IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-817
CIV-2017-485-185
CIV-2017-485-299
CIV-2017-485-262
CIV-2017-485-377
CIV-2017-485-253
CIV-2017-485-292
CIV-2017-485-355
CIV-2017-485-201
CIV-2017-485-196
CIV-2017-485-270
CIV-2017-485-272
CIV-2017-485-269
CIV-2017-485-238
[2023] NZHC 1618

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER	applications for recognition orders for Customary Marine Title and Protected Customary Rights

Hearing: 24 April 2023

Counsel:
B Cunningham for Te Whakatōhea (CIV-2011-485-817)
T Castle for Ngāi Taiwhakaea (CIV-2017-485-185)
A Sykes for Ngāti Ira o Waiōweka (CIV-2017-485-299)
C Panoho-Navaja and J Alexander for Ngāi Tamahaua (CIV-2017-485-262) and Te Hapū Titoko o Ngāi Tamahaua (CIV-2017-485-377)
T Bennion and O Ford-Brierley for Ngāti Patumoana (CIV-2017-485-253)
K Feint KC and S Fletcher for Ngāti Ruatakenga (CIV-2017-485-292)
K Ketu for Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)
B Lyall and H Swedlund for Te Ūpokorehe Treaty Claims Trust (CIV-2017-485-201)
H K Irwin-Easthope for Te Rūnanga o Ngāti Awa (CIV-2017-485-196)

E Rongo for Ngāi Tai (CIV-2017-485-270) and Ririwhenua Hapū (CIV-2017-485-272)
A J Sinclair and B Cunningham for Whakatōhea Kotahitanga Waka (CIV-2011-485-817)
M Sharp for Ngāti Muriwai Hapū (CIV-2017-485-269)
C Leauga for Te Whānau a Harawaka (CIV-2017-485-238)

Interested parties:
R Roff and C Barnett for Attorney-General
R Boyte for Bay of Plenty Regional Council
T Waikato for Ōpōtiki District Council and Crown Regional Holdings Ltd
T Greensmith-West for Whakātane District Council
Seafood Industry Representatives (no appearance)

Judgment: 27 June 2023

JUDGMENT (NO.8) OF CHURCHMAN J
[Re Edwards (Whakatōhea Stage 2]

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Introduction

[1] In the *Re Edwards Stage 2* judgment, the successful applicants were directed to address a number of matters, with some to file further material, to be dealt with at

a case management conference (CMC) in April 2023.[1] The Court, over optimistically as it has turned out, expressed the view that following that CMC, the recognition orders granted to successful applicant groups would be able to be finalised.[2]

[2] All successful applicants' counsel reported difficulties being experienced in finalising the recognition orders for customary marine title (CMT) and protected customary rights (PCR) that had been awarded to the various successful applicant groups.[3]

[3] Some meaningful progress was able to be made in respect of the clarification of PCRs and wāhi tapu, but continued delays in respect of the preparation of compliant and accurate survey maps have frustrated the finalisation of the recognition orders. Little progress has been made in formalising a structure or entity to hold the CMT orders on behalf of the successful applicants in respect of CMT 1 and CMT 2.

[4] A further impediment to the finalisation of the joint CMT orders is that some applicants have approached the drafting of aspects of the orders, particularly in relation to matters such as wāhi tapu sites and the protections they might require, on the basis that they are able to unilaterally control the content of the joint CMTs. Where other successful joint applicant groups do not agree with what is proposed, the parties need to resolve the differences between themselves and present a proposal in relation to matters such as wāhi tapu sites and the protections required for them, which all of the applicant groups awarded joint CMT agree on.

Issues arising

[5] The issues addressed in this decision are:

(a) the lack of progress made on the preparation of survey plans for the CMT orders;

(b) Ngāti Rua's updated draft PCR order and wāhi tapu protections;

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1 *Re Edwards (Te Whakatōhea No. 7)* [2022] NZHC 2644 [Stage 2 judgment].
2 At [546]–[548].
3 See *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 [Stage 1 judgment].

(c) Ngāti Ira's updated draft PCR order;

(d) Ngāi Tamahaua's updated draft PCR order and wāhi tapu protections;

(e) Ngāi Tai's further evidence on their proposed wāhi tapu protections;

(f) Te Uri o Whakatōhea Rangatira Mokomoko's updated draft PCR order and maps;

(g) Ngāti Muriwai's updated draft PCR order; and

(h) Te Ūpokorehe's further evidence regarding wāhi tapu, updated wāhi tapu maps, updated draft PCR order, and PCR maps.

Joint memorandum of counsel

[6] On 14 April 2023, counsel for Te Ūpokorehe filed a joint memorandum of counsel on behalf of the successful applicants.

[7] The memorandum records that the creation of survey plans for the CMT areas which meet the standard of survey determined for the purpose by the Surveyor-General remains an issue, because the Surveyor-General has not yet promulgated guidelines for that purpose. Counsel had however obtained a copy of the Surveyor-General's interim guidelines. Counsel indicated that more time was needed for the preparation of the survey plans for the finalisation of the CMT orders, and asked for a further six months to allow for the preparation of survey plans, and engagement between them to reach agreement on the holders of the CMT orders.

[8] An affidavit was provided from the surveyor engaged by the successful applicants, Ms Julia Glass, which identifies the difficulties encountered in the preparation of survey plans. Ms Glass lists as factors contributing to the complexity of the CMT orders, the legal requirements for survey, the lack of published guidelines, and the size of the areas involved.

The Attorney-General

[9] The Attorney-General filed a memorandum which also indicated that formalised guidance for survey plans remains unavailable to the parties. The Attorney-General stated:

(a) updated and more robust mapping guidelines have been drafted by the Surveyor-General, but that these are currently under review, and are anticipated to be available within the next two months;

(b) the Surveyor-General's interim guidelines have been shared with the parties;

(c) survey plan guideline development is still in the early stages, and that therefore Land Information New Zealand (LINZ) has proposed that any survey plans prepared by the applicants can be processed on an individual dispensation basis;

(d) the Surveyor-General has advised that a minimum of three months is likely to be required for the parties to resolve a number of complex issues, prepare survey plans, and have their survey plans approved by LINZ; and

(e) as a result, the parties are practically unable to comply with the timetable directions made in the Stage 2 judgment.

[10] On that basis, the Attorney-General supported the granting of an extension of time to the applicants for the filing of maps and survey plans in accordance with the directions made in the Stage 2 judgment.

What each party filed for the 24 April 2023 CMC

Te Ūpokorehe

[11] Te Ūpokorehe filed:

(a) an updated draft PCR order;

(b) three maps showing the PCR areas;

(c) a joint affidavit from Maude Edwards and Wallace Aramoana providing further evidence on wāhi tapu protections;

(d) a table of further evidence; and

(e) a map book of the wāhi tapu where recognition is sought.

Ngāti Ruatakenga

[12] Ngāti Rua filed updating information for their PCRs and proposed wāhi tapu protections. The Court was asked to make the PCRs as sought, and confirm that the wāhi tapu prohibitions and restrictions are in order, subject to finalised CMT survey maps. Ngāti Rua re-filed the maps that were provided for the Stage 2 hearing.

[13] Ngāti Rua submitted that wāhi tapu areas cannot be finally mapped or confirmed until the overall CMT survey plans are complete. Counsel say that any other approach would risk the creation of wāhi tapu areas with insufficient certainty, thereby undermining the findings of the Stage 2 judgment.

Ngāi Tamahaua and Te Hapū Tītoko o Ngāi Tama

[14] Ngāi Tamahaua filed a further affidavit by Ms Tracey Hillier responding to the requests for further particularisation in the Stage 2 judgment. It addressed both PCRs and wāhi tapu. Counsel sought an extension to file further maps when they become available, and filed a number of maps relating to their PCRs. Such leave is granted.

[15] Counsel for Ngāi Tamahaua sought clarification in respect of the area awarded to them for their PCR for kaitiakitanga activities in the takutai moana. They submitted that it was unclear whether that PCR extends beyond Tarakeha to Te Rangi.

[16] Ngāi Tamahaua has been unable to run an appropriate tikanga process for nominating a replacement for the late Mr Hetaraka Biddle as hapū representative to be included as a holder of their recognition orders.

Ngāti Ira o Waiōweka

[17] Ngāti Ira filed updated draft PCR orders. Counsel asked the Court to make the PCRs as sought, but noted that final PCR maps have not yet been provided to them, and sought leave to file them as soon as they are available. Such leave is granted.

[18] Ngāti Ira note that there was an error in the PCR orders originally sought – in that a PCR was sought for whitebaiting at the Waiaua River, rather than the Waiōweka River, and sought leave to amend their PCR accordingly. Counsel also raised an issue about their PCR for gathering sand off the mouth of the Waiōweka River. Counsel submitted:

> Finally, counsel acknowledge the submission for the Ōpōtiki District Council ("ODC") that the PCR for [gathering sand] off the mouth of the Waiōweka River may be affected by the redevelopment of the harbour. With respect, the geographic area remains the same whether or not the river mouth is subsequently closed. The PCR was granted for a geographic area and is not dependent on the river mouth remaining. If ODC is opposed to the PCR being granted (and it is not clear whether it is) an appeal should have been filed against the Court's original judgment, when the PCR was first granted. No such appeal has been filed, and such an appeal is very out of time.

[19] The resolution of this issue depends on whether, following completion of the harbour development project, the area in question remains in the takutai moana.

[20] Ngāti Ira supported the granting of further time for the finalisation of the CMT survey plans.

Ngāi Tai

[21] Counsel for Ngāi Tai filed further evidence providing information requested in the Stage 2 judgment. They have been unable to file maps depicting their wāhi tapu on a surveyed area of CMT 3, owing to the delays caused in preparation of survey plans. They seek leave to file their maps when they become available – but have

provided no indication of when that might occur. Such leave is granted. The maps are to be filed as soon as they are available.

Ngāti Awa

[22] Ngāti Awa filed no further evidence. However, counsel noted that no agreement has been reached on the appropriate holder of the Ōhiwa Harbour Joint CMT. Counsel submit that the two hapū nominated to represent Ngāti Awa on the Ōhiwa Harbour CMT are the appropriate bodies to do so, and sought that the Court confirm this. Ngāti Awa prefers not to nominate two individuals from those hapū to represent Ngāti Awa, and its preference is for those hapū collectively to hold the title.

[23] The issuing of a CMT creates rights that are legally enforceable. However only an entity that has legal personality can enforce legal rights. Identified individuals have legal personality as do companies, incorporated societies, statutory boards, incorporated trusts, or in some circumstances the holders of offices created by statute.[4] If the two hapū that Ngāti Awa wish to hold the joint CMT are a form of incorporated entity (including an incorporated trust), there is no difficulty with them being nominated as the relevant legal entity to hold the joint CMT, but there is no information before the Court to establish that is the case at the present time.

[24] In support of her submission that an entity that did not have legal personality could be the holder of a CMT, Ms Irwin-Easthope referred to a statement by Mallon J in *Re Tipene* that "… a holder of a customary marine title order can be more than one legal entity or person…".[5]

[25] The use of the words "legal entity or person" do not support the contention advanced. They do not mean that a group that does not have legal personality could hold CMT. In *Re Tipene,* the Attorney-General had submitted that the holder of a CMT could only be an individual person not multiple people.[6] Mallon J rejected that proposition.

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4 See *Re Tipene* [2017] NZHC 2990, [2018] NZAR 150 – where the holders of the statutory office of "supervisor" under reg 6 of the Tītī (Muttonbird) Islands Regulations 1998 were appointed as holders of the CMT.

5 At [28].

6 *Re Tipene*, above n 4, at [13(d)].

[26] The words at the start of the paragraph containing the passage relied on by Ms Irwin-Easthope set out her reasoning:[7]

> The holder can therefore be the applicant group if that is appropriate in the circumstances, and that group may be more than one person. Of, if the applicant group wishes to appoint a holder of a customary marine title order, they may appoint *a legal entity or entities, or a natural person or persons*.
>
> (emphasis added)

[27] There is no doubt that a hapū can be an "applicant group".[8] But here, the "applicant group" was Ngāti Awa, not either Ngāti Hokopū or Wharepaia. Applying Mallon J's reasoning, if the applicant group is not itself to be the holder, the nominated holder must be a legal entity or entities, or a natural person or persons.

[28] Ngāti Awa raised an issue in relation to the unilateral action taken by Te Ūpokorehe in relation to wāhi tapu and wāhi tapu protections. They commented on the further material filed by Te Ūpokorehe in relation to wāhi tapu in the Ōhiwa Harbour:

> Te Ūpokorehe has filed further evidence on a number of sites within Ōhiwa Harbour, including three sites (Te Araioio o Panekaha, Te Karamea Pā and Paripari Pā) which overlap with the wāhi tapu protection right sought by Ngāti Awa in the common marine and coastal area surrounding Uretara Island (and which is currently subject to appeal). Further, both Karamea and Paripari Pā are of significance to Ngāti Awa, as recognised in the Statutory Acknowledgement for Uretara Island in Schedule 9 of the Ngāti Awa Claims Settlement Act 2005.
>
> (footnotes omitted)

[29] These issues are addressed below.

Crown Regional Holdings Limited and Ōpōtiki District Council

[30] In the Stage 2 judgment, the Court directed Crown Regional Holdings Limited (CRHL) and the Ōpōtiki District Council (ODC) to provide the applicants with an accurate map of the area of the Harbour Redevelopment Project. An updated map has now been filed and provided to the applicants. Counsel note that the Harbour Redevelopment Project is nearing completion, at which time a survey of the

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7 At [28].
8 Marine and Coastal Area (Takutai Moana) Act 2011, s 9(1)(a).

reclamation area will be undertaken, and that information will also be provided to the applicants. Counsel support the request for an extension of time for the filing of maps and survey plans by the applicants.

Te Uri o Whakatōhea Rangatira Mokomoko

[31] Te Uri o Whakatōhea Rangatira Mokomoko filed updated PCR orders and maps for the Court's approval, in line with the findings of the Stage 2 judgment. Counsel note:

(a) their maps have been prepared by Ms Glass and therefore are subject to the same reservations as expressed in relation to the CMT mapping; and

(b) they are wary of the confirmation of their PCR areas in the absence of certainty in relation to the location of wāhi tapu areas, and that it therefore it may be more appropriate for PCR orders to be confirmed when final CMT and wāhi tapu maps are available.

Bay of Plenty Regional Council

[32] Counsel for the Bay of Plenty Regional Council (BOPRC) supported the extension sought by the applicants to allow for survey issues to be addressed.

[33] The BOPRC remained concerned that the updated PCR orders filed lack sufficient detail, and/or include inappropriate matters. Counsel submitted:

> Given the importance of these orders and the need for an appropriate level of clarity in order to fulfil its statutory obligations in relation to them, the Regional Council would respectfully seek a similar opportunity to provide written comments on the proposed wording in the orders prior to these being finalised and sealed. The Regional Council is also happy to engage directly with the applicants to discuss the proposed PCR orders and wāhi tapu conditions if the Court agrees that further refinement and clarity is required.

Whakatāne District Council

[34] The Whakatāne District Council (WDC) adopted largely the same position as the BOPRC. Counsel supported the BOPRC's request to have an opportunity to make further comments on the PCR orders prior to them being sealed.

Te Whānau a Apanui

[35] Te Whānau a Apanui supported the extension sought by the applicants and commented specifically upon the content of draft PCRs filed by Ngāti Rua and Ngāti Ira. Counsel sought clarification from the Court as to whether Ngāti Rua and Ngāti Ira's PCRs are confined to the area over which they were awarded CMT or whether they extend to an area that includes the 12 nautical miles surrounding Whakaari. Counsel sought this clarification as a result of the maps filed by Ngāti Rua and Ngāti Ira for the CMC and the way their PCRs are described in their draft orders.

Ngāti Muriwai

[36] Ngāti Muriwai have filed an updated draft PCR order, and seek leave to file maps when they are available, following the finalisation of the other maps still to be prepared. Such leave is granted.

Analysis

General matters

[37] It is clear that insufficient progress has been made so as to enable the finalisation of the recognition orders at this stage. This is particularly so as the applicants have not yet obtained survey maps for the CMTs awarded that are compliant with the Court's directions. It was anticipated that the recognition orders in their entirety would be able to be finalised at this time. However, the point at which that can occur has not been reached. A key factor in this delay has been the lack of formalised guidance from the Surveyor-General. It is clear that the Court has no option other than to allow further time for the parties to prepare the required items for the finalisation of the recognition orders.

[38] Therefore, I will provisionally schedule a further CMC at least eight months from the release of this decision. Again, I anticipate that at that time, the recognition orders will be able to be finalised. However, I note that the individual dispensation process discussed in the Attorney-General's memorandum remains available to the parties should they wish to pursue that option. It is also the Court's preference that prior to next CMC, the parties will have engaged kanohi ki te kanohi in accordance

with tikanga to try and come to an agreement on who the holders of the relevant joint CMT order will be. In the absence of agreement, the Court is likely to determine that issue on the basis of previous indications.[9]

PCR mapping issues

[39] As a result of the absence of survey plans at this stage, there is little utility in making findings on the provisional maps filed by the applicants, because there may need to be further changes made once survey plans are available. However, there are a few matters the Court can usefully comment upon.

[40] Firstly, as identified by Te Whānau a Apanui, the maps filed by Ngāti Rua and Ngāti Ira for their PCR orders are inconsistent with the findings of previous judgments, particularly regarding findings that those PCR orders were not to include the area of the takutai moana out to 12 nautical miles around Whakaari.

[41] Ngāti Ira o Waiōweka filed maps for certain PCRs, gathering driftwood; gathering mud, rocks and shells from wetlands, estuarine margins and the sea and landing vessels and making passage that were inconsistent with the Court's findings in the Stage 1 hearing. The argument advanced by Ngāti Ira was that these rights were awarded "throughout their claimed area" and that this was their claimed area.

[42] The words "claimed area" used in the Stage 1 judgment to describe the area covered by these PCRs referred to the area depicted in the original map filed with the application. That map stopped at 12 nautical miles from the coastline.

[43] Ngāti Ira filed an amended map on 5 August 2020 which extended out to Whakaari and Te Paepae o Aotea.[10] In the Stage 1 judgment, I held that the amended map filed by Ngāti Ira (and a similar map filed on behalf of Ngāti Ruatakenga) amounted to impermissible extensions of claims and that it was too late for such amendments to be made.[11]

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9 See Stage 2 judgment, above n 1, at [549]–[551].
10 Stage 1 judgment, above n 3, at [471].
11 At [473].

[44] In addition, I also noted that the only evidence of activities around Whakaari and Te Paepae o Aotea related to the gathering of tītī at Whakaari and fishing in the sea around Whakaari and Te Paepae o Aotea.[12] I explained that such activities could not support an order for PCR because of the restrictions set out in s 52(2) of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) which excluded activities relating to fishing, as well as the taking of seabirds.[13]

[45] Ngāti Ira's map relating to these three PCRs will therefore need to be amended so that the area is limited to 12 nautical miles from the Whakatōhea coastline.

[46] Ngāti Ruatakenga were awarded PCRs which included recognition orders in respect of:

(a) collection of rongoā materials;

(b) performing baptisms; and

(c) customary rituals including tangihanga

all "within the claimed area".

[47] They have filed an identical map to Ngāti Ira showing the area for the exercise of these PCRs as extending out to Whakaari and Te Paepae o Aotea. The only difference between them and Ngāti Ira is that their original application attached a map which was triangular in nature with the apex being at Whakaari.

[48] My observations at [473] of the Stage 1 judgment that it was too late for such amendments to be made, also applied to this map. The specific factual findings I made reflected the fact that there was no evidence that the collecting of rongoā materials, performing of baptisms, or customary rituals, including tangihanga, occurred anywhere near Whakaari or Te Paepae o Aotea.

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12 At [474].
13 At [475], and [266]–[374].

[49] The reference to "the claimed area" in the Stage 1 judgment is to the area identified by the Court where the PCR activities actually took place. As set out at [474] and [475] of the Stage 1 judgment, this does not include the area around Whakaari or Te Paepae o Aotea. The map must be amended accordingly.

[50] Secondly, both Ngāti Rua and Ngāti Ira allege that the Court incorrectly recorded in the Stage 2 judgment that they had not provided, at that stage, maps and/or diagrams representing the location of their PCRs. This was not the case.

[51] The finding in respect of Ngāti Ira was "Ngāti Ira did not, as s 109 requires, file an adequate map or diagram."[14] Ngāti Ira's maps were on the Court file, but were inadequate for the purpose of s 109, and were not attached to their draft PCR order. The finding in respect of Ngāti Rua was that "The draft order contains the necessary information required by s 109 other than the necessary diagram or map".[15] This recorded that the maps filed by Ngāti Rua were not attached to their draft order, as is necessary.

Ngāti Rua

[52] The two restrictions Ngāti Rua seek (to equally apply to each wāhi tapu at the Waiaua River and Tirohanga Stream) are:

(a) no fishing or whitebaiting; and

(b) no consumption of food.

[53] In relation to the restriction on the consumption of food at either site, Ngāti Rua say:

> Food and drink are prohibited in a space that is tapu because the consumption of food and drink is noa. Noa and tapu must not be mixed: the tapu (sacred) versus the noa (profane). The mixture of food and drink as noa interferes with the spiritual wellbeing of the wāhi tapu. A dumping of food remains into the stream is both a spiritual and physical pollution of the stream and hence a detraction from its tapu.

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14 Stage 2 judgment, above n 1, at [495].
15 At [542].

[54] In relation to the restriction on fishing and whitebaiting at the Tirohanga Stream, Ngāti Rua say:

> The taniwha Tama-Ariki resides in Tirohanga Stream. He is a tīpuna of Ngāti Ruatakenga. People must not (and do not) fish or whitebait in the stream to respect the presence of the taniwha. Tama-Ariki is the source of the wāhi tapu and to comply with the tapu Tama-Ariki must be respected: it is the taniwha's area and his home, Te Rua a Tama Ariki. As fishing and whitebaiting are noa activities, they must not occur within the wāhi tapu as to do so is to disrespect Tama-Ariki.

[55] In relation to the restriction on fishing and whitebaiting at the Waiaua River, Ngāti Rua say:

> People must not (and do not) fish or whitebait in the wāhi tapu area within the Waiaua River. The site at Waiwhero within the wāhi tapu area is a battle ground where Whakatōhea fought Ngāi Tai. In the aftermath of the battle was as if the water ran red with blood. Kua tau te rangimarie: peace was made between Whakatōhea and Ngāi Tai after the battle and the site where the battle took place is sacred. Te Rangimatanui estuary runs alongside the ancient urupā of Ngāti Ruatakenga, Te Rangimatanui, on the eastern bank of the river. Rāhui whakaroto is another ancient urupā located on the western bank of the river. These urupā are very tapu because they are ancient and hold the remains of significant tipuna for Ngāti Ruatakenga. As fishing and whitebaiting are noa activities, they must not occur within the wāhi tapu as to do so is to disrespect the tapu that exist there.

[56] Counsel for Ngāti Rua opposed the grant of PCR for whitebaiting in this part of the Waiaua River.

[57] In the Stage 2 judgment, the Court concluded that a prohibition on fishing and whitebaiting was already observed in the relevant areas of the Waiaua River and the Tirohanga Stream, as a result of the tapu nature of those areas, and was a prohibition capable of being enforced.[16] That is accordingly a prohibition that may apply to those wāhi tapu areas. I am satisfied that prohibition may be included in the terms proposed by Ngāti Rua in the final CMT order for that area.

[58] Both Ngāti Muriwai and Mokomoko accepted that parts of the Waiaua River where they would otherwise exercise a PCR for whitebaiting rights were tapu and that the PCR could not be exercised in that part of the river that was tapu.

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16 Stage 2 judgment, above n 1, at [398].

[59] Until the CMT maps are finalised, they will not know whether there is a part of the Waiaua River that falls within the takutai moana but outside the area that is tapu. They reserved their respective positions on filing maps until that detail was available.

[60] I am also satisfied that Ngāti Rua have provided adequate reasons for the inclusion of the prohibition on the consumption of food in the same areas, as requested by the Court in the Stage 2 judgment.[17] There is no opposition from any of the other joint CMT applicant groups to the proposed wāhi tapu protections. As previously noted, provided an accurate map can be provided when the CMT survey plans are finalised, the prohibition on the consumption of food in those areas is also a prohibition that may be recognised in the final CMT order.

[61] I turn now to Ngāti Rua's PCR orders. In the Stage 2 judgment, Ngāti Rua was directed to remove references in their draft orders to activities which take place outside of the takutai moana, and to provide an accurate diagram or map.[18]

[62] There remain some issues with the terms of Ngāti Rua's draft order. In the Stage 2 judgment, the Court stated:[19]

> A PCR can only authorise activities which are "exercised in a particular part of the common marine and coastal area." Some of the activities set out in [9.3] and [9.4] of the draft order relate to activities that clearly take place somewhere other than the takutai moana such as planting native plants and pest control in [9.3] and setting stoat traps in [9.4]. These two paragraphs need to be rewritten so as to conform to the order actually granted and to delete reference to activities which do not take place in the CMCA.
>
> (footnotes omitted)

[63] The paragraphs at [9.3] and [9.4] of Ngāti Rua's draft order have not been amended. They therefore still include matters which the Court directed should be removed. Particularly:

(a) references to pest control and the setting of stoat traps should be removed;

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17 At [400].
18 At [541]–[542].
19 At [541].

(b) references to the planting of native plants, weed control, and any form of seaweed or aquatic life should be specified to note that such activities are only included within the order to the extent that they occur within the takutai moana, and only to the extent that their inclusion is permitted by reference to the Fisheries Act 1996 – in the event their inclusion is not permitted by the Fisheries Act, they should be removed; and

(c) the reference to rāhui at [9.5] should also be removed – as the Court has been clear that the practise of rāhui enforceable under the Act is a matter that is more properly an incident of wāhi tapu protections within a CMT order, rather than through PCRs.

Ngāti Ira o Waiōweka

[64] Ngāti Ira's updated draft PCR order largely incorporates the changes directed in the Stage 2 judgment.

[65] However, the sand gathering PCR at the Waiōweka River and the Waiōtahe River appears to have been extended from those locations to Ngāti Ira's entire rohe. That is an inappropriate change, when the Court's findings in the Stage 1 judgment in respect of the gathering of sand were limited entirely to the left side of the mouth of the Waiōweka River out into the takutai moana and also at Waiōtahe.[20] This change must be reversed.

[66] A further issue noted above that was not addressed in the Stage 2 judgment was Ngāti Ira's assertion that their PCR for whitebaiting was intended to be in the Waiōweka and Waiōtahe Rivers, rather than in the Waiaua and Waiōtahe Rivers. Notwithstanding that this change has not been consistently observed in the updated draft PCR – I am satisfied that it is appropriate to make this amendment on the basis of the error identified by counsel.

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[20] Stage 1 judgment, above n 3, at [538].

[67] Counsel raised also the issue of what effect the Court's conclusion that the Ōpōtiki Harbour redevelopment had substantially interrupted the applicant's exclusive use and occupation so as to make CMT in this area unavailable, had on the possibility of a grant of PCR for sand gathering and for whitebaiting in the area occupied by the Ōpōtiki Harbour redevelopment. A similar issue arises in relation to Ngāi Tamahaua's PCR for whitebaiting.

[68] In accordance with s 58(1)(b)(i) of the Act, any substantial interruption of exclusive use and occupation from 1840 to the present day will mean that CMT is not available. However, there is no corresponding "substantial interruption" provision in s 51, which governs PCRs. All that is required is that a PCR has been exercised since 1840 and continues to be exercised in a particular part of the common marine and coastal area (CMCA) in accordance with tikanga by the applicant group.

[69] A significant part of the Harbour redevelopment project involves the reclamation of land which was once part of the CMCA but now is not. Self-evidently, the right to gather sand no longer exists in the reclaimed area which, once reclaimed, ceases to be part of the takutai moana. Whether PCRs for activities like whitebaiting are affected by the Harbour redevelopment project is a question of fact. On the information presently available, the newly created artificial channel did not exist previously. If there was no channel previously at that location, whitebaiting could not have previously been undertaken at that precise location in the takutai moana. Until the final CMT maps are available, it is unlikely to be possible to depict exactly where whitebaiting will be able to continue at the entrance of Ōpōtiki Harbour and the final mapping of this PCR for both Ngāti Ira and Ngāi Tamahaua will have to wait until then.

[70] As noted above, the maps currently attached to Ngāti Ira's draft PCR order need to be amended.

Ngāi Tamahaua and Te Hapū Tītoko o Ngāi Tama

[71] In the Stage 2 judgment, Ngāi Tamahaua satisfied the requirements of the Act for the recognition of Kotukutuku/Puketapu, the Waiaua River and Tirohanga Stream (alongside Ngāti Rua) as wāhi tapu, and was directed to provide accurate maps for the

areas at Tai Haruru, Ōpēpē Stream, and Te Ana o Ani Karere. They were also directed to describe proposed restrictions or prohibitions and reasons for those areas, supported by evidence and capable of enforcement. Ms Hillier's affidavit addresses these matters.

[72] The prohibitions and restrictions that Ngāi Tamahaua seek to apply to their wāhi tapu were not contested by any other joint CMT applicant group. They are:

(a) Kotukutuku/Puketapu:

(i) no burials (including sea burials and ashes);

(ii) no dumping of rubbish or other waste;

(iii) no obstructions or erection of structures without authority of the CMT holders; and

(iv) the power to place rāhui when natural disasters, death, or accidents occur, or when a resource needs to be replenished.

(b) Ōpēpē Stream:

(i) no burials (including sea burials and ashes);

(ii) no dumping of rubbish or other waste;

(iii) no consumption of drugs or alcohol;

(iv) no interruption of the awa through digging, damming or diverting the flow of the awa, altering the level of the water or the dumping of sand, stone, silt or other materials;

(v) the power to place rāhui when natural disasters, death, or accidents occur, or when a resource needs to be replenished.

(c) Taiharuru:

(i) no burials (including sea burials and ashes);

(ii) no dumping of rubbish or other waste; and

(iii) the power to place rāhui when natural disasters, death, or accidents occur, or when a resource needs to be replenished.

(d) Te Ana o Ani Karere:

(i) no burials (including sea burials and ashes);

(ii) no dumping of rubbish or other waste; and

(iii) the power to place rāhui when natural disasters, death, or accidents occur, or when a resource needs to be replenished.

(e) Tirohanga Stream:

(i) no burials (including sea burials and ashes);

(ii) no dumping of rubbish or other waste;

(iii) no consumption of drugs or alcohol;

(iv) no interruption of the awa through digging, damming or diverting the flow of the awa, altering the level of the water or the dumping of sand, stone, silt or other materials;

(v) the power to place rāhui when natural disasters, death, or accidents occur, or when a resource needs to be replenished.

(f) Waiaua River:

(i) no burials (including sea burials and ashes);

(ii) no dumping of rubbish or other waste;

(iii) no consumption of drugs or alcohol;

(iv) no interruption of the awa through digging, damming or diverting the flow of the awa, altering the level of the water or the dumping of sand, stone, silt or other materials;

(v) the power to place rāhui when natural disasters, death, or accidents occur, or when a resource needs to be replenished.

[73] Ms Hillier notes in her affidavit generally that:

(a) the prohibition on burials is necessary to protect the wāhi tapu because human remains can have the effect of desecrating the mauri of the sites, and impact the tapu;

(b) the prohibition on the dumping of rubbish or waste is necessary to protect the wāhi tapu because such matters contaminate the mauri of the area and prevents the maintenance of the tapu, which is required for the performance of various cleansing rituals;

(c) the prohibition on obstructions and structures is necessary for the protection of the wāhi tapu because Ngāi Tamahaua kaitiaki need free passage to protect the mauri and lifeforce of the areas;

(d) the rāhui restriction is necessary for the protection of the wāhi tapu because rāhui allows the mauri of an area to be rebalanced, or a resource to be replenished;

(e) the prohibition on drugs and alcohol is necessary for the protection of the wāhi tapu because anything that changes the hinengaro (mind) of a person can bring negative forces into that space, and is necessary for respecting the tapu of an area; and

(f) the prohibition on the interruption of the awa is necessary for the protection of wāhi tapu because affecting the water flow affects the mauri and the life force of the river.

[74] I address each of these proposed prohibitions and restrictions in turn.

[75] As prefaced in the Stage 2 judgment, a prohibition on burials, sea burials, or the scattering of ashes at a wāhi tapu may be linked to the protection of the mauri of a wāhi tapu and restrictions may be necessary to achieve that protection.[21] Ms Hillier has now provided an appropriate evidential basis for the Court to recognise that burials and the scattering of ashes at a wāhi tapu would affect that tapu negatively, particularly in areas where pito are buried. Accordingly, a restriction on burials and the scattering of ashes applies at the sites to which Ngai Tamahaua seeks that restriction to apply to. The same can be said for the restriction on the dumping of rubbish and other waste in those areas.

[76] As to the prohibitions for the erection of structures or obstacles, or the interruption of the flow of the awa, I consider that such prohibitions are inappropriate. A CMT group has the right to prepare a planning document, and also a Resource Management Act 1991 permission right.[22] Those are rights that are held by a CMT group collectively, which in this case, includes all of the successful applicants for CMT 1 between Maraetōtara and Tarakeha.

[77] I consider that, Ngāi Tamahaua already has the right under the CMT order to effectively prohibit the construction of structures or obstacles or the interruption of the flow of awa within the CMT area, should a person or entity wish to carry out those actions, through the ordinary operation of the rights that flow from the CMT order. However, those rights must be exercised collectively by the CMT group, rather than through the application of wāhi tapu prohibitions.

[78] As noted above in respect of Ngāti Rua's proposed prohibitions and restrictions to apply at the Waiaua River and Tirohanga Stream, the placement of rāhui and the

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21 Above n 1, at [255].
22 See Marine and Coastal Area (Takutai Moana) Act 2011, ss 62(1)(a) and 62(1)(g).

prohibition of the consumption of food, alcohol, and drugs are prohibitions and restrictions that are linked to the protection of a wāhi tapu, and necessary for that purpose. They may accordingly apply to the wāhi tapu proposed by Ngāi Tamahaua.

[79] As to the direction to file an accurate map of Ōpēpē Stream, Taiharuru and Te Ana o Ani Karere, Ms Hillier annexed to her affidavit a Google Earth image depicting the required locations. While this image does not meet the standard required in the Act for certainty as to location, it does confirm that Taiharuru, and Ōpēpē Stream are identifiable locations within the takutai moana. The image is inconclusive as to whether Te Ana o Ani Karere is in the takutai moana – although I accept this may be because of the angle of the image. Ms Hillier indicates that clearer maps will be provided when the survey plan for the CMT orders is filed by the parties. As a result, at this stage, I consider that provisionally, I am satisfied that Ōpēpē Stream, Taiharuru and Te Ana o Ani Karere are within the takutai moana, and have boundaries that have been and/or will be able to be sufficiently identified with certainty upon survey plans.

[80] I turn now to addressing Ngāi Tamahaua's PCR orders.

[81] As to the clarification sought by counsel regarding the boundary of their PCR, I confirm that the boundary of their PCRs order for the exercising of kaitiakitanga activities in the takutai moana, and the gathering of indigenous plants and shells, is to be only between Maraetōtara and Tarakeha, and does not extend to Te Rangi. That was clearly set out at [511] of the Stage 2 decision. It is also clear from [669](d)(ii) of the Stage 1 decision which did not award Ngāi Tamahaua any PCRs east of Tarakeha.

[82] Ngāi Tamahaua filed a number of maps illustrating the locations of their PCRs on a survey plan. The maps appear to accord with the previous findings of the Court and accurately record the parts of the takutai moana where the PCRs are to apply. They may be accepted as appropriate and sufficient for the purposes of the Act, and the finalisation of Ngāi Tamahaua's PCR orders. However, Ngāi Tamahaua's PCR order is not to be confirmed or sealed until the time that the remaining mapping issues are resolved, given the need for matters such the precise boundary for the PCR for whitebaiting at the mouth of the Waioeka River to be addressed.

[83] Finally, given further time will be provided to the applicants, it is of no great importance that Ngāi Tamahaua have failed to date to appoint a second hapū representative. However, I expect that process to have been completed by the time of the next case management conference.

Ngāi Tai

[84] In the Stage 2 judgment, the Court was satisfied that Ngāi Tai had satisfied the requirements for the inclusion in their CMT order of wāhi tapu at Te Rangi, Tarakeha, Awaawakino and Te Toka a Rūtaia. However, the Court directed that Ngāi Tai provide maps that depicted those areas on a surveyed map of their CMT area, enabling the Court to have certainty as to their boundaries. The delay in producing the CMT survey plans means that Ngāi Tai have not yet obtained those maps.

[85] In respect of the prohibitions and restrictions sought by Ngāi Tai at Stage 2, the Court recognised the application of rāhui restrictions when appropriate, and said also:[23]

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

[86] In his affidavit filed for the April CMC, Mr Kelvin Tapuke indicated:

> 17. The reason Ngai Tai seek a prohibition on the processing of catch in their wahi tapū was because it will attract sea predators such as sharks in the area.
>
> 18. The reason Ngai Tai seek a prohibition on the purging of bilges in their wahi tapū [is] because it will pollute [and] possibly [destroy] the ecosystem of the area.

[87] Mr Tapuke also said that the broader reason for their proposed restrictions and prohibitions is to prevent activities that may affect the mauri of wāhi tapu. He made reference to the restrictions and prohibitions sought at the Stage 2 hearing, and provided further reasons as to why they were sought by Ngāi Tai.

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[23] Stage 2 judgment, above n 1, at [400].

[88] He said:

(a) a prohibition on burials, sea burials, or the scattering of ashes at a wāhi tapu is necessary to protect the mauri of the wāhi tapu, because doing as such is highly offensive and extinguishes the mauri ora that allows the gathering of kaimoana;

(b) prohibitions on the modification or destruction of a wāhi tapu, or the building of structures is necessary to protect the mauri of the wāhi tapu; and

(c) a prohibition of the consumption of food and drink at a wāhi tapu is necessary as performing such activities in tapu area makes it noa, thereby removing the sanctity of the area, causing imbalance and possible repercussions.

[89] For the reasons noted above:

(a) a prohibition on burials or the scattering of ashes may be included in the CMT order as a wāhi tapu protection;

(b) a prohibition on the consumption of food and drink at a wāhi tapu may be included in the CMT order as a wāhi tapu protection; and

(c) prohibitions on the modification or destruction of a wāhi tapu, or the building of structures may not be included in the CMT order as a wāhi tapu protection.

[90] Turning then to the two remaining restrictions proposed. I consider that a prohibition on purging of the bilges is logically linked to the protection of a wāhi tapu and the ecosystem that it supports, and is necessary for that purpose. It is also a prohibition that is capable of being enforced. It may therefore be imposed.

[91] It is less clear that a prohibition on the processing of catch (kaimoana) in that area is required to protect the wāhi tapu, or what negative effect the presence of ocean

predators would have on the tapu of the area. However, Ngāi Tai have provided their reasons for the addition of this prohibition on the basis that the presence of ocean predators in that area would, in tikanga, affect the tapu of that area in a negative way, and that this may be avoided by applying a prohibition on the consumption of catch in that area. Ultimately, I consider this prohibition is similar in kind to prohibitions against the consumption of food. It is certain, and amenable to enforcement. Accordingly, this restriction may be imposed in relation to Ngāi Tai's wāhi tapu.

Te Uri o Whakatōhea Rangatira Mokomoko

[92] Te Uri o Whakatōhea Rangatira Mokomoko filed a draft PCR order and maps. Their draft order is consistent with the Court's previous findings, and is therefore in a position to be finalised. However, Te Uri o Whakatōhea Rangatira Mokomoko's PCR order cannot be confirmed until the remaining mapping issues in this proceeding are resolved.

Ngāti Muriwai

[93] Ngāti Muriwai's updated draft PCR order has incorporated the directions of the Court in the Stage 2 judgment. There are however, two remaining issues. In his memorandum, counsel for Ngāti Muriwai stated:

> At paragraph 4.2 which relates to the areas in which the whitebaiting orders would apply subparagraph (a) is deleted which read "In the Marine and Coastal Area from a straight line across the banks at the Waiaua river mouth and upstream of the river by the distance of the river mouth x 5 (As marked 2 on the attached survey plan). This is pursuant to the directions at [487] of the Stage 2 Judgment.
>
> This amendment is made upon the basis as noted in the Judgment that the maps of the MACA areas produced by the Attorney-General indicated that the MACA area in the mouth of the Waiaua River ended below the Waiaua Bridge and the evidence provided on behalf of Ngāti Muriwai was that the hapu traditionally fished for whitebait upstream of that bridge. If however, the final mapping of the MACA area shows that the MACA area extends up the Waiaua River past the Waiaua Bridge then leave is sought to further amend the draft order to include that area past the bridge.

[94] It seems extremely unlikely that when the final maps are provided, they will reveal that the takutai moana extends past the Waiaua Bridge. As noted in the Stage 2 judgment, the bridge is located approximately 600-700 metres south of the mouth of

the river.[24] However, should the final CMT mapping indicate that the takutai moana extends past the Waiaua Bridge, I grant leave for this applicant to file an amended PCR map.

[95] Counsel also stated:

> His Honour has further commented at [476] of the Stage 2 judgment that the proposed terms of the PCR order did "not provide any meaningful description of the intended scale extent or frequency of the exercise of the proposed right. That information will need to be provided"
>
> With respect, Ngati Muriwai seek further directions as to the type of further information required by the Court.
>
> In this regard, under the proposed orders the PCRs are already subject to a set of detailed tikanga values which provide effective terms, conditions and limitations to the rights. Within these values it would seem to be difficult to provide exact detail of the scale, extent and frequency of when the group collects firewood, stones and shells or fishes for whitebait. It would also seem that the legislative intent is for the s 54(2)(b) restrictions to be ultimately tikanga based.
>
> It is also noted that a number of other applicant groups have similarly proposed restrictions on collection of material and whitebaiting that are solely based on tikanga values, where the court has not raised issues as to further information being required.
>
> It is accepted that other applicant groups have made their PCR rights entirely subject to relevant legal regulations applying to the public. However, as noted in the Ngāti Muriwai opening submissions for Stage 2, entirely adopting restrictions applying to the public would make the PCR orders token. Also, any adverse effect on the environment can be dealt with through controls imposed by the Minister of Conservation under s 54(2)(a).
>
> (footnotes omitted).

[96] Ngāti Muriwai's draft order currently records:

> 5. The terms, conditions, or limitations on the scale, extent, and frequency of the activities specified in the order are that the activities are to be carried out in accordance with the tikanga of Ngāti Muriwai including:
>
> (a) *Manaakitanga* in that the activities will be carried out for the benefit and support of the members of Ngāti Muriwai and others supported by them.
>
> (b) *Kaitiakitanga* in that the activities will be carried out in a way that respects the preservation and sustainability of the

[24] Stage 2 judgment, above n 1, at [397].

surrounding natural environment including not taking more of a resource than was required to meet current needs.

(c) Subject to any restrictions placed on accessing and taking resources in the areas under any *rahui* placed by mana whenua.

(d) Respecting any *wahi tapu* in the areas.

[97] I confirm that these are appropriate terms, conditions, and limitations on the scale, extent and frequency of the activities specified in the order. I accept that nothing more is required. However, I note that there is nothing token in recording in a PCR order that the rights contained therein are to be exercised in accordance with the law. Subsequent to the 24 April 2023 hearing, counsel for Ngāti Muriwai filed a memorandum proposing two additional provisions: that the words "The activities will not be carried out for commercial profit and purposes" at the end of [5](a) and that the words: "The activities will be carried out by hand and no machinery will be used" be inserted at the end of [5](b). Both additions are approved.

Te Ūpokorehe

[98] Te Ūpokorehe were directed to provide significant additional information in the Stage 2 judgment. They have provided a quantity of information. It is necessary to address that information in detail. In particular, concerns arise as to the approach taken to wāhi tapu and wāhi tapu protections in circumstances where other applicants who were jointly awarded CMT with Te Ūpokorehe have not agreed to what is proposed.

Wāhi tapu

[99] Te Ūpokorehe have provided a reduced list of wāhi tapu, all of which are located within the Ōhiwa Harbour, along with maps which clearly identify the claimed wāhi tapu. Wallace Aramoana and Maude Edwards commented in their joint affidavit that:

> …[Jimi Hills] worked alongside kaumatua to determine the location of the wāhi tapu and supplied us with draft maps. After a lot of work and redrafting we believe the maps show the area that is required for protection of the wāhi tapu as a minimum. Our knowledge holders felt that protections were needed

between the high and low water marks, because a lot of the wāhi tapu are being damaged through erosion caused by watercraft at high tide.

We are planning to work with the Council and DOC to put up signs and markers on the water so that members of the public know the exact location of the wāhi tapu sites when they are granted. We already have a dedicated resource management team, who will be appointed to act as wardens to continue the mahi that they are already doing to protect our rohe and our wāhi tapu.

It has been very difficult to leave so many of our wāhi tapu out of this process. We do not want the mana of our wāhi tapu to be diminished in any way. But we have accepted that the MACA Act is not the best way to get the protections for the majority of our wāhi tapu, and will use other pathways to protect them.

[100] The sites claimed by Te Ūpokorehe are:

(a) Te Unga Waka;

(b) Whitiwhiti;

(c) Paparoa and Paparoa Urupa;

(d) Taupari Urupa;

(e) Motuorei Point;

(f) Nga Kuri a Taiwhakea;

(g) Te Araioio o Panekaha;

(h) Te Karamea Pā;

(i) Paripari Pā;

(j) Te Motu;

(k) Te Tawai;

(l) Te Kopua o Te Pu;

(m) Tokitoki;

(n) Te Mika;

(o) Te Ana Pokia;

(p) Otakanui;

(q) Te Ana o Muru-te-kaka; and

(r) Te Karaka.

[101] I address each of these sites in turn but start by reminding Te Ūpokorehe that the right to identify and protect wāhi tapu flows from the award of CMT in the relevant area of the takutai moana. Te Ūpokorehe were not awarded their own CMT but a joint CMT with Whakatōhea hapū and Ngāti Awa. Where there is no agreement between all of those applicants who were jointly awarded CMT as to what areas are wāhi tapu and as to the protections that may be required to preserve and protect the wāhi tapu, one of the joint CMT holders cannot impose their views unilaterally on the others.

[102] Some of the other joint CMT holders have identified different wāhi tapu sites (particularly in Ōhiwa Harbour) or different protections.

[103] It was not clear to me the extent to which there as consensus as between the relevant joint CMT holders on these points. Therefore, those wāhi tapu identified by Te Ūpokorehe that I find meet the requirements of the Act for recognition, remain subject to there not being any opposition from the other joint CMT holders either as to the location of the CMT or the protections required.

[104] All of the joint CMT holders will need to discuss these issues prior to the next CMC. Ideally a joint memorandum of counsel will be filed one month prior to that CMC confirming that none of the joint CMT holders object to the depiction of the location of the wāhi tapu on the final maps or the proposed protections. If a joint memorandum is not possible, individual memoranda are to be filed identifying those wāhi tapu and/or protections that are not agreed.

[105] If the disagreements cannot be resolved at the CMC, the location of the relevant wāhi tapu sites and/or protections will not be able to be incorporated into the joint CMT.

Te Unga Waka

[106] Te Unga Waka is said to be the area between the high and low water marks where waka would be launched by Tairongo, below a pā site at Kawakoio. The tapu from the pā site, described as a very spiritual place where tribal discussions were held, is said to extend to the area were waka were launched – and that the tapu from the pā site extends into the takutai moana. Wāhi tapu protections for this area are sought by Te Ūpokorehe as "The site is being eroded and silted through development and use. Materials moved for roading have been placed into swamps which fill in the landing site. The site must be preserved to ensure its mauri is protected."

[107] An area from which waka are launched is typically within the takutai moana. Te Ūpokorehe have in this case, identified a linkage between the pā site and a concurrent use of the takutai moana. The map filed by Te Ūpokorehe identifies that Te Unga Waka is in the takutai moana, and sets out only the area between mean low water springs (MLWS) and mean high water springs (MHWS). This appears to therefore satisfy the requirement that a tapu extending from land into the takutai moana goes no further than is necessary.

[108] They seek wāhi tapu protections to prevent the erosion of the site and to ensure its mauri is protected. There are some difficulties with the proposed protections. Erosion is generally the product of forces of nature that the Court has no power to control. The same applies to silting, particularly where the silting is contributed to by activities undertaken outside the takutai moana.

[109] Attachment "A" to the further evidence dated 14 April 2023 supplied in support of the wāhi tapu claims says: "Materials moved for roading have been placed into swamps which fill in the landing site. The site must be preserved to ensure its mauri is protected".

[110] As to enforcement of conditions relating to this concern, it says: "Te Ūpokorehe wardens/kaitiaki will monitor and report". The document does not explain who they will report to or how they might enforce any breach of these conditions.

[111] Unauthorised reclamation, dumping or alteration of the coast is already legally prohibited.[25] The relevant territorial local authority (in this case the Bay of Plenty Regional Council) has the power to prosecute such action.

[112] As drafted, the proposed restrictions imply that Te Ūpokorehe have the power to approve alteration or destruction of the wāhi tapu site for the purpose of repair or maintenance of the wāhi tapu. This is in conflict with the relevant provisions of the Resource Management Act.

[113] The appropriate way of achieving Te Ūpokorehe's objectives would seem to be utilising the right conferred on a CMT group to prepare a planning document. Sections 88 to 93 of the Act detail the obligations of a Regional Council and other entities arising from the lodging of such a planning document.

[114] However, the right to prepare such a planning document is the right of the CMT group, of which Ūpokorehe is only one part. Co-operation in preparing the planning document will therefore be required between all of the joint CMT holders.

[115] For these reasons, although I can approve the location of the wāhi tapu as being accurately depicted on the supplied map, I cannot record the suggested restrictions.

Whitiwhiti

[116] Whitiwhiti is said to be where Te Ūpokorehe's tīpuna Kahuki lived. Again, Te Ūpokorehe seeks wāhi tapu protections for the area from MLWS and MHWS, which is said to be the area where Kahuki built and launched Ruaramaroa Waka. Protection is sought as "The site is being eroded and silted through development, boat wakes and use. The site must be preserved to ensure its mauri is protected." The map

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[25] See Resource Management Act 1991, s 12(1).

provided gives the Court certainty as to the boundaries of the proposed wāhi tapu, and is clearly within the takutai moana. There is a connection between the historical link to Kahuki and a use of the takutai moana. However, in relation to the proposed restrictions, the same observations apply as to Te Unga Waka. Therefore the area of the wāhi tapu can be recognised but not the proposed restrictions.

Paparoa Pā and Paparoa Urupa

[117] Te Ūpokorehe seek wāhi tapu protections for the areas between MLWS and MHWS in front of both Paparoa Pā and Paparoa Urupa. They have identified the boundaries of these areas in the maps filed. They say that the area in front of Paparoa Pā was a historic waka landing site for access to pā sites along the ridge, and that the area in front of Paparoa Urupa is tapu by association. Just as with the two sites discussed immediately above, they say each site is being eroded and silted through development and use, and that they must be preserved to ensure their mauri is protected.

[118] Te Ūpokorehe allege that tapu originating on land extends into the takutai moana. They have identified the basis for the tapu extending into the takutai moana at Paparoa Pā, by identifying a linkage between the tapu and a use of the takutai moana, and sufficiently identified boundaries.

[119] The position is less clear in respect of the urupa. However, I am prepared to accept that the urupa is an area with a tapu that is sufficient to extend into the takutai moana, on the basis of previous evidence regarding the discovery of koiwi in the Ōhiwa Harbour in modern times. Likewise, the boundaries for this wāhi tapu appear also to be no further than is necessary in accordance with the purposes of the Act.

[120] Accordingly, these sites may also be identified on the CMT order but for the reasons already discussed, the protections sought cannot be granted.

Taupari Urupa

[121] Taupari Urupa is described by Te Ūpokorehe in similar as terms as to Paparoa Pā and Paparoa Urupa:

> The coastline was a historic waka landing site [used] by Te Ūpokorehe ancestors to access pā sites on the ridge line. Wāhi tapu protections are sought at the Urupa site which is on the fringe of the foreshore, between the high and low water marks where there is a sand bank.

[122] The area identified on the maps filed shows that the area of the wāhi tapu is within the takutai moana, and presumably, out in front of the urupa. Restrictions are sought to prevent erosion and protect the mauri of the site.

[123] For the same reasons as the last three sites, this site can be identified on the CMT but the protections sought are unavailable.

Motuorei Point

[124] Motuorei Point is said to be a historic waka landing site for Te Ūpokorehe ancestors of 'great significance'. Wāhi tapu protections are sought in the area between MHWS and MLWS, where waka were landed, to prevent erosion and protect the mauri of the landing site. The map filed provides certainty as to the location of the boundaries of the proposed wāhi tapu protections. Accordingly, this is a wāhi tapu that may be identified on the CMT order but for the reasons discussed above, the protections sought are not available.

Nga Kuri a Taiwhakea

[125] In respect of Nga Kuri a Taiwhakea, Te Ūpokorehe say:

> A taniwha in the shape of a dog with flaming eyes walked the whenua at this site from the foreshore through to the Waimana kaaku. This would warn that a Rangatira of high rank was to pass away. Protections are sought between the high water and low water mark on the foreshore, where the taniwha began its journey.

[126] Again, protections are sought to prevent erosion and protect the mauri of the site, and the map filed provides the Court with clarity as to the location of the boundaries of the proposed wāhi tapu. The location of a taniwha, or an important point on a taniwha's journey is a location that can properly be considered to be tapu. Accordingly, this is a wāhi tapu that may be included on the CMT order but for the reasons already discussed, the protections sought are not available.

Te Araioio o Panekaha, Te Karamea Pā and Paripari Pā

[127] These three sites are sites where Ngāti Awa (one of the joint CMT holders) takes issue with Te Ūpokorehe's claims. There are ongoing discussions with the purpose of resolving these differences.

[128] Te Araioio o Panekaha is said to be a channel within the Ōhiwa Harbour that is associated with ancient battles. Te Ūpokorehe say:

> During the time when tangata kai was practiced, enemies killed in battles around the Western boundary were dragged by Panekaha, an Upokorehe tīpuna and the grandfather of Kahuki, to the pā sites beyond. The dragging of the bodies of those killed created the channel, which is a wāhi tapu.

[129] That appears to be an appropriate basis upon which to conclude that the area identified on the map filed is tapu. The boundaries have been identified with sufficient certainty and clarity.

[130] There is a potential conflict with s 27 of the Act. Section 27(1)(a) provides that every person has the right to enter, and pass and repass through, the marine and coastal area by ship. Section 27(3) provides that this right of passage is subject to any prohibitions imposed by or under an enactment including restrictions and prohibitions imposed under ss 78 and 79. Sections 78 and 79 deal with wāhi tapu and wāhi tapu conditions.

[131] Te Araioio o Panekaha channel is within that part of Ōhiwa Harbour that Ngāti Awa have an interest. The memorandum filed on behalf of Ngāti Awa indicated that counsel would discuss the issues arising from Te Ūpokorehe's proposed restrictions in respect of this site and also two others (Te Karamea Pā and Paripari Pā) with counsel for Te Ūpokorehe in an attempt to put forward an agreed position.

[132] As discussed above, because the rights in relation to wāhi tapu are held by the successful CMT group rather than any individual component of that group, it is necessary for there to be a consensus among the group as a whole as to the description of the wāhi tapu and the protections that are necessary. In the absence of such consensus, the Court cannot grant the sorts of conditions sought here.

[133] A memorandum will need to be filed once the anticipated kōrero between the various joint applicants has been completed indicating what agreements have been reached on these matters. The same comments apply to the proposed wāhi tapu at Te Karamea Pā and Paripari Pā. In respect of both areas, the wāhi tapu protections are for an area between MHWS and MLWS so the location of the proposed wāhi tapu has been clearly identified.

Te Motu

[134] The situation in relation to Te Motu is slightly different in that there does not appear to be any opposition from Ngāti Awa.

[135] Te Ūpokorehe seek wāhi tapu protections for the area of the takutai moana surrounding the island of Te Motu, within the Ōhiwa Harbour, between MHWS and MLWS. They say:

> Te Motu is an island in Ōhiwa harbour. At the Northern point of Te Motu, out on a bluff, there is an urupa. The koiwi are of Upokorehe descent. Due to its location, the koiwi are found below the high water mark, which extends the tapu into the takutai moana. It is Upokorehe who undertake customary recovery of the koiwi, performing appropriate karakaia and Upokorehe tikanga. For this reason, wāhi tapu protections are sought between the high water mark and the low water mark.

[136] Protections are sought to prevent erosion and to protect the mauri of the site. The area sought to be protected is within the takutai moana (being the area between MHWS and MLWS surrounding the island), and is an area that can be described as tapu – given the locating of koiwi below MHWS. The boundaries have been identified with sufficient detail. No other joint applicant group took issue with the status of this site as a wāhi tapu or the boundaries proposed, so it can be identified on the CMT as a wāhi tapu. For the reasons discussed above, the first of the protections sought is not available. The second protection sought was: "Rahui/closure of the area in event of emergency or death or discovery of kōiwi." The right to impose a rahui over an area that is tapu is an incident of holding CMT. None of the other joint CMT holders opposed Te Ūpokorehe's entitlement to impose rahui. It is therefore an available protection.

Te Tawai

[137] In respect of Te Tawai, Te Ūpokorehe say:

> Te Tawai is a historic papakāinga which was occupied by Te Ūpokorehe. It has been in use since the time of Hape ki Tuarangi. The immediate foreshore under Te Tawai was a waka landing and launch pad, which extends the tapu of Te Tawai into the takutai moana. Adjacent to the landing and launch pad on the foreshore is a Cave (Ana) known by Upokorehe as Te Karamea (Red Ochre) a place where they collect the red clay to treat and preserve koiwi, as well as to dye their traditional kete, whariki, piu piu, pare harakeke and other traditional dress ware. Wahi tapu protections are sought for the area between the high water and low water marks.

[138] This area has been identified with sufficient certainty. Te Ūpokorehe has adequately identified the basis for the tapu extending into the takutai moana at Te Tawai, by identifying a linkage between the tapu and a use of the takutai moana, and sufficiently identified boundaries which are no further than necessary to protect the site in accordance with the purposes of the Act. Accordingly, this is a wāhi tapu that may be included on the CMT order. The protections are the same as those sought in respect of Te Motu. For the same reasons, the right to impose rahui is an available protection.

Te Kopua o Te Pu

[139] In respect of Te Kopua o Te Pu, Te Ūpokorehe say:

> Te Kopua o Te Pu is a pari taha taha (cliff bank), that extends into the moana. This is a wāhi tapu, as it is where Te Kooti emptied his pistols into the pari taha taha and threw them into the water directly below the Hokianga pa, and it was from that day on, he told his people, he will no longer take arms against the government, let the faith guide us. This location is also where bodies enter to cross the moana towards the urupa on Te Motu. Those bodies in the urupa are the descendants of Hapuoneone who were the people living in the rohe before Hape and Tairongo came on their waka, and married into Hapuoneone.

[140] The map filed by Te Ūpokorehe for Te Kopua o Te Pu identifies a small area between MHWS and MLWS on the coast of the Ōhiwa Harbour adjacent to Te Motu Island. It is an area that is identified with sufficient certainty. Te Ūpokorehe have provided an adequate basis for the Court to conclude that the area is in fact a wāhi tapu. Accordingly, this is a wāhi tapu that may be included on the CMT order. The

protections sought are the same as for Te Motu and Te Tawai and the same comments apply.

Tokitoki

[141] In respect of Tokitoki, Te Ūpokorehe say:

> Tokitoki is an ancient waahi nohanga of Upokorehe located on the foreshore of Ohiwa Harbour. It is considered significant as it is the only extensive living area found to date immediately after the Kaharoa eruption of 1314 A.D. Tokitoki shows the physical evidence of people living beside the Ōhiwa Harbour at least 700 years ago, before the migration of waka to the area. It is also the only site recorded in the coastal Bay of Plenty with moa remains in their primary context with the archaeological site, i.e. the birds had been hunted and portions of the carcass returned to the site, rather than the bones simply being collected for industrial purposes such as the manufacture of fishhooks and other tools. Wāhi tapu protections are sought between the high and low water marks.

[142] The map filed identifies a small area in the takutai moana between MHWS and MLWS, with clear boundaries. It is unclear on the information provided by Te Ūpokorehe, whether the archaeological site is located in the takutai moana, or on the adjacent land, with the tapu extending into the takutai moana as represented in the map filed. The Court cannot be certain that the wāhi tapu is in fact located in the takutai moana, and Te Ūpokorehe has not provided an adequate basis for a conclusion here that tapu originating on land in that location extends into the moana. Accordingly, this area cannot be included in the CMT order as a wāhi tapu.

Te Mika

[143] Te Ūpokorehe say that Te Mika is a "wahi tapu site where breeding birds would traditionally alert Te Ūpokorehe/Hapuoneone ancestors living in Tokitoki and other pā sites to invaders. These birds were described as manu tipua: "Te manu tipua, te torea ngutu kete kete (Oyster Catcher). The birds would alert the entire harbour."

[144] Te Ūpokorehe have identified an area in the takutai moana, near to the entrance of the Ōhiwa Harbour, disconnected from MHWS, but have identified the boundaries of the proposed wāhi tapu with sufficient certainty. As to the reasons for the restrictions required, Te Ūpokorehe say "The site is being eroded by watercraft,

erosion impacts on the mauri of the site, and there are health and safety concerns with people digging and extracting resources in the area."

[145] Given the site is located entirely within the takutai moana, it is difficult to understand how it may be eroded or silted, especially given the regular operation of the tides within Ōhiwa Harbour must logically move material in a natural manner. Neither is there any obvious connection between the proposed restriction of "5NM speed limit for watercraft" and any erosion. The location of the wāhi tapu in the sea differentiates it from a wāhi tapu adjacent to a coastline where, conceivably, the speed of passing watercraft could have an impact on the coast. It is also unclear what part of the wāhi tapu people "dig and extract resources" in or how that gives rise to "health and safety concerns". The reasons provided by Te Ūpokorehe in support of the first two proposed protections are insufficiently linked to the protection of Te Mika for the purposes of the Act. Accordingly, they may not be recorded on the CMT order as protections. The third protection sought, that of rahui/closure in event of emergency or death, is permissible.

Te Ana Pokia

[146] In respect of Te Ana Pokia, Te Ūpokorehe say:

> The cave Te Ana Pokia was used as a place to conceal Upokorehe War Chief Te Rupe's cloaks including his war cloak, weaponry and taonga. His pa Tahurua was located above Te Ana Pokia. Te Rupe was the Chief who led and defeated Tūhoe at the battle of Maraetotara, where the stream ran red with blood, and is also the western boundary of Te Ūpokorehe.
>
> Today, through erosion, the entrance to this cave is covered by water at high tide, and the tapu extends into the area between the high water mark and low water mark. Wāhi tapu protections are sought for the entrance to the ana, and its surroundings between high and low water mark.

[147] Protections are sought by Te Ūpokorehe for the preservation of the site and the protection of its mauri along with the right to impose rahui. The map filed in respect of Te Ana Pokia identifies a small area between MHWS and MLWS. For the reasons set out above only the right to impose rahui is an available protection. There is also a disconnect in this case between the nature of the site (a cave, the entrance to which is covered by water at high tide) and the claim that the site is being "eroded and silted

through development and use". The only available restriction is the right to impose rahui.

Otakanui and Te Ana o Muru-te-kaka

[148] Otakanui is an area described as being "on the waterline" in the Ōhiwa Harbour where there are caves in which Te Ūpokorehe tīpuna Tonukino and Maruiwi, who were Rangatira and brothers of Tairongo, hid their war trophies, including, cloaks, weapons, and the skulls of other rangatira. Te Ūpokorehe sought the same wāhi tapu protections as were sought in respect of Te Ana Pokia. The map they have provided gives the Court sufficient certainty as to the location sought to be protected. But for the same reasons identified in respect of Te Ana Pokia the only available restriction is the right to impose rahui.

[149] Te Ana o Muru-te-kaka is also a cave described as being "on the waterline" in the Ōhiwa Harbour. Like Otakanui, Te Ūpokorehe tīpuna Tonukino and Maruiwi are said to have hidden their war trophies, including cloaks, weapons, and the skulls of other rangatira in the cave. It its located closer to the entrance of the Ōhiwa Harbour than Otakanui. It is not suggested that the entrance to the cave is inundated at high tide but Te Ūpokorehe seek wāhi tapu protections between MHWS and MLWS. Presumably this is because the tapu extends beyond the entrance to the cave and into the takutai moana. The map sufficiently identifies the proposed wāhi tapu site but, for the reasons discussed above, the only protection able to be awarded is the right to impose rahui.

Te Karaka

[150] In respect of Te Karaka, Te Ūpokorehe say:

> Te Karaka is a significant waahi tapu to Upokorehe. It is an awa that flows out to the Ōhiwa harbour and runs along the base of one of Upokorehe's significant maunga Hiwarau. The plants growing along the sides of the awa are used for medicinal purposes. An Upokorehe kaitiaki resides at Te Karaka. Te Karaka awa connects to Nukuhou awa and is the route the kaitiaki travels. It is part of the Te Ūpokorehe pepeha, and also tapu because of this. Protections are sought in the entrance of this awa, within the takutai moana.

[151] The map that has been provided creates some issues. It depicts an area entirely on the seaward side of MHWS. The area depicted on the map is not an awa that flows into Ohiwa but is part of the harbour itself. The application says: "Protections are sought in the entrance of this awa, within the takutai moana." But there is a disconnect between the protections sought (no alteration or destruction of the site) and the reason it is tapu. For the reasons discussed above in respect of similar protections, the only available protection is the right to impose rahui.

PCRs

[152] I turn now to a consideration of Te Ūpokorehe's PCRs.

[153] In the Stage 2 judgment, Te Ūpokorehe were directed to remove a significant number of matters from their draft PCR order, on the basis that they were not permitted under the Act to be included as part of a PCR. Significant improvements have been made to the draft order.

[154] The gathering of the listed flora and fauna has been appropriately limited in the following fashion:

> Customary harvesting of plant species that are not otherwise excluded from being the subject of an order for protected customary rights within the claimed area. Only specimens that are growing below Mean High Water Springs are covered by this protected customary right.

[155] However, there has been no evidence provided by Te Ūpokorehe as to whether the listed plant species fall within the definition contained in s 2(1) of the Fisheries Act 1996 which excludes "aquatic life" from a PCR. Nor has the list of plant species been significantly changed from the draft order filed for the Stage 2 hearing. Aquatic life is defined as any species of plant or animal life, that at any stage of its life must inhabit water, whether living or dead. Further, Pōhutukawa grow on land, and not within the takutai moana, as do cabbage trees. No indication has been provided to the Court as to whether there are plant species that are within the takutai moana that do not fall within the definition of aquatic life. Unless such information is provided the PCR referring to the customary harvesting of plant species will need to be removed from the draft order.

[156] Te Ūpokorehe have also added a PCR for the "Exercise of kaitiaki obligations through the planting of pingao, sedges, spinifex, toitoi and other plants in the protected customary rights area". This was not included in the draft order filed for the Stage 2 hearing and nor was it a PCR that was awarded to Te Ūpokorehe at Stage 1. This must be removed.

[157] Finally, the maps provided by Te Ūpokorehe clearly and properly set out the boundaries to apply to their PCRs. They are in a position to be finalised, subject to the approval by the Court of their draft order, in terms of the matters noted above.

Conclusion

[158] I expect that the applicants will comply with the further directions of the Court, and provide finalised maps and draft orders to be approved by the Court at the next CMC.

[159] The Court has not yet received the updated mapping guidelines that it was anticipated would be available within two months of the April CMC. As the availability of these guidelines is the key to the finalisation of the maps required for the recognition orders, a date for the next CMC cannot be confirmed until the guidelines are issued and the parties have had an appropriate opportunity to produce maps in accordance with them.

[160] Accordingly, I direct the Registrar to schedule a further CMC in Rotorua for the first available date in February 2024. Counsel are to file and serve compliant maps and amended documents containing the amendments referred to in this judgment no later than two weeks before the date set for the CMC. However, this date is to remain contingent on the parties receiving formalised guidelines for the survey plans within enough time to have had an appropriate opportunity to produce maps in accordance with them. While the Court anticipates that the guidelines will be provided promptly, should this assumption be incorrect, the February 2024 date will be amended accordingly.

[161] I grant leave to counsel to file further memoranda seeking directions, should that be necessary.

Churchman J

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