IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-817
[2022] NZHC 2644

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	the late Claude Augustin Edwards (deceased), Adrian Edwards and others on behalf of Te Whakatōhea
BY	Dean Flavell on behalf of Hiwarau C, Turangapikitoi Waiōtahe and Ōhiwa of Whakatōhea (CIV-2017-485-375)
BY	Larry Delamere on behalf of Pākōwhai Hapū (CIV-2017-485-264), and Te Whānau-a-Apanui (CIV-2017-485-278)
BY	Tracy Francis Hillier on behalf of Ngāi Tamahaua Hapū (CIV-2017-485-262), and Te Hapū Titoko o Ngāi Tama (CIV-2017-485-377)
BY	Muriwai Maggie Jones on behalf of Ngāi Tai (CIV-2017-485-270), and Muriwai Maggie Jones and Te Aururangi Davis on behalf of Ririwhenua Hapū (CIV-2017-485-272)
BY	Te Ūpokorehe Treaty Claims Trust and others on behalf of Te Ūpokorehe (CIV-2017-485-201)
BY	Christina Davis on behalf of Ngāti Muriwai Hapū (CIV-2017-485-269)
BY	Pita Tori Biddle and Karen Stefanie Mokomoko on behalf of Te Uri o

		Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)
	BY	Te Rua Rakuraku on behalf of Ngāti Ira o Waiōweka (CIV-2017-485-299)
	BY	John Hata, Te Ringahuia Hata and Antoinette Hata on behalf of Ngāti Patumoana (CIV-2017-485-253)
	BY	Whakatōhea Māori Trust Board on behalf of Whakatōhea Hapū (CIV-2017-485-292)

Hearing: 14-25 February 2022
Further submissions received on:
4 March (x2), 8 March (x2), 21 March 2022,
30 March, 31 March (x2), and 8 July 2022

Counsel:
B Cunningham for:
Te Whakatōhea (CIV-2011-485-817)
Hiwarau C, Turangapikitoi Waiōtahe and Ōhiwa of Whakatōhea (CIV-2017-485-375)
Pākōwhai Hapū (CIV-2017-485-264)
Te Whānau-a-Apanui Hapū (CIV-2017-485-278)
C Panoho-Navaja for:
Ngāi Tamahaua Hapū (CIV-2017-485-262)
Te Hapū Titoko o Ngāi Tama (CIV-2017-485-377)
E Rongo for:
Ngāi Tai (CIV-2017-485-270)
Ririwhenua Hapū (CIV-2017-485-272)
B Lyall for Te Ūpokorehe Treaty Claims Trust (CIV-2017-485-201)
M Sharp for Ngāti Muriwai Hapū (CIV-2017-485-269)
K Ketu and C Ratapu for Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)
A Sykes for Ngāti Ira o Waiōweka (CIV-2017-485-299)
G Davidson for Ngāti Patumoana (CIV-2017-485-253)
J Pou for Whakatōhea Māori Trust Board (CIV-2017-485-292)
K Feint KC for Ngāti Ruatakenga

Interested Parties:
H Irwin-Easthope and K Tarawhiti for Te Rūnanga o Ngāti Awa (CIV-2017-485-196)
N Coates for Te Rūnanga o te Whānau-a-Apanui (CIV-2017-485-318)
C Leauga, D Stone and D Lafaele for Te Whānau a Harawaka (CIV-2017-485-238)
R Roff, R Budd and S Gwynn for Attorney-General
A Green and M Jones for Whakatāne District Council

T Reweti for Ōpōtiki District Council
R M Boyte for Bay of Plenty Regional Council
B Scott for Seafood Industry Representatives

Judgment: 13 October 2022

JUDGMENT (NO. 7) OF CHURCHMAN J
[Re Edwards (Whakatōhea Stage Two)]

TABLE OF CONTENTS

PART I

Introduction **[1]**

The parties **[9]**

Successful applicants at Stage One [9]

PART II

Legal issues **[13]**

Effect of application of the Act on tikanga [14]

Wāhi tapu and maps [16]

Statutory context [19]

Substantial interruption [20]

Regional Authorities' infrastructure [23]

Other areas of "substantial interruption" [34]

Unique legal status of CMCA [44]

Records of titles within the takutai moana [48]

Specified freehold land [53]

Roads [54]

Conservation areas and reserves [60]

Marine farms [64]

Accommodated infrastructure [68]

Disjunctive vs conjunctive – definition of accommodated infrastructure [72]

Jurisdiction of the Court in respect of accommodated infrastructure and activities [78]
Analysis [80]
Reclamation [82]
CMT boundary angles [88]
Positions of the parties [89]
Analysis [99]
Wāhi tapu [104]
Wāhi tapu adjacent to land [117]
Wāhi tapu – shared exclusivity? [135]
Restrictions and prohibitions [142]
Stage One findings [153]
Approach [156]

Particular issues relating to Te Ūpokorehe **[157]**
Nature of CMT [158]
The Court's findings [167]
Te Ūpokorehe's position at the Stage Two hearing [170]
Who represents Te Ūpokorehe? [177]

PART III

CMT and PCR orders **[183]**
Draft CMT orders [183]

Submissions **[185]**
Ngāti Ruatakenga [185]
Ngāti Ira o Waiōweka [190]
Ngāti Patumoana [192]
Ngāi Tamahaua [195]
Te Ūpokorehe [197]
Ngāti Ngāhere [199]
Te Runanga o Ngāti Awa [200]
Ngāi Tai and Ririwhenua [203]
Ngāti Muriwai [205]
Te Uri a Whakatōhea Rangatira Mokomoko [208]

CMT 1 **[211]**
Mandate requirements for CMT [211]

Case law [212]
Positions of the parties [213]
Evidence of Mr Amoamo and Ms Hata [219]
Discussion [222]
Finding in respect of Ngāti Patumoana [225]
Whakatōhea Māori Trust Board [227]
General observations on who should hold recognition orders [229]

CMT 1 – Maraetōtara to Tarakeha **[231]**

Wahi tapu claims **[231]**

Ngāi Tamahaua **[234]**
Te Ahiaua [237]
Otaotupuku [239]
Awahou and Paengatoitoi [240]
Tawhitinui and Akeake [241]
Tai Haruru, Kotukutuku/Puketapu, Te Ana o Ani Karere, and Ōpēpē Stream [242]
Restrictions and prohibitions [248]

Ngāti Ira o Waiōweka **[261]**
Te Totara [264]
Restrictions and prohibitions [268]

Ngāti Patumoana **[269]**
Onekawa urupā [273]
Maraerohutu [277]
Whanaungakore kaitiaki [281]
Restrictions and prohibitions [282]

Ngāti Ruatakenga **[306]**

Te Ūpokorehe **[311]**
Onekawa Pā/Te Mawhai Pā [324]
Taumata Kahawai [325]
Te Ahiaua [327]
Tarewarewa [331]
Te Rua o Parewarewa [332]
Maromahue Marae [333]
Te Parenui o Pukeni Otao [334]

Paepae Aotea [337]
Te Tukina Rae o Kanawa [338]
Te Rae o Kanawa [340]
Pukeahua [341]
Te Toka o Waiotahe [343]
Hamatatua and Rururerehe [344]

Analysis of wāhi tapu claims within CMT 1 that were made by more than one applicant [345]
Te Kārihi Pōtae/Te Kahiripōtae Urupā [345]
Tuamutu/Tuamotu Urupā [354]
Te Arakotipu [357]
Te Roto [359]
Paerata and Ōpōtiki Mai Tawhiti/Te Arautauta Waka Landing [364]
Maraetōtara [373]
Waiaua River [379]
Tirohanga Stream [391]
Restrictions and prohibitions [394]

CMT 2 – Ōhiwa Harbour [401]
Ngāi Tamahaua [405]
Ngāti Awa [406]
Uretara Island [410]
Te Tukirae o Kanawa [413]
Taipari [416]

Te Ūpokorehe [420]
The entire Ōhiwa Harbour [421]
The balance of Te Ūpokorehe's claims [433]

Analysis of wāhi tapu claims within CMT 2 that were made by more than one applicant [435]
Ihukatia Pā [435]
The area of the coastline surrounding Tauwhare Pā and enclosing Te Kopu ō te Ururoa [439]
Omere and Otao [443]

CMT 3 [444]
Te Rangi [448]

Tarakeha [451]

Awaawakino and Te Toka a Rūtaia [454]

Restrictions and prohibitions [457]

PCR orders [464]

Limitations on the exercise of PCR [468]

Ngāti Muriwai [472]

Ngāti Ira o Waiōweka [489]

Te Uri o Whakatōhea Rangatira Mokomoko [502]

Ngāi Tamahaua/Te Hapū Tītoko o Ngāi Tama [509]

Te Ūpokorehe [515]

A – "Customary harvest of whitebait in the Ōhiwa Harbour and surrounds" [521]

B – "Access to taonga and archaeological sites in rohe for kaumatua assessment of kaitiaki obligations" [523]

D – "Control and removal of mangroves in Ōhiwa Harbour" [524]

F – "Kaitiaki over the harvest of wiwi (sea rush) for use and preparation of traditional kai" [525]

G – "Protection of mussels through control of starfish in Ōhiwa Harbour" [526]

I – "Collection of iron deposits at Te Tawai for use in kōwhaiwhai" [527]

J – "Protection of rare plants, wild orchids, wiwi (sea rush) that does not grow anywhere else, and other rare plants in and around the area of Te Karaka Stream. Extraction of invasive species and clean-up pollution" [528]

K – "Rāhui and customary recovery processes for reburying koiwi" [532]

L – "Harvest of red ochre at Te Oneone" [533]

N – "Culling of black backed gull" [534]

O – "Customary harvest and use of natural and physical resources where they grow or are found within the PCR area" [536]

P – "Customary harvest of the following resources from within application area ..." [537]

Ngāti Ruatakenga [540]

PART IV

CONCLUSION AND SUMMARY [543]

APPENDIX A

PART I

Introduction

[1] In a judgment dated 7 May 2021 in relation to the Stage One hearing, I granted recognition orders to several applicants finding that they had met the tests for Customary Marine Title (CMT) or Protected Customary Rights (PCR) under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).[1]

[2] In this decision following the Stage Two hearing, the focus of the Court is on s 109 of the Act. Section 109(1) provides that an applicant group in whose favour the Court grants recognition by way of PCR or CMT must submit a draft order for approval by the Registrar or the Court.

[3] Section 109(2) is prescriptive as to what a recognition order must specify:

> (a) the particular area of the common marine and coastal area to which the order applies; and
>
> (b) the group to which the order applies; and
>
> (c) the name of the holder of the order; and
>
> (d) contact details for the group and for the holder.

[4] Section 109(3) requires additional information for a PCR:

> (a) a description of the right, including any limitations on the scale, extent, or frequency of the exercise of the right; and
>
> (b) a diagram or map that is sufficient to identify the area.

[5] Section 109(4) sets out important mandatory requirements for what an order for CMT must include:

> (a) a survey plan that sets out the extent of the customary marine title area, to a standard of survey determined for the purpose by the Surveyor-General; and
>
> (b) a description of the customary marine title area; and
>
> (c) any prohibition or restriction that is to apply to a wāhi tapu area within the customary marine title area.

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1 *Re Edwards (No. 2)* [2021] NZHC 1025.

[6] Despite the clarity with which s 109 sets out the matters that the Court must consider in Stage Two proceedings and the limited focus of the Stage Two hearing, many of the applicants made submissions and called evidence that went far beyond the limited matters that can be addressed when considering whether the requirements of s 109 have been met. Some submissions treated the hearing as if it were a type of appeal and tried to convince the Court that aspects of the Stage One decision should be changed; others forgot that the Court's jurisdiction stops at the landward limit of the takutai moana and sought protection for wāhi tapu that were clearly inland of mean high-water springs (MHWS) or for PCR rights that related to activities that occurred somewhere other than the takutai moana. Others sought orders in respect of matters that had not been specified in their original applications or in the orders granted and others invited the Court to make declarations that had nothing to do with s 109 matters at all.

[7] None of the applicant groups who had obtained CMT orders filed survey plans which complied with the requirements of the Act. A number of the groups who obtained PCR orders also did not file a diagram or map as required by s 109(3)(b).

[8] All of this unnecessarily complicated the hearing. The absence of documentation that is required to be filed necessitates that this decision has to be an interim one. The Court acknowledges that, because this is the first case where many of the issues set out in s 109 have been considered and because of the technical difficulties experienced in the preparation of survey plans, it is appropriate to give the successful applicants the opportunity to supplement their evidence in accordance with the Court's directions. However, applicants in future cases where the same issues arise should not assume that the Court will follow the same course.

The parties

Successful applicants at Stage One

[9] There were three different geographic areas where specified applicants met the tests set out in s 58 of the Act for CMT:

(a) CMT 1: a jointly held order for Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Ruatakenga, Ngāi Tamahaua, Ngāti Ngāhere and Te Ūpokorehe from Maraetōtara in the west to Tarakeha in the east and out to the 12 nautical mile limit;

(b) CMT 2: in relation to the western part of Ōhiwa Harbour, a jointly held CMT between the six Whakatōhea hapū and Ngāti Awa; and

(c) CMT 3: between Tarakeha and Te Rangi and out to the 12 nautical mile limit, an order of CMT for Ngāi Tai.

[10] A number of the applicants were granted recognition orders by way of PCR, pursuant to s 51 of the Act, these were:

(a) Ngāti Muriwai;

(b) Ngāti Ira o Waiōweka;

(c) Te Uri o Whakatōhea Rangatira Mokomoko;

(d) Ngāi Tamahaua;

(e) Te Ūpokorehe; and

(f) Ngāti Ruatakenga.

[11] In respect of the proposed PCR orders, I invited the successful applicants to prepare draft recognition orders, and engage in kōrero with other parties, including those who were successful in establishing that they met the tests for CMT.[2] Not all of the successful applicants took up that invitation.

[12] After the hearing, Crown Regional Holdings Limited made an application to participate as an interested party. Effectively, this was so that it could be an interested

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2 At [670].

party in the appeals. The basis of this application was that it was now the holder of the resource consents for the Ōpōtiki Harbour Development Project, such consents having been transferred to them by the Ōpōtiki District Council. It now has sole responsibility for the construction of the project, and holds it as an asset. It did not seek leave to file any additional evidence or submissions, given that had already been done on its behalf by the Ōpōtiki District Council. In the absence of any opposition, that application was granted on 24 May 2022.[3]

[3] *Re Edwards (Te Whakatōhea) No. 6* [2022] NZHC 1160.

PART II

Legal issues

[13] Before addressing the specific applications, I need to make some comments of general application in respect of legal issues that have arisen. I note also that throughout this judgment I use the terms "common marine and coastal area" (CMCA), and "takutai moana" interchangeably.

Effect of application of the Act on tikanga

[14] In order to correct a misapprehension that seems to run through some submissions, I note that the Court does not determine tikanga, that is not its role, that is a matter for iwi and hapū, and the proper authorities on tikanga.[4] It is the Court's role to consider the evidence of tikanga submitted by the parties to assess whether it meets the statutory tests, where tikanga is a matter that the Court is required to have regard to.

[15] Nothing in this decision purports to revoke or amend existing rights exercised in accordance with tikanga. The purpose of this decision is only to give legal effect to the recognition orders granted by the Court in the terms that those rights are recognised by the Act.

Wāhi tapu and maps

[16] At the Stage Two hearing, many of the claims for recognition of wāhi tapu related to areas that were not in the common marine and coastal area as described in s 9 of the Act. The Court has no jurisdiction under the Act outside of the takutai moana.

[17] This Stage Two decision involves the necessity to draw lines on maps. In the Stage One decision the difficulty of synthesising tikanga with western proprietorial concepts, including the drawing of lines on maps to delineate boundaries was

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4 *Re Edwards (No. 2)*, above n 1, at [272]; see also *Ellis v R* [2022] NZSC 114 at [181] per Winkelmann CJ, at [102]-[122] per Glazebrook J, and at [270]-[272] per Williams J.

highlighted.[5] However, as the Act stipulates that recognition orders in terms of those rights that the Court is authorised to grant, must be depicted on maps, the Court must attempt, as best it can, to do that, notwithstanding the inevitable tension with tikanga.

[18] Perhaps the greatest challenge in this case is to identify the boundaries of wāhi tapu in a way that meets the need for certainty as to the location of each individual wāhi tapu. The mechanisms in the Act governing sanctions for breaching wāhi tapu restrictions need to be capable of actually being enforced. This challenge includes taking into account the flexible nature of the concept of tapu, including the fact that, in some instances, tapu may exist at some times and not others and that the intensity of the tapu and the nature of any restrictions that might be required to protect it, decrease the further away one gets from the source of the tapu.[6]

Statutory context

[19] The statutory purposes, legislative history, and legal concepts relevant to the Act were set out in the Stage One judgment from paragraphs [22]-[171]. However, for present purposes, some elaboration is required.

Substantial interruption

[20] In the Stage One judgment, the Court held that:[7]

(a) while the physical activities authorised by a grant of resource consent may have the practical effect of amounting to a substantial interruption to the exclusive use and occupation of part of a particular specified area, the fact that a Council has issued a resource consent pre-dating the commencement of the Act does not automatically have that effect;

(b) the parts of the Ōpōtiki Harbour Development Project that result in the issue of a certificate of title on the basis that the land involved has risen

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5 At [286]–[300].
6 See the discussion at [106] below.
7 *Re Edwards (No. 2)*, above n 1, at [188]-[271].

above MHWS, will no longer be in the takutai moana, and so are unable to be included in a CMT order;

(c) the parts of the Ōpōtiki Harbour Development Project that fall outside the definition of reclaimed land will need to be considered on the same basis as other third-party structures in the takutai moana; and

(d) 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.

[21] The Court recognised in the Stage One decision and in *Re Ngāti Pāhauwera*,[8] that the presence of some structures could amount to substantial interruption on account of their interference with the applicant group's ability to undertake customary activities in the takutai moana over which the structure sits, or within its immediate surrounds. This is ultimately a question of fact.[9] It will depend on the nature, scale and intensity of the structure or activity, and its impact on the ability of applicants to show the requisite standards have been met.[10] There is no presumption that third party structures substantially interrupt customary rights in a specified area.[11]

[22] For example, the Pan Pac Pipeline in the Whirinaki area was held to amount to a substantial interruption in *Re Ngāti Pāhauwera* because the factual evidence demonstrated that there had been significantly reduced use of the area from the 1980s onwards, due to the effect of pollution on the kaimoana in that area.[12] What was important in that determination, was what the evidence established in respect of the actual occupation and use of the area in accordance with tikanga.

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8 *Re Edwards (No. 2)*, above n 1, at [252]; *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [235].
9 *Ngāti Pāhauwera*, above n 8, at [232].
10 *Re Edwards (No. 2)*, above n 1, at [230].
11 *Ngāti Pāhauwera*, above n 8, at [235].
12 At [232].

Regional Authorities' infrastructure

[23] For the reasons detailed below, I am satisfied that those parts of the Ōpōtiki Harbour Development Project that do not fall within the definition of reclaimed land have substantially interrupted the applicant's holding of the relevant area in accordance with tikanga, and that this area should be excluded from CMT 1.

[24] The Ōpōtiki Harbour Development Project was described in the opening submissions of counsel for the Ōpōtiki District Council as:

> [A] significant regional infrastructure project to redevelop the Ōpōtiki harbour into a fully functional deep-water harbour, capable of supporting a large aquaculture industry. Supported by more than $100 million dollars in central and regional government funding, the Harbour Project is the most significant collection of infrastructure occupying the CMCA area that is the subject of these proceedings. Work on the Harbour Project is now well advanced and on track for completion by mid-2023.

[25] In order to complete the project, the relevant resource consents authorise:

(a) erection of 400m-500m training walls (200m of which are located in the CMCA), dredging and depositing of more than 50,000m³ of foreshore and seabed around the Waiōweka River mouth (Consent 65563);

(b) vegetation clearance, earthworks of up to 10,000m³, constructing two 5000m² construction compounds, stockpiling construction materials, cutting through an existing sandspit to create a new harbour entrance, earthworks associated with the disposal of up to 450,000m³ of dredged material to land; and associated discharge of sediment-laden water (Consents 65565, 65569);

(c) activities associated with constructing the harbour entrance and closing the Waiōweka River mouth including the erection, maintenance, and removal of temporary and permanent structures in, on, under and over the foreshore and seabed, removal of material, discharge of sediment and water, disturbance of the foreshore and seabed, taking and diversion of coastal water (Consent 65566);

(d) activities associated with dredging 50,000m³ of material per year from the entrance channel, temporary structures in the CMCA, discharge to the CMCA, disturbance of the foreshore and seabed, taking of coastal water and depositing material in the CMCA (Consent 65567); and

(e) maintenance dredging and earthworks, as well as the associated discharge of contaminated water (Consent 65568).

[26] The general public have been excluded from the area since mid-2021, and this exclusion will continue until late 2023. This is necessary for the project's safe construction. The evidence shows that the project extends over 500 metres into the takutai moana past the mouth of the Waiōweka River and MHWS. The offshore dredging area is, at its widest, over a kilometre long and includes two training walls 200 metres in length.

[27] Regular temporary exclusions will be necessary for the ongoing maintenance of the harbour works following completion. The ongoing maintenance of the project involves dredging of materials, active management of accretion and erosion, and maintenance work for the training walls. This will involve heavy machinery accessing both sides of the harbour to either remove or add sand and/or other materials. These activities will continue for as long as the harbour exists.

[28] I have therefore concluded that the Harbour Development Project has substantially interrupted the applicants' holding of the relevant area in accordance with tikanga, because the project is fundamentally changing the landscape and use of this part of the takutai moana on a substantial scale, and has a major impact on the use and occupation of this area. While Te Whakatōhea have supported the project, the reality is that it is of a nature so as to, during construction and its ongoing operation, remove the ability of the applicant groups to exclusively use and occupy the area in accordance with tikanga.

[29] The goal of the project is to allow larger boats access to Ōpōtiki Harbour, so as to allow for a fully functioning deep-water port, through which the aquaculture industry is expected to grow. The area over which the consent holder will be legally

obliged to ensure the safe operation of the port under the Health and Safety at Work Act 2015, is large enough to disrupt the exercise of customary interests.

[30] What is presently lacking and will need to be provided so that one accurate survey plan can be drawn up for CMT 1, is a map accurately depicting the boundaries of the Ōpōtiki Harbour Development Project.

[31] In his second affidavit dated 1 February 2022, Gerard McCormack, on behalf of Ōpōtiki District Council, included as exhibit "B" an aerial photograph of the area in respect of which consents had been granted. That may provide the starting point for an accurate map.

[32] At [15] of the same affidavit, Mr McCormack noted full copies of the resource consent documentation could be obtained from the Bay of Plenty Regional Council website using their mapping software. That may also assist in creating an accurate map.

[33] I therefore direct that Ōpōtiki District Council/Crown Regional Holdings Ltd provide to the applicants an accurate map of the area of the Ōpōtiki Harbour Redevelopment Project of a sufficient standard to be able to be incorporated into the survey plan required by s 109(4)(a).

Other areas of "substantial interruption"

[34] I do not include as substantial interruptions Council-owned assets that enhance the ability of people to use the takutai moana for recreational activities or those things that have a maritime safety function such as navigation buoys or safety signage or structures with the purpose of environmental protection or monitoring. The relevant regional and local authorities have an established network of a variety of infrastructure within their boundaries. For example, the Ōpōtiki District Council described its infrastructure as including:[13]

> …a reticulated network and land disposal area for [wastewater], stormwater collection, treatment and disposal system, sea walls protecting property, jetties and boat ramps, and roads, bridges, and cycleways.

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13 Affidavit of Aileen Lawrie, 2 February 2022, at [11].

[35] The Ōhiwa Consents RM16-0129, 40268, 66262, and 65904 have not substantially interrupted the holding by the applicants either of the CMT 1 or CMT 2 areas in accordance with tikanga. Nor has Consent RM20-0615, for the construction of cycleway bridges from Ōpōtiki to the Waiōtahe River. Nor have any of the activities or consents associated with stormwater control, port assets, harbour assets or transportation put in evidence by the Whakatāne District Council had the effect of substantially interrupting the use and occupation in accordance with tikanga of the application areas. As individual assets, they have not substantially interrupted the exclusive use and occupation of the takutai moana by the applicants. This conclusion applies as well to the consents covered in the evidence of the Bay of Plenty Regional Council of their assets in the Waiōweka River and the Ōhiwa Harbour.

[36] If anything, the activities and structures associated with these consents can be seen to enhance the use of the relevant area by the applicants and others, rather than as substantially interrupting the exercise of customary rights. For example, the structures in and around the banks of the Maraetōtara Stream enhance and protect the use of the environment, rather than inhibit it. This is consistent with the views of the Court at Stage One. No evidence was submitted to the Court that established that in a wholesale sense, infrastructure owned and controlled by the relevant regional authorities (with the exception of the Harbour Project due to its scale and the ongoing aspect of exclusion) substantially interrupted the use and occupation of the applicant groups in accordance with tikanga. I include the wharf at Port Ōhope in this group of structures.

[37] Under Consent 65984, there is an outfall pipe which carries treated effluent from the Ōhope Wastewater Treatment Plant, into the moana, within the area of CMT 1. The consent was granted by the Bay of Plenty Regional Council to the Whakatāne District Council in November 2016, but the outfall has been used since 1974 and currently services all of Ōhope.

[38] At any point the discharge cannot exceed 1500m^3 per day. The point of discharge is less than one kilometre directly out from Ōhope Beach MHWS (approximately 550m), at a point between Maraetōtara and the entrance to Ōhiwa Harbour, perpendicular with the coastline. The area occupied in the ocean by the

outfall structure is not more than five metres in width, and the consent expires in September 2035.

[39] The description of the outfall site in the application for the consent provides that "there are no rock outcrops or reef habitats within the vicinity", and that both Te Ūpokorehe and Ngāti Awa were consulted in respect of the proposal. The application also noted that there remained opposition to the outfall, in that it affects Ngāti Awa mahinga mātaitai. Commitments were made by local authorities during the application for the current consent period, to move towards a land-based disposal system so as to reduce the adverse impact of discharge on culturally significant areas in the moana. Also, the:

> discharge is a continuation of the existing system which has been monitored for at least ten years. In this time there have been no adverse effects identified in relation to the quality of the environment. The commitment to improvements to the treatment system will produce a higher quality effluent and thereby reduce impacts on the environment.

[40] In a report assessing the environmental effects of the discharge, undertaken as part of the renewal application for Resource Consent 65984 in the early 2000s, shellfish samples were collected to ascertain the effects of discharge on quality. The report states:

> These shellfish samples were gathered as per the resource consent requirements. However on a number of occasions, divers were unable to find any shellfish in the designated area, and on most occasions when shellfish were found in the area, they were small mussels growing directly on the diffuser. Often no shellfish were found, or [there was] insufficient fish to make up a representative sample. This is reflective of the open mobile sandy seabed in the area. Higher populations of shellfish are found closer in shore.

[41] Notwithstanding this, there was evidence of samples of shellfish that were unsafe for human consumption in the area near the diffuser, particularly after rainfall, contrasting with samples taken closer to the shore which were safe to eat. The evidence therefore shows that the outfall pipe has had more than a negligible effect in its immediate environmental surrounds, although there is also evidence that the effect of dairy farm outflow into the Whakatāne River and then out into the moana has had a much greater environmental impact on the nature of kaimoana in the broader area. Glenn Cooper, who gave evidence for the Whakatāne District Council, deposed that

there are no formal restrictions in place (nor have they ever been needed) around the diffuser, but that generally shellfish are not gathered in the area, although water quality had improved throughout the last 20 years.

[42] Te Ūpokorehe submitted that the outfall pipeline merely changed the nature of the use of the area, rather than totally eradicated it, so as to constitute substantial interruption. They submitted that use of an area for food gathering had been replaced with kaitiaki responsibilities of monitoring the environmental impact of the outfall. They said that tikanga evolves to adapt to changing circumstances and so the presence of an outfall pipeline without more does not constitute substantial interruption. Te Ūpokorehe sought, through this submission, to distinguish the effluent outfall pipe from the Pan Pac outfall pipe referred to in the *Ngāti Pāhauwera* decision.[14]

[43] The evidence of the interruption of the use and occupation of the area around the outfall pipeline is not as overwhelming as it was in the case involving the Pan Pac outfall pipeline. There is some evidence that the outfall pipeline has caused some kaimoana at some times, to be unfit for human consumption, and that patterns of kaimoana gathering have changed. But it cannot be said that the presence of this structure has resulted in an impact of sufficient magnitude for there to have been a substantial interruption which would result in its exclusion from the CMT area.

Unique legal status of CMCA

[44] The Act gives the common marine and coastal area a unique legal status. Section 11(2) provides that neither the Crown nor any other person owns or is capable of owning the CMCA. The Act also operates to divest any ownership interest of the Crown and every local authority but, importantly for the purpose of drawing accurate boundaries of the CMCA, not land situated in the CMCA owned by other entities.[15]

[45] An exception to the divestment of Crown and local authority-owned land is provided by s 11(5)(e) which preserves the right of the Crown to designate land in the CMCA as having a special status. That special status can include conservation areas,

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14 *Re Ngāti Pāhauwera*, above n 8.
15 Section 11(3).

reserves (of various sorts), and national parks. The identification of areas with such special status is therefore necessary in order to accurately survey the boundaries of the CMCA.

[46] However, there is yet another complicating feature in relation to those areas which have a special status where part of such an area, after the commencement of the Act, as a result of erosion or other natural occurrence ceases to be land and becomes part of the CMCA. I address the implication of this in relation to the preparation of survey plans in further detail below.

[47] In order to assist those responsible for preparing survey plans and maps of the CMCA for the various recognition orders, I will set out what land is, and is not, to be included within the CMCA.

Records of titles within the takutai moana

[48] Brendan Mulholland, giving evidence on behalf of the Attorney-General, detailed various parcels of land for which freehold title existed, or which were identified as Crown land which has never been alienated and therefore had not had a freehold title. The majority of these were in the Ōhiwa area.[16] He also identified a number of gazetted reserves which were wholly or partially in the takutai moana.

[49] Richard Jennings, who also gave evidence on behalf of the Attorney-General, identified additional roads and parcels of land beyond those covered by Mr Mulholland.

[50] It is therefore necessary to clarify what effect the existence of such parcels of land has on the ability of the Court to grant CMT in respect of the relevant areas.

[51] Section 9 of the Act defines the common marine and coastal area as the area that is bounded by the line of MHWS and by the outer limits of the territorial sea other than:

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[16] A notable example given by Mr Mulholland as to an area of land for which freehold titles existed but which was now inundated by the sea is the area at Ōhiwa Spit.

(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 1997.

[52] Specified freehold land means any land that immediately before the commencement of the Act is:

(a) Māori freehold land within the meaning of s 4 of Te Ture Whenua Māori Act 1993; or

(b) set apart as a Māori reservation under Te Ture Whenua Māori Act 1993; or

(c) registered under the Land Transfer Act 2017 and in which a person other than the Crown or local authority has an estate in fee simple that is registered under that Act; or

(d) subject to the Deeds Registration Act 1908 and in which a person other than the Crown or a local authority has an estate in fee simple under an instrument that is registered under that Act.

Specified freehold land

[53] Mr Mulholland and Mr Jennings identified a number of areas that, prior to the commencement of the Act, consisted of Māori freehold land, a Māori reservation that was registered under the Land Transfer Act 2017 or was subject to the Deeds Registration Act. Appendix 1 to the Crown's closing submissions in this case helpfully collates this evidence. These areas do not form part of the takutai moana. Therefore the proposed CMTs will have to be re-drafted in accordance with the data set out in this evidence.

Roads

[54] Unformed roads located in the takutai moana are treated differently to specified freehold land. Section 14(1) of the Act provides that:

> Any road, whether formed or unformed, that is in the marine and coastal area on the commencement of this Act is not part of the common marine and coastal area.

[55] The Court was provided with evidence that both formed and unformed roads existed within the marine and coastal area.[17]

[56] The Act treats unformed roads located in the CMCA differently to formed roads.

[57] Section 14(3) says:

> If, on the day before any quinquennial anniversary,[18] an unformed road to which subsection (1) applies continues in existence as an unformed road, then that road is deemed to be stopped, and becomes part of the common marine and coastal area on that anniversary, unless a current certificate has been signed and dated in respect of that road.

[58] Section 14(5) also provides that:

> An unformed road that, after the commencement of this Act, comes into existence in the marine and coastal area is part of the common marine and coastal area.

[59] In closing submissions, counsel for the Crown confirmed that there were no certificates signed in respect of the unformed roads identified in the evidence of Mr Mulholland and Mr Jennings. Therefore, those unformed roads have now become part of the common marine and coastal area and are available for inclusion within any grant of CMT. All of the unformed roads can be included in the survey plan prepared for the three CMTs.

Conservation areas and reserves

[60] There was evidence of the existence of both conservation areas and reserves in the marine and coastal area.[19]

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17 See exhibit BM-01 to the affidavit of Brendan Patrick Mulholland, 1 February 2022; exhibits RJ-01 to RJ-16 to the affidavit of Richard James Jennings, 31 January 2022; and exhibit AG-01 to the affidavit of Ashley Neville Gould, 8 June 2020.

18 A quinquennial anniversary is one which marks the fifth, tenth or fifteenth anniversary of the passing of the Act.

19 See exhibit BM-01 to the affidavit of Brendan Patrick Mulholland, 1 February 2022; and exhibits RJ-01 to RJ-10 in the affidavit of Richard James Jennings, 31 January 2022.

[61] The Act is clear that s 11(3) automatically divests Crown or local authority title to land in the CMCA, and that s 11(5)(e) also permits the Crown to set aside part of the CMCA for a specific purpose, thereby removing land from the CMCA. However, where after the commencement of the Act, as a result of erosion or other natural process, any land (including reserves, conservation areas, and/or national parks) becomes part of the CMCA, it ceases to be a reserve, conservation area and/or national park. That appears to be the result of the words "any land" contained in s 13(2), which relates to land other than a road that is owned by the Crown or a local authority.

[62] The presumption contained in s 13(2) does not affect Māori freehold land or other land not owned by the Crown or a local authority. However, although areas of land owned by the Crown or a local authority (other than roads) were excluded from the CMCA at the commencement of the Act, s 13(2) appears to have the effect of making those parts of reserves, national parks or conservation areas which, as a result of erosion or other natural process occurring since the Act's commencement, available for inclusion in the CMT.

[63] Exhibit BM-01 to the affidavit of Mr Mulholland noted that there was evidence that parts of certain reserves had eroded, and that if the areas now appearing to be in the coastal marine area had eroded since the commencement of the Act, then they would have become part of the coastal marine area available for an award of CMT.[20] Unfortunately there was no evidence upon which I could conclude that the erosion of these reserves had occurred since the Act commenced. This means that the various reserves identified in the evidence before the Court which have been affected by erosion and which are now wholly or partly in the coastal marine area are excluded from inclusion in CMT. However, if such erosion does occur in the future, this means that the boundaries of any CMT order which is affected in this fashion will have to be re-drawn. All other conservation areas and reserves identified in the evidence of Mr Mulholland and Mr Jennings as being located in the takutai moana are excluded from the areas available for the award of CMT. The boundaries for the CMT orders in the present case must be prepared on the basis of the current geographic situation.

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[20] Section 13(2).

Marine farms

[64] There are three small oyster farms in Ōhiwa Harbour. However, the evidence did not establish that their presence had interfered with the applicants' ability to carry out customary activities to the extent that could be said to amount to substantial interruption. These farms have been in operation for some time, the original consents having been issued approximately 20 years ago. The structures do not restrict access to the takutai moana around them, or prohibit traditional or recreational food gathering, and this is recorded in the resource consents that authorise them. The evidence before the Court was that all parts of the Ōhiwa Harbour continue to be used for customary activities notwithstanding the presence of the oyster farms, which are approximately two hectares in size. The farms have not had the effect of limiting the applicant groups who undertake customary activities in the area.

[65] Te Ūpokorehe submitted that the Ōhiwa Harbour farms could be distinguished from the Pan Pac outfall pipeline. In that case there was a significantly reduced use of the area, owing to the effect of pollution on kaimoana. I accept that submission. The areas occupied by these marine farms remain available for inclusion in CMT 2.

[66] Turning to Eastern Sea Farms Limited 3,800-hectare marine farm, which sits roughly 8.5 kilometres from the coast of Ōpōtiki. The Whakatōhea Māori Trust Board owns 54 per cent of Eastern Sea Farms Limited, which was established in 2001. Resource consent was granted in 2009 for a period of 20 years, with the right to renew. The first five years of the farm's operation involved only research, prior to being fully commercialised.

[67] Although sizeable, the marine farm does not inhibit access to, or navigation through, the takutai moana. According to the original resource consent application, the farm was never intended to inhibit access or navigation. Coupled with this, is the fact that the marine farm's existence seems entirely consistent with the continued use and occupation of the area in which it is located, by the applicant groups in accordance with tikanga. It is majority owned by Whakatōhea, and the Trust Board's goal is to progress and ensure the flourishing of the iwi as a whole. I conclude that the existence of the marine farm has not substantially interrupted the applicant's holding of the area

in accordance with tikanga. Its continued functioning is consistent with the award of CMT over the area, and so the area it occupies is available for inclusion in CMT 1.

Accommodated infrastructure

[68] During the course of the hearing, there was some dispute as to the meaning of the concepts of "accommodated activities" and "accommodated infrastructure" as those terms are set out in s 63 of the Act. Some applicants and interested parties also invited the Court to express an opinion on what infrastructure or activities in the area covered by this hearing could be considered "accommodated" activities or infrastructure.

[69] For the reasons I will now set out, I feel able to offer some views on the meaning of the statute, and will do that, but consider that expressing any opinion on whether any specific activity or infrastructure meets the tests in s 63 goes beyond the jurisdiction of the Court and is not appropriate in this decision.

[70] I start by explaining the connection between a recognition order for CMT and accommodated activities or infrastructure. Accommodated activities are able to be carried out in a CMT area with s 63(a) providing that such activities are:

> expressly excluded under s 64(1) from the exercise of an RMA permission right or a conservation permission right by a customary marine title group;

[71] The concept of accommodated infrastructure is defined in s 63 in a way that has created some confusion as to whether the three criteria set out in s 63 are conjunctive in the sense that all three are required to be met or whether the third criteria is an alternative to the first two. If the latter interpretation is correct, then one consequence could be that infrastructure owned by private entities or individuals could be "accommodated infrastructure". The definition in s 63 says:

> **Accommodated infrastructure** means infrastructure (including structures and associated operations) that is–
>
> (a) lawfully established; and
>
> (b) owned, operated, or carried out by 1 or more of the following:
>
> (i) the Crown, including a Crown entity:

(ii) a local authority or a council-controlled organisation:

(iii) a network utility operator (within the meaning of section 166 of the Resource Management Act 1991):

(iv) an electricity generator (as defined in section 2(1) of the Electricity Act 1992:

(v) a port company (as defined in section 2(1) of the Port Companies Act 1988):

(vi) a port operator (as defined in Part 3A of the Maritime Transport Act 1994):

(c) reasonably necessary for:

(i) the national social or economic well-being; or

(ii) the social or economic well-being of the region in which the infrastructure is located.

Disjunctive vs conjunctive – definition of accommodated infrastructure

[72] The issue is whether the word 'and' should be read into subparagraph (b)(vi), so that the *reasonably necessary* test is an additional requirement that needs to be met in addition to (a) and (b). The alternative proposition is that the definition should be read disjunctively – that is, whether the word 'or' should be read into subparagraph (b)(vi), so that the *reasonably necessary* test is separated and sufficient on its own to meet the definition.

[73] The legislative development and subsequent amendment to s 63 indicates that (a), (b) and (c) are to be read in conjunction with one another, and that the word 'and' after (b)(vi) needs to be implied to achieve the purpose of the statute.

[74] When the Act first came into effect, the definition of accommodated infrastructure was explicitly conjunctive, with the word 'and' being present at the end of subparagraph (b)(vi).[21] Consequential amendments listed in Schedule 2 to the Maritime Transport Amendment Act 2013, meant that the previous description of a 'port operator' needed to be changed. This amendment appears to have been inserted into the Act without consideration of the context or placement of the amendment

[21] Marine and Coastal Area (Takutai Moana) Act 2011 (as enacted), s 63.

within the wider subsection. As a result of this amendment, the 'and' disappeared from the definition.

[75] Given the nature of this amendment as a consequential amendment necessary to give effect to Maritime Transport legislation, it is highly unlikely that the legislators intended to fundamentally change the operation of the definition of accommodated infrastructure. The Select Committee report of the Māori Affairs Committee on the Act supports this conclusion.[22] The natural reading of the definition would also suggest that without the presence of the word 'or', that both (b) and (c) need to be satisfied, especially as Parliament has used the word 'or' throughout the definition within each both (b) and (c).

[76] The definition of accommodated infrastructure includes "associated operations". Also exempted from being affected by the RMA permission right, 'associated operations' are defined broadly as activities that are necessary for the functioning of an accommodated infrastructure, which includes the relocation of existing infrastructure. If the definition of accommodated infrastructure is read disjunctively, thereby bringing in privately owned structures, then those structures would be able to be relocated anywhere within a CMT area while being exempt from the RMA permission right. This is unlikely to have been intended by Parliament and would potentially undermine the bundle of rights associated with a grant of CMT.

[77] For these reasons, I therefore conclude that the definition should be read conjunctively.

Jurisdiction of the Court in respect of accommodated infrastructure and activities

[78] Ms Roff, counsel for the Attorney-General, in closing submissions submitted that:

> The Attorney-General's position is that the Court has no jurisdiction to make specific findings or determinations as to whether an activity or piece of infrastructure falls within the definition of "accommodated activity" and, if relevant, "accommodated infrastructure". The Act makes it clear that where between a customary marine title group and a person who owns, operates or

[22] Select Committee report of the Māori Affairs Committee on the Marine and Coastal Area (Takutai Moana) Bill, at 18.

> carries out an activity [there is a] dispute whether that activity is an accommodated activity, such cases are to be determined by the Minister for [Land Information] and that decision is final.
>
> Commentary in the departmental report goes some way to explaining the rationale behind the Minister [for] Land Information being responsible for disputes over whether activities are accommodated or not. The report notes the Minister's "expertise with activities in the marine and coastal area", and how the function aligns with other roles of that Minister within the statutory regime.
>
> (footnotes omitted)

[79] At the other end of the spectrum is the view that the Court does have jurisdiction to make determinations on this matter. To this effect, counsel for the Bay of Plenty Regional Council submitted that:

> It is acknowledged that any specific factual disagreements that arise in future over whether an existing activity is accommodated are to be resolved by the Minister [for] Land Information. However, in my submission, it is open to this Court to reach findings on the correct interpretation and application of the statutory criteria for accommodated activities. This will also assist the Regional Council as consent authority when it is processing other applications for activities that could be considered "accommodated".

Analysis

[80] The relevant statutory provisions are ss 64(3) and (4) of the Act. They provide:

> (3) Subsection (4) applies if, in relation to whether an activity is an accommodated activity, there is a dispute between–
>
> (a) a customary marine title group; and
>
> (b) the person who owns, operates, or carries out the activity that is the subject of the dispute.
>
> (4) Either party to the dispute may refer the dispute to the Minister for Land Information for resolution.

[81] The Act therefore clearly grants the Minister exclusive jurisdiction to determine such a dispute and the Court has no jurisdiction in relation to this question.

Reclamation

[82] The Act sets out a comprehensive regime relating to the status and vesting of reclaimed land.[23] Under s 29 of the Act, reclaimed land is defined as permanent land formed from land that formerly was below the line of MHWS and that, as a result of a reclamation is located above the line of MHWS, but does not include:

(a) land that has arisen above the line of MHWS as a result of natural processes, including accretion; or

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

[83] Land reclaimed other than by natural processes whether lawfully or unlawfully is vested in the Crown as its absolute property, although by different mechanisms.[24] The Act does not affect the common law in relation to accretion and erosion.[25] In short, the Act vests reclaimed land from the common marine and coastal area as the absolute property of the Crown, outside of the exceptions in subpart 3 of the Act.[26] If reclaimed land is subject to subpart 3, then it is unable to be included in CMT or PCR orders.

[84] There is some dispute over the effect of reclamations that are not yet complete pursuant to the Harbour Development Project, particularly at the Waiōweka River mouth.

[85] As the Court stated at Stage One:[27]

> For the reasons that relate to other reclamations, the part of this proposal that results in the issue of a certificate of title on the basis that the land involved has arisen above the line of mean high-water springs, means that it is no longer within the takutai moana and therefore no longer falls within the area in respect of which CMT can be issued. That leaves those aspects of the proposal that fall outside the definition of reclaimed land in s 29 of the Act and could be described as "structures such as breakwaters, moles, groynes or seawalls". Such structures need to be considered on the same basis as other third-party structures in the takutai moana such as pipelines.

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23 *Re Ngāti Pāhauwera*, above n 8, at [276], citing *Re Edwards (No. 2)*, above n 1, at [231]-[250].
24 Marine and Coastal Area (Takutai Moana) Act 2011, s 30.
25 Section 13(1).
26 Above n 1, at [239].
27 At [250].

[86] Although the reclamation of areas involved in the Harbour Development Project is consented and well underway, it is not yet complete. The issue is therefore whether the areas which are in the process of being reclaimed should be excluded from the area in respect of which CMT is granted.

[87] Section 113 of the Act provides that a recognition order must not be sealed before the disposal of any appeal. The orders made at the Stage One hearing are all subject to appeal and will not be heard by the Court of Appeal for some time. It is possible that there may be further appeals to the Supreme Court. It therefore appears that the reclamation associated with the Harbour Development Project will be complete before any recognition order is able to be sealed. Accordingly, it is appropriate for such reclamation areas to be excluded from any recognition order.

CMT boundary angles

[88] The Stage One findings regarding CMT provided for the CMT areas to extend out to the 12 nautical mile limit. The way that the eastern Bay of Plenty curves means that if boundaries are depicted by straight lines which start at MHWS and proceed due north, CMT 1 and CMT 3 will overlap with the rohe moana of neighbouring applicant groups. The maps filed by Julia Glass provided an indicative view of the boundaries of each CMT area, but the applicants disagree as to the exact bearings of each of the boundary lines. The issue is whether the boundary lines at Maraetōtara, Tarakeha, and Te Rangi should be angled due north, towards the middle of Whakaari/White Island, or along some other bearing. In this respect the Court must be mindful of the presence of other parties across the Bay of Plenty, who are yet to have their full applications heard, particularly Ngāti Awa to the west, as well as Ngāi Tai and Te Whānau-a-Apanui to the east.

Positions of the parties

[89] Ngāi Tamahaua submitted that the angle issue could be resolved if the applicants were allowed further time to reach an agreement. However, Ngāi Tamahaua also produced exhibits during the hearing which appeared to advocate for boundary

lines at the Maraetōtara Stream and Tarakeha pointing due north.[28] Ngāti Awa and Te Whānau-a-Apanui alleged that this created an area for CMT 1 that went beyond the area depicted in the map attached to Ngāi Tamahaua's original application.

[90] Tracey Hiller, who gave evidence for Ngāi Tamahaua was cross-examined by Ms Rongo for Ngāi Tai on the boundary lines Ngāi Tamahaua proposed. Ms Rongo established that if Ngāi Tamahaua's view was adopted, the boundary at Tarakeha would cut across the rohe moana of Ngāi Tai, and eventually Te Whānau-a-Apanui. Ms Hiller was also cross-examined by Mr Mahuika for Te Whānau-a-Apanui, as to the difference between Ngāi Tamahaua's proposed boundaries and the map attached to their amended application. Ngāi Tamahaua's amended application shows an eastern boundary line that is angled in a north-western direction, towards Whakaari – whereas the boundaries Ms Hiller proposed at the hearing pointed due north. Ms Hiller accepted that these two positions were different.[29]

[91] Ngāti Ruatakenga submitted that at Maraetōtara, the boundary should sit at the middle of the stream. In respect of Tarakeha, Ngāti Ruatakenga endorsed the view of Te Riaki Amoamo, that the boundary should follow the ridgeline of the headland out to sea. They also submitted that in order to avoid boundaries cutting across the rohe of neighbouring iwi, that the boundary lines need to angle inwards as they head out to sea. At the hearing, Te Riaki Amoamo said that the boundary line at Tarakeha should follow the angle of a surveyed boundary on the Tarakeha headland, between the Ōpape and Torere blocks.[30] This proposal would angle the boundary line at Tarakeha slightly in a north-westerly direction.

[92] Mr Amoamo later supported the use of the Tarakeha ridge as the boundary, given that such landmarks were historically used to define customary boundaries between iwi, especially as they could be seen from a long distance out to sea.[31] However, he did not revise his position on what the angle of the boundary line should be.

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28 *Re Edwards* Stage Two Notes of Evidence, at 6-7.
29 At 31.
30 At 88-89; see also Exhibit 11 Tarakeha Boundaries.
31 *Re Edwards* Stage Two Notes of Evidence, at 357.

[93] Muriwai Jones and Kelvin Tapuke's evidence for Ngāi Tai was that the boundary lines for CMT should be from Te Rangi, out to Te Paepae o Aotea, around Whakaari, and then back to Tarakeha.[32] This position would result in the boundary lines pointing in a north-westerly direction, but more so than the angle proposed by Te Riaki Amoamo. This view was contested by Ms Feint for Ngāti Ruatakenga on the basis that the angle proposed by Ngāi Tai would cut across into the rohe moana of Te Whakatōhea. Kelvin Tapuke based the view that the boundaries should be angled towards Te Paepae o Aotea on the view that "at the end of life and when our loved ones pass away, our belief is that our people swim out to [Te Paepae o Aotea]".[33]

[94] Kelvin Tapuke also deposed that the location marked as Te Rangi on the Maven maps was incorrect – identifying Te Rangi as a bay slightly to the west of the headland that Maven marked as Te Rangi.[34] Moving the eastern boundary of CMT 3 to the west has the effect of decreasing the total area of CMT 3, but is in accordance with the Court's findings at Stage One that the boundary of CMT 3 was to be at Te Rangi. Kelvin Tapuke's evidence on this point was uncontested.

[95] In closing, Ms Rongo for Ngāi Tai, proposed that the most equitable solution, given that all of the applicant groups have a significant association to Whakaari, was to angle all of the boundary lines towards that island, addressing the curvature of the coast by dividing it in similar fashion as the cutting of a pie.

[96] Ngāti Awa submitted that the angle of the boundary line at Maraetōtara should be towards Whakaari, rather than due north, as proposed by Ngāi Tamahaua.

[97] Mr Mahuika for Te Whānau-a-Apanui submitted that the angle of both of the boundary lines for CMT 3 should extend in a straight line towards the middle of Whakaari, stopping at 12 nautical miles. Mr Mahuika submitted that this approach:

(a) aligns with the original boundaries of the applications of the Whakatōhea Māori Trust Board and Ngāi Tamahaua;

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32 At 328.
33 At 338.
34 At 327, see also Exhibit 22.

(b) is consistent with the evidence produced by Te Whakatōhea at Stage One;

(c) aligns with a visible and significant geographic marker;

(d) is pragmatic in that it accommodates the curvature of the coast;

(e) is the approach that is the least likely to encroach on the rohe moana of Te Whānau-a-Apanui and Ngāi Tai and therefore;

(f) is the only area that could be said to have been exclusively held in accordance with tikanga.

[98] Te Ūpokorehe, Ngāti Ira and Ngāti Patumoana did not appear to adopt a position on the issue of the boundaries.

Analysis

[99] Although some applicant groups alluded to the possibility of further hui resolving this issue, in the absence of any agreement, the Court must make a ruling. In order for the CMT orders to be finalised, they must be accompanied by a survey plan that sets out the extent of the CMT area.[35] This cannot be done if the parties remain in disagreement as to the angles of the relevant boundaries.

[100] Owing to the natural curvature of the coastline between Maraetōtara and Te Rangi, as well as further along the coast, boundary lines that point due north would have the effect of cutting across the rohe of Ngāti Awa, Ngāi Tai, and Te Whānau-a-Apanui. I accept Ms Feint's submission that the boundary lines for the CMT areas need to angle inwards so as to accommodate the neighbouring iwi along the coast of the Bay of Plenty.

[101] The applicants were agreed as to where the boundary points are, but there was no consensus as to their bearings. The Court's role is to adopt a position that is

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35 Section 109(4)(a).

consistent with the Stage One judgment, is as consistent as possible with tikanga (acknowledging that the drawing of straight lines on maps is not a practice that would historically have been adopted at tikanga), equitable between the parties, enables an accurate survey, and durable in circumstances where neighbouring iwi are yet to have their full applications determined.

[102] I have concluded that the appropriate approach is to:

(a) survey the western boundary of CMT 1 as beginning at the midpoint of the Maraetōtara Stream, angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;

(b) survey the eastern boundary of CMT 1 as the tip of the Tarakeha headland (where it is already depicted on the Maven maps), angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;

(c) survey the eastern boundary of CMT 3 as at Te Rangi as identified by Kelvin Tapuke, angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;

(d) survey the landward boundary of each CMT area as MHWS; and

(e) survey the seaward boundary of each CMT area as at the 12 nautical mile limit, ensuring that this boundary aligns with the natural curvature of the coastline.

[103] These directions must also take into account the findings I have made above as to the boundaries of the CMCA.

Wāhi tapu

[104] Section 62 of the Act provides that one of the rights that is conferred by and may be exercised under an order made for CMT is a right 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

[105] A site must meet the terms of this definition before the CMT group is able to satisfy the requirements of s 78. Resort must therefore be had to tikanga. As stated by Mr Amoamo who gave tikanga evidence for Ngāti Ruatakenga:

> Tikanga guides us in everything that we do in Te Whakatōhea, how we behave and how we operate as whānau, hapū and iwi. 'Tikanga' literally means acting in the ways that are 'tika' (proper/correct). Tikanga is the law in our area and is underpinned by whakapapa, because without whakapapa you have no right to claim, speak for or take care of the whenua or its resources. This applies to the moana as much as the whenua: the moana is just whenua with water sitting on top of it.

[106] Mr Amoamo also provided guidance on the nature of tapu, and wāhi tapu. He said:

> 'Wāhi' is a place or location and 'tapu' is commonly defined as sacred. So in simple terms 'wāhi tapu' is usually out of bounds to people, at least until such time as the proper karakia ritual is performed.
>
> …
>
> Though 'tapu' is commonly translated as sacred, it is more accurate to think of tapu as being a restriction for spiritual purposes. 'Tapu' must be understood alongside the concept of 'noa'. Noa is when tapu is 'removed' or 'cleared' through the proper karakia ritual, removing the spiritual restriction.
>
> …
>
> The nature of the tapu restriction depends on the context and especially why the tapu was imposed. It could be a complete prohibition on entering an area unless you are a tohunga, or it might permit anyone to enter if appropriate karakia are performed first. Understanding whether something (or some place) is tapu (and if so, why it is tapu) is a central part of understanding tikanga.

[107] Muriwai Maggie Jones who gave evidence for Ngāi Tai and Ririwhenua took the position that wāhi tapu are linked to whakapapa and were a source of obligation to tūpuna. She said on this matter:[36]

> Wāhi tapu can include urupā, birthing sites, placenta burial sites, battle sites, sites of old and existing pā, midden and archaeological sites, sources of water, sites of valued natural resources, sites of ritual practises, significant sites attached to tūpuna, sites of extreme tragedy.

[108] Wāhi tapu protections under the Act can be utilised in limited circumstances to exclude third parties and members of the public from specified locations under a CMT order.[37] Wāhi tapu protections represent the sole limitation on public rights of access and navigation that the Act otherwise guarantees. The specificity of the location of the boundaries of a wāhi tapu or wāhi tapu area is therefore of critical importance, given that it is a right that must be capable of being reasonably understood and complied with.[38]

[109] The need for specificity of boundaries is also a matter that is important at tikanga. Louis Rapihana, a tohunga and Ōpōtiki District Councillor said:[39]

> One of the distinguishing features of a wāhi tapu is that its location and boundaries were identifiable so that people would know to avoid the area. Sometimes *tohu* (signs) or *kōrero* (statements) were used to define a wāhi tapu area. A wāhi tapu must have identifiable boundaries so that it can be protected from inappropriate uses and access. It is not possible to protect a wāhi tapu if nobody knows where the boundaries are.

[110] A wāhi tapu protection right may be recognised if there is evidence to establish:[40]

(a) the connection of the CMT group with the wāhi tapu or wāhi tapu area in accordance with tikanga; and

(b) that the CMT group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area.

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36 Affidavit of Muriwai Maggie Jones, 25 January 2022 at [3].
37 *Re Ngāti Pāhauwera*, above n 8, at [72].
38 At [131].
39 Affidavit of Louis Rapihana, 31 March 2022 at [5.1].
40 Marine and Coastal Area (Takutai Moana) Act 2011, s 78(2).

[111] Section 79 of the Act is prescriptive as to what must be set out in a CMT. A CMT order or agreement must set out the wāhi tapu conditions that apply.[41] These are:[42]

(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 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.

[112] Applicants who have been unable to provide the requisite level of detail in evidence, have not been granted wāhi tapu protections.[43]

[113] Section 81(1) of the Act imposes an obligation on the local authority with jurisdiction where a wāhi tapu protection right exists to take appropriate action that is reasonably necessary to encourage public compliance with any wāhi tapu conditions and s 81(2) provides that a person who intentionally fails to comply with a wāhi tapu condition is liable, on conviction to a fine not exceeding $5,000. Section 104(3)(c)(iv) of the Resource Management Act 1991 requires that, when considering an application for a resource consent, the consent authority must not grant a resource consent contrary to wāhi tapu conditions in a CMT order or agreement. In order to be able to do this effectively, there is a need for precision in describing not only proposed restrictions or prohibitions but the reasons for them.

[114] Claims for wāhi tapu must be objectively established not merely asserted.[44] However, the determination of wāhi tapu is:[45]

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41 Section 78(3).
42 Section 79(1).
43 *Re Ngāti Pāhauwera*, above n 8, at [90].
44 *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A80/02, 17 April 2002 at [251].
45 *Re Ngāti Pāhauwera*, above n 8, at [125].

> …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.

[115] In accordance with the views I expressed in the Stage One judgment as to the appropriate lens through which to analyse whether or not the standard has been met for 'held in accordance with tikanga', I am of the view that tikanga must be the principal guiding determinant in establishing whether or not a particular area is wāhi tapu. Existence of tapu is not, and has never been, predicated on recognition by statute. But where, as under the Act, there is a statutory provision for recognition of a wāhi tapu protection right, the relevant statutory requirements must be met. The task for the Court is therefore to consider whether the requirements of ss 78 and 79 of the Act have been met.

[116] As will be seen from my comments below in relation to individual CMT areas, some applicants made claims in relation to a large number of wāhi tapu sites said to be in need of protection. The vast majority of these sites were either not described or identified with the degree of certainty required by s 79(1)(a), or plainly fell outside of the takutai moana. Some claims were withdrawn post-hearing, but many that clearly fell outside the takutai moana were not. The necessary consequence of a lack of certainty as to geographic boundaries of a claimed wāhi tapu is that the Court is unable to grant those applications for wāhi tapu status. The Court does not have jurisdiction to recognise wāhi tapu protection over sites that are not within both the takutai moana and the relevant CMT order.

Wāhi tapu adjacent to land

[117] At the hearing, some of the applicants sought wāhi tapu status for areas in the takutai moana that were adjacent to a wāhi tapu on land. This raised the issue of whether tapu originating on land adjacent to the takutai moana can extend into the takutai moana, so as to be capable of being recognised under the Act. An example of this was said to be Te Rangimatanui, Waiwhero and Rāhui Whākarōto, all located on land around the mouth of the Waiaua River. This assertion also raises the difficult question of how you measure how far out into the takutai moana the tapu might extend.

[118] The Court has been assisted in answering these questions by the evidence of Pou Tikanga/Tohunga Te Riaki Amoamo, as well as other tohunga such as Tā Pou Temara and Louis Rapihana. However, Mr Amoamo's evidence changed through the course of the hearing leaving me uncertain as to what exactly could be drawn from it. Mr Amoamo initially said, in respect of Te Rangimatanui, Waiwhero and Rāhui Whākarōto, that the tapu would end at MHWS and not follow the water receding with the tide.[46]

[119] He later said in respect of Onekawa Pā and Te Matai Pā, that the tapu would recede with the waters of the tide:[47]

> The tapu ends – if high tide comes high up against the beach towards the sandhills, that's where the tapu will end, but it will recede with the high tide going to the low tide, the tapu follows it to the low tides, because it's affecting the river, the sea, and from low tide it comes back up again and it goes just beyond the waves of the coastline, the tapu, and that falls within the mandate of the 12 nautical miles but close to the shoreline … especially closer to the beach where they can cast out for fishing because the tapu just goes beyond the waves, not, not right out to the 12 nautical miles but it's affecting that mandate of the 12 nautical miles.

[120] Finally, he appeared to conclude that, in such cases, an appropriate limit for the tapu to extend into the CMCA would be one nautical mile, but there was no indication as to where this would be measured from. He stated:[48]

> That's correct to all the wāhi tapu pertaining to Ngāti Rua commences with the high tide coming up on the incoming tide as far as it goes and it when it recedes it follows the outgoing tide as far as it goes and from the outgoing tide over the waves into the sea only.

[121] He further stated:[49]

> I'll put it one mile out because there's 10, yeah there's 11 miles beyond the one mile to make the 12 nautical miles…. As long as it goes into the sea to me is the wāhi tapu because the wāhi tapu on the land is I'm familiar with on either side and I'm familiar with on either side and I'm pretty familiar with the sea but it's how far out to sea and when I stated 1 mile, it should be 1 nautical mile out and that's still part of the 12 nautical miles.

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46 *Re Edwards* Stage Two Notes of Evidence, at 107.
47 At 258-259.
48 At 351.
49 At 355.

[122] Other experts in tikanga also provided their view on this issue. When questioned on how far out tapu needs to be extended from a site in order to protect it, Tā Pou Temara stated:[50]

> …it is for the people who are bound to that area to make those determinations. I have a view but the only view that I can give is a general view that, don't get too close to a wāhi tapu, keep right away from it and for me, I am four hours away in Tūhoe land, that is as far as I want to be from that wāhi tapu.

[123] He later expressed approval of an analogy with the heat of a fire:[51]

> ...it's like the heat of fire, the further you are away from the fire the less you will experience the heat of a fire and if you get too close you're going to get burnt and that's an interesting view. Okay. All right. Now about this, no I'd better not give you an example because it may ruin what you are trying to say but I think, I think that's a good, mmm. No I think tapu is tapu and you can't define that if people have died it's an urupā and the further you get away from it you are – it's tapu. The urupā is defined by a trench or by a fence and that's the extent of the tapu of the urupā.

[124] Finally, he stated in respect of fishing in proximity to a tapu area on land:[52]

> Again, yes, the extent of the tapu and the influence of the tapu may have extended to where I might be fishing and I do not want to take that risk. Always uppermost in my mind is that I might transgress that tapu and for my own safety I will go nowhere near that, that place.

[125] Te Rua Rakuraku, Pou Tikanga for Ngāti Ira, also appeared to agree with the view that tapu on adjacent land can extend, in certain circumstances, into the takutai moana. When discussing Ōpōtiki Mai Tawhiti, he said:[53]

> …Papatūānuku it's not just there, it seeps into the dirt, it becomes all part of this. So, it becomes part of the dirt, it becomes part of the sand, it becomes part of the particulars within Papatūānuku so that's why I believe the indications that are set out in this particular way are knowledge [in] those certain areas. From the high tide, tika, to the low tide because the sea will come up and Tangaroa will come up and he'll expose and he'll bring back the taongas that have been dormant for years…

[126] Although the various tohunga expressed the matter differently, a summary of their evidence is that tapu originating on a coastal area can in some cases extend into

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50 *Re Edwards* Stage Two Notes of Evidence, at 132.
51 At 133.
52 At 133.
53 At 153.

the adjacent takutai moana, beyond mean low-water springs. The issue for determination is how that concept can be depicted in a way that satisfies the requirements of s 79 as to clarity for the purposes of enforcement.

[127] There was no consensus among the experts in tikanga as to how to go about measuring the limit of the extent to which tapu from a site on dry land might extend into the adjacent takutai moana.

[128] Expressing a limit in terms of nautical miles is inherently artificial. It is also difficult to reconcile with the evidence from Mr Amoamo set out at [106] above that if an area is tapu then activities which are noa (including things like eating, bathing, or fishing) should not take place within it.

[129] The determination of whether wāhi tapu or wāhi tapu areas meet the test in s 78 involves a tikanga assessment of the extent to which the relevant tapu extends into the takutai moana, and whether the circumstances necessitate this be recognised in order for the wāhi tapu site to be protected. The distance therefore measured from mean high water springs should be no further than is necessary to protect the wāhi tapu site, in accordance with the purposes of the Act.[54]

[130] The issues seem to be whether tikanga establishes that:

(a) the relevant tapu 'extends' or 'radiates' into the takutai moana;

(b) if so, how far the tapu goes; and

(c) is there evidence connecting the proposed prohibitions or restrictions on access to the protection of the wāhi tapu?

[131] Based on the evidence discussed above, I accept that there may be cases where the tapu inherent in a site outside the takutai moana may also affect the adjacent takutai moana and may justify the imposition of prohibitions and restrictions. However, whether that is so depends on what is established by the evidence in relation to each

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[54] Marine and Coastal Area (Takutai Moana) Act 2011, s 78(2)(b).

site. This will include whether the site can be accurately represented on the relevant survey plan and whether the proposed prohibitions can be framed in a way that will permit their effective enforcement. Sufficient information also needs to be provided so that the reasons for the proposed conditions can accurately be recorded on the CMT. All of this requires the Court to individually consider each application for wāhi tapu, and any proposed prohibitions and restrictions.

[132] As to what the Court should do where the evidence as to the location of the boundary of a wāhi tapu is inconsistent, Mr Rapihana's evidence was:[55]

> It is also my sincere whakaaro (belief) that the Court should not attempt to identify the boundaries of wāhi tapu itself where the locations provided are unclear or inconsistent. This is the function and role of tohunga and should not be undertaken by the Court or anyone else. These are extremely important, *tapu* matters of tikanga. It is for the tohunga who are experts in tikanga to provide the correct kōrero and information on wāhi tapu locations and boundaries.

[133] I accept that statement of principle. However, as discussed in detail below, there are some instances where tohunga giving evidence for different applicant groups have disagreed about aspects of tikanga in relation to wāhi tapu including the exact location and boundaries of a wāhi tapu. In some instances where the differences are relatively minor, it has been possible to interpret the evidence in a way that allows for an accurate boundary of the wāhi tapu to be identified. However, in those instances where the evidence is irreconcilable, the result has been a conclusion that the degree of certainty required in order to comply with s 79(1)(a) has not been met and that it is not possible to record the wāhi tapu area in the CMT.

[134] A further complicating factor has arisen where the CMT has been awarded to multiple groups on a joint basis. This means that the wāhi tapu able to be recognised on the relevant CMTs will be the wāhi tapu as agreed by all of the groups jointly awarded CMT. This is discussed in greater detail at [153]-[155] below. Some applicant groups, notably, but not only, Te Ūpokorehe, have proceeded on the basis that they were individually awarded CMT and that they have an entitlement for their wāhi tapu (as opposed to the wāhi tapu agreed upon by the joint group) to be recorded on the title. The difficulties presented by that approach are discussed in detail below.

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55 Above n 39, at [5.3].

Wāhi tapu – shared exclusivity?

[135] In the Stage Two hearing, multiple applicants brought claims for wāhi tapu protection over the same sites or areas. This was the case in respect of Maraetōtara, and some sites in the Ōhiwa Harbour.

[136] Te Ūpokorehe proceeded on the incorrect assumption that the Court had found that they alone had been awarded CMT in respect of their claimed area and therefore were able to dictate which wāhi tapu in that area were to be included in the joint CMT. They said that they:

> …[did] not want to diminish the relationship that others have to the wāhi tapu they have claimed. However Te Ūpokorehe are the ahi ka in the rohe from Maraetōtara to the Waioweka. It is tika that their iwi would hold wāhi tapu protection rights in that rohe – noting Mr Aramoana's statement that Te Ūpokorehe are the caretakers of their rohe, and while they will never bar others from going to wāhi tapu, Te Ūpokorehe will continue to look after the wāhi tapu "as we have all along".

[137] The Court did not find Te Ūpokorehe were the sole ahi kā in their claimed area. It found that they held the claimed area jointly with others. Te Ūpokorehe therefore cannot unilaterally determine what the wāhi tapu areas shown on the joint CMT are going to be, or insist that wāhi tapu areas that are of importance to them take precedence over the wāhi tapu areas of the other applicant groups that were jointly awarded CMT.[56]

[138] Ngāti Ira adopted an approach consistent with the finding that the CMT (and therefore the ability to seek protection for wāhi tapu) was held jointly in the CMT 1 and 2 areas, submitting that:

> …the duties and responsibilities of active protection of certain areas that are designated wāhi tapu are precisely the kinds of shared obligations which [t]ikanga [prescribes] to be recognised.

[139] Each of the applicant groups who were jointly awarded CMT are able to seek protection for their own wāhi tapu, provided they meet the criteria discussed above, and provided there is no disagreement from the other joint holders of the CMT as to the location of the wāhi tapu and any protections required. The hapū/iwi involved

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[56] This topic is addressed below at [153]-[155].

cannot act unilaterally outside of the group awarded CMT. Within the umbrella of the successful CMT group, individual hapū/iwi may identify the same site or an overlapping site and, depending on the nature of the tapu, it is possible that they may propose different restrictions and prohibitions. These matters are discussed further in the context of the various proposed wāhi tapu sites.

[140] The availability of protection for a wāhi tapu within a jointly held CMT is driven by the consideration of whether the specified area is held in accordance with tikanga.

[141] It is not the role of the Court to determine a priority of rights in tikanga relative to wāhi tapu. That is something that needs to be resolved between the parties in accordance with tikanga.

Restrictions and prohibitions

[142] Section 78(2)(b) provides that a wāhi tapu protection right may be recognised on the application of a CMT group if there is evidence to establish:

> That the [customary marine title] group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area.

[143] Some applicants submitted that if a group said that they "required" prohibitions or restrictions on access to a wāhi tapu area, that was the end of the matter and it was not necessary or permissible for the Court to assess whether the prohibitions or restrictions were reasonable or necessary. Such an assertion is untenable.

[144] It is a pre-condition to an order under s 78 that the CMT group provide the Court with evidence which establishes the connection of the group with the wāhi tapu in accordance with tikanga. There must also be evidence to establish the link between the proposed prohibitions or restrictions on access and the protection of the wāhi tapu. If access restrictions are proposed that are unrelated to any element of protection of the wāhi tapu, the Court would not be entitled to approve them. The test in the Act is not just that the group "require" prohibitions or restrictions on access, it is that they require them to protect the wāhi tapu. Wāhi tapu prohibitions and restrictions are intended to protect areas that are sacred. A number of applicants have proposed

conditions which seek to regulate the behaviour of the public for reasons unconnected with protection of wāhi tapu. That is not permissible.

[145] One of the most obvious ways for an applicant to establish the connection between proposed restrictions or prohibitions on access to a wāhi tapu and the protection of the wāhi tapu is to provide evidence that, in accordance with tikanga, the same sorts of restrictions and exclusions are already observed by members of the applicant group. Following this, the applicant would also have to show that those restrictions would be capable of enforcement on the terms of the Act, in respect of a specified location. If, for example, a group proposed a restriction or prohibition on access to a wāhi tapu for the purpose of fishing, but the evidence was that the members of the applicant group regularly fished in the area themselves, that could support a conclusion that such a condition was unconnected with the protection of the area and therefore, not available for the Court to impose.

[146] Some applicants, such as Ngāti Ruatakenga, sought to revisit conclusions made by the Court in *Re Ngāti Pāhauwera*, stating:

> In *Ngāti Pahauwera*, it was considered that proposed prohibitions or restrictions on inappropriate activity that are already regulated in existing legislation (such as a summary offence, or legislation relating to fishing or the RMA) cannot be said to be necessary. It is submitted that this conclusion warrants revisiting in light of the principles in *Trans-Tasman Resources*, that recognise "tikanga as law". Whether inappropriate activity is already regulated in existing legislation is largely beside the point. The requirement for protection is derived directly from tikanga, as a system of law, and it is that jural system that regulates the activity and defines the prohibitions and restrictions required. Indeed, it is inherent in the nature of tapu that restrictions are required, and that the kaitiaki are responsible for protection of the site, not Pākehā.
>
> (footnotes omitted)

[147] This submission misses the point. There is no doubt that it is the kaitiaki who are responsible for protecting wāhi tapu, not Pākehā. However, without in any way diminishing the rights and responsibilities of the tangata whenua, the Act provides a mechanism that allows the protection of wāhi tapu required at tikanga to be enforced through the state legal system. Because the Act contemplates enforcement for breach of wāhi tapu restrictions or prohibitions by way of prosecution, the issue of whether a particular prohibition or restriction is "required" does involve a consideration of

whether the activity sought to be restricted or prohibited is already expressly the subject of legislation addressing the same kind of prohibition or restriction sought by the applicant. Examples are prohibitions on littering or drinking alcohol in a public place.[57] The regulation of the use of vehicles on beaches by means of bylaws can also be relevant.

[148] The Act attempts to make penal sanctions of the type routinely available for breach of criminal or regulatory legal systems available for breaches of certain aspects of tikanga in relation to wāhi tapu. Section 81(2) creates an offence whereby:

> Every person commits an offence who intentionally fails to comply with a prohibition or restriction notified for that wāhi tapu or wāhi tapu area, and is liable on conviction to a fine not exceeding $5,000.

[149] Were it not for the provisions of the Act, these processes would not be available for a breach of tikanga. In that sense, the Act grafts Pākehā concepts of enforcement for breach of legal obligations onto the jural system of tikanga.

[150] If the integration of the two different concepts is going to be effective, the legal obligations which may potentially lead to a process of enforcement when they are infringed, must be articulated in a way that facilitates the ability to, in appropriate cases, bring a successful enforcement action.

[151] The most significant requirement in this regard would seem to be certainty as to the nature of the obligation so that those who are liable for breaching it know exactly what they must not do and where they must not do it. Enforceability is a fundamental requirement of any prohibition which carries with it the possibility of criminal sanction. There must be a relevant matrix to which reference can be made so as to provide individuals or groups with the opportunity to comply with any prohibition. This principle is described by Professors Horder and Ashworth as the principle of 'maximum certainty', and is a corollary to the rule of law.[58] An offence must be clearly defined in law in order to provide an opportunity for individuals to amend their

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57 See *Re Ngāti Pāhauwera*, above n 8, at [144]-[160].

58 Jeremy Holder and Andrew Ashworth *Ashworth's Principles of Criminal Law* (10th ed, Oxford University Press, Oxford, 2022) at 88.

conduct so as to comply with it – they must know what actions and/or omissions will result in sanction.[59]

[152] In respect of wāhi tapu, tikanga undoubtedly defines the prohibitions and restrictions that may be necessary to protect a wāhi tapu but the statement that "… the kaitiaki are responsible for protection of the site, not Pākehā …" would seem to overlook the fact that the Act does not purport to vest solely in kaitiaki all responsibility for protection of particular sites, but specifically includes the protective component of enforcement for breach of prohibitions or restrictions in relation to a wāhi tapu by way of prosecution through the Courts.

Stage One findings

[153] Wāhi tapu protection rights may only be granted in favour of a CMT group.[60] They are incidental to an award of CMT. In the Stage One judgment the applicants were awarded CMT on a joint basis.[61] The CMT orders are to be in accordance with those findings. The 'customary marine title group' for the purposes of the Act and the corresponding CMT orders, is that amalgamation of hapū collectively, rather than each hapū individually. Where the tests for wāhi tapu protections are established, those protections are to be granted in favour of the CMT group.

[154] While the CMT orders may delegate a particular group (for example, a hapū) as having responsibility for the protection of a wāhi tapu or a wāhi tapu area, it is not a mechanism for members of a jointly held order to carve out their own distinct areas of exclusivity. The Court does not have jurisdiction to award wāhi tapu protections in favour of any other entity other than a CMT group. In this respect the applicant's submissions and applications for wāhi tapu protections have, in a number of cases, misunderstood the Court's findings at Stage One, and the requirements of the Act.

[155] The Court was clear as to the basis upon which CMT was awarded. The same analysis applies to wāhi tapu protections. The Court has no jurisdiction to award wāhi tapu protection in respect of sites or areas that are contested or in respect of which

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59 At 89.
60 Section 78(1).
61 At [185]-[187], [331], and [660]-[667].

there is conflicting evidence.[62] That is the nature of the Court's findings as to shared exclusivity:[63]

Approach

[156] Based upon the factors set out above, the following framework has been applied to the assessment of wāhi tapu claims made by CMT groups:

(a) Does the proposed wāhi tapu or wāhi tapu area meet the definition contained in s 6 of the HNZPTA 2014?

(b) Has the CMT group established its connection with the wāhi tapu or wāhi tapu area in accordance with tikanga?

(c) Does the CMT group require the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area?

(d) Has the CMT group provided sufficient information to allow the Court to identify with certainty the location of the boundaries of the wāhi tapu or wāhi tapu area?

(e) Are the proposed restrictions or prohibitions linked to the protection of the wāhi tapu area, and are they capable of being enforced?

(f) Have any exemptions for specified individuals to carry out PCR in relation to or in the vicinity of, the protected wāhi tapu or wāhi tapu area been set out with sufficient certainty?

(g) Where it is alleged that tapu originating on land extends into the takutai moana:

(i) Does the tikanga evidence show that tapu originating on land extends into the takutai moana?

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62 Above n 8, at [166]-[173].
63 Above n 1, at [185]-[187], [331], and [660]-[667].

(ii) Do the circumstances necessitate that this be recognised in order for the wāhi tapu site to be protected?

(iii) What is the distance measured from MHWS that is necessary to protect the wāhi tapu site in accordance with the purposes of the Act?

Particular issues relating to Te Ūpokorehe

[157] There are two particular issues in relation to Te Ūpokorehe that need to be addressed as a result of submissions made to the Stage Two hearing. These are firstly, what was the nature of the recognition orders granted to Te Ūpokorehe and secondly, who represents Te Ūpokorehe.

Nature of CMT

[158] The case initially presented by Te Ūpokorehe Treaty Claims Trust (TUTCT) at the Stage One hearing was that they alone held mana over Ōhiwa Harbour and that any rights other groups claimed to exercise in that area were done under their mana.[64] They also made the same claim for the area from Maraetōtara in the west to Pakihikura (which they define as the mid-point of the Waiōweka River mouth) in the east. Those claims were not upheld by the Court.

[159] The Court's conclusions in relation to CMT, as set out in the Stage One decision, reflect the Court's adoption of, and agreement with, the report provided by the pūkenga. The pūkenga concluded that CMT in the area from Maraetōtara to Tarakeha was exclusively used and occupied in accordance with tikanga by a joint entity which had six different parts. They were: Ngāi Tamahaua, Ngāti Ruatakenga, Ngāti Ira, Ngāti Ngāhere, Ngāti Patumoana, and Te Ūpokorehe (the six entities).[65] Historically, the six entities had been regarded as the six hapū of Whakatōhea, although the evidence established that on various occasions from the latter half of the 19th century onwards, Te Ūpokorehe had been described in European documents as both a hapū and an iwi.

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64 Above n 1, at [158].
65 At Appendix A [(2)(d)].

[160] In recent years, a number of members of Te Ūpokorehe have asserted more vigorously that they are an independent iwi and not a hapū of Whakatōhea. That view was espoused by TUTCT.

[161] Notwithstanding the continuing focus of Te Ūpokorehe on this issue, whether Te Ūpokorehe is properly described as a hapū of Whakatōhea or an iwi in its own right is immaterial to both the conclusions reached by the pūkenga in their report and the decisions reached by the Court in the Stage One hearing.[66] It is also irrelevant to the matters that the Court has to decide at the Stage Two hearing.

[162] The pūkenga report treated Ōhiwa Harbour differently to the area of coastline between Maraetōtara and Tarakeha. It specifically acknowledged that Ngāti Awa had interests in the western part of Ōhiwa Harbour together with the six entities.

[163] The pūkenga's report was available to the parties prior to the presentation of their closing submissions. The six entities and Ngāti Awa indicated that they accepted the pūkenga's findings and the Court was encouraged to adopt a joint exclusivity approach.

[164] This was a change in position for Ngāti Awa who, up to that point, had participated in the hearing as an interested party. None of the applicants objected to that part of Ngāti Awa's application that related to Ōhiwa Harbour being dealt with by the Court as if they had been applicants. Given the pūkenga's conclusions, that seemed a pragmatic result as otherwise potential difficulties could have arisen. Although Ngāti Awa's preference had been to engage directly with the Crown, they also had an application before the Court for orders under the Act. The Court had heard all the evidence relating to that part of Ngāti Awa's claim relating to Ōhiwa Harbour that would have been heard in direct engagement or a separate hearing, and it would have been an inefficient use of the parties', Crown's and Court's resources for the same issues to be litigated again. No applicant was disadvantaged by this approach.

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66 At [313]-[314].

[165] Ngāti Awa also expressly accepted that its interests in Ōhiwa Harbour were held jointly with the Whakatōhea hapū and Te Ūpokorehe (to the extent Te Ūpokorehe might be seen as a separate group to Whakatōhea).

[166] Counsel for Te Ūpokorehe, in closings submissions at the Stage One hearing, also expressly recognised that Ngāti Awa hapū held rights in Ōhiwa Harbour on a basis of joint exclusivity. Te Ūpokorehe's counsel expressly accepted the availability of the concept of joint exclusivity and a joint award of CMT in respect of Ōhiwa Harbour. However, counsel proposed that the joint interests could be recognised by the grant of multiple overlapping CMTs in respect of the same area.[67] The Court concluded that the Act did not provide for multiple CMTs in respect of the same area. That meant that Te Ūpokorehe (like Ngāti Awa in respect of Ōhiwa Harbour) could not insist on receiving their own individual CMT.

The Court's findings

[167] In the Stage One judgment, the Court noted that all of the six entities accepted the pūkenga's findings that the takutai moana was held jointly by the six named groups (in respect of Maraetōtara to Tarakeha) and the six entities and Ngāti Awa (Ōhiwa Harbour). The Court specifically noted that:[68]

> [Ūpokorehe] did not dispute the fact that the other hapū shared the area, the dispute was the basis upon which this was done.

[168] The Court also noted that:[69]

> The pūkenga and the Court differed from Ms Baker of TUTCT as to whether the areas found to have been held jointly were held by [Ūpokorehe] as an iwi with mana moana or as one of six equal groups (seven such groups in relation to Ōhiwa Harbour).

[169] The Court also noted that:[70]

> It is also possible that [Ūpokorehe] might not accept the Court's adoption of the pukenga findings and not wish to be part of any CMT which they jointly held with other hapū. That would obviously be a matter for them.

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67 At [164].
68 At [184].
69 At [183].
70 At [187].

Te Ūpokorehe's position at the Stage Two hearing

[170] The opening submissions of counsel for Te Ūpokorehe at the Stage Two hearing confirmed that Te Ūpokorehe, jointly with the other applicant groups that had been awarded CMT on the basis of joint exclusivity, had filed two draft CMT orders, one in respect of the area between Maraetōtara to Tarakeha, the other in respect of Ōhiwa Harbour. That was consistent with the Court's findings discussed above.

[171] However, some of the evidence filed on behalf of Te Ūpokorehe at the Stage Two hearing, and some of the submissions of counsel, created confusion as to the extent that Te Ūpokorehe actually accepted the Court's conclusion that they did not meet the test set out in s 58 of the Act for CMT on their own, but did meet it on the basis of a joint exclusivity with the other successful groups.

[172] The joint affidavit of Maude Edwards and Wallace Aramoana dated 22 January 2022 filed in support of Te Ūpokorehe's case in the Stage Two hearing, contains conflicting statements. After setting out the Court's findings in respect of CMT 1 and CMT 2 awards, the affidavit says:[71]

> We agree that it is tika for these groups to hold orders of this type – it recognises the rangatiratanga that each of these groups holds in their respective rohe.

[173] That statement is consistent with acceptance of the Court's findings as to shared exclusivity. However, immediately following that, the paragraph goes on to say:

> We don't agree that all of these groups hold mana whenua and mana moana in the Ōhiwa Harbour and the balance of the application area.

[174] That statement would indicate an unwillingness to accept the Court's fundamental finding that neither Te Ūpokorehe nor any other individual Whakatōhea hapū (or Ngāti Awa in respect of Ōhiwa Harbour) could, on their own, meet the test for CMT set out in s 58 of the Act.

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71 At [4].

[175] At [9] of the affidavit, the deponents said:

> Te Ūpokorehe do not agree with the views that the Court arrived at; [sic] However, we now feel compelled to participate in this process to avoid others holding rights in our rohe without any ability on our part to influence the exercise of those rights. Therefore we have engaged with other groups, and arrived at what we would call an uneasy compromise.

[176] The Stage Two hearing is not the forum to challenge any of the findings made in the Stage One hearing. The Court of Appeal is the place to challenge such findings. In this Stage Two hearing, I am obliged to proceed in accordance with the findings made in the Stage One decision, and in accordance with the draft orders which Te Ūpokorehe participated in drafting and filing.

Who represents Te Ūpokorehe?

[177] Surprisingly, given that during the Stage One hearing none of the other applicants challenged the mandate of TUTCT to represent Te Ūpokorehe, during the Stage Two hearing Mr Cunningham, on behalf of the Edwards Priority applicant and the other WKW applicants, cross-examined Te Ūpokorehe witnesses in an apparent attempt to establish that TUTCT did not represent Te Ūpokorehe. He followed that up with submissions to the effect that "The group represented by [TUTCT] is not a hapū of Whakatōhea." He went as far as saying that the contact address for "Te Ūpokorehe hapū of Whakatōhea" is Ngāti Muriwai Authority Trust, 37a Woodlands Road, Ōpōtiki 3122.

[178] These submissions fly in the face of the Court's findings.

[179] There is no doubt that, in 1999, a representative of Te Ūpokorehe supported the original application under the Foreshore and Seabed Act 2004 lodged by the late Mr Edwards. However, it is equally as clear that any authorisation for Mr Edwards to act on behalf of the Te Ūpokorehe was promptly withdrawn.

[180] The entity that advanced the claim at the Stage One proceedings on behalf of Te Ūpokorehe was TUTCT. It was that entity whose evidence was accepted by the pūkenga and by the Court as establishing that Te Ūpokorehe, jointly with the others named, qualified for orders of CMT.

[181] There is no doubt that the view that Te Ūpokorehe is an iwi as opposed to a hapū of Whakatōhea, is not universally held by all people who identify as members of Te Ūpokorehe. Some people, who identified as Te Ūpokorehe and held the view that Te Ūpokorehe was a hapū of the Whakatōhea iwi, gave evidence. Keita Hudson and Bruce Pukepuke were two who gave evidence in support of the unsuccessful Flavell application for CMT. However, no entity, other than TUTCT, advanced an application at Stage One purporting to represent Te Ūpokorehe.

[182] Where, at the Stage One hearing, no challenge has been made to the authority of the applicant group to be represented by the particular entity conducting the litigation, then it is not appropriate for other applicants (or any other party) to attempt to raise such a challenge at the Stage Two hearing.

PART III

CMT and PCR orders

Draft CMT orders

[183] On 21 January 2022, the successful applicant groups filed updated draft CMT orders. The holders of the orders are listed as the various hapū who were successful at Stage One, and there are contact details for each of those hapū with the exception of Ngāti Ngāhere. The draft orders did not contain information regarding wāhi tapu areas and were not accompanied by maps.

[184] The successful applicants are in partial agreement as to the form of the draft orders. However, they have different views as to whether a formal structure/body needs to be created to give expression to the draft orders, so as to provide guidance on issues of governance and/or dispute resolution.

Submissions

Ngāti Ruatakenga

[185] Ms Feint KC, on behalf of Ngāti Ruatakenga, provided submissions as to who should be the holders of CMT 1 and CMT 2 on behalf of Te Kahui. She proposed the following approach in opening submissions, "to put some more flesh around the bare bones of the CMT orders":

> 7.1 *Holder of order* – the iwi/hapū recognised in the decision as the successful applicants are named as the groups to which the orders apply as well as the holders of the orders. The contact people for each group will be two persons:
>
> 7.1.1. one of the individuals who applied for the order (provided they consent); and
>
> 7.1.2. a person elected by hui a hapū according to that group's tikanga – this will have to happen prior to the orders being sealed;
>
> 7.1.3. in the event that there is any dispute about who should be named, the first named applicant shall be inserted (with their consent, and if not, the next named in the application);

7.1.4 following the making of the order, application may be made at any time to vary the order under s 111 provided that the agreements [sic] of that provision are met.

7.2. *Separate Coastal and Ōhiwa Harbour orders* – although the judgment appears to contemplate one order for the six Whakatōhea hapū that covers the coastal area and Ōhiwa Harbour, with a separate order for the western part of Ōhiwa Harbour jointly held with Ngāti Awa hapū, it was decided that the cleanest approach is to have one order for the entire Ōhiwa Harbour, and another for the coastal area;

…

7.5. there was some thought given to including the poutarāwhare construct developed by the pūkenga, to make it clear that other groups (such as the Mokomoko whānau) are included under the roof of this whare held up by the six pou. However, there is not yet consensus as to whether this sort of detail should be included in the order itself or the supporting documentation (such as a trust deed);

7.6. *Decision-making processes* – there was considerable discussion about establishing a trust to hold the order on behalf of the hapū, but consensus was not achieved on this point. Some hapū considered that it would be administratively convenient to have a trust(s) named as the holder and contact point for the CMT orders (Ngāti Rua are in this camp), but others thought that each hapū should represent themselves on the order as a matter of mana motuhake;

7.7. there is agreement on the following principles:

7.7.1. each group has one vote through its two representatives;

7.7.2. in case of dispute between the two representatives, the person elected by hui a hapū takes precedence;

7.7.3. all decisions are by consensus of the holders, expressed through the vote of their representatives;

7.7.4. if agreement cannot be reached, holders must invoke a formal tikanga-based dispute resolution process;

7.7.5. for every application for permission to exercise a resource consent in the common marine area, in the event that consensus is not reached, the holders must advise the applicant that permission is refused;

7.7.6. split votes may be taken in the following two situations only (in the event that consensus is not achieved after following the dispute resolution process), in which case a two-thirds majority will be required:

(a) approval of an application for resource consents where one or more of the groups is an applicant for consents, and it is a condition of the consent that their interest is non-transferable over the life of the consent;

(b) approval of the planning document.

[186] In closing, counsel for Ngāti Ruatakenga submitted that there were two options for the Court to adopt in respect of who holds the CMT orders. These were that:

(a) the orders simply set out that they are held by the successful applicant groups with no further details, other than that all governance and dispute resolution issues are to be determined by tikanga; or

(b) the Court directs that a trust be formed to hold the orders on behalf of the applicant groups, with appointment and decision making processes described in the Trust Deed on the basis of the structure outlined in their opening submissions.

[187] Ngāti Ruatakenga submitted that the former approach had the benefit of simplicity and cost effectiveness, and that it is preferred by some applicants as enhancing the mana motuhake of hapū. However, they also noted that a lack of structure may make dispute resolution difficult. In respect of the latter, they submitted that a trust would provide greater certainty, and be more convenient for engaging with third parties. However, it may not be necessary, and it is unknown whether there is funding available for that purpose.

[188] The type of structure proposed by Ms Feint as to how the CMT orders should be held has considerable merit. It also has the benefit of substantial support from the majority of the successful applicant groups. However, that support is not unanimous. As detailed at [197] and [190]. Te Ūpokorehe and Ngāti Ira are opposed to some components of the proposal. In the absence of unanimity, the Court is obliged to follow option (a) set out by Ms Feint and to record the identity and contact details of those applicant groups jointly awarded CMT 1 and CMT 2, and leave it to them to work out, in accordance with tikanga, how the various rights and obligations flowing from a grant of CMT will be implemented.

[189] As to their PCR order, Ngāti Ruatakenga submits that "Ngāti Ruatakenga, hapū of Whakatōhea" should hold the order, with Mereaira Hata as the main contact person. They submit that their draft PCR order is self-explanatory, simply setting out the PCRs

awarded according to the terms of the Stage One Judgment. No diagram or map was attached to their draft order. That will need to be remedied before the Court can formally grant such an order.

Ngāti Ira o Waiōweka

[190] Ngāti Ira agrees with the submissions of Ngāti Ruatakenga on behalf of Te Kahui as to who should hold CMT 1 and CMT 2. However, Ngāti Ira contests the suggestions made at [7.7.1] and [7.7.2] of Ngāti Ruatakenga's opening submissions. They submit that each representative should have the right to vote and that hapū should not be restricted to one vote through two representatives. They submit that this would be more consistent with tikanga evidence presented by Tā Pou Temara, the position of tikanga at common law, and the right of indigenous peoples to self-determination in international law.

[191] Ngāti Ira submits that Te Mana Moana o Ngāti Irapuaia Charitable Trust should hold their PCR order, with Te Rua Rakuraku as the main contact person. No diagram or map was attached to their draft order. This will need to be remedied.

Ngāti Patumoana

[192] In his opening submissions Mr Bennion on behalf of Ngāti Patumoana stated:

> We adopt the submissions on the nature and content of the orders and the base requirements for the holding entity filed by counsel for Ngāti Ira.

[193] Mr Bennion did not alter this position in closing submissions, but did note briefly the mandate issue regarding Te Ringahuia Hata (discussed below), stating:

> 14. Ms Te Ringahuia Hata was challenged on her standing to hold the order. Her evidence is that she is required to take this matter forward as a kupu ohaaki. Mr Amoamo supported this approach (2nd affidavit Tab 678). In any event, as Ms Feint explained in her opening submissions, the proposal is to have 2 representatives, one from the applicants and one selected by hui a hapū.

[194] Ngāti Patumoana was not awarded any PCRs at Stage One.

Ngāi Tamahaua

[195] Ngāi Tamahaua supports the proposals made by the other members of Te Kahui as to who should hold the CMT orders. At the time the orders were submitted to the Court the hapū appointed representative was Mr Hetaraka Biddle. Given Mr Biddle's passing, Ngāi Tamahaua will need to nominate a replacement.

[196] As to the PCR orders for Ngāi Tamahaua and Te Hapu Tītoko o Ngāi Tama, they propose that Ms Hillier together with a representative appointed in accordance with tikanga should hold the order. The draft PCR order filed with the Court currently describes the proposed holders of the PCR order as Tracy Hillier and Hetaraka Biddle. No diagram or map was attached to their draft order. This will need to be remedied.

Te Ūpokorehe

[197] Te Ūpokorehe intend that TUTCT will be the holder of the CMT order on their behalf. However, Te Ūpokorehe submits that it is not necessary to direct that any other body or arrangement be formed to hold the orders on behalf of the successful applicants collectively. They submit any governance or dispute resolution issues can be addressed through tikanga. Te Ūpokorehe also submit that the guiding principle should be that each successful applicant group appoints their representatives in accordance with their own tikanga, rather than on the terms outlined by Ngāti Ruatakenga.

[198] Te Ūpokorehe submit that the holder of their PCR order should be TUTCT for the same reasons as in respect of the CMT orders. No diagram or map is attached to their draft order either.

Ngāti Ngāhere

[199] Ngāti Ngāhere did not provide submissions or draft orders in respect of their inclusion in CMT 1 or CMT 2. Unless they provide the information required by s 109, including the name of the person or entity to hold the orders on their behalf and their contact details and those of the holder, they will not be able to be listed on the CMT orders.

Te Runanga o Ngāti Awa

[200] Ngāti Awa supports the draft order that has been filed with the Court with respect to the Ōhiwa Harbour CMT. In closing, counsel for Ngāti Awa submitted that the draft order is sufficient in its current terms, and stated:

> Whilst TRONA is not opposed to an entity of some form in principle, such as a trust, TRONA is also mindful of the unnecessary proliferation of further entities in the Bay of Plenty that will require time and resource in an environment where time and resources are already stretched. That has also guided TRONA's approach to the draft Ōhiwa CMT order that has been filed. In short, it is counsels' submission that the requirements under section 109 of the Act have been satisfied in the draft Ōhiwa CMT order filed with the Court on 21 January 2022.

[201] Ngāti Awa confirmed that it is the successful applicants' intention to rely on the Maven maps as the basis for the CMT orders[72], and that they intend to add wāhi tapu schedules to the draft orders once determinations have been made as to wāhi tapu in the Stage Two judgment.[73]

[202] Ngāti Awa were not awarded any PCRs in the Stage One judgment.

Ngāi Tai and Ririwhenua

[203] Ngāi Tai have also filed a draft order in respect of their CMT between Tarakeha to Te Rangi. The holder of their order is to be the Ngāi Tai Takutai Kaitiaki Trust.

[204] Ngāi Tai were not awarded PCRs in the Stage One judgment.

Ngāti Muriwai

[205] Ngāti Muriwai's draft PCR order[74] lists as the holders of the order, the current trustees of the Ngāti Muriwai Authority Trust being: Nepia Tipene, Adriana Edwards, Christina Davis, Glenis Reeve and Milly Hunia. Attached to the draft order was a survey plan depicting the area to which the order is to apply.

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72 At [11(e)].
73 At [14].
74 Which is attached to their closing submissions.

[206] The Trust is proposed as the holder of the PCR on the basis that the hapū of Ngāti Muriwai has provided a mandate to the Trust through hui-a-hapū. Ngāti Muriwai submit that the Trust has been established with the support of the members of Ngāti Muriwai and that it is suitable as the Trust's deed requires the trustees to act for the benefit of the hapū. However, they also propose the addition to the PCR of a provision reading:

> Ngāti Muriwai may at any time by a decision at hui change the holder of the order and if this occurs an application for variation of this order will be made pursuant to section 111 of the Marine and Coastal Area (Takutai Moana) Act 2011.

[207] This provision is unnecessary. Section 111 provides that the holder of any recognition order may apply to vary that order. Alternatively, where the holder has ceased to exist, or being a natural person has died or no longer has legal capacity, a representative of the group to which the order relates may apply to vary it. This provision should therefore be deleted.

Te Uri a Whakatōhea Rangatira Mokomoko

[208] Te Uri a Whakatōhea Rangatira Mokomoko have filed a draft PCR order which names the applicant, Karen Stefanie Mokomoko, as the holder of the order, "or nominee(s) to be appointed before or after [the] order is sealed by the Court". The draft order contains a description of the rights, their location, and proposed limitations on the rights. It does not contain any diagrams or maps, as counsel are waiting for determinations on wāhi tapu to be made, as these may limit or prohibit the exercise of PCRs. Counsel for the whānau stated in their opening submissions that:

> 4.3 As the Court will be aware, no formal entity is established to represent the Whānau. Nevertheless, the proposed holder of the PCR Order remains Karen Mokomoko as per the originating application filed by her and the subsequent amended applications. The intention that the PCR Order be for the entire Whānau is maintained, and whether a representative entity be formed to hold the PCR Order, can be addressed prior to the sealing of the final Order.

[209] It is necessary for any representative entity to be formed and identified to the Court prior to the sealing of the final order in order to comply with s 109(2). No diagram or map is attached to their draft order.

[210] The whānau acknowledge that their application for CMT was unsuccessful, but seek to have their coastal presence in the application area acknowledged in the preamble of the order for CMT 1. They submit that the Stage One judgment[75] and the pūkenga report[76] support that outcome. They seek that their history and kōrero on the coast is reflected somehow in the final CMT orders, in isolation from their operative parts. The successful CMT 1 applicant groups indicated that they were still considering how to accommodate the pūkenga's observations regarding Mokomoko. They are encouraged to conclude that process promptly and advise the Court of the outcome.

CMT 1

Mandate requirements for CMT

[211] The Act is silent in respect of issues of mandate, although the definition of an applicant group provides that those applying for recognition orders must be one or more iwi, hapū or whānau groups, or a legal entity or person appointed to be the representative of such an iwi, hapū or whānau.[77] Any legal entity may be corporate or unincorporate.

Case law

[212] The primary authority regarding issues of mandate is *Re Tipene*. In that case, Mr Tipene had successfully established that he met the tests for a grant of CMT over a small marine and coastal area to the south west of Rakiura (Stewart Island), encompassing the islands of Pohowaitai and Tamaitemioka.[78] Mallon J addressed the issue of who should hold the CMT order in a further judgment.[79]

Positions of the parties

[213] Several applicants challenged the right of Ms Te Ringahuia Hata to effectively step into the shoes of her father, the late Mr John Hata, for the purposes of holding any

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75 Above n 1, at [413]-[420] and [546]-[576].
76 At 175.
77 Marine and Coastal Area (Takutai Moana) Act 2011, s 9.
78 *Re Tipene* [2016] NZHC 3199, [2017] NZAR 599.
79 *Re Tipene* [2017] NZHC 2990.

CMT on behalf of Ngāti Patumoana. Mr Hata was the original primary applicant for Ngāti Patumoana. The parties who sought to challenge Ms Hata's mandate alleged that she had no mandate to represent Ngāti Patumoana, or to be a holder of the CMT orders on their behalf, not having provided feedback to the hapū following the Stage One judgment. Ms Hata and Mr Amoamo were cross examined on that point.

[214] Mr Pou, counsel for the Whakatōhea Māori Trust Board, sought to establish that there had been a 'deficiency' in process because Ms Hata did not report back to the hapū, and alleged that she had not sufficiently engaged with the hapū so as to be able to adequately represent it as a holder of any CMT order.

[215] Mr Riesterer, who gave evidence for the Whakatōhea Māori Trust Board, advanced the same argument in support of the contention that either the Whakatōhea Fisheries Trust and/or the Whakatōhea Māori Trust Board should be appointed as the holder of CMT orders on behalf of the hapū of Whakatōhea.

[216] Mr Sharp, counsel for Ngāti Muriwai, submitted that a central issue was whether a proposed holder has the support of the applicant group, and that the Court must be satisfied that the applicant group have made an informed decision.

[217] Mr Cunningham, counsel for a number of applicant groups who were unsuccessful in their claims for CMT, submitted that all the successful applicants for CMT needed to provide evidence that a 'credible mandate' had been achieved. He expressed a concern that "many of those before the court do not appear to have been mandated to represent the applicant groups at these hearings".

[218] Mr Cunningham then invited the Court to view the procedure set out in the Crown's "Red Book" used by the Waitangi Tribunal, as an analogous process through which successful applicants could be required to demonstrate a credible mandate. The Red Book addresses process requirements in the Tribunal for overlapping claims in the historic settlement process. It is not relevant to claims under the Act. This topic is discussed in greater detail at [229] and [230] below.

Evidence of Mr Amoamo and Ms Hata

[219] Mr Amoamo's evidence was that John Hata was a pou tikanga for Ngāti Patumoana, that he regularly reported back to the hapū, that upon his death he passed that role to his daughter, and that this was in accordance with tikanga. He stated:[80]

> Well, it came under the role of a ōhāki. He passed it on to Te Ringahuia, the knowledge, because Ringahuia is the only one that can speak Māori and very few of Ngāti Patu today speak Māori of the generation of today. They have lost the reo to stand up and speak on the marae. He's passed it on to someone that still has the tikanga Māori and can still participate in karanga and all that on the marae.

[220] He also stated that the time would come when they would both go back to the hapū, confirming that had not occurred in the time between the Stage One judgment and the Stage Two hearing.[81] Ms Hata's evidence on this topic was consistent with that of Mr Amoamo.

[221] This role of kupu ōhāki[82] is one which both Mr Amoamo and Ms Hata described as being a role which tikanga requires that she undertake. Ms Hata stated in cross-examination:[83]

> I think Uncle Te Riaki explained to you the tikanga. The tikanga is kupu ōhāki in my instance, that's the tikanga. It doesn't need to go back to a hapū hui for endorsement, it's one's dying wishes as their last oath, what they wished to see happen and it's done in accordance with tikanga mai rānō. There's a lot of instances where this has happened in Whakatōhea, I'm one of many and it's not an easy role, if you can say, to accept and it's a role that you can't turn down under tikanga… In the case of my representation, Uncle Te Riaki has already explained our tikanga, the process that we follow.

Discussion

[222] In the absence of any prescriptions relating to mandate in the Act, it is for the Court to determine, on the basis of all the evidence tendered to it, who should hold the CMT. That is consistent with the approach taken by Mallon J in *Re Tipene*. It would have been preferable for the successful applicants to have agreed on who should hold

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80 *Re Edwards* Stage Two Notes of Evidence, at 284.

81 At 284.

82 Kupu ōhāki refers to a person's parting or dying wish/speech. See Byron Rangiwai "The critical theory of Te Kooti Arikirangi Te Turiki" (2017) 10 Te Kaharoa 194 at 194.

83 *Re Edwards* Stage Two Notes of Evidence, at 287.

the CMT orders, but that has not happened and the Court must therefore determine the matter as best it can.

[223] As a result of my conclusions in the Stage One decisions as to the joint basis for CMT 1 and CMT 2, each of the successful joint applicants will have to have a representative named on the title. For CMT 1 that will be the six successful applicants. For CMT 2 that will be the seven successful applicants. For CMT 2 Ms Irwin-Easthope, on behalf of Ngāti Awa, nominated two hapū to hold the title. It is up to those two hapū to nominate the individual(s) or entity who are to be named on the title.

[224] Consistent with *Re Tipene*, there is no impediment to an individual or a group of individuals being named on the title in respect of a successful applicant group, so long that it is clear who they are. Subject to the requirements within the Act as to what must be included in a recognition order, it is an internal matter for each successful applicant group to nominate who will hold the title and what process they adopt as to mandate.

Finding in respect of Ngāti Patumoana

[225] None of the parties contesting Ms Hata's mandate provided contrary evidence as to the tikanga relating to kupu ōhāki. Nor did they suggest that Mr Amoamo's view was incorrect or that an alternative course of action would have been more consistent with tikanga. They sought only to dispute Ms Hata being named as a holder of the order on behalf of Ngāti Patumoana on the basis that she had not gone back to the hapū following the Stage One judgment.

[226] I accept the tikanga evidence of Mr Amoamo and Ms Hata, and find that Ms Hata is an appropriate person to be named to hold CMT on behalf of Ngāti Patumoana. She is a named applicant, and her name being included on the CMT is consistent with tikanga, as well as the work she has done to bring Ngāti Patumoana's application to completion.

Whakatōhea Māori Trust Board

[227] At the Stage Two hearing, Mr Pou, representing the Whakatōhea Māori Trust Board, advanced the submission that the Whakatōhea Fisheries Trust would be an appropriate entity to hold the CMT orders for the successful parties. None of the successful parties accepted this proposition and, in his oral comments in closing, Mr Pou appeared to abandon it. Given the absence of support for this proposition among the successful CMT groups, I will not consider it further.

[228] I conclude this section discussing mandate issues with the observation that unlike the situation in the Waitangi Tribunal, there is no particular mandate process that applicants for recognition orders under the Act have to undertake. If more than one party purports to represent the same applicant group, then that would normally be dealt with by an interlocutory hearing prior to the substantive hearing. Sometimes it is dealt with as part of the substantive hearing itself.

General observations on who should hold recognition orders

[229] An important consideration is attempting to ensure that recognition orders are designed in a way that enables a CMT group to self-manage in the future, without having to further resort to the Court to resolve disputes or governance issues. A degree of flexibility is required, so as to meet the purposes of the Act.[84] In addition, there is a need for finality in the present proceedings insofar as it is possible to achieve that.

[230] I do not accept the submission that mandate procedures adopted by the Crown in relation to claims before the Waitangi Tribunal have any application to claims in this Court under the Act. The Crown's policy in the Tribunal context is to negotiate with 'large natural groupings', meaning iwi or an amalgamation of hapū.[85] That is why the Crown implemented the "Red Book". The Act specifically permits applications for recognition orders by whānau, hapū or iwi groups. There is no requirement for applicant groups to be "large natural groupings".

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84 *Re Tipene*, above n 79, at [27].

85 Malcom Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPIL 259.

CMT 1 – Maraetōtara to Tarakeha

Wahi tapu claims

[231] This section of the judgment analyses the wāhi tapu claims made by the applicants, according to each of the CMT areas. It applies the general observations as to wāhi tapu discussed above.[86] For each applicant, I set out the relevant evidence for each wāhi tapu, before assessing whether the restrictions or prohibitions proposed by the applicants are required to protect the wāhi tapu, and are capable of enforcement.

[232] In relation to the conditions for the protection of wāhi tapu, a number of applicants followed a framework developed by the late Hetaraka Biddle. Some of the restrictions or prohibitions set out in that framework go beyond what is available under the Act. Where I have explained why a particular prohibition or restriction is not available, I will not repeat that explanation in relation to each subsequent claim for the same sort of prohibition or restriction.

[233] Wāhi tapu that were claimed by multiple members of the successful joint CMT groups are addressed separately from wāhi tapu that were claimed by only a single applicant group.

Ngāi Tamahaua

[234] Ngāi Tamahaua claims the following sites as wāhi tapu within CMT 1:

(a) Te Kārihi Pōtae urupā;

(b) Te Ahiaua;

(c) Tuamutu/Tuamotu urupā;

(d) Te Arakotipu;

(e) Te Roto;

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86 See [104]-[156].

(f) Otaotupuku;

(g) Awahou;

(h) Paengatoitoi;

(i) Tai Haruru;

(j) Kotukutuku/Puketapu;

(k) Te Ana o Ani Karere;

(l) the extent of the Maraetōtara Stream that is within the takutai moana, including the river mouth and out to sea;

(m) Paerata and Ōpōtiki Mai Tawhiti;

(n) Tawhitinui and Akeake;

(o) the extent of the Tirohanga Stream that is within the takutai moana, including the river mouth and out to sea;

(p) the extent of the Waiaua River that is within the takutai moana, including the river mouth; and

(q) Ōpēpē Stream.

[235] The restrictions and prohibitions sought by Ngāi Tamahaua in relation to all of their wāhi tapu claims were contained in the following table created by Hetaraka Biddle:

Restrictions	Prohibitions
• **Burials (including sea burials and ashes)** – no burials, sea burials, or ashes may be scattered at any of the wāhi tapu sites without the express permission of the relevant hapū representatives • **Camping** – at or near wāhi tapu sites must comply with the hapū coastal management plan (**TBC**) • **Collection and Harvesting** – no natural resources, minerals or any other organic materials may be collected or removed from a wāhi tapu site except with the express authority of the hapū representatives • **Commercial –** no activity for commercial use may be performed at a wāhi tapu site unless it has the express authority of the relevant hapū representatives • **Repairs and maintenance** – no alteration or destruction of the site can occur unless it is necessary for the repair and maintenance of the wāhi tapu and has the approval of the relevant hapū representatives prior to the works occurring • **Restoration** – any planned works involving restoration of a wāhi tapu must be approved by the relevant hapū representatives prior to the works being carried out • **Signage** – no signage, pou or other [fixtures] may not be erected without express permission of the hapū representatives • **Structures** – no structures may be erected at or on wāhi tapu sites or within wāhi tapu areas without the express authority of the relevant hapū representatives	• No drugs or alcohol to be consumed at a wāhi tapu • No vandalising of wāhi tapu areas • No rubbish to be left or dumped on a wāhi tapu site • No developments are to be built on a wāhi tapu site

[236] Ngāi Tamahaua submit that these restrictions and prohibitions are required to ensure that the wāhi tapu are protected from being damaged, disrespected or altered in such a way that would interfere with or diminish the mauri and tapu of those sites. They also seek to ensure that members of the hapū, any manuhiri or members of the public are kept safe. The activities that are sought to be restricted are those which, in the opinion of the hapū, have an effect on the mauri of a site. Ngāi Tamahaua submit that their list of prohibition and restrictions is precise, clear, and capable of readily

being enforced. They submit that they are for matters which cannot reasonably be protected by any other regulation or law. They say that this is because:

> the protections which are being sought are matters which are intrinsically Māori concepts regulated by tikanga Māori as law. The preservation of the mauri of the site for example is a matter which only experts in tikanga and tohunga who practice the various rituals are able to perform. The protection of people not only physically, but spiritually and emotionally is also a matter which these restrictions are aimed at protecting where they are entering onto a site which is a wāhi tapu.

Te Ahiaua

[237] Te Ahiaua is a pā site of historical significance to Ngāi Tamahaua, located on the eastern end of the Waiotahe spit, named for the tīpuna Te Ahiaua. It is in close proximity to Tuamutu/Tuamotu urupā. In oral evidence at the Stage Two hearing, Tracey Hillier, providing evidence for Ngāi Tamahaua stated that "[Te] Ahiaua is a significant site for [Ngāi] Tamahaua. It is where Rongopopoia and his people met their end."[87]

[238] Ngāi Tamahaua seek "wāhi tapu protection over those parts of the site which extend into the CMCA". The map filed by Ngāi Tamahaua does not show the exact location of the pā site. Pā sites are generally located on dry land, above MHWS. No evidence was provided by Ngāi Tamahaua indicating otherwise in respect of Te Ahiaua. No evidence was provided so as to justify a conclusion that the tapu of this site, where the pā is, extends into the takutai moana. As Te Ahiaua itself is not in the takutai moana, the Court has no jurisdiction to recognise it in a CMT as a wāhi tapu.

Otaotupuku

[239] Otaotupuku was said to be a location where kōiwi have been found. No further evidence was provided to the Court as to its location, or the boundaries of the site. The documentation filed with Ngāi Tamahaua's closing submissions shows that Otaotupuku is not in the takutai moana. Therefore, the Court has no jurisdiction to recognise it in a CMT as a wāhi tapu.

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87 *Re Edwards* Stage Two Notes of Evidence, at 13.

Awahou and Paengatoitoi

[240] Awahou and Paengatoitoi were said to be the locations of historic battle sites involving the hapū of Whakatōhea, on opposite sides of the mouth of the Waiaua River. The evidence of Te Riaki Amoamo established that area around the mouth of the Waiaua River is tapu.[88] Ngāti Ruatakenga also made wāhi tapu claims in relation to this area, although using different names to describe it. However, the sites of Awahou and Paengatoitoi as depicted in the hand-drawn diagrams super-imposed on the aerial photographs filed by Ngāi Tamahaua appear to show that they are outside of the takutai moana. They are therefore unable to be recognised on the CMT order as wāhi tapu. The Waiaua River itself is discussed below.

Tawhitinui and Akeake

[241] The documentation filed for Tawhitinui and Akeake indicate that these sites fall within the area of substantial interruption at the western banks of the Waiōweka River, caused by the Ōpōtiki Harbour Development Project. As these sites are not within the CMT area, they cannot be recognised on the CMT order as wāhi tapu.

Tai Haruru, Kotukutuku/Puketapu, Te Ana o Ani Karere, and Ōpēpē Stream

[242] These four sites are clustered closely together in the inter-tidal area at the Tarakeha Headland. Ngāi Tamahaua described them in the following manner:

> 81. Kotukutuku (historically known as Puketapu) is the site where Te Pahau was killed by Ngāi Tai.
>
> 82. Ōpēpē stream is where the Maruiwi women would give birth and various rituals would be performed. Significant evidence of this was given in stage one.
>
> 83. Tai Haruru is a Pā kainga and a site where pito is still buried. Further evidence of this was given in stage one particularly by Hetaraka Biddle who gave evidence of this tradition being passed down to his children.
>
> 84. This is the cave of Ani Karere who was an [important] kaitiaki of [Ngāi Tamahaua].

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[88] See evidence of Te Riaki Amoamo, noted above at [118]-[121].

Hetaraka Biddle provided these details in his table of wāhi tapu sites for Ngāi Tamahaua:[89]

Wahi tapu	**Location**	**Type of wahi tapu**	**Cross-reference to Stage One evidence**
Kotukutuku/Puketapu	Entry to the beach, down the hill from Ōpape 1A18 block	(historically known as Puketapu due to the death of Te Pahau killed by Ngāi Tai)	
Ōpēpē Stream	Below Ōpape marae and urupa. Commences at Hinahinanui and flows out to sea	Birthing stream, a lot of babies died there, Maruiwi (small cervix) overcome through [caesarean] later	Hetaraka Biddle affidavit at [72]-[75] Tracy Hillier affidavit at [72]; 23/11 transcript pp 56-57; [25] p 95; [10] p 97
Tai Haruru	In the Ōpape area along the coast (description to be [provided])	Still put our pito in the cave there. My grandchildren's pito are buried there	
Te Ana o Ani Karere	Located next to Tai Haruru 50-100 [yards] heading towards the rocks	Ani Karere was a tipua and kaitiaki of the whole area. Refer to her as the kaitiaki of our pataka kai	

[243] In his written evidence for Stage One, Hetaraka Biddle stated:[90]

> 72. Ōpēpē is the name of the awa below Ōpape marae and below the urupā. The Ōpēpē awa commences at Hinahinanui and flows out to the sea.
>
> 73. According to our tradition, the name of the awa relates back to the Maruiwi people who Ngāi Tamahaua can also whakapapa back to. The Maruiwi people are considered one of the original inhabitants of the area. The Maruiwi women were small in stature and the Ōpēpē stream was a place they would go to deliver their babies. Due to their small frames the babies often died there at the awa. That is why the name Ōpēpē was given.

[244] An area where pito or whenua are buried or stored is a wāhi tapu. However, no further detail was provided in oral evidence as to the location of the boundaries of Tai Haruru or Ōpēpē Stream. The document filed does not provide the Court with

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89 Exhibit HB2-1 to the Second Affidavit of Hetaraka Biddle, 24 January 2022.
90 Affidavit of Hetaraka Biddle, 20 February 2020.

certainty in respect of the location of the boundaries of these two sites, being shown through hand-drawn additions to a map prepared by Maven. In order for the Court to grant wāhi tapu protection to the areas at Tai Haruru or Ōpēpē Stream, the applicants must file a map with sufficient detail so as to allow the Court to conclude with confidence that they are both in the takutai moana. Given that Tai Haururu is described in the submissions of counsel as a Pā Kainga, it seeks unlikely that it is located in the takutai moana. The mouth of the Ōpēpē Stream may be in the takutai moana, but it is not clear exactly where, in connection with the river, the Maruiwi women gave birth, or where the various rituals referred to as giving rise to the tapu, were performed. If this happened on land beside the river and outside the takutai moana, it cannot be recognised in a CMT order.

[245] It is possible that the nature of a particular site may mean that its exact location cannot, according to tikanga, be shared with the Court. If this is the case, the Court will be unable to recognise that area within a CMT order because of the need for certainty as to the location of the boundaries of a wāhi tapu.

[246] In her Stage Two evidence, Tracey Hillier described Kotukutuku/Puketapu as a channel between a rock formation where "a number of waka came in for safe berthing".[91] It is also the site where Te Pahau was killed by Ngāi Tai. That small channel is visible on the original Maven map showing the area surrounding the Tarakeha Headland, and is within the takutai moana extending from Part Ōpape 1A19B block. Ms Hillier also stated that the wāhi tapu was only "within the toka [rock] environment".[92] Given this is an area that is clearly defined by reference to the natural geographic boundaries surrounding it, and Ngāi Tamahaua have established a connection to the area in tikanga, Kotukutuku/Puketapu meets the requirements of the Act for recognition within a CMT order.

[247] The only evidence provided by Tracey Hillier as to Te Ana o Ani Karere was that the area around the Tarakeha Headland is associated with Ani Karere, who is the kaitiaki of the "whole area".[93] Similarly to Tai Haruru and Ōpēpē Stream, the mapping

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91 *Re Edwards* Stage Two Notes of Evidence, at 35.
92 At 35.
93 At 36.

of Te Ana o Ani Karere by Ngāi Tamahaua does not provide the Court with certainty in respect of the location of its boundaries, being shown through hand-drawn additions to a map produced by Maven. Nor does the original Maven Map reveal any further geographic detail helpful to identifying its location. An accurate map will be required before it can be recognised as a wāhi tapu within the CMT order.

Restrictions and prohibitions

[248] As noted above, Ngāi Tamahaua sought to apply the same set of prohibitions and restrictions across all of their claimed wāhi tapu. However, many of the proposed prohibitions and restrictions do not seem to be linked to the protection of wāhi tapu located in the takutai moana. Many of the proposed restrictions or prohibitions were expressed in a way that meant that there was no real prospect of them being enforced by way of a prosecution. Minimal evidence was provided as to the basis for proposed prohibitions and restrictions other than that they were required to protect the mauri of a site, and/or that they applied as a matter of tikanga. I address each of these in turn.

[249] An obvious example is the proposed restriction that "camping – at or near wāhi tapu sites must comply with the hapū coastal management plan". People do not go camping in the takutai moana. This restriction seems designed to control activities that occur outside of the takutai moana. The Act does not give the Court jurisdiction to impose restrictions on activities occurring outside the takutai moana, even if they are occurring nearby to it. The reference to a "hapū coastal management plan" also creates problems. The Act does not provide for a "hapū coastal management plan". Section 85(1) of the Act provides that a **customary marine title group** has the right to prepare a planning document in accordance with its tikanga.

[250] The CMT group which this right vests in, is not any one of the hapū individually but the collective group in whom CMT 1 and CMT 2 were jointly vested. It may be that this group prepares a document that has different chapters relating to the enforcement of wāhi tapu conditions prepared by each individual hapū/iwi, but that can only be authorised by the collective group. The Act does not confer on an individual hapū the right unilaterally prepare its own planning document.

[251] The proposed restriction against the undertaking of commercial activity at a wāhi tapu, without further detail as to what those activities are and how preventing them is required to protect that wāhi tapu, does not satisfy the requirements of the Act. While this was a restriction sought by multiple applicants, there was no evidence relating to how the prohibition of commercial activities would be required to protect wāhi tapu sites or areas. Neither is the concept of a "commercial activity" one with a sufficiently certain meaning so as to allow those potentially affected by it, to understand exactly what sort of activity is intended to be covered by it.

[252] There was no evidence as to how a restriction on the erection of signage, pou or other fixtures at a wāhi tapu would be linked their protection. If wāhi tapu protections are to be enforceable and complied with, some form of notice or signage at a wāhi tapu is likely to be helpful, if not necessary. A restriction preventing this would seem to be inconsistent with the need for the restriction proposed to be required to protect the wāhi tapu. Some applicants submitted that no signage or pou were to be erected at wāhi tapu sites without express permission from hapū representatives. Information as to who those representatives were to be was not provided. Therefore, those affected by this proposed restriction would not be able to readily find out who to contact.

[253] Some applicants also referred broadly to the restriction or prohibition of activities that effect the mauri of wāhi tapu. The mauri of a wāhi tapu being affected by a particular defined activity provides an appropriate basis in tikanga for the restriction of that activity, and that may be recognised by the Act. However, a generalised restriction or prohibition of any activity that effects the mauri of wāhi tapu, does not meet the requirements of the Act as to certainty or enforceability. The same can be said for restrictions such as "no loud gatherings" or restriction of "public access to risk areas for the introduction of dangerous species".

[254] There are some restrictions that relate to activities that do not take place in the takutai moana or can only take place subject to a resource consent. For example, "developments" are not "repaired" or "restored" in the takutai moana. Once again, the intent seems to be the impermissible one of regulating activities taking place on sites nearby to the takutai moana rather than in it.

[255] It is possible that a prohibition on burials, sea burials, or the scattering of ashes at a wāhi tapu is linked to the protection of the mauri of a wāhi tapu and that these proposed restrictions are necessary to achieve that outcome. However, no evidence was provided by the applicants to suggest that this was the reason for which this prohibition was proposed. The only successful applicant who commented on this restriction was Kelvin Tapuke on behalf of Muriwai Maggie Jones, giving evidence for Ngāi Tai, who stated in respect of the scattering of ashes at wāhi tapu that "we don't want that".[94] This is not a sufficient evidential foundation upon which the Court can conclude that the requirements of the statute have been met. Nor did Ngāi Tamahaua provide evidence on this point.

[256] Section 83 of the Act provides that on or after the date upon which a CMT order is sealed:[95]

> (2) A customary marine title group has, and may exercise, ownership of minerals (other than petroleum, gold, silver, and uranium existing in their natural condition) that are within the customary marine title area of that group.
>
> (3) The reservation of minerals in favour of the Crown continued by section 16(2) ceases.

[257] A prohibition on the removal or collection of minerals is therefore consistent with the rights awarded upon a grant of CMT, with the exception of petroleum, gold, silver, and uranium existing in their natural condition. Sections 83(2) and 83(3) mean that the reservation in favour of the Crown upon the alienation of land from the Crown, of all other minerals existing in their natural condition, created by s 11 of the Crown Minerals Act 1991, ceases. This occurs when a CMT order is sealed. Because ownership of minerals within the CMT area is already a right that crystalises upon the sealing of a CMT order, it cannot be said that a prohibition on the removal or collection of minerals is required to protect wāhi tapu sites.[96] Those minerals will be owned by the CMT group when the order is sealed, and their removal by other parties prohibited.

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94 *Re Edwards* Stage Two Notes of Evidence, at 333.

95 See definition of "effective date", ss 9 and 113.

96 Section 2 of the Crown Minerals Act 1991 defines minerals as a naturally occurring inorganic substance beneath or at the surface of the earth, whether or not under water; and includes all metallic minerals, non-metallic minerals, fuel minerals, precious stones, industrial rocks and building stones, and a prescribed substance within the meaning of the Atomic Energy Act 1945.

Again, it is necessary to note that the rights given by s 83 vest in the joint CMT 1 and CMT 2 groups, not individual hapū.

[258] Conversely, a CMT group does not acquire ownership of all 'natural resources' or 'any other organic materials' upon the sealing of a CMT order. Indeed, neither the Crown nor any other person owns, or is capable of owning, the takutai moana, in the sense that would result in the ownership of all natural resources or organic materials.[97] A prohibition on the removal or collection of natural resources or any other organic materials is therefore inconsistent with an award of CMT, and is unable to apply to a wāhi tapu site or area.

[259] A prohibition on the vandalising of wāhi tapu areas, without further detail as to what is prohibited is not a prohibition amenable to enforcement. The word "vandalising" is capable of capturing a great range of actions, but it is difficult to see how the takutai moana itself, as opposed to structures on nearby land outside the takutai moana, could be vandalised. Similarly, no evidence was provided linking the prohibition of specific activities amounting to vandalism, to the protection of any of the applicants' wāhi tapu sites. Existing structures in the takutai moana could conceivably be vandalised but they remain the personal property of their owners and are not acquired as part of a CMT order.[98]

[260] If the applicants are able to describe proposed restrictions or prohibitions and the reasons for them that are supported by evidence and capable of enforcement, then these should be identified with the updated maps that need to be filed. In the absence of that information the Court cannot make the orders sought.

Ngāti Ira o Waiōweka

[261] Ngāti Ira o Waiōweka in closing submissions, reduced their wāhi tapu claims to two sites within CMT 1. These were Te Totara and Te Kārihi Pōtae.

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97 Section 11(2).
98 Section 18.

[262] The restrictions and prohibitions sought by Ngāti Ira o Waiōweka in relation these claims were contained in a table marked "B" in the appendices to their closing submissions, replicated below.

Restrictions	**Prohibitions**
• No camping at or near wāhi tapu (for example, directly on the beach in front) • No commercial activities performed at or near a wāhi tapu site (for example, directly on the beach in front) • No vehicle access, boats, 4WD bikes, yachts, or any ships to dock near at a wāhi tapu site (for example, directly on the beach in front) • No sea burials or ashes to be scattered at any wāhi tapu • No permanent or temporary structures to be erected at wāhi tapu (for example, directly on the beach in front) • No drones or other small flying devices are to be flown over the wāhi tapu without the prior consent of the hapū • No signage or Pou to be erected at the wāhi tapu without permission from the hapū	**Directly on the beach in front of wāhi tapu:** • No food, drinks, alcohol, picnics, or bonfires etc • No animals (especially horses, dogs) • No pollution, littering • No gutting of fish or leaving empty shells of kina, mussels, and pipi • No building of public toilets • No loud music or bonfires • No 4WDs, motorbikes, campervans, or vehicles • No horse sports or beach sports directly in front of wāhi tapu • No freedom camping, tents, or gazebos • No taking of sand, shells, plants, harakeke, reed, driftwood, or beach ecology • No events such as weddings, horse sports and music festivals
He Whakatūpato A warning, cautionary provision noted in all resource consents and planning documents of the significance of this kaitiaki and who to contact should any strange phenomena occur, missing persons, strandings of boats and mammal life. Tohunga are to be contacted immediately. For Ngāti Ira and the above listed wāhi tapu, the Tohunga to contact is Te Rua Rakuraku. Upon his own directions, he can send someone else to carry out the duties of the Tohunga.	

[263] The reasons for Ngāti Ira's proposed restrictions were drawn largely from the tikanga evidence of Tā Pou Temara, Te Riaki Amoamo, Te Rua Rakuraku and Donald Kurei. Ngāti Ira supported their evidence. Ngāti Ira submits that the restrictions and prohibitions sought are required by Tikanga Māori as law, for the protection of the sites themselves and the people who visit them. They submit that the values of Tikanga Māori are relevant in assessing the obligations of Māori to the takutai moana and future generations.

Te Totara

[264] Te Totara is a historic site where a battle took place between Ngāti Hokupū and Te Whakatōhea, described as being located "below the Onekawa bluff".[99] Mr Donald Kurei, in giving evidence for Ngāti Ira stated:[100]

> the bodies were never retrieved, the bodies that [remain] are still present and still washing up on those shores, and so that's the significance to us, for Ngāti Ira o Waiōweka.

[265] The map filed by Ngāti Ira illustrates that the tapu of the site originates on dry land, just down from Onekawa Pā. In closing, Ngāti Ira submitted that the Act merely requires that wāhi tapu be "located in the CMT area and demonstrably in the vicinity of the mean high water springs mark". I do not accept that submission. The Act requires that wāhi tapu are within the CMT area and within the takutai moana.

[266] Where the evidence establishes that tapu originating on dry land radiates into the moana, and that it is necessary to recognise this in order for the wāhi tapu to be protected, that may be recognised in a CMT order. However, the evidence led by Ngāti Ira in respect of Te Totara did not do that. It alleged that Te Totara was a battle site on the bluff below Onekawa, which falls outside of the takutai moana. That is also where the map filed shows it to be. Therefore, the Court has no jurisdiction to recognise it in a CMT as a wāhi tapu.

[267] Te Kāhiri Pōtae is discussed below in the section relating to wāhi tapu that were claimed by multiple applicants.

Restrictions and prohibitions

[268] As Ngāti Ira have not established the requirements of the Act in respect of Te Totara's wāhi tapu status, it is unnecessary to assess whether their proposed restrictions and prohibitions would be required to protect it. However, I note that the reasoning above at [248]–[260] relating to the proposed prohibitions and restrictions

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99 Joint Affidavit of Te Rua Rakuraku and Donald Kurei 21 January 2022, Exhibit A at 3.
100 *Re Edwards* Stage Two Notes of Evidence, at 152.

of Ngāi Tamahaua, apply to the restrictions and prohibitions proposed by Ngāti Ira, where they are substantially the same.

Ngāti Patumoana

[269] Ngāti Patumoana claims the following sites as wāhi tapu within CMT 1:

(a) Onekawa urupā;

(b) Tuamutu/Tuamotu urupā;

(c) Maraerohutu;

(d) Te Arautauta waka landing; and

(e) Whanaungakore kaitiaki.

[270] This is a reduced list of wāhi tapu, identified in a document filed with Ngāti Patumoana's closing submissions, compared to the original table attached to Te Riaki Amoamo's affidavit of 25 January 2022. Ngāti Patumoana submits that in respect of these claims that the "seaward extent of the wāhi tapu follows from Te Riaki Amoamo's comment that it extends beyond the breakers, about an imperial mile". The restrictions and prohibitions sought by Ngāti Patumoana in relation to all of their wāhi tapu claims were contained in the same table. They are essentially identical to the prohibitions sought by Ngāti Ira.

[271] Ngāti Patumoana's submissions did not squarely address the reasons for the restrictions and prohibitions they have sought in respect of wāhi tapu sites, beyond referring to the evidence of Te Riaki Amoamo, who said that all of the prohibitions and restrictions proposed applied as a matter of tikanga.

[272] Te Arautauta waka landing and Tuamutu urupā are discussed below in the section relating to sites claimed by multiple applicants.

Onekawa urupā

[273] Onekawa urupā was described by Te Riaki Amoamo as an ancient burial site of Ngāti Patumoana which pre-dates 1800.[101] It is situated in the sand dunes on the eastern spit of the Ōhiwa Harbour entrance, below Onekawa Pā. In his oral evidence Mr Amoamo stated:[102]

> …that's the urupā for the Onekawa and Matai ancient pā sites up on, elevated up on the top [of the hill]. So, the urupā is close to the base of [the] smallest headland or the land that extends out to the sea where the sandhills are…

[274] That evidence, and the document filed by Ngāti Patumoana as to its location, illustrates that Onekawa urupā is not in the takutai moana, being located in the sand dunes above MHWS. However, Mr Amoamo also gave evidence attesting that the tapu of the urupā extends from the sand dunes, out in to the moana to a short distance. When asked where the tapu of the urupā extended out to sea, Mr Amoamo said that the tapu of the urupā extends at least over the distance of the foreshore in front of the urupā, out into the waves of the moana.[103] Mr Amoamo was not cross-examined on this evidence for Ngāti Patumoana on the nature, location, or extent of tapu at Onekawa urupā. Nor was any conflicting evidence put before the Court.

[275] The evidence of Mr Brendon Mulholland and Mr James Jennings, given on behalf of the Attorney-General, indicated that the area of land located directly in front of the urupā is part of a reserve, titled 'Section 42 Block V Town of Ōhiwa'.[104] The presence of this reserve was also confirmed by survey maps filed by Ms Julia Glass.[105] Reserves are excluded from the common marine and coastal area, and fall outside of the area over which the Court has jurisdiction to award CMT.[106] However, this reserve does not fall within the takutai moana, and is therefore not a bar to the recognition in a CMT order of the area which is within the takutai moana in front of Onekawa urupā, as a wāhi tapu.

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101 Affidavit of Te Riaki Amoamo on behalf of Ngāti Patumoana, 25 January 2022 at TRA007.
102 *Re Edwards* Stage Two Notes of Evidence, at 258.
103 At 259.
104 Affidavit of Richard James Jennings, 31 January 2022, at Exhibit RJ-04.
105 Julia Glass Maps, CMT 1, at Sheet 8.
106 Section 9.

[276] I accept Mr Amoamo's uncontradicted evidence as to the tapu of Onekawa urupā extending into the takutai moana. However, his evidence was that the tapu area was limited to the area of the foreshore touched by water. Therefore, the wāhi tapu area is only to be the area between MHWS and MLWS directly in front of the urupā. That will need to be properly defined by an accurate map.

Maraerohutu

[277] Ngāti Patumoana seek wāhi tapu protections for the area of the takutai moana directly in front of Maraetohutu Pā, beginning at the Waiwhakatoitoi Stream, and extending out into the moana. Mr Amoamo described Maraerohutu Pā as being east of Waiōtahe beach, and located on privately owned land.[107] Te Ringahuia Hata's Stage One evidence also noted that there is a cluster of historic Pā sites near the mouths of the Maraerohutu and Waiwhakatoitoi Streams.[108]

[278] The document filed by Ngāti Patumoana depicts that the site of Maraerohutu Pā is on dry land some distance above MWHS, but also shows a purple shaded area, said to be wāhi tapu, extending from the Waiwhakatoitoi Stream in a curved fashion out into the moana. At the Stage Two hearing, in the giving of evidence for Ngāti Patumoana, Ms Hata and Mr Amoamo had the following discussion:[109]

> Q. Āe, kia ora Uncle. If we move to Waiwhakatoitoi Stream now, we're seeking [Maraerohutu] wāhi tapu area in this shaded area to the right side of Waiwhakatoitoi Stream, is that right?
>
> A. That's right.
>
> Q. Can you explain why?
>
> A. Because it's in the proximity of the residents of [Maraerohutu] and other ancient pā sites close by are buried down on the sandhills.
>
> Q. Ka pai.
>
> A. The sandhills just across the road and they are not buried on the beach, but they're buried in the sandhills, you get to the sandhills and then the beach, and then the sea.

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107 Affidavit of Te Riaki Amoamo on behalf of Ngāti Patumoana, 25 January 2022, at TRA008.
108 Affidavit of Te Ringahuia Hata, 29 January 2020, at [52].
109 *Re Edwards* Stage Two Notes of Evidence, at 261.

Q. So, the wāhi tapu area of influence, the shaded purple area, Uncle, you've mapped out here, what are the prohibitions and restrictions you want [to see] on this part of [Maraerohutu]? So no food, no kai.

A. Nothing. No food and no eating and drinking or whatever.

Q. Āe.

A. But it goes as far as the high tide water mark when the tapu recedes to the low tide water mark, and it's still affecting the water's edge and that water's edge is part of the ocean and it goes over the waves again, gets into the ocean and that's where the tapu is, from there to the coastland, to the beach.

[279] Ngāti Patumoana therefore assert that the area of the takutai moana in front of Maraerohutu Pā, beginning from the Waiwhakatoitoi Stream, is wāhi tapu, owing to its close proximity to the Pā, which is located on dry land above MWHS, behind the beach. The area mapped by Ngāti Patumoana is however, inconsistent with Mr Amoamo's view that the tapu extends only between the "high tide water mark" and the "low tide water mark", or between the coastland to the beach, as it shows an area extending some distance beyond MLWS. The area that is mapped as wāhi tapu is also entirely disconnected from Maraerohutu Pā, given that Waiwhakatoitoi Stream is slightly west of the Pā site. In order to recognise a wāhi tapu within a CMT order, the Court must be satisfied that a wāhi tapu is in the takutai moana, or that there is a sufficient foundation for a conclusion that tapu originating above MHWS extends into the moana.

[280] In respect of Maraerohutu Pā, the source of tapu is clearly above MHWS, being further away from the water's edge comparatively than Onekawa urupā. Given that the document filed by Ngāti Patumoana is inconsistent with the evidence provided by Mr Amoamo as to the distance the tapu extends, and location of the tapu, Maraerohutu (or the area in front of it) is unable to be recognised in the CMT order. A clear foundation for a conclusion that the tapu of Maraerohutu Pā extends beyond into the takutai moana, was not established by the evidence before the Court.

Whanaungakore kaitiaki

[281] The area relating to Whanaungakore is located at the mouth of the Waiōweka River, within the area of substantial interruption caused by the Ōpōtiki Harbour

Development Project. As it is not within the CMT area the Court is unable to recognise it within a CMT order as wāhi tapu.

Restrictions and prohibitions

[282] Ngāti Patumoana have met the requirements of the Act for the recognition of the area between MWHS and MLWS directly in front of Onekawa urupā, within the CMT order, as wāhi tapu. Ngāti Patumoana sought all of the restrictions and prohibitions in the table noted above, on the basis that they applied as a matter of tikanga.

[283] The reasoning set out above at [248]-[260] relating to the proposed prohibitions and restrictions of Ngāi Tamahaua, applies to the restrictions and prohibitions proposed by Ngāti Patumoana, where they are substantially the same. The remaining restrictions proposed by Ngāti Patumoana are:

(a) no drones or other small flying devices are to be flown over the wāhi tapu without the prior consent of the hapū;

(b) no food, drinks, alcohol, picnics, loud music, or bonfires;

(c) no animals (especially horses, dogs);

(d) no gutting of fish or leaving empty shells of kina, mussels, and pipi;

(e) no building of public toilets;

(f) no 4WDs, motorbikes, campervans, or vehicles;

(g) no horse sports or beach sports directly in front of wāhi tapu;

(h) no taking of sand, shells, plants, harakeke, reed, driftwood, or beach ecology;

(i) no events such as weddings, or music festivals;

(j) within one mile (1.6km) in the sea in front of the wāhi tapu:

(i) no swimming in the area directly in front of the wāhi tapu area;

(ii) no jet skis, kayaks, boats, surfing, and other water sports;

(k) no anchorage; and

(l) He Whakatūpato: A warning, cautionary provision noted in all resource consents and planning documents of the significance of this kaitiaki and who to contact should any strange phenomena occur, missing persons, strandings of boats and mammal life. Tohunga are to be contacted immediately.

[284] Starting with the proposed restrictions on "drones or other small flying devices" being flown over the wāhi tapu without the consent of the hapū, the marine and coastal area is defined in s 9 as including the airspace above the marine and coastal area so the activity which is proposed to be restricted does occur within the takutai moana. But there was no evidence explaining why this restriction was required to protect the wāhi tapu or what the reasons for it were. It therefore does not meet the requirements of ss 78(2) and 79(1)(b) of the Act.

[285] Many of the proposed restrictions appear to attempt to restrict activities that would normally occur on areas outside the takutai moana. This includes restrictions on weddings, music festivals, building of public toilets, horse sports, or the use of campervans. Unless the activities that are proposed to be restricted or prohibited take place in the takutai moana, they cannot be part of a wāhi tapu condition on a CMT.

[286] Some of the proposed restrictions do not relate to activities which would normally occur in the area between MHWS and MLWS, which is the only area which Ngāti Patumoana are able to have recognised within the CMT order as a wāhi tapu. An example is making anchorage. Boats or other water vessels are not typically anchored in the area between MHWS and MLWS. Nor would bonfires take place in an area that is covered by water on a daily basis. No reasons have been advanced as

to why a restriction on swimming or the use of jet skis, kayaks, boats, surf boards or other water activities to a distance of one mile should apply to a wāhi tapu that is established for the purpose of the CMT order, only to be in the area between MHWS and MLWS.

[287] The restriction described in subparagraph (1) purports to require local authorities issuing resource consents or preparing planning documents to include certain content in those documents. That is not something authorised by ss 78 or 79.

[288] As discussed above at [258], a CMT group does not acquire ownership of natural resources or other organic materials, upon the sealing of a CMT order.[110] The Act provides that the common marine and coastal area is incapable of being owned in a sense that would result in the ownership of all organic and/or natural materials. Therefore, a restriction on the taking or removal of sand, shells, plants, harakeke, reeds, driftwood, or beach ecology, being organic materials and natural resources, is inconsistent with an award of CMT, and is unable to apply to a wāhi tapu site or area.

[289] Activities sought to be prohibited such as the gutting of fish or leaving empty shells of kina, mussels and pipi can be addressed under existing legislation. As the Court discussed in *Re Ngāti Pāhauwera* appropriate existing mechanisms include regulations made under the Fisheries Act 1996 or the Resource Management (Marine Pollution) Regulations 1998.[111]

[290] Part Four of the Ōpōtiki District Council's Consolidated Bylaws 2021, which relates to beaches, already prohibits the use of vehicles in the area directly in front of Onekawa urupā, between MHWS and MLWS.[112] A large portion of the Ōhiwa Spit is a vehicle prohibited area, and this area has been depicted in a map, attached to the

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110 With the exception of minerals existing in their natural condition other than petroleum, gold, silver, and uranium.

111 Above n 8, at [159].

112 "Beach" is defined by s 1.5.1 of the Ōpōtiki District Council Consolidated Bylaw 2021 as the foreshore being an area covered and uncovered by the tide between mean high-water springs and mean low water springs and any adjacent area that can reasonably be considered part of the beach environment including areas of sand, pebbles, shell, shingle, dune, or coastal vegetation and to which the public has a right of access but does not include private property.

Consolidated Bylaw by the Council.[113] The Council's bylaws in respect of vehicle prohibited areas provide the following:

> **4.5 Vehicle prohibited areas**
>
> 4.5.2 The Council may by publicly notified resolution declare any part of the beach to be a vehicle prohibited area.
>
> 4.5.3 A person must not take or drive any vehicle in a vehicle prohibited area, other than for surf lifesaving operations, emergency situations, law enforcement activities, or coastal conservation management activities.
>
> 4.5.4 Schedule 1 of Part 4 Beaches identifies vehicle prohibited areas.

[291] The map of the vehicle prohibited area on the Ōhiwa Spit, shows the area directly in front of Onekawa urupā, and marks out an area extending from the headland, and into the takutai moana for a short distance. This map was also submitted with Ngāti Patumoana's closing submissions. Restrictions or prohibitions on the use of vehicles are created pursuant to s 22AB(1)(f) of the Land Transport Act 1998, which provides, among other things, that a road controlling authority may make any bylaw it thinks fit for the purpose of prohibiting or restricting the use of vehicles on beaches. Contravention without reasonable excuse of a bylaw made under s 22AB results in a maximum penalty on conviction a fine of $1000, or in the case of an infringement, a $150 fine.[114]

[292] This is an effective and appropriate mechanism for the restriction of the use of vehicles in areas of the takutai moana. Onekawa urupā and the area in front of it, extending past MHWS, has already been declared a vehicle prohibited area by the Ōpōtiki District Council. Accordingly, it cannot be said that a prohibition or restriction on 4WD, motorbikes or vehicles is necessary to protect it.

[293] As to the control of animals other than dogs on beaches, the Consolidated Bylaw 2021 provides:

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113 Ōpōtiki District Council Consolidated Bylaws 2021, pt 4 sch 1, at Map 2.

114 Land Transport Act 1998, s 22A(3A); and Land Transport (Offences and Penalties) Regulations 1999, sch 1.

4.7 Control of animals

4.7.1 A person must not bring a horse or other animal (excluding dogs) or allow any horse or other animal (excluding dogs) in his or her control into or on:

(a) Any area where endangered birds are nesting, including dotterel areas identified in [the maps contained in] schedule 1 of Part 4 Beaches.

(b) Any designated conservation area.

(c) Any coastal vegetation or rehabilitation area.

(d) The sand dunes.

4.7.2 Any person riding, driving, or leading a horse must enter and exit the beach using designated and/or formed access ways.

4.7.3 Where any horse or other animal is found on any beach in contravention of Part 4 Beaches, it may be seized and impounded by any person duly authorised by the Council.

[294] There are also further provisions which relate to the control of horse riding in public places:

8.10 Control of horse riding in public places

8.10.1 A person must not ride a horse in a public place recklessly or in a manner that intimidates, or causes a danger or nuisance to other people.

8.10.2 The person in control of any horse in a public place must remove or safely dispose of any manure deposited by that horse as soon as practicable.

8.10.3 Except [with] the written consent of the Council or an authorised officer, a person must not ride a horse in a public place in:

(a) The section of Church Street between Kelly Street and Richard Street.

(b) Those sections of Kelly Street, Elliott Street, King Street and Richard Street between Church Street and St John Street.

(c) The Ōhiwa Harbour mudflats.

8.10.4 Following consultation with the public and interested parties, the Council may by resolution prohibit horse riding in any public place additional to those specified in clause [8.10.3].

8.10.5 The Council will install signs to indicate the areas where the prohibitions in clauses [8.10.3] and [8.10.4] apply.

[295] Any prohibition or restriction proposed by a CMT group must be required to protect the wāhi tapu or wāhi tapu area. There are appropriate existing mechanisms for the restriction of the presence of horses upon beaches and public places generally, which are available for the applicants to utilize, in consultation with Ōpōtiki District Council. It cannot be said that a restriction on the presence of horses is required to protect a wāhi tapu.

[296] Part Nine of the Consolidated Bylaw 2021 refers to dog control. The purpose of Part Nine is to "[regulate] the control of dogs so they do not cause danger, distress, or nuisance to the community, stock, domestic animals, or protected wildlife."[115] The power of a territorial authority such as the Ōpōtiki District Council to make bylaws in respect of dog control derives from s 20(1) of the Dog Control Act 1996. Section 20(1)(a) of that Act provides that a territorial authority may make bylaws for the purpose of prohibiting dogs from specified public places. A territorial authority is required to adopt a policy in respect of dogs within its district.[116]

[297] As in respect of vehicles, the Council, "may by publicly notified resolution declare any public place to be a dog prohibited area".[117] For example, there are dog prohibited areas on both Waiaua Spits on each side of the river mouth, and also on the Waiotahe spit.[118] Accordingly, there are appropriate existing mechanisms for the restriction of the presence of dogs in public places, which are available for the applicants to utilise, in consultation with Ōpōtiki District Council. It cannot be said that a restriction on the presence of dogs is required to protect a wāhi tapu.

[298] Although the Act does not provide for wāhi tapu conditions in a CMT to compel local authorities to insert wording into resource consents or planning documents, it can be expected that once a CMT is issued and wāhi tapu sites identified, that the local authorities will engage in dialogue with the CMT holders as to the appropriate mechanisms for enforcement of necessary wāhi tapu protections. There is also scope to utilise s 85.

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115 Ōpōtiki District Council Consolidated Bylaw 2021, Part 9 Dog Control, s 9.2.1.
116 Dog Control Act 1996, s 10(1).
117 Ōpōtiki District Council Consolidated Bylaw 2021, Part 9 Dog Control, s 9.6.1.
118 Ōpōtiki District Council Consolidated Bylaw 2021, Part 9 Dog Control, sch 1, maps 6 and 8.

[299] In giving evidence for Ngāti Patumoana, Te Ringahuia Hata stated that the kind of provision sought by Ngāti Patumoana was of the nature that:[119]

> …it [wouldn't] restrict people from physically entering that area. if something happens in that area, like a drowning or ships are stranded or people go missing, what the whakatūpato provision might say in there is, what is the tikanga process that [must be followed] in order to make that area either noa or what tikanga or karakia ritual is needed and who [someone] would go to see to have those rites performed.

[300] This sort of objective may be able to be achieved pursuant to the power set out in s 85 of a CMT group to prepare a planning document. A planning document may include matters relevant to the sustainable management of the natural and physical resources of the group, and/or the protection of the cultural identity and historic heritage of the group.[120] This includes matters that may be regulated under the Heritage New Zealand Pouhere Taonga Act 2014.[121] A planning document among other things, has the purpose of setting out the regulatory and management objectives of the CMT group for the CMT area, and the policies for achieving those objectives.[122]

[301] Where a CMT group satisfies the requirements for the recognition of a wāhi tapu within a CMT order, that is something that may be included in a planning document. A completed planning document is lodged with the relevant regional council and "any of the agencies referred to in ss 88 to 91 whose jurisdiction is relevant to the contents of the planning document".[123] The agencies referred to in ss 88 to 91 thereby have various obligations to have regard to, and take into account the planning document when performing their statutory and regulatory functions. This is a mechanism through which the Act provides for local and central government to be aware of and have regard to the rights of a CMT group, and their objectives for the management of their CMT area.

[302] A planning document is also a mechanism whereby a CMT group may put on notice any person or entity seeking a resource consent within the CMT area, of a

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119 *Re Edwards* Stage Two Notes of Evidence, at 271.
120 Section 85(3).
121 Section 85(5)(b).
122 Section 85(2).
123 Section 86(1). The agencies referred to in ss 88-91 are local authorities, Heritage New Zealand Pouhere Taonga, the Director-General of Conservation, and the Minister of Fisheries.

requirement of a warning as to specified areas within the takutai moana. Such a provision would be consistent with the exercise of the RMA permission right.[124]

[303] The right to create and lodge a planning document, and also the RMA permission right, vests with the CMT group, rather than the individual entities that make up the CMT group. Further, nothing in the Act limits or affects any resource consent granted before the commencement of the Act.[125] Accordingly, any such warning provision included in a planning document or sought pursuant to the RMA permission right cannot have any effect on existing resource consents.

[304] Because the Act provides a clear mechanism for the inclusion and application of a warning provision of the type sought by Ngāti Patumoana, as well as some of the other applicants, it cannot be said that its inclusion as a restriction or prohibition is necessary to protect a wāhi tapu.

[305] If the applicants are able to describe and propose restrictions or prohibitions that are supported by evidence and capable of enforcement, then they may be included on the CMT. Such prohibitions or restrictions would apply to the area described directly in front of Onekawa urupā between MHWS and MLWS.

Ngāti Ruatakenga

[306] Ngāti Ruatakenga claims the following sites as wāhi tapu within CMT 1:

(a) the area surrounding the mouth of the Waiaua River as a single area, including Te Rangimatanui, Waiwhero and Rāhui Whākarōto as individual wāhi tapu;[126]

(b) Tirohanga Stream; and

(c) Te Roto, an ancient urupā of Ngāti Ngahere.[127]

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124 See s 66.
125 Section 20.
126 For maps see Stage Two Hearing exhibits 6, 26, and 27.
127 For a map see Stage Two hearing exhibit 9.

[307] Ms Feint on behalf of Ngāti Ruatakenga relied on the evidence noted above given by Tā Pou Temara and Te Riaki Amoamo, in submitting "that the Court should approach [wāhi tapu] by considering how far offshore the evidence shows is required to be protected."

[308] Ngāti Rua in reference to the restrictions and prohibitions proposed stated that:

> Ngāti Rua support the table that the late kaumātua Hetaraka Biddle attached to his evidence, but [have] adapted it by adding two further prohibitions, to prohibit consumption of food, and fishing or whitebaiting.

[309] Ngāti Rua submit that the evidence shows that all the restrictions and prohibitions contained in the table apply to their claimed wāhi tapu as a matter of tikanga. The restrictions have been designed to prevent the desecration of wāhi tapu by seeking to prevent inappropriate development or activities, by ensuring that the hapū can regulate what is permissible.

[310] All of Ngāti Ruatakenga's claimed wāhi tapu were also claimed by other applicants. They are addressed in the section below referring to wāhi tapu sites claimed by more than one applicant, as well as their proposed restrictions and prohibitions.

Te Ūpokorehe

[311] Te Ūpokorehe claims the following sites within CMT 1 as wāhi tapu:

(a) Onekawa Pa;

(b) Te Ara Kotipu;

(c) Taumata Kahawai;

(d) Karihi Potae;

(e) Te Ahiaua;

(f) Tarewarewa;

(g) Te Rua o Parewarewa;

(h) Maromahue Marae;

(i) Te Parenui o Pukeni Otao;

(j) Paepae Aotea;

(k) Te Tukina Rae o Kanawa;

(l) Te Rae o Kanawa;

(m) Pukeahua;

(n) Maraetōtara;

(o) Te Toka o Waiotahe;

(p) Hamatatua; and

(q) Rururerehe.

[312] Te Ara Kotipu, Karihi Potae, and Maraetōtara are addressed in the section referring to wāhi tapu claimed by multiple applicants below.

[313] Te Ūpokorehe submit that their "[wāhi tapu] overlap and intertwine. Those on land radiate into the moana, and vice versa.". The only prohibition or restriction sought by Te Ūpokorehe in relation to these sites is the ability to place temporary rāhui when required by tikanga in six specific circumstances. These are:

(a) when natural disasters occur, to protect the Harbour, wāhi tapu and the public;

(b) to restrict public access to risk areas for the introduction of dangerous species;

(c) in the case of unforeseen health and safety threats;

(d) to ensure the sustainability of the ecology in Ōhiwa Harbour;

(e) to restrict development which may impact the ecology of the Ōhiwa Harbour; and

(f) when a death occurs, to restrict swimming and gathering of kaimoana.

[314] As is immediately apparent, the ability to impose prohibitions and restrictions by way of the imposition of temporary rāhui is sought in circumstances which go well beyond the need to protect wāhi tapu. For example, in (a), in addition to protecting wāhi tapu, the conditions are sought to be imposed "to protect the Harbour … and the public". An acceptable condition might read, "when natural disasters occur, to protect wāhi tapu".

[315] Proposed condition (b) "to restrict public access to risk areas for the introduction of dangerous species", does not relate to the protection of wāhi tapu at all. The same can be said for proposed conditions (c), (d), and (e).

[316] Proposed condition (f) "when a death occurs, to restrict swimming and gathering of kaimoana" is connected with the protection of wāhi tapu with the tapu arising as a result of the death. However, the relevant death would need to occur in the takutai moana rather than somewhere else. So a more appropriate restriction might read, "when a death occurs in the takutai moana, to restrict swimming and gathering of kaimoana in the relevant area of the takutai moana."

[317] The reasons put forward for the proposed restrictions also indicate that the focus goes well beyond what is needed to protect wāhi tapu. They were said to be needed to "protect and ensure the mauri of the resources that sustain the entire ecosystem of the [Ōhiwa] Harbour".[128]

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[128] Joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022 at [72].

[318] Another issue that arose in the context of the wāhi tapu claims made by Te Ūpokorehe was the quality of their mapping. Te Ūpokorehe filed two sets of maps. The first were nine maps filed with an affidavit of Mr Jimmy Hills. Those maps illustrated wāhi tapu through diagrams drawn on topographical maps, and labelled with numbers corresponding to a list of over 100 sites contained in the joint affidavit of Wallace Aramoana and Maude Edwards. These maps were said to have been filed given that the formal survey maps prepared by Maven were not available until a short time prior to the Stage Two hearing.

[319] On 22 February 2022, Te Ūpokorehe then filed a further document showing their claimed wāhi tapu, again with diagrams labelled by numbers corresponding to the list of Wallace Aramoana and Maude Edwards. On this document, the diagrams are drawn upon a single satellite image depicting the area between Maraetōtara and the Waiōweka River, including the entire Ōhiwa Harbour.

[320] In the analysis below, I refer primarily to the document filed on 22 February 2022, given that the satellite-imagery provides a clearer basis for the identification of the location of Te Ūpokorehe's wāhi tapu claims. Unfortunately, some of the wāhi tapu claimed through the numbered list of Wallace Aramoana and Maude Edwards do not appear on the document filed on 22 February 2022. Where that is the case, it is necessary to refer to the maps filed by Jimmy Hills.

[321] The main issue in terms of these maps is that many of the wāhi tapu are not in the takutai moana, and the vast majority of their locations are not identified with sufficient certainty so as to allow the Court to identify them. Unless the applicants file a map or set of maps that provides a sufficient basis for the conclusion that their wāhi tapu are in the takutai moana and provide sufficient certainty as to the location of their boundaries, the Court cannot incorporate them into a CMT.

[322] The list of sites provided by Wallace Aramoana and Maude Edwards for Te Ūpokorehe categorised each site according to a list of types of wāhi tapu, these were:[129]

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[129] Joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022 at [83].

(a) Pā sites/Waahi Nohanga;

(b) Pipi beds;

(c) River mouths and streams;

(d) Urupā;

(e) Archaeological sites;

(f) Mahinga Mataitai/Mahinga Kai;

(g) Spawning grounds; and

(h) Taunga ika.

[323] Beyond linking each wāhi tapu claim to a multitude of these categories, little evidence was provided as to their distinct nature or location. This created confusion and uncertainty in respect of sites that were, based on the location in which they were mapped, clearly unable to fall within the categories that they were said to. For example, a number of sites were said to fall within the category of 'river mouths and streams', but were mapped in areas in which there was no rivers or streams. The same can be said for sites that were said to be pā, but were mapped as being located in areas of the takutai moana always covered by water.

Onekawa Pā/Te Mawhai Pā

[324] Onekawa Pā and Te Mawhai Pā are located above MHWS on the Ōhiwa Spit. The cover page of a Historic Report filed by Kahukore Baker for the Stage One hearing depicts a wedding-photo at the pā site, which shows that it is clearly on dry land. As it is not in the takutai moana, the Court has no jurisdiction recognise it within a CMT order. No evidence was provided by Te Ūpokorehe alleging that the tapu of Onekawa Pā and/or Te Mawhai Pā extended into the takutai moana.

Taumata Kahawai

[325] Taumatai Kahawai was said to meet all eight wāhi tapu categories other than being a taunga ika. No further information or evidence was provided as to the nature of the tapu or its location. Te Riaki Amoamo's evidence for Ngāti Patumoana was that Taumata Kahawai was an elevated pā site behind both Tuamutu urupā and State Highway 2, near the Waiotahe River.[130]

[326] Te Ūpokorehe mapped the site as being located along the coastline between the Waiotahe and Waiōweka Rivers, including a significant area that is above MHWS. No evidence was provided alleging the presence of tapu at Taumata Kahawai that originated on land and extended into the takutai moana. As it appears that Taumata Kahawai is not in the takutai moana, it is unable to be recognised within a CMT order.

Te Ahiaua

[327] Te Ahiaua was said to meet all eight wāhi tapu categories other than being a taunga ika. It was also said to be a pipi bed at Waiotahe, where Te Ūpokorehe had recently placed a rāhui due to pollution.[131]

[328] At Stage One, Te Ūpokorehe was described as "[harvesting] from the kaimoana beds of Te Ahiaua", and evidence was provided showing previous incidents of pollution at the "sacred pipi beds of Te Ahiaua".[132] Te Ūpokorehe therefore addressed 'Te Ahiaua' on a different basis and in a slightly different location than the pā site named 'Te Ahiaua' that was claimed by Ngāi Tamahaua to be a wāhi tapu. Tā Pou Temara, in giving evidence for Ngāti Ira at the Stage Two hearing, described the Te Ahiaua pipi beds as "extremely tapu".[133] In an affidavit in reply to Ta Pou's evidence, Wallace Aramoana stated:[134]

> We don't take issue with the substance of this evidence, beyond stating that where examples are given, such as Te Ahiaua pipi bed, care needs to be taken to ensure that the correct kaitiaki are identified.

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130 *Re Edwards* Stage Two Notes of Evidence, at 267.
131 Affidavit of Wallace Aramoana, 9 February 2022, at [67]; and joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022, at [74].
132 Exhibit A to the affidavit of Kahukore Baker, 21 February 2020, at [4.1] and [13.9].
133 *Re Edwards* Stage Two Notes of Evidence, at 124.
134 Affidavit of Wallace Aramoana, 9 February 2022, at [67].

> Te Ūpokorehe are the kaitiaki of this pipi bed. As set out in previous [evidence], we run observations of harvesting, survey of pipi numbers, and have placed rāhui over the beds to allow stock to replenish.

[329] Te Ahiaua was numbered as site 105 in the list of Wallace Aramoana and Maude Edwards noted above. The number 105 does not appear in the document filed on 22 February 2022. However, it does appear on the maps filed by Jimmy Hills, and is depicted to be entirely on dry land, on the eastern side of the Waiotahe River. On the basis of this evidence, the site appears to fall outside the takutai moana, and the Court is unable to recognise it within a CMT order.

[330] However, if the site claimed by Te Ūpokorehe as Te Ahiaua is a set of pipi beds, then they will be located within the takutai moana. If pipi beds that are tapu are to be described on a CMT, the applicants will need to file an updated map that shows that the pipi beds are in the takutai moana, and which provides the Court with certainty as to their location. Information will also need to be provided to establish why the pipi beds are regarded as tapu rather than noa.

Tarewarewa

[331] Tarewarewa was said to be a cave and the location of a kaitiaki named 'Te Rua o Parengarenga'.[135] It was mapped in the eastern portion of the mouth of the Waiotahe River. No further evidence was provided as to the location of Tarewarewa's boundaries. Accordingly, the Court cannot be sufficiently certain as to the location of the boundaries of Tarewarewa, and it is unable to be recognised within a CMT order.

Te Rua o Parewarewa

[332] Te Rua o Parewarewa was said to be tapu for the same reason as Tarewarewa – being the location of the same kaitiaki. It was mapped as being in a significant portion of the Waiotahe River, and including areas of dry land above MHWS. No further evidence was provided by Te Ūpokorehe as to the nature or location of the tapu of Te Rua o Parewarewa, particularly whether or not the tapu was limited to the areas of the Waiotahe River that are within the takutai moana. It cannot be included on the

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[135] Joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022, at 50, site numbered 106.

CMT in the absence of a map confirming that it is located in the takutai moana and what the exact location is. There is no evidence as to the reasons for any proposed prohibitions or restrictions.

Maromahue Marae

[333] Maromahue Marae was said to be part of lands that were confiscated from Te Ūpokorehe by the Crown and given to Tūhoe for the purposes of re-settlement.[136] Marae, like Pā, are generally not located within the takutai moana. Maromahue Marae was mapped as being on the western spit at the Waiotahe River mouth, extending into the takutai moana. No further evidence was provided by Te Ūpokorehe as to where exactly the tapu of Maromahue Marae originated from, being either on dry land, or being a portion of the takutai moana that was previously land but had eroded over time. On the basis that marae are not otherwise located in the takutai moana, and the available evidence illustrating that Maromahue Marae is not in the takutai moana, the Court is unable to recognise it within a CMT order.

Te Parenui o Pukeni Otao

[334] Te Parenui o Pukenui Otao was said to meet all eight wāhi tapu categories other than being an urupā. It was mapped as being entirely within the takutai moana, off the coast of the Ōhiwa spit, slightly east of the frontage of Onekawa Pā and Te Mawhai Pā.

[335] No further evidence or information was provided as to the nature of the wāhi tapu or the location of its boundaries. There was no evidence provided as to why this area fell into the category of a pā site, being located entirely in the takutai moana, or as to why it fell into the category of a river mouth or stream, being entirely disconnected from any river or stream.

[336] As Te Parenui o Pukenui Otao is located within the takutai moana, it is in an area that is capable of being recognised within a CMT order. However, the basis for its tapu has not been clearly articulated and nor has the location of its boundaries been

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136 Exhibit A to the affidavit of Kahukore Baker, 21 February 2020, at [7.2].

established with certainty. As such, the Court is unable to recognise it within the CMT order.

Paepae Aotea

[337] Te Paepae o Aotea was not within the area of the CMT awarded at Stage One.[137] As it is not within the CMT area, it is unable to recognised within the CMT order.

Te Tukina Rae o Kanawa

[338] Te Tukina Rae o Kanawa was said to be a pipi bed, a river mouth and stream, a mahinga mataitai/mahinga kai, a spawning ground, and a taunga hi ika. It was mapped as being in the takutai moana directly out to sea from the entrance to Ōhiwa Harbour. There is conflicting evidence as to the location of this site – with Te Ūpokorehe identifying it in a location that falls within CMT 1, in front of the entrance to the Ōhiwa Harbour – and Ngāti Awa identifying it as extending from the Ōhiwa Spit, within the Harbour and CMT 2. Given that each applicant group identified the site as falling within a different CMT order, I have addressed each claim separately. Wallace Aramoana, giving evidence for Te Ūpokorehe, stated in an affidavit in reply that:[138]

> 58. We do not acknowledge the location or korero that Ngāti Awa has provided regarding this wāhi.
>
> 59. The area that Te Ūpokorehe identifies as [Te Tukina Rae o Kanawa] has a different location and name, that aligns with Te Ūpokorehe history and footprint in and around the harbour.

[339] Beyond disputing the location, no evidence was provided by Te Ūpokorehe as to the nature of the tapu or the location of the boundaries of Te Tukina Rae o Kanawa itself. The Court is unable to recognise it within the CMT order.

Te Rae o Kanawa

[340] Te Rae o Kanawa was said to be an urupā, pā site and a river mouth/stream. It was mapped as being located above MHWS, and on dry land on the western spit at the

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137 Above n 1, at [476].
138 Affidavit of Wallace Aramoana, 9 February 2022.

entrance of the Ōhiwa Harbour. On the map filed by Te Ūpokorehe, Te Rae o Kanawa itself is not in the takutai moana. No evidence was provided establishing that the tapu of Te Rae o Kanawa extended into the takutai moana. The area said to be Te Rae o Kanawa is also within a reserve that extends from the Ōhiwa Spit into the takutai moana.[139] As Te Rae o Kanawa itself is not in the takutai moana, it cannot be recognised within a CMT order.

Pukeahua

[341] Pukeahua was said to be a pā site and an archaeological site. It was mapped as extending from an area of the coastline fronting Ōhope Beach, and extending out into the takutai moana, including an area above MHWS.

[342] The map filed by Te Ūpokorehe does not show the exact location of the pā site or the archaeological site. Pā sites are generally located on dry land, above MHWS. No evidence was provided by Te Ūpokorehe indicating otherwise in respect of Pukeahua. No evidence was provided as to justify a conclusion that the tapu extends into the takutai moana. As Pukeahua does not appear to be in the takutai moana, the Court has no jurisdiction to recognise it in a CMT.

Te Toka o Waiotahe

[343] Te Toka o Waiotahe was described by Jimmy Hills as a "well-known fishing ground" and an "important food source for Ūpokorehe".[140] It was not mentioned in the document filed on 22 February 2022, but was identified in the maps filed by Mr Hills as being located off the coast of the Ōhiwa Spit, within CMT 1, over the entrance of the Ōhiwa Harbour. On that map, the site was only marked by a pin, rather than a small diagram attempting to show the extent of its boundaries. No further evidence was provided by Te Ūpokorehe as to the location of the boundaries of Te Toka o Waiotahe. It is also not clear why an area identified as a fishing ground and food source is tapu rather than noa. Therefore, the Court is unable to recognise it within a CMT order.

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139 Being Section 1 SO 355091 Local Purpose Reserve.
140 Affidavit of Jimmy Hills, 25 January 2022, at [8(b)].

Hamatatua and Rururerehe

[344] Hamatatua and Rururerehe were not included in the list provided by Maude Edwards and Wallace Aramoana, but were added to that list by Jimmy Hills. Their location was not included in the document filed on 22 February 2022. In the final map provided by Mr Hills, Hamatatua and Rururerehe were identified by two pins, each located a long distance out into the moana. No further information or evidence was provided as to the extent, location, or nature of the boundaries of those areas, or whether they fell within the boundaries of CMT 1. This does not satisfy the requirements of the Act as to certainty of location. In the absence of evidence as to the nature and location of Hamatatua and Rururerehe, the Court is unable to recognise them within a CMT order.

Analysis of wāhi tapu claims within CMT 1 that were made by more than one applicant

Te Kārihi Pōtae/Te Kahiripōtae Urupā

[345] Te Kārihi Pōtae was claimed as a wāhi tapu by Ngāi Tamahaua, Ngāti Ira, and Te Ūpokorehe, as an urupā and a historic battle site. It is a site that is sacred for the hapū of Te Whakatōhea as it is said to be where Tuamutu "avenged the death of his father Repanga (son of [the tīpuna] Muriwai)". Donald Kurei, a witness for Ngāti Ira, identified that Te Kārihi Pōtae was a sacred battle site, where utu was extracted for the killing of Repanga.[141] Hetaraka Biddle, in providing evidence for Ngāi Tamahaua stated that Te Kārihi Pōtae was where "Tuamutu killed Rongopopoia" and that "kaitiaki taniwha are located there".[142]

[346] Te Ūpokorehe disputed the evidence of Ngāi Tamahaua and Ngāti Ira generally. In respect of Ngāti Ira's evidence provided by Te Rua Rakuraku and Donald Kurei, Wallace Aramoana stated:[143]

> Where the maps filed for Ngāti Ira do not correspond to the maps that we have filed, we oppose them.

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141 *Re Edwards* Stage Two Notes of Evidence, at 151.
142 Exhibit HB2-1, attached to the second affidavit of Hetaraka Biddle, 24 January 2022.
143 Affidavit of Wallace Aramoana, 9 February 2022, at [64]-[65].

> The maps that have been filed by Ngāti Ira do not provide sufficient korero or evidence for Te Ūpokorehe to respond in detail. However, again, I say that Te Ūpokorehe occupation across our rohe, including our MACA area, predates the period of those applicants who descend from the Mataatua Waka.

[347] In respect of the evidence provided by Hetaraka Biddle for Ngāi Tamahaua, Wallace Aramoana said:[144]

> We pay respect to Hetaraka Biddle, and like many others wish he was here to finish the kaupapa for his people.
>
> We feel, however, that the sites that he listed are more appropriately protected by Te Ūpokorehe.

[348] Wallace Aramoana was cross-examined on this point at the Stage Two hearing by Ms Panoho-Navaja, counsel for Ngāi Tamahaua. During that portion of the hearing, Mr Aramoana accepted that multiple hapū could consider a single place to be wāhi tapu, and either share the same kōrero or have their own kōrero about their connection to that wāhi tapu.[145] Mr Aramoana said that generally:[146]

> Though they may connect to those pā sites, I am not against that but at the end of the day [they are] in [Te Ūpokorehe's] rohe and we are the caretakers of that area… as long as they understand [that] we aren't barring them from going there [or teaching] their children or anyone else…their part of the history…that wāhi tapu [is] in [Te Ūpokorehe's] rohe [and] as custodian we will continue to look after it as we have all along.

[349] This is yet another example where Te Ūpokorehe appear to challenge the Court's finding that CMT 1 and CMT 2 were awarded on a basis of shared exclusivity and not with one hapū/iwi having primary rights over the others. It also ignores the fact that the right to identify wāhi tapu sites and the restrictions or protections that may be required, vests in the CMT group as a whole, not individual hapū/iwi. Where there is no agreement by the CMT group on these matters the requirements of s 109 have not been met and the Court cannot make the orders sought.

[350] Here, the various hapū that make up the CMT group disagree on basic issues about the proposed wāhi tapu. This includes the location of Te Kārihi Pōtae.

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144 At [72]-[73].
145 *Re Edwards* Stage Two Notes of Evidence, at 179-180.
146 At 180.

[351] Ngāi Tamahaua, Ngāti Ira, and Te Ūpokorehe each produced different maps:

(a) Ngāi Tamahaua's map showed the urupā being located above MHWS on the western spit of the Waiotahe River, extending out into the takutai moana;

(b) Ngāti Ira's map showed the urupā as being in the area of the takutai moana in front of the western spit, and extending across the entirety of the mouth of the Waiotahe River; and

(c) Te Ūpokorehe mapped the area slightly differently, as being located above MHWS on the eastern spit of the Waiotahe River, and extending slightly both into the mouth of the river, and the takutai moana.

[352] The evidence provided as to the nature and location of Te Kārihi Pōtae being on the beach opposite a pā site on one side of the Waiotahe River was described by Bruce Stirling as "not entirely accurate".[147] Mr Stirling, who provided evidence on behalf Te Kahui at Stage One, referred to a narrative presented by kaumatua Monita Delamere at a Māori Land Court hearing in 1980, which was that:[148]

> The original bodies buried in the cemetery were drowned deliberately by a chief of Whakatōhea 'Tuamutu' and his men at a fish-netting planned and organised by Tuamutu at the river where the cemetery is.

[353] On the basis of the evidence, it is not possible to conclusively identify the location of the urupā, including whether or not it is on land or in the takutai moana, or exactly where the drowning of Rongopopoia by Tuamutu occurred. While the applicants all identified the wāhi tapu as being broadly proximate to the Waiotahe River mouth, they each mapped different areas in that vicinity. The lack of certainty and the conflict between the different members of the CMT group as to the location of the boundaries of the area means that the Court is unable to recognise Te Kārihi Pōtae within the CMT order.

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147 Exhibit A to the affidavit of Bruce Stirling, 31 January 2020, Te Mana Moana o Te Kahui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea: Historical Issues, at [140].

148 At [141].

Tuamutu/Tuamotu Urupā

[354] Tuamotu/Tuamutu urupā is claimed as a wāhi tapu by Ngāi Tamahaua and Ngāti Patumoana. It was described by Ngāi Tamahaua as including the dunes and parts of the takutai moana at the eastern end of the Waiotahe spit, and to be "the site where Hineiahua was killed and [where] Ngāti Patu are said to have taken their name from" Te Riaki Amoamo for Ngāti Patumoana described it as an "ancient pā site of the tīpuna Tuamutu"[149], which is below the ancient pā site of Taumata Kahawai.[150]

[355] Ngāi Tamahaua and Ngāti Patumoana each mapped the area slightly differently:

(a) Ngāi Tamahaua did not identify the urupā, but depicted a wāhi tapu area entirely within the takutai moana, as a straight line across the mouth of the Waiotahe River, extending out into the moana;

(b) Ngāti Patumoana depicted the urupā as being above MHWS and just behind State Highway 2 on the eastern Waiotahe Spit, with a wāhi tapu area extending from there, slightly crossing a different portion of the river, and extending out into the moana.

[356] Mr Amoamo's evidence was that the burial took place in the sand dunes, and that the area which was once the urupā is now covered by State Highway 2.[151] Mr Amoamo did not address in his evidence the nature of the tapu at the urupā, being located above MHWS, or what distance, if any, it extends into the takutai moana. Ngāi Tamahaua, similarly, did not provide any such evidence. Therefore, because it appears that the urupā is a wāhi tapu that is located above MHWS and is covered in part by State Highway 2, it is unable to be recognised by the Court within a CMT order.

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149 Third affidavit of Te Riaki Amoamo, 25 January 2022, Exhibit A, at [TRA010].
150 *Re Edwards* Stage Two Notes of Evidence, at 267.
151 At 267.

Te Arakotipu

[357] Te Arakotipu is a site located at the Waiotahe drifts and which was claimed to be a wāhi tapu by Ngāi Tamahaua and Te Ūpokorehe. It is where three tūpāpaku were found during the initial stages of the coastal housing development which is located there.[152] Hetaraka Biddle in his evidence for Ngāi Tamahaua, described the area as "[the area] from Paerata (surf club) all the way to the urupā Akeake [including] the area all the way to Tawhitinui".[153] Tracy Hillier in her evidence for Ngāi Tamahaua, stated:[154]

> Te Arakotipu is a significant site for Ngāi Tamahaua. It was a meeting place and a place of safety. It [also] became a wāhi tapu and a burial site and we are finding kōiwi still to this day. It's a place that Ngāi Tamahaua has been strong over for many years, acknowledging our relationship with Ūpokorehe to keep that site protected.

[358] Ngāi Tamahaua mapped Te Arakotipu as a rectangular site, inclusive of a large area above MHWS, containing within it a number of houses on Appleton Road and Waiotahe Drifts Boulevard, and extending out into the moana. Te Ūpokorehe mapped a significantly larger area, including the entirety of the housing development at the Waiotahe drifts, and extending back onto dry land in a curved fashion, following the angle by which State Highway 2 continues towards Ōpōtiki. No part of the area mapped by Te Ūpokorehe appears to fall within the takutai moana. Similarly, the area described by Ngāi Tamahaua and the way in which it has been mapped shows that the site does not fall within the takutai moana. On this basis, the Court is unable to recognise it within a CMT order.

Te Roto

[359] Te Roto is claimed as wāhi tapu by Ngāi Tamahaua, and Ngāti Ruatakenga. It is a site where koiwi have been found, across the Otara River from Pakowhai. Hetaraka Biddle's evidence for Ngāi Tamahaua was that Te Roto was an area where kōiwi have been found in the "sand dunes between the mouth of the Otara River and the moana".

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152 Affidavit of Tracey Hillier, 20 February 2020, at [63].
153 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022 at 10-11.
154 *Re Edwards* Stage Two Notes of Evidence, at 82.

[360] Ngāti Ruatakenga provided in closing submissions that:

> Te Roto is an ancient urupā of Ngāti Ngahere located in the sand dunes. Mr Amoamo included it in his list because it is within the Ngāti Rua rohe as well, and there was no one else giving evidence for Ngāti Ngahere. His evidence was that the mana of the tapu extends to the sea because it is so close to the shore.

[361] Mr Amoamo's evidence for Ngāti Ruatakenga in respect of Te Roto was that:

> …Te Roto is a Ngāti Ngahere ancient urupā and [that is] still functioning at times in this generation because [I have] seen somebody taken there…

[362] When questioned as to the nature of the tapu at Te Roto, Mr Amoamo agreed that Te Roto was the same as Te Rangimatanui – in that it has the mana to go out to sea.[155] While Mr Amoamo stated that the mana/tapu of Te Roto was in such close proximity to the takutai moana that the tapu would extend into the moana, the maps filed show that the urupā is located above MHWS. Neither Mr Amoamo for Ngāti Ruatakenga, or those who gave evidence for Ngāi Tamahaua at Stage Two described the distance to which the tapu extended or provided any further indication as to the location of the Te Roto's boundaries.

[363] While the tapu may extend from the sand dunes at Te Roto into the takutai moana, the Court has not been provided with sufficient information so as to be certain as to the location of the boundaries of the wāhi tapu. Therefore, the Court is unable to recognise it within the CMT order.

Paerata and Ōpōtiki Mai Tawhiti/Te Arautauta Waka Landing

[364] It was said that Paerata was the landing place of the Te Arautauta waka, on which the tīpuna Tarawa travelled, and that Ōpōtiki Mai Tawhiti was the spring in which Tarawa placed two fish that travelled with him from Hawaiki. Ngāi Tamahaua described these two sites as tapu because "they maintain the spiritual [connection] to this significant ancestor of Ngāi Tamahaua". This area was also identified as wāhi tapu by Ngāti Patumoana, under the name Te Arautauta Waka Landing.

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155 *Re Edwards* Stage Two Notes of Evidence, at 82.

[365] Conflicting evidence was provided by the parties in respect of the location of Paerata. Ngāi Tamahaua identified Paerata in closing submissions as:

> the landing site of Tarawa [the] eponymous ancestor belonging to Ngāi Tu which became Ngāi Tamahaua. Paerata is the location where Tarawa is said to have landed on Te Araumauma (uma referring to the chest) and [to have been] mistaken for a rata tree washed up on the shore. Therefore, while the ridge is also referred to as Paerata, the connection to the foreshore is obvious.
>
> (footnotes omitted)

[366] Hetaraka Biddle's evidence was that Paerata:[156]

> Is where they used to put the pito and koiwi to hang.
>
> The site where Tarawa floated and landed.

[367] Te Riaki Amoamo stated in his oral evidence for Ngāti Ruatakenga that:[157]

> it's the landing of Te Arautauta canoe, I'm just above it, the landing, I'm at Paerata Ridge Road and there are two carved poles and it's in memory of the landing of Te Arautauta canoe over here. And Tarawa, he had pet fish tai ngahangaha, and he put his fish in the spring, the puna wai here at Ōpōtiki Mai Tawhiti and that name [was used for the] township of Ōpōtiki. Really the township at Ōpōtiki is Pākōwhai but the name Ōpōtiki [was] taken there…[Tarawa's] pet fish came with him on the journey from Hawaiki nui, Hawaiki roa, Hawaiki pāmaomao and landed here on the beach at Paerata and the name of the canoe is Te Arautauta and Tarawa was the person on that canoe…

[368] Tracey Hillier instead described Paerata as a pā site "up on the ridge".[158] This was echoed later in the hearing when Te Riaki Amoamo and Te Ringahuia Hata jointly gave evidence for Ngāti Patumoana. The following exchange occurred:[159]

> Q. Okay Uncle. If we go back to our table at number 3 to 6 we have Paerata Pā, Maraerohutu Pā, Ōtore Pā and Irirangi Pā on our table, Uncle?
>
> A. I can see it.
>
> Q. But we are going to skip that cluster of pā because they're situated along the ridge.
>
> A. Okay.

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156 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022.
157 *Re Edwards* Stage Two Notes of Evidence, at 84.
158 At 13.
159 At 259.

[369] The thread that can be drawn together from this evidence is that Paerata, while an important area for Te Whakatōhea, is not in the takutai moana. Accordingly, the Court is unable to recognise it within a CMT order.

[370] The map filed by Ngāi Tamahaua for Paerata and Ōpōtiki Mai Tawhiti is a single area of the coastline which does not distinguish between the two sites. It does not identify exactly where Tarawa is said to have landed the Te Arautauta waka or the spring which is said to be Ōpōtiki Mai Tawhiti.

[371] The map filed by Ngāti Patumoana does not identify Paerata, but shows that Ōpōtiki Mai Tawhiti is located above MWHS, on dry land behind State Highway Two.[160] This is the most specific evidence given to the Court as to where Ōpōtiki Mai Tawhiti is. Because Ōpōtiki Mai Tawhiti is not located within the takutai moana, and no evidence was provided to the Court that its tapu extended into the takutai moana, it cannot be recognised within a CMT order.

[372] Te Arautauta is in a different category in that it appears to fall within the takutai moana. There is no dispute that the site where the Te Arautauta Waka landed in a wāhi tapu. What is not clear is why the tapu extends beyond the landing site itself. In the absence of such evidence, the Court is not able to grant the wāhi tapu protection sought.

Maraetōtara

[373] The extent of the Maraetōtara Stream that falls within the CMCA was claimed as a wāhi tapu by Ngāi Tamahaua and Te Ūpokorehe. Maraetōtara is regarded by the Whakatōhea applicants as the westernmost boundary of the customary rohe of the entities associated with Te Whakatōhea – the area to west of Maraetōtara is the customary rohe of Ngāti Awa. As such, it is an important boundary. At the Stage One hearing, and also in their evidence in reply at the Stage Two hearing, Ngāti Awa contested the location of the boundary as being at this point.

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160 Ngāti Patumoana Maps, Stage Two Exhibit 16, at 4, marked X.

[374] The stream at Maraetōtara is a historic site, where a battle took place between a number of groups, including Tūhoe, Te Whakatōhea, Ngāti Awa and Te Ūpokorehe. The battle was won by the rangatira and tīpuna Te Rupe, who both Te Ūpokorehe and Ngāi Tamahaua have whakapapa connections to.[161] Ngāi Tamahaua's evidence was that there is an urupā on the eastern bank of the stream. This was confirmed in the evidence of Te Riaki Amoamo on behalf of Ngāti Patumoana and Ngāti Ruatakenga, who said that a pouwhenua is located at the urupā, dedicated to Ngāti Hokopū and Ngāti Wharepaia, which are hapū of Ngāti Awa.[162]

[375] Maraetōtara was another site to which Te Ūpokorehe claimed primacy of rights, stating:[163]

> We can appreciate that many hapū would wish to hold wāhi tapu protection at this important boundary. However, it is for Te Ūpokorehe, as the group who has traditionally lived in the buffer zone between Ngāti Awa and Te Whakatōhea, to hold rights here.

[376] Ngāi Tamahaua's position was consistent with the findings of the Stage One judgment as to the jointly held CMT orders. In her evidence for Ngāi Tamahaua, Tracey Hillier stated:[164]

> The tīpuna Te Rupe is a significant leader of the taua that created the boundary point of Maraetōtara. We acknowledge [his] whakapapa connections to Ūpokorehe. We also acknowledge [those] same connections of whakapapa of Te Rupe to Ngāi Tamahaua. Te Rupe is the uncle of Tītiko through the whakapapa to ākonga of Ngāi Tamahaua. We acknowledge Tāwhai Te Rupe and his son Hūrae and in [Ngāi Tamahaua's last engagement with] raupatu Hūrae was with Ngāi Tamahaua and so were the leaders of Ūpokorehe. It is what connects us to that area.

[377] The location of Maraetōtara is clearly identifiable by reference to the natural landscape of the area. However, the maps filed by Julia Glass, and the evidence of the Attorney-General show that there is a Local Purpose Reserve (Part Lot 48 DP 5504), vested in the Whakatāne District Council, that begins on the eastern bank of the Maraetōtara Stream, and encompasses the entirety of the stream on the ocean-side of the road running over the stream. This area, accordingly, is not within the takutai

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161 *Re Edwards* Stage Two Notes of Evidence, at 11.
162 Third affidavit of Te Riaki Amoamo 25 January 2022, at [18].
163 Affidavit of Wallace Aramoana, 9 February 2022, at [28].
164 *Re Edwards* Stage Two Notes of Evidence, at 11.

moana. Neither Te Ūpokorehe or Ngāi Tamahaua addressed this issue in their evidence or submissions. Because the area of the stream that would otherwise fall within the takutai moana is subject to a surveyed reserve, the Court is unable to recognise it within a CMT order.

[378] In any case, the lack of consensus among the groups jointly awarded CMT as to wāhi tapu status in this area means that the requirements of s 109 have not been met and the Court cannot make the orders sought.

Waiaua River

[379] Ngāti Ruatakenga claimed three sites in close proximity at the mouth of the Waiaua River as a wāhi tapu single area. These were Te Rangimatanui, Waiwhero and Rāhui Whākarōto.

[380] Waiwhero was said to be the site of an ancient battle between Te Whakatōhea and Ngāi Tai, on the western bank of the Waiaua River, after which the river ran red with blood.[165] Te Rangimatanui was said to be an estuary that runs alongside an ancient urupā of Ngāti Ruatakenga, on the eastern bank of the river.[166] Rāhui Whākarōto was said to be another ancient urupā, located on the western bank of the river.[167]

[381] Ngāi Tamahaua claimed the extent of the Waiaua River that is within the CMCA as a wāhi tapu, on the basis that it is a historic battle site.[168] There was no disagreement between Ngāi Tamahaua and Ngāti Ruatakenga as to the wāhi tapu sites in this area.

[382] As discussed above at [118], Te Riaki Amoamo's evidence was that the tapu of the three sites at the mouth of the Waiaua River extends into the moana, but he also provided conflicting evidence as to the distance the tapu extended. There was no

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165 Third affidavit of Te Riaki Amoamo, 25 January 2022, at [17].
166 *Re Edwards* Stage Two Notes of Evidence, at 75.
167 At 77.
168 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022, at 11.

agreement between the tikanga experts who gave evidence at Stage Two, as to how to measure the distance from MHWS that the tapu might extend.

[383] There was sufficient consistency between the evidence to conclude that parts of the area said to be wāhi tapu can be included as such on the CMT. The two relevant areas are: firstly, the extent of the Waiaua River that is within the takutai moana. Secondly, and separately, the area between MHWS and MLWS, between the Waiwhero and Te Rangimatanui urupā.

[384] However, there are three portions of surveyed land that are located in that part of the Waiaua River that would otherwise be within the takutai moana that need to be considered. These were identified in the evidence of the Attorney-General, and the maps of Julia Glass. In respect of the area at the mouth of the Waiaua River, Brendan Mulholland, who gave evidence for the Attorney-General, stated:[169]

> There has been considerable movement of the river at [its] mouth, from its last cadastral position. The river is tidal and has two branches running to the sea. The coastal marine area line established by the [Bay of Plenty Regional Council] is up by the road bridge at the main (left) branch. In this area there is a length of unformed legal road that is part in the river, part on [a section of accretion], and [which also partly] intersects freehold land. There are also many parcels of Māori freehold land, all affected in part by erosion from the river or tributary stream.
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> The coast from the river mouth to [Ōpēpē] Point is held in multiple Māori freehold titles. There has been a build-up along the coast immediately east of the river mouth in front of Māori parcel 'Opape Papakāinga'. Conversely the majority of the remaining coastline involving thirteen Māori freehold [blocks] or Māori Reservation land has eroded to some degree with [the current line of MHWS likely] encroaching into these parcels.

[385] The first relevant surveyed block is titled 'Allotment 421 Waiōweka Parish'. This is conservation land, held by the Department of Conservation. Conservation areas are excluded from the common marine and coastal area.[170] As such, the area of the Waiaua River that falls within the conservation area, is unable to be included within the CMT order.

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169 Exhibit BM-01 to the affidavit of Brendan Mulholland, 31 January 2022, at 13-14.
170 Section 9.

[386] The second parcel is the unformed road described by Mr Mulholland, which extends off Allotment 421, across one portion of the river, some land, and then into another part of the river. The road that extends from Allotment 421, and across the Waiaua River remains unformed. No certificate signed and dated by the Minister has been put in evidence. Therefore, the unformed road that extends from Allotment 421 is deemed to be stopped, and as of 1 April 2022, became part of the CMCA. The area that is subject to the unformed road may be recognised within the CMT order.

[387] Thirdly, there is a block of Māori freehold land, titled 'Ōpape 3k1 Block' that extends into the part of the Waiaua River that is within the takutai moana. Māori freehold land is included within the definition of 'specified freehold land' for the purposes of the Act. Specified freehold land is excluded from the CMCA.[171] Therefore, the area of Ōpape 3k1 Block that is located within the Waiaua River cannot be recognised within a CMT order.

[388] The evidence provided by the Attorney-General illustrates that the area at the mouth of the Waiaua River is constantly changing through natural processes, and that there has been significant change since the last cadastral survey. Mr Mulholland's evidence was that a new cadastral survey needs to be undertaken to definitively identify the current boundaries of areas in which erosion or accretion have occurred.[172] Where accretion or erosion has occurred, the provisions of the Act relating to reclamation and the common law relating to erosion and accretion apply. If, by natural occurrence, a portion of land is eroded, it becomes part of the CMCA, whereas if new land is created by a natural process of accretion, and it does not have a title, it is vested in the Crown.[173] Areas of land that have been created by accretion are not able to be included within a CMT order.

[389] Therefore, the two wāhi tapu areas at the mouth of the Waiaua River that can be recognised in the CMT order are:

(a) that part of the Waiaua River that is within the takutai moana, excluding

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171 Section 9.
172 *Re Edwards* Stage Two Notes of Evidence, at 423.
173 Above n 8, at [278].

the area of Allotment 421, the Ōpape 3k1 Block, and any area of land created through accretion; and

(b) separately, the area between MHWS and MLWS, between the Waiwhero and Te Rangimatanui urupā.

[390] If the applicants are to be awarded wāhi tapu recognition within the CMT order for these sites, they will need to file a survey plan that accurately depicts the boundaries of the wāhi tapu in accordance with the Court's findings set out above.

Tirohanga Stream

[391] Ngāi Tamahaua and Ngāti Ruatakenga claimed the part of the Tirohanga Stream that is within the takutai moana as a wāhi tapu. It was said that the stream is the location where the taniwha Tama-Ariki resides, who was Tītoko's pet taniwha, and also a tīpuna of Ngāti Ruatakenga.[174] In his evidence for Ngāti Ruatakenga, Te Riaki Amoamo stated that Tama-Ariki is "the guardian of the Tirohanga Stream," and that the tapu of the stream ends "once it touches the salt water".[175] He also stated that people do not whitebait or fish in the stream, owing to the presence of the taniwha.[176]

[392] Ngāi Tamahaua and Ngāti Ruatakenga mapped the wāhi tapu area as being within the stream between State Highway 35 and the mouth of the stream, and extending out into the moana for a short distance.

[393] However, the map of this area filed by Julia Glass shows that there is a section of Crown-owned conservation land that sits over the entire portion of the stream that is claimed as wāhi tapu by Ngāi Tamahaua and Ngāti Ruatakenga. Accordingly, the only portion of the stream that may be recognised within the CMT order as wāhi tapu, is the area between the mouth of the stream, and MLWS, with a width that is the equal to the mouth of the stream. That is consistent with Mr Amoamo's evidence that the tapu ends at the point the stream comes into contact with salt water. As this point may

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174 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022; and *Re Edwards* Stage Two Notes of Evidence, at 78.
175 *Re Edwards* Stage Two Notes of Evidence, at 79.
176 At 79.

vary depending on whether the tide is in or out, a pragmatic solution can be to identify the point where the fresh water meets the salt water at MLWS.

Restrictions and prohibitions

[394] Ngāi Tamahaua and Ngāti Ruatakenga have jointly identified the areas at the Waiaua River, and a limited portion of the Tirohanga Stream as wāhi tapu, as areas able to be recognised within a CMT order. The restrictions and prohibitions proposed by Ngāi Tamahaua were discussed above at [248]-[260].

[395] The restrictions and prohibitions proposed by Ngāti Ruatakenga were the same as those proposed by Ngāi Tamahaua, barring the proposal of two further prohibitions, being:

(a) no fishing or whitebaiting; and

(b) no consumption of food.

[396] As described above at [391], Te Riaki Amoamo's evidence was that a prohibition on fishing or whitebaiting around the Tirohanga Stream is already observed, owing to the presence of the taniwha Tama-Ariki. No conflicting evidence was put before the Court at the Stage Two hearing.

[397] Mr Amoamo's evidence was also that fishing and/or whitebaiting in the Waiaua River only occurs by the bridge that crosses the river, and not at the mouth of the river, because that area is tapu, and also because there is no public access.[177] That position was confirmed by Nepia Tipene, who gave evidence for Ngāti Muriwai, when he was cross-examined by Ms Feint, counsel for Ngāti Ruatakenga.[178] The bridge is located approximately 600-700 metres south of the mouth of the river, and forms part of State Highway 35.

[398] On the basis of this evidence, the applicants have established a connection between the proposed prohibition and the protection of the wāhi tapu. A prohibition

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177 *Re Edwards* Stage Two Notes of Evidence, at 100 and 354.
178 At 235.

on fishing and/or whitebaiting is already observed in the relevant areas of the Waiaua River and the Tirohanga Stream, as a result of the tapu nature of those areas. It is also a prohibition is capable of being enforced.

[399] Accordingly, a prohibition on fishing and whitebaiting at the wāhi tapu areas at the Waiaua River and Tirohanga Stream is amendable to enforcement and able to be recognised within a CMT order, relative to those areas.

[400] Provided an accurate map of the relevant wāhi tapu is able to be produced, the enforcement of a prohibition against the consumption of food may be amenable to enforcement through the Courts. The reasons for it will need to be set out in the CMT order as required by s 79(1)(b). If these pre-conditions are met, it may be included in the CMT order as a wāhi tapu condition.

CMT 2 – Ōhiwa Harbour

[401] This section of the judgment addresses the wāhi tapu claims made by the applicants within CMT 2.

[402] Wāhi tapu that were claimed by multiple members of the successful joint CMT groups are addressed separately from wāhi tapu that were claimed by only a single applicant group.

[403] For CMT 2, the wāhi tapu that were claimed by multiple applicants were:

(a) Ihukatia Pā;

(b) Te Kopu o Te Ururoa/the area of the coastline surrounding Tauwhare Pā;

(c) Omere; and

(d) Otao.

[404] There were areas within CMT 2 that were claimed as wāhi tapu by multiple applicants but under different names or with different locations being specified. Where claims are made under the same name and in same area, they are addressed together. Where claims are made under the same name but in different areas, they are addressed separately.

Ngāi Tamahaua

[405] Within CMT 2, Ngāi Tamahaua claimed the site of Ihukatia Pā, and the area of the coastline surrounding Tauwhare Pā, as wāhi tapu. They did so on the same basis and with the same proposed restrictions as in respect of their CMT 1 claims. These areas were also claimed by Ngāti Awa and Te Ūpokorehe – they are addressed below in the section discussing claims made by multiple applicants.

Ngāti Awa

[406] Ngāti Awa claims the following sites within CMT 2 as wāhi tapu:[179]

(a) the discrete area of the moana around the coastline of Uretara Island;

(b) Te Tukirae o Kanawa;

(c) Taipari;

(d) Te Kopu o Te Ururoa, being the area of the takutai moana to which the tapu from Tauwhare Pā extends into;

(e) Ihukatia;

(f) Omere; and

(g) Otao.

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[179] For maps see Stage Two, Exhibit 13. Ngāti Awa withdrew their further claim to Te Horonga ō Te Hapū on the basis that it falls outside of the CMT area relating to the Ōhiwa Harbour.

[407] The only prohibition or restriction sought by Ngāti Awa in relation to these sites was:

> The ability to place temporary restrictions through rāhui (that are recognised at law) over the area. This restriction is sought to ensure tapu placed via rāhui in specified areas is able to be enforced under te ture Pākehā by Ngāti Awa.

[408] Ngāti Awa submits that the evidence presented by tohunga in these proceedings, reinforced by references made to the works of Tā Hirini Moko Mead, form the basis upon which wāhi tapu protections can be granted.

[409] Te Kopu o Te Ururoa, Ihukatia, Omere, and Otao are discussed below in the section referring to joint claims within CMT 2.

Uretara Island

[410] Ngāti Awa claimed a discrete area of the moana around the coastline of Uretara Island as wāhi tapu. In respect of Ngāti Awa's connection to Uretara Island, Te Runanga o Ngāti Awa's closing submissions stated:

> A Statutory [Acknowledgement] and Deed of Recognition for Uretara Island are included as part of the [Ngāti Awa Claims Settlement Act 2005] and summarise the importance and connection of Ngāti Awa to Uretara Island. Specifically, the Statutory Acknowledgement records Uretara [Island] as one of the many Ngāti Awa wāhi tapu sites within Ōhiwa Harbour and of great cultural and historical importance. To the people of Ngāti Awa, Uretara Island is of the utmost importance because of its physical, spiritual, and social significance in the past, present, and future. The mauri of Uretara Island represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life.

[411] The Statutory Acknowledgement and Deed of Recognition for Uretara Island show that Ngāti Awa have an established connection to Uretara Island in tikanga. [180] However, the more relevant issue is at the Stage Two hearing, Ngāti Awa did not submit evidence or indication beyond the map that was filed, as to the location of the boundaries of the wāhi tapu area surrounding Uretara Island.

[412] When Ms Irwin-Easthope was questioned on this point, she acknowledged that the Court has no jurisdiction over the island itself, given it is above MHWS. When

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[180] See Ngāti Awa Claims Settlement Act 2005, sch 9.

questioned on the extent of the wāhi tapu area around Uretara Island, Ms Irwin-Easthope simply referred to the map that was filed and submitted that it provided sufficient certainty for the purposes of the Act. I do not accept that submission. The map filed by Ngāti Awa does not provide a sufficient level of certainty as to the location of the boundaries of the wāhi tapu area surrounding Uretara Island or explain the basis on which the takutai moana around the island, as opposed to, or because of the island itself, is tapu. It is therefore unable to be recognised within the CMT order.

Te Tukirae o Kanawa

[413] Te Tukirae o Kanawa was a site claimed as wāhi tapu by Te Ūpokorehe and Ngāti Awa. Te Ūpokorehe mapped the site as falling within CMT 1, and this is discussed above at [340]. Ngāti Awa mapped the site differently, locating it within CMT 2. In evidence, Ngāti Awa stated that:[181]

> Te Tukirae o Kanawa is located at the mouth of the Ōhiwa Harbour.
>
> Kanawa was a kuia on the Horouta waka that decided to pull into Ōhiwa. When the waka got to the mouth [of the Harbour], there is a rock there. The waka hit the rock and the kuia fell over and hit her forehead on the rock. Hence the name, Te Tukirae o Kanawa.

[414] The map of this area filed by Julia Glass shows that a portion of the area described as Te Tukirae o Kanawa falls outside of the takutai moana as a result of the presence of an unformed road, extending from the end of Ōhiwa Harbour Road, into what would otherwise be the takutai moana. However, that road remains unformed following the first quinquennial anniversary of the commencement of the Act. No certificate signed and dated by the Minister has been put in evidence before the Court. Therefore, the area described as Legal Road SO 3077, became part of the common marine and coastal area on 1 April 2022. The presence of the unformed road is not a bar to recognising the area where Ngāti Awa have mapped Te Tukirae o Kanawa within a CMT order.

[415] The area mapped by Ngāti Awa includes a significant portion of the Ōhiwa Spit that is above MWHS. No evidence was provided which explained why or how the

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[181] Joint Brief of Evidence of Dr Te Kei (o Te Waka) Wirihana Merito and William Bruce Stewart, 24 January 2022, at [51]-[52].

tapu of Te Tukirae o Kanawa extended onto, or from, that area above MHWS. Te Tukirae o Kanawa was not mapped in a different fashion to Uretara Island, so as to provide the Court with certainty as to the location of its boundaries, and nor was the rock where Kanawa hit her head specifically identified or located. Therefore, it is unable to be recognised within the CMT order.

Taipari

[416] Taipari is located on the western side of the mouth of the Ōhiwa Harbour, and was said to be "the area where Ngāti Awa hapū would read the signs of the ocean, which is reflected in the name 'Taipari' which means the rising and falling of the tides."[182] It was also said to be named for a Rangatira of Ngāti Hokopū, a hapū of Ngāti Awa.[183]

[417] The area mapped by Ngāti Awa appears to fall partly within CMT 1 and partly within CMT 2. Ngāti Awa was not included within the group of successful applicants who were jointly awarded CMT along the coastline between Maraetōtara and Tarakeha. Any area of the wāhi tapu that falls within CMT 1 is unable to recognised within the CMT 2 order.

[418] In addition, the area of Taipari that is within CMT 2 is subject to a piece of reserve land, held by the Department of Conservation, titled 'Allotment 644 Waimana Parish'. Brendan Mulholland's evidence for the Attorney-General was that a large portion of this piece of reserve land has eroded, and is now likely to be located below MHWS, but that the remainder of that area remained above MHWS.[184] It is not clear whether the portion of the reserve that has eroded, was eroded after the commencement of the Act – therefore the area of that reserve is unable to be included within the CMT order. The area of Allotment 664 that remains above MHWS is unable to be recognised within the CMT order, as those areas do not fall within the takutai moana.

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182 At [44].
183 At [45].
184 Exhibit BM-01 to the Affidavit of Brendan Patrick Mulholland, 1 February 2022.

[419] As a result of the presence of Allotment 644, and the lack of clarity regarding whether there is a portion of Taipari that is both within CMT 2 and the takutai moana, the Court does not have certainty regarding the location of the boundaries of the proposed wāhi tapu. The area at the mouth of the Ōhiwa Harbour is likely to be an area in respect of which an updated cadastral survey is required in order to definitively assess the boundaries of the CMCA, as well as where boundaries of CMT 1 and CMT 2 lie. In the absence of this information, the Court is unable to recognise Taipari within the order for CMT 2.

Te Ūpokorehe

[420] In the Ōhiwa Harbour Te Ūpokorehe made a further ninety-eight wāhi tapu claims, including that the harbour in its entirety was a wāhi tapu. These claims are listed below in Appendix A. I do not propose to address each of these claims individually as part of this judgment. I have adopted this approach for the reasons discussed below.

The entire Ōhiwa Harbour

[421] Te Ūpokorehe claimed the entire Ōhiwa Harbour as a wāhi tapu. In the alternative, they submitted that the number of individual claims throughout the harbour meant that the practical or pragmatic approach would be to recognise the entire harbour as a wāhi tapu. This was a further example of Te Ūpokorehe appearing to adopt an approach that refused to acknowledge the finding that they were awarded CMT jointly, rather than in their own right.

[422] The claim of the entire harbour as a wāhi tapu was not supported by the evidence, which showed that there were everyday noa activities that take place in the harbour. The Attorney-General made the point that noa activities took place in the harbour, and this was accepted by Te Ūpokorehe, who submitted that this did not conflict with their contention that the entire harbour is tapu.

[423] Te Ūpokorehe submitted that there should not be a blanket assumption that a place cannot be tapu if kai is gathered at the place or close to it. That is clearly so, given the well-known practice of the placing of rāhui over particular food resources,

that otherwise would not be considered tapu, in order to conserve them. Witnesses at the hearing also gave evidence that whether there was a prohibition on the gathering or consumption of kai at an area considered tapu depended on the nature of the site. Food would not be cultivated near or on an urupā, for example.

[424] The harbour is commonly referred to as a 'food basket' or 'Te Kete Kai o Tairongo'. Tairongo was the eponymous ancestor of Te Ūpokorehe. As a result, the contention that the entire harbour is a wāhi tapu is difficult to maintain. The gathering, preparation, or cultivation of kai is generally understood to be a noa activity. Mr Aramoana conceded as much when under cross examination, it became clear that Te Ūpokorehe's goal in asserting that all of Ōhiwa Harbour was tapu was more to provide a method of protecting the harbour in the future through rāhui, or to establish that they have primacy of rights within the harbour. That is a different assertion to the harbour itself being a wāhi tapu.

[425] While the hapū of Whakatōhea, including Te Ūpokorehe, have established a connection to the Ōhiwa Harbour in that they regularly undertake kaitiaki activities within it, this has been adequately acknowledged by the CMT order. The contention that the entire harbour is a wāhi tapu (other than in respect of the periodic imposition of rāhui), is not in accordance with the evidence. Primarily this is because, as was accepted by Te Ūpokorehe, noa activities take place within the harbour regularly.

[426] Also, Mr Rapihana offered largely uncontroversial evidence relating to tapu generally, that directly relates to this issue. He said:[185]

> Wāhi tapu areas were traditionally kept very separate from areas where fishing, kaimoana collection and other daily activities were performed because such activities are noa (common or ordinary), and never exercised in the same area as a wāhi tapu (sacred place). This is why you will rarely find wāhi tapu in coastal areas where there is lots of movement of people for fishing or transport, such as river mouths. If there are wāhi tapu [present] in such areas, they will have clearly defined boundaries so that people can avoid them and continue to use the kai gathering or travel routes that were essential to the everyday functioning of traditional Māori life.

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185 Above n 39, at [4.3].

[427] The evidence supports a conclusion that the harbour only becomes tapu in its entirety when specific events occur, such as the Whakaari eruption, a whale stranding, or when resources are polluted or running low and a rāhui is imposed. The evidence did not establish that the harbour itself has always been sacred and 'set aside', but rather that Te Ūpokorehe and sometimes others, have regularly used their customary interests and mana in the area to protect an important food resource where it is endangered by a cause that originates externally. This conclusion is consistent with the evidence of Tā Pou Temara that eating near a wāhi tapu such as Waiwhero would be 'appalling' and also Mr Aramoana's evidence that whitebaiting occurs in streams and waterways in and around Ōhiwa Harbour.

[428] I accept the proposition that an area cannot be wāhi tapu if it is shown that noa activities are regularly undertaken there, is not necessarily a strict tikanga principle, and that the real nature of any particular tapu depends on the purpose for which it was identified or placed. However, in the example of the Ōhiwa Harbour it is accepted that activities like the gathering of kaimoana, fishing, travelling by waka and foot, swimming, and gathering other resources are all activities that take place there, and these activities are noa activities. This supports the conclusion that the whole harbour is not a wāhi tapu all of the time.

[429] The placing of rāhui is accepted to be a temporary measure, by which tapu is placed over a certain area by a tohunga in response to an event or circumstance. When that circumstance has passed, the rāhui is lifted, removing the tapu over the area. This is contrasted with the type of wāhi tapu where tapu remains on a permanent basis. It was Mr Rapihana's evidence that only "true wāhi tapu remain tapu on a permanent basis".[186] This would seem to accord with Tā Pou Temara's view at the hearing that:[187]

> …if you are close to a wāhi tapu these are places that you don't go to. These are places that you are told to keep away from. These are places that are shunned and ought not to be challenged. They are places that are well-known and as such generations of Māori are made aware of where they are and the connections that must be observed. They are made aware of the [fact that] stumbling upon these wāhi tapu, these places of sacredness and holiness will result in some form of utu.

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186 Above n 39, at [7.4].
187 *Re Edwards* Stage Two Notes of Evidence, at 120-123.

> … It is thus important when setting out a wāhi tapu that the knowledge keeper or tohunga who has proclaimed those areas has given an indication of what are to be the permitted or conversely limited parameters of any human activity with a particular space; waterway or land area. It is an integral part of the authority processes that are established to ensure those protocols are communicated to those that may come into contact with such places for an effective protective regime to operate. In traditional times wānanga provided the forum for those understandings to be conveyed. In modern times, it is orders of the kind before the Court, and hapū management plans that will set the guidance.
>
> …

[430] The evidence is, in tikanga, that an area cannot be a wāhi tapu if it is shown that noa activities are **regularly** undertaken there.

[431] Te Ūpokorehe's claim that the entire harbour is a wāhi tapu was not supported by the other members of the joint group for CMT 2, which would seem to be an important factor in assessing whether the harbour itself is considered to be sacred and set aside in tikanga. Te Ūpokorehe provided evidence that other hapū have always fished and gathered kaimoana throughout the harbour. The claim that the entire harbour was wāhi tapu did not appear to be widely held by all of the entities that are in some way associated with Te Whakatōhea.[188]

[432] The fact that Te Ūpokorehe also submitted over 100 individual discrete sites that require protection within the Ōhiwa Harbour that are wāhi tapu and require wāhi tapu restrictions or prohibitions also militates against the contention that the entire harbour is in fact wāhi tapu. This does not mean that Te Ūpokorehe cannot apply rāhui over the harbour in tikanga when the circumstances that require that arise, merely that the Court has not been satisfied that the entire Ōhiwa Harbour is appropriately classified as a wāhi tapu for the purposes of the Act.

The balance of Te Ūpokorehe's claims

[433] Little to no evidence was provided in respect of many of the individual claims made by Te Ūpokorehe within the harbour. The documentation filed by Te Ūpokorehe does not provide the Court with the requisite level of certainty as to the location of the boundaries of each of these individual wāhi tapu. A significant number of these sites

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188 Compare *Re Ngāti Pāhauwera*, above n 8, at [97].

do not appear to be within the takutai moana. On that basis, a sufficient evidential foundation was not raised by Te Ūpokorehe to warrant the Court enquiring into each of these claims individually, within an already lengthy, and interim judgment. The exception to this are the wāhi tapu sites to which more than one successful applicant made claim.

[434] Listed in Appendix A is the remainder of the wāhi tapu claims made by Te Ūpokorehe within the Ōhiwa Harbour. If the Court is to be able to enquire into those claims, the applicants must file accurate maps which clearly depict the locations of the boundaries of their claimed wāhi tapu within the Ōhiwa Harbour, only including sites that are within the CMCA. The Court must also be informed of exactly why each of these individual sites are said to be wāhi tapu, and how Te Ūpokorehe's proposed restrictions and prohibitions are linked to, and required for, their protection. Regard must also be had to the fact that CMT 2 was awarded jointly to a group of applicants of which Te Ūpokorehe was only one. Any disagreement between members of the joint group as to the location of a wāhi tapu or the conditions required for its protection will likely result in the Court's inability to award wāhi tapu status or prohibitions and restrictions in respect of that site.

Analysis of wāhi tapu claims within CMT 2 that were made by more than one applicant

Ihukatia Pā

[435] Ihukatia Pā is a historic Pā site for some of the hapū of Te Whakatōhea, and also the site of a battle between Ngāti Awa and Te Whakatōhea. It was claimed as a wāhi tapu by Ngāi Tamahaua, Ngāti Awa, and Te Ūpokorehe.

[436] Ihukatia Pā is located along the Ōhope Spit, and was used as a position from which to defend access to the resources of the harbour. Ngāti Awa provided evidence that Ihukatia was also associated with the Horouta waka, stating that:

> Ihukatia is linked to the time of the Horouta waka. After it entered the Ōhiwa Harbour, and after the accident with Kanawa, one of the [masts] snapped so the Horouta came into the Harbour and put [its] anchor down. The following saying was recounted - "katia te ihu" (put down the anchor). The waka was not to leave until [it] was fixed.

[437] Ngāti Awa and Ngāi Tamahaua both mapped Ihukatia Pā as being located on the Ōhope Spit, facing inwards towards the harbour, including an area of land above MHWS, extending into the takutai moana. Te Ūpokorehe mapped the area in a different location, being closer to the town of Ōhope, on an area of the coastline that is within CMT 1, again, including an area of land above MHWS and extending into the takutai moana. No evidence was provided by any of the applicants establishing that the tapu of the pā site extended into the moana, and if so, how far.

[438] While Ngāti Awa and Ngāi Tamahaua appear to have been in agreement as to the location and wāhi tapu status of the area in which they located Ihukatia, Te Ūpokorehe refused to acknowledge both of their claims for wāhi tapu status for that site.[189] The lack of consensus among the groups jointly awarded CMT, as to wāhi tapu status in this area, means that the requirements of s 109 have not been met, and that the Court cannot make the orders sought.

The area of the coastline surrounding Tauwhare Pā and enclosing Te Kopu ō te Ururoa

[439] Ngāi Tamahaua, Ngāti Awa and Te Ūpokorehe made wāhi tapu claims in this area, for the small bay described as Te Kopu ō Te Ururoa, and the area of the coastline surrounding Tauwhare Pā. This area is located in the far west of the Ōhiwa Harbour, Te Kopu ō Te Ururoa being a small bay which was said to be a breeding ground for sharks. Tauwhare Pā and the surrounding area is also associated with Muriwai, Tairongo and Mereaira Rangihoea, all of whom are tīpuna of significance.

[440] Again, each applicant mapped their claimed wāhi tapu areas slightly differently:

(a) Ngāti Awa identified Te Kopu ō Te Ururoa as a distinct area completely within the takutai moana, being the small bay directly beside Tauwhare Pā, the boundaries of which are able to be identified by reference to the natural landscape of the area;

(b) Ngāi Tamahaua marked out the entire area of the coastline within the

[189] Affidavit of Wallace Aramoana, 9 February 2022, at [60] and [81].

Harbour that surrounds Tauwhare Pā;

(c) Te Ūpokorehe identified three distinct sites in this area, being:

(i) a large area around Tauwhare Pā, mostly above MHWS;

(ii) a smaller area within the area said to be Tauwhare Pā, also mostly above MHWS, called Te Horo, which was said to be an old Te Ūpokorehe settlement; and

(iii) an area of the takutai moana directly in front of Tauwhare Pā, said to be Te Kopua ō Te Ururoa, completely detached from the area said by Ngāti Awa to be Te Kopu ō Te Ururoa.[190]

[441] As to Tauwhare Pā, Te Roto, and the area of the coastline surrounding them, no evidence was provided beyond the maps filed as to the location of the boundaries of the wāhi tapu areas or the distance the tapu extends from MHWS. No evidence was provided establishing that tapu originating on land extends into the takutai moana. Therefore, the Court is unable to recognise these areas within the CMT order as wāhi tapu.

[442] In respect of Te Kopu ō Te Ururoa, Ngāti Awa and Te Ūpokorehe each mapped the area in different locations. Te Ūpokorehe refused to acknowledge Ngāti Awa kōrero in this area. Because there is no consensus between the successful applicants as to the wāhi tapu in this area, they are unable to be recognised within the CMT order as wāhi tapu.

Omere and Otao

[443] Omere and Otao are two sites where kaimoana is gathered in the west of the Ōhiwa Harbour. Both of these sites were claimed as wāhi tapu by Ngāti Awa and Te Ūpokorehe. Neither of Ngāti Awa or Te Ūpokorehe identified the locations of the boundaries of these sites with sufficient certainty pursuant to the terms of s 79(1)(a).

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[190] Ngāti Awa and Te Ūpokorehe used slightly different spellings of this wāhi tapu.

Te Ūpokorehe also refused to acknowledge Ngāti Awa's kōrero in relation to these two sites. The Court is therefore unable to recognise them within the CMT order as wāhi tapu.

CMT 3

[444] This section of the judgment addresses the wāhi tapu claims made by Ngāi Tai within CMT 3.

[445] Ngāi Tai claims four sites as wāhi tapu within the CMT area, these are:

(a) Te Rangi;

(b) Tarakeha;

(c) Awaawakino; and

(d) Te Toka a Rūtaia.

[446] The restrictions sought in respect of these areas were set out at Exhibit 24 during the Stage Two hearing and are replicated in the table below. The same restrictions and prohibitions are to apply to all four sites.

Restrictions/Prohibitions
• No eating or drinking • No processing, consuming of catch • No disposal of organic or inorganic waste material • No loud gatherings • No driving/parked vehicles • No sewage/purging the bilges • No scattering/burying ashes or sea burials • Not modify/destroy site • No introduction of new species • No building structures, earthworks, fracking • No activities that effect the mauri • Rāhui restrictions apply when appropriate

- No rituals without Ngāi Tai Takutai Kaitiaki Trust permission
- No anchorage

[447] Ngāi Tai submit that the evidence provided throughout Stage One and Stage Two provides a basis upon which to conclude that they have established the requirements in ss 78 and 79. They seek the ability to "bring everyone in line with the tikanga that the applicants already practise in that area", in protecting the mauri of the relevant areas.

Te Rangi

[448] Te Rangi was said to be the resting place of the tīpuna Tarawa, and the landing place of the Nukutere waka, in a small bay at the easternmost boundary of CMT 3. Te Rangi was also said to be a wāhi tapu by Ngāi Tamahaua and Ngāti Ruatakenga, who acknowledged that they were not awarded CMT within the area between Tarakeha and Te Rangi.

[449] No evidence was provided as to exactly how far the tapu extends from MHWS. However, the area mapped by Ngāi Tai is clearly within the takutai moana, and the evidence of Mr Tapuke for Ngāi Tai at the Stage Two was that protection was only sought for the area that was identified in that map.[191]

[450] I am satisfied that Ngāi Tai have established their connection to Te Rangi as a wāhi tapu in tikanga, and that the Court has the ability to be certain as to the locations of the boundaries of that area. The wāhi tapu recognised on the CMT order is to be the area between MHWS and MLWS within the area of the bay that Ngāi Tai has identified as Te Rangi. However, Ngāi Tai will need to file a map that depicts the wāhi tapu on a surveyed area of CMT 3, so that there is certainty as to the location of its boundaries.

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191 *Re Edwards* Stage Two Notes of Evidence, at 330 and 340.

Tarakeha

[451] Tarakeha was said to be a wāhi tapu for its association to the significant tīpuna, Apanui, who was the rangatira of Te Whānau-a-Apanui. Muriwai Jones, who gave evidence for Ngāi Tai, stated that:[192]

> Tarakeha means the sacred scent of the female, it reminds all of Ngāi Tai of the high respect and tapū o te wahine…
>
> …The wāhi tapū includes the Tarakeha ridgeline down to the moana (the foreshore). There exists a spiritual connection here due to this significant [tīpuna] that Ngāi Tai do not want threatened.

[452] Tarakeha was also an area that was said to be of significance to Ngāi Tamahaua and Ngāti Ruatakenga, although not within the area in which they were awarded CMT. The only way of accessing this area is to walk around the headland at low tide.[193]

[453] Ngāi Tai mapped the wāhi tapu at Tarakeha as including only the rocks on the eastern side of the headland. These rocks are within the takutai moana. I am satisfied that Ngāi Tai have established their connection to Tarakeha as a wāhi tapu in tikanga, and that the Court has the ability to be certain as to the locations of the boundaries of that area. However, there was no evidence as to the exact boundaries of the wāhi tapu beyond the map that was filed by Ngāi Tai. Therefore, in order for the wāhi tapu at Tarakeha to be recognised within the CMT order, the applicants must file a map that depicts the wāhi tapu on a surveyed area of CMT 3, so that there is certainty as to the location of its boundaries. That area should be no greater than what was described and/or mapped at the Stage Two hearing.

Awaawakino and Te Toka a Rūtaia

[454] Awaawakino and Te Toka a Rūtaia were said to be mahinga kai along the coast within the CMT 3 area. Ngāi Tai's evidence at Stage Two provided that these were seeding areas where shellfish, spats, and kina grow, and feed other types of kaimoana.[194] Te Toka a Rūtaia was also said to be a prominent rock at the Tarakeha headland, which was the anchor of the Nukutere waka. Wāhi tapu protections were

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192 Affidavit of Muriwai Jones, 26 January 2022, at [8]-[9].
193 At [4].
194 *Re Edwards* Stage Two Notes of Evidence, at 330.

sought in these areas to protect the ongoing sustainability of the mahinga kai, given that this is an area in which kaimoana is not gathered regularly.[195]

[455] Awaawakino was mapped as being located directly next to the wāhi tapu area at Te Rangi, to the east. Te Toka a Rūtaia was mapped as being located directly next to the wāhi tapu area at Tarakeha, to the west. Both of these areas are within the takutai moana.

[456] I am satisfied that Ngāi Tai have established their connection to Awaawakino and Te Toka a Rūtaia as wāhi tapu in tikanga, and that the Court has the ability to be certain as to the location of the boundaries of those areas. However, as with Tarakeha, there was no evidence as to the exact boundaries of the wāhi tapu beyond the map that was filed. Therefore, in order for the wāhi tapu at Awaawakino and Te Toka a Rūtaia to be recognised within the CMT order, the applicants must file a map that depicts the wāhi tapu on a surveyed area of CMT 3, so that there is certainty as to the location of its boundaries. That area should be no greater than what was described and/or mapped at the Stage Two hearing.

Restrictions and prohibitions

[457] The reasoning set out earlier in this judgment as to the restrictions and prohibitions proposed by the other successful applicants applies in equal measure to the restrictions and prohibitions proposed by Ngāi Tai. After the removal of restrictions and prohibitions already discussed, the remaining restrictions and prohibitions proposed by Ngāi Tai are:

(a) no processing or consuming of catch;

(b) no sewage or purging of the bilges;

(c) no introduction of new species;

(d) rāhui restrictions to apply when appropriate; and

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195 At 346.

(e) no rituals without the permission of Ngāi Tai Takutai Kaitiaki Trust.

[458] The Court has previously said that the imposition of rāhui is an available right for CMT holders who have established the requirements of the Act for wāhi tapu protections in defined areas.[196] Ngāi Tai provided evidence that rāhui are often imposed over their defined wāhi tapu areas either following a death in the takutai moana, or for conservation purposes in respect of the mahinga kai.[197] Provided that an accurate map of the CMT 3 area is filed, the imposition of rāhui is a prohibition that may be recognised within the CMT order.

[459] However, there are limitations on the extent to which the boundary of any tapu arising from a rāhui can actually be recorded. That is because the source of the tapu derives from a triggering event such as a drowning in a particular locality or a need for protection of a particular food source as a result of some external event such as pollution or overuse. It is obviously impossible in advance to know exactly where or when a rāhui might be imposed, or the nature of the rāhui. That has obvious implications for enforcing a breach of rāhui through the ordinary Court system. It is also not possible for the CMT itself to record the location of the tapu area.

[460] A compromise solution which acknowledges the entitlement at tikanga to impose temporary tapu status by way of a rāhui would be for the title to record that those applicant groups who are jointly awarded CMT may impose rāhui in accordance with tikanga, the details and location of the rāhui to be determined between all joint CMT holders in accordance with tikanga. In Ngai Tai's case, as they are the sole CMT holder (along with their hapū Ririwhenua) in the area between Tarakeha and Te Rangi, they alone will make such decisions.

[461] No evidence was provided as to why a prohibition against the introduction of new species was required to protect Ngāi Tai's wāhi tapu, or how it would be amenable to enforcement through the Courts. This proposed prohibition is therefore unable to be included within the CMT order.

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196 Above n 1, at [389]; above n 8 at [72] and [123].
197 Affidavit of Muriwai Jones, 26 January 2022, at [18]-[22].

[462] Evidence was provided by Te Riaki Amoamo for Ngāti Ruatakenga at the Stage Two hearing regarding a visit by Te Whakatōhea to Te Rangi. His evidence was that Te Whakatōhea needed to ask permission from Ngāi Tai to go to Te Rangi, given that is in the area in which Ngāi Tai hold customary authority. Mr Amoamo recounted that Ngāi Tai kaumatua Bill Maxwell had granted permission for Te Whakatōhea to visit Te Rangi, and that he and other members of Ngāi Tai met Te Whakatōhea there, and went through the process of a pōwhiri, as well as karakia and mihi.[198] This evidence illustrated to the Court that generally tikanga provides that rituals do not occur in the CMT area sought to be granted wāhi tapu protections by Ngāi Tai, without permission from Ngāi Tai. However, in terms of the Act, there is difficulty regarding the enforceability of such a prohibition, given the possibility of prosecution. Mr Amoamo's evidence was also related to a ritual exchange that took place on the beach adjacent to the takutai moana, rather than within it. No evidence was provided by Ngāi Tai as to the reasons why this prohibition was sought or required in respect of the areas which they sought wāhi tapu protections for, which are all located within the takutai moana. On balance, I am not satisfied that Ngāi Tai have established that this prohibition is required to protect the wāhi tapu areas which are able to be recognised within the CMT order. The evidence was that the prohibition is already adhered to in tikanga, which is a more appropriate forum for a prohibition of this nature.

[463] Provided an accurate map of the relevant wāhi tapu is able to be produced, the enforcement of prohibitions against the processing or consumption of catch and purging of the bilges may be amenable to enforcement through the Courts. The reasons for it will need to be set out in the CMT order as required by s 79(1)(b). If these pre-conditions are met, it may be included in the CMT order as a wāhi tapu condition.

PCR orders

[464] A PCR order may be made under s 98 of the Act recognising an 'activity, use or practice' if the Court is satisfied that the requirements under s 51 have been met, and the activity, use or practice sought to be met is not one that is excluded by the Act. It must be an activity that takes place in the takutai moana.

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198 *Re Edwards* Stage Two Notes of Evidence, at 72-74.

[465] At Stage One, the Court made findings as to which applicants had satisfied the tests pursuant to s 51, and in what areas. The applicants were then directed to submit draft orders.

[466] It is not necessary for there to be a survey plan supporting the extent of a PCR order, unlike CMT orders. Certain activities are excluded from being recognised as a PCR by s 51(2). This includes an activity that relates to wildlife within the meaning of the Wildlife Act 1953.

[467] Unfortunately, most of the applicants who submitted draft orders have included activities or practices that the Court did not award at Stage One. These will be dealt with in turn.

Limitations on the exercise of PCR

[468] An issue arose during the course of the hearing as to whether the grant of a PCR authorised activities which went beyond the precise activities for which a PCR had been granted but which might be regarded as ancillary to the exercise of a PCR.

[469] Ms Ella Tennent, giving evidence on behalf of the Bay of Plenty Regional Council, referred in particular to activities such as the construction of access roads or huts to facilitate the undertaking of whitebaiting or of ramps or jetties to facilitate the launching of waka.

[470] Counsel for the Attorney-General correctly submitted that a PCR as defined in s 9 of the Act, is "an activity, use or practice". Secondly, an activity, use or practice, in order to meet the requirements of the Act, must be exercised in the common marine and coastal area.[199] A PCR recognised by the Court therefore cannot authorise any activity outside the takutai moana.

[471] The various PCR orders made by the Court in this case reflect the specific PCR orders sought by each applicant and the evidence tendered in support of each application. No applicant sought ancillary orders in relation to any activity, use or

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199 Section 51(1)(b).

practice. Therefore, there is no basis upon which the Court could grant an ancillary order of the type raised by Ms Tennent.

Ngāti Muriwai

[472] The Stage One decision found that the applicant group that identified themselves as Ngāti Muriwai had established an entitlement to certain limited PCR rights namely:

(a) collecting firewood, stones, and shells along the foreshore of the whole of their claimed area; and

(b) whitebaiting at the Waiaua River and Waiōtahe Estuary.[200]

[473] Although the Court had adopted the pukenga's conclusion that Ngāti Muriwai were not a hapū and had not met the test of establishing that they had exclusively used and occupied the specified area since 1840,[201] they did not have to establish exclusive use and occupation in order to obtain a PCR. At [512], the Court specifically found that it was Ngāti Muriwai applicant group that had established the entitlement to PCR rights.

[474] Although the original Ngāti Muriwai application area included the area of the takutai moana some way out to sea, including Whakaari and Te Paepae o Aotea, as noted at [497] of the Stage One decision, in closing submissions, the application was amended so as to extend from the mouth of the Maraetōtara Stream to Tarakeha. I was most surprised, when in submissions to the Stage Two hearing, counsel asserted that the PCR right in respect of the collection of firewood, stones, and shells that the Court had granted extended to include all the offshore islands including Whakaari and Te Paepae Aotea.

[475] There are two reasons why this claim is incorrect. The reference to "within the application area" at [505] obviously refers to the amended application area set out just a few paragraphs earlier at [497] and secondly, no evidence was led by this applicant

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200 At [512].
201 At [499], [465] and [459].

that it had ever collected firewood, stones and shells from Whakaari, Te Paepae Aotea, or any other offshore island. The PCR only relates to the foreshore between Maraetōtara and Tarakeha.

[476] Ngāti Muriwai have nominated the holders of the order to be Nepia Tipene, Adriana Edwards, Christiana Davis, Glenis Reeve, and Milly Hunia as Trustees of the Ngāti Muriwai Authority Trust, or any other persons appointed as trustees. Certainty of identity is required as to who the holders of the PCR are. The reference to "any other persons appointed as trustees" needs to be deleted. Where the identity of the nominated holder changes, Ngāti Muriwai may apply under s 111(c)(a) of the Act to vary the name(s) of the holder. The restrictions, limitations or terms on the scale, extent, and frequency of the activities in the order are that the activities are to be carried out in accordance with the tikanga of Ngāti Muriwai. That statement does not provide any meaningful description of the intended scale extent or frequency of the exercise of the proposed right. That information will need to be provided.

[477] The draft PCR order submitted with Ngāti Muriwai's closing submissions contained another error. It purported to expand the eastern boundary of the application area from Tarakeha to Haurere Point (Te Rangi). The boundaries for the PCR for the collection of firewood, stones and shells as clearly set out at [497] of the decision extend from the mouth of the Maraetōtara Stream to Tarakeha, including Ōhiwa Harbour, but not further east. The draft PCR order and map will need to be amended to reflect this.

[478] There are also difficulties in the draft order in relation to the PCR for whitebaiting. What the Court found, on the basis of the evidence tendered to it, was that the whitebaiting took place at the Waiaua River and the Waiōtahe estuary. The draft order at [4.2(b)] incorrectly refers to the Waiōweka Estuary instead of the Waiōtahe Estuary.

[479] There is also a problem with the claim for a PCR for whitebaiting in the Waiaua River. During the course of the Stage Two hearing, Mr Nepia Tipene gave evidence for Ngāti Muriwai and conceded under cross-examination that the mouth of the Waiaua River was wāhi tapu, that Ngāti Muriwai therefore did not whitebait there and

that they only whitebaited upstream of the Jackson's Road/Motu Road Bridge. He identified the name of the bridge that they only whitebaited upstream of as the Waiau Bridge[202] and its location as being on the Pacific Coastal Highway.

[480] Mr Nepia accepted that the Waiaua River was non-navigable and that therefore, under the Act, the upper limit of the coastal marine area was a distance extending upstream by a distance that was five times the mouth of the river. He acknowledged that he had not measured the mouth of the river.[203]

[481] The need for evidence calculating the mouth of the river in order to establish that the area upstream of the Waiau Bridge on the Pacific Coastal Highway (where the whitebaiting was said to take place) was still in the CMA was drawn to the attention of counsel who said he would look into the matter.

[482] Attached to the closing submissions of counsel was an aerial photograph of the Waiaua River which had been produced by the Attorney-General at the Stage One hearing.

[483] Counsel accepted that it depicted the CMA ending at Waiau Bridge but the submissions then went on to say:

> However, the instructions of the NMAT trustees are that whitebaiting is carried out in both the immediate upstream and downstream from the bridge area.

[484] Effectively counsel was attempting to contradict the evidence of his own witness given under oath, with what was said in submissions. That is not permissible. As the area in which Mr Nepia said the whitebaiting took place is not in the takutai moana, it cannot be the subject of a PCR.

[485] On 8 March 2022, pursuant to leave granted, counsel for Ngāti Muriwai filed a further memorandum and affidavit of Nepia Tipene. Mr Tipene deposed that the draft order that counsel had filed had been sent to Ngāti Muriwai members. He said that the feedback from members was that they did not agree to the amendment that

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202 *Re Edwards* Stage Two Notes of Evidence, at 235 and 236.
203 At 237.

had been made and wanted to revert to the original draft order which disregarded Mr Tipene's oral evidence that Ngāti Muriwai did not whitebait in the area below the Waiau Bridge because it was wāhi tapu.

[486] Both the memorandum and affidavit are fundamentally misconceived. Cases in the High Court are determined on the basis of the requirements of the Act and the evidence given to the Court. Section 51 of the Act requires that, in order to obtain a PCR, the right must have been exercised since 1840 and continues to be exercised in a particular part of the takutai moana in accordance with tikanga.

[487] In the present case, Mr Tipene's clear evidence was that whitebaiting was not undertaken in that part of the Waiaua River that falls within the takutai moana (below the Waiau Bridge) because that area was wāhi tapu. The activity therefore did not meet the test in s 51(1)(b). Once Mr Tipene made that acknowledgement, counsel properly amended the applications. The fact that members of Ngāti Muriwai might not agree with that cannot alter the fact that the statutory test is not met.

[488] Section 109 of the Act requires that the recognition order contain certain information. Subject to the comments above at [476] in respect of persons appointed as trustees in the future, the draft order clearly identifies the applicant group as being Ngāti Muriwai and the holders of the order are appropriately described as Nepia Tipene, Adriana Edwards, Christina Davis, Glenis Reeve, and Milly Hunia as trustees of the Ngāti Muriwai Authority Trust. Contact details are also given. However, the draft will need to be resubmitted complying with the findings set out above and will also need to be accompanied by a sufficient diagram or map.

Ngāti Ira o Waiōweka

[489] At Stage One, Ngāti Ira o Waiōweka was held to have met the tests for PCR in respect of:[204]

(a) whitebaiting at the Waiaua and Waiōtahe Rivers;

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[204] Above n 1 at [669(b)] and [545].

(b) gathering driftwood throughout their claimed area;

(c) gathering sand off the mouth of the Waiōweka River and at Waiōtahe;

(d) gathering mud, rocks, and shells from wetlands, estuarine margins and the sea throughout their claimed area; and

(e) landing vessels and making passage throughout their claimed area.

[490] The draft order filed by Ngāti Ira goes further than the matters listed by the Court and set out in the preceding paragraph.

[491] In particular, [9(b)(iii)] refers to the harvesting of flax. There was no award of a PCR in respect of gathering flax. At [537], the judgment mentioned that there was evidence that flax was gathered to make things like bowls and baskets for hangi. However, there was no evidence that the flax that was gathered grew in the takutai moana. That is why no PCR was granted.

[492] At [9(b)(iv)], the draft order refers to the collecting of seaweed such as karengo. Ngāti Ira was not awarded a PCR in respect of gathering seaweed. At [536], there was discussion of the evidence of Carlo Gage that karengo was gathered but the decision at [369] explained why there were difficulties in granting orders for PCR in respect of seaweed. Activities regulated by the Fisheries Act cannot be made the subject of a PCR order.

[493] Paragraph [368] of the Stage One decision explains that seaweed is regulated by that Act and that the only category of seaweed not covered was, "seaweed of the class Rhodophyceae while it is unattached and cast ashore".

[494] The judgment noted that:

> It is possible that karengo, a type of seaweed referred to evidence is part of this class but there was no evidence on this point.

[495] Another issue arises in respect of Ngāti Ira's PCR to gather sand off the mouth of the Waiōweka River,[205] given that the reclamations involved in the Harbour Development will result in the closing of the mouth of the Waiōweka. Counsel for ODC submitted that because the area to which this PCR is to apply has not been identified with sufficient certainty, there is a possibility that when the reclamation process is finished, the area in which the PCR is generally understood to be exercised will no longer exist. This submission is correct. Ngāti Ira did not, as s 109 requires, file an adequate map or diagram. It may be that once such a document is filed, the issue will resolve itself. But, until that is done, this paragraph in the draft PCR order cannot be approved.

[496] There was a further issue with the wording of proposed [9(b)(ii)]. The words "to make concrete to support building structures for Ngāti Ira Waiōweka in the Waiōweka River and at Waiotahi" could convey the impression that the PCR authorises Ngāti Ira to build structures in the Waiōweka River. That of course, is not correct. The PCR relates only to activities in the takutai moana. A more appropriate form of wording in replacement of that set out above would be "to make concrete to support building structures for Ngāti Ira o Waiōweka in their rohe".

[497] I note that two of the paragraphs, [4] and [7], have slightly different descriptions of the PCR to all the others. In both of those paragraphs the word "safeguarding" has been inserted. Paragraph [4] reads:

> An order for a PCR safeguarding the gathering and harvesting of whitebait at the Waiaua and Waiotahi Rivers.

[498] The word "safeguarding" does not appear in the Stage One judgement. It is not a concept recognised by the Act. In order to align the PCR with what the Court actually found, it should more appropriately read:

> An order for a PCR for the gathering and harvesting of whitebait at the Waiaua and Waiotahi Rivers.

A similar amendment needs to be made to [7].

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[205] At [9(b)(ii)] of the draft order.

[499] In relation to whitebaiting in the Waiaua River, the limitations in relation to wāhi tapu and those parts of the river and its estuary that are not part of the CMT which are discussed above at [384]–[389] and [479]–[488] also need to be recognised.

[500] There are a couple of other typographical amendments in [9(b)], line 2. There appears to be a word missing. It should read, "ways of life **and** practices".

[501] In [10], the first line should read, "any limitations on the scale, extent **or** frequency …". The balance of the proposed terms satisfactorily meet the requirements of s 109.

Te Uri o Whakatōhea Rangatira Mokomoko

[502] At Stage One, Te Uri o Whakatōhea Rangatira Mokomoko were found to have met the tests for PCR in respect of:

(a) whitebaiting at Waiaua and in and around the Ōhiwa Harbour;

(b) taking of wai tai for rongoā purposes in the claimed area to 100 metres from MHWS, and using wai tai for bathing and healing purposes within Ōhiwa Harbour;

(c) using the takutai moana within the claimed area for transport and purposes of navigation;

(d) travelling to Hokianga Island for wānanga to pass down mātauranga to future generations;

(e) traditional practices such as wānanga, hui, tangihanga and burying of whenua at Taiharuru;

(f) planting of pohutukawa, harakeke, pingao, spinifex and toitoi within the claimed takutai moana area as an exercise of kaitiakitanga; and

(g) launching of boats and waka at the Ōhiwa Harbour.

[503] In the draft order submitted by Te Uri o Whakatōhea Rangatira Mokomoko, the activity of "traditional practices such as wānanga, hui, tangihanga and burying of whenua at Taiharuru" noted at Stage One, has been split into two separate rights being:

(a) burying of whenua at Taiharuru; and

(b) traditional practises such as wānanga, hui and tangihanga, to apply within the takutai moana between Maraetōtara Stream to Tarakeha and including the Ōhiwa and Ōpōtiki Harbours.

[504] The Court stated at Stage One:[206]

> In relation to using areas for various types of traditional practices such as wānanga, hui and tangihanga, there was clear evidence (particularly from Raiha Ruwhiu) of returning whenua (placenta) to the foreshore at Taiharuru and placing the umbilical cord in crevices of the rocks on the seashore. Ms Ruwhiu confirmed that these practices have been carried out since 1840 and were ongoing. No particular site other than Taiharuru was mentioned. The applicant group is entitled to a PCR in respect of this practice at Taiharuru.

[505] That was a clear statement that the practises noted above were limited on the evidence to those that were undertaken at Taiharuru. There was no evidence that any of the traditional practices referred to were carried out anywhere other than Taiharuru. The draft order therefore needs to be amended to reflect this.

[506] That part of the draft order that refers to the taking of waitai for rongoā does not accurately reflect what the Court granted. It refers to "Taking of wai tai for rongoā purposes in the claimed area …" whereas, what the Court held at [552] was:

> …this applicant has met the test in s 51 in relation to the taking of wai tai for Rongoa throughout their application area to 100 m from mean high-water springs …

[507] The draft order needs to be amended to accurately reflect what was granted.

[508] The other information requirements in s 109 have been met other than the filing of a diagram or map sufficient to identify the relevant areas.

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206 At [561].

Ngāi Tamahaua/Te Hapū Tītoko o Ngāi Tama

[509] At Stage One, Ngāi Tamahaua established that they had met the tests for PCR orders in respect of:

(a) whitebaiting in the Ōpape River and at Waiōweka, Pakihi, Kutarere, Waiōtahe and Wainui, to the extent that those activities take place in the takutai moana;

(b) gathering of indigenous plants and shells between Maraetōtara and Tarakeha;

(c) gathering firewood between Ōpape and Ōmarumutu;

(d) collecting wood for artwork from Ruatuna, Waiōtahe, Tawhitinui, Hukuwai, Tirohanga and Waiaua; and

(e) exercising kaitiakitanga activities in the takutai moana including the monitoring of the activities of other users of the takutai moana, rubbish collection, and environmental projects such as those for planting of pingao and spinifex.

[510] In the draft order submitted to the Court, Ngāi Tamahaua have altered slightly the locations to which the PCR order is to apply. The Otara River was included as a location on the whitebaiting PCR, even though it is not in the takutai moana, and therefore is unable to support a grant of PCR.

[511] Secondly, the PCR for exercising kaitiakitanga activities in the takutai moana has been stated as being between Maraetōtara and Te Rangi, extending out to 12 nautical miles. The Court, at Stage One, explicitly found that Ngāi Tamahaua's PCR rights could not extend beyond Tarakeha to Te Rangi, given that the evidence was that Tarakeha was the commonly known and observed boundary between Whakatōhea and Ngāi Tai, despite long held dispute between the groups.[207] In this

[207] At [587]-[589].

conclusion the Court placed emphasis on the evidence of Mr Amoamo, stating "I therefore do not accept Ngāi Tamahaua's argument that, as at the present day, it has mana moana east of Tarakeha".[208] The PCR for exercising kaitiakitanga activities in the takutai moana for Ngāi Tamahaua can only be between Maraetōtara and Tarakeha, out to 12 nautical miles. As noted by the Court in the Stage One decision, this is not an exclusive right, and kaitiakitanga activities may be exercised in that same area by other successful applicants who were awarded PCR in respect of that activity.[209]

[512] The wording in the draft order as to where the various activities protected by a grant of PCR take place refers to "on the foreshore". The concept of "foreshore" is not defined. In order to avoid uncertainty the words "below mean high-water springs" should be added after the words "on the foreshore". This makes it clear that the PCR only relates to activities in the takutai moana.

[513] The draft order nominated the holders of the orders for both Ngāi Tamahaua and Te Hapū Tītoko o Ngāi Tama as being Tracey Hillier and Hetaraka Biddle. As Mr Biddle passed prior to the Stage Two hearing, a new holder will need to be nominated.

[514] The other information requirements set out in s 109 have been complied with apart from the failure to file a sufficient map or diagram.

Te Ūpokorehe

[515] At the Stage One hearing, Te Ūpokorehe established that it had met the tests for PCR orders in respect of:

(a) catching whitebait in the Ōhiwa Harbour;

(b) exercising kaitiakitanga within the takutai moana;

(c) gathering flora and fauna that is not otherwise excluded from being the subject of an order for PCR within the takutai moana; and

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208 At [588].
209 Above n 1, at [606].

(d) collecting shells, mud, wood on the foreshore, and stones within the application area.

[516] Unfortunately the draft order goes well beyond the findings of the Court and includes a number of activities that do take place within the takutai moana and in respect of which no PCR order was granted.

[517] [632] of the Stage One decision addressed the application for orders in respect of plants. It pointed out that any draft order could only relate to plants that actually grew in the takutai moana rather than on adjacent areas of land. That paragraph also made it clear that only flora and fauna not otherwise excluded could be the subject of an order for PCR. As noted above, [368] of the Stage One decision referred to the definition in s 2(1) of the Fisheries Act 1996 which excludes "aquatic life" from a PCR. Aquatic life is defined as any species of plant or animal life, that at any stage of its life must inhabit water, whether living or dead. Seaweed is defined as including all kinds of algae and sea grasses that grow in New Zealand waters at any stage of their life history, whether living or dead. The definition of 'fishing' in the Fisheries Act 1996 includes the harvesting of aquatic life or seaweed.

[518] The applicant has listed the names of over 30 tree and plant species in its draft order. The joint affidavit of Maude Edwards and Wallace Aramoana of 22 January 2022 asserts that they grow in the takutai moana.

[519] Notwithstanding the Court drawing to the attention of the applicant the limitations as to the activities in relation to plant or animal life that can actually support an order for PCR, no regard appears to have been paid to this matter in preparing the draft order. Obvious examples are the reference to wiwi (sea rush) which falls within the definition of seaweed. Mangroves also clearly fall within the definition of aquatic life. That part of the schedule which lists the plants will need to be amended so as to delete any reference to plants that fall within the definition of seaweed or aquatic life. The section will also need to have a preface added which makes it clear that only specimens of the listed plant specifies that are actually growing below MHWS are covered by the PCR.

[520] I now address those matters in Appendix A of the draft order which either go beyond the PCR rights recognised in the Stage One judgment or are incapable of forming the basis of an order for PCR.

A – "Customary harvest of whitebait in the Ōhiwa Harbour and surrounds"

[521] The exact wording at [669(e)(i)] of the Stage One judgment was "catching whitebait in the Ōhiwa Harbour".

[522] At [624], the judgment noted that the only area identified as to where whitebait was caught was in Ōhiwa Harbour. The words "and surrounds" therefore go further than the PCR recognised by the Court.

B – "Access to taonga and archaeological sites in rohe for kaumatua assessment of kaitiaki obligations"

[523] The Court has no jurisdiction to make any ruling in respect of access to taonga or archaeological sites that are not in the takutai moana. The activity supported by an order for PCR must also take place in the takutai moana. The Court cannot make orders for access to the takutai moana. This has to be deleted.

D – "Control and removal of mangroves in Ōhiwa Harbour"

[524] Mangroves fall within the definition of aquatic life and activities such as harvesting or removing them are excluded.

F – "Kaitiaki over the harvest of wiwi (sea rush) for use and preparation of traditional kai"

[525] As mentioned, wiwi is a form seaweed and an activity in relation to it cannot be the subject of a PCR order.

G – "Protection of mussels through control of starfish in Ōhiwa Harbour"

[526] Starfish are a species of aquatic life. Their removal would be harvesting.

I – "Collection of iron deposits at Te Tawai for use in kōwhaiwhai"

[527] Te Ūpokorehe was not granted a PCR order in respect of iron deposits.

J – "Protection of rare plants, wild orchids, wiwi (sea rush) that does not grow anywhere else, and other rare plants in and around the area of Te Karaka Stream. Extraction of invasive species and clean-up pollution"

[528] There was no evidence that wild orchids grew in the takutai moana. There is no indication what the "rare plants" are that are being referred to, or any information that would confirm them as growing in the takutai moana. The reference to "other rare plants in and around the area of Te Karaka Stream" would seem to clearly refer to plants growing outside the takutai moana.

[529] There are difficulties with the reference to "extraction of invasive species and clean-up pollution". There is no explanation as to what "invasive species" are being referred to. It is possibly referring to species like mangroves and, for the reasons discussed above, anything that amounts to harvesting or removing of aquatic life cannot be the subject of a PCR. The words "clean-up pollution" are not sufficiently specific to explain what particular activities are involved, or even what the "pollution" being referred to is. Accordingly, they cannot be the subject of a PCR.

[530] The second of the PCR orders granted was "exercising kaitiakitanga within the takutai moana in relation to the activities set out at [625]-[627]." Those activities included:

(a) engaging with the Department of Conservation and Bay of Plenty Regional Council regarding conservation initiatives;

(b) actively undertaking the control of mangroves in Ōhiwa Harbour including obtaining a resource consent;

(c) establishing a resource management team which liaised with central and local government, and also undertook its own conservation initiatives;

(d) participating in a number of Regional and District Council environmental initiatives including participation in the Ōhiwa Harbour Implementation Forum and the Ōhiwa Harbour Strategy Co-ordination Group; and

(e) undertaking regular site visits including checking on waste management issues and interference with wāhi tapu, as well as activities in relation to stranded whales.

[531] Any order must closely reflect the wording in the decision and also have regard to the restrictions relating to seaweed, aquatic life, and wildlife discussed above.

K – "Rāhui and customary recovery processes for reburying koiwi"

[532] The right to impose a rāhui is an incident of CMT not PCR. The PCR recognised does not refer to customary recovery processes for reburying koiwi.

L – "Harvest of red ochre at Te Oneone"

[533] No right to harvest red ochre was granted.

N – "Culling of black backed gull"

[534] Finally, Te Ūpokorehe have listed the culling of the black backed gull as a kaitiaki activity to be recognised as a PCR within its draft recognition order. No order for PCR in relation to culling of black backed gull was made. In any event, this is an activity that appears to relate to wildlife within the terms of s 51(2). In the terms of the Wildlife Act 1953, wildlife means:

> any animal that is living in a wild state; and includes any such animal or egg or offspring of any such animal held or hatched or born in captivity, whether pursuant to an authority granted under this Act or otherwise.

[535] The black backed gull (larus dominicanus) would appear to meet this definition, and its culling, would therefore be an activity that relates to wildlife. That the black backed gull is "wildlife" is supported by s 7 of the Wildlife Act, and also Sch 5. The fact that it is not protected by the Wildlife Act does not mean that it can

be included within a PCR activity when the Wildlife Act clearly includes it within the definition of wildlife.

O – "Customary harvest and use of natural and physical resources where they grow or are found within the PCR area"

[536] This part of the draft order refers to the list of plants discussed above. As already mentioned, this right needs to be qualified by the wording actually used in the grant of PCR set out at [669(e)(iii)] which was:

> Gathering flora and fauna that is not otherwise excluded from being the subject of an order for PCR within their claimed area.

P – "Customary harvest of the following resources from within application area …"

[537] At [642] of the Stage One decision said:

> …Ūpokorehe are entitled to a PCR for the collection of shells, mud, wood on the foreshore, and stones within the application area.

[538] There was no mention of "sulphur and other non-Crown owned minerals", nor seaweed. Seaweed, as discussed above, cannot be the subject of a PCR order. The draft needs to be amended to reflect this.

[539] The various information requirements set out in s 109 have been met apart from the requirement to file a diagram or map that is sufficient to identify the relevant area. This needs to be done.

Ngāti Ruatakenga

[540] At Stage One, Ngāti Ruatakenga established that they had met the tests for PCR orders in respect of:

(a) collection of rongoā materials within the claimed area;

(b) performing baptisms within the claimed area;

(c) conservation activities in the area around the Ōmaramutu Marae Papakainga and Waiaua estuary;

(d) kaitiaki activities such as the creation of maps for sites in the takutai moana using customary methods; and

(e) customary rituals, as well as tangihanga, within the claimed area.

[541] A PCR can only authorise activities which are "exercised in a particular part of the common marine and coastal area."[210] Some of the activities set out in [9.3] and [9.4] of the draft order relate to activities that clearly take place somewhere other than the takutai moana such as planting native plants and pest control in [9.3] and setting stoat traps in [9.4]. These two paragraphs need to be rewritten so as to conform to the order actually granted and to delete reference to activities which do not take place in the CMCA.

[542] The draft order contains the necessary information required by s 109 other than the necessary diagram or map. Neither of the two maps referred to in the draft order were filed with the draft order. This needs to be attended to.

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[210] Section 51(1)(b).

PART IV

CONCLUSION AND SUMMARY

[543] On the basis of the information presented at the Stage Two hearing, the Court is not presently able to finalise any of the recognition orders. The findings and observations set out in this decision are intended to address the various issues relating to the content of the recognition orders where there has been uncertainty. It will hopefully allow accurate survey plans and maps of the type required by the Act to be prepared and submitted.

[544] In some instances, the Court has indicated that if further evidence is submitted on a particular topic that may permit the recognition on a CMT of a wāhi tapu or wāhi tapu conditions. Any further evidence must be limited to filling the gaps identified by the Court, and must be explicit in doing so.

[545] In other instances, the Court has explained why either wāhi tapu status or wāhi tapu conditions are not available. The fact that parties have been invited in some instances to file further evidence on a particular point should not be taken as an invitation to all parties to challenge any findings of the Court that they disagree with. Those sorts of challenges are matters for an appeal.

[546] I adjourn this matter to a case management conference on a date to be allocated by the Registrar in approximately six months' time. The Registrar will advise whether that CMC is to be held in Rotorua, by VMR, or by a combination of those means.

[547] I expect all successful applicants to have filed and served the required additional information identified in this decision no later than one week prior to the date to be notified for the CMC. Any interlocutory applications in relation to matters arising out of this decision must also be filed and served within the same timeframe.

[548] I anticipate that, following the CMC, the recognition orders can be made on the papers on the basis of the further information supplied.

[549] The joint memorandum of counsel dated 21 January 2022 filed with the proposed draft CMT orders, indicated that there were ongoing discussions in relation to matters such as the key principles that would guide the CMT holders in making decisions. The memorandum also indicated that it was intended that the CMT orders be recorded in te reo Māori first with an English translation accompanying them. If that is still the parties' intention, they will need to file draft orders reflecting that.

[550] If the parties continue to be unable to reach agreement, in order to finalise the CMT, the Court will have to make a decision as to who the nominated holders of CMT 1 and CMT 2 will be. It is likely that this will be six named individuals, each of the individuals representing one of the successful applicant groups, in respect of CMT 1 and, in respect of CMT 2, seven named individuals, each individual representing one of the successful applicants.

[551] It is not for the Court to impose a structure on the applicant groups as to an incorporated or other entity that might hold the CMT. However, if the parties, in accordance with tikanga, agree upon an appropriate entity, the Court is able to consider that and, if satisfied that it meets the requirements of the Act, approve it.

Churchman J

Solicitors:
Legal Hub Lawyers, Auckland for CIV-2011-485-817, CIV-2017-485-375, CIV-2017-485-264, and CIV-2017-485-278
Wackrow Williams & Davies Ltd, Auckland for CIV-2017-485-262 and CIV-2017-485-377
Kāhui Legal, Wellington for CIV-2017-485-318
Oranganui Legal, Paraparaumu for CIV-2017-485-270 and CIV-2017-485-272
Te Mata Law Ltd for CIV-2017-485-238
Lyall & Thornton, Auckland for CIV-2017-485-201
Te Haa Legal, Otaki for CIV-2017-485-269
McCaw Lewis, Hamilton for CIV-2017-485-355
Whāia Legal, Wellington for CIV-2017-485-196
Annette Sykes & Co, Rotorua for CIV-2017-485-299
Bennion Law, Wellington for CIV2017-485-253
Tu Pono Legal Limited, Rotorua for CIV-2017-485-292
Ranfurly Chambers Ltd, Auckland for CIV-2017-404-482
Greig Gallagher & Co, Wellington for CIV-2017-485-185
Franks Ogilvie, Wellington for Landowners Coalition Incorporated
Cooney Lees Morgan, Tauranga for Bay of Plenty Regional Council and Ōpōtiki District Council
Chapman Tripp, Wellington for Seafood Industry Representatives
Crown Law, Wellington for Attorney-General

Counsel:
K Feint KC
R Roff
M Sharp
B Tupara

APPENDIX A

[1] The wāhi tapu claims made by Te Upokorehe within the Ōhiwa Harbour CMT, that have not been addressed, and in respect of which further information and accurate maps, are required, are:

(a) Waikaria;

(b) Wairapuhia;

(c) Tunanui;

(d) Kawakawa Pā;

(e) Panekaha Pā;

(f) Te Unga Waka;

(g) Hauauru Pā;

(h) Wainui Marae;

(i) Te Poka;

(j) Te Hauhau Pā;

(k) Whitiwhiti;

(l) Paparoa;

(m) Ohakana;

(n) Taupari;

(o) Nga Kanohi o Makuiri;

(p) Awaroa;

(q) Paparoa Pā;

(r) Te Kauri Point;

(s) Waikirikri Pā;

(t) Motuorei Point;

(u) Nga Kuri a Taiwhakea;

(v) Toritori Point;

(w) Whakarae Pā;

(x) Te Araioio o Panekaha;

(y) Te Karamea Pā;

(z) Paripari Pā;

(aa) Te Tahora Reserve;

(bb) Motuotu;

(cc) Te Peke;

(dd) Otane te ihi;

(ee) Te Motu;

(ff) Rae Toka;

(gg) Te Ru (Nukuhou River);

(hh) Tarua;

(ii) Pa o Karatehe;

(jj) Turangapikoi;

(kk) Te Waingangara Stream;

(ll) Matekerepu;

(mm) Kererutahi;

(nn) Te Hou;

(oo) Oparaoa;

(pp) Onerau;

(qq) Te Karaka;

(rr) Roimata Pā;

(ss) Piniko;

(tt) Awa Awaroa;

(uu) Hiwaru;

(vv) Te Tawai;

(ww) Taumata Hinaki;

(xx) Poukoro Tu;

(yy) Parahamuti;

(zz) Patua Island;

(aaa) Kutarere Marae;

(bbb) Te Kakaho;

(ccc) Wairua iti;

(ddd) Te Rere Koau;

(eee) Te Wehi;

(fff) Oheu Pa;

(ggg) Te Mauku Pā;

(hhh) Te Kaokaoroa o Pahora;

(iii) Te Ruatuna;

(jjj) Maunga Karetu;

(kkk) Paewiwi;

(lll) Kopua o Te Pu;

(mmm) Hokianga;

(nnn) Pukerotu;

(ooo) Taheke;

(ppp) Mairerangi;

(qqq) Pukeruru Point;

(rrr) Te Ana o Rutaia;

(sss) Papawhariki;

(ttt) Aaroa;

(uuu) Opari;

(vvv) Te Herenga Waka o te Ao Kohatu;

(www) Toki toki;

(xxx) Te Mika;

(yyy) Tipare Kotuku;

(zzz) Whangakopikopiko;

(aaaa) Ua Whaipata;

(bbbb) Tahurarua;

(cccc) Te Ana Pokia;

(dddd) Te Hurike;

(eeee) Otakanui;

(ffff) Pae Manuka;

(gggg) Te Wharau;

(hhhh) Te Ana o Muru-te-kaka;

(iiii) Wharekura Pā;

(jjjj) Te Korokoro;

(kkkk) Te Kai Ara Ara;

(llll) Te Ipu o Te Mauri; and

(mmmm) Paerata Pā.[211]

[211] Paerata Pā was numbered as site 102 in Maude Edward and Wallace Aramoana's list of wāhi tapu sites, but was not marked on any of the maps submitted by Te Ūpokorehe.