IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-793
[2021] NZHC 2726

UNDER	The Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	An application for an order recognising Customary Marine Title and Protected Customary Rights
BY	Colin Francis Reeder and Ngā Pōtiki ā Tamapāhore Trust on behalf of Ngā Pōtiki

CONTINUED OVERLEAF

Hearing: 19-22 and 27-29 April 2021, 4 and 5 May 2021

Appearances: A Warren and J Lewis for Ngā Pōtiki ā Tamapāhore Trust (CIV-2011-485-793)
M Sharp (and S T Webster on 22 April 2021) for Ngāti Hē Hapū Trust (CIV-2017-485-219)
T Bennion for Te Tāwharau o Ngāti Pūkenga (CIV-2017-485-250)
J Gear for Ngāi Te Rangi Settlement Trust (CIV-2017-485- 244H)
N Tahana, A Tapsell and M Grant for Ngā Hapū o Ngāti Ranginui Settlement Trust (CIV-2017-485-294)
G Melvin, A Goosen, and N-B Ngaronoa for the Attorney General
H Leef for Tauranga City Council

Further submissions completed: 12 July 2021

Judgment: 12 October 2021

JUDGMENT OF POWELL J
[Ngā Pōtiki Stage 1 – Te Tāhuna o Rangataua]

BY Te Tāwharau o Ngāti Pūkenga on behalf of Ngāti Pūkenga
(CIV-2017-485-250)

BY: Mita Michael Ririnui as chairperson of the Ngāti Hē Hapū Trust for and on behalf of Ngāti Hē
(CIV-2017-485-219)

BY: Charlie Tawhiao and others as Trustees of the Ngāi Te Rangi Settlement Trust on behalf of Ngāi Tukairangi and Ngāti Tapū
(CIV-2017-485-244H)

BY: The Trustees of the Ngā Hapū o Ngāti Ranginui Settlement Trust on behalf of Ngāi Te Ahi and Ngāti Ruahine
(CIV-2017-484-294)

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Kei Rangataua, ko Tamapāhore
Ngā Papaka o Rangataua
He paru paru te kai
He taniwha ngā Tangata

Keenly I look across to Tauranga
where dwells Te Rangihouhiri and Ranginui
And over at Te Tāhuna o Rangataua
The crabs of Rangataua
they eat mud,
and have the boldness of demigods.[1]

Whakatakinga / Introduction

[1] Within 10 minutes' drive of the Tauranga central business district is a tidal estuary. Roughly three kilometres in length on its longest axis and about two kilometres at its broadest, Te Tāhuna o Rangataua[2] is the eastern-most arm of Tauranga Moana (also known as Tauranga Harbour).

[2] Despite the closeness of Te Tāhuna o Rangataua to the fifth largest metropolitan centre in New Zealand, and despite residential subdivision occurring at the south-western end of the harbour, particularly in Te Tihi/Welcome Bay, the estuary is largely cut off from the rest of Tauranga Moana by the Maungatapū Bridge which carries State Highway 29A from Tauranga to Mount Maunganui and Pāpāmoa. Use and management of the estuary largely remains with a group of active Māori communities affiliating to no less than six marae. As is clear from the whakatauki above, these communities not only colloquially define themselves in part by their relationship to Te Tāhuna o Rangataua as "Ngā Pāpaka o Rangataua" ("the crabs of Rangataua"); they remain the owners of the majority of the land adjoining the estuary, and see themselves as both the traditional owners and kaitiaki of the estuary.

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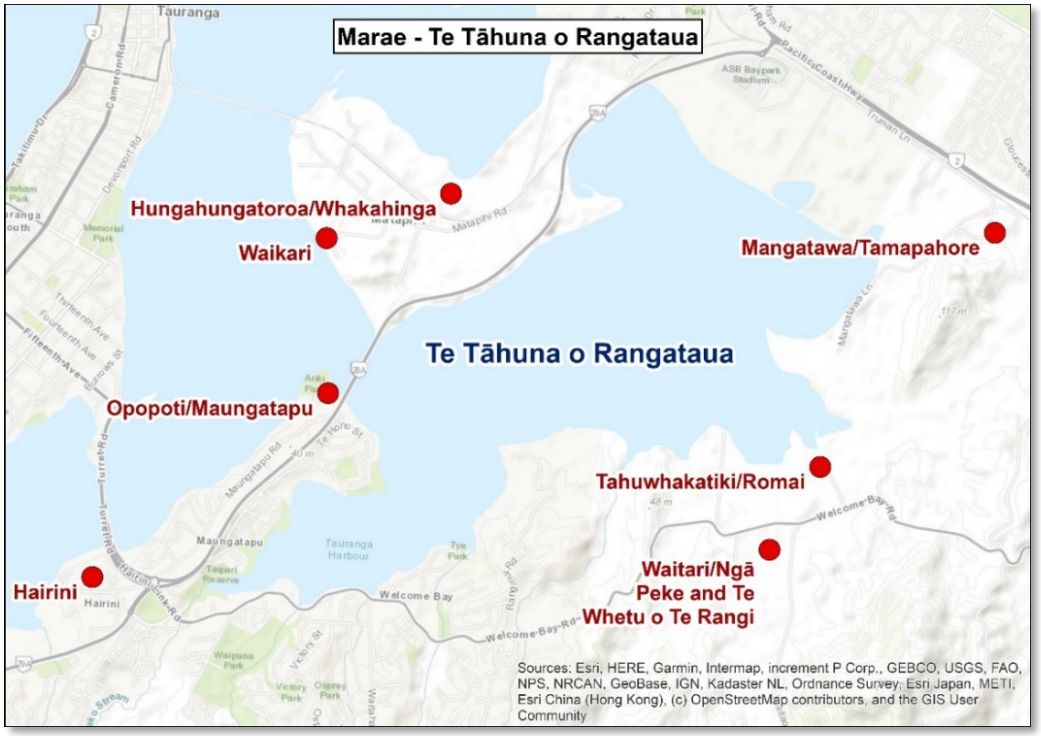
1 Traditional whakatauki or proverb. Translation by Colin Reeder.
2 Literally "bay of Rangataua".

[3] The striking nature of the ongoing Māori presence around Rangataua is illustrated by the map set out below.[3]



Map 1: Marae – Te Tāhuna o Rangataua

Ngā tono / The applications

[4] Seven groups, including groups representing all of the marae located around the harbour and in the wider vicinity, apply for recognition of their customary rights in respect of Te Tāhuna o Rangataua through the issue of a customary marine title ("CMT") under the Marine and Coastal Area (Takutai Moana) Act 2011 ("the MACA").[4]

[5] The applicants are:

(a) Colin Francis Reeder and Ngā Pōtiki ā Tamapāhore Trust on behalf of Ngā Pōtiki ("Ngā Pōtiki");

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3 See Map 1: Marae – Te Tāhuna o Rangataua. For a larger copy of the map, see Appendix 1.

4 Collins J previously determined that the Stage 1 hearings would be limited to the hearing of CMT as the Crown were engaging with Ngā Pōtiki over protected customary rights: Minute (No. 5) of Collins J dated 18 July 2018 at [55]-[58] and [64]-[66].

(b) Te Tāwharau o Ngāti Pūkenga on behalf of Ngāti Pūkenga ("Ngāti Pūkenga");

(c) Mita Michael Ririnui as chairperson of the Ngāti Hē Hapū Trust for and on behalf of Ngāti Hē ("Ngāti Hē");

(d) Charlie Tawhiao and others as Trustees of the Ngāi Te Rangi Settlement Trust on behalf of Ngāi Tukairangi ("Ngāi Tukairangi") and Ngāti Tapū ("Ngāti Tapū"); and

(e) the Trustees of the Ngā Hapū o Ngāti Ranginui Settlement Trust ("Ngāti Ranginui Settlement Trust") on behalf of Ngāi Te Ahi ("Ngāi Te Ahi") and Ngāti Ruahine ("Ngāti Ruahine").

Ngā kaitono / The applicants

[6] Ngā Pōtiki see themselves as a semi-autonomous hapū with strong affiliations to Ngāi Te Rangi iwi. They are centred upon Tamapāhore marae at Mangatawa and Tahuwhakatiki marae, both at the eastern end of the estuary. Also on the eastern side are Ngāti Pukenga based at Te Whetu o te Rangi marae on the historical Ngā Peke block, one of four marae of a relatively small but geographically dispersed iwi.[5]

[7] Ngāi Tukairangi and Ngāti Tapū, hapū of Ngāi Te Rangi, both have marae situated on Matapihi, the peninsula on the north-western side of the estuary.[6] To the south, Ngāti Hē, also regarded as a hapū of Ngāi Te Rangi and with close links to Waitaha, are located across the entrance to Te Tāhuna o Rangataua at Opopoti marae sitting on the bay at the northern end of the Maungatapū peninsula.

[8] Hapū of Ngāti Ranginui iwi, Ngāi Te Ahi and Ngāti Ruahine are not directly located on Te Tāhuna o Rangataua. Although Ngāi Te Ahi have close links to Ngāti Hē in particular, their own marae is at Hairini on the neighbouring arm of Tauranga Moana, while no direct evidence was provided about Ngāti Ruahine.

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5 The other Ngāti Pukenga marae are located at Maketu, Manaia and Whangarei.
6 Hungahungatoroa (Ngāi Tukairangi) and Waikari (Ngāti Tapū) marae.

[9] All seven applicant groups seek to be included in a single CMT encompassing Te Tāhuna o Rangataua. Ngā Pōtiki, Ngāi Tukairangi, Ngāti Tapū, Ngāti Hē and Ngāti Pūkenga ("the Rangataua Working Party applicants") applied at the conclusion of the hearing to consolidate their individual overlapping applications into a single joint application, with any resulting CMT to be held jointly by the five parties in a new legal entity to be known as Ngā Pāpaka o Rangataua. There was no opposition to this application. Indeed, the Crown supported it as necessary if a CMT was to be issued, as it was otherwise impossible for each individual group to show exclusive occupation over the same area. Likewise, the applicant Ngāti Ranginui hapū, Ngāi Te Ahi and Ngāti Ruahine do not oppose a single united application but rather seek to be included in that single CMT.

[10] The applications have been given a priority hearing because Ngā Pōtiki previously applied for recognition of their customary rights over Te Tāhuna o Rangataua under the now-repealed Foreshore and Seabed Act 2004 ("the FASA").[7] The claims of Ngā Pōtiki have been split into two stages, with their claims and the claims of the other applicants in respect of Te Tāhuna o Rangataua being heard as Stage 1. Stage 2 includes the area to seaward of Pāpāmoa including adjacent islands and commenced hearing in September 2021.

Rohe tono / The application area

[11] The application area encompassed by the Stage 1 hearings was finalised over the course of the proceedings. It was originally envisaged that the hearings would consider the applications to Te Tāhuna o Rangataua to the east of the Maungatapū Bridge. In March 2021, shortly before the commencement of the hearings, it was proposed that the area subject to the Stage 1 hearing be extended from the Maungatapū Bridge to a point between the northernmost tip of the Maungatapū peninsula at Whakaneke and a point on the Matapihi peninsula slightly south of Waikari Marae at Te Ahipouto. This extension ("the extended Stage 1 application area") was supported by the Crown and otherwise not opposed by any party. During the hearing, including the site visit undertaken on 20 April 2021, "it became clear that the additional area sought to be included in the extended boundaries for Stage 1 was logically, culturally

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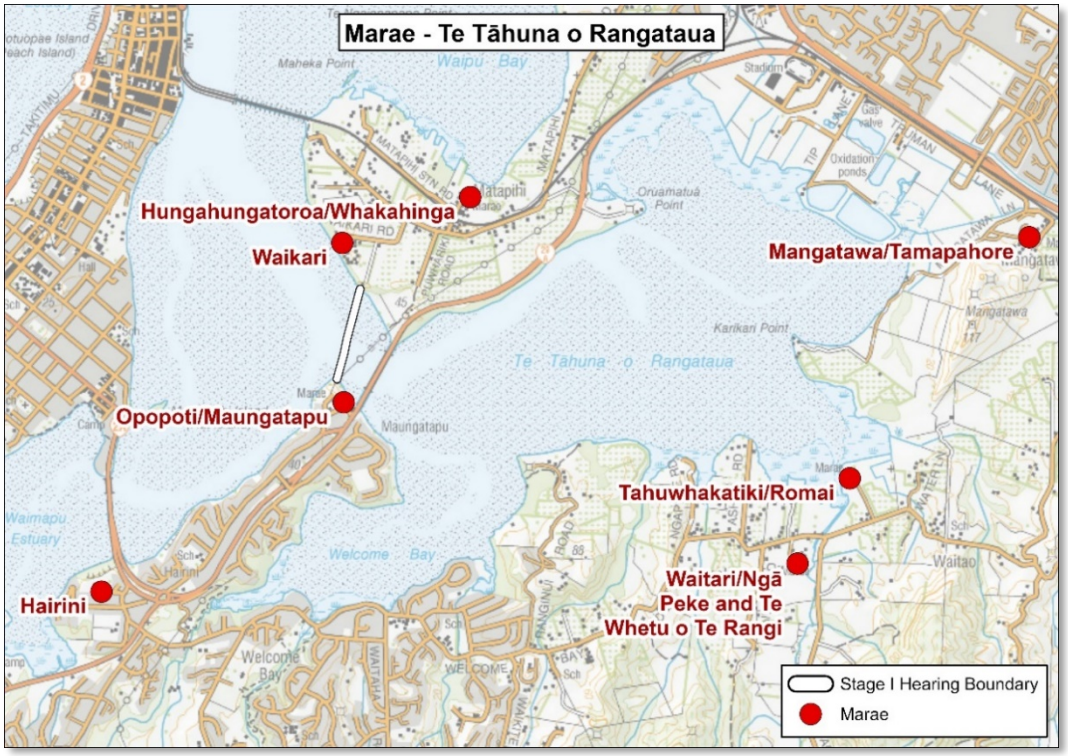
7 MACA, s 125.

and geographically appropriate and I therefore confirmed the extension in the course of the hearing".[8] I went on to note:

> … the location of the Maungatapū Marae and and Te Pā o Te Ariki to the east of the Maungatapū bridge in State Highway 29A made it clear that the extended boundaries proposed were far more appropriate in every respect than that provided by the Maungatapū bridge as the previous boundary.

[12] The extended Stage 1 application area is set out below:



Map 2: The extended application area.

Ngā rōpū whai pānga / Interested parties

[13] There is no opposition to a CMT order being recognised over Te Tāhuna o Rangataua. Although 11 parties including the Crown gave notice of an intention to appear as interested persons pursuant to s 104 of the MACA,[9] only the Crown participated throughout the Stage 1 hearings and it accepts that the tests for the issue of a CMT over Te Tāhuna o Rangataua have been met.

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8 Minute (No. 5) of Powell J dated 7 May 2021 at [8].

9 In addition, Whitiora McLeod applied to be joined as an interested person but leave was refused on 4 May 2021: Minute (No. 5) of Powell J dated 7 May 2021 at [9]-[19].

[14] Of the remaining interested persons, the Tauranga City Council and Bay of Plenty Regional Council provided information about assets within the application area and the extent of the coastal marine area respectively, but otherwise took no position on the applications. Four other interested persons took no position on the applications and did not participate in the hearings but filed legal submissions with regard to the legal effect of resource consents within the application area.[10] The remainder of the interested persons that gave notice did not participate in the hearing at all.[11]

Hanganga / Structure

[15] This judgment considers:

(a) the legislative framework for the recognition of CMT;

(b) the assessment of tikanga;

(c) the nature and extent of the customary rights exercised by the applicants against the legal tests for the recognition of CMT;

(d) whether any customary rights identified have been legally extinguished; and

(e) the terms of any orders necessary.

Anga whakatureture / Legislative framework

[16] The background to and structure of the MACA has already been the subject of judgments of this Court, namely *Re Tipene* and *Re Edwards (No 2) ("Re Edwards")*, and I generally adopt the analysis of Mallon and Churchman JJ respectively.[12]

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10 Sunchaser Investment Limited Partnership, Te Tumu Kaituna 14 Trust, Ford Land Holdings Pty Ltd and Carrus Corporation Ltd.

11 Landowners Coalition, Mt Maunganui Environmental Group, Council of Outdoor Recreation New Zealand and The Seafood Industry Representatives.

12 *Re Tipene* [2016] NZHC 3199 and *Re Edwards (No 2)* [2021] NZHC 1025.

[17] The starting point is that both the preamble and purpose[13] of the MACA are prefaced on the existence of Māori customary rights in the foreshore[14] and seabed.[15] The Act provides that those interests can be recognised in what is defined as the common marine and coastal area ("CMCA").[16] This includes the foreshore and seabed from mean high water springs to the limits of the territorial sea,[17] including beds of rivers within the coastal marine area, the air and water-space above the foreshore and seabed (but not the water), and the subsoil and bedrock below the foreshore and seabed (defined as the marine and coastal area), excluding specified freehold land, land owned by the Crown, or land in a conservation area, national park or reserve.[18]

[18] The MACA provides mechanisms for determining whether identified customary rights can then be recognised as either CMT[19] or protected customary rights ("PCR"),[20] and outlines the consequences of such a determination, including the types of protection that can result.[21]

[19] As has been noted, the present applications seek only a single CMT over Te Tāhuna o Rangataua.[22] The criteria for the issue of CMT are set out in ss 58 and 59 of the Act. The key elements of the test are outlined in s 58(1), which provides:

> (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).

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13 MACA, s 4. See in particular s 4(1)(b).
14 The area between high water springs and low water springs covered and uncovered by the tide.
15 The area within the extended application area covered by water even at low water springs.
16 MACA, s 2.
17 Commonly referred to as the "12 mile limit" extending 12 nautical miles (approximately 22.2 km) from the baseline of the territorial sea as defined in the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.
18 MACA, s 9 definitions of "marine and coastal area" and "common marine and coastal area".
19 MACA, ss 58-59.
20 MACA, ss 51.
21 MACA, ss 52-55 and 60-82.
22 Minute (No. 5) of Collins J dated 18 July 2018.

[20] Section 106(2) provides that it is for an applicant to prove that a 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.

[21] As Churchman J noted in *Re Edwards*,[23] the fact s 106(2) does not require an applicant to specifically prove all components of the test in s 58(1) is of no moment. Although the formulation of the test and the wording of s 106(2) does not match, the MACA is clear that it is the s 58(1) test that must be met before a CMT can be issued. As the additional requirements set out in s 58(1)(b)(i) are not otherwise presumed to have been met, and no other party is required to prove those components, it follows unless there is evidence addressing those issues a CMT cannot be granted. It is therefore implicit that the applicant group bears the practical burden of establishing their use and occupation of the area was exclusive in terms of the test and that such use has continued without substantial interruption.

[22] Establishing the components of s 58(1) is not in itself sufficient, as s 58(4) provides that "customary marine title does not exist if that title is extinguished as a matter of law". However, s 106(3) provides that, "in the absence of proof to the contrary", a customary interest has not been extinguished. This effectively puts the burden of proof of any extinguishment on the party seeking to rely upon it.

Held in accordance with tikanga

[23] With regard to the first part of the test, Crown counsel Mr Melvin submitted that while the phrase "holds in accordance with tikanga":

> … does not connote ownership in an exclusive, individualised, western, legal sense … to continue the analogy with western, legal terms, the court should be satisfied the evidence shows a proprietary-like holding of the specified area of the CMCA according to tikanga.
>
> (citations omitted)

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[23] *Re Edwards (No 2)* [2021] NZHC 1025 at [119]-[131].

[24] The rationale for this approach was purportedly to reflect "the common law distinction between territorial rights, which are interests in land, and non-territorial rights, which are rights to carry out activities over or in a certain area". A similar argument was rejected by Churchman J:[24]

> Interpreting s 58(1)(a) in this manner would … be inconsistent with the stated purpose of the Act, particularly recognition of the mana tuku iho of applicant groups as tangata whenua, provision for the exercise of customary interests in the takutai moana and acknowledgement of the Treaty of Waitangi. It is also difficult to see how it would achieve the purpose of implementing a durable scheme to protect all the legitimate interests of New Zealanders in the takutai moana, as it would severely restrict the possibility of a successful application.
>
> Holding an area of the takutai moana in accordance with tikanga is something different to being the proprietor of that area. Whether or not an applicant group has established that they held an area in accordance with tikanga is to be determined by focusing on the evidence of tikanga, and the lived experience of that applicant group. The exercise involves looking outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European legal concepts.

[25] This is clearly correct. While as Mr Melvin noted there is a difference between the exercise of non-territorial rights such that would give rise to the issue of a PCR, and holding in accordance with tikanga which denotes the exercise of rights over the foreshore and seabed, this does not require or imply any requirement for reading into tikanga a legal concept like "proprietary". Although the manifestations of the tikanga identified in the course of an application may appear to an outside observer to have "proprietary-like" elements, that is an essentially coincidental consequence of the tikanga. It is neither a prerequisite to the issue of a CMT nor a component of the test to be applied. As Churchman J confirmed, when a court is attempting to analyse tikanga Māori:[25]

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

[26] As previous judgments have noted, the concept of "holding" in accordance with tikanga Māori is not new.[26] It is the current test for determining whether land is

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24 At [129]-[130].

25 At [178].

26 See for example *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212 and *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA). (Note that

customary Māori land for the purposes of Te Ture Whenua Māori Act 1993 ("TTWM"), and entitling the owners of that land (once identified) to a certificate of title under the Land Transfer Act 2017.[27] The same test therefore applied to the determination of customary interests in the foreshore and seabed prior to the FASA and the MACA and the subsequent limitation in the type of recognition that could be given for Māori interests in the foreshore and seabed.

[27] Despite that, earlier Native Land Court/Māori Land Court authority is of limited assistance. In part, this is because the issue generally before that Court has not been whether the land was Māori customary land but the identity of those who held the interests in that land. Historically this was because once those with interests were identified the land could be alienated from those owners.[28] An exception was *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board.*[29] Although the status of the land in question was not in dispute,[30] Judge A D Spencer nonetheless considered the meaning of "held in accordance with tikanga" and concluded that the term "held" reflected the continuity of the customary relationship with the land rather than the imposition of European concepts of ownership. As his Honour explained:[31]

> In contemporary terms a distinction may be made between Maori customary land and Maori freehold land, Under the 1993 Act, as discussed above, the former is "held" rather than "owned". With Maori freehold land, however, it may be that ownership of interests may now be tikanga (subject to constraints of alienation within "preferred classes of alienees" etc) inasmuch as it has become accepted practice among Maori to own land (in relative interests) where title to the land has been determined by the Court. The same cannot be said, however, of Maori customary land and the rights attaching to it. Under the Act

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the citation in the New Zealand Law Reports is incorrect – the eight Te Tau Ihu iwi were the appellants and the Attorney-General the respondent in the Court of Appeal).

27 Under s 129(2)(a) of TTWM, "land that is held by Māori in accordance with tikanga Māori shall have the status of Māori customary land". Earlier statutes since 1862 similarly stated that every title and interest in customary land shall be determined "according to the ancient custom and usage of the Māori people": See for example Native Land Court Act 1909, s 91; Native Land Court Act 1931, s 119; and Māori Affairs Act 1953, s 161(2). This formulation echoes the definition of tikanga in s 4 of the TTWM – "Māori customary values and practices".

28 See generally David Williams *Te Kooti tango whenua: The Native Land Court 1864-1909* (Huia, Wellington, 1999).

29 (1998) 25 Tai Tokerau MB 212. See also the discussion in *Bell v Churton* (2019) 410 Aotea MB 244.

30 The case involved a number of small rocks and islets off the coast of Aotea/Great Barrier Island which were acknowledged by the Crown as being Māori customary land. As a result, the primary issue was the identity of the appropriate customary owners: *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212 at 213.

31 At 238.

> and in practice, customary land and things associated with it continue to be "held" rather than owned.

[28] More fundamentally, however, the test for CMT under the MACA is different to the test under TTWM. Although it cannot be correct to imply "proprietary-like" concepts to holding in accordance with tikanga in the first part of the test for CMT, the test, unlike the test in TTWM, is not limited to whether the application area is "held in accordance with tikanga".

Exclusive use and occupation from 1840 until present

[29] The legislature has chosen to add a second part to the test, with s 58(1)(b)(i) of the MACA imposing additional qualitative and temporal components. As a result, a CMT can only be issued if it is shown the applicant group has "exclusively used and occupied [the area subject to the application] from 1840 to the present day without substantial interruption".

[30] These additional requirements must be present notwithstanding a CMT falls far short of the type of fee simple title resulting if land is held in accordance with tikanga Māori under TTWM.[32]

[31] With regard to the first additional requirement, that an applicant group has "exclusively used and occupied" the area subject to the application, while some type of occupation and use is necessary, use and occupation to the exclusion of all others as the words on their face might suggest is not required. Instead, and as Mr Melvin accepted, it is critical to consider the context of an application for a CMT in order to interpret the meaning of exclusive use and occupation for the purposes of the MACA. This context includes the MACA itself, as well as the nature of the physical environment over which the rights under consideration are exercised, and the nature of the tikanga under which the specified area can be said to be held.

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[32] Other than the even more restrictive tests imposed by the short-lived FASA. No FASA application for Territorial Customary Rights (the FASA equivalent of CMT) was ever heard and therefore no judicial consideration to that test ever given. See *Re Edwards (No 2)* [2021] NZHC 1025 at [79]-[80] and [128].

[32] First, the MACA makes it clear it is designed to provide recognition for Māori customary rights to the foreshore and seabed. It gives no indication that it has set out a test that cannot possibly be met. As para (4) of the preamble to the MACA provides:

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

[33] Secondly, s 4 defines the purpose of the legislation in the following terms:

> (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).
>
> (2) To that end, this Act—
>
> (a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
>
> (b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and
>
> (c) gives legal expression to customary interests; and
>
> (d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and
>
> (e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—
>
> (i) for its intrinsic worth; and
>
> (ii) for the benefit, use, and enjoyment of the public of New Zealand.

[34] Moreover, s 7 confirms that the MACA is intended to acknowledge the Treaty of Waitangi / te Tiriti o Waitangi:

> 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,—
>
> (a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and
>
> (b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and
>
> (c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

[35] Against this background, it is clear the requirement for exclusive use and occupation in s 58(1)(b)(i) does not in fact require exclusivity, nor indeed, given the "without substantial interruption" component, use and occupation that is either continuous or constant. Critically, not only are public rights of access established in parallel to the recognition of customary rights but s 59(3) of the MACA makes explicit that the fact others have utilised the application area for the purposes of both navigation[33] and fishing[34] does not of itself prevent the issue of a CMT. The section provides:

> 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.

[36] This exception reflects the nature of the CMCA and makes it clear the interpretation must be informed by the relevant tikanga. For example, as the CMCA is made up of foreshore and seabed, it is clear that outside of any permanent structures access will otherwise be transitory, predominantly for the purposes of navigation or fishing, or walking when the tide is out. How the applicable tikanga deals with these types of activities will therefore be of central importance.

[37] The nature of the CMCA in fact limits both the type and ambit of activities that can be carried out in the CMCA. As a result, and as the MACA provides, the ownership of land abutting the area for which a CMT has been applied will often be

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33 MACA, s 27(1).
34 MACA, s 28.

relevant, as well as evidence of the exercise of non-commercial customary fishing rights by the applicant group.[35]

[38] It is important to bear in mind this context, and the central importance of tikanga, when considering comments made by the Supreme Court of Canada in relation to phraseology similar to the MACA (and from where the MACA wording appears to have emanated). Those decisions, including *Delgamuukw v British Columbia*[36] and *Tsilhqot'in Nation v British Columbia*,[37] involved customary rights to land and therefore placed considerable weight on continuous habitation including such things as the construction of dwellings and the planting of crops. Despite that, I agree with counsel that some of the general statements contained in the Canadian decisions are helpful when considering use, occupancy and exclusivity. As the Supreme Court of Canada noted in relation to occupancy in *Delgamuukw*:[38]

> Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture.

[39] Likewise, in *Tsilhqot'in Nation*:[39]

> To sufficiently occupy the land for the purpose of title, the Aboriginal group … must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.

[40] The Supreme Court of Canada also makes clear that exclusivity does not mean third party access to lands is fatal to a claim for customary ownership. Instead, the Court highlighted the importance of the applicant's own customs (tikanga in the

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35 MACA, s 59(1)(a).
36 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
37 *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256.
38 At 1015.
39 At [38].

New Zealand context) in determining whether third party access is consistent or inconsistent with the notion of exclusive use and occupation:[40]

> Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land … depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

[41] Overall, for the reasons set out above, I conclude that the requirement for exclusive use and occupation of the CMCA set out in s 58(1)(b)(i) does not sit easily with the rest of the MACA and when properly reconciled with the rest of the Act clearly sets a much lower threshold than the wording of the section would otherwise suggest. What is required is evidence of authority giving rise to an ability or intention to exclude others, noting that tikanga may not in fact require the actual exclusion of third parties at any point. Consequently, and subject to the applicable tikanga, it follows:

(a) the fact that third parties, whether Māori or the wider community, have not been excluded by an applicant group at any point is not of itself evidence that an applicant group has not exclusively used and occupied a particular part of the CMCA; but

(b) a lack of interference with the exercise of customary use over the application area by third parties, whether Māori or the wider community, may provide evidence that an applicant has exclusively used and occupied that area.

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[40] At [48].

[42] I turn now to the second part of the additional requirements set out in s 58(1)(b)(i), that the exclusive use and occupation has occurred "from 1840 to the present day without substantial interruption".

[43] The term "without substantial interruption" is not defined. As counsel have noted, the phrase has been used in various Australian cases considering customary rights,[41] and in those cases customary rights were only found to have been substantially interrupted when the cultural connection was lost. Within s 58(1)(b)(i) of the MACA however the phrase "without substantial interruption" is clearly a qualification to the requirement for exclusive use and occupation. As a qualification to the first part of the test in s 58(1)(b)(i) the phrase is not concerned with the nature of the connection itself (as in Australia), and the Australian cases are therefore of no relevance.

[44] As with "exclusively used and occupied", the requirement for continuity is self-evidently dependent on both the nature of the environment and the tikanga applicable to the area in question, and both will colour what is a substantial interruption in any given situation.

[45] It is however equally clear that if the statutory test was not established as at 1840 and maintained without substantial interruption, the only other way a CMT can be established is where there has been a customary transfer of land after 1840 by a group that had established its only customary rights as at 1840 and maintained them without substantial interruption until the date of the customary transfer.[42]

The assessment of tikanga

[46] In support of their application, the Rangataua Working Group applicants commissioned expert evidence on the meaning of "tikanga" and "held in accordance with tikanga" from Dr Te Kahautu Maxwell, an expert in Matauranga Māori. Dr Maxwell's qualifications and evidence were not disputed and his evidence was equally relevant to the applications of the Ngāti Ranginui hapū.

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41 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58, (2002) 214 CLR 422 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

42 MACA, s 58(1)(b)(ii) and (3).

[47] Dr Maxwell began by describing tikanga in the following terms:

> *Tikanga Māori* has become a common term, understanding its meaning; function and its application vary considerably. Although the word tikanga is used a lot, understanding tikanga and knowing its functions is not well known to the majority. Most have little or no knowledge this is due to colonisation, Christianity, land confiscation, the education system and the World Wars and other influences.
>
> Tikanga is a way of life. Tikanga is a set of rules that governs how we behave, how we conduct ourselves and interact with others that is appropriate and in accordance with the laws of one's iwi. Tikanga Māori was an essential part of the traditional Māori normative system since it dealt with moral behaviour, with correct ways of behaving and with processes for correcting and compensating for bad behaviour (Mead 2016: 6-7).
>
> Williams' Dictionary of the Māori Language (2016: 416-17) provides a number of definitions for tikanga. Tikanga can be a rule, a plan, a method, a custom, and a habit. Tikanga can refer to anything normal or usual. Tikanga can mean a reason for being and doing. Tikanga is a meaning. Tikanga provides the reason and meaning for doing something in accordance to Maori custom. Tikanga is authority and control. Tikanga is the correct way of carrying out a task. Tikanga acts as a signpost pointing you in the right direction. The base word of 'tikanga' is 'tika' meaning right or correct.

[48] From there, Dr Maxwell identified the following concepts and core values that underpin tikanga:

> In understanding the nature of tikanga, it is advisable to emphasise the concept of pono because it is an old idea and because its meaning is free of other connotations. By focusing on pono, a judgement may thus be made on whether the practice of a particular tikanga is true to the principles of Māoritanga (Mead 2016:30).
>
> There are a number of core values that underpin tikanga: whanaungatanga; mana; tapu; manaakitanga; and aroha. There are iwi variations of the core values, and therefore the above list is how I understand tikanga and see tikanga to being. Therefore, these core values are not prescribed and may differ from iwi to iwi. These core values are like a whariki; a woven mat, they must go together for tikanga to stand up. You must understand the core values for you to understand tikanga, because it is these core values that instruct you how to behave in the correct manner, which is tikanga.

[49] In the course of elaborating on those core values, Dr Maxwell explained the relationship of tikanga with a range of other traditional concepts, as well as how interests in land were traditionally gained or lost.[43] He explained in relation to mana:

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[43] Including whenua tuku (gifts of land), pakanga (land won and lost through war), ahi kā and continual occupation and the significance of the presence of taniwha, urupa and wāhi tapu, together with the imposition of rāhui.

> Personal and group relationships are always mediated and guided by the high value placed upon mana. Mana has to do with the place of the individual in the social group. Some individuals are regarded as having a high level of mana and others have varying levels (Mead 2016: 33).
>
> Mana is defined in the William's Dictionary of the Māori Language as authority, control, influence, prestige, and power on one hand, and psychic force on the other (Williams 2016: 172). There are three aspects of mana: mana atua - God given power; mana tupuna - power handed down from by one's ancestors; and mana tangata - authority derived from personal attributes (Boast et al 1999). The importance of these three mana explains the dynamics of Maori status and leadership and the accountability between the rangatira and their iwi.
>
> **Mana tupuna** was acquired from birth as mana handed down by one's ancestors. The mātāmua (the eldest child of the sibling set, or in some iwi the first-born male child) acquired the greatest share of mana tupuna. The shares would then decrease in order of birth. In the traditional sense it meant that those with senior whakapapa lines had a head start in the expectation of leadership positions (NZ Law Commission 2001: 33).
>
> **Mana tangata** (achieved through feats of bravery, skill or knowledge) was also important if one wanted to be a leader. If one had mana tupuna, but not mana tangata, then he or she could be expected to be by passed for someone who had both. In this situation, whakapapa could be tailored to show a link to the senior lines of descent (Boast et al 1999: 38). Mana tangata allowed for class mobility, and was often judged not from the perspective of personal achievement, rather the ability to benefit the collective (Durie 1994: 6).
>
> **Mana Ariki:** The final segment of mana is mana atua. Mana atua emphasises the tapu nature of the leadership role and the respect which the community owes its chosen leaders (Williams 2010:12). It governed individual and community behaviour and conduct, in that a rangatira who wore the mantle of mana atua and mana tupuna in abundance would be treated with awe and respect (NZ Law Commission 2001:35).

[50] Dr Maxwell set out the relationship between Māori and the takutai moana (coastal marine area) in the following terms:

> The Māori worldview on the takutai moana is a whakapapa, a genealogical link, a god, a living being, a god, an ancestor.
>
> …
>
> Iwi have their own tipua, taniwha and kaitiaki within their respective rohe. This reflects the Māori worldview, the genealogical links that Māori have to their environment and their responsibility as kaitiaki (guardians). Kaitiaki or guardian spirits are left behind by deceased ancestors to watch over their descendants and to protect sacred places. Kaitiaki are also messengers and a means of communication between the spirit realm and the human world.

> There are many representations of guardian spirits, but the most common are animals, birds, and insects and fish (Barlow 2018: 34).
>
> The takutai moana is the foreshore and seabed where all sea life on the foreshore, in the water and under the seabed resides. The whakapapa connects Maori to all elements of the moana and vice versa. This connection and pūrākau (stories) gives iwi dominion over their rohe moana in a kaitiaki capacity.
>
> The history of the gradual emergence of the terms "mana whenua" and "mana moana" are covered adequately in a very useful paper written by Paul Meredith in 2010 to assist claimants of Te Rarawa (Meredith, 2010). He expells the notion that these terms had a genesis in the Te Kooti Whenua Māori but were in fact deeply rooted in tikanga Māori. When referring to mana moana he provides satisfactory examples of how this works in practice and the mana that rangatira had and how was exercised over whenua and moana on behalf of the iwi.

[51] Bringing these various concepts together, Dr Maxwell went on to explain:

> In terms of the takutai moana, "holding in accordance with tikanga" means to have a type of mana to exercise over a particular area of the takutai moana. The type of mana could be; having mana moana over an area because it falls within the rohe moana of a hapū and more importantly an iwi.
>
> Mana is through whakapapa, which affords an individual or a hapū entitlement to the takutai moana.
>
> Mana is through a relationship to that area.

[52] In cross-examination by the Crown, Dr Maxwell agreed that evidence of the following activities would show an intention on the part of an applicant group to control an area of the takutai moana (in this case the CMCA) according to customary rules and interests:

(a) exercising manaakitanga;

(b) acting as kaitiaki by protecting and looking after the takutai moana and future generations;

(c) the ability to place customary restrictions on access and the taking of resources;

(d) observing the tikanga associated with wāhi tapu as a way of restricting a specific act or use of an area;

(e) knowledge that particular fishing grounds or rocks belong to a particular group by descent;

(f) exercising mana and rangatiratanga, which encompasses a level of authority over a rohe;

(g) acknowledgement of a group's customary authority in an area by other groups;

(h) restricting or regulating access to the common marine and coastal area across abutting land in the ownership of, or under the control of, the applicant group or members of it, where that occurs in accordance with tikanga.

[53] All parties accepted that this formulation, while not definitive, provides a useful guide for assessing the evidence of the applicants before the Court as to whether the test under s 58(1) has been met.

He tatāri o ngā tono / Analysis of the applications

[54] The present applications are the first under the MACA to be heard in Tauranga Moana, but the types of issues raised have a long history in Tauranga. As early as 1885, Taiapa Hori Ngatai, a Ngāi Te Rangi rangatira with strong links to both Ngāi Tukairangi and Ngāti Tapū in particular, told the Minister of Native Affairs:[44]

> Now with regard to the land below the high water mark immediately in front of where I live, I consider that as part and parcel of my own land .. .part of my own garden. From time immemorial I have had this land, and had authority over all the food in the sea. Te Maire was a fishing ground of mine. Onake that is a place which from time in memorial obtained pipis. The rona is another pipi bed, Te Karaka is another place. I am now speaking of the fishing-grounds inside the Tauranga Harbour. My mana over these places has never been taken away. I have always held authority over these fishing places and preserved them and no tribe is allowed to come here and fish without my consent being given. But now in consequence with the work of the Europeans that all the land below high water mark belongs to the Queen, people have trampled on our ancient Māori customs and are constantly coming over here whenever they like to fish. I ask that Māori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld.
>
> The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of rights within the Tauranga Harbour have been apportioned among our different people; and so with the fishing-grounds inside the heads; those are only small spots. I am speaking of the fishing-grounds where hapuku and tarakihi are caught. Those grounds have been handed down to us by our ancestors. This Māori custom of ours is well established and none of the inland tribes would dare go and fish on those places without obtaining the consent of the owners. I am not making this complaint out of a selfish desire to keep all of the fishing-grounds for myself, I am only striving to retain the authority which I inherited from my ancestors.

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[44] See Bruce Stirling *Te Tāhuna o Rangataua* (6 July 2020) at 42-43, a report prepared in support of the Rangataua Working Party applicants' application).

[55] Despite a promise from the Minister that the matters raised by Ngatai would be investigated, that did not occur. It is only now in the course of the present applications, some 135 years later, that the first investigation of those rights has taken place.[45]

[56] From this starting point, I turn to consider the present applications.

[57] The evidence presented makes it clear that the Rangataua Working Party applicants (Ngā Pōtiki, Ngāti Hē, Ngāti Tapū, Ngāi Tukairangi and Ngāti Pūkenga) have a substantially different relationship with Te Tāhuna o Rangataua from that of the two Ngāti Ranginui hapū applying to be included in any CMT, Ngāti Ruahine and Ngāi Te Ahi. This arises as a result of a significant event, a battle known as Kokowai.

[58] In particular, the Rangataua Working Party applicants Ngā Pōtiki, Ngāti Hē, Ngāti Tapū, Ngāi Tukairangi and Ngāti Pūkenga are all ultimately descendants of the victors of that battle, which took place on the side of Mauao,[46] and which it is thought to have occurred sometime towards the end of the 17th century or in the early years of the 18th century. Ngāti Ruahine and Ngāi Te Ahi are hapū of Ngāti Ranginui, who were defeated and displaced as a result of Kokowai. The relationships between the applicants in this case and their respective ability to meet the test for a CMT over Te Tāhuna o Rangataua cannot be understood without an appreciation of Kokowai and its aftermath.

[59] The evidence presented at the hearing disclosed little dispute as to the broad sequence of events. The summary that follows in this judgment is primarily taken from the evidence of Dr Hauata Palmer, a distinguished scholar, tribal historian and kaumatua of Ngāi Te Rangi, whose account had previously been presented to the Waitangi Tribunal in the course of its inquiry into the Tauranga confiscation claims[47] and which was not disputed by any witness before me in the present hearing.

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45 See *Re Tipene* [2016] NZHC 3199 at [11]-[25] and *Re Edwards (No 2)* [2021] NZHC 1025 at [22]-[76] for a broad history of the legal recognition of Māori customary rights and the historical background of the MACA.

46 Also referred to as Mount Maunganui.

47 Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004).

Ngāti Ranginui

[60] Ngāti Ranginui descend from the Takitimu waka, the third waka to arrive in Tauranga Moana and the second to settle after Te Arawa.[48] The Waitangi Tribunal records that Ngāti Ranginui and Waitaha (descending from the Te Arawa waka) conquered the earlier inhabitants, Ngā Marama, and "divided the land between them: Ngāti Ranginui took the land west of the Waimapu River, and Waitaha the land to the east".[49] As well as the lands on the southern shores of Tauranga Moana, this included important pā on the coast at both Mauao and Pāpāmoa.

Te Heke o Rangihouhiri

[61] In the meantime, the ancestors of what is now known as Ngāi Te Rangi ("Ngāi Te Rangi"[50]) had reached Maketu to the east of Tauranga. Their epic journey which would ultimately end in Tauranga Moana has become known as Te Heke o Rangihouhiri after their leader throughout much of their travels, Te Rangihouhiri.

[62] The journey began near Ōpōtiki, where the ancestors of Ngāi Te Rangi had settled after arriving on the Mataatua waka, before being driven out by Ngāti Ha (ancestors of Ngāti Pukenga). The survivors, led by Romainohorangi, escaped into the mountains and made their way to the east coast. There Ngāi Te Rangi were granted refuge by Waho o te Rangi, a chief of Ngāi Te Rangihokaia, a hapū of Te Aitanga o Hauiti, based at Uawa in what is now called Tolaga Bay.

[63] Under Waho o te Rangi's protection, Ngāi Te Rangi were able to settle inland of Waimata. Conflict with Te Aitanga o Hauiti resulted in an agreement for Ngāi Te Rangi, now led by Te Rangihouhiri (the son of Romainohorangi), to return by sea to the Bay of Plenty. There they settled for a period, initially at a place called Hakuranui, and then at a pā at Kaputerangi near Whakatāne. The prospect of conflict with Ngāti Awa made a further move necessary, and after an initial stop near Matatā, Te

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48 The Tainui waka was the second to arrive but did not stay.

49 Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at 28.

50 Although not called Ngāi Te Rangi until after the death of Te Rangihouhiri, the term is used to avoid narrative confusion.

Rangihouhiri's brother Tamapāhore identified Maketu, a place with an abundance of resources, as the preferred destination.

[64] At that time Maketu was held by Tapuika, whose chief, Tatahau, was a first cousin of Te Rangihouhiri and Tamapāhore. Although initially allowed to settle nearby at Te Awa o te Atua, Ngāi Te Rangi were determined to have Maketu and warfare followed. Tapuika sought assistance from Te Ringa of Ngāti Maru and Kinonui of Ngāti Ranginui, while the allies of Ngāi Te Rangi included Ngāti Pūkenga[51] and the ancestors of Ngāi Tukairangi (Ngāti Kahurama and Ngāti Irawharo). Following a number of battles, Ngāi Te Rangi and their allies secured Maketu at the battle of Poporohuamea, although Te Rangihouhiri himself was killed in combat shortly before. It was from that point the iwi became known as Ngāti Rangihouhiri, later shortened to Ngāi Te Rāngi.

[65] Upon the death of Te Rangihouhiri, Tamapāhore took over the leadership of the iwi, and the lands and pā at Maketu were divided among Ngāi Te Rāngi and its allies.

[66] As noted, the fighting at Maketu had brought Ngāi Te Rangi into conflict with Ngāti Ranginui. This conflict resumed sometime after Poporohuamea, as Ngāi Te Rangi probed to the west of Maketu and encountered Kinonui, based at his pā on Mauao, and his brother Ranginui (after whom Ngāti Ranginui is named) at Pāpāmoa. The initial killing of a Ngāti Ranginui castaway from a fishing expedition led to revenge killings by Ngāti Ranginui of Tuwhiwhia and his son Tauaiti. This in turn led to war as Tauaiti's brother Kotorerua sought revenge, seeking what he described as "a complete annihilation" of Ngāti Ranginui.

[67] The assault on Mauao that followed would, in Dr Palmer's words, "be simple, well planned and brutal". A ruse involving the purported gift of kokowai (red ochre clay) enabled Kotorerua and a small force of warriors disguised as slaves to enter the pā, before lighting a fire and spearheading a surprise attack that evening, an assault coordinated with the main Ngāi Te Rangi forces waiting outside the pā.

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[51] Previously Ngāti Hā.

[68] By morning, the battle was over. The pā was destroyed and never reoccupied. The Ngāti Ranginui survivors retreated across Tauranga Moana to the southern shore of the harbour, pursued by Ngāi Te Rangi, who pushed across the harbour to Otūmoetai.

Muruwhenua

[69] Over time, following the capture of Mauao, Ngāi Te Rangi and their allies consolidated their position on the coast. Tamapāhore himself went on to settle at Pāpāmoa and Mangatawa, with his descendants, Ngā Pōtiki ā Tamapāhore, moving into the northern and western sides of Te Tāhuna o Rangataua where they still remain. The ancestors of the other Ngāi Te Rangi applicants Ngāti Tapū, Ngāi Tukairangi and Ngāti Hē also settled around the Rangataua, initially on the Matapihi peninsula on the north western side of Te Tāhuna o Rangataua.

[70] Further settlement to the eastern and southern sides of the harbour was initially prevented by the formidable Waitaha pā, Te Pā o Ariki, located on the northern tip of the Maungatapū peninsula. It was not until Tamapāhore sent his grandnephew Tarete and his wife Hinewai to live with Waitaha at Maungatapū that over time, through further settlement and intermarriage, the group that ultimately became Ngāti Hē was in the words of Mita Ririnui:

> …able to locate ourselves fully in Rangataua with our Ngāti Rangi and Ngāti Pūkenga whakapapa, but also through whakapapa of Waitaha ancestors especially Kumaramaoa.

[71] Ngāti Pūkenga, Ngāi Te Rangi's allies in the invasion, also initially settled on the Matapihi peninsula. They subsequently fell out with Ngā Pōtiki however and were forced to leave Rangataua, albeit retaining some connection with the area. They were eventually able to return permanently to Rangataua after they supported Ngāti Hē against Ngā Pōtiki in a later conflict for which they were rewarded with land, formalised in 1857 through a customary transfer of the Ngā Peke block on the eastern side of the harbour.[52] Ngāti Pūkenga have occupied Ngā Peke since then.

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[52] Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at 292.

[72] The background set out above provides the essential historical and cultural context against which the applications must be assessed. This gives rise to a clear distinction between the two groups of applicants:

(a) The Rangataua Working Party applicants, as the descendants of the victors of the Kokowai and the subsequent muruwhenua of the lands adjacent to Te Tāhuna o Rangataua, have been settled around the harbour since that time and seek recognition of their customary interests in Te Tāhuna o Rangataua; and

(b) The applicant Ngāti Ranginui hapū, Ngāti Ruahine and Ngāi te Ahi, who acknowledge the claims of the other applicants to Te Tāhuna o Rangataua but argue there is sufficient evidence to support their own inclusion in a CMT.

[73] The remaining evidence in support of both groups' applications will now be considered in turn.

The Rangataua Working Party applicants

[74] The evidence is both unequivocal and overwhelming that the Rangataua Working Party applicants have met the legal test for the issue of a CMT.

[75] It is clear that, since occupying the land surrounding Te Tāhuna o Rangataua some 300 years ago, they have held and continue to hold Te Tāhuna o Rangataua in accordance with tikanga. In doing so, they have established exclusive use and occupation without substantial interruption for the purposes of s 58(1)(b) of the Act, with four of the Rangataua Working Party applicants meeting the test under s 58(1)(b)(i) and Ngāti Pukenga the test under s 58(1)(b)(ii) following the tuku[53] of the Ngā Peke block in 1857.

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53 Customary transfer.

[76] The close proximity in which each of the Rangataua Working Party applicants have exercised their rights over Te Tāhuna o Rangataua also makes it clear that a single joint CMT is both appropriate and inevitable.

[77] The mana moana exercised by the Rangataua Working Party applicants, while deriving originally through invasion and subsequent occupation, has only strengthened over time. While in recent times the emphasis has been less on the gathering of resources and more on their role as kaitiaki to protect Te Tāhuna o Rangataua and their relationship with it, as Dr Maxwell made clear such a change in emphasis is entirely consistent with tikanga.

[78] As there is no dispute that each of the Rangataua Working Party applicants has the right to be at Te Tāhuna o Rangataua it is not necessary to set out detailed information about each of the component groups. It is also not necessary to detail the wider evidence the Rangataua Working Party applicants rely upon in support of their applications, primarily from kaumatua and kuia and those with special knowledge of the resources of Te Tāhuna o Rangataua and the efforts made to protect it. Instead the key evidence supporting the issue of a CMT is summarised. As Mr Melvin acknowledged, the evidence is clear that each of the Rangataua Working Party applicants can demonstrate:

(a) they have whakapapa connecting them to the Te Tāhuna o Rangataua;

(b) their whakapapa in turn gives rise to "take tupuna", inheritance from tupuna with authority over Te Tāhuna o Rangataua;

(c) they have an enduring relationship and spiritual connection with the takutai moana, and Te Tāhuna o Rangataua in particular;

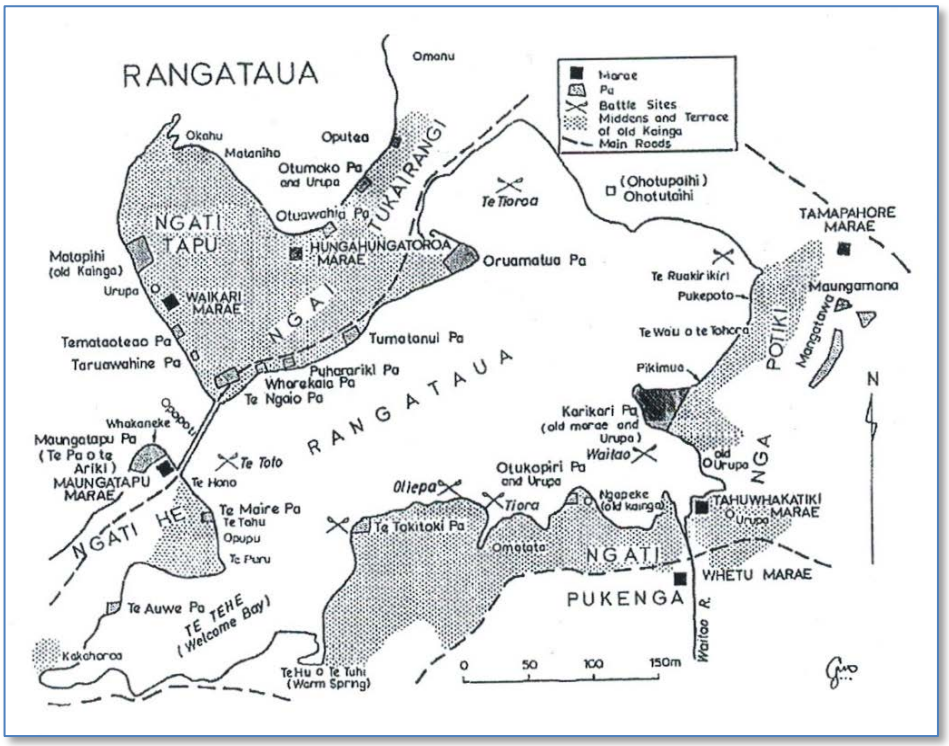
(d) there is a coherent set of beliefs, practices and values that is observed by applicant group members, is widely known and understood, and guides everyday behaviour;

(e) the tikanga is long-standing, having been passed down from generation to generation.

[79] It is no exaggeration to say that at every level, whether practical, cultural, historical and/or spiritual, there exists evidence of a deep and abiding connection between the Rangataua Working Party applicants in Te Tāhuna o Rangataua which translates into ongoing customary authority.

[80] At a cultural level the numerous whakatauki and tauparapara,[54] like that at the beginning of this judgment, speak to the relationship of the Rangataua Working Party applicants and Te Tāhuna o Rangataua.

[81] Similarly, and by way of example, the map below gives an indication of the numerous historical sites of significance:



Map 3: Sites of significance around Te Tāhuna o Rangataua

54 An incantation or type of prayer that can be used to identify a group.

[82] Moreover there is ample evidence that the Rangataua Working Party applicants have used and continue to use Te Tāhuna o Rangataua in every conceivable way, consistent with the nature of the environment. Te Tāhuna o Rangataua has been a consistent source of kaimoana, both finfish and shellfish. The mud and sand in the harbour have been used for different purposes and the estuary remains a means of access, by water at high water and on foot at low tide.

[83] There is no doubt that the use of available resources has been and continues to be managed by each of the Rangataua Working Party applicants in a wide range of ways, including through the adoption of:

(a) sustainable fishing and kaimoana practices, including a number of customary fishing grounds that are known to belong to hapū;

(b) personal health (such as rongoā) practices in the CMCA;

(c) exercising manaakitanga, for example by permitting access to groups outside the area and sharing what is gathered;

(d) acting as kaitiaki by protecting and looking after the takutai moana for future generations, such as ensuring the sustainable use of resources within the application area;

(e) imposing rāhui when warranted;

(f) observing the tikanga associated with wāhi tapu as a way of restricting a specific act or use of an area; and

(g) exercising mana and rangatiratanga, which encompasses a level of customary authority over a rohe and brings with it responsibility for the health and wellbeing of people, resources and general welfare.

[84] The reason the Rangataua Working Party applicants have been able to maintain their customary authority notwithstanding the close proximity to metropolitan Tauranga is the result of a number of factors. First, there are several physical factors

that have meant that long established customary practices have been largely able to continue without interference. These include:

(a) the Maungatapū Bridge linking the Maungatapū and Matapihi peninsulas acts as an effective barrier to waterborne transport from the rest of Tauranga Harbour to Te Tāhuna o Rangataua;

(b) the shallow waters within Te Tāhuna o Rangataua restrict navigation to the smallest craft for a limited period either side of high water. There are only two boat launching ramps within Te Tāhuna o Rangataua, both only accessible at high tide, and no yacht or boating clubs within the harbour;

(c) over half of the coastline of Te Tāhuna o Rangataua is Māori freehold land;

(d) much of the remaining land not owned by Māori is rural, industrial or roading reserve which limits public access to the harbour;

(e) State Highway 29A provides an effective barrier to public access to Te Tāhuna o Rangataua to Bay Park; and

(f) public access to Te Tāhuna o Rangataua from the most built up residential area in Te Tihi/Welcome Bay is significantly limited by the encroachment of mangroves and the shallowness of that part of the harbour even at high water.

[85] As a result, there has been little third party use of Te Tāhuna o Rangataua, and this has largely enabled the Rangataua Working Party applicants to exercise their customary authority without interference. This conclusion was confirmed by Dr Terence Green, a historian commissioned by the Crown "to provide an assessment of the extent to which the area specified in the [extended Stage 1 application area] has been subject to third party (non-applicant) use and occupation from 1840 to the present day". Having considered the sources available, Dr Green concluded that "a notable

feature of the application area within Te Tāhuna o Rangataua is the very limited extent to which it appears to have ever been used or occupied by third parties".

[86] In addition to a lack of any significant recreational use of Te Tāhuna o Rangataua, it was clear from the material considered by Dr Green as well as information provided by Tauranga City Council that, to the extent resource consents have been issued in the extended Stage 1 application area, these have generally had at most a minimal effect on the type of customary rights and authority exercised by the Rangataua Working Party applicants. Indeed, the evidence of the Tauranga City Council was that most of the consents located in the Te Tihi/Welcome Bay area have simply regularised previously constructed seawalls and other minor infrastructure on the edge of that part of the estuary, a lot of which are in any event now located above the high water mark and therefore outside the application area.

[87] Likewise, while there have been a number of small reclamations in the Te Tihi/Welcome Bay area and that associated with the Mangatawa sewage scheme on the northern side of the estuary, the effect of the reclamations and the subsequent issue of title has been to remove those lands from the application area. Aside from these structures, there is little evidence of any active management undertaken by either of the local authorities, Tauranga City Council (which has no real statutory role below high water) and the Bay of Plenty Regional Council, nor even the emergence of any significant community organisations asserting a management role over Te Tāhuna o Rangataua.

[88] It has thus largely fallen to the Rangataua Working Party applicants exercising mana moana in their roles as kaitiaki to provide for and protect both the health and wellbeing of Te Tāhuna o Rangataua and their relationship with it. In such situations, the evidence is clear that the Rangataua Working Party applicants have consistently utilised all means at their disposal to sustain Te Tāhuna o Rangataua. The response of the Rangataua Working Party applicants to the Mangatawa sewage ponds on the northern side of the estuary provides a vivid illustration of both the approach taken and its ultimate success.

[89] The proposal to construct sewage treatment ponds at Mangatawa arose in the context of an earlier struggle over water quality standards in the wider Tauranga Moana/Tauranga Harbour including Te Tāhuna o Rangataua. In 1972, the Mount Maunganui Borough Council proposed to construct a sewage reticulation, treatment and disposal system that involved oxidation ponds on some 52 hectares of land to be reclaimed from the bed of Te Tāhuna o Rangataua. Bruce Stirling, a historian commissioned on behalf of the Rangataua Working Group applicants, noted the final figure proposed for reclamation was 74 hectares. The proposal involved discharging waste from the oxidation ponds directly into Te Tāhuna o Rangataua until such time as an ocean outfall was created.

[90] As Mr Stirling's evidence shows, tangata whenua "staunchly opposed" the proposal from the outset. Despite this opposition, it received the necessary planning consent in March 1974, with those consents subsequently upheld by the Town and Country Planning Appeal Board. Before the appeal was heard however, the opposition encountered had led the Borough Council to abandon its plans to discharge effluent directly into Te Tāhuna o Rangataua, and to instead agree to construct the ocean outfall at the same time as the rest of its scheme. Thus, the strength of the iwi response played a significant role in preventing what was perceived at the time as a likely environmental disaster.

[91] The sewage treatment plant nonetheless proceeded against the continued opposition of objectors, including the members of the Rangataua Working Party applicants and other iwi, following the passage of the Mount Maunganui Borough Reclamation and Empowering Act 1975, but the initial reclamation and construction of the sewage ponds was not the end of iwi opposition. On the contrary, that opposition has been maintained to the present day.

[92] In the end, iwi led by the Rangataua Working Party applicants have been successful in limiting the total area reclaimed to 23 ha rather than the 74 ha approved, and ongoing pressure has effectively eliminated the prospect of further additions to the plant in Te Tāhuna o Rangataua with the repeal of the 1975 Act in 2012.[55] Instead,

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[55] The Mount Maunganui Borough Reclamation Repeal Act 2012.

the ongoing pressure led the Tauranga City Council to agree to decommission the entire waste water scheme by 2012, but this has yet to be effected.

[93] The history of the Mangatawa sewage scheme illustrates the resilience of the customary owners of Te Tāhuna o Rangataua and their ability to take a long-term view of their responsibility to protect and sustain Te Tāhuna o Rangataua. While the initial construction of the scheme could, at least initially, have been perceived as a substantial disruption to the customary rights of the Rangataua Working Party applicants, it has eventually resulted in broader recognition of their role as kaitiaki over Te Tāhuna o Rangataua.

[94] Other illustrations of the exercise of customary authority through a variety of legal strategies and mechanisms include the successful opposition in 1976/77 to a proposal for an additional sewage scheme, this time proposed to be located in Te Tihi/Welcome Bay, and the ongoing opposition by Ngāti Hē and Ngāi Tukairangi to the alignment of electricity transmission lines extending from Te Pā o Ariki on the Maungatapū peninsula to Te Ngaio Pā at Matapihi (across the entrance to Te Tāhuna o Rangataua). Those lines are supported by a pylon located in the extended Stage 1 application area to the east of the Maungatapū Bridge.[56] It appears clear that the original alignment of the power lines was completed in the absence of agreement with either Ngāti Hē or Ngāi Tukairangi and has been the subject of Treaty of Waitangi claims by both. As with the Mangatawa sewage scheme, ongoing discussions with Transpower by those affected has resulted in a commitment to ultimately remove the existing lines and instead realign them along the Maungatapū Bridge. Although the mechanism for that has yet to be finally determined, it is again an important example of the ongoing resilience and ultimate recognition of customary authority over Te Tāhuna o Rangataua.

[95] The evidence presented at the hearing makes it clear that the role of the Rangataua Working Party applicants as kaitiaki is ongoing. Current challenges are ongoing environmental threats to the fisheries within Te Tāhuna o Rangataua caused by the run-off from subdivisions inland from Te Tihi/Welcome Bay. As before, the

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[56] See *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

Rangataua Working Party applicants are prepared to use every legal avenue to in order to fulfil their role as kaitiaki, with the present application for a CMT being a manifestation of that. In other initiatives, Ngā Pōtiki were successful in getting the New Zealand Geographic Board to change the name of the estuary from Rangataua Bay to Te Tāhuna o Rangataua in 2012, and an application to Heritage New Zealand Pouhere Taonga ("HNZ") led to the whole of Te Tāhuna o Rangataua being recognised as a wāhi tapu for the purposes of the Heritage New Zealand Pouhere Taonga Act 2014.

[96] Subject only to addressing the issue of extinguishment, it is clear that a CMT over Te Tāhuna o Rangataua is warranted for the Rangataua Working Party applicants.

Ngāti Ruahine and Ngāi Te Ahi

[97] In contrast to the Rangataua Working Party applicants, there is little to support the applications brought on behalf of Ngāti Ruahine and Ngāi Te Ahi.

[98] There was in fact no evidence to support the inclusion of Ngāti Ruahine in a CMT over Te Tāhuna o Rangataua. No Ngāti Ruahine witness gave evidence and, apart from limited whakapapa evidence provided by the Ngāi Te Ahi witnesses, almost no information about the history of Ngāti Ruahine was put before the Court at all. There was no evidence of any tikanga linking Ngāti Ruahine with Te Tāhuna o Rangataua, and no evidence that Ngāti Ruahine ever used or occupied Te Tāhuna o Rangataua from 1840 to the present day, let alone sufficient evidence to meet the test under s 58(1).

[99] Indeed, in the only direct evidence about Ngāti Ruahine settlement, Dr Martin Fisher, the historian called by Ngāti Ranginui Settlement Trust, accepted in cross-examination that as at 1840 Ngāti Ruahine were living at Waimapu Pa located near Poike on the Waimapu estuary, which is not on the Rangataua. No evidence was given as to where Ngāti Ruahine are currently based or whether they have any present connection with Te Tāhuna o Rangataua.

[100] Given this position, and although the Ngāti Ranginui Settlement Trust were not prepared to withdraw the application on behalf of Ngāti Ruahine, Ms Tahana as

counsel for Ngāti Ranginui fairly conceded in oral closing submissions that there was insufficient evidence to support any claim for a CMT in respect of Te Tāhuna o Rangataua. I respectfully agree. The Ngāti Ranginui Settlement Trust application in respect of Ngāti Ruahine cannot succeed and is therefore dismissed.

[101] The position is more complicated with regard to Ngāi Te Ahi. It is clear from the evidence that Ngāi Te Ahi along with the other hapū of Ngāti Ranginui have a strong connection with Tauranga Moana generally, not least at Poike, the arm of Tauranga Moana in front of Hairini marae.[57]

[102] There is also no dispute that members of Ngāi Te Ahi exercise customary rights in respect of Te Tāhuna o Rangataua. The question is the nature and extent of those rights and whether the rights exercised emanate from Ngāi Te Ahi or Ngāti Hē. As a result, I am required to determine whether Ngāi Te Ahi can be said to hold Te Tāhuna o Rangataua in accordance with tikanga in their own right, and if so, whether the rights exercised amount to any form of occupation from 1840 to the present day.

[103] The situation has arisen because of the acknowledged closeness of Ngāi Te Ahi and Ngāti Hē. Ngāi Te Ahi are based at Hairini marae, which is not one of the six marae located around Te Tāhuna o Rangataua.[58] However, Ngāi Te Ahi have over time developed an exceptionally close relationship with Ngāti Hē at Opopoti marae at Maungatapū, while still acknowledging it as a Ngāti Hē marae.

[104] Both hapū acknowledge the evolution of exceptionally close whakapapa links which mean that, in practice, most individuals can now whakapapa to both hapū. An example is Desmond Heke Kaiawha who gave evidence twice in the present hearing, on behalf of both Ngāti Hē and Ngāi Te Ahi. This poses a difficulty in the context of the present application because each of the witnesses who have given evidence for Ngāi Te Ahi has rights as Ngāti Hē in respect of Te Tāhuna o Rangataua which are not in dispute, and there has hitherto been no reason to identify a Ngāi Te Ahi-specific source to those rights; and whether the rights of use and occupation asserted emanate from Ngāi Te Ahi as opposed to Ngāti Hē.

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57 See Map 1.
58 See Map 1.

[105] The case for the Ngāti Ranginui Settlement Trust is that Ngāi Te Ahi exercise customary rights in the southwest end of the harbour, Te Tihi/Welcome Bay and in particular around the Kaitemako Stream, and that these rights derive from Ngāi Te Ahi in their own right through their own connections with Waitaha rather than through their acknowledged Ngāti Hē connections. As a result, the Ngāti Ranginui Settlement Trust contend Ngāi Te Ahi are entitled to be part of a single joint customary marine title along with the other applicant groups.

[106] In support of the contention that the rights emanate from Ngāi Te Ahi, Mr Tapsell on behalf of Ngāi Te Ahi relied upon the following evidence:

(a) the presence of individuals identified as Ngāi Te Ahi in land blocks at the southwestern end of the harbour including, in particular, in the Tapuaeotu block;

(b) the acknowledgement of Ngāi Te Ahi interests in Te Tāhuna o Rangataua by Ngāti Pukenga witnesses Mr Smallman and Ms Ohia;

(c) the presence of Ngāi Te Ahi in various hapū-led initiatives to protect Te Tāhuna o Rangataua from the 1970s onwards; and

(d) the exercise of customary rights in Te Tāhuna o Rangataua, specifically mahinga kai.

[107] Having considered the matters raised by Ngāi Te Ahi, I conclude the evidence is insufficient to support their inclusion in the CMT over Te Tāhuna o Rangataua.

[108] First, although some whakapapa information about the origins of Ngāti Ranginui generally and Ngāi Te Ahi in particular have been provided, there is a complete absence of evidence as to the basis upon which Ngāi Te Ahi (previously known as Ngāti Tamahika) could hold any part of Te Tāhuna o Rangataua in accordance with tikanga, or otherwise have been part of exclusive use and occupation without substantial interruption from 1840 to the present.

[109] In particular, there is simply no evidence put before the Court that would explain in tikanga terms how and to what extent any form of connection was maintained by Ngāi Te Ahi in the aftermath of the Ngā Te Rangi invasion through to the allocation of the land blocks from the 1870s following the Tauranga raupatu which commenced in 1865. While it is clear that a number of those blocks within the catchment of Te Tāhuna o Rangataua include owners identified as Ngāi Te Ahi, only one with a majority of Ngāi Te Ahi owners, Tapuaeotu, directly abuts the estuary at its southwestern-most point.

[110] Even these links are insufficient. While four of the six owners of Tapuaeotu are acknowledged as Ngāi Te Ahi, there is insufficient information available to reach any conclusion that the interest derived from their Ngāi Te Ahi whakapapa as opposed to other interests held by those owners. Indeed, as historian Fiona Hamilton noted in her report on behalf of Ngāi Te Ahi commissioned for the Tauranga enquiry of the Waitangi Tribunal:[59]

> There are few existing minute book records which express in detail how Ngāi Te Ahi are connected to Tauranga lands and people.

[111] In this case there is evidence about the nature of the Ngāi Te Ahi connection with the Hairini block, upon which their principal marae is situated, and the Ngāi Te Ahi connections with the Poike estuary, but that is not the case for Tapuaeotu and Ms Hamilton did not identify any particular basis for why the block was awarded to the successful owners.

[112] In any event, it appears that much if not all of Tapuaeotu was alienated within a short time. Interests in a small (20 hectare) block for a relatively short period is not of itself compelling evidence for the existence of continuing rights of Ngāi Te Ahi over Te Tāhuna o Rangataua.

[113] The other specific evidence relied on by Ngāi Te Ahi also falls short of meeting the s 58(1) test. The acknowledgement of Ngāi Te Ahi interests provided by both Mr Smallman and Ms Ohia was very general in nature and, as with the Ngāi Te Ahi witnesses themselves, neither was pressed to explain the basis for the conclusion

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[59] Fiona Hamilton *Ngāi Te Ahi historical report: Wai 370* (Y215G1/Y370A2, February 2000).

reached. Likewise, while there is no doubt Ngāi Te Ahi has joined with other hapū to support different initiatives with regard to Tauranga Moana generally and with the Rangataua Working Group applicants on issues relating to Te Tāhuna o Rangataua in particular, there is nothing to suggest that participation in the various working groups identified was recognition of the type of customary rights in issue in this case, as opposed to a show of support from neighbouring hapū.

[114] Furthermore, the customary rights identified by the Ngāi Te Ahi witnesses as having been exercised by Ngāi Te Ahi in their own right were extremely limited compared to the wealth of detail provided by the Rangataua Working Party applicants. There is, for example, no suggestion that Ngāi Te Ahi have ever imposed a rāhui over Te Tāhuna o Rangataua, while the rights identified were limited to the gathering of titiko (snails) and fishing for patiki (flounder) in Te Tāhuna o Rangataua, as well as the gathering of manuka along the Kaitemako Stream which flows into the estuary. Even then, of those specific customary practices identified, only one still appears to be continuing given titiko cannot be gathered at present and there does not appear to be any present gathering of manuka along the Kaitemako due to the effects of development. In any event, the source of those rights remain unclear, as is the basis for asserting that it comes from Ngāi Te Ahi rather than through Ngāi Te Ahi's links with Ngāti Hē.

[115] In addition to these matters, I found the evidence of Mita Ririnui to be telling. Mr Ririnui, as the named applicant for Ngāti Hē and a Ngāti Hē kaumatua, explained in detail the history of Ngāti Hē and their close relationship with Ngāi Te Ahi, but although he saw himself as both Ngāti Hē and Ngāi Te Ahi, he could not bring himself to acknowledge that the interests asserted over Te Tāhuna o Rangataua were on behalf of Ngāi Te Ahi. He confirmed that, as was the case historically, "the kaitiaki interest [over Te Tāhuna o Rangataua] sits with Ngāti Hē" with the "benefits … shared with Ngāi Te Ahi". He stated that he was unaware of Ngāi Te Ahi carrying out practices of kaitiakitanga independently of Ngāti Hē, with whom they have worked jointly due to having interests in Te Tāhuna o Rangataua "through Ngāti Hē through the whanaungatanga and the whakapapa and the history".

[116] Overall, I conclude that although Ngāi Te Ahi clearly has more of a connection with Te Tāhuna o Rangataua than that put forward for Ngāti Ruahine, Ngāi Te Ahi still falls far short of establishing either the necessary basis in tikanga or the necessary degree of use and occupation over the requisite period. The Ngāti Ranginui Settlement Trust application on behalf of Ngāi Te Ahi therefore also fails and is dismissed.

[117] Although not sought on behalf of Ngāi Te Ahi, I note that the mahinga kai rights exercised by Ngāi Te Ahi may give rise to a PCR in terms of s 51 of the MACA. As the Court is given a discretion to consider an application for a CMT as an application for a PCR pursuant to s 107(1), leave is reserved should Ngāi Te Ahi wish to apply for a PCR on the basis set out in the final section of this judgment.

Extinguishment? / Whakakorenga?

[118] As noted earlier, a CMT "does not exist if that title has been extinguished as a matter of law".[60] There is no suggestion that the customary rights that have continued to be exercised by the Rangataua Working Group applicants have been finally extinguished. However, the Crown contends that customary rights insofar as they relate to the foreshore of Te Tāhuna o Rangataua were extinguished on 12 October 1915 as a consequence of the enactment of the Tauranga Foreshore Vesting and Endowment Act 1915 ("the Tauranga FVA"), before being statutorily resurrected by the Foreshore and Seabed Endowment Revesting Act 1991 ("the Foreshore Revesting Act").

[119] Although the Crown does not contend that extinguishment is an obstacle to the issue of a CMT in this case, and to that extent somewhat moot, the issues raised with regard to the interpretation and effect of historical legislation remain important. The very fact that it can be seriously suggested that the same rights I have found to have been consistently exercised since 1840 were legally and lawfully extinguished for a period of some 76 years provides a vivid illustration of the essential sterility of the legal concept of extinguishment.

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60 MACA, s 58(4).

The Crown position on extinguishment

[120] In asserting that customary rights in the foreshore were extinguished in 1915, Mr Melvin relied upon s 3 of the Tauranga FVA. This provided:

> On the passing of this Act the whole of the foreshore of the Tauranga Harbour as described in Schedule 1 hereto shall vest in the Tauranga Harbour Board, subject to the right of resumption by the Crown hereinafter mentioned.

[121] Schedule 1 to the Tauranga FVA in turn provided:

> ALL the foreshore of the Tauranga Harbour commencing at the north head, Katikati entrance, and thence following the mainland to the headland at Mount Maunganui opposite the Beacon Rock at the Tauranga entrance to the harbour; as shown on the plan deposited in the office of the Chief Surveyor at Auckland, as No 18315 (blue), and thereon edged blue.

[122] Mr Melvin submitted that the effect of s 3 and Schedule 1 was to vest the fee simple of the foreshore of Tauranga Harbour,[61] including Te Tāhuna o Rangataua, in the Tauranga Harbour Board. Although he acknowledged the statutory language did not expressly state that the fee simple vested in the Board, Mr Melvin submitted that this was a necessary implication of s 6, which provided:

> **Issue of Crown grants or certificates of title to Board**
>
> The Governor is hereby empowered to sign a warrant or warrants authorizing the issue of Crown grants or certificates of title, as the case may require, for the said foreshore and lands or any part thereof to and in favour of the Board, subject to and provided that any portion of the said foreshore so vested as aforesaid may be resumed by the Crown at any time for any public work or public purpose without compensation, except that compensation shall be payable and assessed in manner provided by The Public Works Act 1908, for wharves, buildings, or permanent improvements made and effected by the Board or any lessee of any of said lands so resumed.

[123] In Mr Melvin's submission:

> Section 6 is correctly viewed as a machinery provision enabling the Board to obtain a record of its title, if it required one, and specifying the process by which that should be done. In this respect, a comparison can be drawn with s 47 of the Public Works Act 1981 or s 60F of the Conservation Act 1987: the land already vests in the Crown for the public work or conservation purpose, but the Crown can call for an actual title if it requires one.

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[61] The description in Schedule 1 did not refer to Matakana Island and this was subsequently remedied by the Tauranga Harbour Amendment and Foreshore Vesting Act 1917.

[124] Mr Melvin argued that the effect of the Tauranga FVA was distinguishable from the legislation considered by the Court of Appeal in *Ngāti Apa v Attorney-General* ("*Marlborough Sounds*").[62] In particular, on the basis of his analysis of ss 3 and 6 and Schedule 1 noted above, the Tauranga FVA was not limited to a vesting of a radical title. Mr Melvin observed the Tauranga Harbour Board in whom the title was vested was not part of the Crown and submitted that notwithstanding the title to the Tauranga FVA the foreshore did not vest as an endowment, nor that the power of resumption contained in s 3 implied "that an estate less than fee simple had been vested in the Tauranga Harbour Board on the passing of the [Tauranga FVA]". Overall, and despite acknowledging the foreshore purportedly subject to the Tauranga FVA was not surveyed, it was Mr Melvin's submission:

> … the combined effect of ss 3 and 6 of the 1915 Act make it clear and plain that, on the enactment of the 1915 Act, Parliament vested an estate in fee simple in the foreshore of the Tauranga harbour in the Tauranga Harbour Board. That estate was inconsistent with the continuation of other legal interests in the foreshore, including Māori customary title.

[125] Notwithstanding his conclusion that customary rights to the foreshore within Tauranga Moana including at Te Tāhuna o Rangataua had been extinguished, Mr Melvin submitted that s 5 of the Foreshore Revesting Act "achieved a statutory revival of Māori customary interests in the foreshore of Tauranga Harbour". This is because s 4 of the Foreshore Revesting Act provided that the Act applied to all land that:

> (a) Was formerly alienated from the Crown and vested in a Harbour Board or a local authority, whether by or under the authority of any enactment or otherwise; and
>
> (b) At the commencement of this Act, either –
>
> (i) Is foreshore or seabed, and is vested in a local authority (whether as a successor or otherwise); or
>
> (ii) Is land that has been reclaimed from the sea unlawfully.

[126] Section 5 then provided:

> **Foreshore and seabed revested in Crown** – Subject to section 6 of this Act –

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

(a) All of the original vestings of land to which this Act applies are hereby revoked; and

(b) All of the land to which this Act applies is hereby revested in the Crown as if it had never been alienated from the Crown and free from all subsequent trusts, reservations, restrictions, and conditions.

[127] In Mr Melvin's submission, as the foreshore of Tauranga Harbour was land to which the 1991 Act applied, the statutory revesting of land in the Crown "as if it had never been alienated from the Crown" thereby effected the "statutory revival" of any Māori customary interests extinguished by the 1915 Act. Moreover:

> The Attorney-General does not consider that the period during which customary interests were extinguished would have amounted to a substantial interruption in terms of s 58(1)(b)(i) of the Act. The requirement of exclusive use and occupation without substantial interruption is a question of fact and the test does not require customary property rights to subsist uninterrupted while the use and occupation occurred.

Was customary title to the foreshore extinguished?

[128] The principles applicable to the extinguishment of customary rights are not in dispute. The starting point is as set out by the then Chief Justice, Dame Sian Elias, in *Marlborough Sounds:*[63]

> More recently, the effect of the radical title acquired by the Crown with sovereignty has been considered by this Court in *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641 and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20. The position was restated by Cooke P for the Court in *Te Ika Whenua* at 23-24:
>
> "On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. It was so stated by Chapman J in *R v Symonds* (1847) NZPCC 387, 390, in a passage later expressly adopted by the Privy Council, in a judgment delivered by Lord Davey, in *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384.

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63 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [29].

[129] In the same case, Keith and Anderson JJ went on to review the relevant authorities, including those considered by Elias CJ. The following principles are apparent from their joint judgment:[64]

(a) An approach that is protective of customary interests is to be taken;

(b) Construction must be liberal instead of strict, with doubtful expressions resolved in favour of the indigenous group;

(c) Further "the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain"; and

(d) Lawful extinguishment of customary interests, must not be "by a side wind" but any intention to extinguish customary interests through a statutory scheme must be clear and plain.

[130] Therefore, the approach that must be taken is as Blanchard J stated in *Faulkner v Tauranga District Council*:[65]

> Customary or aboriginal (Crown recognised) title is a burden on the Crown's feudal title. It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end. Unless there is legislative authority or provisions such as were found in ss.85 and 86 of the Native Land Act 1909, the Executive cannot, for example, extinguish customary title by granting the land to someone other than the customary owners. If it does so the grantee's interest is taken subject to the customary title: *Nireaha Tamaki v Baker* (1901) NZPCC 371; [1901] AC 561. Customary title does not disappear by a side wind. Where action taken by the Crown which arguably might extinguish aboriginal title is not plainly so intended the Court will find that the aboriginal title has survived.

[131] Applying these principles to the Tauranga FVA, it is clear that legislation was not sufficiently explicit to extinguish Māori customary rights to the foreshore in any part of Tauranga Moana, and to conclude otherwise would amount to an extinguishment by way of a side wind.

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64 At [147]-[148] and [154].
65 *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 363.

[132] I reach this conclusion for two principal reasons:

(a) the Tauranga FVA fails to sufficiently identify the foreshore said to be the subject of the Act; and in any event

(b) the Tauranga FVA was not sufficiently explicit to extinguish Māori customary rights.

(a) Failure to identify foreshore

[133] The area of foreshore subject to the Tauranga FVA was, as noted, defined "as described in Schedule 1" of the Act.[66] Schedule 1 in turn referred to an area of "foreshore of the Tauranga harbour":

> … **as shown** on the plan deposited in the office of the Chief Surveyor at Auckland, as No 18315 (blue), and thereon edged blue.
>
> (emphasis added)

[134] The problem for the Crown is that the plan referred to in Schedule 1 does not identify any foreshore at all. It is not a nautical chart showing depth of water or land drying out at low tide, but a cadastral map repurposed for use in the Tauranga FVA. Thus, while the plan has ample detail about the land lots adjoining Tauranga harbour, no hydrographical detail of the harbour is represented at all. Instead there is simply a series of roughly parallel lines shown, with those closest to the land blocks coloured in a blue wash. To illustrate, that part of the plan referred to in Schedule 1 insofar as it relates to Te Tāhuna o Rangataua is reproduced below:

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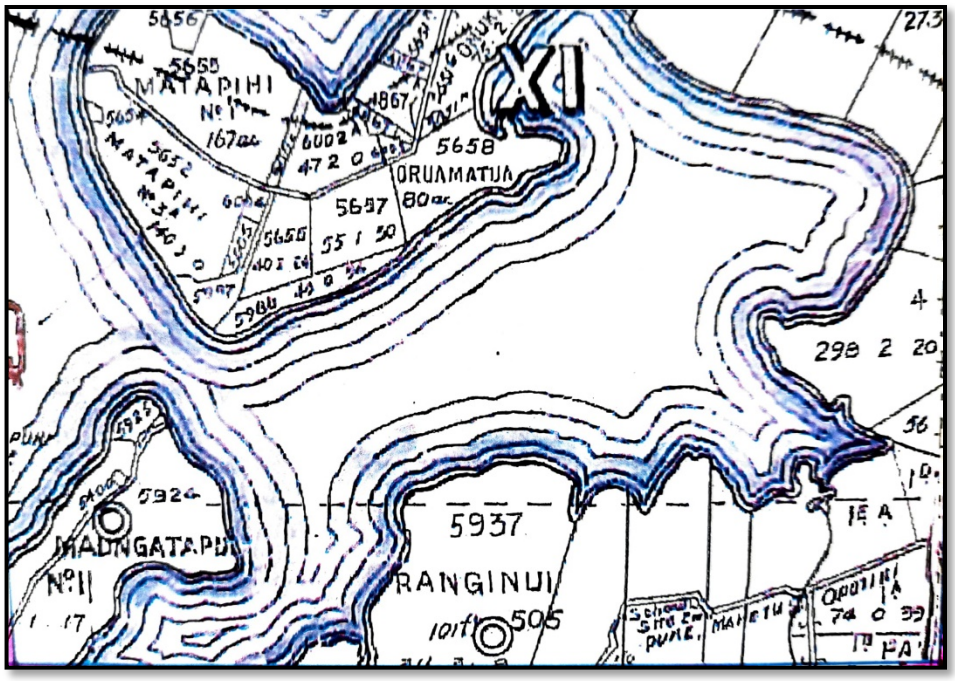
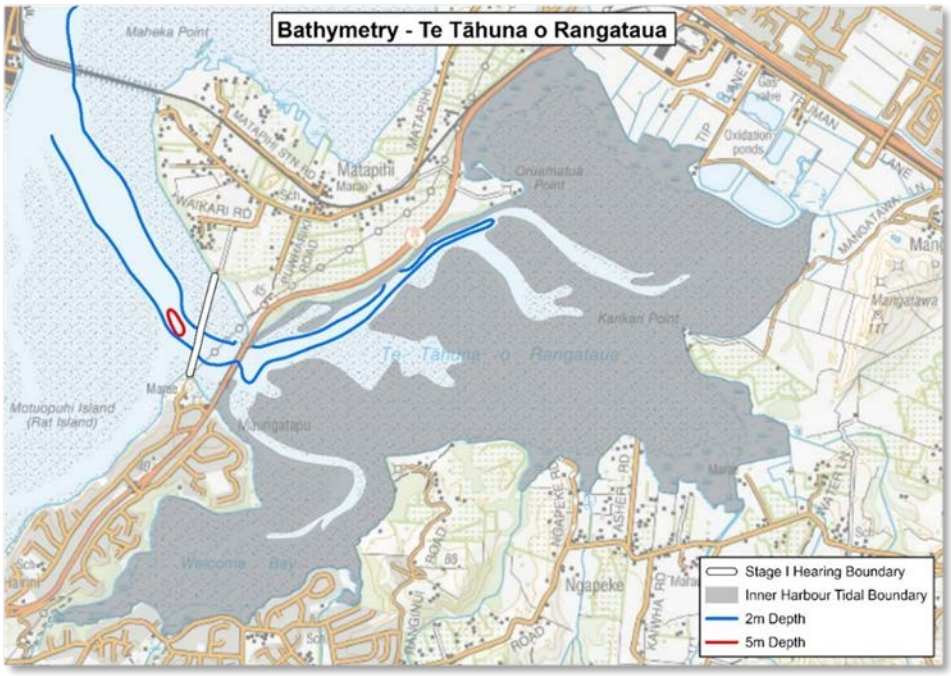
66 See [120] above.



Map 4: Extract from Plan 18315 showing Te Tāhuna o Rangataua section.

[135] This is to be contrasted with a recent chart showing the channels (seabed) and the areas which dry out at low water (foreshore):



Map 5: Bathymetry – Te Tāhuna o Rangataua

[136] By no sense of the imagination could the parallel lines drawn on the map be taken as being foreshore. Contrary to the statement in Schedule 1 of the Tauranga FVA, the foreshore is simply not shown on the plan at all. In such circumstances, I cannot see how the Act can be said to be sufficiently clear as to what was intended to have been vested, let alone to have sufficiently delineated the areas over which Māori customary rights were purportedly extinguished without either notification to those exercising customary interests or mention of compensation. It is not for a court in the 21st century to attempt to interpret what can only be described as manifestly inept legislative drafting in a manner that would facilitate extinguishment, albeit historical, when to do so is clearly antithetical to the accepted approach to extinguishment in New Zealand.

(b) Statute not sufficiently explicit to extinguish Māori customary rights

[137] In addition to failing to define the foreshore purported to have been extinguished, the Tauranga FVA was otherwise insufficiently explicit for any New Zealand Court to conclude that it intended to extinguish Māori customary rights in Tauranga Moana, including any rights in Te Tāhuna o Rangataua.

[138] In *Marlborough Sounds*, the Court of Appeal concluded that the deemed vesting contained in the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 ("the Territorial Sea Acts") was insufficiently explicit to extinguish Māori customary rights in the seabed (that is, from the low water mark to the limits of the territorial sea). This was despite the relevant provisions in both Acts having deemed the seabed "to be and always to have been vested in the Crown". As Elias CJ noted:[67]

> No expropriatory purpose in the Act in relation to Maori property recognised as a matter of common law and statute can be properly read into the legislation. It is principally concerned with matters of sovereignty, not property. I agree with the reasons given in the judgment of Keith and Anderson JJ. The language of deeming, the preservation of existing property interests, the compatibility of radical title in the Crown and Maori customary property, and the absence of any direct indication of intention to expropriate make it impossible to construe the legislation as extinguishing such property.

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67 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [63].

[139] In this case, as with the Territorial Sea Acts, s 3 of the Tauranga FVA provided only that the lands subject to the Act "shall vest in the Tauranga Harbour Board". The provision otherwise did not specify the nature of the title purported to have been passed, still less that there was any intention to extinguish or otherwise expropriate Māori customary rights.

[140] As Blanchard J noted in *Faulkner*,[68] it follows that in the absence of any specific act of extinguishment, any title purported to be vested in the Tauranga Harbour Board could not be greater than that held by the Crown. At that point, the Crown itself held only a radical title and had not otherwise taken steps to extinguish Māori customary rights to the foreshore of Tauranga Moana. As a result, a title on the terms provided for in the Tauranga FVA transferred by the Crown to the Tauranga Harbour Board could not have extinguished extant Māori customary rights, but rather was transferred subject to those same rights.

[141] The position under the Tauranga FVA can be contrasted with the Whangarei Foreshore Vesting Act 1913 ("the Whangarei FVA") which relevantly stated:

> On the passing of this Act the lands described in Schedule 1 hereto shall vest in and be the property of the Whangarei Harbour Board (hereinafter referred to as the Board) **for an estate in fee-simple**, and the Governor is hereby empowered to sign a warrant authorizing the issuing of a Crown grant or certificate of title, as the case may require, for the said lands to and in favour of the Board.
>
> (emphasis added)

[142] The Whangarei FVA made it clear that the vesting in the Whangarei Harbour Board under that Act was an estate in fee simple from the beginning. The fact that both the Tauranga FVA and the Whangarei FVA otherwise had identical provisions "empowering" the Crown to authorise the issue of Crown grants of certificates of title does not lead to the conclusion that the title initially transferred to the relevant Board was in each case identical. Instead, with regard to the lands subject to the Tauranga FVA, the absence of any intention to extinguish means that the title only becomes a fee simple title at the point the Harbour Board required a Crown grant or certificate of

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[68] *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC).

title pursuant to s 6, whereupon once that title was issued, and only then, the land vested would become a fee simple title.

[143] The same process occurs in the case of s 47(1) of the Public Works Act and s 60F of the Conservation Act relied upon by the Crown. In the absence of explicit extinguishment of land subject to one or other of those Acts, it is only at the point at which a certificate of title is issued that extinguishment occurs: a simple vesting in the Crown is insufficient.[69]

[144] As with the lack of definition of the foreshore contained in the Tauranga FVA, there is an insufficient basis to conclude a fee simple title was vested and to conclude otherwise would be inconsistent with the accepted principles of extinguishment. I therefore conclude that the Tauranga FVA was insufficiently explicit to extinguish Māori customary rights in Te Tāhuna o Rangataua and did not do so.

[145] Even if I am wrong, I accept Mr Melvin's submission that the effect of ss 4 and 5 of the Foreshore Revesting Act is sufficiently explicit to enable a "statutory revival" of any customary rights extinguished by the Tauranga FVA.

[146] The clear words of the relevant sections of the Foreshore Revesting Act, set out at [125] and [126] above, make it clear that whatever the nature of the title

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[69] Section 47(1) of the Public Works Act provides:

Except as provided in subsection (4), where any land has become vested in the Crown or a local authority under this Act or any former Act relating to public works, the Registrar-General of Land, on the completion of such surveys (if any) as may be necessary, shall at the request of the Minister or local authority issue a record of title for the estate in the land or part of the land specified in the request in the name of the Crown or local authority, as the case may require, and that record of title shall include a reference to the purposes (if any) for which the land is held, and may be subject to any relevant encumbrances or restrictions.

Section 60F of the Conservation Act provides:

(1) On the written request of the Director-General in respect of any of the land for the time being held under this Act for conservation purposes or for the purposes of the Department, the Registrar-General of Land must issue a record or records of title under the Land Transfer Act 2017 (in the name of Her Majesty the Queen for conservation purposes or for the purposes of the Department).

(2) For the purposes only of the Land Transfer Act 2017, a request under subsection (1) is conclusive evidence that the land to which it relates is held under this Act for conservation purposes or, as the case requires, for the purposes of the Department.

(3) If the survey of any land is inadequate for the issue of a record of title under subsection (1), the Registrar-General of Land may require the Director-General to deposit such other plan as the Registrar-General of Land, after consultation with the Surveyor-General, thinks sufficient to comply with section 224 of the Land Transfer Act 2017.

transferred to a harbour board it is "revested in the Crown as if it had never been alienated from the Crown and free from all subsequent trusts, reservations, restrictions, and conditions".

[147] Although as Mr Melvin has noted the orthodox position as recently set out in *R v Saxton* was that "customary rights, once extinguished, cannot revive",[70] this can no longer be considered correct. Given the MACA itself explicitly restored "any customary rights formally extinguished by the [FASA]",[71] the orthodox position is perhaps better expressed as "customary rights, once extinguished, cannot revive unless legislation specifically provides otherwise".

[148] Ultimately, and irrespective of the effect of the Tauranga FVA, there can be no doubt that there has been no extinguishment of customary interests in Te Tāhuna o Rangataua so as to preclude issue of a CMT to the Rangataua Working Group applicants.

Te whakatau / The decision

[149] For the reasons set out above, the applications of the Rangataua Working Party applicants (Ngā Pōtiki, Ngāti Pūkenga, Ngāti Hē, Ngāi Tukairangi and Ngāti Tapu) are granted as follows:

(a) A CMT is to issue in favour of Ngā Pōtiki ā Tamapāhore, Ngāi Tukairangi, Ngāti Tapū, Ngāti Hē and Ngāti Pūkenga;[72]

(b) The CMT shall apply over that area of common maritime and coastal area[73] known as Te Tāhuna o Rangataua as shown in the extended application area (Map 2), subject to survey.

[150] The Rangataua Working Party applicants are to submit a draft order for approval of the Registrar pursuant to s 109(1) of the MACA. The contents of the draft order are as specified in s 109(2)-(4) and include:

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70 *R v Saxton* [2009] NZCA 498 at [38].
71 See Foreshore and Seabed Act 2004, s 13(1) and MACA, s 6.
72 MACA, s 109(2)(b) and (c).
73 MACA, s 2.

(a) a survey plan;[74]

(b) specifying the holder;[75] and

(c) specifying any prohibition or restriction that is to apply as a wāhi tapu or wāhi tapu area within the CMT granted.[76]

[151] It follows that not only will the extended application area have to be surveyed, but as the Rangataua Working Party applicants signalled in closing submissions, a special purpose trust to hold the CMT will have to be established for the benefit of each of the Rangataua Working Group applicants under the name Ngā Papaka o Rangataua.[77]

[152] In addition, in closing submissions, counsel for Ngā Pōtiki raised the possibility that because Te Tāhuna o Rangataua had been found to be a wāhi tapu for the purposes of the Heritage New Zealand Act, ss 78 and 79 of the MACA were applicable. This leads to the potential for prohibitions or restrictions to be imposed on the CMT pursuant to s 109(4)(c) of the MACA.

[153] As a result of the timing of the issue, it was not able to be addressed at the hearing. Leave was granted to the parties to file further submissions both on the effect of the decision by HNZ to recognise Te Tāhuna o Rangataua as a wāhi tapu and the contents of any proposed prohibitions or restrictions. To date, additional submissions have only been received on the first of those issues. The Rangataua Working Party applicants submitted that HNZ's finding should be determinative, while the Crown identified a number of issues caused by the fact that the matter was only raised after the calling of the evidence. The Crown submitted that the difference in procedure meant that the decision by HNZ could not be conclusive, but it nonetheless appeared to accept that Te Tāhuna o Rangataua was a wāhi tapu area (a defined area enclosing a number of wāhi tapu) for the purposes of the Act.

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74 MACA, s 109(4)(a).
75 MACA, s 109(2)(c).
76 MACA, s 109(4)(c).
77 Noting that such is envisaged in the definition of "applicant group" in s 9 of the MACA.

[154] Given the current position on the wāhi tapu issue, the parties are requested to file submissions on whether a further hearing is required for the purpose of determining:

(a) whether Te Tāhuna o Rangataua is a wāhi tapu or wāhi tapu area for the purposes of the MACA. This includes whether witnesses should be recalled for further questioning; and/or

(b) the type of protection and/or restrictions that may be necessary to protect the wāhi tapu thereby identified.

[155] Submissions on the issues identified above are to be filed as follows:

(a) on behalf of the Rangataua Working Party applicants, within six weeks of the issue of this judgment; and

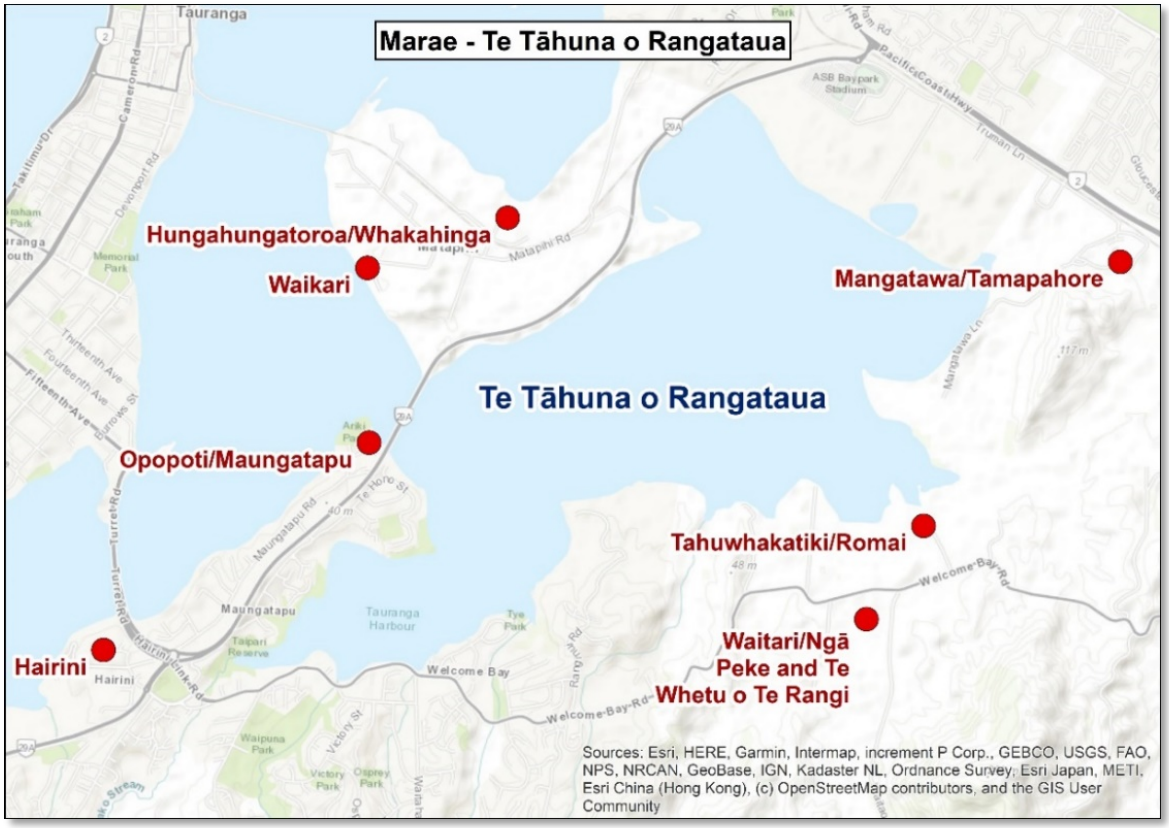
(b) by the Crown and/or any other interested persons wishing to make submissions, within nine weeks of the date of this judgment.

[156] Leave is otherwise reserved generally to seek further directions on any issues relating to the terms of the draft order, including any issues relating to the holder of the order and/or the area subject to the order.

[157] The application of the Ngāti Ranginui Settlement Trust on behalf of Ngāti Ruahine and Ngāi Te Ahi is dismissed except insofar as the Trustees will, on behalf of Ngāi Te Ahi, have two months after the issue of this judgment to confirm whether they wish to have the application on behalf of Ngāi Te Ahi considered as an application for a PCR. If Ngāi Te Ahi seeks to have a PCR determined, a telephone conference will be convened to determine what further steps are necessary to consider the application or whether the application can be determined on the pleadings and evidence already before the Court.

Powell J

Appendix 1:


Marae - Te Tāhuna o Rangataua
Hungahungatoroa/Whakahinga
Waikari
Mangatawa/Tamapahore
Te Tāhuna o Rangataua
Opopoti/Maungatapu
Tahuwhakatiki/Romai
Waitari/Ngā Peke and Te Whetu o Te Rangi
Hairini
Tauranga
Welcome Bay
Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community