IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-821
[2021] NZHC 3599

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	Ngāti Pāhauwera (CIV-2011-485-821) Ngāti Pārau (CIV-2017-485-246) Ngāi Tahu ō Mōhaka Waikare (CIV-2017-485-235) Maungaharuru-Tangitū Trust (MTT) (CIV-2017-485-241)

Hearing: 9 February–26 March 2021
Final written submissions received 21 July 2021

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B Lyall and L Thornton for Mana Ahuriri Trust
R Roff, R Budd and S Gwynn for Attorney-General
H P Harwood for Hawke's Bay Regional Council
M Williams for Pan Pac Forest Products Limited
A Williams for Seafood Industry Representatives

Judgment: 22 December 2021

JUDGMENT OF CHURCHMAN J

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PART I

Introduction

[1] The Trustees of the Ngāti Pāhauwera Development Trust on behalf of Ngāti Pāhauwera, as well as three other applicant groups, have applied under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) for recognition orders for Customary Marine Title (CMT), Wāhi Tapu Protection and Protected Customary Rights (PCR) in Hawke's Bay. The area of coastline involved in the various applications before the Court extends from a point approximately 11km south of the entrance to Napier Harbour, northwards to the northern bank of Poututu Stream which is just south of Wairoa.

[2] This judgment is divided into seven parts. Part I is the introduction, and summary of the case. Part II details the parties and their applications. Part III provides a brief factual and procedural background to the case. Part IV considers the legal, tikanga, and technical issues. Part V is an assessment of each party's CMT application, while Part VI is an assessment of each party's PCR application. Part VII is the conclusion.

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[1] This is one of a number of whakataukī (proverbial sayings) that emphasise the two food sources (mahinga kai) of the tangata whenua in the region covered by these applications, namely the sea (specifically the Tangitū reefs) and the mountains (Maungaharuru).

PART II

The parties

Ngāti Pāhauwera Development Trust (CIV-2011-485-821)

[3] Ngāti Pāhauwera are a confederation of hapū located around Mōhaka in northern Hawke's Bay. Their traditional iwi rohe/tribal boundaries are based on those set down by Te Kahu o Te Rangi, a principal tupuna of Ngāti Pāhauwera who lived before the time of the Treaty of Waitangi.

[4] Since 2012, the definition of Ngāti Pāhauwera as represented by the Ngāti Pāhauwera Development Trust has been set out in s 12 of the Ngāti Pāhauwera Treaty Claims Settlement Act 2012, which provides that:

> **12 Meaning of Ngāti Pāhauwera**
>
> (1) In this Act, Ngāti Pāhauwera means—
>
> (a) the collective group composed of individuals who descend from 1 or more Ngāti Pāhauwera ancestors and who are members of 1 or more of the Ngāti Pāhauwera hapū listed in Schedule 1; and
>
> (b) every whānau, hapū, or group to the extent that it is composed of individuals referred to in paragraph (a); and
>
> (c) every individual referred to in paragraph (a).
>
> (2) In this section, Ngāti Pāhauwera ancestor means a recognised ancestor of any of the Ngāti Pāhauwera hapū who exercised the customary rights predominantly in relation to the core area of interest at any time after 6 February 1840.
>
> (3) For the purposes of subsection (1)(a), a person is descended from another person if descended from that other person by—
>
> (a) birth; or
>
> (b) legal adoption.
>
> (4) In this section, customary rights means rights according to tikanga Māori (Māori customary values and practices), including—
>
> (a) rights to occupy land; and
>
> (b) rights in relation to the use of land or other natural or physical resources.

[5] Ngāti Pāhauwera seek recognition orders for CMT, Wāhi Tapu Protection, and PCR in the application area. The boundaries of the application area are:

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

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

(c) on the Northern end, by the Northern bank of the Poututu Stream; and

(d) on the Southern end, by the Esk River.[2]

Maungaharuru-Tangitū Trust (CIV-2017-485-241)

[6] The Maungaharuru-Tangitū Trust (MTT) is a post-settlement governance entity established in 2012 to represent a collection of hapū including Ngāti Kurumōkihi, Ngāti Marangatūhetaua (sometimes referred to as Ngāti Tū), Ngāti Whakaari, Ngāi Tauira, Ngāi Te Ruruku Tangoio and Ngāi Tahu. The trustees of the Maungaharuru-Tangitū Trust have filed under the Act for recognition orders, specifically PCR and CMT over its application area, on behalf of these hapū.

[7] Shane Taurima, Chief Executive of the Trust, gave evidence that membership is open to any person who can whakapapa to the following tūpuna:

(a) Tataramoa (for Ngāti Kurumōkihi);

(b) Tūkuapa I (for Ngāti Marangatūhetaua);

(c) Whakaari (for Ngāti Whakaari);

(d) Tauira and Mateawha (for Ngāi Tauira);

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[2] The Esk River is also referred to as Waiohinganga. Other geographic features which are mentioned in this decision by both Māori and Pākehā names are Punakērua/Tait's Beach, Whakaari/Flatrock, Moeangiangi/Ridgemount, Te Whanganui-a-Orotu/Ahuriri Estuary/Napier Inner Harbour. There are also te reo Māori place names which are spelt slightly differently such as Waikari/Waikare, Arapaowanui/Arapaoanui and Panepoa/Panepaua. These different names and spellings are used interchangeably throughout the decision.

(e) Te Ruruku, through Hēmi Puna and Taraipene Tuaitu (for Ngāi Te Ruruku (ki Tangoio); or

(f) Tahumatua II (for Ngāi Tahu).

[8] The marae for the hapū is located at Tangoio, approximately 20km north of Napier. Ms Tania Hopmans, the Deputy Chief Executive of the Trust, explained in her affidavit the whakapapa behind the Trust and its coastal rohe:

> The name Maungaharuru-Tangitū, used in the name of our post settlement governance entity (and the previous incorporated society), encapsulates who the Hapū are that we represent, our key traditions and the resources we have enjoyed for many, many generations from our customary lands and coast.
>
> Maungaharuru is the maunga tapu (sacred mountain) which defines our western boundary. But the maunga is more than that: it is the source of essential sustenance for the Hapū and the waters flowing from the maunga feed the streams, rivers, aquifers, lakes, wetlands and sea and all those waterbodies come within the realm of Tangaroa-i-te-Rupetu (the spiritual guardian of the moana and waterbodies, and all within them). Tangaroa's realm is interconnected therefore from a mātauranga Māori perspective, and viewed as an indivisible whole…
>
> Tangitū is the coast and sea adjacent to the lands of the Hapū; it is also the Hapū kaitiaki (guardian) which takes the shape of a whale, and it contains innumerable taonga (treasures) and resources which have fed and nurtured the Hapū over many generations.
>
> …
>
> From Maungaharuru to Tangitū lies our takiwā. Our most significant whakatauākī (tribal proverb) describes this relationship and the interdependence of the mountain and the sea:
>
> > Ka tuwhera a Maungaharuru, ka kati a Tangitū, Ka tuwhera a Tangitū, ka kati a Maungaharuru.
> >
> > When the season of Maungaharuru opens, the season of Tangitū closes, when the season of Tangitū opens, the season of Maungaharuru closes.

[9] The MTT application details the boundaries of the application area as follows:

(a) northwards to a point past the Waitaha River;

(b) southwards to Keteketerau from the mean high-water springs on the landward side;

(c) southeast to Pania Reef; and

(d) out to 12 nautical miles at sea.

Ngāti Pārau (CIV-2017-485-246)

[10] Ngāti Pārau are a cross-applicant seeking to have their application decided in this hearing. They are based in Te Whanganui-ā-Ōrotu (also known as Ahuriri Estuary) and are a hapū of Ngāti Kahungunu. As set out in the affidavit of Mr Roderick Hadfield, Ngāti Pārau descend from the tūpuna of Pitaka Te Otupeka and Tareha Te Moananui (a rangatira of Ngāti Kahungunu hapū, including those in the Ahuriri area). Mr Hadfield deposed:

> The interests in the lands and seas to our immediate north are our whanaunga, Ngāti Hinepare, Ngāti Mahu and Ngai Tawhao. This boundary is traditionally based on whakapapa and the continued exercise of rangatiratanga by Ngāti Pārau.
>
> The interests in the lands and seas to our immediate south are our whanaunga, Ngāti Hawea. This boundary is marked by Te Umuroimata and an old pā near Park Island and out to Pania reef, this boundary is considered a wāhi tapu site for Ngāti Pārau.

[11] The primary marae of Ngāti Pārau is Waiohiki Marae, which is located in Waiohiki, south of Taradale. The marae connects ancestrally to the waka Tākitimu, the maunga Hikuranga and Ōtātara, and the awa Tūtaekurī.

[12] In their 2017 application to this Court for CMT and PCR recognition orders under s 98 of the Act, Ngāti Pārau describe their boundaries as follows:

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

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

(c) the northernmost landmark of the application area boundaries being the Ahuriri harbour entrance and Ahuriri inner-estuarine area; and

(d) the area extending out to include Pania Reef, then heading across on an easting bearing out to 12 nautical miles; and

(e) the area out to 12 nautical miles from the northern most point heading south along the 12 nautical mile boundary until it intersects on an eastern bearing with the southernmost landmark; and

(f) the southernmost point ending approximately 11 km south of the old harbour entrance at the southern end of the Tutae o Mahu block.

Ngāi Tahu ō Mōhaka Waikare (CIV-2017-485-235)

[13] The Ngāi Tahu application seeks recognition orders for PCR, CMT and wāhi tapu recognition over the following area:

(a) starting at the mouth of the Mōhaka River in the north;

(b) to the mouth of the Waiohinganga/Esk River in the south;

(c) beginning at the line of the high tide springs; and

(d) extending to the outer limits of the territorial sea.

[14] Ngāi Tahu submit that since 1840, they have maintained a continuous presence on what is their ancestral land overlooking the coastline between the Mōhaka and Esk Rivers, which has been concentrated at or around the mouth of the Waikari River, and that their connection to the coastline has not been broken as a result of Crown land purchasing or confiscation. Counsel submit that Ngāi Tahu's ancestral rights have primacy over the Ngāti Pāhauwera Development Trust and the Maungaharuru-Tangitū Trust, which are confederations of a number of hapū who do not have such ancestral rights. Counsel submitted that Ngāi Tahu ō Mōhaka Waikare are neither part of, nor represented by, either the Ngāti Pāhauwera Development Trust or the Maungaharuru-Tangitū Trust.

Mana Ahuriri Trust

[15] The Mana Ahuriri Trust is a post-settlement governance entity representing the hapū of Ngāti Hinepare, Ngāti Māhu, Ngāti Matepū, Ngāti Pārau, Ngāi Tawhao, Ngāti Tū, and Ngāi Te Ruruku.

[16] The Trust has signed a deed of settlement with the Crown on 2 November 2016 which includes a statutory acknowledgement of the Ahuriri hapū coastal marine area.

The trust has sought to engage directly with the Crown for recognition of CMT and PCR over the statutory acknowledgment area.

[17] As a result, the Trust appeared at the Ngāti Pāhauwera hearing, but did not wish for its application to be determined at this time, and appeared in relation to the part of its statutory acknowledgment area that overlaps with the application areas of Ngāti Pāhauwera and the other cross-applicants.

The Attorney-General

[18] The Attorney-General on behalf of the Crown gave notice that he wished to appear as a party to the Ngāti Pāhauwera proceedings. The Attorney-General sought to be heard on the evidence and law relating to the applications and in relation to the public interest.

Other appearing/interested parties

[19] The following parties also filed notices signalling their intention to appear at the hearing:

(a) *Pan Pac Forest Products Ltd (Pan Pac)*: Pan Pac filed a notice of appearance for the Ngāti Pāhauwera proceeding, on the basis that it has an interest in the applications to be heard arising from its ownership and operation of a pulp mill located at Whirinaki, and is the holder of a number of resource consents issued under the Resource Management Act 1991 (RMA) including for the discharge of treated effluent from the pulp mill into the marine and coastal area subject to the applications. Pan Pac, in its notice of appearance, reserved the right to oppose the applications to the extent that, if granted, the recognition orders would prevent or hinder continued lawful operation of the pulp mill, including in reliance on all existing and any future resource consents granted to it under the RMA. In opening submissions, counsel for Pan Pac submitted that (at least in relation to Whirinaki), there is insufficient evidence to establish a PCR over the application area, and that questions arise as to whether, so far as Whirinaki is concerned, that the

applicants 'hold' that area in accordance with tikanga and have exclusively used and occupied it since 1840. Overall, Pan Pac submitted that the recognition orders sought by way of PCR or CMT relative to Whirinaki specifically, should not be made. Counsel played an active part in the hearing.

(b) *Council of Outdoor Recreation Associations of New Zealand (CORANZ)*: CORANZ filed a notice of intention to appear as an interested party in the proceeding on the basis that it has an interest in the matter to protect the rights of the outdoor recreation community for recreation in and use without restriction of the area subject to the application. CORANZ did not participate in the hearing itself.

(c) *Hawke's Bay Regional Council (the Council)*: The Council filed a notice of its intention to appear and be heard in the proceeding on the grounds that the application is within its jurisdiction (particularly in relation to its regulatory responsibilities over the application area under the RMA), that it owns and operates infrastructure within the application area which provide local services, and that if granted, the application could impact on the exercise and administration of the Council's regulatory functions and provision of local services. The Council was neutral as to whether any of the applicants had satisfied the statutory tests to the requisite standard of proof for CMT and PCR. Counsel participated in the hearing, to ensure that the scope and terms of the rights sought to be provided for in any orders do not disproportionately affect the Council's interests, and that the terms of any orders made by the Court are certain and workable.

(d) *The New Zealand Seafood Industry Representatives*: NZ Rock Lobster Industry Council Ltd, Paua Industry Council Ltd, Fisheries Inshore New Zealand Ltd and the NZ Federation of Commercial Fishermen Inc (collectively referred to as the "Seafood Industry Representatives") filed a memorandum dated 14 August 2017 giving notice that they wish to appear and be heard in respect of all applications under the Act, as

organisations mandated to represent the holders of individual transferrable quota allocated in perpetuity throughout New Zealand fisheries waters under the Fisheries Act 1996. In relation to this particular proceeding, counsel for the Seafood Industry Representatives filed late evidence in the form of two affidavits expressing their position on the applications.

PART III

The factual and procedural background

[20] The history of Ngāti Pāhauwera's application for their claimed rights and interests over the takutai moana in their rohe stretches back over three decades. It is important to briefly cover the history of this application, for two reasons. Firstly, evidence from earlier applications and hearings, including the Māori Land Court, the Planning Tribunal, three Waitangi Tribunal inquiries, and a Crown-appointed independent assessor's report was adduced in this hearing. Some of the evidence is of particular use and/or importance to this Court's determination as to whether Ngāti Pāhauwera has met the statutory tests under the Act. Secondly, going back over the history of Ngāti Pāhauwera's application provides a small but significant illustration of how long Ngāti Pāhauwera have been attempting to have their claimed rights and interests in the takutai moana recognised, and also explains how they became a "priority applicant" under the Act.

[21] In the late 1980s, Ngāti Pāhauwera opposed the imposition of a water conservation order over the Mōhaka River, including the River mouth (included in the area of Ngāti Pāhauwera's current application). A special tribunal was convened to determine the application, which recommended that the conservation order be made, and prepared a draft order. Ngāti Pāhauwera objected to that draft order, and a Planning Tribunal was set up to assess the objections. The Tribunal ultimately determined that it had no legal authority to consider the evidence put forward by Ngāti Pāhauwera, and in April 1992, recommended that the draft order be made.

[22] Also in 1992, and in response to the Planning Tribunal's decision, Ngāti Pāhauwera, through a rangatira of their iwi, Ariel Aranui, filed a claim to the Waitangi Tribunal concerning their rangatiratanga over the Mōhaka River. Broadly, Ngāti Pāhauwera's position was that their rangatiratanga over the River was confirmed and guaranteed in Article Two of Te Tiriti o Waitangi/the Treaty of Waitangi, and had never been relinquished. They argued that the making of a water conservation order without their consent would usurp their rangatiratanga and amount to a breach of the principles of the Treaty.

[23] This claim resulted in the *Mohaka River Report*, where the Waitangi Tribunal recommended that a water conservation order should not be made unless and until discussions between Ngāti Pāhauwera and the Crown resulted in an agreement on a regime for the control and management of the Mōhaka River.[3] The Tribunal also recommended that the Crown should enter into discussions with Ngāti Pahauwera as a Treaty partner with a view to reaching agreement on the vesting of the bed of the river from the Te Hoe junction to the river mouth. As noted by counsel for Ngāti Pāhauwera in their opening submissions, the Crown did not negotiate with Ngāti Pāhauwera on these recommendations, and the water conservation order was ultimately imposed in December 2004.

[24] In the 1990s, Ngāti Pāhauwera were involved in two other Waitangi Tribunal inquiries in the Hawke's Bay area. Firstly, the Whanganui-ā-Ōrotu Inquiry, which concerned Ahuriri Lagoon, also known as Te Whanganui-ā-Ōrotu or the Napier Inner Harbour.[4]

[25] Ngāti Pāhauwera originally participated in that inquiry as part of the claimant group with interests in the area, but were removed from that group shortly before the hearing started. In its report, the Tribunal concluded that Ngāti Pāhauwera did have certain shared interests in the area due to whanaungatanga/whakapapa connections, their claim to tangata whenua status over Te Whanganui-ā-Ōrotu could not be substantiated on the whakapapa evidence given.[5] The Tribunal noted:[6]

> Ngati Pahauwera asked that they be rightfully included or joined as principal claimants to Te Whanganui-a-Orotu. We cannot accede to that request. Indeed, it may well be that only those with tangata whenua status could have done that. In the event they chose not to. We do not doubt, however, that the Wai 55 claimants will honour their clearly stated intention to recognise, in accordance with tikanga Maori, the rights and interests of their whanaunga, Ngati Pahauwera.

[26] Secondly, the Mōhaka ki Ahuriri inquiry, which related to a district inquiry by the Waitangi Tribunal over the Hawke's Bay, across three geographical subdivisions.[7]

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3 Waitangi Tribunal *Mohaka River Report* (Wai 119, 1992) at 6.4.
4 Waitangi Tribunal *Te Whanganui-a-Orotu Report* (Wai 55, 1995).
5 At 192.
6 At 193.
7 Waitangi Tribunal *Mohaka ki Ahuriri Report* (Wai 201, 2004).

This included the northern division, which was described as the "traditional tribal territory of Ngāti Pāhauwera".[8] In its report, the Tribunal found that the Crown had breached Te Tiriti in its dealings and transactions with Ngāti Pāhauwera, and stated that:[9]

> …despite the Crown having ignored the Tribunal's recommendations in the *Mohaka River Report 1992*, we believe that it still needs to negotiate with Ngati Pahauwera over the management of the river.

[27] Following the passing of the Foreshore and Seabed Act 2004, three members of Ngāti Pāhauwera filed an application for a customary rights order under that Act. Ngāti Pāhauwera were the only group to have had an application heard under the Foreshore and Seabed Act, which occurred in the Māori Land Court in February 2008, at Mōhaka.

[28] Less than a month after the hearing, the Crown offered to enter into negotiations with Ngāti Pāhauwera over their customary rights order application, and their historical Treaty claims. This led to an adjournment of the Ngāti Pāhauwera application in the Māori Land Court under the Foreshore and Seabed Act. However, while Ngāti Pāhauwera were able to sign a deed of settlement on their Treaty claims in December 2010,[10] negotiations had not been completed by the time the Foreshore and Seabed Act went under review, and the current Act was passed. The Māori Land Court Customary Rights Order application was automatically transferred to the High Court under the new Act.[11]

[29] Negotiations and engagement between the Crown and Ngāti Pāhauwera continued. In 2014, as part of the negotiations, Ngāti Pāhauwera collated evidence of their rights and interests in the takutai moana, which was provided to an independent assessor. The Minister for Treaty Negotiations at the time, the Hon Chris Finlayson QC, established the non-statutory position of independent assessor in order to provide

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8 At xxiii.

9 At 20.4.

10 The Ngāti Pāhauwera Claims Settlement Act was eventually passed in 2012.

11 Section 125(3) of the Act directs that this Court give priority to applications transferred to it from the MLC ahead of any other applications. The term "priority" therefore refers only to the entitlement of the applicant group to have their application heard before the applications of non-priority applicants. Other than in this respect, priority applications do not have any greater status or merit than other applications.

an independent, non-binding opinion on the extent to which the tests were met. The Hon John Priestly QC was appointed to this role, and released his report in December 2015.

[30] In his report, the independent assessor found that Ngāti Pāhauwera had established a legal basis for the following:

(a) CMT in their favour in respect of the area claimed in the common marine and coastal area between Poututu Stream and Pōnui Stream out to a distance of 250m, but importantly, *excluding* the Mōhaka River mouth, because it was deemed to be navigable and therefore vested in the Crown;

(b) recognition of wāhi tapu under s 78 in the CMT area, limited solely to negotiated tikanga fishing practices and rāhui for short periods; and

(c) establishment of certain PCRs.

[31] In August 2016, the Minister issued an offer to enter into negotiations for a recognition agreement in respect of CMT over a particular area (namely between the Waihua River mouth and Pōnui Stream and between the mean high-water springs and mean low-water springs but not including the Mōhaka River mouth), albeit smaller than the area recommended by the independent assessor. The Minister did not consider that on the basis of the evidence presented to him, the tests for PCRs or wāhi tapu protection under the Act were met in any part of the Ngāti Pāhauwera application area.

[32] A draft recognition agreement was prepared in 2017, but was never fully accepted or finalised, and in 2017, Ngāti Pāhauwera's application to this Court under the Act was amended to its current form.

[33] The boundaries of Ngāti Pāhauwera's application area have changed in the manner that I now outline. In June 2005, the Ngāti Pāhauwera Development Trust applied to the Māori Land Court for customary rights orders under s 48 of the

Foreshore and Seabed Act 2004. In 2006, the southern boundaries of this application were amended. To support the amended application, an affidavit of Mr Toro Waaka, a kaumātua of Ngāti Pāhauwera and Chair of the Ngāti Pāhauwera Development Trust, was filed.

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

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

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

[37] In March 2018, as a result of a minute of Collins J dated 21 March 2018, this Court required all applicants to file memoranda with a map which showed accurate boundaries of the application area so that the location of boundaries and the compass

bearings of the boundary lines between seaward and landward boundaries were identifiable.[12]

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

[39] On 13 December 2018, the Development Trust filed a memorandum through their counsel labelled "Ngāti Pāhauwera High Court Application Area". This included a map which detailed extended boundaries of the application area, south of the Esk River mouth and down to Bluff Hill in Napier. In response to this, the Maungaharuru-Tangitū Trust applied to strike out part of the application for recognition orders made by the Ngāti Pāhauwera Trust (the respondents) under s 107 of the Act, filed on 15 March 2017. Specifically, the strike-out related to the part of the application area that extended south, below the Esk River mouth.

[40] MTT contended that the application area detailed in the 13 December 2018 map was much larger than the boundaries detailed by the Ngāti Pāhauwera Trust in their original 2017 application. They submitted that the enlarged boundaries constituted a new application that was barred under the Act.[13] As a result, MTT submitted that the part of the Ngāti Pāhauwera application that detailed the enlarged boundaries should be struck out. This Court granted the strike-out application, and the part of the Ngāti Pāhauwera application that comprised the extended application area was struck out.[14]

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

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

14 *Re Ngāti Pāhauwera (Strike Out Application)* [2020] NZHC 1139.

PART IV

Legal, tikanga and technical issues

Holds in accordance with tikanga

[41] Section 58 of the Act provides that CMT 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 subs (3).

[42] The legal requirements in relation to s 58, in particular the standard and burden of proof were examined in detail in *Re Edwards (Te Whakatōhea (No. 2)*[15] as was the meaning of the words "holds the specified area in accordance with tikanga" and I will not repeat what was said there but simply adopt those observations.

[43] As set out in Part IV of *Re Edwards*, the starting point in analysing whether the takutai moana has been held in accordance with tikanga, is to look at the whakapapa (descent lines) and whanaungatanga (familial relationships) of the applicant groups.

[44] Detailed evidence was provided by all of the applicant groups as to their whakapapa. I analyse that evidence more fully in Appendix 2 to this decision. However, some general observations can be made at this point.

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[15] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [77]-[103], and [104]-[144].

[45] Each of the applicant groups are inter-related one with the other. That is unsurprising given that they have lived in relative proximity to each other for hundreds of years.

[46] The applicants all consider themselves to be members of the iwi Ngāti Kahungunu but they also see themselves as having distinct identities.

[47] Although they share a number of common ancestors,[16] in their evidence they often chose to emphasise the differences in their whakapapa rather than their commonalities. That was particularly so in relation to Ngāti Pāhauwera, Ngāi Tahu ō Mōhaka Waikare and MTT.

[48] Whakapapa was used by all of the applicant groups to authenticate their belonging to a particular area through their connection with a specific ancestor or ancestors.

[49] As a result of the analysis set out in Appendix 2 to this decision, I am satisfied that each of the applicant groups has established their whakapapa connection to the takutai moana. Some of the whakapapa evidence given by some witnesses was challenged by other applicant groups. The Court is not the appropriate place for whakapapa issues to be resolved. It is much more appropriate for this to be done through kōrero on the marae and in accordance with tikanga. The important point for the purposes of this decision is that each of the applicant groups has clearly established whakapapa connections to a part of the whenua adjacent to the takutai moana. That is not a finding that all have held areas of the takutai moana in accordance with tikanga but means that each applicant group meets the threshold of having whakapapa which connects them to the takutai moana in question.

Ngāi Tahu mandate

[50] The mandate of Malcom Kingi to represent Ngāi Tahu ō Mōhaka Waikare has been challenged, particularly by MTT.

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[16] The evidence of Ms Hopmans on behalf of MTT was that some 4000 of 6000 MTT members could also whakapapa to Ngāi Tahu.

[51] The challenge does not go as far as asserting that a separate hapū of Ngāi Tahu does not exist. The closing submissions on behalf of MTT expressly acknowledged:

> MTT does not suggest that Ngāi Tahu is anything other than an independent hapū, with a distinct takiwā, but that does not prevent MTT representing that hapū in these proceedings.

[52] The submissions also stated:

> The representation of Ngāi Tahu by MTT is addressed as part of the legislation that established MTT as an entity and is a matter of fact for the Court to determine in light of the evidence from MTT about its mandate and who it represents.

[53] MTT specifically claim that s 12 of the Maungaharuru-Tangitū Hapū Claims Settlement Act 2014 mandates MTT to represent Ngāi Tahu in these proceedings. They say that mandate has not been revoked.

[54] Section 12(1)(b) of that Act lists Ngāi Tahu (rather than Ngāi Tahu ō Mōhaka Waikare) as one of the hapū that it represents. However, that reference to Ngāi Tahu is qualified by the definition of tūpuna set out in s 12(2)(a)(vi). The effect of that subsection is that while it refers to the tūpuna of Tahumatua II, descent from that tūpuna alone is not enough and, in order to claim membership of MTT, any Ngāi Tahu descendant with whakapapa links to Tahumatua II also needs to be descended from "…the tīpuna named in 1 of subparagraphs (i) to (v)". Those tūpuna are exclusively MTT tūpuna. The effect of this is that, pursuant to its settlement legislation, MTT only represent members of Ngāi Tahu where those members also descend from another hapū that MTT acknowledges as being part of the MTT confederation. This has major implications for MTT's claim to represent all of Ngāi Tahu.

[55] Those members of Ngāi Tahu who cannot whakapapa to one of the named MTT tūpuna are excluded from being members of MTT. That such people exist is undoubted. Indeed, it was the original exclusion of Malcolm Kingi from membership of MTT on the basis of a claimed lack of descent from an MTT tupuna that appears to have been the catalyst for Malcolm Kingi's interest in, and research of, his Ngāi Tahu whakapapa.

[56] MTT is not the only entity whose Treaty of Waitangi settlement legislation refers to them representing Ngāi Tahu. The Ngāti Pāhauwera Treaty Claims Settlement Act 2012, in Schedule 1, lists the Ngāti Pāhauwera hapū and lists Ngāi Tahu as one those hapū.

[57] In closing submissions, counsel for Ngāi Tahu firmly rejected any suggestion that either MTT or Ngāti Pāhauwera represented Ngāi Tahu ō Mōhaka Waikare. The submission was:

> Ngāi Tahu ō Mōhaka Waikare represent themselves and Mr Kingi has obtained the mandate to represent them in the MACA Act proceedings.

[58] The issue of mandate is contested by MTT.

[59] MTT advanced five separate grounds upon which it was said that Malcolm Kingi had no mandate to represent Ngāi Tahu:

(a) there was no valid application as Mr Kingi did not hold a mandate when he made the application in 2017;

(b) a meeting of Ngāi Tahu members on 30 January 2021 which purported to endorse a mandate could not retrospectively authorise such an application;

(c) even if the 30 January 2021 meeting did provide a mandate, there was insufficient evidence to show exclusive use and occupation "of the entire application area from 1840 until now";

(d) what was said to be the mandate given by Ngāi Tahu members to MTT to negotiate a Treaty settlement "has not been revoked"; and

(e) that the preponderance of evidence was that the southern boundary of the Ngāi Tahu takiwā was as detailed in the Te Kuta books.

[60] In support of the contention that there is no valid application by Ngāi Tahu, counsel for MTT said that s 101(c) of the Act required that an applicant group must be

described. It said that simply describing the applicant as "Ngāi Tahu ō Mōhaka Waikare located in the Hawke's Bay on the East Coast of the North Island of New Zealand" was insufficient. However, this cannot be reconciled with MTT's acknowledgement that they did not dispute the existence of Ngāi Tahu as an independent hapū with its own takiwā. The only place that takiwā can be is in the Hawke's Bay. The description was sufficient to put MTT (and its members) on notice of the claim.

[61] Counsel also referred to the definition of "applicant group" in s 9 as meaning one or more iwi, hapū or whānau groups. It was submitted that the Act does not contemplate granting CMT to an individual. It was said that Mr Kingi had identified himself as the order holder, and that this had not been mandated by a whānau, hapū or iwi at the time of filing the application. It was submitted that there was no reference to mandate in the application documents or reference to what hapū were represented.

[62] The Act does not prescribe any particular mandate process, neither does it require that an applicant, in an application, must detail the mandate it has. While it is correct that applicant groups, in order to obtain a recognition order, must be either an iwi, hapū or whānau, it is very common for individuals or groups of individuals to be named as the applicants on behalf of an applicant group. Where an applicant group is granted a recognition order, there is nothing in the Act which prescribes the name in which the order must be held. There is nothing prohibiting an applicant group authorising one or more individuals to hold the order on their behalf.

[63] In relation to Mr Kingi's evidence that in 2007, he was given a "blessing" from a group of elders to be the spokesperson for Ngāi Tahu, MTT submit firstly, that the elders concerned have passed away; and secondly, that they could not have given a mandate to bring a claim under the Act as it was not passed until 2011.

[64] Being authorised by elders to be a spokesperson is something different to specifically being authorised to bring a claim under the Act. However, in the absence of any evidence that such authorisation did not occur, or had been revoked, it is consistent with Mr Kingi's actions. It is also consistent with the fact that at the hui

held on 30 January 2021, Mr Kingi's actions in bringing the claim were endorsed by the 27 people who attended.

[65] If, after the commencement of an application, the mandate is challenged, the best way of confirming the mandate would seem to be to hold a hui to confirm the will of the people who are said to be represented by the claim. This is not a matter of validating a "nullity" as submitted by MTT, it simply confirms the assertion made by Mr Kingi that he represents a group of Ngāi Tahu who are either not eligible to be, or chose not to be, represented by MTT (or Ngāti Pāhauwera).

[66] MTT are critical of the fact that the advertisement for the hui held on 30 January 2021, with its reference to "Ngāi Tahu ō Mōhaka Waikare" would not have signalled to MTT Ngāi Tahu whānau that it might necessarily affect them. This submission would seem to miss the point that Malcolm Kingi has not at any stage purported to represent people with Ngāi Tahu whakapapa who have chosen to be represented by MTT.

[67] MTT submitted "Mr Kingi is very aware that MTT represents Ngāi Tahu, but he chose not to provide the details of the hui to MTT to inform its members". As discussed above, the only members of Ngāi Tahu that MTT represents are those who also qualify as members of MTT through having whakapapa links to a named MTT ancestor. Only such registered MTT members would have received any notification of MTT's claims to represent them in the proceedings under this Act. There is no factual basis for MTT claiming that they represent Ngāi Tahu members who do not have MTT whakapapa links. Neither would Ngāi Tahu descendants who are not also MTT members have been notified of any claim by MTT to represent them.

[68] MTT say that Mr Kingi only represents some eight families and it is not possible that "those families alone held the entire area in accordance with tikanga since 1840 until now". This claim confuses two separate issues. The first is whether the application by Mr Kingi is a nullity because he did not have a mandate; and second is whether, on the facts, the claims can be made out.

[69] For these reasons, I do not accept the submission that Mr Kingi's claim was a nullity, and that he did not have any mandate. I will separately address the issue of whether the claims by Ngāi Tahu for recognition orders have been made out.

Wāhi tapu

[70] A contentious aspect of the Ngāti Pāhauwera claim is their assertion that the entirety of their claim area is either wāhi tapu or a wāhi tapu area. I therefore need to consider the extent and location of possible wāhi tapu within the application area, and whether the Act permits an entire application area to be treated as wāhi tapu. Ngāi Tahu also sought protection of wāhi tapu via the Act.

[71] MTT sought recognition and protection of wāhi tapu areas by way of a PCR order in their opening submissions. However, it appears that they no longer seek this PCR order, as it is not referred to as part of the orders sought in their closing submissions. They opposed Ngāti Pāhauwera's claim that the entire area of the CMT claim could be categorised as wāhi tapu.

[72] For the reasons that I set out below, I conclude that wāhi tapu conditions could be utilised in limited circumstances to temporarily exclude third parties and members of the public from specified locations designated as wāhi tapu and subject to wāhi tapu conditions under a CMT order, through the implementation of a rāhui wāhi tapu condition by the parties. However, these must be *specified* locations. There are several discrete locations within the Ngāti Pāhauwera CMT application area that can be made subject to wāhi tapu orders but not the entire area.

[73] Several judgments of the Māori Land Court, High Court, and Environment Court, as well as this Court's observations in *Re Edwards* provide a useful framework for determining a definition and statutory threshold for wāhi tapu.

Statutory framework

[74] Under the Act, an applicant seeking CMT may seek to include recognition of a wāhi tapu or a wāhi tapu area in a CMT order or in an agreement.[17] A wāhi tapu protection right may be recognised if there is evidence to establish:[18]

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

[75] Section 62 of the Act provides that an order made for CMT confers a right upon the applicant to protect wāhi tapu and wāhi tapu areas. Under s 9 of the Act, "wāhi tapu" and "wāhi tapu area" have the meanings given to those terms in s 6 of the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPTA). That Act defines those terms as follows:

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

[76] Counsel for Ngāti Pāhauwera noted that during the legislative process in which the Marine and Coastal Area (Takutai Moana) Bill was being passed through the House, the Ministry of Justice provided advice to the Māori Affairs Select Committee, on the Bill and the Historic Places Act (the predecessor to the HNZPTA) stating:[19]

> The Marine and Coastal Area (Takutai Moana) Bill (the Bill) uses the same definition of wāhi tapu and wāhi tapu area as the Historic Places Act 1993 as outlined above. The policy intention is that there is no difference in meaning or application of these terms in the implementation of the Bill.

[77] If a CMT is recognised by the Court, a CMT order or agreement must set out the wāhi tapu conditions that apply.[20]

[78] The wāhi tapu conditions that must be set out in a CMT order are:[21]

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17 Section 78(1).
18 Section 78(2).
19 Ministry of Justice *Advice to the Māori Affairs Committee – Question 13: Provide advice on wāhi tapu and wāhi tapu areas* (19 November 2010) at [6].
20 Section 78(3).
21 Section 79(1).

(a) The location of the boundaries of the wāhi tapu or the wāhi tapu area that is the subject of the order; and

(b) The prohibitions or restrictions that are to apply, and the reasons for them; and

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

[79] Under s 79(2), wāhi tapu conditions may affect the exercise of fishing rights, but must not do so to the extent that the conditions prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area.[22] Wāhi tapu conditions do not affect the exercise of kaitiakitanga by a CMT group in relation to a wāhi tapu or wāhi tapu area in the CMT area of that group.[23]

[80] Under s 80, wardens may be appointed by a CMT group with an interest in a wāhi tapu or wāhi tapu area,[24] to promote compliance with a prohibition or restriction imposed under s 79.[25] Fishery officers and/or honorary fishery officers may enforce wāhi tapu conditions imposed under s 79 if, and to the extent that, any fishing in a wāhi tapu or wāhi tapu area breaches those conditions.[26]

[81] Section 81 dictates that a local authority that has statutory functions in the location of a wāhi tapu or wāhi tapu area subject to a wāhi tapu protection right must, in consultation with the relevant CMT group, take any appropriate action that is reasonably necessary to encourage public compliance with any wāhi tapu conditions.[27]

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22 Section 79(2)(a).

23 Section 79(2)(b).

24 These wardens may be appointed in accordance with s 118 of the Act, which allows the Governor-General, by Order-in-Council, to make regulations which give directions relating to the management of wardens by a customary marine title group whose customary marine title order includes prohibitions and restrictions in respect of a wāhi tapu or wāhi tapu area.

25 Section 80(1). Section 80(2) provides that appointed wardens are responsible to the CMT group for the following functions: to assist in implementing any prohibition or restriction, to enter a wāhi tapu or wāhi tapu area for the purpose of performing the warden's functions, to advise members of the public of any applicable prohibition or restriction, to warn a person to leave a wāhi tapu or wāhi tapu area, to record any failure to comply with a prohibition or restriction if the warden has reason to believe that the failure is intentional and the name, contact details, and date of birth of a person who the warden has reason to believe is intentionally failing to comply with a prohibition or restriction, and to report to a constable any failure to comply with a prohibition or restriction in any case where the warden has reason to believe that the failure is intentional.

26 Section 80(3).

27 Section 81(1).

[82] Subsection (2) of that section further states that every person who intentionally fails to comply with a prohibition or restriction notified for that wāhi tapu or wāhi tapu area commits an offence, and is liable on conviction to a fine of up to $5000, although this provision is superseded by the offence provisions of the HNZPTA if a wāhi tapu or wāhi tapu area subject to a wāhi tapu protection right is protected by a heritage covenant under s 39 of that Act.[28]

The Ngāti Pāhauwera wāhi tapu claim

[83] Counsel for the Ngāti Pāhauwera Development Trust submitted that the entirety of their application area is sacred to Ngāti Pāhauwera, and that in some circumstances the application area needs protection through restriction of access. Counsel submitted that Ngāti Pāhauwera do not seek to prohibit access, but rather restrict access only in certain circumstances, specifically:

(a) if a person dies in the application area or if kōiwi are found by imposing a rāhui for a period, to be lifted by karakia after a set time; and

(b) to restrict access for those who pollute, litter, gut their fish on the beach or in the water, over-exploit or waste resources, and in relation to the river mouths in particular, to be able to exclude those who use those areas as a toilet.

[84] In Appendix Five of their opening submissions, counsel for Ngāti Pāhauwera set out the specific award of wāhi tapu protection rights which they seek from the Court:

> 1.1. Prohibitions/restrictions on access to the wāhi tapu/wāhi tapu area are binding, subject to the following exceptions:
>
> 1.1.1. To prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area;
>
> 1.1.2. "Emergency activities" to prevent, remove, or reduce an actual or imminent danger to human health or safety or a danger to the environment or property so significant that immediate action is required, including all necessary coastal protection work undertaken in a customary marine title area

[28] Section 81(3).

by a local authority or Crown agency and emergency actions under the Civil Defence Emergency Management Act 2002, Biosecurity Act 1993, Hazardous Substances and New Organisms Act 1996, Maritime Transport Act 1994, Fire Service Act 1975 and Resource Management Act 1991;

1.1.3. To exercise PCRs.

1.2. Intentional failure to comply with restrictions on access to the wāhi tapu/wāhi tapu area is an offence liable to a fine of up to $5,000;

1.3. In consultation with the CMT group, a local authority must take any appropriate action reasonably necessary to encourage public compliance;

1.4 A CMT group can appoint wardens to assist in implementing prohibitions/restrictions, advise public of prohibitions/restrictions, warn a person to leave a wāhi tapu/wāhi tapu area and report anyone intentionally failing to comply to police. Fishery officers appointed under Fisheries Act 1996 can take the same actions where they relate to fishing.

[85] In closing submissions, counsel for Ngāti Pāhauwera submitted that particular emphasis should be placed on the HNZPTA, referring to the statement mentioned above by the Ministry of Justice that the definitions in the HNZPTA and the Act were intended to be similar. Counsel submitted that the HNZPTA had a similar purpose to the Act, and that the Māori Heritage Council[29] had interpreted the HNZPTA definitions a number of times through a robust process. Counsel also submitted that cases interpreting the definition of wāhi tapu under the RMA or Te Ture Whenua Māori Act 1993 were not relevant, because they did not look to the HNZPTA for guidance, were inconsistent, and placed "conspicuous reliance" on evidence from single consultants.

[86] Counsel referred to the Māori Heritage Council's interpretation of wāhi tapu, set out in its vision statement for Māori heritage, which defined the term as:

> …specific sites, areas and localities of significance to iwi, hapū and whānau life, history, culture and experience. They are usually specific sites that have substantial association with ancestors. Wāhi tapu registrations do not ascribe restrictive values to a place; they provide recognition of Māori values only.

[87] Counsel noted that a wide variety of places had been registered as wāhi tapu by the Māori Heritage Council, including reefs, pā sites, urupā, burial sites/caves,

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[29] The Māori Heritage Council is a part of Heritage New Zealand (formerly the Historic Places Trust) that determines applications under the HNZPTA to register wāhi tapu and wāhi tapu areas.

islands, battles sites, and rocks. Counsel also stressed that wāhi tapu and wāhi tapu areas could be in water (referring to a number of rivers, parts of the ocean, and lakes that had designated wāhi tapu status), and also that wāhi tapu areas varied in size from only a few square metres to over 200 hectares. The example of Tūranganui a Kiwa | Poverty Bay, designated as a wāhi tapu area in December 1999, was given by counsel to emphasise that wāhi tapu could be large areas, rather than just small discrete sites.[30]

[88] The majority of counsel for Ngāti Pāhauwera's submissions on this issue centred on the argument that the entirety of the application area was wāhi tapu. In terms of the sacredness of the area, it was submitted that the application area was sacred to Ngāti Pāhauwera:

(a) in the traditional sense, as Ngāti Pāhauwera had many established tikanga customs and practices relating to the takutai moana passed down inter-generationally, including burying of the dead in and around the area, imposing rāhui, using the reti board, and trading hāngi stones with other iwi;

(b) in the spiritual sense, as the application area was revered, awed and respected by Ngāti Pāhauwera, with a number of their witnesses talking about their whanaungatanga relationships with the coastal environment, and the wairua of the elements within that environment;

(c) in the religious sense, as although Ngāti Pāhauwera did not describe their relationship with the application area being religious as such, witnesses referred to supernatural or transcendent controlling powers when talking about the application area, including having respect for Tangaroa;

(d) in the mythological sense (although again Ngāti Pāhauwera did not use this word to describe the sacredness of the area) because of the evidence given by witnesses which could be described as myth-like from a non-

[30] However, on the New Zealand Heritage List/Rārangi Kōrero, I note that the extent of the list entry for that area describes it as "Marker reefs for Iwi/Hapū tribal boundaries and fishing grounds". It is therefore unclear as to whether the entirety of the area is defined as wāhi tapu.

Māori view, such as the presence of taniwha, and the personification of Tangaroa as the ocean; and

(e) in the ritual sense, as evidence was given of prescribed ceremonies and procedures performed in the application area, including karakia, the use of water for healing, rāhui, and procedures around whale strandings.

[89] Counsel submitted that the entirety of the application area met the definition of both being wāhi tapu, and a wāhi tapu area. In relation to the former, it was submitted that while the largest registered wāhi tapu appeared to be around 200 hectares, there was no limit in either the HNZPTA, the Act, or the decisions of the Māori Heritage Council on a size limit. In relation to the latter, it was submitted that in the event that the whole application area was not wāhi tapu, it could still be defined as a wāhi tapu area, given that it was land which contained one or more wāhi tapu, including burial sites, tauranga waka, and reefs, all of significant importance and sacred to Ngāti Pāhauwera.

Ngāi Tahu's wāhi tapu claim

[90] Ngāi Tahu did not refer to a condition for wāhi tapu in their opening and closing submissions. However, in both their original and amended application, Ngāi Tahu indicated that they would seek to include recognition of wāhi tapu and wāhi tapu areas in a CMT order under s 78 of the Act. In their amended originating application, Ngāi Tahu noted that various wāhi tapu and wāhi tapu areas of importance to them were located within the application area, and said that they reserved the right to include any wāhi tapu in a recognition order for CMT after a pukenga had been consulted, and historical research was carried out. However, in closing submissions, counsel for Ngāi Tahu conceded that while some of the witnesses had referred to wāhi tapu in their evidence, the exact location of these would require further specificity (potentially through archaeological evidence) not available at the time, and that this could be potentially be engaged at the second stage of the hearing. Counsel also acknowledged however, the difficulty of amending the statement of claim years after the original deadline, particularly in light of the Court's observations on amending applications

post-deadline in *Re Ngāti Pāhauwera Development Trust*.[31] The time for Ngāi Tahu to submit evidence in support of their claim for wāhi tapu was at the hearing. The absence of such evidence means that their claims have not been substantiated.

MTT's wāhi tapu claim

[91] As discussed above, MTT sought a PCR order for the preservation, development, management, occupation of wāhi tapu and sites of cultural significance in its opening submissions, but did not refer to this application during closing submissions. However, like the Attorney-General MTT opposed Ngāti Pāhauwera seeking that the entirety of their application area be designated as a wāhi tapu/wāhi tapu area on the grounds that:

(a) the Act does not contemplate an entire application area being identified as a wāhi tapu area – instead the wāhi tapu provisions in the Act are intended to protect known and identifiable wāhi tapu, which Ngāti Pāhauwera had not particularised;

(b) some restrictions proposed by Ngāti Pāhauwera were uncertain, such as prohibitions on the over-exploitation or wasting of resources – because the consequences of non-compliance with a wāhi tapu condition could be significant any proposed condition should be precise; and

(c) the types of restrictions Ngāti Pāhauwera propose are capable of being regulated under other legislation, and are accordingly not required to protect wāhi tapu or a wāhi tapu area.

[92] In relation to Ngāi Tahu, MTT's position was that it was unclear whether any recognition for wāhi tapu was actually being sought in this case, but if an entitlement to a recognition order by way of CMT could not be established by Ngāi Tahu, the issue of wāhi tapu does not arise as it would form part of a CMT order.

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31 *Re Ngāti Pāhauwera (Strike Out Application)*, above n 14.

The Attorney-General's position

[93] Counsel for the Attorney-General took a different position to Ngāti Pāhauwera in relation to the application of the HNZPTA. While acknowledging that the HNZPTA was relevant given that it provided the definition of the terms "wāhi tapu" and "wāhi tapu area", they submitted that these definitions should also be read in light of the Act's text and purpose, and that a direct application of the terms in the HNZPTA and the Māori Heritage Council decisions would not provide assistance to the Court when considering whether to recognise a wāhi tapu area, given the differing text and purpose for each Act.

[94] Counsel referred to a number of definitions and criteria for wāhi tapu, which are set out below. It was submitted that while the Act does not distinguish between the values of particular aspects of wāhi tapu (with different locations having different historical or cultural values and states of tapu), claims for wāhi tapu must be objectively established, not merely asserted.[32] There needed to be evidence of a widely held belief by the CMT group that the area in question was wāhi tapu or a wāhi tapu area, and that, where sought, restrictions or prohibitions on access were needed. There must be evidence on why the sites were regarded as wāhi tapu, and the nature of the activities carried out in the area were relevant to whether it could be described as sacred or tapu in accordance with tikanga. It was submitted that, although a site might be important or held to be a taonga, evidence of living in a state of noa, and for example, gathering or preparing kai at a site, would tend to suggest that it was not wāhi tapu.

[95] In support of that proposition, counsel cited *Peters – Oriwa 1B1*, a Māori Land Court case where Judge Ambler observed:[33]

> I accept Marie Tautari's evidence that from her dealings with the various kaumatua and kuia associated with the land there was never any mention of a wholesale wahi tapu which prohibited building on the land. I also accept that the existence of middens does not automatically make the place a wahi tapu. Middens signify human occupation and, in particular, the preparation of kai, which in itself is at odds with an area being a wahi tapu. While I accept that

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32 Counsel referred to *AA Hamilton for the Te Uri Karaka Hapu v Far North District Council and Northland Regional Council* [2015] NZEnvC 012 at [82] to [83]; and *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2012] NZRMA 123 (HC) at [51].

33 *Peters – Oriwa 1B1* (2010) 8 TTK MB 210 at [16].

> middens may signify historical occupation of the land, there is no cogent evidence that this particular area is a site of particular significance.

[96] Counsel acknowledged that the evidence demonstrated that a number of the applicants had a connection with wāhi tapu, for example Ngāti Pāhauwera applicants discussed:

(a) kōiwi being found close to the common marine and coastal area at Poututu, and a history of blood being spilled in the area, meaning some members of Ngāti Pāhauwera avoid going there; and

(b) despite erosion of the coastline, the mauri of wāhi tapu remained in the sea caves and sand dunes along the beach where the remains of Ngāti Pāhauwera had been buried.

[97] Despite this, counsel submitted that Ngāti Pāhauwera faced evidential challenges to the recognition and inclusion of wāhi tapu protection in any order for CMT that might be issued. While Ngāti Pāhauwera had demonstrated a spiritual connection to the takutai moana, there was a significant evidential challenge to recognising the whole of the application area as wāhi tapu. There was evidence of everyday noa activities undertaken on parts of the takutai moana which conflicted with notions of the area being sacred, and claims that the entire area was wāhi tapu appeared from the evidence to be general rather than specific, and were not widely held by all members of Ngāti Pāhauwera, again evidenced by noa activities such as kaimoana-gathering taking place across the application area.

[98] While Ngāti Pāhauwera had provided some evidence of specific locations and sites of wāhi tapu (such as the kōiwi at Poututu discussed above) there was limited evidence that restrictions or prohibitions were required to protect these discrete areas. The Attorney-General's overall conclusion was that Ngāti Pāhauwera had not demonstrated or provided evidence that the whole application area was a wāhi tapu area, nor that wāhi tapu protection was required. Similarly, Ngāi Tahu also had not demonstrated clear evidence of the locations of wāhi tapu within its rohe, or that restrictions were needed to protect these areas.

Wāhi tapu in the law

[99] The term "wāhi tapu" is referred to in a number of other pieces of legislation. For example, the Te Ture Whenua Māori Act 1993 defines wāhi tapu as land set apart under s 338(1)(b) of that Act,[34] while that particular provision dictates that the Māori Land Court or Māori Appellate Court may make an order to set apart as a Māori reservation any Māori freehold land or general land that is a wāhi tapu, "being a place of special significance according to tikanga Māori".

[100] Under the RMA, "historic heritage" includes "sites of significance to Māori, including wāhi tapu",[35] while s 6(e) defines "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga" as a matter of national importance.

[101] I do not accept the submission of counsel for Ngāti Pāhauwera that only examples under the HNZPTA definition of wāhi tapu should be considered in this case. While that Act provides assistance on the definition of wāhi tapu, cases involving the application of the definition under the RMA or TTWMA, via the Environment Court or Māori Land Court, are also of assistance. In particular, the exercise to be undertaken by those Courts is likely to be more similar in form and substance to what this Court is required to do than the function of the Māori Heritage Council under the HNZPTA.

[102] The purpose of the HNZPTA is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand.[36] The functions of the Māori Heritage Council include, for example:[37]

> (a) to ensure that, in the protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, and other historic places and historic areas of interest to Māori, Heritage New Zealand Pouhere Taonga meets the needs of Māori in a culturally sensitive manner;
>
> (b) to develop Māori programmes for the identification and conservation of wāhi tūpuna, wāhi tapu, wāhi tapu areas, and historic places and historic areas of interest to Māori, and to inform the Board of all activities, needs, and developments relating to Māori interests in such areas and places;

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34 See Te Ture Whenua Māori Act 1993, s 4.
35 See Resource Management Act 1991, s 2(1).
36 Heritage New Zealand Pouhere Taonga Act 2014, s 3.
37 Heritage New Zealand Pouhere Taonga Act 2014, s 27.

(c) to assist Heritage New Zealand Pouhere Taonga to develop and reflect a bicultural view in the exercise of its powers and functions;

(d) to consider and determine suitable applications to enter wāhi tūpuna, wāhi tapu, and wāhi tapu areas on the New Zealand Heritage List/Rārangi Kōrero; and

(e) to propose historic places and historic areas of interest to Māori to be entered on the New Zealand Heritage List/Rārangi Kōrero.

[103] By way of contrast, the Act balances a range of different purposes, including:[38]

(a) establishing 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) recognising the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and

(c) providing for the exercise of customary interests in the common marine and coastal area; and

(d) acknowledging te Tiriti o Waitangi.

[104] Therefore, the guiding purposes which this Court must take into account when considering applications under the Act, and the essential function of the Court in this jurisdiction, differ from those guiding the Māori Heritage Council.

[105] Useful guidance on the traditional and legal definitions of wāhi tapu was provided in the Māori Land Court case of *Taueki v McMillan*. In that case, Judge Harvey referred to the evidence of Professor Hirini Moko-Mead in relation to wāhi tapu:[39]

> Before turning to the case as put by the parties, consideration of the independent expert evidence is appropriate. Professor Hirini Mead provided evidence as to the historical and cultural meaning of wāhi tapu. He examined the plain meaning of the words "wāhi tapu," and in doing so said it can be considered a place or site under religious or superstitious restrictions, beyond one's power, inaccessible or sacred. It could thus be described as a "restricted

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38 Section 4.

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

zone" or as a site of very special cultural significance or as a protected zone which has a religious sanction over it and is identified or marked in some way. He said that it is expected that such a restricted zone demands a different sort of behaviour due to the sacred aspect of the restriction.

…

In summary, Professor Mead set out his view on criteria for wāhi tapu:

(a) It is a place where the revered ancestors and relatives lie;

(b) It is a place that is identified and recognised as a wāhi tapu, not only in a legal sense but culturally and traditionally as well;

(c) It is a place that remains tapu for a long period of time and the people believe this;

(d) It is a place of memories and of stories that mean much to the descendants;

(e) It can be a place where death occurred but the bones of the dead are somewhere else; and

(f) It is invariably a place that has a name.

[106] Judge Harvey went on to consider legal and statutory definitions of wāhi tapu, noting:[40]

Mr Clark noted that many of the provisions do not provide a definition of wāhi tapu but simply refer to their existence. Those provisions that do provide a definition are not entirely consistent. Even so, some general elements as to what constitutes a wāhi tapu include:

(a) reference to a geographical place, usually described as sacred or significant;

(b) the place is accorded its wāhi tapu status due to its traditional, spiritual, religious, mythological, cultural or historical significance; and

(c) in terms of Te Ture Whenua Māori Act 1993, there is an additional element of it being a place of special significance in accordance with tikanga Māori.

In examining the case law, Mr Clark found that on the whole there was a divergence of approach in the High Court and Environment Court as to the elements that constitute a wāhi tapu. That difference includes consideration of activities occurring within the site, identifying the location of the site, the size and scale of the site, the use of outside experts, and the emphasis placed upon oral traditional kaumātua evidence.

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[40] At [97]-[100].

> Mr Clark noted that the Environment Court tended to take a narrow approach to the definition of wāhi tapu, showing a preference to accept the evidence of outside experts rather than kaumātua. In reliance on outside experts the Environment Court appears to have defined wāhi tapu, as including:
>
> (a) a wāhi tapu is a specific place – geographically circumscribed usually limited to a specific place – usually very small;
>
> (b) wāhi tapu are, by definition, strictly set apart from daily life; and
>
> (c) wāhi tapu must be associated with religious rather than secular activities.
>
> Conversely, according to Mr Clark the High Court tended to take a more encompassing view and was more willing to accept the oral evidence of kaumātua, particularly where this was not contradicted. In a number of cases the High Court considered that the absence of certain of the elements above was not fatal to the determination of wāhi tapu.

[107] The Waitangi Tribunal, in its *Te Roroa Report*, also made the following observation as to the definition of wāhi tapu:[41]

> For Māori, wahi tapu like taonga is an "umbrella term" that applies not only to urupā (burial grounds) but other places that are set apart both permanently and temporarily. These include places associated in some way with birth or death, with chiefly persons and with traditional canoe landing and building places. Temporary tapu are usually imposed and removed on hunting or fishing grounds or cultivations to conserve and protect the resource. They also include places associated with particular tupuna and events associated with them, set in order by whakapapa…

[108] In terms of the standard of evidence applied, in *Winstone Aggregates Ltd v Franklin District Council*, the Environment Court commented that, while as a general principle, identification of wāhi tapu is "a matter for tangata whenua", claims of wāhi tapu must be objectively established, not merely asserted: there needs to be material of a probative value which satisfies the Court on the balance of probabilities and the Court needs to feel persuaded that the assertion is correct.[42]

[109] In the earlier case of *Heta v Bay of Plenty Regional Council*, the Environment Court similarly observed that:[43]

> The concepts of tikanga Māori and the relationship of Māori and their cultural traditions with their ancestral lands is better discussed at a hui on a marae,

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41 Waitangi Tribunal *Te Roroa Report* (Wai 38, 1992) at 227.

42 *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A80/02, 17 April 2002 at [251].

43 *Heta v Bay of Plenty Regional Council* EnvC Auckland A93/2000, 1 August 2000 at [27].

> without evidentiary and other legal constraints. It is in such a setting that the subtle nuances of such concepts can better be aired and determined.

[110] Ronald Young J in *Takamore Trustees v Kapiti Coast District Council* made some useful observations about the type of proof required in relation to the existence of wāhi tapu. That case concerned an appeal from the Environment Court against a decision by the Kāpiti Coast District Council to build a link road that would go through lands containing wāhi tapu, including urupā.[44] Ronald Young J was critical of the Environment Court's decision to reject and critique the evidence provided by kaumātua concerning the location and geographical definition of the wāhi tapu areas, stating:[45]

> The Court expresses surprise at the "sparseness" of the evidence and says there is nothing in the evidence to suggest burials in the wetland immediately adjacent to the urupa. Finally the Environment Court express doubt about the presence of koiwi in the particular swamp area of relevance south-west and northwest of the urupa.
>
> It is clear from the evidence quoted that the koumatua [sic] identified koiwi in the wetlands of Takamore area. The wetlands are about 360 metres in length and considerably less in width. The evidence it seems did not identify each individual wetland within this limited area and say there are koiwi buried there. The evidence was the swamp lands "have long been the resting place for our ancestors". It is difficult to see, given we are concerned with an oral history which pre-dates European presence, more specificity is reasonably possible. The area within which the koiwi are said to be buried is geographically well defined. The evidence was cryptic, but this is hardly a reason for rejecting it. Each of the three witnesses gives relevant evidence. Mr Parai gives a rationale for swamp burials (preservation and safety from marauding tribes). There is no evidence identified which the Court accepts to contradict this.
>
> The Court complains about a lack of "backup history" or "tradition". Again, it is difficult to understand what this means. Those in the iwi entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible and reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence. The Court complained it was bereft of "evidence" and had "assertion" only of the presence of koiwi. The evidence was given by koumatua [sic] based on the oral history of the tribe. What more could be done from their perspective. The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence. Nor could the kind of geographical precision apparently sought by the Court be reasonably expected. The claim of burials is within a defined area. To require a precise location of burial in such circumstances before satisfaction with the evidence is to potentially reduce

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44 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496.

45 At [66]-[69].

> many claims of waahi tapu areas to unproven and reduce s 6(e), (7) and (8) matters accordingly. If the test applied to koiwi presence by the Court was also applied to the presence of taonga, the Court would have logically been required to find their presence not proved. The fact it did not seems difficult to understand.
>
> Having therefore considered the conclusion and the "reasons" given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the koumatua [sic] of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

[111] In terms of exclusion, ss 26, 27 and 28 of the Act, which set out the public rights to access, navigation, and fishing, are subject to ss 78, 79 and 81 – which set out the protection, conditions and compliance requirements for wāhi tapu areas. For example, s 26(1) provides that every individual has the right to enter, stay in or on, leave, pass or repass in, or engage in recreational activities in, the common marine and coastal area. However, s 26(1) is subject to any authorised prohibitions or restrictions that are imposed under s 79, or by or under any other enactment.

[112] Therefore, if an applicant group becomes a holder of CMT and within that CMT order or agreement, wāhi tapu conditions that provide for exclusion of members of the public pursuant to s 26(1) when rāhui over those wāhi tapu areas are put in place, temporary third-party exclusion may occur in these situations.

[113] This indicates that although CMT (which provides the authority to set these wāhi tapu conditions) is a relatively limited, sui generis[46] right, if the applicants are able to prove both the statutory tests for CMT, and provide evidence which, on the balance of probabilities, proves that specific, defined locations within that CMT area are capable of meeting the wāhi tapu threshold under s 78(2), then the CMT holders may be able to exclude the public or public activities from that particular area for the period of time in which the rāhui is put in place.

[114] This would also be consistent with the principles of statutory interpretation. In *Ngaronoa v Attorney-General*, the Court of Appeal traversed the relevant case law on

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[46] "Sui Generis" is defined in *Black's Law Dictionary* (11th ed, Thomson Reuters) at 1734 as: "of its own kind or class, unique or peculiar".

the application of the Treaty of Waitangi to statutory interpretation.[47] While affirming the observations of Cooke P in *New Zealand Māori Council v Attorney-General*, the Court also referred to *Barton-Prescott v Attorney-General*, where it was accepted that the principles of the Treaty of Waitangi could be deployed in statutory interpretation regardless of whether the statute expressly provided for it:[48]

> We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the [T]reaty in the statute. We also take the view that the familial organisation of one of the peoples a party to the [T]reaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly we take the view that all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the [T]reaty was intended to preserve and protect. Since we are satisfied that the wording of the Acts with relevance to this proceeding is such that there is no conflict with Treaty principles, indeed there are a number of provisions which directly incorporate those principles and there is certainly nothing contrary to that in the Guardianship Act itself, we are not therefore confronted with and do not comment on the situation which might arise where a statutory provision was seen to be in conflict with the Treaty of Waitangi or related principles.

[115] The Court of Appeal then confirmed that:[49]

> Today it can be stated with confidence that, even where the Treaty is not specifically mentioned in the text of particular legislation, it may, subject to the terms of the legislation, be a permissible extrinsic aid to statutory interpretation.

[116] However, the Court of Appeal ultimately concluded that the Treaty of Waitangi could not assist in the interpretation task in the circumstances,[50] referring to Ellis J's statement in the High Court decision of the same case, where Her Honour held that "the *Barton-Prescott* approach can only be applied where there is an interpretative exercise that the court is able to undertake".[51]

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47 *Ngaronoa v Attorney-General* [2018] NZCA 351. The case was appealed to the Supreme Court, but leave was not granted for the ground of appeal concerning the Treaty of Waitangi and statutory interpretation.

48 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184. This was later affirmed in *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 and in *Ngaronoa v Attorney-General* at [44]-[46].

49 At [46].

50 The case concerned the interpretation of the Electoral Act 1993 and its provisions prohibiting prisoners from voting.

51 At [51].

[117] I also note that in the recent Supreme Court decision of *Trans-Tasman Resources v The Taranaki-Whanganui Conservation Board*, William Young and Ellen France JJ observed that Treaty clauses should not be narrowly construed, and instead, due to the constitutional significance of the Treaty to the modern New Zealand state, they must be given a broad and generous constructions, and that any intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.[52]

[118] Here, the Treaty of Waitangi is expressly referred to and acknowledged in two separate provisions.

[119] Firstly, the purpose of the Act, set out in s 4, is described as being 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).

[120] Secondly, s 7 of the Act provides:

> 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

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[52] *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151].

(c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

[121] Given these express provisions, and the effect of *Barton-Prescott* and *Trans-Tasman Resources*, the Treaty of Waitangi and the mana tuku iho of the tangata whenua over the takutai moana will play a role in any interpretation exercise under the Act. However, given the purpose of the Act also includes s 4(a) referred to above, the protection of the legitimate interests of all New Zealanders must also be taken into account.

[122] An appropriate means of balancing these two interests in a way that is consistent with the statute is to allow for the exercise of rāhui through the process set out at [111]-[113] above. Therefore:

(a) rāhui over particular specified and defined wāhi tapu locations may be able to be imposed and enforced through the Act when wāhi tapu conditions are in place and a CMT order/agreement has been granted; but

(b) a more general rāhui may not necessarily be imposed through the Act, but imposed and adhered to through tikanga.

[123] This approach was effectively affirmed in *Re Edwards*. In that decision, the Court held that if the applicants are able to prove both the statutory tests for CMT, as well as providing evidence which on the balance of probabilities proves that specific, defined locations within that CMT area are capable of meeting the wāhi tapu threshold under s 78(2), then CMT-holders may be able to exclude the public or public activities from that particular area through wāhi tapu conditions in s 79, which may include exercise of rāhui within those locations.[53] However, an important qualification to this is that wāhi tapu conditions in relation to rāhui would need to comply with the identification of boundary requirements in s 79.

[124] The Court also observed:[54]

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53 See [389].
54 At [390].

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

[125] Having considered the authorities above, I turn now to determining whether the entirety of an application area can be a wāhi tapu or wāhi tapu area. This is ultimately a bijural assessment based on both tikanga and statutory law, as the applicants will have to satisfy the two elements under s 78(2) set out above, but this will be based on the factual evidence given by kaumatua and others as to the tikanga of the wāhi tapu in the area. So the test is based on s 78(2), but will be heavily influenced by the tikanga of the applicants.

[126] It is conceivable that the entirety of an application area can be considered wāhi tapu. There may be future cases under the Act where the evidence quite clearly illustrates that an entire application area is wāhi tapu or is a wāhi tapu area in accordance with the tikanga of the local whānau/hapū/iwi.

[127] I note, for example, in Powell J's recent decision of *Re Reeder (On Behalf of Ngā Pōtiki)*, there was an acknowledgement by the Crown that the entirety of Te Tāhuna o Rangataua (the eastern part of Tauranga Harbour) could be a wāhi tapu area under the Act, given that it had already been recognised as such under the HNZPTA.[55]

[128] However, there is insufficient evidence in this particular case, in relation to Ngāti Pāhauwera's application, to conclude that the entirety of the application area is a wāhi tapu or a wāhi tapu area. I assess the specific evidence of Ngāti Pāhauwera's wāhi tapu claim further below, but I make three points by way of explanation for this conclusion.

[129] The first point is an acknowledgment. The takutai moana, along with the whenua, is obviously of major importance and significance to Māori. The whakapapa

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55 *Re Reeder (On Behalf of Ngā Pōtiki)* [2021] NZHC 2726 at [153].

connection that tangata Māori retain with the whenua and moana through their ancestry back to atua such as Papatūānuku, and natural features such as rivers, lakes and maunga are foundational connections of great significance within te ao Māori. Ngāti Pāhauwera witnesses discussed the wairua of the environment around them as an example of this. Toro Waaka deposed:

> Wairua pervades every aspect of our thinking. All bodies have wairua including the clouds, the morning dew drops, rocks, sand, driftwood, plants, insects to name a few.

[130] The second point is that, although all aspects of the natural environment are great significance within te ao Māori, the discussion in the authorities above indicates that there are certain areas or places that are of heightened significance, or of a tapu, rather than noa nature, to local iwi, hapū, or whānau as a result of a number of possible factors. An example might be a particular part of the beach being tapu due to the remains of kōiwi being buried there after a battle.

[131] The third point is that in this case, it is not clear enough from the evidence that has been put before the Court as to the tikanga being practised within the application area, that the entirety of this application is a wāhi tapu. Only limited evidence was given in relation to the tapu nature of the whole area, all of which related to particular parts of it, rather than the entirety of the area. I now turn to considering these particular areas. Before I do, I acknowledge that there is some tension between the requirements for wāhi tapu conditions in the Act, and the giving of evidence in relation to wāhi tapu and wāhi tapu areas. As noted by several witnesses for Ngāti Pāhauwera, and as has been apparent from past Māori Land Court cases on the issue,[56] because of the heightened significance and tapu nature of wāhi tapu, kaumatua may be wary of, or unwilling to, divulge information as to their whereabouts and history. This is understandable, and reflects a tension between the statutory requirements of the Act, and tikanga Māori. However, it will be difficult for a Court under the s 78(2) requirements to grant wāhi tapu conditions over an unspecified area about which there is little information, although if there is sufficient evidence about the tapu nature of a

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[56] See for example *Deputy Registrar – Waima North B1 and Waima North B2* (2010) 5 Taitokerau MB 211 (5 TTK 211).

particular defined area and its background, without providing exact locations, the Court may still be able to order wāhi tapu area conditions.

Relevant evidence of wāhi tapu

[132] An analysis of the Ngāti Pāhauwera evidence has led me to determine that there are in effect, five areas which the tikanga evidence indicates are capable of being classified as wāhi tapu. These are:

(a) the Mōhaka River mouth;

(b) parts of the Arapaoanui blocks;

(c) an area of the coast around Poututu;

(d) an area of the coast around Moeangiangi; and

(e) sites of previous pā, battles, or kōiwi within the application area.

[133] I will start with (a) and (b). In relation to (a), Awhina Waaka described taniwha living in the area around the Mōhaka River mouth (particularly the taniwha Paikea, who was referred to by a number of the applicants as a katiaki of the river), that they were tapu, and that they would protect those of the whānau who respected the beach. A map created by Ramon Joe, a respected kaumatua and kaiako of Ngāti Pāhauwera, in 1992 and submitted to the Waitangi Tribunal illustrated the location of Paikea as being at the Mōhaka River mouth, within the common marine and coastal area.

[134] Because wāhi tapu conditions are part of a CMT order, and because I am precluded under the Act and the Coal Mines Act 1979 via the RMA from granting a CMT order over the Mōhaka River mouth, I cannot include a wāhi tapu condition in relation to the Mōhaka River mouth.

[135] In relation to (b), Arthur Gemmell referred to a piece of Māori freehold land at the Aropaoanui 3E block, which had a boundary with the sea of around 300m. Mr Gemmell deposed that:

> Looking from Aropaoanui towards the east to the very top of the hill, on the other side of the river, are visible remains of many terraces. There is also evidence of wahi tapu sites on Aropaoanui 3E and the neighbouring Aropaoanui 3C and as far as I am aware most of these sites have been registered as historic places. Our property also has an often used urupa.

[136] I am unable to grant any wāhi tapu conditions in this area, as it is does not appear that the wāhi tapu referred to by Mr Gemmell are within the common marine and coastal area.

[137] Turning now to (c) and (d). In relation to (c), Bruce Howard Te Kahika referred to the coast at Poututu, and stated that the area was "very tapu". He deposed:

> As a fencer I have had access to many places in the application area that other people cannot get to easily. One of those places is Poututu. I have something to say about this area, but it is hard for me to explain because the person that told me about these things is very sensitive about them and it is a sensitive issue. I think he has some taonga that should not be there, in his house, which cannot be good for his health. When I was working near Poututu in 2006 I heard about wahi tapu, koiwi and taonga at Poututu. I have heard about koiwi being found close to the moana, and the story that there was blood spilt in that area. It makes sense that koiwi might be found in an area with changing landscape through erosion. I know that other Ngati Pahauwera people have areas at Poututu that they will not go to because they have been warned off by their families for those very reasons. I believe that this place is very tapu.

[138] I consider that this is useful evidence in respect of an area that appears to be a wāhi tapu to the people of Ngāti Pāhauwera, as a result of the kōiwi, and battles that have occurred. While the scope of the area needs to be defined more precisely, my view is that there is enough information before the Court to conclude that this could be an appropriate area for a wāhi tapu condition within the grant of CMT to Ngāti Pāhauwera, particularly in relation to the proposed condition that a rāhui be placed over the area if kōiwi are found. However, I am also of the view that I need greater clarity on two things before such a condition can be finalised. I therefore direct that at the Stage 2 hearings, counsel for Ngāti Pāhauwera file submissions detailing:

(a) the specific location of the area of coast around Poututu that is considered wāhi tapu by Ngāti Pāhauwera; and

(b) why the proposed conditions for wāhi tapu are required and how they might apply here.

[139] In relation to (d), Mr David Alexander in his brief of evidence discussed the classification of part of Moeangiangi as a wāhi tapu under the HNZPTA. While acknowledging that it was unclear who applied for the wāhi tapu listing over the area, Mr Alexander provided evidence of a report from Heritage New Zealand Pouhere Taonga:

> Moeangiangi is considered to be a wahi tapu, in the traditional, ritual and spiritual sense, by Ngati Pahauwera, Ngai Tamaterangi, as well as those hapū represented by Maungaharuru – Tangitū Inc.
>
> Te Puna o Rangiriri is the traditional name of a spring that originates on the pa site and nourishes the abundant offshore Tangita reef. Moeangiangi is used as a taunga waka with access to that significant mahinga kai mataitai (fishing grounds) ....
>
> Today, ngā kaitiaki o Moeangiangi consider the site to be the "mauri" or life-force of the Tangitū reef-fishing grounds. It is imbued with the mana of generations of rangatira ....
>
> Apart from its sacred and historic significance, Moeangiangi is valued by many hapū for its fisheries and taunga waka, an end link in the chain of sustenance going from the bush to the sea.

[140] However, Moeangiangi is a location that Ngāti Pāhauwera, Ngāi Tahu and MTT have all sought recognition by way of CMT order over. Any recognition of wāhi tapu is therefore dependent on the applicant first being entitled to a CMT order. That issue is addressed in Part V of this decision.

[141] Finally, in relation to (e), two witnesses referred to wāhi tapu areas in the sand dunes and sea caves more generally. Kuki Green stated:

> Wāhi tapu is a sensitive subject and not spoken of a lot. Wāhi tapu is a form of protection. The coastal area has seen much change over the centuries and much of the physical evidence of wāhi tapu is all but lost. This does not mean the mauri or spiritual energy is any less today though. There may be no headstones, but we respect and treat the coastal area as wāhi tapu, consistent with our customary rights and the area below and above the high-water mark is spiritually significant in many ways. Both areas include the remains of tīpuna of the past as it was the practice to bury our dead in sea caves and sand dunes along the beach. The sand dunes have since been eroded by the sea as have the sea caves. This is why we continue to maintain the application area is wāhi tapu and always will be. We also say this because the mauri is a spiritual energy that has no boundaries.

[142] Toro Waaka said:

There are wāhi tapu throughout the application area. Many are talked about by other witnesses. However, as well as the specific places where access needs to be restricted, like river mouths, there are other wāhi tapu in the application area that we cannot identify today. I have explained this before.

We have been passed on kōrero about our tūpuna being buried in caves along the coast. We have also been told that tūpuna were buried in sand dunes which once existed at the beach but have eroded into the sea over time.

This was a common practice along the whole coast that I observed in my role with the Department of Conservation and I was often consulted on what to do when bones were exposed. *Māori* did not have steel spades and shovels so opted for burial in softer ground and caves. Annexed and marked 'K' is a sketch of the southern side of the *Mōhaka* area from 1869 and shows an area of sand hills along the coast.

At page 26 of my 2007 report also noted Uncle Ramon Joe's evidence that urupā would have been established near commonly travelled routes at strategic places. As the coast was at a commonly travelled route for Ngāti Pāhauwera, there would have been burial along the coast.

I add that the coast was also where invading armies were met by tangata whenua as the coast was their byway. Blood was spilt on the beach and river mouths in many a battle, and koiwi from those battles most likely would have been buried nearby. Some examples of battles we know of along our coast include Waikari. The Battle of Wharekiri was a coastal pā just south of the Waikari River mouth. The inhabitants were decimated by a contingent of Tamamutu from Tūwharetoa, and I explained earlier that because they did not know the route going from Waikari to Mōhaka and the waves were crashing on the cliffs, they turned back.

Mōhaka south. The battle of Otia was on the southern side of the Mōhaka River where people were killed and a chief named Kupe was wounded.

The battle between Tureia and Ngāi Tahu was on the southern side of the Mōhaka River and along the coast to Te Umu toto o Hoata (the blood filled oven of Hoata). There were also people killed in the same battle as the Ngāi Tahu waka Te Riu o te whenua landed at the mouth of the Ruakituri or Coquet, what they call the Coquet stream just above the Mōhaka Bridge.

Waihua. The battle with the sons of Rakaihikuroa and the killing of Ngāi Tahu rangatira Tawhirirangi and his sister and their people occurred on the northern side of the Mōhaka River. There are still bones that are exposed on this side of Te Awaawa stream or on that side I mean, but most have eroded into the sea.

Towards Waihua there are a number of coastal pā sites that sustained many an attack over time. Te Huki had a pā just south of Te Awaawa. A few kilometres along further was the pā of Mangumangu that overlooks the Takapau beach.

At Waihua also there is a coastal pā on the area known today as the Island, at the mouth of the river.

> Given erosion over time many of the coastal sites of battles and burial grounds have been washed into our moana. With the alienation of much of our traditional lands and the dislocation of people the ancient sites or urupā are often unknown.
>
> I have heard of burial sea caves but I do not know where they are nor do we know where the koiwi from past burial in sand dunes have gone over than that they disappeared with the encroaching sea. They could be anywhere in the application area. We only know that area is to be respected.

[143] Like Mr Te Kahika's evidence, Mr Waaka's statements give useful evidence of discrete locations within the Ngāti Pāhauwera rohe that are considered tapu and/or of historical and cultural significance in accordance with tikanga Māori. While I am unable under the Act to grant wāhi tapu conditions over locations that are not specified in sufficient detail, I consider that, similarly to the area at Poututu, wāhi tapu conditions, particularly the imposition of rāhui if kōiwi are found, may be granted as part of a CMT order over the common marine and coastal area for Ngāti Pāhauwera at the Waihua River mouth, Waikari River mouth, and the mouth of the Te Awaawa Stream, if counsel are able to confirm at the second stage:

(a) the specific location of the area of coast around those locations that is considered wāhi tapu by Ngāti Pāhauwera; and

(b) how the proposed conditions for wāhi tapu might apply here.

The proposed conditions

[144] Ngāti Pāhauwera have applied to have certain conditions imposed in relation to wāhi tapu. The Act contemplates the imposition of conditions such as proposed prohibitions or restrictions on access but only where those conditions are required "to protect the wāhi tapu or wāhi tapu area".[57]

[145] Ngāti Pāhauwera have sought the imposition of the following conditions:

(a) temporary restrictions on access to parts or all of the application area in certain circumstances; and

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57 Section 78(2)(b).

(b) prohibitions on certain inappropriate behaviours in the application area/restrictions on access to those who behave inappropriately.

[146] Both the Attorney-General and MTT have raised concerns about these conditions.

[147] The Attorney-General submitted that, while it was possible for large parts of the marine and coastal area to be subject wāhi tapu protection, it was unlikely that large areas would require extensive prohibitions or restrictions in order to protect them.[58]

[148] Counsel referred to the fact that the compliance provisions in the Act allowed local authorities to encourage public compliance with wāhi tapu conditions and provided that a deliberate failure by a person to observe these conditions could bring a fine of up to $5000.

[149] The Attorney-General submitted that these punitive consequences demonstrated the importance of wāhi tapu restrictions being clear and comprehensible to the public and to the authorities and officers who will enforce them. It was submitted that vague or general conditions would not be enforceable and were not the type of condition anticipated by the Act.

[150] According to the Attorney-General, wāhi tapu conditions were intended to protect areas that were sacred rather than regulate the actions of the public in the way proposed by Ngāti Pāhauwera. It was also submitted that restricting people from activities such as polluting, littering, gutting fish in the common marine and coastal area, over-exploiting resources or using rivers as toilets, were more appropriately dealt with through alternative mechanisms. The alternative mechanisms was said to include the RMA, the Fisheries Act, the Regional Council's Coastal Marine Environment Plan, and generally through educational measures.

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[58] Counsel referred to *Minhinnick v Minister of Corrections* ENC Auckland A043/2004, 6 April 2004 at [204]; *Gavin H Wallace Ltd v Auckland City Council* [2012] NZEnvC 120 at [52] and [53]; and *Serenella Holdings Ltd v Rodney District Council* ENC Auckland A100/2004, 30 July 2004 at [106].

[151] It was also submitted that if CMT was recognised then the holders of the CMT order would have the opportunity of preparing a planning document which could influence planning and regulation of activities such as polluting and littering under the RMA.[59]

[152] MTT advanced similar grounds of opposition noting that concepts such as "over exploit or waste resources" had no clear meaning. It was submitted that as the consequences of non-compliance with a prohibition or restriction notified for a wāhi tapu could be significant, any conditions had to be precise.

[153] It was also submitted that as the types of restrictions that Ngāti Pāhauwera proposed were capable of being regulated under other legislation they therefore did not meet the test of being "required" to protect wāhi tapu or a wāhi area.

[154] The criticism of the proposed wāhi tapu conditions as being imprecise and unclear is a valid one. People who are at risk of having penal sanctions imposed upon them are entitled to know exactly what conduct will attract those sanctions. Concepts such as "over exploitation or wasting of resources" are subjective and vague.

[155] If a condition is going to be imposed, it needs to be capable of being readily enforced. Ngāti Pāhauwera propose a restriction to be in place at "river mouths" to the effect that: "no-one may defecate or urinate in rivers/access is restricted to only those who do not defecate or urinate in rivers".

[156] The restricting of access to river mouths of people who either have in the past, or might in the future, defecate or urinate in part of the coastal marine area, gives rise to major practical problems. Firstly, someone would need to be present to deny access to such people. Secondly, they would either have to know that a person who wished to access that part of the takutai moana had at some stage in the past done such a thing or (presumably) might be intending to do such a thing in the future. This is likely to be an impossible task.

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[59] See ss 85, 88 and 93(6) of the Act.

[157] However, more importantly, given that the stated reason for the proposed restriction is: "To protect the rivers and the resources with them, including kai, from pollution", it cannot be said that such a prohibition is necessary. This is because there is legislation already in existence which specifically addresses this issue. Section 32(1) of the Summary Offences Act 1981 provides:

> Every person is liable to a fine not exceeding $200 who urinates or defecates in any public place other than a public lavatory.

[158] A more effective way of addressing the concern expressed by Ngāti Pāhauwera would seem to be by way of encouraging the territorial local authority to increase awareness among visitors to the takutai moana that such activity is a criminal offence and can result in prosecution. Encouraging the local authority to provide toilets at suitable locations would also seem to be a sensible option.

[159] Activities such as "polluting, littering, or gutting fish onto the beach or into the water" can be addressed under existing legislation including regulations made under the Fisheries Act 1996[60] or the Resource Management (Marine Pollution) Regulations 1998.

[160] For these reasons, even if the Court had found that the entirety of the Ngāti Pāhauwera application area was wāhi tapu or a wāhi tapu area, a number of the conditions sought by Ngāti Pāhauwera would not have been appropriate.

Shared exclusivity

[161] In *Re Edwards*,[61] the Court accepted that the test in s 58(1)(b)(i) which required exclusive use and occupation of the specified area from 1840 to the present day, without substantial interruption, could be met when two or more applicants established that they had "shared exclusivity". After the release of the decision in *Re Edwards*, I gave all of the participants in this case the opportunity of filing submissions in relation to the legal findings in that case, including on the issue of shared exclusivity.

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60 Fisheries Act 1996, s 186.
61 *Re Edwards*, above n 15, at [145]-[170].

[162] Prior to the presentation of closing submissions in this case, each of the applicants had, with leave, amended their pleadings to advance claims of shared exclusivity in respect of various parts of their claims for recognition orders.

[163] In supplementary submissions, counsel for the Attorney-General accepted that the statutory definition of "applicant group" to mean "one or more iwi, hapū or whānau" accommodated the concept of shared exclusivity. Although it was noted that both limbs of s 58(1) (holds the specified area in accordance with tikanga and has exclusively used and occupied it from 1840 to the present day without substantial interruption) needed to be satisfied.

[164] The Attorney-General submitted that the decision in *Re Edwards* did not address what "exclusive use and occupation" meant where there were overlapping claims between applicants who are each asserting exclusivity against the other. The Attorney-General acknowledged that considerations of exclusive use and occupation involved a question of fact.

[165] The Court in *Re Edwards* held:[62]

> In terms of the Canadian jurisprudence it is also clear that where competing claimant groups completely deny each other's history and claims to title, shared exclusivity, on the facts, cannot exist.

[166] To the extent that the *Re Edwards* decision may not have fully defined what "exclusive use and occupation" means where there are overlapping claims between applicants, I now give some guidance.

[167] Firstly, each applicant must establish as an issue of fact that they held the specified area in accordance with tikanga. This will involve the applicants firstly establishing their whakapapa and their entitlement through whakapapa to the area of the takutai moana in question. In cases such as the present where the parties acknowledge extensive overlapping whakapapa and whanaungatanga relationships, it will not be unusual for two or more groups to be able to establish the necessary whakapapa connection.

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62 At [166].

[168] Secondly, the applicant groups need to establish the relevant tikanga and a holding of the area in accordance with that tikanga.

[169] Thirdly, the applicants have to acknowledge their shared interest in CMT with the other applicant group. That will normally be done by a specific reference in their application to that shared interest.

[170] Fourthly, the claimed shared interest needs to be acknowledged by the other party. That party also needs to seek a shared CMT.

[171] The Court is likely to be guided by the evidence of a pukenga (either those appointed by the Court or those called by the parties) as to whether the applicable tikanga supports a conclusion that the groups seeking CMT on the basis of shared exclusivity, in fact, held the area on such a basis.

[172] If there is a complete denial by an applicant group of any shared interest with another applicant group, that applicant group cannot expect that the Court to award it shared CMT if it rejects its claim to exclusivity but concludes customary rights were shared.

[173] There may be cases where an applicant accepts that customary interests were shared with other applicant groups but contends that, in accordance with tikanga, its rights were greater than, or different to, the other groups. If there is pukenga evidence that, in accordance with tikanga, (and contrary to the claims of the applicant group asserting that their shared rights were greater than others), the shared customary rights were of an equal status, a finding of shared exclusivity may be possible.

[174] This was the situation in the *Re Edwards* case in relation to the claims by Te Ūpokorehe who acknowledged the shared customary interests of others but said the rights of the others were under their mana. The pukenga disagreed with this and concluded that the customary rights of all of the applicants were similar and shared. A further relevant feature of that case which is unlikely to be common was that there were effectively two claims being advanced on behalf of Ūpokorehe, one by the

Te Ūpokorehe Treaty Claims Trust, and another which advanced the Ūpokorehe claims as being part of the claims by the six Whakatōhea hapū.

[175] In supplementary submissions in this case, counsel for the Attorney-General submitted that where applicant groups do not agree that use and occupation was on a shared basis, one result might be that no applicant group will successfully prove a claim to CMT and instead the competing claims will cancel one another out. That may often be the case but is not necessarily so. It is always open to the Court to find on the facts that a particular claimant group has met the tests in s 58 notwithstanding a claim by a rival applicant group. If that were not so, then the advancing of a completely unrealistic claim by one group would mean that the Court could not award CMT to any group.

[176] As discussed in Part V of this decision, there are areas where I have found the tests in s 58 have been met on a shared basis such as between the Waikari River and Pōnui Stream and around Pania Reef, but there are also areas where I have been unable to find shared exclusivity (such as between Te Awakarikari and the Waikari River) where one of the applicants does not acknowledge sharing customary rights with an applicant who I am satisfied holds those rights in accordance with tikanga.

[177] In supplementary submissions, counsel for the Attorney-General also addressed the issue of whether or not a successful applicant group must demonstrate the ability to exclude others. Counsel submitted that:

> …it is not the Attorney-General's submission that the applicant group must show in every case the ability to exclude others, as might be possible with (dry) land, as a necessary element of "exclusive use and occupation" in s 58(1)(b)(i) of the Act. However, an applicant group might bring evidence that it does attempt to exclude or control access to the takutai moana, or has sought to do so in the past, and such evidence would likely be relevant to the applicant group's claim to CMT.

[178] Section 58 does not require that a successful applicant for CMT is able to exclude others from the takutai moana in the way that registered proprietors of a piece of land with a certificate of title are able to. The concept of holding in accordance with tikanga and exclusive use and occupation in accordance with that tikanga are, as

discussed in Part IV of *Re Edwards*, fundamentally different to European property rights.

[179] If an applicant for CMT had to establish that they had and could legally exclude others from their takutai moana, then no orders for CMT could be granted. The reason for that is that for most of the period since 1840, the Courts have not recognised customary marine title, and there has been no legal mechanism available to Māori that would allow them to legally exclude others.

[180] In terms of s 58, the exclusive use and occupation needs to be in accordance with tikanga. As explained in *Re Edwards*,[63] the concept of exclusion and control inherent in western proprietorial systems is not a feature of tikanga.

Extinguishment – the Mōhaka River

[181] The application area in which the Ngāti Pāhauwera Development Trust seek orders for CMT and PCR includes the area of coast where the Mōhaka River flows into the sea. It is apparent from the evidence that, the Mōhaka River, particularly the Mōhaka River mouth, is of great significance to the people of Ngāti Pāhauwera, and is an area that they particularly want to have CMT granted over. The Mōhaka River mouth is within Ngāti Pāhauwera's "core area of interest" as defined in the Ngāti Pāhauwera Treaty Claims Settlement Act 2012.[64]

[182] However, before CMT can be granted over the mouth of the Mōhaka River, two issues must be considered:

(a) whether the Mōhaka River is within the boundaries of the marine and coastal area under the Act 2011; and

(b) whether the applicants are precluded from being granted CMT as a result of the river being "navigable" and therefore vested under the Crown under the Coal Mines Act Amendment Act.

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63 At [110]-[144].

64 This is defined in the Deed of Settlement of historical claims of Ngāti Pāhauwera (17 December 2010) Schedule 6 at 116 as between "the mouth of the Waikari River and about 3km north-east of the Waihua River".

[183] Below, I detail the importance of the river mouth to Ngāti Pāhauwera, and their decades-long battle to attempt to protect and/or regain control over it. It is unfortunate that they will not be able to do so here, but I am bound by the decision of the Supreme Court in *Paki*. I note that in that case, the Supreme Court was not applying the law to the circumstances of rivers such as the Mōhaka, which are more influenced by the tides and weather than the Waikato River at Pouakani. It is possible that the appellate courts looking at the matter now would not interpret the effect of the Coal Mines legislation in the same way, in light of the different circumstances relating to coastal/tidal rivers that will be subject to the navigability test in application under this Act, and also in light of the Supreme Court's very recent observations on the importance of the Treaty of Waitangi and its principles in considering construction of statutory language.[65] However, until the decision in *Paki* is reconsidered, I am bound to follow it.

[184] Ngāti Pāhauwera have been engaged in litigation and negotiation over the Mōhaka River since the late 1980s, including in the Planning Tribunal, the Waitangi Tribunal, the Māori Land Court, under an Independent Assessor in 2014, and now in this Court under the Act.

[185] Toro Waaka detailed the significance of the Mōhaka River to Ngāti Pāhauwera. In his brief of evidence filed on 19 December 2019, Mr Waaka stressed that the river was of "paramount importance" to Ngāti Pāhauwera, noting that:

> Water or wai gives meaning to the identity of tangata whenua. If one was asked "Ko wai koe?" "what waters, river, parts of the ocean are you from?" Hence in our Ngāti Pāhauwera Statement of identity to manuhiri on our marae and introduction to our rohe we include waters and land:
>
> | | |
> |---|---|
> | Tangitū ki te Moana | Tangitū is the ocean |
> | Maungaharuru ki uta | The Maungaharuru ranges inland |
> | Mohaka te Awa | Mohaka is the river |
> | Ngāti Pāhauwera te Iwi | Ngāti Pāhauwera is the people |

[186] Mr Waaka also provided evidence of the significant spiritual use of the Mōhaka River by Ngāti Pāhauwera historically and more recently, referring to his brief of evidence filed in the Waitangi Tribunal Mōhaka River Inquiry in 1992:

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[65] See *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board*, above n 52, at [150]-[151].

> The spiritual use of the water included healing and tohi rights. The river was also the home of many taniwha, hence the saying he piko he taniwha he piko he taniwha. The status of taniwha was bestowed upon selected ancestors to commemorate their great deeds and importance to our people. These ancestors were the spiritual kaitiaki of different parts of the river. The mouth of the river was the domain of Paikea. Other Taniwha include Hine Mako and Popoia. These taniwha appeared from time to time to warn of impending disaster or to help people in trouble e.g. if someone was drowning, a taniwha would appear in the form of a dolphin and assist the person ashore. The taniwha assumed a number of forms the ones known to me are half human-half eel with red hair, a horse, a red dog, human with wings at Arakanihi, whales, dolphins and logs.

[187] Gladys Nelson (along with many of the other witnesses for Ngāti Pāhauwera), deposed as to the importance of the river as a source of kai and other resources for Ngāti Pāhauwera:

> I was born in Mohaka in the back room of the Hawkins homestead. We survived on big vegetables gardens and would collect water from the Mohaka river for our garden and our own usage. I remember every chance we got being at the Mohaka river mouth with my grandfather while he used his Reti board trying to catch us food. We also used to have our nets in the estuary. Nowadays I spend every spare moment I can fishing or on Mohaka beach or the river side. Our awa is full of trout. I am a regular at Mohaka beach with my mokopuna. We fish, gather hangi stones and driftwood. We practice Ngāti Pahauwera tikanga when we are at the beach.

Past litigation

[188] In opening submissions for the Ngāti Pāhauwera Development Trust, counsel detailed the litigation history of Ngāti Pāhauwera and the Mōhaka River, stemming back to the late 1980s, when Ngāti Pāhauwera opposed the imposition of a water conservation order on the river, and a special Planning Tribunal was convened to consider the application for the order; to the Mōhaka River claim in 1992; to their application for a customary rights order under the Foreshore and Seabed Act; and to the report of the independent assessor in 2014.

[189] In his report, the Independent Assessor gave the following reasons for his recommendation that the Mōhaka River mouth *not* be included with in the proposed CMT recognition agreement:[66]

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[66] John Priestly QC *Report of Independent Assessor on evidence supporting claims by Ngāti Pāhauwera under Marine and Coastal Area (Takutai Moana) Act 2011* (December 2015) at 20.

> It is not the function of an Independent Assessor to make legal rulings. Rather, the focus must be on the evidence. What evidence there is about the navigation of the river mouth, however, both at and prior to 1903, points strongly to the river at and immediately behind its mouth being navigable. There is evidence of commercial vessels, plying both ways between Wairoa and Napier, calling into the Mohaka River mouth to collect and discharge both cargo and passengers. There is an early painting of the river mouth in the 1860s depicting what certainly seem to be signal flags to convey information about the mouth to passing and approaching vessels. There is evidence of punts and ferries crossing the river in both directions to convey passengers and goods. There is evidence of surf boats being used in conjunction with commercial steamship companies to ferry stores to the beach. There is evidence of a vessel grounding on the bar. There is evidence of wool bales being ferried down-river for collection by commercial vessels. There are references to the Mohaka mouth being regarded as part of the Wairoa port. There is the general tenor of the evidence of Mr B Parker, Senior Historical Researcher for the Crown Law Office, and the evidence he presented in October 2007 and February 2008 to the Maori Land Court.
>
> All this evidence, in my view, results in the Crown's submission that, by virtue of the 1903 Amendment Act, the Mohaka River bed at and behind its mouth is navigable and thus vests in the Crown, being strongly arguable, and that Ngāti Pahauwera's CMT is thus extinguished by virtue of s 58(4).
>
> But even if extinguishment was not the central issue, in my view the same evidence raises real issues under s 58(l)(b)(i). Given the clear and undisputed use of the river mouth during the second half of the 19th century and the early 20th century for the purposes of pastoral trade, boat building (which requires eventual floating out to sea), ferries crossing the river, and entry across the bar by commercial vessels and schooners, a body of evidence exists which tilts against Ngati Pahauwera being able to assert on the balance of probabilities that the Mohaka River mouth has been exclusively used and occupied by it without substantial interruption from 1840.
>
> For these reasons, in two discrete areas, I consider the available evidence does not, on the balance of probabilities, lead to a conclusion that the Mohaka River mouth can be included in the claimed customary marine title.

[190] In opening submissions to this Court, counsel for the Ngāti Pāhauwera Development Trust submitted that the Crown "wrongly interpreted the Coal Mines legislation as extinguishing CMT". In response to that submission, I will consider whether the Mōhaka River mouth fits within the definition of marine and coastal area under the Act and if it does, whether it is precluded from being included in a grant of CMT due to the Coal Mines legislation.

Boundaries of the takutai moana and rivers under the Act

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

Marine and coastal area—

(a) means the area that is bounded,—

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

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

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

…

(d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b).

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

coastal marine area means the foreshore, seabed, and coastal water, and the air space above the water—

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.

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

mouth, for the purpose of defining the landward boundary of the coastal marine area, means the mouth of the river either—

(a) as agreed and set between the Minister of Conservation, the regional council, and the appropriate territorial authority in the period between consultation on, and notification of, the proposed regional coastal plan; or

(b) as declared by the Environment Court under section 310 upon application made by the Minister of Conservation, the regional council, or the territorial authority prior to the plan becoming operative,—

and once so agreed and set or declared shall not be changed in accordance with Schedule 1 or otherwise varied, altered, questioned, or reviewed in any way until the next review of the regional coastal plan, unless the Minister of

> Conservation, the regional council, and the appropriate territorial authority agree.

[194] The Regional Coastal Environment Plan (the Plan) of the Hawke's Bay Regional Council sets out the boundary of the coastal marine area within the Hawke's Bay Region, which includes the Ngāti Pāhauwera application area (and the Mōhaka River mouth). This plan became operative in 2014, and replaced the Hawke's Bay Regional Coastal Plan (which had been operative since June 1999).

[195] The boundaries of the coastal marine area under this plan are set out in a number of maps. The Advice Notes attached to those maps provides that the mean high-water springs are defined as the following:

> Mean high water springs is deemed to be the seaward boundary of the following:
>
> a. Parade Gravel Extraction Area
>
> b. Vegetation Clearance Management Area
>
> c. Westshore Renourishment Area
>
> Mean high water springs is deemed to be the landward boundary of the following:
>
> a. Class CR(HB) Water
>
> b. Harbour Management Area
>
> c. Historic Heritage Area
>
> d. Hovercraft Restricted Area
>
> e. Port Management Area
>
> f. Significant Conservation Area (excluding SCA7, SCA13, and SCA18)
>
> g. Awatoto Gravel Extraction Area

[196] The maps which set out the coastal marine area around the Mōhaka River mouth in the Plan indicate that the mouth is in between a Significant Conservation Area and a Vegetation Clearance Management Area, placing it within the mean high-water springs under the Plan, and therefore within the coastal marine area. The specific line at which the Mōhaka River mouth is located is also included in these maps.

Section 58(4) of the Act and the Mōhaka River

[197] Section 58(4) of the Act provides that without limiting subs (2) of that provision, CMT does not exist if that title is extinguished as a matter of law.

[198] Section 261(2) of the Coal Mines Act 1979 provides that:

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

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

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

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

[201] Therefore, an issue arises: if a river can be defined as "navigable", then it may be vested in the Crown, and if it is vested in the Crown, then that has the effect of CMT having already been extinguished, precluding the applicants from having the mouth of the river included in a CMT or PCR order. As discussed above, this was the basis on which the Independent Assessor determined that the Mōhaka River mouth should not be included within a CMT recognition agreement with Ngāti Pāhauwera.

[202] As noted in *Re Edwards*, the starting point in considering the definition of what is "navigable" in this context is the Supreme Court decision in *Paki v Attorney-General*.[67] In *Re Edwards*, the Court discussed *Paki* in detail, and so I will not repeat that analysis here.

[203] Post-*Paki*, the state of the law in the New Zealand context as to the vesting of the beds of navigable rivers in the Crown can be described as follows:

(a) section 354 of the RMA enshrines into current law s 261(2) of the Coal Mines Act 1979, meaning that the bed of navigable rivers are vested in the Crown;

(b) section 261(2) is the appropriate provision (as opposed to the earlier Coal Mines legislation) to be applied when considering navigability, which (as stated by the majority at [50] of *Paki*) is to be assessed as at 1903;

(c) navigability is to be assessed through a "segmented" approach, whereby the particular stretch of river at issue, rather than the entire river, is considered;

(d) navigability of the particular stretch of river is to be assessed according to actual use and the physical characteristics of the river in the particular place, and the width and depth of the river may also be a useful factor to take into account;

(e) a "bare possibility of accommodating occasional craft", or "the fact that some stretch of water is navigable by some acrobatic tour de force" does not support a general finding of navigability, nor does mere recreational use on its own (although this could count as evidence of the capacity of a river to support navigation for the purposes of transport and trade);

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[67] *Paki v Attorney-General* [2012] NZSC 50.

(f) the vesting of navigable rivers in the Crown under the Coal Mines legislation displaced the conveyancing presumption of usque ad medium filum aquae from the English common law that ownership of the bed of the river to the middle of the was included in the purchase of land adjoining the river; and

(g) however, according to the majority in *Paki*, that conveyancing presumption potentially only applied to *non-tidal* navigable rivers, as in navigable tidal rivers and estuaries, it was already ousted by a prima facie rule of evidence that, where navigable, the bed of those tidal rivers and/or estuaries belonged to the Crown.

[204] Thus if the Mōhaka River *is* considered navigable (as at 1903), then it is vested in the Crown under the Coal Mines legislation. The question to consider at this point is whether the bed of the Mōhaka River is vested absolutely (meaning that customary title is totally extinguished), or whether some form of customary title remains, which can be used to grant CMT.

[205] In the second part of the *Paki* litigation, the Supreme Court was concerned with the question of whether, in non-navigable rivers, title to the riverbed had passed to the adjoining owner under the ad medium filum aquae presumption and that where that had occurred in relation to the Pouakani blocks, the bed was held by the Crown subject to fiduciary obligations owed to the individual Māori owners of the riparian blocks.

[206] In *Paki (No 1)*, the owners had effectively proceeded on the assumption that the Crown had obtained ownership of the riverbed when it acquired the riparian land by reason of the ad medium filum presumption.[68] This was due to the 1962 Court of Appeal decision of *Re the bed of the Wanganui River*, where it was held that the Māori Land Court lacked jurisdiction on the basis that the riparian land had been investigated by the Native Land Court, meaning that ownership of the riverbed had been determined and customary rights extinguished, with the ad medium filum presumption applying.[69] This decision had led the applicants to reframe their arguments in *Paki*

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68 *Paki v Attorney-General (No 2)* [2014] NZSC 118 at [12].
69 At [13].

(No 2) on the basis that customary interests had already been extinguished and title passed to the Crown, but that the Crown owed fiduciary duties to the original Māori owners of the blocks.

[207] The Supreme Court dismissed the appeal, on the basis that it was not convinced that the doctrine of ad medium filum aquae applied in the circumstances. The majority made two key points for the purpose of this case.[70]

[208] Firstly, the majority in the case considered that the precedent from *Re the bed of the Whanganui River* did not have universal application, and instead was limited to the specific circumstances pertaining to that litigation relating to the Whanganui River.[71]

[209] Secondly, the majority expressed doubt as to application of the ad medium filum presumption. Elias CJ took the strongest view on this (with Glazebrook and McGrath JJ concurring on more hesitant terms), asserting that this was simply a "conveyancing presumption" which could be rebutted by an assessment of the custom and usage of the local Māori owners.[72]

[210] Therefore, *Paki (No 2)* supports the proposition that in non-navigable rivers, it is not necessarily the case that the process of title investigation in the Native Land Court has extinguished customary title to the riverbed via the presumption of ad medium filum aquae – customary title may remain and can be investigated. However, given my conclusion that, as at 1903, on the balance of probabilities, it has been established that the mouth of the Mōhaka River was navigable, I do not get to the stage of considering whether the conveyancing presumption discussed by the Supreme Court in *Paki* could have extinguished pre-existing customary rights.

[211] Counsel for Ngāti Pāhauwera and counsel for the Attorney-General both produced historical evidence in support their competing positions as to the navigability of the Mōhaka River. However, I am forced to conclude that as at 1903, the mouth of

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70 The majority consisted of Elias CJ and McGrath and Glazebrook JJ, but all three wrote separate judgments. William Young J dissented, and Chambers J died before the judgment was delivered.

71 At [175].

72 At [24]-[25].

the Mōhaka River was in fact navigable. Counsel for the Attorney-General adduced a range of evidence which indicated that the mouth of the river was between the late 19th and early 20th century used as a location/stop for transport, a small hub for trading purposes (particularly materials from farms, such as wool), and as a small port.

[212] It appears that, around 1903, despite the bar, the mouth was being used and traversed by boats for those trading and transport purposes. For example, the Attorney-General adduced evidence of Brent Parker, a historical researcher engaged by the Crown Law Office, who gave evidence on the navigability of the Mōhaka River in relation to Ngāti Pāhauwera's application to the Māori Land Court for a customary rights order under the Foreshore and Seabed Act 2004. Mr Parker deposed that in the late 19th and early 20th century, while larger vessels had foundered on the bar, smaller vessels were able to, and did, operate in the lower reaches of the Mōhaka River, including the mouth. This included three boats controlled by the Wairoa-Mōhaka Steamship Company (which operated from the 1870s to the 1940s), used to ferry wool and as transport between Napier, Mōhaka, and Wairoa. One particular steamer, the *Tu Atu*, was described as being "built especially for the shallow bars of the Wairoa and Mōhaka rivers".

[213] Mr Parker also referred to surfboats that were used to ferry materials between the ships and the beach, when the bar made crossing difficult. Other evidence described that while river bars "often presented" a hazard to shipping, smaller craft could be used to ferry goods and passengers, while an unnamed report referred to by Ashley Gould (a historian who gave evidence for the Crown on third party use of the takutai moana in the application) as being dated between 1907-1919, described the Mōhaka River as having "a small port", with the river permitting "till some years ago", small steamers to get in "fairly often", although that report did note that those boats "rarely ever" got in at the time the report was written.

[214] There was also a relatively large body of evidence supporting the navigability of the Mōhaka River in the late 19th century. There was evidence of the Mōhaka River being used as a network of transport in the 1840s and 1850s, while Mr Parker's 2007 report refers to evidence of a whaling station at the mouth of the river in the 1850s, where the boats belonging to the station would pass in and out of it "in almost all

weathers".[73] Mr Parker went on to refer to a letter in the Hawke's Bay Herald in 26 November 1864, where Mr James Grindell detailed the crossing the Mōhaka bar and out to sea on a small boat.

[215] Perhaps the most compelling evidence in favour of counsel for the Attorney-General's argument that the Mōhaka River was navigable was a report written by Toro Waaka as evidence for the Mōhaka River inquiry by the Waitangi Tribunal in 1992. In that report, Mr Waaka stated that, in relation to the Mōhaka River:

> Prior to the earthquake, schooners could enter the mouth of the river making this area an important distribution and staging post.

[216] I note that this issue is relatively finely balanced. There is little evidence which *explicitly* discusses the navigability of the Mōhaka River mouth in the year 1903, and the bar of the mouth did certainly not appear easy to cross – at most small boats and vessels could enter, provided the weather was not too turbulent, and it does not appear that large vessels could enter the River mouth at all. However, I have to come to the conclusion that, on the evidence of activity around the early 20th century, and activity in the late 19th century, the Mōhaka River mouth was navigable as defined in *Paki v Attorney-General*.[74]

[217] I am also of the view that the application of this legislation extinguishing customary Māori title (through the Coal Mines Act, applied via the RMA), effectively amounts to extinguishment via a sidewind, and results in an injustice for the people of Ngāti Pāhauwera in this case. The Attorney-General, in closing, acknowledged Ngāti Pāhauwera's continued and consistent connection to the Mōhaka River, and particularly its mouth. For the reasons I set out below, there is no doubt that Ngāti Pāhauwera held this area in accordance with tikanga as at 1840 and have continued to do so and, but for the Coal Mines legislation would be entitled to an order for CMT in respect of it.

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[73] Mr Parker did acknowledge however, that this description of navigability may be "optimistic in light of other sources".

[74] *Paki v Attorney-General*, above n 67.

Extinguishment – the Pan Pac pipeline

[218] Pan Pac Forest Products Ltd (Pan Pac) appeared in these hearings as an interested party, particularly in relation to the applications which could have an effect on its ownership and operation of a pulp mill located at Whirinaki.

[219] The pulp mill at Whirinaki was established in 1973. From that point onwards, until the present day, Pan Pac has been discharging material (which originally included human waste, and is now treated effluent from the pulp mill) into the takutai moana via an outfall. From between 1973 and 2014, that outfall included a submarine pipeline and 44 metre diffuser, located some 300 metres off Whirinaki Beach. However, a result of a new treatment operation was that it led to stronger colouration of the wastewater, leading to Pan Pac being issued with a non-compliance notice by the Hawke's Bay Regional Council. Pan Pac constructed a new 2.4km outfall. The consenting and construction of this new outfall was vigorously opposed by the Maungaharuru-Tangitū Trust, but was eventually approved by the Environment Court.[75]

[220] As counsel for MTT have noted, Pan Pac's involvement in these proceedings, is essentially to seek a "carve out" in any award of CMT within the MTT application area, in relation to Whirinaki. Pan Pac's position is that its occupation and use of that particular part of the area amounts to substantial interruption of the use and occupation of Whirinaki by the MTT hapū, and therefore CMT cannot be awarded over that particular area. Pan Pac does not oppose the granting of CMT to applicant groups in any other part of the application area.

[221] MTT oppose Pan Pac's position. In closing, counsel for MTT submitted that the MTT hapū had a continued connection and relationship to the area as they continue to exercise kaitiakitanga in relation to it. Counsel also identified several issues with Pan Pac's position:

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[75] See *Maungaharuru-Tangitū Trust v Hawke's Bay Regional Council* [2016] NZENVC 232.

(a) Pan Pac has no ongoing right to continue its operations in the location – it must continually apply for resource consents and there is no guarantee that consents will continue to be issued;

(b) any consent held by Pan Pac now or in the future does not amount to a proprietary right that would affect the ability of the Court to make orders for CMT or PCR;

(c) the evidence from a number of witnesses was that the quality of kaimoana was adversely affected in the area as a result of Pan Pac operations commencing – it seems inequitable that Pan Pac can now use these actions to its benefit to argue substantial interruption; and

(d) there is evidence of use of the takutai moana in the Whirinaki area from the MTT witnesses.

Analysis

[222] *Re Edwards* held that a Court cannot draw an inference that because an activity in the coastal marine area is carried out pursuant to a resource consent that pre-dates the commencement of the Act, it would automatically amount to a "substantial interruption" of the exclusive use and occupation of the takutai moana by the applicant groups.[76] The Court held:[77]

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

[223] Therefore, to determine whether the Pan Pac outfall pipe amounts to a substantial interruption of the exclusive use and occupation of the applicant groups over that particular area, requires an examination of the factual evidence.

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[76] At [229].
[77] At [230].

[224] Before turning to this, I need to consider an argument raised by counsel for MTT following the conclusion of the hearing. As noted above, the *Re Edwards* decision was released on 7 May 2021, and counsel were invited to file further submissions on points arising from *Re Edwards* that may have an effect on this case. Counsel for MTT filed further submissions on 17 May 2021. They referred to the observation set out at [222] above, and submitted that this was relevant to the issue of whether the presence of the Pan Pac outfall pipeline amounted to a substantial interruption. Counsel submitted that the Court does not have to apply a factual assessment of whether the Pan Pac outfall amounts to substantial interruption of MTT's exclusive use and occupation, because the resource consent for that outfall was authorised by a resource consent granted in June 2019, after the commencement of the Act.

[225] Counsel for Pan Pac filed submissions in response on 1 June 2021. Pan Pac's position is that while the most recent resource consent was issued in 2019, it has held and exercised a number of resource consents that predated commencement of the Act, and that ultimately the short point is that Pan Pac's outfall had been discharging treated process wastewater at Whirinaki since 1973.

[226] In an affidavit filed by counsel for Pan Pac for the hearing, Peter Arthur Allan, a manager employed at Pan Pac between 1976 and 2016, set out a table of consents issued to Pan Pac for its effluent discharge, up until 2016. The table evidences a number of consents for disposal and discharge of material through an outfall, by the Hawke's Bay Regional Water Board and then the Hawke's Bay Regional Council. It is apparent that while the most recent consent for the extended outfall was granted after the Act was passed, Pan Pac had been granted consent to discharge effluent from its original outfall well before the Act existed.

[227] The key issue is therefore whether the outfall has, in fact, had the effect of substantially interrupting the exclusive use and occupation of MTT hapū or other applicant group over the takutai moana at Whirinaki.

[228] It is apparent that the takutai moana in the vicinity of Whirinaki was traditionally used and occupied by the MTT hapū, particularly as an area for gathering

kaimoana and fishing, and that MTT hapū had an abiding connection to the area. In his historical report, Tony Walzl noted that the area around Whirinaki was traditionally used as a mahinga kai prior to the 1931 Napier Earthquake, that Whirinaki was a good area for collecting kaimoana particularly mussels and eels, and that Moremore, a kaitiaki of the MTT hapū, had been sighted there in the past.

[229] Boyce Spooner described catching "big snapper" between Whirinaki and Napier, while Bevan Taylor described the "whole coastline" as being for good for kaimoana, from Whirinaki point to Tangoio and further. Heitia Hiha recalled diving along Whirinaki "at least once a month" during the summer in the 1970s, while Ruruarau Hiha also recalled diving for mussels in the deeper waters off Whirinaki in the 1980s.

[230] However, the evidence indicates that from the 1970s and 1980s onwards, MTT hapū members lessened or ceased these activities, as a result of the pollution from the Pan Pac mill and the outfall. The evidence of both Bevan Taylor and Fred Reti was that from when the Pan Pac mill was established in the 1970s, they noted the deterioration of mussels in the area as a result of the waste from the mill. Kuia Gray also described Whirinaki as having an effect on the kaimoana in the area, namely mussels, and the area being polluted. Ruruarau Hiha recalled that when he was diving for mussels from 1970s onwards when the mill began to operate, that a scum layer had developed on the mussels. Hoani Taurima deposed that when collecting mussels and pāua as a child with his grandfather, realising for the first time that they were contaminated/polluted. Heitia Hiha deposed that while he used to dive at the end of Whirinaki point, his father stopped diving there because of the decline in quality of the mussels, and that he had not dived there for over 20 years – also recalling a sludge or film-like silt over the mussels.

[231] Reviewing the evidence it is apparent that the hapū of MTT still hold the general area in accordance with tikanga. A number of the witnesses discussed their connection to the Whirinaki area, and also importantly, continued to exercise their role as kaitiaki over the area. This is evidenced by their continued work with, and sometimes opposition to, Pan Pac over the paper mill and outfall in the area, and also their holding of kaitiaki positions in relation to the area. For example, Tania Hopmans

deposed that she was the hapū representative of the Pan Pac Environmental Trust, which had both the environmental purpose of promoting enhancement, restoration, and protection of the environment, and the cultural purpose to offset impacts on mana whenua hapū. I therefore find that this element of the test under s 58 is satisfied.

[232] However, the difficulty is not with that element, but with the requirement that MTT prove exclusive use and occupation over this particular part of the area since 1840, without substantial interruption. In other words, the use of the word "and" at the end of s 58(1)(a) means that, in addition to proving a holding in accordance with tikanga, it is necessary for the Court to be satisfied that there has been no substantial interruption. On the evidence, I am compelled to conclude that there has been substantial interruption in relation to the area around the pipeline. Statements given by the MTT witnesses all point to the conclusion that since the Pan Pac mill and outfall began to operate in the 1970s, there has been significantly reduced use of the area, with many of the witnesses stopping their activities, such as collecting kaimoana, from the 1980s onwards.

[233] So, although MTT has satisfied the first part of the test – that is, the hapū of MTT do still hold the general area in accordance with tikanga, I have come to the conclusion that the second part of the statutory test is not satisfied, due to substantial interruption.

[234] The Stage 2 hearing will be the place to determine the exact boundaries of the area either side of the outfall pipeline that should be excluded from any CMT. My tentative view is that a "carve out" 400 metres either side of the outfall might be required.

Other structures in the takutai moana

[235] As noted in *Re Edwards*, whether a structure in the takutai moana has the effect of amounting to a substantial interruption to the part of the specified area in which the structure is located, is ultimately a question of fact.[78] There is, in effect, no presumption that third party structures substantially interrupt customary rights in a

[78] At [251].

specified area. Some structures, such as sewage outfall pipelines, including the Pan Pac pipeline, will amount to a substantial interruption of the exclusive use and occupation of that part of a specified area because they limit the ability of an applicant group to undertake activities such as fishing/kaimoana gathering and navigation in the area immediately around the structure.[79]

[236] Other structures such as navigation buoys or markers, breakwaters, seawalls or similar structures, may actually enhance the use of the relevant parts of the takutai moana not only by applicant groups but also others.[80] Where an application group/groups support the creation and maintenance of such structures, it is difficult to see why the fact that the structures physically exist should be said to amount to a substantial interruption of exclusive use and occupation.[81]

[237] According to a map produced by Mr Jennings, a Crown historian, the majority of the structures located within the takutai moana in these proceedings were in and around Napier City, particularly the inner harbour and the port. In fact, as noted by the Attorney-General in closing submissions, there did not appear to be any third-party structures past Whirinaki. The Whirinaki area has also already been discussed as being subject to substantial interruption, as a result of one of those lawfully established structures, the Pan Pac outfall pipeline.

[238] Other than for a small number of exceptions, it appears that the structures are all located in areas of the takutai moana where I have found that substantial interruption has occurred, namely around Marine Parade, the Napier Port, and the Napier Inner Harbour.

[239] Turning to these exceptions. The first is Pania Reef. There appear to be two buoys located close to the boundary of the reef, although there was nothing suggested by any of the parties that the presence of these buoys would amount to substantial interruption, and I therefore conclude that substantial interruption has not occurred.

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79 At [252].
80 At [252].
81 At [253].

[240] The second is the Ahuriri Estuary, namely LINZ primary parcel 9. Below, I consider the structures in this parcel, including the bridges and walkways, and have determined that exclusive use and occupation was not substantially interrupted by the structures present.

[241] The third is the southern part of Ngāti Pārau's boundary. There appears to be a stormwater outfall close to the southern boundary, although as with the structures above, there did not appear to be any evidence that clearly suggested that it had resulted in substantial interruption of Ngāti Pārau's exclusive use and occupation.

[242] The fourth and final exception is Hardinge Road Reef. Relatively close to the reef, there is a pile marking the wreck of the ship "Montmorency". As noted in the affidavit of Ms Nichola Ann Nicholson, the Hawke's Bay Regional Council holds a resource consent for a structure in the seabed adjacent to the wreck for the marking of the site as a navigational aid. The consent specifically relates to a pile being driven into the seabed for the creation of a new navigation aid to replace an existing unsatisfactory beacon. Again, there is no evidence suggesting that the presence of this structure has resulted in substantial interruption.

Extinguishment – the Foreshore and Seabed Endowment Revesting Act 1991

[243] During the hearing in this case, counsel for Ngāti Pārau conceded that there had been a substantial interruption under s 58(1)(b)(i) in respect of parts of the application area that had been vested in the Napier Harbour Board in the late 19th and early 20th centuries. This concession was essentially made for four reasons:

(a) that certain parts of the application area (the vested areas) had been statutorily vested under the Napier Harbour Board Act 1874,[82] and the Napier Harbour Board Amendment and Endowment Improvement Act 1887;[83]

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82 This Act reserved and set aside areas of land for the use, benefit and endowment of the Harbour Board. It was followed by other statutes in 1875, 1876 and 1884 vesting the land in the Board.

83 This Act more accurately clarified the boundaries of the land comprising Ahuriri Lagoon vested in the Harbour Board.

(b) the registration of fee simple title in the name of the Napier Harbour Board for part of the land known as the "Ahuriri Lagoon" in 1929, and registration of fee simple title in the name of the Napier Harbour Board for land partly in the Heretaunga District and partly under the water of Hawke's Bay, including part of the Ahuriri Lagoon Reserve, in 1933;

(c) that the location of the majority of the vested areas in and around the Napier Port and the area that were part of Te Whanganui-ā-Ōrotu prior to the 1931 Napier Earthquake; and

(d) the fact that all of the vested areas are immediately adjacent to Napier City, which is where the evidence indicates that the majority of third-party activities associated with the takutai moana occur.

[244] However, following the hearing, counsel for the Attorney-General filed additional submissions addressing the implications of s 5 of the Foreshore and Seabed Endowment Revesting Act 1991 (the 1991 Act). The Attorney-General's position is that in effect, the 1991 Act revived customary title in a number of those vested areas that had previously been extinguished by statutory vesting and fee simple title. Counsel identified specific parcels of land where CMT and PCR could potentially be recognised, and also considered that within those specific parcels, the period during which customary interests were extinguished (that is, between 1928/1933 and 1991) would not necessarily amount to substantial interruption.

[245] In a minute dated 13 April 2021, I granted Ngāti Pārau leave to file reply submissions to the Attorney-General. These were filed on 1 June 2021, and indicated that Ngāti Pārau had withdrawn their concession that there was substantial interruption in the vested areas under s 58 of the Act, and that the customary connection of Ngāti Pārau to the vested areas had not been severed, making those areas available for an order of CMT if the statutory tests were met.

[246] As a result of this development, in this part of the judgment I will consider whether customary title has been revived in those vested areas, and whether it might be available for an order of CMT.

Relevant law and analysis

[247] Section 5 of the 1991 Act provided:

> **5 Foreshore and seabed revested in Crown**
>
> Subject to section 6 of this Act,—
>
> (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.

[248] Section 4 of the 1991 Act provided that it applied to all land formerly alienated from the Crown and vested in a Harbour Board or local authority, and at the commencement of the Act was either foreshore or seabed and vested in a local authority, or land reclaimed from the sea unlawfully.

[249] As noted by counsel for the Attorney-General, it appears that some parts of the takutai moana within Te Whanganui-ā-Ōrotu and the Napier Port and Harbour areas were land to which the 1991 Act applied because, at the commencement of the 1991 Act, it was vested in either the Napier City Council, Hawke's Bay Regional Council or the Napier/Hawke's Bay Harbour Board.[84]

[250] Section 5 of the 1991 Act only appears to have been considered in the Courts once before – by Powell J in the most recent decision under the Act.[85] I discuss Powell J's approach below, but record that I agree with both his and the Attorney-General's position that there is an argument that the statutory revesting of land in the Crown "as if it had never been alienated from the Crown and free from all subsequent trusts, reservations, restrictions, and conditions" achieved a statutory revival of customary interests in the foreshore and seabed.

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84 These all fall within the definition of a "local authority" as that term was used in s 4(b)(i) of the 1991 Act.

85 *Re Reeder (on behalf of Ngā Potiki)*, above n 55.

[251] This is because of the statutory background to the Act. As noted by counsel for the Attorney-General, the explanatory note of the Foreshore and Seabed Endowment Revesting Bill 1989 stated that in relation to s 5 (then cl 4 of the Bill):[86]

> Clause 4 is the revesting provision. It revokes the original vestings and revests those areas in the Crown. It also removes any trusts, reservations, restrictions, or conditions that may have been part of the original vesting or imposed subsequently. For the purposes of the revesting, "foreshore" means those areas covered and uncovered by the flow and ebb of the tide at ordinary spring tides.
>
> The intention is that the land concerned will have the same legal status as it had immediately before the alienation from the Crown. **This means that any Maori interests in respect of the land at that time can be revived when the Bill comes into force**.
>
> [emphasis added]

[252] Counsel for the Attorney-General also noted that the 1989 Bill was introduced to the House of Representatives, the Minister of Māori Affairs was asked if the Bill opened-up the right for "Māoridom" to go back and question of ownership of any seabed or foreshore. His response was as follows:[87]

> Mr Lee: … For the benefit of the Minister of Maori Affairs I shall read the explanatory note relating to clause 4: "The intention is that the land concerned will have the same legal status as it had immediately before the alienation from the Crown. This means that any Maori interests in respect of the land at that time can be revived when the Bill comes into force." Most of the endowments came into being at the end of last century. Can I take it from the Minister of Maori Affairs that the Bill opens up the right for Maoridom to go back to the question of ownership of any seabed or foreshore? Is that correct?
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> Hon. K. T. Wetere: Yes.

[253] Counsel for the Attorney-General referred to two cases which at least partly support the notion that customary rights, once extinguished, cannot revive. The first is *R v Saxton*, where in relation to the vesting of pounamu in the South Island, Robertson J held that pounamu, along with all other minerals, was vested in its natural state in the Crown by mining legislation enacted after 1860, and that these customary rights in pounamu could not be revived.[88]

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86 Explanatory Note to the Foreshore and Seabed Endowment Revesting Bill 1989, No.208-1 (emphasis added).

87 NZPD 502 at 13389.

88 *R v Saxton* [2009] NZCA 498 at [38].

[254] The second is *Fejo v Northern Territory of Australia*, where the High Court of Australia found that native title to land was not, and could not be, revived when the land came to be held again by the Crown, as those customary rights were extinguished by the grant of freehold title, rather than merely being suspended.[89]

[255] However, I am of the view that this approach can be distinguished. Firstly, Kirby J inferred in his minority decision in *Fejo* that native title may arise again, but the only means by which that result could be achieved was by way of specific legislation.[90] The Australian Courts have more recently acknowledged and/or recognised that where particular sections of the Native Title Act 1993 apply, prior extinguishment of native title rights and interests may be "disregarded" for the purposes of a claim to establish native title.[91]

[256] Secondly, in relation to *Saxton*, the Court of Appeal was dealing with a very different factual situation – one in which a claim to customary rights was arguably far more tenuous. Mr Saxton and his son were convicted on one charge of theft after they stole pounamu on three separate occasions from the Cascade Plateau in South Westland. That pounamu had been vested in Te Rūnanga ō Ngāi Tahu under the Ngāi Tahu (Pounamu Vesting) Act 1997. Mr Saxton and his son appealed their conviction on the basis that they had not stolen the pounamu, because it had never been acquired by the Crown (and thus could not be vested in Te Rūnanga o Ngāi Tahu), and that they had customary rights over the pounamu through Mr Saxton's long term partner (his son's stepmother), whose father had whakapapa links to the local hapū. The Court found that upon assessment of mining legislation passed after 1860, pounamu was clearly vested in the Crown, and therefore ownership could be transferred to Te Rūnanga. The conviction appeal was consequently dismissed, as the Saxtons had no right to take the pounamu.

[257] Robertson J based his conclusion that customary title could not be revived once extinguished on a paper written by Douglas Graham in 2001, titled "The Legal Reality

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89 *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 at [43].
90 At [112].
91 See *Tjungarrayi v Western Australia* [2019] HCA 12 at [1]; and *Coulthard v South Australia* [2014] FCA 101.

of Customary Rights for Māori".[92] While this paper provides a useful summary of a number of different legal and proprietary issues relating to customary rights to land, it does not reflect the current law as articulated in *Attorney-General v Ngāti Apa*. In relation to customary rights being unrevivable, Mr Graham opines:[93]

> This fact seems to have been overlooked in recent litigation in New Zealand, where some seem to believe that if exclusive possession at the time of annexation by Britain can be proved, then a customary title will still exist unless and until extinguished by the Crown.

[258] But this is, in fact, the current position in New Zealand law. *Re the Ninety-Mile Beach* has been overturned. The Court of Appeal in *Ngāti Apa* held that the radical title acquired by the Crown upon cession of sovereignty was not inconsistent with common law recognition of native/customary property rights and title.[94] These rights and title continued until clearly and lawfully extinguished.[95] As Elias CJ stated in that decision:[96]

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

[259] Conversely, in this case, there appears to be a specific and explicit intention from the legislature to revive customary rights that have been extinguished. Those rights may of course have been extinguished by other factors before, during, or after the enactment of the legislation, such as by way of substantial interruption. As Powell J stated in *Ngā Pōtiki*:[97]

> The clear words of the relevant sections of the Foreshore Revesting Act…make it clear that whatever the nature of the title transferred to a harbour board it is "revested in the Crown as if it had never been alienated from the

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92 Douglas Graham "The Legal Reality of Customary Rights for Maori" (2001) Treaty of Waitangi Research Unit, Occasional Papers Series, Number 6.

93 Mr Graham went on to refer to *Re the Ninety-Mile Beach* [1962] NZLR 461, and stated that the investigation of title and subsequent inconsistent grant of land adjacent to the foreshore will itself extinguish any customary title to the foreshore.

94 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [30].

95 At [34], [47], [162], and [183].

96 At [49].

97 At [146]-[147].

> Crown and free from all subsequent trusts, reservations, restrictions, and conditions".
>
> 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", this can no longer be considered correct. Given the MACA itself explicitly restored "any customary rights formally extinguished by the [Foreshore and Seabed Act]", the orthodox position is perhaps better expressed as "customary rights, once extinguished, cannot revive unless legislation specifically provides otherwise".

[260] As a result of this decision, and in light of both the Attorney-General and Ngāti Pārau's joint position on this issue, I find that the statutory revesting of land in the Crown "as if it had never been alienated from the Crown and free from all subsequent trusts, reservations, restrictions, and conditions" achieved a statutory revival of customary interests in the foreshore and seabed in certain parts of Ngāti Pārau's application area.

[261] I also accept the approach of the Crown and Ngāti Pārau that only a certain number of parcels of land (namely those, as submitted by counsel for Ngāti Pārau, which cover a large part of the inner Ahuriri estuary, the coastal parcel that abuts the western spit, and the coastal parcel running along marine parade) are available to be considered under a CMT order, given that a number have had the customary interests extinguished in them due to subsequent registration of new fee simple titles, or being outside the common marine and coastal area. When considering Ngāti Pārau's CMT application later in the judgment, I will therefore only consider those parcels of land where CMT could still potentially be recognised.

Extinguishment – the Napier Port and Te Whanganui-ā-Ōrotu

[262] Two areas identified by the Attorney-General as being affected by extinguishment are the Napier Port and Te Whanganui-ā-Ōrotu. The Napier Port, and part of Te Whanganui-ā-Ōrotu are within the application area of Ngāti Pārau, while a further part of Te Whanganui-ā-Ōrotu is also within the Maungaharuru-Tangitū Trust application area.

[263] In closing submissions, counsel for the Attorney-General submitted that areas in and around the Napier Port and Harbour were no longer capable of being subject to

CMT orders, because they were not part of the common marine and coastal area (CMCA). This was because those particular areas were either specified freehold land, or had a certain status that precluded them from being party of the CMCA. Section 9 of the Act provides that the CMCA means the marine and coastal area other than:

> (a) specified freehold land located in that area; and
>
> (b) any area that is owned by the Crown and has the status of any of the following kinds:
>
> > (i) a conservation area within the meaning of s 2(1) of the Conservation Act 1987:
> >
> > (ii) a national park within the meaning of s 2 of the National Parks Act 1980:
> >
> > (iii) a reserve within the meaning of s 2(1) of the Reserves Act 1977; and
> >
> > (iv) the bed of Te Whaanga Lagoon in the Chatham Islands.

[264] Under s 9, specified freehold land includes land that before the commencement of the Act is Māori freehold land, a Māori reservation, or is registered under the Land Transfer Act 2017 or subject to the Deeds Registration Act 1908 as being held an estate in fee simple by a person other than the Crown or a local authority.

[265] Section 2(1) of the Conservation Act 1987 provides that a conservation area is any land or foreshore that is for the time being held under the Conservation Act for conservation purposes, or land in respect of which an interest is held under that Act for conservation purposes. This includes stewardship areas (apart from certain exceptions, which do not apply in these circumstances).

[266] Sections 2(1) and 23 of the Reserves Act 1977 includes local purpose reserves within the definition of 'reserve' – that is, reserves for the purpose of providing and retaining areas for such local purpose or purposes.

[267] Counsel for the Attorney-General also noted that under s 14 of the Act, any road, whether formed or unformed, that is in the marine and coastal area on the commencement of the Act is not part of the common marine and coastal area.

[268] I have determined that the statutory revesting of land under the Foreshore and Seabed Endowment Revesting Act achieved a revival of customary interests in the foreshore and seabed in certain parts of Ngāti Pārau's application area. This mainly relates to specific parcels of land vested in the late 19th century, and registered as fee simple title in 1929 and 1933. Parcels 2, 3, 6 to 19, 21, 22, and 24 to 26 were subject to s 5 of the 1991 Act. The Crown noted that parcels 1, 4, 5, and 23 did not fall within the 1991 Act as they had already been revested in the Crown as Crown land subject to the Land Act 1948 by s 31(2) of the Reserves and Other Lands Disposal Act 1950. I do not consider that these parcels have had their customary rights revived because, as noted by counsel for the Crown, s 31(2) of the Reserves and Other Lands Disposal Act 1950 does not contain the critical wording in the 1991 Act which revives customary rights – that is: "as if it had never been alienated from the Crown".

[269] A number of those parcels that would have had their customary interests revived would then also have had those customary rights subsequently extinguished through the subsequent creation of fee simple titles registered prior to the extinguishment of all customary interests in the foreshore and seabed by s 13 of the Foreshore and Seabed Act. Those parcels were: 2, 3, 7, 15, 16, 18 and 19.

[270] There were also parcels of land within the Napier Port and Te Whanganui-ā-Ōrotu areas that were outside the CMCA – on the basis that they were specified freehold land,[98] conservation land,[99] reserve land,[100] or roads.[101]

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98 Two areas of specified freehold land were within Ngāti Pārau's application area – two freehold titles were transferred from the Napier Harbour Board to Port of Napier Ltd in 1988 under s 23 of the Port Companies Act 1988.

99 The Crown adduced evidence of stewardship areas around Te Whanganui-ā-Ōrotu, within the application area of Ngāti Pārau.

100 Parcels in Ahuriri Lagoon, the Iron Pot and at Whakariri Avenue Reserve held by the Napier City Council were determined to be a local purpose reserves under the Reserves Act 1977.

101 This included roads within the marine and coastal area in the Ahuriri Lagoon, within Ngāti Pārau's application area.

[271] Overall, as noted by the Crown, the following parcels of land have had their customary rights revived, and are within the CMCA: 6, 8, 9, 12, 17, 22 and 26. These parcels are therefore able to be assessed in light of the tests under ss 51 and 58 of the Act.

[272] I have come to the conclusion that none of the remaining parcels of land, except for parcel 9, can give rise to an award of CMT. This is because, for different reasons, Ngāti Pārau's exclusive use and occupation of those areas has been substantially interrupted. I set out these reasons as follows:

(a) Parcels 17 and 22 (located along Marine Parade, the Napier Port, Ahuriri and Westshore): Counsel for Ngāti Pārau conceded in closings that the footprint of non-Ngāti Pārau use was "very strong" around the port and Marine Parade area. Both areas, as well as the Ahuriri area, had been developed for a number of decades, including through the construction of a number of structures on the port and Marine Parade. There was also significant recreational use of 17 and 22, as well as very significant boat use, in which 22 included the area in which ships entered and exited Napier Port, and 17 included the land in which boats entered into the marina for Napier's inner harbour. I consider that all these factors, in their totality have substantially interrupted Ngāti Pārau's exclusive use and occupation of the area.

(b) Parcel 12 (located at the entrance to the inner harbour): This parcel includes a number of structures including a marina and a boat ramp, as well as intensive third-party use (due to those two structures). These factors, in these particular circumstances, amount to substantial interruption.

(c) Parcels 6, 8, and 26 (located in Te Whanganui-ā-Ōrotu, specifically the Ahuriri estuary): There also appears to be third party use in this area, through use of the walking tracks via the estuary, and use of the state highway going along a bridge crossing through the estuary. There is also the presence of three significant structures (two roads and a bridge

containing a walking track and railway), with Mr Fisher giving evidence which showed that by the early 1990s, it was impossible to bring waka into the area, because the Pandora Bridge was so low. On top of this, the discharge of sewerage into the inner harbour had caused significant pollution to the point that in the 1990s, Ngāti Pārau members deposed in Waitangi Tribunal hearings that they were no longer collecting kaimoana from the area.[102] I therefore find that substantial interruption has also occurred here.

[273] As I have done with the hapū of MTT in relation to Whirinaki, I want to explicitly record that the first element of the statutory test under s 58(1) has been satisfied. Ngāti Pārau (in some areas in conjunction with other hapū and iwi) continues to hold the area in which these parcels are located in accordance with tikanga. It was apparent through evidence produced by members of Ngāti Pārau and Mr Fisher that the Ngāti Pārau had played a significant role as kaitiaki in attempt to protect, conserve, and sustain the takutai moana within the immediate vicinity of Napier, particularly in relation to the inner harbour and Ahuriri estuary.

[274] Since 1840, Ngāti Pārau have lived in and exercised rangatiratanga over the area, including through the authority of Tareha Te Moananui, and Waiohiki Marae, and through their use and occupation of parts of Te Whanganui-ā-Ōrotu. More recently, Mr Fisher gave evidence of Ngāti Pārau seeking to preserve parts of the Ahuriri estuary, namely a canoe reserve, since the 1950s, and participating in both conservation organisations and local government from the 1970s onwards. In even more recent times up until today, Ngāti Pārau has partnered with the Port, local government, and the Department of Conservation to protect the physical and cultural health of the takutai moana and exercise its position as kaitiaki over the area. In closing submissions, counsel for Ngāti Pārau noted that the Ahuriri Estuary walking track in the Westshore area was developed with the support of the Department of Conservation to acknowledge Ngāti Pārau interests as mana whenua including the

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[102] Kay Taape Tareha O'Reilly stated at a Tribunal hearing in 1993 that "[w]ith the increases of urbanisation and industrialization which have led to pollutants being discharged into the whanga a lot of our people are very skeptical about collecting kaimoana from there", while Mana Powhira Cracknell stated that "only a fool would take kaimoana of any from there at this particular time" (referring to the inner harbour).

erection of a pouwhenua to mark places of significance to Ngāti Pārau and a tribute to Ngāti Pārau's relationship with the estuary as kaitiaki.

[275] It is also important to note that this conclusion only applies to the specific area in which those parcels are located. The evidence differs in relation to Pania Reef, as well as areas further out in the CMT, which I assess in more detail from [493] below.

[276] I also need to briefly discuss the issue of reclamation. In *Re Edwards*, the Court discussed the effect of reclamation on the common marine and coastal area and claims under the Act, particularly through Subpart 3 of Part 2, which sets out a comprehensive regime relating to the status and vesting of reclaimed land.[103] Under s 29 of the Act, reclaimed land is defined as permanent land formed from land that formerly was below the line of mean high-water springs and that, as a result of a reclamation is located above the line of mean high-water springs, but does not include:

(a) land that has arisen above the line of mean high-water springs as a result of natural processes, including accretion; or

(b) structures such as breakwaters, moles, groynes, or sea walls.

[277] Section 30 dictates that land that has been either lawfully or unlawfully reclaimed from the common marine and coastal area is vested in the Crown, and thus held by the Crown as its absolute property.

[278] The Act also contemplates the effect of accretion (where the sea gradually recedes, increasing the area of the land) and erosion (where the sea gradually encroaches, lessening the area of the land) under s 13. That provision states that the Act does not affect the common law in relation to these doctrines, but does state that if a natural occurrence such as erosion occurs, then that eroded land becomes part of the common marine and coastal area, while if new land ceases to be part of the common marine and coastal area by a natural occurrence such as accretion, and does not have title, it is vested in the Crown. Accretion differs to the phenomenon described by counsel as avulsion – which occurs where there is a sudden change in the landward

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[103] See *Re Edwards*, above n 15, at [231]-[250].

boundary of the common marine and costal area, such as through an earthquake. Avulsion is defined in the *Laws of New Zealand* as "where the change of boundary between the land and the water is not slow and imperceptible, but sudden, as by an earthquake which abruptly alters the high-water line…".[104]

[279] Both reclamation, and accretion (in the form of avulsion) are relevant to the application area in this case. In terms of reclamation, counsel for the Attorney-General adduced expert evidence that from the 1850s onwards, parts of Te Whanganui-ā-Ōrotu were being reclaimed for the expansion of Napier and development of infrastructure, including port facilities. By 1931, when the Napier Earthquake struck, a substantial part of the lagoon within Te Whanganui-ā-Ōrotu had already been reclaimed, and uplift of land created the opportunity for further, more extensive reclamation. The Public Works Department had completed a comprehensive reclamation scheme by the late 1930s for agricultural, residential, and industrial development, which significantly reduced the area of Te Whanganui-ā-Ōrotu which remained below the high water. Following a relatively small amount of further reclamation, since 1970 the coast in that area had changed little. Therefore, those areas that have been reclaimed or moved outside the common marine and coastal area via avulsion are no longer available to be subject to a grant of CMT and PCR.

Waipātiki Marine Farm and substantial interruption

[280] One additional issue I need to consider is a marine farm located within the exclusive CMT area of MTT, off Waipātiki Beach.

[281] There are two resource consents issued on 14 April 2004 granted for Napier Mussels for a 2,806 hectare mussel farm approximately 3-nautical miles offshore (5.5 kilometres) from Waipātiki Beach. A Marine farming permit was issued by the then Ministry of Fisheries on 14 April 2004 pursuant to section 67J of the Fisheries Act 1983 to farm the consented space for the same duration to 3 July 2032.

[282] According to Mr Sykes for the Seafood Industry Representatives, preliminary trials have commenced, but the farm is not yet in commercial use. The farm is within,

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[104] *Laws of New Zealand – Water* (online ed, LexisNexis) at 24.

and makes up, an Aquaculture Management Area referred to by Mr Jennings in his evidence.

[283] In *Re Edwards*, the Court did not explicitly find that CMT was substantially interrupted in the areas where the marine farms were located, but instead stated:

> [255] In relation to some structures (for example working wharves), obligations arising under the Health and Safety at Work Act 2015 or issues relating to the commercial activities undertaken in or around such structures mean that the they should also be excluded from CMT. Examples of the latter may well be the Eastern Sea Farms Limited 3,800-hectare marine farm and the three oyster farms in Ōhiwa Harbour. However, because the submissions of the parties did not squarely address the issue of which structures should be excluded from any grant of CMT that will need to be the subject of further submissions at the next stage of this hearing.
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> …
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> [258] As discussed, the presence of some third-party activities such as the operation of marine farms may be sufficient to mean that in respect of the area where those activities are undertaken, CMT should not issue on the basis that the presence of these activities amount to a substantial interruption in the use and occupation of the takutai moana. However, that is also a matter that will need to be addressed in the next part of the hearing in this case.

I also note that the Court stated at [264] that the fact that third parties undertake both commercial and recreational fishing activities in the specified area does not amount to a substantial interruption of the holding of the specified area in accordance with tikanga.

[284] The Seafood Industry representatives adduced only a minimal amount of evidence concerning what effect, in terms of substantial interruption, the Napier Mussels farm has had on exclusive use and occupation, or exactly how far along it is in terms of development, outside of the fact that consents have been granted, and Mr Sykes saying that preliminary trials have occurred. I therefore determine that this is an issue where, like in *Re Edwards*, I will delay my determination to the second stage, on the expectation that the parties and interested parties will provide sufficient evidence so that the Court can make an informed decision as to whether the proposed marine farm development in fact amounts to a substantial interruption of MTT's holding of the part of the takutai moana in which the proposed marine farm is located.

The dual pathway

[285] The fact that applicants for recognition orders have the option of obtaining them through two completely different pathways: litigation or direct engagement with the Crown, can create problems. In considering a claim under the Act, the Court will not necessarily have any knowledge of the details of an overlapping or competing claim being advanced by direct engagement.

[286] As discussed above, the Mana Ahuriri Trust appeared in these proceedings as an interested party, having elected to directly engage with the Crown over their application under the Act. This presents an issue in that the Trust's application area overlaps with the application areas of the parties in these proceedings. In particular, there is a significant overlap between the application areas of MTT and Ngāti Pārau, and the Mana Ahuriri Trust.

[287] As opposed to their position in relation to Ngāti Pāhauwera and Ngāi Tahu on the northern boundary, MTT's position towards the hapū of the Mana Ahuriri Trust is that they recognise and acknowledge that the Ahuriri hapū represented by the Trust had shared interests in the area around Pania Reef (although not mana whenua interests) as well as one of the Mana Ahuriri hapū, Ngāti Matepū, having shared interests between Te Uku (located between Whirinaki and Whakaari) and Keteketerau.

[288] At the time of closing submissions in this hearing, MTT and the Mana Ahuriri Trust had not reached a formalised agreement in relation to recognising these shared interests through a shared/joint award of CMT (if the Court found that the statutory tests for CMT were made out). MTT had however, set out and formalised an agreement with Ngāti Pārau in relation to holding a shared CMT title over Pania Reef, and acknowledged that Ngāti Matepū would be entitled to a position on the board of the Trust that would be set up to hold that CMT title. I address the significance of that agreement below at [499]-[502] and in Part V of this agreement.

[289] However, on 30 June 2021, counsel for MTT filed an affidavit by Ms Tania Hopmans concerning an agreement with Petane Marae Trust (stated in the agreement as representing Ngāti Matepū) in relation to shared CMT over the area in which MTT

had signalled that there were shared interests, namely between Te Uku and Keteketerau.

[290] Counsel for the Mana Ahuriri Trust filed a memorandum in response to this agreement on 21 July 2021. In that memorandum, counsel unequivocally stated that the Mana Ahuriri Trust had not authorised Ngāti Matepū to act on behalf of the Mana Ahuriri hapū. Trustee elections were to be held on 9 August 2021, and the trustees considered that such a major decision (in relation to the shared CMT) could not be made while the election process was underway and that, hapū hui would need to be called before Ngāti Matepū could commit their people to this arrangement.

[291] Counsel stated that Ngāti Matepū did not have a standalone application for direct engagement, but that it was included with a number of hapū to be represented in direct engagement by the Mana Ahuriri Trust, who were continuing their engagement with the Crown on behalf of all hapū. For this reason, counsel stated that the Mana Ahuriri Trustees did not consider it appropriate for this Court to act on the MTT-Ngāti Matepū agreement.

[292] The Court discussed the issues arising from the 'dual pathway' in *Re Edwards*. In that decision, it stated that given the number of proceedings under the Act in which there are parties with interests in the takutai moana that overlap with the applicants, but choose to take the direct engagement pathway, it is critical that the rights and interests of these directly engaged parties are maintained by ensuring that they have the ability to appear before the Court, as an interested party or cross-applicant, in proceedings concerning applications that overlap with their own area of interest.[105]

[293] The Court also stated that a finding that an applicant group in these proceedings held CMT in the overlapping area would arguably have the effect of prohibiting the Crown from coming to a contrary agreement with another group in direct engagement, which had the potential to cause an injustice.[106] The potential for injustice would however be lessened where the party pursuing direct engagement has participated in the Court hearing as an interested party. It is important to note the fact that in its Stage

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105 At [403].
106 At [406].

1 Report on the Act, the Waitangi Tribunal indicated that the legislation engaged the Treaty principle of active protection – namely, the Crown's obligation under the Treaty of Waitangi to actively protect Māori rights and interests.[107] There would appear to be a question as to whether the legislation, by providing for two separate and potentially mutually exclusive avenues for obtaining recognition orders/agreements achieves the obligation of active protection.

[294] In *Re Edwards*, the Court determined that it was not appropriate to adjourn the hearing in order for the Crown to directly engage with Ngāti Awa. In that case, Ngāti Awa were an interested party in the litigation but were directly engaging with the Crown under the Act, and had an application area that overlapped with the western part of the Whakatōhea applications. They participated in the hearing by calling evidence and having their counsel cross-examine and make submissions throughout the hearing. The active involvement of Ngāti Awa in that hearing permitted the Court to draw some conclusions that a part of the area was jointly held by the Whakatōhea applicants and Ngāti Awa.

[295] However, in this case, the circumstances are somewhat different. While appearing as an interested party, the Mana Ahuriri Trust had little input into the hearing. In *Re Edwards*, Ngāti Awa's application area only overlapped on the westernmost side of claimant parties' own application area. Here, there is significant overlap between the Mana Ahuriri Trust's application area and MTT's application area, while Ngāti Pārau's application area appears to be entirely overlapped by the Trust's claimed area.

[296] This puts the Court in an impossible position. As expressed in *Re Edwards*, the Courts will be reluctant to adjourn or stay parts of a proceeding where there are overlapping claims with an applicant in direct engagement with the Crown, in order to wait for that direct engagement to occur and a decision made by the Crown on the validity of the overlapping claim. The draft Direct Engagement strategy promulgated by the Attorney-General extends as far out as 2045 – meaning that groups may have to wait over two decades for the direct engagement process to even commence. To

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[107] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at 3.3. See also [404] of *Re Edwards*.

adjourn for that period of time would be to create an injustice in itself, and I also reiterate the view expressed in *Re Edwards* that lengthy adjournments in the case of overlapping claims where the parties cannot reach an agreement is not a durable solution under the Act.

[297] Notwithstanding MTT's acknowledgement of shared interests with Ngāti Matepu, the Court clearly cannot bind the Mana Ahuriri Trust to a shared CMT agreement that they have not sought themselves. If the Court makes a finding of CMT which excludes the Mana Ahuriri Trust knowing that MTT acknowledge at least some element of shared exclusivity, this is likely to result in the Trust being unable to be awarded CMT when they do enter into direct engagement with the Crown, given the Crown's view that multiple CMTs are not available under the Act.[108]

[298] I have considered whether one possible means of reaching a middle ground between these two undesirable positions is to make a declaration of a "preliminary finding" as to CMT within parts of the application area in which the Mana Ahuriri Trust overlaps MTT and Ngāti Pārau.

[299] However, such an approach conflicts with the approach taken by the Court in *Re Edwards* as to the concept of shared exclusivity.

[300] In *Re Edwards*, the Court also accepted that "shared exclusivity" could not become a default option or some form of "consolation prize" where two competing groups each claimed exclusive possession and there was no agreement as to shared exclusivity.[109]

[301] The facts of this case are different to those in *Re Edwards*. The Mana Ahuriri Trust does not presently accept a shared exclusivity with MTT (unlike Ngāti Awa did with Whakatōhea).

[302] In respect of the area of overlap acknowledged by MTT with Ngāti Matepu, I cannot make a joint award of CMT as Ngāti Matepu are not an applicant in these

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108 See *Re Edwards*, above n 15, at [154], [155], [157] and [169].
109 At [178]-[180].

proceedings and do not have an application of their own (as opposed to being part of the Mana Ahuriri Trust application) for direct engagement.

[303] Prior to the conclusion of the hearing, MTT and Ngāti Pārau amended their claims and presented a joint affidavit acknowledging shared interests in the area around Pania Reef. They acknowledged that the applicant groups represented by the Mana Ahuriri Trust also had some interests, albeit not as mana moana, in this area, and they proposed a structure to hold any CMT awarded in a manner which reflected their assessment of the tikanga relating to customary rights in this area. Because this proposal emerged late in the proceeding, the Court did not have the benefit of the pukenga's views on it, but it does not seem to be inconsistent with his conclusions.

[304] In *Re Edwards*, the Court accepted that an applicant group or groups awarded CMT, could make provision in the wording of the CMT for recognition of another applicant group who may not have met the test for CMT but was nonetheless recognised by the successful parties as having a particular connection with the takutai moana.[110] I accept that Ngāti Pārau and MTT have met the test of having held, in accordance with tikanga, the area around Pania Reef. Their agreement that Ngāti Pārau had the stronger claim of the two is also consistent with the evidence. The proposal that the entity to hold CMT should be constituted in a way that is similar to the approach taken in *Re Edwards* to the Mokomoko applicant group referred to above, I set out my views as to how this might happen in Part V of this decision.

Land block purchases, confiscation, and substantial interruption

[305] In this part of the judgment, I will consider the effect of large-scale purchases and confiscation of land blocks abutting the different application areas.

[306] The first two, and arguably most significant, purchases made by the Crown in this area were the Ahuriri and Mōhaka purchases, both occurring in 1851. In its *Mohaka ki Ahuriri Report*, the Waitangi Tribunal determined that the intent behind the Crown's decision to purchase large blocks of land in Hawke's Bay was based on an objective to both prevent the spread of the 'squatting' system prevalent in the

110 At [420].

Wairarapa,[111] northward as well as to break it in the Wairarapa by providing alternative and more secure runs for the squatters.[112] The report also noted that Māori were also keen to sell land to the Crown in order to acquire the anticipated benefits of Pākehā settlement.[113]

The Ahuriri purchase

[307] In 1850, the Crown, through their chief land purchase commissioner Donald McLean, opened negotiations with hapū based in Ahuriri to purchase a large block of land within their tribal rohe. These Ahuriri hapū included Ngāti Tū, Ngāti Matepu, Ngāti Hineuru, Ngāti Pārau, Ngāi Tawhao, and Ngāi Te Ruruku.[114] According to the Deed of Settlement between the Crown and Ahuriri hapū (as well as the findings by the Waitangi Tribunal in the *Mohaka ki Ahuriri Report*), in order to persuade these hapū to accept low prices, the Crown led them to believe that they would derive considerable benefits from selling their land to the Crown.

[308] On 17 November 1851, after a period the Crown purchased the Ahuriri block for £1,500. Tareha Te Moananui and 299 others signed the deed of purchase, which encompassed some 265,000 acres.[115] According to MTT historian Tony Walzl, reserves for the hapū provided for in the deed included Roro-o-Kurī Island, Wharerengi, Puketitiri and Pukemokimoki, however, the Crown did not establish any mechanism to ensure these reserves would remain in Māori ownership, and by the 1920s all the reserves had been sold. Although Donald McLean (a key figure in these purchases) supposed that the inland lagoon of Te Whanganui-ā-Ōrotu was included in the purchase, this suggestion was "subsequently rejected with protests over Te Whanganui-ā-Ōrotu extending through into the 20th century".

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111 The lack of available land in Wellington had seen settlers venture over the dividing range to informally lease runs from Māori for their flocks. This worked against the Crown's objective of buying Māori land cheaply and on-selling it to settlers at a profit to finance the development of the colony.

112 Waitangi Tribunal *Mohaka ki Ahuriri Report: Volume I*, above n 7, at xxiv.

113 At xxiv.

114 *Mohaka ki Ahuriri Report: Volume I*, above n 7, at 1.5.3.

115 At 5.2.

The Mōhaka purchase

[309] In April 1849, three rangatira from the Waikare, Te Poihipi, Hou and Hoani Waikari, offered land to the Crown in return for a large payment and the introduction to their district of many settlers. While the Crown did not immediately follow up this offer, by January 1851 McLean was keen to purchase land in the Mōhaka district, and as a result, by March 1851 the Crown was negotiating to purchase a large block. After a period of negotiations, by April 1851 the Crown's negotiations were focused on a block between the Waikari and Mōhaka Rivers.

[310] A deed of sale was signed in December 1851 that provided for the Crown to pay £800 in four annual instalments of £200. Some 297 people signed the Mōhaka deed of purchase, including McLean, and Paora Rerepu. The Crown did not complete payment of the purchase money until April 1855, when it made a payment of £300 of which £100 was paid to the Waikare people and £200 to the Mōhaka people. They protested about the size of the payment which McLean acknowledged was small, noting in his diary that Māori would consider the payments to be inadequate unless they received the collateral advantages the Crown had led them to expect from the development of settlement on the land that they sold.

[311] The deed did not provide for any reserves to be set aside for Māori along the north bank of the Waikari River. In 1851, Waikare Māori retained a large amount of land on the south bank, but customary interests in this land were later extinguished as part of implementing the Crown's policy of confiscation. Although much of the land was returned to individual members of the hapū, by the 1930s the Crown had purchased most of it as part of their purchasing scheme in the early 20th century.

Raupatu

[312] Following a number of other purchases of Māori land throughout Hawke's Bay in the 1860s, the next significant action relating to the loss of Māori land was the Mōhaka-Waikare confiscation in 1867.

[313] In the late 1850s, disputes arose between the Crown and Māori connected to the Kīngitanga and the Pai Marire (also referred to as the Hauhau) religious movement.

By 1863, fighting had broken out between the Crown and Māori in the Taranaki and Waikato regions and this soon had an impact on the northern Hawke's Bay.[116] In 1864, the Crown sought to build up its landholdings in the northern Hawke's Bay and reinforce alliances with local iwi, including Ngāti Pāhauwera, who were considered loyal to the Crown, which led to McLean negotiating the purchase of the 21,000 acre Waihua block in the northern part of the Ngāti Pāhauwera rohe. As with the other purchases, those selling the land (including Paora Rerepu) sought to enhance their own security and gain the economic opportunities which came with European settlement. In particular Ngāti Pāhauwera were motivated to sell to confirm their loyalty to the Crown as allies against the spread of the Hauhau movement.

[314] War broke out on the East Coast in 1865 and from that time Ngāti Pāhauwera gave both political support and substantial military assistance to the Crown against followers of Pai Marire.[117] In October 1866 there was a limited military conflict between Crown forces and Pai Marire in the Napier area.[118] The Crown responded by issuing a proclamation under the New Zealand Settlements Act 1863 that confiscated all Māori land between the Waikari and Esk Rivers in January 1867.[119] This included lands in which Ngāti Pāhauwera held interests, with the confiscation extinguishing all customary Māori title to the area, including that of Ngāti Pāhauwera, even though they were not considered by the Crown to have been 'rebels'.[120] The confiscated area became Crown land subject to claims for compensation (including the return of land) by the former owners.

[315] Effectively, the Crown acknowledged that 'loyal' iwi, such as Ngāti Pāhauwera, would be affected by the confiscation, and therefore accepted that it had an obligation to return some of the confiscated lands to those 'loyal' hapū and iwi. This led to two agreements between the crown and 'loyal' hapū and iwi to return certain confiscated land blocks. The first, in 1868, fell through, while the second, in 1870, led to the Mōhaka and Waikare Districts Act 1870, and the return of certain land blocks, but as noted by both David Alexander and Richard Boast, the lands were not

116 Deed of Settlement of historical claims of Ngāti Pāhauwera (17 December 2010) at 2.37.
117 At 2.40.
118 At 2.42.
119 At 2.42.
120 At 2.42.

necessarily returned to their former owners, and the agreement was highly favourable to Tareha Te Moananui.[121] According to Mr Alexander, Ngāti Pāhauwera were not involved in the drawing up of the ownership lists in the 1870 agreements, as a result of their decision to not attend and stay home due to the disruption in the area caused by Te Kooti.[122] The Ngāti Pāhauwera land that was retained was then reduced again by further Crown purchasing in the late 19th and early 20th centuries, although some of the land retained after these purchases continued to be held and developed by Ngāti Pāhauwera through a Māori land development scheme created by the Stout-Ngata Commission.

[316] It is important to set out this history for two reasons. First, I repeat the finding in *Re Edwards* that both ownership by others of land abutting the takutai moana, or confiscation of land abutting the takutai moana, does not automatically amount to substantial interruption of exclusive use and occupation. Neither does ownership of such land by an applicant group automatically result in them holding the area in accordance with tikanga. In *Re Edwards*, it was noted that it was difficult to see how the ability to control access to abutting land could be determinative of the existence of CMT, because the Act provides that CMT is specifically subject to extensive general rights of access as well as navigation and fishing rights.[123] Similarly, in *Re Clarkson*, Mallon J observed that:[124]

> I consider that Catherine Clarkson's reliance on land ownership as distinguishing the applicant group from others with customary rights in the specified area is misplaced. Owning land that abuts the application area is no more than a relevant factor to be taken into account when determining whether customary marine title exists in a specified area. It is neither a mandatory consideration nor the only relevant factor in determining whether customary marine title exists. …

[317] Mallon J went on to state that land ownership does not of itself, give rise to mana whenua over the specified area sufficient to support a claim to the application area to the exclusion of, and without a demonstrated mandate from, others who

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121 Richard Boast "Recognising Multi-textualism: Rethinking New Zealand's Legal History" (2006) 37 VUWLR 547 at 557.
122 At [206].
123 At [173].
124 *Re Clarkson* [2021] NZHC 1968 at [194].

whakapapa to the area and who, through that, have a deep and enduring connection to it.[125]

[318] Similarly, in relation to raupatu, the Court held in *Re Edwards* that the raupatu imposed upon the iwi of the Eastern Bay of Plenty did not amount to a 'substantial interruption', because those whānau/hapū/iwi continued to exercise their rights in respect of the takutai moana (which included fishing activities), and that their connection to the takutai moana in tikanga had not been severed as a result of the confiscation.[126] The same reasoning applies in this case.

[319] Second, I note that evidence of ownership lists concerning the return of confiscated land blocks is not always a particularly useful indicator of who has held the area in accordance with tikanga in 1840. This is because it is not entirely clear that those individuals to whom the land was returned represented an accurate reflection of all those who held the area in accordance with tikanga, and/or exercised mana whenua over the area. For example and as noted above, the agreement for the return of certain land blocks in the 1870s was highly favourable to Tareha Te Moananui, despite it not being clear that he exercised customary rights over the areas he was granted. Mr Alexander identified a "conspicuous absence" of Ngāti Pāhauwera signatures in the 1870 agreement, which he noted was not surprising, given their preoccupation to matters closer to home – namely their recovery from the attack on Mōhaka by Te Kooti in 1869. Mr Walzl also acknowledged that the post-1859 land purchases included parties that were "recognised by the Crown that had more tenuous links to the block as compared with others", while the Waitangi Tribunal in its *Mohaka ki Ahuriri Report* found that it was evident that "traditional iwi and hapū boundaries were not followed when the confiscated Mōhaka-Waikare district was subdivided into defined blocks".[127]

[320] This lack of clarity was perhaps worsened by the Native Land Court hearings in the 1880s and 1890s, which due to the inaccessibility of those hearings, as well as the absence of certain individuals and owners, only led to increase inter-hapū disputes in relation to land.[128] I therefore approach the evidence in relation to return of land

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125 At [195].
126 See [193]-[207].
127 At 238.
128 See for example, the Waitangi Tribunal's findings in Chapter 12 of the *Mohaka ki Ahuriri Report*.

ownership under these blocks with some caution, and observe that the better approach – and more effective evidence, is an assessment of both whakapapa and tikanga – namely, who exercised customary rights over the takutai moana at the time, and how this was affected by whakapapa and whanaungatanga.

Pukenga

[321] Under both ss 51 and 58 of the Act, tikanga is central to the statutory test as to whether an entitlement to a recognition order has been made out.

[322] Section 51 defines a PCR as one which has been exercised since 1840:[129]

> …continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time.

[323] Section 58 has a corresponding provision which provides that CMT exists in a specified are of the common marine and coastal area if the applicant group "holds the specified area in accordance with tikanga"[130] and has exclusively used and occupied the specified area from 1840 to the present day without substantial interruption.

[324] The identification of the tikanga that applies in the areas covered by the various applications is therefore the critical component in establishing whether the tests for CMT and PCR have been met.

[325] As the Court noted in *Re Edwards*,[131] the proper authority on issues of tikanga are the living people who have retain the knowledge and wisdom passed down to them by their ancestors. These people are commonly referred to as pukenga.

[326] All of the applicant groups called extensive evidence as to tikanga from their own pukenga.

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129 Section 51(1)(b).
130 Section 58(1)(a).
131 *Re Edwards*, above n 15, at [308].

[327] Section 99 of the Act gives the Court the option of obtaining advice from a pukenga who has knowledge and experience of tikanga. This discretion is available whenever an application for a recognition order raises a question of tikanga.

[328] There were differences between the various applicants on tikanga issues so the Court appointed Dr Des Kahotea as pukenga under s 99.

[329] Dr Kahotea had been nominated by Ngāti Pāhauwera and, ultimately, his appointment was not opposed by any of the other applicants. He did not have any iwi affiliations with any of the applicant groups that might have given rise to a claim of conflict of interest.

[330] Dr Kahotea was asked to answer five questions on tikanga:

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

(b) What aspects of tikanga should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga?

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

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

(e) Having regard to the evidence, what tikanga is relevant to the PCR claimed by the applicants?

[331] Dr Kahotea produced a report on tikanga issues dated 19 March 2021 and was cross-examined on the contents of that report by a number of counsel for the applicants.

[332] In response to the first question, Dr Kahotea's report can be summarised as:

(a) the mana of the sea was the provision of food and that respect for the mana of the sea is the tikanga or mahi tika (doing what is right) with the harvesting of kaimoana;

(b) that tikanga involved kaitiakitanga in the sense of protecting the resource and managing it through karakia, rāhui and mahi tika; and

(c) that the rights to access kaimoana were inherited from ancestors, rights were passed down through families from earlier times to now (Ngā Whānau I Ngā Wa o Mua). The rights to use the resources of the takutai moana depended on whakapapa ki te whenua, whakapapa mo whanaungatanga (genealogy to the land, genealogical links to one another).

[333] In respect of the second question, the aspects of tikanga influencing an assessment of whether or not the area in question was held in accordance with tikanga were descent from ancestors and the evidence of settlement and activities in and adjacent to the takutai moana. The involvement of applicant groups in kaitiakitanga such as nominating people to be a kaitiaki including official officers for fisheries was said to be relevant, as was the fact that applicant groups had recognised kaitiaki tipua, for example, Pania, Moremore, Paikea, and Tangitū.

[334] In answer to the question which applicant group or groups hold the application area or any part of it in accordance with tikanga, the pukenga first summarised the area covered by applications of each group, then recorded the names of the iwi/hapū/whānau groups and analysed which applicant groups had met the tests of tikanga.

[335] In relation to Ngāti Pāhauwera, the pukenga described three distinct areas. The first was between Poututu Stream in the north and Pōnui Stream in the south which the pukenga concluded Ngāti Pāhauwera had exclusively held in accordance with tikanga.

[336] Secondly, between Pōnui Stream in the north and Waitaria Stream in the south, the pukenga said that Ngāti Pāhauwera shared this area with Ngāi Tahu. Confusingly, the pukenga had earlier noted that it was "Waikari to Waitaria Stream shared with Ngāi Tahu".

[337] The third area was between Waitaria Stream and the Esk River where the pukenga concluded that Ngāti Pāhauwera had not exclusively held this area but shared it with various MTT hapū.

[338] In relation to Ngāi Tahu o Mōhaka Waikare, the pukenga's conclusion was that on a shared basis with Ngāti Pāhauwera, they exclusively held the area between Pōnui Stream in the north and Waitaria Stream in the south. Ngāi Tahu's claim between Pōnui Stream and the Mōhaka River was not upheld.

[339] The pukenga's opinion was that, in relation to MTT's application area from the Waitaha River in the north to Keteketerau in the south, southeast to Pania Reef and out to 12-nautical miles, this part of the takutai moana was not exclusively held by MTT but was shared with others including Ngāi Tahu, Ngāti Pāhauwera and Ngāti Pārau.

[340] In relation to Ngāti Pārau, the pukenga concluded that they had held, in accordance with tikanga, an area from the Ahuriri Harbour entrance including the inner harbour and Pandora area in the north, to a point approximately 11km south of the old harbour entrance just north of an estuary called Waitangi. This included the area of the Pania Reef. The pukenga felt unable to conclude what the seaward boundary of the Ngāti Pārau takutai moana was.

[341] In support of the conclusions he had reached, the pukenga referred to what he said were discrepancies in the whakapapa put forward by MTT witnesses. He noted that the documentation in the Te Kuta books[132] clearly showed Ngāi Tahu as an independent hapū with whakapapa to the whenua o take tūpuna at Te Kuta.

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[132] The Te Kuta Minute Books refer to evidence given in June and July 1891 in relation to the Te Kuta block. The Te Kuta block, which lies to the south of the Waikari River within the takiwā of Ngāi Tahu, had a title issued for it in 1882. However, in 1891, a komiti takiwā collected evidence relating to cases that had been brought in relation to the block. The hearings were held in Mōhaka.

[342] The pukenga also took issue with some of the MTT claims relating to Ngāi Te Ruruku (referred to by the pukenga as Ngāti Te Ruruku).

[343] Te Ruruku was of Ngāti Pāhauwera descent and how he became involved in the affairs of Ngāti Tū (a constituent hapū of MTT) was described by the MTT historian, Tony Walzl, this way:

> Marangatuhetaua became renowned in his lifetime for the decisive action he took to finally deal with the southern incursions. He ventured north to Mōhaka and secured the services of the fighting chief Te Ruruku who he enticed to come amongst his community with promises of access to great resources. Te Ruruku, and the select group of warriors from among his relatives who came with him, fought alongside Ngāti Tū and Ngāi Tatara to vanquish the southern transgresses. Marangatuhetaua granted land to Te Ruruku at Waipatiki and Arapawanui in recognition of his services. Te Ruruku settled his family and warriors on these lands.

[344] The "southern incursions" being referred to by Mr Walzl in this paragraph referred to attacks by Ngāti Hinepara on Ngāti Tū particularly about the rights to access kaimoana. One of the disputed tikanga findings was the nature of the rights that Te Ruruku and his party of warriors acquired.

[345] The evidence of MTT witnesses was that they did not acquire mana whenua status and whatever rights they did acquire could be revoked by Ngāti Tū.

[346] Tania Hopmans, a witness for MTT, put it this way:

> Our Hapū includes Ngāi Te Ruruku ki Tangoio. Their eponymous ancestor was invited (with some of his followers[133]) by Ngāti Tū to help defend our fishing grounds from invaders from the south. As a result of his services Te Ruruku received gifts of land from Ngāti Tū.
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> This is an important distinction because Te Ruruku's ability to occupy lands came through tuku whenua – the gifting of land, not originating ancestors and ahi ka roa. I would say Te Ruruku and his followers come under the mana of

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It is not possible to now discern the purpose of the hearings and they are not referred to in the records of the Native Land Court. The hearings do not seem to have produced any legal outcome. However, the minute books contain evidence in te reo relating to the assertions of those who claimed interests in the area.

133 The MTT witnesses tended to use descriptions such as "some" or "a select group" or "several others" which minimised the number of people who came south with Te Ruruku whereas Toro Waaka for Ngāti Pāhauwera deposed that Te Ruruku travelled south with 300 warriors at the invitation of Ngāti Tū. The pukenga's view of this was "Te Ruruku as a "fighting chief" would have brought his Taua which would have included close relatives rather than use the toa of Marangatūhetaua as suggested by Ms Hopmans".

> Ngāti Tū because it was that Hapū that gifted their lands. The 'ki Tangoio' aspect arises through a particular line of descent from Te Ruruku being Hemi Puna and his wife Taraipene Tuaitu. It is these two source tūpuna and their descendants, who maintained ahi ka roa – occupation in our takiwā.

[347] This description of the relevant tikanga was not accepted by Dr Kahotea. He said:

> In the above Tania Hopmans stated that because of the tuku whenua from Marangatūtetaua [sic] Ngāti [sic] Te Ruruku came under his mana. Tuku whenua does not work that way, especially when calling on the services of a toa rangatira or fighting chief. If Te Ruruku accepts the tuku whenua and remain on the land then their noho from that period on creates the take whenua for Ngāti [sic] Ruruku. There may have been separate areas of Ngāti [sic] Te Ruruku land between Whakaari and Keteketerau the members of the hapū of Ngāti [sic] Te Ruruku would all be entitled to be included in any lists of land owned by Ngāti [sic] Te Ruruku.

[348] Whether Ngāi Te Ruruku are mana whenua or not, is regarded by MTT as being of fundamental significance. Ngāti Pāhauwera refer to the close whanaungatanga ties between Te Ruruku and his descendants and Ngāti Pāhauwera, and see that as a source of rights in the takutai moana whereas MTT seek to distinguish the rights of the descendants of Te Ruruku and subordinate them to the rights of Ngāti Tū as set out in the extract from the evidence of Tania Hopmans above.

[349] MTT also do not list Te Ruruku as being one of the source tūpuna whose descendants qualify for membership of MTT. Instead, as also referred to in the evidence of Tania Hopmans above, they have chosen to nominate as the source tupuna a descendent of Te Ruruku, Taraipene Tuaitu and her husband Hemi Puna. Hemi Puna's father was in fact a Pākehā called Frederick Spooner.

[350] The reason given by MTT for excluding the descendants of Te Ruruku other than the descendants of Taraipene Tuaitu is because it is said that her descendants "maintained ahi ka roa – occupation in our takiwā". In the context of this case MTT contend that the consequence of defining their source tūpuna in this way is that those descendants of Te Ruruku who went back to the Ngāti Pāhauwera rohe or elsewhere cannot use their whakapapa connection to claim the status of mana whenua or mana moana in the MTT takiwā.

[351] There are problems with this proposition. Ms Hopmans accepted in cross-examination that individuals who remained in a location could maintain ahi kā roa for members of the group they belonged to. That is clearly correct. A number of the witnesses gave evidence in this proceeding in relation to events which occurred in the 1820s and 1830s when the area between Tangoio and Mōhaka was significantly depopulated as a result of the inhabitants fleeing to the Māhia Peninsula to avoid the raids by Waikato and other iwi who were armed with muskets. Those witnesses uniformly accepted that the few who remained behind maintained ahi kā roa for those who left.

[352] The proposition also implies that the only descendants of Te Ruruku who remained in the MTT takiwā were the descendants of Taraipene Tuaitu. That was not established on the evidence.

[353] I also note that Dr Kahotea was not the only witness who expressed some disquiet about the tikanga implications of excluding people from membership of a group by way of a definition in a deed. Justin Puna, a witness for MTT, acknowledged that the Tangoio Marae Charter of 2010 excluded members of Ngāi Tahu and Ngāti Pāhauwera from being members of the marae. He expressed reservations about whether this was in accordance with tikanga. In commenting on this, Tania Hopmans pointed out that the marae and MTT have separate charters. But, in my view, similar principles would seem to apply to both.

[354] I am therefore not persuaded that the pukenga's conclusion in relation to the rights of the descendants of Te Ruruku is wrong. However, that does not resolve the issue of who holds the takutai moana in accordance with tikanga and meets the test for CMT.

[355] MTT's case was presented on the basis that a finding of mana whenua in relation to land, automatically determined mana moana in the adjacent takutai moana. In closing submissions, MTT's counsel criticised Dr Kahotea for not addressing what was claimed to be the "key" issues of the "differences between tangata whenua/mana whenua/mana moana rights and whanaungatanga privileges" and whether having

these resulted in the holder having met the test of holding the takutai moana in accordance with tikanga.

[356] This criticism is misplaced. As counsel acknowledge elsewhere in the submissions, a finding on who has met the test for CMT in the Act is a legal decision for the Court to make. While the Act stipulates that ownership of land adjacent to the takutai moana is a discretionary factor the Court may consider, there is a difference between legal ownership and mana whenua. It is a question of fact in each case whether those with mana whenua exclusively also hold the nearby takutai moana in accordance with tikanga. It is possible that they might not meet the statutory test at all or they may jointly hold the area with one or more others. That, ultimately, is a decision for the Court, not the pukenga.

[357] In relation to Ngāi Tahu's claim, the pukenga's opinion was that Ngāi Tahu did not hold all of the area of its claim (from the mouth of the Mōhaka River in the north to the mouth of the Waiohinganga/Esk River at Petane in the south. He expressed the view that, on a shared basis with Ngāti Pāhauwera, they could be said to have held, in accordance with tikanga, the area between Pōnui Stream in the north and Waitaria Stream in the south.

[358] MTT challenge Dr Kahotea's conclusions in this regard as well and point to the fact that he does not explain exactly what features of tikanga justify the conclusion that he has come to.

[359] They note that when being cross-examined, Dr Kahotea accepted that mana was important. They say that although Dr Kahotea highlighted kaitiakitanga as a significant aspect of tikanga relevant to the test of holding the takutai moana in accordance with tikanga, Dr Kahotea's report does not give examples of kaitiakitanga supporting his findings (including that in relation to Ngāi Tahu).

[360] MTT referred to there being some confusion as to the boundaries of the Ngāti Pāhauwera and Ngāi Tahu applications, and the various areas that the parties claim shared interests in.[134]

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[134] This issue is addressed at [369]-[377] below.

[361] The Court heard evidence from a number of Ngāti Pāhauwera witnesses that they and their forebears had exercised rights of access to gather kaimoana in the takutai moana claimed by MTT as exclusively theirs. The fact that Ngāti Pāhauwera people gathered kaimoana at places such as Arapaoanui, Moeangiangi and Tiwhanui was not disputed by MTT. However, their case was that the rights to do this did not arise because they were mana whenua. Tony Walzl, the historian for MTT, described the matter this way:

> When considering the takiwā of Maungaharuru-Tangitū hapū at the southern end, because of their close connections through whakapapa with the hapū there, the concept of a boundary does not appear to arise when Maungaharuru-Tangitū kaumātua speak of this area. To the north, the situation is different. Although there's clearly close whakapapa links between Maungaharuru-Tangitū hapū and Ngāti Pāhauwera, there is consistent comment from Maungaharuru-Tangitū kaumatua of a boundary existing between the two groups. The Waikari River is said to be that boundary.
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> Whanaungatanga has been described by the Maungaharuru-Tangitū kaumatua as being the relationship or kinship of the Hapū to other hapū. One expression of whanaungatanga was the act of allowing other people into the takiwā of the Hapū to access kaimoana. Maungaharuru-Tangitū hapū had such a close relationship with Ngāti Hineuru. People of Tangoio used to exchange kai ngāhere [food sourced from the bush] for kaimoana. Those from Te Haroto would bring pikopiko, poaka and birds from the bush and would return with kaimoana. If people from Te Haroto came down to the coast, then the local people would collect extra kaimoana. In addition, Ngāti Hineuru who came down from Te Haroto to Tangoio were allowed to gather kaimoana often in designated areas.
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> To the north, despite there being a boundary at the Waikari River, hapū commentators have described how, under whanaungatanga, Ngāti Pāhauwera were allowed to fish at places on the Tangitū coast. Kaumatua have stated that the whanaungatanga began at the very boundary between the hapū and Ngāti Pāhauwera – the Waikari River. There was also knowledge of an arrangement that existed for Ngāti Pāhauwera in relation to Tiwhanui, which was located just to the north of Moeangiangi, as being a place where they could dive for kaimoana. In return for access to Tiwhanui, hangi stones were obtained north of Waikari River. Kaumatua recall Ngāti Pāhauwera fishing at Moeangiangi alongside their Ngāti Tū relations. At Arapawanui close whakapapa connections meant that families from Ngāti Pāhauwera would visit. Aside from these northern locations, an arrangement also existed that allowed Ngāti Pāhauwera to come all the way to Te Whanganui ā Orotu to gather kaimoana. Maungaharuru-Tangitū kaumatua, however, note that this was by invitation only, it was not a right.

In closing submissions, counsel for MTT asserted that the pukenga did not comply with the Court's directions regarding process, did not fully address the questions asked and produced a report with what are said to be internal inconsistencies.

[362] The conclusion that MTT wish the Court to accept is that, in accordance with r 9.38 of the High Court Rules 2016 (HCR), because aspects of the Court expert's report are not accepted by all the parties, those aspects of the report must be treated as information furnished to the Court and given appropriate weight. The implication is that "the appropriate weight" must be minimal.

[363] In terms of the criticism of the process that the pukenga followed in attempting to ascertain the relevant tikanga, while it is correct to note that the pukenga did not follow the advice in the Court's Minute as to advising applicants and interested parties who he was proposing to meet or communicate with,[135] a pukenga cannot be expected to comply with the sorts of procedural requirements binding on the Court.

[364] A pukenga is appointed for the knowledge of tikanga that they possess at the date of the appointment. This knowledge is augmented by the additional knowledge they might obtain from talking to the parties or undertaking research. An example of this is that a pukenga may determine that the best way to explore relevant issues of tikanga is to hold a series of kanohi-ki-te-kanohi (face to face) meetings with the different applicant groups rather than have one big meeting where all the parties and all of their lawyers are present. It is not for the Court to dictate to the pukenga how they must go about their task.

[365] All of the applicants get the opportunity to cross-examine the pukenga on his report. That includes the opportunity to ask the pukenga about what investigations or conversations have informed his report. I would not want it to be thought that any deviation from the procedural principles that might be applied to a Court will invalidate a pukenga's evidence. However, the sorts of criticisms that MTT make in this case are relevant in relation to the weight that the Court puts on the pukenga's report.

[366] In *Re Edwards*, there was very little, if any, disagreement between the applicants as to the pukenga's findings on tikanga. The Court was able to therefore place considerable reliance on the conclusions reached by the pukenga.

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135 *Minute (No. 11) of Churchman J* HC Wellington CIV-2011-485-821, 28 October 2020.

[367] In the present case, I accept that, in accordance with HCR 9.38, the fact that parts of the pukenga's report are not accepted by all parties goes to the extent which I can rely upon the pukenga's report. The fact that the pukenga was cross-examined is relevant but does not completely ameliorate the criticisms of the report in this case. I also accept that there is substance in the MTT submission that, to the extent that the pukenga has attempted to address legal issues, it goes beyond what was asked of him.

[368] I now address MTT's complaint that there was confusion about the boundaries of the different applications.

[369] Dr Kahotea used the Waitaria Stream as the Ngāi Tahu southern boundary. MTT say that Waitaria "is an inland stream and not one that goes to the coast". It also says that no party referred to that as a boundary. In fairness to the pukenga, he did not just refer to the Waitaria Stream. On the first occasion he referred to this boundary, he described it as "Waitaha Ki Tiwhanui (Waitaria Stream)". Tiwhanui is a readily identifiable point being the highest of the cliffs that rise up almost straight out of the ocean. There was evidence that it was used as a lookout point.

[370] The witnesses for MTT did not precisely define what they said was the boundary between Ngāi Tahu and Ngāi Te Aonui (an MTT hapū). As part of [45] of his reply affidavit, Tony Walzl produced a map showing what he said were the boundaries between MTT hapū within the Mōhaka-Waikare block. The boundaries of all but one of the hapū were delineated by rivers that flowed to the sea. However, in relation to what was described by Mr Walzl as an "overlap" area between Ngāi Te Aonui and Ngāi Tahu, while the northern boundary followed the course of the Waikari River, there was no river where the southern boundary was said to be. That is likely to be because at the point on the coast where the southern boundary is said to be, there are no significant rivers that flow into the ocean in that vicinity. There are waterways (such as the Waitaria Stream) near where Mr Walzl places the southern boundary but they run northwards and, in the case of the Waitaria Stream, northwest, to ultimately join with the Waikari River.

[371] The fact that there is therefore some uncertainty about the precise Ngāi Tahu southern boundary is unsurprising. In his first affidavit, Tony Walzl discusses the

background to the Crown purchase of the lands between the Ahuriri and Mōhaka purchases. He notes that the first offers of sale of land to the Crown in the area between the Ahuriri and Mōhaka purchases came out of Waikare and the resident Ngāi Tahu peoples He noted that the original offer made to Donald McLean was for the area between Waitaha to Moeangiangi. He expressed surprise that the Ngāi Tahu's chiefs would have offered to sell land as far south as Moeangiangi and noted that "Tahu's boundary"[136] as extending only to the Otumatai District.

[372] Mr Walzl also refers to the Te Kuta Minute Books of 1891 and notes that they do not give a specific northern boundary for Ngāi Te Aonui. He refers to the Guthrie-Smith producing a later map which showed Ngāi Te Aonui's boundary extending well to the north of Moeangiangi towards Waikare although he concedes the map was not specific as to the precise boundary.

[373] At [50] of his reply affidavit, Mr Walzl sets out his understanding of the boundary of Tahumatua II. He draws upon on the evidence of Tahu's boundary given in the Te Kuta Books saying he had been able to identify nine of 23 named boundary points. The closest locations to the coast that he gives for the southwestern boundary are Otumatai and Te Awakarikari a Te Rito. Neither of these locations are actually on the coast either.

[374] Mr Walzl relies on this boundary to refute the suggestion of Dr Paul Husbands, historian for Ngāi Tahu, who had suggested that Ngāi Tahu had occupation south of the Waikari River extending to Te Wai-o-Hingāhinga/Esk River.

[375] It is also important to remember that in pre-European times, boundaries between different hapū or iwi were not represented by lines drawn on a map but focused on resource boundaries which were often not exclusive, and which tended to radiate from a "central heart to uncertain fringes".[137]

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136 The boundary laid down by Tahumatua II that was relied on as delineating the takiwā of Ngāi Tahu.

137 *Re Edwards*, above n 15, at [289].

[376] In *Re Edwards*, the Court also referred to the *Ngāti Awa Raupatu Report* where the Tribunal said:[138]

> Further, the land itself was not seen to be dissected by lines on plans. It was viewed not as a combination of enclosed allotments but in terms of resource sites that the hapū, or particular families of the hapū, habitually used. The question was not where the boundary laid between hapū but which hapū could access a particular resource at what time and for what purpose.

[377] I therefore conclude that the use by the pukenga of the Waitaria Stream in the vicinity of Tiwhanui to delineate the Ngāi Tahu southern boundary is not inconsistent with the evidence given by MTT witnesses and discussed above, in relation to the boundary between Ngāi Te Aonui and Ngāi Tahu. In referring to the Waitaria Stream near Tiwhanui, the pukenga seems to have been trying to make sense of uncertain information. I accept the evidence of Tony Walzl that the closest point to the coast of "Tahu's Boundary" is at Te Awakarikari a Te Rito. I take this as being Ngāi Tahu's southern boundary.

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138 Waitangi Tribunal *The Ngāti Awa Raupatu Report* (Wai 46, 1999) at 132.

PART V

Analysis of the applications – CMT

Ngāti Pāhauwera

[378] On 22 March 2021, Ngāti Pāhauwera filed an amended claim. The boundaries of the claim did not change from the northern bank of Poututu Stream in the north to the Esk River (Waiohinganga) in the south. The significant change was to assert the CMT was shared with other applicants in some areas.

[379] Ngāi Tahu also filed a similar amended application dated 23 March 2021. The boundaries remained from the mouth of the Mōhaka River in the north to the mouth of the Waiohinganga/Esk River in the south. Effectively, Ngāti Pāhauwera and Ngāi Tahu had agreed that to the extent that the Court found that their interests overlapped, they advanced the proposition that they were jointly applying for CMT in those areas.

[380] The pukenga concluded that Ngāti Pāhauwera had established its claim between Poututu Stream and Pōnui Stream on an exclusive basis. He did not accept Ngāi Tahu's claim to have held the area between Pōnui Stream and the Mōhaka River. Between Pōnui Stream and Waitaria Stream/Tiwhanui, the pukenga found that joint exclusivity between Ngāti Pāhauwera and Ngāi Tahu had been established. I will examine each of these conclusions.

Poututu Stream to Pōnui Stream

[381] This area has been described as the "core area" for Ngāti Pāhauwera.[139] Its claim for CMT in respect of this area had already been considered twice. Firstly, by the Independent Assessor in his report of 15 December 2015; and secondly, by the then Minister for Treaty of Waitangi Negotiations, in his decision of 23 August 2016. Both decisions concluded that the evidence (much of which also formed part of the evidence tendered to this Court in respect of this application), established Ngāti Pāhauwera was

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139 See The Ngāti Pāhauwera Treaty Claims Settlement Act 2012 at s 11.

entitled to an order for CMT. However, there were differences in reasoning and, as to the area of CMT.

[382] In terms of whether the requirement of s 58(1)(a) of the Act that the applicant held the area in accordance with tikanga, the Independent Assessor adopted a similar approach to that taken by this Court in *Re Edwards*. The Independent Assessor concluded:[140]

> I am satisfied, as a matter of statutory interpretation, given the clear purpose of the Act, that the word "tikanga" must inform the verb "holds". Parliament when it used the word "holds" was clearly not referring to ownership in a legal sense. No iwi "owns" marine and coastal areas (as defined) in that sense.

[383] A little further on, he said:

> Consistent with sensible statutory interpretation, the use of "hold" in s 58(1)(a) must fall well short of legal ownership, since no iwi is in a position to claim legal ownership of a marine and coastal area. The use is equivalent to saying something is "held" in high regard.

[384] The then Minister for Treaty of Waitangi Negotiations took a different view as to the meaning of the words "holds in accordance with tikanga". He focused on the common law distinction between "territorial" rights which are interests in land and "non-territorial" rights which are rights to carry out activities over a certain area without holding an interest in land on which the activity occurs. He noted that the Act stated that CMT is an interest in land.

[385] For the reasons set out in *Re Edwards*, I prefer the approach taken by the Independent Assessor.[141] That approach is inconsistent with the view taken by the then Minister for the Treaty of Waitangi Negotiations at [16] of his decision that:

> …section 58(1)(a) requires evidence showing a proprietary or proprietary-like holding of the specified area of CMCA according to tikanga.

[386] I accept that an applicant is required by s 58(1)(a) to establish more than the operation of a system of tikanga. This may be achieved by identifying relevant tikanga

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140 *Report of the Independent Assessor on Evidence Supporting Claims by Ngāti Pāhauwera under the Marine and Coastal Area (Takutai Moana) Act 2011*, above n 66, at 11.

141 *Re Edwards*, above n 15, at[104]-[144].

values (such as ahi kā roa, rāhui, manaakitanga and kaitiakitanga) and demonstrating how those values were applied in the takutai moana.

[387] Additional tikanga values referred to by the Independent Assessor as justifying his conclusions were weaving the takutai moana into Ngāti Pāhauwera's oral history, including waiata, rules governing iwi behaviour in the area, inclusion of various geographic features in kōrero, and ancient and ongoing whakapapa connections. To this could be added the recognition of the presence of named taniwha/kaitiaki.

[388] Both the Independent Assessor and the Minister accepted that there was evidence of tikanga being applied in relation to the application area which justified the conclusion that the area (or rather part of it) was held in accordance with tikanga. A similar conclusion was also reached by the pukenga in this case. The Attorney-General did not disagree with the findings made by the Independent Assessor and Minister (or the pukenga) but noted that the application area that was the subject of this application was more extensive than the application area considered by the Independent Assessor and Minister. That observation is correct and, as detailed below, I come to different conclusions in respect of different parts of the extended application area.

[389] This Court received even more extensive evidence about the tikanga followed by Ngāti Pāhauwera in the application area than the Independent Assessor or Minister had done. Particular features were the extent to which the takutai moana was a part of the oral history of Ngāti Pāhauwera, and was incorporated into waiata and whakataukī. Evidence was also given as to the involvement of the applicant in kaitiaki activities including attempts to stop the over-exploitation or pollution of the resources in the takutai moana by third parties. I am satisfied that Ngāti Pāhauwera have met the s 58(1)(a) test of holding this part of the takutai moana in accordance with tikanga.

[390] One point where the Independent Assessor and Minister differed from each other is the seaward boundary of the takutai moana. The Independent Assessor fixed the seaward boundary as being 250 metres from mean high-water springs. The Independent Assessor relied on evidence given that members of Ngāti Pāhauwera dived on reefs and shellfish sites approximately 200 metres offshore. He

acknowledged the cultural importance to Ngāti Pāhauwera of activities that took place in the takutai moana beyond 250 metres such as the role of their tūpuna and kaitiaki, Paikea, and their kaitiaki activities in attempting to control aspects of third-party fishing that were said to amount to exploitation.

[391] The Independent Assessor also noted that the iwi's rohe moana under the Fisheries (Kaimoana Customary Fishing) Regulations 1998, extended over a designated area out to approximately six miles. However, he seems to have based his decision on a finding that the area beyond 250 metres was not one where Ngāti Pāhauwera could claim exclusive use and occupation.

[392] The Minister took an even more restrictive view holding that the test was only satisfied in respect of the area between mean high-water springs and mean low-water springs.

[393] The Minister acknowledged that any assessment of the seaward boundary of a CMT area will involve a degree of artificiality because it would represent customary interests by fixed boundary points. He acknowledged that such an approach tended to downplay the contextual nature of custom and attributed a fixed inflexible character to Māori interests. He expressed the view that such an approach was "…however, a necessary consequence of the recognition of rights and interests through the Act".

[394] I take a different view as to what the evidence establishes as the seaward boundary of the area that Ngāti Pāhauwera could be said to have exclusively held in accordance with tikanga.

[395] As noted earlier in this decision, Māori did not hold areas in accordance with straight lines drawn on a map. GPS co-ordinates were unknown. The pukenga acknowledged in his report that the mana of this part of the takutai moana was in the provision of food (ko te mana o te moana he kai). He acknowledged the importance of kaitiakitanga and the obligation of the kaitiaki to protect the resources of the area through activities such as "karakia, rāhui and mahi tika (doing what's right)". He did not suggest that these obligations could be delineated by drawing lines on a map.

[396] It cannot be said that Ngāti Pāhauwera's obligations as kaitiaki stopped at mean low-water springs or a line drawn at 250 metres from the shore. Neither can it be said that the use of resources was limited to those areas.

[397] The following of rituals such as the saying of karakia before and after fishing or gathering kaimoana did not just apply to activities between mean high and low-water springs or activities within 250 metres off the shore. They applied equally to offshore fishing and navigation. The reference to the takutai moana in the kōrero and waiata of Ngāti Pāhauwera equally did not stop at low-water springs or 250 metres. Neither was there any such artificial limitation to the area in respect of which a rāhui would be imposed in circumstances such as a drowning or to preserve a particular resource.

[398] As discussed above, holding in accordance with tikanga cannot mean that the applicant group had, and continues to maintain, the ability to physically exclude all others from the area. The Act specifically notes that activities by third parties such as navigation and fishing are not inconsistent with the test of holding in accordance with tikanga. These sorts of activities, along with recreational activities, are also not inconsistent with the tikanga value of manaakitanga.

[399] The Independent Assessor was of the view that the evidence in respect of the area beyond 250 metres from shore "falls well short of the iwi being able to claim exclusive use and occupation". That conclusion appears to have been reached on the basis that third parties have used the area for activities such as fishing and navigation. However, as discussed above, such activities do not automatically negate the concept of holding in accordance with tikanga.

[400] It is also significant that no other applicant group disputed Ngāti Pāhauwera's claim to CMT in this area. In the context of claims under the Act, that is unusual. It represents a clear acknowledgement by the tangata whenua that, in accordance with tikanga, Ngāti Pāhauwera had exclusive rights in this area. There was no suggestion by any participant in the hearing that those rights had been extinguished.

[401] On the issue of whether Ngāti Pāhauwera's rights extended out to the 12-nautical mile limit, the facts in this case are different to those in *Re Edwards*. In that case, there was evidence of the successful applicant groups using the takutai moana well beyond the 12-nautical mile limit imposed by the Act for the purposes of CMT. That included evidence of a detailed knowledge of fishing grounds stretching out beyond that limit, and regular use by the applicant groups of offshore islands such as Whakaari (White Island) which were considerably further offshore than 12-nautical miles. There is no corresponding evidence in this case.

[402] Where the boundary of CMT is to be less than the 12-nautical mile limit, there is always going to be an artificiality in drawing a line to define that boundary. But it is impossible to give any certainty to the limits of CMT without something such as a line or GPS co-ordinates.

[403] In most cases, the intensity and frequency of the use of the resources of the takutai moana will decrease the further one goes from the shore. It is difficult, if not impossible, to apply concepts of tikanga in a way that fully captures values that can be diagrammatically shown on a map. That may well be why the pukenga, in this case, accepted in some instances that the area held in accordance with tikanga did not extend as far as the 12-nautical mile limit but felt unable to delineate or particularise where the boundary might have been. Ultimately, it is a question of impression based on the evidence the Court has received.

[404] The tikanga evidence satisfies me that the tikanga values that were practiced and which supported a finding that the applicant held the area in accordance with tikanga, extend well beyond the immediate foreshore. However, there was little evidence that they went as far as 12-nautical miles.

[405] Erring on the side of liberality, I fix the boundary as 5km offshore from mean high-water springs. There was no evidence that any part of the takutai moana was excluded from activities such as the harvesting of resources, or responsibility such as kaitiakitanga, therefore, artificial as it may be, the 5km limit will be in a straight line parallel with mean high-water springs.

Ngāi Tahu claim to the south bank of the Mōhaka River

[406] There is one aspect of this application area that the Independent Assessor and Minister did not have to deal with. That is the claim on behalf of Ngāi Tahu that their interests went as far north as the Mōhaka River. Ngāi Tahu o Mōhaka Waikare were not involved in any of the previous hearings or investigations in relation to Ngāti Pāhauwera's claims. No other applicant group had contested the Ngāti Pāhauwera claims.[142]

[407] The basis of the Ngāi Tahu claim that their boundary extended as far north as the Mōhaka River, was their rejection of the account by Toro Waaka for Ngāti Pāhauwera and Tony Walzl, historian for MTT, of what had happened to Ngāi Tahu. Mr Waaka's evidence was that Ngāti Pāhauwera tūpuna, Tureia and Kahutapere, with the assistance of Te Whatuiapiti, attacked the group of Ngāi Tahu living on the south bank of the Mōhaka River, driving them from five pā: Pukaroro, Te Whaupapa, Te Herepiritia, and Te Kanui o Tonga.

[408] Ngāi Tahu's historian, Dr Paul Husbands, appears to accept that Tureia attacked Ngāi Tahu at the Mōhaka River but does not specifically say what the consequence of that attack was. In submissions, Ngāi Tahu's counsel suggested that through his mother, Tureia was closely connected with Ngāi Tahu and that it was unlikely he would have attacked his own mother's people.

[409] In his reply affidavit, the historian for MTT, Tony Walzl, refers to the evidence presented to the Waitangi Tribunal by historians, Fred Reti and Patrick Parsons. He noted that that evidence indicated that there were two groups of Ngāi Tahu living alongside each other. One, living along the southern bank of the Mōhaka River who were conquered by Tureia and whose land became part of the mana whenua of Ngāti Pāhauwera, and the other, descendants of Tahu Matua II (relations of Tureia), who continued to live in a takiwā created by their ancestor, Tahu Matua II, which was not affected by the conquest.

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142 The evidence was that the southern boundary of the Ngāti Pāhauwera claimed core area was in fact adjusted back to the present point to avoid the possibility of any overlap in the claim advanced by MTT on behalf of Ngāi Tahu.

[410] Mr Walzl's account of Tureia's conquest is that:

(a) Parakiwai, a relative of Tureia who lived on the north bank of the Mōhaka River, wanted Tureia to come down from Te Māhia Peninsula and live alongside him; and

(b) the land on the immediate southern side of the Mōhaka River was occupied by Ngāi Tahu, the descendants of Tahutoria. After an incident over fishing rights, Tureia's people sacked a series of pā that ran up the southern side of the Mōhaka River. Walzl then referred to the accounts of people such as Nutana Te Kawe, Wepiha Wainohu, and Tohu Rahurahu, who had expressed the view that the Tahu people on the south bank of the Mōhaka River who were conquered by Tureia, were descendants of Tahutoria who lived long before Tahu Matua.

[411] Mr Walzl also refers to his 10 August 2020 affidavit where he says:

> Considering that both Tureia's mother, Tamateahirau, and grandfather, Tamakonohi, were immediate descendants of Tahu Matua, and that Tahu Matua was Tureia's great-grandfather, it would be quite something to attack his own close kin and conquer their land.

[412] The evidence of Toro Waaka and Tony Walzl convinces me that there were in fact two separate and distinct groups of Ngāi Tahu. The group at Mōhaka descended from Tahutoria, and the group at Waikare descended from Tahu Matua.

[413] The rights of the group descended from Tahutoria between Pōnui Stream and the Mōhaka River were extinguished when they were conquered by Tureia of Ngāti Pāhauwera. My conclusion on this is consistent with the tikanga findings of the pukenga.

[414] I therefore conclude that Ngāti Pāhauwera have established that they exclusively held, in accordance with tikanga, without substantial interruption, their core area between the Poututu Stream in the north and Pōnui Stream in the south from mean high-water springs out to a line parallel to mean high-water springs 5km out to sea.

Pōnui Stream to the Waikari River

[415] As discussed below, in relation to the Ngāi Tahu ō Mōhaka Waikare claim, both Ngāti Pāhauwera and Ngāi Tahu amended their pleadings to advance a claim for shared CMT in this area. There was extensive evidence of the use of this section of the takutai moana by Ngāti Pāhauwera. The evidence also confirmed that the same tikanga practices were followed in this area as those observed in the northern part of the Ngāti Pāhauwera claim where I have concluded that they are entitled to CMT on an exclusive basis.

[416] The real issue for the Court is to determine whether the claims advanced by MTT to this area mean that Ngāti Pāhauwera and Ngāi Tahu cannot be said to have held the area in accordance with tikanga and exclusively used and occupied it. The pukenga's opinion was that, in accordance with tikanga, Ngāti Pāhauwera and Ngāi Tahu shared an area between Pōnui Stream in the north and Waitaria Stream in the vicinity of Tiwhanui in the south. Tiwhanui, as discussed above, is well south of the Waikari River and close to the point of Te Awakarikari identified by MTT historian, Tony Walzl, as the southern boundary where Ngāi Tahu overlapped with the MTT hapū Te Aonui. So, on the basis of the pukenga's finding, the area between the Waikari River and Pōnui Stream was included in the area jointly held by Ngāti Pāhauwera and Ngāi Tahu.

[417] Others who have investigated the boundary between Ngāti Pāhauwera and the MTT hapū have put it as being at the Waikari River. For example, the deed of settlement entered into between the Crown and Ngāti Pāhauwera as part of the settlement of Ngāti Pāhauwera's Treaty of Waitangi claim, recorded that Ngāti Pāhauwera's core area of interest was bounded in the south by the Waikari River.

[418] The MTT settlement documentation does not seem to refer to a concept of "core area of interest" but the statutory acknowledgement contains maps delineating an area off the coast starting at a point approximately midway between Whirinaki and Tangoio Bluff in the south, and finishing at Matahorua Stream, near the Waikari River in the north. Another map identifies a number of named reefs in the same area and refers to them as being in MTT's area of interest.

[419] As noted above, MTT historian, Tony Walzl, also referred to the northern boundary of the MTT hapū being the Waikari River.

[420] There is, therefore, an evidential basis for finding that the Ngāti Pāhauwera CMT boundary is as far south as the Waikari River, although I note that the findings made by the Waitangi Tribunal did not involve an assessment of who held the takutai moana in accordance with tikanga.

[421] There was some evidence of members of MTT hapū fishing and whitebaiting as far north as the Waikari River but the basis for MTT's claim that it has customary interests north of the Waikari River seems to rest on its assertion that it represents Ngāi Tahu, and it is Ngāi Tahu's connection with the area that provide the basis for the claimed rights between the Waikari River and Pōnui Stream.

[422] I am not satisfied that there is sufficient evidence that would justify concluding that it could be said that MTT held any area north of the Waikari River in accordance with tikanga. There were limited rights to things such as the collection of hāngi stones in exchange for fishing privileges[143] but these were said by MTT witnesses to be similar to the rights enjoyed by members of Ngāti Pāhauwera to fish and gather kaimoana in the areas which MTT claimed as its exclusive takutai moana.

[423] For these reasons,[144] I find that, on a basis of shared exclusivity, Ngāti Pāhauwera and Ngāi Tahu have met the tests in s 58 in respect of the area between the Waikari River and Pōnui Stream. As to how far the CMT extends out beyond mean low-water springs, the same observations apply to this area as to the exclusive part of the Ngāti Pāhauwera takutai moana, and it is appropriate for a similar line parallel with the shore to be drawn.

Ngāti Pāhauwera's interests south of the Waikari River

[424] Although the pukenga found that the interests that Ngāti Pāhauwera shared with Ngāi Tahu extended as far south as the Waitaria Stream in the vicinity of Tiwhanui, this was disputed by MTT. In closing submissions, counsel referred to a

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143 As discussed by Tony Walzl in the passage set out at [361] above.
144 And, in relation to Ngāi Tahu, the reasons discussed below.

map that had been produced by Ms Hopmans as Exhibit 1. That map acknowledged a shared interest between MTT and Ngāti Pāhauwera between the southern boundary of the Otumatai block in the south (not far from the point identified by the pukenga as the southern boundary of Ngāi Tahu and Ngāti Pāhauwera's shared interests), and Pōnui Stream in the north. In relation to the area between Tahu's boundary in the south and the Waikari river in the north, such a concession is sensible and reflects the weight of the evidence. Were it not for one factor, it might have provided the basis for an order of shared CMT in this area. That one factor is MTT's trenchant resistance to acknowledging that Ngāi Tahu ō Mōhaka Waikare had any interest at all. That puts it in direct conflict with the conclusions reached by the pukenga, and the conclusions that I have reached in this decision.

[425] This is therefore one of those cases where the failure by one applicant to recognise the interests of an overlapping applicant means that the Court is unable to approach the matter on the basis of shared exclusivity.

[426] MTT do not accept any sharing with Ngāti Pāhauwera south of the Otumatai block so no award of shared exclusivity is available for that area either. Even if that were not the case, the evidence establishes that the rights Ngāti Pāhauwera held south of the Otumatai block were more in the nature of whanaungatanga rights than mana moana.

Ngāi Tahu o Mōhaka Waikare

[427] As noted above, on 23 March 2021, Ngāi Tahu filed an amended application. The amended application did not alter the northern and southern boundaries of the application which had been set out in an earlier amended application dated 22 December 2020. Those boundaries remain the Mōhaka River in the north and the Waiohinganga/Esk River in the south. But they acknowledged that there was an overlap in the north with Ngāti Pāhauwera and in the south with MTT.

[428] To the extent of the overlap, the amended application invited the Court to consider it as a joint application for shared CMT between the overlapping parties. As discussed above, Ngāti Pāhauwera amended their application in similar fashion.

[429] For the reasons discussed at [161]-[180] above, *Re Edwards* held that there may be "shared exclusivity" and the possibility of a jointly held CMT if the evidence establishes, in fact, that such a situation existed and, if it did exist, the extent of the area in question.

[430] The geographical features of the coast between the Waikari River in the south and the Pōnui Stream in the north, are similar to the features from Pōnui north to Poututu Stream. It is rugged and inaccessible with high cliffs rising from close to the shore. Although it is difficult, and at times dangerous to travel on, it can be, and has continuously been since 1840, used by Māori as a route for travel up and down the coast between the various isolated settlements, fishing grounds and kaimoana gathering sites.

[431] There was evidence of the operation of the same tikanga in this area as I have found existed in the area from Pōnui Stream northward. The use of the resources of the takutai moana and the kaitiaki obligations were also consistent with those in place north of the Pōnui Stream.

[432] However, the evidence in relation to Ngāi Tahu is more complicated than that involving Ngāti Pāhauwera. There is no doubt that Ngāi Tahu are an ancient people who have been present in the area (particularly either side of the Waikari River) for many generations. At one point, Toro Waaka, in his evidence on behalf of Ngāti Pāhauwera, went as far as to say that all Ngāti Pāhauwera were descendants of Ngāi Tahu people.

[433] Both Ngāti Pāhauwera and MTT, in their settlement deeds, had clauses saying that, for the purposes of those deeds, Ngāi Tahu was one of the hapū that they represented. However, the issue is not whether those people with Ngāi Tahu ancestry who choose to be represented by either Ngāti Pāhauwera or MTT, have established a claim to CMT, but whether Ngāi Tahu o Mōhaka Waikare, represent a separate component of Ngāi Tahu. I am satisfied that they do for the reasons discussed above.[145]

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[145] See [69] above.

[434] However, it is clear that the number of Ngāi Tahu descendants who have authorised Malcolm Kingi to represent them, is very modest as compared to the number of people with Ngāi Tahu ancestry who identify as being part of either Ngāti Pāhauwera or the various hapū that make up MTT. Indeed, it may be more appropriate to describe the Ngāi Tahu application as more of a whānau application than a hapū application.

[435] The pukenga's conclusion was that:

> On a shared basis with Ngāti Pāhauwera they would meet the test of tikanga between Pōnui Stream in the north and Waitaria Stream in the south.

[436] In closing submissions, counsel for the Attorney-General specifically said it did not challenge the findings of the pukenga report, although it did note that all of the applicant groups faced challenges when it came to meeting the test for CMT, in relation to the entirety of their respective application area.

[437] The Attorney-General accepted the concept of shared exclusivity describing it as:

> …allowing for a number of iwi, hapū or whānau to effectively "join hands" as one applicant group and have CMT recognised across a single area.

[438] Counsel for the Attorney-General went on to state:

> In the present case, there is some evidence that at least parts of the application area are shared by more than one applicant group. Ngāti Pāhauwera, Ngāi Tahu and MTT have all led evidence that they were accessing, using and occupying the same parts of the CMCA.

[439] Counsel noted that while Ngāti Pāhauwera indicated that they consider an area south of Waikare to be shared, such a view was not shared by other applicant groups.

[440] As to the overlap between MTT and Ngāi Tahu, the MTT historian, Tony Walzl, produced a map, titled "Figure 1 Ngāti Tū mana whenua within the Mōhaka/Waikare block".

[441] Mr Walzl says that the area where mana whenua was shared between Ngāi Tahu and Ngāi Te Aonui was between the Waikari River in the north and Tahu's

boundary in the south, with the closest boundary of Tahu's boundary to the coast being identified as Te Awakarikari a Te Rito.

[442] As discussed above,[146] this is similar to the shared area south of the Waikari River identified by the pukenga.

[443] In Figure 1 above, Mr Walzl does not identify any MTT hapū having a shared area north of the Waikari River. The MTT deed of settlement of their historical claims put the northern boundary of their statutory acknowledgement area at the Waikari River. I therefore come to the conclusion that, to the extent that Ngāi Tahu o Mōhaka Waikare has interests between the Waikari River and the Pōnui Stream, they were shared with Ngāti Pāhauwera rather than MTT.

[444] There is no dispute that Ngāi Tahu have whakapapa links to the area between the Waikari River and Pōnui Stream. They do not now own land abutting the takutai moana in this area but that is not a determinative factor. The evidence was that they continue to access the area and make use of its resources. The evidence of the tikanga that they practised in relation to the takutai moana was similar to the tikanga followed by Ngāti Pāhauwera.

[445] Given that both Ngāti Pāhauwera formally amended their CMT applications to acknowledge shared interests with each other, as I set out in relation to Ngāti Pāhauwera's claim, I find that they are entitled to advance a claim for shared CMT. However, the area of shared CMT is only between the Waikari River and Pōnui Stream. For the same reasons discussed in relation to the Ngāti Pāhauwera core area, I find that the shared area of CMT extends from mean high-water springs out to 5km in the sea.

[446] I deal with Ngāi Tahu's claim to the area of the takutai moana adjacent to the Otumatai and Te Kuta blocks below, when discussing MTT's application. In relation to their claim to areas south of the Otumatai block, the pukenga did not find that they held this area in accordance with tikanga. The evidence is overwhelming that this conclusion is correct.

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146 At [369]-[377] above.

MTT

[447] The MTT application area for CMT spans between the Pōnui Stream in the north (just above the Waitaha River), to Keteketerau in the south, extending out to the 12-nautical mile limit and encompassing Pania Reef.

[448] As with the other applicants, there are certain locations within MTT's application area where CMT is unavailable on the basis that it is extinguished, or substantially interrupted. For MTT, as discussed above, this has occurred in the area around the Pan Pac paper mill outfall, at Whirinaki.

[449] However, the majority of MTT's application area is still available for an award of CMT, provided that the s 58 test is satisfied. The critical consideration in relation to MTT's application is exclusivity – and when and how shared exclusivity can be applied. Because of the overlapping interests in MTT's application area with Ngāti Pāhauwera, Ngāi Tahu, Ngāti Pārau, and the Mana Ahuriri Trust, I will assess the application in three discrete areas.

[450] Before I do so however, it is important to note that the hapū of MTT have resided in, and had a connection to, the application area as at and before 1840. I discuss the history and whakapapa of the six hapū that make up MTT in Appendix 2. In summary, MTT descend from three early groups located at Ahuriri, Tangoio, and the Waikari River.[147] From these three early groups six hapū emerged, with each hapū descending from what was described as a "source ancestor". These tūpuna included:

(a) Ngāti Tū: Tūkapua I, a direct descendant of Toi Kairakau (a famous navigator and seafarer who established his southernmost pā at the head of the Tangoio Valley) and from whom descended the eponymous tūpuna of the hapū, Marangatūhetaua;

(b) Ngāi Tauira: Who descended from Mahu Tapoanui and Ngāti Whatumoana, the descendants of who were the tōhunga Tūnuiarangi and the eponymous rangatira Tauira;

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147 Known as Ngāti Whatumoana, Ngāti Awa, and Ngāti Tahu.

(c) Ngāi Tahu: Descending from Tahumatua II, who established a takiwā within the Waikare District;[148]

(d) Ngāti Kurumōkihi: Who emerged from the interaction between Ngāti Tū and Taraia I and his generals of Ngāti Kahungunu, who had come into the takiwā;

(e) Ngāi Te Ruruku: Established following Marangatūhetaua's invitation to Ngāti Pāhauwera rangatira Te Ruruku to move into the area in order to repel other invading hapū;[149] and

(f) Ngāti Whakaari: A section of Ngāti Tū based at Petane, descending from Whakaari as their founding rangatira.

[451] Many MTT witnesses also described their deep and enduring connection with the whenua and moana around their application area. Several witnesses detailed their whakapapa stretching back to Tangaroa, the atua of the ocean, and Ruamano, the son of Tangaroa who took the form of a whale that guided the waka Takitimu to Aotearoa. Witnesses also discussed their connection to Maungaharuru, the sacred maunga on the western boundary of the MTT rohe, and Tangitū, the coast, sea, and reefs adjacent to the rohe – both of which protected and nurtured the hapū of MTT.

[452] The first section I will assess is the area between MTT's claimed northern boundary at the Pōnui Stream, and the southern boundary of the Otumatai block. MTT suggested that this section should be considered as a shared area in which both MTT and Ngāti Pāhauwera, as the two entities representing and encompassing Ngāi Tahu, both had customary interests and rights in it.

[453] For the reasons set out above in relation to the Ngāti Pāhauwera and Ngāi Tahu claims, I have concluded that the area between the Waikari River and Pōnui Stream was held by Ngāti Pāhauwera and Ngāi Tahu jointly, not by MTT. It is apparent that MTT had some shared interests in this area, but that these interests arose as a result of

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148 The Ngāi Tahu whakapapa is disputed between MTT, Ngāti Pāhauwera, and Ngāi Tahu ō Mōhaka-Waikare – an issue I deal with at [406]-[414] above.

149 Discussed above at [342]-[354].

whanaungatanga. I have already referred to the evidence of Mr Walzl, MTT's historian, who in both a historical report and reply affidavit detailed the takiwā of Ngāi Tahu, including its boundaries. He set those boundaries as being the southern end of the Otumatai block (and close to a point called Te Awakarikari a Te Rito) in the south, to the Pōnui Stream in the north. As part of schedule included with the Deed of Settlement between MTT and the Crown, it was acknowledged that the Ngāi Tahu takiwā comprised the "Otumatai and Te Kuta blocks northwards to the Waitaha Stream".

[454] Dealing with the area of the takutai moana adjacent to the Otumatai and Te Kuta blocks, shared exclusivity requires each party to acknowledge the other's shared interests in order for joint CMT to be granted.[150] Here, MTT were firm in their position that they did not recognise Ngāi Tahu ō Mōhaka Waikare as a separate entity. In closing submissions, counsel for MTT noted that MTT's explicit position was that they did not agree that there were any areas shared with Ngāi Tahu. Because of this, I cannot grant MTT an award of CMT over this area, as I do not consider that they use and occupy the area or hold it in accordance with tikanga exclusively, and although they accept sharing with Ngāti Pāhauwera, they do not accept shared exclusivity with Ngāi Tahu. This also means that Ngāi Tahu cannot meet the test of exclusive use and occupation.

[455] The second section is between the southern boundary of the Otumatai block, and Arapaoanui. This section was part of what MTT said was their exclusive area – in that it did not recognise any of the other parties as having interests in the area. The key consideration for this section is whether MTT do in fact exclusively use and occupy the area, or whether that exclusivity is shared with Ngāti Pāhauwera and Ngāi Tahu, whose applications overlap.

[456] For the reasons set out below, I have concluded that MTT does hold this section of the application area in accordance with tikanga, and has also clearly used and occupied the area since, and before, 1840. The first factor to record is that alongside MTT's enduring whakapapa connection to the area, they also maintained fishing

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150 See *Re Edwards*, above n 15, at [170].

grounds and coastal pā throughout the area, carrying out activities such as gathering kaimoana, fishing, diving, and swimming in areas such as Moeangiangi and Arapaoanui. In her affidavit, Ms Hopmans included a map of traditional coastal pā and settlements in that area, including Moeangiangi pā, and Te Puku-o-te-Wheke at Arapaoanui, while Mr Bevan Taylor described traditional fishing grounds in the same area, many of them being clustered off the coast from the Moeangiangi and Waipapa Rivers. Identification and knowledge of the location of offshore fishing grounds is an important component in demonstrating that the areas in which those grounds are located are held in accordance with tikanga.

[457] MTT continue to use and occupy this area to this day, by continuing to carry out activities such as fishing, diving and swimming, and also hold the area in accordance with tikanga. This is evident through exercise of their role as kaitiaki over the area, whereby they have consistently acted to protect and preserve the takutai moana, through the exercise of rāhui, carrying out karakia to lay stranded whales to rest at beaches such as Arapaoanui, working with government and private entities to represent the interests of mana whenua (such as local government, and the Minister of Conservation) and managing conservation lands.

[458] The second factor to record is that there is a history of consistent interaction and interrelationship between Ngāti Pāhauwera and the MTT hapū within this section. The most important example of this is the Ngāti Pāhauwera rangatira, Te Ruruku. As noted by Mr Walzl, Te Ruruku was an early Ngāti Pāhauwera rangatira born at Wairoa, and the nephew of Te Kahu o Te Rangi, a founding ancestor of Ngāti Pāhauwera. Te Ruruku was based at Mōhaka with his uncle Te Kahu o Te Rangi when Marangatūhetaua, a rangatira of MTT hapū Ngāti Tū living at Ngāmoerangi pā, enlisted his help to repel the invading hapū. In return, he was gifted land. Tania Hopmans describes the gift and Te Ruruku's takiwā as follows:

> Marangatūhetaua sought the help of Te Ruruku, a Wairoa chief. Te Ruruku helped Ngāti Tū and Ngāi Tatara to repel the invaders and in return he was gifted land. Tribal archives record, "ko Waipatiki na Marangato i tuku ki a Te Ruruku" – Marangatūhetaua gifted land at Waipatiki to Te Ruruku. Included within this gift was the pa, Te Wharangi, located on the hill to the north of the Waipatiki River mouth. Therefore, Ngāi Te Ruruku gained their occupation rights within the takiwā through tuku whenua, and such rights were specific to those who maintained ahi-kā-roa, namely the descendants of Hemi Puna and Taraipine Tuaitu. Other pā associated with

> Ngāi Te Ruruku include Ngāmoerangi, Whakaari and Te Puku-o-to-Wheke at Arapawanui.
>
> Alongside Ngāti Tū and Ngāti Kurumōkihi, Te Ruruku and his descendants became responsible for the military stability of a considerable takiwā comprising the lands of Ngāti Tū, Ngāti Kurumōkihi and Ngāi Tahu. The reputation of these lands rested on its bounty as a food resource. It possessed the superior fishing grounds of Tangitū, the coveted eeling lakes at Tūtira and its tributaries, the tributaries of the Waikari River and the renowned bird-snaring grounds of Maungaharuru.

[459] Therefore, the third and most critical factor appears to come down to the principle of whanaungatanga. MTT's position as set out in closing submissions is that Ngāti Pāhauwera do not have any tangata whenua/mana whenua/mana moana rights in the area identified as "MTT exclusive", and that they do not agree to any form of shared interests with Ngāti Pāhauwera or Ngāi Tahu o Mōhaka Waikare in that area. According to MTT, to take a 'shared exclusivity' approach to this section of their application area would be to put aside the tino rangatiratanga that one of their hapū, Ngāti Tū, have in the area.

[460] Counsel for MTT rightly pointed that the greatest proportion of customary use evidence for Ngāti Pāhauwera related to the Mōhaka River, the river mouth, and the beach surrounding it, whereas evidence of customary use below the southern boundary of the Otumatai Block appeared to show that Ngāti Pāhauwera were only present in the area as a result of whanaungatanga only.

[461] In both *Re Edwards* and *Ngā Pōtiki*, it was acknowledged that both limbs of the statutory test for s 58 require an assessment centred around the applicable tikanga of the area, rather than common law proprietary concepts. In *Re Edwards*, in relation to s 58(1)(a), the Court held:[151]

> 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.

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151 At [130].

[462] In *Ngā Pōtiki*, in relation to s 58(1)(b)(i), Powell J observed that it was important to bear in mind "the central importance of tikanga" when considering the concept of exclusive use and occupation.[152]

[463] As discussed in *Re Edwards*, a critical aspect of applicable tikanga in cases under this Act will be the whakapapa of the applicants, and the interrelated principle of whanaungatanga.

[464] Counsel for MTT submitted that evidence of whanaungatanga was insufficient for CMT, because whakapapa can connect any given person to a number of groups. Therefore, relying on whakapapa alone would "open the floodgates" to allow for all sorts of applications claiming that areas of the CMCA have been held, used, and occupied by those who are not tangata whenua. Referring to evidence given in the Te Whanganui-ā-Ōrotu hearings, counsel submitted that whanaungatanga was a privilege rather than a right, and that providing for whanaungatanga cannot be construed as the MTT hapū relinquishing their mana whenua to those whānau who took advantage of such privileges, at the invitation of tangata whenua.

[465] Counsel went on to refer to evidence of both Ngāti Pāhauwera and MTT witnesses who discussed Ngāti Pāhauwera's ability to access this section of MTT's application area for fishing and gathering kaimoana. For example, Mr Walzl in his historical report referred to a number of MTT witnesses, including kaumatua, who described that, under whanaungatanga, Ngāti Pāhauwera could come into this section of MTT's rohe to fish on the coast. David Puna stated that because of this whanaungatanga, "those north of the Waikari River" could enter into the hapū takiwā to fish, noting that "as long as the resource was there we would share it".

[466] Bevan Taylor described his elders fishing in the area where the Ngāti Pāhauwera and MTT boundaries merged, and also recalled Ngāti Pāhauwera fishing in the area as they were related to one another. He was also aware of Ngāti Pāhauwera fishing at Moeangiangi with their Ngāti Tū relations, stating:

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152 At [36]-[38].

> They [Ngāti Pāhauwera] fished with Ngāti Tu. It was whakawhanaungatanga (an expression of kinship/generosity). We were related and comfortable to fish together.
>
> …When they came to join us, it was not a mana thing, they came because they were whānau.

Mr Taylor went on to state however, that this was an access privilege that was still under the mana of the hapū.

[467] Rangi Spooner also had knowledge of an arrangement that existed for Ngāti Pāhauwera in relation to Tiwhanui just to the north of Moeangiangi, as a place they could dive for kaimoana, and recalled that in return for access to Tiwhanui, "anybody who wanted hāngi stones could send someone over to their area to get them". Tui Puna, May Karaitiana, and George Tawhai all also recalled Ngāti Pāhauwera fishing at Arapaoanui through whanaungatanga.

[468] A number of Ngāti Pāhauwera witnesses also discussed their ability to access this section of the MTT application area through whanaungatanga. Mr Arthur Gemmell, chairman of the Arapaoanui 3E Trust, described his uncle travelling by horse from Mōhaka down to Ridgemount to collect kaimoana, and accepted that the ability to accept kaimoana in that area was as a result of whanaungatanga.

[469] Mr Owen Gerald Hapuku also recalled collecting mussels with his whanau at places south of the Waikari River including Ridgemount and Moeangiangi, with his uncle telling him he could go to those places due to a 'Pāhauwera connection'. Mr Hapuku stated that MTT and Ngāti Pāhauwera were "more or less one people" through whakapapa, and that one of the reasons that Ngāti Pāhauwera people could collect kaimoana from the area below the Waikari River was whanaungatanga. Ms Gaye Hawkins also described collecting kaimoana at Arapaoanui (as well as Tangoio) through whanaungatanga connections.

[470] I consider that MTT are correct in stating that providing for whanaungatanga does not amount to tangata whenua relinquishing their mana or rangatiratanga over the whenua or moana. As I have discussed above, it is clear that MTT hapū hold this position. However, I consider that counsel for MTT's characterisation of whanaungatanga as a privilege is not correct. This is for two reasons.

[471] First, experts on the interface between tikanga and the common law have described whanaungatanga as the source of rights and obligations, rather than amounting to an exclusive privilege. For example, this Court has previously cited the extra-judicial observations of Williams J in relation to whanaungatanga, which are worth repeating here:[153]

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

[472] In *Trans-Tasman Resources*, Williams J noted that the interests of iwi with mana moana "reflected the values of the interest holder", and that those values – mana, whanaungatanga and kaitiakitanga – principles of law that predate the arrival of the common law in 1840, are relational.[154] Dr Carwyn Jones has described whanaungatanga as follows:[155]

> Whanaungatanga reflects the centrality of relationships in all aspects of the Māori world. Whakapapa provides a framework for organising those relationships – the word itself conjures the image of layering generations one upon the other to construct a network of relationships that stretches backwards and forwards through time. All relationships within the Māori world are understood through this kinship framework and rights and obligations are determined by relationships. There is a strong ethic of collective responsibility and individual rights always exist in relation to the collective. The maintenance of good relationships, not only between living people but between people and the gods, people and the natural environment, and between current, past, and future generations are key considerations in determining any course of action.

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

154 See *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 52.

155 See Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1 Legalities 162.

[473] Counsel for MTT are correct in submitting that given the statutory requirements for granting CMT under s 58, evidence of whakapapa connections alone will be unlikely to satisfy the test. However, evidence of whakapapa that gives rise to longstanding whanaungatanga rights and obligations evidenced via continued use and activity, can indicate shared interests over an area within the takutai moana, noting that as discussed above, rights, interests, and obligations under tikanga Māori are collective and relational rather than exclusive or individual, with whakapapa and whanaungatanga being the foundational framework underlying those interests. Consequently, the evidence of a longstanding practice whereby Ngāti Pāhauwera were able to access the application for fishing and gathering of kaimoana, indicates at least some sort of shared interest via whanaungatanga.

[474] Second, as noted by Powell J in *Ngā Pōtiki*, the nature of the takutai moana limits both the type and ambit of activities that can be carried out within it.[156] A significant proportion of the evidence in relation to use and occupation of the takutai moana related to fishing and gathering of kaimoana, and transport. Therefore, evidence of fishing/collecting kaimoana by an applicant group is important to determining the different interests between whānau/hapū/iwi in the application area. Again, it is the presence of this type of evidence here, by Ngāti Pāhauwera accessing and using this part of the MTT area, which indicates a shared interest.

[475] Consequently, I have come to the conclusion that Ngāti Pāhauwera does have a shared interest in the second section of MTT's application area. I would have considered that it would be appropriate for MTT and Ngāti Pāhauwera to hold the area via a joint CMT title in line with the concept of shared exclusivity, however I am unable to do so as a result of MTT's position that they the area on an exclusive basis.

[476] The final section is between Arapaoanui and MTT's southern boundary at Keteketerau. This section encompasses the rest of MTT's claimed exclusive area, as well as its overlapping application with the Mana Ahuriri Trust.

[477] In terms of the area between Arapaoanui and Te Uku (where MTT acknowledge the boundary between their exclusive area and a shared area with

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156 At [37].

Ngāti Matepū of the Mana Ahuriri Trust), MTT have satisfied the requirements of the s 58 test, and should be awarded CMT over this area. It is apparent from the evidence that the hapū of MTT have held this area in accordance with tikanga, and continue to do so. Many of the MTT witnesses discussed their whakapapa connections back to tūpuna who resided within this area, including those who belonged to the hapū of Ngāti Tū, Ngāti Kurumōkihi and Ngāti Whakaari. Those MTT hapū continue to hold and exercise tikanga over the area today, through protecting coastal pā sites at Tangoio and Whakaari, laying down rāhui at Waipātiki and Punakērua beaches, laying whales to rest at Tangoio, and working with third parties such as the Ministry of Fisheries, the Pan Pac Environmental Trust, and the Department of Conservation.

[478] In terms of exclusive use and occupation, the sole marae of the MTT hapū is based at Tangoio, and this area and the coast surrounding it remains an important core area of fishing and gathering kaimoana for the MTT hapū. Other activities around this area included carrying out karakia in and over the area, travelling along the coast on foot or by boat, and gathering rongoā. I therefore grant an award of CMT to MTT between Arapaoanui and Te Uku.

[479] For the reasons I have given above in this decision, I cannot grant an award of joint CMT to MTT and Ngāti Mātepu in the acknowledged shared area between Te Uku and Keteketerau, as Ngāti Matepū were not a party to this proceeding, and the Mana Ahuriri Trust who represent them and did appear as an interested party, have not expressed their consent to this agreement.

[480] In terms of the seaward boundary for this part of the application area where MTT have been successful in gaining CMT, there is a greater amount of evidence relating to activities further out to sea, in deeper waters around this area than there was in relation to the Ngāti Pāhauwera claim. The rohe moana recognised by the Ministry of Primary Industries for Ngāi Te Ruruku o Te Rangi (between the Waikari River and Bluff Hill) extends out to 12-nautical miles, and while there was little evidence specifically pinpointing activity by MTT hapū out that far, there was sufficient evidence of ‘deep sea’ activity to infer that MTT did travel well out to sea.

[481] This evidence included a 1921 map of Ngāi Tatara fishing grounds showing fishing locations around the application area, with a red dotted line referring to deep sea fishing that was confirmed by Ms Diane Lucas, a landscape architect, as being some three to four kilometres offshore. In closing submissions, counsel for MTT referred to Te Omoko, a fishing spot for Hāpuku that was well beyond that re-dotted line. Hāpuku and other fish were also caught offshore on boats including off the coast of Tangoio, off Arapaoanui in the reefs, through longline fishing off Punakērua, and in the early 19th century, through use of whale boats launched at Tangoio.

[482] Overall, I conclude that the was sufficient evidence to justify a conclusion that MTT should be successful in their application for a CMT over an area between Arapaoanui and Te Uku, and out to the 12-nautical mile limit. The precise GPS co-ordinates of the boundaries can be determined at the Stage 2 hearing.

Ngāti Pārau

[483] The Ngāti Pārau application area for CMT spans between the Ahuriri Harbour entrance and estuary, extending out to Pania Reef and the 12-nautical mile limit, and finishing in the south at approximately 11km south of the old harbour entrance at the southern end of the Tutae o Mahu block, before Awatoto.

[484] The pukenga concluded that Ngāti Pārau held the application area in accordance with tikanga, with the qualification that, because of a lack of evidence, he was not able to say how far the area extended out to sea. That conclusion was supported by the evidence tendered at the hearing and I adopt it.

[485] However, there are a number of locations within Ngāti Pārau's application area where CMT has been substantially extinguished or is unavailable for other reasons. These include the areas in and around the immediate vicinity of Napier City, including the Napier Port, Te Whanganui-ā-Ōrotu, and Marine Parade, all discussed at [262]-[279] above.

[486] There are, however, certain locations within Ngāti Pārau's application area where CMT has not been extinguished. This includes the area below Marine Parade,

and the reefs and waters further out from the coast. I will therefore now consider these areas in accordance with the s 58 statutory assessment.

[487] At Appendix 2 below, I set out the evidence of Ngāti Pārau's whakapapa and history in detail. In short, the mana whenua that Ngāti Pārau retain over their application area can be traced back from Tangaroa, to Pania and Moremore (the son of Pania) down to Hinetua and Tunuiarangi, with the latter being a tohunga and rangatira based at Heipipi, north of Napier. From those two tupuna descended Hikawera II, who was described as exercising mana and rangatiratanga over an area from Tangoio to Hastings. Hikawera II's grandsons were Tuku a Te Rangi and Te Kereru, and in turn through the rights provided by Tuku a Te Rangi, his grandson Rangikamangungu continued to maintain his tupuna's interests near the southern end of Te Whanganui-ā-Ōrotu and towards the coast. Rangikamangungu's grandson was Tāreha Te Moananui, who according to William Colenso, was one of the five principal chiefs at Ahuriri in the late 1840s.

[488] Tareha and his people appeared to be residing around the Awatoto area as at 1840, and also carried out fishing and use of the area around Te Whanganui-ā-Ōrotu. Tareha also established a marae at Waiohiki (this is still the principal Ngāti Pārau marae today), with Tareha's descendants continuing to reside in the area up until and including current times.

[489] In a historical report commissioned for the hearing, Mr Martin Fisher detailed Ngāti Pārau's exercise of customary fishing rights in the area from 1840 onwards. Mr Fisher referred to evidence of their dependence on the Ahuriri Estuary as a "principal food source", which continued to occur following the Ahuriri Purchase in 1851.

[490] Despite significant physical changes in the area (particularly reclamation) in the early 20th century, Mr Fisher noted evidence from the 1920 Native Land Claims Commission and a 1932 hearing that Ngāti Pārau continued to use the area for fishing and gathering kaimoana, while also referring to the fact that land in the southern part of the application area was vested in Tareha's two sons in 1918, and referred to as "Tareha's Reserve". There was also evidence that post-earthquake, Ngāti Pārau use

and occupation continued, with witnesses from the Te Whanganui-ā-Ōrotu hearing before the Waitangi Tribunal in 1993 describing collection of kaimoana from areas such as the Ahuriri Estuary and Westshore.

[491] In recent times up until today, Ngāti Pārau has engaged in a number of partnerships with government and private entities (such as the Napier Port and Pan Pac) to protect the physical and cultural health of the takutai moana and exercise its obligations as kaitiaki over the area. For example, the Ahuriri Estuary walking track in the Westshore area was developed with the support of the Department of Conservation to acknowledge Ngāti Pārau interests as mana whenua including the erection of a pouwhenua to mark places of significance to Ngāti Pārau and a tribute to Ngāti Pārau's relationship with the estuary as kaitiaki, while Ngāti Pārau is also represented on the Pan Pac Environment Trust, and partnered with other mana whenua hapū to develop and implement a Marine Cultural Health Programme as part of Napier Port's 6 wharf construction and dredging project. Mr Hadfield, a member of Ngāti Pārau, gave evidence that:

> Ngāti Pārau continues to keep our fires burning and exercise mana whenua of the area by walking the land, fishing and diving in the Ngāti Pārau coastal area and maintaining iwi alliances. While our inter-relationships with other groups are important, Ngāti Pārau whānau still assert mana whenua and mana moana in our rohe. For example if there was a storm and there had been flooding, we would often check our kaimoana beds and diving spots to assess the damage and the behaviour of the fish. We would let our neighbours know if the damage was bad or ok to visit again.

[492] Alongside use via activities such as fishing and gathering kaimoana, it was apparent that Ngāti Pārau exercised different rights and obligations under tikanga within the area. This included the exercise of kaitiakitanga discussed above, but also manaakitanga via the gathering of fish and kaimoana for events and manuhiri, upholding ahi kaa by maintaining their rights over the adjacent land as mana whenua, demonstrating mātauranga through knowledge of the maramataka, tides, fishing areas and relevant karakia to be performed and perhaps most importantly, through whakapapa connections to the kaitiaki of the area, Pania and Moremore. As Mr Tamaiti Cairns stated:

> All of the korero in Waiohiki can be linked back to our relationship with Pania and when you include Pania then people understand that our relationship with

> the sea is strong. Pania is often in our karakia and is part of the landscape that supports the mana moana of Ngati Parau.
>
> The legend of Pania is well known, she is the kaitiaki of the reef and coastal area of Ahuriri. There have been sightings of her, but it is more common to see her son, Moremore.
>
> Moremore is a taniwha who often disguises himself as a white shark or white whale. It might be because a white whale is rare, or that the presence of a white shark that never approaches or attacks the people is rare.
>
> When I was young, my kuia always told me of Moremore, and how he maintained the relationship between the living people of the coast and Pania. It is widely known that this kaitiaki belongs to the Tareha whanau because of their direct whakapapa to Pania.

[493] There is also a range of evidence adduced by Ngāti Pārau indicating exclusive use and occupation over parts of the application area. While exclusive use and occupation has been substantially interrupted in a number of areas, the evidence indicates that there are five discrete areas where CMT could be said to still exist:

(a) Pania Reef;

(b) Hardinge Reef;

(c) the Marine Parade coastal area around the southern boundary;

(d) areas of deeper water away from the coast outside of the Napier Port shipping lanes; and

(e) parts of the Ahuriri Estuary.

[494] The critical question therefore is whether Ngāti Pārau has exclusively used and occupied these five areas from 1840 to the present day without substantial interruption.

[495] First, Pania Reef. On the evidence, this was in fact the area where it was most clear that there was exclusive use and occupation, albeit with shared interests from other mana whenua groups. Many Ngāti Pārau witnesses discussed a deep and enduring connection with Pania Reef, particularly in relation to the connection between Tania and Moremore, and the Tareha Family. They described Pania and Moremore (two tūpuna from which they descended) as being kaitiaki of the reef who

were often sighted around the area, and that there was particular tikanga and kawa to be followed when going to the reef, especially for fishing or gathering kaimoana.

[496] Kay Taape Tareha O'Reilly and Hera Taukamo stated that the Tareha whānau of Ngāti Pārau (who directly descended from Tareha Te Moananui) had special rights and privileges to go and fish in the area, with Kay Taape Tareha O'Reilly describing a particular rock at the reef where only the Tareha whānau had rights to go and fish – a kawa that was also acknowledged by the Waitangi Tribunal in its *Te Whanganui-a-Orotu Report*.[157] This tradition appeared to stretch back a number of generations, back to Tareha Te Moananui.

[497] Witnesses also discussed fishing and gathering kaimoana in the area. For example, Tamati Cairns recalled diving for kaimoana at the reef, while Hera Taukamo recalled her brother swimming to Pania Reef from an anchored boat for kaimoana, and also that Ngāti Pārau members would visit the reef on special occasions, such as for tangi or hui. Mr Laurence O'Reilly, who prepared a cultural impact assessment report for a new development for the Napier Port in 2017, noted that for Ngāti Pārau and other mana whenua, Pania Reef remained a key area for the gathering of kaimoana under customary permits issued under the Kaimoana Customary Fishing Regulations. As noted by the witnesses, alongside other mana whenua groups including Ngāi Te Ruruku, Ngāti Pārau were instrumental in Pania Reef being included as part of the Moremore Mātaitai Fishing Reserve.

[498] The evidence also indicated that Ngāti Pārau's use and occupation had not been substantially interrupted. A map detailing the various shipping routes and activity in the application area adduced by Mr Phillip Cleaver (an expert witness called by the Attorney-General) showed that, unsurprisingly, ships avoided the reef and did not cross over it. While issues with sediment and pollution had impacted the fish and shellfish population in the reef, dive surveys of the area carried out for the cultural impact assessment indicated that that were still a number of different fish and shellfish populations present.

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[157] See Waitangi Tribunal *Te Whanganui-a-Orotu* Report above n 4, at 14-15.

[499] Certain hapū of MTT (as well as certain hapū of the Mana Ahuriri Trust) were also acknowledged as having shared interests in the Pania Reef area. However, both MTT and Ngāti Pārau acknowledged that it was the latter who had the primary and most important interest in that area. Prior to the conclusion of the hearing, MTT and Ngāti Pārau filed a joint affidavit between Ms Tania Hopmans and Mr Rapihana Te Kaha Hawaikirangi representing each party respectively, which included an agreement between MTT and Ngāti Pārau in relation to the overlapping areas within their respective applications. The parties agreed and mutually recognised that each other had shared interests in the overlap area, and MTT expressly acknowledged the primacy of Ngāti Pārau's interest in the area containing Pania Reef. Both parties also acknowledged the interests of Ahuriri Hapū in the overlap area.

[500] I have concluded that because of the mutual recognition between these two applicant groups in relation to the overlap area, and particularly Pania Reef, that an award of CMT can be granted over the reef to both Ngāti Pārau and MTT, consistent with the principle of shared exclusivity, and on the grounds set out in the agreement between the two. I also consider that, unlike other parts of the application area, it is appropriate that CMT be awarded in this area despite the Mana Ahuriri Trust hapū choosing to enter into direct engagement with the Crown over an area which overlaps this one. This is because the evidence before me, which includes evidence from Waitangi Tribunal hearings, as well as other third parties reports, indicates that Ngāti Pārau have primacy of interests over the reef, and also that in the agreement, both MTT and Ngāti Pārau have explicitly made provision for Ahuriri Hapū interests to be recognised, by including a representative in the trust designed to hold CMT between the parties.

[501] Mana Ahuriri Trust hapū were not an applicant group in this proceeding. They have elected to pursue their claim by direct negotiation. However, given the express acknowledgement by Ngāti Pārau and MTT that they jointly held the area around Pania Reef with the Mana Ahuriri hapū it seems unjust that the option of choosing direct engagement over litigation could potentially result in the Mana Ahuriri hapū losing the opportunity to obtain a shared CMT order in respect of the area around Pania Reef. The answer to this dilemma may be found in s 111 of the Act. This section authorises the Court to vary a recognition order. Subsection (4) provides that a

variation application can only be made by or on behalf of the holder of the order. If, in direct engagement, the Mana Ahuriri Trust hapū are able to satisfy the Crown that they are entitled to an order for CMT in respect of the area around Pania Reef on the basis of shared exclusivity with Ngāti Pārau and MTT, those two applicant groups could formally apply to the Court for a variation of the recognition order to refer to the interests of the Mana Ahuriri Trust applicant group.

[502] I am unaware of the state of the direct engagement negotiations but, in light of this decision, it may be possible that the Crown would be willing to promptly address that part of the application which related to the application for CMT around Pania Reef. If they found the case made out, and the Court was notified prior to Stage 2 of this hearing, the need for a variation of the CMT order at some stage in the future would be avoided.

[503] Second, Hardinge Road Reef. Unlike Pania Reef, which is located further out from the coast and is protected under customary fishing regulations, Hardinge Road Reef is located closer to the shore in Napier, between the Port and the Ahuriri Harbour entrance. There was greater evidence of third-party use in the area, including surfing and swimming, although Mr Cleaver during cross-examination suggested that this was not necessarily on the reef itself.

[504] Mr Cleaver also stated that between 1910 and 1974, Napier's sewerage was discharged from a pipe 50 feet off the eastern end of the entrance channel, at Perfume Point, close to Hardinge Road Reef. The pollution from this outfall appeared to affect the fish and kaimoana population. However, a number of witnesses recalled fishing and collecting kaimoana from the reef, as well as several deposing that they continued to do so. Mr Rapihana Hawaikirangi described the area as a place where kuku, kina and pāua could be harvested close to the beach, and that Tareha and his whānau had rights of refusal over harvesting kai from this section of the beach. Hera Taukaumo stated that Ngāti Pārau collected "kina, mussels, bubu, kahawai and mullet" from the area, while Kay O'Reilly also stated that during her upbringing, her whānau often gathered kaimoana from Hardinge Road.

[505] I have come to the conclusion that despite the pollution and third-party activity, there still appears to be sufficiently exclusive use and occupation of the reef area for CMT to be granted.

[506] Third, the Marine Parade coastal area between the end of parcel 22, and the southern boundary of Ngāti Pārau's application area. While there are still third-party activities in this area, and I have concluded that exclusive use and occupation of parcel 22 to the north was not substantially interrupted due to any rigorous and consistent third-party use. There was still evidence of Ngāti Pārau using this area for fishing. Mr Rapihana Hawaikirangi referred to the part of this area as Te Upokopoito, stating that was the traditional name for the spit which ran from Mataruahau south to Awatoto, and today consisted of Marine Parade and the start of Highway 51, and that snapper and kahawai are caught along this spit, with tuatua also being present. Hera Taukamo stated that it was "common" to see Ngāti Pārau whānau fishing, diving, or collecting kaimoana at Marine Parade, catching trevally, snapper, kahawai, and mullet.

[507] On this evidence, I consider that in the takutai moana off this particular part of Marine Parade, there is still exclusive use and occupation by Ngāti Pārau, and CMT can be granted over this area.

[508] Fourth, in the areas of deeper water away from the coast (and excluding the shipping lanes leading to Napier Port) out to the 12-nautical mile limit. There was limited evidence of Ngāti Pārau activity out to the 12-nautical mile limit, and in fact in closing submissions, counsel for Ngāti Pārau conceded that in comparison to the situation in *Re Edwards*, there was less evidence of activity extending out to the 12-nautical mile limit. In that case, the Court noted that it was unsurprising that the bulk of evidence in relation to exercising tikanga over an area would relate more to the most intensively used parts of the takutai moana, including the intertidal, estuary and immediate coastal areas.[158]

[509] It was also stated that useful evidence of use and occupation further out from the coast included descriptions as to fishing grounds, underwater features such as

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158 At [328].

rocks or the nature of the seabed, as well as details of the particular types of fish to be caught in these locations.[159]

[510] Clearly the evidence of the detailed knowledge of Ngāti Pārau in relation to reefs in the area, particularly Pania Reef, is evidence of activity in deeper waters. Mr Hawaikirangi also referred to sailing on waka hourua to fish, with counsel for Ngāti Pārau in closing stating that this occurred in deeper waters off Marine Parade, while Nigel Hadfield referred to fishing for hapuka and other deepwater fish found in and around Pania Reef.

[511] However, there did not appear to be any evidence of activity further out from Pania Reef. I therefore conclude that I cannot award CMT out past that area to the 12-nautical mile limit. Noting the evidence above that there did appear to be some fishing around, and potentially just past Pania Reef, it would be appropriate to extend the seaward limit to 1.5km off the shore in all areas where Ngāti Pārau has been granted CMT. The precise boundaries around Pania reef can be determined at Stage 2. They obviously will not extend into the shipping lanes.

[512] Finally, the Ahuriri Estuary. While many of the parcels in and around this area have had their customary interests substantially interrupted, I consider there is still a possibility that CMT is available for parcel 9. There are third-party structures in this area, including two bridges, and walking tracks, as well as there being significant pollution. However, there was also evidence from the Ngāti Pārau witnesses that despite the shellfish being polluted, members of the applicant group still continued to fish in the area. Kay Taape Tareha O'Reilly stated that the poor water quality in the Ahuriri Estuary rendered it unsuitable for collecting shellfish, but that the hapū would still regularly gather other kaimoana from the area. Rapihana Hawaikirangi similarly stated:

> Ngati Parau do not fish as extensively in areas traditionally frequented by Ngati Parau hapū because of the changes that have occurred to Te Whanga and the area around the harbour. However, we do continue to fish and to exercise our role as kaitiaki over these areas.

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159 At [329].

[513] Laurence O'Reilly also recalled fishing in the Ahuriri Estuary, including off the Pandora Bridge. In his cultural impact assessment report, Mr O'Reilly also stated that despite the pollution and health risks, some Ngāti Pārau whānau continued to exercise their customary fishing rights in the area, even potentially to the detriment of their health.

[514] This continued activity, combined with the fact that Ngāti Pārau continuously and vigorously exercise their role as kaitiaki of the area have led me to the conclusion that their customary rights over parcel 9 have not been substantially interrupted. I therefore award CMT over this area.

PART VI

Analysis of the applications – PCR

[515] In this part of the judgment, I detail the activities which each applicant sought to be protected by a PCR order under the Act. I then set out my reasons for why certain activities are precluded from being protected through a PCR order, and which activities do in fact come within the ambit of PCRs, and of those activities, which have passed the relevant statutory threshold.

Ngāti Pāhauwera Development Trust (CIV-2017-485-821)

[516] The Ngāti Pāhauwera Development Trust sought orders granting PCRs over the following activities:

(a) to take, utilise, gather, manage and/or preserve all natural and physical resources including sand, stones, gravel, pumice, driftwood, kokowai, wai tapu, inanga and kokopu;

(b) to utilise, manage and/or preserve tauranga waka;

(c) to utilise, manage and/or preserve traditional routes of travel; and

(d) to utilise, manage and/or preserve the application area as a place to demonstrate manaakitanga to visitors including tourists.

[517] As already dealt with above, Ngāti Pāhauwera also sought ‘wāhi tapu’ orders, whereby, across the whole application area, they could place a restriction on access after a drowning, death, or a body/kōiwi found, until they had taken the necessary steps to deal with the drowning or death in the area in accordance with tikanga, for example by performing a karakia or completing a period of rāhui, and impose prohibitions on polluting, littering, gutting fish onto the beach or into the water, over-exploitation or wasting of resources. For the reasons set out above, applications for wahi tapu recognition are dealt with in relation to CMT nor PCR orders.

[518] Turning first then, to the taking/utilising/gathering/managing/ preserving of "all natural and physical resources", including sand, stones, gravel, pumice, driftwood, kokowai, wai tapu, inanga and kokupu.

[519] Clearly the phrase "all natural and physical resources" has an extremely broad scope. As was set out in *Re Edwards*, there are a number of resources in the takutai moana that cannot be subject to a PCR order, mainly set out at s 51(2) of the Act. These include:

(a) kaimoana and/or aquatic life, subject to limited exceptions;[160]

(b) marine mammals within the meaning of the Marine Mammals Protection Act 1978;[161]

(c) wildlife within the meaning of the Wildlife Act 1953;[162]

(d) fossils, rock, sand, or minerals removed for commercial aquaculture;[163]

(e) all petroleum, gold, silver, and uranium existing in its natural condition in land;[164] and

(f) taonga tūturu (as rights in respect of taonga tūturu are conferred on holders of CMT rather than PCR).[165]

[520] In closing submissions, counsel for Ngāti Pāhauwera conceded that s 51(2) imposed a significant limitation upon the application for PCRs over "all natural and physical resources", and acknowledged that the application would need to be limited to natural and physical resources other than those resources listed in s 51(2). This effectively reduced the list to the nine natural resources set out at [516] above.

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160 Section 51(2)(a). See paras [366]-[371] of *Re Edwards*.
161 Section 51(2)(d)(ii). See paras [376]-[377] of *Re Edwards*.
162 Section 51(2)(d). See paras [372]-[374] of *Re Edwards*.
163 Section 51(2)(b). See para [385] and fn 201 of *Re Edwards*.
164 Section 16(1). See para [385] of *Re Edwards*.
165 Sections 62 and 82. See paras [382]-[383] of *Re Edwards*.

[521] When Ngāti Pāhauwera's application under the Act was considered by an independent assessor, he similarly sought clarification from Ngāti Pāhauwera as to what the words "all natural and physical resources" did and did not include. While the Hon John Priestly QC rejected Ngāti Pāhauwera's catch-all claim to *all* natural and physical resources, he did find that the *specified* items in the claim (which appears to be the same list as set out at [516] above) had been taken, utilised, gathered, managed, and preserved by Ngāti Pāhauwera in the claimed area since 1840 and that the exercise of those rights is in accordance with the iwi's tikanga.[166]

[522] In relation to sand, stones (excluding hāngi stones, which I discuss in more detail from [527] below), and gravel the only restriction on this resource under the Act is the removal of it for commercial aquaculture.[167] The majority of the evidence provided by witnesses on behalf of Ngāti Pāhauwera in relation to sand came from briefs of evidence filed as part of the 2007 Māori Land Court hearing for Customary Rights Orders under the Foreshore and Seabed Act 2004. However, the majority of witnesses who gave evidence at that hearing also read out their briefs of evidence in this proceeding.[168] None of them resiled from or altered their position as to the use of sand, stones, and gravel by Ngāti Pāhauwera, and therefore I consider it safe to conclude that the practices and beliefs discussed in their briefs of evidence are still extant.

[523] In terms of what those witnesses actually stated, Gaye Hawkins discussed the use of sand in the traditional planting process to assist with the germination of seeds

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166 *Report of Independent Assessor on evidence supporting claims by Ngāti Pāhauwera under Marine and Coastal Area (Takutai Moana) Act 2011*, above n 66, at 25.

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

168 Gaye Hawkins, Charles Lambert, and Colin Culshaw all gave evidence in relation to sand, stones and gravel in the current proceeding, and had also given evidence in the 2007 Māori Land Court hearing. Ani Keefe's 2007 brief of evidence was also read out by her son, as she was too ill to attend the current proceeding.

(of kumara, hue and kamokamo plants), and that sand, stones, and gravel were used in urupā for grave stones, and also for building materials, metalling driveways and gathering grit for hen houses. Ms Hawkins also discussed the use of sand and shingle by Ngāti Pāhauwera to block and drain the mouth of the Waihua River in order to catch herring, pātiki (flounder) and mullet.

[524] Charles Lambert stated that stones from the foreshore and seabed were used "in the old days" for making adzes, sinkers, and weapons, while gravel found in and around the mouth of the Mōhaka River was an important taonga that was kept in place by Ngāti Pāhauwera in order to sustain the quality of the water. Sand from the foreshore and seabed was used for gardening (kumara seedlings were also mentioned) and Mr Lambert noted that he probably used "one or two trailer loads of sand each year just for our whanau".

[525] Colin Culshaw deposed that Ngāti Pāhauwera had always used sand from the foreshore and seabed for a variety of infrastructural items, including making fire places, roads, and in more modern times, concrete blocks. He described the coloured stones in the Ngāti Pāhauwera foreshore and seabed as being "the most beautiful in New Zealand", being used to make jewellery, and that while this practice began to die out, it was being revived in kura and kohanga reo. According to Mr Culshaw, the stones and gravel were also important to Ngāti Pāhauwera because they improved the quality of water where the Ngāti Pāhauwera people fished, enhancing the taste of the fish.

[526] Ani Keefe also discussed the importance of gravel at the Mōhaka River as being of importance to Ngāti Pāhauwera due to its role in making the water clean and improving the taste of kahawai caught in the area. She also stated that Ngāti Pāhauwera had always used sand from the foreshore and seabed in gardens and for growing kumara seedlings, as well as for use in building "in the old days". Ms Keefe deposed that "these days each family probably uses a couple of trailer loads of sand per year for their gardens and for filling in their potholes".

[527] In relation to hāngi stones, I note that in 2016, the Attorney-General on behalf of the Crown offered Ngāti Pāhauwera statutory control of all hāngi stones in the

application area between Poututu Stream and Pōnui Stream, but this agreement was never finalised. As with the other natural materials and resources, a number of witnesses gave evidence in relation to hāngi stones.

[528] Pursuant to ss 57 and 58 of the Ngāti Pāhauwera Treaty Claims Settlement Act 2012, hāngi stones situated in the bed of the Mōhaka or Te Hoe Rivers (to the extent that the bed of those rivers is situated in the core area of interest but not in the coastal marine area) may only be extracted if the relevant hāngi stones are loose, the person extracting them has obtained the written consent of the trustees of the Ngāti Pāhauwera Development Trust to extract the relevant hāngi stones, and that person extracts the relevant hāngi stones in accordance with any terms or conditions set out in the written consent.

[529] Charles Lambert deposed that his whānau had always collected hāngi stones. For example, if they went fishing, they would bring hāngi stones back, and would go "quite a long way along the beach" hunting for hāngi stones. Mr Lambert considered the hāngi stones in the Ngāti Pāhauwera rohe to be unique and renowned all over the country, and also noted that the hāngi stones from the river differed from those collected at the beach because they were angled, whereas the stones from the beach were smoother and rounder.

[530] Mr Lambert also noted that before hāngi stones were used, they had to be cured, otherwise they would explode because of the salt water. According to Mr Lambert, hāngi stones were often given to those not living by the beach, or swapped for kaimoana.

[531] Wiremu Hodges noted that if manaakitanga was central to the cultural values of Ngāti Pāhauwera, then hāngi stones were vital to the scale of providing it. Mr Hodges compared the importance of hāngi stones to Ngāti Pāhauwera as being similar to the importance of pounamu to Ngāi Tahu as a taonga. The stones were not only important for large, practical catering purposes (being used for cooking for hui, tangihanga, birthdays, weddings and other celebrations), but also at a domestic level, where individual households used the hāngi whenever family occasions meant having to provide larger than usual meals. According to Mr Hodges, most Pāhauwera

households had their own supply of hāngi stones that averaged between 10 and 30, depending on the size, intended use, and number to be fed.

[532] Mr Hodges deposed that the stones could be used "year after year" when handled with "loving care", and that they were highly prized taonga. Mr Hodges noted that his own family source was from the river at Hororoa, but that they also gathered the stones from the coast when fishing. Mr Harry Tuapawa[169] described hāngi stones as having their own mana, and that they were of great importance to Ngāti Pāhauwera.

[533] Before setting out my conclusion on the availability of PCRs for the collection and use of hāngi stones, other stones, sand, and gravel, I make two observations.

[534] Firstly, as discussed above, the Coal Mines Act has extinguished the interests of Ngāti Pāhauwera in the bed of the Mōhaka River. While PCRs are not automatically legally inconsistent with the Crown's title to the bed of the Mōhaka River, PCRs that are inconsistent with the Coal Mines Act are likely to be unavailable. Because s 14(1) of the Coal Mines Act deems that all minerals within the bed of a navigable river to be the "absolute property" of the Crown, this means that the collection of hāngi stones, other stones, sand, gravel, and other minerals from the bed of Mōhaka River (at its mouth) is not available as a PCR.

[535] Secondly, s 14(1) only refers to the minerals "within" the riverbed as being the absolutely property of the Crown. Consequently, the collection and use of hāngi stones, other stones, sand, and gravel is not legally precluded in the area away from the Mōhaka River mouth. This point was made by both counsel for Ngāti Pāhauwera and the Crown.

[536] I therefore find that there is sufficient evidence that between the Waihua River and Waikari River, Ngāti Pāhauwera since 1840 have continuously exercised their right to use and collect these resources in accordance with tikanga, and that this right has not been extinguished by law, and conclude that Ngāti Pāhauwera are entitled to a PCR within their application (excluding the mouth of the Mōhaka River) to the collection and use of sand, stones, hāngi stones and gravel. If I were not precluded by

[169] Mr Tuapawa is deceased. His evidence was read out at the hearing by Ms Bonnie Hatami.

the Supreme Court decision in *Paki* discussed above, I would have extended the PCR to include the month of the Mōhaka River.

[537] Turning next to pumice, driftwood, and kokowai. First, and as acknowledged by counsel for Ngāti Pāhauwera, the Coal Mines Act limitation that applied to sand, stones, hāngi stones, and gravel in relation to the Mōhaka River will also apply to pumice and kokowai.

[538] In relation to driftwood, Mr Wayne Taylor noted in oral evidence that driftwood was the main source of wood and heating for the various Ngāti Pāhauwera marae, including Mōhaka Marae, and Waihua Marae, and was often collected from the beach for firewood.[170]

[539] Gaye Hawkins described the people of Ngāti Kura (a hapū of Ngāti Pāhauwera) as utilising driftwood to build whare and fences around gardens, for tokotoko, raparapa, carving walking sticks, and for firewood. She deposed that Ngāti Kura had been gathering driftwood for firewood from pre-1840 for their cooking and heating needs, and recalled that as a child she would be sent down to the beach to collect driftwood in order to supply a number of houses for the next month. Large pieces of driftwood suitable for carving were set aside for this purpose, especially as large native trees became more and more difficult to obtain.

[540] Similarly, Awhina Waaka deposed that the local people within the application area took "lots of firewood from the beach" as it was the only fuel for cooking and heating the homes in winter. Appended to Ms Waaka's 2013 affidavit was a Ngāti Pāhauwera waiata and hīmene songbook containing a waiata titled "Waiata Mo Te Reti", which described a fisherman filling their bag with firewood after using a reti board.

[541] According to Charles Lambert, Ngāti Pāhauwera used driftwood from the foreshore and seabed to make reti boards for fishing on the river and in the ocean. The boards themselves were made out of driftwood, and due to its strength, it was also used to make fish hooks and walking sticks, as well as polished bowls. Mr Lambert

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[170] Mr Wane Taylor's evidence was given by his younger brother, Mr Guy Taylor.

noted that the use of driftwood meant that for most purposes, it was not necessary to cut down native trees so as to not waste resources, and that this reflected Ngāti Pāhauwera's approach to utilising the resources available to them on the foreshore and seabed.

[542] Hazel Kinita also described driftwood as an important resource for the Ngāti Pāhauwera marae at Mōhaka and Raupunga, and also used domestically by members of Ngāti Pāhauwera for heating and cooking.

[543] Harry Tuapawa described the importance of driftwood to Ngāti Pāhauwera as follows:

> Ngāti Pahauwera do not see the driftwood from the beach as being kua mate, dead, we ask the Gods for it and recognise that it has its own mana and that it is special because it has been through the ocean's treatment process. Some driftwood gets buried in the sand and pops out of the sand when it is ready for us to use.

[544] In relation to pumice, Olga Rameka described a multitude of uses of the resource by the people of Ngāti Pāhauwera. This included sandpaper, for decoration, and for gardening.

[545] Colin Culshaw deposed that pumice was used for washing when he was a child, as well as carving, cleaning, hunting (as decoys for ducks), fishing, and building (for packing concrete walls). Mr Culshaw described also discussed pumice as being used for rongoā, and for decorative purposes.

[546] Charles Lambert said pumice was continuously collected and used by Ngāti Pāhauwera, but he did not specify what that use was for.

[547] In relation to kokowai, there was little evidence as to the modern use and collection of the resource by Ngāti Pāhauwera witnesses. Kokowai was described by Wayne Taylor as:

> …an iron oxide or red ochre. It is ground into a powder and is used for carvings and tattooing. In tattooing, kokowai was used only very rarely because it showed that a person was very tapu and was usually the sign of an Ariki. Kokowai was also mixed with whale oil and used as body paint or by the cooks in food because it was believed that it would ward off evil spirits.

[548] Mr Taylor went on to explain that Kokowai was used on Hineringa, Kurahikakawa and Mōhaka Marae, but that the place that Ngāti Pāhauwera gathered the kokowai from had disappeared because of an earthquake in 1931 causing erosion and slips in the area (although it was discovered from time to time along the beach).

[549] Similarly, Harry Tuapawa stated:

> When the land used to extend out a bit further than it does now there was kokowai in it. But when the ocean swallowed the land, the sea took this kokowai, and now sometimes it pops up out of the water. We pick up kokowai to decorate our gardens, but in the old days it would have been used as a red dye.

[550] In conclusion, I am satisfied that there is sufficient evidence of Ngāti Pāhauwera's use and collection of driftwood and pumice to grant PCRs in respect of those two resources. However, there is insufficient evidence before me to indicate that kokowai is still continuously used and available. I therefore cannot grant a PCR in respect of that resource.

[551] Next, wai tapu. Charles Lambert deposed that wai tapu was and is drunk for medicinal purposes such as chest complaints and coughs, noting that it was common amongst Ngāti Pāhauwera to "keep a bottle in the fridge", and was also used to dry fish.

[552] According to Gaye Hawkins, wai tapu was used in traditional healing practices by healers, and was an ancient tradition that related to pre-European religious beliefs. The practice was still applied by whānau in the Waihua area, particularly by those raised in a traditional manner or who were associated with the Ringatu or Tu te Kohe religion, as well as being associated with mate hinengaro (mental illness).

[553] Colin Culshaw also stated that Ngāti Pāhauwera continued to use wai tapu as a traditional rongoā, particularly for skin ailments. The water was also used for preserving fish or seafood. Similarly, Wiremu Winiana stated that wai tapu was a rongoā or medicine used to cure and clean sores, and recalled as a child that if he had cuts on his skin, he would be told by his parents to go and bathe in the sea by sitting in the waves.

[554] There is sufficient evidence given from Ngāti Pāhauwera witnesses to prove that the collection and use of wai tapu for rongoā and other purposes is a right that has been continuously exercised in accordance with tikanga in the application area since before 1840, and that this right has not been extinguished. I therefore grant a PCR in respect of this right. As almost all of the evidence referred to the area from the Mōhaka River to the Waihua River, the PCR extends to an area 200 metres south of the mouth of the Mōhaka River and north to the Waihua River and out to 50 metres beyond mean low-water springs.

[555] Finally under this activity, īnanga and kokopu. As noted in *Re Edwards*, non-commercial whitebait fishing may be included within the grant of a PCR. This is because s 52(2)(a) dictates that a PCR does not include an activity that is regulated under the Fisheries Act 1996, and that while the vast majority of fishing practices are regulated under that Act, one limited exception under s 89(1) of that Act is whitebait.[171]

[556] A number of witnesses recalled fishing for whitebait at the mouth of the Mōhaka, Waihua or Waikari Rivers. For example, Marama Taylor referred to fishing for whitebait on both the Mōhaka and Waikari Rivers, while Anne Motutere deposed that the mouth of the Mōhaka River was the best part for fishing kahawai, shark, and mullet, as well as whitebait. Karen Te Aho also recalled using buckets and nets to catch whitebait at Mōhaka as a children, while Beverly Rameka also recalled using nets or channels as a child to catch whitebait in the same area. I note that in the independent assessor's report, the Hon John Priestly observed:

> Locals interviewed by DOC officials in the late 1980s described the Mohaka River as a prolific fishing ground, particularly for kahawai, flounder, and herring. Whitebait fishing occurs in the river mouth and angling occurs along the beach at Mohaka. Ngāti Pāhauwera report reduced number of whitebait in recent years due to environmental damage and water quality issues.

[557] In relation to the Waihua River, Mr William Culshaw opined:

> There are other ways to use driftwood for fishing too. For example, the Waihua River mouth is usually blocked and during the whitebait season and

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171 See *Re Edwards*, above n 15 at [366]-[375]. Commercial whitebait fishing is regulated under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and therefore is precluded from being recognised in a PCR order under s 51(2)(c)(ii).

> the whitebait are always trying to get back up the river. If we are hungry for whitebait, we can catch them by just using driftwood.

[558] However, Wi Derek Huata-King observed that:

> The Waihua mouth is blocked with logs and silt and the reef no longer provides the abundance of sea life: snapper, kahawai, gurnard, mussels, pipi's, crayfish, whitebait, that was once abundant in my grandparent's day. Nowadays people go to Waihua to fish mainly for snapper – they say the reef is there covered in silt.

[559] Toro Waaka also noted that environmental degradation was affecting and lessening the whitebait population, stating that while whitebait fishing still occurred, gravel extraction had compromised whitebait breeding areas in the river.

[560] Overall, I am of the view that despite the apparent reduction in whitebait population, non-commercial whitebait fishing at the Mōhaka and Waikari River mouths appears to be a continuously exercised right/activity by Ngāti Pāhauwera, in accordance with their tikanga. I also do not consider that Ngāti Pāhauwera exercising their right to carry out non-commercial whitebait fishing to be inconsistent with the vesting of the Mōhaka riverbed under the Coal Mines legislation. Consequently, I grant a PCR over non-commercial whitebait fishing at the Mōhaka and Waikari River mouths, but find that there is insufficient evidence to do so at the Waihua River mouth.

[561] The next relevant activity is the utilisation, management and/or preservation of tauranga waka. The independent assessor, in his report, found that this activity should be protected under a PCR order. Several witnesses described the use of tauranga waka by Ngāti Pāhauwera. Gaye Hawkins deposed that the foreshore had always been important for the launching and returning of waka and other boats in order to again access to the sea. Traditionally, tauranga waka were stored above the highwater when they were not being used, but were launched on the foreshore She stated that Ngāti Pāhauwera continued to use the foreshore for the launching of waka, and now launch boats straight off the public roadway over the foreshore. Ms Hawkins identified two particular locations of tauranga waka:

> Two Tauranga waka were spoken of by my tipuna in the Waihua area that I can recall. The first was the A36 Maori Reservation, more commonly known as the Island at the mouth of the Waihua River, part of which was designated as a landing place for Manuhiri passing through the area. This tauranga waka

> is no longer in place, the land having been exchanged for a property further up the river.
>
> The other Tauranga waka was at a place called Takapau between Waihua and Mohaka where an old pa site was established by Mamangu the younger brother of Kurahikakawa. In earlier times this was used as a resting place for travellers. This tauranga waka is still there, however as very few people have waka, the use has changed so that manuhiri now can camp at this place.

[562] However, Colin Culshaw's position was that there was no specific site within the application area for tauranga waka, and that instead the area from Poututu to Waikare all amounted to tauranga waka for Ngāti Pāhauwera. Mr Culshaw deposed:

> We know where to launch our boats and where to land them because the waka that goes out must come back otherwise there will be no kai for the family. Our knowledge of the tauranga waka comes from our exercise of mana whenua, mana moana and mana tipuna over the foreshore and seabed and the fact that we have been here for so long. This is the way it always is and has always been.

[563] Similarly, William Culshaw stated that tauranga waka sites changed, and were all across the application area:

> The mouth of the Mōhaka river changes frequently. Sometimes it is half way to Waihua. Our waka are dictated by the river for where we can launch and land. The whole area is tauranga waka because our people change as the course of our river changes. Nobody can say where it is going to be next, but because the foreshore and seabed is Ngāti Pāhauwera, we know where to launch and land. For example, we know that the only time you can come in up the mouth of the Mōhaka on a waka is within two hours either side of high tide.
>
> For as long as the wind and sea and Mōhaka has been here, we have always been here and so we use tauranga waka. We have always done this like the sun rises in the dawn, goes across the sky during the day and sets at night.

[564] The preservation and use of tauranga waka is a PCR available under the Act. There is sufficient evidence provided by Ngāti Pāhauwera witnesses for me to conclude that the use of tauranga waka has been exercised since 1840, and continues to be exercised within the common marine and coastal area in accordance with tikanga today. There is no evidence that this activity has been extinguished, outside of the site referred to by Ms Hawkins. I therefore consider that a PCR order allowing Ngāti Pāhauwera to manage, use, and protect their tauranga waka should be granted between Waikare and Poututu. The precise location of the tauranga waka is a matter to be resolved at the Stage 2 hearing.

[565] The next relevant activity is the utilisation, management and/or preservation of traditional routes of travel. In *Re Edwards*, the Court held that making passage to fishing grounds and/or islands within the application area could provide a basis for a PCR for Ngāti Ira o Waiōweka, a particular applicant group in that case.[172] However, in this case, there was little specific evidence relating to traditional routes of travel within the CMCA. While a number of Ngāti Pāhauwera witnesses referred to accessing parts of the CMCA more broadly, and going down to the beach for a number of activities, and even discussed their knowledge of tides and dangers of walking along certain parts of the coast, there is insufficient evidence here for me to draw a firm conclusion on the location and historical and current use of traditional routes of travel, either in the sea or on the coast.

[566] Even if this were not the case, there would be some difficulty with the concept of "preservation". There was evidence of extensive change to the coastline as a result of erosion and earthquake activity. Those processes have affected the ability to travel along the coast. They are not processes that can be controlled. Neither the Court nor the applicants have any ability to "preserve" travel routes along the coast in the face of the forces of nature.

[567] The final relevant activity is the utilisation, management and/or preservation of the application area as a place to demonstrate manaakitanga to visitors including tourists. I note that while a general and intangible exercise of an activity related to tikanga principles such as expressing manaakitanga, maintaining rangatiratanga, or acting as kaitiaki, without manifestation of any physical activity or relation to any natural or physical resource, is precluded from being recognised as a PCR under s 51(2)(e).[173] However, an exercise of these practices relating to manaakitanga, kaitiakitanga, rangatiratanga and mana motuhake that can be connected to a natural or physical resource and manifested by the relevant group in a physical activity is able to be recognised by a grant of PCR, provided they meet the statutory test.[174]

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172 See [542]-[545].
173 *Re Edwards*, above n 15, at [379].
174 At [380].

[568] There is little evidence of Ngāti Pāhauwera specifically utilising/managing/preserving the application area to demonstrate manaakitanga to visitors, including tourists. One way in which this was manifested by way of a physical activity, however, was the collection of hāngi stones for hākari, or for manuhiri. Wiremu Hodges' discussion of this at [531]above provides an example of this. Because I have already awarded, to the extent that I can under the Act, a PCR for the collection of hāngi stones under the Act, I will not make an additional order, but note that this exercise would otherwise satisfy the requirements under s 51.

Maungaharuru-Tangitū Trust (CIV-2017-485-241)

[569] MTT seek a PCR order over the following activities:

(a) using the takutai moana for the implementation of spiritual practices and ceremonies associated with burial, blessings and rongoā;

(b) preservation and use of traditional routes of travel;

(c) use of tauranga waka (specific areas for the landing and launching, vessels);

(d) gathering and use of natural resources from the takutai moana (including blue clay, sand, shingle, rock, stone, driftwood, shells and pumice); and

(e) fishing for whitebait and collecting karengo.

[570] It is important to firstly note that both MTT and Ngāti Pārau filed amended originating applications at the end of the hearing in this case. Through their submissions of counsel, they sought orders for PCRs over activities that were not included in their first originating applications, filed in April 2017 before the statutory cut-off date.[175]

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[175] See s 100(2) of the Act.

[571] I have previously been required to strike out part of an application in these proceedings.[176] However, I consider that the circumstances in this case are distinguishable from that successful application. In that case, Ngāti Pāhauwera sought to substantially enlarge their application area several years after their original application was filed. It was not clear from that original application that Ngāti Pāhauwera intended on amending their application, particularly to the extent that they did. Conversely, both Ngāti Pārau and MTT signalled that they were applying for PCRs in their original application, but did not specify exactly which activities they were seeking protection over. In the affidavits of Tania Marama Petrus Hopmans and Kay Taape Tareha O'Reilly on behalf of MTT and Ngāti Pārau respectively, they broadly detailed the activities that would eventually become part of their more specific application for PCR orders. At the very least, it can be inferred that Kay Taape Tareha O'Reilly was referring to Ngāti Pārau exercising kaitiakitanga and sustainable management over the area which, as discussed below, is the only PCR which I am able to grant Ngāti Pārau on the evidence before me.

[572] In *Re Tipene* Mallon J observed that although the Act has provided a new mechanism for recognition of customary interests, it provides little by way of procedural guidance and no procedural rules have been promulgated.[177] It was to be expected that as applications developed, they would evolve and be refined. Thus, it would be wrong for the Court to take an unduly narrow approach to permissible amendments in the circumstances, and also inconsistent with the Court's flexibility provided by s 107.[178]

[573] I adopt this approach, and consider that it is applicable here. I consider this to be a situation where Ngāti Pārau and MTT are refining and clarifying their applications, rather than extending or drastically enlarging them so that their pleadings are essentially different.

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176 See *Re Ngāti Pāhauwera (Strike Out Application)*, above n 14.
177 *Re Tipene* [2015] NZHC 169 at [19].
178 At [22].

[574] I therefore turn now to the five PCR orders sought by MTT, starting with the use of the takutai moana for the implementation of spiritual practices and ceremonies associated with burial, blessings and rongoā.

[575] Marama Te Hata referred to the collection and use of shells to prepare rongoā in. She stated that pāua shells were better than man-made containers, as they were natural and kept the mauri of the rongoā.

[576] Kipa Albert Inia Arapeta deposed that the fishery was "our rongoā", and that every time his whānau were sick, "the old lady would take us down [to the takutai moana] to hōroi our self, wash our self".

[577] Several other witnesses referred to the use of seawater as a cleansing or healing rongoā. David Puna deposed that the sea water was used to keep skin and injuries clean or to drink as a purgative, while Hoani Taurima stated:

> Just being in the water, having the water splash over you, it's like being baptised in a way. Getting splashed, swimming, diving that's part of my spirituality, I'm getting baptised every time I go into the water, getting cleansed. Definitely gives me a glow.

[578] In Tony Walzl's historical report, he also noted that in the MTT Statement of Association for the Deed of Settlement, it was acknowledged that sea water was traditionally collected for "medicinal purposes".

[579] There is insufficient evidence to conclude that any other resources other than seawater have been used for rongoā practices. I consider that MTT have satisfied the requirement for a PCR over use of seawater in the takutai moana as a rongoā as this appears to be a continuously practiced activity in accordance with tikanga that has not been legally extinguished. There was no real evidence about precise locations where wai tai was taken from so I infer that it was anywhere between Keteketerau and the Waikari River and out to 50 metres beyond mean low-water springs, and grant the order accordingly.

[580] Turning next to preservation and use of traditional routes of travel. A number of the applicants discussed walking along particular parts of the takutai moana,

including along the beach when the tide was out. In particular, a number of the witnesses discussed walking between Arapaoanui and Moeangiangi, taking a coastal route depending on the tide. In cross-examination, Michael Brown and Puna Ote-Ora Brown both stated that members of the MTT hapū walked along the beach from Arapaoanui to Moeangiangi as part of the process for collecting kaimoana and fishing, and that this route required special knowledge of the tides, and was still used today. George Tawhai also discussed a road to Moeangiangi that was accessible in the 1960s, while May Karaitiana also discussed going along the coast "north and south from Arapaoanui", including to Moeangiangi, depending on the tides. Mr Walzl's report detailed evidence concerning MTT hapū accessing the coast to travel between Arapaoanui and Moeangiangi through walking or on horseback, and that by the mid-1980s, a roadway had been established by the local owner.

[581] However, despite this evidence, it is difficult to infer that this activity still continues, or is practiced in accordance with tikanga. There was little discussion by the witnesses about accessing the coast in these particular areas for tikanga-based activities, and it was also unclear as to whether this was a consistent practice that still occurred today. For these reasons, I consider that I cannot award a PCR order over this activity. I also refer to the difficulties inherent in the concept of "preservation" of routes of travel discussed above.

[582] Third, preservation and use of tauranga waka. As with use of the takutai moana as a route for travel, the evidence provided here was mainly historical. A number of witnesses, including Te Hata Kani II, Fred Roy Maadi Reti, Tui Puna, Richard Andrews and David Taurima, all gave evidence about the launching of boats at Arapaoanui and Tangoio. Although most of this evidence was historical, I can infer that it has not ceased. I therefore award a PCR order over this activity, specifically at Arapaoanui and Tangoio. However, this is for the use of tauranga waka not their preservation. Whether these places are preserved is entirely dependant on the forces of nature which the Court cannot control.

[583] Fourth, gathering and use of various resources from the takutai moana. In terms of the gathering of blue clay or uku, I find that there is insufficient evidence for a PCR to be granted over this activity. Only one witness referred to the collection of

this resource – Kipa Arapeta, who described getting blue clay from the hill, to use as soap. It was unclear whether this continued to occur, and there was no evidence that it occurred in the takutai moana. I also cannot grant a PCR over the activity of collecting shingle, as it is not clear that this is an activity that has been exercised since 1840, given that the evidence provided of it related to collection of shingle for roads or driveways.

[584] In terms of the gathering of sand, driftwood, and rocks/stones, I find that a PCR over this activity can be granted. There is evidence of MTT witnesses using sand to take the slime off eels when caught, and that sand was used by MTT tūpuna, as well as the current generation, to make kumara pits. There is also evidence of rocks from around Arapaoanui beach for decoration and as a tool to assist with eeling on the Arapaoanui River.

[585] There is also evidence of MTT hapū members traditionally, and in modern times collecting driftwood to use for decoration, cooking, and heating, as well as lighting fires on the beach. Hoani Taurima specifically recalled lighting fires with driftwood with whānau for warmth and to cook kai at the Te Ngarue Stream mouth.

[586] Finally, shells and pumice. There was evidence from MTT witnesses that pumice from both Arapaoanui and Tangoio were used for art, decoration and rongoā. Marama Te Hata provided evidence of her tūpuna carving pumice in the likeness of the atua for kumara, and also as a rongoā on skin MTT witnesses also described collecting shells for from Arapaoanui and Tangoio for art and decoration, including for urupā, as a tool for weaving, and preparing rongoā. I grant a PCR for gathering:

(a) sand, driftwood, rocks and stones; and

(b) shells and pumice

between Keteketerau and Waikare.

[587] Fifth and lastly, whitebaiting and collection of karengo. I am satisfied that, on the evidence, MTT hapū have been practicing these activities since 1840 in accordance

with tikanga and are therefore entitled to orders for PCR in respect of these activities. First, a number of witnesses referred to whitebaiting in three particular areas – and I find that whitebaiting in these areas is covered by a PCR for MTT: the Arapaoanui River, the Waikari River, and the Te Ngarue Stream. Renata Bush described catching whitebait from the Arapaoanui River with his uncles, and also that his niece would catch them in more recent times. Bevan Taylor deposed that he and others would stretch out nets at the Waikari River mouth "right by the sea side" in order to get whitebait, and described the tidal nature of the Waikari River as being a factor in whitebaiting. Hoani Taurima described netting whitebait in Te Ngarue Stream, and that his cousin still did so. Kuia Gray similarly stated that there was whitebait in Te Ngarue in early spring.

[588] In terms of collection of karengo, Kira Arapeta and Elizabeth Puna described harvesting karengo at Arapaoanui and Waipātiki. George Tawhai also discussed collecting karengo 200 yards past the first rocks at Arapaoanui, while Renata Bush also described collecting karengo on the rocks in Arapaoanui, and that it was in season in winter. I grant a PCR for this activity in these locations and out to 500 metres below mean low-water springs.

Ngāti Pārau (CIV-2017-485-246)

[589] Ngāti Pārau seek a PCR order over the following activities:

(a) the gathering of rongoā;

(b) protecting the health and sustainability of their tūpuna Pānia and Moremore and their taiao (marine environment);

(c) acting as a source of manaakitanga (hospitality and caring) for their manuhiri, which in turn was important to the mana of Ngāti Pārau;

(d) providing a place where whānau were able to continue traditional tohunga practices;

(e) providing a place where whānau can connect with their tūpuna and where whānau can heal and re-energise their wairua;

(f) exercising kaitiakitanga by:

(i) protecting and managing the marine environment;

(ii) ensuring the whakapapa of the children of Tangaroa, those whom we whakapapa to (fauna and flora known to reside in and around Pania and the Ahuriri area), is protected, restored, sustained, and enhanced;

(iii) using the fauna and flora at Pania along with other signs from the land (flowering trees) and skies (stars, moon, sun) to inform the maramataka and phase of the life cycles, spawning times and when mahingakai are ready or fat.

[590] There was insufficient evidence in the Ngāti Pārau application to allow the Court to make PCR orders over a number of the activities sought. In terms of the collection of rongoā, Rapihana Te Kaha Hawaikirangi referred to a location called "Te Wai Rongoa", where whānau would go to clean and heal their wounds and cuts with the water. However, it was unclear whether this location was still used and accessible, or exactly where it was in the application area. Hera Taukamo also referred to the collection of "Awa weed" as a rongoā to heal wounds. Again, it was unclear as to whether this still occurred. There is therefore insufficient evidence to grant a PCR relating to the collection of rongoā.

[591] There was also insufficient evidence for me to make a PCR order over the activities described in [589](c), (d), or (e).

[592] However, throughout the evidence, a number of Ngāti Pārau witnesses described their role in exercising kaitiakitanga throughout the application area. In particular, several witnesses discussed their involvement in kaitiakitanga practices and activities both solely through the hapū and as part of joint ventures between the hapū

and third parties. It is apparent that Ngāti Pārau have exercised kaitiakitanga since 1840. A number of witnesses described practicing kaitiakitanga over historically and culturally important locations within the application area, such as Pania Reef and the Ahuriri Estuary, particularly through protecting and managing fish stocks and restoring resources.

[593] This practice has continued into modern times. For example, Rapihana Te Kaha Hawaikirangi deposed that Ngāti Pārau whānau were continuously engaged in monitoring activities over the marine environment, including through trustees of the Ngāti Pārau Hapū Trust attending marine monitoring events such and relocating mahinga kai species from port development areas, and maintaining and checking turbidity buoys over Pania Reef. In his previous work with the Department of Conservation, Mr Hawaikirangi recalled the hapū being called upon to undertake karakia, open events, or take guided tours in the Ahuriri estuary or coastal area during planting or conservation days. Similarly, Roderick Hadfield stated:

> Ngāti Pārau continues to exercise kaitiakitanga in the present day. We are watchful and aware of the resource stocks and the activities that take pace in takutai moana. Often we do warn and restrict other people from fishing or collecting kaimoana in these areas, which is in a way a form of rahui as we promote sustainable fishing and collection of kaimoana to let the fish stocks replenish so they are in a healthy and abundant.
>
> My late cousin Tipu Tareha also represented Waiohiki Marae and Ngāti Pārau on a number of committees and organisations including as fishing representatives. Tipu and I worked as a team, with the support of our partners we covered the many committees, organisations and local, regional and central government agencies that impacted on or were important to furthering the development of Waiohiki Marae and Ngāti Pārau Whanui.
>
> …
>
> Ngāti Pārau continues to keep our fires burning and exercise mana whenua of the area by walking the land, fishing and diving in the Ngāti Pārau coastal area and maintaining iwi alliances. While our inter-relationships with other groups are important, Ngāti Pārau whānau still assert mana whenua and mana moana in our rohe. For example it there was a storm and there had been flooding, we would often check our kaimoana beds and diving spots to assess the damage and the behaviour of the fish. We would let our neighbours know if the damage was bad or ok to visit again.
>
> Another example was when Rangi Spooner established Nga Kaitiaki o Moremore a whānau-run group focused on protecting the coastal areas. They would issue customary permits to collect kaimoana that attempted to cut across our rohe. Ngāti Pārau never accepted this type of activity or recognised

> their permits, and we have our own tangata kaitiaki that respects the tikanga around the collection of kaimoana in the area.

[594] Although the practice of kaitiakitanga has evolved, the evidence indicates that it still appears to be practiced in accordance with tikanga. Consequently, I consider that a PCR over kaitiakitanga practices relating to managing and supporting the health of the marine environment through the application area out to 5km is appropriately granted.

Ngāi Tahu ō Mōhaka Waikare (CIV-2017-485-235)

[595] The specific PCR that Ngāi Tahu seek are:

(a) exercising of kaitiaki responsibilities over the specified application area, which includes the passing down of Māori lore and ecological wisdom to the younger generations, conservation, protection and supervision of the specified area; and

(b) kaimoana gathering and protection.

[596] In relation to the first PCR sought, while there was some discussion by Ngāi Tahu witnesses about the passing down of certain mātauranga in relation to fishing, gathering kaimoana, and eeling, as well as two brief references to the teaching of the maramataka, I consider that there was insufficient evidence directly related to the passing down of this knowledge, or the exercise of kaitiaki responsibilities over the specified area, to allow for a PCR to be granted here.

[597] In relation to the second PCR sought number of the Ngāi Tahu witnesses referred to fishing and kaimoana gathering. For example, both Malcolm Kingi and Mary Lynne Brown described in detail the kaimoana gathering and fishing activities carried out by Ngāi Tahu in different parts of the application area, including fishing for kahawai and snapper, gathering shellfish, and eeling. However, all of these activities are precluded from being part of a PCR order under the Fisheries Act 1996 and therefore cannot be the subject of an order for PCR.

PART VII

Conclusion

[598] In summary, I make the following orders. I have concluded that the applicants have met the s 58 test for CMT in the following areas:

(a) an exclusively held area of CMT for Ngāti Pāhauwera over the area between the Poututu Stream in the north and Pōnui Stream in the south from mean high-water springs out to a line parallel to mean high-water springs 5km out to sea;

(b) a jointly held CMT for Ngāi Tahu and Ngāti Pāhauwera over the area between the Pōnui Stream in the north to the Waikari River in the south from the mean high-water springs out to a line parallel to mean high-water springs 5km out to sea;

(c) an exclusively held CMT for MTT over the area between Arapaoanui in the north and Te Uku in the south from mean high-water springs out to a line parallel to the mean high-water springs 12-nautical miles out to sea;

(d) a jointly held CMT for Ngāti Pārau and MTT, noting the proviso set out at [499]-[502] of this decision, over Pania Reef; and

(e) an exclusively held CMT for Ngāti Pārau, between the mean high-water springs and where applicable, a line parallel to the mean high-water springs 1.5km out to sea, over Hardinge Reef, the Marine Parade coastal area around the southern boundary, and parcel 9 in the Ahuriri Estuary.

[599] In terms of PCR, I make the following orders:

(a) Ngāti Pāhauwera:

(i) the use and collection of hāngi stones, other stones, sand, and gravel within the application area between the Waikare and Waihua Rivers, excluding the mouth of the Mōhaka River;

(ii) the use and collection of driftwood and pumice within the application area between the Waikari and Waihua Rivers;

(iii) the use and collection of wai tapu and rongoā over an area 200 metres south of the mouth of the Mōhaka River and north to the Waihua River and out to 50 metres beyond mean low-water springs;

(iv) for non-commercial whitebait fishing at the Mōhaka and Waikari River mouths; and

(v) to manage, use, and protect tauranga waka between Waikare and Poututu;

(b) MTT:

(i) use of the seawater as a rongoā between Keteketerau and the Waikari River and out to 50 metres beyond mean low-water springs;

(ii) use of tauranga waka at Arapaoanui and Keteketerau;

(iii) gathering sand, driftwood, shells, pumice, and rocks/stones between Keteketerau and Waikare;

(iv) for non-commercial whitebait fishing the Arapaoanui River, the Waikari River, and the Te Ngarue Stream where they are within the marine and coastal area; and

(v) collecting karengo at Arapaoanui and Waipātiki out to 500 metres below mean low-water springs.

(c) Ngāti Pārau:

(i) carrying out kaitiakitanga practices relating to managing and supporting the health of the marine environment through the application area out to 5km.

Stage 2 hearing

[600] Pursuant to s 109 of the Act, a successful applicant group who have established an entitlement to a recognition order must submit a draft order for approval by the Registrar. The practice, in cases under the Act, has become that a Stage 2 hearing is convened to finalise the terms of all recognition orders. Interested parties affected by recognition orders have the right to attend those hearings and make submissions on the precise nature of the orders.

[601] The Stage 2 hearing in this matter has been set down to commence in the High Court at Napier on Monday 23 May 2022 and, if required, to continue in the District Court at Hastings the following week to conclude no later than Friday 3 June 2022.

[602] The applicants are encouraged to kōrero with each other in accordance with tikanga, in relation to the form of the proposal orders and to file and serve draft orders, submissions and any necessary briefs of evidence no later than 5pm on 6 May 2022.

Churchman J

Solicitors:
Smail Legal Ltd, Auckland for Ngāti Pāhauwera
DLA Piper, Wellington for Maungaharuru-Tangitū Trust
Kāhui Legal, Wellington for Ngāti Pārau
Tamaki Legal Ltd, Auckland for Ngāi Tahu ō Mōhaka Waikare
Crown Law Office, Wellington for Attorney-General
Lyall & Thornton, Auckland for Mana Ahuriri Trust
Simpson Grierson, Wellington for Hawke's Bay Regional Council
Chapman Tripp, Wellington for Seafood Industry Representatives

cc: Martin Williams, Barrister, Napier for Pan Pac Forest Products Limited

APPENDIX 1: PUKENGA REPORT

PUKENGA REPORT ON TIKANGA ISSUES

SECTION 1

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

Ko te mana o te moana he kai:[1]

> the mana of the sea is the provision of food;
>
> respect for the mana of the sea is the tikanga or mahi tika associated with its harvesting;
>
> mana can be tapu or mauri

Mai ra noa ki tenei wa I mahia nga mahi kite kohi kai o te moana, kei nga toka, awa, puwaha, taunga ika, tahuna, pou kupenga me era atu waahi:

> Since the beginning of time to the current period people have continued to get food of the moana from the various places it provides.

Kaitiakitanga:

> Kaitiaki tipua kaitiaki tangata – kaitikai tipua has the role of protecting the resource and the people who belong to the area, kaitiaki tangata is the management of the resource through karakia, rahui and mahi tika (doing what's right).

Heke tīpuna, nohonga tīpuna, nohonga hapu me nga whanau I nga wa o mua ki tenei wa – take mataitai, take kai moana – the rights to the mataitai, kai moana.

Heke tīpuna – descend from ancestors, nohonga tipuna – Ancestral home or Kainga, nohonga hapu – sub-tribe settlement or Pa, nga whanau I nga wa o mua – families from earlier times to now. Take mataitai – customary purpose or cause on foreshore, Take kai moana – customary food source from sea, the origins and source and issues concerning growth and development for foreshore and seabed and sea food for sustenance.

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[1] Pomare Sullivan Te Patuwai kaumatua Motiti Island pers communicate 1993

Whakapapa ki te whenua, whakapapa mo whanaungatanga, genealogy to the land, genealogical links to one and other.

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

Heke tīpuna, nohonga tīpuna, nohonga hapu me nga whanau o mua; ko nga tohu, he pa, kainga, urupa, rua koiwi, ana kōiwi.

Descend from ancestors, ancestral homes Pa/Kainga, hapu and families of earlier times, the signs of Pa, kainga are all settlements, urupa / cemetaries, rua koiwi, burial plot, ana koiwi, burial caves.

Mahinga kai mai ra noa Cultivating food from earlier times.

Kaitiaki tipua, kaitiaki tangata Kaitiaki Tipua is a supernatural being caretaker, Kaitiaki Tangata – is a nominated person from whanau, hapu or iwi to be caretaker, official officer from Fisheries etc.

Kaitiaki Tipua for example is Pania, Moremore, Paikea, Tangitu and Paikea.

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

Ngati Parau

Napier city North and South, Westshore, Bluff Hill, Ahuriri Port, Te awa, Awatoto, including Pania Reef.

Maungaharuru Tangitu hapu (Ngati Kurumokihi, Ngati Marangatūhetaua (also known as Ngati Tū), Ngati Whakaari, Ngai Tauira, Ngai Te Ruruku ki Tangoio, and Ngai Tahu)

Tiwhanui ki Keteketerau – he rohe

Ngai Tahu

Te Kuta, Waikari, Arapaoanui, Tutira, Waitaha ki Tiwhanui (Waitaria Stream) Keteketerau

Ngati Pahauwera Development Trust:

Poututu, Arapaoanui, Tutira, Te Haroto, Keteketerau ki Waitaha

The boundaries above have been adjusted from the MACA application boundaries.

(c) Who, in fact, are the iwi, hapu or whanau groups that comprise the applicant group?

Ngati Pārau

Ngati Kurumokihi, Ngati Marangatūhetaua, Ngati Whakaari, Ngai Tauira, Ngai Te Ruruku ki Tangoio, and Ngai Tahu

Ngai Tahu

Ngati Pahauwera and associated hapu

Meeting the tests of tikanga

1 Maungaharuru Tangitu Trust

Application area between northwards to a point past the Waitaha River, and southwards to Keteketerau from mean high water springs on the landward side, south east to Te Pania reef and thence out to 12 nautical miles.

Maungaharuru Tangitu hapu as represented by the Maungaharuru Tangitu Trust does not meet the test of tikanga for the area outlined. This means moana was not exclusive but shared with others, including Ngai Tahu, Pahauwera, and Ngati Parau.

2 Pahauwera 1

From Poututu Stream to Pōnui Stream

Pahauwera does meet the test of exclusive use in accordance with tikanga for the area defined

(from Waikari to Waitaria Stream shared with Ngai Tahu).

3 Pahauwera 2

Between Pōnui Stream and Esk River, Hawke's Bay

Pahauwera does not meet the test for the area defined. Their mana moana was not exclusive but, in respect of the area between Pōnui stream in the North and Waitaria Stream in the South was shared with

Ngai Tahu. Between Waitaria stream and the Esk river it was shared with various MTT hapu.

4 Ngai Tahu o Mohaka Waikare

The mouth of the Mōhaka River in the North, to mouth of the Waiohinganga River or Esk River in the south, at Petane,

Does not meet the test of tikanga for the area defined On a shared basis with Ngati Pahauwera they would meet the test of tikanga between Pōnui stream in the North and Waitaria stream in the South.

5 Ngati Parau

The area from the Ahuriri Habour entrance including the inner habour and Pandora area. It ends approximately 11 km south of the old harbour entrance just north of an estuary called Waitangi. This extends 12 nautical miles out and includes Pania reef.

Does meet the test of tikanga for the area defined however because little evidence was given to the 12 mile limit. I am not able to say how far the area extended out to sea.

Note: boundaries have been taken from Statements of Claims and Te Arawhiti web site for applications of claims for Heretaunga

Explanation

Maungaharuru Tangitu Trust identification of hapu does not match the historical record since 1840 of hapu associated with the coastal area between south of the Waikari River and Keteketerau. The Trust has presented their list of hapu where some historical hapu have been subsumed under a dominant hapu such as Ngati Tu, and the whakapapa that is used to show this is imperfect. This can be seen in many instances where two tīpuna are shown or described in various documents as the eponymous ancestor of Ngati Tu, Tukapua 1 and the mokopuna Marangatūhetaua. Examination of Parsons' whakapapa shows the construction of whakapapa for origins, mana and whanaungatanga but do not show what were the origins of various elements of whakapapa that were used, which can lead to questions of bias. Ngai Tahu is clearly shown in the Te Kuta Books as an independent hapu, with whakapapa to the whenua or take tipuna at Te Kuta, the occupation and use of the area by tīpuna. Based on the presence of names

identified as Ngati Tu in a list for Te Kuta, this is used to claim the mana of Ngai Tahu by Maungaharuru Tangitu Trust.

The specific claims for Ngati Te Ruruku by Maungaharuru Tangitu Trust and in turn Mana Ahuriri were created by Crown Settlement processes which has no place for MACA claims and negates the history and mana of the hapu Ngati Te Ruruku. Te Ruruku was given land for his military services, settled with his hapu and was drowned in the area.

Ngai Tahu

As stated above Ngai Tahu is clearly shown to be an independent hapu in 1891 and Malcolm Kingi has claimed the mana of Ngai Tahu through his whakapapa and whanau support. According to tikanga Ngai Tahu can claim (on a shared basis) a tentative area from Waitaria Stream in the South to the Ponui stream in the North.

Ngati Pahauwera

The claim to Ngai Tahu was also based on the Te Kuta Book narratives of Ngati Pahauwera and Ngai Tahu using the protection of Ngati Pahauwera fighting chiefs. The mana of a fighting chief does not relate to take and mana whenua which would remain with Ngai Tahu.

This applies to the use of the claim of the mana of Kahuoterangi as a fighting chief over a takiwa. However any claims to Te Ruruku and his whanaunga who settled with him on the tuku whenua of Marangatūhetaua could be made by Ngati Pahauwera if they were living in the two rohe of Mohaka and the Tangitu coast. This has to be shown that they did.

Comments

Maungaharuru Tangitu Trust and Ngati Pahauwera would need to re-define who were the hapu on the coast between Arapaoanui and Keteketerau. Although no MACA claim was lodged by Ngati Matepu they should be acknowledged between Keteketerau and Waiohinganga. Section 2 will provide the detail of the Explanation above.

SECTION 2

1.0 Introduction

The objective of this Section is to explain in detail issues arising from the evidence of claimants in their affidavits and document bank of their CMT and exclusive use claims. Maungaharuru-Tangitu Trust (MTT) and Pahauwera Development Trust (PDT). The two trusts as hapū Treaty claimants of Ngati Pahauwera and Maungaharuru-Tangitu Trust have spent almost 30 years researching and advancing their Treaty claims where these two hapū trusts have become products of the Treaty of Waitangi Settlement process. The bulk of their historical evidence for this MACA hearing came from the Treaty of Waitangi land claims and their engagement with claims to the Seabed and Foreshore Act 2004 in 2007 for Ngati Pahauwera.

Ngati Parau also was part of the Ahuriri Treaty of Waitangi claims process and had settled their claims with a collective of hapu Mana Ahuriri and for MACA lodged a specific hapu claim.

Ngai Tahu o Waikare Mohaka claim under Malcolm Kingi who started as a personal journey of researching family whakapapa which led to the connection of dots of his career as a shearer, shearing and food gathering at Waikari as whanau, and the later learning of his tīpuna Huka, Ngai Tahu and association with Waikari. In 2008 he went to an advertised hui at Tangoio marae for the Foreshore and Seabed Act because he wanted to assert his Ngai Tahu mana and rangatiratanga where he became aware of the MTT claim for Ngai Tahu as one of their hapu. In 2017 contact with Tamaki Legal led to his lodging of a claim for Ngai Tahu.[2]

1.1 The Issues

In the area between Waikari and Waiohinganga River there are references to many historical hapu:

- The request from Marangatūhetaua at Mohaka to Te Ruruku to stop the incursions of Ngati Hinepare taking their kai moana and the tuku whenua from Marangatūhetaua to Te Ruruku which was the obligation of the request.

---

2 Mere Brown pers communicate March 2021

- Te Ruruku came with whanau and their toa and this was a generation before 1840
- The Settlement entities of MTT and Ngati Pahauwera claiming Ngai Tahu as a hapu of each respective entities
- The Ngati Pahauwera claim of the mana of Kahuoterangi over the region The hapu along the coast came under the mana of Ngati Tu through Marangatūhetaua or was a hapu of Ngati Tu through descent from Tukapua 1
- Ngati Te Ruruku ki Tangoio
- Whether Marangatūhetaua or Tukapua 1 is the epynomous ancestor of Ngati Tu
- MTT rohe or takiwa is exclusive to their hapu identified in the Settlement Act
- Ngai Tahu came under the mana of Ngati Tu
- Ngai Tahu is a hapu of Ngati Pahauwera

Government policy for direct settlement is a process whereby historical Treaty grievances are settled between the Crown and Maori claimants in the political arena, rather than through the courts or the Waitangi Tribunal. Under the current model of direct settlement, the Crown decided to seek settlements solely with "large natural groupings" (iwi or amalgamations of hapu groups), despite academic consensus that Maori society has traditionally been organised along smaller, hapu lines rather than in the larger groupings with which the Crown seeks to negotiate.[3] A process of convenience for the Crown rather than tikanga and whakapapa.

Ngati Kahungunu has the largest rohe in the lka a Maui (North Island) and settlement with the Crown has been with six "large natural groupings" of amalgamation of hapu of which Ngati Pahauwera and MTT are two. Ngati Parau are a hapu that was part of the Mana Ahuriri Settlement Bill. Ngai Tahu are represented by a whanau establishing

[3] Birdling, M. 2004. Healing The Past Or Harming The Future? Large Natural Groupings And The Waitangi Settlement Process. NZ Journal of Public and International Law Vol2 no. 2 p 260

their rights as a hapu to the takutai moana. Both MTT and Pahauwera claim Ngaitahu as a hapu that comes under them.

2.0 Identification and Location of Hapu on the Coast

Between 1840 and 1851 the missionaries William Williams and William Colenso visited kainga on the coast as part of their missionary work to proselytize and hold services. Colenso came to the mission station at Ahuriri in 1844 and at the same time Hamlin became based at Wairoa. Williams recorded the following:[4]

1840	Oct. 17	Wakari
	October 30th	revisited Waikari
1842	November	visited Arapaoanui and Waikari
1843	December	Ngamoerangi a pa of some magnitude on the north side of Ahuriri.
1845	January 28	Ngamoerangi
	October 24	small population at Waikari
	October 26	Aropaoanui, six natives attend service.
	October 27	Went to Tangoio large population Waiohinganga another population

William Colenso recorded:

1845	January 18th	150 at service at Ngamoerangi
1846	June 12th	visit to Tangoio
	July 4th	100 people at service
	July 7th	20 people at Arapaoanui
1847	June	Kapemaihe
		Tangoio
	June 16th	Arapaoanui
1847	August 27th	Kapemaihe
		Ngamoerangi who had a resident trader

[4] Taken from Parsons, P 1994 Wai 299 Waikare ki Waikare Confiscated Lands. Ancestral Overview. Tab. p 8296

		Tangoio Sunday 100 at Sunday service
	August 30th	Aropaoanui 20 at Service
1848	February 22	Kapemaihe village on shore of Hawkes Bay
1849		Tangoio 84 at service
	September 30th	133 people at service
1850	January 12	Tangoio 50 at service and 70 the following day
	January 14th	90 at Petane
1851	Nov 11	Meet up with Hamlin at Moeangiangi 20 present.
		Petane and Tangoio
	March 1851	Petane, Tangoio

Petane, Kapemaihe (below Heipipi pa[5]), Waiohingahinga, Moeangiangi, Tangoio, Aropaoanui and Waikari were the estuary and river mouth kainga visited by the missionaries from 1840 to 1851 between Keteketerau and Waikari. Hamlin and Colenso divided the coastal kainga between the missionaries at Ahuriri and Wairoa. Parsons report only referred to the Waikari area and I was not able to access any reports that may have referred to the coastal kainga between Waikari and Wairoa by the missionary Hamlin. The missionaries were only concerned with the names of kainga and numbers at services or resident and did not make references to the names of hapu. However in the purchasing of land Rangatira and hapu were recorded because they were dealing with land not numbers of people to convert to Chritianity and colonial government officials in the recording of census for 'Natives' recorded iwi, hapu, kainga and population:

1870[6]

Waikare	Ngatirehua	15
Aropaoanui	Ngati Moe	33

5 Bevan Taylor per com
6 Appendices to the Journals of House of Representatives 1870 A11 p 7

1874 (Dr Ormond)[7]		
Arapawanui	Ngatimoe (Ngatiraho)	63
Waikare	Ngaitauhere (Ngatikaingaahi)	130
1878 Wairoa District[8]		
Waikari	Ngaitauhere	25
Arapawanui	Ngaitohumare	24
Tongoio	Ngaitamakiwhakaari	49
Hawkes Bay	south of Tangoio River S Locke R.M.	
Petane	Ngatimatepo	
	Ngatitama	
Pawhakairo	Ngatiparau	
1881	Wairoa District Captain Preece R.M.[9]	
Waikari	Ngatikaingaahi	
Hawkes Bay District	Captain Preece R.M.	
Arapawanui	Ngatitohumare	24
Tangoio	Ngatikurumokihi	44
Petane	Ngatikurumokihi	47
	Ngatimatepu	30

The later census divided the region between Wairoa and Hawkes Bay and I have included Ngati Moe in the 1870 census for Arapaoanui where it gives 15 hapu as resident in Arapaoanui. In the census years of 1874, 1878 and 1881 a statement is made "Between Tangoio River and the Southern Boundary of Hawke's Bay Province" as the general area and referring to a list of hapu and I would assume would be the same for the 1870 list of fifteen hapu for Arapaoanui.

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7 AJHR 1874 I G p2
8 AJHR 1878 I G p2
9 AJHR 1881 I G p 3

In his use of the Maori census of the 19th century Richard Boast comments:[10]

> On the whole the census documentation is too garbled to make much sense of. The hapu linkages are obviously complex. It is noted that in his Ancestral Overview report, doubtless because of this complexity, Patrick Parsons has in the main analysed the hapu of the Maungaharuru-Tangitu district according to particular ancestors rather than hapu names;

and in his opinion:

> It has to be concluded on the whole that the official sources are not of much assistance when it comes to clarifying hapu names and locations in the region.

Tony Walzl in his historian's report makes the following comments:[11]

> 2.227 In the above census, as was frequent with census of this time, hapu labels were applied widely and loosely. The census records "Ngaitauhere" at Waikare which has been noted as a hapu of Ngai Tahu. The name "Ngatikaingaahi". The use of "Ngatimoe" at Arapawanui reflects the broad use of this term. The "Ngatiraho" is probably a reference to Ngati Te Rangitohumare.
>
> 2.229 Again, there is a need to comment on hapu labels. "Ngaitauhere" (a hapu of Ngai Tahu) again features at Waikare. The term "Ngaitohumare" that features is again a reference to Ngati Te Rangitohumare. The "Ngatimakiwhakaari" at Tangoio is probably a reference to the Ngati Whakaari hapu of Ngati Tu.
>
> 2.232 Hapu labels again recorded "Ngaitohumare" (Ngati Te Rangitohumare) at Arapawanui. And "Kaingaahi' at Waikare. The hapu name "Ngatikurumokihi" is being broadly applied for those Ngati Tu living at Tangoio and all people living at Petane.

The Kuta books of 1891 refer to Ngaitauhere as a hapu who descends from Tahu or Tahumatua and their residence at Waikari in the census of 1874 and 1878 confirms the narratives of the Te Kuta Books as Tahu being the take tīpuna for the lands at Te Kuta and Waikari. Ngatikaingaahi is shown as a hapu of Ngati Tauhere at Waikari in the 1874 census and in the 1881 census Ngatikaingaahi is the hapu resident at

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10 Boast, R. P. 2011 Confiscation and Crown purchase: The Maungaharuru – Tangitu region 1840-1950).
11 Walzl, T 2020. Maungaharuru-Tangitu and the Takutai Moana Tab 215- 221..p 7947

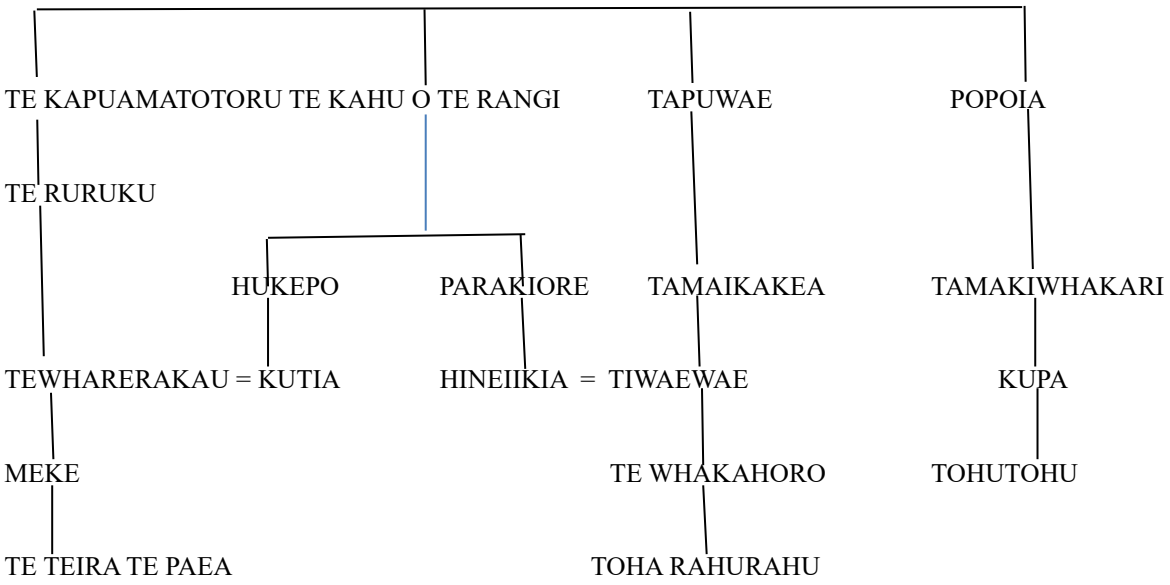
Waikari, meaning Ngati Tauhere and in turn Ngai Tahu. From this 19th century census data its shows Ngaitahu resident and the mana for Waikari.

Ngati Raho is a hapu of Ngati Moe seen in the 1874 census and the residence of Ngati Moe at Arapoanaui.

The residence of Ngati Kuramokihi at Tangoio and Petane is explained by Walzl as as general term for the residents of the area or kainga. The identity and naming of hapu is about their mana as a kin or descent group not location and kainga. Ngati Kuramokihi is named as a hapu of of Maungaharuru ki Tangitu Trust meaning they have mana as a hapu and take whenua and take tīpuna ki nga whenua. There are Maungaharuru Tangitu Trust references to Ngati Tu and Ngati Te Ruruku as having land interests at Petane not Ngati Kuramokihi.

The presence of Ngai Tama-ki-Whakaari at Tangoio is not a reference to Ngati Whakaari as Walzl suggests but is a reference to a son of Popoia, brother to Te Kahu O Te Rangi as seen in the following whakapapa below.[12] Te Ruruku as a 'fighting chief' would have brought his taua which would have included close relatives rather than use the toa of Marangatūhetaua as suggested by Ms Hopmans. Ngai Tama-ki-Whakaari would be another hapu the same as Ngati Te Ruruku where the tīpuna was a recent arrival from Wairoa. Also Ngai Tama-ki-Whakaari resident at Tangoio kainga does not necessarily mean they were there, but sometimes the reference could be to a place of residence in an area.

12 Parsons ‘Mōhaka ki Waikare’ Tab..p8431



Ngai Tohumare as resident at Arapawanui in 1881 would probably be Ngai Te Rangitohumare as suggested above by Walzl and confirmed by the whakapapa and statement below by Parsons:[13]

[13] Ibid Parsons Tab p 8398

NGAI TE RANGITOHUMARE

The hapu Ngai Te Rangitohumare who are recorded as having participated in the 1859 Aropawanui purchase take their name from the ancestress Te Rangitohumare.

WHATUIAPITI = TE HUHUTI

HIKAWERA II = TE UIRAIWAHO

TE RANGITOHUMARE = TE HUKI

1. PURUAUTE
2. KAHARA
3. TE HAUWAITANOA
4. MATAITAI
5. HIKAWERA
6. RANGIWAHAHIA
7. TAORANGI

Another whakapapa by Parsons shows Te Ruruku as a descendent or uri of Te Huki and Te Rangitohumare where an objective of Marangatūhetaua of going to Wairoa to request the military services which would require the gift of land as tuku generally would be to a relative or someone who descends from tipuna of the area rather than a stranger:[14]

TETEKANAO — KAHUTAPERE II — TE WHATUIAPITI

TUREIA = HINE KIMIHANGA — HIKAWERA II

TE HUKI = TE RANGITOHUMARE (F)

PURUAUTE

TE KAPUAMATOTORU

TE RURUKU

[14] Parsons 'Mohaka ki Waikare' Tab…p 8371

Walzl made a statement under-cross examination where historians do not place much reliance on the Maori population and census data of the Appendices to the House of Representatives but historians are not trained in social organisation which the comments above from both Boast and Walzl shows.

2.1 Ngati Te Ruruku

Maungaharuru-Tangitu Trust identified a specific section of Ngati Te Ruruku hapu for their Settlement purposes, Ngāti Te Ruruku ki Tangoio based on descent from Hemi Puna and his wife Taraipine Tuaitu. For Ngati Te Ruruku ki Tangoio I see other whanau with interests in Tangoio. Tareha in 1869 sent his people to go fishing at Tangoio where the Hawkes Bay Herald noted:[15]

> Some of Tareha's people are going to Tangoio to fish, also to take seed potatoes for Mr. Morris. Tareha wishes the fact to be mentioned, lest his people might be mistaken for Hau Haus, and injurious reports get into circulation.

Tareha is in the whakapapa below as descending from Te Ruruku.[16] Hapu of the Mana Ahuriri identified in the their Settlement Act identify Ngati Tu and Ngati Te Ruruku. They identify the tīpuna Tukapua I for Ngati Tū and Wharerakau or Te Hiku for Ngai Te Ruruku. The Mana Ahuriri in their Deed of Settlement of Historical Claims refers to Ngati te Ruruku:

> Ngāi Te Ruruku: Ngāi Te Ruruku are the descendants of Wharerakau and Te Hiku, who were descendants of the eponymous ancestor Te Ruruku. Te Ruruku was active in the late eighteenth century. Born at Wairoa, he was given certain lands between Arapawanui and Te Whanganui-ā-Orotu by Marangatūhetaua, the chief of Ngāti Tū, in return for military services. Ngai Te Ruruku have interests at the northern end of Te Whanganui-ā-Orotu, which are intermingled with those of Ngati Matepu and Ngati Tū.[17]

and for Ngati Tu:

> Ngati Tū: the eponymous ancestor for Ngati Tū is Tūkapua I, a descendant of the Ngati Awa ancestor Koaupari who had come to Ahuriri. An important connection for this hapū is the

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15 Hawkes Bay Herald 15 October 1869
16 Reti Tab 223 p 9007
17 Ahuriri Hapū And The Trustees Of The Mana Ahuriri Trust And The Crown. Deed Of Settlement Of Historical Claims 2016

> marriage of Pania, Tūkapua's daughter, with Tikorua, the grandson of Kahungunu. Ngati Tū, along with Ngāti Matepū and Ngāi Te Ruruku, to whom they are closely related, came to occupy territory bordering the northern end of Te Whanganui-a-Orotu. Within this area, Ngāti Tū are more closely identified with the northern end of Whareponga Bay, over the Maporiki Ridge to the Waipatupatu Inlet and over College Hill into the Esk Valley.[18]

For Treaty Settlements purposes, Maungaharuru-Tangitu Trust and Mana Ahuriri made a separation between Ngati Ruruku and Ngati Tū hapu and for their MACA claim, Maungaharuru-Tangitu Trust make claims to the Ngati Ruruku and Ngati Tu rohe of Mana Ahuriri, that is Hemi Puna and are extending into Wharerakau and Te Hiku of Ngai Te Ruruku. This is the area between Keteketerau and Waiohinganga. The same conclusion can be made between Ngati Tū and Ngati Marangatohetaua.

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[18] Ibid

CHART 5B — NGAI TE RURUKU

KAHUNGUNU = RONGOMAIWAHINE

Kahukuranui = Tuteihonga

Rakaipaaka = Turumakina

Kaukohea = Mawete

Tutekanao = Tama Te Ahirau

Tureia = Hinekimihanga

Te Huki = Te Rangitohumare

Puruaute = Te Matakainga

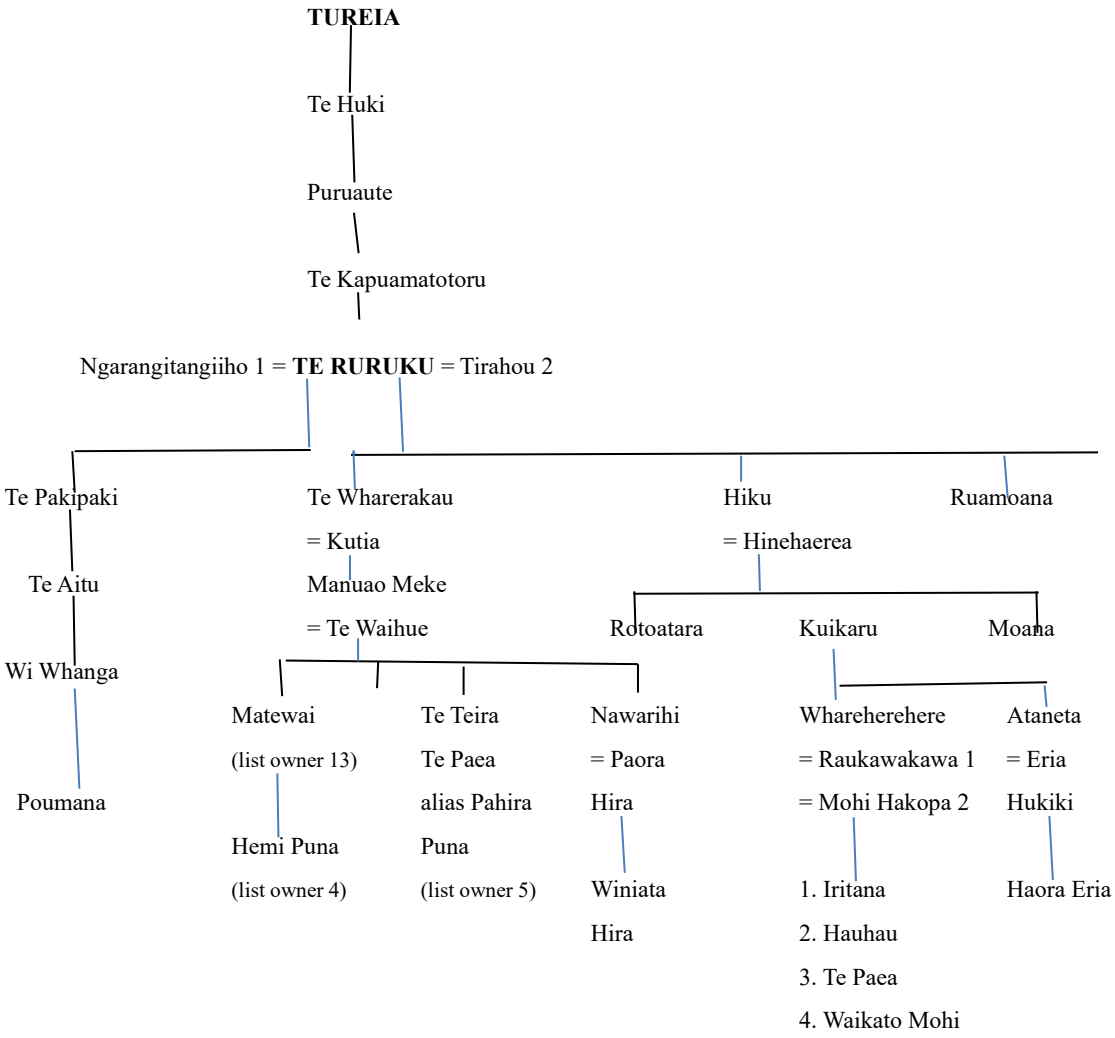
Te Kapuamatotoru = Te Whewhera

TE RURUKU = Ngarangikatangiho 1

- Hineoroia
  - Te Hauwaho
    - Te Ani Ringatuhi (list owner 32)
      - Wi Ngamaiaia
  - Oneone
    - Tareha Te Moananui (list owner 40)
      - Te Roera
      - Kurupo
- Rehe
- Te Heitawhiri
  - Hinetaua
    - Roka Te Koari
  - Te Okoro
    - Matewai = Frederick Spooner
      - Hemi Puna (list owner 1)
        - Ni Parata (list owner 26)
    - Te Teria Te Paea (list owner 3)
    - Ngawarihi = Paora Hira
      - Winiata Hira
- Mahia
- Toromata
- Herepao
  - Tane Moana
    - Akuhata Te Hapua
      - Tarapine Te Aitu (list owner 24) = Hemi Puna
        - 1. Ni Parata Puna
        - 2. Te Muera Puna
        - 3. Honiana Puna
        - 4. Akuhata Puna
    - Paora Torotoro (list owner 31)
      - Warihia Ihukino
        - Hera Hokahoka

CHART 5D

NGAI TE RURUKU



2.0 Maungaharuru Tangitu Trust and their hapu

Although the Settlement Act identifies the hapu of Maungaharuru Tangitu Trust, the history and mana that is presented is weighted towards Ngati Tu. Tania Hopmans in her evidence states that hapu of Maungaharuru Tangitu Trust:

> Ngati Marangatuhetaua (also known as Ngati Tu), Ngati Kurumokihi, Ngati Whakaari, Ngai Tauira, Ngai Te Ruruku (ki Tangoio), and Ngai Tahu (the Hapu).Tab p 1095

A claim was filed 1992 for Maungaharuru Tangitu Society Inc and explained her role:

> Following this I assisted with the collection of evidence for the Waitangi Tribunal hearings and interviewed many kaumatua about the history of the

Hapu and their relationship with their takiwa (traditional area). While preparing for our Waitangi Tribunal hearings, and settlement negotiations with the Crown,

> we also commissioned research about our history and gathered further korero from our kaumatua. Most of those kaumatua have since passed away. P 1096

And explains why they had arrived at the selection of tīpuna and hapu for Maungaharuru Tangitu Trust:

> In terms of whakapapa there are three originating ancestors of our Hapu from early times whose descendants became source tipuna of the Hapu.
>
> 25.1 Toi Kairakau to Tukapua I the source tipuna for Ngati Tu (including Ngati Whakaari)).
>
> 25.2 Tunuiarangi to Tauira the source tipuna for Ngai Tauira.
>
> 25.3 Tahu Matua II to Te Keu o te Rangi the source tipuna for Ngai Tahu.
>
> 26 In addition, through the marriage of Porangi a descendant of Tukapua I, to Tataramoa the son of Kahutapere II, a further hapu was formed – Ngai Tatara, which later changed its name to Ngati Kurumokihi.
>
> 27 Our Hapu includes Ngai Te Ruruku ki Tangoio. Their eponymous ancestor was invited (with some of his followers) by Ngati Tu to help defend our fishing grounds from invaders from the south. As a result of his services Te Ruruku received gifts of land from Ngati Tu.
>
> 28 This is an important distinction because Te Ruruku's ability to occupy lands came through tuku whenua – the gifting of land, not originating ancestors and ahi ka roa. I would say Te Ruruku and his followers come under the mana of Ngati Tu, because it was that Hapu that gifted their land. The 'ki Tangoio' aspect arises through a particular line of descent from Te Ruruku being Hemi Puna and his wife Taraipene Tuaitu. It is these two source tupuna and their descendants, who maintained ahi ka roa – occupation in our takiwa.
>
> 29 Ngai Tahu is a group that occupied both sides of the Waikari River. They sold most of their land between 1851 and 1927 and largely dispersed to areas where they had other connections; through marriage, family or other land interests. They were absorbed into settlements such as Tangoio, Petane, Mohaka, a few to Te Haroto and some to Wairoa. Today, MTT represents Ngai Tahu who have married in to one of our other Hapu – i.e., who whakapapa to Tahu Matua II and the source tipuna of one of our other Hapu.

In the above Tania Hopmans states that because of the tuku whenua from Marangatūhetaua Ngati Ruruku came under his mana. Tuku whenua does not work that way, especially when calling on the services of a toa rangatira or

fighting chief. If Te Ruruku accepts the tuku whenua and remain on the land then their noho from that period on creates the take whenua for Ngati Ruruku. There may have been separate areas of Ngati Ruruku land between Whakaari and Keteketerau the members of the hapu of Ngati Ruruku would all be entitled to be included in any lists of land owned by Ngati Te Ruruku.

Ngai Tahu is an independent hapu with take tīpuna and whenua claims and mana to the Te Kuta Block and Waikari shown by the residence of Ngati Tauhere. The lost of land and the need for whanau to shift to other lands under different Marangatūhetaua hapu identifies which they have rights to, is a story around the motu. In any absence other hapu cannot claim today these lands because the mana remains with the original hapu and this is signified by urupa. Malcolm Kingi views himself and his whanau as tuturu Ngaitahu whereas the claim by Maungaharuru Tangitu Trust to Ngai Tahu reflects marenarena or intermarriage. In accordance with tikanga the tuturu claim to representation would be stronger than the claim as a result of marriage links.

3.0 Ngati Pahauwera

The traditional origin of identity of Ngati Pahauwera was described by Toro Waaka as Te Tini o Tureia, a collective of hapu under the mana of Tureia. During the era of the Native Land Court rights of land for Ngati Pahauwera was a mix of descent from Kahu o Te Rangi and those who came under the mana of Kahu o Te Rangi. This was used for a rohe claim from Waikare river mouth to Poututu. [19] Ngati Pahauwera claimed the following hapu associated with the Te Kuta Block:

Ngaitauhere

Ngati Tataku

Ngati Ruatai

The above three were based on Te Kuta Books for identification and Ngai Tahu descent was limited to Tahutoria. The whakapapa was provided by Cordry Huata

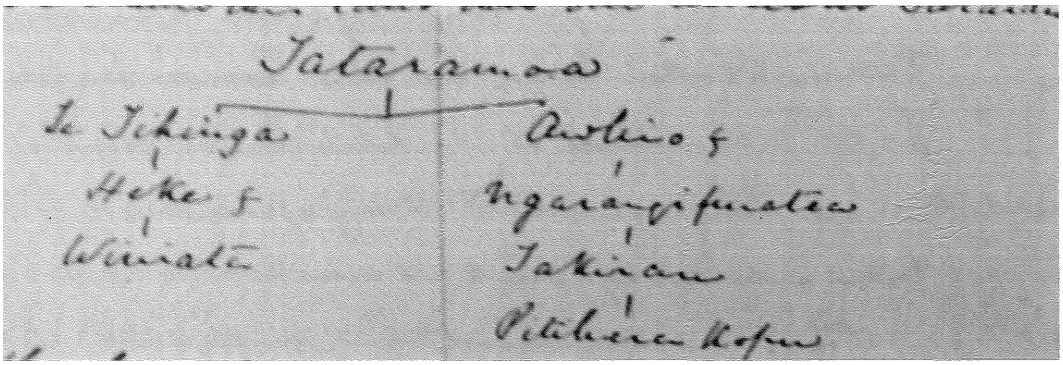
[19] Brief of Evidence of Toro Waaka 2007 TAB pp5218 - 5250

as showing the Tahu associated with Ngati Pahauwera was Tahutoria whose rohe at one time reached Mohaka from Waikari.

The Te Kuta Books show the whakapapa for the land at Te Kuta was Tahu or Tahu matua which was claimed by Ngai Tahu Mohaka ki Waikare and Maungaharuru Tangitu Trust.

3.0 Tataramoa ki Moeangiangi

In 1866 a land title investigation was conducted by the Native Land Court for a block of land of 1092 acres at Moeangiangi, one of the few blocks for which a title investigation was conducted. Winiata Te Awapuni on behalf of himself and Pitihera Kopu stated at the hearing they belonged to Ngati Pahauwera and resided at Mohaka and claimed the land through ancestor Tataramoa and occupation and cultivation by ancestors as well as his father and himself and gave the following whakapapa:[20]



Te Retimana Ngarangipai also claimed the land by descent from Mutu an ancestor.[21] He said he was Ngatikuramakihi and Ngati Moe and lived at Tutira and Moeangiangi. Mutu was the former owner of the land. Te Retimana said Mutu invited Tataramoa to the land and both parties had continued to occupy it to the time of the Court. Sometimes in whakapapa tīpuna could be missed out.

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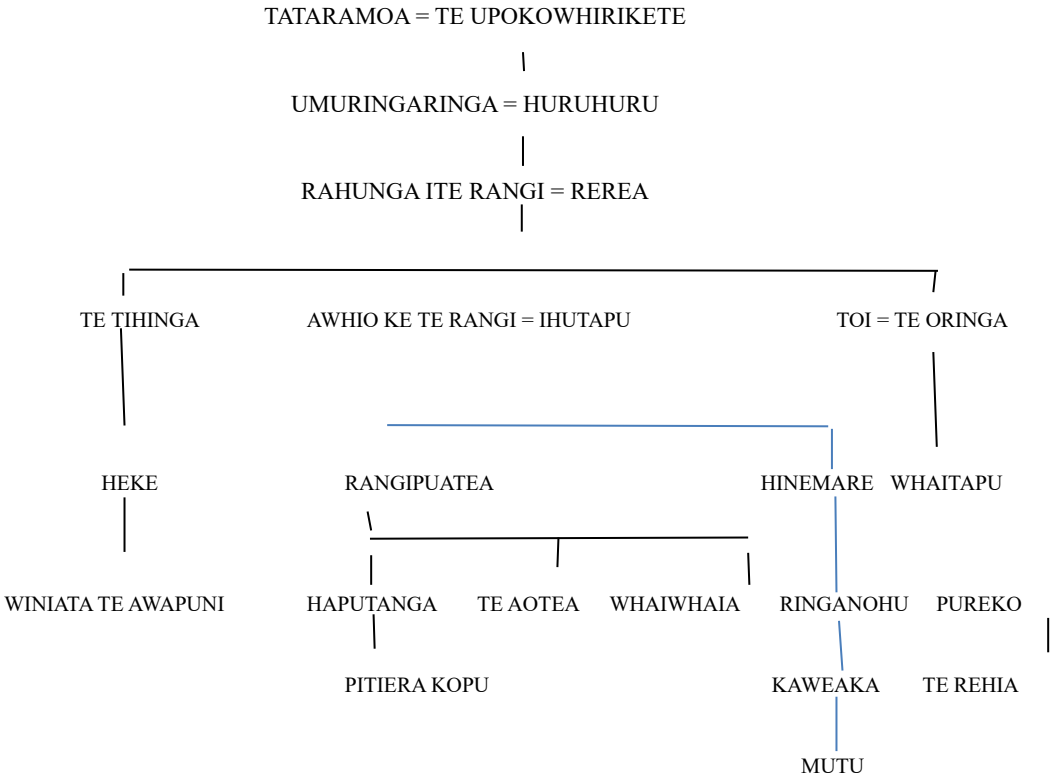
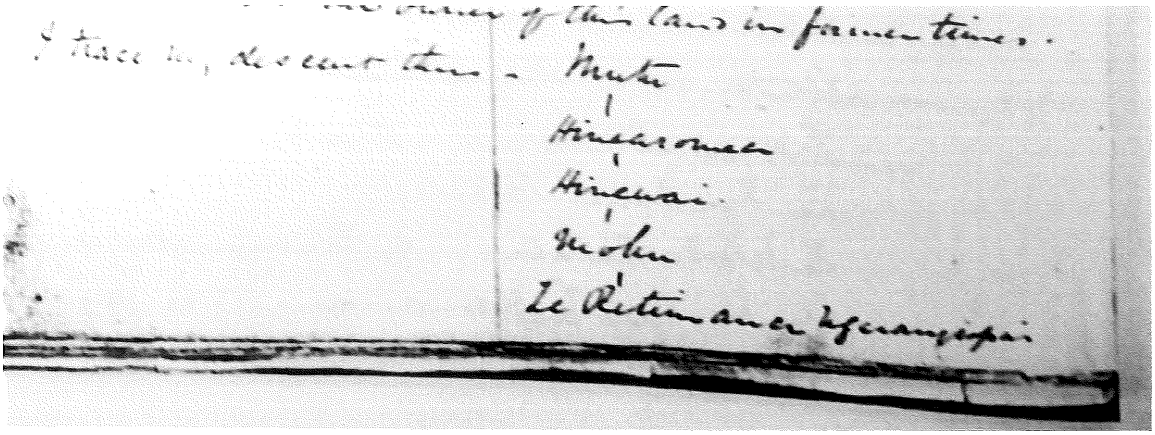
20 Napier MB 1 pp 78-79

21 Napier MB 1 pp 78-79

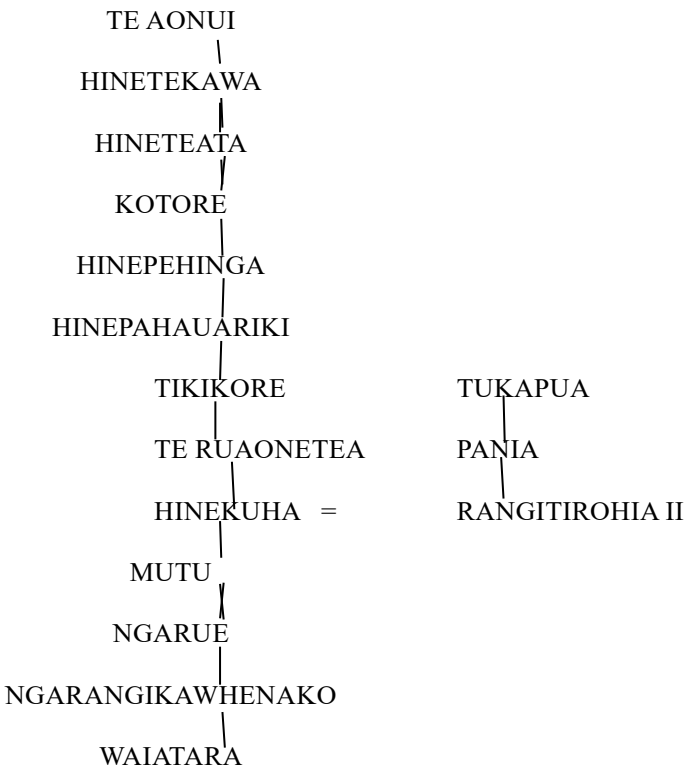


Parsons identifies Winiata Te Awapuni and Pitiera Kopu in this whakapapa above but does not mention that they claimed at belonging to Ngati Pahauwera.[22] Also he does not explain the difference between the MB whakapapa and the one he has produced



22 Parsons Mohaka ki Waikare Tab.. p8368

Claim by Te Retimana Ngarangipai of Ngati tatara and Ngati Aonui to Moeangiangi



This whakapapa from Parsons[23] showing Mutu descending from Aonui, the hapu shown in Guthrie Smith map of Tutira, Lands of Ngai Tatara, showing Te Aonui on the coast between Waikoau and Waikari Rivers.[24]

I have not seen in any document a reference to this claim to Moeangiangi by Winiata and Pitiera as being Ngati Pahauwera. There is a difference in the whakapapa for Pitiera in the Minute Book where he descends from Takirau and Parsons has another tīpuna. Without the benefit of relevant whakapapa the claim from Ngati Pahauwera individuals would reflect the marenarena category I have raised above.

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23 Parsons Tab pp 8391

24 Smith, G Tutira map between pages 66 and 67

Comments

Trying to put together our history and whakapapa and claims to our lands is a large and difficult task. It requires resourcing of a scale many of us find difficult to meet in terms of people with knowledge and ability to undertake any task without the mention of finance and other resources to research archives and communicate with whanau. We have to respond to challenges and demands with whatever resources or resourcing we can draw upon or have on hand.

My analysis above about the shortcomings of the identification of hapu by Maungaharuru Tangitu Trust is more about their use of material from their Treaty claim and Settlement processes for their MACA claims. The Treaty Settlement processes does not involve the same tests as MACA claims. Hapu claims can be very difficult compared to a claim by an iwi, and the hapu between Ponui and Keteketerau have a very difficult job of reconstructing and putting together whakapapa and korero from fragments because of the history of very early land sales, land confiscation and further land alienation during the twentieth century by the Crown over very marginal lands by colonial and post-colonial values.

Hirini Mako Mead has developed a framework using Tikanga Maori and Matauranga Maori to assess contentious issues to find a Maori position on these issues. His framework uses five test by which you can assess a Maori stance to an issue. I have taken one test.

Test 3: The Take-utu-ea aspect – Take (Issue) Utu (Cost) Ea (Resolution). Take-utu-ea refers to an issue that requires resolution. Once an issue or conflict has been identified, the utu refers to a mutually agreed upon cost or action that must be undertaken to restore the issue and resolve it.

My concern in respect of the Maungaharuru Tangitu Trust claim is that the whakapapa relied on does not establish exclusive mana moana for the hapu named. The resources of the Takutai Moana were shared. There may well be a basis for a claim of shared exclusivity but, as I understand it, that is not the basis on which this case has been put forward.

Des Kahotea

19 March 2021

APPENDIX 2: WHAKAPAPA SUMMARY

[1] This appendix is split into three parts. First, I will discuss the early occupation of the application area. Second, I will summarise the early tūpuna of the area. Finally, I will summarise the specific whakapapa of each of the applicant groups, namely:

(a) Ngāti Pāhauwera;

(b) Maungaharuru Tangitū Trust (MTT);

(c) Ngāi Tahu ō Mōhaka Waikare (Ngāi Tahu); and

(d) Ngāti Pārau.

[2] At this point, it is worth reiterating the Court's observations in *Re Edwards*:[1]

> Because the establishment of descent lines (whakapapa) and familial relationships (whanaungatanga), are critical in identifying which applicant group or groups held a specified area in accordance tikanga, it is necessary to set out the evidence given by the various applicants on this topic. I acknowledge the tapu nature of the whakapapa to the applicants, and stress that it is for the applicants to define and describe their own whakapapa, while it is the Court's role to consider whether, based partly on the whakapapa evidence provided by the applicants, the tests for CMT and PCR have been met. Put simply, the Court does not act as a final arbiter defining the whakapapa of the applicants.

[3] Therefore, as in *Re Edwards*, I preface these comments by noting that a number of witnesses emphasised the tapu nature of the evidence about whakapapa and the importance of treating whakapapa with care.

[4] One other matter that has arisen in this case is the use of unsigned briefs of evidence, and briefs given as evidence in other, earlier proceedings.[2] Rule 9.76(c) of the High Court Rules 2016 dictates that an affidavit must either be signed by the person making it, or if that person cannot write, have that person's mark set to it by that person.

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1 *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [302].

2 Such as the Mōhaka River claim to the Waitangi Tribunal, the Māori Land Court application under the Foreshore and Seabed Act 2004, and the Ngāti Pāhauwera Crown engagement process.

[5] However, s 105 of the Act provides that:

> In hearing an application for a recognition order, the Court may receive as evidence any oral or written statement, document, matter, or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible.

[6] This provides the Court with significant latitude to be flexible in dealing with the evidence adduced in proceedings before it under the Act. I consider that a sensible approach is to assess unsigned and/or older briefs of evidence on the basis of whether or not the assertions and facts stated in those briefs are disputed.

[7] An unsigned or older brief of evidence which discusses whakapapa or tikanga[3] that is undisputed between the parties may still be useful and hold some weight in the Court's assessment. However, the Court will be more reluctant to accord significant weight to an unsigned or older brief of evidence that contains facts or assertions that are disputed between the parties.

Early occupation

[8] As noted in *Re Edwards*, Māori have inhabited Aotearoa/New Zealand for the last millennium.[4] Evidence before the Waitangi Tribunal in the Mōhaka ki Ahuriri claim indicated that Māori have occupied the Hawke's Bay region since around the early 10th century:[5]

> According to radiocarbon dates from archaeological sites, Maori have occupied the Hawke's Bay region since about the early tenth century. The many pa on hillsides and promontories provide evidence of long occupation, although the initial settlements were not as elaborately fortified as pa such as Otatara, which was constructed by Turauwha at some point before the sixteenth century. Tribal traditions and whakapapa also indicate a long history of occupation in this region. The building of pa may represent the expansion of the descendants of Kahungunu into the region in the sixteenth century. The ancient tribes included Ngati Hotu, Ngati Mahu, Whatumamoa, and, later, Whatonga and his people from the Kurahaupo waka, which made a landfall on Mahia Peninsula.

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3 As discussed above, the Court's role is not to act as a final arbiter defining the whakapapa of the applicants, and it is for the applicants to define their own tikanga.

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

5 Waitangi Tribunal *Mōhaka ki Ahuriri Report* (Wai 201, 2004) at 3.4.

[9] Ms Pishief, an archaeologist who appeared as an expert witness for MTT, provided evidence of archaeological sites and records from around the Hawke's Bay which indicated human settlement and activity dating back to the 14th century. For example, in relation to the Heipipi-Kaimata cultural landscape (just north of modern-day Napier), Ms Pishief deposed:

> The sites include several pa, large kainga, smaller kainga, middens, storage pits and terraces and provide evidence of intense occupation of this range of hills well-sited above the Wai-o-Hinganga River and Te Whanganui-a-Orotu.
>
> The canoe slips at the northern end beneath Kaimata Pa are a rare indication of the connections with the sea and the importance of waka to these coastal communities.
>
> Dr Mark Allen obtained three radiocarbon dates from samples of shells taken from middens in the Heipipi Pa Historic Reserve as part of the research for his PhD on pa in mid-Hawke's Bay. The three dates range from c. 1510 to c. 1650 AD. In 2009 a further midden sample from an excavation at Esk Valley winery produced a date range between c. 1400 and c. l500AD.
>
> Although the archaeological research indicates the sites date from c. 1400 to 1650 AD, the area is highly likely to have been inhabited into the 1800s.
>
> Only one documented artefact has been found, an argillite toki from the Transitional or Archaic period (the earlier settlement era (c. 1300 to 1500 AD).

Early tūpuna and waka

Papatūānuku, Ranginui, and Ngā Atua Māori

[10] Many of the applicants began their whakapapa from Io-Nui/Io-Matua-Kore, to Papatūānuku and Ranginui and their children, ngā atua Māori (the Māori gods), down to the first humans and voyagers who travelled across Te Moana-Nui-a-Kiwa (the Pacific Ocean) to Aotearoa. In particular, a number of the witnesses for the applicant groups discussed their whakapapa connection all the way back to Tangaroa (the atua or god relating to the seas and oceans). Again, I reiterate the comments in *Re Edwards* – it is not possible in this decision to set out in full all of the extensive whakapapa evidence given, and no disrespect is intended by paraphrasing or summarising the evidence.[6]

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6 At [303].

[11] However, it is important for the purposes of these proceedings, and perhaps in the broader context of this legislation as a whole, to make a brief observation on the statements of several kaumatua appearing on behalf of the applicant groups, in relation to Tangaroa. According to these kaumatua, Tangaroa is not only an atua, or god, of the ocean but also a manifestation of the ocean itself, from which the applicants descend. It is important to understand this whakapapa connection in order to understand the perspectives and tikanga of the applicant groups in relation to the takutai moana.

[12] For example, Bevan Taylor, a kaumatua of a number of the hapū of the Maungaharuru Tangitū Trust, deposed that:

> Tangitū (the sea within our takiwa) is within the domain of Tangaroa-i-te-Rupetu (also known as Tangaroa). Tangaroa is the spiritual guardian of the moana (sea), waterbodies, and all within them. The descendants of Tangaroa and our Hapū are connected by whakapapa. Tangaroa's descendants include the whales, waves, ocean currents and fish life. Tangaroa is seen as a whole and indivisible entity including the moana, coastal waters, beds, rocks, reefs and beaches, springs, streams, rivers, swamps, estuaries, wetlands, flood plains, aquifers, aquatic life, vegetation and coastal forests. So the domain of Tangaroa goes from the tihi tapu (sacred peaks) of Maungaharuru to Tangitū - ki uta ki tai - from mountain to sea.

[13] Similarly, Toro Waaka, a kaumatua and applicant of Ngāti Pāhauwera, stated:

> The oceans became the abode of Tangaroa. Tangaroa is one of our ancestors. We accept we are sacredly interconnected with the environment as descendants of Papatūānuku and Tangaroa. We accept that through the oceans we are united with the many nations from whence many of our ancestors came.

[14] On behalf of Ngāti Pārau, Kay Taape Tareha O'Reilly stated:

> Growing up we learnt of the history of Tareha's connection and the descent from Tangaroa to Pania and Moremore coming further down to Hinetua and Tunui a Rangi, who was a powerful tohunga and Ngati Whatumamoa chief of Heipipi when Taraia arrived at Te Whanganui-a-Orotu.

[15] Finally, the Waitangi Tribunal's *Report on the Crown's Foreshore and Seabed Policy* discussed Tangaroa in the context of the relationship between the spiritual and physical world in te ao Māori:[7]

---

[7] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 1.3.1

> The relationship between Maori and the natural world is regulated by tikanga. This involves both spiritual and physical dimensions. There are elements of authority (mana) and law, ritual and use, which are rooted in the spirit world and the concepts of tapu (sacred) and noa (ordinary and free from restrictions). The rangatira and the tohunga perform the karakia and rituals that invoke the protection of the atua of the sea and govern use of its bounty. They are the focal point in the complex relationship between the atua of the natural world and the tangata whenua. Rima Edwards put it like this:
>
> > The essence of these karakia is seeking permission from Tangaroa to bless your going out to sea or your going to acquire food from the sea because it is Tangaroa who is God and Mauri of all these things and it is he who owns the sea and all its treasures within. It is by these values and practices that the life principle of the sea and all things within the sea, will remain fertile in perpetuity. The life principle of the sea remains alive and so man will remain alive.

[16] Witnesses for the applicant groups also discussed their whakapapa connections to other atua or deities. For example, witnesses for Ngāti Pāhauwera, including Cordry Huata and Toro Waaka discussed their whakapapa connection to Māui Tikitiki-a-Taranga, noting that the Mōhaka River mouth was referred to by Ngāti Pāhauwera as "Te Waha o Te Ika" or the "Mouth of the Fish" (of Māui).

[17] Furthermore, on behalf of MTT, Bevan Taylor referred to Ruamano, who according to the whakapapa given, was the son of Tangaroa; a whale that guided the waka Takitimu from Hawaiki to Aotearoa.

Tamatea and the Takitimu waka

[18] Throughout the evidence given by witnesses for all of the applicant groups, it was apparent that the Takitimu waka and tūpuna related to it, was a significant part of the early whakapapa of the iwi and hapū within the application area.

[19] It is difficult to pinpoint exactly when the Takitimu waka arrived in Aotearoa. In *Takitimu: A History of Ngāti Kahungunu*, J H Mitchell suggests that it arrived from Polynesia at some point in the 14th century.[8] Mr Tama Huata, a Ngāti Pāhauwera kaumatua who had given evidence during the Crown engagement process with

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[8] J H Mitchell *Takitimu* (Reed Publishing, 1944) at 80. I note however, that some caution must be taken with this date, given that Mitchell's text relies on the "Great Fleet" theory propounded by Percy Smith, which has since been effectively debunked – see *Tangata Whenua: A History*, above n 4, at 47.

Ngāti Pāhauwera in 2013,[9] deposed that the Takitimu was built in Polynesia in 1060, and travelled through a number of Pacific Islands before being sailed to Aotearoa by Tamatea Arikinui. The Takitimu waka made landfall further north on the East Coast, and then travelled down the country to the application area.

[20] Both Ngāti Pāhauwera and MTT witnesses referred to their connection back to the Takitimu waka. According to Toro Waaka, the Takitimu was captained by Tamatea Arikinui, whose son was Rongokako, who in turn had a son called Tamatea Pokaiwhenua, a well-known tupuna across the central North Island. Tamatea Pokaiwhenua's son was Kahungunu, who is discussed in more detail below.

[21] A number of Ngāti Pāhauwera and MTT witnesses discussed the Takitimu travelling through the application area. For example, Bevan Taylor discussed the impact of Ruawharo, a tohunga aboard the Takitimu, on the area:

> Also of particular significance is the korero about the mauri (life force) of fish and whales. Ruawharo was a tohunga aboard the waka Takitimu. He gathered sands from Hawaiki and took them aboard the waka. The sands held the mauri of fish life. Ruawharo had three sons, and to extend the mauri of fish life he placed each of his sons on different parts of the coast from Te Mahia to Heretaunga. Significantly for our Hapu he placed his son Makaro at Arapawanui to instil the mauri of fish and whales along our coastline.

[22] Toro Waaka made a similar observation:

> The principal tohunga on the waka Takitimu were two brothers Ruawharo and Tupai who were exponents in a range of esoteric knowledge. Amongst other skills Ruawharo was a known adept in karakia associated with enhancing the mauri of the sea whilst his brother Tupai had expertise associated with the mauri of birdlife and living things on the land. When the Takitimu sailed through what is known today as Hawke's Bay Ruawharo placed some of his children and a grandchild at different locations on the coast as kaitiaki of different foods in the ocean.

[23] In his historical report for MTT, Tony Walzl referred to a similar statement made by MTT kaumatua Fred Reti:

> As the voyaging waka Takitimu sailed down from and off the Mohaka coast towards Ngamoerangi at Tangoio, Tupai, a Tohunga, chanted a karakia (incantation), over the enchanted staff, Papauma. The fertility branch of Papauma had the power wherever it was placed, to make the surrounding area

[9] Mr Huata passed away in 2015. His brief of evidence was read out in these proceedings by his daughter, Narelle Karanema Huata.

> fruitful and in abundance. The Tohunga hurled the staff up into the heavens, where it flew inland to land atop the mountain range. On receiving the staff the mountain roared with joy and approval. That is how in legend the Maungaharuru range (the mountain that roared) got its name.

[24] This history was discussed by a number of other witnesses from Ngāti Pāhauwera and MTT, including Tania Hopmans, Maraea Aranui, and Cordry Huata. Notably, evidence given by Henry Raymond Adsett (now deceased) to the Planning Tribunal Inquiry regarding the Mohaka River Water Conservation Order in 1990 (and appended to the affidavit of Bonny Hatami, who gave evidence for Ngāti Pāhauwera), stated that in Raupunga (the wharenui at Te Huki Marae, a marae with affiliations to Ngāti Pāhauwera) there was a panel which depicted that story, titled the "Maungaharuru panel".

[25] Several Ngāi Tahu witnesses also discussed the role of the Takitimu in their history and whakapapa.[10] It appears that Tahupōtiki, the eponymous tupuna of Ngāi Tahu (including Ngāi Tahu ō Mōhaka Waikare), eventually took over the captaincy of the Takitimu, sailing it down the east coast of the North Island, and to Te Waipounamu (the South Island).

[26] Finally, Roderick Hadfield on behalf of Ngāti Pārau also referred to that hapū's connection back to the Takitimu waka in his brief of evidence, stating:

> Our primary marae is Waiohiki Marae, which is located in Waiohiki, south of Taradale. The marae connects ancestrally to the waka Takitimu, the maunga Hikuranga and Ōtaratara and the awa Tūtaekurī.

Paikea

[27] The position and role of Paikea within the whakapapa of the applicants differed between some groups; namely Ngāti Pāhauwera, and Ngāi Tahu. Paikea is perhaps best known as the voyager who arrived to Aotearoa on the back of a whale, and is a famous tupuna throughout the east coast of the North Island.

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[10] Although, as discussed below, Ngāi Tahu also place emphasis on their connection with the Horouta waka.

[28] In closing submissions, counsel stressed that Ngāi Tahu placed particular emphasis on their whakapapa connection back to Paikea and the Horouta waka, particularly in relation to Tahupōtiki:

> A key identifier for Ngāi Tahu ō Mōhaka-Waikare is their whakapapa. It is sacred and cherished. It is the literal source of who they are as a people and consequently it is important that accuracy, authenticity and propriety is maintained. Both Ngāi Tahu ō Mōhaka-Waikare and Ngāti Pāhauwera have whakapapa to the ancestor Paikea but they are different in substance. Toro Waaka agreed that they are different.

[29] According to Malcolm Kingi and Mary/Mere Lynne Brown, Tahūpotiki descended from Paikea, and also from Pouheni, a high priest of the Horouta waka. Dr Paul Husbands, an expert witness who gave evidence on the history of Ngāi Tahu, noted in his brief of evidence that:

> As set out in Ngāi Tahu whakapapa, Tahupōtiki was the younger son of Paikea, the legendary whale rider.

[30] Conversely, witnesses for Ngāti Pāhauwera described Paikea as being in a different position in their own whakapapa, and also discussed the current presence of Paikea as a taniwha, acting as kaitiaki over the Mōhaka River.

[31] Toro Waaka deposed that Paikea was the son of Uenuku, who descended from Māui Tikitiki-a-Taranga:

> Uenuku had another son, Ruatapu, who had caused the death by drowning of all of his brothers except Paikea (whose previous name was Kahutia o te Rangi). Paikea was able to summon up a whale to rescue him. The descendants of Ruatapu go down to Toto, who was the wife of Tamatea Arikinui of the waka Takitimu.

[32] Wayne Taylor, Cordry Huata, and Wiki Hapeta Taiamai[11] all deposed that Paikea was not only a tupuna of Ngāti Pāhauwera, but took the form of a taniwha that protected the Mōhaka River. As noted by Wayne Taylor, one of the hapū of Ngāti Pāhauwera is called Ngāti Paikea for this reason.

[33] Toro Waaka also acknowledged this, indicating in these proceedings (in relation to the Crown engagement process) that:

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[11] Wiki Taiamai's evidence was read out in Court by her daughter.

> Our tīpuna manifest themselves in forms other than human. Paikea is our Taniwha at the Mōhaka river mouth. Often they are ancestors, who in their passing return as guides and protectors for us. Paikea who came on, I gave his genealogy yesterday, he came to Aotearoa on the back of a whale…

[34] When examined by Mr Naden on this point, Mr Waaka indicated that Paikea, the tupuna and Paikea the taniwha, were one and the same:

> Are you saying the taniwha is a separate entity from Paikea, the whale rider?
>
> No, I'm saying that's the original one.
>
> They are one and the same?
>
> Yes.

[35] In noting this difference between the applicant groups, I do not intend to decide who is correct or to uphold the whakapapa of one witness over another. Instead, the key points to take away are that Paikea is clearly a significant ancestor for *both* those applicant groups – who can each claim whakapapa connections back to him, and that to Ngāi Tahu, Paikea is a key figure relating to their identity and the identity of their eponymous ancestor Tahupōtiki, while for Ngāti Pāhauwera, Paikea is both a prominent ancestor and a kaitiaki of the Mōhaka River, an awa of great significance to them.

Tahupōtiki

[36] As discussed above, Tahupōtiki is the eponymous ancestor of the applicant group Ngāi Tahu ō Mōhaka Waikare, and also the iwi Ngāi Tahu of Te Waipounamu. Malcolm Kingi discussed this in his brief of evidence:

> From this evidence I understand that Tahupōtiki was asked by Ngāti Porou kaumatua to leave his home at Whangara (north of what is now Gisborne) because of his secret love for Hamo o te Rangi, who was the wife of his tuakana (elder brother) Porourangi. The korero is that Hamo o te Rangi also loved Tahupōtiki. Tahupōtiki was exiled from his lands and was made to leave immediately. Many of his friends joined him on his hikoi, and at first, he stayed at Maraetaha (south of what is now Gisborne and north of Mahia) before he began his journey to Te Waipounamu (now also called the South Island). Soon after, he was called back to Whangara for the tangi of his brother. There he claimed Hamo o te Rangi for his wife, and afterwards, they left Whangara together and travelled to Maraetaha, and then to Maititi where they stayed for a while.

> There is korero that from there, Tahupōtiki and Hamo o te Rangi continued their hikoi south by sailing on the Takitimu waka down the east coast of Aotearoa New Zealand. They settled at Mōhaka for a time. Although Tahupōtiki continued his hikoi southwards, some of his descendants stayed at Mōhaka and eventually became known as Ngāi Tahu ō Mōhaka Waiakare. We understand that our tīpuna from Tahupōtiki include, Raka te-huru-manu, Raka-waha-kura I, Rakaiwhakaata, Tuwhaitara, and Tahumatua II. Tahumatua II was named after Tahupōtiki as he was also known as Tahumatua I.

[37] Importantly, according to Ngāi Tahu witnesses, Tahupōtiki descended from the Horouta waka, through Pouheni, and also had an older brother, Porourangi, the eponymous tupuna of Ngāti Porou. I discuss the whakapapa of Tahupōtiki and his descendants in greater detail below.

Kahungunu

[38] Like the other tūpuna discussed above and below, Kahungunu is an important and well-known ancestor in the application area and on the east coast of the North Island as whole. He is the eponymous ancestor of Ngāti Kahungunu, and according to the witnesses in these proceedings, was the son or descendant of Tamatea Arikinui or Tamatea Pokaiwhenua.

[39] According to the Waitangi Tribunal's *Mohaka ki Ahuriri Report*, Kahungunu was the son of Tamatea Arikinui, and settled at Maungakahia pā on the Māhia Peninsula after a life as a 'wanderer', but his descendants led his people in the early 16th century south into the Ahuriri area.

[40] Toro Waaka also discussed the role of Kahungunu in the Ngāti Pāhauwera whakapapa:

> Kahukuranui was the eldest son of Kahungunu. One of his wives was Tuteihonga who was a leading Ariki tipuna (chieftainess) of the Heretaunga/Whanganui a Orotū area. Their son Rakaipaaka and his people moved to the Heretaunga, Whanganui a Orotū area and established themselves based on the take tipuna (ancestral right) of his mother. The descendants of Rakaipaaka occupied a wide area between the Nuhaka region and the wider Ahuriri area and continue to do so.

[41] According to Mr Waaka, Tureia, an important tupuna for Ngāti Pāhauwera (discussed in more detail below), also descended from Kahungunu.

[42] The hapū of MTT also have a connection to Kahungunu. As noted by Tony Walzl in his historical report for MTT, two of the three early hapū of MTT, Ngāi Tauira and Ngāti Tū, both had whakapapa connections back to Kahungunu. In the case of Ngāi Tauira:

> As noted previously, Ngai Tauira are the descendants of Tauira, the great grandson of Tunuiarangi and descendant from Kahungunu through his mother Hinetapaturangi.

[43] In the case of Ngāti Tū:

> This subsection will examine what occurred when Tangiahi and Rangitirohia, grandsons of Tukapua I, who were born and raised at Turanganui, returned to the lands of their mother as members of Taraia's expedition. It will present a recorded Maungaharuru Tangitu perspective that Tangiahi, in particular, moved to protect his mother's people and ensure their continued independence, thereby laying the foundations for the emergence over time of the hapu Ngati Tu.
>
> As noted previously, Tukapua I, the eponymous ancestor of the Maungaharuru-Tangitu Hapu Ngati Tu, is extant four generations after Te Koaupari of Ngati Awa who came into Hawke's Bay from the Bay of Plenty. Tukapua I's daughter, Pania, married Tikorua and presumably joined his people at Turanga-nui-a-Kiwa. Tikorua was on Taraia I's southward expedition into Ahuriri. He was accompanied by both his sons, Rangitirohia I and Tangiahi who, judging by their recorded actions, were clearly adult warriors at this time.
>
> Taraia I and Tupurupuru were the sons of Rakaihikuroa, the grandson of Kahungunu and Rongomaiwahine…

Mahu Tapoanui

[44] According to the historical report of Tony Walzl on behalf of MTT, Mahu Tapoanui was an originating ancestor for "most if not all" hapū of Ahuriri. Walzl states:

> The explorer chief Mahu Tapoanui who, by some whakapapa was extant 22 generations before the mid-nineteenth century, is an originating tipuna for most if not all hapū of Ahuriri. In some traditions, Mahu is claimed as being an original inhabitant who did not arrive on a canoe. Although Mahu lived principally in the Mahia and Waikaremoana districts he visited Ahuriri as part of his explorations. The locality of Omahu, in Heretaunga, is named for Mahu Tapoanui. Seven generations later, a direct descendant of Mahu named Te Orotu, established his people in the Ahuriri district. The significant lagoon Te Whanganui-ā-Orotu is named for this ancestor. Two of Orotu's kāinga were located in the vicinity of the lagoon. One was on Tuteranuku Island. The other was at Tiheruheru at Poraiti. Heipipi pā may date from Orotu's

> settlement. Heipipi spreads along the Petane hills between Bay View and Kaimata. Eventually Orotu left Ahuriri in the possession of his son, Whatumamoa. His descendants became collectively known as Ngāti Whatumamoa. Their takiwā extended from the coast at Ahuriri far inland towards Taihape.

[45] Furthermore, in the Waitangi Tribunal's *Te Whanganui-a-Orotu Report*, the Tribunal stated:[12]

> Through the whakapapa produced by Rameka Pohatu (D12), the claimants established their identity as descendants of the first people of the area who are linked to 'the cosmos, to the land and to the waters of the region'. From Toi, the line of descent extends to Mahu, 'the very beginning of our people', who begat Orotu, who resided at Te Whanganui-ā-Orotu for at least part of his life. His son, Whatumoana, was born at Te Whanganui-ā-Orotou and was one of the original owners of the land. Finally, the line descends to Turauwha, the principal chief at Otatara when Taraia, son of Kahungunu, invaded and conquered Heretaunga 14 or 15 generations before 1850 (in about 1550).

Pania and Moremore

[46] Pania and Moremore were, and continue to be, important tūpuna and figures within the application area. The history of Pania and Moremore was summarised by the Waitangi Tribunal in its *Te Whanganui-a-Orotu Report*:[13]

> Mystically associated with Te Whanganui-a-Orotu is Tangaroa, who begat Ruamano, the guardian whale who led and navigated the waka Takitimu on its great voyage to Aotearoa. Especially important to the claimant hapu are two descendants: Pania, the sea maiden, and her son Moremore, whom she bore for her land-based lover before the sea people turned her into a rock at the entrance to Port Ahuriri (which used to be visible at high tide). The old people said that from a boat in the moonlight when the tide was out you used to see her lying there, with her legs astride and her arms outstretched to either side, seaweed all around where her head would be. They would get hapuku from under one arm, moki from under the other, and from between her legs another variety of fish.
>
> Moremore, a taniwha who was born with the head of a fish and the body of a human, lived in a cave in the sea just off Sturm's Gully, near the Iron Pot, and his descendants used to frequent the Ahuriri Heads in particular. He served his people of Te Whanganui-a-Orotu as a kaitiaki and caretaker, patrolling the coastal waters and inner harbours while they gathered kaimoana and fished. Strong, recurrent themes in the evidence of older claimants were the protection that Moremore gave from the perils of the sea, the maintenance of tikanga pertaining to the gathering of kaimoana, and the close affinity that Moremore had with the Tareha family.

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12 Waitangi Tribunal *Te Whanganui-a-Orotu Report* (Wai 55, 1995) at 2.2.1.

13 At 2.2.4.

> According to witnesses who have seen him, Moremore could change shape and turn himself into anything. More often than not, he was a shark, stingray, or octopus, but sometimes he was a rock or a big log. He appeared to warn them when danger was present or when they failed to observe customary rituals and protocols that conserved resources and maintained water purity.

[47] Ngāti Pārau in particular emphasised their whakapapa connections back to these two figures, as noted by Tamati Cairns, who discussed the presence of the two tūpuna in the kōrero at Waiohiki marae (a marae with Ngāti Pārau affiliations):

> Legends of taniwha and great kaitiaki are markers in history of mana, rangatiratanga and whakapapa. Ngāti Pārau has whakapapa – and in this context, kaitiaki is correct. Kaitiaki in this context are our deities, they are the principles and figures and taniwha that we the people whakapapa to or put in place to be the guardians of particular areas as in Moremore. Moremore is a kaitiaki and yet in time when he was of human form, one could say as he is mentioned he is the son and yet in another context he is now the kaitiaki.
>
> Ngāti Pārau has connections to Tangaroa, Pania. She is a tīpuna and tipua of Ngāti Pārau and her mana over this coastal area is inherited by the people of Ngāti Pārau.
>
> All of the kōrero in Waiohiki can be linked back to our relationship with Pania and when you include Pania then people understand that our relationship with the sea is strong. Pania is often in our karakia and is part of the landscape that supports the mana moana of Ngāti Pārau.
>
> The legend of Pania is well known, she is the kaitiaki of the reef and coastal area of Ahuriri. There have been sightings of her, but it is more common to see her son, Moremore.
>
> Moremore is a taniwha who often disguises himself as a white shark or white whale. It might be because a white whale is rare, or that the presence of a white shark that never approaches or attacks the people is rare.
>
> When I was young, my kuia always told me of Moremore, and how he maintained the relationship between the living people of the coast and Pania. It is widely known that this kaitiaki belongs to the Tareha whānau because of their direct whakapapa to Pania.
>
> Nowadays Pania has become an idol to another culture. Her story has been memorialised by Napier City and there is a statute of her which is a well-known tourist attraction.

[48] Kay Taape Tareha O'Reilly made a similar statement, in particular emphasising the connection of her Tareha whānau with Pania and Moremore:

> Growing up we learnt of the history of Tareha's connection and the descent from Tangaroa to Pania and Moremore coming further down to Hinetua and Tunui a Rangi, who was a powerful tohunga and Ngāti Whatumamoa chief of Heipipi when Taraia arrived at Te Whanganui-a-Orotu.

Specific whakapapa of the applicant groups

Ngāti Pāhauwera

[49] Ngāti Pāhauwera are a confederation of hapū located around Mōhaka in Hawke's Bay. Their traditional iwi rohe/tribal boundaries are based on those set down by Te Kahu o Te Rangi, a principal tūpuna of Ngāti Pāhauwera who lived before the time of the Treaty of Waitangi. David Alexander (who prepared a historical report on Ngāti Pāhauwera's customary interests in the application area for the hearing), summarised Ngāti Pāhauwera's early tūpuna and their connection to Ngāti Kahungunu in his brief of evidence:

> Ngāti Pāhauwera see themselves as being part of the Kahungunu peoples, though with a separate history that distinguishes them from other Kahungunu peoples, in particular Ngāti Kahungunu ki Wairoa to the north and Ngāti Kahungunu ki Heretaunga to the south. This separate identity revolves around Te Kahu o Te Rangi as their leader, through it is not just Te Kahu o Te Rangi who is being acknowledged. His forbears, such as his great grandfather Tureia, his grandfather Te Huki and his father Puruaaute, and earlier generations, are equally as important to establishing and developing the authority that Te Kahu held over his people, so that Te Kahu was consolidating the rangatira authority that his forebears had developed. Equally Te Kahu could not have maintained his authority during his lifetime on his own, and his close family, such as his brothers Popoia, Tapuae and Kapuamatatoru, played a significant role in supporting his leadership. In that sense the confederation's identification with Te Kahu o Te Rangi is representative of a more extensive time period during which the separate identity of Ngāti Pāhauwera was developed, than just during Te Kahu's own lifetime.

[50] As discussed above, the pre-1840 whakapapa and history from which Ngāti Pāhauwera derive their mana over the application area can be traced back to tūpuna such as Māui Tikitiki-a-Taranga, Tamatea Arikinui and Tamatea Pokaiwhenua, Paikea, and Kahungunu. According to the evidence of Toro Waaka, from Kahungunu, several generations down, descended Tureia, whose son was Te Kupenga-a-Te Huki (also known as Te Huki), whose son in turn was Puruaaute, and from Puruaaute descended Te Kahu o Te Rangi and Popoia.

[51] It was evident from the evidence given in these proceedings that the tūpuna Tureia, Te Huki and Te Kahu o Te Rangi form a critical part of Ngāti Pāhauwera whakapapa, and it is worth briefly discussing each one.

[52] Tureia is an important tupuna in the context of the whakapapa and historical relationship between Ngāti Pāhauwera and Ngāi Tahu. According to Toro Waaka and Cordry Huata, Tureia is five generations removed from Kahungunu, and was involved in a battle at Mōhaka, where he drove Ngāi Tahu out of their pā, and settled the area with his siblings. Those peoples united under his leadership were known as Te Tini o Tureia – a collective of hapū joined under Tureia's leadership for protection.

[53] During the hearing, witnesses from Ngāi Tahu expressed firm opposition to this version of events. I discuss their whakapapa perspective on Tureia under the "Ngāi Tahu" section below.

[54] Te Huki was the son of Tureia. Toro Waaka described him as a renowned figure who had a number of politically strategic marriages, creating interrelationships between iwi and hapū across a large stretch of the east coast, from Whangara down to Te Poroporo (near Porangahau). These descent lines across the east coast, all connected back to Te Huki, became known as Te Kupenga o Te Huki (the Net of Te Huki). As with Tureia, Ngāi Tahu also have a different perspective on Te Huki's whakapapa – namely that Te Huki directly descended not only from Kahungunu, but also from Tamateahirau, a direct descendant of Tahupōtiki.

[55] Te Kahu o Te Rangi and his brother Popoia were grandsons of Te Huki, and sons of Puruaaute. According to Toro Waaka and Canon Wi Te Tau Huata,[14] Te Kahu o Te Rangi was a foundational tupuna for Ngāti Pāhauwera, and was critical in setting the modern boundaries and identity for the group. In particular, Te Kahu o Te Rangi was involved in a number of battles and engagements throughout his rohe in in the Hawke's Bay area, and it was from him that the name "Ngāti Pāhauwera" was said to originate.

[56] Turning to the more recent period, his brief of evidence David Alexander cites a report by Angela Ballara and Gary Scott written for the Mōhaka ki Ahuriri inquiry,

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[14] Mr Canon Wi Te Tau Huata was a respected kaumatua and pastor of Ngāti Kahungunu and Ngāti Pāhauwera who passed away in the 1990s. His evidence, given to the Planning Tribunal in 1990, was read out in these proceedings by his daughter, Ms Ngatai Huata.

where they make the following observation about Ngāti Pāhauwera in the 18th to mid-19th centuries:[15]

> The area of land from the Waihua River, south of Wairoa, to Tangoio, and inland to the Upper Mohaka River, was dominated in the eighteenth century and later by the major tribe Ngāti Pāhauwera. They were hybrid people, with links to both Ngāti Kahungunu migrants from Turanganui and pre-Kahungunu occupants of the area. In the Land Court they were found to have links from Waihua to Moeangiangi…
>
> While Ngāti Pāhauwera and its associated hapū dominated the larger area and beyond it, and its claims to territory, including intermarriage, were interspersed with those of other hapū, a number of other hapū had clear claims to various areas in the Mohaka-Waikare blocks.

[57] Alexander notes that in 1840, the hapū of the area were still recovering from major upheavals of the past two decades, including conflicts from the musket wars, raiding taua (war parties) and early European settlement, but by the 1840s, hapū were gradually returning to the area. Alexander stressed that while there may have been a partial loss in the occupation of the area, because none of the coastal peoples in Hawke's Bay were displaced by conquest, "life picked up again in generally the same patterns of occupation, and therefore occupation rights, as previously", with the main difference being that people lived in undefended kāinga rather than in defended pā along the coast at Waihua, Mōhaka, Waikare, Moeangiangi, Aropaoanui, Ngāmoerangi and Tangoio.

Maungaharuru-Tangitū Trust

[58] The Maungaharuru-Tangitū Trust is a post-settlement governance entity established in 2012 to represent a collection of hapū including Ngāti Kurumōkihi, Ngāti Marangatūhetaua (Ngāti Tū) , Ngāti Whakaari, Ngāi Tauira, Ngāi Te Ruruku ki Tangoio and Ngāi Tahu.

[59] The marae for the Hapū is located at Tangoio, approximately 20km north of Napier. Ms Tania Hopmans, the Deputy Chief Executive of the Trust, explains in her affidavit the whakapapa behind the Trust and its coastal rohe:

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[15] See Angela Ballara and Gary Scott *Crown Purchases of Māori Land in Early Provincial Hawke's Bay* (January 1994, Wai 201, #I1).

> The name Maungaharuru-Tangitū, used in the name of our post settlement governance entity (and the previous incorporated society), encapsulates who the Hapū are that we represent, our key traditions and the resources we have enjoyed for many, many generations from our customary lands and coast.
>
> Maungaharuru is the maunga tapu (sacred mountain) which defines our western boundary. But the maunga is more than that: it is the source of essential sustenance for the Hapū and the waters flowing from the maunga feed the streams, rivers, aquifers, lakes, wetlands and sea and all those waterbodies come within the realm of Tangatora-i-te-Rupetu (the spiritual guardian of the moana and waterbodies, and all within them). Tangaroa's realm is interconnected therefore from a mātauranga Māori perspective, and viewed as an indivisible whole…
>
> Tangitū is the coast and sea adjacent to the lands of the Hapū; it is also the Hapū kaitiaki (guardian) which takes the shape of a whale, and it contains innumerable taonga (treasures) and resources which have fed and nurtured the Hapū over many generations.
>
> …
>
> From Maungaharuru to Tangitū lies our takiwā. Our most significant whakatauākī (tribal proverb) describes this relationship and the interdependence of the mountain and the sea:
>
> Ka tuwhera a Maungaharuru, ka kati a Tangitū, Ka tuwhera a Tangitū, ka kati a Maungaharuru.
>
> When the season of Maungaharuru opens, the season of Tangitū closes, when the season of Tangitū opens, the season of Maungaharuru closes.

[60] The whakapapa, history and customary interests of the hapū represented by MTT are set out in a detailed report prepared by Tony Walzl, as well as through kaumatua and tikanga evidence given in the form of affidavits from Bevan Taylor, Justin Puna and Tania Hopmans.

[61] In Ms Hopmans' 3 April 2017 affidavit, she described the origins of the current MTT hapū as descending from three early groups of people:

> (a) Ngāti Whatumoana: the descendants of the explorer chief Mahu Tapoanui. Mahu's direct descendant Te Orotu established his people permanently at Ahuriri;
>
> (b) Ngāti Awa: the descendants of the explorer Toi Kairakau (also known as Toi Te Huatahi). Toi established his southernmost pā (fortified village) at the head of the Tangoio valley; and
>
> (c) Ngāi Tahu: the descendants of Te Keu-o-te-rangi originally inhabited the lands bordering the Waikari River.

[62] As set out above, MTT represents the interests of six separate hapū. I will now briefly set out the evidence detailing the origins of each hapū and their founding tūpuna.

[63] Starting with Ngāti Tū. According to Tania Hopmans, the "source ancestor" for Ngāti Tū was Tūkapua I. Tūkapua I was direct descendant of Toi Kairakau, a famous navigator and seafarer who established his southernmost pā at the head of the Tangoio valley, called Te Pā-o-Toi. Toi's son Awanuiarangi (the eponymous ancestor of Ngāti Awa of Te Moana-a-Toi/the Bay of Plenty) had a great grandson, Te Koaupari, who travelled to the Ahuriri area from the Bay of Plenty while in turn, Tūkapua I was the great, great-grandson of Te Koaupari. Tony Walzl notes that while the timing of Te Koaupari's arrival in the area has been debated, he is generally associated with the Otatara pā (located on the banks of the Tūtaekurī River) and may have been its original builder.

[64] However, as noted by Ms Hopmans, while Tūkapua I is the 'source ancestor' for Ngāti Tū, the ancestor from whom the hapū is named is in fact Marangatūhetaua, a famous fighting chief who was the great, great, great grandson of Tūkapua I. The hapū is named after him in recognition of his many deeds and respect that he earned.

[65] Another ancestor descending from Toi and associated with MTT is Tangoio, as noted by Mr Walzl:

> One ancestor from Te Tini o Toi who is associated with the Maungaharuru-Tangitū landscape is the giant Tangoio. Kaumatua Fred Reti has presented a narrative relating to Tangoio.
>
> > One day the giant Tangoio was practising his skills as a warrior by spearing the waves of the sea, not far from the mouth of the Te Ngarue stream, on the Tangitū shoreline. So absorbed was he at the task in hand, that he failed to notice a Taua (war party) came up from behind him. Before he realised anything was amiss he was overpowered and mortally wounded. Looking up at the ancient pa Te Rei o Turei, Tangoio asked his enemies to change its name to Te Rei o Tangoio [sic] (forehead of Tangoio) so that his name would never be forgotten. And so it is that the pa and valley, to this day, bears his name.

[66] Tania Hopmans also deposed in her 2017 affidavit that two early but now extinct hapū in the area, Ngāi Te Aonui and Ngāti Rangitohumare, were absorbed into Ngāti Tū over time through intermarriage:

Ngāi Te Aonui

> Rangitirohia II of Ngāti Tū married Hinekahu of (a different) Ngāi Te Aonui based in the Wairoa district. Their son was Mutu, and their descendants also became known as Ngāi Te Aonui and were based at Moeangiangi. The source of their mana whenua was through Rangitirohia II. Over time, Ngāi Te Aonui was absorbed by Ngati Tū through further intermarriage. Ngāi Te Aonui were also known to have occupied the pa Te Puku-o-to-Wheke at Arapawanui.

Ngāti Rangitohumare

> Ngāti Rangitohumare takes its name from Rangitohumare, the first wife of Te Huki of Wairoa. Rangitohumare was born and raised at Oueroa pā in Heretaunga. They had numerous children, including Te Hauwaitanoa. Te Hauwaitanoa settled at Arapawanui and it is from Te Hauwaitanoa's descendant, Toroa, that Ngāti Rangitohumare descend. A small hapū, Ngāti Rangitohumare was over time absorbed into Ngāti Tū through intermarriage. Ngāti Rangitohumare were known to have occupied the pa Te Puku-o-te-Wheke at Arapawanui.

[67] Secondly, Ngāi Tauira. This hapū descends from Ngāti Whatumoana, who are in turn the descendants of the early tūpuna who visited Ahuriri area, Mahu Tapoanui. Seven generations down from Mahu Tapoanui, Te Orotu (the namesake for Te Whanganui-ā-Ōrotu) established his people permanently in the Ahuriri area. While Te Orotu eventually abandoned the area, he left Ahuriri under the control of his son, Whatumoana, the eponymous ancestor of Ngāti Whatumoana from whom Ngāi Tauira descend.

[68] Tūnuiarangi, described by Tony Walzl as a "key ancestor" for MTT, with ancient connections to their takiwā, descended from and led the Ngāti Whatumoana hapū:

> Tunuiarangi (also known as Tunui) is a key ancestor for Maungaharuru-Tangitū with ancient connections to their takiwā. Kaumātua Fred Reti described Tunuiarangi as "a tohunga of immeasurable power and sorcery". Tauira is a descendant of Tunuiarangi. He is the eponymous ancestor for Ngai Tauira, one of the Hapū of Maungaharuru-Tangitū Tunuiarangi was a descendant of Tangaroa, the lord of the sea. The lineage of whakapapa descends through Tangaroa' s son Ruamano, the guardian whale that led and navigated the waka Takitimu on its great voyage across Te Moana-nui-a-Kiwa (the Pacific Ocean) to Aotearoa. The whakapapa descends further down through Tangaroa's children to Pania the sea maiden who was turned into a rock formation under the sea situated off the Port of Napier. Before being turned into a rock she bore a son, Moremore. Moremore, often seen in the form of a shark, had the ability to transform itself into other sea creatures. As well as Tangitū he is a kaitiaki for the coast of Te Matau-a-Mauī and Tangitū.

[69] Tauira, the eponymous ancestor of Ngāi Tauira, was the great-grandson of Tūnuiarangi. According to Tania Hopmans, Ngāi Tauira is an ancient hapū, preceding Ngāti Tū, but having been largely absorbed into it through intermarriage.

[70] Thirdly, Ngāi Tahu. According to Tony Walzl, Tahumatua II is the eponymous tupuna of Ngāi Tahu, and was acknowledged as having established a takiwā within the Waikare district. Within his takiwā, Tahu and his descendants moved about the land on both sides of the Waikari River, and that permanent occupation within that takiwā was said to have begun with Tahu's son Tamakonohi and continued with his grandson Te Otaha and then their descendants.

[71] Tania Hopmans made the following observation about Ngāi Tahu in her 2017 affidavit:

> Ngāi Tahu was a small hapū which had ahi-kā-roa along the Waikari and Waitaha Rivers and their tributaries. The eponymous ancestor of Ngāi Tahu is Tahumatua II. Tahu's descendant, Te Keu-o-te-Rangi, fathered four children: Toenga, Tukapuarangi, Te Whiunga and Hinekaraka. The descendants of these four children were known as Ngāi Tahu and those who maintained their occupation were the tangata whenua. Various branches of Ngāi Tahu were known by other names and represented smaller family groups, such as Ngāti Hikapii, Ngāti Hineiro, Ngāti Moe, Ngāti Peke, Ngāti Rangitakuao, Ngāti Tataku and Ngāi Te Maaha. There are kāinga and pā associated with Ngāi Tahu along the Waikari, Anaura and Waitaha Rivers and their tributaries. The kāinga and pā of Ngāi Tahu in the lower Waikari River area, and as far north as the Waitaha Stream, include Kumarawainui, Tutaekaraka, Hurihanga, Takapuwahia, Tokatea, Pukepiripiri, Puketaiata, Tauwhare and Kaiwaka. The kāinga and pā in the upper Waikari River and its tributaries include Te Nakunaku, Waipopopo, Tawhitikoko, Patokai and Tiekenui.

[72] Fourthly, Ngāti Kurumōkihi. This hapū, formerly known as Ngāi Tatara, were described by Tania Hopmans as a group who emerged from the interaction between Ngāti Tū and the Ngāti Kahungunu migrants, Taraia I and his generals, who had come into the takiwā. One of Taraia I's most influential generals was Kahutapere II, who married Hineterangi of Ngāti Awa, and established himself in Te Whanganui-ā-Ōrotu, having five children including Tataramoa, the eponymous ancestor of Ngāi Tatara.

[73] Tataramoa lived around the same time as Marangatūhetaua of Ngāti Tū. Marangatūhetaua was said to have given Tataramoa the task of stopping raiding war parties. According to Ms Hopmans, Tataramoa and his people were particularly

associated with Moeangiangi on the coast and with the inland areas around Lake Tūtira.

[74] Later events at Lake Tūtira saw the hapū changes its name to Ngāti Kurumōkihi. Tony Walzl described these events in his report, discussing the raids by Tūhoe on the pā of Taurangakōau, a pā used by Ngāi Tatara on Lake Tūtira. During an attack, Ngāi Tatara warriors used mokihi, or rush-rafts in battle.

[75] Fifthly, Ngāi Te Ruruku. Their presence in the area dates back to the time of Marangatūhetaua and Tataramoana. According to Tania Hopmans, both these rangatira were "getting on in years" when friction broke out between their people and another hapū, named by Tony Walzl as Te Hika-o-te-Rautangata. Marangatūhetaua enlisted the help of Te Ruruku, a Ngāti Pāhauwera rangatira based in Wairoa, who helped Ngāti Tū and Ngāi Tatara to repel the invading hapū. In return, he was gifted land. Tania Hopmans describes the gift and Te Ruruku's takiwā as set out above.

[76] Finally, Ngāti Whakaari. Tania Hopmans describes their whakapapa as follows:

> Ngāti Whakaari is a section of Ngāti Tū that lived at Petane. Their founding chief is Whakaari. He is a descendant of the Ngāti Tū chief, Kohipipi through his son Te Kaupeka. The pa site Whakaari (also known as Flat Rock) is believed to have been named after the ancestor Whakaari.

[77] Walzl also makes the following observation:

> The small hapū Ngāti Whakaari are named after an eponymous ancestor who was a descendant of Tangiahi through Kohipipi's son Kaupeka. Whakaari was extant at the beginning of the nineteenth century. It is thought that he is associated with the headland that bears his name. He also is associated with the death of Te Ruruku being in the fishing waka with him.

Ngāi Tahu ō Mōhaka Waikare

[78] Ngāi Tahu ō Mōhaka Waikare (Ngāi Tahu) are a group that descend from the eponymous tupuna of Tahupōtiki (Tahumatua I) and Tahumatua II. Tahupōtiki is also the eponymous tūpuna of the Ngāi Tahu iwi (or in their own mita or dialect, Kāi Tahu) in Te Waipounamu/the South Island. Malcolm Kingi, who made the application to this

Court on behalf of Ngāi Tahu ō Mōhaka Waikare, explains the relationship between Tahupōtiki and his hapū as follows (emphasis added):

> Tahupōtiki was the teina (younger brother) of Porourangi, and their parents were Nanaia and Niwaniwa. Nanaia's father was Tarahakatu, the son of Pouheni, a high priest of the Horouta waka. Porourangi and Tahupōtiki are important tīpuna of Ngāi Tahu ō Mōhaka Waikare. Both Porourangi and Tahupōtiki have connections to Paikea, Huturangi, Te Whironui, Whatonga, Toitehuatahi and Maui.
>
> …
>
> From this evidence I understand that Tahupōtiki was asked by Ngāti Porou kaumatua to leave his home at Whangara (north of what is now Gisborne) because of his secret love for Hamo o te Rangi, who was the wife of his tuakana (elder brother), Porourangi. The korero is that Hamo o te Rangi also loved Tahupōtiki. Tahupōtiki was exiled from his lands and was made to leave immediately. Many of his friends joined him on his hikoi, and at first, he stayed at Maraetaha (south of what is now Gisborne and north of Mahia) before he began his journey to Te Waipounamu (now also called the South Island). Soon after, he was called back to Whangara for the tangi of his brother. There he claimed Hamo o te Rangi for his wife, and afterwards, they left Whangara together and travelled to Maraetaha, and then to Matiti where they stayed for a while.
>
> There is korero that from there, Tahupōtiki and Hamo o te Rangi continued their hikoi south by sailing on the Takitimu waka down the east coast of Aotearoa New Zealand. They settled at Mōhaka for a time. Although Tahupōtiki continued his hikoi southward, some of his descendants stayed at Mōhaka and eventually became known as Ngāi Tahu ō Mōhaka Waikare. We understand that our tīpuna from Tahupōtiki include, Raka-te-huru-manu, Raka-waha-kura I, Rakaiwhakaata, Tuwhaitara, and Tahumatua II. Tahumatua II was named after Tahupōtiki as he was also known as Tahumatua I.

[79] Mary/Mere Brown, who filed a brief of evidence and also has whakapapa to Ngāi Tahu, has explained the rohe of Ngāi Tahu and its connection back to Tahupōtiki:

> The rohe of Ngāi Tahu ō Mōhaka Waikare extends from the Mōhaka River, down to the Esk River outlet; then you follow the Esk River right along the Napier-Taupo Road, to the bridge which crosses the Mōhaka and then you follow the River eastwards, back to its mouth.
>
> After Tahupōtiki left the Mohaka and hikoied to the South Island, the descendants of Tahupōtiki set the boundaries and maintained ahi kaa (keeping the fires burning) over the whenua, and the takutai moana. I have read the Te Kuta minute books, and the korero of Raiha, my great-great-grandmother's sister is documented. In the Te Kuta investigation she is documented as saying that it was Tahumatua II who set the boundaries of our whenua.
>
> …

> I believe that since then, the whenua and the moana from Mohaka to Petane has belonged to Ngāi Tahu ō Mōhaka Waikare. There are names on whenua along the coastline, and further inland, which demonstrate our mana whenua, such as the stream, Tahumata near Lake Tutira.

[80] Ngāi Tahu assert their rights of mana whenua over the application area through their descent/whakapapa back to Tahumatua I and Tahumatua II. According to the affidavits of Malcolm Kingi and Mary Brown, it was Tahumatua II, one of Tahupōtiki's descendants who did not follow him down to the South Island and kept ahi kaa in the area, that set the tribal rohe/boundaries for Ngāi Tahu.

[81] However, as noted by counsel in closing submissions, Ngāi Tahu consider their "original ancestor" to be Tahupōtiki/Tahumatua I. According to evidence given by Mr Kingi and Ms Brown, Tahupōtiki travelled with his wife, Hamo o Te Rangi, into the Mōhaka-Waikare region for a period of time before they left for the South Island. While in the area, they were said to have laid down a boundary, established a house at Pūtōrino, and initiated a Ngāi Tahu settlement. According to Mr Kingi, the lands that were obtained by Tahumatua II, passed down the generations from Tahupōtiki's descendants, were in turn passed down to his son Tahutoria, to Tamakonohi, to Te Otaha, to Hinetonga, to Te Keu o Te Rangi, and to Toenga.

[82] Ngāti Pāhauwera's position[16] was that Tureia defeated Tahutoria and Ngāi Tahu in battle at the mouth of the Mōhaka River, and in turning extinguished their ahi kaa and mana whenua over the area. The Ngāi Tahu witnesses refuted this, and stated that Tureia was the son of Tamateahirau, who was the younger sister of Te Otaha (and therefore both were granddaughters of Tahutoria), and therefore the unlikelihood that Tureia would attack those who had direct whakapapa connections to, or the fact that the historical timing appeared to be off (in that it was unlikely Tureia would have fought his great-grandfather) undermined Ngāti Pāhauwera's position on this issue. Mr Kingi also noted:

> The idea that Tureia conquered Tahutoria is disputed by the evidence presented in the Te Kuta minute books that Tahutoria passed his mana down to Te Otaha, and Te Otaha to Hinetonga, and Hinetonga to Te Keu o te Rangi. Therefore, the whakapapa line, and the rights to the ancestral lands, and mana whenua from Tahutoria, through to Huka and down to my daughter, Maria, has not been stopped.

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[16] Discussed in detail at [406]-[414] of this decision.

[83] In oral evidence, Cordry Huata of Ngāti Pāhauwera conceded that Ngāi Tahu had not been entirely decimated by Ngāti Pāhauwera:

> Q. If that is we've discussed the application of *Tahutoria*'s boundary means that that's a *Ngāi Tahu* boundary, can that mean that *Ngāi Tahu* were not conquered?
>
> A. Well I think it's about a conception of what does "conquered" mean because I don't believe people were conquered. They we're – you know it's just like I still carry *Tahu* in me. I still carry a whole lot of stuff in. To be conquered is to be what? Decimated, gone, disappeared? But that's not how, that's not how the conquest happens. I think, I think it's something where someone becomes more prominent than others.
>
> Q. So your reference to *conquered* here isn't a reference to being decimated or exterminated?
>
> A. No. They were still, they still remained there, they still intermarry. Because if you follow that *Kautata* line you're gonna find it goes on to – that comes out at *Tuhemata* also and *Tuhemata* is *Ruataumata's* brother and that has a *Kahungunu* line. They intermarry.
>
> Q. I suppose another way of putting your position here is that there are still *Ngāi Tahu* people walking around today who descend from *Tahu Pōtiki*?
>
> A. Oh yes.

[84] What appears to be apparent from the evidence is that even if Ngāi Tahu were attacked and defeated, or even if they still remained and were not decimated, intermarriage between Ngāi Tahu and Ngāti Pāhauwera occurred, resulting in shared interests, mana whenua and whakapapa in the Te Kuta block area and between the Waikari River and the Pōnui Stream.

[85] Finally, Ngāi Tahu consider themselves to be an iwi with own distinct hapū, including Ngāti Kautata, Ngāi Tātaku, Ngāti Taihere, Ngāti Rauwiri, Ngāti Mawete, Ngāi Te Maaha, Ngāi Hineiro, Ngāti Moe and Ngāti Rangitakuao. However, as discussed above, MTT and Ngāti Pāhauwera consider Ngāi Tahu to be a hapū related to their group/confederation. Tania Hopmans acknowledged that Ngāi Tahu had branches or "smaller family groups", while Mr Alexander noted that:

> …in the same manner as the Maungaharuru Tangitū hapū, the hapū of Ngāi Tahu Mōhaka-Waikare are recognised by the Ngāti Pāhauwera Treaty Claims Settlement Act 2012 as being hapū of the Ngati Pāhauwera collective or confederation.

[86] Ultimately, whether Ngāi Tahu are an iwi or a hapū does not affect whether they can make an application under the Act. This is because under s 9(1), an applicant group is defined as one or more iwi, hapū, or whānau groups that seek recognition under Part 4 of the Act over their PCR or CMT by recognition order or an agreement. Therefore, as either as a hapū or an iwi, Ngāi Tahu would fit this definition.

Ngāti Pārau

[87] Ngāti Pārau are a hapū based in Te Whanganui-ā-Ōrotu (also known as Ahuriri Estuary). According to the affidavit of Roderick Hadfield, Ngāti Pārau descend from the tūpuna of Pitaka Te Otupeka and Tāreha Te Moananui (a rangatira of Ngāti Kahungunu hapū, including those in the Ahuriri area). He deposed:

> The interests in the lands and seas to our immediate north are our whanaunga, Ngāti Hinepare, Ngāti Mahu and Ngai Tawhao. This boundary is traditionally based on whakapapa and the continued exercise of rangatiratanga by Ngāti Pārau.
>
> The interests in the lands and seas to our immediate south are our whanaunga, Ngāti Hawea. This boundary is marked by Te Umuroimata and an old pā near Park Island and out to Pania reef, this boundary is considered a wāhi tapu site for Ngāti Pārau.

[88] The primary marae of Ngāti Pārau is Waiohiki Marae, which is located in Waiohiki, south of Taradale. The marae connects ancestrally to the waka Tākitimu, the maunga Hikuranga and Ōtātara, and the awa Tūtaekurī.

[89] According to the affidavit of Kay Tareha-O'Reilly, Ngāti Pārau assert their mana whenua and customary rights over their application area through their whakapapa back to a number of tūpuna, down from the atua Tangaroa, to Pania and Moremore (the son of Pania), down to Hinetua and Tunuiarangi, down to Hikawera II. Tamaiti Cairns described Hikawera II as a tupuna who had tino rangatiratanga and mana from Tangoio to Hastings, and that:

> It was the responsibility of Hikawera and his hapū to exercise manaakitanga over these lands and coastal areas, to protect the rangatira of the whenua and takutai on behalf of the whānau. Hikawera's tino rangatiratanga and mana has not been extinguished. It exists through his descendants of Ngāti Pārau who have continued to exercise mana and manaakitanga over these same areas.

[90] According to Martin Fisher, who prepared a historical report for the hapū, Ngāti Pārau are the descendants of Hikawera II through his two sons, Tuku a Te Rangi, and Te Kereru. Through the rights provided by Tuku a Te Rangi, his grandson Rangikamangungu continued to maintain his tupuna's interests near the southern end of Te Whanganui-ā-Ōrotu and towards the coast.

[91] Mr Fisher further noted that Ngāti Pārau are also the descendants of Tuku a Te Rangi's brother, Te Kereru, whose interests ranged into the southwestern corner of the former pre-quake Te Whanga and current edge of the Ngāti Pārau claimed area in the Ahuriri estuary at Te Umuroimata pā near Park Island.

[92] Rangikamangungu's grandson was Tāreha Te Moananui, who according to William Colenso, was one of the five principal chiefs at Ahuriri in the late 1840s. Tāreha was also known as a rangatira of Ngāti Kahungunu and Ahuriri hapū who had significant involvement in the Mōhaka and Ahuriri purchases in the 19th century.