to the respondents, the only accurate calculation of the angle of the line at the southern end/boundary (of the application area) was through the coastline. Counsel, referring to the affidavit of Mr Waaka dated 17 February 2020, submitted that based on this calculation, the purported extension was approximately 10 kilometres of additional coastline compared to the approximately 60 kilometres of coast along the rest of the application area, an increase of 17 per cent, rather than 55 per cent. Consequently, counsel asserted that the submissions of the applicants that the historical Esk River was significantly further south was an exaggeration. It was also submitted that application area of the applicants overlapped about half of this extended area, meaning the increase was negligible.

Material change to application and new cause of action

[37] Counsel referred to the *Transpower NZ Ltd v Todd Energy Ltd* as the leading authority on what constitutes a fresh cause of action, referring to [61]-[62] of *Transpower*, where the Court of Appeal made the following observations:[17]

> [61] The relevant principles as to when a cause of action is fresh are summarised in the *Ophthalmological* case at [22]-[24] as follows:

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16 *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [13].
17 *Transpower NZ Ltd v Todd Energy Ltd,* above n 7.

(a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 at 242–243 (CA) per Diplock LJ);

(b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" (*Paragon Finance plc v D B Thakerar & Co* (a firm) [1999] 1 All ER 400 at 405 (CA) per Millett LJ);

(c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 at 273 (CA) citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 at 961 (SC) per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and

(d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR 779 at 785 (SC) per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 at 1151 (CA)).

[62] Transpower also relies on *Attorney-General v Carter* [2003] 2 NZLR 160 at [48] (CA) where the Court observed: "The circumstance that the underlying facts may be the same or similar does not save a cause of action from being fresh if the plaintiff seeks to derive a materially different legal consequence from those facts."

[38] Counsel also referred to *Commerce Commission v Visy Board Pty Ltd*, where the Court of Appeal observed that the key question for determining whether a fresh cause of action had arisen was whether the amendment to pleadings changes the claim against the defendant so that it is something essentially different from what it was before the amendment.[18] According to the Court, what constitutes "essentially different" is a change to the legal basis for the claim.[19] Counsel argued that these observations were applicable here. The respondents' amended claim was essentially the same in that the nature of the pleading had not changed; it was still a claim under the Act alleging that Ngāti Pāhauwera's application area is bounded by the Esk River. The amendment was simply a clarification of this position, by specifying the historical Esk, as opposed to the Esk in its current location.

[39] The present case, according to counsel, fell into the category of a "relatively insignificant" geographical change, analogous to *Ophthalmological Society of New Zealand Inc v Commerce Commission* (referred to in *Transpower*) where an amendment of an area from

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18 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [142].

19 At [146].

"Southland" to "Southland and Otago" for the purposes of the ophthalmological market was described as insignificant.[20] Counsel also referred to *Tipene*, particularly Mallon J's observations that it would be wrong for this Court to take an unduly narrow approach to permissible amendments, which would be inconsistent with the express flexibility given to the Court under the Act,[21] because like in *Tipene*, the essence of the application had not changed.

Late amendment

[40] Counsel argued that where a defect in a pleading can be cured, a Court will normally order an amendment to the statement of claim rather than striking out that claim.[22] It was also submitted that the paramount consideration in determining whether leave should be granted to make late amendments was giving the parties every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding,[23] and that an amended pleading may be permitted if the proposed claim has substantial merit and will not cause injustice to the defendants.[24]

No prejudice or delay

[41] Counsel for the respondents denied that their amended application will cause prejudice or delay to the applicants. They contended that the applicants have already collected evidence over their own application area and have had since 2018 (when the amended application was filed) to prepare evidence countering the claims of the respondents.

Issues with other parties

[42] The respondents also opposed the inclusion of Ngāti Pārau as an interested party in the proceedings. Counsel noted that Ngāti Pārau's original application under the Act extended past the Esk River, and although this was amended, there was still some uncertainty regarding a possible overlap between Ngāti Pārau and Ngāti Pāhauwera in 2018. As a result, on 12 February 2019, this Court issued a minute directing that the applications of Ngāti Pārau and the applicants would be heard in their entirety with the Ngāti Pāhauwera application.

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20 *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [22]-[24].

21 *Re Tipene,* above n 8, at [21]-[23].

22 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 52 at [89].

23 *Body Corporate 32561 v McDonough* [2014] NZHC 1821 at [10].

24 *Body Corporate 177519 v Auckland City Council* HC Auckland CIV-2005-404-5563, 24 May 2011.

[43] Because of this, it was submitted that there was no prejudice to Ngāti Pārau not being included as an interested party to the strike-out application, because Ngāti Pārau effectively already were, for all practical purposes, an interested party to the respondents' application as a whole. It was also submitted that like the applicants, the respondents' amended application would cause little prejudice or delay to Ngāti Pārau's own application, because they had known about it since 2018. In fact, Ngāti Pārau arguably received an advantage from the potential overlap, as it allowed their claim to be heard with Ngāti Pāhauwera's application (to be heard in 2021) rather than having to wait longer for a lengthy period of Crown engagement.

[44] Counsel also referred to the affidavit of Ms Hopmans, where at Appendix B, extract 4, a map indicates that the respondents' area only stretches past the Ngāti Pārau area by "a very small sliver" out at the seaward boundary, indicating that it would be unjustified to allow for additional hapū outside of Ngāti Pārau to be included as interested parties opposing the application.

Inadmissible evidence

[45] Finally, on 16 April 2020 counsel for the respondents filed a memorandum objecting to new evidence introduced into the applicants' submissions in reply to Ngāti Pāhauwera and the Attorney General dated 8 April 2020. Counsel contend that in [77] of their submissions, counsel for the applicants made calculations without explaining how they are reached, and that it is prejudicial for the applicants to introduce new evidence under the guise of closing submissions, when the respondents are denied the ability to challenge the veracity of this evidence.

[46] At [79] of their submissions, counsel for the applicants note that they are:

> … instructed that if the combined area of the 2007 maps is extended to the territorial sea limit, the 2017 application area is approximately 94,797 hectares, as recalculated by a spatial analyst and shown on a map annexed to these submissions.

[47] Counsel for the respondents submit that both the map, and the information provided by an unnamed spatial analyst, are not included in any of the applicants' affidavits filed. Consequently, counsel submit that they are hearsay evidence under s 17 of the Evidence Act 2006, and therefore inadmissible.

Position of the parties – other parties

The Crown

[48] The Attorney-General also filed submissions in relation to the strike-out application. It was submitted that the Attorney-General did not wish to present a view on the merits of the application, but simply desired to assist in setting out the relevant principles for determining the application, and to submit on whether there was need for further public application if the application was amended, and whether affected parties should be permitted to file a notice of appearance in respect of the amended application.

[49] Counsel for the Attorney-General referred to the cases discussed above (*Transpower, Waitakere City* and *Ophthalmological Society*) as well as s 107, in discussing the principles to be applied to this application: the test for whether a cause of action is fresh (and therefore statute-barred) is whether an amended pleading constitutes something "essentially" different, and whether there is such a material change is a question of degree. Mallon J's observations in *Tipene* were also submitted to be relevant. In particular, where an amendment enlarges the application area, whether the application is being brought on a materially different basis is a question of degree. Relevant considerations in the context may include:

(a) whether the amendment is likely to require substantial additional evidence from the applicant or any other parties;

(b) whether evidence filed to date remains relevant to the amended application; and

(c) whether any significant new issues of fact or law will be raised in relation to the amended application.

[50] The Attorney-General also submitted that if the amendment is allowed, further public notice of the application should occur, and suggested that if further interested parties in the application arise, then they should be given the change to file a notice of appearance.

Ngāti Pārau

[51] Ngāti Pārau have applied to be joined as intervenor to the application to strike-out part of the Ngāti Pāhauwera application. They support the application to strike-out. The application

area of Ngāti Pārau is located to the south of the respondents' application, but as a result of the extension of the respondents' southern boundary, Ngāti Pārau now note that there is an extensive overlap between the two application areas. The submissions made by counsel for Ngāti Pārau are similar and in support of those made by the applicants. In particular, Ngāti Pārau submit that:

(a) the extension of the respondents' application area means that the area in respect of which recognition orders are now being sought is materially different from, and larger than, its 2017 application and as such, is an original application;

(b) the time limit for filing applications under s 100(2) and notices to appear as an interested party to be heard in applications for recognition orders under s 104 has passed and the amended application is therefore statute barred; and

(c) the amendment is frivolous, vexatious or an abuse of process, and would significantly prejudice Ngāti Pārau and others.

Relevant law and analysis

Admissibility issues

[52] Before dealing with the substantive issue, the issue of admissibility raised in [77] and [79] of counsel for the applicants' submissions needs to be addressed. My conclusion is that the submission at [77] of the submissions is admissible. Counsel simply appear to be submitting that even an increase of 17 per cent to the application area, as discussed by the respondents in their own submissions, would be a material increase. The calculations appear to be based on an increase to the entire (marine and coastal) area that would be enlarged if the amended application was accepted, in response to the counsel for the respondents' own calculation of 17 per cent based on Mr Waaka's 17 February 2020 affidavit where he stated that the amended application only extended the coastline boundary by 10 kilometres. I do not consider that this submission would have an unfairly prejudicial effect on the proceeding under s 8(1)(a) of the Evidence Act 2006.

[53] However, there are issues with the contents in [79]. Both the calculations of the spatial analyst and the new map do not appear to have been included in any affidavits filed by the

applicants. I accept the submission of counsel for the respondents that this is hearsay evidence under s 17 of the Evidence Act, and in breach of r 9.55. Paragraph [79] and the new map attached to the submissions are therefore inadmissible. I therefore put them to one side and have had no regard to them in preparing this decision.

Jurisdiction to strike-out

[54] The jurisdiction of this Court to strike-out an application in part or in whole under the Act is found in s 107, which is set out at [19] above. Rule 15.1 is substantially similar to this provision; therefore the authorities on that rule are applicable here.

[55] The cases of *Couch v Attorney-General* and *Attorney-General v Prince* were acknowledged by both counsel for the respondents and counsel for the applicants as providing the general principles that this Court should apply when considering a strike-out application. The observations of the Court of Appeal in *Prince* at [20] above are particularly instructive. It is evident from the authorities that this Court must take a cautious approach to striking out applications, and exercise its power sparingly.[25] It is inappropriate to strike out a claim summarily unless the Court can be certain that it cannot succeed.[26]

[56] Conversely, if a claim is "doomed to failure",[27] or so clearly untenable so that it cannot proceed,[28] there can be no justification in allowing it to continue.[29] Following the observations of Tipping J in *Murray*, if a claim is so clearly statute-barred that it can properly be regarded as frivolous, vexatious or an abuse of process, then it may be struck out.[30] Ultimately, this Court must assess whether the respondent has presented enough by way of pleadings, particulars and evidence to persuade the Court that a claim is not to be viewed as statute-barred.[31]

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25 *Attorney-General v Prince*, above n 3, at 267; *Couch v Attorney-General*, above n 3, at [31]; and *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at p 317 (CA) per Richmond P.

26 *Couch v Attorney-General*, above n 3, at [33].

27 *Attorney-General v McVeagh*, above n 6, at 564.

28 *Couch v Attorney-General*, above n 3, at [31].

29 *Attorney-General v McVeagh*, above n 6, at 564; *Te Whakakitenga O Waikato Inc v Martin* [2016] NZCA 548 at [15].

30 *Trustees Executors Ltd v Murray*, above n 5, at [33].

31 *Trustees Executors Ltd v Murray*, above n 5, at [34].

New or "fresh" cause of action

[57] The principles set out in *Transpower* and *Ophthalmological Society* (see [24] and [37] above) are applicable here.[32] Of particular importance is the principle affirmed in both Courts, and earlier applied in the cases of *Chilcott v Goss* and *Smith v Wilkins Davies Construction Co Ltd*,[33] that the test of whether an amended pleading is "fresh" is whether it is something "essentially different" from that which was pleaded earlier.[34] This change is a matter of degree.

[58] While both *Transpower* and *Ophthalmological Society* stressed that a change in the nature of the pleadings can occur through alterations in matters of law, facts or both, in *Commerce Commission v Visy Board* the Court of Appeal stated that it will be rare that factual matters are so vital as to affect the essence of the case brought against the defendant.[35] It is more likely that the change will occur in the legal basis for the claim.[36] For a cause of action to be considered "fresh" on the basis of facts alone, these facts would have to be so fundamental that they would change the essence of the case.[37]

[59] The threshold for determining a claim to be a "fresh" cause of action on the basis of new or additional factors is clearly a high one. This was affirmed in *ISP Consulting Engineers Ltd v Body Corporate 89408*,[38] where the Court of Appeal reiterated that the essential question was whether the proposed amendment would change the essential nature of the claim, giving rise to a new area of factual enquiry.[39] The Court also held that the assessment was objective, and the consideration must be of the substance of what is pleaded, rather than the form.[40]

[60] As acknowledged by counsel on both sides, the principles set out in *Tipene* are also relevant here. In particular, Mallon J's statements that given the lack of procedural guidance within the Act, it is expected that applications may evolve or be refined,[41] and that given the

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32 These principles have also been affirmed in the more recent cases of *Wishart v Murray* [2015] NZHC 3363 at [80] and *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160 at [21].

33 *Chilcott v Goss* [1995] 1 NZLR 263 at 273; and *Smith v Wilkins and Davies Construction Co Ltd* [1958] NZLR 958 at 961.

34 *Ophthalmological Society of New Zealand Incorporated v Commerce Commission*, above n 20, at [22]-[24]; *Transpower NZ Ltd v Todd Energy Ltd,* above n 6, at [61].

35 *Commerce Commission v Visy Board Pty Ltd,* above n 18, at [146].

36 At [146].

37 At [146]. See also *Smith v Wilkins and Davies Construction Co Ltd*, above n 33, at 961.

38 *ISP Consulting Engineers Ltd v Body Corporate 89408*, above n 32, at [24].

39 At [25].

40 At [22].

41 *Re Tipene,* above n 8, at [19].

purpose and history behind the Act, it would be wrong to take an unduly strict or narrow approach to any or all amendments that are permissible under the Act.[42]

[61] Counsel for the respondents emphasise that no material amendment has been made. They submit that the nature of the pleading has not changed: the amended claim is still a claim under the Act alleging that the relevant area of Ngāti Pāhauwera is bounded by the Esk River, and that it simply clarifies or refines, consistent with the approach in *Tipene*, that the southern boundary is at the historical Esk, as opposed to its current position.

[62] If this was the case, then the amendment could not be considered as altering the facts in such a fundamental way that they changed the very essence of the case. However, my conclusion is that the change is more significant than that, and that it does in fact amount to a fresh cause of action. There are four reasons for this.

[63] Firstly, the past positions and actions of Ngāti Pāhauwera indicate that the application area was intended to end (on the southern boundary) at the current, rather than historical, location of the Esk River. The 2007 affidavit of Mr Waaka attached to both the amended application under the Foreshore and Seabed Act and the 2017 application under this Act, which included both Map One and Map Two, supports the conclusion that the respondents intended for the southern boundary of their application to end at the location of the current Esk River Mouth. Counsel for the respondents submit that these maps were only meant to act as a general reference and were not intended to be fully accurate. However, given that the Esk River would reasonably be construed as referring to its current position, the respondents would have been more explicit about their definition of the Esk as being its historical location, especially as it was the key marker for the southern boundary of their application if that was actually what had been intended.

[64] For this same reason, the respondents would have been expected to clarify their position on the historical position of the Esk River to this Court at an earlier stage. This could have occurred in their memorandum in response to the 21 March 2018 minute of Collins J, where they again included Map One and Map Two, or when the Crown filed memoranda on 25 May 2018 detailing the approximate boundaries of each application area and referred to the south boundary as the Esk River Mouth. Counsel maintained that no opportunity was given to provide

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42 At [20]-[21].

feedback on the Crown maps, but the respondents could have raised the issue with either the Crown or this Court if they considered the boundaries to be inaccurate due to the use of the current Esk River Mouth as a marker.

[65] Secondly, given the past definition of the Ngāti Pāhauwera boundary, the extension to the application area through the amendment is considerable. Even taking counsel for the respondents' estimate of a 17 per cent increase in the application area, as opposed to an increase of over 50 per cent according to counsel for the applicants, the result of this amended application would be a significantly greater overlap with the application areas of both the applicants and Ngāti Pārau. Counsel for Ngāti Pārau noted that this would include Te Whanganui-a-Orotu, an area which the Waitangi Tribunal in its 1995 *Te Whanganui-a-Orotu Report* found that seven hapū, including Ngāti Pārau, had customary interests in, or "tangata whenua status" over, as a result of occupation, control and use,[43] but that Ngāti Pāhauwera could not be included as tangata whenua due to their interests in the area mainly arising through whanaungatanga with those seven hapū, rather than ahi kaa, occupation or control.[44] Consequently, this extension would likely entail the addition of new evidence and inquiries from the parties into the customary interests of Ngāti Pāhauwera over this new extended area. It cannot be characterised as a "relatively insignificant" geographical change in the same manner as what the Court in *Ophthalmological Society*[45] was referring to; given the number of hapū with connections to Te Whanganui-ā-Orotu alone, and the importance of whenua and takutai moana to Māori overall, an overlapping extension of this nature is not insignificant.

[66] Thirdly, and as a result of the two factors above, this case is distinguishable from *Tipene*. The case before the Court in *Tipene* concerned a refinement which narrowed the application area before the final filing date. When stating that this Court should not take an unduly narrow approach to permissible amendments under the Act, Mallon J explicitly noted that this was in part because that "may have undesirable consequences as the 3 April 2017 date approaches".[46] In this case, the amendment occurred well after the 3 April 2017 date, and involved a considerable extension increasing the overlap with the applications of other parties. As a result, the nature of the amendment differs from *Tipene;* it is not a permissible refinement but a material change, which alters the very essence of the pleadings.

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43 Waitangi Tribunal *Te Whanganui-a-Orotu Report* (Wai 55, 1995) at 1.3.
44 *Te Whanganui-a-Orotu Report*, above n 43, at 11.9.
45 Above n 34.
46 *Re Tipene*, above n 7, at [21].

[67] Fourthly and finally, the relevant considerations set out by the Crown and referred to at [49] of this judgment are applicable here and may be useful in determining strike-out proceedings of this nature in the future. In particular, because of the range of overlapping interests in the new area that the respondents have extended their boundaries, this amendment is both likely to require substantial additional evidence from the applicants and Ngāti Pārau, and that while the evidence filed by the parties to date remains relevant to the application, the amendment gives rise to significant new factual issues. Therefore, I conclude that this amendment constitutes a fresh cause of action that is sufficiently and clearly statute-barred to the point that it can be struck out as an abuse of process under s 107(3)(d) or r 15.1(1)(d).

Prejudice and delay

[68] As discussed at [27] above, counsel for the applicants cited the case of *Waitakere City Council* in relation to prejudice arising from a fresh cause of action. In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, the Court of Appeal noted that prejudice under r 15.1(1)(b) requires an element of impropriety and abuse of the Court's processes.[47] Although abuse of process has already been made out under r 15.1(1)(d), it goes too far to describe the claim as having an element of impropriety. It is not vexatious, which was given as an example of impropriety in *Chesterfields*.[48] However, there is a stronger argument for a consequence of the amendment being delay. This is because both the applicants and Ngāti Pārau would likely have to undertake significant additional research and preparation in order to assess and dispute the customary interests over the new area that the respondents' application now extends.

[69] While counsel for the respondents correctly acknowledged that the evidence prepared by both the applicants and Ngāti Pārau thus far will still be applicable, given the nature of the coastal area in the respondents' amended application, particularly Te Whanganui-a-Orotu, the applicants and Ngāti Pārau will have to both supplement their own evidence of customary interests in the area, and to consider and factor in additional evidence from the respondents. Counsel for the Crown also signalled that if the amendment was allowed, further public notice should be given, and further interested parties should be granted leave to file a notice of appearance under s 104 of the Act. Counsel for the Crown submitted that as most deadlines for the substantive hearing of the Ngāti Pāhauwera claim are some time away (the hearing is due

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47 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, above n 22, at [89]. See also *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.1.03[(1)].

48 At [89].

to commence on 9 February 2021), introduction of additional parties would not adversely affect the timetable. However, I consider the need for the addition of new parties, as well as an increase in the evidence to be considered for all the current parties, as potentially delaying the timetable. The factor of delay under r 15.1(1)(b) also supports the striking out of the extended part of the amended claim.

Late amendment

[70] Counsel for the respondents, referring to *Body Corporate 177519 v Auckland City Council*, argued that an amended pleading may be permitted even where there is serious prejudice and significant delay, if the claim has substantial merit and is not unjust. While Ellis J in that case did observe that she would be prepared to grant leave notwithstanding the issues with prejudice and delay, she ultimately refused leave on the basis that the amended pleading was not only prejudicial but lacked substantive merit.[49] Ellis J also applied the principles in *Elders Pastoral Ltd v Marr*, in which the Court of Appeal found that leave to amend pleadings will only be granted if it is in the interests of justice and does not significantly prejudice or delay the other party.[50] In *Canterbury Medical Officer of Health v Bond Markets Ltd,* Gendall J approved this approach, noting:[51]

> In order to obtain leave to take such an amending step, not only after the close of pleadings date but also after what is effectively the close of the trial here, it is necessary for the appellant to "surmount the three formidable hurdles" of showing that doing so would be in the interests of justice and it would not significantly prejudice other parties or cause significant delay. The Court must weigh these constraints against the principle that parties should have every opportunity to ensure that the real controversy between them is determined.

[71] Considering this balancing exercise, I note that the parties, specifically the respondents, did have an opportunity to ensure that the issue in this case was determined, by submitting the extended boundaries before the filing date. While I have already discussed the issue of prejudice and delay above, I do not think that a late amendment can be justified in this case. This is because I consider that it would not be in the interests of justice to do so.

[72] The Act, as set out in s 4 and the preamble, is intended to establish a durable scheme that will ensure inalienable and enduring legal rights and interests for Māori whānau, hapū, and

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49 *Body Corporate 177519 v Auckland City Council*, above n 24, at [19] and [33].
50 At [12].
51 *Canterbury Medical Officer of Health v Bond Markets Ltd* [2018] NZHC 496 at [31].

iwi over the coastal marine environment to which they are intrinsically connected through mana, rangatiratanga, kaitiakitanga and whanaungatanga.[52] The durability of this legislation, and this purpose, is weakened if impermissible material changes are allowed to be made to applications under the Act after the limitation period has long since passed, because it may undermine the applications of other whānau, hapū, and iwi. Again, as observed by Mallon J, the Court must not take an unduly narrow approach to permissible amendments, but they must in fact, be permissible.

Conclusion and result

[73] For the reasons discussed above, that the part of the respondents' application that comprises the extended application area is struck out.

[74] I invite the parties to settle costs themselves and am of the preliminary view that costs should lie where they fall but if any party wishes to apply for a costs order, they should file and serve that application within 14 days of this judgment, with the other party having 14 days to reply.

Churchman J

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Smail Legal Limited, Auckland for Ngāti Pāhauwera Development Trust
DLA Piper, Wellington for Maungaharuru-Tangitū Trust
Kahui Legal, Wellington for Ngāti Parau
Tamaki Legal Limited, Auckland for Ngai Tahu o Mōhaka Waikare

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[52] Marine and Coastal Area (Takutai Moana) Act 2011, s 4 and preamble. See also Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 2.1.5.