**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

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

**CIV-2011-485-821**
**[2023] NZHC 15**

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|---|---|
| UNDER | the Marine and Coastal Area (Takutai Moana) Act 2011 |
| IN THE MATTER OF | an application for an order recognising Customary Marine Title and Protected Customary Rights |
| BY | Ngāti Pāhauwera (CIV-2011-485-821)<br>Ngāti Pārau (CIV-2017-485-246)<br>Ngāi Tahu ō Mōhaka Waikare (CIV-2017-485-235)<br>Maungaharuru-Tangitū Trust (MTT) (CIV-2017-485-241) |

Hearing: 23-26 May 2022
(last submissions received 25 November 2022)

Counsel:
R N Smail and E A James for Ngāti Pāhauwera Development Trust (CIV-2011-485-821)
M K Mahuika, L A V Underhill-Sem and T W Afoa for Ngāti Pārau (CIV-2017-485-246)
D C F Naden, S M Yogakumar and L K Millington for Ngāi Tahu ō Mōhaka Waikare (CIV-2017-485-235)
K M Anderson and M J Dicken for Maungaharuru-Tangitū Trust (MTT) (CIV-2017-485-241)
B Lyall for Mana Ahuriri Trust
R Roff and S Gwynn for Attorney-General
H P Harwood for Hawke's Bay Regional Council
M Williams for Pan Pac Forest Products Limited
A Williams for Seafood Industry Representatives

Judgment: 19 January 2023

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**JUDGMENT OF CHURCHMAN J**
**[Ngāti Pāhauwera Stage 2]**

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## PART I

### Introduction

[1] In a judgment dated 22 December 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] The focus of the Court at Stage Two is on s 109 of the Act.[2] 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] Draft orders have been filed by the parties, as well as agreements between them as to the operation of recognition orders which were found to be jointly held. This degree of cooperation and organisation between the parties and their counsel is to be commended.

[4] However, there remains some dispute between the parties as to how the recognition orders are to be apportioned between them, and the findings of the Stage One judgment. Aspects of the draft orders filed by the parties, and also their submissions at the Stage Two hearing, were contrary to the findings of the Stage One judgment. Further, the maps prepared by Spencer Holmes, produced in the evidence of Mr de Leijer, were indicative only.

[5] Accordingly, like the Whakatōhea Stage Two decision, this judgment unfortunately has to be an interim one, with the draft orders and mapping to be completed and/or amended on the basis of the findings and directions below.[3]

[6] I note at the outset that the Surveyor-General, Mr Haanen, who gave evidence for the Attorney-General, indicated at the Stage Two hearing that he intended to prepare, distribute, and file with the Court a more robust set of guidelines for the

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1 *Re Ngāti Pāhauwera* [2021] NHZC 3599.
2 *Re Edwards (No. 7)* [2022] NZHC 2644 at [2].
3 Above n 2, at [6]–[8].

surveying of areas to be subject to recognition orders. To my knowledge he has not done so in the intervening period. As such, the findings of this judgment have to be based on the materials that were before the Court at the Stage Two hearing, and any further materials that have since been filed.

[7] This judgment has four parts. These are:

(a) **Part I:** Introduction;

(b) **Part II:** Legal issues and preliminary issues;

(c) **Part III:** Analysis of the draft orders filed by the parties; and

(d) **Part IV:** Conclusion

**The parties**

[8] There were five different geographic areas where specified applicants met the tests set out in s 58 of the Act for CMT:[4]

(a) **CMT 1 –** Ngāti Pāhauwera – between Poututu Stream and Pōnui Stream, from mean high-water springs (MHWS) to a line running parallel to MHWS five kilometres out to sea;

(b) **CMT 2 –** Ngāi Tahu ō Mōhaka Waikare (Ngāi Tahu) and Ngāti Pāhauwera jointly – between the Pōnui Stream and the Waikari River from MHWS to a line running parallel to MHWS five kilometres out to sea;

(c) **CMT 3 –** Maungaharuru-Tangitū Trust (MTT) – between Arapaoanui and Te Uku from MHWS to 12 nautical miles out to sea;

(d) **CMT 4 –** Ngāti Pārau and MTT jointly – over Pania Reef, with Ngāti Pārau having primacy of interests over this area; and

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4 Above n 1, at [598].

(e) **CMT 5 –** Ngāti Pārau – over Hardinge Reef, in the Marine Parade coastal area around the southern boundary, from MHWS to 1.5 kilometres out to sea; and over Parcel 9 in the Ahuriri Estuary.

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

(a) Ngāti Pāhauwera;

(b) MTT; and

(c) Ngāti Pārau.

[10] The interested parties who appeared at both the Stage One and Stage Two hearings were the Attorney-General, the Hawke's Bay Regional Council, Pan Pac Forest Products Ltd, and Mana Ahuriri Trust. The Seafood Industry Representatives participated in the Stage One hearing, but sought to be excused from appearing at the Stage Two hearing, by way of a memorandum dated 19 May 2022. That request was granted.

## PART II

## The law

[11] Prior to addressing some preliminary issues and the specific applications, I will summarise the law that applies when the Court is determining Stage Two proceedings. As in previous judgements, I note that throughout this judgment I use the terms "common marine and coastal area" (CMCA), and "takutai moana" interchangeably.

*Draft orders – requirements*

[12] Successful applicants for either CMT or PCR must submit a draft order for approval by the Registrar or the Court.[5] 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.

[13] 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.

[14] 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
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> (c) any prohibition or restriction that is to apply to a wāhi tapu area within the customary marine title area.

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5 Marine and Coastal Area (Takutai Moana) Act 2011, s 109(1).

[15] Certainty is required in respect of the boundaries of CMT orders, and wāhi tapu areas. For CMT orders, a survey plan is required, which clearly identifies the boundaries of the takutai moana. In respect of wāhi tapu, the ability to enforce wāhi tapu protections depends on the Court having certainty as to the location of the boundaries of a wāhi tapu.

[16] In respect of both CMT and PCR orders, draft orders filed for a Stage Two hearing must be consistent with the findings of the Court at Stage One. The proper forum for challenging the Court's findings is on appeal. Applicant groups whose draft orders are inconsistent with the Court's findings have been required to resubmit their draft orders.

*Boundaries of the takutai moana*

[17] Identifying the boundaries of the takutai moana depends on an analysis of the Act and its relationship with various other legislation, including the Resource Management Act 1991 (RMA). The Court must have regard to the effect that certain types of land have on the boundaries of the takutai moana, and consequently the boundaries of CMT or PCR areas, as the Court's jurisdiction to grant such orders is only in respect of the takutai moana.

[18] 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:

> (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.

[19] 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.

[20] Therefore, such land or portions of such land, even where they are present below the line of MHWS, do not form a part of the takutai moana.

[21] However, as I have noted recently, the effect of s 13(2) of the Act is that:[6]

> …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.
>
> 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.

[22] A conclusion that such erosion of any land has occurred after the commencement of the Act, and that therefore that land is available for inclusion in a CMT order, logically depends on evidence establishing that is the case. Because no evidence was presented in this proceeding establishing that there was land which had been eroded following the Act's commencement, areas of land that "have been affected by erosion and which are now wholly or partly in the coastal marine area are excluded from inclusion in [the] CMT [orders]".[7] If such erosion occurs in the future, the boundaries may have to be withdrawn. As will be seen below, through Mr Haanen's

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6 Above n 2, at [61]–[62].
7 At [63].

evidence, the possibility of needing to redraw boundary lines is a factor incorporated into the methodology used for the survey mapping of recognition orders.

[23] No evidence was put before the Court showing that, since the passing of the Act any land had been reclaimed or that the status of formed roads or unformed roads located in or encroaching into the takutai moana had changed.

[24] To assist in identifying the boundaries of the takutai moana, the Attorney-General filed evidence from Mr Brendan Mulholland and Mr Richard Jennings. Both Mr Mulholland and Mr Jennings provided similar evidence for the *Re Edwards* Stage Two hearing. Mr Mulholland's evidence presented data relating to "land parcels with tidal boundaries within the marine and coastal area across the areas that could be subject to wāhi tapu protection rights as outlined in *Re Ngāti Pāhauwera* [Stage One]".[8] He identified a number of land parcels in the areas Ngāti Pāhauwera sought to have wāhi tapu protections over, that were conservation land, privately-owned freehold land, and Māori-owned freehold land. These areas do not form part of the takutai moana, and the final CMT maps will need to be drafted in accordance with Mr Mulholland's evidence.[9]

[25] Mr Jennings presented three sets of maps. These were:

(a) maps showing an indicative view of the CMT areas granted by the Court through the Stage One judgment;

(b) maps illustrating land parcels that appear to encroach on the potential wāhi tapu areas sought by Ngāti Pāhauwera, as described in Mr Mulholland's evidence; and

(c) maps displaying what the Attorney-General considers to be Ngāti Pārau's exclusive CMT area, and areas where Ngāti Pārau's PCRs have been recognised by the Court.

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8 Affidavit of Brendan Mulholland, 16 May 2022 at [14].

9 Ngāti Pāhauwera's wāhi tapu claims are discussed below at [79]–[92].

[26] These maps were of assistance to the Court in that they presented a different view as to the CMT areas awarded at Stage One than what was offered by the applicants through Mr de Leijer. However, substantively they did not provide evidence of additional parcels of land to be excluded from the takutai moana as compared to Mr Mulholland's evidence.

*Substantial interruption*

[27] As the Court has previously stated, the presence of some structures or activities can amount to substantial interruption on account of their interference with an applicant group's ability to undertake customary activities in the takutai moana where the structure is or the activity occurs, or in their immediate surrounds.[10] Whether there has been a substantial interruption is a question of fact, depending on the nature, scale and intensity of the structure or activity, and its impact on the ability of an applicant to meet the tests in ss 51 or 58.[11] There is no presumption that third party structures or activities substantially interrupt customary rights.[12]

[28] The existence of resource consents issued prior to the Act's commencement authorising physical activities in, or the occupation of the takutai moana, do not automatically have the effect of substantially interrupting the existence and exercise of customary rights. What is required is that the physical activities authorised by resource consents practically disrupt the occupation of an area and the exercise of customary rights.[13]

[29] For example, in the recent *Re Edwards* Stage Two judgment, the Court considered that the parts of the Ōpōtiki Harbour Development Project that were not reclaimed land had substantially interrupted the applicants' holding of the relevant area in accordance with tikanga.[14] The evidence illustrated that the physical activities authorised by the relevant resource consents had the practical effect of "fundamentally changing the landscape and use of [that] part of the takutai moana on a substantial

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10 *Re Edwards (No. 2)* [2021] NZHC 1025 at [252]; and above n 1, at [235].
11 Above n 1, at [232]; and *Re Edwards (No. 2)*, above n 10, at [230].
12 Above n 1, at [235].
13 *Re Edwards (No. 2)*, above n 10, at [286]–[300].
14 Above n 2, at [23].

scale, and [had] a major impact on the use an occupation of [that] area".[15] A project of that scale required regular exclusion of the general public from the area and active management involving heavy machinery for the duration of the Harbour's existence.[16] Health and Safety at Work Act 2015 obligations in relation to the project were also large enough to disrupt the exercise of customary interests.

[30] In the Stage One judgment in these proceedings, the Court held that:

(a) while the current consent for the Pan Pac outfall pipeline was granted after the commencement of the Act, the pipeline had consent to discharge effluent from its original outfall well before the Act commenced, meaning that the key issue was a factual one – whether the outfall had the effect of substantially interrupting the exclusive use and occupation of the applicants;[17]

(b) the evidence indicated that from the 1970s and 1980s, MTT hapū members significantly lessened or ceased entirely the gathering of kaimoana in the area around the pipeline, as a result of the pollution from the outfall, and that this amounted to substantial interruption;[18]

(c) the exact boundaries of the area of substantial interruption around the outfall would be determined at the Stage Two hearing;

(d) from the remaining parcels of land in the CMCA around the Napier Port, Marine Parade, and Te Whanganui-ā-Ōrotu, which had their customary rights revived, the only parcel of land in respect of which Ngāti Pārau's customary interests had not been substantially interrupted was parcel 9;[19]

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15 At [28].
16 At [27].
17 Above n 1, at [226]–[227].
18 Above n 1, at [230].
19 At [272].

(e) the parties were to provide supplementary evidence at Stage Two to enable the Court to determine whether the Waipātiki Marine Farm constitutes a substantial interruption;[20] and

(f) the shipping lanes at Napier Harbour were not to be included in Ngāti Pārau's exclusive CMT area, as a result of substantial interruption.[21]

[31] The Pan Pac outfall pipeline is discussed below at [40]. The Waipātiki Marine Farm is discussed below at [117]. The shipping lanes are discussed below at [66].

*Wāhi tapu*

[32] In assessing wāhi tapu claims under the Act, the following framework applies:[22]

(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?

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

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20 At [284].
21 At [511].
22 Above n 2, at [156].

(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?

**[33]** The only applicant currently seeking wāhi tapu protections is Ngāti Pāhauwera. Their four wāhi tapu claims are discussed in detail below [79]–[92].

## Preliminary issues

*Status of Ngāti Matepū*

[34] In the Stage One judgment, I discussed the issues that arise when the Court is considering a claim under the Act in an area where there are overlapping or competing claims being advanced solely by direct engagement.[23] The issue in these proceedings is that the Crown-engagement application of the Mana Ahuriri Trust (of which Ngāti Matepū is a part) significantly overlaps with the applications of MTT and Ngāti Pārau.

[35] At the Stage One hearing, the Mana Ahuriri Trust indicated to the Court that it did not consent to an acknowledgment by MTT and Ngāti Matepū of their shared interests in the area between Te Uku and Keteketerau. The Court stated:[24]

> Notwithstanding MTT's acknowledgement of shared interests with Ngāti Matepū, the Court clearly cannot bind the Mana Ahuriri Trust to a shared CMT agreement that they have not sought themselves. If the Court makes a finding of CMT which excludes the Mana Ahuriri Trust knowing that MTT acknowledge at least some element of shared exclusivity, this is likely to result in the Trust being unable to be awarded CMT when they do enter into direct engagement with the Crown, given the Crown's view that multiple CMTs are not available under the Act.
>
> …
>
> In respect of the area of overlap acknowledged by MTT with Ngāti Matepū, I cannot make a joint award of CMT as Ngāti Matepū are not an applicant in these proceedings and do not have an application of their own (as opposed to being part of the Mana Ahuriri Trust application) for direct engagement.
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> (Footnotes omitted).

[36] On 3 May 2022, prior to the Stage Two hearing, counsel for the Mana Ahuriri Trust filed a memorandum stating that the Trust had revisited their objection to the

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23 Above n 1, at [285]–[304]; see also *Re Edwards (No 2),* above n 10, at [403]–[406].
24 Above n 1, at [297] and [302].

agreement between MTT and Ngāti Matepū, and that the Trustees had unanimously withdrawn their objection. Then, in their submissions for the Stage Two hearing, MTT submitted that the withdrawal of the Trustees' objection meant that the Court could now award a joint CMT in the area between Te Uku and Keteketerau to MTT and Ngāti Matepū.

[37] The reasons for this given by counsel were the following:

> 44.1 The MTT application that was amended with the leave of the Court specifically seeks this shared CMT area.
>
> 44.2 The shared area is supported and agreed to by Ngāti Matepū (the joint affidavit agreement filed [reflects] this). Accordingly, the Court has evidence before it that shows the section 58 tests can be met by these two groups.
>
> 44.3 Mana Ahuriri Trust is a party to these proceedings and does have a direct engagement application in relation to this area (and Ngāti Matepū is one of the hapū it represents). That entity has been present throughout these proceedings and it now does not oppose this shared area proposal.
>
> 44.4 No other parties were found to have rights in this area by the Court.
>
> 44.5 It would be extremely prejudicial to Ngāti Matepū and MTT to miss out on an opportunity for a joint CMT award through the Court process, after the time and expense incurred by both parties in these proceedings. If the Court is satisfied the tests for CMT are met, it is submitted that the most fair and equitable approach is for that award to be allowed to proceed. This would actively protect both parties' interests and avoid the time and cost involved in direct engagement with the Crown.
>
> 44.6 This proposal is effectively the same arrangement as the shared CMT between Ngāti Pārau and MTT, which the Court has accepted.

[38] These submissions were opposed by Pan Pac and the Attorney-General. Ms Roff, counsel for the Attorney-General, stated:

> The Court does not have jurisdiction to make a recognition order for CMT or shared CMT in relation to a group that has not made an application under s 100 of the Act within the statutory timeframe. Ngāti Matepū, has not made an application under s 100 (unlike Ngāti Awa in *Re Edwards*, for example). Nor has Mana Ahuriri Trust. Therefore there is no jurisdiction for the Court to make a recognition order for shared CMT between MTT and Ngāti Matepū in

> relation to the area from Te Uku to Keteketerau, notwithstanding that Mana Ahuriri Trust now consent.
>
> The Attorney-General recognises that there is no provision in the Act to allow a Crown-engagement application to be treated as an application for a recognition order from the Court….The Crown recognises that this could lead to an injustice in certain cases.
>
> In recognition that this issue may have serious consequences for applicants who have an application in one pathway only, the Minister for Treaty of Waitangi Negotiations, as responsible Minister under the Act, has advised Cabinet that Te Arawhiti officials will undertake policy work on this issue. Officials will consider options to remedy the disconnect currently within the Act, including the possibility of a legislative amendment.

[39] I accept Ms Roff's submissions. The Court does not have the jurisdiction to award CMT jointly to MTT and Ngāti Matepū, in circumstances in which neither the Mana Ahuriri Trust nor Ngāti Matepū have applications before the Court. I accept the view of the parties that this in some circumstances can lead to an injustice, and the Waitangi Tribunal's view that the Act engages the Te Tiriti o Waitangi principle of active protection.[25] It is a positive development that the Crown is investigating the possibility of legislative amendment. However, at this stage, as Ngāti Matepū do not have an application before the Court, I am unable to make an award of CMT jointly to MTT and Ngāti Matepū in the area between Te Uku and Keteketerau. As Ms Roff correctly submitted, the situation is not the same as that of Ngāti Awa in the *Re Edwards* proceedings, as they also had an application before the Court. Nor is it the same as in respect of the joint award to MTT and Ngāti Pārau, who both have applications before the Court.

*Pan Pac outfall pipeline*

[40] The pipeline is located in the area between Te Uku and Keteketerau. As noted above, there has been no award of CMT in that area. Accordingly, the Court is not required to enter into the analysis proposed in the Stage One judgment, as to how large an area should be 'carved-out' as a substantial interruption. I accept the Attorney-General and Pan Pac's submissions on this point. Nevertheless, I will briefly comment on some of the arguments made by the applicants.

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[25] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at 3.3.

[41] As noted above at [30(a)], the Court held in the Stage One judgment that the fact that the current resource consent for the outfall pipeline was granted after the commencement of the Act, was not a factor that prohibited the Court from inquiring into whether substantial interruption had occurred. Whether there has been substantial interruption of the occupation and exercise of customary rights in accordance with tikanga is a question of fact. Somewhat surprisingly, counsel for MTT submitted:

> …the factual assessment of whether there has been substantial interruption under s 58(1)(b) of the MACA Act does not arise, where the activity concerned is carried out pursuant to a consent granted **after** the commencement of the MACA Act.
>
> …
>
> …the Pan Pac outfall is operating under a resource consent granted post the commencement of the MACA and therefore, under s 58(2) there is no substantial interruption to the exclusive use and occupation of MTT in the area off Whirinaki. There cannot be as a matter of law.

[42] As submitted by counsel for Pan Pac, MTT's submissions in this regard seek to relitigate the Stage One judgment, and are matters that are more appropriately raised on appeal. They are not submissions that are appropriate in a Stage Two hearing.

[43] Finally, the Mana Ahuriri Trust indicated that as the pipeline is within the boundaries of their Crown-engagement application area, their negotiations with the Crown would benefit from guidance on how large the area of substantial interruption is.

[44] The Attorney-General submits that this is a matter to be negotiated and determined by the Minister in the Crown-engagement process. I agree this is an issue that does not need to be addressed – and should be left to be negotiated through the Crown-engagement process.

*River mouths*

[45] Pursuant to the Act, the location and boundaries of coastal river mouths need to be accurately recorded so as to clearly identify the boundaries of the takutai moana. Section 9 of the Act provides that the marine and coastal area includes the beds of rivers that are part of the coastal marine area within the meaning of the RMA. The

RMA provides that the landward boundary of the coastal marine area is MWHS, except where MHWS crosses a river mouth. In that situation, the landward boundary of the coastal marine area is the lesser of:

(a) one kilometre upstream from the mouth of the river; or

(b) the point upstream that is calculated by multiplying the width of the river mouth by five.

[46] Whether the bed of a river is a part of the CMCA also depends on whether the river itself is 'navigable or non-navigable' in the terms of *Paki v Attorney-General*.[26]

[47] However, some river mouths in the CMT areas awarded at Stage One have not yet been defined through the mechanisms set out in the RMA's definition of "mouth". For example, this is the case in respect of the Moeangiangi River, as well as Waitaha Stream, Poututu Stream, Te Awaawa Stream and Pōnui Stream. The parties need clarification as to what process should be used to define river mouths, so that the landward boundary of the CMT areas can be accurately surveyed.

[48] Section 2 of the RMA provides:

> **mouth**, for the purpose of defining the landward boundary of the coastal marine area, means the mouth of the river either—
>
> (a) as agreed and set between the Minister of Conservation, the regional council, and the appropriate territorial authority in the period between consultation on, and notification of, the proposed regional coastal plan; or
>
> (b) as declared by the Environment Court under section 310 upon application made by the Minister of Conservation, the regional council, or the territorial authority prior to the plan becoming operative,—
>
> and once so agreed and set or declared shall not be changed in accordance with Schedule 1 or otherwise varied, altered, questioned, or reviewed in any way until the next review of the regional coastal plan, unless the Minister of Conservation, the regional council, and the appropriate territorial authority agree.

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[26] *Paki v Attorney-General* [2012] NZSC 50; and *Paki v Attorney-General (No 2)* [2014] NZSC 118.

[49] These requirements were the subject of submissions and evidence at the Stage Two hearing. MTT submitted that the Hawkes Bay Regional Council would have to provide assistance in determining the location and boundaries of river mouths. The Hawkes Bay Regional Council suggested that any adjustments to the CMCA for the mouths of rivers could only be undertaken through the next review of the Council's Regional Coastal Environment Plan.

[50] Ngāti Pāhauwera and MTT suggested that Mr de Leijer be provided with further time to ascertain the average width of the mouth of the relevant waterways, and thereby the CMCA boundary, and then file updated maps with the Court, to be the basis for declarations made by the Court.

[51] In response, the Attorney-General submits that the landward boundary of a river that does not have a defined river mouth is simply MHWS, on the basis that the bed of the river is not part of the coastal marine area, and therefore that the definition of the landward boundary for the marine and coastal area applies. Ms Roff submitted:

> A river mouth can only be defined by the Minister of Conservation, the relevant regional council and the [territorial] authority by agreement, or in the absence of the agreement, the Environment Court. If a river does not have an agreed or declared river mouth, it would have to go through the statutory process as set out in the RMA to determine the location of the mouth. The jurisdiction to make a declaration as to the legal definition of any river mouth lies with the Environment Court, not the High Court

[52] I accept Ms Roff's submissions. The RMA is clear in its identification of the processes by which the location and boundary of a river mouth is determined, "for the purpose of defining the landward boundary of the coastal marine area". There are two mechanisms, either:

(a) it is agreed and set between the Minister of Conservation, the regional council, and the appropriate territorial authority in the development of a proposed regional coastal plan; or

(b) it is declared by the Environment Court upon an application made by the Minister of Conservation, the regional council, or the appropriate

territorial authority prior to a proposed regional coastal plan becoming operative.

[53] It is also clear from the RMA that the location and boundaries of a river mouth, once set in accordance with one of those two mechanisms:

> shall not be changed…or otherwise varied, altered, questioned, or reviewed in any way until the next review of the regional coastal plan, unless the Minister of Conservation, the regional council, and the appropriate territorial authority agree.

[54] It was accepted that the coastal waterways noted above have not had their mouths' locations and/or boundaries determined by either mechanism in the RMA and are not included in the regional coastal plan. In other words, those waterways, and their mouths, have not been legally defined. The definition of 'coastal marine area' as set out in the RMA therefore provides that the landward boundary of the takutai moana is the line of MHWS, until such time that the relevant waterways have their mouths legally defined.

[55] Therefore, the landward boundary of a CMT order which includes a river mouth that has not yet been defined in accordance with the RMA, is MHWS.

*Moveable boundaries*

[56] Counsel for MTT identified a further issue in respect of how river mouths and other moveable boundaries are to be identified on surveyed CMT orders. They stated:

> How do the PCR and CMT orders reflect that these are 'moveable' boundaries? That is, while the mapping provided to the Court takes into account the current location of the rivers and the mouths of those rivers, how is it made clear that these will move over time when those maps are referenced in the orders? This may be something the Crown can assist with, with input from the Surveyor-General. However, MTT has attempted to make this clear by noting in the draft orders filed on behalf of MTT, where the boundaries referred to are moveable.

[57] In response, the Attorney-General submitted in closing that:

> It is not necessary to note on the draft orders where boundaries are movable, as it is inherent in the legal description of the boundaries, for example, "line of MHWS" will denote that the boundary is movable.

> Under s 109(4)(a) of the Act, every CMT order must include a survey plan that sets out the extent of the CMT area, to a standard of survey determined for the purpose by the Surveyor-General. It is expected that the survey plans prepared will reflect the Court's findings [and] be accurate and unambiguous.

[58] The Surveyor-General, Mr Haanen, addressed this issue in his evidence for the Attorney General. Mr Haanen has issued interim guidance to assist the mapping of recognition orders as required by the Act. This interim guidance was issued on 14 April 2022, and is intended to complement the High Court Practice Note "Mapping guidelines for applications to the High Court under the Marine and Coastal Area (Takutai Moana) Act 2011". Mr Haanen has also:

(a) determined that survey plans must be prepared in accordance with the Cadastral Survey Rules 2021, which includes provisions specifically designed to enable surveys in the marine and coastal area;[27]

(b) assessed that in most instances, it should not be necessary for a surveyor to conduct a field survey for the purpose of defining the boundaries of the CMCA;[28] and

(c) indicated that where a CMT area is bounded by the landward boundary of the CMCA, surveys are expected to establish the relationship between the CMT area and the abutting land.[29]

[59] As the Surveyor-General, Mr Haanen has the responsibility of determining a standard to which survey maps accompanying CMT orders must comply, in order to be deposited and confirmed. In his affidavit, Mr Haanen stated:[30]

> While the interim guidance is for the purposes set above and is intended to support claims for CMT, it could also be followed when mapping protected customary rights areas to assist applicants and interested parties (e.g. local government) understand the boundaries of protected customary rights areas with sufficient accuracy and unambiguity.
>
> …

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27 Affidavit of Anselm Haanen, 16 May 2022 at [26].
28 At [32].
29 At [34].
30 At [15]–[21].

> As the interim guidance is newly developed and is still under review, I expect further detail and guidance to be added in response to issues that arise with its application in this proceeding.
>
> One such issue that has arisen since the interim guidance was issued relates to the investigation of coastal movement where the current line of MHWS differs significantly from the cadastral boundaries; for example, where the mouth of a river has moved to a new position. In such cases the investigation will need to determine whether the coastal movement has occurred due to either erosion, accretion, or avulsion, that is because, for example, if a parcel of specified freehold land abutting the CMCA has been affected by an avulsion effect, the boundaries of that land parcel became fixed as a result of the avulsion. However, [if] the parcel was affected by erosion, the boundaries would have moved with the water margin. The nature of the movement, along with the type of parcel, will help determine the location of the CMCA boundary, and ultimately, the CMT boundary.
>
> In some cases, investigation of coastal movement may not be able to provide sufficient evidence to establish whether accretion, erosion or avulsion has occurred. Each of these can result in a different determination of the boundary. I anticipate that, if this occurs, information gathered during the investigation may need to be presented to the Court for the Court to determine the boundaries of the CMCA, and ultimately the boundaries of CMT.
>
> (footnotes omitted)

[60] Essentially, Mr Haanen's evidence was that a moveable boundary (such as the line of MHWS) is illustrated on a survey plan as a 'irregular line' (or wavy line), which denotes the boundary at the time of survey, and also signifies that the boundary may potentially move upon re-survey. This can be compared to a 'right-line boundary', which is straight, and must follow the shortest distance between two boundary points.[31]

[61] An irregular line is accompanied by a description of what it represents, and when so accompanied, is able to be accepted for deposit as part of a final survey plan. The irregular line is the legal definition of the boundary line, where it is represented on the survey map as where it exists at the time of survey. However, the fact that it is an irregular line means that legal boundary is subject to change.

[62] Mr Haanen addressed this in his affidavit in the following terms:

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[31] Cadastral Survey Rules 2021, r 7.

> Generally, a boundary of a parcel defined by an irregular line is moveable (in terms of the law),[32] whereas a boundary defined by a right-line is fixed. The Rules require parcel boundaries that follow the line of MHWS (water boundaries) to be defined by irregular lines. The Rules also require boundaries in the water to be defined by right lines (straight lines between points), as these provide a higher level of accuracy than irregular lines. However, the outer limit of the territorial sea is an existing boundary that will need to be defined by an irregular line. While it is preferable for other boundaries to be defined by straight lines, exemptions can be provided. A parcel depicted as an irregular line around a reef could, for example, be represented as a series of short straight lines that [do] not deviate by more than a few metres from that depicted on the map of the CMT area.

[63] The Interim Guidance addresses this point in the following fashion:

> The line of MHWS is a 'moveable' boundary under the common law doctrine of accretion and erosion. As the line can move with time (depending on the underlying topography as well as any long-term change in sea level), its location need not be accurately determined at any given point in time. The line should be sufficiently accurate to locate it correctly in relation to the adjacent parcels.

[64] Mr Haanen also indicated that more formal guidelines will be developed and provided to the Court for inclusion in a practise note. He stated:[33]

> …and it's certainly my intention to produce a more robust set of guidelines that I would be happy to distribute more broadly. So that is certainly the intention…

[65] It therefore appears that Mr Haanen's evidence addresses the issues regarding moveable boundaries, and that preparation of survey maps in accordance with his guidelines will provide the Court with sufficient certainty. As noted above, further guidance has not yet been provided by Mr Haanen to the Court. I note that it will be important as more proceedings are determined and agreements negotiated with the Crown that clear and robust guidelines are available to applicant groups for the mapping of proposed recognition orders.

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32 Survey plans do not explicitly indicate that a water boundary is moveable, but are required to note the legal location of the boundary, e.g. 'line of MHWS'.

33 *Re Ngāti Pāhauwera* Stage Two Notes of Evidence, at 137.

*Napier Harbour shipping lanes*

[66] The Court was clear at Stage One that the shipping lanes in the Napier Harbour would not be included in the CMT areas awarded to MTT and Ngāti Pārau.[34] However, at that point, there was not enough evidence to accurately map those shipping lanes for the purpose of excluding them from a CMT order. That position remained at the Stage Two hearing.

[67] When providing evidence, Mr de Leijer indicated that he was aware of marine charts which he could use to identify the location of the shipping lanes, but that it was not his area of expertise, and any maps he produced would be unlikely to be accurate.[35] However, he did indicate that he could produce maps which represented the shipping lanes' impact on the proposed CMT areas.[36]

[68] Both MTT and Ngāti Pārau addressed the issue of the shipping lanes in their submissions. In summary, they submitted that:

(a) there was no evidence illustrating that the shipping lanes have caused a substantial interruption, simply Mr Cleaver's evidence at Stage One which provided a map of vessel movements in the area;

(b) s 27 of the Act provides for the right to enter, pass and repass through the marine and coastal area by ship, subject to any authorised restrictions and prohibitions that are imposed by law;

(c) s 59(3) provides that the use of a specified area of the common marine and coastal area for fishing or navigation does not of itself preclude the applicant group from establishing the existence of CMT;

(d) on the basis of ss 27 and 59(3), there does not need to be a 'carve-out' from the CMT order, as the Act maintains the right of passage for ships regardless of there being a CMT order in that area;

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34 See above n 1, at [508] and [511].
35 *Re Ngāti Pāhauwera* Stage Two Notes of Evidence, at 96.
36 At 96.

(e) the Maritime Transport Act 1994 and related Rules (and Regional Council Navigation Bylaws) are the appropriate mechanism to control maritime traffic and provide for specific shipping lanes; and therefore

(f) the scheme of the Act ensures that navigation is unaffected by an award of CMT and is not a matter that in and of itself would amount to substantial interruption.

[69] These submissions directly challenge the Court's findings at Stage One, and are arguments more appropriately raised on appeal.

[70] The Attorney General indicated in closing that Mr de Leijer, as the applicants' surveyor will prepare a map showing the extent of the shipping lanes based on the information currently before the Court. If that map has been prepared, it has not yet been filed with the Court.

[71] On 4 November 2022, further evidence was filed by Ngāti Pārau, addressing the location of the shipping lanes. This evidence consisted of an affidavit sworn by Michel de Vos, General Manager of Infrastructure Services at Port Napier Ltd. Attached to Mr de Vos' affidavit as Exhibit A is a map which illustrates the location of the shipping lanes in the Napier Harbour, as well as the Port Management Area, and the Pania Reef 'Significant Conservation Area'. This map may provide an appropriate basis from which to calculate the area to exclude from the CMT areas held by Ngāti Pārau and MTT, and by Ngāti Pārau exclusively.

[72] Mr de Vos states in his affidavit that:

> There are a number of routes for entry into the Port from the respective Pilot Boarding Grounds. These are well defined shipping channels and their use is dictated by the vessel type, size, weather conditions and the ship's draft. The shipping channels are charted and approved by Maritime New Zealand.
>
> The Hawke's Bay Navigation Safety Bylaw 2018 defines an area for the Napier Breakwater Harbour and Approaches on Map 1.6 of the bylaw. That is the general area where vessels have and continue to use to access the port, and where the port's shipping channels have been located.

[73] I am satisfied that there is now sufficient evidence before the Court to adequately map the location of the shipping lanes so that they may be excluded from the CMT orders. It is up to the successful applications for CMT to utilise the information now available to prepare final maps. All of the areas between the boundaries of the lines marked as shipping lanes in the exhibits to Mr de Vos' affidavit are excluded from inclusion in the CMT orders.

## PART III

[74] This part analyses the draft orders and maps filed by the parties, and the evidence tendered in respect of them. It first addresses the CMT orders, before moving on to the PCR orders.

### CMT 1 – Ngāti Pāhauwera between Poututu Stream and Pōnui Stream

*Holder of the order*

[75] The Trustees of the Ngāti Pāhauwera Development Trust have been named as the holders of Ngāti Pāhauwera's exclusive CMT order. I am satisfied that the Trustees are an appropriate group to hold the CMT order on behalf of Ngāti Pāhauwera. They are the named applicant in these proceedings, and they are required to act for the benefit of Ngāti Pāhauwera, and in accordance with tikanga. Appropriate contact details have been included in the order.

*Boundaries*

[76] Ngāti Pāhauwera submitted that the northern bank of the Poututu Stream should be the boundary of their exclusive CMT order, on the basis that the Stage One judgment did not exclude the Poututu Stream. That appears to be an appropriate outcome. No other party opposed the northern bank being the boundary. The northern bank should therefore be the boundary.

[77] Ngāti Pāhauwera considered that the midpoint of the Pōnui Stream would be the appropriate boundary there. During the course of the hearing, Ngāi Tahu advised they did not object to the midpoint being used as the boundary. The midpoint of the Pōnui Stream should therefore be the boundary.

[78] The landward boundary of the CMT order is to be the landward boundary of the CMCA, which is MHWS. The seaward boundary is a line that is five kilometres from and parallel to the landward boundary.

*Wāhi tapu*

[79] Ngāti Pāhauwera seek to have the following sites included as wāhi tapu within their exclusive CMT area between Poututu Stream and Pōnui Stream. These are:

(a) an area of the coast around Poututu;

(b) the Waihua River mouth;

(c) the Waikari River mouth; and

(d) the Te Awaawa Stream.

[80] These areas have been marked out on maps by Ngāti Pāhauwera, and identified as circles which radiate out for one kilometre from the centre line of each of the rivers where the wāhi tapu are located. Ngāti Pāhauwera submit that this approach has been chosen because:

(a) it is difficult to map with specificity the location where kōiwi washed from coastal burial or battle sites may lie, because they may move within the coastal environment;

(b) Ngāti Pāhauwera is reluctant to provide specific details as to the locations of these sites as in the past identified sites have been damaged by third parties; and

(c) the one kilometre measurement is consistent with the boundaries of the takutai moana as defined in the RMA, providing certainty for third party users of the area.

[81] The only prohibition and/or restriction Ngāti Pāhauwera seek is the ability to place rāhui when required if kōiwi are found. The nature and length of rāhui are to be in accordance with Ngāti Pāhauwera tikanga, and would be publicly advertised by them.

[82] The way in which Ngāti Pāhauwera have mapped their wāhi tapu area creates some fundamental problems. Firstly, there appears to be no evidential basis for the boundaries of the wāhi tapu areas extending to a distance of one kilometre from the relevant river mouths.

[83] Secondly, reluctance to identify the areas more specifically does not assist the Court with the requirements of the Act as to certainty. This has been previously emphasised by the Court in the Stage One judgment[37] and more recently also.[38] If the Court is unable to conclusively identify the boundaries of a wāhi tapu, then protections are unable to be included within a CMT order.

[84] Thirdly, the Court did not indicate in the Stage One decision that the areas proposed by Ngāti Pāhauwera in their draft order and maps would be awarded. It indicated that there were several "discrete locations within the Ngāti Pāhauwera CMT application area" that could be subject to wāhi tapu orders, but that they had to be specified locations.[39] For example, in respect of the area of the coast claimed at Poututu, the Court noted that:

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

[85] Further, in reliance on Mr Waaka's evidence, the Court considered that wāhi tapu conditions may be granted for Ngāti Pāhauwera at the Waihua River mouth, Waikari River mouth, and the mouth of the Te Awaawa Stream. His evidence was that

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37 Above n 1, at [131].
38 Above n 2, at [108].
39 Above n 1, at [72].

there are wāhi tapu throughout Ngāti Pāhauwera's application area, particularly because there were tūpuna buried in caves along the coast. However, the granting of wāhi tapu conditions was subject to the requirement that counsel provide "the specific location of the area of coast around those locations that is considered wāhi tapu by Ngāti Pāhauwera".[40]

[86] The areas that Ngāti Pāhauwera have identified as wāhi tapu at Poututu, the Waihua River mouth, Waikari River mouth, and the Te Awaawa Stream do not comply with the Court's directions. The maps appear not to pertain to specified areas, but rather much larger areas than what was identified by the Court at Stage One.

[87] Also relevant is the fact that little further evidence has been provided by Ngāti Pāhauwera on the specific location of wāhi tapu or wāhi tapu areas. This was commented upon by Ms Roff for the Attorney-General, who took the view that there remains uncertainty around whether the areas identified by Ngāti Pāhauwera are in fact wāhi tapu in the context of the Act.

[88] I accept the submission that while there is general evidence showing that aspects of the areas mapped by Ngāti Pāhauwera are sacred and treated as tapu, the precise location of these areas has not been provided by Ngāti Pāhauwera. Ngāti Pāhauwera's evidence at Stage Two was largely confined to addressing the issue discussed below at [94] regarding the holder of their joint CMT order with Ngāi Tahu.

[89] Mr Waaka did, however, state:[41]

> Because the four sites identified by the Court are all at river mouths and are located in the takutai moana, they are affected by the moana and other environmental forces along the coast, such as waves, wind, tides and erosion. The changeable nature of the coast means koiwi could wash or erode out of an urupa, coastal cave or battle site along the coast and be moved by the forces of the ocean to areas far from where they were originally buried. This means that the area where protection is needed from time to time through rāhui, is much broader than just a small strip along the beach.
>
> It is not possible to draw a neat line around battle sites where koiwi could be found like you might for some other sites, such as historic buildings or land based cemeteries that are marked by a fence. Not only did the battles and

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40 At [143(a)].
41 Brief of Evidence of Toro Waaka, 11 May 2022 at [34]–[39].

> burials we talked about in our evidence happen a long time ago but, as I have mentioned, those sites are subject to a lot of movement so human remains from battles or burial can move a lot.
>
> In fact, these are some of the reasons why we applied for wāhi tapu protection over the whole application area, so that we can care for the mauri of the whole area. The Trustees have struggled with the further information being sought by the Court over these four small areas, in part because we are reluctant to share too much information that might make those sites easier to find by third parties who might damage them, but ultimately we would rather have some protection than to have no protection.
>
> For the reasons I have just described we have decided to simply draw circles around the four river mouths that the Court has referred to in the Stage One judgment. We are filing maps that draw a circle reaching out 1km from the centre point of the river mouths. 1km has been selected as I understand this is the maximum distance upstream that can be included in an order. It also partly addresses the fact that the River mouths move over time. We gave evidence about this in Stage One.
>
> We do not accept that these four sites referred to by the Court are the only battle and burial sites along our coast. We gave evidence about a range of other battle and burial sites, but always being careful to not pinpoint too much as this can lead to those sites being found and damaged by others.

[90] The Act stipulates that a CMT order or agreement must set out the wāhi tapu conditions that apply.[42] These include the location of the boundaries of the wāhi tapu area that is the subject of the order.[43] The importance of certainty as to the location of boundaries derives from the fact that:[44]

> 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.[45]

[91] In my view, the manner in which Ngāti Pāhauwera have mapped their proposed wāhi tapu bears no demonstrable connection to the evidence presented in these proceedings, or tikanga. It does not comply with the Court's directions at Stage One. There further does not appear to be a clear foundation on which to separate these areas as tapu, as distinct from areas in which noa activities are regularly undertaken.

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42 Section 78(3).
43 Section 79(1).
44 Above n 2, at [108].
45 Above n 1, at [131].

Mr Waaka accepted in cross-examination that once a rāhui was lifted over the proposed areas, Ngāti Pāhauwera would go back to carrying out noa activities there.[46]

[92] For those reasons, I am of the view that Ngāti Pāhauwera have been unable to satisfy the requirements of the Act as to certainty of location in respect of their proposed wāhi tapu areas. I accept the submissions made on behalf of the Attorney-General. As such, it is not necessary for the Court to enquire into whether the restrictions and/or prohibitions sought by Ngāti Pāhauwera meet the requirements of the Act. The draft order will need to be amended to remove reference to wāhi tapu conditions.

**CMT 2 – Ngāi Tahu and Ngāti Pāhauwera between the Pōnui Stream and the Waikari River**

[93] Ngāti Pāhauwera and Ngāi Tahu each filed a draft order. There is disagreement between them as to the contents of the draft order. They must file a single draft order in accordance with the Court's findings that they hold CMT jointly.

*Holder of the order*

[94] Ngāti Pāhauwera argue that they alone should hold the CMT order. They say:

(a) Ngāi Tahu is a hapū within the confederation of 85 hapū represented by the Ngāti Pāhauwera Development Trust;

(b) the number of people that supported Mr Kingi's application on behalf of Ngāi Tahu are less than one per cent of the total members of the Ngāti Pāhauwera Development Trust;

(c) Ngāi Tahu having the same rights as Ngāti Pāhauwera in the management of the joint CMT would grant Ngāi Tahu, as a small group, greater rights than the majority of the members of the Ngāti Pāhauwera Development Trust, and this would be undemocratic;

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[46] *Re Ngāti Pāhauwera* Stage Two Notes of Evidence, at 18–19.

(d) a number of Ngāti Pāhauwera witnesses support that Ngāti Pāhauwera solely hold the joint CMT order; and

(e) the issue of how the joint CMT should be held is a matter of tikanga that should be referred to the Māori Appellate Court for its opinion.

[95] Ngāi Tahu submits that a finding of shared exclusivity means that their rights and Ngāti Pāhauwera's rights are held on an equal footing. They submit that it is not possible for Ngāti Pāhauwera to "have more of a say in managing the shared area". They say that the management of the area should be conducted on an equal basis, and that Mr Kingi should be the holder of the order on behalf of Ngāi Tahu.

[96] For the following reasons, Ngāti Pāhauwera's arguments on this point are untenable.

[97] The Act clearly provides that applications may be made by iwi, hapū, and whānau, thereby considering that applicant groups of any size may successfully apply for recognition orders.[47] Regardless of their size and relationship to Ngāti Pāhauwera, Ngāi Tahu made an application within the statutory timeframe and satisfied the tests in the Act in that they hold the area between the Pōnui Stream and the Waikari River jointly with Ngāti Pāhauwera. That was accepted by Ngāti Pāhauwera.

[98] In the terms of the Act, Ngāi Tahu are on equal footing with Ngāti Pāhauwera. The fact that Ngāi Tahu are a relatively smaller group is of no legal significance in terms of the Act, or as to their status as a successful applicant group. Ngāi Tahu was as entitled to advance an application pursuant to the Act as any large iwi. It is not for Ngāti Pāhauwera to dictate whether Ngāi Tahu can have a role in the management of the jointly held CMT order, where Ngāi Tahu have established the tests for CMT in the Act. However, the CMT order is managed, it must be managed on an equal basis between the two parties.

[99] In advance of the Stage Two hearing, Ngāti Pāhauwera filed evidence establishing that members of the Trust did not support Mr Kingi or Ngāi Tahu having

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47 Section 9.

an equal footing, or even a lesser management interest in the CMT order. This evidence contained statements such as the following:[48]

> I understand that there is a group of people who whakapapa to Ngāi Tahu who want Malcolm Kingi to represent their Ngāi Tahu interests. I understand that Mr Kingi is calling this subsection of the Ngāi Tahu hapū "Ngāi Tahu ki Mōhaka-Waikare".
>
> I accept that Mr Kingi is Ngāi Tahu and that Mr Kingi represents some members of Ngāi Tahu hapū. I respect Mr Kingi and the wishes of my relations who want him to represent their Ngāi Tahu interests.
>
> However, I do not agree that Mr Kingi represents all Ngāi Tahu people with interests between Pōnui and Waikari. I do not agree that Ngāi Tahu ki Mōhaka-Waikare encompasses all Ngāi Tahu with interests between Pōnui and Waikari.
>
> As a member of Ngāi Tahu, I support the [Ngāti Pāhauwera Development Trust] to hold any Customary Marine Title order or any other orders made under the Act on behalf of Ngāi Tahu.

[100] Likewise, Mr Waaka stated:[49]

> As Trustees we must represent the interests of all of the members of all of our hapū. So we cannot agree that Malcolm's whānau should share 50:50 decision making with everyone else from the Ngāti Pāhauwera hapū.
>
> Malcolm says he represents Ngāi Tahu o Mōhaka Waikare. As the Court recognised, this whānau is a modest subsection of Ngāi Tahu. We represent all of Ngāi Tahu. We also represent 84 other hapū, many of whom are married into Ngāi Tahu. I have attached marked **"A"** a whakapapa chart relating to Ngāi Tahu. Ngāi Tahu is not our only hapū with interests between Pōnui and Waikari. Because Ngāi Tahu were defeated, the remaining members of Ngāi Tahu intermarried with other hapū [of] Ngāti Pāhauwera. Most of our Ngāti Pāhauwera hapū have interests there.
>
> Even if the Court would need to make us joint holders, we believe it would need to be in proportion to the whānau we represent.
>
> …
>
> The practical effect would be that the Trustees would make the decisions.
>
> I'm not sure if the Court is expecting a new joint entity to hold CMT. Malcolm's whānau represents an extremely small minority of all of our whānau who have a right to CMT between Pōnui and Waikari. If we created a new entity together to jointly hold the CMT order, Malcolm would have an extremely small minority in the decisions of the entity. Again, practically, the Trustees would actually make decisions. It would make the entity pointless and create an unfair administrative burden on us and on Malcolm. Also, we understand Malcolm would not agree to this.

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48 Affidavit of Andrew Hodges, 5 May 2022 at [6]–[9].

49 Brief of Evidence of Toro Waaka, 11 May 2022 at [15]–[25].

> Because of these factors, we believe that the Trustees should be the holder of joint CMT from Pōnui to Waikari on behalf of all of the Ngāti Pāhauwera hapū including Ngāi Tahu. Our Trust is democratically elected and we believe that the Trustees holding the joint CMT is consistent with the tenets of democracy which underly the administration of this country. The members of the 85 hapū of Ngāti Pāhauwera including Ngāi Tahu which includes Ngāi Tahu o Mōhaka Waikare can all register with us, and participate fully, including voting where there is a vote and standing for election as a Trustee.
>
> …
>
> The judges of the High Court have not been trained in how to balance the desires of a whānau against the rights of an iwi or confederation of hapū. By contrast, generally the judges of the Māori Land Court have to have some competency and certainly have experience in dealing with tikanga and multiply held land. The Māori Land Court was where this application started, before the Honourable Justice Williams. Ngāti Pāhauwera also had a section 30 Order application heard in the Māori Land Court in 1994. I understand the Māori Appellate Court has a role under the Act where tikanga issues arise. Matauranga Māori is increasingly being recognised (including by the Crown) as an important part of legal and other proceedings, and we think that it should come into play in this situation also.
>
> Ngāti Pāhauwera have shown goodwill throughout this process, working first with the Crown through engagement, and not opposing the applications of Malcolm or MTT. The Trustees believe that if this Court says we must split joint CMT across more than one holder, we deserve to be able to have the Māori Appellate Court look at how to do this in accordance with tikanga.

[101] Evidence of dissatisfaction of members of Ngāti Pāhauwera, the position at tikanga, or fundamental principles of democracy cannot change the terms of the Act, which provide that Ngāi Tahu ki Mōhaka-Waikare may make an application. Nor can it change the findings of the Court at Stage One that shared exclusivity had been established on an equal basis. The natural incident of shared exclusivity is that Ngāi Tahu and Ngāti Pāhauwera must hold the CMT order jointly, on an equal footing. No evidence has established that Ngāti Pāhauwera's interest in the relevant area is stronger or greater than that of Ngāi Tahu and the fact that Ngāti Pāhauwera is larger does not make a difference.

[102] Nor do I agree that there is an issue of tikanga which requires referral to the Māori Appellate Court for consideration. The issue is primarily one of interpreting the Act, a function which is properly the role of the High Court, pursuant to the Act.[50] As stated by the Court of Appeal:[51]

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50 Section 9; see also *Collier v Ngāti Rehua-Ngāti Wai ki Aotea* [2020] NZCA 536.
51 At [19].

> …the High Court is not required to refer any question to the Māori Appellate Court when determining an application for a recognition order. Moreover, its discretion to make an order stating a case under s 99 of the Act is limited to a question of tikanga raised in an application for a recognition order. The High Court is not entitled to abrogate to the Māori Appellate Court its statutory responsibility to determine applications for recognition orders in accordance with s 98 of the Act.

[103] Section 99 provides that the Court may refer to the Māori Appellate Court or a pūkenga for an opinion or advice on a question of tikanga. In this case, the Court sought and obtained the views of a pūkenga. To the extent that Ngāti Pāhauwera's position raises a question of tikanga the Court was entitled to have regard to the views of the pūkenga. The pūkenga's view was that Ngāti Pāhauwera and Ngāi Tahu held the area between the Pōnui Stream and the Waikari River jointly. That view requires that the CMT be held on an equal basis.

[104] As a result of the disagreement between Ngāti Pāhauwera and Ngāi Tahu, there has been no progress towards resolving the question of whether some form of management entity should be created for the management of the jointly held CMT order. In the event that agreement between the parties is not possible, the CMT order should simply list that it is jointly held on an equal basis by the Trustees and Mr Kingi. Should Ngāi Tahu seek to change who holds the order on their behalf in the future, they will have to make an application to vary the CMT order, in accordance with s 111.

*Boundaries*

[105] As discussed above, the boundary line at the Pōnui Stream is to be located at the midpoint of that Stream.

[106] Ngāi Tahu submitted that the boundary at Waikari River should be the southern bank of that River. This was unopposed by Ngāti Pāhauwera. Ngāi Tahu identified that as there was no adjoining CMT area south of the Waikari River, it was not necessary to take the same approach as at the Pōnui Stream.

[107] However, in closing submissions, concerns were raised by MTT as to the consistency of approach applied by the Court in respect of boundaries. MTT said that

as the Stage One judgment had found that MTT had customary interests at the Waikari River (but not north of it), that the midpoint of that river should be the boundary point.[52] They said that to adopt a different position would create an inconsistency as to the approach taken at the Pōnui Stream. In effect, MTT was saying that because their customary interests included the Waikari River, that it would be inappropriate for Ngāti Pāhauwera and Ngāi Tahu to be awarded CMT over the entirety of that river.

[108] That approach sits awkwardly with the Court's jurisdiction given that MTT were not awarded CMT in that area. Their exclusive CMT area is some way south, beginning at Arapaoanui. Further, the reason that MTT were not awarded CMT in the area immediately south the Waikari River was owing to their "trenchant resistance to acknowledging that Ngāi Tahu had any interest at all".[53] The Court was unable to recognise any interests considered to exist by the pūkenga in that area because MTT were unwilling to approach that area on the basis of shared exclusivity, beyond recognising Ngāti Pāhauwera's interests. Now, MTT are attempting to reduce (albeit by a very small amount) the area awarded jointly to Ngāti Pāhauwera and Ngāi Tahu, on the basis that they also have customary interests in that area. In my view it would be inappropriate to do so, where MTT were not awarded CMT in that area, particularly because they refused to acknowledged other interests in that area. Accordingly, my view is that the southern bank of the Waikari River may be confirmed as the boundary.

[109] The landward boundary of the CMT order is to be the landward boundary of the CMCA. The seaward boundary is a line that is five kilometres from the landward boundary.

*Ngāi Tahu's draft order*

[110] Ngāi Tahu's draft order (and also portions of their submissions) discussed the phrase 'aboriginal rights' and 'aboriginal rights claims'. In this respect, Mr Naden appeared to be operating under a misunderstanding as to the operation of s 98. That section provides:

> **98 Court may recognise protected customary right or customary marine title**

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52 See above n 1, at [421]–[425].
53 At [424].

(1) The Court may make an order recognising a protected customary right or customary marine title (a **recognition order**).

(2) The Court may only make an order if it is satisfied that the applicant,—

(a) in the case of an application for recognition of a protected customary right, meets the requirements of section 51(1); or

(b) in the case of an application for recognition of customary marine title, meets the requirements of section 58.

(3) No other court has jurisdiction to make a recognition order.

(4) On and after the commencement of this Act, the jurisdiction of the Court to hear and determine any aboriginal rights claim is replaced fully by the jurisdiction of the Court under this Act.

(5) In subsection (4), **aboriginal rights claim** means any claim in respect of the common marine and coastal area that is based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, titles, or duties of a similar nature, whether arising before, on, or after the commencement of this Act and whether or not the claim is based on, or relies on, any 1 or more of the following:

(a) a rule, principle, or practice of the common law or equity:

(b) the Treaty of Waitangi:

(c) the existence of a trust:

(d) an obligation of any kind.

…

[111] The effect of s 98 is that the High Court, pursuant to the Act (and subject to appeal), is the sole jurisdiction within which Māori may seek to have their customary rights within the takutai moana recognised under the Act. It does not mean that in the Stage One judgment the Court "recognised the Parties' aboriginal right to title in the common marine and coastal area". Nor does it create a jurisdiction to "administer and facilitate the implementation of the customary right to effective management of the takutai moana".

[112] Recognition orders awarded pursuant to the Act are a creature of statute, and constitute a unique bundle of rights that is awarded upon satisfaction of the statutory tests. As the Court has illustrated, this is a recognition and expression of rights that exist through tikanga, by what Carwyn Jones would describe as New Zealand's 'state

legal system'.[54] Those same rights continue to exist in tikanga notwithstanding the Act. What the Court may grant pursuant to the Act is not aboriginal title as that doctrine is conceived of by the common law, but rather only CMT or PCR. Section 98 is clear in that the Court's jurisdiction to interact with customary rights in the takutai moana is now limited to recognition of CMT or PCR.

[113] Ngāi Tahu's draft order currently conflates the distinction between rights existing at tikanga, rights existing at common law as a result of tikanga, and rights created by the Act that may exist as a result of tikanga. References to aboriginal rights and aboriginal title must therefore be removed.

**CMT 3 – MTT between Arapaoanui and Te Uku**

*Holder of the order*

[114] MTT have proposed the trustees of the Maungaharuru-Tangitū Trust as the holders of the CMT order, as appointed from time to time in accordance with the Trust Deed. I am satisfied that the trustees are an appropriate group to hold the CMT order on behalf of MTT and that the contact details included in the draft order are sufficient. No issues arose as to the holder of the order.

*Boundaries*

[115] In the Stage One judgment, MTT was awarded CMT between Arapaoanui and Te Uku.[55] MTT proposes that the boundaries of that CMT order be:

> 1.1 between Te Uku in the south, and
>
> 1.2 the northern bank of the [Arapaoanui] River in the north (a moveable boundary), and
>
> 1.3 along the line of Mean High-Water Springs (a moveable boundary), and
>
> 1.4 out to 12 nautical miles from Mean High-Water Springs, and
>
> 1.5 including all rocks and reefs, and

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54 Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) Legalities 162.

55 At [478].

> 1.6 including the beds of rivers that are part of the coastal marine area under the Resource Management Act 1991 in that area (these are moveable boundaries), and
>
> 1.7 including airspace above, and the water space above that area (but not the water) and subsoil, bedrock and other matter below that area.

[116] Those boundaries appear to be appropriate and no concerns were raised in respect of them. I note in accordance with the comments above at [56]–[65], it is not necessary for MTT to describe certain boundaries as 'moveable' in the terms of their draft order. The fact that certain boundaries are moveable is a factor that is incorporated into the way in which CMT maps are to be surveyed.

*Waipātiki Marine Farm – substantial interruption*

[117] At Stage One the Court stated:[56]

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

[118] Evidence has now been filed as to the effect of the marine farm on the exclusive use and occupation of the area by MTT, who submit that there has been no substantial interruption. The marine farm is located only partially in the area exclusively awarded to MTT.

[119] Napier Mussels Limited is the consent holder for the marine farm. Tania Hopmans provided evidence for MTT on this point. Ms Hopmans put in evidence a letter from Ngahiwi Tomoana, the Chairperson of Ngāti Kahungunu Iwi Incorporated, which establishes that:

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56 At [284].

(a) Napier Mussels Limited were granted resource consents in 2002 for an offshore mussel farm;

(b) 91 per cent of the shares in Napier Mussels Limited are held by Kahungunu Asset Holding Company Limited, an entity wholly owned by Ngāti Kahungunu Iwi Incorporated;

(c) the remaining nine per cent of shares are held by Sea Investments Limited (six per cent), and RP Holdings Limited (three per cent);

(d) the marine farm only consists of a 130–150 metre experimental line and supporting structures, installed in 2005, which were a part of the first stage of the marine farm's development;

(e) the first stage of the marine farm's development was never completed;

(f) the other four stages of development were given consent, but none of them have ever commenced;

(g) the lapse date for the structure and occupation consents was in 2009;

(h) no mussels are currently being grown on the farm other than self-sown mussels;

(i) Ngāti Kahungunu Iwi Incorporated do not consider that there has been a substantial interruption, and support all applicants in these proceedings; and

(j) the Seafood Industry Representatives were not authorised to raise an argument of substantial interruption on behalf of Ngāti Kahungunu Iwi Incorporated.

[120] Malcolm Miller provided further evidence on the marine farm on behalf of the Hawkes Bay Regional Council. Mr Miller provided that there are three current resource consents held by Napier Mussels Limited, allowing them to:

(a) erect surface and subsurface structures and occupy the coastal marine area for a period of 30 years to 4 July 2024, in a staged approach (the structural consent);

(b) discharge contaminants for a period of 30 years to 4 July 2024 (the discharge consent); and

(c) undertake marine farming to 3 July 2024 (the farming consent).

[121] Mr Miller confirmed that development of the marine farm began in 2005 but that the first stage of development was never completed, and further stages never commenced. He says that no mussels have been grown on the farm since 2012 except self-sown mussels, and that the only area currently occupied by Napier Mussels Limited is the 150 metre experimental line.

[122] As acknowledged by the parties, and noted in the consents themselves, this raises an issue of whether the structural consent has lapsed on its own terms, or in the terms of s 125 of the RMA.

[123] The structural consent provides:

> **Lapsing of Consent**
>
> 42. This consent shall lapse in terms of Section 125 of the [RMA] with respect to any stage of the development, if the development has not occurred within two years after the date on which it is able to commence in accordance with condition 6. Except that if any stage of the development has not occurred for reasons provided for in conditions 7 and 8, the consent shall not lapse with respect to that stage. (For the avoidance of doubt, if staging is delayed for environmental reasons in accordance with other conditions of consent, the consent, with respect to that stage, shall not lapse)
>
> **Cancellation of Consent**
>
> 43. The consent holder shall immediately notify the Council and the Maritime Safety Authority in writing, should it cease to use the structures for mussel farming within the area in which it is authorised to place structures by this consent. The structures authorities by this consent shall be removed as soon as practicable after the date of cessation of farming as directed or authorised in writing by the Council. (In such an event the Council will review the conditions of consent to reduce the area authorised for the mussel farm).

44. Following full development, should any block of lines be abandoned or not farmed for a period of two years or more, consent for that area shall be cancelled in accordance with section 126 of the [RMA].

[124] Section 125 of the RMA provides:

> **125 Lapsing of consents**
>
> (1) A resource consent lapses on the date specified in the consent or, if no date is specified,—
>
> (a) 5 years after the date of commencement of the consent, if the consent does not authorise aquaculture activities to be undertaken in the coastal marine area; or
>
> (b) 3 years after the date of commencement if the consent does authorise aquaculture activities to be undertaken in the coastal marine area.
>
> (1A) However, a consent does not lapse under subsection (1) if, before the consent lapses, –
>
> (c) the consent is given effect to; or
>
> (d) an application is made to the consent authority to extend the period after which the consent lapses, and the consent authority decides to grant an extension after taking into account—
>
> (i) whether substantial progress or effort has been, and continues to be, made towards giving effect to the consent; and
>
> (ii) whether the applicant has obtained approval from persons who may be adversely affected by the granting of an extension; and
>
> (iii) the effect of the extension on the policies and objectives of any plan or proposed plan.

[125] Mr Miller stated on this point:

> Although Stage 1 of the consent was commenced, it was not "completed" ("completion" means at least 75% of the lines are in place). In my view, it is unlikely that when preparing the consent conditions it was envisaged that the activity would stall without a stage being completed. As such, there are no conditions in the consent which deal specifically with a partially completed stage.
>
> The Council approach to date has been to treat the consent as remaining in place for the works that have been completed. However, I acknowledge that arguments could be made that the consent has lapsed some time ago because Stage 1 was not completed within the specified time. The Council has not considered that the consent has lapsed in its entirety because some of the Stage 1 development has "occurred" (as is the language used in Condition 42). The Council has taken an approach that Napier Mussels' decision not to develop

> the farm to the full extent authorised by the consent does not mean that the portion that has been developed is unlawful.
>
> Stages 2-5 were not commenced within the relevant time periods outlined in the consent and therefore have lapsed. Stages 2-5 therefore cannot be carried out in reliance on the existing consent, and a further application would be required in order to complete those stages.
>
> Although no mussels are currently being grown on the farm, the consent holder has maintained contact with the Council in respect of the activity and continues to maintain the structures in a minimal form. Consequently, the Council has not considered that Napier Mussels has abandoned the farm.
>
> The consent holder has not notified the Council that it has ceased to use the existing structures for mussel farming and appears to, at least in some limited form, wish to continue its use of the [Stage] 1 area. Condition 43 has not been triggered by the consent holder and the consent has not been cancelled. As Stage 1 of the farm has not been fully developed, condition 44 is not triggered and the consent has not been cancelled.

[126] Mr Miller is also of the view that the discharge and farming consents remain active and exercisable to the extent they are provided for or permit activities in respect of the Stage 1 development.

[127] Therefore, while it appears that there remains some uncertainty as to the legal status of the three consents, I am satisfied that from the granting of the consents in 2002, to the present, the effect of the marine farm on the surrounding area has been minimal. I do not propose to make findings as to the status of the consents, as the Court is not required to do so. The issue the Court needs to address is one of fact, namely, whether the marine farm has substantially interrupted MTT's holding of that part of their exclusive area in accordance with tikanga. Based on the evidence tendered at Stage Two of this proceeding, I am satisfied that the marine farm has not had that effect.

[128] The activities authorised by the consents were never completed, and the marine farm is not currently being used for any purpose connected to the consents. There is no suggestion that the structure that remains impacts or ever has impeded MTT's use and occupation of the area. There appears to be no opposition to MTT's position in this respect. Neither Napier Mussels Limited nor Ngāti Kahungunu have adopted a contrary position. The Seafood Industry Representatives did not appear at Stage Two or file submissions.

[129] Accordingly, I am satisfied that the marine farm has not substantially interrupted MTT's holding of the relevant area in accordance with tikanga, and that the area of the marine farm that impacts on MTT's CMT area need not be excluded.

**CMT 4 - Ngāti Pārau and MTT jointly over Pania Reef**

*Holder of the order*

[130] Ngāti Pārau and MTT's approach to their jointly held CMT order has been highly cooperative, which is to be commended. As noted at Stage One, they have provided the Court with an agreement which shows that:

(a) they acknowledge each other's shared interests;

(b) Ngāti Pārau has primacy of rights;

(c) other Ahuriri hapū also have interests in the area;

(d) the CMT is to be held by a trust to be established, called 'the Pania Trust', but that if the CMT is granted prior to the establishment of the Trust, it will be held by Ngāti Pārau, and the order will provide that Ngāti Pārau will transfer the CMT to the Trust once it is established; and

(e) the Trust will have eight trustees:

(i) two appointed by Ngāti Pārau;

(ii) two appointed by MTT; and

(iii) one trustee appointed by each of Ngāti Matepū, Ngāti Hinepare, Ngāti Mahu, and Ngāi Tawhao.

[131] The draft order filed by the parties replicates these terms, which I am satisfied are appropriate. The Trust has not yet been established. It is unclear to me why that is the case. Nevertheless, the parties have agreed upon a mechanism by which to

transfer the CMT to the Trust once it is established, whenever that is. In the event that the Trust has not yet been established as at the date of this decision, the holder of the CMT order in the interim is by consent to be the trustees of the Ngāti Pārau Hapū Trust.

*Boundaries*

[132] An issue arose at the Stage Two hearing regarding what area the Court awarded jointly to MTT and Ngāti Pārau at Stage One. Ngāti Pārau seek clarification of whether the CMT boundary for Pania Reef was to extend out to a seaward limit of 1.5 kilometres or whether that provision only applied to the areas where they were granted CMT exclusively. Ngāti Pārau and MTT's proposed CMT map over Pania Reef relies on the area designated as the Moremore B Mātaitai Reserve under the Fisheries Act 1996 regulations, and then extends out 1.5 kilometres from the edge of that reserve.

[133] The Attorney-General submits that the Court did not determine at Stage One that the CMT boundary for Pania Reef was to extend out to a seaward limit of 1.5 km. Ms Roff submits that the Court's determination that it would be appropriate to extend the seaward limit to 1.5km off the shore in all areas, related only to the areas where the Court granted CMT to Ngāti Pārau exclusively.

[134] The Attorney-General's submissions are correct. The Court did not determine at Stage One that the CMT boundary for Pania Reef was to extend out to a seaward limit of 1.5 km past the reef. The Court stated:[57]

> [499] Certain hapū of MTT (as well as certain hapū of the Mana Ahuriri Trust) were also acknowledged as having shared interests in the Pania Reef area. However, both MTT and Ngāti Pārau acknowledged that it was the latter who had the primary and most important interest in that area. Prior to the conclusion of the hearing, MTT and Ngāti Pārau filed a joint affidavit between Ms Tania Hopmans and Mr Rapihana Te Kaha Hawaikirangi representing each party respectively, which included an agreement between MTT and Ngāti Pārau in relation to the overlapping areas within their respective applications. The parties agreed and mutually recognised that each other had shared interests in the overlap area, and MTT expressly acknowledged the primacy of Ngāti Pārau's interest in the area containing Pania Reef. Both parties also acknowledged the interests of Ahuriri Hapū in the overlap area.

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[57] Above n 1.

> [500] I have concluded that because of the mutual recognition between these two applicant groups in relation to the overlap area, and particularly Pania Reef, that an award of CMT can be granted over the reef to both Ngāti Pārau and MTT, consistent with the principle of shared exclusivity, and on the grounds set out in the agreement between the two. I also consider that, unlike other parts of the application area, it is appropriate that CMT be awarded in this area despite the Mana Ahuriri Trust hapū choosing to enter into direct engagement with the Crown over an area which overlaps this one. This is because the evidence before me, which includes evidence from Waitangi Tribunal hearings, as well as other third parties reports, indicates that Ngāti Pārau have primacy of interests over the reef, and also that in the agreement, both MTT and Ngāti Pārau have explicitly made provision for Ahuriri Hapū interests to be recognised, by including a representative in the trust designed to hold CMT between the parties.

[135] That was the portion of the judgment that set out the terms of the CMT area over Pania Reef. Ngāti Pārau instead referred to the following portion of the judgment in an attempt to establish that the CMT area over Pania Reef was to extend for a further 1.5 kilometres:[58]

> [511] However, there did not appear to be any evidence of activity further out from Pania Reef. I therefore conclude that I cannot award CMT out past that area to the 12-nautical mile limit. Noting the evidence above that there did appear to be some fishing around, and potentially just past Pania Reef, it would be appropriate to extend the seaward limit to 1.5km off the shore in all areas where Ngāti Pārau has been granted CMT. The precise boundaries around Pania reef can be determined at Stage 2. They obviously will not extend into the shipping lanes.

[136] That portion of the judgment referred only to the areas in which Ngāti Pārau had been awarded CMT exclusively. This was reiterated at the conclusion of the judgment, which stated that there would be CMT in the following areas:[59]

> (d) a jointly held CMT for Ngāti Pārau and MTT, noting the proviso set out at [499]-[502] of this decision, over Pania Reef; and
>
> (e) an exclusively held CMT for Ngāti Pārau, between the mean high-water springs and where applicable, a line parallel to the mean high-water springs 1.5km out to sea, over Hardinge Reef, the Marine Parade coastal area around the southern boundary, and parcel 9 in the Ahuriri Estuary.

[137] As noted by Ms Roff, the proviso set out at [499]–[502] (partially set out above) relates to the shared exclusivity between Ngāti Pārau and MTT, the primacy of

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58 Above n 1.
59 At [598].

Ngāti Pārau's rights, and that there are Ahuriri hapū interests to be recognised in the final CMT order. It is clear that the Court did not award joint CMT over Pania Reef and extending out for a distance of 1.5 kilometres to Ngāti Pārau and MTT.

[138] Instead, the most appropriate boundaries for the CMT order recognised at Stage One over Pania Reef appear to be the boundaries of the Moremore Mātaitai Reserve. That area is clearly mapped on the maps provided by Mr de Leijer, and appears to accord with where Mr Jennings has also mapped the reef. That is to be the CMT area as represented on the final survey maps.

**CMT 5 – Ngāti Pārau at Hardinge Reef, Marine Parade and the Ahuriri Estuary**

*Holder of the order*

[139] Ngāti Pārau have proposed the trustees of the Ngāti Pārau Hapū Trust as the holders of the CMT order, as appointed from time to time in accordance with the Trust Deed. I am satisfied that the trustees are an appropriate group to hold the CMT order on behalf of Ngāti Pārau and that the contact details included in the draft order are sufficient. No issues arose as to the holder of the order.

*Boundaries*

[140] Ngāti Pārau also attempted to revisit the Court's findings at Stage One in respect of the CMT area which they were awarded on an exclusive basis. At Stage One, Ngāti Pārau were granted CMT exclusively over Hardinge Reef, in the Marine Parade coastal area around the southern boundary of their application area from MHWS to 1.5 kilometres out to sea, and over Parcel 9 in the Ahuriri Estuary.[60] The Court also determined that third-party use in a number of other parcels amounted to a substantial interruption of Ngāti Pārau's use and occupation of those areas.[61]

[141] In their Stage Two submissions Ngāti Pārau argue that:

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60 Above n 1, at [598(e)].
61 At [272]–[273] and [503]–[514].

(a) parts of parcel 17 (which sits entirely over Hardinge Reef), may be included in their CMT order, as it is not a location where there was significant third party activity, warranting substantial interruption; and

(b) the area around Town Reef and the southern end of Parcel 22 may be included in their CMT order, as that area is not affected by the Napier Port, Marine Parade or significant boat use.

[142] The Attorney-General in response in his written submissions said that:

> …it is not open to Ngāti Pārau to now seek "potential CMT" and introduce new evidence that relates to the area in and around parcel 22 and Town Reef, and beyond, when the Court has made findings and orders in the stage one judgment that substantial interruption had occurred.

[143] These arguments require some elucidation in respect of the Stage One judgment, in light of the fact that the primary purpose of a Stage Two hearing is to correctly and accurately define the boundaries of the CMT and PCR orders awarded at Stage One. Towards the end of the Stage Two hearing, it became clear that confusion had arisen in respect of parcels 17, 19, and 22, which are located respectively, out from the entrance of the Ahuriri Estuary, at the entrance of the Napier Port, and off Marine Parade. This confusion was brought to the Court's attention by Mr Mahuika for Ngāti Pārau, and Ms Roff for the Attorney-General.

[144] Firstly, Mr Mahuika's submission in respect of Hardinge Reef was essentially that there was an inconsistency in the Stage One judgment, owing to a misidentification of the location of Hardinge Reef. The maps prepared by Mr Jennings on behalf of the Attorney General for the Stage Two hearing do not identify Hardinge Reef, but rather a small triangular area outside of parcel 17 further out to sea than where the reef appears to be located as shown on Mr de Leijer's maps. Mr de Leijer's maps show that the reef structure is located much closer to shore, and entirely within parcel 17. The inconsistency identified was that the Court found that third-party use had substantially interrupted Ngāti Pārau's exclusive use and occupation of parcel 17, but also awarded CMT over Hardinge Reef, which falls within that same area. In respect of Hardinge Reef, the Court stated:

> [503] Second, Hardinge Road Reef. Unlike Pania Reef, which is located further out from the coast and is protected under customary fishing regulations, Hardinge Road Reef is located closer to the shore in Napier, between the Port and the Ahuriri Harbour entrance. There was greater evidence of third-party use in the area, including surfing and swimming, although Mr Cleaver during cross-examination suggested that this was not necessarily on the reef itself.
>
> [504] Mr Cleaver also stated that between 1910 and 1974, Napier's sewerage was discharged from a pipe 50 feet off the eastern end of the entrance channel, at Perfume Point, close to Hardinge Road Reef. The pollution from this outfall appeared to affect the fish and kaimoana population. However, a number of witnesses recalled fishing and collecting kaimoana from the reef, as well as several deposing that they continued to do so. Mr Rapihana Hawaikirangi described the area as a place where kuku, kina and pāua could be harvested close to the beach, and that Tareha and his whānau had rights of refusal over harvesting kai from this section of the beach. Hera Taukaumo stated that Ngāti Pārau collected "kina, mussels, bubu, kahawai and mullet" from the area, while Kay O'Reilly also stated that during her upbringing, her whānau often gathered kaimoana from Hardinge Road.
>
> [505] I have come to the conclusion that despite the pollution and third-party activity, there still appears to be sufficiently exclusive use and occupation of the reef area for CMT to be granted.

[145] I accept that this is an issue that requires clarification.

[146] Mr Mahuika submitted that the confusion in the Stage One judgment was able to be reconciled if the Court clarified that CMT was awarded over Hardinge Reef, within parcel 17, but the remainder of that parcel was excluded on the basis of substantial interruption. He says that this would be consistent with the Court's view that third party activities do not occur with the same intensity over the reef structure, as in the surrounding area close to the shoreline. In response, Ms Roff submitted that the correct position was that the small area mapped by Mr Jennings outside of parcel 17 is the only area in which CMT is available to Ngāti Pārau, given the Court's findings on substantial interruption within parcel 17.

[147] In my view, while either of these interpretations appear open on the words of the Stage One Judgment, Mr Mahuika's position accords most correctly with the reality of the location of Hardinge Reef and the evidence tendered in respect of it. The evidence presented at Stage One established that while significant third party use in parcel 17 substantially interrupted Ngāti Pārau's exclusive use and occupation, those third party uses were not of the same intensity over the Hardinge Reef structure. CMT

was awarded over that reef on that basis. Accordingly, I accept the arguments made by Mr Mahuika. CMT can be recognised over the reef within parcel 17 notwithstanding that the Court's findings on substantial interruption in the remainder of that area still apply. The small triangular area mapped by the Crown is also available for an award of CMT. The location of Hardinge Reef needs to be accurately mapped, so as to be included in the CMT order.

[148] Secondly, it is clear that there has been a typographical error in misdescribing parcel 19 as parcel 22 at Stage One. The Court described parcel 22 as an area in "which ships entered and exited Napier Port", and found that substantial interruption had occurred on that basis.[62] This is clearly wrong as parcel 22 is located on the other side of the shoreline from the entrance to Napier Port, adjacent to Marine Parade. As such, parcel 22 is not an area in which ships enter and exit Napier Port. Ngāti Pārau's exclusive use and occupation of parcel 22 cannot have been substantially interrupted solely on that basis. The parcel which is at the entrance of Napier Port is parcel 19, which is not available for inclusion in a recognition order as a result of "the subsequent creation of fee simple titles registered prior to the extinguishment of all customary interests in the foreshore and seabed by s 13 of the Foreshore and Seabed Act".[63]

[149] This issue may be resolved under the slip rule.[64] I confirm that parcel 19, at the entrance to Napier Port, is included within the area of substantial interruption noted in the Stage One judgment at [272(a)] as well as being unavailable for inclusion in a CMT order for the reasons noted at [269]. While I discussed with counsel at the Stage Two hearing that this was a matter that may have been more appropriate to correct through the appeals process, it is ultimately my view that this kind of clarification falls within the category of matters that is appropriately dealt with at the Stage Two juncture. As noted, the purpose of the Stage Two process is to accurately and correctly identify the boundaries of the areas awarded at Stage One (if any). Given the complexity of the Act and the voluminous material before the Court, there may in limited circumstances be a need to correct errors or omissions where further information or more accurate mapping is put before the Court.

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62 Above n 1, at [272(a)].
63 At [269].
64 High Court Rules 2016, r 11.10.

[150] Turning then to the area around parcel 22, Mr Mahuika on behalf Ngāti Pārau did not dispute the CMT area mapped by the Crown from the southern end of parcel 22 to the southern boundary of Ngāti Pārau's application area and out to 1.5 kilometres. He accepted that area was correct. Nor did he dispute that substantial interruption had occurred within parcel 22 owing to third party use, notwithstanding the typographical error noted above.

[151] However, he noted that as parcel 22 does not extend out to 1.5 kilometres, that there is an area which includes Town Reef beyond the boundaries of parcel 22, that was not subject to findings in the Stage One judgment, and submitted that area is available for an award of CMT. He said that area should be included within Ngāti Pārau's CMT order, excluding the areas in which the Court found there had been substantial interruption.

[152] No specific references to Town Reef or the surrounding areas were made in the Stage One judgment, beyond noting the substantial interruption in respect of parcel 22. However, the Court was clear in respect of the areas in which CMT was awarded.[65] Those areas did not include Town Reef or its surrounds.

[153] In my view, the findings of the Court in respect of this area must stand subject only to appeal. This issue is not the same as in respect of Hardinge Reef, where CMT was awarded over that area. Nor is there an error to be corrected as in respect of parcel 19. In the absence of a matter that requires correction, or upon which further evidence has been tendered, the Court's findings at Stage One must stand. The area described by Mr Mahuika is therefore unavailable for inclusion with the CMT order.

**PCR – Ngāti Pāhauwera**

*What was recognised at Stage One?*

[154] At Stage One, Ngāti Pāhauwera was granted PCRs in the following terms:[66]

> (i) the use and collection of hāngi stones, other stones, sand, and gravel within the application area between the Waikare and

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65 Above n 1, at [506] and [598(e)].
66 At [599(a)].

Waihua Rivers, excluding the mouth of the Mōhaka River;

(ii) the use and collection of driftwood and pumice within the application area between the Waikari and Waihua Rivers;

(iii) the use and collection of wai tapu and rongoā over an area 200 metres south of the mouth of the Mōhaka River and north to the Waihua River and out to 50 metres beyond mean low-water springs;

(iv) for non-commercial whitebait fishing at the Mōhaka and Waikari River mouths; and

(v) to manage, use, and protect tauranga waka between Waikare and Poututu;

*Consistency of draft order and maps with Stage One findings and the Act*

[155] Ngāti Pāhauwera's draft order uses the exact wording of the Stage One judgment, and appears to be consistent with those findings. However, the way in which most of the PCR orders awarded to Ngāti Pāhauwera at Stage One have been mapped goes beyond the findings of the judgment. As submitted by Ms Roff:

> It is for the applicants to satisfy the Court that the draft PCR orders and maps reflect the applications before the Court, the evidence filed by the applicants in stage one, and the Court's findings in respect of PCRs in the stage one judgment.

[156] Ngāti Pāhauwera have currently mapped the PCR relating to the use and collection of hāngi stones, other stones, sand, and gravel between the Waikare and Waihua Rivers, out to a seaward limit of 12 nautical miles from MWHS. However, in their opening submissions, they indicated that the seaward boundary was to be five kilometres from MHWS. Notwithstanding this inconsistency, the Court did not indicate or intend at Stage One for the seaward boundary of this PCR to extend either to 12 nautical miles, or five kilometres. Nor was any evidence put before the Court which established that the practise of collecting such resources extended out to either of those distances.

[157] The same can be said for the PCR order relating to the collection and use of driftwood and pumice. Mr Waaka provided evidence to the effect that such resources have value to Ngāti Pāhauwera wherever they are, regardless of whether they are collected by Ngāti Pāhauwera. I accept that evidence. However, as submitted by the

Attorney-General, a PCR cannot include an activity that is based only on a spiritual or cultural association, unless manifested in a physical activity or use related to a natural or physical resource.[67] Ngāti Pāhauwera did not tender evidence which established that the collection or use of driftwood, pumice, hāngi stones, other stones, sand, and/or gravel, was a practice that occurred out to 12 nautical miles or five kilometres.

[158] I indicated to counsel at the Stage Two hearing that the appropriate seaward boundary for these PCRs was MLWS. As a result of the lack of evidence justifying a conclusion that the seaward boundary of these PCRs should be 12 nautical miles or five kilometres. I direct that the maps depicting these PCRs be amended to reflect a seaward boundary of MLWS. The draft order should also reflect this finding.

[159] The PCR for the use and collection of wai tapu and rongoā appears to have been mapped clearly and in accordance with the directions of the Stage One judgment. The draft order and map require no amendment.

[160] Ngāti Pāhauwera have mapped their PCR for whitebaiting at the mouths of the Mōhaka and Waikari Rivers in the same manner as their wāhi tapu claims, being circles radiating out one kilometre from the centre line of each river mouth. Ngāti Pāhauwera say that:

> …the one kilometre area goes only as far as the upstream edge of the common marine and coastal area, and encompasses a small area of beach so that the PCR does not abruptly stop at the artificial river mouth line and partly addresses the fact that the River mouths move around. Evidence in Stage One demonstrated that the River mouths change from north to south and the coast is subject to signification erosion and accretion.

[161] Mr Waaka's evidence was:

> Although it does not make a difference in this hearing [I] have to say that even though the Act cuts our rivers like this, it is artificial because to us they are whole. It is not clear what the Court was thinking in terms of the River mouths. I understand that the river mouth is a line based on an artificial legal definition. I also understand that upstream of this line, the takutai moana goes a maximum of 1km based on another legal definition in the Act.
>
> For non-commercial whitebait fishing, we are filing maps that draw a circle extending 1km from the centre point of the Mōhaka and Waikari river mouths. 1km goes only as far as the upstream edge of the takutai moana, and

[67] Marine and Coastal Area (Takutai Moana) Act 2011, s 51(2)(e).

> encompasses a small area of beach so that the PCR does not abruptly stop at the artificial river mouth line. It also partly addresses the fact that the River mouths move around.

[162] Similarly to the PCRs concerning stones, sand, gravel, driftwood, and pumice, I consider that there was no evidence before the Court which established that the PCR relating to whitebaiting was to apply in an area of the type mapped by Ngāti Pāhauwera. The Stage One judgment does not contain any findings that would justify the award of PCR to the extent mapped by Ngāti Pāhauwera. Instead, the evidence established that whitebaiting occurred in those river mouths and in their immediate surrounds, rather than out to a distance of one kilometre. Accordingly, the PCR order cannot extend to those areas.

[163] I consider that the most appropriate area for this PCR is simply the area of those river mouths that are within the takutai moana, with a seaward boundary of MLWS. I reiterate the view expressed in the Stage One judgment that the award of PCR for non-commercial whitebait fishing in the Mōhaka river is not inconsistent with the vesting of the Mōhaka riverbed under the Coal Mines legislation. I direct that the map relating to the whitebaiting PCR be amended in accordance with these findings.

[164] Ngāti Pāhauwera have mapped the PCR for tauranga waka as between the Waikari River and the Poututu Stream, from MHWS, out to 12 nautical miles. Their opening submissions also stated that the seaward boundary was to be from MHWS out to a distance of five kilometres. Neither of those seaward boundaries were specified at Stage One, and nor did the Court indicate that the PCR awarded was to apply to a large and indiscriminate area. Instead it was intended to be in respect of distinct areas. The Court stated:[68]

> The preservation and use of tauranga waka is a PCR available under the Act. There is sufficient evidence provided by Ngāti Pāhauwera witnesses for me to conclude that the use of tauranga waka has been exercised since 1840, and continues to be exercised within the common marine and coastal area in accordance with tikanga today. There is no evidence that this activity has been extinguished, outside of the site referred to by Ms Hawkins. I therefore consider that a PCR order allowing Ngāti Pāhauwera to manage, use, and protect their tauranga waka should be granted between Waikare and Poututu. *The precise location of the tauranga waka is a matter to be resolved at the Stage 2 hearing*.

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[68] Above n 1, at [564].

(emphasis added)

[165] I accept that there was evidence which attested that tauranga waka were across the entire application area. However, the Court's conclusions at Stage One were based on the evidence which identified distinct locations as tauranga waka. Ngāti Pāhauwera have not mapped distinct areas, but rather a broad and indiscriminate area, including a seaward boundary out to the limits of the territorial sea.

[166] The Stage One judgment did not award the PCR for tauranga waka in such a large area. Such evidence as there was did not establish that tauranga waka were present on the seaward side of MLWS. Accordingly, unless Ngāti Pāhauwera are able to map this PCR in defined areas, as in accordance with the Court's findings at Stage One, the PCR for tauranga waka will be unable to be included in their recognition order.

**PCR – Maungaharuru-Tangitū Trust**

*What was recognised at Stage One?*

[167] At Stage One, MTT was awarded PCRs in the following terms:[69]

> (i) use of the seawater as a rongoā between Keteketerau and the Waikari River and out to 50 metres beyond mean low-water springs;
>
> (ii) use of tauranga waka at Arapaoanui and Keteketerau;
>
> (iii) gathering sand, driftwood, shells, pumice, and rocks/stones between Keteketerau and Waikare;
>
> (iv) for non-commercial whitebait fishing the Arapaoanui River, the Waikari River, and the Te Ngarue Stream where they are within the marine and coastal area; and
>
> (v) collecting karengo at Arapaoanui and Waipātiki out to 500 metres below mean low-water springs.

[69] Above n 1 at [599(b)].

*Consistency of draft order with Stage One findings and the Act*

[168] The PCR for the use of seawater appears to have been mapped clearly and in accordance with the directions of the Stage One judgment. The map requires no amendment. However, the draft order filed by MTT provides that this PCR order:

> 1.4 [includes] all rocks and reefs, and
>
> 1.5 [includes] airspace above, and the water space above that area (but not the water) and subsoil, bedrock and other matter below that area…

[169] It is unclear why MTT have included these matters within the PCR order that was definitely stated to only be in respect of the use of seawater for medicinal practises in the area between Keteketerau and the Waikari River and out to 50 metres beyond mean low-water springs.[70] The Court stated, "There is insufficient evidence to conclude that any other resources other than seawater have been used for rongoā practices".[71]

[170] There is no reference in the Stage One judgment to this PCR including rocks, reefs, airspace, soil, or bedrock. Nor are such rights ones that crystallise on an award of PCR. A PCR does not include any right or title over the part of the takutai moana where the PCR is exercised, other than rights described in s 52.[72] Section 52 does not provide that a PCR includes rights or title over resources in the area in which a PCR is exercised, other than the resource in respect of which the PCR is granted.

[171] PCRs do not constitute an interest in land in the same sense that an award of CMT does[73], which includes the ownership of minerals other than petroleum, gold, silver, and uranium existing in their natural condition.[74] While the marine and coastal area includes the airspace above the marine and coastal area, its inclusion in a PCR which was found to only relate to the use of sea water for medicinal purposes is inappropriate. The references in the draft order noted above at [168] must accordingly be removed, where they appear throughout MTT's draft PCR order.

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70 At [575]–[579].
71 At [579].
72 Marine and Coastal Area (Takutai Moana) Act 2011, s 54(1).
73 Section 60(1)(a).
74 Section 83(2).

[172] The PCR for the use of tauranga waka was stated by the Court to be "specifically Arapaoanui and Tangoio". Despite this clear direction, MTT have mapped:

> …the sandy beach areas at both Arapawanui and Tangoio (relating to landing and launching) and out to 12 nautical miles to reflect the areas used for anchoring.

[173] MTT provided evidence at the Stage Two hearing in respect of these boundaries. Specifically, on behalf of MTT, Tania Hopmans stated:[75]

> The meaning of tauranga waka also includes the anchoring of boats…the evidence the Court refers to in [the Stage One] decision relates to areas for launching and landing boats as well as the anchoring of boats, often for fishing. To be able to fish on the reefs, I understand boats need to anchor. Accordingly, the areas proposed by MTT for tauranga waka at Arapawanui and Tangoio incorporate the area for landing and launching boats (landward side) as well as the offshore area for anchoring boats. Given the Court's prior findings about the Hapū fishing out to 12 nautical files, the seaward boundary for tauranga waka has been shown as 12 nautical miles.

[174] George Tawhai stated:[76]

> I would like to note that when fishing it is important to anchor the boat. The anchor prevents the boat from drifting away from the fishing ground or reefs. When I have been out fishing it has usually been in a smaller boat. I don't like to go out too far. [I] probably anchor no further than around 2-3 nautical miles from shore. I know of other whānau who have fished further out than me. I have fished off Arapawanui south towards Waipātiki and north right up past Moeangiangi to the point (which I understand is called Tiwhanui). Consequently, I have anchored in many places all over the coat from south of Arapawanui and north to Tiwhanui.

[175] Hoani Taurima also gave evidence of fishing out near the Waipātiki Mussel Farm, roughly three nautical miles out to sea.[77]

[176] The Attorney-General took issue with this evidence. Ms Roff submitted that the evidence filed by MTT at Stage Two sought to address evidential gaps as to the nature, exercise and location of specific activities and uses. She said that the applicants were seeking to improve or broaden the PCRs that were recognised by the Court at Stage One. Ms Roff submitted:

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75 Affidavit of Tania Topmans, 11 May 2022 at [55].
76 Affidavit of George Tawhai, 11 May 2022 at [9].
77 Affidavit of Hoani Taurima, 11 May 2022 at [13].

> As noted above, PCRs can only be recognised in particular parts of the CMCA where it has been established on the evidence that the activity, use or practice continues to be exercised in accordance with tikanga by the applicant group. If there is a prohibition of the activity in an area where the PCR order is sought (for example, the area of the beach at Arapawanui between the rocks that prohibit the launching and landing of vessels), it is difficult to see how that PCR activity meets the test in s 51(1)(b) of the Act.
>
> The Attorney-General notes that MTT filed an amended originating application at the end of the stage one hearing and through its submissions of counsel, sought orders for PCRs over activities that were not included in their first originating application (filed April 2017). Despite a PCR for "preservation, development, management, occupation and the use of tauranga waka (specific areas for the landing, launching, anchoring, mooring vessels)" being referred to in a memorandum of counsel dated 14 April 2018 and in opening submissions, MTT's closing submissions referred only to a PCR for the "preservation and use of tauranga waka (specific areas for the landing and launching of vessels)." There is no mention of seeking anchoring of waka as tauranga waka in MTT's closing submissions or in Appendix B which contained a summary of the evidence that MTT had filed in support of the PCR.
>
> (footnotes omitted).

[177] Effectively, Ms Roff challenged MTT's position that they had intended to apply for, and had been awarded a PCR for the use of tauranga waka that included the practise of anchoring some way out to sea. In response, counsel for MTT submitted that:

> The intention of MTT when preparing this evidence was to provide the Court with the rationale for why MTT proposed the various 'lines on the map' in the areas the Court awarded, rather than simply drawing lines with no rationale provided. As counsel understands it, the intention of the Stage 2 hearing is to precisely identify the boundary lines for each PCR and CMT area awarded by the Court. It is submitted that MTT has provided no evidence that is suggesting any of the PCR areas awarded are incorrect, or that new areas of PCRs should be included. It is providing detail of where the lines should be, within the areas awarded by the Court.
>
> The Court's direction in the Decision anticipates further evidence would be filed, as it provides for 'any necessary briefs of evidence' to be filed by 6 May (extended to 11 May). All parties have had the MTT evidence since 11 May 2022. Any party could have chosen to cross-examine on any issues of inconsistency, if there were any. They didn't.

[178] Counsel also challenged the view that the use of tauranga waka is limited to land-based activities, stating that the word 'anchoring' was used in communications to the Court, and also in their evidence. They said that their evidence:

> …referred to launching of boats to go fishing – for example, fishing at the reefs, fishing generally, whaling, diving for crayfish and diving for kina. It is not the fishing activity that this PCR relates to, but the activity of using waka to do so. This involves launching and landing of boats to go fishing, but also, the activity of anchoring in parts of the takutai moana in the 3 locations the Court identified. As set out in Mr Tawhai and Mr Taurima's evidence of 11 May 2022, the practical matter is that boats need to be anchored when undertaking these activities (just like they need to be launched and landed for these activities). This is the basis for seeking the PCR for tauranga waka to 12 nautical miles.

[179] Counsel submitted that the consequence of accepting the Attorney-General's objection to their evidence would be that applicants would be encouraged to draw arbitrary lines not based on the parameters of the actual activity that the PCR is based on.

[180] I am of the view that MTT have mapped an area that goes far beyond what the Court awarded at Stage One. Firstly, the PCR was for the use of tauranga waka, being the launching of vessels, specifically at Arapaoanui and Tangoio. It did not extend to the practise of anchoring those vessels some way out to sea for the purpose of fishing. I accept that the primary function of the Stage Two process is to identify the precise boundaries of the orders granted to the applicants, and that applicants are entitled to file evidence for that purpose, but that does not extend to doing so in a manner that conflicts with the Court's findings. In any event, the evidence filed by MTT at Stage Two established that at most, the practise of anchoring vessels for the purpose of fishing occurs at a distance of three nautical miles. That does not accord with the map filed by MTT which seeks a seaward boundary of 12 nautical miles. Further, the practise of anchoring vessels for the purpose of fishing would appear to fall within the definition of 'fishing' contained in the Fisheries Act 1996. It is accordingly a practise that is unable to be included within a PCR order.

[181] The seaward boundary for MTT's tauranga waka PCR should be MLWS, and the maps filed by MTT should be amended on that basis. In addition, similarly to the PCR for tauranga waka awarded to Ngāti Pāhauwera, the Court anticipated that MTT's PCR for tauranga waka would be mapped by reference to precise locations. The Court determined that those precise locations would be at Arapaoanui and Tangoio, specifically. The maps filed by MTT are also to be amended to reflect that finding.

[182] A PCR for non-commercial whitebaiting was awarded to MTT at the Arapaoanui River, the Waikari River, and the Te Ngarue Stream where they are within the marine and coastal area. MTT have mapped these areas as having seaward boundaries out to 50 metres from MLWS, and landward boundaries that extend out to 300 metres either side of the banks of those Rivers and the Stream. Again, the Attorney-General took issue with the way in which MTT had mapped this PCR and the evidence presented in respect of it at Stage Two.

[183] As above, I am of the view that the way in which MTT have mapped their whitebaiting PCR goes beyond the findings of the Court at Stage One, which were clear. The draft order and map must be amended to reflect the Court's findings, being the areas of the Arapaoanui River, the Waikari River, and the Te Ngarue Stream where they are within the marine and coastal area. The seaward boundaries of these areas are to be MLWS. The landward boundaries are to be the areas of those waterways that are within the takutai moana, and not extending beyond the banks of those waterways.

[184] PCRs are not required to be mapped to the same standard as CMTs. However, the boundaries of MTT's whitebaiting PCR will be able to be adequately recorded on a survey plan through the use of irregular lines representing moveable boundaries, notwithstanding the fact that the mouths of the relevant waterways may move. As noted, there is no need to specify in a draft order that any particular boundary is moveable.

[185] Finally, the Attorney-General submitted that the draft order does not currently reflect the fact that MTT were only awarded PCR for non-commercial whitebaiting, in accordance with the prohibition on activities regulated under the Fisheries Act 1996. I accept that submission. The draft order must also be amended to reflect the fact that the whitebaiting PCR is on a non-commercial basis.

[186] MTT were awarded a PCR for the gathering of sand, driftwood, rocks, stones, shells, and pumice, between Keteketerau and Waikare. MTT have mapped this area, with a seaward boundary of 50 metres below MLWS, and including the beds of rivers that are within the takutai moana. The seaward boundary was proposed as 50 metres

below MLWS so as to be consistent with the area for the PCR for the collection of seawater.

[187] The Attorney-General submitted that there was no evidential basis for a seaward boundary out to 50 metres from MLWS in respect of this PCR. I agree. Accordingly, the seaward boundary is to MLWS.

[188] MTT were awarded a PCR for the collection of Karengo at Arapaoanui and Waipātiki out to 500 metres below MLWS. The draft order and map filed by MTT appears to reflect the Court's findings at Stage One, with the exception of the references made to the airspace, subsoil, bedrock, rocks and reefs as discussed above.

[189] In respect of this PCR, the Attorney-General submitted:

> …This PCR activity should be limited by the statutory exclusion under s 52(2) of the Act so far as the PCR activity is regulated under the Fisheries Act 1996.
>
> Section 51(2) of the Act prevents a PCR being recognised for any activity, use or practice that is regulated under the Fisheries Act 1996. Seaweed is regulated under the Fisheries Act 1996 through the definition of 'fishing', However, the Fisheries Act 1996 does not regulate "seaweed of the class Rhodophyceae while it is unattached and cast ashore". The draft PCR order should therefore reflect the statutory exclusion under the Act and note that it only relates to collecting karengo in so far as it is for Rhodophyceae while it is unattached and cast ashore (to an area extending 500m beyond MLWS).

[190] I agree. The draft order should be amended to specify the statutory exclusion of the collection of seaweed contained in the Fisheries Act.

**PCR – Ngāti Pārau**

*What was recognised at Stage One?*

[191] At Stage One, Ngāti Pārau were awarded a PCR for:[78]

> (i) carrying out kaitiakitanga practices relating to managing and supporting the health of the marine environment through the application area out to 5km.

[78] At [599(c)].

[192] The Court stated:[79]

> It is apparent that Ngāti Pārau have exercised kaitiakitanga since 1840. A number of witnesses described practicing kaitiakitanga over historically and culturally important locations within the application area, such as Pania Reef and the Ahuriri Estuary, particularly through protecting and managing fish stocks and restoring resources.
>
> This practice has continued into modern times. For example, Rapihana Te Kaha Hawaikirangi deposed that Ngāti Pārau whānau were continuously engaged in monitoring activities over the marine environment, including through trustees of the Ngāti Pārau Hapū Trust attending marine monitoring events such and relocating mahinga kai species from port development areas, and maintaining and checking turbidity buoys over Pania Reef. In his previous work with the Department of Conservation, Mr Hawaikirangi recalled the hapū being called upon to undertake karakia, open events, or take guided tours in the Ahuriri estuary or coastal area during planting or conservation days.
>
> …
>
> Although the practice of kaitiakitanga has evolved, the evidence indicates that it still appears to be practiced in accordance with tikanga. Consequently, I consider that a PCR over kaitiakitanga practices relating to managing and supporting the health of the marine environment through the application area out to 5km is appropriately granted.

*Consistency of draft order with Stage One Findings*

[193] Ngāti Pārau's draft order describes their PCR order as:

> Carrying out kaitiakitanga practices relating to managing and supporting the health of the marine environment through the application area out to 5km, includes:
>
> (i) Within historically and culturally important locations such as Pania Reef, Ahuriri Estuary, Te Taha, Te Pakake, Taipo stream, [Te] Umu Roimata, Te Wai Rongoa, The Waka Landing Site, Rangatira Reef, Te Karaka, Town Reef, Te Upokopoito, Awatoto, Waitangi;
>
> (ii) Protecting and managing fish stocks and restoring resources to support the health of the marine environment;
>
> (iii) Monitoring mahinga kai species and involvement in relocation of mahinga kai species;
>
> (iv) Monitoring the effects of natural events on mahinga kai;
>
> (v) Involvement in events for planting, clean up or flora and fauna conservation;
>
> (vi) the exercise of rāhui.

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79 At [592]–[594].

[194] The Attorney-General took issue with a number of these activities. Ms Roff submitted that as a right exercised under a PCR must relate to a physical activity or resource, the reference to "kaitiakitanga practices relating to managing and supporting the health of the marine environment", is not specific enough. She says that the draft order names locations that do not match the areas mapped by Ngāti Pārau, and are outside Ngāti Pārau's application area, or not within the takutai moana, and that these areas should be removed.

[195] Ms Roff submits that the practise of rāhui to the exclusion of third parties is only capable of being imposed in accordance with the Act where provided for by wāhi tapu conditions in a CMT order. She says further that:

> Ngāti Pārau is seeking as part of its [kaitiakitanga] practices, the protecting and maintaining of fish stocks and monitoring and relocation of māhinga kai species. This PCR activity is excluded from being recognised as a PCR by s [51(2)] of the Act as it is regulated under the Fisheries Act 1996.
>
> Under the Fisheries Act 1996, fishing means "the catching, taking, or harvesting of fish, aquatic life, or seaweed"; and includes "any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed"; and "any operation in support of or in preparation for any activities described in this definition".

[196] Ngāti Pārau's evidence and submissions at Stage Two did not appear to dispute or otherwise address the Attorney-General's views on these matters. Instead, their closing submissions simply noted, "There is no dispute in relation to this area".

[197] Turning now to an assessment of Ngāti Pārau's draft order. I accept the Attorney-General's submission that the phrase "kaitiakitanga practices relating to managing and supporting the health of the marine environment" without more lacks specificity, and potentially raises issues in terms of certainty and enforcement. Accordingly, the approach Ngāti Pārau has taken by specifying certain activities under a broader heading of 'kaitiakitanga practises' is to be commended. However, there are some issues with Ngāti Pārau's draft order as it stands.

[198] Firstly, the area to which the PCR order is to apply appears to broadly coincide with the map filed with Ngāti Pārau's original application, and extends only out to the five kilometres specified in the Stage One judgment. That includes Pania Reef, Ahuriri

Estuary, Rangatira Reef, Hardinge Reef and Town Reef. In order to identify the other locations listed, I have had regard to the evidence filed by Ngāti Pārau at Stage One. The Waka Landing Site is located inside the Ahuriri Estuary, within the takutai moana, and is able to be included within the PCR order. However, according to maps filed at Stage One, Te Pakake, Te Taha, Te Karaka, and Te Wai Rongoa appear to be located outside of the takutai moana, being on dry land in the area around Napier Port and the Ahuriri Estuary. Although, I note that Te Taha was described as a mahinga kai by Rapihana Hawaikirangi at Stage One, and that accordingly it is likely to be in the takutai moana.[80] Te Pakeke was described as an island near the Ahuriri harbour mouth.[81] It would then appear to fall outside of the takutai moana. Te Karaka was described as a point where whānau would fish from. [82] It is unclear from that description whether it is in or outside of the takutai moana. Te Wai Rongo was described as a place where "whānau would go to heal their wounds as it is a safe and easy location to access the beach".[83] Again, it is unclear whether Te Wai Rongo is within the takutai moana.

[199] Similarly, Te Upokopoito and Awatoto appear to be located on dry land on the coast south of Napier Port. In respect of Te Upokopoito, Mr Hawaikirangi said:[84]

> Te Upokopoito was the traditional name for the spit which [runs] from Mataruahau south to Awatoto. Today Marine Parade and the start of Highway 51 runs along this same area. Snapper and kahawai are caught along this spit, tuatua are also present. Access to the sea along this section is very dangerous.

[200] As above, the reference to Te Upokopoito being a spit, implies that it is not located in the takutai moana. Although I assume Ngāti Pārau intend the PCR to apply to the area in the takutai moana in front of the spit, that was not the way in which Te Upokopoito was mapped. Awatoto was said to be a section of beach known for plentiful fishing, it may therefore be in the takutai moana.[85]

[201] As to Waitangi, Mr Hawaikirangi described it as a large Pā site where the Treaty of Waitangi was signed, and "the mouth and estuary of three large rivers, the

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80 Affidavit of Rapihana Hawaikirangi, 11 August 2020 at [22(c)].
81 At [22(d)].
82 At [22(m)].
83 At [22(g)].
84 At [22(p)].
85 Above n 80, at [22(q)].

Karamu/Clive, Ngarururoro and Tūtaekurī".[86] However, Ngāti Pārau did not distinguish in their maps between the Pā site and the river mouths/estuary, and the Pā site is unlikely to be located within the takutai moana.

[202] Te Umu Roimata was not identified on any maps by Ngāti Pārau, but was said to be a canoe landing and Pā site within the area of Ngāti Pārau's authority in the Ahuriri estuary in the historical report prepared by Martin Fisher for the Stage One hearing. Mr Hawaikirangi confirmed that.[87] On that basis, Te Umu Roimata would also appear not to be within the takutai moana.

[203] Finally, as to the Taipo stream, Mr Hawaikirangi said that it was:

> a fresh water stream which is fed from springs that start in the hills by Pukekura or Sugar Loaf Hill. The stream continues to be an important habitat for mahinga kai species, namely short finned tuna. White bait species are also prolific in the Taipo and [it] is an important spawning area. However, caution is taken when harvesting kai in the Taipo because the impact from paru (pollution) running from the residential area is a risk.

[204] The Taipo stream appears to be located some way inland from where State Highway 2 crosses the Ahuriri Estuary, and is therefore not within the takutai moana. It is unable to be included within Ngāti Pārau's PCR order. Ngāti Pārau's draft order must be updated to include only locations that are clearly within the takutai moana. Ngāti Pārau is to provide the Court with clear maps depicting that the locations they seek to include within the PCR order, are within the takutai moana.

[205] As submitted by Ms Roff, the following activities appear to be excluded from inclusion in Ngāti Pārau's PCR order:

(a) protecting and managing fish stocks and restoring resources to support the health of the marine environment; and

(b) involvement in relocation of mahinga kai species.

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86 At [22(r)].
87 At [22(f)].

[206] Section 51(2) of the Act provides that a PCR does not include an activity that is regulated under the Fisheries Act 1996. Fishing is defined as "the catching, taking, or harvesting of fish, aquatic life, or seaweed", including "any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed", and "any operation in support of or in preparation for any activities described in this definition". Therefore, the activities listed above must be removed from Ngāti Pārau's draft order.

[207] However, my view is that the monitoring of mahinga kai species, and the monitoring of the effects of natural events on mahinga kai are activities that fall outside of the definition of fishing, and may accordingly be included in Ngāti Pārau's PCR order. The same can be said for "involvement in events for planting, clean up or flora and fauna conservation", where those activities relate to flora and fauna that are within the takutai moana.

[208] As the Court has previously stated, the exercise of rāhui in a manner that is enforceable pursuant to the Act, as distinct from in tikanga, is a practise that may only be awarded in respect of wāhi tapu areas within a CMT order.[88] It is not a right that crystallises on an award PCR. While Ngāti Pārau may continue to impose rāhui in accordance with tikanga within their customary area, any reference to the practise in their PCR order must be removed.

*General comments on PCRs*

[209] Both the Hawkes' Bay Regional Council and the Attorney-General submitted that it would be useful for the applicants to specify in their PCR orders that they are required to be exercised in accordance with tikanga. I agree, that would be an appropriate matter for all successful applicants to include as a limitation on the scale, frequency and extent of their PCR orders.

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88 *Re Edwards (No. 2),* above n 10, at [387]–[389].

## PART IV

## Conclusion

[210] Accordingly, as in the *Re Edwards* Stage Two decision, the Court is not currently able to finalise any of the recognition orders. The findings and observations set out in this decision are intended to address the issues that have arisen in relation to the maps and draft orders filed by the parties. There is some uncertainty that still needs to be addressed, so as to allow for the filing of draft orders and maps that are compliant with the Act. I note that where further information has been requested by the Court, any further information filed must be limited to filling the gaps identified by the Court, and must be explicit in doing so.

[211] 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 Napier, by VMR, or by a combination of those means.

[212] I expect all successful applicants to have filed and served the required additional information identified in this decision no later than one month 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 no later than one week prior to the CMC.

[213] I anticipate that, following the CMC, the recognition orders can be made on the papers on the basis of the further information supplied.

**Churchman J**

Solicitors:
Smail Legal Ltd, Auckland for Ngāti Pāhauwera
DLA Piper, Wellington for Maungaharuru-Tangitū Trust
Kāhui Legal, Wellington for Ngāti Pārau
Tamaki Legal Ltd, Auckland for Ngāi Tahu ō Mōhaka Waikare
Crown Law Office, Wellington for Attorney-General

Lyall& Thornton, Auckland for Mana Ahuriri Trust
Simpson Grierson, Wellington for Hawke's Bay Regional Council
Chapman Tripp, Wellington for Seafood Industry Representatives

cc: Martin Williams, Barrister, Napier for Pan Pac Forest Products Limited