IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-232; CIV-2017-485-267
CIV-2017-485-259; CIV-2017-485-224
CIV-2017-485-221; CIV-2017-485-260
GROUP M, STAGE 1(A)
[2024] NZHC 309

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

Continued…

Hearing:	4-18 September; 21-28 September; 6 October; 19 October and 25-27 October 2023 Site visits on 19-20 September; 10 October and 24 November 2023
Appearances:	D C F Naden, M Sreen, S M Yogakumar, H J Fletcher, A Crawford and C Smith for Ngāi Tūmapūhia-a-Rangi Hapū and Ngāi Tukōkō and Ngāti Moe T Bennion and O Ford Brierley for Ngāti Hinewaka R Siciliano, C Mataira and K Katipo for Rangitāne o Wairarapa and Rangitāne o Tamaki nui-ā-Rua J P Ferguson and J E Judge for Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua M Houra for Te Ātiawa C Hirschfeld and H Clatworthy for Te Hika o Pāpāuma B Lyall and H Swedlund for Ngāi Tūmapūhia-a-Rangi Ki Motuwairaka Inc, Ngāi Tūmapūhia-a-Rangi Ki Okautete Inc and the Kawakawa 1D2 Ahu Whenua Trust B Scott and R Wales for the Seafood Industry Representatives J Prebble and D Kleinsman for the Attorney-General H Harwood for South Wairarapa District Council
Judgment:	26 February 2024

JUDGMENT OF GWYN J

BY	Ngāi Tūmapūhia-a-Rangi Hapū Incorporated, on behalf of Nga Uri O Ngāi Tūmapūhia ā Rangi Hapū (CIV-2017-485-232)
	Kahura James Watene on behalf of Ngāi Tūkoko and Elizabeth Lily Te Piki Watene on behalf of Ngāti Moe (CIV-2017-485-267)
	Ngāti Hinewaka Me Ōna Hapū Karanga Charitable Trust on behalf of Ngāti Hinewaka (CIV-2017-485-259)
	The Rangitāne Tū Mai Rā Trust, on behalf of the hapū of Rangitāne o Wairarapa and Rangitāne o Tamaki nui-ā-Rua (CIV-2017-485-224)
	Trustees of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust on behalf of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua (CIV-2017-485-221)
	Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust on behalf of Te Ātiawa (CIV-2017-485-260)
INTERESTED PARTIES	Sue Taylor for Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Incorporated and Sam Morris, Lynall Morris, and Jason Morris for Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Incorporated
	Kawakawa 1D2 Ahu Whenua Trust
	Seafood Industry Representatives
	Attorney-General
	Greater Wellington Regional Council
	Hutt City Council
	South Wairarapa District Council
	Carterton District Council
	Masterton District Council
	Landowners Coalition
	Council of Outdoor Recreation Associations of New Zealand Incorporated

TABLE OF CONTENTS

Whakataukī

Ko ō tatou whakapono ngā kaiwehewehe i a tātau. Ko ō tātau moemoeā me ō tātau pākatokato ngā kaiwhakakotahi i a tātau.

It is our truths that are actors of separation. It is our dreams and difficulties that act to unify us.[1]

Whakatakinga | Introduction

[1] The Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act) recognises customary interests of Māori in the common marine and coastal area.[2]

[2] The marine and coastal area is the area between high-water springs and the 12 nautical mile limit of the territorial sea.[3] The Takutai Moana Act creates three new types of legal interest. First, a right to participate in conservation processes; second, a customary marine title; and third, a protected customary right.[4] These legal interests may be granted to iwi, hapū or whānau groups.[5]

Ngā tono | The applications

[3] In Stage 1(a) of this proceeding the Court was asked to determine whether the six applicant groups are entitled to orders recognising customary marine title (CMT) and/or protected customary rights (PCRs) in the hearing area.[6] The hearing area relates to a part of the common marine and coastal area in south Wairarapa, starting in the south at Tūrakirae Head and moving east and north up the Wairarapa Coast to the southern bank of the Whareama River, and extending from the line of mean high-water springs, out to the territorial sea limit.

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1 Hinemoa Elder *Aroha: Māori wisdom for a contented life lived in harmony with our planet* (Penguin Random House, Auckland, 2020) at 93, quoting a whakataukī by Te Wharehuia Milroy (Ngāi Tūhoe).
2 Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act], s 7.
3 Section 9(1).
4 Part 3.
5 Section 9(1), definition of "applicant group".
6 HC Wellington CIV-2017-485-259, 28 June 2022 (Minute of Churchman J); and see also HC Wellington CIV-2017-404-481, 9 November 2022 (Minute of Churchman J).

[4] The hearing area is depicted in Figure 1 below.[7]

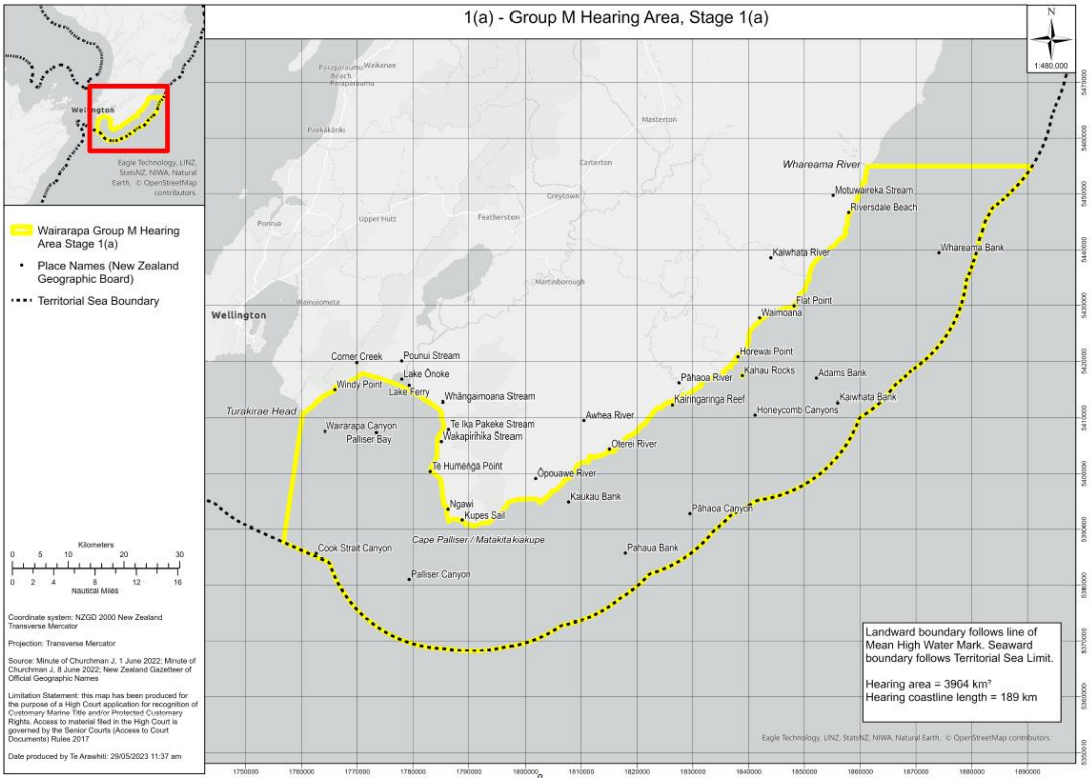

Figure 1: Original application area map

Ngā kaitono | The applicants

[5] The applicants are:

(a) Trustees of the Rangitāne Tū Mai Rā Trust, on behalf of Rangitāne o Wairarapa and Rangitāne Tamaki nui-ā-Rua (CIV-2017-485-224) (Rangitāne);

(b) Trustees of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust, on behalf of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua (CIV-2017-485-221) (Ngāti Kahungunu);

(c) Ngāti Hinewaka Me Ōna Karangaranga Trust, on behalf of Ngāti Hinewaka (CIV-2017-485-259) (Ngāti Hinewaka);

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7 A landscape depiction of the area is at Appendix I. See also Appendix II which shows the original overlapping applications.

(d) Kahura James Watene on behalf of Ngāi Tūkoko Ngāti Moe (CIV-2017-485-267) (Ngāi Tūkoko and Ngāti Moe);

(e) Ngāi Tūmapūhia-ā-Rangi Hapū Inc on behalf of Nga Uri o Ngāi Tūmapūhia a Rangi Hapū (CIV-2017-485-232) (Ngāi Tūmapūhia);

(f) Te Ātiawa ki Te Upoko o Te Ika a Māui Pōtiki Trust, for the benefit of the people of Te Ātiawa (CIV-2017-485-260) (Te Ātiawa); and

(g) George Ngatai Matthews on behalf of Te Hika o Pāpāuma (CIV-2017-404-481) (Te Hika o Pāpāuma).[8]

[6] A brief summary of each of the applicant groups is set out below.

Te Ātiawa

[7] Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust (Te Ātiawa) represents the people of the iwi of Te Ātiawa no runga i te Rangi, as well as several Ātiawa hapū, including Ngāti Te Whiti, Puketapu, Hāmua, Te (or Ngāti) Matehōu and Taranaki Whānui combined within their takiwā.

[8] The beneficiaries of the Te Ātiawa ki Te Upoko o Te Ika Maui Potiki Trust whakapapa to Te Ātiawa in Taranaki and Ngāti Awa in the Bay of Plenty, among other Te Ātiawa groups with the eponymous tīpuna Rauru and Te Awanuiārangi. In respect of the area relevant to the Stage 1(a) hearing, the Te Ātiawa hapū with interests include:

(a) Ngāti Te Whiti;

(b) Puketapu;

(c) Taranaki Whānui;

(d) Ngāti Hāmua; and

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8 See [40] below which notes that Te Hika o Pāpāuma's application is now to be heard at Stage 1(b).

(e) Te Matehōu.

Rangitāne

[9] The application is brought by the trustees of the Rangitāne Tū Mai Rā Trust. The Trust is a post-settlement governance entity for both Rangitāne o Wairarapa and Rangitāne o Tamaki nui-ā-Rua. Rangitāne is made up of a number of hapū, set out in the Rangitāne Tū Mai Rā Trust Deed and the Rangitāne o Wairarapa Tāmaki nui-ā-Rua Deed of Settlement. Ngāti Hāmua is the principal or primary hapū of Rangitāne o Wairarapa. The hapū listed within the Deed of Settlement also include Te Hika o Pāpāuma and Ngāi Tūkoko. The Trust was ratified in 2013 and established in 2014 to receive and administer settlement redress from the Crown to Rangitāne, which was provided through the 2016 Deed of Settlement. The Trust represents all iwi members who whakapapa to Rangitāne and who may benefit from the Deed of Settlement.

[10] The Rangitāne application was originally filed to ensure that Rangitāne interests in the takutai moana were protected. The application extends across the entire Rangitāne takiwā, from Tūrakirae in the south to Poroporo in the north. That part of the area north of the southern bank of the Whareama River is being heard as part of the Stage 1(b) hearing.

[11] Rangitāne makes this application in support of hapū interests and as a korowai application for those Rangitāne hapū with interests in the takutai moana, but recognising the specific hapū applications before the Court.

[12] In respect of the area covered by this Stage 1(a) proceeding, the relevant Rangitāne hapū with interests include:

(a) Ngāti Hāmua;

(b) Ngāti Hinetauira;

(c) Ngāti Māhu;

(d) Ngāti Meroiti;

(e) Ngāi Tūkoko; and

(f) Te Hika o Pāpāuma.

[13] The Trust wishes to ensure that their hapū who are not represented by other applications — Ngāti Meroiti, Ngāti Māhu, Ngāti Hinetauira and Ngāti Hāmua — are appropriately recognised in the orders made.

Ngāti Hinewaka

[14] The applicant, Ngāti Hinewaka Me Ōna Hapū Karanga, refers to all persons who whakapapa to any of:

(a) Ngāti Hinewaka

(b) Ngāti Rangaranga

(c) Ngāti Rongomaiaia

(d) Ngāti Te Kawekairangi

(e) Ngāti Pārera

(f) Ngāti Te Aokino

(g) Ngāi Te Ao

(h) Ngāti Māhu

(i) Ngāti Hikarara

(j) Ngāti Hikawera

(k) Ngāti Kahukuranui

(l) Ngāti Ngapu o te Rangi

(m) Ngāti Hinetauira

(n) Ngāi Tuohungia

(o) Ngāti Rua

(p) Ngāti Rākaiwhakairi

(q) Ngāti Rākairangi

(r) Ngāi Tūkoko[9]

[15] The phrase "me ona Hapū Karanga" means related or associated hapū, that also have their own distinct hapū identities.

[16] This is reflected in the statutory acknowledgement for the coastal marine area in the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act 2022.[10]

[17] For the purposes of this judgment I refer to Ngāti Hinewaka Me Ōna Hapū Karanga as the Karanga or Ngāti Hinewaka, as distinguished from Ngāti Hinewaka hapū.

[18] Ngāti Hinewaka sought recognition orders for their customary interests between Te Unuunu in the north, proceeding south around Mātakitaki-a-Kupe (Cape Palliser) to the western shore of Lake Ōnoke.

Ngāi Tūkoko and Ngāti Moe

[19] The applicant group is comprised of two hapū: Ngāi Tūkoko and Ngāti Moe. Ngāi Tūkoko and Ngāti Moe are both hapū of Ngāti Kahungunu.

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9 Ngāi Tūkoko also claims separately.
10 Section 28.

[20] Ngāi Tūkoko is principally from the Tuhirangi-Pirinoa area, and Ngāti Moe from the Pāpāwai-Greytown area.

[21] The application is made by Kahura James Watene, of Ngāi Tūkoko, and Elizabeth Lily Te Piki Watene, of Ngāti Moe.

[22] As with the other applicants, Ngāi Tūkoko and Ngāti Moe's third amended application seeks orders on the basis of shared exclusivity for the areas, and between the hapū, as agreed by the parties.

Ngāti Kahungunu

[23] The Trustees of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust are the applicants, on behalf of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.

[24] The Ngāti Kahungunu Settlement Trust was established in March 2017 and is the post-settlement governance entity for the confederation of hapū comprising Ngāti Kahungunu ki Wairarapa and Ngāti Kahungunu ki Tāmaki nui-ā-Rua (Ngāti Kahungunu). The objects and purposes of the Ngāti Kahungunu Settlement Trust include to progress applications under the Takutai Moana Act on behalf of Ngāti Kahungunu claimants, marae, hapū and whānau.

[25] The application is advanced as an overarching or korowai application for all Ngāti Kahungunu hapū, marae and whānau with interests in the takutai moana of the Wairarapa and Tāmaki nui-ā-Rua. The application was filed in order to ensure that the interests of all Ngāti Kahungunu hapū in that takutai moana could be recognised in the event that in the event that the relevant Ngāti Kahungunu hapū did not file their own applications.

[26] After the Ngāti Kahungunu application was filed it became apparent that various other Ngāti Kahungunu hapū or hapū karanga (groupings of related or associated hapū) had also filed applications. These are the applications on behalf of Ngāti Hinewaka, Ngāi Tūkoko and Ngāti Moe, Ngāi Tūmapūhia-ā-Rangi and Te Hika o Pāpāuma. The last of these is now to be considered in the Stage 1(b) hearing.

[27] These applications are supported by Ngāti Kahungunu. As with the other applicants, Ngāti Kahungunu has filed an amended application which reflects the applicants' collectively agreed position.[11] Other than Te Ātiawa, all of the hapū identified in the five areas of shared exclusivity in the mana moana agreement are hapū of Ngāti Kahungunu and/or Rangitāne. All are named within the list of Ngāti Kahungunu hapū in the Trust Deed of the Settlement Trust and in the definitions in s 13 and sch 1 of the Settlement Act.[12]

Ngāi Tūmapūhia

[28] Ngāi Tūmapūhia-ā-Rangi hapū (Ngāi Tūmapūhia) is a hapū of Ngāti Kahungunu and Rangitāne.

[29] The application is filed by Ngāi Tūmapūhia-ā-Rangi Hapū Inc.

[30] Ngāi Tūmapūhia's application area runs from the northern bank of the Whareama River, along the coastline south to the southern bank of the Pāhaoa River and 12 nautical miles out to sea from all points along that coastline. That part of the application area from the southern bank to the northern bank of the Whareama River is to be considered in the Stage 1(b) hearing.

Whakapapa

[31] The establishment of descent lines (whakapapa) and familial relationships (whanaungatanga) is critical in identifying which applicant group or groups held a specified area in accordance with tikanga. As Churchman J noted in *Re Edwards Whakatōhea*,[13] it is for the applicants to define and describe their own whakapapa; it is the Court's role to consider whether, based in part on the whakapapa evidence provided by the applicants, the tests for CMT and PCR have been met. "Put simply, the Court does not act as a final arbiter defining the whakapapa of the applicants".[14]

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11 The mana moana agreement, discussed at [119]–[156] below.
12 Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act 2022.
13 *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 [*Re Edwards*] at [301].
14 At [301].

[32] The Court's task in this regard was simplified by the mana moana agreement in which all hapū along the coastline of the application area have acknowledged one another's mana tuku iho in respect of different parts of the coastline, in accordance with their shared tikanga. The agreement is a graphic illustration of their shared whakapapa links. For that reason it has not been necessary to consider different perspectives and points of emphasis regarding the history of, and relationships between, the applicant groups. Ultimately the applicants did not seek to litigate those matters. In general terms I am able to conclude that the applicant groups have been able to establish their whakapapa links to the application area, going back to the earliest Māori settlement. In terms of tikanga, they have been able to establish their mana in respect of the whenua and takutai moana by that whakapapa and through discovery, the naming of and relationship with geographical features, long and continuous occupation and raupatu.

[33] Although individual hapū may choose to emphasise one line of descent over another, all of the hapū of the south Wairarapa coastline share common whakapapa, giving rise to obligations of whanaungatanga.

[34] Most of the applicants provided detailed whakapapa, which informed their evidence. A summary of the applicants and/or a brief summary of the whakapapa evidence provided is attached to this judgment as Appendix VI.

Rohe tono | The application area

[35] The Stage 1(a) application area is depicted at Figure 1, attached to this judgment as Appendix I.

[36] Two of the applications encompassed the entire hearing area and extend into the Stage 1(b) area:

(a) Rangitāne, seeking recognition of CMT and PCRs in the common marine and coastal area (CMCA) between Tūrakirae Point north to Arataura (Poroporo), between the line of mean high-water springs and out to the territorial sea limit.

(b) Ngāti Kahungunu, seeking recognition of CMT and PCRs in the CMCA between Tūrakirae Head north to Poroporo between the line of mean high-water springs and out to the territorial sea limit.

[37] Three of the applications, as filed, fell entirely within the hearing area. Two of those were therefore heard in full in Stage 1(a):

(a) Ngāti Hinewaka, seeking recognition of CMT and PCRs in the CMCA between Lake Ōnoke (Lake Ferry) and Te Unuunu (Flat Point), between the line of mean high-water springs and out to the territorial sea limit.

(b) Ngāi Tūkoko and Ngāti Moe, seeking recognition of CMT and PCRs in the CMCA between Lake Ōnoke in the northwest and Mātakitaki-a-Kupe in the southeast and out to the territorial sea limit.

[38] The third, Ngāi Tūmapūhia's application, seeks recognition of CMT and PCRs in the CMCA between the southern bank of the Pāhaoa River and the northern bank of the Whareama River on the Wairarapa Coast, between the line of mean high-water springs and out to the territorial sea limit. As filed, it was entirely within the Stage 1(a) hearing area. However, during the course of the hearing, by agreement, the hearing area was amended so as to remove the Whareama River from Stage 1(a) and add it to the Stage 1(b) hearing area. As a consequence, that part of Tūmapūhia's application encompassing the Whareama River will be heard in the Stage 1(b) hearing.

[39] Te Ātiawa has a much smaller overlap with the Stage 1(a) hearing area, and its applications were determined to the extent of their overlap only. Te Ātiawa seeks recognition of CMT and PCRs in the CMCA between Pipinui Point on the west coast of the North Island, around to Mukamukaiti (Windy Point), including "all natural lakes, rivers, and streams on the landward side of mean high-water spring[s]" out to the territorial sea limit. Te Ātiawa's application overlaps with the hearing area from Mukamukaiti in Palliser Bay west to Tūrakirae Head, between the line of mean high-water springs at Mukamukaiti and out to the territorial sea limit at a point southwest of Tūrakirae Head.

[40] Te Hika o Pāpāuma seeks recognition of CMT and PCRs in the CMCA between the mouth of the Whareama River (southern bank) and Poroporo, between the line of mean high-water springs and out to the territorial sea limit. At the start of the hearing Te Hika o Pāpāuma's application overlapped with the Stage 1(a) hearing area in respect of the Whareama River. As noted above, during the course of the hearing, the hearing area was amended and Te Hika o Pāpāuma's application will now be heard in the Stage 1(b) hearing.

The dual pathway — Crown engagement applications

[41] Section 94 of the Takutai Moana Act provides for two pathways for the recognition of CMTs and PCRs. One is by application to the High Court under s 100 of the Act, which is what this proceeding is concerned with. The other is by reaching an agreement with the Crown, under s 95 (Crown engagement). The Crown need not enter into an agreement.[15] If it does, the agreement takes effect through an Order in Council (for a PCR) or bespoke legislation (for CMT).[16]

[42] Applicants had until 3 April 2017 to file an application to engage directly with the Crown, or to be heard in the High Court, or both.[17] 385 applications were filed for Crown engagement and approximately 202 applications were filed in the High Court.[18] Many applicants filed in both pathways.

[43] The six applicant groups in this case have also submitted applications under the Act for Crown engagement.

[44] In addition, Sue Taylor for Ngāi Tūmapūhia-ā-Rangi ki Motuwairaka Inc and Sam Morris, Lynall Morris and Jason Morris for Ngāi Tūmapūhia-ā-Rangi ki Okotete Inc have filed an application for Crown engagement (Crown engagement parties), but have not filed a corresponding application with the High Court. These two entities participated in the Stage 1(a) hearing as interested parties and filed evidence

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15 Takutai Moana Act, s 95(3).
16 Section 96(1).
17 Section 100(2).
18 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) [Takutai Moana Report Stage 1] at 24.

supporting the application advanced by Ngāi Tūmapūhia in the area from the southern bank of the Whareama River down the coast to Te Āwhea.

[45] There is no provision for an application under s 95 to be treated by the Court as an application under s 100, or vice versa. As Churchman J observed in *Re Edwards*, the lack of interconnection between the two pathways has caused difficulties. The Takutai Moana Act does not specifically address the question of how to proceed when a claim for recognition orders being advanced through litigation overlaps with a different claim by another applicant group, proceeding by way of direct engagement.[19]

[46] In the Court of Appeal's judgment on appeal from *Re Edwards* Miller J did not accept that a Court can force a recognition order on a party which has exercised its right to pursue the Crown engagement pathway instead.[20] Justice Miller accepted that an injustice might result if the Court were to find that exclusivity were shared by two groups but was forced to dismiss an application by one of them on the ground that the other had not submitted to the Court's jurisdiction, electing instead to pursue Crown engagement.[21]

[47] But the Judge thought such an outcome was unlikely in practice:[22]

> The second group, which I will call the interested party, will have had an opportunity to resist the applicant's claims to sole or shared exclusivity in the proceeding. The Court will have made findings on the evidence. The Crown need not negotiate a recognition agreement with the interested party, and I doubt it would do so where the Court had heard from that party and found that they did not enjoy sole exclusivity but rather shared it with an applicant group. The Court, having heard evidence, is likely to have been in a better position than the Crown to decide whether the statutory criteria have been met. Such agreement between the Crown and the interested party may be even less likely where, as in this case, the interested party had filed its own application before the statutory deadline but not brought it on for hearing. Contrary to the view taken by Churchman J, but subject to what I said above about pleadings, the Court might make findings as to shared exclusivity, then adjourn the proceeding to allow an opportunity for a tikanga process among affected groups and engagement with the Crown. This process need not cause unreasonable delay.

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19 *Re Edwards*, above n 13, at [405].

20 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504 [*Whakatōhea*] at [236].

21 At [237].

22 At [238].

Ngā rōpū whai pānga | Interested parties

[48] As the Court of Appeal noted,[23] there are no defendants in a proceeding under the Takutai Moana Act, only applicants and interested parties.

[49] In addition to Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Inc and Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Inc, other interested parties who filed notices of appearance[24] in relation to the Stage 1(a) hearing were:

(a) Kawakawa 1D2 Ahu Whenua Trust (Kawakawa Trust) which owns land abutting part of the marine coastal area within the hearing area and is an interested party in respect of Ngāti Hinewaka's application. The Kawakawa Trust called evidence.

(b) NZ Rock Lobster Industry Council Ltd, Pāua Industry Council Ltd, Fisheries Inshore New Zealand Ltd and the New Zealand Federation of Commercial Fishermen Inc (together, the Seafood Industry Representatives group or SIR) which called evidence.

(c) South Wairarapa District Council which filed evidence in relation to its assets within, and its uses of, the sea in the hearing area but did not seek to actively participate in the hearing.

(d) Hutt City Council which did not actively participate in the hearing and was granted leave to be excused from it. The Council has requested the right to participate in any further stage of the hearing if the Court is minded to grant orders under the Act, in relation to a precise area(s) to be subject to the orders and/or any specific matters/conditions arising or in relation to the proposed orders (including in respect to wāhi tapu).

(e) Masterton District Council which did not take a position on the merits of the application and did not actively participate in the hearing.

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23 At [236].
24 Takutai Moana Act, s 104.

(f) Carterton District Council which did not take a position on the merits of the application and did not actively participate in the hearing.

(g) Greater Wellington Regional Council which did not actively participate in the hearing and was granted leave to be excused from the hearing.

(h) The Landowners Coalition which filed a Notice of Appearance dated 19 February 2018 but has taken no steps in the proceeding.

(i) The Council of Outdoor Recreation Associations of New Zealand Inc, which filed a general Notice of Appearance for all Takutai Moana Act applications for recognition orders, on 12 August 2017, but took no part in this proceeding.

[50] It is anticipated that the local and regional body interested parties may wish to participate in any further stage of the hearing related to the precise area to be subject to any orders made and/or any specific matters/conditions arising or in relation to the proposed orders (including in respect to wāhi tapu).

[51] The Attorney-General also appeared as an interested party, as in all previous proceedings under the Takutai Moana Act. As I acknowledged during the course of the proceedings, the Attorney-General is not an "interested party" in the same sense as the "tangata whenua" interested parties[25] and the SIR, each of which has a direct interest in the outcome of the applications. As Churchman J acknowledged in *Re Rihari (on behalf of Ngāti Torehina ki Mataka Hapū/Iwi of Niu Tireni)*,[26] the role of the Attorney-General is to appear in the "interests of the public" to ensure the Court has all relevant information before it and to assist in the interpretation and application of the Act through legal submissions.

[52] In this hearing, counsel for the Attorney-General made submissions on the approach to interpreting the legislation and applying the tests for CMT or PCR and, at

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25 In this proceeding, Kawakawa Ahu Whenua Trust, Ngāi Tūmapūhia-ā-Rangi ki Motuwairaka Inc and Ngāi Tūmapūhia-ā-Rangi ki Okautete Inc.

26 *Re Rihari (Ngāti Torehina Ki Mataka Hapū/Iwi of Niu Tireni)* [2019] NZHC 2658 at [2](f).

my request, provided an assessment of the evidence proffered by each of the applicants and whether it met the tests for CMT and/or PCRs.

[53] The Attorney-General called evidence from three witnesses, which I will refer to later.

Hearing; site visits

[54] The hearing took place at a conference centre in Whakaoriori (Masterton). It began on 4 September 2023. After five weeks, the Court took an adjournment for the preparation of the pūkenga report and closing submissions. Site visits were organised by Ngāi Tūmapūhia, Ngāti Hinewaka, Ngāi Tūkoko and Ngāti Moe and the Kawakawa Trust. The Judge, pūkenga, High Court Registrar and counsel (for those parties who wished to attend) took part in the site visits on 19 and 20 September, 10 October and 24 November 2023, respectively.

[55] The delivery of closing submissions was deferred to enable counsel to consider the Court of Appeal's decision in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board (Whakatōhea)* which was released on 18 October 2023. Submissions were delivered from 25 to 27 October 2023 inclusive. Overall, the Court sat for eight weeks with four adjournments.

Relevant background materials

[56] A number of reports have provided useful context to this hearing and were referred to in the parties' submissions. For example, the Waitangi Tribunal's report on its inquiry into the district called Wairarapa ki Tararua, which extends from the southern coast of the eastern side of the North Island up to southern Hawke's Bay.[27] In particular, the Tribunal's report highlights the dramatic loss of Māori land in Wairarapa ki Tararua, beginning in June 1853.

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[27] Waitangi Tribunal *The Wairarapa ki Tararua Report Volume I: The People and the Land* (Wai 863, 2010) [Wairarapa Report Volume I]; and Waitangi Tribunal *The Wairarapa ki Tararua Report Volume II: The Struggle for Control* (Wai 863, 2010) [Wairarapa Report Volume II].

[57] The Waitangi Tribunal has already undertaken in two reports a national, historical and contemporary survey of customary rights in the foreshore and seabed. Conclusions from those surveys provide a useful background against which the Court can consider customary interests specific to the Wairarapa Coast.

[58] In its 2004 report, the Waitangi Tribunal said:[28]

> The foreshore and sea were and are taonga for many hapū and iwi. Those taonga were the source of physical and spiritual sustenance. Māori communities had rights of use, management and control that equated to the full and exclusive possession promised in the English version of the Treaty. This promise applied just as much to the foreshore and seabed as, in 1848, it was found to apply to all dry land. There is in our view no logical, factual, or historical distinction to be drawn. In addition to rights and authority over whenua, Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing.

[59] This view was confirmed in the Tribunal's 2023 report, which was published during the course of this hearing:[29]

> We accept that some parts of te takutai moana – for example, fishing grounds or areas containing wāhi tapu – are more significant to Māori than others. However, the evidence given during this inquiry demonstrates that, for the claimants, the entire takutai moana in their rohe is a taonga. That some areas within it are more significant than others does not undermine the status of te takutai moana as a whole.
>
> …
>
> In contrast, we heard no evidence to suggest that some parts of te takutai moana are not considered a taonga. On the strength of the evidence we heard, we conclude that the marine and coastal area as a whole is a taonga that has significant importance to Māori.

[60] The Tribunal's report outlines its concerns about some aspects of the Takutai Moana Act, including the statutory test for CMT. In the Stage 2 Report the Tribunal found that the statutory regime itself is not compliant with te Tiriti o Waitangi and Treaty of Waitangi principles.[30] While the Tribunal's report is not binding on the Court, it provides relevant context and, as a number of applicants submitted,

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28 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [2.1.8].

29 Waitangi Tribunal *Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry: Stage 2 Report* (Wai 2660, 2023) [Takutai Moana Report Stage 2] at 50.

30 At [6.5.4].

highlighted the significance of the Court considering the history of the Takutai Moana Act and its purpose and preamble.[31]

[61] Of more general relevance is *He Poutama*, the study paper released by Te Aka Matua o te Ture | the Law Commission, which reviews the role of tikanga concepts in state law.[32] The paper provides an account of what tikanga is and addresses how tikanga and state law might best engage.

Te ture | The law

Anga whakatureture | Legislative framework

Definitions

[62] Central to the Takutai Moana Act (and replacing the term "foreshore and seabed") are the terms "marine and coastal area" and "common marine and coastal area".[33] Rights recognised under the Act apply in the CMCA, which is a subset of the marine and coastal area.

[63] The "marine and coastal area" is defined as follows:

> **marine and coastal area—**
>
> (a) means the area that is bounded,—
>
> (i) on the landward side, by the line of mean high-water springs; and
>
> (ii) on the seaward side, by the outer limits of the territorial sea; and
>
> (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Natural and Built Environment Act 2023); and
>
> (c) includes the airspace above, and the water space (but not the water) above, the areas described in paragraphs (a) and (b); and
>
> (d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b)

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31 The Stage 2 report was issued on 4 October 2023, prior to the Court of Appeal decision in *Whakatōhea*, above n 20, where the Court did undertake such a consideration.

32 Te Aka Matua o Te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).

33 Section 9.

[64] The "coastal marine area" within the meaning of the Resource Management Act 1991 (RMA) is defined at s 2 of the RMA:

> **coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water—
>
> (a) of which the seaward boundary is the outer limits of the territorial sea:
>
> (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
>
> (i) 1 kilometre upstream from the mouth of the river; or
>
> (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

[65] This definition means the CMA boundary may extend up a river for a distance.

[66] The "common marine and coastal area" is defined in the Takutai Moana Act as follows:

> **common marine and coastal area** means the marine and coastal area other than—
>
> (a) specified freehold land located in that area; and
>
> (b) any area that is owned by the Crown and has the status of any of the following kinds:
>
> (i) a conservation area within the meaning of section 2(1) of the Conservation Act 1987:
>
> (ii) a national park within the meaning of section 2 of the National Parks Act 1980:
>
> (iii) a reserve within the meaning of section 2(1) of the Reserves Act 1977; and
>
> (c) the bed of Te Whaanga Lagoon in the Chatham Islands

[67] The Takutai Moana Act accords the CMCA a special status, such that neither the Crown nor any person is capable of owning it.[34] This special status does not affect the exercise of customary rights as recognised under the Takutai Moana Act, or the lawful use of, or any lawful activity in, the CMCA.[35]

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34 Section 11(1) and (2).
35 Section 11(5)(a) and (b).

Customary Marine Title (CMT)

[68] Section 58(1) of the Takutai Moana Act establishes a two-limb test for the recognition of CMT. It provides:

> (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—
>
> (a) holds the specified area in accordance with tikanga; and
>
> (b) has, in relation to the specified area,—
>
> (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
>
> (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

[69] The rights that attach to CMT were summarised by Miller J in *Whakatōhea*:[36]

> CMT is the most extensive form of statutory right provided for under MACA. CMT is a (non-alienable) interest in land.[37] It is a territorial right, not merely a usage right. A group which holds CMT over a specified area does not have the right to exclude people from that area: public rights of access, navigation and fishing are … expressly carved out and protected by ss 26–28. But the group has certain rights set out in ss 60 and 62 of MACA including permission rights under the Resource Management Act (RMA permission right),[38] and certain conservation statutes;[39] a right to protect wāhi tapu and wāhi tapu areas;[40] prima facie ownership of newly found taonga tūturu;[41] ownership of certain minerals;[42] and the right to create a planning document for the area.[43] The group may use, benefit from or develop a customary marine title area, but is not exempt from obtaining any relevant resource consent, permit, or approval that is required under another enactment for the use and development of that customary marine title area.[44]

[70] Matters that can be taken into account in determining whether CMT exists are set out in s 59:

> **59 Matters relevant to whether customary marine title exists**

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36 *Whakatōhea*, above n 20, at [134] per Miller J and see also [391] per Cooper P and Goddard J.
37 Takutai Moana Act, s 60(1).
38 Sections 66–70.
39 Sections 71–75.
40 Sections 78–81.
41 Section 82.
42 Section 83.
43 Sections 85–93.
44 Section 60(2).

(1) Matters that may be taken into account in determining whether customary marine title exists in a specified area of the common marine and coastal area include—

(a) whether the applicant group or any of its members—

(i) own land abutting all or part of the specified area and have done so, without substantial interruption, from 1840 to the present day:

(ii) exercise non-commercial customary fishing rights in the specified area, and have done so from 1840 to the present day; and

(b) if paragraph (a) applies, the extent to which there has been such ownership or exercise of fishing rights in the specified area.

(2) To avoid doubt, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does not limit subsection (1)(a)(ii).

(3) The use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.

(4) For the purpose of subsection (1)(a)(i), land abutting all or part of the specified area means—

(a) land that directly abuts the specified area; or

(b) land that does not directly abut the specified area, but does directly abut any of the following:

(i) a marginal strip (as defined in section 2(1) of the Conservation Act 1987) that directly abuts the specified area:

(ii) an esplanade reserve (as defined in section 11 of the Natural and Built Environment Act 2023), but only to the extent that it directly abuts the specified area:

(iii) a reserve (as defined in section 2(1) of the Reserves Act 1977), but only to the extent that it directly abuts the specified area:

(iv) a Māori reservation (as defined in section 2(1) of the Reserves Act 1977) that directly abuts the specified area:

(v) a road that directly abuts the specified area:

(vi) a railway line that directly abuts the specified area.

Court of Appeal decision in Whakatōhea

[71] The Court of Appeal's decision in *Whakatōhea*[45] is the first substantive appellate decision under the Takutai Moana Act.

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[45] *Whakatōhea*, above n 20, at [39]–[63] per Miller J and [384] per Cooper P and Goddard J.

[72] Both Miller J and the majority judgment of Cooper P and Goddard J traverse the legislative history and purpose of the Act in some detail.

[73] Justice Miller discusses *Attorney-General v Ngati Apa*,[46] where the Court of Appeal determined that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed. In part to overcome that decision, the Foreshore and Seabed Act 2004 was enacted. As the Preamble to the Takutai Moana Act records, the policy underpinning the Foreshore and Seabed Act was found (by the Waitangi Tribunal, the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Special Rapporteur) to have breached te Tiriti o Waitangi/the Treaty of Waitangi and to have a discriminatory effect on whānau, hapū and iwi.[47]

[74] The Preamble to the Takutai Moana Act describes the scheme of the Act as follows:

> (4) This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations:
>
> …

[75] As the majority of the Court of Appeal noted,[48] the purpose statement is central to the interpretation of s 58, which sets out the CMT test. It says:[49]

> **4 Purpose**
>
> (1) The purpose of this Act is to—
>
> (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
>
> (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and

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46 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).
47 *Whakatōhea*, above n 20, at [52].
48 At [381].
49 Takutai Moana Act, s 4.

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

(d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

(2) To that end, this Act—

(a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and

(b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and

(c) gives legal expression to customary interests; and

(d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and

(e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—

(i) for its intrinsic worth; and

(ii) for the benefit, use, and enjoyment of the public of New Zealand.

[76] Consistent with that purpose, s 5 repeals the Foreshore and Seabed Act and s 6 provides for the restoration of customary rights that were extinguished by the Foreshore and Seabed Act. Those customary rights are "given legal expression" in accordance with the Takutai Moana Act.

[77] Section 7 confirms that the Takutai Moana Act is intended to take account of te Tiriti/the Treaty:

7 Treaty of Waitangi (te Tiriti o Waitangi)

In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—

(a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and

(b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and

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

[78] In summarising the importance of these provisions, the majority of the Court of Appeal said:[50]

> The consistent theme of these provisions is that MACA is intended to restore customary interests in the common marine and coastal area that were extinguished by the 2004 Act. Those interests are to be "given legal expression" in accordance with MACA.[51] Or, as it is put in the Preamble, *translated into* legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations. Section 7 expressly makes the link with the Treaty of Waitangi: MACA recognises and promotes the exercise of customary interests of Māori in the common marine and coastal area "in order to take account of the Treaty of Waitangi". It does so by providing, among other things, for PCRs to be recognised and protected and for CMT to be recognised and exercised.

Holds the specified area in accordance with tikanga

[79] The Court of Appeal confirmed that when assessing the first limb of the CMT test (s 58(1)(a)), the focus should be on "the group's intention and ability to control access to an area, and the use of resources within it, *as a matter of tikanga*."[52] So, for example, a group may hold an area in accordance with tikanga, where tikanga requires the permission of that group to be sought before others access the area or use resources within it.[53] "Holds in accordance with tikanga" reflects the Te Ture Whenua Maori Act 1993[54] definition; "[t]here is no connotation of ownership, but rather that it is retained or kept in accordance with tikanga Maori".[55]

[80] The Takutai Moana Act makes extensive use of tikanga concepts and te reo Māori terms. The assessment is expressly not focused on the group's practical ability to exclude others from entering certain areas,[56] given that Māori were increasingly deprived of this ability since the British assumed sovereignty in 1840.[57]

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50 *Whakatōhea*, above n 20, at [384] (emphasis in original).
51 Takutai Moana Act, s 6(1).
52 *Whakatōhea*, above n 20, at [403] (emphasis in original).
53 At [403].
54 Section 129(2)(a), the definition of Māori customary land.
55 *Whakatōhea*, above n 20, at [397], citing *da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212 (25 TTK 212) at 217.
56 *Whakatōhea*, above n 20, at [429].
57 At [426](d) and [429].

[81] Rather, the touchstone for the first limb of the test is whether, from a tikanga perspective, the applicant group can be considered the group possessing the requisite mana to determine who may access and use the area, irrespective of whether they possess the practical means of doing so.[58] One of the Act's purposes is to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua".[59] In Miller J's minority judgment, he conceptualises mana tuku iho as "the inherited right or authority to speak for a specific part of the common coastal and marine area."[60]

[82] The first limb of the test for CMT under s 58(1)(a) requires that an applicant group "holds" the specified area in accordance with tikanga. The test is whether the group currently uses and occupies the area, in a manner consistent with the nature of that area and it requires the group to have control or authority over the area according to tikanga. The majority accepted that evidence of activities that show control or authority of the area,[61] as opposed to simply carrying out a particular activity in that area,[62] will be of particular importance in distinguishing a "holding" of the area from the use of the area to the other particular resource.[63]

[83] Accordingly, in order to determine whether the first limb of the CMT test has been met, it is necessary to define the relevant tikanga of the area in question that demonstrates control or authority over the ability to access and use the area.

[84] Justice Miller's judgment identifies the elements of mana over land and its occupants which can be considered historic methods of controlling an area.[64] Dr Joseph's pūkenga report includes a similar list.[65] The elements referred to by Miller J include:

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58 At [429] and [434].
59 Section 4(1)(b).
60 *Whakatōhea*, above n 20, at [133]; and see also Takutai Moana Act, s 9(1).
61 *Whakatōhea*, above n 20, at [401].
62 At [401].
63 At [401]–[404] per Cooper P and Goddard J. To similar effect, see [140] per Miller J.
64 At [167], referring to Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) at 303–308, and [168] where the judgment identifies further, post-colonial elements of control.
65 Dr Robert Joseph *Pūkenga Report* (17 October 2023) at [75] and see [109]–[118] below. See this report in full at Appendix V to this judgment.

(a) military action taken to displace existing occupants (take raupatu, take ringa kaha and take pakihiwi kaha);

(b) occupation;

(c) intermarriage with tangata whenua women;

(d) marking out in some way a rohe which the group is capable of defending;

(e) naming of places;

(f) establishment of urupā;

(g) establishment of tūahu (shrines);

(h) establishment of kāinga;

(i) placing of wāhi tapu;

(j) adoption of a group name;

(k) approval and acceptance of neighbouring iwi.

[85] Justice Miller's judgment also refers to the relational values of tikanga.[66] Where an applicant group can provide adequate evidence of the activity set out above, their "cultural exchanges or practices" will be imbued with sufficient whanaungatanga, mana, manaakitanga, utu, kaitiakitanga and tapu to satisfy the first limb of the s 58 test. Justice Miller confirmed that the interconnectedness encompassed by whanaungatanga is traced through whakapapa links.[67]

[86] The focus on applying tikanga to control access does not require that the tikanga is always successfully implemented in the face of third party or non-Māori

66 *Whakatōhea*, above n 20, at [127].
67 At [127].

activities that override or are not undertaken consistently themselves with tikanga (such as commerical fishing) where there is no ability to lawfully restrict access.[68]

[87] The Court of Appeal accepted that, in the case under appeal, it was appropriate to ask the pūkenga which groups, if any, held a specified area in accordance with tikanga. That was plainly a question of tikanga within the scope of s 99 of the Act.[69] Although, as Miller J noted, it is a question on which a Court cannot defer to the pūkenga, but must reach its own conclusion.[70] Justice Miller also added that it would have been appropriate to ask the pūkenga whether any applicant group exclusively used and occupied a specified area, as that too is in part a question of tikanga.[71]

Exclusive use and occupation without substantial interruption

[88] The second limb of the s 58 test, unlike the first limb, does not refer to tikanga. But the Court of Appeal held that s 58 establishes a "single test" which must be interpreted as a whole.[72] The concept of exclusive use and occupation, in s 58(1)(b), must be viewed through the lens of tikanga, not that of the common law alone.[73]

[89] The majority in *Whakatōhea* concluded that it is "exceptionally difficult" to reconcile the text of s 58(1)(b) with the purposes of the Takutai Moana Act. The majority considered a literal reading of this limb of the test would mean that it was "likely there would be few areas of the foreshore or seabed where CMT could be made out":[74]

> Far from recognising and promoting customary interests, MACA would in many cases extinguish those interests. And it would do so by a side wind, by setting a threshold for recognition of CMT that could not be met as a result of matters that would not otherwise affect common law recognition of customary title.

[90] The majority considered this outcome would be inconsistent with the te Tiriti/the Treaty, as well as the purpose of the Takutai Moana Act set out in s 4 and

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68 At [401]–[404], [424]–[426] and [434] per Cooper P and Goddard J.
69 At [266] per Miller J and [360] per Cooper P and Goddard J.
70 At [266] per Miller J.
71 At [266].
72 At [138].
73 At [138].
74 At [416] per Cooper P and Goddard J.

the statement in s 7 that the Act recognises and promotes the exercise of customary rights to take account of te Tiriti/the Treaty.[75]

[91] The majority accept that use of a particular resource in an area will not, without more, amount to exclusive use and occupation of that area.[76] There must be a "strong presence" in the area, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.[77]

[92] The majority also observed that the second limb of the CMT test must be approached "having regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga, and having regard to the scheme and purpose of MACA."[78] It identifies a number of factors relevant to that assessment.[79]

[93] The majority did not accept a submission made by the Landowners Coalition Inc and SIR that an applicant group needs to demonstrate both an intention and an ability to exclude others (including non-Māori) from the relevant area, from 1840 to the present day.[80] The majority considered that such a requirement would be unjust and unprincipled, given the ability to exclude others was "taken away from Māori customary owners by the law as it was understood for most of the relevant period."[81]

[94] Justice Miller is critical of the majority's approach to the requirement in the second limb for exclusive use and occupation since 1840. The Judge characterises the majority's approach as unjustifiably discounting the literal meaning of s 58 in an attempt to give effect to the purpose in s 4,[82] and "amount[ing] to a presumption that rights in existence in 1840 have survived to the present day."[83]

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75 At [416].
76 At [422].
77 At [422].
78 At [426].
79 At [426].
80 At [429].
81 At [429].
82 At [189] per Miller J.
83 At [196].

[95] Justice Miller concludes that "exclusivity of use and occupation requires both an externally-manifested intention to control the area as against other groups and the capacity to do so."[84] The legal inability of the applicant group to resist trespass through force or common law must be set aside when considering capacity to exclude.[85]

"Without substantial interruption"

[96] The Court's discussion of the phrase "without substantial interruption", in s 58(1)(b)(i), of the Act is traversed at [615]–[674] below.

Exclusivity/Shared CMT

[97] The Court of Appeal was unanimous that it would be inconsistent with the scheme of the Act to have two or more overlapping CMTs in the same area. However, all three members of the Court had no difficulty in a single grant of recognition in favour of two or more groups of a single CMT, in respect of a particular area, noting that such a grant is most likely where the groups make a joint application, or where they make separate applications, but each acknowledges the shared rights of use and occupation of the other groups.[86]

[98] The majority took a different view from Miller J in relation to a situation where there are two applicant groups, neither of which acknowledges the rights of the other. The majority did "not see any contradiction in a finding that two applicant groups hold a specified area in accordance with tikanga vis-à-vis all other groups and individuals, and between them exclusively use and occupy the area, while at the same time vigorously contesting their mutual rights as between themselves."[87] The majority said:[88]

> A refusal to recognise CMT in those circumstances would effectively mean that areas that were unquestionably in Māori customary ownership in 1840 were taken out of Māori ownership, and customary rights and interests lost, because a currently unresolved tikanga difference between two or more hapū

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84 At [162] and [165]–[172].
85 At [180] and [170].
86 At [439] per Cooper P and Goddard J.
87 At [440].
88 At [442].

> cannot be resolved in the High Court in the context of competing applications for CMT.

[99] In contrast, Miller J said:[89]

> … a court may not be satisfied of exclusivity in the absence of evidence that other groups recognise an applicant group's rights (or a satisfactory account of why such evidence is lacking). Consensus is even more important for shared exclusivity, which rests on evidence that the groups concerned shared control of an area to the exclusion of others.

Standard and burden of proof

[100] Section 106(2) of the Takutai Moana Act requires the applicant for CMT to prove that the specified area:

(a) is held in accordance with tikanga; and

(b) has been used and occupied by the applicant group from 1840 to the present day.

[101] Section 106(2)(b) does not include the words "exclusively" and "without substantial interruption" contained in s 58(1)(b)(i).

[102] The Court must be satisfied that an applicant group:[90]

(a) holds the specified area in accordance with tikanga (s 58(1)(a)); and

(b) has exclusively used and occupied the specified area from 1840 to the present day, without substantial interruption (s 58(1)(b)(i)).

[103] However, s 106 does not require that all elements be proved by an applicant group. Both the majority and Miller J concluded that it is not for an applicant group to establish that their occupation was exclusive from 1840 to the present day and was not substantially interrupted. If the applicant group proves the two aspects above, that will be sufficient for the Court to draw an inference that the s 58 test is met, unless

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89 At [172] per Miller J.
90 Takutai Moana Act, s 106.

some other party takes it on themselves to demonstrate that the customary interests of the applicant group were not sufficient to establish effective control over the relevant area as at 1840, or have ceased to have the necessary character or been substantially interrupted after 1840.[91]

Navigable rivers: is customary title extinguished in law?

[104] CMT and PCRs do not exist if extinguished as a matter of law.[92] The party relying on extinguishment bears the onus of proving it.[93]

[105] At the outset of the hearing the Whareama river mouth, which forms part of Te Pāpāuma's and Ngāi Tūmapūhia's application areas, was within the Stage 1(a) hearing area. The opening submissions for the Attorney-General and Te Pāpāuma addressed the question of extinguishment and specifically whether the bed of the Whareama River within the CMCA (or any other river within the application area) vested in the Crown under s 14 of the Coal-mines Amendment Act 1903 (CMAAA), preserved by s 354(1)(c) of the RMA. The submissions for the Attorney-General were that the language of s 14 clearly shows that beneficial property in the riverbed of navigable rivers was vested in the Crown in 1903, and the reference to "absolute property" in s 14 demonstrates Parliament's intended effect of the section.

[106] The Attorney-General's submissions also addressed the question of navigability of the Whareama River. In response, Te Hika o Pāpāuma submitted that the Whareama River was not navigable and that therefore title in the riverbed has not been extinguished.

[107] The issue of extinguishment and rivers is dealt with briefly in in *Whakatōhea*.[94] The Court of Appeal concluded CMT is available in riverbeds that fall within the marine and coastal area and were vested in the Crown under the CMAAA. Under s 11(3) of the Takutai Moana Act, any previous vesting of the CMCA in the Crown under the CMAAA was reversed. Justice Miller concludes that, while s 58(4)

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91 *Whakatōhea*, above n 20, at [435]–[436] per Cooper P and Goddard J.
92 Takutai Moana Act, ss 58(4) and 51(1)(c) respectively.
93 Section 106.
94 *Whakatōhea*, above n 20, at [239]–[244] per Miller J.

contemplates that CMT may be extinguished in law, the provision appears to contemplate extinguishment of CMT by means other than Crown ownership that was subsequently reversed.[95] The judgment of the majority does not address the point, so it may be taken that the Court is unanimous on this point.[96]

[108] The effect of the Court of Appeal judgment is that extinguishment no longer arises in this Stage 1(a) proceeding. First, as discussed, the Court of Appeal has confirmed that the CMAAA is not effective in extinguishing CMT with regard to the Whareama River. Second, because the Whareama River has now been moved from the Stage 1(a) hearing to Stage 1(b), the issue must be dealt with separately. The remaining issue concerning the Whareama River is where the boundary of the CMCA lies. That will be addressed in the Stage 1(b) hearing.

The pūkenga report

[109] Dr Robert Joseph was appointed by the Court as pūkenga, on the proposal of Ngāi Tūmapūhia, Ngāi Tūkoko and Ngāti Moe and Rangitāne. No other party opposed the appointment.[97] Suggested questions for the pūkenga were set out in Churchman J's minute and, in the absence of a response from any party, were finalised, at the start of the hearing, in the following terms:

(a) What tikanga does the evidence establish or support applies in the area that is the subject of the applications before the court?

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

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

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95 At [244] per Miller J.
96 At [360] per Cooper P and Goddard J.
97 HC Wellington CIV-2017-485-259, 8 November 2022 (Minute of Churchman J).

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

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

[110] During the course of the hearing I invited counsel to consider whether the questions for the pūkenga needed to be amended or supplemented. Memoranda were filed by the applicants and the Attorney-General, setting out proposed amendments to the pūkenga questions.

[111] After hearing from counsel on 5 and 6 October 2023, and consulting with the pūkenga, I finalised the amended questions for the pūkenga, taking account of the joint memorandum of counsel and the mana moana agreement (discussed below).[98] Those questions are attached to this judgment as Appendix IV. The pūkenga filed his report on 18 October 2023 and was available for questioning by the parties on 19 October 2023.

[112] Dr Joseph's report provides an important source of expert advice for the Court.

[113] The report sets out the following as tāhuhu (fundamental signposts of tikanga):[99]

(a) Wairuatanga — acknowledging the metaphysical world — spirituality — including placating the departmental Gods' respective realms;

(b) Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world;

(c) Whanaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights,

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98 See Appendix IV; and HC Wellington CIV-2017-404-481, 9 October 2023 (Minute of Gwyn J).
99 Pūkenga Report, above n 65, at [40].

responsibilities and obligations that follow from the individual's place in the collective group;

(d) Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group;

(e) Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects;

(f) Noa — free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually ritually through karakia and water;

(g) Utu — maintaining reciprocal relationships and balance with nature and persons;

(h) Mauri — recognition of the life-force of persons and objects;

(i) Hau — respect for the vital essence of a person, place or object;

(j) Rangatiratanga — effective leadership; appreciation of the attributes of leadership;

(k) Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires;

(l) Aroha — charity, generosity; and

(m) Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations."

[114] Dr Joseph agreed that the tikanga indicia and values listed in his report could be grouped under the following overarching concepts:

(a) intensity of Māori association;

(b) whakapapa and the relevant tāke (how land was obtained);

(c) exercising control and authority of the resource; and

(d) obligations in the nature of kaitiakitanga.

[115] The pūkenga report confirms that the following activities may demonstrate a group's control or authority over the CMCA according to customary rules and interests:

(a) exercising manaakitanga, for example by permitting access and sharing what is gathered;

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

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

(d) exercising mana and rangatiratanga in manifest ways, for example through advisory and tribal committees which encompass a level of authority over a particular rohe;

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

(f) the ability to place customary restrictions on access and the taking of resources, for example through the establishment of rāhui;

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

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

[116] In *Re Reeder*, the Court considered this list, while not definitive, to be a useful guide for assessing the evidence of the applicants before the Court as to whether the test under s 58(1) has been met.[100]

[117] During cross-examination on his report, Dr Joseph confirmed that the following are controlling activities:

(a) stopping and querying recreational fishers about over-fishing and under-sized catch;

(b) the authorising of customary take by tangata kaitiaki;

(c) the placing of rāhui following a drowning, whale stranding or for conservation purposes; and

(d) protecting wāhi tapu by restricting knowledge of their location.

[118] The pūkenga report is appended to this judgment as Appendix V.

Mana moana agreement (shared agreement)

[119] At the beginning of the hearing, there were seven applicant groups. Two of the applications encompassed the entire hearing area and there were other overlaps between applications. There were also disputes about representation.

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100 *Re Reeder* [2021] NZHC 2726, [2022] 3 NZLR 304 at [53].

[120] As a result of kōrero during the course of the hearing, at the conclusion of the hearing, but before the pūkenga report was delivered and before the Court heard closing submissions, the applicants filed a joint memorandum of counsel setting out their agreement as to area and hapū and coastal demarcation points within the hearing area, in six coastal rohe.[101] Those coastal rohe are set out in Figure 2 below.[102] The parties refer to the agreement as the mana moana agreement.

Figure 2: Mana moana agreement map

[121] Each of the applicants then filed amended applications for recognition orders which, for the relevant coastal rohe, were consistent with the terms of the mana moana agreement and seek CMTs on the basis of shared exclusivity. On that basis the applicants submitted that the Court was not required to determine issues of overlaps within the hearing areas.

[122] By the time of closing submissions, the Court was faced with a unique situation — all hapū along the coastline of the application area have acknowledged one

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101 One of which will now be encompassed in the Group M Stage 1(b) hearing.
102 Also attached in landscape form as Appendix III.

another's mana tuku iho in respect of different parts of the coastline, in accordance with their shared tikanga.

[123] The applicants say that the shared exclusivity of use and occupation is reflected throughout the evidence of the witnesses for all applicants, demonstrating ahi kā. On the basis of that evidence, orders for CMT could have been sought across the entire Stage 1(a) area of the takutai moana at an iwi level. I observe that, similar to *Re Edwards*,[103] at the outset of this case some of the applications, from Rangitāne, Ngāti Hinewaka and Ngāti Kahungunu, were "korowai" applications, filed on behalf of all of that iwi's hapū. There were applications before the Court consistent with shared exclusivity as proposed.

[124] What may have seemed at the outset of the hearing to be a conflict (in terms of overlapping application areas, representation and/or mandate), or an impediment to reaching resolution as to who should hold rights, proved to be the opposite. That is, the close interconnectedness and close whakapapa of all applicants.

[125] Through the mana moana agreement, the applicants have collectively agreed that CMT should be recognised and held at a hapū level. The determination of the names of those hapū is a matter of tikanga that appropriately sits with the applicants. Counsel submits that in a consensual position such as this, the Court should not be prepared to "lift the veil" to question the integrity of the arrangement. It is the sum of the evidence that counts in determining whether the statutory tests have been met.

[126] The mana moana agreement was brought to the Court by rangatira with mana. Dr Joseph acknowledges the significance of the agreement, after "decades of mana korero, mana rangatira, and mana whakahaere which is in effect a modern day Wairarapa Moana Maunga Rongo Kawenata."[104] Dr Joseph remarked that, through the mana moana agreement, "kua ea – a state of balance has been achieved".[105]

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103 *Re Edwards*, above n 13, at [177]–[187].
104 Pūkenga Report, above n 65, at [123].
105 At [124].

[127] The pūkenga's report observes[106] "how readily they may prove their claims in the takutai moana area, and how impossible it is to contradict them if they only agree amongst themselves."

[128] The mana moana agreement represents a contemporary exercise of rangatiratanga on the part of the iwi and hapū applicant groups. It is in itself a customary agreement in accordance with tikanga.

[129] I accept and agree with the pūkenga's assessment that the division of the application area into five coastal rohe in this application area, as set out in the mana moana agreement, is an appropriate representation of customary interests and thus a customary agreement in accordance with tikanga. The mana moana agreement is the applicants' collective agreement that CMT should be recognised and held at a hapū level. It reflects that when the applicants speak of areas held in accordance with tikanga, they do so on an agreed basis.

[130] It was clear from the evidence before the Court that there is a shared tikanga in relation to the occupation and use of the takutai moana along the South Wairarapa coast. By the mana moana agreement all hapū named in it acknowledge each other's mana tuku iho in accordance with that shared tikanga. Interwoven and interconnected relationships through whakapapa and whanaungatanga are a significant component of the accepted tikanga along the South Wairarapa coast. This tikanga is the basis of, and allows for, the shared exclusive interests between various hapū along the coast.

[131] Except for Te Ātiawa, all of the hapū who seek CMT orders are hapū of Ngāti Kahungunu and/or Rangitāne. All are named within the list of Ngāti Kahungunu hapū in the Trust Deed of the Ngāti Kahungunu Settlement Trust and in the definitions in s 13 and sch 1 of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Act 2022. The historical evidence before the Court from both professional historians (Tony Walzl and Bruce Stirling) and the tangata whenua (for example, Haami Te Whaiti, Dr Takirirangi Smith, Robin Potangaroa and Steven Chrisp) makes it clear that the entire Wairarapa and its takutai moana, within the Stage 1(a) hearing

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[106] At [51], referring to the judgment of Chief Judge Fenton in 1870, reprinted in Alex Frame "Kauwaeranga Judgment" (1984) 14 VUWLR 227 at 244.

area, was within the customary ownership and control of Ngāti Kahungunu and Rangitāne in accordance with tikanga as at 1840. That is consistent with the view of the Waitangi Tribunal in its *Wairarapa ki Tararua Report*.[107]

[132] There are close whakapapa links between those iwi. The evidence demonstrates:

(a) The whakapapa connections between the applicant groups connect them to not only their tīpuna, but to one another and to the takutai moana.

(b) The hapū have collectively exercised mana and rangatiratanga over the takutai moana, from before 1840 until today, through their continued kaitiakitanga duties and responsibilities, caring for Papatūānuku and Tangaroa, and ensuring through their tikanga that there is kaimoana left for future generations.

(c) The hapū have used the takutai moana along the entire Wairarapa coastline to feed their whānau, hapū and iwi since before 1840 until now, based on mātauranga that was passed down through the generations.

(d) Hapū groups used and occupied one another's whenua and moana at different times, as part of sharing with each other as part of the manaakitanga on the coast.

[133] This interconnectedness was demonstrated in the evidence of many witnesses. By way of example, Piriniha Te Tau of Rangitāne talked of all hapū and iwi along the coast being connected in some way through whakapapa, and of "shared" interests along the coast. Joseph Potangaroa, also of Rangitāne, confirmed the ability to collect kaimoana in areas physically occupied by other groups. Throughout his evidence Steven Chrisp talked of Rangitāne as "part of the story along the Coast, jointly with other whānau". Robin Potangaroa of Ngāti Kahungunu similarly talked of the

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[107] Wairarapa Report Volume I, above n 27, at 3–4.

continued use and occupation over generations and being beside each other on the coast, "whether they are back inland in Masterton or Carterton, they know that particular whānau usually go down to those particular areas an everybody knows that's their area".

[134] Haami Te Whaiti of Ngāti Hinewaka said: "No one – none of our hapū have ever been excluded from fishing on our – in our fishing grounds, and that's – I mean – and I think that's the whole coast, our whole coastline. Those are shared."

[135] The historian Bruce Stirling confirmed it was difficult to draw exact boundaries because "most areas of interest are overlapped by multiple other areas of interest".

[136] Such is the nature of the whakapapa and whanaungatanga connections here that witness evidence will often be evidence of the rights and interests of more than one hapū or group.

[137] I am conscious of Miller J's injunction in *Whakatōhea* that there must be a proper foundation in custom and tikanga for any awards of CMT.[108] Orders under s 58 cannot be made based simply on agreements between applicants to avoid further litigation. I am satisfied that the mana moana agreement is not simply an artifice or an accommodation of convenience, but rather a reflection of the shared and interlinked whakapapa and whanaungatanga of the applicants, which became apparent during the course of the hearing.

[138] In the mana moana agreement the applicants have determined the names of the hapū in each coastal rohe, as a matter of tikanga. I accept that the mana moana agreement is in itself confirmation that the named hapū are linked by whakapapa and have a shared history of use. It is the acknowledged mana tuku iho, combined with the continued presence and performance of kaitiaki obligations, that demonstrates hapū control of the takutai moana, as a matter of tikanga.

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[108] *Whakatōhea*, above n 20, at [222] per Miller J, citing *Re Edwards*, above n 13, at [184].

[139] The evidence from Robin Potangaroa, of Ngāti Kahungunu, for example, is consistent with that. Mr Potangaroa said:

> … [there] will always be differences of view on the history of our iwi, on the elements of our whakapapa, on the primary affiliations of certain hapū, [p]articularly those hapū whose names appear in the hapū lists of both [Rangitāne and Ngāti Kahungunu] iwi.
>
> However, if we focus on those hapū with whom we all have affiliations regardless of whether we describe ourselves as Ngāti Kahungunu or Rangitāne, … [then] together, we are confident that we will have included all those who have held and exercised and continue to hold and exercise customary rights in accordance with tikanga along our coast."

[140] Mr Bennion, counsel for Ngāti Hinewaka noted that the Native Land Court minutes that were in evidence before the Court (despite their deficiencies) consistently show that coastal interests were organised around hapū and that there were layers of fishing rights — some general or generic to a number of hapū and some specific to particular hapū or even whānau. Rights in particular toka were gifted between groups. Everyone knew which hapū interests were controlling in particular areas.

[141] The amended applications filed after the mana moana agreement was reached name some hapū who were not specifically named in the original applications and from, or on behalf of whom, there was no direct evidence at hearing. Counsel for the Attorney-General acknowledged the significance of the mana moana agreement. While not seeking to undermine the agreement, or to imply that certain iwi or hapū do not have interests in any particular area, counsel raised the question whether the evidence is sufficient to meet the test for CMT in respect of each named hapū group, in each of the coastal rohe. Counsel submitted that s 58 requires that each hapū group identified in the mana moana agreement meet the test for CMT, in respect of each area defined in the agreement. That is so because, first, the evidence relates to the application areas being held at hapū level, and second, the orders seek to hold the application areas collectively by all named hapū.

[142] The Attorney-General points to the judgment in *Whakatōhea*,[109] where Miller J apparently rejects Churchman J's reliance (via the pūkenga report) on consensus among the applicant groups as to the seaward extent of use and occupation.

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[109] *Whakatōhea*, above n 20, at [317].

[143] It seems to me the essence of Miller J's comment in *Whakatōhea* is that the Court cannot simply rely on the agreement of the parties, or the pūkenga's report, to conclude that the criteria under s 58 are met. The Court must itself assess the evidence in deciding if s 58 is satisfied. But that is a different question from whether the Court needs to be directly satisfied by evidence from each of the constituent members of an applicant group that the constituent member in itself meets the statutory tests.

[144] In *Re Reeder*[110] Powell J, in discussing the exclusive use and occupation test, referred to "*each* of the Rangataua… applicants".[111] However it appears from the judgment that Powell J in fact proceeded on the basis of whether the constituent groups (the Rangataua Working Party applicants) had met the statutory test collectively.[112]

[145] Support for that approach can be discerned from a number of passages in the Court of Appeal judgment in *Whakatōhea*. Portions of Miller J's judgment (not dissented from by the majority) support the submission that hapū within an applicant group may rely on the status and activity of any member of the group.

[146] In his discussion of the "applicant group" Miller J said, of the provisions concerning who may apply and the contents of an application:[113]

> Sections 100 and 101 together envisage that the person who is to hold the order need not be the person who made the application. It follows that a board might seek CMT on behalf of constituent hapū whose mandate it holds and on the basis that the hapū, or some other nominated entity, would hold the title.

[147] And, discussing ss 107–111, the Judge said:[114]

> These provisions envisage as follows:
>
> (a) An applicant group may comprise a number of distinct iwi, hapū or whānau groups which have chosen to make a single collective application.
>
> …
>
> (c) The applicant group may rely on the status (as landowner) or activity (exercise of customary fishing rights) of any member

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110 *Re Reeder*, above n 100.
111 At [83] (emphasis added).
112 See for example [78].
113 *Whakatōhea*, above n 20, at [198] per Miller J.
114 At [203].

> of the group to prove that CMT exists. Such status or activity of a member or members may be relevant to proof of the applicant group's continuous use and occupation of the area specified in their application.

[148] Justice Miller acknowledges that members of an applicant group may enjoy differing degrees or kinds of mana over the area specified in their application, but may nonetheless share in a single CMT over that area, provided that one or more of the member groups has exclusively used and occupied each part of the area since 1840 (subject to that requirement, claims can accommodate changes in iwi, hapū or whānau groups since 1840).[115]

[149] Justice Miller also discussed whether an amendment to an application under the Act changes its essential nature:[116]

> An applicant group may comprise several distinct groups which may rely on the connection which any member group has to the affected area. This suggests that amendments are unlikely to change the essential nature of an application where they introduce member groups, or larger groups of which the applicant group is a member.

[150] And further:[117]

> … the Court may accommodate tikanga processes in which applicant groups and opposing parties decide whether to seek shared or separate CMT and agree on who is to hold a recognition order. To permit such processes is consistent with MACA's objective of recognising mana tuku iho in the common coastal and marine area. It allows the Court to accommodate applicants' preferences to structure their holdings so that recognition orders are administered in accordance with tikanga (and without need for judicial intervention).

[151] Further, as Miller J said in relation to Ngāti Muriwai (a whānau forming part of the iwi applicant group), a group forming part of another group may participate in a CMT recognition order granted to an applicant group of which they form part, provided members of the applicant group are able to meet the CMT criteria (and their participation should be resolved among a successful applicant group of which they form part and in accordance with tikanga).[118]

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115 At [204].
116 At [220](a).
117 At [220](d).
118 At [281]; and see also *Re Greensill* [2023] NZHC 2207 at [9]–[10] and [16].

[152] Pulling together those threads I conclude, first, that the determination of the names of those hapū listed in the mana moana agreement is a matter of tikanga that sits with the applicants. It is not for the Court to second-guess the integrity of the arrangement.

[153] Second, it is not essential that all iwi and hapū named in the mana moana agreement in respect of a specific coastal rohe called direct evidence. In each rohe the applicants come to the Court as a collective, saying we mutually acknowledge each other's interests in the rohe and here is our evidence. It is sufficient if some members of the applicant grouping have given evidence adequate to meet the statutory tests in each of the coastal rohe. It is the sum of the evidence that counts. The mutual acknowledgement of each other's interests contained in the mana moana agreement is itself powerful evidence of their historical and contemporary connection to the rohe.

[154] The situation might be different if the amended applications were "contrary to the interests of justice vis-à-vis other applicants and interested parties", as Miller J observed:[119]

> … applications may undergo significant modification as parties join the proceeding and the evidence comes in, provided the result is not in substance a new application and amendment is not contrary to the interests of justice vis-à-vis other applicants and interested parties. Such a process may reflect a complex and overlapping distribution of territorial and usage rights among whānau, hapū and iwi in traditional Māori society.

[155] Here, all of the applicants support and are signatories to the mana moana agreement. The first two tangata whenua interested parties support the mana moana agreement. The Kawakawa Trust supports CMT being recognised in their rohe and supports the holders of CMT being determined at the Stage 1(b) hearing. While the Kawakawa Trust disputes the boundary between two of the coastal rohe described in the mana moana agreement and do not support an order being granted to Ngāti Hinewaka at this time, because of representation issues, those unresolved questions do not impinge on the issue raised by the Attorney-General. As the Court of Appeal said, "It follows that acceptance by other iwi, hapū or whānau groups of an applicant

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[119] *Whakatōhea*, above n 20, at [221] per Miller J (footnotes and citations omitted).

group's right to speak for a specified part of the common coastal and marine area is powerful evidence of exclusivity."[120]

[156] As to the broader question of a grant of CMT being made on the basis of "shared exclusivity", the Court of Appeal is clear that there is no difficulty with the grant of recognition in favour of two or more groups of a single CMT in respect of a particular area.[121]

Kawakawa 1D2 Ahu Whenua Trust (Kawakawa Trust)

[157] Kawakawa Trust was granted leave to appear as an interested party in the application filed for Ngāti Hinewaka.[122]

[158] The Kawakawa Trust administers 2,000 acres of customary land across three Māori land blocks. Kawakawa 1D2 is one of the few blocks of Māori freehold land remaining in the Wairarapa. The Trust holds the land on behalf of 141 of the descendants of the original owner, Hemi Te Miha. Five of the seven current trustees are descendants of Hemi Te Miha. The land abuts the takutai where the Trust exercises mana moana.

[159] The Ngāti Hinewaka application area overlaps with the takutai abutting the Kawakawa Trust whenua. The owners of the Kawakawa Trust share the same whakapapa lines as the rest of Ngāti Hinewaka Me Ōna Hapū. The Trust says it participated in the hearing to ensure that the voices of those with mana moana over the adjoining takutai were heard.

[160] Tā Kim Workman and Murray Hemi gave evidence for the Kawakawa Trust. Their evidence included examples of the Trust's kaitiaki role in respect of the whenua and moana in their rohe, including protection of ecological sites.

[161] The trustees endorse the mana moana agreement. The Trust supports the court granting CMT in the areas where the statutory tests have been met, including in their

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120 At [171].
121 At [439] per Cooper P and Goddard J.
122 CIV-2017-485-259.

rohe, subject to the question of the "boundary" between the relevant rohe (as discussed below).

[162] The Trust raised three issues:

(a) The process for determining who should ultimately be the holder of any CMT order(s) in their rohe and how order(s) should be held in a way which recognises the mana tuku iho of all rights holders in the area.

(b) The omission of inland hapū from those hapū named in the mana moana agreement.

(c) The boundary drawn in the mana moana agreement.

[163] As to the first issue, the Kawakawa Trust does not consider that Ngāti Hinewaka Me Ōna Hapū Karanga Trust has demonstrated that it represents all of Ngāti Hinewaka and associated hapū, and does not support an order issuing to the Ngāti Hinewaka Me Ōna Hapū Karanga Trust at this time. It supports the submission that holders for the orders should be determined at the Stage 1(b) hearing.

[164] The trustees say that it is not sufficient for their interests to be "managed by appropriate hapū being named in the orders". Their concern is that, while hapū may be listed on an order, in practice the holder of the order will hold authority to exercise the CMT rights. Order(s) should be held in a way which recognises the mana tuku iho of all rights holders in the area.

[165] The trustees hold rights in the whenua and are mandated to speak for their beneficiaries. If they are not involved in the administration of any CMT orders granted, the Trust and its beneficiaries are denied the rights that they have on dry land. Such denial would not be due to a lack of connection to the rohe, but because they did not file an application under the Takutai Moana Act in their own right, prior to the statutory deadline (which, as the Trust notes, was found by the Waitangi Tribunal to be in breach of the Treaty principles of partnership, active protection, and

whanaungatanga).[123] The Trust says that it is for the beneficiaries of the Trust to speak for the area of coastline where they hold whenua. It is those individuals who have maintained ahi kā roa as a matter of tikanga.[124]

[166] The Trust acknowledges that the Takutai Moana Act is focused on iwi, hapū and whānau, but says the views of entities such as the Trust should be given weight. It asks that the ultimate holder of any recognition order be determined through a process consistent with tikanga to ensure that the holder is representative of all those who exercise inherited rights or have authority to speak for the CMCA. The order(s) should be held on the basis of a commitment to iwi and hapū wide consultation, with clear accountability to the wider community.

[167] The Trust referred by analogy to the Natural and Built Environment Act 2023 (recently repealed) which provided for the establishment of an iwi and hapū committee, which then decided on the composition for the regional planning committee and determined the Māori appointing body or bodies to appoint members.[125]

[168] In response to that submission, Ngāti Hinewaka submits it is inappropriate and would give rise to a potential tension to have the trustees of a land block represented, in that capacity, as a land block trust must primarily represent its trustees, rather than hapū. Ngāti Hinewaka notes that all of Mr Te Whaiti, Mr Robin Potangaroa and Mr Mason are trustees for land blocks along the coast, but they do not come to the Court as trustees, rather as hapū.

[169] But Mr Te Whaiti, for Hinewaka, agreed in cross-examination that bodies such as whenua trusts and marae play a vital part in maintaining a connection with the whenua and the moana and should have a say in the way in which CMT orders should operate. Ngāti Hinewaka agrees that there should be a way in which the Trust can participate in decisions made by the customary groups. It agrees that can be resolved at the Stage 1(b) hearing, when the form of any orders is determined.

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123 Takutai Moana Report Stage 1, above n 18, at 116 where the Tribunal recommended repeal of the statutory deadline.

124 *Whakatōhea*, above n 20, at [432] per Cooper P and Goddard J.

125 Natural and Built Environment Act 2003, sch 7, pt 1, cl 3 (repealed).

[170] As to the second issue, the Trust says that the list of hapū to be represented in the orders sought for the two relevant rohe seems arbitrary and not consistent with the evidence of use of the rohe. It says some hapū are omitted, despite a long history of use and occupation in the rohe, apparently on the basis of a distinction drawn by Ngāti Hinewaka between "inland" and "coastal" hapū. This may result in some hapū permanently losing rights under the Takutai Moana Act.

[171] Three hapū are not included in Ngāti Hinewaka's list: Ngāti Kahukuranui, Ngāti Hikawera and Ngāti Hikarara. Mr Te Whaiti's affidavit notes that Bruce Stirling's report correctly identifies that the interests of these three hapū lie principally inland, away from the marine and coastal application area. However, the Kawakawa Trust says that Ngāti Hikawera and Ngāti Kahukuranui do have interests in the Wairarapa moana.

[172] In relation to the proposed CMT for the area from the Kawakawa Point[126] to Āwhea River, the Kawakawa Trust notes that three hapū only have been named: Ngāti Hinewaka, Ngāti Rangaranga and Ngāi Tuhoungia. Mr Stirling's report examines the history of the Te Kopi-Waitutuma Block. The title was awarded to "the descendants of Hinewaka, Tatea, and Tuhoungia who can prove occupation". The descendants of Tatea were Ngāti Rua. It appears that Ngāti Rua have not been included on the CMT application because, in Mr Stirling's view, "[t]he inland portion (Te Kopi-Waitutuma No. 1) is not relevant to the application area, although it can be noted that the rights of Ngāti Rua to the northern part of that block had been admitted during the hearing." The Trustees say this is a further example of the potential to permanently lose rights under the Takutai Moana Act on the basis of an arbitrary distinction between inland and coastal iwi.

[173] In response Ngāti Hinewaka says that the Court must respect that all of the applicant groups are saying that those hapū listed are the appropriate groups. However, the inland hapū will be provided for.

[174] On the third issue, the relevant boundaries proposed in the mana moana agreement are from Mukamukaiti to Kawakawa Point and from Kawakawa Point to

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126 Also known as Ngawi.

Āwhea River. The Trust says drawing the boundary at Kawakawa Point would require it to participate in two orders rather than one. It proposes that instead the boundary is placed at Mangatoetoe Stream.

[175] Ngāti Hinewaka in response says it is not appropriate to make a significant customary decision, based on the Trust's administrative convenience. The change to the boundary line proposed by the Kawakawa Trust does not resolve the issue of which hapū fall on each side of the line. The Kawakawa line would stretch Ngāi Tūkoko and Ngāti Moe's interests and weigh heavily on them.

[176] I agree that, ultimately, it is for the applicants who have arrived at and submitted the mana moana agreement to determine the boundary lines between the coastal rohe that best reflect their customary interests and their ability to satisfy the statutory tests. While I accept the practical difficulty that creates for the Trust, that cannot be the determining factor.

[177] It seems to me that underpinning the Kawakawa Trust's submission is an understandable sense of frustration that the statutory framework drives reliance on what it calls "arbitrary lists" of hapū, at the expense of the much more nuanced nature of whakapapa and whanaungatanga and the relationships between the people of the Wairarapa. I would expect that — as Ngāti Hinewaka agrees is appropriate — the parties will engage in a tikanga process to discuss the holder of the orders and how the holder will recognise and uphold significant relationships, including with the Kawakawa Trust, and how to recognise the inherent relationship between coastal and inland hapū. Those discussions could include for example, the precise terms on which the orders might be issued and other matters that should be accommodated in accordance with tikanga by the holders of any orders, in the course of their implementation and administration.[127]

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[127] In *Re Edwards*, above n 13, at [420], cited in *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [304] where the High Court observed that an applicant group granted CMT could make provision in the wording of the CMT for recognition of another applicant group who may not have met the test for CMT, but was recognised by the successful parties as having a particular connection with the takutai moana. That is consistent with the Court of Appeal's conclusions regarding shared exclusivity in *Whakatōhea*, above n 20, at [204], [281], [439] and [441]–[443].

What evidence is required to meet the statutory tests?

"Holds the specified area in accordance with tikanga"

[178] The first limb of the test for CMT under s 58(1)(a) requires that an applicant group "holds the specified area in accordance with tikanga".

[179] The Court of Appeal clarified that was is required is a consideration of whether the group *currently* uses and occupies the area, in a manner consistent with the nature of that area, and requires the group to have control or authority over the area according to tikanga.

[180] Accordingly, the applicants' evidence should demonstrate:

(a) the current use and occupation (consistent with the nature of the area);

(b) an intention and ability to control access to the area and use of its resources as a matter of tikanga, focusing on whakapapa, mana or rangatiratanga, manaakitanga and kaitiakitanga);[128] and

(c) activities showing control or authority, such as the implementation of rāhui, observance of wāhi tapu, the tangible exercise of rangatiratanga, kaitiakitanga and manaakitanga, rather than simply carrying out a use or activity.

[181] These concepts are developed in Miller J's list of 15 elements of mana over land. Dr Joseph's report contains a similar list.[129] In addition, Dr Joseph sets out a series of "tikanga indicia"[130] and what he refers to as activities that show control or authority.

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128 By reference to these concepts as developed in the pūkenga report, above n 65, and *Whakatōhea*, above n 20.

129 Pūkenga Report, above n 65, at [75].

130 At [74].

Mana

[182] Mana encompasses authority, control, influence, prestige or power, that is spiritual in nature, and acquired through whakapapa and personal accomplishment.[131] Dr Joseph refers to both authority and control in his description of mana: "[it] encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group".[132]

Marae/papakāinga

[183] Identification of marae or papakāinga demonstrates a strong association and continued occupation of the whenua.

Land ownership

[184] Ownership of land proximate to the takutai moana may indicate current use and occupation and control.

Kaitiakitanga

[185] Kaitiakitanga is the obligation of stewardship and the protection of one's own.[133] Kaitiakitanga is a manifestation of mana, because without mana there is no authority for the exercise of stewardship.[134]

[186] The practice of kaitiakitanga encompasses conservation, guardianship, education and protection in relation to the takutai moana. Kaitiakitanga includes the fulfilment of obligations to conserve, nurture, and protect the takutai moana.[135] Dr Joseph confirmed that kaitiakitanga can evidence the holding of an area in accordance with tikanga, as opposed to mere use of the area.

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131 *Whakatōhea*, above n 20, at [127].
132 Pūkenga Report, above n 65, at [40](d).
133 *Whakatōhea*, above n 20, at [127].
134 At [127].
135 Pūkenga Report, above n 65, at [72].

Rāhui

[187] The imposition of rāhui (bans on the taking of resources or the entering into zones within a territory)[136] historically represented forms of stewardship, governance and management of lands and CMAs. As Dr Joseph observed during questioning on his report, a rāhui is a law and an important manifestation of whakapapa, mauri and kaitiakitanga. When a rāhui is set by hapū members, access to or the use of the marine and coastal area can be restricted.

Tapu

[188] Tapu is the respect for the spiritual character of all things and is a religious observance or spiritual practice for the purposes of protecting and reinforcing mana and sanctity.[137] In his pūkenga report, Dr Joseph noted that tapu is:[138]

> a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area.

Customary usages (fishing and kaimoana gathering)

[189] Dr Joseph's tikanga indicia of the coastal area being held in accordance with tikanga include reliance on the takutai moana for sustenance.

Manaakitanga

[190] Manaakitanga is "the reciprocal process of showing and receiving care and hospitality."[139] As Miller J noted, manaakitanga confers mana on both groups; Dr Margaret Wilkie identified manaakitanga as a dimension of mana.[140]

[191] The majority judgment in *Whakatōhea* also confirmed that permitting others to access the area and utilise the resources within it is an expression of manaakitanga and doing so is a manifestation of control of the area.[141] The majority also confirmed

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136 At [37].
137 *Whakatōhea*, above n 20, at [127].
138 Pūkenga Report, above n 65, at [53](c).
139 *Whakatōhea*, above n 20, at [127].
140 At [130].
141 At [403].

that permitting a group to use an area's resources reflects mana or control in respect of that area and supports, rather than undermines, an application for CMT.[142]

"Exclusive use or occupation without substantial interruption"

[192] Under the second limb of the CMT test, the applicants must show first, as at 1840, use and occupation with sufficient control to exclude others if they wished. This translates into:

(a) a strong presence manifesting in acts of occupation. For example, through the imposition of rāhui, observance of wāhi tapu, tangible exercise of rangatiratanga, kaitiakitanga and manaakitanga. Demonstrating an area belonged to, was controlled by, or was under exclusive stewardship of the applicant group;

(b) in terms of "marine areas", observation, control and regular use (for fishing/kaimoana gathering, transport, rongoā and other activities).

[193] As to continuity to the present day (that is, post-1840), what is required is:

(a) that connection or control is not lost as a matter of tikanga, in terms of ahi kā over time, or between groups, accounting for factors that substantially disrupted the operation of tikanga, and noting the exercise of manaakitanga and whanaungatanga can support rather than undermine a claim;

(b) use and occupation not being substantially interrupted by lawful activity carried on pursuant to statutory authority (for example, through permanent structures such as port facilities, provided it excludes the applicant group from accessing the area, but noting that some third-party access to fishing in an area is unlikely to constitute substantial interruption).

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142 At [424].

The five coastal rohe – CMT

[194] The amended applications filed by all of the applicants seek orders, on a shared exclusive basis (with one exception, where there is only one applicant) in five of the coastal rohe identified in the mana moana agreement and for decision in this hearing. The five coastal rohe are:

(a) Tūrakirae to Mukamukaiti;

(b) Mukamukaiti to Kawakawa;

(c) Kawakawa Point to Āwhea River;

(d) Āwhea River to Te Unuunu; and

(e) Te Unuunu to Whareama.

[195] In those circumstances, and in light of my conclusion that the evidence in relation to each coastal rohe where shared exclusivity is sought is properly considered on a global basis, I have considered whether the statutory tests are satisfied within each of the five coastal rohe.

[196] The coastal rohe and the parties who seek orders on the basis of shared exclusivity are discussed below.

Tūrakirae to Mukamukaiti

[197] The name Tūrakirae for the headland to the east of Ōrongorongo derives from the area being a headland (rae) and being where the Remutaka Range comes down (turaki) to the sea.[143] Tūrakirae is the western headland of Palliser Bay (Kawakawa).

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[143] G Leslie Adkin *The Great Harbour of Tara: Traditional Maori Place-Names and Sites of Wellington Harbour and Environs* (Whitcombe and Tombs, Christchurch, 1959) at 89; and Department of Conservation *Turakirae Head Scientific Reserve Brochure* (2007).

[198] An order for shared exclusivity in this area is sought by Ngāti Hinewaka, Ngāti Rua, Ngāi Tūkoko, Ngāti Moe, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira, Ngāti Hāmua and Te Ātiawa hapū.

[199] The evidence in relation to this coastal rohe was principally from Te Ātiawa. In considering the evidence I have had regard to the mana moana agreement and its significance as a mutual acknowledgement of historical and contemporary interests. I have also placed some weight on the pūkenga's opinion that the agreement accords with the tikanga for the relevant area.

Holds the specified area in accordance with tikanga

Te Ātiawa

[200] In this Group M Stage 1(a) hearing Te Ātiawa is participating as an iwi and its evidence and submissions make no distinction between iwi and hapū within the applicant group. For that reason, the Te Ātiawa evidence did not focus on any particular hapū of Te Ātiawa holding or having a presence in the coastal rohe, although the evidence of Te Rira Puketapu refers to Te Ātiawa representing several Te Ātiawa hapū, including Ngāti Te Whiti, Puketapu, Hāmua and Te Matehōu. Witnesses for Te Ātiawa cite whakapapa affiliations to Te Matehōu (Īhāia Puketapu and Te Rira Puketapu) and Hāmua (Renee Randall).

[201] Mr Stirling's evidence identifies the historical presence of Ngāti Tama (hapū) at Mukamuka and Mr Walzl's evidence records the historical presence of Ngāti Hāmua and Te Matehōu at Ōrongorongo, although this appears to be the coastal area to the west of Tūrakirae.

[202] Te Ātiawa's claim extends from the traditional land boundary markers, beginning at the northern lateral boundary extending from Pipinui Point in the east, with a right line following a seaward boundary, continuing along the outer limits of the territorial sea. The eastern lateral boundary is a right line landward to Mukamukaiti.

[203] The historical nature of Te Ātiawa's holding is relevant to the question of whether today it holds the area in accordance with tikanga and the intention and ability to control access to the area and use of its resources. An agreement entered into between Te Ātiawa and Ngāti Kahungunu in 1840 (the Maunga Rongo Peace Agreement) established peace and demarcated their respective interests with a boundary defined by landmarks.[144]

[204] The peace agreement resulted from a journey Te Wharepouri (Te Wharepouri, Te Kakapi-o-te-rangi) (a Te Ātiawa chief) took to Hawke's Bay where most of the Wairarapa people had taken refuge. Te Wharepouri wished to negotiate for the release of his niece Te Kakapi who, along with Te Wharepouri's wife, Te Urumairangi, had been captured by Nukupewapewa, a Kahungunu leader, at the battle of Tauwhiriata in 1835. Nukupewapewa released Te Urumairangi, who told her husband that the Wairarapa chief sere prepared to negotiate for Te Kakapi's release. On arrival in Hawke's Bay, Te Wharepouri found that Nukupewapewa had recently drowned and his successor, Tutepakihirangi, insisted that Te Ātiawa abandon all claim to return to Wairarapa in return for Te Kakapi's release. A group of Ngāti Kahungunu chiefs accompanied Te Wharepouri back to Wellington in July 1840 and it was probably during this visit that a peace agreement was reached between Ngāti Kahungunu and Te Ātiawa.[145]

[205] The Peace Agreement meant that Ngāti Kahungunu abandoned their claims west of the Remutaka and Tararua Ranges, while Te Ātiawa gave up any claim to the east of those ranges.

[206] Mr Puketapu's evidence recounts the Peace Agreement as stating:

> Live, all of you, on this side of the bounding mountains … you on this side, I on the other. I will call those mountains our shoulders; the streams that fall down this side are for you to drink; on the other side for us.

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144 Bruce Stirling *Ngati Hinewaka me ona Hapu Karanga: Historical Report* (February 2023) [Stirling Report] at 42; and Tony Walzl *Te Ātiawa & the Wairarapa Takutai Moana* (21 April 2023) [Walzl Te Ātiawa Report] at [3.2].

145 Waitangi Tribunal *Te Whanganui a Tara me ona Takiwa*: *Report on the Wellington District* (Wai 145, 2003) [Waitangi Tribunal Wellington Report] at 30.

[207] Further sequences of arranged marriages ensued, together with the exchange of gifts and the release of prisoners, which cemented the peace in the traditional custom.

[208] Te Rira Puketapu gave evidence that since 1840 Te Ātiawa have exclusively occupied and used lands adjacent to Te Ātiawa's CMCA, including at Tūrakirae Head and Mukamukaiti.

[209] The historical evidence suggested some ambiguity as to the precise location of this boundary of the Maunga Rongo Peace Agreement. For example, Mr Stirling's evidence suggests the boundary was at Tūrakirae, which would have precluded Te Ātiawa from having interests in this coastal rohe until later granted by Crown deed. But, as Mr Walzl records, Lieutenant Colonel William Anson McCleverty was appointed to resolve issues that had been created by the New Zealand Company's sale of land occupied by Māori to settlers. This was done by obtaining further deeds of exchange from the iwi and hapū concerned, whereby their settlements and cultivations that were "owned" by settlers were exchanged for land in other places. Mr Walzl's evidence suggests the fact of William McCleverty's deed in favour of Te Ātiawa in 1847, within the area from Tūrakirae to Mukamukaiti, indicates the iwi's pre-existing and unextinguished interests in this coastal rohe.[146] The Waitangi Tribunal Report on Te Whanganui-a-Tara appears consistent with this.[147]

[210] Ngāti Kahungunu's position is that Tūrakirae is the customary boundary in accordance with the Maunga Rongo Agreement but, as an exercise of mana rangatiratanga, agreement has been reached recognising the mutual interests between Tūrakirae and Mukamukaiti. That is consistent with the position taken by the two iwi in relation to the allocation of certain fisheries assets, and recorded in an agreement between them in 2009 and put in evidence by Te Rira Puketapu.

[211] There is evidence of activities being undertaken by members of Te Ātiawa in this coastal rohe, that show authority or control, including in terms of exercising kaitiakitanga. Mr Puketapu gave evidence that Te Ātiawa look after the kaimoana

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146 Walzl Te Ātiawa Report, above n 144, at [3.33]–[3.40].
147 Excerpts from Waitangi Tribunal Wellington Report, above n 145.

through the permit system. Kaitiaki issue permits for the taking of kaimoana such as crayfish, pāua and kina. To that extent, they properly regulate and report the amount of customary catch in their takiwā rohe moana to ensure sustainability. Mr Puketapu himself has been issuing permits for customary gathering of kaimoana since about 2010.

[212] Hawea Tomoana also gave evidence of gathering kaimoana to feed his whānau and encouraging and enabling customary fishing and management traditions to continue in the rohe moana. This is something he is passing down to his children.

[213] In 2000, Te Ātiawa Customary Fisheries Committee applied to have the traditional customary fisheries area gazetted pursuant to the 1998 Kaimoana Regulations. An agreement was reached under the Maori Fisheries Act 2004 between Ngāti Hinewaka-Kahungunu and Te Ātiawa ki te Upoko o te Ika a Māui Pōtiki Trust over the customary food gathering rohe moana in relation to each other's interests in the coastline between Mukamuka and Tūrakirae. The agreement signifies Ngāti Kahungunu's recognition of Te Ātiawa's customary fishing interests.

[214] Mr Puketapu spoke of Ngāti Awa wāhi tapu and other sites of historical significance in and around Tūrakirae headland to Rimurapa headland, from Rimurapa headland to the top of the Remutaka ranges. There was evidence of old burial sites and kōiwi at Mukamuka in the east and of the maintenance of urupā.

[215] The Te Ātiawa witnesses gave evidence of fishing and kaimoana-gathering in their coastal rohe. Te Rira Puketapu talked of both sides of Tūrakirae being a favoured fishing and diving spot in his youth, when his people still owned the Ōrongorongo block at Tūrakirae. Mr Puketapu gave evidence of going along the coast out to the heads from Tūrakirae to Rimurapa headland and Mukamuka to get mussels.

[216] Mr Puketapu also describes Te Ātiawa tikanga practices, such as saying a karakia before going in the sea, never shelling kaimoana on the beach or on the boat and never turning your back on the sea.

[217] Renee Randall talks of travelling to Tūrakirae to meet with whānau and gather kaimoana. Although this meant going across the Riddiford property, Mr Randall says this has never been an issue. Mr Randall's whānau had a bach at Ocean Beach and he and others grew up diving for crayfish at Mukamukaiti. Mr Randall also talked of familiarity with the coast, knowing where to dive and gather kaimoana, and in what conditions.

[218] Hawea Tomoana gave evidence of, as he grew up, going to Mukamukaiti, and from there to Ocean Beach and back to Tūrakirae. Mr Tomoana's evidence is that Te Ātiawa descendants continue to maintain their relationship with the takutai moana in accordance with tikanga and kawa from Pipinui Point to Mukamukaiti.

[219] Mr Tomoana also gave evidence of fishing and kaimoana gathering from a young age and referred to the intergenerational harvesting of kaimoana within the takiwā rohe moana, including at Tūrakirae over the years, and along the Pencarrow coast. Mr Tomoana's evidence is that his people have been going there for generations, not just in his lifetime, or even in his grandfather's lifetime or his great grandfather's lifetime.

[220] Te Rira Puketapu gave evidence of the imposition of rāhui within Te Ātiawa's application area and Mr Tomoana also speaks of implementing rāhui to prevent misuse and depletion of resources, with the occasional posting of a rāhui designating an area as being out of bounds for fishing or harvesting for a certain period, to allow the resources to regenerate, and of confronting poachers.

[221] There is further evidence of a contemporary presence in and holding in accordance with tikanga of this coastal rohe by Te Ātiawa, from Tūrakirae to Mukamukaiti. For example, a block of land at Mukamukaiti remains in Māori (Te Ātiawa) ownership and as Renee Randall's evidence, for example, demonstrates is characterised by persistent regular use.

[222] Te Rira Puketapu's whakapapa evidence connects Te Ātiawa to this area. Īhāia Puketapu expresses that connection in the pepeha:

> Mai Turakirae ki Rimurapa, mai Rimurapa ki Remutaka.

> Mukamuka ki te rāwhiti, Pipinui ki te rā tō.
>
> (From Turakirae headland to Rimurapa headland, from Rimurapa headland to the top of the Remutaka ranges, Mukamuka in the east of the rising sun, Pipinui in the west of the setting sun).

[223] I am satisfied by the evidence of Te Ātiawa's continuing claim to this coastal rohe.

Rangitāne

[224] Rangitāne asserts mana whenua and mana moana from the Owhango River in the north of the application area to Tūrakirae Point in the south.

[225] The Rangitāne hapū who seek orders in this coastal rohe are Ngāti Hāmua and Ngāti Hinetauira.

[226] In terms of cosmogeny, there is evidence that connects these hapū groups to the general application area, through Kupe.

[227] In terms of whakapapa, there is evidence that connects these hapū to this area. Joseph Potangaroa provided a copy of his Ngāti Hāmua Traditional Report which he published in 2013. The Report sets out a detailed Rangitāne whakapapa. Mr Potangaroa gives evidence of whakapapa that connects Ngāti Hāmua and Ngāti Hinetauira to this area broadly, through Rangitāne at an iwi level.

[228] Steven Chrisp's evidence too details the Rangitāne whakapapa, noting that Ngāti Hāmua is the matua hapū for Rangitāne.

[229] In his expert historical report for Ngāti Hinewaka, Bruce Stirling gives evidence of whakapapa that connects Ngāti Hāmua to this area broadly, through Ngāti Kahungunu at an iwi level, and also of evidence that connects Ngāti Hinetauira to this area broadly, through Ngāti Kahungunu.[148]

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148 Stirling Report, above n 144.

[230] Mr Puketapu's evidence for Te Ātiawa included whakapapa that appears to connect Ngāti Hāmua to this area broadly, through Te Ātiawa, at an iwi level, and Ngāti Hāmua (and Te Matehōu)[149] at a hapū level, at Ōrongorongo and elsewhere further west of Tūrakirae (although it appears this excludes the coastal rohe within the hearing area).

[231] The witnesses who gave evidence for the Rangitāne applicant group whakapapa to the Ngāti Hāmua hapū and Ngāti Hinetauira witnesses did not participate directly in the proceeding. There is no difficulty with that, given the interwoven whakapapa of hapū all along the coast and my conclusion that applicants could have sought orders at an iwi, rather than hapū, level.

[232] Mr Chrisp's oral evidence was that Rangitāne interests "are really around that Lake Ōnoke area".

Ngāti Hinewaka

[233] In the coastal rohe from Tūrakirae Head to Mukamukaiti, the Ngāti Hinewaka hapū who seek orders are Ngāti Hinewaka hapū, Ngāti Rua, Ngāti Rākaiwhakari, Ngāti Rākairangi and Ngāi Tūkoko (noting that Ngāi Tūkoko separately seek interests in this rohe). Ngāti Hinewaka says that although the western side of Lake Ōnoke is the western border of its application area, Ngāti Hinewaka has historical and ongoing interests in the rohe moana all the way to Tūrakirae Head.

[234] There was no direct evidence given in the proceeding from witnesses who primarily whakapapa to any of Ngāti Rua, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi and Ngāti Hinetauira. I do not see a difficulty with that in itself. While all the witnesses who gave evidence for Ngāti Hinewaka whakapapa to the Ngāti Hinewaka hapū they also cite whakapapa affiliations, relevant in this coastal rohe, to Ngāi Tūkoko, Ngāti Rākaiwhakairi and Ngāti Hinetauira.

[235] Tūrakirae is a significant site for Ngāti Hinewaka, as it is the coastal boundary agreed between West Coast and Wairarapa iwi in the historic peace agreement

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149 Walzl Te Ātiawa Report, above n 144, at [3.54].

(discussed above). Mr Te Whaiti gave evidence of use of the area, beyond Kiriwai between Lake Ōnoke and Tūrakirae, in general terms, as a place of healing.

[236] Mr Te Whaiti's oral evidence was that the only Ngāti Hinewaka hapū with known or definite interests in this rohe is Ngāi Tūkoko. However, Mr Watene's evidence for Ngāi Tūkoko was that, although he recalled his grandparents telling him of Tūkoko fishing at Tūrakirae Head, he was not aware of any current use in that part of the rohe.

[237] As to whakapapa, there is evidence that connects Ngāti Hinewaka to this area at an iwi level, through Ngāti Kahungunu.[150] In terms of cosmogeny, there is also evidence that connects these hapū groups to this general area through Kupe.[151]

Ngāi Tūkoko and Ngāti Moe

[238] Ngāi Tūkoko and Ngāti Moe rely on the Ngāti Kahungunu korowai application in respect of the coastline area from Tūrakirae Head east to Lake Ōnoke and out to sea 12 nautical miles from all points along that coastline, and that is supported by Ngāti Kahungunu.

[239] Mr Chrisp affirmed Rangitāne's support for Ngāi Tūkoko's claim, particularly in the area from Tūrakirae to Kiriwai.

[240] The evidence from both Mr Watene (for Tūkoko) and Mrs Watene (for Moe) indicated their presence is principally east from the eastern banks of Lake Ōnoke.

[241] In terms of whakapapa, there is evidence that connects both hapū groups to this area at an iwi level, through Ngāti Kahungunu. In terms of cosmogeny, there is evidence that connects these hapū groups to this general area through Kupe.

[242] I conclude that the collective evidence of the applicants in this rohe establishes a current holding of the area in accordance with tikanga.

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150 Stirling Report, above n 144, at 14 and 42.
151 At 1–3.

Exclusive use and occupation 1840 to the present day

Te Ātiawa

[243] There is evidence of Te Ātiawa's historical interests and presence in the broader area before 1840,[152] and within this specific coastal rohe from 1847 onwards.[153]

[244] As above, there is evidence of a peace agreement between Te Ātiawa and Ngāti Kahungunu in 1840 and some evidence to suggest this precluded Te Ātiawa from controlling the area east of Tūrakirae after that time.[154]

[245] However, the evidence of Īhāia Puketapu suggests Te Ātiawa's use and occupation of this coastal rohe continued between 1840 and 1847, although possibly limited to kaimoana gathering.

[246] There is evidence of an award of title in 1847 and some evidence to suggest this award was informed by actual customary interests in the area at the time it was made.

[247] The evidence suggests that from 1847, Te Ātiawa continued to use and occupy this area, notwithstanding increasing sale and alienation of the block. Minutes of Native Land Court hearings in the late 19th and early 20th centuries, confirming alienations, record the interests of Te Ātiawa in this area.[155]

[248] While there are some gaps in the evidential record, particularly in the mid-20th century, the contemporary evidence given by Te Ātiawa witnesses reflects continued use and occupation, and stewardship, in terms of customary fishing and kaimoana gathering and kaitiakitanga in this area.

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152 Walzl Te Ātiawa Report, above n 144, at [3.49]–[3.54].
153 At [3.35] and [3.36].
154 Stirling Report, above n 144, at 42.
155 Walzl Te Ātiawa Report, above n 144, at [3.57].

[249] Te Ātiawa has retained ownership of some land abutting the coastal rohe, which may be taken into account in determining whether CMT exists.[156] This is a small parcel of Māori land remaining in the area, south of Mukamukaiti, within what was originally the Ōrongorongo Reserve. Retention of this land is likely to help facilitate access to and use and occupation of the area.

[250] The evidence suggests that Te Ātiawa's connection with, and any control over, the area (to the extent this existed in 1840) has not been lost. There is evidence of continuity of use and occupation of this coastal rohe on the part of Te Ātiawa, from at least 1847 to the present day. I infer from the evidence that there was such use and occupation in the period 1840 to 1847 also.

[251] There are no major access issues to this part of the coast and while access is sometimes restricted by private owners, it is only in relation to the public generally and to vehicle access. Renee Randall's evidence was that access is now more restricted in terms of private landowners who occasionally have denied reasonable and practical access. However, Mr Randall also clarified that, as tangata whenua, members of Te Ātiawa have built a working relationship with the private owners of abutting land so that there is cooperation with them. Access by foot remains possible, with the only other access by boat. Access is otherwise restricted by the nature of the terrain and environment.

[252] The question whether commercial fishing amounts to a substantial interruption is considered on a general basis at [632]–[662] below. Specific to Te Ātiawa I note the evidence that it has continued customary fishing and kaimoana gathering practices in this area and, as is clear from Īhāia Puketapu's evidence, it has also continued to exercise a degree of authority and control in terms of engagement with poachers and commercial fishers.

[253] As to other factors that might amount to substantial interruption, the Tūrakirae Head Scientific Reserve at the Ōrongorongo Block may have had some impact on the nature of use and occupation in this area on the part of tangata whenua. However,

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156 Takutai Moana Act, s 59(1)(a)(i).

although extensive, I conclude that the Reserve has not constituted a substantial interruption.

[254] As to the seaward extent of use and occupation, the Te Ātiawa witnesses were reluctant to disclose the locations of particular fishing sites. The evidence clearly demonstrates a familiarity with and regularity of use of the inshore area, but there is a lack of evidence of observation, control or regular use of the offshore fishery.

[255] I conclude that Te Ātiawa can demonstrate exclusive use and occupation of this coastal rohe from 1840 to the present day.

Rangitāne

[256] The historical evidence suggests Ngāti Hinetauira was present only around Wairarapa moana and at Te Kopi.[157]

[257] There is some historical evidence indicating a strong presence in the area at 1840 on the part of Ngāti Hāmua. Mr Chrisp's evidence indicates that Ngāti Hāmua was present in proximity to this area, based on a tuku to recognise its role in defending the Wairarapa hapū from incursions by Taranaki iwi and Ngāti Toa in the 1820s and the 1830s. It appears these interests and this presence only extended as far as land around Lake Ōnoke and the Wairarapa Moana.

[258] There was little direct evidence of continuity of use and occupation of this coastal rohe on the part of Ngāti Hāmua and Ngāti Hinetauira.

Ngāti Hinewaka

[259] Mr Te Whaiti and Mr Stirling set out detailed descriptions of the history of these hapū, the whakapapa that links the hapū to the whenua, the moana and to each other, and their continuous use of the application area since before 1840.

[260] Mr Te Whaiti gave details of significant Ngāti Hinewaka historical papakāinga, marae and pā sites. The furthest west is at Kiriwai.

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157 Stirling Report, above n 144, at 23.

[261] Mr Stirling's evidence also details census data from the late 19th and early 20th centuries, which identify specific papakāinga related to a number of the hapū within Ngāti Hinewaka,[158] although none within this coastal rohe.

[262] Evidence for Ngāti Hinewaka details the contemporary and ongoing customary use and activities they undertake in the application area generally, including kaitiakitanga, adherence to tikanga, gathering of kaimoana, use of karakia and placing of rāhui.

[263] Mr Te Whaiti's evidence covered the kawa and tikanga of Ngāti Hinewaka, followed for many generations and adhered to throughout the application area. Mr Te Whaiti also recounted karakia used to call kaimoana both in the shallows and from deep waters.

[264] Manaakitanga plays a significant role in the ongoing kaimoana gathering practices of members of Ngāti Hinewaka. The practice of gathering kaimoana and bringing it back to those who live inland was described by witnesses before the Court and also in the kōrero of those who have since passed away, recorded by Mr Te Whaiti and Dr Foss Leach.[159]

Ngāi Tūkoko and Ngāti Moe

[265] Mr Walzl's evidence establishes Tūkoko's early arrival "in the vicinity of the Wairarapa Lakes". It is clear that by 1840, the hapū had established associations with at least some of the land lying adjacent to the application area. While Crown land purchasing in the Wairarapa led to the alienation of much of Ngāi Tūkoko's whenua, Tūkoko's descendants continued to use the marine and coastal area for kaimoana gathering in particular and they continued to occupy at least some of their historic lands.

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158 Stirling Report, above n 144.

159 Dr Foss Leach did not give evidence as a witness. His work, including B Foss Leach "The prehistory of the Southern Wairarapa" (1981) 11(1) J R Soc of N Z 11, was included in the evidence provided by Bruce Stirling.

[266] Moe Te Ao's child, Mahangapuhia, led a migration of people from Waimarama in the Hawke's Bay to live in various places in the Wairarapa. Towards the end of the 18th century, marriages tied Ngāti Moe and Ngāti Rua, who at that time occupied the coastal lands from Te Kopi to Te Humenga. Dr Heather Ballara recorded that Ngāti Moe was a "major hapū" of the Wairarapa region in the period between 1769 to 1840 and that they were in the Wairarapa Valley/Palliser Bay area.[160]

[267] Martin McKinley was told by his grandmother that the area from Tūrakirae Head to the western side of Lake Ōnoke is tapu, as many people were killed there.

[268] Collectively, Ngāi Tūkoko and Ngāti Moe had a strong presence in Palliser Bay as at 1840 and would have had sufficient control over the area at that time to exclude others if they wished to do so, although the evidence for Ngāi Tūkoko and Ngāti Moe is that the resources in the bay were shared.

[269] Mr Walzl's historical evidence for Ngāi Tūkoko suggests the hapū was involved in the sale of the land to the west of Lake Ōnoke (extending to Tūrakirae), including through Raniera Te Iho-o-te-rangi and Ngairo Takatakaputea. In Mr Walzl's view this demonstrates Ngāi Tūkoko's interests in this area.

[270] On the other hand, Mr Stirling's evidence suggests Te Iho-o-te-rangi's involvement in the land sale was improper and unauthorised and did not necessarily reflect interests on his part or that of his hapū in land west of Lake Ōnoke. But Mr Stirling's evidence also indicates the involvement in this sale of land of another chief, Ngairo Takatakaputea, who also has connections to Ngāi Tūkoko.

[271] That is consistent with the evidence of Mr Chrisp, who gave evidence for Rangitāne, who also suggests from his understanding of the historical record that Ngāi Tūkoko has interests in the block.

[272] In 1883 Piripi Te Maari noted in his evidence before the Native Land Court, during the inquiry into title of the Wairarapa Lakes:

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[160] Heather Ballara "The Origins of Ngāti Kahungunu" (Doctor of Philosophy in History thesis, Victoria University of Wellington, 1991) at 167.

> I claim through Tūkoko, my ancestor … Tūkoko was a permanent resident here. Tūkoko belonged to Rangitaone [sic] and N'Kahungunu … From Tūkoko down to the present time, we have always resided on this land … I can point out all the places where Tūkoko to myself have lived on this land. Tūkoko has a claim to both the lakes in the western side.

[273] I accept that the involvement of at least two chiefs with connections to Ngāi Tūkoko does suggest an ability to control and exclude others from this land and provides a sufficient basis for drawing inferences to satisfy the second limb of the test.

[274] In respect of current holding, in accordance with tikanga, both Mr Watene's evidence for Ngāi Tūkoko and Mrs Watene's evidence for Ngāti Moe was limited east of Lake Ōnoke. The evidence from Mrs Watene suggests that Ngāti Moe also does not currently hold or have a presence in this area, past the eastern banks of Lake Ōnoke.

[275] There is evidence that connects both hapū groups to this area at an iwi level, through Ngāti Kahungunu.[161] In terms of cosmogeny, there is evidence that connects these hapū groups to this general area through Kupe.[162]

Conclusion

[276] I am satisfied that there is sufficient evidence before the Court to conclude that, collectively, the applicants in this coastal rohe satisfy the statutory tests. The fact that the interests of each applicant in this rohe are not of equal strength is not fatal to a finding of use and occupation on the basis of shared exclusivity as between them.

[277] Through the mana moana agreement, Te Ātiawa has acknowledged that the other applicants in this rohe do have both historical and contemporary interests sufficient to found a CMT on the basis of shared exclusivity. That in itself is powerful evidence of their rights, as is the pūkenga's opinion that acknowledgement of the shared interests accords with relevant tikanga for the area.

[278] An order for CMT on a joint exclusive basis for the named applicants is appropriate, out to three kilometres from the coast.

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161 Stirling Report, above n 144, at 14 and 42.
162 At 1–3.

Mukamukaiti to Kawakawa Point

[279] An order for this coastal rohe, on the basis of shared exclusivity, is sought by Ngāi Tūkoko and Ngāti Moe and hapū of Ngāti Hinewaka (Ngāti Hinewaka hapū, Ngāti Rua, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi), and hapū of Rangitāne (Ngāti Hinetauira and Ngāti Hāmua).

Holds the specified area in accordance with tikanga

[280] Both Ngāti Hinewaka and Ngāi Tūkoko gave evidence of their currently holding this coastal rohe area in accordance with tikanga.

Ngāti Hinewaka

[281] The Ngāti Hinewaka hapū who hold mana moana in the area from Tūranganui and the southern part of Lake Ōnoke are Ngāi Rākaiwhakairi, Ngāi Tūkoko, Ngāti Rākairangi, Ngāti Ngapu o te Rangi and Ngāti Rua.[163]

[282] Ngāi Rākaiwhakairi were named by Piripi Te Maari as one of the "principal hapu in Wairarapa."[164] Piripi Te Maari further confirmed their interests at Lake Ōnoke. Ngāi Tūkoko are associated with Ngāti Rākaiwhakairi, with interests in and around Wairarapa Moana. Ngāti Rākairangi have interests in the southern side of Wairarapa Moana and were the principal hapū of Piripi Te Maari. The eponymous ancestor of Ngāti Ngapu o te Rangi was a mokopuna of Hinewaka's son Ngaokiterangi and are associated with the southern coastal lands of Wairarapa Moana. Ngāti Rua are principally connected to Te Kopi and Tūranganui.

[283] The Tūranganui deed (by which the Crown acquired a significant area of land beside Lake Ōnoke and the south coast) was signed by representatives of a range of hapū, including Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Rua, Ngāi Tūkoko and Ngāti Hinewaka.[165] A number of pā and kāinga in this area were identified, including Upokokirikiri and Okorewa.

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163 Stirling Report, above n 144.
164 At 22.
165 At 53.

[284] A 1908 petition for a reserve at the mouth of the Wairarapa Moana, where it met the sea, was signed by a number of rangatira and members of these hapū. They named the hapū they represented, including Ngāti Rākairangi, Ngāi Tūkoko and Ngāti Rākaiwhakairi.

[285] The area has been used by Ngāti Hinewaka for generations as a kai basket.

[286] The Ngāti Hinewaka hapū who hold mana moana in the area from Te Kopi to Whatarangi are Ngāti Hinewaka (hapū) and Ngāti Rua.

[287] As noted above, Ngāti Rua are principally connected to Te Kopi and Tūranganui. The Ngāti Rua tīpuna Tatea lived, died and was buried at Te Kopi.

[288] This area includes the 19th century papakāinga of Omoekau and the Te Kopi fishing area, which was the subject of a 1953 petition.

[289] For Ngāti Hinewaka there is evidence of regular use and occupation of sites for fishing and kaimoana gathering within this area, at and around Lake Ōnoke, Okorewa, Whāngaimoana, Te Kopi, Whatarangi, Te Humenga, Waiwhero and Kawakawa.

[290] David McKinley, who has whakapapa affiliations to Ngāti Hinewaka, Ngāti Hinetauira, Ngāti Rongomaiaia, Ngāti Māhu and Ngāti Te Kawekairangi, gave evidence of his lifelong association with the Wairarapa coast and the rohe moana. Mr McKinley describes gathering kaimoana through the rohe moana, from Te Awaiti in the north to Tūrakirae in the south. He and his whānau frequented sites at Te Awaiti, Tora, White Rock, Mātakitaki-a-Kupe and Ngā Pōtiki. Mr McKinley's father passed on his mātauranga about gathering kaimoana, including what tohu to wait for before collecting kina.

[291] Ross Ward is a member of Ngāti Hinewaka, a resident of Te Kopi and a direct descendant of Hemi Te Miha. Mr Ward gave detailed evidence of the long association between his whānau and the rohe moana. He has fished these waters throughout his life and has passed on his skills and mātauranga to the next generations.

[292] Mr Te Whaiti, Mr McKinley, Mr Ward and others of Ngāti Hinewaka have been involved in and advocated for the establishment of reserves in this area, including for taiāpure at Te Kopi and Te Humenga, and mātaitai reserves at Mātakitaki-a-Kupe and Pukaroro. Ngāti Hinewaka has the ability to recommend restrictions in these taiāpure, for the Minister to consider.

[293] Ngāti Hinewaka has also secured voluntary agreements limiting the areas within which commercial divers, rock lobster fishers and pāua fishers may fish.

[294] Ngāti Hinewaka issues permits for, and fish and kaimoana, are caught and gathered, in this area. Mr McKinley has been a kaitiaki of Ngāti Hinewaka for eight years, managing customary permits and ensuring every diver is aware of conservation and health and safety.

[295] The Court heard evidence of the operation of a system of tikanga within this coastal rohe, including a range of practices linked to customary values and principles, covering fishing and other kaimoana-gathering practices; manaakitanga, for example by gathering and sharing kaimoana; kaitiakitanga — protecting the takutai moana for current and future generations and ensuring the sustainable gathering of kaimoana.

[296] Mr Te Whaiti gave evidence of the reinterring of kōiwi found along the shore and there was also evidence that members of the hapū observe the tikanga associated with wāhi tapu as a way of restricting use of the area.

[297] There was evidence of the exercise of mana and rangatiratanga, demonstrating a level of customary authority over the area, reflecting responsibility for the health and well-being of people, resources and the environment generally. This has included engagement with commercial fishers and petitions to local and central government.

[298] These practices demonstrate control and authority and the ability and intention to control access to this coastal rohe and the use of its resources, including between Māori and non-Māori. By way of example, the hapū successfully negotiated voluntary restrictions on commercial fishing and secured compliance with rāhui restrictions.

[299] As to cosmogeny, there is evidence that the hapū in this coastal rohe are connected to Kupe. In terms of whakapapa, Ngāti Hinewaka is connected to the area at both an iwi and hapū level. In the part of the rohe from Mukamukaiti to Lake Ōnoke, through Ngāti Kahungunu at an iwi level, and through Ngāi Tūkoko at a hapū level. In that part of the coastal rohe from Lake Ōnoke to Kawakawa (Ngawi) Point, Ngāti Hinewaka is connected through Ngāti Kahungunu at an iwi level, and Ngāi Tūkoko, Ngāti Rua, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi, and Ngāti Hinetauira at a hapū level.

[300] Mr Te Whaiti's evidence demonstrates Ngāti Hinewaka's enduring relationship and spiritual connection with the area and its resources. As in the other coastal rohe, this claim is recognised by the other parties to the mana moana agreement.

[301] As to offshore use and occupation, the evidence suggests this was mainly concentrated on the inshore area, extending two or three miles offshore. It appears that offshore fishing was focused on particular areas around submerged pinnacles and fish holes. The evidence did not specify a distance from shore.

Ngāi Tūkoko and Ngāti Moe

[302] There is strong contemporary evidence of Ngāi Tūkoko currently holding the area from Lake Ōnoke to Kawakawa in accordance with tikanga.

[303] Ngāi Tūkoko and Ngāti Moe are are well established in and around Lake Ōnoke. The signatories for the land block on the lake's west side included Ngāi Tūkoko representatives. Ngāti Moe was prominent amongst the signatories for the Tūranganui block, which is located on the east side of the lake. Tony Walzl specifies that Ngāti Moe was on the title for the lakes and Ngāi Tūkoko occupied the vicinity around the lakes.[166]

[304] Mr Walzl's evidence was that while in some areas mana whenua equates to mana moana, this is not the reality of mana moana in Palliser Bay. For example, Ngāti Moe and Ngāi Tūkoko were marginalised from the Native Land Court title

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166 Tony Walzl *Ngāi Tukoko and Ngāti Moe and the Takutai Moana* (17 February 2023) [Walzl Ngāi Tukoko and Ngāti Moe Report].

grants. The submission on their behalf is that Native Land Court minutes should be viewed with caution when relied on to determine which hapū had mana whenua over the land blocks. Land ownership evidence can be indicative of use and occupation of the takutai moana but need not be determinative of it.

[305] As Mr Walzl observed in his evidence, the reality of the mana moana in this area is shared use by whānau and hapū.

[306] The Ngāi Tūkoko marae, known as both Tuhirangi and Kohunui, is situated in Pirinoa near Lake Ōnoke. The land the marae is built on belonged to Kahura Watene's grandmother. The original marae was destroyed by fire in the 1950s. When the new marae was built, the wharenui was named Tuhirangi after the guardian taniwha that came to the Wairarapa with the Ngāi Tara people. Tuhirangi was a taniwha associated with the sea and was said to guide and protect canoes in the water.

[307] Ngāti Moe's marae, Pāpāwai, is in Greytown. Ngāi Tūkoko also affiliate to Pāpāwai. The present-day marae was built after the original marae was destroyed in a storm. While the Pāpāwai marae is inland, the people of Pāpāwai continue to maintain strong associations with the lakes in Wairarapa. It is at Pāpāwai marae where the agreement to gift the Wairarapa Lakes to the Crown was signed on 13 January 1896.

[308] There is evidence of regular use and occupation of sites for fishing and kaimoana gathering within this area, at and around Lake Ōnoke, Whatarangi, Te Humenga and Ngawi (with Ngāi Tūkoko more focused at Te Humenga and Ngāti Moe at Ngawi), but also at other locations along this coastal rohe, for the purposes of fishing and gathering kaimoana, and kaitiakitanga.

[309] Mr Watene is an appointed tangata kaitiaki under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (Kaimoana Regulations), for the rohe moana of Ngāti Hinewaka and oversees and issues permits. In that role, Mr Watene issues permits for customary take in the area from Mukamukaiti, located west of Lake Ōnoke, to Pāhaoa. He monitors customary and recreational take.

[310] I accept that Mr Watene's fulfilment of that role also supports Ngāi Tūkoko's application, having regard to the whakapapa connection and shared nature of interests between these two hapū groups and the korowai application made by Ngāti Hinewaka at an iwi level.

[311] There is evidence of the operation of a system of tikanga, including in terms of a range of practices linked to customary values and principles. This is manifested in fishing and other kaimoana-gathering practices; manaakitanga, for example by gathering kaimoana and sharing what is gathered. Also in kaitiakitanga, in terms of protecting and looking after the takutai moana for itself and future generations, including by ensuring the sustainable gathering of kaimoana within this area. The evidence shows the observation of the tikanga associated with wāhi tapu as a way of restricting use of the area. There is also evidence of these hapū exercising mana and rangatiratanga, encompassing a level of customary authority over the area and reflecting responsibility for the health and well-being of people, resources and the environment generally.

[312] This evidence demonstrates control and authority, and the ability and intention to control access to this area, and use of its resources, at least between Māori.

[313] There is evidence of whakapapa that connects Ngāi Tūkoko to the part of the rohe from Mukamukaiti to Lake Ōnoke, and both Ngāi Tūkoko and Ngāti Moe to the part of the rohe from Lake Ōnoke to Kawakawa Point. Similarly, in terms of cosmogeny, there is evidence that connects these hapū groups to this general area through Kupe. There is also good evidence of an enduring relationship and spiritual connection with the area and its resources from the eastern side of Lake Ōnoke to Ngawi.

[314] In that part of this coastal rohe from Lake Ōnoke to Kawakawa Point, it is evident that Ngāi Tūkoko and Ngāti Moe currently hold the area in accordance with tikanga.

[315] Ngāi Tūkoko and Ngāti Moe have retained land ownerships in the following land blocks near the coast: Tūranganui Block 65B(2); Tūranganui 2A; Tūranganui 1D;

and Tūranganui 1E(3). While ownership of land is not required to prove CMT, evidence of this nature assists in demonstrating use and occupation of the takutai moana.[167]

[316] There is evidence of regular use and occupation of sites for fishing and kaimoana gathering, at and around Lake Ōnoke, Whatarangi, Te Humenga and Ngawi, as well as other coastal locations where hapū members fish, gather kaimoana and demonstrate kaitiakitanga.

[317] As with Ngāti Hinewaka, within this rohe there is evidence of Ngāi Tūkoko and Ngāti Moe operating a system of tikanga, through practices linked to customary values and principles. These include fishing and other kaimoana-gathering practices; the exercise of manaakitanga by gathering and sharing kaimoana; kaitiakitanga, by protecting the takutai moana of the current and future generation, including the sustainable gathering of kaimoana; observing the tikanga associated with wāhi tapu, as a way of restricting use of the area. Kahura Watene's evidence demonstrated, at a more general level, the exercise of mana and rangatiratanga over the area.

[318] Mr Watene noted the stories he was told about his great-great-grandfather Teone who would go fishing and gather kaimoana all along the Palliser Bay coastline around 1840. Through kōrero tuku iho, he came to understand how Ngāi Tūkoko belong in Palliser Bay.

[319] Similarly, Martin McKinley gave evidence of his mother passing to him kōrero tuku iho about Ngāi Tūkoko's mana in Palliser Bay. This knowledge had in turn been passed to her by Mr McKinley's grandmother.

[320] For Ngāti Moe, the kōrero handed down to Elizabeth Watene was that the Ngāti Moe rohe ran from the mountains to the coast. That is what her koro and kuia were told and it is what she knows. Richard Pirere's father and grandfather told him stories of their grandparents and great-grandparents fishing and diving in the application area.

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[167] Takutai Moana Act, s 59(1)(a).

[321] This kōrero tuku iho helps to anchor the applicant group to this coastal rohe.

[322] Mr Watene talked of spending 15 years transplanting pāua from one part of the takutai moana in Ngawi to another. He would place the male and female pāua together to have them reproduce. This work is demonstrative of how strongly tikanga guides Mr Watene's relationship with the takutai moana.

[323] Elizabeth Watene has planted pīngao between Whāngaimoana and Lake Ōnoke to stop sand dune erosion, guided by the same tikanga of stewardship and preservation.

[324] The witnesses for Ngāi Tūkoko and Ngāti Moe also gave evidence of monitoring commercial, recreational and customary fishing, as a way of protecting the sea's resources. For example, Mr Watene (in his role as a tangata kaitiaki) told of alerting fisheries officials to suspected poaching. He gave evidence of confronting recreational divers who had taken more than they should. On one such occasion, the Police became involved and the recreational divers were not able to keep their take.

[325] Mr McKinley also gave evidence of confronting people for overfishing or for collecting undersized kaimoana at Te Humenga Point.

[326] Mr Watene, Mr McKinley and Jasmine Watson all gave evidence of beach clean-ups, as part of the tikanga of kaitiakitanga.

[327] Elizabeth Watene advocated for the building of a wharepaku at the Cape Palliser Lighthouse (Te Tawhiti) to address the fact that the public were defecating along the coastline because no toilet facility was available in the area.

[328] Mr Watene also gave evidence of hapū members attending at whale strandings.

[329] The evidence of Mr Watene and Mr McKinley, for Ngāi Tūkoko, and Mrs Watene, for Ngāti Moe, told of the kawa (protocols) they follow when they are in the marine and coastal area. Most of that kawa is imbued with the kaitiakitanga duty of fisheries preservation. It includes, for example, only taking what you need and only taking the right sized kaimoana.

[330] The placement of rāhui indicates customary authority. Mr McKinley's evidence was that since 2008 he has known of at least seven or eight rāhui placed in the application area. A recent rāhui was placed in 2019 between Lake Ōnoke and Whāngaimoana Beach when a body was found there. There was a prohibition on use and access to the takutai moana in that area for a week.

[331] Rāhui have also been imposed in Palliser Bay in response to whale strandings, to prevent people from getting close to the whales. Mr Watene's evidence was that if someone is seen ignoring a rāhui they will be spoken to in order to bring about compliance.

[332] Kahura Watene gave evidence that there were Ngāi Tūkoko/Ngāti Moe wāhi tapu between Te Kopi and Te Humenga. The existence and knowledge of them is evidence of the deep associations with the marine and coastal area at Palliser Bay. Mr Watene would not divulge the specific locations for fear of desecration.

[333] As to customary usages (fishing and kaimoana gathering), Mr McKinley gave evidence of his aunts and uncles teaching him how to use a handline from off the beach and how to fish according to the maramataka, an important guide used by his whānau to ensure that they are fishing in accordance with the moon, the seasons and with the habits of the fisheries. It is knowledge that his grandmother passed to her children and which has been passed down through the generations.

[334] Mr Watene talked about how his tīpuna, Tame Kahutara, made his own waka and fished all along the coastline from Tūrakirae Head to the Pāhaoa River, as did his great-great-grandfather, Teone. Mr Watene has fished and dived for kaimoana all his life throughout the application area, including at Lake Ōnoke, Te Kopi and Ngawi.

[335] Maria Tawhiri's evidence was also of fishing and diving from a young age. She has gathered kina, crayfish and many other types of kaimoana at Lake Ōnoke, Ngawi and Te Humenga.

[336] Elizabeth Watene recalls watching her father collect pāua at the seal colony at Cape Palliser and just north of the Cape. Mrs Watene also gave evidence of her father

and uncle travelling out to sea on their waka to fish between Whāngaimoana Beach and Lake Ōnoke beach. Her whānau gathered kaimoana at Queen Victoria Rock, just south of Ngawi.

[337] Fay Pirere talked of gathering kaimoana from a young age. Her whānau would camp at Ngawi and gather crayfish, kina and pāua. Today, the younger members of the whānau continue to go to Lake Ōnoke, Ngawi and Cape Palliser to catch flounder, eel, butterfish, tarakihi, crayfish, pāua and kina.

[338] Peter Davidson grew up watching his father, uncles and grandfather fishing and diving in the application area. They passed their knowledge to him and he has regularly fished and dived at Lake Ōnoke, Te Kopi, Te Humenga Point and Ngawi.

[339] Similarly, Richard Pirere began fishing and diving throughout the area when he was four years old. He has continued with that practice all his life and travels regularly to Te Kopi, Te Humenga and Ngawi to gather or catch pāua, kina, snapper, moki and crayfish. Both Kahura Watene and Richard Pirere gather crabs at Ngawi, at Lake Ōnoke and at Whāngaimoana Beach.

[340] The pūkenga's list of "tikanga indicia" that signal whether an iwi, hapū or whānau have a taonga relationship with the takutai moana includes their identification of taniwha (guardians) residing in the takutai moana.

[341] Both Mr Watene and his youngest daughter, Jasmine Watson, gave evidence of encountering "Te Wheke". Michael Kawana gave evidence about a spiritual kaitiaki in the form of an octopus. He referred to "Te Wheke o Muturangi", the spiritual pet octopus of Muturangi, a chief of Hawaiiki. The kōrero that he was told is that there is "dangerous water" wherever the octopus is encountered.

[342] As a tangata kaitiaki, Mr Watene is demonstrating Ngāi Tūkoko manaakitanga when he permits customary take. His evidence of confronting recreational fishers when they have taken more than they are entitled to demonstrates manaakitanga in the sense of those fishers being enlightened or informed about the concerns with overfishing and the taking of undersized catch.

[343] The whakapapa evidence connects Ngāi Tūkoko to the area from Mukamukaiti to Lake Ōnoke, and both Ngāi Tūkoko and Ngāti Moe to the area from Lake Ōnoke to Kawakawa Point. The evidence of both Mr Watene and Mrs Watene shows an enduring relationship and spiritual connection with the area and its resources, from the eastern side of Lake Ōnoke to Ngawi.

[344] While the contemporary evidence of Ngāi Tūkoko currently holding that part of this coastal rohe from Mukamukaiti to Lake Ōnoke is not as strong as for the area from Lake Ōnoke to Kawakawa Point, I am satisfied that the evidence as a whole, and considering this coastal rohe as a whole, does establish current holding in accordance with tikanga.

Rangitāne

[345] The Rangitāne hapū included in this coastal rohe are Ngāti Hinetauira, Ngāti Hāmua and Ngāi Tūkoko (which also claims separately, as detailed above).

[346] Piriniha Te Tau, Michael Kawana, Joseph Reiri-Mangai and Joseph Potangaroa, all gave evidence for Rangitāne. All whakapapa to the Ngāti Hāmua hapū.

[347] Mr Kawana's evidence discusses the tikanga around interacting with the moana, particularly in terms of whanaungatanga and including the maintenance of tapu. Both Mr Kawana and Mr Te Tau also record tikanga around collecting kaimoana which, in their evidence, remains as it always has. These examples of tikanga or rules applied by iwi and hapū in relation to the takutai moana are evidence of both an intention and ability to control their rohe moana through tikanga.

[348] Steven Chrisp's evidence, in relation to the area from Tūrakirae to Kawakawa Point, discusses the kōrero of Ngāti Hinetauira and Ngāti Hāmua and their whakapapa, particularly in relation to the area around Lake Ōnoke.

[349] Mr Te Tau gave examples of the Rangitāne hapū use around specific locations, including Ngawi, Waikekeno and Te Unuunu. Mr Kawana provided some documents referred to in the Waitangi Tribunal which record specific coastal pā and kāinga of Rangitāne hapū.

[350] Rangitāne's evidence, for example, from Joseph Potangaroa, is that his "tīpuna held and protected the entire Wairarapa coastline" and Mr Te Tau talked of Ngāti Hāmua having historical connections, all along the coast to Lake Ōnoke. He talks of his whānau having gathered kaimoana all along the coast to that point. Mr Te Tau's evidence is that Ngāti Hāmua also has interests at Te Kopi and Whatarangi.

[351] There is evidence of the exercise of kaitiakitanga in this rohe. Mr Te Tau told of how at times his whānau has questioned people for doing certain things on the coast or fishing in certain locations and, when necessary, reported those incidents to the authorities. He recalled as a child several instances of his grandparents, uncles and father reprimanding locals for taking undersized kaimoana, or more than was necessary.

[352] Similarly, Michael Kawana talks of his obligation as tangata whenua, as kaitiaki of the coastline and of continuing to apply the processes and protocols used by his tīpuna whenever gathering kaimoana. He emphasises that his hapū take their obligations as kaitiaki very seriously to ensure that they are respecting, uplifting and encouraging the tikanga and the kawa put in place by their tīpuna.

[353] There was also evidence of the operation of a system of tikanga in terms of fishing and kaimoana gathering practices and manaakitanga. Mr Te Tau talked of how the kaimoana his hapū collect varies along the coastline. At the southern end, it was more about fishing, pāua and crayfishing. Mr Te Tau talked of his hapū and whānau and himself gathering kai all his life from Mataikona all the way down the coast to Lake Ōnoke, in accordance with the seasons and mātauranga Māori.

[354] As Mr Te Tau notes, collecting kaimoana from the coast was integral to his whānau and hapū sustenance, but it has never been just about getting kai. It has always also been about mātauranga Māori and how they, as Ngāti Hāmua, are connected to the atua and their surroundings.

[355] Mr Chrisp referred to the Waitangi Tribunal's *Wairarapa ki Tararua Report*, released in 2010, which made special mention of how Rangitāne's traditions of manaakitanga have remained strong along the coast.

[356] In terms of cosmogeny, Mr Potangaroa's evidence is that the Rangitāne hapū groups are connected to this area through Kupe. In terms of whakapapa, the evidence connects these hapū to this coastal rohe. Mr Stirling's evidence is that Ngāti Hāmua and Ngāti Hinetauira are connected, through Rangitāne at an iwi level.

[357] Similarly, Ngāti Hāmua is connected to the area through Ngāti Kahungunu at an iwi level. Further, Ngāti Hinetauira is connected to the area, through Ngāti Kahungunu.

[358] I am satisfied that there is adequate evidence to conclude that the Rangitāne applicants in this rohe hold the area in accordance with tikanga.

Exclusive use and occupation 1840 to the present day

Rangitāne

[359] There is evidence indicating the presence in this coastal rohe at or around 1840 on the part of Ngāti Hinetauira and Ngāti Hāmua. Mr Stirling's evidence suggests that Ngāti Hinetauira was present around Wairarapa Moana and at Te Kopi. There was also evidence of Ngāti Hāmua having a presence in the area, around Lake Ōnoke and Wairarapa Moana, based on a tuku to recognise its role in defending the Wairarapa hapū from incursions from Taranaki iwi and Ngāti Toa in the 1820s and 1830s.

[360] There was little specific evidence of continuity of use and occupation of this coastal rohe by Ngāti Hinetauira and Ngāti Hāmua from 1840 to the present day.

Ngāi Tūkoko/Ngāti Moe

[361] As noted above, Ngāi Tūkoko and Ngāti Moe are are well established in and around Lake Ōnoke. The signatories for the land block on the lake's west side included Ngāi Tūkoko representatives and Ngāti Moe was prominent amongst the signatories for the Tūranganui block, which is located on the east side of the lake. Tony Walzl records that Ngāti Moe was on the title for the lakes and Ngāi Tūkoko occupied the vicinity around the lakes.

[362] As Mr Walzl observed, the reality of the mana moana in this area is shared use by whānau and hapū.

[363] As recorded above, the Ngāi Tūkoko marae is situated in Pirinoa near Lake Ōnoke and Ngāti Moe's marae, Pāpāwai, is in Greytown.

[364] Ngāi Tūkoko and Ngāti Moe have retained land ownership in four Tūranganui land blocks near the coast. That assists in demonstrating use and occupation of the takutai moana.[168]

[365] Mr Watene participates in the oversight and issuing of permits for customary fishing within Ngāti Hinewaka's gazetted rohe moana. This demonstrates Ngāi Tūkoko's exercise of control in relation to other Māori in this area, in a manner that is consistent with shared exclusivity.

[366] Kahura Watene and Jasmine Watson both gave evidence of the protection of knowledge about customary fishing grounds and practices and this knowledge being passed down the generations.

[367] The evidence of Mr Watene and Mrs Watene in particular demonstrated extensive contemporary use and occupation of this area, including at Lake Ōnoke, Whatarangi, Te Humenga and Kawakawa.

[368] There is an evidential gap in the mid-20th century, and towards the end of the 20th century there is not the same degree of evidence of use and occupation and assertion of authority, or demonstration of intention and ability to exclude third parties, for Ngāi Tūkoko and Ngāti Moe as there is for Ngāti Hinewaka in this coastal rohe.

[369] However, the fact that interests are not of equal strength is not fatal to a finding of use and occupation on the basis of shared exclusivity between Ngāi Tūkoko and Ngāti Moe and the other hapū named in respect of this coastal rohe.

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168 Takutai Moana Act, s 59(1)(a).

[370] As to offshore use and occupation, Mr Watene's evidence was that this extends only as far as 500 metres from the shore. Mrs Watene's evidence was that Ngāti Moe's patterns of use are consistent with those of Ngāi Tūkoko.

[371] I conclude there is sufficient evidence to indicate a continuity of use and occupation of this coastal rohe by Ngāi Tūkoko and Ngāti Moe.

Ngāti Hinewaka

[372] Mr Stirling's historical evidence indicates that Ngāti Hinewaka, Ngāti Rua, Ngāi Tūkoko, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi and Ngāti Hinetauira all had a presence in this coastal rohe at or about 1840.

[373] Ngāti Hinewaka was present in the area from Te Kopi to Mātakitaki-a-Kupe and around the coast to Āwhea.

[374] Ngāti Rua was present at Te Kopi and Tūranganui (previously with interests extending to Te Kawakawa and Te Oroi).

[375] Ngāi Tūkoko was present in the area around Lake Ōnoke and Wairarapa Moana.

[376] Ngāti Rākaiwhakairi was present at southern Wairarapa Moana, to the east beside Palliser Bay, and at Lake Ōnoke in the Tūranganui Block.

[377] Ngāti Rākairangi was also present at Wairarapa Moana and around Palliser Bay and at Lake Ōnoke in the Tūranganui Block.

[378] Ngāti Ngapu o te Rangi was present in coastal lands near Wairarapa Moana and Te Kopi and at Lake Ōnoke in the Tūranganui Block.

[379] Ngāti Hinetauira was present around Wairarapa Moana and at Te Kopi.

[380] The evidence from both Mr Stirling and Mr Walzl is that there are archaeological sites in the area showing the existence of pā, midden ovens, urupā and

other traditional sites, including stone row gardens, particularly in the area from Te Kopi to Kawakawa, and middens covering more than a hectare. While these cannot be attributed to any particular group, they reflect the patterns of use and occupation of these hapū.

[381] Lake Ōnoke was a focal point for use and occupation, and customary regulation, on the part of Ngāti Hinewaka and others. The seasonal blockage of the outlet from the Lake resulted in ideal eeling conditions. This was an important source of kai for local coastal and related inland hapū.

[382] Mr Stirling's evidence suggests that throughout the period from 1819 to 1840, a period of warfare and migrations, Te Kopi was a site of significance, where immigrating parties assembled and those who remained settled. It was also the place at which those returning settled, at least temporarily.

[383] Mr Stirling notes a gap in the evidential record during the mid-20th century. However, the minutes of the Native Land Court from late 19th and early 20th centuries record the interests of these hapū, particularly at and around Lake Ōnoke, Te Kopi, Te Humenga and Ngawi.

[384] While, as the Attorney-General indicates, there is a lack of evidence specific to Ngāti Rua, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi and Ngāti Hinetauira, there is strong evidence of the continuity of use and occupation of this coastal rohe by Ngāti Hinewaka and Ngāi Tūkoko, from Lake Ōnoke to Kawakawa, from 1840 to the present day.

[385] Mr Stirling gave evidence of efforts by Ngāti Hinewaka in the mid to late 20th century to assert control and its intention to exclude third parties, including non-Māori, through petition and regulation of the fishery.

[386] Ngāti Hinewaka oversees and issues permits for customary fishing within its gazetted rohe moana, covering this entire coastal rohe.

[387] Mr Te Whaiti gave evidence of knowledge about customary fishing grounds and practices being protected and passed down the generations.

[388] There is also evidence of extensive contemporary use and occupation of this area, including at Lake Ōnoke, Okorewa, Whāngaimoana, Te Kopi, Whatarangi, Te Humenga, Waiwhero and Kawakawa.

[389] There is still some Māori land in this rohe, at Te Kopi and Ngawi.

[390] As to the question of substantial interruption, while there are numerous coastal and land use resource consents throughout this area, and multiple water use consents around Lake Ōnoke, there was no evidence to suggest that these have interrupted or will interrupt use by hapū in a substantial way.

[391] Other third party uses include an operational farm at Kawakawa Station, also offering accommodation and a coastal walk; an accommodation facility run by the Department of Conservation at Te Kopi; and a camping village, with a cafe-bar and driving range, at Waimeha. There is also a freedom camping area at this waterfront. None of these uses amount to substantial interruption.

[392] I am satisfied that there is sufficient evidence to indicate a continuity of use and occupation of this coastal rohe by the Ngāti Hinewaka applicants.

Conclusion

[393] I conclude that, collectively, the applicants in this rohe have provided sufficient evidence to satisfy the statutory tests. An order for a jointly held CMT will be made, out to three kilometres from the coastline.

Kawakawa Point to Āwhea River

[394] An order on the basis of shared exclusivity is sought for this coastal rohe by the hapū Ngāti Hinewaka, Ngāti Rangaranga and Ngāi Tuohungia. All are Ngāti Hinewaka hapū.

Holds the specified area in accordance with tikanga

[395] The Ngāti Hinewaka hapū who hold mana moana in the area from Kawakawa Point to Waitutuma, within this rohe, are Ngāti Hinewaka (hapū) and Ngāi Tuohungia.

[396] Ngāi Tuohungia has interests around Palliser Bay, particularly at Mātakitaki.

[397] During the Native Land Court hearing in 1890, Ngāti Hinewaka was identified as the hapū with primary interests at Mātakitaki. When Mātakitaki No 3 was set aside as a fishing reserve, it was vested in Piripi Te Maari on behalf of Ngāti Hinewaka, as were the Mātakitaki-a-Kupe reserves associated with Mātakitaki Block No 1.

[398] Mr Te Whaiti gave evidence of Ngāti Hinewaka retaining several coastal reserves in the area from Te Humenga to Mātakitaki-a-Kupe, including the Mātakitaki No 3 (Fishing Reserve) referred to above,of which he is a trustee.

[399] On the eastern side of Mātakitaki No 3 is a tauranga waka named Ōhinerua. Another tauranga waka lies between the mouths of the Waitutuma and Te Roro streams, named Te Maire.

[400] Hapū members carry out a range of customary activities in this area, including kaitiakitanga, manaakitanga, collection of kaimoana and fishing.

[401] Reon Kerr, who is a member of Ngāti Hinewaka, Ngāti Māhu and Ngāti Rongomaiaia, and a direct descendant of Piripi Te Maari, gave evidence of his lifelong association with this coast and the rohe moana. He maintains a strong spiritual connection with the moana that he describes as "in the blood." Mr Kerr details fishing and gathering kaimoana across the rohe moana for whānau, hapū and marae. Among the locations identified by Mr Kerr were Cape Palliser, Tora and Ngawi.

[402] Mr Te Whaiti also gave evidence of the Mātakitaki-a-Kupe A1 and A2 (the Lighthouse Reserve) reserves. He is a trustee of these two blocks of land also, which were returned to Ngāti Hinewaka by the government in 1993. At that time, the land was vested in trustees and set aside as a reserve under s 338 of Te Ture Whenua Māori Act. The Mātakitaki No 2 block, immediately to the east of Mātakitaki-a-Kupe A1

and A2 comprises about 274 hectares. These reserves and the blocks that remain as Māori land serve as a basis for use and occupation of the takutai moana.

[403] Ross Ward is a beneficial owner and trustee of the Te Kopi block, which remains Māori land. Over time the trustees of the block organised a scheme of leases for their people who his great-uncles had informally allowed to put baches on the land. Bach owners now have an agreement with the Trust under which they own the buildings, but not the underlying land. They pay rental and any sales of the baches must be approved by the trustees.

[404] In addition, approximately 300 acres of the Te Kopi block were leased to the Sutherland family who owned the adjoining Whatarangi Station. Mr Ward's evidence is that after his grandmother died, the Sutherlands continued to farm the land, but without paying rent.

[405] Ngāti Hinewaka gave evidence of regular use and occupation of sites for fishing and kaimoana gathering, at and around Kawakawa Point, Mātakitaki-a-Kupe (including the Mātakitaki No 3 Fishing Reserve) and the land blocks referred to above.

[406] Mr Te Whaiti and Mr McKinley gave evidence of the practice of kaitiakitanga, including by ensuring the sustainable gathering of kaimoana within the area and engaging with commercial fishers. Ngāti Hinewaka's gazetted rohe moana encompasses this rohe and there is evidence of the issuing of authorisations and gathering of kaimoana in this area in accordance with the Kaimoana Regulations and Fisheries (Amateur Fishing) Regulations 2013 (Amateur Fishing Regulations), including at Ngawi, Kawakawa, Mātakitaki and White Rock. As already noted, Mr McKinley is one of seven appointed kaitiaki for the rohe moana of Ngāti Hinewaka. He estimates that he issues approximately 20 permits per year.

[407] The Ngāti Hinewaka hapū who hold mana moana in the Te Oroi area, within this rohe, are Ngāti Hinewaka (hapū) and Ngāti Rangaranga.

[408] The eponymous ancestor of Ngāti Hinewaka was gifted land at Te Oroi, where she came to live from Heretaunga. Ngāti Hinewaka also has interests throughout the

application area and adjacent lands, including from Opouawe around to Te Tawhiti. Ngāti Rangaranga are strongly associated with Te Oroi, being named in the land blocks' titles.

[409] There is an important traditional tauranga waka at Te Oroi.

[410] The witnesses for the applicants also gave evidence of the operation of a system of tikanga in the whole of this coastal rohe and a range of practices linked to customary values and principles.

[411] As Mr Te Whaiti noted, many of the fishing grounds and fishing rocks within Ngāti Hinewaka's rohe moana are named and their names are still in use today. Those fisheries are still under the control of the hapū who hold mana over the whenua. Fisheries were the responsibility of the resident hapū with interests in the adjoining land. Whānau have and continue to fish and gather kaimoana for the marae, providing kaimoana and fish for tangihanga and other important events as an important part of Ngāti Hinewaka tikanga.

[412] The importance of kaimoana can be seen in the coastal locations of the various marae and papakāinga of Ngāti Hinewaka.

[413] Mr Te Whaiti and Mr Kerr also gave evidence of the exercise of manaakitanga, by gathering kaimoana and sharing what is gathered.

[414] Mr Te Whaiti talked of the tikanga associated with wāhi tapu and also gave evidence of reburying kōiwi when they are found along the foreshore.

[415] Evidence was also given of the use of the takutai moana and its waitai for rongoā and for sourcing medicinal ingredients to heal and cure ailments and promote wellbeing.

[416] There is evidence of Ngāti Hinewaka exercising mana and rangatiratanga, encompassing a level of customary authority over the area and reflecting responsibility for the health and wellbeing, both of the people and the environment, including through engagement with and petition to local and central government. Mr Ward gave

evidence of being involved with Mita Carter in applying for the taiāpure at Te Kopi and Te Humenga.

[417] Mr Te Whaiti also gave evidence of rangatira of his hapū placing rāhui within the rohe moana since time immemorial. As a Ngāti Hinewaka kaitiaki, Mr Te Whaiti has several times himself made the decisions regarding the placing of rāhui of an area of the coast when someone has drowned in the moana. The area of the rāhui has varied from several kilometres from the shore to close to the shore, for periods extending from one to several weeks.

[418] Mr Stirling's evidence connects Ngāti Hinewaka to this area through Ngāti Kahungunu at an iwi level and both directly and through Ngāti Rangaranga and Ngāi Tuohungia at a hapū level. Mr Stirling's evidence was also that, in terms of cosmogeny, these hapū are connected to this general area through Kupe.

[419] There was no direct evidence of Ngāti Rangaranga and Ngāi Tuohungia currently holding the area in accordance with tikanga, as all witnesses who filed and gave evidence for Ngāti Hinewaka (Haami Te Whaiti, David McKinley, Ross Ward and Reon Kerr) whakapapa to the Ngāti Hinewaka hapū. However, they also cite whakapapa affiliations to Ngāi Tuohungia.

[420] As I have discussed in relation to the mana moana agreement, and in respect of the Mukamukaiti to Kawakawa Point rohe, it is sufficient that the evidence establishes continuing use on the part of the applicant hapū collectively. I am satisfied that it does.

[421] As to offshore use and occupation, the evidence suggests this extended two or three miles, but was otherwise concentrated on the inshore area. Offshore fishing focused on particular areas around submerged pinnacles and fish holes. Apart from that the evidence was general in nature and not specific as to precise location or distance from shore.

Exclusive use and occupation from 1840 to the present day

[422] Mr Stirling's evidence indicated a presence in this coastal rohe at or around 1840 on the part of all three named hapū, Ngāti Rangaranga and Ngāi Tuohungia and Ngāti Hinewaka.

[423] Ngāti Rangaranga was present at Te Oroi, Ngawakakupe and Mātakitaki (and identified distinctly at Āwhea).

[424] Ngāi Tuohongia was present beside Palliser Bay, particularly at Te Kopi and down to Mātakitaki, and from Waitutuma to Mataoperu.

[425] Ngāti Hinewaka was present in the area from Te Kopi to Mātakitaki-a-Kupe and around to Āwhea.

[426] Mr Stirling also gave evidence of archaeological sites reflecting the existence of pā, midden ovens, urupā and other traditional sites in this area. While these cannot be attributed to any particular group, his evidence is that they reflect the patterns of use and occupation of these hapū in this coastal rohe.

[427] There is strong evidence to indicate Ngāti Hinewaka's continuity of use and occupation of this coastal rohe from 1840 to the present day.

[428] Historically, Ngāti Hinewaka appears to have been present in the blocks at Kawakawa, Mataoperu and Āwhea and in the corresponding reserves, including the fishing reserve at Mātakitaki 3 and at Opouawe and Te Oroi. Mr Stirling's evidence was that despite a confiscation of land at White Rock in 1845, Ngāti Hinewaka continued to exercise control over this land, including by leasing it to others, until it was sold in 1853 (with 10 acres set aside for the Opouawe Reserve).

[429] The interests of Ngāti Hinewaka are reflected in the contemporary tangata whenua evidence, including reference to the land sales and Mātakitaki Reserves. While Mr Stirling noted the general lack of historical evidence of use and occupation of this area (northeast up the coast from Mātakitaki-a-Kupe), his view was this is

reflective of gaps in the evidential record and that accordingly the Court should defer to tangata whenua evidence in this regard.

[430] That contemporary tangata whenua evidence includes reference to the land sales and the reserves at Mātakitaki (of which Mr Te Whaiti is now a trustee).

[431] The Ngāti Hinewaka interests are also reflected in the evidence regarding the famous Toka Hapuka and tauranga waka and traditional fishing areas; knowledge of these is still preserved.

[432] Ngāti Hinewaka applied for a mātaitai in Mātakitaki-a-Kupe (as well as one in Pukaroro) but was declined in respect of both prospective mātaitai on the basis that the Minister for Oceans and Fisheries was not satisfied the proposed mātaitai would not prevent commercial fishers from taking their quota entitlement.

[433] As to substantial interruption, I discuss the impact of commercial fishing more generally at [632]–[662]. In this coastal rohe, it is clear from the evidence that Ngāti Hinewaka consider the extent of commercial fishing unacceptable and its impact undesirable but, as in the other coastal rohe, commercial fishing has not interrupted the practice of customary fishing.

[434] In other respects, while the loss of ownership of land abutting the takutai moana has had some impact on the ability of hapū groups to access, and to exclusively use and occupy, this coastal rohe, Ngāti Hinewaka has demonstrated an ongoing ability to access and use the area through, for example, the remaining reserves (albeit in some places using a four-wheel drive vehicle).

[435] As to other factors, in 1845, more than 40,000 acres of land at Mataoperu was confiscated, principally as punishment for the taking of goods by Māori from Richard Barton at the Maungaroa station, as the result of a disagreement and the causing of offence to chief Te Wereta Kawekairangi. The confiscation was not pursuant to statutory authority and nor was it enforced. Eventually the Crown purchased the land in 1853. The evidence suggests that, until that time, Ngāti Hinewaka continued to do

what they wanted with the land, including by allocating parts within the area purportedly confiscated to Thomas Russell and Charles Pharazyn.

[436] In 1897, 55 acres of the Mātakitaki No 1 block (adjoining the fishing reserve) were taken under the Public Works Act 1894, for the construction of the Cape Palliser lighthouse. Ngāti Hinewaka objected, because its people were buried there, but to no avail. More recently, the lighthouse was automated and only about three of the 55 acres originally taken were required for the continued lighthouse operation. The balance of the land was then offered back under the Public Works Act 1981, at market value. After Ngāti Hinewaka set out the history of the site and its initial objection to the taking, the land was returned at no cost. This demonstrates a level of control sufficient to exclude others, including non-Māori.

Conclusion

[437] I am satisfied that the evidence shows that the applicant hapū hold this coastal rohe in accordance with tikanga and demonstrate exclusive use and occupation at 1840 and from 1840 to the present day and an order for a jointly held CMT should be granted, to three kilometres from the shore.

Āwhea River to Te Unuunu

[438] Ngāi Tūmapūhia and hapū of each of Ngāti Hinewaka (Ngāti Rongomaiaia, Ngāti Māhu, Ngāti Kawekairangi, Ngāi Te Ao, Ngāti Te Aokino, Ngāti Pārera) and Rangitāne (Ngāti Meroiti and Ngāti Hāmua) seek an order on the basis of shared exclusivity in this coastal rohe.

Holds the specified area in accordance with tikanga

<u>Ngāi Tūmapūhia</u>

[439] Ngāi Tumāpūhia has provided evidence of a strong contemporary presence in this rohe and current holding of the area in accordance with tikanga, consistent with its remote nature and limited accessibility.

[440] Through time, Ngāi Tūmapūhia built and occupied numerous fortified pā and marae, many of which are in the proximity of their specified area. For example, Dr Takirirangi Smith and Ryshell Griggs both gave evidence about Te Unuunu, the last fortified pā to be occupied by the hapū. The pā is in close proximity to the moana. Patrick Mason gave evidence about Tūmapūhia presence at this pā site, where Te Ikaraeroa, drowned.

[441] Other pā sites were established by the Ngāi Tūmapūhia people, including Te Taumata o Tūmapūhia at Waikekeno and others in the Kaihoata area. That evidence was also supported by the kōrero of Dr Smith.

[442] There are three Ngāi Tūmapūhia marae: Ngāi Tūmapūhia a Rangi; Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka; and Ngāi Tūmapūhia-ā-Rangi ki Ōkautete.

[443] In contemporary times, Ngāi Tūmapūhia built marae near and adjacent to their takutai moana. The people of Ngāi Tūmapūhia were gifted land by Ngāpine, a Ngāi Tūmapūhia tīpuna. However, the gifted land was prone to flooding and so the hapū built the marae on a separate piece of gifted land at Homewood (Ngāpuketūrua). From its elevated position, the marae looks directly out to the Ngāi Tūmapūhia moana and is in close proximity to the moana (a few hundred metres from Motuwaireka Stream/Riversdale beach).

[444] As discussed above, a single Crown Engagement application was filed by Sue Taylor on behalf Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Inc, and by Sam Morris, Lynall Morris and Jason Morris on behalf of Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Inc. The Crown Engagement parties are interested parties in these proceedings and their application area runs from Whareama River in the north to Āwhea River in the south. They represent hapū members who affiliate to Mōtūwairaka and Ōkautete marae respectively. Hapū members affiliated to the three Ngāi Tūmapūhia marae, including the applicant group and the Crown Engagement applicants, have been working collectively for the recognition of Ngāi Tūmapūhia's customary rights in the specified area and in the Pāhaoa ki Āwhea rohe.

[445] The Crown Engagement parties support Ngāi Tūmapūhia's application from the Whareama River to Pāhaoa, support the proposal for an order on the basis of shared exclusivity from Te Āwhea to Te Unuunu, provided that Ngāi Tūmapūhia a Rangi is given appropriate recognition, and agree that the Whareama River mouth is held jointly between Te Hika a Pāpāuma and Ngāi Tūmapūhia (this last area now being for resolution in Stage 1(b)).

[446] A range of practices demonstrate Ngāi Tūmapūhia's control and authority over the rohe, their ability and intention to control access to the area, and use of its resources.

[447] As to customary usages (fishing and kaimoana gathering), through their koroua and kuia, uncles and aunts, parents and grandparents, Ngāi Tūmapūhia have learned how to fish, collect kaimoana and understand their rohe moana.

[448] Patrick Mason, the chairperson of the Ngāi Tūmapūhia a Rangi marae committee, gave evidence that as a young boy he was taught different techniques for catching fish, including hand-lining, kite fishing, net fishing and reel fishing. He has fished and gathered kaimoana in all parts of the application area, in the Pāhaoa ki Āwhea rohe, near the Whareama River, at Uriti Beach, Te Unuunu, the Waikekeno River, the Pāhaoa River, at Te Awaiti and Āwhea.

[449] Ms Riddell's evidence is that from the age of 18 months, she was cared for by her koro in his home by the sea. Through him she learned their whakapapa and history and came to learn that the sea is an important part of their lives: a source of sustenance, of identity and a place of healing. Ms Riddell grew up watching her koro, her father and other whānau fish and gather kaimoana using traditional techniques, including longline fishing with flax.

[450] Phillip Paku also gave evidence of how his father and grandfather taught him to fish from the shore at Whareama, Ōrui, Uriti, Te Papa and Patanui. Ms Rolls' connection to the takutai moana began at a young age through gathering kaimoana, such as booboos, at Te Unuunu, Uriti and Te Awaiti. Ms Rolls emphasised that she

has ensured that her tamariki and mokopuna have their own relationships with the moana.

[451] Gary Griggs (the Fisheries Manager and the MACA Project Manager of the marae committee) and Jamie Griggs gave evidence of their connection to the marine and coastal area, especially through fishing and diving. In particular, they talked about Matariki Farm beach where they have fished and dived since they were children.

[452] Ngāi Tūmapūhia gave evidence of arrangements with private landowners abutting the takutai moana and resolution of access issues with private owners by negotiation, relationship, reciprocity and voluntary agreement. Through those arrangements they have maintained access to the takutai moana.

[453] Dr Takirirangi Smith gave evidence of successfully litigating access arrangements and securing compliance with wāhi tapu restrictions by private owners.

[454] More generally, Ngāi Tūmapūhia brought evidence of a system of tikanga operating within their rohe. As well as fishing and other kaimoana-gathering practices, the evidence demonstrated manaakitanga, for example by gathering kaimoana and sharing what is gathered; kaitiakitanga, by protecting and looking after the takutai moana, including by ensuring the sustainable gathering of kaimoana.

[455] Kaitiaki responsibilities have been manifested in a number of ways. Some Ngāi Tūmapūhia members have assumed responsibility for maintaining the breeder pāua population near Kaihoata. Phillip Paku gave evidence that a select few Ngāi Tūmapūhia divers know the various locations of the breeder pāua within their rohe moana. The divers, who include Phillip Paku and Gary Griggs, keep the location information confidential in the interests of pāua replenishment.

[456] Mr Paku's concern with overfishing has led to confrontations with commercial fishers. Similarly, Hana Riddell gave evidence of her uncles talking kanohi ki te kanohi with commercial fishermen asking them to be mindful of over-fishing. Since she was a young adult, Ms Riddell has taken on the responsibility of a voluntary fishing inspector and reports overfishing.

[457] Ngāi Tūmapūhia's gazetted rohe moana begins at Pāhaoa. There is evidence of permits being issued and fish and kaimoana being caught and gathered within this area. Gary Griggs, together with other Ngāi Tūmapūhia members, has been designated as tangata kaitiaki under the Fisheries (Notification of Ngāi Tumapuhia a Rangi Māori Marae Committee Tāngata Kaitiaki) Notice 2015. In this role, Gary Griggs issues customary fishing permits through which the tangata kaitiaki are able to monitor, to some degree, the number of shellfish and fish being taken from their rohe for customary usage. Mr Petrie's evidence addressed the reporting of this information to, and its recording by, the Ministry for Primary Industries (MPI).

[458] In his capacity as tangata kaitiaki, Gary Griggs has met with MPI officials to discuss the hapū's plans and aspirations for their takutai moana. He has also raised concerns with MPI about commercial fishing, in particular, the excess taking of crayfish by commercial fishers from the hapū's rohe moana. Gary Griggs' evidence demonstrated the exercise of Ngāi Tūmapūhia's mana and rangatiratanga. In addition to issuing customary fishing permits for his hapū, in his role as Tangata Kaitiaki, Mr Griggs also undertakes a broader responsibility for ensuring the health and wellbeing of the rohe and its resources, and his hapū.

[459] Ngāi Tūmapūhia has a widespread hapū practice of self-imposed catch limits. The Ngāi Tūmapūhia witnesses also gave evidence of the kawa they follow when they are at the coast, as another manifestation of their kaitiaki responsibilities. This knowledge has been handed down to them as kōrero tuku iho, which they pass on to their tamariki in turn. The kawa include, by way of example, always saying a karakia before going in or out to sea, never preparing or eating seafood on the beach, and only taking enough kaimoana for a feed.

[460] Mr Paku spoke of Ngāi Tūmapūhia taking measures to protect against pollution from farming. A committee, including Ngāi Tūmapūhia members, represent Ngāi Tūmapūhia's views to the local authorities.

[461] Dr Takirirangi Smith gave evidence of Ngāi Tūmapūhia members bringing issues to the attention of the three district councils that cover the takutai moana of the rohe, as kaitiaki, and objecting to several resource consent applications, including a

proposed subdivision at Te Unuunu. These forms of statutory protest indicate a degree of control over the land from a tikanga perspective.

[462] There was further evidence of Ngāi Tūmapūhia's kaitiaki role: working with a native plant expert, and the regional council, to help restore native plant life and to preserve the sand dunes with plant restoration; carrying out beach clean-ups.

[463] Ngāi Tūmapūhia exercise manaakitanga by permitting the members of other hapū to access and use their rohe moana for the purpose of gathering kaimoana. The historical evidence from Mr Walzl was that, in early times, as a manifestation of manaakitanga, Ngāi Tūmapūhia leased land to settlers, which in some respects, resembled traditional tuku whenua.

[464] Mr Mason gave evidence that inland whānau would journey to the coast to gather kaimoana to take back to their marae. Similarly, Mr Paku noted that Ngāi Tūmapūhia have maintained good relations with neighbouring hapū and welcome their whanaunga from Ngāti Hāmua to their coast.

[465] Dr Takirirangi Smith observed that kaimoana is particularly significant for Ngāi Tūmapūhia, because of their identity as a coastal hapū. Examples of this include the supplying of kaimoana to tangi and hui of non-Ngāi Tūmapūhia Wairarapa Māori, as well as for the 28th Māori Battalion reunions. Dr Smith also noted that Ngāi Tūmapūhia provide access to Te Unuunu beach for customary fishing for those who have obtained a customary fishing permit from Motuwairaka and Okautete tangata kaitiaki.

[466] There is evidence of Ngāi Tumāpuhia exercising customary authority in observing the tikanga associated with tapu as a way of restricting the use of the area. Rāhui have been placed in the rohe when drownings have occurred and for conservation purposes. Ms Rolls provided evidence of rāhui placed over parts of the specified area for conservation purposes. Ryshell Griggs told of her Uncle Tom drowning at Kaihoata reef, and the ensuing rāhui that meant no one could access the reef for three months. The rāhui was respected by Māori and non-Māori in the area. Dr Smith's evidence was that whenever there is a drowning or a person has gone

missing within Ngāi Tūmapūhia's rohe moana, someone from Ngāi Tūmapūhia is notified.

[467] Ms Griggs and Mr Paku gave evidence about Ngāi Tūmapūhia's wāhi tapu at Rangipou, a sacred rock where the hapū go fishing. Mr Paku said a karakia must be said there out of respect for the tīpuna. The Tūmapūhia evidence also covered another wāhi tapu at the mouth of the Kaihoata River. It is a Ngāi Tūmapūhia belief that when a certain totara tree stump becomes visible in the water in the Kaihoata River, a rangatira has passed away. Another wāhi tapu exists at Karaka Bay. That is thought to be where Kupe spent time planting karaka trees.

[468] There are a number of urupā within the Ngāi Tūmapūhia rohe. Ms Griggs gave evidence of an urupā located at the foothills of the Ahirara range which was later moved to the coastal Ngutukoko reserve at Kaihoata. Ms Griggs also referred to another urupā on the Ngāpuketūrua reserve. Gary Griggs discussed several urupā near the coast where his Tūmapūhia tīpuna are buried. A Ngāi Tūmapūhia urupā is located by the Kaihoata River, where the original pā site for Tūmapūhia was based. These are sacred places where their tīpuna are buried, or where there is a deep, spiritual connection. The tikanga and kawa for how Ngāi Tūmapūhia hapū conduct themselves at the urupā and wāhi tapu has been passed from generation to generation.

[469] Dr Smith's evidence was that Ngāi Tūmapūhia have been recognised by government bodies as possessing the authority to address tapu issues including whale strandings and the discovery of human remains within their rohe moana.

[470] Neighbouring hapū and iwi have recognised the whakapapa, mana whenua and mana moana of Ngāi Tūmapūhia. Ngāi Tūmapūhia affiliates to both Ngāti Kahungunu and Rangitāne. This demonstrates the close whakapapa connections of the Wairarapa hapū. Steven Chrisp, who gave evidence for Rangitāne, identified the ancestors who tied Ngāi Tūmapūhia to Rangitāne iwi. Rangitāne acknowledges and supports Ngāi Tūmapūhia's customary interests in the takutai moana from the Whareama River to the Āwhea River. Ngāti Hinewaka similarly acknowledges and supports Ngāi Tūmapūhia's customary rights in this rohe.

[471] Ngāi Tūmapūhia own and/or administer whenua that lies adjacent to this coastal rohe. This includes land blocks at Te Unuunu; Pukaroro; Ngāpuketūrua; and Te Maipi. While ownership of land is not required to prove CMT, evidence of this nature demonstrates use and occupation of the takutai moana by the hapū.[169]

[472] The evidence of offshore use and occupation of this area suggests this extended eight to 10 kilometres from the coast of Waikekeno, and about eight kilometres from the mouth of Pāhaoa River. Evidence from other members of the hapū indicates use and occupation has occurred at least as far offshore as 10 kilometres, and as much as 80 kilometres (all the way to the Hikurangi Trench).

[473] From the totality of the evidence I infer observation, occupation, control and regular use of the takutai moana up to 10 kilometres offshore.

[474] There is evidence of whakapapa that connects Ngāi Tūmapūhia to the area, through the eponymous ancestor Tūmapūhia. In terms of cosmogeny, this evidence connects the hapū back to Kupe.

[475] Mr Walzl's evidence establishes that there is an enduring relationship and spiritual connection with the area and its resources and with neighbouring hapū.

Ngāti Hinewaka

[476] All witnesses who filed and gave evidence for Ngāti Hinewaka whakapapa to the Ngāti Hinewaka hapū, rather than to the other Ngāti Hinewaka hapū in whose name the order is sought (Ngāti Rongomaiaia, Ngāti Kawekairangi, Ngāi Te Ao, Ngāti Te Aokino, Ngāti Pārera and Ngāti Māhu). However, David McKinley has whakapapa affiliations (relevant to this coastal rohe) to Ngāti Rongomaia, Ngāti Kawekairangi and Ngāti Māhu. Haami Te Whaiti's hapū (relevant to this coastal rohe) are Ngāti Rongomaia and Ngāti Kawekairangi. And there is evidence of a close connection between these other hapū and the founders and descendants of Ngāti Hinewaka, including through the evidence of Mr Stirling.

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169 Takutai Moana Act, s 59(1)(a)(i).

[477] The evidence indicates current use of this coastal rohe on the part of members of Ngāti Hinewaka (hapū). Mr Te Whaiti and Reon Kerr both gave evidence of current use of this coastal rohe, including fishing sites at Te Awaiti, Tora and Te Unuunu. Mr Te Whaiti also talked of fishing and camping sites at Te Awaiti, Huariki and Pukeroro.

[478] Customary fishing and control of customary fisheries extends as far as Pāhaoa, in terms of Ngāti Hinewaka's gazetted rohe moana. Permits are issued and fish and kaimoana caught and gathered at Āwhea, Te Awaiti and Pāhaoa. Mr Petrie gave evidence of this being reported to and recorded by MPI.

[479] Te Unuunu is an important papakāinga in this coastal rohe where, as Mr Te Whaiti's evidence suggests, the whakapapa of Ngāi Tūmapūhia and Ngāti Hinewaka hapū reside together.

[480] There is also evidence of ownership of coastal land. Mr Te Whaiti is an owner and trustee on various Māori land trusts owning coastal lands at Pukaroro (Te Awaiti and Huariki), Waikekeno and Te Unuunu and for many years was a trustee and chair of Kohunui Marae.

[481] The Ngāti Hinewaka hapū who hold mana moana in the area of Te Awaiti to Te Unuunu, within this coastal rohe, are Ngāti Rongomaiaia, Ngāti Pārera, Ngāi Te Ao, Ngāti Te Aokino, Ngāti Te Kawekairangi and Ngāti Māhu.

[482] Ngāti Rongomaiaia, Ngāti Māhu and Ngāi Te Ao were named by Piripi Te Maari as some of the "principal hapu in Wairarapa".[170]

[483] Ngāti Pārera have interests in lands on the coast, including the reserves at Te Awaiti and Huariki. Ngāi Te Ao have interests in the Pukaroro and Rerewhaitu areas, as well as links further north reflecting their connections to Ngāi Tūmapūhia. Ngāti Te Kawekairangi are strongly associated with Te Unuunu and Waikekeno. Ngāti Te Aokino descend from their eponymous ancestor, who is a significant tīpuna for Ngāti Hinewaka, and their interests include the Pukaroro and Pahuia areas.

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[170] Stirling Report, above n 144, at 22.

[484] Te Awaiti is associated with an historical papakāinga which is and has always been a significant fishing spot for these hapū. Another significant papakāinga in this area was a Ngāti Hinewaka settlement at the mouth of the Oterei River.

[485] There was a significant Ngāti Hinewaka papakāinga at Te Unununu. The hapū identified above have interests in the reserves at Te Awaiti, Huariki and Pukaroro. Ngāti Māhu and Ngāti Te Kawekairangi also have interests at Waikekeno.

[486] At Pāhaoa there were pā and papakāinga (now part of the reserve), with associated urupā where tīpuna of these hapū are buried.

[487] The area between Āwhea and Te Unuunu is shared with Ngāi Tūmapūhia and Ngāti Hinewaka hapū. The shared nature of this area and the strong whakapapa connections between the groups was acknowledged by a number of witnesses, including Patrick Mason and Dr Takirirangi Smith.

[488] Members of Ngāti Hinewaka carry out a range of customary activities in this area, including kaitiakitanga, manaakitanga, collection of kaimoana and fishing.

[489] Reon Kerr, who has whakapapa connections to Ngāti Hinewaka, Ngāti Māhu and Ngāti Rongomaiaia, gave evidence of fishing and kaimoana gathering in these areas, including at Te Unuunu. Mr Kerr undertakes these activities through customary fishing permits, is a kaitiaki for Ngāi Tūmapūhia and will soon become a kaitiaki for Ngāti Hinewaka.

[490] In terms of whakapapa, Mr Stirling's evidence demonstrates the connection of the Ngāti Hinewaka hapū groups to the area at an iwi level, through Ngāti Kahungunu. In terms of cosmogeny, Mr Stirling's evidence also connects these hapū groups to the area through Kupe.

[491] I am satisfied that the evidence for the applicant hapū collectively demonstrates a strong contemporary presence in this rohe and current holding of the area in accordance with tikanga.

Rangitāne

[492] The relevant Rangitāne hapū groups in this coastal rohe are Ngāti Māhu, Ngāti Meroiti and Ngāti Hāmua.

[493] The witnesses who gave evidence for Rangitāne whakapapa to Ngāti Hāmua hapū. No evidence was given directly on behalf of Ngāti Māhu and Ngāti Meroiti. As discussed above in relation to the mana moana agreement, I do not think this is fatal to their application. What is necessary is that the evidence of the applicants as a whole in each of the coastal rohe satisfies the statutory tests.

[494] All of Piriniha Te Tau, Joseph Reiri-Mangai and Michael Kawana gave evidence of Ngāti Hāmua's interests and presence in this area, its enduring relationship and spiritual connection with the area and its resources, particularly at Te Unuunu, Waikekeno and Motuwaireka.

[495] Mr Te Tau gave evidence of his whānau interests starting in Te Hika o Pāpāuma, south to Pukeroro (just north of Te Awaiti). On Mr Te Tau's father's side those interests run from Te Hika a Pāpāuma, Whareama down to the Kaihoata, Ngāi Tūmapūhia takiwā and then reconnects with Ngāti Hinewaka. On Mr Te Tau's mother's side, the whānau interests run from south of Kaiwhata awa, Te Unuunu, Waikekeno, Pāhaoa down to Pukeroro. Those connections mean that they have maintained ahi kā roa along this stretch of the Wairarapa coastline.

[496] Mr Chrisp's evidence sets out the relevant whakapapa connections and also refers to the coastal blocks of Māori land between the Rerewhakaaitu River and the Kaiwhata (also referred to as Kaihoata) River, which include owners from Ngāti Meroiti, Ngāti Māhu and Ngāti Hāmua, alongside others.

[497] Dr Takirirangi Smith's evidence for the Crown Engagement parties suggested that other hapū groups may not consider Ngāti Hāmua to hold this coastal rohe in accordance with tikanga, and that it was primarily an inland hapū. Joseph Potangaroa's evidence indirectly addressed this question. His view was that the Customary Fishing Regulations have "divided our people". In that context, Mr Potangaroa said:

> Inland hapū like Hāmua who had significant fishing grounds on the coast are considered by so-called coastal hapū as "outsiders" and as having no interest in the coast. This is a clear example of this divide.

[498] In any event, the mana moana agreement signifies the applicants' recognition of the claim by Ngāti Hāmua in relation to this rohe.

[499] Mr Te Tau and Mr Kawana provided evidence of the exercise of kaitiakitanga on the part of Ngāti Hāmua in this area. For example, Mr Te Tau talked of his whānau having questioned people for doing certain things on the coast or fishing in certain locations and when necessary, they reported these incidents to the authorities. Mr Te Tau recalled, as a child, several instances of his grandparents, uncles and father reprimanding locals for taking undersize kaimoana or more than was necessary. Mr Kawana also talked of the whānau carrying out their obligations as kaitiaki.

[500] Mr Stirling's evidence indicated that, in terms of whakapapa, these hapū are connected to the area, through Rangitāne at an iwi level. Mr Potangaroa's evidence established a connection, through Ngāti Hāmua, at a hapū level. In terms of cosmogeny, there is also evidence that connects these hapū groups to this general area through Kupe.

[501] There is evidence of a continuing claim to this coastal rohe on the part of the Rangitāne hapū. The mana moana agreement signifies the recognition of this claim by the other parties.

Exclusive use and occupation 1840 to the present day

Ngāi Tūmapūhia

[502] Tony Walzl's historical evidence[171] indicates that Ngāi Tūmāpūhia had a strong presence in this coastal rohe.

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[171] Tony Walzl *Ngai Tumapuhia-a-Rangi and the Takutai Moana* (27 February 2023) [Walzl Ngai Tumapuhia Report].

[503] Mr Walzl's report shows that Te Unuunu, Arawhata, Waikekeno, Wharaurangi, Pāhaoa, Pukaroro and Te Awaiti were sites of early and ongoing settlement, and Te Āwaiti, Pāhaoa and Pukaroro were important landing sites.

[504] Archaeological evidence reflects Ngāi Tūmapūhia sites and patterns of settlement in this coastal rohe.

[505] Significant reserves were set aside for Ngāi Tūmapūhia during Crown purchasing in this area, including at Te Unuunu, Waikekeno, Wharaurangi and Pāhaoa; parts of these reserves remain Māori land in the ownership of members of Ngāi Tūmapūhia. A small reef off the coast from Pukaroro was also reserved during Crown purchasing and remains Māori land today.

[506] There is consistent evidence of the use of this coastal rohe for customary fishing and kaimoana gathering, large-scale cultivation of crops with stone-field gardens, use of the adjoining rivers for waka logging and trade and joint ventures with settlers, including business, whaling and selling or leasing land.

[507] Mr Walzl's report records that, following Ngāi Tūmapūhia's arrival in the Wairarapa, he was gifted the land from Arawhata to Mōtūwairaka by Tukoroua. Subsequently, Tūmapūhia's grandson, Hineuku, was gifted land from Arawhata South to Hine Papanga te mutunga at Pāhaoa. With those two tuku, Tūmapūhia's descendants were able to occupy and establish themselves along the coastline. They established ahi kā roa. The allotment of land and area to Tūmapūhia's offspring is evidence that there was control over their lands.[172] Control was exhibited over their traditional rohe with the expressed delineation of their boundaries.

[508] The ability to exclude others from these areas is evidenced by the establishment by Ngāi Tūmapūhia's ancestors of several defensive pā along the relevant coastline, as discussed above. Dr Smith's evidence was also that in the early 1800s, when a war party was seen coming down the coast south of the Whareama River, the Ngāi Tūmapūhia wāhine dressed as tāne and carrying weapons, performed a war haka. Their actions were enough to scare off the tauā.

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172 Walzl Ngai Tumapuhia Report, above n 171.

[509] Mr Walzl's evidence was also that Te Muhunga tomo at the mouth of the Kaihoata River was "a sacred place and not trespassed upon by strangers".

[510] It is clear that, as at 1840, Ngāi Tūmapūhia possessed the ability to exclude third parties from their application area and were in control of the takutai moana.

[511] Ngāi Tūmapūhia's evidence is of continued use and occupation, from 1840 to the present day.

[512] Historically, Ngāi Tūmapūhia owned land across the eastern coast of southern Wairarapa. Dr Smith's evidence noted that this included Ngāi Tūmapūhia descendants owning land at Te Unuunu, enabling generations to camp adjacent to the coastal and beach areas.

[513] As a manifestation of manaakitanga, Ngāi Tūmapūhia leased land to settlers. In some respects, this resembled traditional tuku whenua.[173]

[514] The Crown argued that they had the exclusive right to negotiate with Māori in all transactions, not just land purchases.[174] These informal leasing arrangements were therefore resisted by the Crown, as the Crown relied on the profits generated from their purchases of Māori land to finance the development of New Zealand.[175] Dr Smith gave evidence of the Crown persuading Ngāi Tūmapūhia rangatira to enter into tikanga tuku or tuku whenua agreements with the Crown, rather than the informal leasing arrangements with settlers.

[515] Until 1853 the leasing of land by Wairarapa Māori, including Ngāi Tūmapūhia, to settlers was the most prevalent form of engagement.[176] That position shifted significantly in June 1853 with Crown purchases of Tūmapūhia owned land which were largely carried out by Crown land purchasing official Donald McLean.

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173 At [2.7].
174 At [2.9].
175 At [2.9].
176 At [2.11].

[516] From June 1853, the Crown rapidly purchased "about three-quarters of the Wairarapa valley as well as considerable portions of the Wairarapa coast", by early 1854.[177]

[517] The Crown purchased significant amounts of land from Ngāi Tūmapūhia. Wereta Te Kawekairangi, a significant Tūmapūhia chief was identified as part of a "coastal trio", along with Te Hapuku and Hoera Whakataha,[178] Barry Rigby and Andrew Francis also recognised that Te Kaiwekairangi (and therefore Ngāi Tūmapūhia) was involved mostly in East Coast purchases.

[518] Mr Walzl's report provides a brief history on some of the Crown's purchases from Ngāi Tūmapūhia. Wairarapa Māori, including Ngāi Tūmapūhia, saw land as taonga tuku iho and in this time period it was not yet contextualised that land could be alienated, the way that it is through a sale, from a Western perspective.[179] The 1853 and 1854 purchases of Ngāi Tūmapūhia land were therefore understood to be tuku whenua agreements, with the payments made viewed as koha, which served as utu for the land use. It follows that Ngāi Tūmapūhia would have believed they would retain rangatiratanga of the land and that the deeds were an exercise of manaakitanga.

[519] The Waitangi Tribunal agreed with Ngāi Tūmapūhia's submission that when they signed the deeds of land sale, they sought a "partnership".[180]

[520] Te Kawekairangi signed the deeds of sale for Castlepoint on 22 June 1853 and was also signatory on the deed of sale for Te Āwaiti. Te Kawekairangi, along with 12 others, was paid an initial sum of £600 for Te Āwaiti.

[521] Āwhea was sold to the Crown in January 1854 and Te Kawekairangi signed the deed of sale.

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177 At [2.11].

178 Barry Rigby and Andrew Francis *Wairarapa Crown Purchases 1853-1854: A Report Commissioned by the Waitangi Tribunal* (Wai 863, December 2002) at [30].

179 Walzl Ngai Tumapuhia Report, above n 172, at [2.43]–[2.44].

180 At [2.22].

[522] Te Kawekairangi's prominence across interests, as a rangatira of Ngāi Tūmapūhia, signifies the occupation of Ngāi Tūmapūhia across the coast of the Wairarapa.

[523] As recorded above, Ngāi Tūmapūhia continues to hold interests in land blocks at Te Awaiti, Te Unuunu and Pukaroro and Āwhea.

[524] Also as recorded above, Ngāi Tūmapūhia oversees and issues permits for customary fishing within its gazetted rohe moana, from Pāhaoa and north beyond this coastal rohe.

[525] There is evidence from Mr Mason, Ms Griggs, Ms Rolls, Mr Griggs and Ms Riddell, of extensive contemporary use and occupation for fishing, kaimoana and resource gathering, swimming, recreation and camping.

[526] Patrick Mason, among others, talked about the knowledge of customary fishing grounds and practices being protected and passed down from one generation to the next.

[527] Much of the abutting land is now privately owned, in non-Māori hands, but the evidence was that land-based access to the coastal rohe remains available, through private farmland, and the area is also accessed by boat or jet ski, at Glenburn (south of Te Unuunu), Pāhaoa River and Te Awaiti.

[528] The lack of public access to some areas, including at Te Awaiti and Pukeroro, protects fish stocks and boosts abundance, thus supporting the exercise of authority and control by Ngāi Tūmapūhia.

[529] This indicates that Ngāi Tūmapūhia's connection to, and control over, this coastal rohe have not been lost as a matter of tikanga.

[530] Whether commercial fishing in the application area amounts to substantial interruption to exclusive use and occupation is discussed generally (at [632]–[662]).

[531] Other activity, such as a recreational access track from the Pāhaoa River to the Honeycomb Rock Track is very unlikely to have impacted on ongoing customary activities, given the wild and remote nature of the area.

Hinewaka

[532] Mr Stirling's evidence indicates that Ngāti Hinewaka had a presence in this coastal rohe at or around 1840.

[533] Ngāti Rongomaia in the area from Te Awaiti to Te Unuunu; Ngāti Kawekairangi in the area from Te Awaiti to Te Unuunu; Ngāi Te Ao in the area from Te Awaiti to Te Unuunu and at Te Maipi and Motuwaireka (where it had connections to Ngāi Tūmapūhia) and at Pukaroro (where it had connections to Ngāti Hinewaka); Ngāti Te Aokino in the area from Te Awaiti to Te Unuunu and at Pukaroro and Paehuia; Ngāti Pārera in the area from Te Awaiti to Te Unuunu with "influence" that extended to Te Awaiti and Huariki. Ngāti Māhu in the area from Te Awaiti to Te Unuunu, particularly at Pāhaoa; Ngāti Hinewaka from Te Kopi to Mātakitaki-a-Kupe and around to Āwhea, but with connections to other hapū in various locations, including Ngāi Te Ao at Pukaroro.

[534] As previously outlined, it is not necessary that each Ngāti Hinewaka hapū in this rohe give specific evidence relating to every part of the rohe.

[535] Both Mr Te Whaiti and Mr Kerr gave evidence of a continued connection to and control over the area, particularly from Āwhea to Pāhaoa. I infer from that, from the evidence of a presence as at 1840, and from the evidence of current holding of the area in accordance with tikanga, that there is continuity of use and occupation by the named Ngāti Hinewaka hapū, considered as a whole.

Rangitāne

[536] There is historical evidence indicating a presence in this coastal rohe at or around 1840 on the part of Ngāti Māhu, in the area from Te Āwaiti to Te Unuunu, and in particular at Pāhaoa.

[537] Mr Chrisp's evidence referred to particulars of these historical interests. For example, the tuku made by Ngāti Meroiti for Ngāti Māhu at Te Unuunu, and the recording of Ngāti Māhu's interests in the subsequent land sales.

[538] Mr Chrisp also refers to the provision made by Tamahau Mahupuku for Ngāti Māhu in the Waikekeno subdivision hearings in the late 1890s and to the reserves set aside for Te Kawekairangi and the hapū under him, including Ngāti Māhu, in this coastal rohe (and in particular at Wharaurangi, Hahaia, Waikekeno and Te Unuunu).

[539] Mr Chrisp's evidence also indicates a presence in this coastal rohe at or around 1840 on the part of Ngāti Meroiti. In particular:

(a) members of Rangitāne remained on land that was the subject of a tuku in the vicinity of Wharaurangi, Waikekeno and Pāhaoa, on the basis of its whakapapa and the interests of Ngāti Meroiti;

(b) the tuku, referred to above, made by Ngāti Meroiti for Ngāti Māhu at Te Unuunu;

(c) the interests of Ngāti Meroiti at Pāhaoa and Pukeroro, described in detail in the Ngā Waka-a-Kupe hearings of the 1880s and 1890s; and

(d) the reserves set aside for Te Kawekairangi and the hapū under him, including Ngāti Meroiti, in this coastal rohe (and in particular at Wharaurangi, Hahaia, Waikekeno, and Te Unuunu).

[540] The evidence of both Mr Chrisp and Joseph Potangaroa indicates a presence in this coastal rohe at or around (and in some cases much earlier than) 1840 on the part of Ngāti Hāmua.

[541] There is historical evidence of use and occupation of this area on the part of Ngāti Hāmua, including at Te Unuunu, Motuwaireka, Waikekeno, Pāhaoa and Āwhea. Ngāti Hāmua acquired use rights at Pāhaoa about two generations prior to the signing of the Treaty of Waitangi/te Tiriti o Waitangi. The evidence also suggests Ngāti

Hāmua customarily engaged in coastal fishing at various places along the Wairarapa coastline, including at Waikekeno.

[542] In terms of continuity of use, the evidence of Mr Chrisp suggests that blocks at Te Unuunu, Waikekeno and Pāhaoa have remained in the uninterrupted ownership of Ngāti Māhu, Ngāti Meroiti and Ngāti Hāmua (the latter at least at Pāhaoa), since 1840, and the block owners have used these lands as a base for gathering kaimoana. This is consistent with the evidence of Mr Jennings for the Attorney-General, in his map of Māori land, which includes small blocks remaining at these locations.

[543] As above, I do not think it necessary for all of the Rangitāne hapū to give direct evidence, provided the evidence as a whole provides a sufficient basis on which the Court can reach conclusions. While the Attorney-General suggests that the contemporary evidence may indicate a loss, as a matter of tikanga, of control that may have previously amounted to exclusive use and occupation on the part of Ngāti Hāmua, I am satisfied that the evidence taken as a whole provides a sufficient basis platform from which I can infer that the Rangitāne hapū in this coastal rohe have exclusively used and occupied this coastal rohe at and since 1840, in accordance with tikanga.

Conclusion

[544] In conclusion I am satisfied that collectively the evidence shows that the applicant hapū hold this coastal rohe in accordance with tikanga and demonstrate exclusive use and occupation as at 1840 and from 1840 to the present day and an order for a jointly held CMT should be granted, to 10 kilometres offshore.

Te Unuunu to Whareama

[545] The applicants agree that Ngāi Tūmapūhia, exclusively, are the relevant hapū in this coastal rohe.

Holds the specified area in accordance with tikanga

[546] The evidence given by Ngāi Tūmapūhia witnesses demonstrates their strong contemporary presence in this coastal rohe and I am satisfied that the area is currently held in accordance with tikanga.

[547] That evidence shows regular use and occupation of sites for fishing and kaimoana gathering. For example, Patrick Mason talks of fishing all along the Wairarapa Coast from the Whareama River to the Āwhea River, as his tīpuna did. Mr Mason mostly fishes at Uriti and Te Awaiti, but chooses where to go depending on the weather and the tides. At Ōrui Beach (close to the Whareama River) the hapū go diving for pāua, kina and crayfish. They collect karengo from Ōrui Beach.

[548] Mr Mason's whānau go camping at Uriti Beach every year, catching kahawai, red cod, kina, pāua, rock fish, crabs, crayfish and karengo. They also go 10 to 12 kilometres out from shore at Uriti to catch groper and tarakihi.

[549] The Court heard evidence of Ngāi Tūmapūhia arrangements with private owners of land abutting the takutai moana. Gary Griggs spoke of a mutual agreement with Tatham Farm to provide access to each other's land at Uriti. Dr Takirirangi Smith talked of holding a gate key to gain easier access to Te Unuunu Beach to carry out customary fishing.

[550] Ngāi Tūmapūhia retains land at Homewood (Ngāpuketūrua). Mr Griggs administers this land, by way of lease to local farmers whose farmland abuts the coast. That arrangement is conducive to reciprocal relationships and provides Ngāi Tūmapūhia with access to the takutai moana.

[551] Duncan Petrie's evidence for the Attorney-General noted permits being issued and fish and kaimoana being caught and gathered in this area, within Ngāi Tūmapūhia's gazetted rohe moana (beginning at Pāhaoa), including at Whareama, Homewood, Ōrui, Motuwaireka, Okautete, Uriti Point and Kaihoata. This is reported to and recorded by MPI.

[552] There is evidence of the operation of a system of tikanga, demonstrating control and authority, in terms of the hapū's fishing and kaimoana-gathering practices; manaakitanga; observing the tikanga associated with wāhi tapu to restrict access to certain areas; imposing restrictions on access and the taking of resources through rāhui (for example, at Kaihoata).

[553] Jamie Griggs, Ryshell Griggs, Gary Griggs and Langdale Rolls all gave evidence of fishing and other kaimoana-gathering practices.

[554] There was also evidence of exercising kaitiakitanga. Gary Griggs has been the Tangata Kaitiaki since 2015. This role involves issuing customary fishing permits for the hapū. Mr Griggs keeps a record of all the permits he has issued. He has had discussions with MPI, including to discuss his goals for the rohe moana around protection of traditional fishing resources, and to express concerns about the impact that commercial fishing is having on the hapū's resources and sustainability. Most recently, Mr Griggs approached MPI about his concerns about overfishing of crayfish.

[555] Gary Griggs' evidence demonstrated the exercise of mana and rangatiratanga when he spoke of his tangata kaitiaki role, demonstrating a level of customary authority over the area and assumption of responsibility for the health and well-being of people, resources and the environment.

[556] There is evidence of observing the tikanga associated with wāhi tapu to restrict use of the area.

[557] The evidence showed the use of customary restrictions on access and the taking of resources, for example, by the placement of rāhui (which appear to be observed by both Māori and non-Māori). Both Ryshell Griggs and Langdale Rolls gave the example of rāhui being placed at Kaihoata. Evidence of these practices demonstrates control and authority, and the ability and intention to control access to this area, and use of its resources, including with non-Māori.

[558] There is evidence of whakapapa that connects to this area directly through the eponymous ancestor, Tūmapūhia. In terms of cosmogeny, this connects the hapū back

to Kupe. Mr Walzl's evidence demonstrated an enduring relationship and spiritual connection with the area and its resources, and with neighbouring hapū. As with the Āwhea to Te Unuunu rohe, there is also evidence of whakapapa that connects Ngāi Tūmapūhia to this part of the coastal rohe directly through the eponymous ancestor, Tūmapūhia.

Has exclusively used and occupied it from 1840 to the present day

[559] Mr Walzl's evidence indicates that Ngāi Tūmapūhia had a strong presence in this coastal rohe. Waipupu, Riversdale, Uriti Point, Waiorongo, Matariki, Waikaraka, Kaihoata, Homewood and Karaka Bay were sites of early and ongoing settlement. Waipupu was a significant urupā. Riversdale was significant (including throughout the 20th century) as a place for gathering mussels and kina and Uriti Point (including throughout the 20th century) was significant as a ground for gathering crayfish, pāua and crabs. Waiorongo was significant as a mahinga kai and the swamp near Waikaraka Stream was significant as a wāhi tapu. Kaiwhata was, and remains, significant as a site visited by both Kupe and Tūmapūhia and as a site that provided defensive positions during battle.

[560] Mr Walzl refers to archaeological evidence which reflects sites and patterns of settlement by Ngāi Tūmapūhia in this particular rohe.

[561] Significant reserves were set aside for Ngāi Tūmapūhia during Crown purchasing in this area, including at Whareama, Homewood and Te Unuunu. Parts of these reserves remain Māori land and in the ownership of members of Ngāi Tūmapūhia.

[562] There is historical evidence of the use of this coastal area for customary fishing and kaimoana gathering, as described above, and trade through selling or leasing land, all of which is evidence of a strong presence manifesting in acts of occupation.

[563] All of this demonstrates control and authority and the ability and intention to control access to this area, and use of its resources. Ngāi Tūmapūhia has successfully negotiated access arrangements, including at Motuwaireka, and secured compliance with rāhui restrictions, including response to a drowning at Riversdale in 2015.

[564] The evidence also indicates the continuity of use and occupation of this coastal rohe on the part of Ngāi Tūmapūhia, from 1840 to the present day.

[565] Members of Ngāi Tūmapūhia continue to hold interests in land blocks at Te Unuunu, Homewood and Te Maipi.

[566] Ngāi Tūmapūhia oversees and issues permits for customary fishing within its gazetted rohe moana, encompassing this entire coastal rohe.

[567] Knowledge regarding customary fishing grounds and practices has been protected and passed down the generations. Gary Griggs gave evidence of that being depicted by a map.

[568] There is also evidence of extensive contemporary use and occupation, including for fishing, kaimoana and resource gathering, swimming, recreation and camping.

[569] As with the Āwhea River to Te Unuunu rohe, while much of the abutting land is in the hands of private owners, members of Ngāi Tūmapūhia have arrangements and relationships with these families and individuals which mean that land-based access to the takutai moana continues to be available.

[570] This evidence suggests that Ngāi Tūmapūhia's connection to, and control over, this coastal rohe have not been lost as a matter of tikanga.

[571] As for offshore use and occupation, the evidence suggests this extends 10 to 12 kilometres offshore from Uriti. As discussed above, evidence from other members of the hapū indicates use and occupation at least as far offshore as 10 kilometres (Hana Riddell) and as much as 80 kilometres, out to the Hikurangi Trench (Hana Riddell).

[572] There is sufficient evidence from which I can infer continued use and occupation out to 10 kilometres from the coast.

[573] The impact of commercial fishing on the South Wairarapa coast generally is discussed at [632]–[662]. As for the other coastal rohe, there is evidence that

commercial fishing has had some impact on fish stock levels and, in turn, the nature of customary fishing in this coastal rohe by Ngāi Tūmapūhia. But that has not of itself interrupted exclusive use and occupation.

[574] The only other evidence of significant third-party resource consents in this rohe is a resource consent obtained in 1999 for a subdivision for Te Unuunu.

[575] Although much land abutting the takutai moana is in the hands of private owners, arrangements and relationships with these families and individuals (of both a personal and professional nature), ensure that land-based access continues to be available, and the area is also frequently accessed by boat or jet ski.

Conclusion

[576] I am satisfied that Ngāi Tūmapūhia satisfy the statutory criteria for a grant of CMT in this coastal rohe, out to 10 kilometres from the shore.

Seaward boundary of CMT

[577] The Takutai Moana Act defines the area within which the Court can recognise Māori customary rights. The seaward boundary of the marine and coastal area is defined in the Act as being "… the outer limits of the territorial sea". This is commonly referred to as the "12 mile limit" which extends from the baseline of the territorial sea. The seaward boundary of the territorial sea is "…every point of which line is distant 12 nautical miles from the nearest point of the baseline". The baseline of the territorial sea is the low-water mark along the coast of New Zealand.[181]

[578] All applicants have applied for CMT out to the 12 nautical mile limit.

[579] That is opposed by SIR which says there is no evidence to demonstrate that as at 1840 the offshore area was occupied and controlled in a manner that demonstrated that either it was held in accordance with tikanga or exclusively used and occupied at the time. Nor has there been sufficient evidence to help identify a closer potential boundary.

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[181] Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 5.

[580] The Attorney-General also doubts that the evidence is sufficient to demonstrate patterns of observation, control or regular use to the boundary sought and, in some areas, suggests that nor is the evidence sufficient for the Court to draw inferences.

[581] In *Whakatōhea* Miller J concluded that the evidence did not justify a CMT recognition out to the 12 nautical mile limit, but went on to say:

> This is not to suggest that CMT is confined to specific fishing grounds or other resources. It may extend to all the rohe moana exclusively occupied and used by an applicant group for purposes such as passage and navigation as well as resource-gathering. I have noted evidence that a group's takutai moana includes areas adjacent to their land. There is also evidence that in Māori customary law, rights of control are also linked to resources, and most of the evidence about offshore use in this case concerns resources; in particular, fish. So the inquiry into CMT must recognise resource boundaries.

[582] The majority in *Whakatōhea* said that the "strong presence" in an area, required to meet the second limb of the s 58 test will be more difficult to demonstrate in respect of offshore areas visited only occasionally (for example, to fish) than shallower areas close inshore that could be (and were) observed and controlled from coastal settlements, and used on a regular basis.[182] Use of such areas will often be more akin to a use or resource right rather than a right of exclusive occupation.

[583] Pre-colonisation, all of Aotearoa New Zealand was held by Māori according to their tikanga and customs. As Elias CJ said in *Attorney-General v Ngati Apa*[183] that "ownership" extended beyond the dry land to include the marine and coastal area also.

[584] The Waitangi Tribunal also noted that any Māori customary interests that lie beyond the outer limits of the territorial sea remain undisturbed (unless affected or extinguished by means other than the Takutai Moana Act).[184]

[585] The division between land and sea is inconsistent with tikanga. In the *Wairarapa ki Tararua Report*, the Waitangi Tribunal said:[185]

> **(1) *The Māori conception of coastal land and resources***

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182 *Whakatōhea*, above n 20, at [422].
183 *Attorney-General v Ngati Apa*, above n 46, at [51].
184 Takutai Moana Report Stage 1, above n 18, at 70.
185 Waitangi Tribunal *The Wairarapa ki Tararua Report*: *Volume III: Powerlessness and Displacement* (Y863, 2010) [Wairarapa Report Volume III] at 983–985 (citations omitted).

> Māori traditionally saw the land and sea as one entity. Dr Leach outlined how this conception flows from a worldview established in Polynesia and carried to places as far-flung as Hawaii, Tahiti, the Cook Islands and Aotearoa New Zealand. Nutrition needs across Polynesia were met by a combination of land and sea resources…
>
> Māori conceived their mana as extended to fishing rocks, submerged rock pinnacles, and fishing holes offshore. Such places were identified and named in the minutes of Wairarapa and Te Maipi Native Land Court hearings in the 1880s and 1890s. Dr Leach gave as examples Te Ruaara, an offshore fishing rock where hāpuku congregate, and Te Hohonu, a fishing hole where kōura are caught off Te Hūmenga. Takirirangi Smith, using the records of the Te Maipi hearings in September 1888, described a number of rua kōura and rua hāpuku (crayfish and groper holes) owned by those giving evidence. These were located not within the land area claimed but offshore. George Matthews similarly described the interests of Te Hika-ā-Pāpāumu in pinnacles and rocks, including the twin sisters Ngāpuketerua and Ngāpukeriki and the rocks Mahuika and Pūtaki.
>
> …
>
> (**3**) ***Pākehā conception of land and sea different***
>
> From the outset, the colonists' different conception of land and sea as distinct environmental zones affected the ability of Māori to articulate and obtain what they wanted and needed as owners of coastal resources.
>
> When surveyors prepared maps and the Native Land Court defined titles, their focus was on the land. In some cases, the seaward boundary was defined by the high-water mark, in others by the low-water mark… These marks on maps meant nothing to Māori: for them, land and sea were seamlessly linked…

[586] Dr Joseph's pūkenga report also records the Māori view that a water resource and a land resource were conceptually the same and capable of being under the mana of a community. Dr Joseph quotes from the 1921 Native Land Claims Commission which reported with reference to Napier Inner Harbour[186] that in Native custom, Māori rights were not confined to the mainland, but extended as well to the sea where "[d]eep-sea fishing-grounds were recognized by boundaries fixed by the Maoris in their own way; they were well known, and woe betide any alien who attempted to trespass upon them".

[587] The pūkenga report notes that Ngāpuhi leaders in 1955 described Te Moana-nui-a-Kiwa (the Pacific Ocean) as being the "Māoris' marae" and "main *marae* of our ancestors", due to it being crossed many times by the Māori people before the

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[186] "Reports of Native-Land Claims Commission: Whanganui-o-Rotu" [1921] 2 AJHR G-5 at 13.

Europeans discovered it.[187] Māori had strong mana and rangatiratanga relationships with the takutai moana, including the ocean itself and have kaitiakitanga responsibilities that extend out to sea.[188]

[588] The majority judgment in *Whakatōhea* cites comments of Sir Edward Taihākurie Durie when discussing the nature of the complex network of customary rights in relation to land, as well as coastal reefs and fishing grounds: "Resource boundaries were conceived of lineally, and radially with rights or authority radiating from a central heart to uncertain fringes."[189]

[589] Consistent with that, witnesses in this hearing were reluctant to define the distance to which their rights and mana extended. They described themselves as being a part of the takutai moana and it forming an integral part of their identity — there is no defined boundary on this connection to the sea.

[590] The applicants submit that, while the Court of Appeal has observed that control in the offshore area will be harder to demonstrate, the nature of the "holding" cannot be understood by studying mere uses, but by testing whether whakapapa and wairua thinking encompasses offshore areas. That being so, the nature of the applicants' "holding" of offshore areas must be tested having regard to tikanga — aspects of tikanga are better indicators of the nature and extent of the governance of the takutai moana.

[591] As the pūkenga report noted, the tikanga of Taunaha o Tapatapa Whenua is about claiming an area by naming it.[190] Naming an area is an example of having mana in an area. Both the historian Mr Stirling and Dr Smith referred to the naming of the continental shelf Te Whiti a Naunau (on average about 15 miles from shoreline) and the Hikurangi Trench (connected with the naming of the Pāpawai Marae Whare Tīpuna Te Puke ki Hikurangi). It follows that by naming the continental shelf and the Hikurangi Trench, Wairarapa Māori saw their mana as extending to those areas.

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187 Pūkenga Report, above n 65, at [143] (emphasis in original).
188 At [145].
189 *Whakatōhea*, above n 20, at [364].
190 Pūkenga Report, above n 65, at [79] and [89].

[592] Rāhui and kaitiakitanga also provide examples. Both can extend well into the offshore area and would practically do so. Rāhui and kaitiakitanga are both clearly territorial matters. As Mr Hemi said in evidence, Ngāi Tūmapūhia would not think to impose a rāhui in Cape Palliser and Ngāti Moe would not consider that it could do so at Te Unuunu.

[593] Within the application area a number of offshore fisheries have been identified, including by Mita Carter during his 1992 Taiāpure application. These extend out as far as Te Whiti-a-naunau. Mr Te Whaiti's evidence for Ngāti Hinewaka quotes Mita Carter as saying:

> All these names are underwater trenches, canyons, risers, and were known to our ancestors who ventured out to fish the horizon and beyond… Our Kaitiaki under the customary fisheries regulation also extends out to the edge of the Continental Shelf and a little beyond.

[594] This kaitiakitanga, as Mita Carter identifies, stems from the practices of tīpuna long since dead, and extends to those practising it to this day.

[595] In cross-examination, Dr Joseph was asked whether kaitiaki responsibilities would extend far out to sea if there was an oil spill. He considered tangata whenua (the specific people of the area) would have the right to engage and assist with the clean-up, as was the case with the *Rena*.[191]

[596] In its *Muriwhenua Fishing Report*, the Waitangi Tribunal referred to fishing grounds of the Muriwhenua tribes in the Northland region as extending up to 48 miles offshore.[192]

[597] The Waitangi Tribunal commented in its Wairarapa ki Tararua Report:[193]

> ***(2) Mana extended offshore***
>
> Māori conceived their mana as extending to fishing rocks, submerged rock pinnacles, and fishing holes offshore. Such places were identified and named in the minutes of the Wairarapa and Te Maipi Native Land Court hearings in

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191 The container ship *Rena* ran aground on the Astrolabe Reef in the Bay of Plenty, 12 nautical miles off Tauranga, on October 2011.

192 Waitangi Tribunal *Report of the Waitangi Tribunal – Muriwhenua Fishing Claim* (Y22, 1988) at 196–197.

193 Wairarapa Report Volume III, above n 185, at 955.

> the 1880s and 1890s. Dr Leach gave as examples Te Ruaara, an offshore fishing rock where hāpuku congregate, and Te Hohonu, a fishing hole where kōura are caught off Te Hūmenga. Takirirangi Smith, using the records of the Te Maipi hearings in September 1888, described a number of rua kōura and rua hāpuku (crayfish and groper holes) owned by those giving evidence. These were located not within the land area claimed but offshore.

[598] And in its 2023 report on the Takutai Moana Act, the Waitangi Tribunal heard claimant evidence in relation to the 12 nautical mile limit in the Act:[194]

> They [the claimants] submit that the limit of the territorial sea at 12 nautical miles out has no relevance under tikanga whatsoever. Rather, claimant Robert Gable, of Ngāti Tara, says in his brief of evidence that his tūpuna went out 'further than that to fish ... They used small boats and were able to read the tides well and also used favourable winds to return to shore.' Other claimants also give evidence that their customary interests extend 'to the furtherest traditional fishing grounds', which are well beyond the 12 nautical mile limit. Bryce Peda-Smith, on behalf of Te-Whānau-ō-Rataroa, describes the method for finding the right seaward boundary under tikanga: 'if you go out 10 miles and you catch a fish with a Māori name, keep going. If you go out 50 miles and you catch a fish with a Māori name, keep going. Keep going and when you catch a fish that doesn't have a Māori name, you have reached the boundary.'

[599] Dr Takirirangi Smith, for the Crown engagement parties, gave evidence of fishing grounds being beyond the continental shelf. A fishing ground named Tunui a Te Ika, which is "a far way offshore" because of the association with the "ling" — a deep-water fish that is found up to depths of 1,000 metres.

[600] As Steven Chrisp for Rangitāne observed, Māori in both pre-European and post-European times did go offshore for a range of reasons — for a variety in their diet, for the challenge of it, and for the enjoyment of it.

[601] Joseph Potangaroa, of Rangitāne, also referred in his evidence to his knowledge of offshore fishing locations, albeit not mapped. Mr Potangaroa gave evidence of the importance of the Hikurangi Trench to the people of the Wairarapa. He talked of the kōrero given to him about the significance of 'Hikurangi' and the naming of the Hikurangi Trench and the naming of the Whare Tīpuna, Te Puke ki Hikurangi. Ngāi Tūmapūhia tīpuna would hunt whales at the Hikurangi Trench, launching their vessel from Kaihoata. Phillip Paku for Ngāi Tūmapūhia, gave

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194 Takutai Moana Report Stage 2, above n 29, at 65 (footnotes and citations omitted).

evidence of his tīpuna going far out to sea on their 20 feet long whale chaser boat was at least.

[602] The Ngāti Hinewaka rohe moana was also used as a mode of transport, with tauranga waka traversing the coastline. Large waka, similar to Te Heke Rangatira which is held by the Museum of New Zealand Te Papa Tongarewa, were used for voyages further up the coast and out to Te Waipounamu.

[603] Rangatira and members of Ngāti Hinewaka have been present for, placed and enforced, rāhui all along the Hinewaka rohe moana since time immemorable. Rāhui have been placed for many reasons, including drownings or to assist in conservation of particular fisheries. Rāhui are significant not just to protect members of the iwi or hapū, but also strangers. Manaakitanga includes the obligation to protect strangers within the rohe from physical and spiritual harm. A kairāmua (challenge or breach) of a rāhui will result in utu, and the offender is expected to suffer an aituā (disaster).[195]

[604] Hana Riddell for Ngāi Tūmapūhia gave evidence of her father's voyages to the Hikurangi Trench, which lies 65–125 kilometres southeast of the Wairarapa coast. Her father, together with other hapū members, would fish there for important hapū occasions.

[605] Ms Riddell also gave evidence of hapū members taking fishing trips to the Pinnacles. Leaving from Uriti or Whareama, the fishing trips could have taken up to two to three days.

[606] In more recent times, Patrick Mason testified that he takes fishing trips some 10–12 kilometres from the shoreline at Uriti Beach to catch groper and tarakihi. He also goes some eight kilometres east of the mouth of the Pāhaoa River to catch blue cod, groper, trumpeter and tarakihi. Phillip Paku takes his boat out to Snapper Rock, five miles from Uriti Beach, to catch blue cod and gurnard. Both Phillip Paku and Patrick Mason gave evidence of fishing at a group of rocks seven miles out from Uriti Beach.

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[195] The Court of Appeal in *Whakatōhea*, above n 20, at [165], recognised the importance of rāhui as a manifestation of control, as a right reserved to the group controlling the relevant area.

[607] Dr Smith, talked of going on waka voyages up to 100 nautical miles offshore and journeys to Kaikoura and Heretaunga and Wairoa. Dr Smith testified that traditional methods of deep-sea fishing known to Ngāi Tūmapūhia are prevalent in a wider discourse of whakapapa kōrero narratives discussed by Nepia Pohuhu and others.

[608] A number of applicants referred to their use of the offshore area by way of Māori active involvement in the fisheries quota management regime through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (Fisheries Settlement). As a consequence of the Fisheries Settlement and the development of their customary interest in fisheries, iwi are allocated quota for both inshore and deep-water stocks, reflecting their rights and interests out to sea. Inshore stocks are allocated to iwi on the basis of coastline interests (mana whenua/mana moana) and deep-water stocks are allocated based on both coastline interests and relative iwi population.

[609] The fishing data presented in evidence for SIR and the Attorney-General shows fishing events across the hearing area out to 12 nautical miles. This must necessarily include fishing interests and/or activities by, and/or for the benefit of the applicant groups.

Conclusion

[610] As the Court of Appeal noted, exclusive use and occupation will inevitably look different offshore than in inshore coastal areas. By its very nature, offshore areas will be visited less frequently, with less regular use of resources, by both Māori and non-Māori. Sources of evidence of use and occupation will necessarily be thinner.

[611] As Miller J observed,[196] when discussing what amounts to substantial interruption, even regular commercial fishing is a "transitory use".

[612] In light of that one might conclude that it will be virtually impossible to show a "strong presence" in the offshore, marine area. I think a better view is that a "strong presence" looks different in the marine area than on land. It is necessary to look at

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196 *Whakatōhea*, above n 20, at [182].

different ways of measuring and assessing that presence. Evidence of usage, such as fishing, will be part of it but, as set out above, hapū have also had an ongoing presence and acts to demonstrate that those areas were within their control as a matter of tikanga. Tikanga values, such as the exercise of kaitiakitanga and the imposition of rāhui, were and are practised in the application area, extending past the immediate foreshore and out to the 12 nautical mile limit and beyond. This is evidence of a continued presence and stewardship over these areas.

[613] I have some sympathy for the applicants' submission that, in light of the evidence as to tikanga practices, it is not necessary for them to give specific examples of fishing out to 12 nautical miles across the whole of the Stage 1(a) hearing area. Rather the Court can draw inferences that the applicant groups have held, used and occupied the takutai moana out to 12 nautical miles in accordance with tikanga. The practice of tikanga values can itself found legal recognition.

[614] However, while more is required than mere use of a resource, some evidence of use is, in my view, also necessary. In some of the coastal rohe, the evidence of continued usage of the marine areas was stronger than in others. So, for example, in the Āwhea River to Te Unuunu rohe and the Te Unuunu to Whareama rohe, there was evidence of fishing out to 12 nautical miles and beyond. In the other three coastal rohe the specific evidence was limited to smaller distances offshore. That is reflected in the orders I have granted.

"Without substantial interruption"

[615] The phrase "without substantial interruption", as it appears in s 58(1)(b)(i), is not defined in the Takutai Moana Act.

[616] A substantial interruption amounts to an extinguishment of customary rights. As the Court of Appeal held in *Ngati Apa*, any statutory extinguishment of customary rights must be express or by necessary implication.[197]

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[197] *Attorney-General v Ngati Apa*, above n 46, at [185].

[617] There is a high statutory threshold for substantial interruption. The "substantial" test is in itself onerous.

[618] The "without substantial interruption" criterion requires the Court to consider the nature, extent, duration and cause of any interruption to the applicant group's exclusive use and occupation.[198] The presence of others is not inconsistent with exclusive posession, at least when the use of the area is in accordance with tikanga.[199]

[619] The majority suggests that there may be a substantial interruption where a group has ceased to use and occupy an area to the point where ahi kā roa is no longer maintained by that group; or other Māori groups have displaced the original customary holders as the primary occupiers and kaitiaki of the area.[200] Third-party use for fishing or navigation, and public rights of access, may be capable of amounting to substantial interruption, as a matter of construction of s 59(3), but this will depend on the facts.[201]

[620] The requirement for continuity is dependent on both the nature of the environment and the tikanga applicable to the area in question and both will colour what is a substantial interruption in any given situation.[202] Similarly, in *Re Edwards*, Churchman J observed that whether an activity is a substantial interruption will depend on its nature, scale and intensity.[203]

[621] The Act already provides express protection for the rights of access and navigation within the marine and coastal area and for the preservation of fishing rights for all people.[204] Any grant of CMT is expressly subject to these rights, making it plain that Parliament did not intend for evidence of access, navigation or fishing alone to amount to a substantial interruption so as to defeat a grant of CMT.

[622] Third party users will not necessarily preclude a grant of CMT. [205] Section 59(3) provides:

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198 *Whakatōhea*, above n 20, at [174] per Miller J and [433] per Cooper P and Goddard J.
199 At [177].
200 At [432].
201 At [181].
202 *Re Reeder*, above n 21, at [44].
203 *Re Edwards*, above n 13, at [230].
204 Takutai Moana Act, ss 26–28.
205 Sections 58 and 59.

> The use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.

[623] The majority also observes that use or occupation of the area by another person in a manner that was expressly authorised by an Act of Parliament could substantially interrupt the use and occupation of the area by the applicant group (for example, by the lawful construction and operation of port facilities in a manner that excludes the applicant group from access).[206]

[624] The Court gave an example of the lawful construction and operation of port facilities pursuant to a resource consent or some other form of legislative authority.

[625] The burden of proof for substantial interruption is on third party users and not on the applicant group.[207]

Tikanga as it applies to substantial interruption

[626] Both *Re Reeder* and *Re Edwards* make clear that tikanga is relevant to the test for substantial interruption. This was confirmed by the Court of Appeal in *Whakatōhea*, citing the failure to maintain ahi kā roa in particular:[208]

> First, it seems to us that rights that existed as at 1840 will have been substantially interrupted where a group has ceased to use and occupy a relevant area for such an extended period that ahi kā roa is no longer maintained by that group as a matter of tikanga. More generally, where as a matter of tikanga a group has ceased to have the relevant degree of control and authority over an area after 1840, for example because other Māori groups have displaced the original customary holders as the primary occupiers and kaitiaki of the area, the test will not be met by that original holder. (In those circumstances, it seems likely that the first limb of s 58(1) also will not be satisfied by the original holders: they will not currently hold the area in accordance with tikanga.)

[627] Manaakitanga will be relevant. The majority in the Court of Appeal said the requirement of exclusive use and occupation without substantial interruption had to be

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206 *Whakatōhea*, above n 20, at [433].
207 At [436].
208 At [432]–[434].

approached having regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga. Relevant factors include:[209]

> The frequent and generous exercise of manaakitanga by whanau, hapu and iwi in favour of other Maori groups, and in favour of European settlers. …
>
> It would be ironic and unjust if the generous welcome that Māori extended to settlers were now to be treated as diminishing or extinguishing the rights of Māori groups: MACA should not be read in a manner that would produce that unsatisfactory result.

Degree of substantial interruption required

[628] In *Re Edwards*, Churchman J referred to the "severing" of the connection with the takutai moana.[210] That is consistent with the Court of Appeal's ahi kā roa interruption.[211] Ahi kā roa refers to continuous use and only ends when the fires grow cold. Substantial interruption must cease use and occupation in a relevant area for such an extended period that ahi kā roa is no longer maintained by that group.

[629] Both *Re Ngāti Pāhauwera*[212] and *Re Edwards*[213] provide examples of substantial interruption. In the former case an applicant group's specified area included a pipeline that had been discharging wastewater since 1973. Justice Churchman found there was a substantial interruption as the pipeline had "significantly reduced use of the area, with many of the witnesses stopping their activities, such as collecting kaimoana, from the 1980s onwards". Also in *Re Ngāti Pāhauwera*, the Court determined that many of the land parcels within the takutai moana around Napier Port, Napier Marine Parade and the Ahuriri estuary were areas where customary rights and interests had been substantially interrupted.[214]

[630] In *Re Edwards*,[215] the High Court held that the Ōpōtiki Harbour Development Project substantially interrupted the applicant's holding of the relevant area in accordance with tikanga. The project had fundamentally changed the "landscape and

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209 At [426](b).
210 *Re Edwards*, above n 13, at [206].
211 *Whakatōhea*, above n 20, at [432].
212 *Re Ngāti Pāhauwera*, above n 127, at [225].
213 *Re Edwards (Whakatōhea Stage 2) No 7* [2022] NZHC 2644 [*Re Edwards No 7*] at [28].
214 *Re Ngāti Pāhauwera*, above n 127, at [272].
215 *Re Edwards No 7*, above n 213, at [28].

use of this part of the takutai moana on a substantial scale and had a major impact on the use and occupation of the area."

[631] However, also in *Re Edwards*, the Court was satisfied that raupatu[216] did not amount to a substantial interruption, as local Māori continued to rely on the takutai moana as a source of food and were not denied access to the takutai moana or its resources as a result of the raupatu.[217]

Does commercial fishing amount to a substantial interruption?

[632] SIR participated in the hearing as an interested party. In opening submissions counsel for SIR submitted that, in order to avoid a finding of substantial interruption in terms of s 58(1)(b), an applicant group needed to demonstrate both an intention *and* an ability to exclude others (including non-Māori) from the relevant area from 1840 to the present day. Counsel's submission was that the use of the moana for commercial fishing, by third parties, amounted to a more than minor interference to which the applicant group(s) objected without successful recognition or result, thus demonstrating a lack of capacity to exercise control over an area.

[633] SIR's evidence emphasised the extent of the application area which covers all of the South Wairarapa Coast and extends 12 nautical miles offshore. The application area encompasses 250 kilometres of coastline from Tūrakirae Head to the mouth of the Whareama River; 1,672 square nautical miles of seabed (1.417 million hectares) and heavily used commercial (and recreational) fishing grounds that have been fished for over 100 years.

[634] Daryl Sykes[218] gave evidence for SIR that the application area provides a habitat for two important commercial species, rock lobster and pāua. The former cover the majority of the coastline, within 30–40 metres of the low tide line. The latter are spread along much of the coastline. In addition, the hard rocky ground of the coastline provides a habitat for smaller commercial fisheries for kina and beach cast seaweed.

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216 The process of Crown confiscation of Māori land in the 1860s.

217 *Re Edwards*, above n 13, at [202] and [203].

218 Mr Sykes is a Senior Technical Advisor to SIR who has previously worked for the NZ Rock Lobster Industry Council and other fishing industry participants.

The application area also forms part of a much larger area used principally today by commercial fishing trawlers and longline vessels working up and down the southern east coast between Wellington and Napier.

[635] SIR's evidence was largely presented in relation to the south Wairarapa coast as a whole. I have also approached the issue on a global basis.

[636] The submission for SIR is that over the past 100 years, the seafood industry has had a very significant presence within all parts of the application area. Far from being transitory or isolated, its activities have been continuous and sustained throughout the application area. Over the decades, thousands of tonnes of fish products, worth tens of millions of dollars, have been harvested by commercial operators. The seafood industry's use and occupation far exceeds any use and occupation of the applicants.

[637] It was also a feature of SIR's evidence that, although consistent with international law and practice, this commercial fishing has had a material impact on the size of the fish stocks (the biomass or abundance). That was not contested by the applicants. The biomass is now well below (30–40 per cent) that which existed when commercial fishing commenced.

[638] SIR's submission that both an intention and an ability to exclude others (including non-Māori) from the relevant area from 1840 to the present day is necessary was expressly rejected by the Court of Appeal. The majority said:[219]

> It would be unjust and unprincipled to require an applicant group to demonstrate an ability to exclude others, when that ability was taken away from Māori customary owners by the law as it was understood for most of the relevant period. In the absence of an ability to exclude others an intention to do so would be futile. MACA should not be read as requiring whānau, hapū and iwi to demonstrate an intention and ability to exclude other people from coastal areas in circumstances where the law effectively deprives them of that ability.

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219 *Whakatōhea*, above n 20, at [429].

[639] While it remains a case-by-case assessment, the effect of the Court of Appeal decision is that commercial fishing in and of itself will be unlikely to constitute substantial interruption. As the majority said:[220]

> The submission by LCI [Landowners Coalition Inc] and SIR that any substantial third party access to (or fishing in) an area claimed by a group demonstrates that the group did not hold the area exclusively (or that exclusivity was substantially interrupted) fails to take these matters into account. It misunderstands the centrality of whanaungatanga and manaakitanga to relationships between iwi Māori and whenua. It would, if accepted, have the result that MACA fails to achieve its stated purposes.

[640] In closing submissions in this case, Mr Scott for SIR conceded that, on the basis of the Court of Appeal judgment in *Whakatōhea*, evidence of fishing, navigation and access by third parties is not of itself fatal to an application for CMT. Nor is the fact that the fishing has occurred without the consent of the applicant group, or shows a current inability by the applicant group to control the third party use of the application area.

[641] As counsel noted, fisheries have been substantially regulated and authorised by regulation from the early 1900s onwards. Mr Scott also notes that the right of access for non-commercial take (whether by members of the applicant groups or third parties fishing the specified area) has been controlled and authorised by Parliament, beginning progressively in the 1930s and increasing over time.

[642] While SIR does not argue that the legislative scheme in and of itself prevents the applicants from establishing that they have retained exclusive use and occupation, without substantial interruption, it provides the statutory context in which the Court must consider the evidence of lawful third-party fishing activities authorised by Parliament. As Miller J said,[221] the question is as to the scale, extent and duration.

[643] SIR's submission is that intensive commercial fishing activity, over a prolonged period of time, undertaken lawfully pursuant to Parliamentary authorisation and consistently with international law/practice, within the broader application area

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220 At [427].
221 At [181].

but, in particular, the coastal reefs, has substantially interrupted the applicants' ability to use those parts of the application area that were historically used for fishing.

[644] The applicants' response to the SIR submission emphasised three points. First, commercial fishing has not occurred with the applicants' "consent". Second, as determined by the Court of Appeal, commercial fishing is not in and of itself a substantial interruption.[222]

[645] Third, they acknowledge that the fisheries resources on the South Wairarapa Coast have been significantly depleted from pre-European levels. But while the applicants' witnesses universally agree that commercial fishing has had an impact on their ability, and that of their whānau and hapū, to fish and gather kaimoana, nevertheless, they have continued to fish and gather kaimoana in their rohe moana in accordance with custom. They have continued to assert their customary rights, and, significantly, protested for the preservation of kaimoana in the application area to the fullest extent of the law. This was acknowledged by Mr Sykes.

[646] The evidence of many witnesses, for all applicants, reflects the continued use and occupation of the takutai moana.

[647] A number of the applicants also contested the accuracy of the both the events-based reporting and the statistical area reporting provided by SIR, submitting that it is difficult to establish the exact frequency of commercial fishing activities in the application area as the fisheries data provided by SIR and the Crown witnesses applied to an area much broader than the application area. Mr Sykes accepted that the map of trawling activities, over a 10-year period, could not accurately reflect the actual trawling activities that are taking place. Further, the commercial fishing data does not cover the period from 1840 to 1977 and is incomplete between the years of 1978–2019.

[648] Ngāti Kahungunu submits that the SIR fisheries data cannot be relied on as third-party use without further inquiry, as the applicants are undoubtedly included in the data.

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222 Takutai Moana Act, s 59(3).

[649] The completeness and accuracy of Dr Carpenter's evidence for the Attorney-General was also disputed. Dr Carpenter presented a report entitled "Third party use and occupation report for Wairarapa-Tararua coastal area".

[650] The Carpenter report is stated to outline the "nature and extent of commercial, recreational, and customary fishing on the coast". It includes details on, for example, the number of registered fishing vessels and fishermen in New Zealand in 1912 and 1977; the number of commercial fishing boats or licences operating off the Wairarapa coast and how many fishers they employed in the 1960s; fishing vessels domiciled in the Wairarapa and their catch figures in 1969; and the number of crayfish boats at Ngawi in 2005 and 2009.

[651] Dr Carpenter accepted that, in all of the categories in which he gave details, he did not know how many of the vessels or licences were Māori-owned, or how many of the fishers were Māori. Dr Carpenter also accepted that he could not identify:

(a) who held the fishing rights, who was controlling the fishery or who was undertaking the fishing;

(b) the extent to which those fishing activities directly or indirectly involved persons who had whakapapa to the applicant groups; and

(c) what arrangements or understandings might have existed between those persons carrying out the fishing activities and the applicant groups.

[652] Ngāti Kahungunu makes the same point in relation to other examples of third-party use and occupation included in Dr Carpenter's report, such as third-party occupation at the Ngawi fishing village and development of baches there since the 1950s; workers on the coastal margins; whalers and related wharves; business partnerships and ownership of land abutting the coast. Dr Carpenter acknowledged that each of these did or may have included Māori.

[653] It follows, the applicants say, that the data in Dr Carpenter's report in relation to "third-party" use may include direct or indirect use by, or arrangements with, Māori persons and/or applicant groups.

[654] More generally, the applicants point to overall Māori interests in fisheries. Mr Sykes' evidence indicated that Māori interests control approximately 43 per cent of the seafood industry, 36 per cent of the crayfish quota in the relevant area and 74 per cent of the pāua quota in the relevant area. Mr Sykes agreed that iwi and hapū are active in the management and commercial aspect of fisheries. Iwi have a significant proportion of rights and interests within the region's fisheries. The applicants submit their involvement in such fishing activity and related fisheries management is consistent with the continued use and occupation of the takutai moana in accordance with tikanga.

[655] As the Court of Appeal held, the "legal disability" of restrictions on Māori exercising their traditional methods of exclusion and control must be set aside when considering capacity to exclude, particularly the legal inability to resist trespass.[223] Evidence of iwi and hapū complaints about lawful commercial fishing demonstrated that Māori never surrendered their connection to the area or abandoned their claims to control it.[224]

[656] There were many examples of that in the evidence in this case. For example, Ngāti Hinewaka have fought to protect their rohe moana from the impacts of commercial fishing for generations, with varying degrees of success. Through the Kaimoana Regulations they managed customary fishing in their rohe moana.

[657] Mita Carter records commercial fishers notifying and obtaining the consent of hapū representatives to fish commercially in the rohe moana, Ngāti Hinewaka attempted to establish 20 fishing reserves from 1853 onwards, raising concerns with the Crown about the decline in pāua stocks, and attempting since 1870 to assert customary rights through fishing reserves.

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223 *Whakatōhea*, above n 20, at [170].
224 At [180] per Miller J.

[658] The Palliser Bay taiāpure was established in 1995, closing of the area at Te Kopi to commercial crayfishing and pāua diving, and closing the taiāpure area at Te Humenga to commercial crayfishing.

[659] Ngāi Hinewaka applied for mātaitai reserves at Mātakitaki-a-Kupe and Pukaroro, which were ultimately declined due to potential impact on commercial fisheries.

Conclusion

[660] There is an inherent inconsistency in SIR's position that, on the one hand, the commercial fisheries are "properly managed" but, on the other hand, the reduced biomass has had such a significant impact on the applicants that it amounts to "substantial interruption". As Miller J said:[225]

> I add that even regular commercial fishing is a transitory use. And if the resource is properly managed from a fisheries perspective, it seems unlikely that fishing would so deplete the resource as to cause an applicant group to abandon the area indefinitely…

[661] In any event, there is no evidence that any commercial fishing has interrupted the ahi kā roa of any hapū group or groups along the coastline. To the extent that there have been changes to the availability of resources, hapū have always found ways and means to address that at tikanga, within what is permitted by legislation. They have also continued to resist the impacts of commercial fishing on their rohe, by whatever means have remained available to them.

[662] I conclude that the evidence of commercial fishing in the application area is insufficient to amount to substantial disruption of the exclusive use and occupation of the applicants.

Remoteness

[663] In addition to SIR's specific submission that commercial fishing off the Wairarapa coast amounts to a substantial interruption, both SIR and the Attorney-General posed the question whether the difficulty of access to the takutai moana on

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225 At [182].

the south Wairarapa coast might amount to substantial interruption. In particular they refer to:

(a) significant areas of land abutting the takutai moana have over time gone out of applicant ownership. In some cases abutting landowners have restricted access over their land.

(b) the irregularity of the terrain abutting the takutai moana and the remote and harsh natural environment.

(c) the lack of coastal roads.

[664] What constitutes substantial interruption is necessarily coloured by the nature of the environment. Difficulty of access due to environmental factors should not be considered as amounting to substantial interruption, either by itself, or combined with other factors when, at 1840, all of Aotearoa New Zealand was customarily held by Māori.[226]

[665] The applicants' evidence was that they accessed and continued to access so-called difficult to access parts of the takutai moana by foot or sea; the lack of roading did not and does not now prevent access. Their evidence was also that non-applicant coastal landowners generally allow them access to the takutai moana over the land, based on their whakapapa connection to the area. In the rare case where landowners would not allow access over their property, applicants (such as Mr Te Tau) gave evidence that it did not stop them from accessing those areas of the takutai moana.

[666] Relevantly, Dr Joseph observes that, although tikanga at a conceptual level considers land and sea to be indivisible, tikanga can and did adapt when the settlers brought a cash economy to Aotearoa, causing Māori to sell their coastal lands while retaining their customary rights and interests in the takutai moana.[227]

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[226] See *Whakatōhea*, above n 20, at [362] per Cooper P and Goddard J, citing Sir William Martin "Opinions of various authorities on native tenure" [1890] I AJHR 1 at 3.

[227] Pūkenga Report, above n 65, at [138].

[667] In addition, to accommodate the environment, the applicant groups' access, use and occupation of the takutai moana was and is often seasonal. Seasonal use and occupation is consistent with the tikanga concept of take ahi kā (an occupational right to land). Dr Joseph refers to the Waitangi Tribunal's 1993 Pouakani Report:[228]

> ahi kā or ahi kā roa, the principle of keeping the fires burning on the land as a symbol of long-standing occupation. This did not necessarily mean continuous settlement, but it did mean continued use, such as seasonal visits for fishing or birding in which temporary encampments might be made. If occupation rights were to be maintained, the fires grew cold after three or more generations, the fires may be regarded as being extinguished, ahi mataotao.

[668] Mr Te Whaiti, in cross-examination, observed that a non-Māori perspective around occupation and cultivation, focuses on, for example, permanent cultivations. He emphasised the importance of taking a Māori perspective and looking at the seasonality and the ability for Māori to use resources at the right time of year.

[669] There was considerable evidence of the importance of Māori labour on the coastal sheep stations, especially the importance of Māori shearing gangs. Mr Carpenter, in his evidence for the Attorney-General, spoke of the usual resident populations of these isolated stations being augmented by Māori seasonal workers.

[670] A number of Ngāi Tūmapūhia witnesses spoke of how coming to the coast for seasonal work has allowed them to regularly access the takutai moana. Phillip Paku talked of his father working as a shearing contractor on the farm by Ōrui and Whareama and of whānau members coming to the coast to gather kaimoana and eat it at the shearing station. Similarly, Langdale Rolls remembered staying at the shearing sheds on the Te Awaiti Farm, as a child, and going diving with the other kids while the adults were shearing on the farm.

[671] Patrick Mason has been running a shearing business in the Wairarapa for 17 years. Four generations of his whānau were shearers before him. When asked if shearing gangs working on the coast would also go fishing at the time, Mr Mason said "I can confirm that. … It's part of the industry. When you're shearing on the coast, … everyone goes diving and fishing after work".

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228 Waitangi Tribunal *The Pouakani Report* (Wai 33, 1993) at 14.

[672] And Dr Takirirangi Smith gave evidence of how, when he was young, his parents and other whānau members were often involved in the seasonal shearing gangs that worked the coastal stations. Dr Smith said: "The importance of the shearing gangs for our parents and grandparents at the time was that it allowed whanaungatanga and extended whānau to work together, also providing a way to connect with our whenua and taonga tīpuna along the coast".

[673] In any event, as counsel for Ngāti Kahungunu noted, the questions raised about coastal terrain, remote conditions, lack of roads and landlocked coastal areas cut both ways. Those factors mean it is even less likely that "substantial interruption" could be satisfied in the present case. That is, third parties are less likely to have disrupted or interfered with the customary land and/or takutai moana rights of the applicants when access to the coast and the takutai moana is more limited and difficult.[229]

[674] There is insufficient evidence to conclude that the factors of remoteness and climatic harshness have amounted to substantial interruption in any particular parts of the application areas.

Protected customary rights

[675] "Protected customary rights", or PCRs, are rights that have been exercised in a particular area since 1840, continue to be exercised by the applicant group in accordance with tikanga, and have not been extinguished as a matter of law.[230]

[676] PCRs are provided for in s 51 of the Takutai Moana Act:

> **51 Meaning of protected customary rights**
>
> (1) A **protected customary right** is a right that—
>
> (a) has been exercised since 1840; and
>
> (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
>
> (c) is not extinguished as a matter of law.

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229 For example, Piriniha Te Tau gave evidence that he and his whānau gathered kaimoana in bays where they guarantee they can get kaimoana because the bays are landlocked, which he says is helpful because you have to walk or boat there, and otherwise people do not go there at all.

230 Takutai Moana Act, ss 9 and 51(1).

(2) A **protected customary right** does not include an activity—

(a) that is regulated under the Fisheries Act 1996; or

(b) that is a commercial aquaculture activity (within the meaning of section 4 of the Maori Commercial Aquaculture Claims Settlement Act 2004); or

(c) that involves the exercise of—

(i) any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or

(ii) any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; or

(d) that relates to—

(i) wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act:

(ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978; or

(e) that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource (within the meaning of section 11 of the Natural and Built Environment Act 2023).

(3) An applicant group does not need to have an interest in land in or abutting the specified part of the common marine and coastal area in order to establish protected customary rights.

[677] Although PCRs were not the direct focus of the Court of Appeal's decision in *Whakatōhea*, the Court did say that the Act contemplates that PCRs may be recognised for groups that did not exist in 1840, as long as someone to whom the applicant has a relevant connection has continuously exercised the relevant customary right in the particular area since then and has done so in accordance with tikanga.[231] Section 106(2)(b) omits the words "exclusively" and "without substantial interruption" contained in s 58(1)(b)(i) of the Act.

[678] A PCR does not confer any right to control the relevant area.[232] Nor does it confer an exclusive right to any relevant resource. A group that has a PCR in respect of a specified area is entitled to exercise that right in that area without needing to obtain

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231 *Whakatōhea*, above n 20, at [336] and [341] per Miller J and [360] per Cooper P and Goddard J.

232 Takutai Moana Act, s 54.

a resource consent, and without paying certain charges under the RMA.[233] The Minister of Conservation has the authority to impose controls over the PCR should its exercise have an adverse effect on the environment.[234]

[679] A PCR affects third parties' resource consent applications. A resource consent must not be granted to a third party in an area protected by a PCR if the activity in question will, or is likely to have, adverse effects that are more than minor on the exercise of the PCR, unless the group holding the right gives its written approval.[235]

[680] An applicant for a PCR must both specify the particular activity, use or practice that the PCR application covers, and identify the "particular part" of the CMCA over which the recognition of the right is sought.[236] Requiring the location of a PCR to be defined is consistent with the statutory effect of a PCR, as set out above.

[681] A PCR may be granted to one applicant group over an area that is subject to CMT held by another group.[237] Multiple overlapping PCRs are also possible; as Churchman J observed in *Re Edwards*, "the very nature of the activities sought to be recognised as PCRs suggest that it would be illogical to limit a recognition order to one applicant group only, when there are a number within the application area".[238]

[682] The Takutai Moana Act requires continuity between an activity, use or practice in 1840 and the activity, use or practice today. The Act does not specify the length of time that would render an activity, use or practice discontinued such as to prevent it being recognised as a PCR. That may depend on the nature of the activity, use or practice and the circumstances surrounding any break in continuity.

[683] One significant event could prevent the activity, use or practice from being exercised continuously in a particular area. Or it may be that there is no evidence that a certain activity, use or practice continues, as in *Re Edwards*.[239] In contrast, numerous

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233 *Whakatōhea*, above n 20, at [331]; and Takutai Moana Act, s 52.
234 Takutai Moana Act, s 56.
235 Section 55.
236 Section 51(1)(b).
237 *Re Edwards*, above n 13, at [398]; and *Whakatōhea*, above n 20, at [333].
238 *Re Edwards*, above n 13, at [397]; and *Whakatōhea*, above n 20, at [333] and [341].
239 *Re Edwards*, above n 13, at [506]–[507].

small interruptions, even when combined, may not prevent an activity from being continuous because the interruptions are temporary, or because they were a result of, or consistent with, the tikanga of the applicant group.

[684] Some customary activities are intermittent by their nature, such as using resources for rongoā or spiritual ceremonies, or gathering seasonal resources.

[685] There are a range of activities for which a PCR order can be granted. PCRs have been granted in two cases to date, *Re Edwards*[240] and *Re Ngāti Pāhauwera*,[241] including for:

- collecting/gathering firewood, wood for artwork, pumice, mud, rocks, sand, stones, indigenous plants and shells, and gravel;
- collecting karengo;
- gathering flora and fauna;
- use and collection of rongoā materials (including seawater) and wai tapu;
- non-commercial fishing for whitebait;
- landing vessels and making passage;
- launching of boats and waka;
- using the takutai moana for transport and for the purposes of navigation;
- to manage, use and protect tauranga waka; and
- exercising kaitiakitanga activities in the takutai moana relating to managing and supporting the health of the marine environment.

[686] Certain activities, uses and practices cannot be the subject of a PCR order. These include: [242]

(a) an activity that is regulated under the Fisheries Act 1996 (Fisheries Act), including most fishing practices;[243]

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240 *Re Edwards*, above n 13.
241 *Re Ngāti Pāhauwera*, above n 127.
242 Takutai Moana Act, s 51(2).
243 Section 51(2)(a); and *Re Edwards*, above n 1319, at [366].

(b) activities relating to "wildlife" within the meaning of the Wildlife Act 1953, including some seabirds, and marine mammals within the meaning of the Marine Mammals Protection Act 1978 (MMPA), including whales;[244]

(c) a right that is based on a spiritual or cultural association, unless the applicant group can demonstrate that the association is manifested in a physical activity, or a use related to a natural or physical resource (although this does not undermine the right of mana whenua/tangata whenua to assert those practices within tikanga and te ao Māori);[245] and

(d) protecting traditional sites like wāhi tapu.[246]

Protected customary rights orders sought in this case

[687] A range of PCRs are sought in this case.

Ngāti Kahungunu

[688] Ngāti Kahungunu seeks PCRs (on behalf of Ngāi Tūmapūhia, Ngāi Tūkoko, Ngāti Moe, Ngāti Hinewaka and Ngāti Hinewaka hapū, including Ngāti Hinetauira, and Ngāti Hāmua) in relation to the following activities:

(a) taking, utilising, gathering, managing and/or preserving all natural and physical resources including sand, shells, stones, gravel, pumice, driftwood, kōkōwai, wāhi tapu, īnanga and kōkopu;

(b) utilising, managing, preserving and developing tauranga waka;

(c) seeding and harvesting shellfish for non-commercial purposes;

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244 Takutai Moana Act, s 51(2)(d); and *Re Edwards*, above n 13, at [372]–[377].
245 Takutai Moana Act, s 51(2)(e); and *Re Edwards*, above n 13, at [378]–[380].
246 These are provided for at ss 78 and 79 of the Takutai Moana Act: see *Re Edwards*, above n 13, at [387]–[390].

(d) utilising, managing, preserving and developing traditional routes of travel;

(e) utilise, manage, preserve and develop the application area as a place to demonstrate manaakitanga to visitors;

(f) holding wānanga; and

(g) undertaking and implementing cultural practices such as rāhui and blessings.

Rangitāne

[689] Rangitāne seeks PCRs in relation to the following activities:

(a) collection of water (for ceremonial purposes, medicinal properties, and for use when returning inland) and plants (for pharmaceutical purposes and flax for education); and

(b) rāhui.

Ngāti Hinewaka

[690] In its originating application dated 31 March 2017, Ngāti Hinewaka sought PCRs in relation to the following activities:

(a) the taking of kaimoana including fish and shellfish;

(b) passage over and use of areas in waka and landing of waka;

(c) recreation;

(d) collection of sand and stones, shingle and detritus;

(e) spiritual and cultural practices, including wāhi tapu, karakia tawhito, karanga, imposition of rāhui, exercise of kaitiakitanga and mana,

naming of places in the sea "and all similar uses and practices associated with the use of the coastal area as a cultural and economic resource for Ngāti Hinewaka"; and

(f) all other associated customary uses of the CMCA and associated islands and reefs.

[691] In its opening submissions, however, Ngāti Hinewaka suggested it was seeking PCRs only in relation to gathering activities across the application area for rongoā and traditional materials including plants, driftwood, stone and materials from whales.

[692] The amended application from Ngāti Hinewaka, dated 20 October 2023, does not confirm PCRs sought are limited to only the above matters as described by them in submissions. Instead, it continues to seek the full list of PCRs as set out above.

Ngāi Tūkoko and Ngāti Moe

[693] Ngāi Tūkoko and Ngāti Moe seek PCRs in relation to the following activities:

(a) a general right of kaitiakitanga over the specified area for the purposes of conservation measures and practices;

(b) a right of kaitiakitanga over customary (non-commercial) fisheries;

(c) the taking, use, management and/or preservation of natural and physical resources including driftwood, shells, hāngī stones and other rocks, karengo, kelp, whitebait, crabs, booboos (cat's eyes), coastal harakeke (flax); and

(d) conducting traditional practices including the use of the maramataka.

Ngāi Tūmapūhia

[694] Ngāi Tūmapūhia seeks PCRs in relation to the following activities:

(a) a general right of kaitiakitanga over the specified area for the purposes of conservation measures and practices;

(b) a right of kaitiakitanga over customary (non-commercial) fisheries;

(c) the taking, use, gathering, management and/or preservation of natural and physical resources including rocks, sand, driftwood, shells, crabs, whitebait, karengo, flax, puha and pīngao and pūpū/booboos;

(d) conducting traditional practices including the use of the maramataka; and

(e) conducting traditional practices such as the gathering of resources for rongoā.

Te Ātiawa

[695] In its amended application dated 14 August 2023, Te Ātiawa seeks PCRs in relation to the following activities:

(a) customary fishing activities;

(b) customary gathering and regulation of stock levels of shellfish and other species (kaitiakitanga); and

(c) customary notification of rāhui (temporary prohibition from an area).

[696] In its written opening submissions, however, Te Ātiawa submitted it was seeking PCRs for:

(a) the right of kaitiakitanga over the marine and coastal area;

(b) the right of kaitiakitanga over its customary non-commercial fisheries; and

(c) the gathering of taonga, traditional flora and fauna, driftwood, shells, rocks, garden kelp, harakeke (flax), karengo and hāngī stones.

[697] I have considered the applications under categories of activities.

Taking, using, gathering, managing and/or preserving natural and physical resources

[698] All six applicant groups are seeking PCRs in relation to the taking, use, management and/or preservation of specific natural and physical resources. To the extent the gathering of kaimoana (including karengo, kelp, crabs and booboos) is also sought for recognition, this is discussed in relation to fisheries below.

[699] PCRs are also sought in relation to sand, shells, stones, gravel, pumice, driftwood, kōkōwai, wai tapu or water, and plants.

In general, the taking, use, management and/or preservation of these resources can be recognised through PCRs, provided the test in s 51 is met.

Material from whales

[700] Ngāti Hinewaka seeks a PCR for the gathering of material from whales for rongoā and traditional purposes.

[701] The Takutai Moana Act excludes all activities relating to "wildlife" within the meaning of the Wildlife Act (including those animals specified in sch 6 of that Act).

[702] A PCR cannot recognise an activity that relates to marine mammals within the meaning of the MMPA.[247] The MMPA defines "marine mammal" as:[248]

(a) any mammal which is morphologically adapted to, or which primarily inhabits, any marine environment;

(b) all species of seal, whale, dolphin, porpoise, dugong and manatee;

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247 Takutai Moana Act, s 51(2)(d)(ii).
248 Marine Mammals Protection Act 1978, s 2(1).

(c) the progeny of any marine mammal; and

(d) any part of any marine mammal.

[703] The effect of s 51(2)(d)(ii) of the Takutai Moana Act is that PCRs are not available for the gathering of materials related to whales, alive or dead,[249] regardless of the purpose for which the materials are sought.

Whitebait (īnanga and kōkopu)

[704] Ngāi Tūkoko and Ngāti Moe and Ngāti Kahungunu seek PCRs for the harvesting of īnanga and kōkopu.

[705] Non-commercial whitebait fishing is not regulated by the Fisheries Act and does not fall within the scope of s 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (Settlement Act). Whitebait fishing is regulated under the Conservation Act 1997 and Māori customary fishing rights in freshwater non-commercial whitebait fishing are reserved from regulation under that Act.[250] Activities in relation to whitebait fishing may be recognised by a PCR, subject to sufficient specification.[251]

[706] The evidence for Ngāi Tūkoko and Ngāti Moe in relation to catching īnanga appeared to include Lake Ōnoke and possibly also Whāngaimoana Beach. I grant a PCR in respect of the catching of īnanga at Lake Ōnoke and Whāngaimoana Beach.

[707] For Ngāi Tūmapūhia Ryshell Griggs gave evidence of catching īnanga at Kaihoata River. Patrick Mason also spoke of catching īnanga at Kaihoata and at Pāhaoa River.

[708] I grant a PCR for catching īnanga at Kaihoata and a Pāhaoa River.

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249 See for example s 4(1).
250 Conservation Act 1997, s 26ZH.
251 See for example *Re Edwards*, above n 13, at [669](a)(ii), (b)(i), (c)(i) and (e)(i).

Utilising, managing, preserving and/or developing tauranga waka and traditional routes of travel

[709] Ngāti Kahungunu seeks PCRs in relation to using, managing, preserving and/or developing tauranga waka, and Ngāti Hinewaka seeks a PCR in relation to passage over and use of areas in waka and landing of waka.

[710] In general, these activities may be recognised as PCRs, provided they meet the test under s 51. However, consistent with the scheme of the Takutai Moana Act, any use, management, preservation or development of such sites cannot limit the public rights of access and navigation under ss 26 and 27.

[711] Ngāti Kahungunu's application provided insufficient evidence as to the location, time, duration and intensity of the activity for which a PCR was sought.

[712] Ngāti Hinewaka seeks a PCR for passage over and use of the application area between Lake Ōnoke and Te Unuunu in waka and the landing of waka. Evidence of this activity was given by Haami Te Whaiti and Bruce Stirling, who spoke of particular locations. It appears these locations are of largely historical significance and there was insufficient evidence of continued use. It is open to Ngāti Hinewaka to provide more detailed evidence of continued use, if possible, at the Stage 1(b) hearing.

Holding wānanga

[713] Ngāti Kahungunu seeks a PCR to hold wānanga. Holding a wānanga is an activity capable of recognition as a PCR under the Act, provided it meets the test in s 51 (and is manifested in a physical activity or use or practice related to a natural or physical resource). However, there was insufficient evidence as to the location, time, duration and intensity of the activity.

Undertaking and implementing cultural practices such as rāhui and blessings

[714] Ngāti Kahungunu, Rangitāne and Ngāti Hinewaka seek PCRs to undertake and implement rāhui. Ngāti Kahungunu also seeks a PCR to undertake other cultural practices such as blessings. Te Ātiawa seeks a PCR to undertake and implement cultural practices such as customary notification of rāhui and blessings.

[715] An activity based on a spiritual or cultural association can be recognised by a PCR only if that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource.

[716] The practice of placing a rāhui over an area is intended to restrict access to and use of that area. The exclusionary effect of a rāhui would interfere with the right of access of all New Zealanders to the CMCA, as provided in s 26. The Takutai Moana Act makes it clear that the only prohibitions or restrictions capable of interfering with access to the CMCA are those imposed to protect wāhi tapu,[252] or by any other enactment.[253] As Churchman J said in *Re Edwards*,[254] the structure of the Act is more consistent with the imposition of rāhui, and the consequent creation of an area that is subject to tapu, with the holding of CMT, rather than a PCR.[255] It follows that placing rāhui on the CMCA cannot be recognised as a PCR, but may be the subject of a wāhi tapu protection right in certain circumstances.

[717] Rāhui may of course still be imposed and adhered to through tikanga. As Churchman J said in *Re Edwards*: "There is nothing preventing the applicants from exercising their own rangatiratanga over the entire area through imposing a rāhui when they consider it is appropriate to do so, but such a rāhui will not necessarily be enforced under the Act, but through the laws and norms of tikanga".[256]

General right of kaitiakitanga for the purposes of conservation measures and practices

[718] Ngāi Tūkoko and Ngāti Moe, Ngāi Tūmapūhia and Te Ātiawa refer to a general duty of kaitiakitanga towards the takutai moana as a whole. Ngāi Tūkoko and Ngāti Moe and Ngāi Tūmapūhia submit that a PCR order is an appropriate mechanism to give effect to the preamble of the Takutai Moana Act, to "translate" tikanga rights into an enforceable duty over the takutai moana.

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252 Section 79.
253 Section 26(2).
254 *Re Edwards*, above n 13, at [387].
255 Sections 78(1), 78(3) and 79.
256 *Re Edwards*, above n 13, at [390].

[719] They seek PCRs for exercising kaitiakitanga in their respective specified areas, for the purposes of conservation measures and practices. Ngāi Tūkoko, Ngāti Moe and Ngāi Tūmapūhia refer to this as the "takutai kaitiaki duty".

[720] Exercising kaitiakitanga is generally an activity that is carried out in accordance with tikanga, as required by s 51. What is required is a specific manifestation of exercising kaitiakitanga — whether by a physical activity, or a use or practice related to a natural or physical resource — that may be recognised as a PCR.[257] In *Re Edwards*, the Court considered examples could include:[258]

> … exercise of kaitiakitanga, such as through planting resources (counsel for the Attorney-General gave the example of planting pīngao to protect and strengthen sand dunes), or rangatiratanga through use of the takutai moana for cultural practices such as communicating matauranga Māori, waiata, practice of rongoā, wānanga, tangihanga and other practices that involve physical activity connected to physical resources of the takutai moana.

[721] There is considerable evidence of the exercise of a "takutai kaitiaki" duty, applied to the marine and coastal area in the whole of the application area. For example, Kahura Watene of Ngāi Tūkoko spoke of his hapū tikanga that requires members of the hapū to be aware of their traditional kaitiaki responsibilities. In their relationship with the whenua and the moana, they are first and foremost kaitiaki. Mr Watene gave evidence that he takes this responsibility seriously and tries to take action wherever possible to care for the takutai moana. Piriniha Te Tau, in his evidence for Rangitāne, stated that "protecting our coastline is a key role as kaitiaki and ahi ka". Robin Potangaroa, for Ngāti Kahungunu, gave similar evidence about maintaining the rohe moana.

[722] Likewise, Renee Randall, for Te Ātiawa, gave evidence of the broad scope of a kaitiaki's duties. Ryshell Griggs, for Ngāi Tūmapūhia, when asked whether she would see kaitiakitanga as a form of her people exercising control and authority over their rohe, replied "I'm refusing to accept controlling because kaitiakitanga is not controlling. It is merely practising the well-being of everything around you and what you interact with. Moana, whenua."

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257 Section 51(2)(e); and see also *Re Edwards*, above n 13, at [378]–[380].
258 At [380].

[723] Kahura Watene, Dr Takirirangi Smith, Jamie Griggs of Ngāi Tūmapūhia, and Piriniha Te Tau, among others, all evidenced a takutai kaitiaki duty in relation to the takutai moana as a whole.

[724] The pūkenga agreed in principle that there can be a kaitiakitanga duty over the takutai moana itself.

[725] While the possibility of a PCR for a general right of kaitiakitanga may be available to these applicants, the Attorney-General submits that none of them has sufficiently particularised the location and the activity or use through which kaitiakitanga is manifested, and to which the PCR would apply.

[726] In *Re Edwards*, Churchman J granted a PCR relating to physical activities throughout those parts of the applicant's rohe moana that fell within the takutai moana as defined by the Takutai Moana Act,[259] and for "exercising kaitiaki activities in the takutai moana including the monitoring of the activities of other users of the takutai moana, rubbish collection, and environment projects such as those for planting of pingao and spinifex".[260]

[727] In *Re Ngāti Pāhauwera* the High Court granted a PCR for "carrying out kaitiakitanga practices relating to managing and supporting the health of the marine environment through the application area out to 5km".[261]

[728] I am satisfied that in this case too there is sufficient particularity about the physical manifestation of the kaitiaki function carried out by these applicants to grant PCR orders. It seems to me that the nature of the kaitiaki function and a kaitiaki's duties mean that it is a general duty of kaitiakitanga towards the takutai moana as a whole and it is appropriate to grant the PCR for those parts of each applicant's rohe moana as fall within the takutai moana.

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259 *Re Edwards*, above n 13, at [628] and [669](e)(ii).
260 At [669](d)(ii).
261 *Re Ngāti Pāhauwera*, above n 127, at [599](c)(i).

Kaitiakitanga of customary fisheries

[729] Ngāi Tūkoko and Ngāti Moe, Ngāi Tūmapūhia and Te Ātiawa also seek PCRs for exercising kaitiakitanga over non-commercial (customary) fisheries. Fisheries kaitiakitanga is expressed as a duty to care for and protect the fisheries of the takutai moana.

[730] The applicants characterise these activities as, first, "altruistic kaitiakitanga" and second, as dual purpose fisheries kaitiakitanga. Examples of the former include:

(a) Monitoring the catch of recreational fishers;

(b) Prevention of waterways and marine pollution;

(c) Beach clean-ups;

(d) Discouraging the supplying of hui or tangi with kaimoana; and

(e) Leaving the takutai moana as you find it.

[731] The applicants submit that some acts of kaitiakitanga can be both an altruistic act of fisheries preservation *and* comprise an act of fishing within the Fisheries Act definition. Examples of such "dual purpose fisheries kaitiakitanga" offered by Ngāi Tūmapūhia include not taking small shellfish, maintaining confidentiality about the location of breeder pāua (the transplanting of pāua technically amounts to fishing, but is also an exercise of kaitiakitanga) and only taking as much kaimoana as you need.

[732] Where there is a dual purpose, the kaitiakitanga activity should not be deemed to be an act of "fishing" because to do so would breach the fisheries guarantee in art 2 of te Tiriti, would be inconsistent with s 7 of the Takutai Moana Act and be inconsistent with the following purposes of the Act:

(a) Recognising the applicant's mana tuku iho in the marine and coastal area;[262]

[262] Takutai Moana Act, s 4(1)(b).

(b) Providing for the exercise of customary interests in the CMCA;[263] and

(c) Acknowledging the Treaty of Waitangi (te Tiriti o Waitangi).[264] (s 4(1)(d)).

[733] As discussed, kaitiakitanga is generally tikanga-based and can meet the tikanga element of s 51. As a matter of fact, I am satisfied there is extensive evidence before the Court that indicates kaitiaki practices in relation to customary fishing by hapū members (Ngāi Tūkoko and Ngāti Moe, Ngāi Tūmapūhia and Te Ātiawa) from 1840 to the present day, within the hearing area.

[734] However, the Act places restrictions on the extent to which activities related to fishing and kaimoana practices can be recognised as PCRs. The question is whether those restrictions prevent the granting of a PCR for kaitiakitanga in respect of non-commercial (customary) fisheries.

[735] Section 51(2)(a) of the Takutai Moana Act states that a PCR does not include an activity that is regulated under the Fisheries Act. The Fisheries Act regulates "fishing", which it defines as:[265]

(a) the catching, taking, or harvesting of fish, aquatic life, or seaweed; and

(b) includes—

(i) any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed; and

(ii) any operation in support of or in preparation for any activities described in this definition.

[736] "Fish" includes all species of finfish and shellfish, at any stage of their life history, whether living or dead.[266]

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263 Section 4(1)(c).
264 Section 4(1)(d).
265 Fisheries Act 1996, s 2(1).
266 Section 2(1).

[737] "Aquatic life" means any species of plant or animal life that, at any stage in its life, must inhabit water, whether living or dead, and includes seabirds, whether or not they are in the aquatic environment.[267]

[738] "Seaweed" includes all kinds of algae and sea-grasses that grow in New Zealand fisheries waters at any stage of their life, whether living or dead.[268] This includes karengo.

[739] Nor can a PCR include an activity that involves the exercise of any non-commercial Māori fishing right or interest subject to the declarations in s 10 of the Settlement Act. The Settlement Act, referred to in s 51(2)(c)(i) and (ii) of the Takutai Moana Act, provides a full and final settlement of all Māori claims to commercial fishing rights and changes the status of non-commercial fishing rights so that they no longer give rise to rights in Māori or obligations on the Crown having legal effect.[269]

[740] Section 10 of the Settlement Act states:

> **10 Effect of Settlement on non-commercial Maori fishing rights and interests**
>
> It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983—
>
> (a) shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto
>
> (b) the Minister, acting in accordance with the principles of the Treaty of Waitangi, shall—
>
> (i) consult with tangata whenua about; and
>
> (ii) develop policies to help recognise—
>
> use and management practices of Maori in the exercise of non-commercial fishing rights; and
>
> (c) the Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade; but

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267 Section 2(1).
268 Section 2(1).
269 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Preamble.

(d) the rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly—

(i) are not enforceable in civil proceedings; and

(ii) shall not provide a defence to any criminal, regulatory, or other proceeding,—

except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.

[741] Ngāi Tūkoko, Ngāti Moe and Tūmapūhia submit that a PCR in respect of customary fisheries remains open. First, they say that by art 2 of te Tiriti/the Treaty of Waitangi the Crown confirms and guarantees to Māori the "full and undisturbed possession of their … fisheries". This includes the Māori interest in maintaining, developing, and exercising kaitiakitanga over their fisheries. The Waitangi Tribunal has held the fisheries guarantee is a "positive" one, putting an onus on the Crown to actively protect customary fishing rights.

[742] Ngāi Tūkoko and Ngāti Moe say that a PCR for kaitiakitanga over non-commercial (customary) fisheries is not prevented by s 51(2)(a) or (c)(ii). Section 51(2) lists a series of activities that cannot constitute a PCR; s 51(2)(a), (c)(i) and (ii) are concerned with the activity of fishing. "Fishing" and "fisheries" are different. "Fishing" is a verb and defines certain activities. "Fisheries" is a noun and defines certain objects, such as fish species. The applicants are not seeking recognition of kaitiakitanga over fishing rights or interests but, rather, over non-commercial (customary) fisheries.

[743] The starting point is the definition of each of "fishing" and "fishery". The now-repealed Fisheries Act 1983 (1983 Act) included the following definitions:[270]

fishery means 1 or more stocks or parts of stocks or 1 or more species of fish, aquatic life, or seaweed that can be treated as a unit for the purposes of conservation or management

…

fishing means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and includes any other activity which may reasonably be expected

[270] Fisheries Act 1983, s 2.

to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed; and also includes any operation in support of or in preparation for any activities described in this definition

[744] The current Fisheries Act includes similar definitions:

> **fisheries resources** means any 1 or more stocks or species of fish, aquatic life, or seaweed
>
> …
>
> **fishing—**
>
> (a) means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and
>
> (b) includes—
>
> (i) any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed; and
>
> (ii) any operation in support of or in preparation for any activities described in this definition

[745] In support of this argument, Ngāi Tūkoko and Ngāti Moe submit that their kaitiakitanga activities, and those of other applicants, are altruistic and primarily in the interests of preservation of the fisheries. The exercise of kaitiakitanga is not "fishing" for the purposes of s 2 of the Fisheries Act.

[746] In relation to s 51(2)(c)(ii) of the Fisheries Act, Ngāi Tūkoko and Ngāti Moe and Ngāi Tūmapūhia say that s 10 of the Settlement Act settles non-commercial fishing rights, but not claims concerning kaitiakitanga of non-commercial (customary) rights in fisheries. The Fisheries (Kaimoana Customary Fishing) Regulations apply to the "taking" of fisheries resources, not to preserving or protecting the fisheries resource. While acknowledging that reg 14 of the Kaimoana Regulations provides for the participation of kaitiaki in fisheries management, they submit it does not provide for fisheries kaitiakitanga. Regulation 14 is derived from a legislative regime that is primarily focused on utilisation.[271] Regulation 3 of the Kaimoana Regulations states that the regulations "apply to the taking of fisheries resources for customary food gathering purposes". That is anathema to a kaitiaki's duty.

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[271] Fisheries Act 1996, s 8: "The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability."

[747] "Fishing" and "fisheries" are not defined in the Settlement Act, but should be given the meaning given to those terms in s 2 of the 1983 Act (and the equivalent terms in the current Fisheries Act). The 1983 Act was in effect at the time the Settlement Act was enacted.

[748] The applicants rely on case law concerning s 6(7) of the Treaty of Waitangi Act 1975.[272] Section 40 of the Settlement Act inserted s 6(7) into the Treaty of Waitangi Act. Section 6(7) provides that the Waitangi Tribunal shall not have jurisdiction in relation to "commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983". That provision too distinguishes between "fishing" and "fisheries".

[749] In the cases relied on the Waitangi Tribunal and the Court of Appeal respectively differentiated between commercial fishing and commercial fisheries.

[750] Given the consistent statutory and case law differentiation between "fishing" rights and "fisheries" rights, Māori claims concerning kaitiakitanga over non-commercial (customary) fisheries are not captured, let alone prohibited, by s 10(d) of the Settlement Act.

[751] The applicants also argue that the principle of legality applies. If Parliament had intended to extinguish or curtail customary rights it would need to have made its intention clear. There is no such clarity in respect of excluding kaitiakitanga of customary (non-commercial) fisheries in this context.

[752] It follows, those applicants say, that kaitiakitanga of non-commercial customary fisheries can be the subject of PCRs under the Act**.**

[753] The Attorney-General responds that it is artificial to distinguish acting in a kaitiaki role, from the act of fishing itself. Kaitiakitanga is a role in a resource where Māori have a customary interest. An activity constituting the exercise of kaitiakitanga

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[272] Waitangi Tribunal *Ruling of Judge D J Ambler concerning claims relating to the impact of commercial fishing on customary non-commercial fisheries* (Wai 898, 2014) at [2.6.60]; and *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Assoc Inc* [1996] 3 NZLR 10 (CA) at 16–17.

over non-commercial (customary) fisheries is an activity that, under s 51(2)(a) and (c)(ii), is expressly excluded from being recognised as a PCR. It is an activity "that is regulated under the Fisheries Act 1996" and "that involves the exercise of any non-commercial Māori fishing right or interest".

[754] The Attorney-General says the case law on s 6(7) of the Treaty of Waitangi Act is not determinative: the wording of s 51(2)(c)(ii) of the Takutai Moana Act is not the same as s 6(7). Section 6(7) relates to the Waitangi Tribunal's jurisdiction and decisions on s 6(7) are concerned with the Tribunal's role and jurisdiction.

[755] Nor can the applicants sustain an argument that the Settlement Act has not provided for Māori fishing rights and interests so far as they relate to non-commercial customary fisheries, simply because it does not expressly refer to "fisheries" (as opposed to "fishing"). Non-commercial fishing rights and interests must, in practice, be exercised somewhere — the locations will invariably be the sea, coastal, or inland fisheries (including traditional fisheries).

[756] This is reflected in the obligations set out in s 10(b) of the Settlement Act (to consult with tangata whenua and develop policies to help recognise use and management practices of Māori in the exercise of non-commercial fishing rights) and s 10(c) (to promote regulations that recognise and provide for customary food gathering, as well as the protection of places which are of customary food gathering importance). The term "customary food gathering" is defined in the customary fishing regulations to mean "the taking of fish, aquatic life, or seaweed or managing of fisheries resources" for a non-commercial purpose.

[757] The Kaimoana Regulations and the Fisheries (South Island Customary Fishing) Regulations 1999 have been promulgated under the 1996 Act, in accordance with s 10(c).

[758] The Kaimoana Regulations provide for traditional fisheries (Preamble); for customary food gathering and the exercise of rangatiratanga in respect of traditional fisheries; the confirmation of tangata kaitiaki under reg 9; and the recognition of mātaitai, which provides for management of an area, under reg 23.

[759] There are also provisions under s 175 of the Fisheries Act for taiāpure, to enable protection of areas that are of special significance as a place of food or for spiritual/cultural reasons.

[760] The Attorney says there is no extinguishment under the Takutai Moana Act. Customary fishing rights cannot be litigated, but are given expression through the Kaimoana Regulations.

[761] I have concluded that kaitiakitanga of non-commercial (customary) fisheries is a "right or interest" subject to the declarations in s 10 of the Settlement Act. Those declarations include a commitment by the Minister to "develop policies to help recognise … use and management practices of Maori in the exercise of non-commercial fishing rights"[273] and to recommend regulations to provide for "customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai)".[274]

[762] The Kaimoana Regulations,[275] and the Amateur Fishing Regulations[276] recognise and regulate non-commercial customary kaimoana-gathering and give effect to those commitments. As the Attorney-General submits, the adequacy or otherwise of these mechanisms is not the issue in this case.

[763] I have some sympathy for the argument made for Ngāi Tūkoko, Ngāti Moe and Ngāi Tūmapūhia, that the Kaimoana Regulations are part of a legislative regime focused on utilisation. The Fisheries Act definition of fishing is focused on catching, taking, harvesting. Even the expanded definition in s 2(1)(b) is about activities that facilitate or result in catching, taking or harvesting.

[764] Writing extrajudicially, Williams J has described kaitiakitanga as "the obligation to care for one's own":

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273 Section 10(b)(ii).
274 Section 10(c).
275 Regulations 11–13.
276 Regulations 50–52.

> No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right. The term that describes the legal obligation is kaitiakitanga. This is the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her, or its physical and spiritual welfare. Kaitiakitanga is then a natural (perhaps even inevitable) off-shoot of whanaungatanga [the fundamental law of the maintenance of properly tended relationships].

[765] And it is certainly the case that exercising kaitiakitanga over a customary fishery will, in some cases, be a broader and separate activity to exercising non-commercial fishing rights and interests — for example, the transplantation of pāua carried out by Ngāi Tūkoko. Kaitiakitanga will also encompass, for example, planting resources and monitoring pollution and in other ways developing the reciprocal relationship with the takutai moana that Williams J speaks of. However, those aspects of kaitiakitanga can be encompassed within the PCR for a general right of kaitiakitanga for the purposes of conservation measures and practices/takutai kaitiaki duty. And applicant groups can continue to exercise kaitiakitanga in respect of their customary fisheries in accordance with tikanga, even though not recognised as a PCR.

Gathering of karengo/seaweed, kelp

[766] A number of applicants seek PCRs to gather kelp, karengo/seaweed and pūpū/booboos (cat's eyes).

[767] As to seaweed and kelp, s 89(1) of the Fisheries Act requires a current fishing permit for the taking of any fish, aquatic life or seaweed. Section 89(2) says that subs (1) does not apply to the taking of certain listed species.

[768] The question is whether the species in s 89(2), which include seaweed of the class Rhodophyceae[277] can be said to be "regulated" by the 1996 Act for the purposes of s 51(2)(a) of the Takutai Moana Act. The Court of Appeal in *Whakatōhea* noted that it had "reservations" about the Attorney-General's view that Rhodophyceae is correctly characterised as regulated by the 1996 Act.[278]

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277 Fisheries Act, s 89(2)(f).

278 *Whakatōhea*, above n 20, at [337], n 402.

[769] The applicants say that seaweed of the class Rhodophyceae, and species such as bull kelp, which are listed in sch 4C to the 1996 Act, and referred to in s 93 of that Act, are not actively controlled by the Fisheries Act and therefore the right to take such species is not "regulated by the Fisheries Act". Accordingly, it is not excluded from being the subject of a PCR.

[770] I do not accept that submission and note the Court of Appeal's "reservations" appear to be a preliminary view, but not a finding. The definition of "fishing" in the Fisheries Act captures activities in relation to the catching, taking or harvesting of all "fish, aquatic life, or seaweed". All such species are clearly regulated under the Fisheries Act, being expressly within the ambit of that Act, and controlled by the legislation and, pursuant to that control, subject to an exemption under s 89(2)(f) of the Act.

[771] Accordingly, I conclude that a PCR is not available in respect of the collection of karengo, kelp, other seaweed.

[772] A PCR for the collection of crabs and pūpū is precluded by s 51(2) and the definition of "fish" in s 2(1) of the Act.

Traditional practices — use of the maramataka and gathering of resources for rongoā purposes

[773] Ngāi Tūkoko and Ngāti Moe and Ngāi Tūmapūhia seek PCRs for conducting traditional practices such as maramataka (use of the moon to inform fishing). In *Re Edwards* the Court clarified that if mātauranga Māori, such as using maramataka, is manifested in a physical activity or use in relation to a natural or physical resource, that physical activity or use may come within the ambit of s 51.[279]

[774] Martin McKinley spoke of previous generations of his whānau passing down this knowledge orally and using the maramataka to choose when to go diving. Mr McKinley also spoke of keeping a piece of seaweed hanging outside. The seaweed

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[279] *Re Edwards*, above n 13, at [557].

changes with the weather; he could tell how rough the sea was, based on how wet or dry the seaweed was.

[775] Kahura Watene gave evidence of learning about the maramataka from aunties and uncles and of himself fishing according to the maramataka and of following the northern star, Matariki. Similarly, Jasmine Watson talked of her grandparents and tīpuna using the maramataka to know when to fish, and how she is still learning about it.

[776] Gary Griggs for Ngāi Tūmapūhia, gave evidence of knowing when to dive by looking at the tides and the moon.

[777] A PCR cannot include a right that is based on a spiritual or cultural association, unless the applicant group can demonstrate that the association is manifested in a physical activity, or a use related to a physical or natural resource.[280] It is the physical activity itself that is protected through the statute, and this has the effect of protecting the spiritual or cultural association to the extent manifested in the activity.

[778] In *Re Edwards* the Court considered, for example, the exercise of the following could be recognised as a PCR:[281]

> rangatiratanga through use of the takutai moana for cultural practices such as communicating mātauranga Māori, waiata, practice of rongoā, wānanga, tangihanga and other practices that involve physical activity connected to physical resources of the takutai moana.

[779] In *Ngāti Pāhauwera*[282] Churchman J considered a claim by Ngāti Parau for a PCR over activities including "exercising kaitiakitanga by: … using the fauna and flora at Pania along with other signs from the land (flowering trees) and skies (stars, moon, sun) to inform the maramataka and phase of the life cycles, spawning times and when mahingakai are ready or fat."

[780] Although maramataka is not specifically referred to in the Court's conclusion, the Judge did grant a PCR "over kaitiakitanga practices relating to managing and

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280 Takutai Moana Act, s 51(2)(e); and *Re Edwards*, above n 13, at [378]–[380].
281 *Re Edwards*, above n 13, at [380].
282 *Ngāti Pāhauwera*, above n 127, at [589].

supporting the health of the marine environment through the application area out to 5km".

[781] The very nature of maramataka makes it difficult to be precise about where it will be exercised. I grant PCRs for those parts of each of the applicant's rohe moana as fall within the takutai moana.

Other applications

[782] I summarise the PCR applications not already discussed.

Rangitāne

[783] Rangitāne seek a PCR for the collection of water, for ceremonial purposes, medicinal properties and for use when returning inland; and plants for pharmaceutical purposes and flax for education.

[784] Rangitāne witnesses gave evidence of collecting water at Waikekeno, Glenburn, Te Unuunu, and where the karaka trees live.

[785] I am satisfied that this activity takes place in accordance with tikanga and it is more probable than not that it has been exercised at those locations since 1840 and has not been extinguished. A PCR can therefore issue.

[786] I accept that a PCR for the collection of plants for ceremonial and medicinal plants is available but insufficient evidence was provided as to specific plants, location and timing.

Ngāti Kahungunu

[787] Ngāti Kahungunu sought PCRs to take, utilise, gather, manage and/or preserve all natural and physical resources, including sand, shells, stones, gravel, pumice, driftwood, kōkōwai, wai tapu, īnanga and kōkopu.

[788] There was some evidence from Robin Potangaroa but it lacked sufficient specificity as to location, time, duration and intensity for the Court to be satisfied that

the s 51 test is met. In any event, I have assumed that the overarching Kahungunu application is captured in the more specific applications of hapū.

[789] Ngāti Kahungunu also sought a PCR to seed and harvest shellfish for non-commercial purposes. This activity is excluded under s 51(2)(a) and (c)(ii) of the Act.

[790] A PCR was sought to utilise, manage, preserve and develop traditional routes of travel. The evidence was insufficiently detailed as to location, time, duration and intensity to satisfy the Court of the s 51 requirements.

[791] The same was true of the PCR sought to utilise, manage, preserve and develop the application area as a place to demonstrate manaakitanga. What was required was evidence that the practice is manifested in a physical activity or use connected to a resource. The evidence was insufficiently specific to satisfy s 51.

[792] A PCR was also sought to undertake and implement cultural practices such as rāhui and blessings. As discussed above, because a rāhui anticipates a power to exclude third parties and is therefore governed by s 79, it must be sought by way of a wāhi tapu right to be exercised by a CMT holder. There was a lack of specificity in relation to the other cultural practices for which a PCR was sought.

Ngāti Hinewaka

[793] As discussed above, a PCR is not available in respect of kelp and seaweed. Similarly, a PCR sought by Ngāti Hinewaka for the taking of kaimoana, including fish and shellfish, is excluded by s 51(2)(a) and (2)(c) of the Fisheries Act.

[794] Ngāti Hinewaka also sought a PCR for the collection of sand and stones, shingle and detritus. The relevant areas identified are Waikekeno, where stone was collected for tools and where, today, sandstone, limestone and chert are collected. Another location identified was north of Waikekeno and south to Te Kakau which are well known historically as a source of materials for stone tools (sandstone, limestone and chert).

[795] Evidence was also given by Mr Te Whaiti that as far as Pāhaoa there was an archaeological recording of a stone quarry. This indicates that the area in respect of which these activities have occurred is fairly general.

[796] I am satisfied that the evidence is sufficient for the Court to grant a PCR in respect of this activity in the area from north of Waikekeno to Kakau.

[797] Ngāti Hinewaka also seeks a PCR for harvesting whahariki, harakeke, raupō and pīngao as their ancestors did, for weaving fishing nets, tukutuku panels, piupiu, kākahu, kete, poi, tīpare and other items. This is a permitted activity but it appears not to have been included in Ngāti Hinewaka's amended application. Because of the lack of specificity of the evidence, it is not clear whether the relevant locations are beyond mean high-water springs. It is not possible to grant an order on the basis of the current evidence.

[798] I grant Ngāti Hinewaka's application for the gathering of driftwood in that part of its rohe moana as falls within the takutai moana. In my view the nature of this activity does not require identification of a precise location.

[799] Ngāti Hinewaka seeks a PCR in respect of spiritual and cultural practices. The details of what was sought, and in what locations, was not provided and no PCR can be ordered.

[800] Finally, a PCR was sought for all other associated customary uses of the CMCA and associated islands and reefs. This was insufficiently particularised to enable the grant of a PCR.

Ngāi Tūkoko and Ngāti Moe

[801] A PCR was also sought to take, utilise, gather, manage and/or preserve all natural and physical resources, including the collection of driftwood, shells, hāngī stones and other rocks, and coastal harakeke. Elizabeth Watene gave evidence of collecting driftwood at Lake Ōnoke, including within the CMCA, which is used for firewood or for crafts. While driftwood is found all along the coast, most is at Lake

Ōnoke, because of the Ruamahanga River. Ms Watene also talked of decorating driftwood of interesting shapes with harakeke, putiputi (flowers) and shells.

[802] Mr Watene's evidence was of collecting harakeke along the coast, particularly at, and west of, Mātakitaki-a-Kupe, including at Ngawi. The coastal harakeke is softer than that found inland and is easier to work with. It is used to make kete or baskets, for carrying things and sometimes even for cradling babies. Mr Watene talked of his grandparents collecting harakeke to make kete.

[803] Mr Watene also gave evidence of gathering garden kelp from near the seal colony that has washed up onto the shore. That can be turned into a liquid fertiliser, sprayed on the gardens to help the plants grow. As discussed above, a PCR for the gathering of seaweed and kelp is not available.

[804] The evidence of collecting shells was not specific as to location. Kahura Watene spoke of collecting hāngī stones at Tūranganui River.

[805] I conclude that there is sufficient evidence for the Court to grant a PCR in respect of the collection of driftwood at Lake Ōnoke, harakeke at Mātakitaki-a-Kupe and hāngī stones at Tūranganui River.

Ngāi Tūmapūhia

[806] Ngāi Tūmapūhia sought a PCR for traditional practices such as maramataka and for the gathering of resources for rongoā purposes. The former is considered above. The gathering of resources for rongoā purposes is a permitted activity. Hana Riddell gave evidence of her hapū using mussel shells for healing purposes and talked of an aunty having a special kuku (shell) which she used to ease babies' teething. Ms Riddell also talked of using seawater to treat eczema or other rashes. She also referred to school children going en masse to the water to obtain relief for skin complaints such as chicken pox and measles. I accept the evidence of this practice and, as with the gathering of driftwood, I do not think it requires (or lends itself to) the pinpointing of a specific location within the applicant's overall application area.

[807] A PCR was also sought to take, utilise, gather, manage and/or preserve all natural and physical resources, including the collection of driftwood, shells, hāngī stones and other rocks, karengo, kelp, whitebait, crabs, pūpū and coastal harakeke.

[808] The effect of s 51(2)(a) and (c)(ii) is that a PCR is not available for crabs, karengo and pūpū/booboos.

[809] Hana Riddell spoke of her hapū collecting harakeke from "by the swamp" to make their own piupiu, but there was a lack of evidence as to continuity of that practice.

[810] As to the collection of shells, driftwood and rocks from Te Unuunu, Ms Rolls gave evidence that she still collected rocks (mostly small stones, pebbles) each time she visited Te Unuunu. Gary Griggs gave evidence of regularly collecting driftwood and shells from the Matariki Farm, south of Uriti. The driftwood is used for decoration. It is also used to make things such as huts. Mr Griggs also observed that collecting driftwood keeps the beach clean. I accept it is appropriate to grant a PCR for these activities, at the locations discussed in the witnesses' evidence.

Te Ātiawa

[811] In addition to the PCRs already discussed more generally above, Te Ātiawa also sought a PCR for the gathering of taonga, traditional flora and fauna, driftwood, shells, rocks, harakeke (flax) and hāngī stones.

[812] However, no specific evidence was provided in this regard.

Wāhi tapu and protection of cultural sites

[813] Wāhi tapu protection rights can only be granted to a holder of CMT, in accordance with the relevant criteria in the Takutai Moana Act.[283]

[814] The Act is clear that prohibitions or restrictions on access to the CMCA may only be imposed to protect wāhi tapu or wāhi tapu areas under s 79 of the Act, or by

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283 Section 78(2).

any other enactment.[284] This limits the scope of available PCR orders and means that placing a rāhui on the CMCA cannot be recognised as a PCR under the Act.[285]

Ngā ōta | The orders

CMT orders

[815] For the reasons set out above, I have concluded that the applicants have met the test for CMT in the following areas:

(a) a jointly held CMT for Ngāti Hinewaka, Ngāti Rua, Ngāi Tūkoko, Ngāti Moe, Ngāti Rakaiwhakariri, Ngāti Rākairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira, Ngāti Hāmua and Te Ātiawa hapū over the area between Tūrakirae Head in the west and Mukamukaiti in the east, from the mean high-water springs out to a line parallel to mean high water springs three km out to sea;

(b) a jointly held CMT for Ngāi Tūkoko and Ngāti Moe, Ngāti Hinewaka hapū, Ngāti Rua, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira and Ngāti Hāmua over the area between Mukamukaiti in the west and Kawakawa Point in the east from the mean high-water springs out to a line parallel to mean high-water springs three km out to sea;

(c) a jointly held CMT for the hapū Ngāti Hinewaka, Ngāti Rangaranga and Ngāi Tuohungia over the area between Kawakawa Point in the west and Āwhea River in the east from the mean high-water springs out to a line parallel to mean high-water springs three km out to sea;

(d) a jointly held CMT for Ngāi Tūmapūhia and Ngāti Rongomaiaia, Ngāti Māhu, Ngāti Kawekairangi, Ngāi Te Ao, Ngāti Te Aokino, Ngāti Pārera, Ngāti Meroiti and Ngāti Hāmua over the area between Āwhea River in the south-west and Te Unuunu in the north-east from the mean

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284 Section 26(2).
285 *Re Edwards*, above n 13, at [387]–[390].

high-water springs out to a line parallel to mean high-water springs 10 km out to sea; and

(e) an exclusively held CMT for Ngāi Tūmapūhia over the area between Te Unuunu in the south-west and Whareama in the north-east from the mean high-water springs out to a line parallel to mean high-water springs 10 km out to sea.

PCR orders

[816] I make the following PCR orders:

(a) Rangitāne:

(i) collection of water (for ceremonial purposes, medicinal properties, and for use when returning inland) at Waikekeno, Glenburn and Te Unuunu.

(b) Ngāti Hinewaka:

(i) collection of sand and stones, shingle and detritus in the area from north of Waikekeno to Kakau; and

(ii) gathering driftwood, in its application area.

(c) Ngāi Tūkoko and Ngāti Moe:

(i) a general right of kaitiakitanga over the application area for the purposes of conservation measures and practices;

(ii) collection of driftwood at Lake Ōnoke, harakeke at Mātakitaki-a-Kupe and hāngī stones at Tūranganui River;

(iii) catching of īnanga at Lake Ōnoke and Whāngaimoana Beach; and

(iv) conducting traditional practices including the use of the maramataka, within its application area.

(d) Ngāi Tūmapūhia:

(i) a general right of kaitiakitanga over the application area for the purposes of conservation measures and practices;

(ii) the taking, use, management and/or preservation of rocks, driftwood and shells at Te Unuunu and Uriti;

(iii) catching īnanga at Kaihoata and at Pāhaoa River;

(iv) collection of water (for rongoa purposes) in the application area; and

(v) use of the maramataka, within the application area.

(e) Te Ātiawa:

(i) a general right of kaitiakitanga over the application area for the purposes of conservation measures and practices.

Wāhi tapu

[817] The parties are to file any further evidence in support of their applications for wāhi tapu areas by the week of 15 April 2024.[286] That evidence, and submissions as to whether wāhi tapu areas should be determined, will be heard during the course of the hearing time allocated for the Stage 1(b) hearing, for hearing in the High Court at Wellington, which commenced on Monday 19 February 2024.

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[286] HC Wellington CIV-2017-404-481, 1 December 2023 (Minute of Gwyn J) and subsequent directions of 23 January 2024.

Stage 2 hearing

[818] A successful applicant group who has established an entitlement to a recognition order must submit a draft order for approval by the Registrar.[287] The practice that has developed in cases under the Takutai Moana Act is that a Stage 2 hearing is convened to finalise the terms of all recognition orders. Interested parties affected by recognition orders have the right to attend those hearings and make submissions on the specific terms of the orders.

[819] As noted above, evidence on the applications for wāhi tapu areas will be heard during the Stage 1(b) hearing. In the meantime, the applicants are strongly encouraged to kōrero with each other in accordance with tikanga, in relation to the form of the proposed recognition orders, with a view to submitting those draft orders as soon as possible after a decision is issued on the wāhi tapu applications.

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

Addendum

[821] The applicants were given an opportunity to make any corrections, additions or deletions to the summary of their whakapapa before delivery of the judgment. The judgment reflects the applicants' responses. It also corrects some minor errors, pursuant to r 11.10 of the High Court Rules 2016. The judgment has effect from 7 March 2024 (pursuant to r 11.5 of the High Court Rules).

Gwyn J

[287] Takutai Moana Act, s 109.

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APPENDIX I - Original application area map

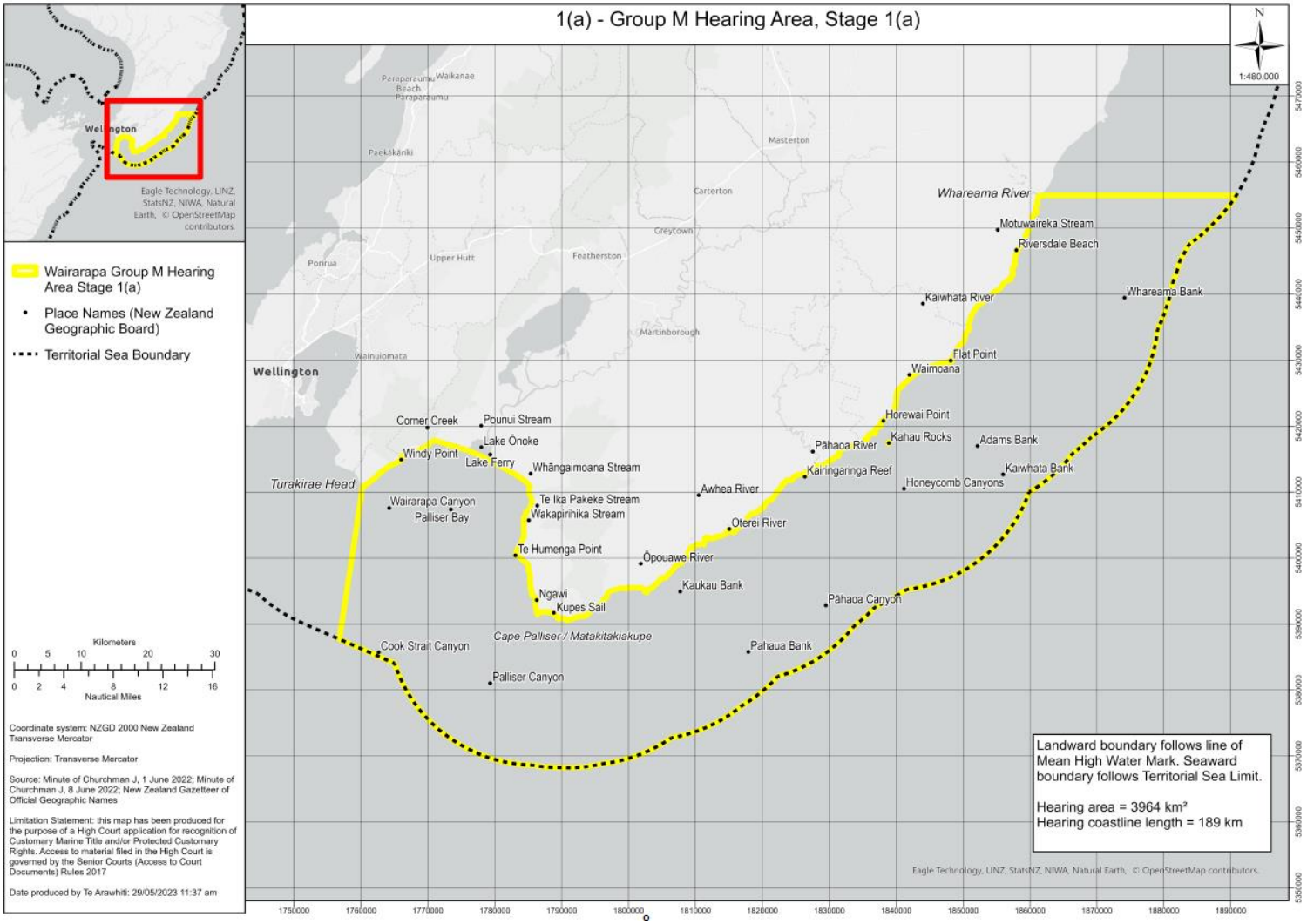

Figure 1: Original application area map

APPENDIX II – Overlapping applications map

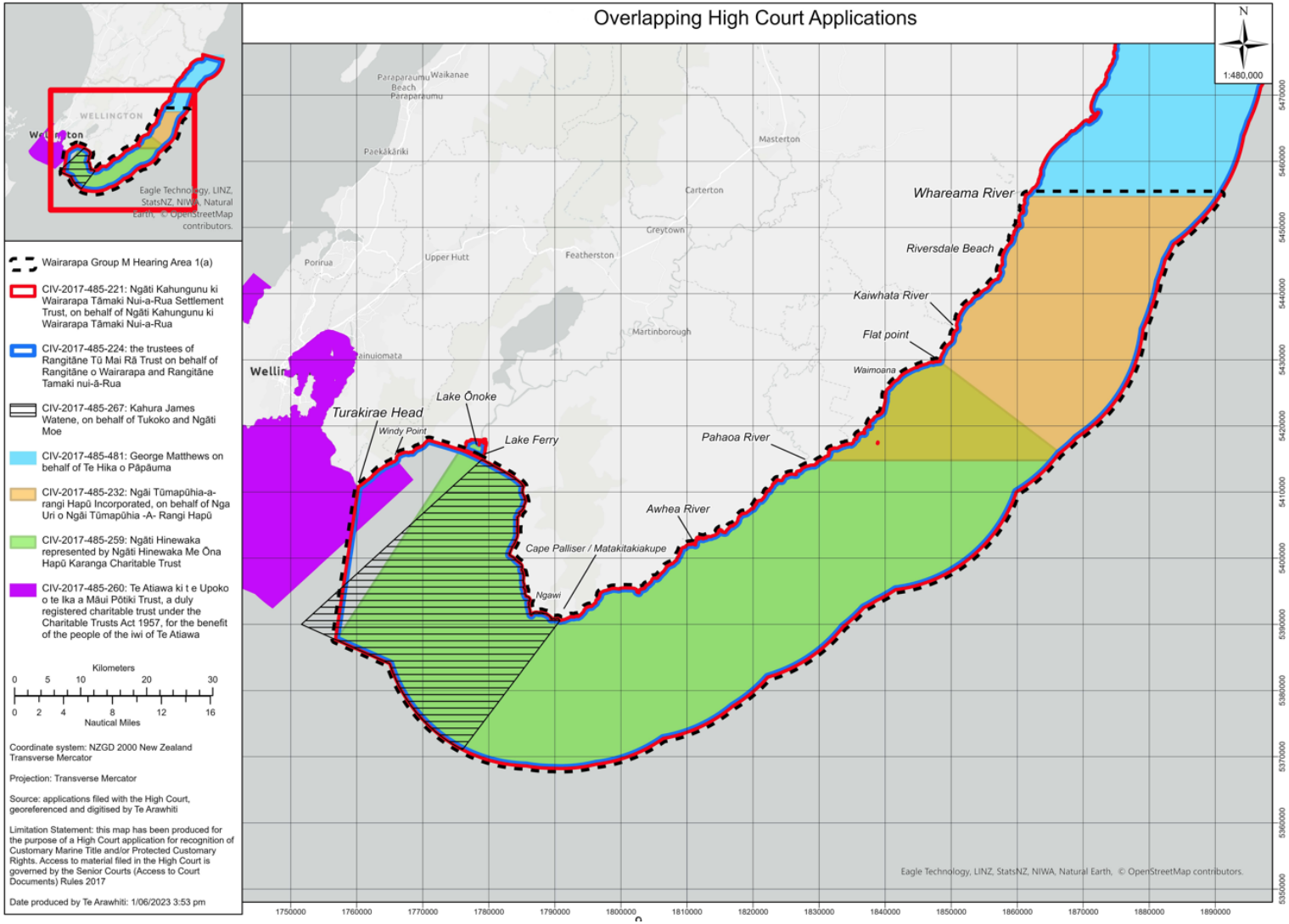

Figure 3: Overlapping applications map

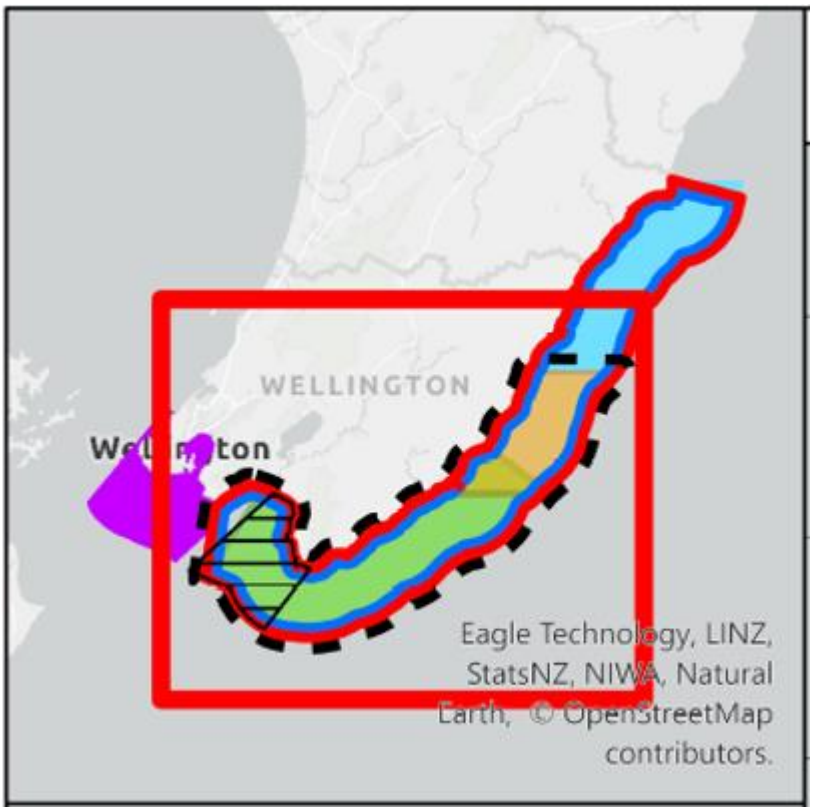

Figure 4: Overlapping applications map (overview)

APPENDIX III – Mana moana agreement map

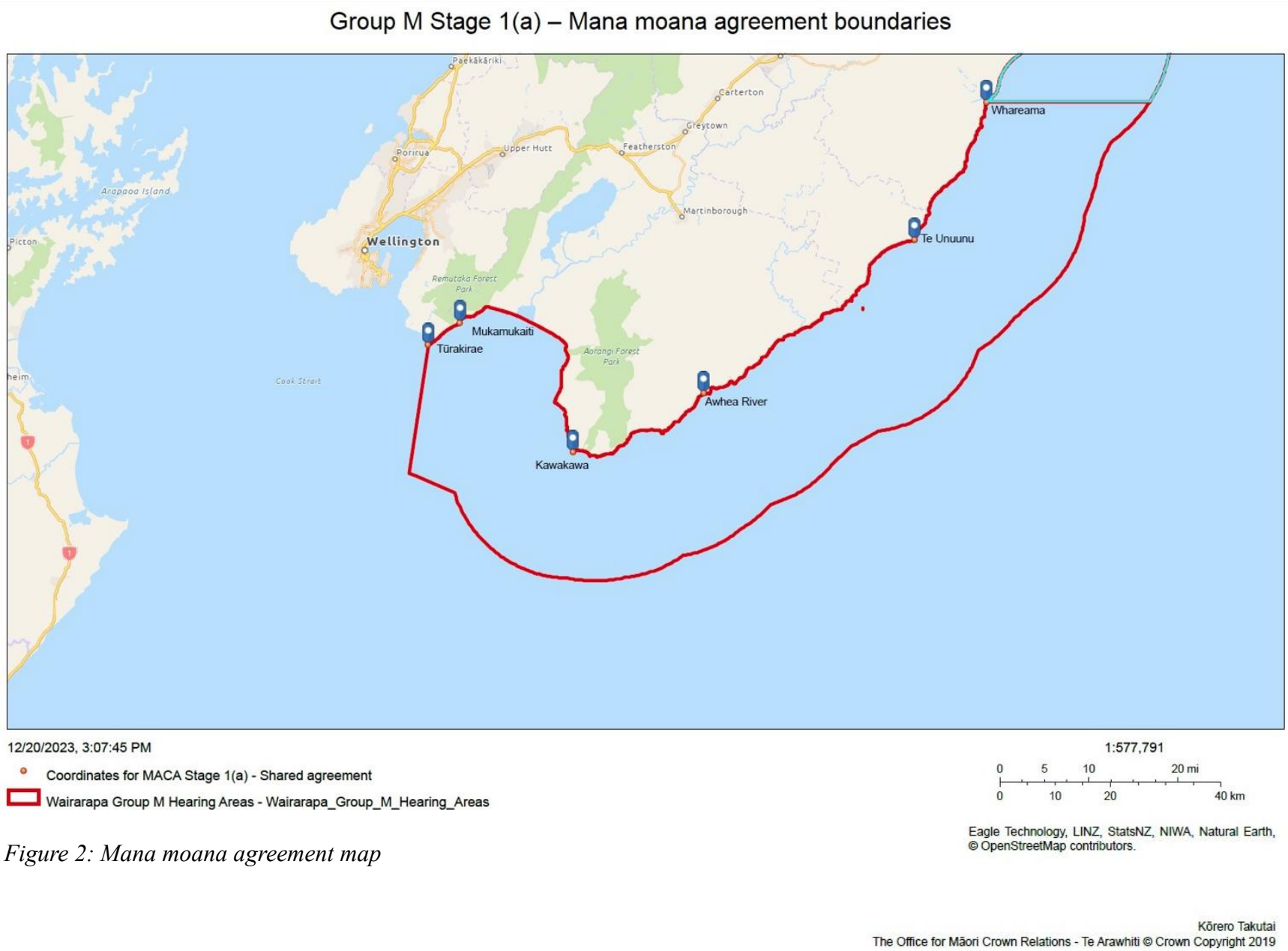

Figure 2: Mana moana agreement map

APPENDIX IV – Questions for the Pūkenga

1. What tikanga does the evidence establish or support in the application area?

2. What aspects of tikanga should influence the assessment of whether or not

    a. the area in question, or any part of it, is held in accordance with tikanga?

    b. there is a distinction between holding an area in question, or any part of it, in accordance with tikanga, and using that area or its resources in accordance with tikanga?

3. In respect of the areas as set out at [10] of the Joint Memorandum:

    a. which applicant group or groups hold each of the relevant areas in accordance with tikanga?

    b. where there is a shared interest, does it accord with relevant tikanga for each area to be held on a shared basis by the relevant groups?

4. In respect of the areas as set out in [10] of the Joint Memorandum, what aspects of tikanga are relevant to the assessment of whether or not:

    a. an area in question, or any part of it, has been exclusively used and occupied by the relevant applicant group or groups?

    b. the consideration of any third party activities, including ownership of abutting land, access to the takutai moana, and fishing?

5. Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

APPENDIX V – Pūkenga Report

IN THE HIGH COURT OF NEW ZEALAND	**CIV-2017-485-224**
WELLINGTON REGISTRY	**CIV-2017-485-267**
	CIV-2017-485-232
I TE KŌTI MATUA O AOTEAROA	**CIV-2017-485-259**
TE WHANGĀNUI-Ā-TARA ROHE	**CIV-2017-485-221**
	CIV-2017-404-481
	CIV-2017-485-267

UNDER THE	**Marine and Coastal Area (Takutai Moana) Act 2011**
IN THE MATTER OF	**an application by trustees of the Ngāti Kahungunu ki Wairarapa Tamaki-Nui-ā-Rua Settlement Trust on behalf of Ngāti Kahungunu ki Wairarapa Tamaki-Nui-ā-Rua**
AND	**an application by the trustees of Rangitāne Tū Mai Rā Trust on behalf of Rangitāne o Wairarapa Moana and Rangitāne Tamaki nui-ā-Rua**

Cont.

PŪKENGA REPORT OF DR ROBERT JOSEPH

DATED 18 October 2023

Judicial Officer: Gwyn J

AND	**an application by Ngāi Tūmapūhia-a-Rangi hapū Incorporated on behalf of Ngāi Tumapuhia a Rangi hapū**
AND	**an application by Ngāti Hinewaka represented by Ngāti Hinewaka Me Ōna Hapū Karanga Charitable Trust**
AND	**an application by Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust on behalf of the iwi of Te Ātiawa**
AND	**an application by Kahura James Watene on behalf of Tukōkō and Ngāti Moe**
AND	**an application by George Matthews for and behalf of Te Hika o Pāpāuma Mandated Iwi Authority**

MAY IT PLEASE THE COURT

I DR ROBERT ANDREW JOSEPH of Hamilton, University of Waikato Associate Professor of Law affirm:

Introduction

1. I have been appointed as a pūkenga by the High Court in this proceeding pursuant to s. 99(1)(b), Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA"**) and the High Court Rules 2016.

2. I have read and agree to comply with the Code of Conduct in Rules 9.36-9.43 and Schedule 4 of the High Court Rules 2016.

3. I have been asked to answer the following questions put forward by the parties to this application.

    A) What tikanga does the evidence establish or support in the application area?

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

        ii) There is a distinction between holding an area in question, or any part of it, in accordance with tikanga, and using that area or its resources in accordance with tikanga?

    C) In respect of the areas as set out at [10] of the joint memorandum of counsel for the applicants, dated 29 September 2023:

        i) which applicant group or groups hold each of the areas in accordance with tikanga?

        ii) where there is a shared interest, does it accord with relevant tikanga for each area to be held on a shared basis by the relevant groups?

    D) In respect of the areas as set out in [10] of the joint memorandum, what aspects of tikanga are relevant to the assessment of whether or not:

        i) an area in question, or any part of it, has been exclusively used and occupied by the relevant applicant group or groups?
        ii) The consideration of any third-party activities including ownership of abutting land, access to the takutai moana, and fishing?

E) Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

Joint Memorandum of Counsel Shared Agreement September 2023

4) Joint Memorandum Shared Agreement of Counsel for the Applicants dated 29 September 2023 para. 10:

i) As the Court is aware, the focus for all groups has been on hapū interests along the coast. The applicants and interested parties for tangata whenua groups have had a number of discussions regarding the details of the CMT orders sought and on a preliminary basis are in agreement that the relevant hapū in the different coastal rohe identified include:

a) *Tūrakirae to Mukamukaiti* – Ngāti Hinewaka, Ngāti Rua, Ngāi Tukoko, Ngāti Moe, Ngāti Rakaiwhakairi, Ngāti Rakairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira, Ngāti Hamua and Te Atiawa hapū.
b) *Mukamukaiti to Kawakawa Point*[1] – Ngāti Hinewaka, Ngāti Rua, Ngāi Tukoko, Ngāti Moe, Ngāti Rakaiwhakairi, Ngāti Rakairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira, and Ngāti Hamua.
c) *Kawakawa Point to Awhea River* – Ngāti Hinewaka, Ngāti Rangaranga and Ngāi Tuohungia.
d) *Awhea River to Te Unuunu* – Ngāi Tumapuhia a Rangi, Ngāti Rongomaiaia, Ngāti Maahu, Ngāti Meroiti, Ngāti Kawekairangi, Ngāi Te Aho, Ngāti Te Aokino, Ngāti Parera and Ngāti Hamua.
e) *Te Unuunu to Whareama* – Ngāti Tumāpuhia-ā-rangi.
f) *Whareama rivermouth* – Te Hika a Pāpāuma and Ngāi Tumāpuhia-ā-rangi.

Pūkenga Role

5) I wish to note from the outset that I do not profess to be an expert on the tikanga of the Wairarapa Moana applicants for this hearing. However, and with the deepest respect, it has been an absolute privilege to read the respective affidavits and briefs of evidence, and to listen to the evidence of the respective Wairarapa Moana expert witnesses which has broadened my appreciation for and understanding of some of the tikanga of the Wairarapa Moana claimants.

6) My role in these proceedings, however, is to not advocate for either party's versions of tikanga but to provide an independent report on the relevant general tikanga Māori and where possible, specific localised tikanga for answering the above 8 questions.

[1] Also known as Ngawi Point.

7) I have drawn on some lengthy scholarly and historical research as well as some oral sources and the claimant witness affidavits and briefs of evidence to inform my opinion in answering the above questions.

Report Outline

8) This report will answer each of the above 8 questions in the following manner: Section A will address question a) above by providing important context to understand tikanga Māori by first briefly highlighting the statutory purposes of the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA or the Act") and then the importance of Māori worldviews and tikanga Māori generally. The report then discusses the key tāhuhu – fundamental signpost values and principles of tikanga Māori. Section A then proceeds to discuss tikanga Māori over the takutai moana to bring it within the context of the Act.

9) Section B addresses question b) above by referring to what I consider to be the key aspects of tikanga Māori that should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga with reference to specific tikanga Māori laws and institutions. The second segment of section B addresses what aspects of tikanga should influence the assessment of whether or not there is a distinction between holding an area in question or any part of it in accordance with tikanga and using that area or its resources in accordance with tikanga.

10) Section C addresses question c) above by referring to the areas as set out at [10] of the joint memorandum of counsel for the applicants, dated 29 September 2023, by answering which applicant group or groups hold each of the areas in accordance with tikanga; and where there is a shared interest, does it accord with relevant tikanga for each area to be held on a shared basis by the relevant groups?

11) Section D answers question d) above by referring to the areas as set out in [10] of the joint memorandum of counsel for the applicants, dated 29 September 2023, and answering the questions on what aspects of tikanga should influence the assessment of whether or not the area in question, or any part of it, has been exclusively used and occupied by the relevant applicant group or groups; and the consideration of any third party activities including ownership of abutting land, access to the takutai moana, and fishing?

12) Section E then answers question on having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

13) Section F finishes with some brief conclusions for the report.

14) Accordingly, section A will now deal with question a) on what tikanga the evidence establishes or supports in the application area by first discussing the importance of the MACA statutory purposes and how they relate to tikanga and Māori worldviews.

Section A: What tikanga does the evidence establish or support in the application area?

MACA Statutory Purposes

15) Before we discuss tikanga Māori, it is important to place our discussion within the context of the statutory purposes of the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA" or "the Act") and the important place of tikanga Māori in supporting most of the MACA statutory purposes.

16) The statutory purposes of MACA can be ascertained from its text[2] and the Parliamentary debates when MACA was being enacted in the Legislature. MACA has four statutory purposes none of which are expressed as having priority over the others.

17) Section 4(1)(a), MACA states that the first purpose of the statute is 'to establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand.' "All New Zealanders" includes Māori iwi, hapū and whānau groups who have customary interests in the common marine area, as well as other New Zealanders who do not.

18) Section 4(1)(b), MACA states the second purpose of the statute which is to 'recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as tangata whenua. Section 9(1) of the Act defines 'mana tuku iho' as 'inherited right or authority derived in accordance with tikanga,' while s. 4(2) states that the Act recognises mana tuku iho by giving legal expression to customary interests.

19) The second purpose of MACA is consistent with the requirement that an applicant group comprises 'one or more iwi, hapū and whānau' and the purpose is achieved through the provision of:

    a. Rights to participate in conservation processes pursuant to Part 3, subpart 1 of the Act.
    b. Protected customary rights ("PCRs") pursuant to Part 3, subpart 2 of the Act; and
    c. Customary marine title ("CMT") and the rights such title confers pursuant to Part 3, subpart 3 of the Act.[3]

20) The third purpose of the Act is s. 4(1)(d) which is to 'provide for the exercise of customary interests in the common marine and coastal estate' which is achieved through the provision of:

    a. Rights to participate in conservation processes;

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[2] Section 5(1), Interpretation Act 1999. See also *Commerce Commission v Fisheries Co-Operative Group Ltd* [2007] NZSC 36, 3 NZLR 767 at 22.

[3] Namely, permission rights under s. 121, Natural and Built Environments Act 2023, a conservation permission right, a wāhi tapu protection right, rights in relation to marine mammal watching permits, rights in respect of a New Zealand coastal policy statement, prima facie ownership of taonga tuturu, and rights of mineral ownership pursuant to Part 3, subpart 3 of the Act.

b. Protected customary rights; and
c. Customary marine title and the rights that such title confers.

21) The final purpose of MACA is s. 4(1)(d) which is 'to acknowledge the Treaty of Waitangi – Te Tiriti o Waitangi. Section 7, MACA explains how the Act does so which states:

> In order to take account of the Treaty of Waitangi (Te Tiriti o Waitangi), this Act recognises, and promotes the exercise of customary interests of Māori in the common marine and coastal area by providing:
> a) In subpart 1 of Part 3, for the participation of affected iwi, hapū and whānau in the specified conservation processes relating to the common marine and coastal area; and
> b) In subpart 2 of Part 3, for customary rights to be recognised and protected; and
> c) In subpart 3, Part 3, for the customary marine title to be recognised and exercised.

22) The Treaty of Waitangi/Te Tiriti o Waitangi and its principles will be a relevant interpretative aid where ambiguity or a lack of clarity in the Act exists.

23) Tikanga Māori also plays a key role in fulfilling the purposes of the MACA statutory framework. Tikanga Māori is defined in the s. 9 Interpretation section of MACA as 'Māori customary values and practices.'

24) The next section will discuss tikanga Māori customary values and practices in some depth as it relates the purposes of MACA. We will start with an important section on worldviews that provides context for understanding tikanga Māori better.

Worldviews

25) As noted above, this section will first briefly discuss the importance of Māori āronga (worldviews) and tikanga Māori generally. The section then discusses the key tāhuhu values and principles of tikanga Māori generally followed by a brief discussion of tikanga Māori within the Marine and Coastal Area (Takutai Moana) Act 2011 context and then assesses what tikanga the evidence established or supported in the application area.

26) Fundamental to any discussion of tikanga Māori is the necessity to appreciate its functioning within te Ao Māori – Māori worldviews. As the New Zealand Law Commission recently opined:

> Understanding tikanga requires a journey through the Māori world, one that outlines the knowledge systems, values and beliefs, and that locates tikanga in its natural environment. To try to build an understanding of tikanga outside of that framework runs the risk of it becoming decontextualised and abstract, and where its authentic meaning becomes distorted.[4]

[4]Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023) at 25.

27) Worldviews generally orientate the human being and their community to their world so that it is rendered understandable and their experience of it is explainable. The Reverend Māori Marsden, a late 20th century Ngāpuhi tohunga (expert), scholar and philosopher, articulated an economical definition of a culture's worldview when he opined:[5]

> "Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be, of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'world view' of a culture. The world view is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The worldview lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture."

28) Marsden's definition notes that a worldview or āronga grows according to individual and community experiences. As a group experience and perceive their reality, they go about the task of understanding it, of forming views and ideas about the reality they perceive. These perceptions and conceptualisations form a cultural worldview that is something subscribed to, is carried by, and assented to by the group. If you see the world in a certain way, this view will determine what you value in the world or not and how, through behaviour. By understanding the worldview of a culture, we can come to an understanding of its values and behaviour. Worldviews then, are invisible sets of ideas about the world that lie deep within a culture.[6]

29) A traditional Māori cultural worldview was based on the Māori cosmogony (creation stories) that provided a blueprint for life setting down innumerable precedents by which communities were guided in the governance and regulation of their day–to–day existence.[7] Māori tribal worldviews generally acknowledged the natural order of living things and the kaitiakitanga (stewardship) rights, responsibilities and relationships to one another and to the environment. The overarching principle of balance underpinned all aspects of life. Māori worldviews are ones of holism and physical and metaphysical (spiritual) realities where the past, the present and the future are forever interacting. The maintenance of the worldviews of life — including within a Marine and Coastal Area (Takutai Moana) Act 2011 context — are dependent upon the maintenance of the culture and its many traditions, values, practices and rituals.

30) By trying to understand te Ao Māori (culture), āronga (worldviews), te reo (language), whakapapa (rich tribal histories), korero (oral traditions), mātauranga Māori (knowledge systems), kawa (rituals) and tikanga Māori (customary law), one may be able to bridge the cultural divide.

Tikanga Māori

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[5] CT Royal, *The Woven Universe: Selected Writings of Rev. Maori Marsden* (Estate of Rev. Maori Marsden, 2003) at 56.

[6] Above.

[7] See Te Rangi Hiroa in P Buck, *The Coming of the Māori* (Whitcoulls 1949, Reprint 1977); and Pei Te Hurinui Jones, *He Tuhi Mārei-kura* (Aka & Associates Ltd, 2013).

31) Māori as a people lay claim to a set of abstract cultural values and ways of organising social life that are distinctively Māori and refer to these ways as Māori customary law or tikanga Māori which is sometimes described as values, principles or norms that determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just and correct.

32) "Tika" means correct, right or just and the suffix "nga" transforms "tika" into a noun thus denoting the system by which correctness, justice or rightness is maintained.[8] The late and highly respected Te Arawa Anglican Bishop, Manuhuia Bennett, in an interview in 2000 by the author and other colleagues defined tikanga as "doing things right, doing things the right way, and doing things for the right reasons".[9]

33) Professor Hirini Mead, respected Ngāti Awa kaumātua (elder) described tikanga Māori as embodying: [10]

> "… a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do."

34) Professor Mead added: [11]

> "Tikanga are tools of thought and understanding. They are packages of ideas which help to organize behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us ... They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed."

35) Te Aka Matua o te Ture – the New Zealand Law Commission recently referred to tikanga Māori as covering the core beliefs, values and principles broadly shared among Māori and is informed by mātauranga Māori (knowledge systems) broadly shared by all Māori.[12]

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[8] J Williams "Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law" (2013) 21 *Wai L Rev* 2; and R Joseph "Re-Creating Space for the First Law of Aotearoa-New Zealand" (2009) 17 *Wai L Rev* 74.

[9] Cited in R Benton, A Frame and P Meredith, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, Victoria University Press, 2013) at 431. The author was one of the interviewers of Bishop Bennett for this interview in April 2000.

[10] H Mead "The Nature of Tikanga" (Unpublished Manuscript Paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) at 3–4.

[11] Above.

[12] Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023) at 27. The Law Commission distinguished between tikanga Māori – laws that cover the core beliefs, values and principles broadly shared among Māori, and tikanga-ā-iwi – localised expressions of tikanga that are shaped by different Māori groups' knowledge and experience which varies between different Māori groups. Idem.

36) Early Colonial officials even had no difficulty in accepting that tikanga Māori customs and usages had the character and authority of law.[13]

37) Tikanga Māori then, is the traditional body of values and ethics developed by Māori to govern themselves personally and collectively, privately and publicly, and governed decision-making regarding, inter alia:

a. "leadership, governance and management concerning all matters including Māori land and other natural resources including the takutai moana area;[14]
b. intra- and inter-governance relationships and decision-making with whānau (extended families) hapū (sub-tribes), iwi (tribes/nations) and other groups;[15]
c. governance relationships with Pākehā[16] missionaries, traders, settlers and politicians;[17]
d. determining rights to land and other resources based on take tūpuna (discovery and ancestry), take tukua (gift), take raupatu (confiscation) and ahi kā (occupation);[18]
e. the exercise of kaitiakitanga (stewardship) governance practices including the imposition of rāhui (bans on the taking of resources or the entering into zones within a territory) and other similar customs and exercising responsible stewardship governance over the community on all matters;[19]
f. regulating governance use rights for hunting, fishing and gathering, and sanctioning those who transgressed tikanga Māori or Māori rights and responsibilities (or both);[20]
g. regulating tribal citizenship rights, responsibilities and relationships to resources."[21]

Key Tikanga Māori Values

38) I submit that there are several underlying core values and principles that underpin and inform the broader legal system of tikanga Māori as articulated by such authorities as

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[13] See for example the instructions of James Stephen to Governor Hobson 9 December 1840, *GBPP*, (1841, No. 311) at 24, cited in AH McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 393–394. In addition, in 1832, after a stay in New Zealand, RW Hay reported to the Colonial Office in London: "The property of the soil is well defined, their jurisprudence extensive, and its penalties are submitted to without opposition, even from the stronger party." "Notices of New Zealand" from Original Documents in the Colonial Office, communicated by RW Hay, Esq., reported in *The Journal of the Royal Geographical Society,* (1832) at 2.

[14] R Boast and others, *Māori Land Law* (Butterworths, Wellington, 1999) at 30–37.

[15] Above at 33–41.

[16] Pākehā is the Māori term for newcomer, non-Māori or European. The term is used respectfully throughout this report.

[17] Above at 28–30.

[18] A Erueti, "Māori Customary Law and Land Tenure" in R Boast and others *Māori Land Law* (Butterworths, Wellington, 1999) at 42–45; G Asher and D Naulls, *Māori Land* (New Zealand Planning Council, Wellington, 1987) at 5–6; and H Kawharu, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 55–56.

[19] Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, 1988) at 181.

[20] Above at 58–61.

[21] H Kawharu, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 39; and E Durie, "Custom Law" (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994) at 5.

Justice Joseph Williams,[22] Professor Hirini Mead,[23] Sir Taihākurei Eddie Durie[24] and more recently Te Aka Matua o te Ture – the New Zealand Law Commission.[25]

39) In the 2021 High Court decision of *Ngāti Whātua Ōrākei Trust v Attorney-General,*[26] the pūkenga referred to the 'tāhuhu he aratohu – fundamental signposts[27] - that guide Māori approaches to tikanga Māori and allow for some shared understandings and mutual interactions.

40) From these Māori worldviews come the cardinal – albeit non-exhaustive - customary tikanga Māori tāhuhu values or component parts of:

a. "Wairuatanga — acknowledging the metaphysical world — spirituality — including placating the departmental Gods' respective realms;
b. Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world;
c. Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;
d. Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group;
e. Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects;
f. Noa — free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually ritually through karakia and water;
g. Utu — maintaining reciprocal relationships and balance with nature and persons;
h. Mauri — recognition of the life-force of persons and objects;
i. Hau — respect for the vital essence of a person, place or object;
j. Rangatiratanga — effective leadership; appreciation of the attributes of leadership;
k. Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires;
l. Aroha — charity, generosity;
m. Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations."

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[22] J Williams,"Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law" (2013) 21 *Wai L Rev* at 3.
[23] H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) 29-38. Mead adds tika - right or correct; and pono – true or genuine.
[24] E Durie, 'Will the Settlers Settle? Cultural Conciliation and Law,' in *Otago Law Review,* (Vol. 8, 1996) at 452.
[25] Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023).
[26] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 per Palmer J.
[27] Above at paras 319-320.

41) The late Professor Nin Tomas noted in 2006 that 'there is a need for a better understanding of how tikanga fits together as a coherent principle-based system of law.'[28] The Law Commission agreed when it noted in 2023:

> Tikanga is sensitive to context and evolves according to circumstance. However, more can be said about how its concepts work together to govern and guide behaviour. Showing how core concepts are connected both explains tikanga as a normative system and safeguards tikanga by recognising that it functions as an integrated, comprehensive whole.[29]

42) Earlier, the Law Commission commented in 2001:

> As always in tikanga Māori, the values are closely interwoven. None stands alone. They do not represent a hierarchy of ethics, but rather a koru, or a spiral of ethics. They are all part of a continuum yet contain an identifiable core.[30]

43) Perceiving the above cardinal tikanga Māori tāhuhu values or component parts as integrated can safeguard tikanga by ensuring that it is not treated as simply a "grab bag" from which to extract isolated values. An appreciation of tikanga Māori values holistically and understanding how these tikanga Māori concepts interlock within the overall structure are critical to their effective application within a contemporary MACA context and much broader.

44) Tikanga Māori also includes adherence to proper kawa (rituals, form and process) in karakia (incantations), waiata (songs), whakapapa (genealogical recitations), whaikōrero (oratory) and debate.[31] Accordingly, the value system on which tikanga Māori is based is aspirational and idealistic, setting desirable standards to be achieved.[32]

45) Fundamental to tikanga Māori is a conception of how Māori should relate to land, water, all lifeforms and to each other. It is a conception based on:

    i. Whakapapa or the physical descent of everything; and
    ii. Wairuatanga or the spiritual connection of everything.

    It is a legal system that recognises a legal responsibility to care for people and the world in which we live, and to constrain its exploitation.[33]

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[28] N Tomas, 'Key Concepts of Tikanga Maori (Maori Custom Law) and their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau: Past and Present,' (PhD Thesis Dissertation, Waipapa Taumata Rau, University of Auckland, 2006) at 34. See also C Fox, 'Ko Te Mana Te Utu. Narratives of Sovereignty, Law and Tribal Citizenship in the Potikirua ki Te Toka-a-Taiau District,' (PhD Thesis Dissertation, Te Whare Wānanga o Awanuiārangi, 2023).

[29] Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023) at 47.

[30] Te Aka Matua o te Ture, Law Commission, *Māori Custom and Values in New Zealand Society* (Law Commission Study Paper SP9, Wellington, 2001) at 29.

[31] H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–32.

[32] See John Patterson, *Exploring Māori Values* (Dunmore Press, 1992) and H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–32.

[33] See M Orbell, *The Natural World of the Māori* (William Collins Publishers, Auckland, 1985) at 215–217.

46) Tikanga Māori then is about what is appropriate human conduct in accordance with the tāhuhu values and principles noted above of Māori groupings for their circumstances at a particular point in time. Tikanga Māori then must be understood in context and will draw on precedents and the right and wrong actions of tūpuna (ancestors) to determine appropriate action.

Tikanga Māori and the Marine and Coastal Area (Takutai Moana) Act 2011

47) Applying an English common law approach over the New Zealand marine and coastal estate is not appropriate for our country that depends on our coastal marine estate. Elias CJ affirmed in the 2003 Court of Appeal decision of *Attorney-General v Ngāti Apa*[34] that the common law in New Zealand is different to other common law countries when she noted:

> "But from the beginning of the common law of New Zealand as applied in the Courts, it differed from the common law of England because it reflected local circumstances."[35]

48) Chief Justice Elias continued:

> "Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage [tikanga] recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga."[36]

49) The Marine and Coastal Area (Takutai Moana) Act 2011 ('**MACA'**) was enacted to repeal the controversial Foreshore and Seabed Act 2004[37] which was a political response to the *Attorney-General v Ngāti Apa*[38] decision that severely limited Māori property rights in the marine foreshore and seabed areas based on pre-existing historic aboriginal rights. MACA introduced a new framework for recognising customary rights in the marine and coastal area based on tikanga Māori which is referred to in s. 9, MACA as: 'Māori customary values and practices.'

Tikanga Māori in the Wairarapa Moana Application Area

50) With reference to evidence supporting takutai moana claims for recognising the doctrine of aboriginal title in the Kauaeranga area (modern day Thames), Chief Judge

[34] [2003] 3 NZLR 577.
[35] Above, at 652, para. 17.
[36] Above, at 660, para. 49.
[37] Marine and Coastal Area (Takutai Moana) Act 2011, s. 5.
[38] [2003] 3 NZLR 577.

Francis Fenton of the Native Land Court (as he was then) concluded in the 1870 *Kauaeranga Judgment:*

> "I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider *how readily they may prove such*, and how impossible it is to contradict them if they only agree amongst themselves."[39] [emphasis added]

51) The evidence of all the Wairarapa Moana claimants and their respective witnesses has highlighted, as Chief Judge Fenton articulated in 1870, how readily they may prove their claims in the Wairarapa Moana takutai moana area, and how impossible it is to contradict them if they only agree amongst themselves.

Application of the Evidence

52) The specific tikanga that the evidence establishes or supports in the Wairarapa Moana application area includes the specific tikanga Māori values and 'tāhuhu he aratohu – fundamental signposts noted above.

53) Accordingly, the Wairarapa Moana witness evidence throughout the hearing readily established and supported the specific tikanga Māori values and 'tāhuhu he aratohu – fundamental signposts[40] - of:

a. "Wairuatanga - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;[41]
b. Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including all of the Wairarapa Moana claimant groups to each other and the takutai moana claimant area;[42]

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[39] Chief Judge Fenton, *Kauaeranga Judgment,* (1870) reprinted in *VUWLR (*Vol. 14, 1984) 227 at 244.
[40] Above at paras 319-320.
[41] See the Affidavit of Robin Te Huna Potangaroa dated March 2017 at [4] [[CB Tab 16 at 201.0001]; Brief of Evidence of Hana Rei Paku Ridell, no date at [71][[CB Tab 28, 201.000125]]; Brief of Evidence of Langdale Ohorere Puhara Rolls no date at [37][[CB Tab 29, 201.00143]; Brief of Evidence of Patrick Bruce Mason no date at [37-38][[CB Tab 30, 201.00152]]; Second Affidavit of Haami Te Whaiti dated 14 February 2023 at [113-117, 126-129][[CB Tab 38, 201.00198]]; Affidavit of Hawea Tomoana dated 3 May 2023 at 17][[CB Tab 50, 201.00302]]; Affidavit of Martin Maioha Diamond Toria McKinley dated 19 January 202 at 1-8, 17-18][[CB Tab 54, 201.00323]]; Brief of Evidence of Kahura James Watene no date at [48-53][[CB Tab 57, 201.00355]]; Brief of Evidence of Peter Thomas Junior Davidson no date at [14-20][[CB Tab 58, 201.00371]]; and Rely Brief of Evidence of Richard Pirere no date at [13][[CB Tab 65, 201.00400]].
[42] Above, Potangaroa at 2-8; Affidavit of Steven Mark Chrisp dated 27 March 2017 at [19-56][[CB Tab 17 at 201.000018]]; Reply Brief of Evidence of Steven Mark Chrisp dated 7 July 2023 at [1.0-4.1][[CB Tab 24, 201.000856]; Brief of Evidence of Gary Dennis Griggs, no date at [1-6][[CB Tab 27, 201.00111]]; above Brief of Evidence of Michael Ian Joseph Kawana dated 10 February 2023 at [1.0][[CB Tab 18 201.00029]]; Brief of Evidence of Pirinihia Te Tau dated 10 February 2023 at [1.0-1.4] [[CB Tab 19, 201.00040]]; Brief of Evidence of Steven Mark Chrisp dated 10 February 2023 at [3.0-4.25][[CB Tab 20, 201.00050]]; Brief of Evidence of Hana Rei Paku Ridell, no date at [4-9][[CB Tab 28, 201.000125]]; Brief of Evidence of Phillip Rei Paku no date at 3-40][[CB Tab 31, 20.11]]; above Brief of Evidence Ryshell Griggs at 5-41; above Second Affidavit of Haami Te Whaiti at 2-83; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [1-13][[CB Tab 41, 201.00254]]; Affidavit of Reon Hune Kerr dated July 2023 at [5-9][[CB Tab 43, 201.00261]]; Affidavit of Renee Dethirey Patel

c. Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;[43]
d. Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;[44]
e. Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;[45]
f. Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;[46]
g. Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;[47]
h. Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;[48]
i. Hau — respect for the vital essence of a person, place or object;[49]
j. Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;[50]

Randall dated 3 May 2023 at [1-15][[CB Tab 51, 201.00309]]; Brief of Evidence of Faye Pane Pirere no date at 1-6;[[CB Tab 55, 201.00341]]; above Watene at 1-5; Affidavit of George Matthews dated 26 April 2023 at [1-8][[CB Tab 68, 201.00410]]; Affidavit of Dr Takirirangi Clarence Smith dated 23 May 2023 at [75-108][[CB Tab 70, 201.00422]]; and Affidavit of Ta Robert Kinsela Workman KNZM QSO dated 18 May 2023 at [24-29][[CB Tab 72, 201.00461]].

[43] Above, Potangaroa at 5-8; above Te Tau at 2.0-5.11; Brief of Evidence of Joseph Eruera Reiri-Mangai dated 22 March 2023 at [3.0-6.3][[CB Tab 22, 201.00074]]; Brief of Evidence of Gary Dennis Griggs, no date at [11-60][[CB Tab 27, 201.00111]]; Affidavit of Jamie Clive Griggs dated 9 December 2022 at [1-6][[CB Tab 26, 201.00105]]; above, Brief of Evidence of Ryshell Evelyn Rei Griggs no date at [36-37][[CB Tab 32, 201.00171]]; above Second Affidavit of Haami Te Whaiti at 2-85; Third Affidavit of Haami Te Whaiti dated 18 July 2023 at [1-45][[CB Tab 44, 201.00266]]; Reply Brief of Evidence of Ihaia Porutu Puketapu dated 28 April 2023 at [-8][CB Tab 48, 201.00289]]; above Tomoana at 1-12; above Randall at 1-15; and above Mathews at 1-48.

[44] Above, Potangaroa at 11-12; above Te Tau at 5.6; above Crisp at 19-56; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [8-24][[CB Tab 25, 201.00104]]; above Rolls at 8-40; above Patrick Mason at 6-38; above Second Affidavit of Haami Te Whaiti at 86-163; Affidavit of Reon Hune Kerr dated July 2023 at [19-25][[CB Tab 43, 201.00261]]; above Ihaia Puketapu at 1-8; above Tomoana at 13-21; above Randall at 10-23; above McKinley at 9-30; above Faye Pane Pirere at 3-23; Brief of Evidence of Jasmine Trixie Kahira Watson no date at [1-33][[CB Tab 56, 201.00347]]; above Watene at 6-79; above Dr Smith at 1-170; and Affidavit of Murray Allan Hemi dated 24 May 2023 at [1-34][[CB Tab 73, 201.00505]].

[45] Above, Potangaroa at 14; above Kawana at [5.0-5.15]; above Reiri-Mangai at 3.3-6.3; above Phillip Rei Paku at 35-36; above Brief of Evidence Ryshell Griggs at 38-41; above Ihaia Puketapu at 5-8; above Tomoana at 20; above Randall at 22; above McKinley at 26; above Watson at 24-26; and above Watene at 60-63.

[46] Above Crisp at 6.16; and above Watene at 60-63.

[47] Above McKinley at 7-8; above Watson at 22-23; above Watene at 51-55; above Davidson at 20; and Rely Brief of Evidence of Richard Pirere no date at [13][[CB Tab 65, 201.00400]].

[48] Above Watson at 22-23; above Richard Pirere at 13; and above Dr Smith at 48.

[49] See Affidavit of Dr Takirirangi Clarence Smith dated 23 May 2023 at [1-170][[CB Tab 70, 201.00422]].

[50] Above Te Tau at 7.0-8.4; above Crisp at 6.0-7.0; above Gary Griggs at 61-70; above Rolls at 8-40; ; above Patrick Mason at 6-38; above Phillip Rei Paku at 5-40; above Second Affidavit of Haami Te Whaiti at 86-163; above McKinley at 9-30; Reply Affidavit of Matin Maioha Diamond Toria McKinley dated 6 July 2023 at [1-2][[CB Tab 61, 201.00383]]; Rely Brief of Evidence of Kahura James Watene no date at [1-17][[CB

k. Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;[51]
l. Aroha — charity, generosity;[52]
m. Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations including in the takutai moana claimant area.[53]"

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

54) This section will refer to the specific tikanga Māori laws and institutions I believe should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori to answer question b) above.

55) The section will first briefly refer to the relevant MACA statutory tests that, inter alia, mention tikanga Māori in ss. 58, 78 and 51 MACA for–
    a. Customary marine title (CMT),
    b. Wāhi tapu protection (WTP) and
    c. Protected customary rights (PCR):

Customary Marine Title (CMT)

56) Customary marine title refers to customary interests based on the common law doctrine of aboriginal title established by a Māori applicant group in a specified location of the common marine and coastal area as long as the Māori applicant group can pass the stringent statutory tests[54] in s. 58, MACA which states:

Tab 63, 201.00390]]; above Matthews at 1-48; above Dr Smith at 1-170; above Workman at 30-158; and above Hemi at 1-34.

[51] Brief of Evidence of Phillip Rei Paku no date at [9-11][[CB Tab 31, 20.11]]; Affidavit of Reon Hune Kerr dated July 2023 at [11-19][[CB Tab 43, 201.00261]]; above Watene at 54; Reply Affidavit of Matin Maioha Diamond Toria McKinley dated 6 July 2023 at [1-14][[CB Tab 61, 201.00383]]; Rely Brief of Evidence of Elizabeth Lily Te Piki Watene no date at 1-6][[CB Tab 62, 201.00387]]; Rely Brief of Evidence of Kahura James Watene no date at [1-17][[CB Tab 63, 201.00390]]; above Mathews at 6-7, 26; above Dr Smith at 51; above Workman at 69-105; and above Hemi at 1-34.

[52] Above Watene at 51-55.

[53] Above, Potangaroa at 12, 16; above, Crisp para 19-56; above Kawana at 4.10-4.12; above Te Tau at 5.10 and Te Tau 1.05.2; above Crisp at 6.17; above Reiri-Mangai at 3.3-6.3; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [25-32][[CB Tab 25, 201.00104]]; above Gary Griggs at [64-70]; above Jamie Griggs at [7-23]; above Hana Ridell at 73-79; above Rolls at 39-40; above Phillip Rei Paku at 29-34; above, Second Affidavit of Haami Te Whaiti at 115-163; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [14-20][[CB Tab 41, 201.00254]]; above Reon Kerr at 21-26; above Tomoana at 19; above Randall at 21-22; above McKinley at 28-30; above Watson at 27-33; above Watene at 64-79; above Davidson at 21-24; and above Mathews at 36-48.

[54] For an early academic analysis of the MACA tests, see Joseph, R, 'Frozen Rights? The Right to Develop Māori Treaty and Aboriginal Rights,' in *Waikato Law Review,* (Vol. 19, Issue 2, 2011) at 117-133. For a recent assessment of the MACA tests, see *Re Tipene* [2016] NZHC 3199, *Re Tipene* [2017] NZHC 2990, *Re*

"58 Customary marine title

(1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group –

(a) *holds the specified area in accordance with tikanga*; [emphasis added] and

(b) has, in relation to the specified area –

(i) exclusively used and occupied it from 1840 to the present day without any substantial interruption; or

(ii) received it, any time after 1840, through a customary transfer in accordance with subsection (3)

(2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—

(a) the commencement of this Act; and

(b) the effective date.

(3) For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—

(a) a customary interest in a specified area of the common marine and coastal area was transferred— and

(b) *the transfer was in accordance with tikanga*; [emphasis added] and

(c) the group or members of the group making the transfer—

(i) *held the specified area in accordance with tikanga*; [emphasis added] and some members of a group who were not part of the applicant group; and

(ii) exclusively used and occupied the specified area from the time of the

(ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and

(d) the group or some members of the group to whom the transfer was made have— (i) between or among members of the applicant group; or

(ii) to the applicant group or some of its members from a group or transfer to the present day without substantial interruption.

(4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law."

Wāhi Tapu Protection

57) Establishing wāhi tapu will provide local Māori groups the opportunity to issue legally binding restrictions on public access to specific wāhi tapu areas within a CMT area which is a strong enabling provision for applying tikanga Māori, pursuant, inter alia, to s. 78 MACA**s.**

"78 Protection of wāhi tapu and wāhi tapu areas

(1) A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area –

Edwards (Whakatohea (No. 2)) [2021] NZHC 1025, *Re Clarkson & Ors* [2021] NZHC 1968, *Ngā Potiki & Ors – Stage 1 – Te Tāhuna o Rangataua* [2021] NZHC 2726 and *Re Ngāti Pāhauwera, Ngāti Pārau, Ngāi Tahu ō Mōhaka Waikare & Maungaharuru-Tangitū Trust* [2021] NZHC 3599.

(a) in a customary marine title order, or
(b) in an agreement.

(2) A wāhi tapu protection right may be recognised if there is evidence to establish –
(a) the connection of the group with the wāhi tapu or wāhi tapu area *in accordance with tikanga*; [emphasis added] and
(b) that the group requires the proposed prohibitions on access to protect the wāhi tapu or wāhi tapu area."

Protected Customary Rights

58) Protected customary rights (PCRs) refer to any activity, use or practice established by a Māori applicant group. PCRs are recognised by a protected customary rights order or an agreement. A protected customary rights order means an order of the Court granted in recognition of the protected customary rights of a group pursuant to s. 113, MACA. PCRs are established in accordance with s. 51, MACA:

"51 Meaning of protected customary rights.
(1) A protected customary right is a right that –
(a) has been exercised since 1840 and
(b) continues to be exercised in a particular part of the common marine and coastal area *in accordance with tikanga* [emphasis added] by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
(c) is not extinguished as a matter of law."

59) The first limb of the test for CMT under s. 58(10(a) requires an applicant group to hold the specified area in accordance with tikanga. A recent extensive judicial discussion of tikanga Māori is Palmer J's 2021 High Court decision of *Ngāti Whātua Ōrākei Trust v Attorney-General.*[55] In assessing significant tribal tikanga differences, Palmer J identified several salient characteristics of tikanga:

1. There is a need to understand tikanga holistically as an interlocking set of reinforcing norms where there is a set of principles which reinforce each other in pointing the way.[56]
2. Tikanga evolves around values and a value system that comprises a spectrum with values and rules but with values informing the whole range.[57]
3. Tikanga is fundamental to constituting iwi and hapū tribal identity in the exercise of their rangatiratanga.[58]
4. There are different versions of which principles would be regarded as "core" to tikanga depending on the context of a particular issue that arises.[59]

[55] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 per Palmer J.
[56] At [306].
[57] At [307].
[58] At [310].
[59] At [311].

5. As circumstances change over time, tikanga and its practices may also change over time.[60]
6. Tikanga is a way of life and is performed more than stated.[61]

60) Palmer J concluded:

> [There] were and are fundamental philosophical underpinnings, tāhuhu he aratohu that guide iwi approaches to tikanga and allow for some shared understandings and mutual interactions. However, the tikanga of an iwi or hapū is shaped by the historical narrative of that iwi or hapū including the impact of colonisation and other events and circumstances over time. As such, the application of tikanga cannot be examined and understood without that context.[62]

Palmer J added that tikanga varies across iwi and hapū because they face different circumstances which can lead to adjustments in what is required of tikanga custom.[63]

61) As noted above, the first limb of the test for CMT under s. 58(10(a) requires an applicant group to hold the specified area in accordance with tikanga. The term "held" relates to the nature of CMT which is a territorial right and an interest in land as it relates to the marine and coastal area.

62) In *Re Reeder*,[64] the Court endorsed the statements made by the Māori Land Court decision of *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*[65] concerning the meaning of "held in accordance with tikanga." The Court considered that the term "held" reflected the continuity of the customary relationship with the land.[66]

63) The wording of s. 58(1)(A) MACA is similar to the wording used to define Māori customary land in s. 129(2)(a), Te Ture Whenua Māori Act 1993 which defines such land as being 'held by Māori in accordance with tikanga Māori,' hence it being considered in the *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*[67] decision. The Court held that it was not appropriate to:

> … make its determination from a Pākehā or Court perspective [āronga or worldview] of Māori customs and usages - from the outside looking in but was required to make its determination according to tikanga Māori – from the inside.[68]

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[60] At [312].
[61] At [322].
[62] At [322].
[63] At [325].
[64] *Re Reeder (Nga Potiki Stage 1 – Te Tahuna o Rangataua)* [2021] NZHC 2726 at [27].
[65] *John da Silva v Aotea Maori Committee and Hauraki Maori Trust Board,* (1998) 25 Tai Tokerau MB 212 at 213.
[66] At [
[67] *John da Silva v Aotea Maori Committee and Hauraki Maori Trust Board,* (1998) 25 Tai Tokerau MB 212 at 213.
[68] At [215].

64) Referring specifically to the word "held" in s. 129(2)(a), Te Ture Whenua Māori Act 1993, the Court stated:

> The important word here is "held." There is no connotation of ownership but rather it is retained or kept in accordance with tikanga Māori.

65) In 1921 decision of *Amodu Tijani v Secretary Southern Rhodesia*,[69] the Judicial Committee of the Privy Council, then the highest legal authority for New Zealand, recognised that English legal doctrines might have no application in English colonies where they differed from native laws. The Privy Council warned against "… a tendency operating at times unconsciously, to render (Native title to land) in terms which are appropriate only to systems which have grown up in English law.' The Privy Council pointed out that "the notion of individual ownership is quite foreign to native ideas" and that "All the members of the community, village or family, have an equal right to the land, but in every case the Chief or headman of the community or village, or the head of the family has charge of the land, and in a loose mode of speech is sometimes called the owner."[70]

66) A clash of worldviews and legal systems occurred in 1914 when Sir John Salmond, Solicitor General (at the time) was involved in legal proceedings concerning the Treaty of Waitangi and tikanga Māori customary rights over water. Sir John sent a memorandum to the Attorney-General at the time which included the following:

> The Prime Minister... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery (which would not enable a freehold order to be issued) and not rights of ownership as are now claimed ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, foreshores and tidal waters in the Dominion ... I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained ... it may be anticipated that the Court will hold that *by native custom the Natives own not merely the land, but the water of this country* and freehold titles will be issued accordingly [emphasis added].[71]

67) In contrast, the 2002 Environment Court decision of *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council,*[72] concluded that 'the meaning and sense of a Māori value should primarily be given by Māori.'[73] The Court added that 'assessments should be made within the Māori worldview from where they came.'[74] The Court reflected on the requirement to consider the relationships of Māori with the natural environment and the need to consider evidence in the form of facts and concluded:

> Since section 6(e), RMA [now repealed] does refer to Māori culture and traditions; we have to be careful not to impose inappropriate 'Western concepts.'

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[69] *Amodu Tijani v Secretary Southern Rhodesia* [1921] 2 AC 199, 403.
[70] Above.
[71] Salmond to Attorney-General, 1 August 1914, *Opinions Relating to Lands Department 1913-15*, cited in Alex Frame, *Salmond: Southern Jurist*, (Victoria University Press, Wellington, 1995) at 119.
[72] (2002) ELRNZ 111 (EnvC) at 46.
[73] Above, at 46 and 53.
[74] Above.

> The appellants expressed concerns about that in various ways. Implicit in much of the appellants' evidence is the idea that each culture can only be explained in its own terms. This depends on the relativistic notion that classifications in any one language or culture are not determined by how the world does not come quietly wrapped up in facts. Facts are the consequences of ways in which we represent the world.[75]

68) In *Re Edwards,*[76] Churchman J similarly observed:

> Holding an area of the takutai moana in accordance with tikanga is something different to being a proprietor of that area. Whether or not an applicant group has established that hey held an area in accordance with tikanga is to be determined by focusing on the evidence of tikanga and the lived experience of that applicant group. The exercise involves looking outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European legal concepts.[77]

Churchman J then concluded that the 'critical focus must be on tikanga and the question of whether or not the specified area was held in accordance with the tikanga that has been established.

69) Earlier in the 1994 Court of Appeal decision of *Te Runanga o Te Ika Whenua v Attorney-General,*[78] Cooke P (as he was then) stated: 'The nature and incidents of Aboriginal title are matters of fact dependent on the evidence in any particular case.'[79]

70) Equally, the question of whether the requirements of s. 58(1)(a), MACA have been met is a question of fact with the focus on the factual inquiry being on tikanga Māori. A key question then is what is an appropriate tikanga factual inquiry framework for assessing whether or not the area in question, or any part of it, is held in accordance with tikanga?

71) To be able to establish CMT, wāhi tapu and PCRs under MACA as noted above, general key aspects of tikanga Māori in my opinion to assess whether or not the area in question, or any part of it, is "held" in accordance with tikanga Māori are similar to those articulated by the Waitangi Tribunal in the 2011 WAI 262[80] and the 2012 Water and Geothermal Resources Reports[81] that referred to certain indicia or signposts of Māori 'stewardship' over fresh waterways that I believe also resonate for the takutai moana of the Wairarapa Moana claimants in this case.

72) Some of these relevant stewardship signposts were noted by the Waitangi Tribunal who commented on what it termed a 'taonga test' for, and proofs of proprietary interests, or

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[75] Above.
[76] *Re Edwards*, at [130]
[77] At [140].
[78] *Te Runanga o Te Ika Whenua v Attorney-General,* [1994] 2 NZLR 20 (CA) at 24.
[79] Above.
[80] Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.
[81] Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

more appropriately 'stewardship' in our MACA context, over the waterways including the takutai moana:

> "In assessing whether a waterway was a taonga [treasured possession] to any particular group, the Waitangi Tribunal took into account the intensity of the Māori association with the waterway including originating ancestral relationship [whakapapa and take tupuna] and an ongoing cultural and spiritual relationship with the waterway [ahi kā roa]; the exercising of control and authority over the resources [mana whenua and mana moana], and the fulfilment of obligations to conserve, nurture and protect the waterway [kaitiakitanga]."[82]

73) The Tribunal earlier in its 2011 Wai 262 Report also referred to the taonga test when it opined:

> "Whether a resource or place is a taonga can be tested … Taonga have mātauranga Māori [inherited knowledge] relating to them, and whakapapa [genealogy] that can be recited by tohunga [experts]. Certain iwi or hapū will say they are kaitiaki [stewards]. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested."[83]

74) The Waitangi Tribunal's specific signposts to test whether an iwi, hapū or even whānau have a taonga relationship with reciprocal 'stewardship' responsibilities over the waterways and for the takutai moana marine coastal area for the Wairarapa Moana claimants in the current MACA hearing includes the following tikanga indicia:

a. "Whakapapa identifying a cosmological connection with the takutai moana;[84]
b. Exercised mana or rangatiratanga over the takutai moana;[85]

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[82] Above, at 51.

[83] Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.

[84] For claimant evidence, see above, Potangaroa at 2-8; Affidavit of Steven Mark Chrisp dated 27 March 2017 at [19-56] [[CB Tab 17 at 201.000018]]; Reply Brief of Evidence of Steven Mark Chrisp dated 7 July 2023 at [1.0-4.1][[CB Tab 24, 201.000856]; Brief of Evidence of Gary Dennis Griggs, no date at [1-6][[CB Tab 27, 201.00111]]; above Brief of Evidence of Michael Ian Joseph Kawana dated 10 February 2023 at [1.0][[CB Tab 18 201.00029]]; Brief of Evidence of Pirinihia Te Tau dated 10 February 2023 at [1.0-1.4] [[CB Tab 19, 201.00040]]; Brief of Evidence of Steven Mark Chrisp dated 10 February 2023 at [3.0-4.25][[CB Tab 20, 201.00050]]; Brief of Evidence of Hana Rei Paku Ridell, no date at [4-9][[CB Tab 28, 201.000125]]; Brief of Evidence of Phillip Rei Paku no date at 3-40][[CB Tab 31, 20.11]]; above Brief of Evidence Ryshell Griggs at 5-41; above Second Affidavit of Haami Te Whaiti at 2-83; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [1-13][[CB Tab 41, 201.00254]]; Affidavit of Reon Hune Kerr dated July 2023 at [5-9][[CB Tab 43, 201.00261]]; Affidavit of Renee Dethirey Patel Randall dated 3 May 2023 at [1-15][[CB Tab 51, 201.00309]]; Brief of Evidence of Faye Pane Pirere no date at 1-6;[[CB Tab 55, 201.00341]]; above Watene at 1-5; Affidavit of George Matthews dated 26 April 2023 at [1-8][[CB Tab 68, 201.00410]]; Affidavit of Dr Takirirangi Clarence Smith dated 23 May 2023 at [75-108][[CB Tab 70, 201.00422]]; and Affidavit of Ta Robert Kinsela Workman KNZM QSO dated 18 May 2023 at [24-29][[CB Tab 72, 201.00461]].

[85] See above, Potangaroa at 11-12; above Te Tau at 5.6; above Crisp at 19-56; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [8-24][[CB Tab 25, 201.00104]]; above Rolls at 8-40; above Patrick Mason at 6-38; above Second Affidavit of Haami Te Whaiti at 86-163; Affidavit of Reon Hune Kerr dated July 2023

c. Exercised kaitiakitanga;[86]
d. It has a mauri – life force;[87]
e. Performance of rituals central to the spiritual life of the hapū and whānau;[88]
f. Identified taniwha [guardians] residing in the takutai moana;[89]
g. Is celebrated or referred to in waiata [songs];[90]
h. Is celebrated or referred to in whakatauki [proverbs];[91]
i. The takutai moana was relied on as a source of food;[92]
j. A source of textiles or other materials;[93]
k. For travel or trade;[94] and

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at [19-25][[CB Tab 43, 201.00261]]; above Ihaia Puketapu at 1-8; above Tomoana at 13-21; above Randall at 10-23; above McKinley at 9-30; above Faye Pane Pirere at 3-23; Brief of Evidence of Jasmine Trixie Kahira Watson no date at [1-33][[CB Tab 56, 201.00347]]; above Watene at 6-79; above Dr Smith at 1-170; Affidavit of Murray Allan Hemi dated 24 May 2023 at [1-34][[CB Tab 73, 201.00505]]; above Te Tau at 7.0-8.4; above Crisp at 6.0-7.0; above Gary Griggs at 61-70; above Rolls at 8-40; ; above Patrick Mason at 6-38; above Phillip Rei Paku at 5-40; above Second Affidavit of Haami Te Whaiti at 86-163; above McKinley at 9-30; Reply Affidavit of Matin Maioha Diamond Toria McKinley dated 6 July 2023 at [1-2][[CB Tab 61, 201.00383]]; Rely Brief of Evidence of Kahura James Watene no date at [1-17][[CB Tab 63, 201.00390]]; and above Matthews at 1-48.

[86] See Above, Potangaroa at 12, 16; above, Crisp para 19-56; above Kawana at 4.10-4.12; above Te Tau at 5.10 and Te Tau 1.05.2; above Crisp at 6.17; above Reiri-Mangai at 3.3-6.3; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [25-32][[CB Tab 25, 201.00104]]; above Gary Griggs at [64-70]; above Jamie Griggs at [7-23]; above Hana Ridell at 73-79; above Rolls at 39-40; above Phillip Rei Paku at 29-34; above, Second Affidavit of Haami Te Whaiti at 115-163; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [14-20][[CB Tab 41, 201.00254]]; above Reon Kerr at 21-26; above Tomoana at 19; above Randall at 21-22; above McKinley at 28-30; above Watson at 27-33; above Watene at 64-79; above Davidson at 21-24; and above Mathews at 36-48.

[87] See above Watson at 22-23; above Richard Pirere at 13; and above Dr Smith at 48.

[88] For claimant evidence, see Affidavit of Robin Te Huna Potangaroa dated March 2017 at 4 [[CB Tab 16 at 201.0001]; Brief of Evidence of Hana Rei Paku Ridell, no date at [71][[CB Tab 28, 201.000125]]; Brief of Evidence of Langdale Ohorere Puhara Rolls no date at [37][[CB Tab 29, 201.00143]; Brief of Evidence of Patrick Bruce Mason no date at [37-38][[CB Tab 30, 201.00152]]; Second Affidavit of Haami Te Whaiti dated 14 February 2023 at [113-117, 126-129][[CB Tab 38, 201.00198]]; Affidavit of Hawea Tomoana dated 3 May 2023 at 17][[CB Tab 50, 201.00302]]; Affidavit of Martin Maioha Diamond Toria McKinley dated 19 January 202 at 1-8, 17-18][[CB Tab 54, 201.00323]]; Brief of Evidence of Kahura James Watene no date at [48-53][[CB Tab 57, 201.00355]]; Brief of Evidence of Peter Thomas Junior Davidson no date at [14-20][[CB Tab 58, 201.00371]]; and Rely Brief of Evidence of Richard Pirere no date at [13][[CB Tab 65, 201.00400]].

[89] Refer to above Phillip Paku at 20; above Kahura Watene at 48-50; and above Peter Davidson at 21-22.

[90] See above Kahura Watene at 2.0, above Matthews at 4.0; and Dr Takirirangi Smith at 10-11.

[91] Refer to above Kahura Watene at 2; and Dr Takirirangi Smith at 1-70.

[92] Refer to above, Potangaroa at 12, 16; above, Crisp para 19-56; above Kawana at 4.10-4.12; above Te Tau at 5.10 and Te Tau 1.05.2; above Crisp at 6.17; above Reiri-Mangai at 3.3-6.3; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [25-32][[CB Tab 25, 201.00104]]; above Gary Griggs at [64-70]; above Jamie Griggs at [7-23]; above Hana Ridell at 73-79; above Rolls at 39-40; above Phillip Rei Paku at 29-34; above, Second Affidavit of Haami Te Whaiti at 115-163; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [14-20][[CB Tab 41, 201.00254]]; above Reon Kerr at 21-26; above Tomoana at 19; above Randall at 21-22; above McKinley at 28-30; above Watson at 27-33; above Watene at 64-79; above Davidson at 21-24; and above Mathews at 36-48.

[93] Refer to above Gary Griggs at 59-60; above Matthews at 45; above Jamie Griggs at 18; above Kahura Watene at 39-47; above McKinley at 23-24; above Langdale Rolls at 35-36; above 2nd Affidavit Haami Te Whaiti at 150-161; above Reply Brief Te Tau at 3.0-3.54; and above Faye Pirere at 21.

[94] See above, Potangaroa at 18, 32, 33 and 43; above, Crisp at 3.0; above Kawana at 42; above Te Tau at 7.3; above Reiri-Mangai at 40; above Ryshell Griggs at 28; above 2nd Affidavit of Te Whaiti at 35-42, 143-146; above Phillip Rei Paku at 16-22; above Hana Ridell at 37, 54; and above Gary Griggs at 29-30, 56.

l. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to 'some, if not all of the takutai moana area.[95]"

75) Professor Hirini Mead provided an additional (although similar) useful list of tikanga questions for assisting with determining some aspects of tikanga Māori that could influence whether any claimant takutai moana area is held in accordance with tikanga Māori which includes the following:

a. "How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand], take kite [discovery], other?

b. If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?

c. The land [and takutai moana] are actually occupied by people and kāinga are established.

d. A rohe is marked out in some way. How? Provide a map.

e. Over time urupa are established over land, tuahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.

f. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?

g. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].

h. The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.

i. The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.

j. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.

[95] See above, Potangaroa at 12, 16; above, Crisp at 19-56; above Kawana at 4.10-4.12; above Te Tau at 5.10 and Te Tau 1.05.2; above Crisp at 6.17; above Reiri-Mangai at 3.3-6.3; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [25-32][[CB Tab 25, 201.00104]]; above Gary Griggs at [64-70]; above Jamie Griggs at [7-23]; above Hana Ridell at 73-79; above Rolls at 39-40; above Phillip Rei Paku at 29-34; above, Second Affidavit of Haami Te Whaiti at 115-163; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [14-20][[CB Tab 41, 201.00254]]; above Reon Kerr at 21-26; above Tomoana at 19; above Randall at 21-22; above McKinley at 28-30; above Watson at 27-33; above Watene at 64-79; above Davidson at 21-24; and above Mathews at 36-48.

k. The new iwi is able to defend its rohe and can call on allies to help to defend the estate.

l. The new iwi is approved by the neighbours and its presence is validated by the experience."[96]

76) It is important to also acknowledge that the above tikanga Māori indicia and tikanga Māori question lists are not exhaustive but are at least appropriate as starting points for answering what specific tikanga Māori laws and institutions should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori.

Section Bii): What aspects of tikanga should influence the assessment of whether or not: there is a distinction between holding an area in question, or any part of it, in accordance with tikanga, and using that area or its resources in accordance with tikanga?

77) Having discussed tikanga Māori and whether an area in question is held in accordance with tikanga extensively already above, this section will focus on distinguishing between "holding" an area and "using" that area or its resources in accordance with tikanga.

78) There is a distinction between holding an area and using that area in accordance with tikanga. In order to answer this question, the key tikanga values and concepts of whakapapa, whānaungatanga, rangatiratanga, mana, mana tangata, mana whenua, mana moana, manaakitanga and kaitiakitanga are relevant but have been explored in detail above and will not be repeated in this section. But each tikanga concept is relevant and provides important context to answer this question of distinguishing between holding and using an area and its resources in accordance with tikanga. One of the key differences is how a particular group became connected with the whenua and rohe moana through what Māori refer to as take whenua, take moana and ahi kā roa.

79) There are different types of *take* which describe more about how a particular group came to be connected to land. *Take* means the basis of a right to land or water. The Native Land Court was directed to determine the title to Māori land in accordance with the Native custom – tikanga - and concluded that the Native custom had a clear view on the right to land, by one group as against another, finding that there were four kinds of take or rights arising from Māori tradition: take taumou (discovery) and the related take taunaha (claiming by naming), take ahi kā (occupation), take tuku (gift) and in certain instances, take raupatu (conquest).[97]

80) The Waitangi Tribunal referred to the various *take* for establishing rights to land and resources in the 1993 Pouākani Report:

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[96] H Mead, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 314,

[97] For example, conquest was not a source of title if it was not followed up by occupation.

> Māori people occupied land in extended kin groups, whanau and hapu under a system of interlocking and overlapping rights of use (usufructuary rights). These rights, take, were derived as follows:
>
> Take whenua kite hou: a right of discovery, such as one related journeys of occupants of an ancestral canoe.
>
> Take tupuna: an ancestral right derived from continuous occupation, particularly one which would be traced from an ancestral canoe.
>
> Take raupatu: a right obtained by conquest, with displacement or servitude of the original occupants, followed by occupation of the land by the conquering group.
>
> Take tuku: a right by virtue of a gift or exchange awarded in special circumstances such as a marriage or settlement of a dispute.[98]

81) While these four *take*, when coupled with the necessary element of occupation, are organising principles of Māori land tenure, an 1890s letter by Major Rapata Wahawaha to Elsdon Best outlined some 28 variations of *take whenua* which suggests that Māori had more complex systems of traditional property rights under tikanga.[99]

82) An 1878 editorial in the Māori newspaper *Te Wananga* similarly discussed the various *take* rights over land:

> The Māori not only claims land by right of discovery and occupation … but he also claims by right of conquest, gift in marriage, gift for help in obtaining food for feasts, help in time of sickness (or payment to priests for supposed protection from the power of witchcraft), for the dead being carried over the land, for relations murdered on the land, and a thousand other claims of such nature. But there are other claims to land by the offspring (male line of descendants) of daughters (to land of their grandfathers) who haver married chiefs of other tribes.[100]

83) Take tupuna was generally considered a more secure form of right than take raupatu. Take tupuna manifested itself through whakapapa (genealogies) that identified the relevant line of descent and succession, it determined kinship groupings, rank and status, and revealed relationships and connections to each other.

84) To recite the descent of names was often to make a claim to land and natural resources. The earlier the ancestor, the stronger the claim to the land and resources. However, just because a person has whakapapa interests and connections, that does not necessarily

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[98] Waitangi Tribunal, *Pouākani Report,* (Wai 33, Wellington, 1993) at 14.

[99] 'War narrative of Rapata Wahawaha, MS including stories of Uenuku, Ruatapu and Paikea, introduction of Christianity on East Coast, etc, Mana and Take-whenua, (ATL, MS Papers-0072-39E).

[100] Editorial, *Te Wananga,* (Napier, 5 January 1878) at 1-2.

translate into rights and interests like mana whenua. Māori descent groups and individuals must constantly pay attention to their take tupuna connection with the land and natural resources. Achieving a higher level of interest like mana whenua involves other factors such as ahi kā.

Take Ahi Kā and Tuku Whenua

85) Any discussion around the nature of territorial rights in accordance with tikanga must not lose sight of the importance of ahi kā. Every right to land and the marine estate rohe moana, whether it rested upon take tupuna – ancestry, take raupatu – conquest, or take tuku – gift, was required to be kept alive by occupation or the exercise of some act signifying ownership and use. This tikanga demands that in order to maintain rights and claims to land and the rohe moana, whānau, hapū and iwi need to show continuous occupation of an area generally referred to as ahi kā (lit fire) or ahi kā roa (long burning fire).

86) The principle of ahi kā keeping fires burning on the land symbolically served as such a signifier of long-standing occupation. The following whakatauki (proverb) captures this principle:

> Ka wera hoki i te ahi, e mana ana ano – While the fire burns, the mana is effective.[101]

87) The Waitangi Tribunal in its 1993 Pouākani Report[102] discussed ahi kā occupation when it asserted:

> … ahi ka or ahi ka roa, the principle of keeping the fires burning on the land as a symbol of long-standing occupation. This did not necessarily mean continuous settlement, but it did mean continued use, such as seasonal visits for fishing or birding in which temporary encampments might be made. If occupation rights were to be maintained, the fires grew cold after three or more generations, the fires may be regarded as being extinguished, ahi mataotao.[103]

88) The Māori anthropologist Te Rangi Hiroa (Sir Peter Buck) described how Māori established and maintained title – take – to the ownership of land:

> The title (take) to the ownership of land was based on two main claims: right to inheritance through ancestors (Take tupuna) and right of inheritance through conquest (take raupatu). The right of prior discovery became historically merged in ancestral right. Conquest (raupatu) alone did not confer right of ownership unless it was followed by occupation. If the invading party retired, the survivors of the defeated tribe could return and still own their land. Occupation to establish a title had to be continuous, as idiomatically expressed by the term ahi ka or lit

[101] 'He Whakatauki,' in *Te Pipiwharauroa: He Kupu Whakamarama,* (No. 130, January 1909) at 56.
[102] Waitangi Tribunal, *Pouākani Report,* (Wai 33, Wellington, 1993) at 14.
[103] Above. The Pouākani whenua in the Ngāti Raukawa rohe in southern Waikato is part of where Wairarapa Moana Māori settled at Mangakino which land was given to the people of Wairarapa Moana as part of the gifting of Lake Wairarapa to the Government at the end of the 19th century.

> fire. So long as a people occupied the land, they kept the fires going to cook their food. Conversely, the absence of fires showed that the land had been vacated. Even if a conquering tribe did not leave a holding party, they might claim land subsequently if it remained unoccupied. However, if some of the conquered people evaded the invaders and remained on the land to keep their fires a light, the right of ownership of the defeated people was not extinguished. … When conquered territory was occupied for some generations, the title by conquest became a historical event and the functioning title became that of ancestral inheritance (take tupuna). A third and rarer title, termed tuku (to cede), included lands which were ceded in compliance with some custom, such as that of paying a raiding party (taua wahine) as recompense for the infidelity of a tribal woman to her husband. However, no matter what the title, the length of tenure of the land depended on the military strength of the people to hold it.[104]

89) Hapu and iwi demonstrated their ahi kā and connection to land and the rohe moana through their association with, and knowledge of, the landscape, seascape, flora, fauna and tohu sites of cultural and historical significance. Related to ahi kā is the tikanga of taunaha or tapatapa whenua which is about claiming by naming. Every hill, valley, stream, river, lake, mountain, forest, estuary, harbour, and coastal estate was named by Māori and those names have meaning and importance to associated hapu and iwi.

Tuku Whenua

90) A tikanga situation that has been commonly misunderstood as demonstrating ahi ka is when visitors or neighbours have been allocated temporary usage rights on another group's land and resources. Tuku whenua is the tikanga notion of land allocation that permits occupation and use rights while the mana whenua of the donor tribe continues over the land and resources. Such an arrangement should not be understood as conveying mana over the land and resources to the visiting group. Such a situation might be a temporary tuku whenua.

91) In discussing tikanga concepts, the Ngāti Porou rangatira and Native Land Court assessor Major Rapata Wahawaha described his understanding of ahi kā by distinguishing an occupation right by way of ancestry from that of a mere user right – tuku whenua - when he asserted:

> Take ahi ka roa – Right to land through long occupation. There are many protocols concerning the title according to occupation. One title of occupation is through an ancestor which is directly related to the above, in so far as it is a generally accepted rule that it wasn't through the length of time that the land was occupied that gave title to that land, but through their own ancestry lines. … Another title of occupation is if someone sees the bounty of the land and wants to utilise it to grow food in his knowledge too that it belongs to someone else.

[104] Te Rangi Hiroa, *The Coming of the Maori*, (Whitcombe and Tombs, 1949) at 381.

> Despite the length of time, he spends there he is unable to establish title for himself. …. He merely uses it and upon completion he will abandon it. … Hence there are two major types of title – 1. [Ahi ka roa i runga i te take tupuna] - Occupation through ancestry. 2. [Ahi ka roa i runga i te take kore] - Occupation through a title that is groundless.[105]

92) Some Māori complained that Native Land Court Judges had simplified and misconstrued the tikanga of ahi ka with tuku whenua. The complaint was that the Court was wrongly awarding land to groups who had only been allocated temporary sites for cultivation and usage by tangata whenua trough tuku whenua. The Ngāti Kahungunu Wairarapa Moana rangatira Te Whatahoro Jury and others wrote a letter to the editor of the Māori newspaper *Te Wananga* in 1877 making such a complaint when they recorded:

> Some land which is being awarded according to long standing and undisturbed occupation [ahi ka roa] is not being carefully examined by the Court as to whether that claim is right. There are many facets of this concept te ahi ka roa or permanent residence. One aspect of occupation is when a person happens upon the residence of somebody else, and for a period of time is looked after by that person. Coming to the present time, the descendants of the traveller will then prepare to discuss the issues of that land according to their knowledge. Soon, the person entitled to that land could be defeated by the supposed long occupation and knowledge of that traveller, if the Court is not careful in its inquiry.[106]

93) On the other hand, a tuku whenua might also be more permanent depending on context. The anthropologist Raymond Firth recorded that 'the cession of land to another tribe seems to have been regarded as one of the most valuable gifts to be made only on occasions of great significance.'[107] The late Ngāti Porou ki Harataunga rangatira Paki Harrison recorded how Ngati Porou were granted land – tuku whenua - at Kennedy Bay (Harataunga) on the Coromandel Peninsula by the Hauraki rangatira Paora Te Putu during the turbulent Musket Wars period of the 1830s. Harrison stated that when Te Putu died, a mere known as Whaita and a cloak were presented to Ngati Porou as a tapae toto – a present given in connection with the chief's death. Harrison contended that the taonga presentation along with inter-marriages served to confirm the tribe's occupancy and made the land transfer [tuku whenua] permanent.[108] Gifting of land through tuku whenua confirmed rights and cemented relationships. But the tuku whenua had to be followed up by continuous occupation – ahi ka – to perpetuate permanency.

94) Hence, there is a distinction between holding an area and using that area in accordance with tikanga. Some of the key aspects of tikanga that should influence the assessment

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[105] War narrative of Rapata Wahawaha. MNS including stories of Uenuku, Ruatapu and Paikea, introduction of Christianity in the East Coast, etc, Mana and Take-Whenua, ATL, MS-Papers-0072-39E.

[106] Te Whatahoro Jury and others, *Te Wananga* (Vol. 4, No. 278, 14 July 1877) at 26.

[107] R, Firth, *Economics of the New Zealand Maori,* (2nd Ed., Government Printer, Wellington, 1972) at 390.

[108] Cited in R Benton, P Meredith & A. Frame, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Maori Customary Law,* (University of Victoria Press, Wellington, 2013) at 400-401.

of the distinction between holding an area in question or using an area in accordance with tikanga include the common key tikanga values and concepts of whakapapa, whānaungatanga, rangatiratanga, mana, mana tangata, mana whenua, mana moana, manaakitanga and kaitiakitanga which are relevant for context but are not discussed in detail in this section because they have been discussed in detail above. One of the key points on holding and using an area is how a particular group became connected with the whenua and rohe moana. The key tikanga concepts then for answering this question include take whenua kite hou (discovery), take tupuna (inheritance), take raupatu (conquest), take tuku (gift) and ahi kā roa (occupation), along with tapae toto (gifting land on the death of a rangatira), take taunaha and tapatapa whenua (claiming through naming).

95) Of course, the key Wairarapa Moana witness to discuss take tuku whenua is Dr Takirirangi Smith in his 2001 report Tukuwhenua and Māori Land Tenure in Wairarapa[109] where he refers to a number of historical Ngāti Kahungunu tuku whenua examples including the tuku whenua of Tamaiwaho to Te Rehunga,[110] the tuku of Te Rerewa,[111] and the tuku whenua of Te Angiangi to Te Whatuiapiti.[112] Dr Smith also discussed early tuku whenua examples with European squatters,[113] tuku whenua and land leases,[114] and tuku whenua and land alienation in the Wairarapa.[115] Although Dr Smith's key thesis focusses on early colonial cross-cultural misunderstanding of the tikanga of tuku whenua and land alienation, the report is useful in providing a deeper Ngāti Kahungunu understanding and context on the tikanga of tuku whenua and mana, tapu, whakapapa and rongomau[116] (peace alliances), hence its utility in assisting with answering our question on distinguishing between holding and using an area or its resources in accordance with tikanga.

Section C: In respect of the areas as set out at [10] of the joint memorandum of counsel for the applicants, dated 29 September 2023:

i) which applicant group or groups hold each of the areas in accordance with tikanga?

Whenua Tautohetohe: Debatable Lands

[109] T. Smith, *Tukuwhenua and Maori Land Teure in Wairarapa,* (A Report to the Waitangi Tribunal commissioned by the Wai 429 Claims Committee, October 2001).
[110] Above at 36.
[111] Above.
[112] Above.
[113] Above, at 86-128.
[114] Above, at 220-223.
[115] Above, at `29-227.
[116] Above, at 37-38.

96) The author is aware that there have been numerous legal, cultural and political disputes between various Wairarapa Moana claimant groups over many years. It is common for people to disagree, dispute and conflict over whenua territorial boundaries and resources. Where there are possible claimant disagreements, conflict and disputes over whakapapa, mana whenua and mana moana for orders under MACA, differences can be reconciled within tikanga Māori which are fully dependent upon the political will of the applicant groups.

97) Professor Hirini Mead, in a paper prepared a report to the Waitangi Tribunal in support of Ngāti Awa's claim (Wai 46), outlined the basic idea of contested land or what he termed "whenua tautohetohe."[117] Mead argued that there were zones of contested land lying between iwi and hapu groups, that were characteristically rich in resources and exploited by both sides and that it was difficult to fix a boundary within the zone where he opined: "As military strength fluctuates, so did the boundary, so there was always the element of contestability in land zones regarded as whenua tautohetohe."[118]

98) Mead discussed this tikanga concept of whenua tautohetohe further which:

> … embraces the idea that the boundary between tribal territories is not so much like a surveyed line, although a line may exist, but rather is like a band of land, which may be likened to a zone of no-man's-land.[119]

99) In 1890 a collection of papers offering various opinions on native tenure was published in the Appendices to the House of Representatives which included the opinion of Chief Justice Sir William Martin who described the term kāinga tautohe which he translated as debated lands:

> But between territories of different tribes there are often tracts of land, which are called "kainga tautohe" or (literally) debatable lands.[120]

100) Mead concluded that Martin's notion of 'kāinga tautohe' is the same idea as 'whenua tautohetohe'. The early Māori scholar Hari Hongi also supported the notion of 'debatable lands.' Commenting on tikanga Māori custom as it relates to land boundaries, Hongi conceded: 'There were, it is true, debatable lands lying contiguous to certain boundaries.'[121] Mead also observed that some parts of the boundary are likely to be more 'debatable' than others.[122]

101) History and whakapapa teach us that it is common for all people to disagree, dispute and conflict over whenua territorial boundaries. Where there are possible claimant

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[117] The paper was reproduced in his collection of essays*:* H, Mead, *Landmarks, Bridges and Visions: Aspects of Maori Culture: Essays*, (Victoria University Press, Wellington, 1997 at 238).
[118] Above.
[119] Above.
[120] 'Opinions of Various Authorities on Native Tenure', AJHR, 1890, G.-1, p. 3.
[121] Hongi, Hari (n.d) *Maori Land Rights, Marriage Customs, Kinship,* Alexander Turnbull Library, MS-Papers-5717.
[122] Mead, S. M., *Landmarks, bridges and visions : aspects of Maori culture : essays,* p. 236

disagreements, conflicts and disputes over whakapapa, mana whenua and mana moana for orders under MACA, differences can be reconciled within a tikanga Māori context but is fully dependent upon the political will of the applicant groups agreeing to abide by tikanga Māori, such as the tikanga institutions of hohou i te rongo and he tatau pounamu, to achieve the tikanga concept of ea.

Hohou i te Rongo

102) The key traditional tikanga Māori concepts and institutions for resolving disputes and peace-making historically included hohou i te rongo – peace after war conflict rituals that were accompanied by mana tangata (strong leadership), awhina (assistance, help), aroha (affection, love), manaakitanga (hospitality, respect), utu (reciprocity through gift exchange), mana wahine (the authority of women) and the institution of hākari (large political feasts).

103) Dispute resolution and peace-making was often brought about by the takawaenga or mediation of woman. High-ranking women in addition to their role as takawaenga (mediators) were often given in marriage to their former adversaries as a means of sustaining a durable peace settlement. And gifts of pounamu (greenstone jade) often formed a tangible part of peace-making arrangements and were frequently exchanged to also cement the peace kawenata (covenant or agreement).

Wahine Takawaenga – Women as Peace Mediators and He Tatau Pounamu

104) Pounamu was highly valued traditionally because it was durable, rare and beautiful to behold. Pounamu is found only on the West Coast of the South Island and was used historically as a means of exchange. In times of trouble, peace could be secured ending incessant warfare and tribal feuds through a political marriage and pounamu gift exchange. Te Waaka Tamaira, a noted Tuwharetoa rangatira, recorded how women were often takawaenga emissaries in abating protracted conflict in 1905:

> "In times past … if a woman went to mediate a conflict, she would not be touched by either side, for the saying associated with her was the breaking of a lasting peace is wrong."[123]

105) Dr Pei Te Hurinui Jones, the Tainui luminary, commented on the important role of women and the exchange of pounamu in tatau pounamu peace-making ceremonies to end the protracted wars between Ngāti Tuwharetoa, Waikato, Raukawa and Maniapoto against the Rongomaiwahine and Ngāti Kahungunu tribes – which included Wairarapa Moana tribal groups as we heard from many of the claimants - at Nukutaurua, Te Mahia, (now northern Hawkes Bay) during the turbulent Musket Wars in the second decade of the 19th century:

> "The peacemaking was carried out on the elevated ground at Whakarewa, overlooking Okura-a-renga pa. A young chieftainess named Te Rohu was given

[123] Te Waaka Tamaira, *Te Puke ki Hikurangi,* (Vol. 6, No. 10, 29 April 1905) at 5.

in marriage to Toiroa, and the Rongomaiwahine high chief in turn handed over to Pikihuia, the wife of Papaka, Te Heuheu's younger brother, a tangiwai greenstone tiki, which was then named Whakarewa."[124]

106) Te Rohu was the daughter of the great Ngāti Tuwharetoa rangatira Mananui Te Heuheu and his senior wife Nohopapa. The late Dr Angella Ballara recorded that Te Rohu negotiated the lifting of the siege with the help of Pikihuia, and Te Toiroa, the Rongomaiwahine and Kahungunu matakite (spiritual leader).[125]

107) Later, Te Pareihe of Ngāti Whatuiapiti, and Nukupewapewa of Wairarapa Moana, prepared an expedition of 1,600 warriors against Mananui Te Heuheu of Ngāti Tuwharetoa and Ngāti Raukawa at Waitahanui pā on the eastern side of Lake Taupo. In this tense situation and as a show of mana wahine, Te Rohu again succeeded in making peace with Te Pareihe of Heretaunga and Nukupewapewa of Wairarapa Moana by first meeting the attackers outside the pā, defying and then challenging them. Te Pareihe and his warriors contented themselves by firing off their muskets, brandishing the heads of those killed at Omakukura pā on the western shores of Lake Taupo, and then performing a haka. Mananui subsequently emerged from the pā and confirmed the tatau pounamu peace agreement.

108) Te Rohu's peace was subsequently extended to Waikato and Ngāti Raukawa when each sent a woman of rank, including Te Paea, niece of Potatau Te Wherowhero, [126] to confirm the tatau pounamu.[127] The following year, Mananui took a party of Ngāti Tuwharetoa to Pa-whakairo in Hawkes Bay to cement the peace and, Dr Ballara noted, Te Rohu may have been given in marriage to Te Pareihe, but she seems to have continued to accompany her father rather than remain in Heretaunga.[128] But as illustrative of mana wahine and the important takawaenga (mediator) role of women for tatau pounamu peace agreements, the word of Te Rohu was binding on her Ngāti Tuwharetoa people.

109) Many of the Wairarapa Moana claimants and expert witnesses referred to the famous Maunga Rongo Peace Agreement between Wairarapa Moana initially under Nukupewapewa and Te Atiawa under Te Wharepouri in circa. 1840 that halted the protracted Musket Wars conflict and ensured peace between the tribes with the Remutaka ranges being the boundary for resolving the whenua territorial disputes.

110) A further key element of resolving protracted disputes and conflict is mana rangatira.

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[124] Pei Te Hurinui Jones Papers, (ATL, MS-Papers-0358).

[125] Ballara, A, 'Te Rohu,' in Orange, C, (Gen. Ed.), *The People of Many Peaks: The Maori Biographies from the Dictionary of New Zealand Biography, 1769-1869,* (Vol. 1, Bridget Williams Books, Department of Internal Affairs, Wellington, 1990) at 280.

[126] Potatau Te Wherowhero was subsequently anointed the first ariki or Māori King of the Kīngitanga movement in 1858 by Wiremu Tamihana Tarapipipi Te Waharoa – the King maker.

[127] Above at 281.

[128] Above.

Mana Rangatira

111) One key element that is required to assist Wairarapa Moana claimant groups to reconcile their differences to move together to process and then govern their MACA claims is effective rangatira leadership that can weave the claimants together by blending the mana of these respective whānau, hapū and iwi groupings.

112) There is much literature on traditional rangatiratanga for effective governance leadership. Dr Hirini Mead, for example, provided a thorough analysis of traditional Māori rangatira criteria based on tikanga Māori by examining the rangatiratanga of two prominent 19th century rangatira — Te Rangikaheke of Te Arawa and Himiona of Ngāti Awa.[129] Dr Mead listed the following criteria for the mandate and legitimacy of a traditional Māori rangatira that included:

a. "whakapapa (genealogy);
b. ngā pumanawa — talents;
c. acceptance and confirmation by the people;
d. identity being known by other iwi (tribes);
e. tūrangawaewae (having a place to stand on the traditional tribal homeland);
f. gender;
g. mana (inherited and achieved spiritual authority, influence, status); and
h. tapu (spiritual sanctity, avoiding risk, intrinsic sacredness, setting apart from the unclean)." [130]

113) Illustrious whakapapa ancestry, although important, was not enough for being an effective rangatira. Felix Keesing, the New Zealand anthropologist, commented on Ngāti Porou leadership in 1928 and stressed the distinction between descent (ascription) and meritocracy (achievement) or what he termed the mana of dignity and the mana of business when he opined:

> "But in Ngati Porou, from some eight generations back the "mana" of dignity has been quite severed from the "mana" of business. In all matters of ceremonial, the leadership of the hereditary chiefs of highest lineage is unquestioned; but in all matters of wisdom and business, those most competent to do so direct the tribal affairs."[131]

114) While whakapapa continues to be a practical reality for ascriptive Māori leadership, rangatira are also expected to possess a range of relevant skills for achieved Māori leadership in accordance with tikanga Māori and the respective tasks at hand. Mana rangatira are those leaders who can weave the people together and who acknowledge and can blend the mana of the respective groups.

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[129] HM Mead, *The Mandate of Leadership and the Decision-Making Process* (Te Puni Kokiri, Wellington, 1992).
[130] Above.
[131] Keesing, F, *The Changing Maori*, (New Zealand Board of Maori Ethnological Research, Thomas Avery & Sons, New Plymouth, 1928, Vol. 1, No. 2).

115) Dr Wi Repa of Ngāti Porou provided an interesting synopsis of a rangatira in 1926 in an obituary to his wife as a wahine rangatira:

> "… The chief is someone who can bind the people at both hapū and iwi level in their endeavours. S/he is a leader. S/he starts and finishes tasks and is followed by people. S/he is described as a chief whose chiefly lines are held in regard, increased and distinguished, by other tribes."[132]

116) Professor Mead also listed the required ngā pumanawa (talents) of a mana rangatira, namely:

a. "knowledge and industriousness;

b. mediation and dispute resolution abilities; [emphasis added]

c. having courage and being a good strategist in war;

d. knowledge of the arts of carving;

e. knowledge of looking after the people;

f. command of the knowledge and the technology to build large canoes or houses; and

g. a sound knowledge of the boundaries of tribal lands."[133]

117) In a similar manner, Mahuika,[134] and Te Ua[135] analysed some of the credentials for traditional Māori rangatira selection and effectiveness based on ascription and achievement. Mahuika and Te Ua analysed rangatiratanga in a specific Ngāti Porou, East Coast context. Bowden in contrast, attempted to delineate the different types of Māori leadership based on the principle of tapu for spiritual leadership and mana for secular leadership.[136]

118) Professor Ranginui Walker on the other hand, traced the changing model of Māori leadership from ascription and achievement to state and self-appointment.[137] After the turn of the 20th century, achievement became more influential than ascription in the assumption of mana rangatira leadership roles.

119) Traditional leaders – mana rangatira - under tikanga Māori then had ascribed mana leadership through whakapapa but also achieved mana by developing numerous ngā

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[132] *Te Toa Takitini,* (No. 57, 1 May 1926) at 400.
[133] HM Mead, *The Mandate of Leadership and the Decision-Making Process* (Te Puni Kokiri, Wellington, 1992).
[134] A Mahuika, "Leadership: Inherited and Achieved," in M King (ed) *Te Ao Hurihuri: Aspects of Māoritanga* (Reed Books, Auckland, 1992) at 42.
[135] H Te Kani Kerekere Te Ua, "Notes on Māori Chieftainship" (1955) 64(4) *Journal of the Polynesian Society* 488.
[136] R Bowden, "Tapu and Mana: Ritual Authority and Political Power in Traditional Māori Society" (1979) 14(1–2) *The Journal of Pacific History* 50.
[137] R Walker, "Changes to the Traditional Model of Māori Leadership" (Unpublished, Auckland, 1992).

pumanawa (skills) and ngā huanga (attributes) for the tasks before them that required self-discipline, self-mastery and visionary inter-generational leadership.

120) The Wairarapa Moana claimant groups need these types of mana rangatira governed by tikanga Māori to process the current MACA claims more efficiently by blending the mana of these respective whānau, hapū and iwi groupings to lead them effectively into the future.

121) One other important specific tikanga Māori leadership skill that mana rangatira need is to blend the mana of the claimant groups going forward.

122) With reference to evidence supporting early 19th century takutai moana claims for recognising the doctrine of aboriginal title in the Kauaeranga area (modern day Thames), Chief Judge Francis Fenton concluded in the 1870 *Kauaeranga Judgment:*

> "I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider *how readily they may prove such*, and how impossible it is to contradict them if they only agree amongst themselves."[138] [emphasis added]

123) The evidence of all of the Wairarapa Moana witnesses has highlighted, as Chief Judge Fenton articulated in 1870, how readily they may prove their claims in the takutai moana area, and how impossible it is to contradict them if they only agree amongst themselves. In the current Wairarapa Moana MACA hearing, I acknowledge the mana of the rangatira in coming to an agreement of 29 September 2023 among the claimants and counsel which has been decades of mana korero, mana rangatira, and mana whakahaere which is in effect a modern day Wairarapa Moana Maunga Rongo Kawenata.

124) At least for this part of the Wairarapa Moana MACA journey, kua ea – a state of balance has been achieved which is significant.

125) Consequently, and with due respect, I believe that under tikanga Māori, the Joint Memorandum Shared Agreement of Counsel for the Applicants dated 29 September 2023 para. 10 should be respected – te mana o nga kupu - hence the Wairarapa Moana groups that hold each area in accordance with tikanga should be as agreed in this modern day Maunga Rongo kawenata:

ii) As the Court is aware, the focus for all groups has been on hapū interests along the coast. The applicants and interested parties for tangata whenua groups have had a number of discussions regarding the details of the CMT orders sought and on a preliminary basis are in agreement that the relevant hapū in the different coastal rohe identified include:

[138] Chief Judge Fenton, *Kauaeranga Judgment,* (1870) reprinted in *VUWLR (*Vol. 14, 1984) 227 at 244.

\a) *Tūrakirae to Mukamukaiti* – Ngāti Hinewaka, Ngāti Rua, Ngāi Tukoko, Ngāti Moe, Ngāti Rakaiwhakairi, Ngāti Rakairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira, Ngāti Hamua and Te Atiawa hapū.

b) *Mukamukaiti to Kawakawa Point*[139] – Ngāti Hinewaka, Ngāti Rua, Ngāi Tukoko, Ngāti Moe, Ngāti Rakaiwhakairi, Ngāti Rakairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira, and Ngāti Hamua.
c) *Kawakawa Point to Awhea River* – Ngāti Hinewaka, Ngāti Rangaranga and Ngāi Tuohungia.
d) *Awhea River to Te Unuunu* – Ngāi Tumapuhia a Rangi, Ngāti Rongomaiaia, Ngāti Maahu, Ngāti Meroiti, Ngāti Kawekairangi, Ngāi Te Aho, Ngāti Te Aokino, Ngāti Parera and Ngāti Hamua.
e) *Te Unuunu to Whareama* – Ngāti Tumāpuhia-ā-rangi.
f) *Whareama rivermouth* – Te Hika a Pāpāuma and Ngāi Tumāpuhia-ā-rangi.

C(ii) where there is a shared interest, does it accord with relevant tikanga for each area to be held on a shared basis by the relevant groups?

126) Tikanga Māori historically and today acknowledges shared interests in whenua, rohe moana and other resources. The tikanga concept of tuku whenua mentioned above is an example of sharing the whenua, rohe moana and other resources. Indeed, the Ngāti Kahungunu rangatira Ihaia Hutana noted in a 1902 newspaper article:

> With requests for residence, or for gardens, whether it is a claim from within the sub-tribe or from an outside relative, a piece of land or a place of abode and cultivations will be given from within the community. … they will not be admitted into the pare kainga, and this type of gift [tuku] will also not include the greater part of the land. But it will instead include the area that has been arranged for settlement and gardening within the village; it will not include the ocean and the fishing beds, nor the eel lakes, the forest and the bird snares … there is continuing authority [mana tuturu] overarching all of this, including in the areas of residence and areas of gardening … Gardens are a major issue in Māori custom over which authority [mana] is maintained, and the embodiment of that authority [mana] can be seen, heard and expressed through rahui at the appropriate time. However, the refugees share in the largesse of the lakes, produce and fishing grounds under the communal authority [mana huihui] under the licence from the benefactor, that is from the chief of chiefs [te rangatira o nga rangatira ranei].[140]

127) Depending on the context, mana can be considered inclusive as well as all-encompassing and not necessarily confer exclusivity or predominant rights. But it

[139] Also known as Ngawi Point.
[140] Ihaia Hutana, *Te Puke ki Hikurangi,* (Vol. 5, No. 1, 30 August 1902) at 3.

depends on the kind of mana at issue. An interesting and relevant tikanga phrase is mana huihui – gathering of mana. Mana huihui describes instances where hapu and iwi came together and shared the mana over land and resources, particularly those lands lying contiguous to tribal boundaries – whenua tautohetohe or rohe tautohe [debated lands] as noted above – where interests were more fluid than patrolled and delineated.

128) There are numerous instances where hapū and iwi came together and shared land and resources such as the Kīngitanga Movement within Tainui and Paremata Māori Kotahitanga Movements which was at Pāpāwai in the end of the 19th century. Not enough attention has been given to the complex relationships between kinship groups with shared whakapapa (genealogy), history and occupation of kainga or settlements; where members from multiple hapū and iwi could be found in common occupation. In addition to mana huihui (the gathering together of authority), we have seen such expressions as kai huihui (the gathering together of food) and noho huihui (common occupation). Importantly, mana huihui was and should not be about subsuming one identity over another. Mana huihui was about mutually beneficial alliances for their very day to day existence and partly expressed through the concept of whānaungatanga emphasised relationships rather than demarcation of interests. Rather than a rigid pyramid of whānau, hapū and iwi, there were instead overlapping and interconnected networks of interests that selected genealogical records to confirm those kinship ties.[141] This also extended to land tenure where boundaries between groups were more blurred and fluid than patrolled and delineated.

129) Shared lands and resources could also be the result of conflict resolution processes such as hohou ki te rongo, tatau pounamu or maunga rongo kawenata as noted above which included the Remutaka ranges for the Maungarongo kawenata between Wairarapa Moana and Te Atiawa in 1840. Such tikanga processes and institutions highlight that overlapping claims and challenges can be negotiated and settled where, inter alia, political will, mana rangatira and mana wahine as takawaenga are present.

130) The crucial element of mana huihui is that it required consent and acquiescence by all parties in the sharing arrangement. Unless parties agreed to share mana, there was no mana huihui. Mana huihui is contrasted with sharing resources or use rights which is not the same as sharing mana over an area or resource.

131) Furthermore, in the 1997 Canadian Supreme Court decision of *Delgamuukw v British Columbia,*[142] the Court raised the possibility of several First Nations groups holding an area on the basis of shared exclusivity.[143] The Marine and Coastal Area (Takutai Moana) Act 2011 provides for shared exclusivity or mana huihui through the definition of 'applicant group' which means 1 or more iwi, hapu or whanau groups' that seek recognition of their customary interests under the Act. Shared exclusivity was also

[141] For a useful discussion of this issue, see Ballara, A, *Iwi: The Dynamics of Maori Tribal Organisation from c. 1769-c. 1945,* (Victoria University Press, Wellington, 1998).

[142] *Delgamuukw v British Columbia* [1997] SCR 1010 at [158]. The Supreme Court's discussion of shared exclusivity is obiter.

[143] Above.

acknowledged by Churchman J in *Re Edwards*.[144] However, shared exclusivity or mana huihui requires groups, as noted above, to acknowledge the rights and interests of others to the shared areas.

Section D: In respect of the areas as set out in [10] of the joint memorandum, what aspects of tikanga are relevant to the assessment of whether or not:

i) an area in question, or any part of it, has been exclusively used and occupied by the relevant applicant group or groups?

132) As noted in more detail above, this report concerns tikanga in relation to the takutai moana, but there are a number of values that apply to all tikanga Māori. To briefly answer this question of what aspects of tikanga are relevant to assess whether an area or part of it has been exclusively used and occupied by the relevant group or groups, the tikanga aspects as noted above include, inter alia, wairuatanga, mana whenua, mana moana, rangatiratanga, whanaungatanga, whakapapa, tapu, noa, utu, mauri, kaitiakitanga, take tupuna, take tuku whenua, and mana huihui. The rest of this section will illustrate some of these tikanga concepts in practice by referring to specific historic exclusively used and occupied rohe moana examples.

133) Aspects of mana and rangatiratanga authority can be personal as well as expressive of authority over a place, people or taonga. Māori generally have rights of te tino rangatiratanga, kaitiakitanga and mana – authority - in respect of the whenua and waterways – rivers, lakes, streams, springs, and the abutting coastal marine estate. Rangatiratanga and mana include tribal jurisdiction - authority - which includes such actions as the kaitiaki obligation to care for the resources and the people including future generations. Many iwi and hapū had full authority and control over the coastal areas at the time of the Treaty of Waitangi – and for some time afterwards.

134) For example, fresh water was sold for drinking as some early sailors found out in the Hokianga Harbour when they sought to provision their ships with water from local streams. British Resident, James Busby, referred to this in 1835 in a dispatch to the Colonial Secretary when he noted:

> 'A payment has been pretty regularly exacted in this harbour for permission to water and I have heard of a demand for harbour dues having been made by one of the chiefs of the Hokianga River.'[145]

135) In terms of private interests over the marine and coastal area, the *Te Karere o Nu Tireni* newspaper reported in 1843 where the editor attempted a fishing trip in the Northland area and a meeting of some wary Māori residents who opposed the 'incursion.'

[144] *Re Edwards (Whakatohea (No. 2))* [2021] NZHC 1025 at [145-168].
[145] Despatch from British Resident,' (ATL, qMS-0344, No. 65/2)

> A Māori fellow once set off (Ngapo is his name, he is from the sub-tribe of Ngati Korokoro) with a tomahawk in his hand, his boat approaching another and saying, 'weigh anchor and row on, you'd be angry if someone came to steal from your store.' Then one of us said, 'is this your store, the sea?' He replied, 'yes indeed, the sea belongs to me, no one is allowed to fish, it has already been set aside for us.'[146]

136) Following the New Zealand Wars of the 1860s, the government began to regulate fisheries. The Thames Sea Beach Bill was proposed as a solution to problems that arose at the Thames goldfields with the rush of miners and the ensuing challenges over title to the foreshore and seabed lands. Tanameha Te Moananui and others from Pukerahui sent a petition to the government regarding mana whakahaere tōtika jurisdiction during this time:

> You, the Government, have asked for the gold of Hauraki; we consented. You asked for a site for a town; you asked also that the flats of the sea off Kauaeranga should be let; and those requests were acceded to. And now you have said that the places of the sea which remain to us will be taken. O friends, it is wrong, it is evil. Our voice, the voice of Hauraki, has agreed that we shall retain the parts of the sea from high water mark outwards. These places were in possession from time immemorial; these are the places from which food was obtained from the time of our ancestors even down to us their descendants … O friend, our hands, our feet, our bodies are always on our places of the sea … The men, the women, the children are united in this, that they alone are to have the control of all the places of the sea.[147]

137) A second Kohimarama Conference was convened by Paora Tuhaere of Ngati Whatua at Orakei, Auckland, in 1879 where it was reported:

> The Queen in the Treaty of Waitangi promised that the Māoris should retain their mana. That word is correct because the Queen accepted us as her subjects, and she said to the Māori belonged the mana over his pipi grounds. … The Queen also said that the Māori should retain their mana over the sea.[148]

138) That same year, the rangatira, Apihai Te Kawau, of Ngāti Whatua discussed a sale of coastal land he was involved in when he informed the Governor at Orakei in 1879:

> It was only the land that I gave over to the Pākehās. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods.[149]

139) Hori Tauroa added:

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[146] 'Hi Ritenga Māori' in *Ko Te Karere o Nu Tireni,* (Vol. 2, No. 6, 1 June 1843) at 23.
[147] 'Report of the Select Committee on the Thames Sea beach Bill,' in *AJHR,* (Vol. 2, 1869, F-7) at 18.
[148] 'Paora Tuhaere's Parliament at Orakei,' in *AJHR,* (1879, Sess. II, G-8) at 20.
[149] Cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 2nd ed. Wellington, 1989) at 113.

> I was not aware of the Government taking all my large pipi-banks and shoals in the Manakau (Manukau harbour). Those large banks have all gone to the Government. I was not told why these were taken. I wish to know now whether they belong to the Queen or remain my property.[150]

140) The Māori view that a water resource and a land resource were conceptually the same and were capable of being under the mana of a community is supported by several 19th and 20th century observers. Thus, the 1921 Native Land Claims Commission reported with reference to Napier Inner Harbour that in Native custom, Māori rights were not confined to the mainland, but extended as well to the sea where 'deep-sea fishing grounds were recognised by boundaries fixed by the Māoris in their own way; they were well known, and woe betide any alien who attempted to trespass upon them.'[151]

141) In 1918, Captain Gilbert Mair advised the Native Land Court on some of the Te Arawa lakes:

> a. …no land in New Zealand has been more absolutely, more completely and more thoroughly under Māori owners' customs and rights than these two lakes, nor do I know of any piece of land in New Zealand in all my experiences that has been used or that can show more marks of ownership, individual or tribal than those lakes, and the surrounding lands.[152]

142) During the Native land Court hearing, Mair was cross-examined by the Crown over fishing beds at sea:

> Q. Did the Arawas go to the Bay of Plenty sea fishing?
> A. Yes, the Arawas had fishing grounds off Maketu.
> Q. Did they claim fishing grounds several miles out?
> A. Yes, quite in accordance with their Māori custom.
> Q. Would those fishing grounds be staked out at all, or marked off or located from the shore?
> A. Yes, they had marks on the land which were only disclosed to the favoured few, and even those miles off Maketu were the property of tribes and not common grounds. They caught hapūku and other fish there.[153]

143) Māori then possessed territory, or areas over which they had authority or mana, and the territory which they possessed was not just land but included the whole of the territorial resources of land, lakes, rivers, springs, swamps, estuaries, lagoons, inland seas, coastal marine areas and even the deep sea. In fact, in 1955 some Ngapuhi leaders lodged an application with the Māori Land Court for title to Te Moana-nui-a-Kiwa – the Pacific Ocean. The claim was based on rights from Tangaroa, as a descendant of

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[150] Above.
[151] 'Whanganui-o-Rotu' in '*Report of the Native Land Claims Commission'*, *AJHR*, (1921, Vol.2, G-5) at 13.
[152] 'Evidence of Captain Gilbert Mair,' (National Archives, Wellington, Crown Law Office, File CLO 174, Part I) at 184.
[153] Above, at 270.

Rangi and Papatuanuku; the act of Maui-tikitiki-a-Taranga in fishing up the North Island from the sea, Kupe through his voyage to the island across this ocean, and his naming of points on land alongside it; and through human blood which Maui smeared on his face when fishing the island from the sea. The Newspaper reported:

> The Māoris said they had a duty to their ancestors to have the waters vested in the Māoris as a mark of respect to the wisdom of the moana, the personification of the ocean, in making this part of the world so extensive that Maui could fish New Zealand from the sea, 'far from land involved in trouble.' … Mr Hohepa Heperi … spoke on the last grounds of the claim. This was the Great Ocean of Kiwa [Te Moananui-a-Kiwa] was the Māoris' marae. 'By the time Europeans discovered the oceans,' he said, 'it had already been crossed many times by the Māori people. Therefore it was the main *marae* of our ancestors.[154]

144) Māori iwi and hapū then had strong mana and rangatiratanga relationships with the coastal and marine estate including the ocean itself and they continue to exercise mana and rangatiratanga responsibilities over the coastal and marine estate. Indeed, Māori have durable traditional and contemporary mana responsibilities over the coastal marine estate, which includes kaitiakitanga responsibilities.

145) The kaitiaki responsibilities of Māori over lands and the coastal and marine areas were very important. Māori had intimate knowledge of their environment. They not only viewed themselves as beneficiaries of the resources but also as kaitiaki – stewards - which acknowledges the mana and tapu of the environment. Kaitiakitanga traditionally refers to a watcher or guard. The modern usage of the term encapsulates an emerging ethic of stewardship, guardianship or trusteeship especially over natural resources such as lands and the rohe moana but also people - whānau (family), tamariki (children), mokopuna (grandchildren), and for those appointed to governance and management positions of organisations and in other distinguished positions of authority.[155] In former times, rāhui, tapu and even aukati (enforced political borders) were the kaitiaki forms of stewardship governance and management of lands and coastal marine areas. Māori iwi and hapū continue to exercise their tangata whenua responsibilities as kaitiaki of land, lakes, rivers, springs, swamps, estuaries, lagoons, inland seas, coastal and marine areas, and the rest of the environment.

Section D: In respect of the areas as set out in [10] of the joint memorandum, what aspects of tikanga are relevant to the assessment of whether or not:

ii) The consideration of any third-party activities including ownership of abutting land, access to the takutai moana, and fishing?

[154] 'Claim to the Pacific,' in *New Zealand Herald*, (24 February 1955). See also 'Claim to the Pacific,' in *Journal of the Polynesian Society*, (Vol. 64, 1955) at 162.

[155] Benton, R, Frame, A & Meredith, P, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 105.

146) There are a number of key tikanga Māori values – te aratohu - that apply to most if not all tikanga Māori situations. To briefly answer this question of what aspects of tikanga are relevant to assess whether or not the consideration of any third parties' activities including ownership of abutting land, access to the takutai moana and fishing in the areas set out in 10 of the joint memorandum.

147) Briefly, the relevant tikanga aspects as noted above include, inter alia, wairuatanga, mana whenua, mana moana, rangatiratanga, whanaungatanga, whakapapa, tapu, noa, utu, mauri, kaitiakitanga, take tupuna, take tuku whenua, and mana huihui.

148) The short answer for this challenging question is that all of the Wairarapa Moana claimants need to respectfully consider all third-party activities and interests such as ownership of abutting lands, for, inter alia, access to and fishing interests in the rohe moana.

149) As the first law of Aotearoa, tikanga Māori as a legal system, is based on relationships, - about how Māori relate to their environment, to one another and to non-Māori.[156] Whether one is talking with visitors on a marae, or is fishing, hunting, building, weaving or foraging, protocols of respect are paid to keep peace in the spiritual and earthly realms. The protocols are replete with whaikōrero (orations), pepeha (sayings), whakatauakī (proverbs), whakapapa (genealogies), karakia (incantations), and waiata (traditional chants). Central to this is the recitation of whakapapa, which traverse both spiritual and physical realms. The land and water are shared between those who have passed on to te arai (the spirit world), the living and those yet to be born. Ancestors, whether remote or recent, occupy a spiritual world that is as real to Māori as the physical world. Accordingly, forebears are not spoken of but are spoken to, and creation stories are not myths but beliefs, beliefs which are the foundation of tikanga Māori law.[157]

150) Under tikanga, Māori have always been prepared to share through appropriate relationships. Associated with the spiritual awareness and well-being, or wairuatanga, that comes with the takutai moana, is the display of respect for the inhabitants of the natural world, and the virtue of displaying respect when dealing with one another.

151) When dealing with one another, the key conceptual regulator of conduct is the ideal or value of manaakitanga. Manaakitanga, as noted earlier, refers to the reciprocal enhancement of the mana of each other when people engage. It is most commonly associated with the generous hosting of visitors or with the respect protocols when Māori formally engage with one another in discussion. Nonetheless, it is a concept which informs best standards in Māori conduct generally. It requires that one should seek to enhance the mana of others through words and by demonstrative acts showing aroha (love), generosity and care. In this context mana refers to both individual status

[156] See Waitangi Tribunal *Muriwhenua Land Report* (Wellington, 1997) at 21-23 and especially the evidence cited of Dame Anne Salmond – "… Māori were operating in a world governed by *whakapapa* … Ancestors intervened in everyday affairs, *mana* was understood as proceeding from the ancestor-gods and *tapu* was the sign of their presence in the human world. Life was kept in balance by the principle of *utu* (reciprocal exchanges) which operated in relations between individuals, groups and ancestors."

[157] Ibid, at 133-150.

and human dignity generally. Mana is something that all people have, although some have more mana than others, as is evident in the demeanour of the senior rangatira, whose word is law. So, everyone must be acknowledged, and those of significant mana most especially so.

152) In oratory, a most common way of respecting others and building stronger relationships is through the use of whakapapa to kindle ancient bonds of consanguinity. This connects to the related value of whakawhanaungatanga which involves the nurturing and building of filial relationships.

153) Through the tikanga value of manaakitanga,"by honouring (manaaki) people the mana endures (ma te manaaki i te tangata e tu ai te mana).[158] Through whanaungatanga, Te Rama of Tuwharetoa (Taupo) addressed Tamahau Mahupuku of Wairarapa:

> He poroporoaki ki a koutou e noho mai ra i Wairarapa, ia Ngaati Tuwharetoa e noho atu nei i konei, … he whanaunga tuturu koutou no Ngaati Tuwharetoa i runga i o tatou whakapapa.
>
> This is a farewell to you who reside at Wairarapa from Ngati Tuwharetoa, you are indeed relatives of Tuwharetoa based on our genealogies.[159]

154) The virtue of whakawhanautanga thus applies not only to building relationships amongst the several hapū of common descent, but to relationships far and wide.

155) As noted earlier, one of the key points on holding and using an area is how a particular group became connected with the whenua and rohe moana including through tuku whenua or gifting. Dr Takirirangi Smith referred to a number of historical Ngāti Kahungunu tuku whenua examples to Māori but also to Pākehā.[160] For Māori, tuku whenua was again about acknowledging respectful relationships and sharing with others.

156) Even when Māori signed the Treaty of Waitangi in 1840, rangatira (chiefs) expected the Crown to protect their rangatiratanga (chieftainship) over the taonga (valued natural resources), and that the taonga would be sustained for future generations in perpetuity. In return, Māori were prepared to share with the British, and subsequently, the New Zealand Crown thus acknowledging a respectful kawenata relationship for sharing the resources of the nation.

157) I believe Māori are still prepared to enter into respectful tikanga relationships with landowners, fishers and others where they are prepared to extend manaakitanga and whanaungatanga to share the responsibility of the sustainable well-being of the takutai moana for all New Zealanders.

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[158] R Benton, P Meredith & A. Frame, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Maori Customary Law,* (University of Victoria Press, Wellington, 2013) at

[159] Above, at

[160] Above, Smith at 86-128. My reference to the term Pākehā is used respectfully. It means newcomer or non-Maori.

Section E: Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

158) Having discussed tikanga Māori extensively already earlier, this section will be brief.

159) The specific tikanga that is relevant to the protected customary rights claimed by the Wairarapa Moana applicants should include the following:

a. "Whakapapa identifying a cosmological connection with the takutai moana;[161]
b. Exercised mana or rangatiratanga over the takutai moana;[162]
c. Exercised kaitiakitanga;[163]
d. It has a mauri – life force;[164]
e. Performance of rituals central to the spiritual life of the hapū and whānau;[165]

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[161] For claimant evidence, see above, Potangaroa at 2-8; Affidavit of Steven Mark Chrisp dated 27 March 2017 at [19-56] [[CB Tab 17 at 201.000018]]; Reply Brief of Evidence of Steven Mark Chrisp dated 7 July 2023 at [1.0-4.1][[CB Tab 24, 201.000856]; Brief of Evidence of Gary Dennis Griggs, no date at [1-6][[CB Tab 27, 201.00111]]; above Brief of Evidence of Michael Ian Joseph Kawana dated 10 February 2023 at [1.0][[CB Tab 18 201.00029]]; Brief of Evidence of Pirinihia Te Tau dated 10 February 2023 at [1.0-1.4] [[CB Tab 19, 201.00040]]; Brief of Evidence of Steven Mark Chrisp dated 10 February 2023 at [3.0-4.25][[CB Tab 20, 201.00050]]; Brief of Evidence of Hana Rei Paku Ridell, no date at [4-9][[CB Tab 28, 201.000125]]; Brief of Evidence of Phillip Rei Paku no date at 3-40][[CB Tab 31, 20.11]]; above Brief of Evidence Ryshell Griggs at 5-41; above Second Affidavit of Haami Te Whaiti at 2-83; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [1-13][[CB Tab 41, 201.00254]]; Affidavit of Reon Hune Kerr dated July 2023 at [5-9][[CB Tab 43, 201.00261]]; Affidavit of Renee Dethirey Patel Randall dated 3 May 2023 at [1-15][[CB Tab 51, 201.00309]]; Brief of Evidence of Faye Pane Pirere no date at 1-6;[[CB Tab 55, 201.00341]]; above Watene at 1-5; Affidavit of George Matthews dated 26 April 2023 at [1-8][[CB Tab 68, 201.00410]]; Affidavit of Dr Takirirangi Clarence Smith dated 23 May 2023 at [75-108][[CB Tab 70, 201.00422]]; and Affidavit of Ta Robert Kinsela Workman KNZM QSO dated 18 May 2023 at [24-29][[CB Tab 72, 201.00461]].

[162] See above, Potangaroa at 11-12; above Te Tau at 5.6; above Crisp at 19-56; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [8-24][[CB Tab 25, 201.00104]]; above Rolls at 8-40; above Patrick Mason at 6-38; above Second Affidavit of Haami Te Whaiti at 86-163; Affidavit of Reon Hune Kerr dated July 2023 at [19-25][[CB Tab 43, 201.00261]]; above Ihaia Puketapu at 1-8; above Tomoana at 13-21; above Randall at 10-23; above McKinley at 9-30; above Faye Pane Pirere at 3-23; Brief of Evidence of Jasmine Trixie Kahira Watson no date at [1-33][[CB Tab 56, 201.00347]]; above Watene at 6-79; above Dr Smith at 1-170; Affidavit of Murray Allan Hemi dated 24 May 2023 at [1-34][[CB Tab 73, 201.00505]]; above Te Tau at 7.0-8.4; above Crisp at 6.0-7.0; above Gary Griggs at 61-70; above Rolls at 8-40; ; above Patrick Mason at 6-38; above Phillip Rei Paku at 5-40; above Second Affidavit of Haami Te Whaiti at 86-163; above McKinley at 9-30; Reply Affidavit of Matin Maioha Diamond Toria McKinley dated 6 July 2023 at [1-2][[CB Tab 61, 201.00383]]; Rely Brief of Evidence of Kahura James Watene no date at [1-17][[CB Tab 63, 201.00390]]; and above Matthews at 1-48.

[163] See Above, Potangaroa at 12, 16; above, Crisp para 19-56; above Kawana at 4.10-4.12; above Te Tau at 5.10 and Te Tau 1.05.2; above Crisp at 6.17; above Reiri-Mangai at 3.3-6.3; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [25-32][[CB Tab 25, 201.00104]]; above Gary Griggs at [64-70]; above Jamie Griggs at [7-23]; above Hana Ridell at 73-79; above Rolls at 39-40; above Phillip Rei Paku at 29-34; above, Second Affidavit of Haami Te Whaiti at 115-163; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [14-20][[CB Tab 41, 201.00254]]; above Reon Kerr at 21-26; above Tomoana at 19; above Randall at 21-22; above McKinley at 28-30; above Watson at 27-33; above Watene at 64-79; above Davidson at 21-24; and above Mathews at 36-48.

[164] See above Watson at 22-23; above Richard Pirere at 13; and above Dr Smith at 48.

[165] For claimant evidence, see Affidavit of Robin Te Huna Potangaroa dated March 2017 at 4 [[CB Tab 16 at 201.0001]; Brief of Evidence of Hana Rei Paku Ridell, no date at [71][[CB Tab 28, 201.000125]]; Brief of Evidence of Langdale Ohorere Puhara Rolls no date at [37][[CB Tab 29, 201.00143]; Brief of Evidence of Patrick Bruce Mason no date at [37-38][[CB Tab 30, 201.00152]]; Second Affidavit of Haami Te Whaiti dated 14 February 2023 at [113-117, 126-129][[CB Tab 38, 201.00198]]; Affidavit of Hawea Tomoana dated 3 May 2023 at 17][[CB Tab 50, 201.00302]]; Affidavit of Martin Maioha Diamond Toria McKinley dated 19

f. Identified taniwha [guardians] residing in the takutai moana;[166]
g. Is celebrated or referred to in waiata [songs];[167]
h. Is celebrated or referred to in whakatauki [proverbs];[168]
i. The takutai moana was relied on as a source of food;[169]
j. A source of textiles or other materials;[170]
k. For travel or trade;[171] and
l. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to 'some, if not all of the takutai moana area.[172]"

Section F: Concluding Comments

160) The witness evidence throughout the hearing readily and easily established and supported over the Wairarapa Moana takutai moana area the tikanga Māori and local tikanga Wairarapa Moana values and concepts of:

a. Wairuatanga - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;
b. Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including all of the Wairarapa Moana claimants' groups to each other and the takutai moana claimant area;
c. Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;

January 202 at 1-8, 17-18][[CB Tab 54, 201.00323]]; Brief of Evidence of Kahura James Watene no date at [48-53][[CB Tab 57, 201.00355]]; Brief of Evidence of Peter Thomas Junior Davidson no date at [14-20][[CB Tab 58, 201.00371]]; and Rely Brief of Evidence of Richard Pirere no date at [13][[CB Tab 65, 201.00400]].

[166] Refer to above Phillip Paku at 20; above Kahura Watene at 48-50; and above Peter Davidson at 21-22.

[167] See above Kahura Watene at 2.0, above Matthews at 4.0; and Dr Takirirangi Smith at 10-11.

[168] Refer to above Kahura Watene at 2; and Dr Takirirangi Smith at 1-70.

[169] Refer to above, Potangaroa at 12, 16; above, Crisp para 19-56; above Kawana at 4.10-4.12; above Te Tau at 5.10 and Te Tau 1.05.2; above Crisp at 6.17; above Reiri-Mangai at 3.3-6.3; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [25-32][[CB Tab 25, 201.00104]]; above Gary Griggs at [64-70]; above Jamie Griggs at [7-23]; above Hana Ridell at 73-79; above Rolls at 39-40; above Phillip Rei Paku at 29-34; above, Second Affidavit of Haami Te Whaiti at 115-163; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [14-20][[CB Tab 41, 201.00254]]; above Reon Kerr at 21-26; above Tomoana at 19; above Randall at 21-22; above McKinley at 28-30; above Watson at 27-33; above Watene at 64-79; above Davidson at 21-24; and above Mathews at 36-48.

[170] Refer to above Gary Griggs at 59-60; above Matthews at 45; above Jamie Griggs at 18; above Kahura Watene at 39-47; above McKinley at 23-24; above Langdale Rolls at 35-36; above 2nd Affidavit Haami Te Whaiti at 150-161; above Reply Brief Te Tau at 3.0-3.54; and above Faye Pirere at 21.

[171] See above, Potangaroa at 18, 32, 33 and 43; above, Crisp at 3.0; above Kawana at 42; above Te Tau at 7.3; above Reiri-Mangai at 40; above Ryshell Griggs at 28; above 2nd Affidavit of Te Whaiti at 35-42, 143-146; above Phillip Rei Paku at 16-22; above Hana Ridell at 37, 54; and above Gary Griggs at 29-30, 56.

[172] See above, Potangaroa at 12, 16; above, Crisp at 19-56; above Kawana at 4.10-4.12; above Te Tau at 5.10 and Te Tau 1.05.2; above Crisp at 6.17; above Reiri-Mangai at 3.3-6.3; Affidavit of Ryshell Evelyn Rei Griggs dated 2 April 2017 at [25-32][[CB Tab 25, 201.00104]]; above Gary Griggs at [64-70]; above Jamie Griggs at [7-23]; above Hana Ridell at 73-79; above Rolls at 39-40; above Phillip Rei Paku at 29-34; above, Second Affidavit of Haami Te Whaiti at 115-163; Affidavit of Ross Kelvin Ward dated 17 February 2023 at [14-20][[CB Tab 41, 201.00254]]; above Reon Kerr at 21-26; above Tomoana at 19; above Randall at 21-22; above McKinley at 28-30; above Watson at 27-33; above Watene at 64-79; above Davidson at 21-24; and above Mathews at 36-48.

d. Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;
e. Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;
f. Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;
g. Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;
h. Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;
i. Hau — respect for the vital essence of a person, place or object;
j. Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;
k. Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;
l. Aroha — charity, generosity;
m. Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations including in the takutai moana claimant area.

161) The specific tikanga Māori laws and institutions that should influence the assessment of whether or not the areas in question, or any parts of it for these MACA hearings, is held in accordance with tikanga Māori includes the following indicia:

a. Whakapapa identifying a cosmological connection with the takutai moana;
b. Exercised mana or rangatiratanga over the takutai moana;
c. Exercised kaitiakitanga;
d. It has a mauri – life force;
e. Performance of rituals central to the spiritual life of the hapū and whānau;
f. Identified taniwha residing in the takutai moana;
g. Is celebrated or referred to in waiata;
h. Is celebrated or referred to in whakatauki;
i. The takutai moana was relied on as a source of food;
j. A source of textiles or other materials;
k. For travel or trade; and
l. There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to ‘some, if not all of the takutai moana area.

162) An additional useful list of tikanga questions for assisting with determining some aspects of tikanga Māori that should influence whether any takutai moana area is held in accordance with tikanga Māori includes:

a. How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand], take kite [discovery], other?

b. If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?

c. The land [and takutai moana] are actually occupied by people and kāinga are established;

d. A rohe is marked out in some way. How? Provide a map.

e. Over time urupa are established over land, tuahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.

f. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?

g. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].

h. The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.

i. The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.

j. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.

k. The new iwi is able to defend its rohe and can call on allies to help to defend the estate.

l. The new iwi is approved by the neighbours and its presence is validated by the experience.

163) It is important to also acknowledge that the above tikanga Māori indicia and tikanga Māori question lists are not exhaustive but are at least appropriate as starting points for answering what specific tikanga Māori laws and institutions should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori, as well as for assessing PCRs.

164) While tikanga Māori inevitably adapts and evolves in time and space, we need to ensure that we do not stray so far that our contemporary tikanga Māori customary institutions and practices are no longer premised on those underlying fundamental

tāhuhu –Te Ao Māori values and principles outlined earlier such as whānaungatanga, whakapapa, wairuatanga, mana, and manaakitanga.

165) Furthermore, when Māori signed the Treaty of Waitangi in 1840, rangatira (chiefs) expected the Crown to protect their rangatiratanga (chieftainship) over the taonga (valued natural resources), and that the taonga would be sustained for future generations in perpetuity. In return, Māori were prepared to share with the British, and subsequently, the New Zealand Crown thus acknowledging a respectful kawenata relationship for sharing the resources of the nation.

166) I believe Māori are still prepared to enter into respectful tikanga relationships with landowners, fishers and others where they are prepared to extend manaakitanga and whanaungatanga to share the responsibility of the sustainable well-being of the takutai moana for all New Zealanders.

167) Whatever the outcomes of the current MACA hearing, maintaining the mana of the Wairarapa Moana claimants and the integrity of tikanga Māori are imperative. As outlined throughout this report, tikanga Māori is about "doing things right, doing things the right way, and doing things for the right reasons" within a mātauranga and tikanga Māori worldview underpinned by wairuatanga and whānaungatanga relationships.

168) In conclusion and with utmost respect, it is my modest opinion that the Wairarapa Moana claimant groups to this hearing have shown that their tikanga customary laws and institutions are flourishing, vibrant and that they are still relevant, and it appears that they may have delivered on the statutory tests, inter alia, in ss. 51 and 58, Marine and Coastal Area (Takutai Moana) Act 2011, for PCRs and CMT in accordance with their contemporary tikanga.

Ko te heke mai kei runga i tēnei rā me te aha e mahia ana koutou.
The future depends on today and what you do with it.

DATED this 17th day of October 2023

Dr Robert Joseph

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APPENDIX VI – Summary of applicants and whakapapa

Ngāti Kahungunu

[1] Ngāti Kahungunu is a confederation of approximately 110 hapū descended from the eponymous tipuna, Kahungunu. Kahungunu was the son of Tamatea who commanded the Tākitimu waka.

[2] Many of the Ngāti Kahungunu hapū retain their own distinct hapū identity, and there are also close inter-relationships and overlaps between hapū (reflected in the common reference to Ngāti Kahungunu 'hapū karanga' in this region), with the result that some persons refer to or emphasise a particular hapū (rather than, or as well as, Ngāti Kahungunu as an iwi) when identifying themselves, even where they have multiple inter-connected affiliations through whakapapa.

[3] The primary Ngāti Kahungunu coastal hapū (or hapū karanga) are generally acknowledged to be Te Hika o Pāpāuma, Ngāi Tūmaphia ā Rangi and Ngāti Hinewaka. However, these and other hapū karanga groupings also embrace and/or acknowledge the coastal interests of other hapū, including for example Ngāti Moe and Ngāti Tūkoko, as the list of hapū set out in the definition of "Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua" in the trust deed of the Ngāti Kahungunu Settlement Trust reflects.

[4] Ngāti Kahungunu ki Wairarapa-Tāmaki Nui ā Rua tupuna means an individual or individuals who:

(a) exercised customary rights by virtue of being descended from Kahungunu and one or more of Hamua, Hinewaka, Kahutapere, Kaiparuparu, Kirikohatu, Mahanga, Manawatu, Moeteao, Moetekakara Nuku, Pakuia, Pouri, Raekaumoana, Rakaihikuroa through Te Rangitataia or Umuroa or a recognised ancestor of Te Uma Whanui, Rakairangi, Tapuke, Te Matau, Te Opekai, Te Rangihakahaka, Te Rangihirawea, Te Rehunga and Tuohungia, Te Hinaariki, Te Rangitawhanga, Te Whakumu, Tuhakeke, Tūkoko, Tumapuhiaarangi, Tumaiteuru, Tuohungia, Tupurupuru, Turanga,

Turaumoa, Waipuhoro and/or any other recognised ancestor of a Ngāti Kahungunu ki Wairarapa-Tāmaki Nui ā Rua hapū; and

(b) exercised those customary rights predominantly in relation to the Ngāti Kahungunu ki Wairarapa-Tāmaki Nui ā Rua area of interest at any time after 6 February 1840.

[5] Ngāti Kahungunu's mana and kaitiakitanga over their rohe, including the takutai moana, was reflected in the Coastal Marine Area Statutory Acknowledgement that was provided by the Crown and recorded in the Ngāti Kahungunu ki Wairarapa-Tāmaki nui-a-Rua Deed of Settlement. The statement of association for that coastal marine area records:[1]

> Ngāti Kahungunu trace their ancestry and connection to the coastal marine area from Tautāne to Turakirae from the earliest inhabitants through to the successive waves of Ngāti Kahungunu migrations into the district.
>
> Ngāti Kahungunu migrations into Wairaraapa and Tāmaki nui-a-Rua were generally peaceful and achieved through "tuku" whereby land was gifted by the local inhabitants in return for tangible objects such as waka. This led to local inhabitants migrating whilst others remained and intermarriage ensued with protection given by the migrants. On occasion where there was resistance to Ngāti Kahungunu overtures, our ancestors simply took the land, describing this in the Native Land Court as giving the land "mana".
>
> The three Ngāti Kahungunu hapū karanga synonymous with the coastal marine area are:
>
> 1. Te Hika o Pāpāuma;
> 2. Ngāi Tūmapūhia-ā-Rangi; and
> 3. Ngāti Hinewaka.
>
> These hapū were and continue to be seen today as tuturu hapū of Ngāti Kahungunu.
>
> On the arrival of the sacred waka "Tākitimu" to Rangiwhakaoma (Castlepoint), there alighted one of the most famed tohunga on the waka, none other than Tūpai, who when he set up his whare wananga taught Rongokako, the son of Tamatea Arikinui, the rangatira of Tākitimu.
>
> The district of Wairarapa ki Tāmaki nui-a-Rua in the 19th Century was known as "Te Rohe o Rongokako", an acknowledgement of our Ngāti Kahungunu whakapapa and history.

---

[1] Ngāti Kahungunu ki Wairarapa-Tāmaki-nui-a-Rua Deed of Settlement, Schedule: Documents, Part 2, Statements of Association, at 5–6.

> Ngāti Kahungunu occupied numerous pā and kāinga along the length of the coastal marine area from Tautane (where the headstone of a celebrated Ngāti Kahungunu chief is) to Turakirae which following the inter-iwi wars in the late 1830's became the south Western boundary for Ngāti Kahungunu.
>
> Ngāti Kahungunu's interests along the coastal marine area are through traditional rights of whakapapa and occupation as descendants of Ngāti Kahungunu.
>
> Ngāti Kahungunu are the kaitiaki for urupā all along the coastal marine area, some of which are in continued use today.
>
> …

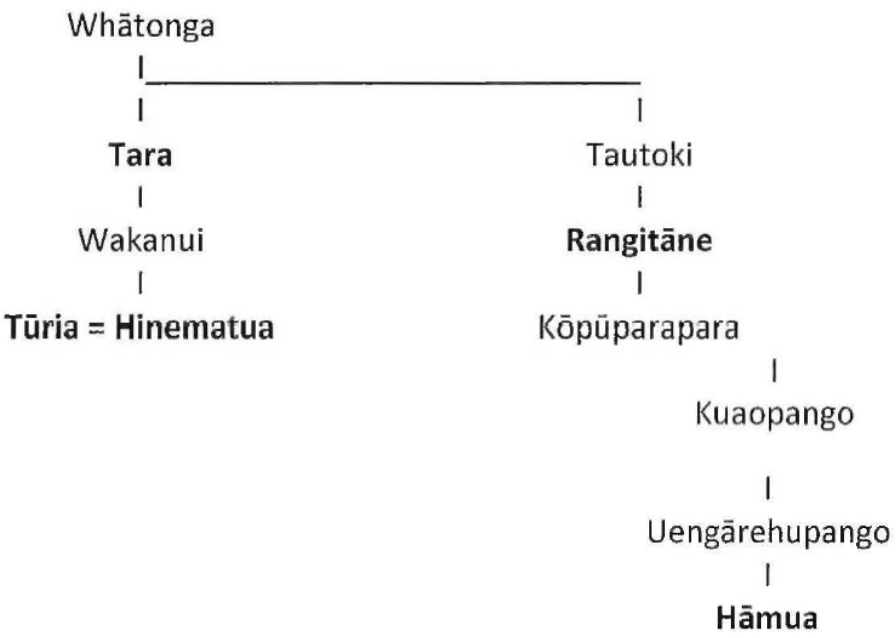
Rangitāne

[6] Rangitāne trace their connection to the coastal marine area from Te Aho a Maui (Cape Turnagain) to Tūrakirae back to the earliest Māori ancestors. The archaeological sites of early Māori coastal settlement, such as those in Palliser Bay, date from the period of Rangitāne occupation. Traditionally, Rangitāne maintained their ancestral relationship with the coastal area for at least 28 generations through migrations to seasonal fishing camps, and knowledge of ancestral relationships and usage rights.

[7] Rangitāne's story commences with the arrival of the Kurahaupō waka at Nukutaurua on the Mahia Penninsula. This waka carried three principal rangatira, including Rangitāne's tipuna, Whātonga (who was closely related to Kupe).

[8] Whātonga settled for a period at Nukutaurua before moving south towards Heretaunga. When Whātonga finally left Heretaunga he travelled south towards Tāmaki nui-ā-Rua, eventually settling in the Manawatū and Wairarapa regions.

[9] On his arrival in Manawatū, Whātonga married his second wife, Reretua. This marriage produced his second son, Tautoki. Tautoki eventually married Te Waipuna and gave birth to the eponymous ancestor, Rangitāne.



[10] Within the Wairarapa Marine and Coastal Area, Turia and Hinematua were important ancestors. The descendants of this union were known as Ngāti Hinematua and were clearly and consistently recognised as belonging to Rangitane.

> Tumapuhia ... came from Heretaunga originally to his hapu, the Ngāti Hinematua, on the Rangitane side.[2]
>
> The statement is correct that Tumapuhia's descent [was] from Hinematua and Rangitane and that is how he gained the land ... Tukoroua was the paramount owner. He was descended from Ngataierua, the son of Hinematua of Rangitane.[3]
>
> My hapu is Ngaitumapuhia ... I derive my right through Tumapuhia. My take is ancestral occupation . Tumapuhia is my ancestor. The 'take' is descended from Tukoroua. He belonged to Ngatihinematua. Hinematua was the original owner of the land).[4]
>
> I can state the nature of my claims. They are ancestral and occupation. Have occupied permanently. My ancestral claim is from Hinematua.[5]

[11] Ngāti Hinematua people maintained mana whenua and mana moana over the Wairarapa Marine and Coastal Area over several generations.

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2 Tamati Te Apatu in Te Maipi Maori Land Court Hearing 1888; 8 Wairarapa MB 493 (8 WAI 493).
3 Tamati Te Apatu in Te Maipi Maori Land Court Hearing 1888, 9 Wairarapa MB 18-20 (9 WAI 18-20).
4 Taiawhio Te Tau in Te Mai pi Maori Land Court Hearing, 1888; 9 Wairarapa MB 49 (9 WAI 49).
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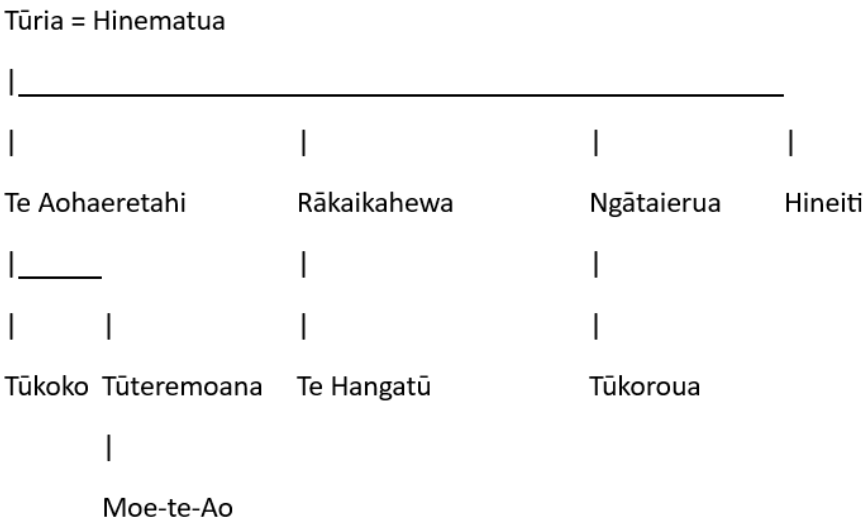

[12] These Tīpuna of Ngāti Hinematua played critical roles in the various tuku whenua to incoming groups. They and their descendants intermarried with the newcomers to create the range of interests along the Wairarapa Coast.

Relationship between Rangitāne o Wairarapa and Rangitāne o Tāmaki nui-ā-Rua

[13] For Rangitāne o Wairarapa, the close relationship with Rangitāne o Tāmaki nui-ā-Rua stems from the tipuna Te Rangiwhaka-ewa who is a direct descendant of the eponymous ancestor, Rangitāne, and of the principal Rangitāne ancestor of the Wairarapa, Hāmua. Hāmua is also a direct descendant of Rangitāne.

[14] As noted in Rangitāne's Deed of Settlement of their historical Treaty of Waitangi claims, Ngāti Hāmua is the matua hapū for Rangitāne. The eminent historian Dr Angela Ballara has noted "every time Hāmua's genealogy was traced in the Land Court, it was given from Rangitāne. In no cases was it traced from… any other ancestral line."[6]

[15] The descendants of Te Rangiwhaka-ewa's children, Parikoau and Tamahau, became important tīpuna for both Rangitāne o Wairarapa and Rangitāne o Tāmaki nui-ā-Rua. They are connected through Hāmua and Te Rangiwhaka-ewa.

Ngā Tūmapūhia-ā-Rangi hapū

[16] Ngā Uri ō Tūmapūhia ā Rangi hapū is a hapū of Ngāti Kahungunu and of Rangitāne.

[17] Ngāi Tūmapūhia's ancestors arrived in Aotearoa aboard the Kurahaupō and Takitimu waka. The hapū derives its customary rights in their traditional rohe from Hinematua who, during the 19th century Wairarapa Native Land Court title investigation hearings, was described by nearly all hapū as the "original owner of the land". It is said that most hapū in the Wairarapa region descend from Hinematua.

[18] Hinematua married Tūria, the great-great-great-great grandson of Kupe. Their offspring are the founding ancestors of the hapū of Wairarapa. Ngāi Tūmapūhia are one such hapū.

[19] Tūmapūhia-ā-Rangi, the eponymous ancestor of Ngāi Tūmapūhia a Rangi, was born in Waimarama, which is situated just south of Te Kauwae-a-Māūi (Cape Kidnappers) ("Tūmapūhia"). Tūmapūhia descended from Kahungunu and was related to many prominent rangatira of his time. He also descended from Rakaimoari and Te Ao Haeretahi; the former being a mokopuna of the Ngāti Kahungunu chief, Rakaihaikuroa, and the latter being a mokopuna of Hinematua and Tūria:

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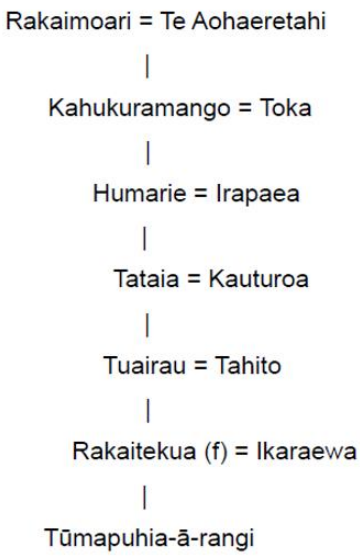
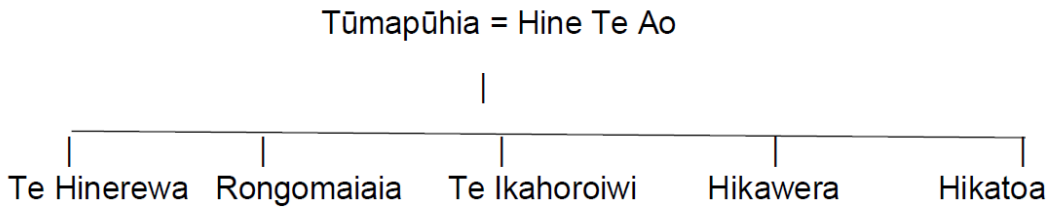
6 Heather Angela Ballara, "The Origins of Ngāti Kahungunu" (PhD Thesis in History, Victoria University of Wellington, 1991) at 160.



[20] The offspring of Tūmapuhia and Hine te Ao are set out below:



[21] Ngāi Tūmapuhia hapū trace their whakapapa to the ancestor Tūmapuhia.

Ngāti Hinewaka

[22] Ngāti Hinewaka me Ōna Hapū Karanga refers to all persons who whakapapa to any of:

(a) Ngāti Hinewaka

(b) Ngāti Rangaranga

(c) Ngāti Rongomaiaia

(d) Ngāti Te Kawekairangi

(e) Ngāti Pārera

(f) Ngāti Te Aokino

(g) Ngāi Te Ao

(h) Ngāti Maahu

(i) Ngāti Hikarara

(j) Ngāti Hikawera

(k) Ngāti Kahukuranui

(l) Ngāti Ngāpuoterangi

(m) Ngāti Hinetauira

(n) Ngāi Tuohungia

(o) Ngāti Rua

(p) Ngāti Rākaiwhakairi

(q) Ngāti Rākairangi

(r) Ngāi Tūkōkō

[23] In the Wairarapa the two prominent iwi are Ngāti Kahungunu and Rangitāne. The whakapapa of the Wairarapa hapū overlap in many respects, and many hapū can claim association with both iwi. Ngāti Hinewaka me Ōna Hapū Karanga is made up of hapū who in the main identify with Ngāti Kahungunu.

[24] This is reflected in the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act, Statutory Acknowledgment for the Coastal Marine area, states:

> Ngāti Kahungunu trace their ancestry and connection to the coastal marine area from Tautane to Turakirae from the earliest inhabitants through to the successive waves of Ngāti Kahungunu migrations into the district.
>
> Ngāti Kahungunu migrations into Wairaraapa and Tamaki nui-a-Rua were generally peaceful and achieved through "tuku" whereby land was gifted by the local inhabitants in return for tangible objects such as waka. This led to local inhabitants migrating whilst others remained and intermarriage ensued with protection given by the migrants. On occasion where there was resistance to Ngāti Kahungunu overtures, our ancestors simply took the land, describing this in the Native Land Court as giving the land "mana".
>
> The three Ngāti Kahungunu hapū karanga synonymous with the coastal marine area are:
>
> 1. Te Hika o Papauma;
>
> 2. Ngai Tūmapūhia-a-Rangi; and
>
> 3. Ngāti Hinewaka.
>
> These hapū were and continue to be seen today as tuturu hapū of Ngāti Kahungunu.
>
> On the arrival of the sacred waka "Takitimu" to Rangiwhakaoma (Castlepoint), there alighted one of the most famed tohunga on the waka, none other than Tūpai, who when he set up his whare wananga taught Rongokako, the son of Tamatea Arikinui, the rangatira of Takitimu.
>
> The district of Wairarapa ki Tamaki nui-a-Rua in the 19th Century was known as "Te Rohe o Rongokako", an acknowledgement of our Ngāti Kahungunu whakapapa and history.
>
> Ngāti Kahungunu occupied numerous pa and kainga along the length of the coastal marine area from Tautane (where the headstone of a celebrated Ngāti Kahungunu chief is) to Turakirae which following the inter-iwi wars in the late 1830's became the south Western boundary for Ngāti Kahungunu. Ngāti Kahungunu's interests along the coastal marine area are through traditional rights of whakapapa and occupation as descendants of Ngāti Kahungunu.
>
> ...

[25] The phrase “Me Ōna Hapū Karanga” means related or associated hapū in addition to Ngāti Hinewaka, that also have their own distinct hapū identities. Ngāti Hinewaka me Ōna Hapū Karanga hapū can be grouped according to the closeness of association through whakapapa and their shared lands.

[26] Ngāti Maahu, Ngāti Te Kawekairangi, Ngāti Rongomaiaia, Ngāti Parera, Ngāi Te Ao and Ngāti Te Aokino occupied the lands from Te Unuunu to Te Awaiti.

[27] Ngāti Rangaranga occupied lands with Ngāti Hinewaka around Te Oroi. Rangaranga was a sister of Hinewaka's husband Tamaitohikura.

[28] Ngāti Rakaiwhakairi, Ngāi Tūkoko, Ngāti Rakairangi, Ngāti Ngapuoterangi and Ngāti Rua occupied the lands around Turanganui and also Wairarapa Moana.

[29] Hinewaka originally came from Heretaunga to Awhea. Mōkaiwhenua kore and Mōkai Waipawa of Ngāitaumata were living there and gave the land from Te Wahapouri to Oroi to Hinewaka. Hinewaka and her people occupied the pā at Te Maire.

[30] A second tuku was made by Hikapuku as he was leaving for the South Island to Hinewaka "E hine e tēnei ānō te whenua me ngā tāngata" giving her the rest of his land from Opouawe to Te Tawhiti (site of the Cape Palliser lighthouse) near Matakitaki. Hikapuku was a descendant of Kahungunu and Te Aomatarahi and also was descended from Hineterangi.

[31] Hinewaka's fourth child, Te Upoko, married Te Whakatakahia, the great grandson of Te Rangitāwhanga (son of Hinetauira and Rākaiwerohia). Their granddaughter Te Puhinahina, a child of Te Akituoterangi, married Te Aopakurangi, who belonged to Ngāti Hakeke and Ngai Tamanuhiri and lived at Te Kawakawa. The couple were arguing about his adultery when Te Aopakurangi struck Te Puhinahina with his fist to the back of her neck, which killed her. When word of Te Puhinahina's death reached her father, Te Akituoterangi, he was at Te Whanganui a Tara and sent word to others of Ngāti Hinewaka, Te Kohai and Pahura, to seek retribution for the death of their sister. A taua was put together which also consisted of Te Hikaopapauma, Ngai Tumapuhiaarangi and Ngāti Rongomaiaia. These coastal hapū are closely related and consistently supported one another during times of warfare.

[32] The place where the taua attacked Te Aopakurangi's people became known as Waiwhero because of the stream flowing red with blood. Hinewaka's brother, Pakiua, is credited with this success. Then, by deception, Horewai pa at Te Kopi was also taken. Thus, having been defeated in battle, land is given over to the victors, a practice

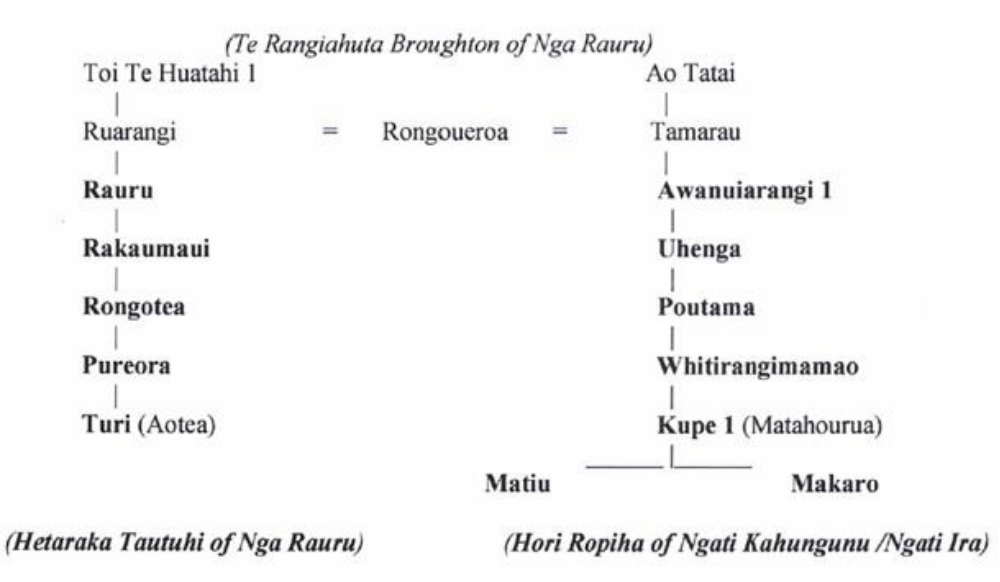
which is embodied in the expression ‘Mate tangata, riro whenua’ and as retribution for the death of Te Puhinahina.

[33] Hinewaka and her husband Tamaitohikura share several ancestors of Ngai Tara, Rangitāne, Ngāti Ira and Ngāti Kahungunu iwi whose descendants have occupied the Wairarapa coastal and wider east coast regions for many hundreds of years.

Te Ātiawa

[34] Te Ātiawa ki te Upoko o te Ika a Māui Pōtiki are part of the “Awa” people. They whakapapa with Te Ātiawa in Taranaki and Ngāti Awa in the Bay of Plenty among other Te Ātiawa groups with the eponymous tīpuna Rauru and Te Awanuiarangi.

[35] Te Ātiawa whakapapa and their respective relationship derives its customary rights in their traditional rohe consists of both the east and west coast to the earliest known tīpuna associated with the head of the fish – Kupe.



[36] Te Ātiawa’s claim extends from the traditional land boundary markers that begin at the northern lateral boundary extending from Pipinui Point in the east, with a right line following a seaward boundary continuing along the outer limits of the

territorial sea. The eastern lateral boundary is a right line landward to Mukamukaiti, thereto Windy Point.

[37] More specifically, and as espoused by the peace agreement between Te Ātiawa and the Wairarapa tribes – then led by Tutepakihirangi (the successor to Nukupewapewa) – established the Remutaka and Tararua ranges as the boundary line between Wairarapa tribes to the east, and Te Ātiawa to the west which form the basis relevant to the application of Te Ātiawa to customary interests in the coastal area from Tūrakirae to Mukamukaiti.

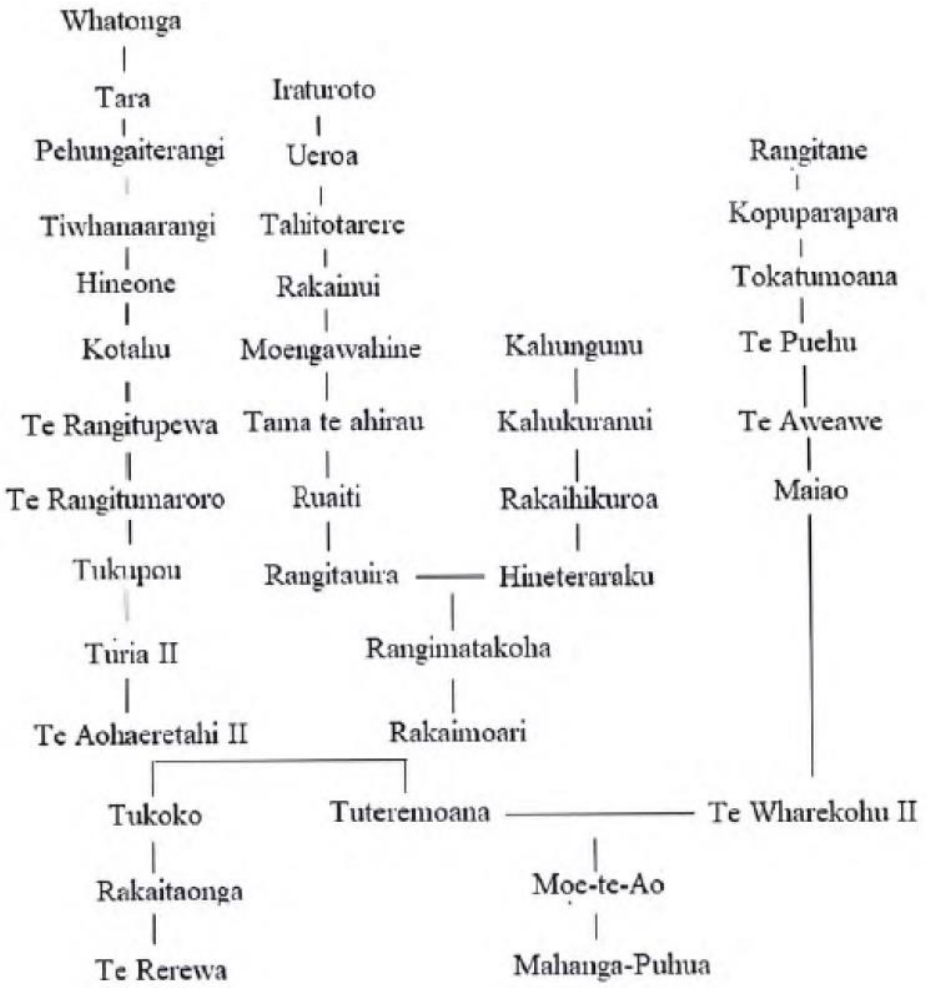
> Live, all of you, on this side of the boundary mountains – you on this side, I on the other. I will call those mountains our shoulders; the streams that fall down on this side are for you to drink; on the other side for us.

[38] The peace made use of the facts of Te Wharepouri and Te Puni's land sales to demarcate their lands. Further sequences of arranged marriages, together with the exchange of gifts and the release of prisoners, cemented the peace in the traditional custom.

Ngāi Tūkoko and Ngāti Moe

Ngāi Tūkoko

[39] Tūkoko, the eponymous ancestor of Ngāi Tūkoko, descended from Whātonga, Iratūroto, Kahungunu and Rangitāne, as shown in the whakapapa below:



[40] Ngāi Tūkoko and Ngāti Moe are hapū of Ngāti Kahungunu. Ngāi Tūkoko is principally from the Tuhirangi-Pirinoa area, while Ngāti Moe is from the Papawai-Greytown area.

Ngāti Moe

[41] Ngāti Moe and their eponymous ancestor Moe Te Ao trace their descent from Whātonga, Iratūroto, Kahungunu, and Rangitāne. Tūkoko was Moe Te Ao's uncle. Her father, Tūteremoana, was Tūkoko's brother. Moe Te Ao married Whakahirangi to seal a peace agreement between Tūteremoana's people, Taraia and Te Aomatarahi.

Moe Te Ao's twins from this marriage, Mahangatīkaro and Mahangapuhia, became significant tīpuna for the hapū.

[42] Ngati Moe trace their whakapapa to their tīpuna Moe Te Ao and to the banks of the Ruamahanga River:

Descendants from **Moe Te Ao (1st W) = Te Whakaihirangi**		
Mahanga Tikaro		**Mahanga Puhua = Ruhi**
Tumaiteuru	=	Aoteki
Hiatangata 1st	=	Rangitumomotu
Muretu	=	Puruaute
Hitangata 2nd	=	Unknown
Te Whatahoronui 1st	=	Aromea
Te Aitu O Te Rangi 1st	=	J M Jury
J A Te whatahoro Jury 2nd	=	Pane Ihaka Te Moe Whatarau
Huhana Te Aitu O Te Rangi 2nd	=	Mataroa Hamuera
Emere Te Piki Hamuera 1st	=	Renata Matua Pirere
Ihaia Whakamairu Pirere	=	Pane Pancy Pirere
Eliabeth lily Te Piki Pirere	=	Kahura Watene

[43] Moe Te Ao married Te Whakaihirangi of Ngāti Ira to bring peace between the two tribes. She gave birth to her twin boys along the riverbank of the Ruamahanga which starts from the maunga Tararua and flows through the rohe on the east side of the Wairarapa townships, into the lake, and then out to sea. The birth of her son, Mahanga Tikaro, was difficult so she was taken to a sacred place called Toko a Hinemoko, near Pāpāwai. A karakia was performed over Moe Te Ao because of the difficult birth. Moe Te Ao was then moved to Te Awakairangi and gave birth to Mahanga Puhua there. Moe Te Ao was later beheaded by a Rangitāne taua (war party). Tikaro's daughter, Tumaiteuru and Puhua's son, Aoteki, married and gave birth to Hiatangata (I).

[44] Hiatangata (II), Tumaiteuru's great-granddaughter, gave birth to Te Whatahoronui. Te Whatahoronui married Aromea and they lived together in Waka a Pāua, near Martinborough. Aromea's brother, Nuku Pewa Pewa, was Ngāti Kahungunu's war chief.

[45] Te Whatahoronui's daughter, Te Aitu o Te Rangi (I), was an important tīpuna for Ngāti Moe. Ngāti Moe had to defend its mana whenua when, in the early 1800s, a Ngāti Toa taua invaded the South Wairarapa. Te Aitu o Te Rangi was captured by Ngāti Toa and taken to Kapiti Island. After her release, she married John M Jury. On her return to Waka a Pāua, she discovered the greenstone Hoe called Kauorarangi, which was hidden at the base of a tree where she grew up. She believed that discovering this meant that the land belonged to her and so she claimed it.

[46] Te Aitu o Te Rangi and John M Jury had a son named John Alfred Te Whatahoro Jury. He was another important tīpuna of Ngāti Moe. Te Aitu o Te Rangi and John M Jury built their home at Ngaki a Totara on the island called Te Ureta (Jury's Island). John Alfred Te Whatahoro Jury was a Ngati Kahungunu scholar, recorder, and interpreter. He was known for his roles as chairperson of the Māori Parliament in 1892 and as a tohunga.

Interconnected whakapapa

[47] The whakapapa of Ngāi Tūkoko and Ngāti Moe affirms the inter-hapū and intra-hapū connections. As noted above, Tūkoko and Moe Te Ao were uncle and niece respectively. Through their descent from the ancestors Whātonga, Iratūroto, Kahungunu and Rangitāne, Ngāi Tūkoko and Ngāti Moe connect to the other hapū of Palliser Bay.