IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-404-481
CIV-2017-485-193
CIV-2017-485-220
CIV-2017-485-221
CIV-2017-485-224
CIV-2017-485-226
CIV-2017-485-232
Group M, Stage 1(b)
[2025] NZHC 1523

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application for orders recognising Customary Marine Title and Protected Customary Rights
	(Continued)

Hearing Date: On the papers

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R Siciliano, C Mataira, K Katipo and T Prendiville-Stowers for Rangitāne o Wairarapa and Rangitāne Tāmaki nui-ā-Rua
D Naden, M Sreen, H Fletcher, A Crawford and C-R Smith for the Pirere whānau and for Ngā Uri o Ngāi Tūmapūhia-ā-Rangi hapū
B Lyall and H Swedlund for Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Inc and Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Inc
B Scott and R Wales for the Seafood Industry Representatives
J Prebble, D Kleinsman and F Hussain for the Attorney-General

Judgment: 11 June 2025

FINAL JUDGMENT OF GWYN J
[Applying Supreme Court decision]

BY	George Ngatiamu Matthews, on behalf of Te Hika o Pāpāuma Mandated Iwi Authority (CIV-2017-404-481)
	Ngāti Kere MACA Working Party, on behalf of Ngāti Kere Hapū (CIV-2017-485-193)
	Trustees of Pāpāuma Marae (CIV-2017-485-220)
	Trustees of Ngāti Kahungunu Ki Wairarapa Tamaki-Nui-A-Rua Settlement Trust, on behalf of Ngāti Kahungunu ki Wairarapa Tamaki-nui-a-Rua (CIV-2017-485-221)
	Trustees of Rangitāne Tū Mai Rā Trust, on behalf of Rangitāne o Wairarapa and Rangitāne Tamaki nui-ā-Rua CIV-2017-485-224)
	Rebecca Harper, on behalf of Pirere whānau (CIV-2017-485-226)
	Ngāi Tūmapūhia-a-Rangi hapū Incorporated on behalf of Ngā Uri o Ngāi Tūmapūhia-ā-Rangi hapū (CIV-2017-485-232)
INTERESTED PARTIES	Sue Taylor, on behalf of Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Incorporated
	Sam Morris, on behalf of Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Incorporated
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	Attorney-General
	Central Hawkes' Bay District Council

Manawatū-Whanganui District Council

Greater Wellington Regional Council

Hawkes' Bay Regional Council

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Introduction

[1] On 10 December 2024, I issued an interim judgment in this proceeding.[1]

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[1] *Re Te Hika o Pāpāuma Mandated Iwi Authority* [2024] NZHC 3745 [Interim Judgment].

[2] The Interim Judgment made findings on the applicants' applications for orders recognising Customary Marine Title (CMT) under the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act).

[3] The Interim Judgment was "interim" because it discussed and applied the Court of Appeal decision in *Whakatōhea Kotahitanga Waka (Edwards)*[2] and was substantially completed before the Supreme Court decision in that matter was released.[3] It did not take into account the findings of the Supreme Court decision.[4]

[4] On that basis I directed the parties to make legal submissions on the effect (if any) of the Supreme Court decision on the legal analysis and resulting findings in the Interim Judgment, with a view to issuing a final judgment.

[5] I have now received those submissions. By agreement of the parties, I have considered their submissions, and arrived at this final judgment, on the papers.

[6] As discussed below, the Supreme Court decision focuses on the meaning of s 58 of the Takutai Moana Act, which contains the test that must be met to obtain an award of CMT.[5]

[7] As I noted in the Interim Judgment,[6] I do not intend to revisit my factual findings, but rather to consider whether the application of the law, as it is now set out in the Supreme Court decision, to those facts results in any different findings on the applicants' applications for CMT.

[8] I do not propose to repeat in full the evidence as set out in the Interim Judgment. For that reason, this judgment must be read together with the Interim Judgment.

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2 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [Court of Appeal decision].

3 *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka* [2024] NZSC 164 [Supreme Court decision].

4 Interim Judgment, above n 1, at [658]–[659].

5 Supreme Court decision, above n 3, at [5].

6 Interim Judgment, above n 1, at [659].

[9] The Supreme Court did not directly address "shared exclusivity", the application of s 58 to navigable rivers, protection of wāhi tapu and wāhi tapu areas,[7] the mandate of applicant groups and procedural questions. In so far as the Interim Judgment deals with those issues, it remains unchanged.

[10] The Interim Judgment also did not address the applications for protected customary rights made by the applicants under Part 3 Subpart 2 of the Takutai Moana Act. Those applications will be addressed in a judgment to follow.

Supreme Court decision

[11] As the Supreme Court decision records, its focus is on issues of general import regarding CMTs, and whether the majority decision of the Court of Appeal was correct in its analysis and interpretation of s 58 of the Takutai Moana Act.[8]

[12] The first point to note about the Supreme Court decision is that it is a unanimous decision of five judges. That is in contrast to the Court of Appeal judgment which set out two different approaches to aspects of the s 58 test for CMT.

New Zealand, Australian and Canadian jurisprudence

[13] The Supreme Court discussed the Court of Appeal decision in *Ngāti Apa*[9] and the key Australian and Canadian aboriginal title authorities referred to in that case. It characterises the Court of Appeal as saying that those decisions of the Australian High Court and the Canadian Supreme Court:[10]

> …demonstrated the common law's continuing recognition of customary rights, and suggested New Zealand courts too should not lightly interpret statutory language as excluding such recognition.

[14] The Supreme Court noted that the tests for Aboriginal rights set out in the Canadian and Australian authorities are relevant because s 58 of the Takutai Moana Act 'adopts' language from them, even allowing for differences in the

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7 Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act], ss 78 and 79.
8 Supreme Court decision, above n 3, at [5].
9 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
10 Supreme Court judgment, above n 3, at [9]; citing *Ngāti Apa* at [31] and [87] per Elias CJ and [148] per Keith and Anderson JJ.

New Zealand situation occasioned by the establishment of a Native Land Court 130 years before those nations.

[15] The Supreme Court decision also traverses the application by the Native Land Court of the New Zealand Settlements Act 1863 and the Native Lands Act 1865.

[16] To complete its historical inquiry, the Court looked at the origins and later repeal of the Foreshore and Seabed Act 2004 (FSA).

Reconciliation

[17] The first departure from the approach of the Court of Appeal majority is the Supreme Court's general approach to interpretation and its approach to s 58 in particular. The Court emphasised that the text and legislative purpose of the Takutai Moana Act make clear its purpose to recognise and reconcile competing interests in the marine and coastal area.

[18] Early in the judgment, the Court recorded:[11]

> It can be no surprise that tensions persist between rights and expectations under the prior Māori customary legal order and those under the (relatively) new state legal order. Nor is it surprising that writing modern laws for their reconciliation, and applying them to particular cases, has proved difficult and controversial. This has also been the experience in cognate jurisdictions such as Canada and Australia.

[19] As the Court noted in discussing the history of the legislation:[12]

> The theme of reconciliation was reiterated in the Ministerial Review Panel's report, referred to in the Preamble of [the Act]. The Panel advised that a Treaty-based approach meant "it [was] time to expect that both cultural views should be recognised in law and to the extent practical, reconciled". The Panel recognised that such reconciliation could be challenging in light of the "two strikingly different views about property and access". The question was not "whose law should prevail" rather "whether both laws [could] be accommodated in a bicultural legal regime.

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11 At [4].

12 At [74]; footnotes omitted.

[20] The Court emphasised the significance of the Preamble and the Purpose of the Act, noting that the thread of reconciling rights and interests "is key to understanding how Parliament intended the Act to work".[13] The term reconciliation is used more than 40 times in the judgment and an appendix is attached entitled "Table summarising reconciliation in the statutory scheme".

[21] The reconciliation approach applies both to interpretation of the Takutai Moana Act at a general level, through "conflict-minimising rules applicable to the entire marine and coastal area", and on a case-by-case basis in relation to resolution of fact-specific tensions.[14]

[22] Significantly, as the Supreme Court decision recognises, the Takutai Moana Act process of reconciliation "covers the entire field". Section 98 provides that the only avenue for customary rights and interests to be recognised in the marine and coastal area is by application (or negotiation with the Crown) under the Takutai Moana Act. The jurisdiction of the High Court to hear and determine "any aboriginal rights claim" is replaced fully by the jurisdiction of this Court under the Takutai Moana Act.[15] That highlights the significance of a refusal of an application for CMT under s 58 of the Takutai Moana Act.

Baseline premises

[23] While the Court noted that its focus was primarily on the "machinery" relating to CMT claims, it recorded that the machinery, and reconciliation of the potentially conflicting rights and interests, depends for its efficacy on the Act's baseline premises.[16] The text of s 58 is interpreted in light of the Act's purpose and context and of those premises.

[24] The four "baseline premises" on which the Act is built are:

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13 At [79] and [102]–[103].
14 At [104].
15 At [114]; and Takutai Moana Act, s 98(4).
16 At [105].

(a) the removal of legal and beneficial Crown ownership as previously vested by s 4(a) of the FSA;[17]

(b) the revival of customary interests.[18] Section 6 of the Takutai Moana Act restores the customary interests extinguished by the FSA and says they are to be given legal expression in accordance with the Takutai Moana Act;

(c) the protection of vested property rights and expressly authorised activities in the common marine and coastal area, according to their own terms.[19] Some vested property rights are protected through the definition of the "common marine and coastal area".[20] Other rights are protected through specific provisions, such as s 18 (rights of owners of structures), s 20 (pre-Takutai Moana Act resource consents) and s 21 (certain other proprietary interests);

(d) the guarantee of public rights of access to, and navigation and fishing in, the marine and coastal area, including within CMT areas (subject only to wāhi tapu exclusions under ss 78–79).[21]

[25] On reconciliation, the Supreme Court concluded:[22]

> …it is implicit in [the Act] that the precedence of private rights will be strictly to the extent of the conflict and no more. Given the centrality of reconciliation in this statute and the importance of all the rights and interests concerned (and particularly prior Treaty rights), the courts will be slow to conclude that one set of important rights will override another—and, when that cannot be avoided, they will allow such override only to the extent necessary.

Section 58

[26] Section 58 is the machinery by which the courts can resolve fact-specific tensions arising on CMT applications.[23]

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17 At [106]. See Takutai Moana Act, s 11.
18 At [107].
19 At [108].
20 Takutai Moana Act, s 9(1).
21 Supreme Court decision, above n 3, at [109].
22 At [113].
23 At [216].

[27] Section 58 provides:

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; 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).

(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—

(i) between or among members of the applicant group; or

(ii) to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and

(b) the transfer was in accordance with tikanga; and

(c) the group or members of the group making the transfer—

(i) held the specified area in accordance with tikanga; and

(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) held the specified area in accordance with tikanga; and

(ii) exclusively used and occupied the specified area from the time of the 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.

[28] Before considering the Supreme Court's analysis of each of the elements of s 58, it is important to emphasise the Court's observation that the elements of the s 58 test are "not just interconnected, but overlapping. As will be seen they sometimes express the same idea but from a different perspective".[24]

[29] Section 58 must be read in light of s 106.[25] Section 106 distributes the burden of proof between applicants and contradictors in CMT applications. Subsection (2) provides:

> (2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area—
>
> (a) is held in accordance with tikanga; and
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> (b) has been used and occupied by the applicant group, either—
>
> (i) from 1840 to the present day; or
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> (ii) from the time of a customary transfer to the present day.
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> (3) In the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

[30] As the Court went on to note,[26] applicant groups must prove they hold the specified area in accordance with tikanga and have "used and occupied" the area from 1840 to the present day, but it is then for contradictors to adduce evidence of non-exclusivity or substantial interruption. "Thus, for the purposes of s 98(2)(b), it is presumed, absent proof to the contrary, that the applicant's use and occupation has been exclusive and not substantially interrupted."

"Holds in accordance with tikanga"

[31] As the Court recorded, New Zealand's experience of early legislative engagement with customary title is in marked contrast to the Australian and Canadian experience.[27] The starting premise of both the New Zealand Settlements Act 1863 and

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24 At [134]. See also [157] and [190].
25 At [119].
26 At [120].
27 At [55].

the Native Lands Act 1865 was that every part of Aotearoa was held by hapū under the prior legal order – that is, according to tikanga. "The hapū retained their prior entitlements unless and until lawfully extinguished by or under legislation, or by prior purchase effected or ratified by the Crown."[28]

[32] The Court recorded that what was the case in respect of the Ninety Mile Beach in 1840 was also true for the rest of the country:[29]

> In other words, it may be taken, at least as a starting proposition, that through acts of reverence, exploitation, control and memory in accordance with tikanga, relevant places were named and located, the ancestors belonging to those places were identified, the whakapapa which conveyed their rights through the generations was remembered, and the rights themselves were exercised, by the generation of Māori then living when the Treaty of Waitangi was signed in 1840.

[33] The Supreme Court also noted that the Native Land Court's explication of the four essential sources of tikanga rights in land was sound.[30] Those sources are:

(a) take taunaha – right by discovering claim;

(b) take tūpuna – ancestral right;

(c) take raupatu – right by conquest; and

(d) take tuku – right by transfer.

[34] Of these, the most important source of right was take tūpuna.[31]

[35] But, as the Court noted, these four take were insufficient on their own to sustain rights in land. Each of them had to be accompanied by continuous occupation or ahi kā: "literally translated, this was a requirement to keep one's fires burning on the land. Just how many fires were required, and to what intensity, depended on context reflecting the varied nature of the resource complexes whose use tikanga regulated".[32]

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28 At [36].
29 Supreme Court decision, above n 3, at [56].
30 At [38].
31 At [38]–[39].
32 At [40].

The Native Land Court generally took the approach that an absence of three generations would lead to loss of the right of ahi kā, but the Supreme Court recorded the preferable view that the degree of discontinuity sufficient to end a take in land was contextual.[33]

[36] The Supreme Court also emphasised that mana played a key role as an expression of right, expressed by "controlling access to particular places and resources through the institution of rāhui."[34]

[37] As the Supreme Court noted,[35] the statutory test for Māori customary title in s 129 of the Te Ture Whenua Māori Act 1993 (TWMA) was adopted as the model for the first part of the s 58 test for CMT. Section 129(2)(a) provides that "land that is held by Māori in accordance with tikanga Māori should have the status of Māori customary land".

[38] The judgment refers to the case of *da Silva v Aotea Māori Committee*, noting that the language of s 129 of the TWMA highlighted the importance of determining ownership through a tikanga lens rather than making determinations through a Court or Pakehā perspective.[36] By inserting the TWMA definition of customary land into the s 58 test in the Takutai Moana Act, "the legislature opted for a familiar formulation which did not just invoke the TWMA experience, but also prior formulations of the test and jurisprudence under them".[37]

[39] The Supreme Court also noted the reference by the Court of Appeal in *Ngāti Apa* to *Kauwaeranga*, the 1870 judgment of Chief Judge Fenton of the Native Land Court, in relation to a claim to customary title to the Thames foreshore.[38] The Supreme Court cited part of Chief Judge Fenton's discussion of the evidence adduced in support of the customary rights application:[39]

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33 At [43].
34 At [41].
35 At [50].
36 At [49]; citing *da Silva v Aotea Māori Committee* (1998) 25 Taitokerau MB 212 (25 AT 212) at 215.
37 At [57].
38 Alex Frame "Kauwaeranga judgment" (1984) 14 VUWLR 227 [*Kauwaeranga* reprint] at 229 and following; as cited in *Ngāti Apa*, above n 9. This is a reprint of *Kauwearanga* (1870) 4 Hauraki MB 236.
39 *Kauwaeranga* reprint at 240; Supreme Court judgment, above n 3, at [52].

> …That the use to which the Māoris appropriated this land was to them of the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much greater value and importance to their existence in any equal portion of land on terra firma.

[40] The Supreme Court considered that the Native Land Court findings on the foreshore and seabed were orthodox, reliable and consistent, and generally applicable to all parts of the country.[40]

[41] The Supreme Court emphasised that the use of the word "holds" in s 58(1)(a) is important for two reasons. First it can be contrasted with the use of the word "exercised" in s 51, in relation to PCRs. "Holds" indicates that the required relationship is more significant for CMT. It is not just a collection of unconnected activities or uses. It must amount to an "integrated or holistic relationship with a seascape."[41] "Holds" is informed by tikanga, take tūpuna (as the most important source of right in this context). An applicant must demonstrate the following in order to establish this element of the test:[42]

(a) mana being claimed and exercised over the claimed area;

(b) the tikanga relationship with the area is a continuing one in the present tense;

(c) the right is ancestral, as required by tikanga; and

(d) the customary interest has not become ahi mātaotao,[43] in accordance with tikanga.

[42] The second implication of the use of "holds" is that it is not enough to demonstrate that the seascape was held in the past.[44] The applicant must demonstrate

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40 Supreme Court judgment, above n 3, at [56].
41 At [140].
42 At [140]–[143].
43 "The cooling fires of occupation" – a term used where the customary title to land may be lost through lack of occupation over two to three generations.
44 At [142].

that the tikanga relationship with the area is a continuing one. It requires that the tikanga relationship has not become ahi mātaotao.

[43] But to find that a marine area is "held" in accordance with tikanga does not require physical policing of territorial boundaries or a reliance on a "strong presence", as the Court of Appeal majority required. The Supreme Court said:[45]

> Another way of expressing this idea is that "holds" suggests that, in addition to the claim of a special relationship with a seascape and the carrying out of activities there, *mana* over the relevant area is claimed and exercised… Mana—a quintessentially Māori principle—carries with it notions of control….it is important to understand that maintaining what might, in western terms, be called a spiritual relationship with place, and carrying out activities in that place, are themselves expressions of mana. Mana, being the corollary of kaitiakitanga, is about the way these things are remembered, maintained and done.

"[E]xclusively used and occupied"

[44] The Court of Appeal majority found that exclusive use and occupation requires a "strong presence" in the area,[46] but that the ability to meet this test will not necessarily be defeated by evidence of access to the area and use of resources in the area by other Māori groups. Tikanga principles such as whanaungatanga and manaakitanga should be taken into account when considering the presence of others in the area.[47]

[45] The Supreme Court agreed that tikanga must also be part of that assessment.[48] It noted that the exclusive use and occupation requirement is drawn from the Canadian decision in *Delgamuukw*, subsequently developed in *Tsilhqot'in* and referred to in the High Court of Australia decision in *Western Australia v Ward*.[49] The articulation in *Tsilhqot'in* was what is required is a "strong presence on or over the land claimed, manifesting itself in acts of occupation" and an "intention and capacity to control the land".[50] But, as the Court noted, what that means in practice is dependent on context: the nature of the place claimed and the community claiming it, the nature of the

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45 At [141].
46 Court of Appeal decision, above n 2, at [422].
47 At [424].
48 Supreme Court decision, above n 3, at [154]–[157].
49 *Western Australia v Ward* [2002] HCA 28, (2002) 213 CLR 1 at [89]–[90].
50 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38] and [48].

customary relationship with the place, including its use, and the prior law—tikanga—regulating both relationship and use.[51]

[46] The Court referred to the acknowledgment in the Australian and Canadian cases of the risk of imposing common law views of property on systems that have a very different concept of the relationship between people and land: the Act "reflects this experience".[52]

[47] The term "exclusive" is coloured by the express acknowledgment in the Act that public rights of access, navigation and fishing may coexist with customary rights.[53]

[48] Significantly, the Supreme Court judgment does not focus on the "strong presence" that the Court of Appeal majority emphasised,[54] nor distinguish between inshore and offshore areas. Rather, it notes that the "indicia and intensity of use and occupation will be distinctive to the seascape", because it cannot be fenced or occupied as dry land can be.[55]

[49] Nor is it necessary to show that use and occupation from 1840 were unaffected by colonisation.[56] As the Supreme Court noted, both the Canadian and Australian authorities recognise that insisting on unbroken assertions of control is unrealistic and would entrench colonial injustices.

[50] "[U]se and occupation" means control rather than residence, and not literally to the exclusion of all others; it "cannot mean actual physical occupation of the landscape is required".[57] The test is:[58]

> …[m]aking extensive use of the space (in light of its nature and resources) coupled with an intention and some capacity to assert control over it, to the extent permitted by law… So, where whanau, hapū or iwi have maintained a strong cultural connection with an area, harvested and protected its resources,

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51 Supreme Court decision, above n 3, at [154].
52 At [156].
53 At [158]; and Takutai Moana Act, s 59(3).
54 Court of Appeal decision, above n 2, at [422].
55 At [159].
56 At [160].
57 At [161].
58 At [161].

> and asserted mana in a practical way in relation to it, that may be sufficient on the mix of facts in a particular case. That may be so notwithstanding third-party use of the area.

[51] The judgment refers to a list of eight factors provided by the Crown, but notes that they are not exhaustive nor cumulative. It stresses that an overall assessment must be taken:[59]

> Rather than isolated acts or circumstances, they must reflect that the applicant group still uses and relates to the claimed seascape in a way that is integrated or holistic—that is, as part of a continuing order within the applicant group community. If that is their true context, such acts or circumstances will be properly seen as practical expressions of mana or control over the seascape. They will accordingly contribute to satisfying the exclusive use and control requirement.

[52] The Supreme Court went on to list six other factors that may support a conclusion that the applicant group has demonstrated sufficient use and control of an area:[60]

(a) engaging in tikanga-based ceremonies in relation to the area including, but not only, the imposition of rāhui;

(b) organising or being involved in fora, events or collective activities that reflect practical kaitiakitanga of the claim area—for example, environmental clean ups or public discussions in relation to the health of an aspect of the seascape;

(c) educating members of the iwi or hapū about tikanga and the claim area—for example, by holding wānanga on the subject and facilitating practical exercises of kaitiakitanga in the area;

(d) maintaining deep cultural and spiritual connection with the area—for example, through regular performance of karakia, and regular repetition of place-based kōrero, waiata and so forth at hui or other public occasions;

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59 At [162]–[163].
60 At [163].

(e) appointing kaitiaki and exercising powers under customary fishing regulation in relation to the area; and

(f) establishing formal relations and maintaining ongoing consultations with public authorities having regulatory power over the area.

[53] The Court stressed the need to be satisfied that particular acts or circumstances are part of a wider context of use and control. Ultimately, it "can only be a practical question of fact and degree considered in light of the Act's context and purpose".[61]

[54] Although the question of "shared exclusivity" is left for full consideration in the Court's subsequent judgment, it is apposite to include the Court's preliminary comments here, in the context of the Court's discussion of what constitutes "exclusive use and occupation". The judgment refers to Associate Professor Andrew Erueti's description of customary rights, which highlights that shared exclusivity in New Zealand is the rule rather than the exception.[62] As the Court noted, "[i]n tikanga there is a complex interweaving of rights and interests among iwi, hapū and whānau with respect to the common marine and coastal area. It would be surprising if [the Act] were intended to apply in a manner that cuts across tikanga in such a fundamental way".[63]

[55] The Court went on to say that the legislative history demonstrates that the Takutai Moana Act expressly contemplated the finding of shared exclusivity.[64] The Court said that means it is not arguable that the presence of other applicant groups who also express mana within the claimed area precludes a finding of exclusivity.[65] The Court will assess whether a finding of shared exclusivity is possible when one or more of the applicant groups assert CMT to the exclusion of all others in its subsequent judgment.

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61 At [164].

62 Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 41 at 42–43, as cited in Supreme Court decision, above n 3, at [170].

63 Supreme Court decision, above n 3, at [170].

64 At [171].

65 At [172].

"[F]rom 1840 to the present day"

[56] The Court recorded that this aspect of the s 58 test is the most difficult to apply, as it "bears the major burden of the Act's reconciliation purpose".[66]

[57] The key difference between the Court of Appeal majority and the Supreme Court relates to this need for continuity. The majority in the Court of Appeal focused on pre-colonisation use and occupation, holding that the applicant must show that customary rights in the area existed in 1840 and they were the group that exercised those rights. In assessing whether there had been substantial interruption to that exclusive use and occupation, the majority thought it necessary to have regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga", as well as to the scheme and purpose of the Act. It found that only lawful activities constitute substantial interruptions; activities permitted in the exercise of manaakitanga do not; nor do activities authorised "by legislation capable of overriding those rights".[67] The test was summarised:[68]

(a) Does the applicant group currently hold the relevant area as a matter of tikanga?

(b) In 1840, did the applicant group use and occupy the area, and have sufficient control over the area to exclude others if they wished to do so?

(c) Did the post-1840 use and occupation cease or was it interrupted?

[58] The Supreme Court emphasised the requirement of continuity. The use of the phrase "has … exclusively used and occupied" implies that use and occupation must be continuous and "not merely historical or merely current".[69] That parallels the Australian jurisprudence. The Court emphasised that reading a continuity requirement out of s 58 would require the Courts to assume that colonisation did not happen at all

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66 At [175].
67 Court of Appeal decision, above n 2, at [428].
68 At [434].
69 Supreme Court decision, above n 3, at [190].

and is not realistic.[70] The Court did note however that it must be sensitive to historical realities; the evidence must be viewed through the Treaty rights-preserving lens of the Act.

[59] The question is whether customary rights "have been exercised with sufficient continuity to be recognised by a CMT order", despite the impacts of colonisation.[71]

[60] The Supreme Court also noted that the evidence required in respect of continuity might also be relevant to the question of substantial interruption and vice versa.[72]

[61] As in the Court of Appeal, the Supreme Court held that applicants are only required to show that they hold a specific area in accordance with tikanga (including proof of some control and continuity) and that they used and occupied the area from 1840 to the present day. It is then up to any contradictors to demonstrate that use and occupation were not "exclusive" and/or there has been substantial interruption.[73] The Court noted that this approach was consistent with the approach in Australia and Canada that "the onus of extinguishment lies on the Crown".[74] For the purposes of s 98(2)(b) it is then presumed, absent proof to the contrary, that the applicant's use and occupation has been exclusive and not substantially interrupted.[75] The Court of Appeal majority concluded such an approach is consistent with the limited rights conferred by a CMT order, especially given they are subject to rights of access, navigation and fishing.[76]

"[W]ithout substantial interruption"

[62] "[S]ubstantial interruption" is not further defined in the Act.

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70 At [192].
71 At [175].
72 At [191].
73 At [120].
74 At [123], citing an explanation of what is now s 106 by the Attorney-General at (17 March 2011) 670 NZPD 17394.
75 At [120].
76 Court of Appeal decision, above n 2, at [430], referring to ss 26–28 of the Takutai Moana Act.

[63] On this aspect of the test, the Supreme Court said the question is whether the applicant hapū/iwi have been "crowded out" for a "sufficiently substantial period". It is a holistic assessment, encompassing both spatial and temporal elements.[77] The Court referred to the High Court of Australia judgment in *Members of the Yorta Yorta Aboriginal Community v Victoria*, where Brennan J used the concept of substantial interruption in addressing loss of cultural connection with an area, rather than interference with use and occupation.[78]

[64] The Court of Appeal majority limited interferences only to those expressly authorised by a statute capable of overriding customary rights.[79] The Supreme Court found that approach to be too narrow. It held that lawful activities and structures (by non-Māori or Māori) that interfere with the exercise of customary rights will be relevant, whether expressly authorised by statute, or simply not unlawful. Unlawful activities or structures will not be relevant.[80]

[65] The Supreme Court noted that both the physical extent and the duration of any interruption will be relevant.[81] Activities that interfere with but do not interrupt exclusive use and occupation will not be enough.[82] Nor will activities that interrupt but only temporarily or intermittently. Neither case will meet the "substantial" requirement.

[66] And, as the Court noted:[83]

> …the distribution of the burden of proof under s 106 means that the applicant group is not required to provide a perfect evidential narrative of uninterrupted and exclusive use an occupation. Given the 185-year time span, gaps in the narrative are to be expected.

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77 Supreme Court decision, above n 3, at [198].
78 At [24] and [190], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* [2022] HCA 58, (2002) 214 CLR 422 at [47], [87] and [89].
79 Court of Appeal decision, above n 2, at [428].
80 Supreme Court decision, above n 3, at [199].
81 At [194].
82 At [198].
83 At [194].

[67] As s 59(3) provides, third-party fishing and navigation are not necessarily disqualifying, but nevertheless may be relevant to the assessment of interruption. The Supreme Court said:[84]

> …They are unlikely to preclude the existence of CMT on their own, but there may be cases in which, in combination with other activities, fishing and navigation may help to crowd out the applicant group's exclusive use and occupation, and so contribute to substantial interruption.

[68] Ultimately, whether there has been substantial interruption will be a question of fact, to be considered rather than assumed.[85] It is a matter of context and degree. What must be substantially interrupted is "the continuing integrated or holistic order under which the applicant community uses and controls the claim area".[86]

[69] Overall, the Court cannot be satisfied that the continuous exclusive use and occupation of the area from 1840 to the present day has been established if the evidence is that the applicant group has, for a sufficiently substantial period, been "crowded out" of the claimed space by competing structures or activities. In such a case there has been substantial interruption and a CMT may not be granted.[87]

[70] The reconciliation mechanisms in the Act mean the Court is not required to ignore evidence of factual impairment, but is required to view it through the Treaty rights-preserving lens of the Act, one that will be slow to conclude coexistence is not possible.[88]

Application of Supreme Court decision to these applications

[71] I now turn to consider whether and how the Supreme Court decision impacts on the findings in the Interim Judgment in relation to each applicant. This requires a particular focus on the criteria "holds in accordance with tikanga" and "exclusive use and occupation".

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84 At [200].
85 At [201].
86 At [195].
87 At [198].
88 At [209].

[72] The question whether commercial fishing amounts to "substantial interruption" to the applicants' rights is considered globally, across the application area.

Rangitāne

[73] Rangitāne sought CMT at a hapū level for specific Rangitāne hapū present along the coastline – Ngāti Te Rangiwhaka-ewa, Ngāti Parakiore and Ngāti Hāmua.

[74] Rangitāne did not purport to have exclusive or primary rights anywhere on the coast, acknowledging their whanaunga with Te Hika o Pāpāuma and Ngāti Kere and the joint presence of those iwi in their respective areas. Rangitāne sought joint CMT at a hapū level, with those iwi, based on shared exclusivity and joint use and occupation.[89]

[75] In the Interim Judgment I concluded that the evidence for Rangitāne, taken together with the evidence of the other applicants, met the criteria for shared CMT to be held by the named Rangitāne hapū with Te Hika o Pāpāuma and Ngāti Kere.[90]

[76] The Attorney-General's submissions observe a lack of evidence that "the iwi itself" holds the application area in accordance with tikanga. But that submission misapprehends the basis on which the Rangitāne claim was advanced. As above, the claim was made at a hapū level and recognising the rights of Te Hika o Pāpāuma and Ngāti Kere. Rangitāne also refutes the suggestion, in the Attorney-General's submissions, that Rangitāne itself does not seek CMT but would be happy for Ngāti Kere, rather than Rangitāne or Ngāti Hamua, to hold CMT, at least in Pōrangahau, with acknowledgement by Ngāti Kere of Rangitāne's interests.

[77] The Attorney-General acknowledges that Rangitāne demonstrated evidence of use, particularly in key areas, but also submits that the evidence does not show a "sufficient" level of control, compared to other hapū.

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89 Interim Judgment, above n 1, at [18]–[21] and [411].
90 At [436].

[78] In the Interim Judgment I recorded that Rangitāne had demonstrated use and occupation "of some degree", dating back to 1840.[91] And, as the Supreme Court decision noted, "*some* capacity to assert control" is what is required.[92]

[79] Having re-examined the evidence in light of the Supreme Court decision, I remain satisfied that Rangitāne has demonstrated its integrated relationship with the seascape and the exercise of mana over the area, both historical and contemporary, with the necessary intention and some capacity to control the relevant areas.

[80] The Attorney-General's submissions, as during the course of the hearing, remain critical of the approach adopted in the Interim Judgment that where parties are seeking joint CMT over an area, it is the sum of the evidence of the applicant groups that must satisfy the CMT tests.

[81] The Supreme Court decision does not directly address how joint interests are to be assessed. But, as discussed above at [54], in relation to exclusive use and occupation the Supreme Court decision records that "shared exclusivity in New Zealand is the rule rather than the exception".[93]

[82] Overall, there is nothing in the Supreme Court decision that alters my findings in relation to Rangitāne.

Ngāi Tūmapūhia

[83] Ngāi Tūmapūhia's application relates to the Whareama River mouth. The Whareama River mouth was one of the coastal rohe encompassed in the Mana Moana Agreement reached during the Stage 1(a) hearing, under which the applicants acknowledged shared interests in six coastal rohe within that application area.

[84] Subsequently, it was decided that the Whareama River mouth would be dealt with in this Stage 1(b) hearing.

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91 At [425]–[435].
92 Supreme Court, above n 3, at [161] and [222] (emphasis added).
93 At [170].

[85] For that reason, the evidence referred to in the Interim Judgment drew heavily on the Stage 1(a) judgment. I was satisfied in the Interim Judgment that there was good evidence to demonstrate that Ngāi Tūmapūhia currently exercises authority and control over the Whareama River, according to tikanga. The evidence included an ongoing presence, regular use and occupation of sites for fishing and kaimoana gathering and various indication of long-held and ongoing occupation and control.

[86] The Attorney-General's submissions accept that conclusion but, in light of the Supreme Court decision, suggest that "the evidence that is more limited is that of mana or authority and control over the area (beyond an ongoing connection and association)".

[87] Having reconsidered the evidence, I am satisfied that the evidence for Ngāi Tūmapūhia was sufficient for this purpose. The Interim Judgment referred to the following matters indicating the presence of mana:

(a) rights inherited through whakapapa to the eponymous ancestor Ngāi Tūmapūhia and the legendary Kupe, including to coastal land blocks that included the reservation of fishing rights;[94]

(b) remembrance of that whakapapa by current members, including Dr Takirirangi Smith;[95]

(c) continued exercise of these rights through ownership of land and the holding of tangata kaitiaki rights;[96]

(d) historical and contemporary control over the Whareama area, including through the presence of defensive pā and the warding off of marauding tauā along the coast;[97]

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94 Interim Judgment, above n 1, at [153]–[154].
95 At [155].
96 At [152] and [641].
97 At [155].

(e) acts of exploitation through historical and contemporary reliance on the takutai moana for sustenance;[98] and

(f) acts of reverence, particularly the spiritual connection with the area and its resources.[99]

[88] In terms of the "exclusively used and occupied" criterion, as set out in the Interim Judgment, the hapū:

(a) made extensive use of the takutai moana at Whareama, in light of its nature and resources, particularly through customary fishing, selling and leasing land, kaimoana and resource gathering, swimming, recreation and camping;[100]

(b) expressed an intention and some capacity to assert control over it, to the extent permitted by law, including through continued land ownership from 1840 to the present day, as well as the imposition of rāhui, administering of tangata kaitiaki permits and holding commercial fishers to account through inspections;[101]

(c) harvested and protected the resources including through kaimoana collection and the imposition of rāhui, administering of tangata kaitiaki permits and holding commercial fishers to account through inspections.[102]

[89] In doing so, Ngāi Tūmapūhia asserted mana in a practical way in relation to the takutai moana.[103]

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98 At [152].
99 At [154].
100 At [158]–[160].
101 At [156], [157], [624] and [640].
102 At [158]–[160], [624] and [640].
103 At [158]–[160], [624] and [640].

[90] In relation to the first limb of s 58, I remain satisfied that Ngāi Tūmapūhia's customary interest in its application area does amount to "an integrated or holistic relationship with the seascape."[104]

[91] In relation to the second limb, I remain satisfied that Ngāi Tūmapūhia has, in the words of the Supreme Court decision, "maintained a strong cultural connection with [the] area, harvested its resources and asserted mana in some practical way".[105]

[92] As to the seaward boundary, the Interim Judgment found that there was insufficient evidence of a strong presence out to 12 nautical miles at the Whareama River mouth.

[93] Ngāi Tūmapūhia's submission is that this conclusion ought to change following the Supreme Court decision because:

(a) rāhui were not imposed with seaward limits;[106]

(b) kaimoana was gathered in known parts of the seascape such as the Hikurangi Trench (or Trough) out 65–125 kilometres from the shore;[107]

(c) deep-sea fish species have long been gathered;[108]

(d) historical use of methods of deep-sea fishing continue to be used;[109] and

(e) hapū members hold tangata kaitiaki authority over kaimoana collection extending out to 12 nautical miles.[110]

[94] Both Ngāi Tūmapūhia and the Pirere whānau submit that a separate spatial assessment, as made by the Court of Appeal, is no longer appropriate in light of the

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104 Supreme Court decision, above n 3, at [140] and [219].
105 At [222].
106 Interim Judgment, above n 1, at [625].
107 At [627].
108 At [628].
109 At [629].
110 At [641].

Supreme Court decision. This inevitably affects the assessment of the appropriate seaward boundary. Both applicants strongly argue that on the Supreme Court's approach they can be shown to have exclusively used and occupied the takutai moana out to 12 nautical miles.

[95] Both applicants point to the specific contexts of:

(a) the takutai moana, over which control cannot be asserted in the same ways as on land;[111]

(b) areas further offshore inevitably have incidents of control of a different character to those closer to the coast;[112] and

(c) the rugged nature of the Wairarapa coastline and seas, over which less evidence of control should be required to satisfy this element than in relation to the inshore.[113]

[96] Also, as Ngāi Tūmapūhia note, the Stage 1(a) Judgment found that Ngāi Tūmapūhia's CMT extended out 10 kilometres, all the way from the Pāhaoa River to the southern bank of the Whareama River, and was acknowledged to extend out 12 nautical miles by the signatories to the Mana Moana Agreement.[114]

[97] Ngāi Tūmapūhia highlights what appears to be an incongruity in that its use and occupation over 57.4 kilometres of coastline extends to 10 kilometres offshore, but the adjacent 50 metres extends to less than five kilometres offshore.

[98] On this basis Ngāi Tūmapūhia submits that the seaward extent of its use and occupation at the Whareama River should align with that of the other 99 per cent of its application area. That submission is addressed at [121] below.

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111 Supreme Court decision at [159].
112 Interim Judgment, above n 1, at [607], [630] and [650].
113 Supreme Court decision, above n 3, at [154].
114 Interim Judgment, above n 1, at [9].

Pirere whānau

[99] In the Interim Judgment I concluded that the Pirere whānau held its application area in accordance with the tikanga as a whānau and that holding as a whānau was consistent with the Takutai Moana Act.[115] The Attorney-General maintains her position that there is a question whether the Pirere whānau interests can be held at whānau level.

[100] The Supreme Court decision does not address the question of who or what may be a CMT rights holder under the Takutai Moana Act. Accordingly, that aspect of the Interim Judgment is not affected.

[101] The evidence, as set out in the Interim Judgment, was clear as to the Pirere whānau's mana in its application area. That evidence included:

(a) rights inherited through whakapapa to Te Whareaute and Te Matakorihi, particularly in relation to coastal land blocks;[116]

(b) remembrance of that whakapapa by current members of the whānau, Rebecca Harper, Faye Pirere and Lisa Pirere;[117]

(c) continued exercise of these rights through the holding of shares in land, control over use of the Pirere whānau urupā and holding of tangata kaitiaki rights;[118]

(d) historical and contemporary control over the Whakataki area, especially in relation to ownership of land and rights to speak to the area as kaitiaki, in response to third party incursions;[119]

(e) acts of exploitation through historical and contemporary reliance on the Takutai Moana for sustenance;[120] and

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115 At [440]–[517].
116 At [458]–[476].
117 At [479]–[493].
118 At [475]–[477] and [494].
119 At [477]–[481].
120 At [486]–[493].

(f) acts of reverence, including in relation to the Pirere whānau urupā, Te Wharepouri's Mark and the mouth of the Whakataki Stream, as well as collecting kaimoana.[121]

[102] These factors remain sufficient, in my view, to satisfy the Supreme Court's formulation of the requirement of "holding in accordance with tikanga".

[103] As to "exclusively use and occupy", the Interim Judgment recorded that the Pirere whānau:

(a) made extensive use of the takutai moana at Whakataki, particularly through customary fishing from 1840 through to the present day;[122]

(b) expressed an intention and some capacity to assert control over it, to the extent permitted by law, including through continued land ownership from 1840 to the present day, as well as the imposition of rāhui;[123]

(c) maintained a strong cultural connection with Whakataki, notably through the continued maintenance and respect for the Pirere whānau urupā, Te Wharepouri's Mark and the Mouth of the Whakataki Stream, which is regarded as a wāhi tapu;[124]

(d) harvested and protected its resources, including through kaimoana collection, the imposition of a rāhui and the holding of the pōwhiri in response to the threat of oil drilling in the sea;[125] and

(e) in doing so, asserted mana in a practical way in relation to the Takutai Moana.[126]

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121 At [482]–[493].
122 At [510].
123 At [506] and [514].
124 At [511]–[512].
125 At [479], [506] and [510].
126 At [517].

Seaward limit

[104] As I have noted above, the Pirere whānau and Ngāi Tūmapūhia make a strong submission that, in light of the Supreme Court decision, it is appropriate to extend the seaward boundary of their CMT out to 12 nautical miles. It is therefore convenient to address the general question of seaward boundary at this point.

[105] A number of submissions made by Ngāi Tūmapūhia and the Pirere whānau are also relevant to other applicants. Both those applicants rely, among other things, on:

(a) their statutory appointment as kaitiaki for the granting of permits for customary take under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (Kaimoana Regulations), with authority out to 12 nautical miles;[127]

(b) their historic and current non-statutory kaitiaki role, including the "policing" of commercial fishing to ensure that limits on take are not exceeded; and

(c) their historic and contemporary imposition of rāhui, when required.

[106] As the applicants emphasise, neither kaitiakitanga nor rāhui have territorial limits.

[107] In the Interim Judgment, I expressed the view that the indicia of use and occupation required to establish "exclusivity" would vary, both in relation to the whenua and the moana.[128]

[108] I recorded the applicants' submission that the practice of tikanga values can itself found legal recognition, without the necessity for applicant groups to give

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127 As recorded in the Interim Judgment, above n 1, at [641]–[645], Te Hika o Pāpāuma and Ngāti Kere have also exercised roles as tangata kaitiaki under the Fisheries (Kaimoana Customary Fishing) Regulations 1998.

128 At [607].

specific examples of fishing out to 12 nautical miles across the whole of the Stage 1(b) hearing area.[129]

[109] In the Interim Judgment, as in *Re Ngāi Tūmapūhia*, I observed that the "strong presence" required by the Court of Appeal inevitably looks different in the marine area than on land:[130]

> …It is necessary to look at different ways of measuring and assessing that presence. Intensity of use will inevitably – by the very nature of the outer sea – be different, likely less. Applying tikanga to the evaluation, the identification and naming of significant landmarks, the imposition of rāhui, and the exercise of kaitiakitanga, might all constitute a manifestation of mana and control.

[110] And further:[131]

> …I agree with the applicants that it might be possible to grant CMT out to 12 nautical miles for the whole of the application area, allowing for less intensive use and occupation than would be required in other parts of the common marine and coastal area. That point could be reached on the basis of the combined effect of evidence about fishing, exercising the role of kaitiaki, using the sea as a place of passage, and exercises of mana in various forms."

[111] On that basis I reached a cautious conclusion that the sea area was held according to tikanga out to a distance of five kilometres from the low water mark along the coastline of the application area.[132]

Supreme Court decision

[112] While the Supreme Court did not specifically consider the seaward extent to which CMT might be granted, it made a number of observations that are relevant to that question.

[113] First, the Supreme Court decision emphasises the importance of context in deciding what acts of occupation are necessary to establish "exclusive use and occupation" and how the intention and capacity to control are expressed.[133] The Court

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129 At [647]. See also *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [612].
130 At [648]; citing *Re Ngāi Tūmapūhia* at [610]–[612].
131 At [650].
132 At [651]–[652].
133 Supreme Court decision, above n 3, at [154].

noted that the necessary contextual inquiry "will include the nature of the place claimed and of the community claiming it, the nature of the customary relationship with the place, including its use, and the prior law—tikanga—regulating both relationship and use".[134]

[114] In discussing ahi kā, the Supreme Court said:[135]

> …Some areas such as cultivations, riparian and inshore fisheries were intensively used and closely held. In other areas such as inland forests and offshore fisheries, only occasional use during the birding and gathering seasons might satisfy ahi kā requirements.

[115] The Court also said:[136]

> It must also be remembered that the seascape is not dry land. It cannot be fenced off, built up or otherwise occupied in the same way that dry land can be. Nor, until relatively recently, was it possible (or even necessary) to farm areas or resources within the seascape. It follows that the indicia and intensity of use and occupation will be distinctive to the seascape.

[116] In relation to "holds", the Supreme Court decision emphasises the need for an integrated or holistic relationship with the seascape.[137] To repeat, as the Court noted, "through acts of reverence, exploitation, control and memory, relevant places within a seascape were named and located, the ancestors belonging to those places were identified, the whakapapa that conveyed their rights through the generations was remembered, and the rights themselves were exercised."[138] That is, "*mana* over the relevant area is claimed and exercised".[139]

[117] The Court went on to say:[140]

> …use and occupation cannot mean actual physical occupation of the seascape is required. Occupation is clearly meant in the sense of control rather than residence. …exclusive cannot mean literally to the exclusion of others. The Act's context (seascape) and purpose (reconciliation) are quite inconsistent with that construction. Instead, making extensive use of the space (in light of its nature and resources) coupled with an intention and some capacity to assert control over it, to the extent permitted by law, is what is intended by the test

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134 At [154].
135 At [40].
136 At [159].
137 At [140].
138 At [140].
139 At [141] (emphasis in original).
140 At [161].

> and supported in the cases. …So, where whānau, hapū or iwi have maintained a strong cultural connection with an area, harvested and protected its resources, and asserted mana in a practical way in relation to it, that may be sufficient on the mix of facts in a particular case.

Analysis

[118] I accept the submission for the Pirere whānau and Ngāi Tūmapūhia that the Supreme Court's general approach is at odds with the Court of Appeal's statement that "the nature and the different ways in which such areas [marine areas] can in practice of the sea be used" make the requisite level of control "more difficult to demonstrate in respect of offshore areas" visited only occasionally".[141]

[119] However I think the analysis that underpinned the finding of a five kilometre seaward limit in the Interim Judgment is broadly consistent with the Supreme Court's approach. In the absence of express consideration of this question by the Supreme Court I am not persuaded that I should extend the limits ordered in the Interim Judgment (subject to one aspect discussed in the following paragraph below).

[120] In *Re Ngāi Tūmapūhia-a-Rangi Inc* I concluded that Ngāi Tūmapūhia had demonstrated exclusive use and occupation of the takutai moana out to 10 kilometres, from Te Awhea to the southern bank of the Whareama River.[142] That finding is not the subject of any of the extant appeals against that judgment.

[121] I accept Ngāi Tūmapūhia's submission that it would be incongruous to find that its use and occupation of the 50 metres adjacent to that coastline, i.e. the mouth of the Whareama River, extends out only to five kilometres offshore. I agree that is an error in the Interim Judgment. That finding is amended to 10 kilometres offshore.

Te Hika o Pāpāuma

[122] In the Interim Judgment I found that Te Hika o Pāpūma had satisfied the criteria for a CMT in the area from the southern bank of the Whareama River, including the Mataikona block, to Wainui (Herbertville), but not as far north as Poroporo.[143] I left

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141 Court of Appeal decision, above n 2, at [422].
142 *Re Ngāi Tūmapūhia-a-Rangi Inc*, above n 128, at [815(d) and (e)].
143 Interim Judgment, above n 1, at [292].

for discussion between Te Hika o Pāpāuma and the Pāpāuma Marae Trustees who should be the holder of the CMT in relation to the Mataikona block.[144]

[123] I do not understand Te Hika o Pāpāuma to challenge the conclusion that the area from Wainui to Poroporo is not included in its CMT.

[124] The only issue arising from the Supreme Court decision that might affect my conclusions in the Interim Judgment in relation to Te Hika o Pāpāuma's application relates to the continuity requirement — from 1840 to the present day "without substantial interruption". The Attorney-General's submissions flag a question about the period during which the Mataikona block was run by the Māori Trustee and there was some restriction by the station manager on whānau access to the coastline. The question is whether that could be said to amount to substantial interruption in terms of the Supreme Court's test. That issue arises in relation to both Te Hika o Pāpāuma and the Pāpāuma Marae Trustees.

[125] In relation to Te Hika o Pāpāuma, I noted in the Interim Judgment that during the period of 1930 to 1972 the Mataikona Block was run by the Māori Trustee, and there was some evidence that during that period the Station Manager would not let Te Hika o Pāpāuma whānau onto the coastline to gather kaimoana.[145]

[126] The submission for Te Hika o Pāpāuma is that the "administration" of Aohanga Station land did not rise to the level of substantial interruption because it would never have been intended that the Māori Trustee was to be a permanent owning trustee of the land. It is reasonable, on the available facts, to infer that the interlude between 1929 and 1973 may be regarded as temporary and a fairly modest interference.

[127] Te Hika o Pāpāuma emphasises, as it did in the first instance hearing, the expert evidence of Tony Walzl. Mr Walzl stated:[146]

> Over the early twentieth century, much of the Mataikona land continued to be leased and the Crown considered the acquisition of this land on several

144 At [294].
145 At [289].
146 Tony Walzl *Te Hika o Pāpāuma and the Takutai Moana* (Walghan Partners, 31 July 2023) at [3.3].

> occasions. However, ultimately the land was run as Aohanga Station under the administration of the Māori Trustee from 1929 to 1973 when the owners voted to incorporate, and the station was re-investing in them.

[128] Mr Walzl went on to point out:[147]

> Although faced with a myriad of difficulties over the 1940's and 1950's such as "rabbits, droughts and labour shortages", the debt acquired over the development years was paid by the early 1950s. Therefore, the Trustee began the process of returning the station to the control of its owners.

[129] I remain satisfied that the administration of Aohanga Station by the Māori Trustee, while undoubtedly an interference with the exercise by Te Hika o Pāpāuma of some of the incidents of ownership, did not amount to a substantial interruption of its holding of the area.

Pāpāuma Marae Trustees

[130] The Interim Judgment set out an extensive list of factors that showed that, in my view, the Pāpāuma Marae Trustees had demonstrated that they held the application area in accordance with tikanga, in an integrated and holistic manner, and demonstrating mana and ahi kā.[148]

[131] As to the second limb, "exclusive use and occupation" again, there was evidence at the hearing of the applicant's satisfaction of that test. For example, it showed the applicant:

(a) being in physical occupation of the adjacent land and having active marae, papakāinga, urupā, and wāhi tapu along the coastline;[149]

(b) since occupation, actively defending the rōhe and boundaries against threats and encroachment;[150]

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147 At [3.25].
148 Interim Judgment, above n 1, at [338]–[375].
149 At [372] and [385]–[387].
150 At [382] and [384].

(c) the establishment of the Aohanga Incorporation, a standalone land holding entity, to hold the whenua;[151]

(d) engaging in tikanga based ceremonies, including the placing of rāhui;[152]

(e) restricting and monitoring public access to the coastline via land passage;[153]

(f) being recognised and protected by law as the owners of the whenua;[154]

(g) members of the applicant group being officially recognised at kaitiaki along the application area, under the Kaimoana Regulations, whose responsibility is to manage customary fishing in the areas, including issuing permits, recommending rules, and reporting;[155]

(h) naming places;[156]

(i) extensively exercising kaitiakitanga in a variety of ways, ranging from active management and regeneration of natural resource (for example, by setting rāhui), environmental monitoring, ensuring sustainable use, spiritual safety in accordance with tikanga Māori, and petitions to stop the commercial taking of kaimoana; and[157]

(j) extensively using the landscape and practising tikanga in relation to how the applicants engage with the moana and handing down that mātauranga and tikanga through the generations.[158]

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151 At [15], [249]–[251], [284] and [381].
152 At [370] and [371].
153 At [346], [349]–[351], [381], [385].
154 At [337]–[342] and [368].
155 At [357]–[359].
156 At [378].
157 At, for example, [357], [370] and [389].
158 At [386] and [388].

[132] The same issue about the administration of the Mataikona Block/Aohanga Station discussed in relation to Te Hika o Pāpāuma also arose in respect of the application by the Pāpāuma Marae Trustees.

[133] In the Interim Judgment I concluded that the appointment of the Māori Trustee in relation to the administration of Aohanga station, between 1931 and 1972, did not amount to a substantial interruption.[159]

[134] I was satisfied that the geographic isolation of the Aohanga whenua, along with natural barriers, preserved an uninterrupted link between the applicant group and their application area and that they had continued to exercise rangatiratanga, kaitiakitanga and manaakitanga over their marine resources.[160]

[135] The Interim Judgment recorded that in the period while the Mataikona Block was run by the Māori Trustee, the owners and workers on Aohanga Station continued to have access to the coast and were not practically prevented from accessing the coast from the reserves beside the rivers at either end of the Block. Bruce Stirling's expert report noted that "[t]he owners certainly retained an active interest in the customary resources of their coast despite the best efforts of the Station Manager to discourage them."[161]

[136] The Interim Judgment also noted that continued ownership of the land abutting the Pāpāuma Marae area has supported the Marae Trustees' ability to exclude people and exercise control over the takutai moana.[162]

[137] The Pāpāuma Marae Trustees dismiss the "broad-brush" statements from the Seafood Industry Representatives (SIRs), of "limited evidence of the applicant groups' contemporary customary authority" and "little ability to control or prevent the use of the CMCA by third parties for a broad range of commercial, residential and recreational purposes". The Trustees say that statement can have no application to their application, noting that the Attorney-General's submissions state that the

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159 At [396].
160 At [395].
161 At [383].
162 At [385].

Te Pāpāuma Marae Trustees' "evidence showing control of the area adjacent to the owned Māori land, between Mataikona River and Aohanga River, remains reasonably strong". The applicant notes the finding in the Interim Judgment that the applicant group had:[163]

> Largely exclusive access to their coastline since Te Matau, partly by virtue of land ownership and partly because of the geography of the area.

[138] I was also satisfied that what evidence there was of fishing or other use of the coast and coastline was scattered, consistent with manaakitanga, and insufficient to displace the applicants' evidence that it had held the area in accordance with tikanga from 1840.[164]

[139] I am not persuaded that the Supreme Court decision in any way changes those conclusions.

Ngāti Kere

[140] Ngāti Kere's amended application for CMT, which I granted on 5 June 2024,[165] covered the area from the northern bank of the Ouepoto Stream in the north, to the southern bank of the Ākitio River in the south. In their application Ngāti Kere acknowledged the possibility of shared exclusivity and acknowledged all of their whanaunga of Ngāti Kahungunu ki Wairarapa, Rangitāne and Te Hika o Pāpāuma.

[141] In the Interim Judgment, I concluded that Ngāti Kere had satisfied the s 58 criteria in relation to the area from Ouepoto Stream in the north, to the southern bank of the Wainui Stream (its original CMT application area), but that the evidence was not sufficiently strong or consistent to demonstrate that the criteria were met in the broader application area (from the southern bank of the Ākitio River to the southern bank of the Wainui Stream), at least in the absence of acknowledgement by Rangitāne and Te Hika o Pāpāuma of shared interests in that rohe.[166]

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163 At [379]–[380].
164 Interim Judgment, above n 1, at [396].
165 *Re Ngāti Kere (Application to amend CMT area)* [2024] NZHC 1472.
166 Interim Judgment, above n 1, at [566].

[142] Ngāti Kere did not file submissions addressing the Supreme Court decision. In her submissions, the Attorney-General comments on the phrase in the Interim Judgment "at least in the absence of acknowledgement by Rangitāne and Te Hika o Pāpāuma of shared interests in that rohe", in the following way:

> The non-recognition of customary interests by others may be relevant to the assessment of an applicant's evidence of use and occupation, but is not determinative of it.
>
> The Supreme Court suggests such contradictory evidence should be considered in the context of non-exclusivity, *after* it has been determined that an applicant has cleared the hurdles of s 106 in terms of the first two limbs of the test.[167]

[143] The Attorney-General invites the Court to reconsider this finding in light of that submission.

[144] The portions of the Supreme Court decision cited by the Attorney-General largely address the burden of proof under the Takutai Moana Act, to the effect that once an applicant has shown it holds the specified area in accordance with tikanga and has "used and occupied" the area "from 1840 to the present day", it is presumed, absent proof to the contrary by any contradictor(s), that the applicant's use and occupation has been exclusive and not substantially interrupted.

[145] As the Attorney-General acknowledges, the question of shared exclusivity has yet to be addressed by the Supreme Court in detail. I am not persuaded that the cited portions of the Supreme Court decision do address the question of when it is relevant to consider the recognition or non-recognition of an applicant's customary interests by others.

[146] In any event, at the time of writing this judgment, there was nothing before me to suggest that Rangitāne and Te Hika o Pāpāuma do now acknowledge Ngāti Kere's shared interests in the area from the southern bank of the Wainui Stream to the southern bank of the Ākitio River.

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[167] Citing the Supreme Court decision, above n 3, at [120], [189], [194], [217] and [225].

[147] I conclude that the Supreme Court decision does not alter the findings in the Interim Judgment relating to Ngāti Kere.

Commercial fishing as a substantial interruption?

[148] The question whether commercial fishing amounts to substantial interruption is relevant to all applicants.

[149] The evidence for the SIRs of the impact of commercial fishing was set out in the Interim Judgment where I noted that:[168]

> …There is no doubt that commercial fishing has had an impact on the applicants. Many witnesses for the applicants acknowledged the depletion of fisheries resources on their coast, with a consequent impact on their ability to fish and gather kaimoana.

[150] However, I went on to note that the applicants have:[169]

> …continued to assert their customary rights and to fish and gather kaimoana in their rohe moana in accordance with custom. They have also protested for the preservation of kaimoana in the application area to the fullest extent of the law.

[151] I concluded that commercial fishing in the application area had not amounted to substantial interruption of the applicants' rights.[170]

[152] The Supreme Court found that s 58 "does not limit who (or what) can cause a substantial interruption" and that "Māori and non-Māori alike can substantially interrupt an applicant group's exclusive use and occupation (assuming the purported interrupter, if Māori, is not themselves exercising shared customary rights)".[171]

[153] The Supreme Court decision also records that, while third-party navigation and fishing "are unlikely to preclude the existence of CMT on their own", there may be "cases in which, in combination with other activities, fishing and navigation may help

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168 Interim Judgment, above n 1, at [587].
169 At [587].
170 At [590].
171 Supreme Court decision, above n 3, at [202].

to crowd out the applicant group's exclusive use and occupation and so contribute to substantial interruption".[172]

[154] The SIRs submit that the test for substantial interruption articulated by the Supreme Court represents a significant departure from the approach reflected in the Interim Judgment.

[155] The submission for the SIRs is that the applicants have been "crowded out" by the sustained and pervasive use of the CMCA within the application area by others, and the collective impacts of those uses on the applicant groups. The SIRs submit that the evidence suggests that the applicants have had little ability to control or prevent the use of the CMCA by third parties for a broad range of commercial, residential and recreational purposes.

[156] In relation to commercial fishing, the SIRs say that the evidence of an impact on the exercise of customary fisheries went well beyond demonstrating a mere interference, with a material impact by both land use and the overuse of the resources themselves on the intertidal species that were of critical importance for customary food gathering purposes. The SIRs say that commercial fishing in the whole of the application area has resulted in substantial interruption of the exclusive use and occupation of the applicants.

[157] The Attorney-General submits that, consistent with the findings in the Interim Judgment, there are no individual instances of a third-party use or activity that appear to constitute substantial interruption in and of themselves.[173] But the Attorney-General submits that the evidence of commercial fishing, alongside that of depletion of fish stocks and the significant impact this has had on the ability of applicant groups to fish and gather kaimoana, should be part of the Court's factual assessment as to whether substantial interruption has occurred. That must be considered in tandem with other evidence.

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172 At [200].

173 Interim Judgment, above n 1, at [590].

[158] The joint submissions filed on behalf of the Pirere whānau and Ngāi Tūmapūhia point to the evidence for the Pirere whānau, which was that commercial fishing within its rohe moana is limited, a position that was supported by the evidence of Daryl Sykes for the SIRs. As Mr Sykes acknowledged:

> There is not as much rocky reef system in that eight kilometres of coastline than there is further north at Ōkau.

[159] Counsel for Ngāi Tūmapūhia also notes that for this application area, as for the application area in the Stage 1(a) hearing, there is a reliability issue with events-based reporting data for commercial fishing. Although a fishing vessel may begin a fishing event in a specific area and report that location, it could, and it is most likely to, venture away from its starting locations. Similarly, the size of statistical areas within which reporting is measured make the findings problematic, as several statistical areas are larger than the entire hearing area, let alone Ngāi Tūmapūhia's application area.

[160] On the basis of those discrepancies, Mr Sykes for the SIRs conceded in the Stage 1(a) hearing that the data he used could not be used to reliably show the quantitative extent of commercial fishing within Ngāi Tūmapūhia's application areas. That applies equally here. The evidence put forward with regard to commercial activity is insufficiently certain for the Court to conclude that Ngāi Tūmapūhia's exclusive use and occupation of the application area, in particular at the Whareama River has been adversely affected.

[161] The Pirere whānau and Ngāi Tūmapūhia also note that the evidence referred to by the SIRs in support of its assertion that "intertidal species that were of critical importance for customary food gathering purposes having been materially impacted on by both land use and the overuse of the resources themselves" does not include any evidence of the Pirere whānau's or Ngāi Tūmapūhia's ability to access the coast, or collect kaimoana, having been impeded by third-party activities.

[162] On the contrary, the Pirere whānau note that Dr Samuel Carpenter's evidence for the Attorney-General stated that the Whakataki Reserve is an example of an area in which a Māori presence was maintained throughout the 19th and 20th centuries.

Analysis

Commercial fishing

[163] As the Supreme Court noted, what must be substantially interrupted is that which must have been inferentially established at stage 1 of the evidential inquiry: the continuing integrated or holistic order under which the applicant community uses and controls the claim area.[174]

[164] As the Court said:[175]

> ...the substantial interruption inquiry is fundamental to [the Act]'s reconciliation of rights and interests, including, as we have said, Treaty rights and interests. Again, that reconciliation is premised on the idea that rights and interests should be allowed to co-exist as far as possible. It follows that the Courts should be slow to conclude that continuity is so broken or exclusivity so compromised as to preclude the grant of CMT.

[165] The SIRs appear to formulate the test as the ability to control third-party use of the takutai moana, but such a formulation would not be consistent with the Supreme Court's conclusion that the requirement for "exclusivity" accommodates public access, navigation and fishing, given the effect of s 59(3) of the Act.[176]

[166] While there can be no doubt from the evidence that commercial fishing has impaired or interfered with the applicants' rights, to one degree or another, impairment or interference is not sufficient for the purposes of s 58(1)(b)(i). What is required is "interruption", and it must be "substantial".

[167] Having reconsidered the evidence I conclude that is not the case here. My finding in the Interim Judgment, that commercial fishing does not amount to "substantial interruption" of the applicants' holding, does not change as a result of the Supreme Court decision.

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174 Supreme Court decision, above n 3, at [195].
175 At [204].
176 At [158].

Other "interferences"

[168] The additional evidence cited by the Attorney-General includes evidence of an American drilling exploration; historically, evidence of the use and occupation of run holders like John Sutherland and corresponding alienation of land, as set out in the report of Dr Carpenter. The Attorney also points to the access issues experienced between 1931 and 1972 at the Mataikona Block (while it was run by the Māori Trustee) and whether these issues combined constitute a crowding out of Te Hika o Pāpāuma members for a sufficient time, amounting to substantial interruption.

[169] I have discussed the appointment of the Māori Trustee to run the Mataikona Block in the specific context of Te Hika o Pāpāuma and the Pāpāuma Marae Trustees above.[177]

[170] In relation to the other evidence cited by the Attorney-General, I agree with the submission for the Pirere whanau that the reference to the drilling exploration does not advance the argument, given the finding in the Interim Judgment that members of the Pirere whānau were in fact consulted in relation to that proposal (which never went ahead), reflecting the whānau's mana and manaakitanga.[178]

[171] I conclude that these other "interferences", whether considered alone or in combination with commercial fishing, do not amount to a substantial interruption within the application area.

Conclusion

[172] In my reassessment of the Interim Judgment, I have focused on the Supreme Court's emphasis on the role of the Takutai Moana Act in reconciling rights — noting the importance of prior Treaty rights and the injunction for the court to be slow to conclude that rights should be overridden. I have also focused on the importance of context. Having reviewed the evidence in light of the Court's decision, I have concluded that my findings as to CMT do not change (except for the change to

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177 At [123]–[129] and [132]–[139].
178 Interim judgment, above n 1, at [479] and [508].

Ngāi Tūmapūhia's seaward limit as noted at [121] above). The Interim Judgment is amended at [651]–[652] to reflect that change.

[173] In all other respects, the Interim Judgment stands.

Gwyn J

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