

**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 1599**

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: 19, 21–22 and 26–29 February 2024; 1–12 and 14 March 2024; 23
and 30 April 2024; and 1–3 May 2024
Site visits on 18–22 March 2024

Counsel: C Hirschfeld and H Clatworthy for Te Hika o Pāpāuma Mandated
Iwi Authority
L Watson for Ngāti Kere hapū
S Northey and T Hautapu for Trustees of Pāpāuma Marae
J Ferguson and H Herewini for Ngāti Kahungunu ki Wairarapa
Tāmaki nui-a-Rua
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: 16 June 2025

JUDGMENT No. 3 OF GWYN J
[Granting protected customary rights]

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

Seafood Industry Representatives

Attorney-General

Central Hawkes' Bay District Council

Manawatū-Whanganui District Council

Greater Wellington Regional Council

Hawkes' Bay Regional Council

Introduction

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

[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 The effect of the Supreme Court decision is reflected in the final judgment on CMTs, *Re Te Hika o Pāpāuma Mandated Iwi Authority* [2025] NZHC 1523.

[4] The Interim Judgment also did not address the applications for Protected Customary Rights (PCRs) made by the applicants under Part 3 Subpart 2 of the Takutai Moana Act, reserving them for the final judgment.⁵ Those applications are addressed in this judgment.

Protected Customary Rights

[5] 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.⁶

[6] Although PCRs were not the direct focus of the Court of Appeal decision, the Court did say that the Act contemplates that PCRs may be recognised for groups that

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

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 Interim Judgment, above n 1, at [655].

⁶ Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act], ss 9 and 51(1).

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.⁷ Section 106(2)(b) omits the words “exclusively” and “without substantial interruption” contained in s 58(1)(b)(i) of the Act.

[7] PCRs are not addressed in the Supreme Court decision, other than to distinguish the nature of a PCR from CMT, and to note the differing relationship between the applicant and the application area required to establish each of those rights.⁸

Statutory criteria, rights conferred

[8] A PCR does not confer any right to control the relevant area.⁹ 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 a resource consent, and without paying certain charges under the RMA.¹⁰ The Minister of Conservation has the authority to impose controls over the PCR should its exercise have an adverse effect on the environment.¹¹

[9] 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.¹²

[10] 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.¹³ Requiring the location of a PCR to be defined is consistent with the statutory effect of a PCR, as set out above.

⁷ Court of Appeal decision, above n 2, at [336] and [341] per Miller J; and [360] per Cooper P and Goddard J.

⁸ Supreme Court decision, above n 3, at [70] and [140] respectively.

⁹ Takutai Moana Act, s 54.

¹⁰ Court of Appeal decision, above n 2, at [331]; and Takutai Moana Act, s 52.

¹¹ Takutai Moana Act, s 56.

¹² Section 55(2).

¹³ Section 51(1)(b).

[11] A PCR may be granted to one applicant group over an area that is subject to CMT held by another group.¹⁴ 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”.¹⁵

[12] 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.

[13] 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*.¹⁶ In contrast, numerous 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.

[14] Some customary activities are intermittent by their nature, such as using resources for rongoā or spiritual ceremonies, or gathering seasonal resources.

PCRs granted to date

[15] There are a range of activities for which a PCR order can be granted. PCRs have been granted in four cases to date, *Re Edwards*, *Re Ngāti Pāhauwera*,¹⁷ *Re Ngāi Tūmapūhia* and *Te Whānau a Ruataupare Ki Tokomaru*,¹⁸ including for:

- (a) collecting/gathering firewood, wood for artwork, pumice, mud, rocks, sand, stones, indigenous plants and shells, and gravel;

¹⁴ *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 [*Re Edwards*] at [398]; and Court of Appeal decision, above n 2, at [333].

¹⁵ *Re Edwards* at [398].

¹⁶ At [506]–[507].

¹⁷ *Re Ngāti Pāhauwera* [2021] NZHC 3599.

¹⁸ *Nga Hapu o Tokomaru Akau v Te Whānau a Ruataupare Ki Tokomaru* [2024] NZHC 682.

- (b) collecting karengo;
- (c) gathering flora and fauna;
- (d) use and collection of rongoā materials (including seawater) and wai tapu;
- (e) non-commercial fishing for whitebait;
- (f) landing vessels and making passage;
- (g) launching of boats and waka;
- (h) using the takutai moana for transport and for the purposes of navigation;
- (i) to manage, use and protect tauranga waka; and
- (j) exercising kaitiakitanga activities in the takutai moana relating to managing and supporting the health of the marine environment.

Restrictions on what may be the subject of a PCR

[16] There are some statutory limits on what may be the subject of a PCR order. Section 51(2) of the Takutai Moana Act provides:

- (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 Māori 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).

[17] I discuss each of the excluded activities that is relevant to this case.

Activities regulated by the Fisheries Act and 1992 Settlement Act

[18] The definition of “fishing” in the Fisheries Act 1996 captures all “fish, aquatic life, or seaweed”.¹⁹ “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”. “Seaweed” includes all types of algae and seagrasses that grown in New Zealand fishery waters at any stage of their life, whether living or dead.²⁰ In *Re Ngai Tūmapūhia* I determined that all seaweed, including of the class Rhodophyceae, are regulated under the Fisheries Act, being expressly within the ambit of that Act and controlled by that legislation.²¹

[19] Section 89 of the Fisheries Act is a substantive provision to which all fish, aquatic life, and seaweed are subject. This section sets out a general regulatory regime for the taking of all such species, with the effect that all takings must be authorised by current permit, unless an exception to that requirement applies. The exceptions relate to:

¹⁹ Fisheries Act 1996, s 2 definition of “fishing”.

²⁰ Section 2 definition of “seaweed”.

²¹ *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [766]–[771].

- (a) the taking of fish, aquatic life or seaweed for non-commercial purposes and in accordance with amateur fishing regulations made under the Fisheries Act;²²
- (b) the taking of fish, aquatic life or seaweed for non-commercial purposes and in accordance with any Māori customary non-commercial fishing regulations made under the Fisheries Act;²³ and
- (c) relating to seaweed of the class Rhodophyceae, while it is unattached and cast ashore.²⁴

[20] The effect is that all the kaimoana species collected, for which recognition is sought in PCR orders under this heading, fall within the definition of fish, shellfish, or aquatic life, and are specifically regulated under either ss 89, 93 and/or Schedule 4C of the Fisheries Act 1996. They are therefore precluded from recognition in a PCR order under s 51(2)(a).

[21] The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (1992 Settlement Act) provides a full and final settlement of all Māori claims to commercial fishing rights.²⁵

[22] Regulations issued under the Fisheries Act recognise and protect non-commercial customary fishing and food gathering. The Fisheries (Kaimoana Customary Fishing) Regulations 1998 (Kaimoana Regulations) and the Fisheries (Amateur Fishing) Regulations 2013 (Amateur Regulations) both recognise and regulate non-commercial customary kaimoana gathering.

[23] The outcome is that both commercial and non-commercial customary fishing practices and the protection of customary fishing grounds are recognised and provided for in other enactments and excluded from being capable of recognition by PCR orders under the Takutai Moana Act.

²² Fisheries Act, s 89(2)(a).

²³ Section 89(2)(b).

²⁴ Section 89(2)(f).

²⁵ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, preamble (I)(viii).

[24] Whitebait (inanga and kokopu) is the only exception to the non-recognition of fishing related activities as PCRs under the Act. Non-commercial whitebait fishing is not regulated by the Fisheries Act and does not fall within the scope of s 10 of the 1992 Settlement Act.²⁶ Activities in relation to whitebait fishing may be recognised by PCRs.

Activities related to wildlife

[25] Certain seabirds are regulated under the Wildlife Act 1953. Under that Act, “wildlife” is defined as any animal that is living in a wild state; “animal” is defined to include any bird that is not a domestic bird.²⁷ Under s 2(1), domestic bird is defined as:

...any domestic fowl, duck, goose, or turkey, or any pheasant kept, held, raised, or bred on premises for which the predominant purpose is the sale of pheasant meat or live pheasant for human consumption; but does not include any such bird that is living in a wild state, or any other bird not referred to in this definition notwithstanding that it may be living in a domestic state.

[26] The two seabirds of relevance in this case are tītī (muttonbird) and kōau (shags). These birds do not fit within the definition of “domestic bird” under s 2(1) and are therefore defined as “wildlife” under the Wildlife Act, precluding inclusion within a PCR order.

Marine mammals

[27] A PCR cannot recognise an activity that relates to marine mammals within the meaning of the Marine Mammals Protection Act 1978 (MMPA). The MMPA recognises and regulates the treatment of, and activities relating to, marine mammals. The definition of “marine mammals” includes:²⁸

- (a) any mammal which is morphologically adapted to, or which primarily inhabits, any marine environment;
- (b) amongst other species, all species of whales;

²⁶ Whitebait fishing is regulated under the Conservation Act 1987.

²⁷ Wildlife Act 1953, s 2.

²⁸ Marine Mammals Protection Act 1978, s 2 definition of “marine mammal”.

(c) the progeny of any marine mammals; and

(d) any part of any marine mammal.

[28] The MMPA applies equally to alive and dead marine mammals.²⁹

[29] The effect of s 51(2)(d)(ii) of the Act is that PCRs cannot be granted for the gathering of materials related to whales, alive or dead, regardless of the purpose for which the materials are sought.

Rights based on spiritual or cultural association

[30] Blessings and other spiritual practices that involve activities based on spiritual and/or cultural associations may be recognised by PCR orders only where the associations are manifested by a physical activity or use related to a natural physical resource.

Restricted categories in this case

[31] A range of PCRs are sought in this case. A number of them come within the restricted categories discussed above.

Kaitiakitanga of customary fisheries

[32] Te Hika o Pāpāuma and Ngāi Tūmapūhia seek PCRs for exercising kaitiakitanga over customary (non-commercial) fisheries.

[33] As discussed below from [42], exercising kaitiakitanga is generally tikanga-based and is potentially capable of meeting the s 51 requirements (provided it is manifested in a physical activity). However, exercising kaitiakitanga over customary fisheries cannot be recognised by a PCR order, because of the exclusions under s 51(2)(a) and (c)(ii).

²⁹ Section 4(1).

Gathering kaimoana (including seeding and harvesting)

[34] Te Hika o Pāpāuma, the Pirere whānau, Ngāti Kere, Ngāti Kahungunu and Rangitāne seek to have the collection or gathering of kaimoana (including seeding and harvesting) recognised by PCRs.

[35] As discussed above, all activities relating to the gathering of kaimoana are regulated by the Fisheries Act, for the purpose of s 51(2)(a) of the Takutai Moana Act. A PCR for this purpose is not available under the Act.

Traditional practices such as gathering of resources for rongoā purposes

[36] Te Hika o Pāpāuma, the Trustees of Pāpāuma Marae, Ngāti Kere and Ngāi Tūmapūhia seek PCRs in relation to gathering resources for rongoā purposes. Activities related to this can be recognised under the Takutai Moana Act, provided the activities do not use resources for these medicinal and/or healing properties that are not capable as recognition as a PCR. So, for example, picking seaweed for rongoā purposes cannot be recognised as a PCR. On the other hand, collection of sea water for rongoā purposes is capable of recognition as a PCR.

Material from whales

[37] The Trustees of Pāpāuma Marae seek a PCR for the collection of landed whales as taonga of Tangaroa.

[38] As discussed above, the MMPA precludes recognition of this activity by way of a PCR.

Non-physically manifested activities

[39] Te Hika o Pāpāuma has applied for a PCR for communicating hapū mātauranga. The exercise of kaitiakitanga must be grounded in a specific activity.

Rāhui

[40] Ngāti Kahungunu, the Trustees of Pāpāuma Marae, Ngāti Kere and Rangitāne seek PCRs in relation to the implementation of rāhui. Ngāti Kahungunu, the Trustees

of Pāpāuma Marae and Ngāti Kere also seek PCRs in relation to the undertaking of spiritual or cultural practices, such as blessings.

[41] 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 continuing right of access of all New Zealanders to the CMCA, provided for in s 26 of the Takutai Moana Act. The Act is clear that the only prohibitions or restrictions capable of interfering with access to the CMCA are those imposed to protect wāhi tapu,³⁰ or by any other enactment.³¹ 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.³² As noted in *Re Ngāi Tūmapūhia*, “[r]āhui may of course still be imposed and adhered to through tikanga”.³³

Permissible categories of general application in this case

Kaitiakitanga for conservation purposes/takutai kaitiaki duty

[42] Although each application is framed somewhat differently, each of Ngāi Tūmapūhia, the Pirere whānau, Te Hika o Pāpāuma, the Pāpāuma Marae Trustees and Ngāti Kere seek PCR orders for exercising kaitiakitanga in their respective areas, for the purposes of conservation measures and practices. Ngāi Tūmapūhia and the Pirere whānau refer to this as a takutai kaitiaki duty.

[43] In *Re Pāhauwera*, Churchman J granted a PCR order “over kaitiakitanga practices relating to managing and supporting the health of the marine environment through the application area”.³⁴

[44] Similarly, in *Re Ngāi Tūmapūhia* I recognised that PCRs relating to such a kaitiakitanga duty over the takutai moana itself were appropriate for Ngāi Tūmapūhia over its entire application area.³⁵ As I noted, the nature of the kaitiaki function and kaitiaki duties mean that it is a general duty of kaitiakitanga towards the takutai moana

³⁰ Takutai Moana Act, s 79.

³¹ Section 26(2).

³² *Re Ngāi Tūmapūhia*, above n 21, at [716].

³³ At [717].

³⁴ *Re Ngāti Pāhauwera*, above n 17, at [593]–[594].

³⁵ *Re Ngāi Tūmapūhia*, above n 21, at [728] and [816(c)(1) and (d)(i)].

as a whole; for that reason it does not in my view require the identification of specific locations within each applicant's application area. It is appropriate to grant the PCR for those parts of each applicant's rohe moana as fall within the takutai moana.³⁶

[45] As in *Re Ngāi Tūmapūhia*, I am satisfied that there is sufficient evidence of *Re Ngāi Tūmapūhia*'s kaitiakitanga activities across this part of their application area. In the earlier hearing all of Ryshell Griggs, Kahura Watene, Dr Takirirangi Smith and Jamie Griggs, gave evidence of practising takutai kaitiakitanga duty in relation to the takutai moana as a whole.

[46] For the Pirere whānau, there was evidence of beach cleaning from Rangiwahakaomo/Castlepoint to Whakataki. Evidence was also provided by Dianne Sutherland and James Davidson of planting reeds at Whakataki to revitalise the eroding sand dunes.

[47] For Te Hika o Pāpāuma, the applicant provided evidence of a Waitangi Tribunal claim being filed arising from concern about oil drilling at the Mataikona coast and also of dune restoration at Rangiwahakaomo/Castlepoint, of beach clean-ups and protection of inanga at the Whareama River.

[48] The Pāpāuma Marae Trustees called evidence from each of Demetrius Pōtangaroa, Meri Tipene-Walker and Cheryl-Anne Broughton-Kūrei, about their relationship with the coastline in their application area, sourced in the tikanga values they have inherited from their tūpuna. As Mr Pōtangaroa described it, these values are enshrined within kaitiakitanga and provide a detailed list of what kaitiakitanga includes.

[49] Specific examples were given in evidence of how the duty of kaitiakitanga is manifested.

[50] For example, Mrs Broughton-Kūrei talked of her conception of being a kaitiaki as knowing the whakapapa of the kaimoana and the biological substrate in your area, and holding knowledge of tupuānuku (food that is grown in the ground), tupuārangi

³⁶ At [728].

(food that comes from above ground), waitī (freshwater) and waitā (seafood). As Mrs Broughton-Kūrei put it, kaitiaki understand the whakapapa of the kaimoana, such as crayfish needing pāua, pāua needing kina and kina needing kelp to survive. They are linked in a chain that cannot be broken. A kaitiaki must also be aware of the importance of the whenua and moana as a resource for its people.

[51] Many examples were given of how members of the applicant group fulfil their role as kaitiaki of the application area.

[52] I accept that it is appropriate to grant a PCR order that recognises a general duty of kaitiakitanga over the takutai moana, for each of these applicants, in relation to their entire application area.

Whitebait (inanga and kokopu)

[53] Ngāi Tūmapūhia, Te Hika o Pāpāuma and Ngāti Kere seek PCRs in relation to whitebait fishing. As discussed above, whitebait is an exception to the non-recognition of fishing related activities as PCRs under the Act.

Utilising, managing, preserving and/or developing tauranga waka and traditional routes of travel

[54] Ngāti Kahungunu and Ngāti Kere seek PCRs in relation to using, managing, preserving and/or developing tauranga waka. In general, these activities may be recognised by PCR orders, provided the test under s 51 is satisfied. However, the development of such sites and routes must be consistent with the scheme of the Act: the exercise of those rights cannot limit the public rights of access and navigation under ss 26 and 27.

Holding wananga

[55] Ngāti Kahungunu and Te Hika o Pāpāuma seek PCRs in relation to holding wananga. Holding wananga is an activity that, in general, is capable of recognition as a PCR under the Act, provided it is manifested in a physical activity or use or practice related to a natural or physical resource.

PCRs sought by each applicant in this case

[56] I now turn to consider the specific PCRs sought by each applicant in this case.

Ngāi Tūmapūhia-a-Rangi hapū

[57] Ngāi Tūmapūhia-a-Rangi hapū seeks PCRs for the following activities in the application area:

- (a) For exercising kaitiakitanga in the specified area which involves guardianship, conservation, education and protection measures and practices;
- (b) For kaitiakitanga of customary (non-commercial) fisheries;
- (c) To take, utilise, gather, manage and/or preserve all natural and physical resources including the collection of rocks, sand, driftwood, shells, crabs, whitebait, karengo, flax, puha, pīngao and pūpū/booboos;
- (d) For traditional practices such as the exercise and use of the maramataka; and
- (e) For traditional practices such as the gathering of resources for rongoā purposes.

Kaitiakitanga

[58] As discussed above, a PCR for kaitiakitanga of customary (non-commercial) fisheries cannot be granted under the Takutai Moana Act.

[59] In contrast, as also discussed, a PCR for exercising kaitiakitanga for conservation purposes may be available. Here, many witnesses for Ngāi Tūmapūhia gave evidence (during the Stage 1(a) hearing) of a kaitiakitanga duty that applies to the marine and coastal area as a whole. For example, Piri Te Tau stated that “protecting our coastline is a key role as kaitiaki and ahi ka”. Robin Potangaroa gave similar evidence about maintaining the rohe moana.

[60] Ngāi Tūmapūhia provided evidence of the exercise of kaitiakitanga across its application area. There is evidence that this includes and extends to the Whareama River, at least in relation to appointments in respect of Ngāi Tūmapūhia's gazetted rohe moana.

[61] Other witnesses too — Ryshell Griggs, Dr Takirangi Clarence Smith and Jamie Griggs — also gave evidence of their kaitiakitanga duty to the coast.

[62] I am satisfied that it is appropriate to grant a PCR recognising a general duty of kaitiakitanga over that part of the takutai moana in Ngāi Tūmapūhia's application area.

Gathering of natural and physical resources

[63] In relation to the gathering of natural and physical resources, Ngāi Tūmapūhia seeks a PCR to take, use, manage and/or preserve shells and whitebait from the Whareama River.

[64] Matthew Paku gave additional evidence about Ngāi Tūmapūhia's consistent use of the Whareama River for collecting whitebait. Mr Paku learned how to collect kaimoana from his father, who had done so himself from at least the 1940s. Mr Paku's evidence was that whitebait are caught at the river mouth and along all 14 kilometres upstream. Whitebaiting is done in accordance with the maramataka during the summer months.

[65] As discussed, whitebait is the only exception to the non-recognition of fishing related activities as PCRs under the Act. I am satisfied that it is appropriate to grant a PCR in relation to the collection of whitebait at the Whareama River mouth.

[66] The application filed by Ngāi Tūmapūhia also sought a PCR in relation to the gathering of crabs and pūpū/boobos. These fall within the ambit of the Fisheries Act and, as discussed, cannot be the subject of a PCR.³⁷

³⁷ At [772].

Maramataka

[67] As to the use of traditional practices such as the exercise and use of the maramataka, Gary Griggs provided evidence about knowing when to dive by looking at the tides and the moon. In the Stage 1(a) proceeding I found that the very nature of maramataka makes it difficult to be precise about where it will be exercised,³⁸ and granted PCRs accordingly.³⁹

[68] On the same basis I grant a PCR for the exercise and use of the maramataka for that part of Ngāi Tūmapūhia's application area included in this hearing.

Gathering of resources for rongoā purposes

[69] In relation to the gathering of resources for rongoā purposes, Hana Rei Paku Riddell gave evidence of use of sea water to treat skin ailments. Ms Riddell and Patrick Mason also gave evidence of the use of mussel shells for rongoā purposes.

[70] There is evidence of the collection of mussels in proximity to the Whareama River and generally evidence of the use of mussel shells for rongoā purposes. Similarly, there was evidence before the Court of the use of sea water to treat various skin conditions and ailments, including eczema, scabs, chicken pox and measles (from Hana Riddell).

[71] I accept it is appropriate to grant a PCR in this respect at the Whareama River mouth.

Te Hika o Pāpāuma

[72] Te Hika o Pāpāuma notes that, being a coastal group, they have relied heavily on gathering of kaimoana, inshore fishing, bird catching and snaring, and collecting resources such as shells, wood, bones, seaweed, stones and sand. Some of this resource collection has been for rongoā or for clothing. Te Hika o Pāpāuma fisher

³⁸ At [781].

³⁹ At [816(d)(v)].

peoples sought deep water fish such as kumukumu (gurnard), puaihakarua (sea perch) and deep sea cod.

[73] Te Hika o Pāpāuma also undertakes the following activities in the common marine and coastal area: exercising kaitiakitanga, travel, trade, bird catching/snaring, harvesting plants, shrubs and tree material, gathering resources for rongoā purposes, ceremonial practices such as hui, mārena and tangihanga.

[74] Te Hika o Pāpāuma has undertaken these activities since prior to 1840 and continues to undertake these activities in the application area in accordance with tikanga, albeit in some instances using modern equipment.

Exercising mana motuhake and rangatiratanga

[75] The PCR sought in Te Hika o Pāpāuma's amended application (dated 21 March 2023) is for the exercise of mana motuhake and rangatiratanga across the whole application area (from Poroporo to Whareama). In submissions the right is described as freedom of movement and assembly.

[76] Te Hika o Pāpāuma relies on *Re Edwards* where Churchman J said that an example of practices relating to rangatiratanga and mana motuhake that could be recognised by a grant of PCR was:⁴⁰

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.

[77] While it is the case that a PCR can include a right that is based on a spiritual or cultural association that is manifested in a physical activity or a use related to a physical or natural resource,⁴¹ Te Hika o Pāpāuma has provided no specific examples of the exercise of the right sought and a PCR is not therefore available.

⁴⁰ *Re Edwards*, above n 14, at [380].

⁴¹ At [378]–[380].

Wananga

[78] While Te Hika o Pāpāuma continue to pass on knowledge, custom, tikanga and whakapapa throughout their application area, no specific examples were provided which would enable the grant of a PCR.

Exercising kaitiakitanga

[79] Te Hika o Pāpāuma says it continues to exercise kaitiakitanga throughout its application area, both for the conservation of fish stocks and kaimoana and more generally for conservation purposes.

[80] As discussed above, commercial and non-commercial customary fishing practices and the protection of customary fishing grounds are excluded from protection by way of a PCR.

[81] However, a PCR may be granted in respect of kaitiakitanga for conservation purposes.

Harvesting kaimoana; fishing

[82] Te Hika o Pāpāuma continues to harvest kaimoana and to fish within the application area to feed whānau, kaumātua and hapū and to provide kai for hui, tangihanga and mārena. As discussed above, a PCR for these activities is precluded by the terms of the Fisheries Act and the 1992 Settlement Act.

Resource extraction

[83] Te Hika o Pāpāuma seek PCRs for the continued extraction of resources from their application area when washed up after storms, including shells/fossils, wood, bones, seaweed (including agar, karengo and bull kelp), stones, sand and tuna ahi.

[84] Bone extraction is not amenable to a PCR, as an activity related to wildlife, marine mammals or aquatic life. Collecting tuna and seaweed is also excluded.

[85] There was evidence of stones being collected from Akitio Beach, Rangiwhakaoma/Castlepoint, and Sandy Beach at Mataikona. There was also evidence that driftwood, sand, rocks and seawater are collected at or in proximity to the Whareama River. A PCR is granted for the extraction of those resources.

Use of resources for rongoā purposes

[86] Te Hika o Pāpāuma also seeks a PCR for the use of resources, including agar, seawater and some plant species, for rongoā purposes.

[87] As already discussed all forms of seaweed, including agar, are not amenable to the grant of a PCR. In other respects though, a PCR may be available for rongoā purposes. There was evidence of the collection of seawater and sand for rongoā purposes, including for treating eczema, and a PCR is granted for that activity.

Recreational use

[88] Te Hika o Pāpāuma submits that it continues to recreationally use the application area, for example, for camping, swimming, walking and running. However, no specifics are provided which might enable the grant of a PCR.

Bird catching/snaring

[89] Te Hika o Pāpāuma continues to catch and snare birds in the application area for the purpose of feeding whānau, hapū and iwi. However, as discussed above, the grant of a PCR in this respect is precluded by the Wildlife Act.

Use of resources & environment during tangihanga

[90] Te Hika o Pāpāuma continues to use salt water for embalming and sand hills as urupā. The latter relates to the reinternment of disturbed kōiwi. Evidence was given that this had occurred at the Mataikona end of Aohanga Station.

[91] However, as the Attorney-General's submissions note, the nature of the activity is such that it occurs in response to the presentation of kōiwi on the coast. While that

will likely be in proximity to known burial grounds, the precise location of such events cannot be accurately predicted and thus there is insufficient specificity of the area in which it will occur.

[92] The evidence as to the collection of sea water for embalming was also of a general nature and insufficient to found a PCR order.

Use of marine and coastal area for transport

[93] Te Hika o Pāpāuma continues to use the marine and coastal area for transport, including for trading; travel for hui, tangihanga and mārena; access to rongoā; and transportation of kai for whānau and hapū. The evidence of these activities was largely historical and not specific. It was therefore insufficient to found the grant of PCRs.

Ngāti Kere

[94] The ancestors of Ngāti Kere utilised the common marine and coastal area for food collection and other activities. This history is reflected in the PCR orders they seek.

[95] Ngāti Kere seeks PCRs for fishing and kaimoana gathering in the estuaries and coastal margins of their application area, and for the use of tools and equipment in association with those fisheries activities.

[96] Ngāti Kere also seeks a PCR for undertaking non-commercial aquaculture activities.

[97] PCR orders are also sought for the collection of kōau (shag) eggs and tītī (mutton bird) chicks; the use of beached whales; the collection of natural resources for rongoā; transport along the coastal routes; the transfer of hapū marine cultural knowledge, seasonal kaimoana exchange with inland hapū, access to gardens on land, social interaction, and manaakitanga; activities relating to spiritual practices, such as rāhui; collecting, planting and cultivating plant species in coastal wet margins; launching and using waka; customary activities relating to enhancement of the

environment; and gathering other natural resources and use for non-commercial purposes.

Fishing and food gathering

[98] Fishing and activities related to aquatic life are excluded from recognition by way of PCR, under s 51(2)(a) of the Takutai Moana Act. Non-commercial customary fishing is also excluded.⁴²

[99] Of the list of kaimoana and fish specified by Ngāti Kere, only non-commercial activities related to whitebait are permitted. Dr Tipene-Leach gave evidence of whitebait fishing, noting that the Pōrangahau River is a favourite place for whitebait fishing because of its location and length. Dr Tipene-Leach also talked of smaller streams – like the Makaramu Stream (which flows into the Pōrangahau River) and the Waipaoa Stream, which are also good for collecting whitebait.

[100] Morehu Smith also gave evidence of the knowledge and practices relating to whitebait fishing being taught through the generations, in accordance with tikanga.

[101] I am satisfied that there is a sufficient basis to grant a PCR in relation to whitebait fishing at the Pōrangahau River, the Makaramu Stream and the Waipaoa Stream, to the extent those whitebait fishing areas are within the CMC. Ngāti Kere should provide further evidence on this point for the purposes of the final orders hearing.

[102] The use of tools and equipment in association with the fisheries activities is also caught by the exclusions under s 51(2)(a) and (c)(ii).

Gathering of natural and physical resources

[103] Both bird snaring and the collection of kōau eggs are excluded from recognition, being activities relating to wildlife.⁴³

⁴² Takutai Moana Act, s 51(2)(c)(ii).

⁴³ Section 51(2)(d)(i).

[104] The use of beached whales is, as discussed earlier, not able to be protected by a PCR.

[105] As to the collecting, planting and cultivating of plant species in coastal wet margins, such as harakeke, tī kouka and pīngao, there was evidence of pīngao planting at Te Paerahi beaches and generally at the Pōrangahau coastline. The evidence from Dr Tipene-Leach was that this was currently in the regeneration phase and is not currently collected, although it is expected to be available for collection in the future. I accept it is appropriate to grant a PCR in relation to the collection, planting and cultivating of pīngao at Te Paerahi beach.

[106] No evidence was provided in relation to the collection, planting and cultivation of harakeke and tī kouka.

Gathering of resources for rongoā purposes

[107] In relation to the collection of rongoā, evidence was given for Ngāti Kere of knowledge of natural medicines being practised in the area. However, no specific examples or sites were provided and thus are not capable of recognition by way of a PCR order. While some evidence was provided of seaweed being used for rongoā purposes, this is not capable of being recognised as a PCR.

Other PCRs sought

[108] As for transport along the coastal routes, while this is a permitted activity for the purposes of the Act, no evidence was given specifically relating to the activity.

[109] Similarly, in relation to the transfer of knowledge of hapū marine culture, seasonal kaimoana exchange with inland hapū, access to gardens on land, social interaction and manaakitanga, there was no evidence provided (as required) that this is a physically manifested activity, other than in the form of fishing.

[110] As to the launching and using of waka, while this is capable of being recognised by way of a PCR, only general evidence of this historical practice was

provided. No specific sites were raised and nor, from the evidence, does it appear to be a continued activity.

[111] No evidence was provided of either customary activities relating to enhancement of the environment or of undertaking non-commercial aquaculture activities.

Pāpāuma Marae Trustees

[112] The Trustees of the Pāpāuma Marae seek recognition orders for the exercise of kaitiakitanga as a PCR which includes, but is not limited to:

- (a) the gathering, use, planting and cultivating of plant species such as flax, tī kouka, karaka, pīngao and karengo;
- (b) the collection and harvesting of rongoā such as kawakawa for illness and general health;
- (c) the collection of landed whales as Taonga of Tangaroa;
- (d) the collection of natural resources such as silicified limestone;
- (e) activities related to spiritual practices (such as rāhui); and
- (f) the burial of kōiwi.

Collection of silicified limestone

[113] Robin Potangaroa gave evidence of the collection and use of silicified limestone which, Mr Potangaroa said has been used for adze production for many centuries. His evidence was that a “workshop site” had been found at the mouth of the Aohanga River. Mr Potangaroa’s evidence was that their ancestors used the silicified limestone in the area to fashion adzes. The sites where these adzes have been found in the coastal area of the block. Demetrius Pōtangaroa confirmed that the practice of collecting limestone continues at the Mataikona coastline.

[114] The evidence demonstrates continuity of the use of limestone for purposes capable of PCR recognition. Although the evidence was not completely specific about where on the Mataikona coastline this occurs, the coastline of the Marae Trustees application area is small and therefore I am prepared to grant the PCR.

Kōiwi

[115] The Trustees also seek PCR recognition for the customary reinternment of kōiwi found on the coast, in accordance with tikanga. The evidence from Demetrius Pōtangaroa was that when kōiwi are exposed from traditional places of burials in the sandhills at Mataikona, the necessary steps are taken to deal with the bones in accordance with tikanga.

[116] The evidence was sufficient to show continuity of burial of kōiwi when they are exposed from traditional places of burials in sandhills, and is therefore theoretically capable of being recognised as a PCR.

[117] However, as discussed in relation to Te Hika o Pāpāuma, the difficulties of identifying a precise location mean there is an insufficient basis for the grant of a PCR.

Gathering of natural and physical resources

[118] The collection of landed whales as taonga of tangaroa is an activity that is excluded under s 51(2)(d) of the Takutai Moana Act.⁴⁴

[119] In terms of the gathering, use, planting and cultivation of plant species, this is a permitted activity, subject to activities relating to aquatic life and seaweed which are excluded under s 51(2)(a) and (c)(ii).

[120] Meri Tipene-Walker spoke of her mother growing and picking flax and other plants and also talked of her cousins doing so today. While this evidence demonstrates continuity of the activity, as the Attorney-General's submissions note, Ms Tipene-Walker refers to the flax as being located in front of Te Aroha Marae, which suggests that any related activity occurs outside of the CMCA. In the absence of further

⁴⁴ *Re Ngāi Tūmapūhia*, above n 21, at [686] and [703].

evidence as to the specific area in which the activities carried out, I am not able to grant a PCR.

Gathering of resources for rongoā purposes

[121] No evidence was presented by the Pāpāuma Marae Trustees as to the collection and harvesting of rongoā. Thus, although it is a permitted activity, there was insufficient information on which a PCR could be granted.

Activities related to spiritual practices

[122] PCR orders for activities related to spiritual practices can be available when they are manifested in a physical activity or a use related to a natural or physical resource.⁴⁵ The evidence provided did not give examples of this necessary physical manifestation within the takutai moana. Rāhui itself cannot be recognised as a PCR.⁴⁶

Rangitāne

[123] Rangitāne seeks PCR orders recognising:

- (a) the 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) the imposition of rāhui.

Collection of water and plants

[124] In Rangitāne's submission these activities have been undertaken by the iwi since at least 1840. Specific plants, kai and other resources have been collected from the moana for pharmaceutical purposes.

[125] In his evidence, Dr Paewai talked of collecting large drums of water from the sea at Wainui and Akitio for ceremonial purposes. Dr Paewai's evidence was that the

⁴⁵ At [686].

⁴⁶ At [792].

sea at Akitio gives his people medicine and that collecting seawater (waitai) for ceremonial purposes is recognised as being superior to freshwater for assisting tapu/noa procedures. Dr Paewai also gave evidence of the collection of rongoā flax and plants for pharmaceutical purposes, on the coast at Mataikona. Dr Paewai's evidence demonstrated the contemporary nature of this activity.

[126] Joseph Potangaroa talked of the historical origins of rongoā activities on the part of Ngāti Hāmua.

[127] I am satisfied that the evidence, both historical and contemporary, is sufficient to grant a PCR for the collection of water for ceremonial purposes at Akitio and Wainui and for the collection of flax and plants for rongoā purposes, at Mataikona.

[128] While there was evidence of seaweed collection in use for rongoā purposes, as already discussed, seaweed is not permitted to be the subject of a PCR under the Takutai Moana Act.⁴⁷

Rāhui

[129] Since at least 1840, rāhui have regularly been placed in Tautāne, Akitio and Pōrangahau when drownings have occurred. Over the last 30 years, rāhui have been applied in the Whakataki area also.

[130] As discussed earlier, rāhui cannot be recognised as a PCR under the Act.⁴⁸

Pirere whānau

[131] The Pirere whānau seeks PCRs for the following:

- (a) kaitiakitanga over the marine and coastal area;
- (b) to take, utilise, gather, manage and/or preserve all natural and physical resources including stones, driftwood, shells, karengo; and

⁴⁷ At [771].

⁴⁸ At [792].

- (c) gathering resources for rongoā.

Kaitiakitanga

[132] As above, a PCR providing for kaitiakitanga for conservation purposes may be granted under the Act. The evidence of Faye Pirere was that the Pirere whānau always have a designated kaitiaki from the whānau protecting the application area and keeping the home fires burning. James Davidson gave evidence that this practice has been passed down for generations and continues to be practised.

[133] Dianne Sutherland and James Davidson gave evidence of beach cleaning within the area from Rangiwahakaoma/Castlepoint to Te Wharepouri's Mark and that this cleaning of the beach extends further up the coastline to Whakataki.

[134] Rebecca Harper gave evidence of conservation activities being carried out by the whānau, including by planting hundreds of reeds at Whakataki to revitalise the eroding sand dunes.

[135] As discussed above, the exercise of kaitiakitanga manifesting in a tangible physical activity may be recognised as a PCR.

[136] I am satisfied that the evidence for the Pirere whānau satisfies the relevant criteria and a PCR may be granted in this respect.

Gathering of natural and physical resources

[137] As to the PCR sought for the recognition of the right to take, use, manage and/or preserve natural and physical resources, there was evidence from Dianne Sutherland of her collection of shells in the southern part of the application area, between Castlepoint Stream and the Whakataki Stream. Ms Sutherland's evidence was that she collects them three to four times per week to scatter in her garden.

[138] North of the Whakataki Stream, Lisa Pirere collects shells, visiting once every two months and usually taking only one shell per visit. Ms Pirere considers this to be a display of reciprocity with tangaroa. She follows her grandfather's example in treating the shells as taonga.

[139] James Davidson gave evidence as to his collection of pāua shells, which he uses for the eyes in his carvings. Mr Davidson explained how he exclusively uses shells from the application area in his carvings and will collect up to ten pāua from Nancy's Bay every time he visits.

[140] Ms Pirere gave evidence of collecting rocks, again in a reciprocal manner, near the Whakataki Stream, and treating them as taonga in the way her grandfather taught her. Ms Sutherland collects yellow stones near the Whakataki Stream, three to four times each week.

[141] Mr Davidson referred to collecting driftwood along the coast for cooking food and to use as firewood. In addition, he collects logs from the Whakataki Stream for traditional carving (toi whakairo).

[142] I am satisfied that these activities are sufficiently specified to allow the granting of a PCR for the collection of shells, rocks and stones, and driftwood, in the application area.

[143] Rebecca Harper, Faye Pirere, Lisa Pirere, Peter Davidson, James Davidson and Richard Pirere all referred to collecting the plentiful karengo between the Castlepoint Stream and Ōkau Stream, all the way up to Suicide Rock, all year round.

[144] As I discussed in *Re Ngāi Tūmapūhia*, a PCR is not available in respect of the collection of karengo.⁴⁹

⁴⁹ At [771].

Gathering of resources for rongoā purposes

[145] A PCR is also sought for the gathering of resources for rongoā. Faye Pirere's evidence was that she collects kawakawa and puha for rongoā within the application area – just north of the Whakataki Stream.

[146] As discussed above, the gathering of activities connected to the gathering of resources for rongoā purposes can be recognised under the Act, provided the activities do not use resources that are not capable of recognition as a PCR — for example, seaweed. The resources referred to by Ms Pirere are not in that category. Accordingly, a PCR is available for the gathering of kawakawa and puha for rongoā purposes.

Ngāti Kahungunu

[147] Ngāti Kahungunu made a korowai application, in support of hapū and whānau applicant groups.⁵⁰ It deferred to those groups to provide their own evidence of the activities for which they sought PCR recognition.

PCR Orders

[148] I make the following PCR orders:

- (a) Ngāi Tūmapūhia:
 - (i) a right to exercise kaitiakitanga over the application area for the purposes of conservation measures and practices;
 - (ii) collection of whitebait at the Whareama River mouth;
 - (iii) use of the maramataka, within the application area; and
 - (iv) gathering of sea water and mussel shells for rongoā purposes.

⁵⁰ Interim Judgment, above n 1, at [567]–[570].

(b) Te Hika o Pāpāuma:

- (i) a right to exercise kaitiakitanga over the application area for the purposes of conservation measures and practices;
- (ii) collection of stones from Akitio Beach, Rangiwhakaoma/Castlepoint and Sandy Beach at Mataikona;
- (iii) collection of driftwood, sand, rocks and seawater at or in proximity to the Whareama River; and
- (iv) collection of seawater for rongoā purposes.

(c) Ngāti Kere:

- (i) collection of whitebait at the Pōrangahau River, Makaramu Stream and the Waipaoa Stream, to the extent those whitebait fishing areas are within the CMC; and
- (ii) collection, planting and cultivating of pīngao at Te Paerahi beach.

(d) Pāpāuma Marae Trustees:

- (i) collection and use of silicified limestone along the Mataikona coastline.

(e) Rangitāne

- (i) collection of water for ceremonial purposes at Akitio and Wainui;
and
- (ii) collection of flax and plants for rongoā purposes at Mataikona.

(f) Pirere whānau

- (i) a right to exercise kaitiakitanga over the application area for the purposes of conservation measures and practices;
- (ii) collection of shells, rocks and stones, and driftwood in the application area; and
- (iii) collection of kawakawa and puha for rongoā purposes.

Gwyn J

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