IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-270
CIV-2017-485-272
[2024] NZHC 1373

UNDER	The Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	MURIWAI MAGGIE JONES on behalf of NGĀI TAI IWI and the URI of NGĀI TAI IWI
	MURIWAI MAGGIE JONES on behalf of RIRIWHENUA HAPU
	ATTORNEY-GENERAL Interested Party
	BAY OF PLENTY REGIONAL COUNCIL Interested Party

Hearing:	29 April 2024
Appearances:	E K Rongo and A Gordon for M M Jones on behalf of Ngāi Tai Iwi and Ririwhenau Hapū G L Melvin and S L Gwynn for Attorney-General B A Scott for Seafood Industry Representatives (written submissions only)
Judgment:	28 May 2024
Reissued:	29 May 2024

JUDGMENT OF CHURCHMAN J

Table of Contents

	Paragraph Number
Introduction	1
Scope of rehearing	6
Relevant findings in the Court of Appeal	10
Submissions at the rehearing	19
Ngāi Tai's submissions	19
Attorney-General's submissions	29
Seafood industry representative's submissions	41
Analysis of whether specified area is held in accordance with tikanga	43
Exclusive use and occupation	72
Submissions	80
Ngāi Tai's submissions and relevant evidence	80
SIR submissions	92
Attorney-General submissions	94
Analysis of exclusive use and occupation	100
Outcome	124

Introduction

[1] The iwi Ngāi Tai and its hapū Ririwhenua (hereafter jointly referred to as Ngāi Tai unless otherwise indicated) were successful applicants in an application for Customary Marine Title (CMT) under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). In a judgment dated 7 May 2021,[1] they were awarded CMT for the area between Tarakeha and Te Rangi and out to 12 nautical miles from the coast. That award will be referred to as CMT3.

[2] The Ngāi Tai and Ririwhenua applications extend further to the east than Te Rangi but the only part of their application under MACA that they wished the Court to determine related to the area between Tarakeha and Te Rangi.

[3] In the 2021 decision I also made an award of CMT in respect of the area immediately to the west of the application of Ngāi Tai to six Whakatōhea hapū: Ngāti Ruatakenga, Ngāti Patumoana, Ngāti Ira o Waiōweka, Ngāti Ngāhere,

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1 *Re Edwards (No 2)* [2022] NZHC 1025; 2 NZLR 772 [the 2021 decision].

Ngāi Tamahaua and Te Ūpokorehe.[2] As I noted in the 2021 decision, Ngāi Tai share close whakapapa links with these neighbours.[3]

[4] A number of applicants and interested parties appealed the 2021 decision and on 18 October 2023 the Court of Appeal released its decision on those appeals.[4]

[5] In the Court of Appeal, Landowners Coalition Inc (LCI), who were supported by Seafood Industry Representatives (SIR), had challenged the award of CMT3. The Attorney-General did not appeal the 2021 High Court decision, but, nonetheless, is recorded in the Court of Appeal decision as having submitted that the evidence was not sufficient to justify CMT out to the 12 nautical mile limit.[5] The Court of Appeal has directed a rehearing in relation to CMT3.[6]

Scope of rehearing

[6] The rehearing was directed only in respect of certain aspects of the 2021 decision. Other than those issues upon which a rehearing was directed, or an error of law was identified, the balance of the 2021 High Court judgment remains undisturbed.

[7] The extent and nature of the rehearing is determined by the terms on which the Court of Appeal has remitted the matter to the High Court.

[8] There was no direction by the Court of Appeal that further evidence be filed in respect of CMT3 and all parties were content to rely upon the evidence that had been before this Court in the first instance.

[9] In addition to claiming CMT between Tarakeha and Te Rangi, Ngāi Tai had also claimed CMT around Whakaari (White Island) and Te Paepae o Aotea. The Court

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2 The first five hapū mentioned affiliate to Te Whakatōhea. Up until recently, Te Ūpokorehe also affiliated to Te Whakatōhea but in recent times, some members have asserted a separate identity as an iwi. It was not necessary for the purposes of my decision for me to find whether they were a separate iwi or a hapū of Whakatōhea.

3 The 2021 decision, above n 1, at [307(d)].

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

5 At [17].

6 At [356].

of Appeal's decision made it clear that the rehearing did not extend to the common marine and coastal area around Whakaari and Te Paepae o Aotea.[7]

Relevant findings in the Court of Appeal

[10] In the Court of Appeal there was no challenge to the finding in the 2021 High Court decision that the western extremity of CMT3 was Tarakeha. The principal challenge to the grant of CMT came from LCI and SIR. They challenged the finding that Ngāi Tai had exclusively used and occupied its claimed area from 1840 to the present day without substantial interruption.[8] SIR argued that the evidence established that commercial fishing had resulted in substantial interruption.[9]

[11] That argument was rejected by the Court of Appeal.[10] However the Court was not satisfied that the evidence had established that the test in s 58 of MACA had been met out to 12 nautical mile limit.[11]

[12] Several of the applicant groups argued that the burden of proof adopted in the 2021 decision was too high. Miller J accepted that argument saying:[12]

> ...if an applicant group can show that it holds an area in accordance with tikanga [which is the test for s 58(1)(a)], the Court may infer, in the absence of contrary evidence, that it has done so since 1840.

[13] The majority held:[13]

> Reading ss 58 and 106 together, as we must, we consider that an applicant group will need to call evidence to satisfy the Court that:
>
> (i) The specified area is currently held by that group in accordance with tikanga. That is, the group will need to show that as a matter of tikanga it has authority to use and occupy the area, and to control access to and use of that area by others.
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> (ii) The use and occupation of that area by the group has been continuous from 1840 to the present day (allowing for tuku, and for changes in composition and identities of customary groups).

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7 *Whakatōhea Kotahitanga Waka,* above n 4, at [356].
8 Marine and Coastal Area (Takutai Moana) Act 2011, s 58(1)(b)(i).
9 *Whakatōhea Kotahitanga Waka,* above n 4, at [22].
10 At [328]–[329].
11 At [311] and [319].
12 At [228].
13 At [435]–[436].

> [436] That will be sufficient for the Court to draw an inference that the s 58 test is met, unless some other party takes it on themselves to demonstrate that the customary interests of the applicant group were not sufficient to establish effective control over the relevant area as at 1840, or have ceased to have the necessary character or been substantially interrupted after 1840…

[14] A feature of this case is that although Ngāi Tai asserted that it had offshore fishing grounds within the area of CMT3, it refused to disclose where they were and declined to identify them. This was because it did not wish to risk interference in the fishing grounds from others. Miller J, with whom the majority agreed on this point, accepted the submission from the Attorney-General that the existence of offshore fishing grounds which were not disclosed in evidence could not justify a CMT recognition order out to the 12 nautical mile limit.[14]

[15] Miller J went on to note that he was not suggesting that CMT was confined to specific fishing grounds or the use of other resources.[15] He held that CMT may extend to all the rohe moana exclusively occupied and used by an applicant group for purposes such as passage and navigation as well as resource-gathering.

[16] Miller J also noted that there was "…evidence that a group's takutai moana includes areas adjacent to their land".[16]

[17] This comment seems to have been misconstrued by counsel for SIR in his submissions at the rehearing. Mr Scott asserted "…on the Court of Appeal's interpretation, applicant groups must prove that, prior to the declaration of sovereignty in 1840, they not only held the land adjacent to the application area but that they also held the coastal marine area now claimed".

[18] To justify this submission, Mr Scott made reference to paragraph [434] of the majority in the Court of Appeal's decision. The paragraph relied on does not support the submission that an applicant for CMT must prove that prior to 1840 they held both the land adjacent to the application area and the coastal marine area. As s 59(1)(a) of MACA makes clear, whether an applicant group or any of its members own land

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14 At [319].
15 At [320].
16 At [320].

abutting all or part of the specified area and have done so without substantial interruption from 1840 to the present day, is a matter that *may* be taken into account in determining whether customary marine title exists. Unlike the corresponding provision in the now repealed Foreshore and Seabed Act,[17] it is no longer a compulsory requirement.

Submissions at the rehearing

Ngāi Tai's submissions

[19] Whether an applicant group whakapapa to the land adjacent to the claimed takutai moana is the starting point in establishing whether or not they hold the takutai moana in accordance with tikanga.[18] Ms Rongo for Ngāi Tai started her submissions by referring to the arrival of Ngāi Tai tipuna on the Tainui waka some 27 generations ago.

[20] Appendix B to the 2021 decision addressed whakapapa, including that of Ngāi Tai. Miller J noted that there was no challenge to that material and that the Court of Appeal adopted it.[19] I therefore do not need to repeat it in detail but note that it described the Tainui waka arriving in Aotearoa with Tōrere-nui-a-rua on board. She married Manaakiao who was descended from Te Tini-o-Toi whose people were among the earliest to live in the area that is now the rohe of Ngāi Tai. Their son was named Tai after whom the iwi was named. It is therefore clear that Ngāi Tai have long whakapapa links to the claimed area.

[21] Appendix B to the 2021 decision also recorded that there had been border disputes between Ngāi Tai and its western neighbours going back hundreds of years.[20] Those disputes, which are discussed further in relation to the evidence of the historian Mark Derby who gave evidence for the Attorney-General,[21] are evidence of Ngāi Tai defending its borders, responding to incursions from their neighbours, and engaging in incursions of their own.

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17 Foreshore and Seabed Act 2004 s 32(2)(b).
18 The 2021 decision, above n 1, at [301].
19 *Whakatōhea Kotahitanga Waka*, above n 4, at [35].
20 The 2021 decision, above n 1 at Appendix B at [13].
21 Exhibit MD-02 of the Affidavit of Mark Derby dated 2 June 2020 at [55]–[87].

[22] Ms Rongo also referred to the conclusions reached by the pūkenga. The Pūkenga Report is set out in Appendix A to the 2021 decision. It expressed the matter this way:[22] "However, and based on Tikanga, our view is that Ngāi Tai have mana whenua from Tarakeha in the west to Taumata o Apanui." While the conclusions reached by the pūkenga are not definitive, because the pūkenga are experts in tikanga, their views carry considerable weight. Their conclusions are also supported by evidence given by Ngāi Tai witnesses as well as evidence given by witnesses on behalf of other applicants.

[23] In the High Court hearing, one of the Whakatōhea hapū, Ngāi Tamahaua, contended that the boundary between Ngāi Tai and Whakatōhea was in fact Te Rangi not Tarakeha. Their counsel advocated for a shared CMT order between Ngāi Tamahaua and Ngāi Tai.[23] I rejected that claim.[24] I noted that all of the other Whakatōhea hapū accepted Tarakeha as the boundary.[25] Ngāi Tamahaua did not appeal that finding.

[24] Ms Rongo's submissions referred to the fact that Ngāi Tai's neighbours recognised their mana whenua and mana moana over the area between Tarakeha and Te Rangi. She referred in particular to the detailed evidence given by Te Riaki Amoamo. Mr Amoamo was a senior and respected kaumatua who gave evidence for the Whakatōhea hapū Ngāti Ruatakenga. He was an impressive witness. He explained that when members of Whakatōhea wished to enter the rohe moana of Ngāi Tai east of Tarakeha they needed to formally ask permission. Mr Amoamo recounted the process he followed when he and members of his hapū wished to access Te Rangi.[26] He would contact a Ngāi Tai kaumatua, Mr Bill Maxwell, to obtain permission. Ms Rongo referred to the evidence of the cross-examination of Mr Amoamo on 24 September 2020. Mr Amoamo acknowledged that the custom was that when Whakatōhea visited Te Rangi, Ngāi Tai would be present to pōwhiri them into the area and that Ngāi Tai kaumatua would lead the manuhiri along the beach and, in

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22 The 2021 decision, above n 1, at Appendix A at [4(c)(iii)(1)(e)].

23 At [582].

24 At [586].

25 Ngāti Ruatakenga had initially challenged the boundary but, by the end of the 2021 hearing, agreed it was at Tarakeha.

26 Te Rangi is a flat white rock visible at low tide and was the landing place of the Nukutere waka and therefore a place of great significance to the Whakatōhea hapū.

accordance with the tikanga of that place they would all ensure there was only one set of footsteps, with each person walking in the footsteps of the one in front.[27]

[25] In relation to the issue of holding the area in accordance with tikanga, Ms Rongo referred to the evidence of Arapeta Mio and Muriwai Maggie Jones given at the hearing on 1 October 2020. Both gave evidence in the High Court as to the exercise by Ngāi Tai of kaitiakitanga over the claimed area. Mr Mio referred to the exercise of kaitiakitanga by imposing various conservation measures such as returning mussels that were too small, not targeting one area for fish when it was depleted and of handing down customary knowledge relating to kaitiakitanga and manaakitanga in the mana moana. Ms Rongo noted Mr Mio's evidence that:[28]

> We are in that area and therefore what's in front of us is what we must look after. *Ko te kāpata kai* [food cupboard] not only for this time but it is the *kāpata kai* for our next to follow, so if we weren't looking after those areas at this time what of the future.

[26] Other examples of kaitiakitanga given by Mr Mio are found between pages 67 and 95 of the transcript of the hearing. Ms Jones had also given extensive evidence as to the exercise of kaitiakitanga.[29] She particularly emphasized Ngāi Tai's role in relation to conservation, including care of the beach and being involved in whale rescues. Ms Jones also explained that she was formerly a member of the Ōpōtiki District Council and noted that Ngāi Tai were recognised by and worked closely with the local council in relation to their role as kaitiaki of their rohe moana.

[27] Mr Mio and Ms Jones also both spoke about the spiritual connection with the takutai moana which included the collection of salt water for blessings and cleansings and the tikanga which applies to activities such as diving.[30] In relation to manaakitanga, Ms Jones explained the protocols around the taking of kai moana and the protection of sea birds.[31]

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27 *Re Edwards (No 2)* Transcript CIV-2011-485-817, 24 September 2020, at 77-78.
28 *Re Edwards (No 2)* Transcript CIV-2011-485-817, 1 October 2020 at 90
29 *Re Edwards (No 2)* Transcript CIV-2011-485-817, 1 October 2020 at 128–132,
30 At 80 and 126.
31 At 126.

[28] In support of the submission that Ngāi Tai exercise mana over the takutai moana, Ms Rongo referred to Mr Mio's evidence about the imposition of rāhui. The type of instances where rāhui were imposed included when drownings happened, in relation to depletion of resources and following the eruption of Whakaari.[32] She also referred to the evidence of Robert Edwards, a kaumātua who had given evidence for Whakatōhea, about the imposing of rāhui when Whakaari erupted. She said that his evidence confirmed that the surrounding iwi acknowledged the mana of Ngāi Tai and their right to impose a rāhui in respect of their takutai moana. Mr Edwards said:[33]

> …Ngāti Awa put on a rāhui. Whānau-ā-Āpanui put on [sic], and Ngāi Tai put on a rāhui and we Whakatōhea put on a rāhui in consultation with each other and triggering and implementing our tikanga because those people aren't there, they lost with their – we have to show respect and the rāhui has been coming down through the centuries, and we are still enforcing them today.

Attorney-General's submissions

[29] In relation to whether Ngāi Tai holds the specified area in accordance with tikanga, the Attorney-General submitted that the focus should be on:

(a) Whether the group currently uses and occupies the area, in a manner consistent with the nature of that area and has control or authority over the area in accordance with tikanga.

(b) Whether there is an intention and ability to control access to an area, and the use of resources within it as a matter of tikanga.

I accept those submissions.

[30] Mr Melvin, counsel for the Attorney-General, referred to the observations of the majority of the Court of Appeal in this case where they said:[34]

> "A group may hold an area in accordance with tikanga where, for example, tikanga requires the permission of that group to be sought before others access the area or use resources within it."

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32 At 81.

33 *Re Edwards (No 2)* Transcript CIV-2011-485-817, 8 September 2020 at 81.

34 *Whakatōhea Kotahitanga Waka,* above n 4, at [403].

[31] This proposition is why the evidence of Mr Amoamo set out in [24] above is so important in this case. Mr Melvin also referred to the recent High Court decision of *Re Ngāi Tūmapūhia-a-Rangi Hapū Incorporated*[35] where the Court said that in order to meet the test s 58(1)(a) the applicant's evidence should demonstrate:[36]

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

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

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

I accept this as a correct summary of the law.

[32] Mr Melvin conceded that Ngāi Tai had provided some evidence of holding the takutai moana between Tarakeha and Te Rangi in accordance with tikanga but submitted that this evidence was primarily concentrated around the inter-tidal areas of the specified area, with a particular focus on shoreline and coastal fishing.

[33] Mr Melvin also acknowledged the finding by the pūkenga in the High Court proceedings that Ngāi Tai held mana whenua from Tarakeha to Taumata o Apanui but noted that the pūkenga did not provide any specific information as to whether Ngāi Tai held the entire application area out to 12 nautical miles.

[34] After reviewing the evidence of Ms Jones, Mr Mio and Mr David Peters given at the Hight Court hearing, Mr Melvin concluded that it supported a finding that, in accordance with tikanga, Ngāi Tai have control and authority in respect of the takutai

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35 *Ngāi Tūmapūhia-a-Rangi Hapū Inc v Taylor* [2024] NZHC 309.
36 At [180].

moana generally, between Tarakeha and Te Rangi. However, his view was that control and authority was focused on the inter-tidal areas.

[35] Mr Melvin conceded that there was evidence of an element of control and authority by Ngāi Tai including:

(a) Ngāi Tai permitting access to their takutai moana and granting others permission to fish in it.

(b) The imposition of rāhui.

(c) Having wāhi tapu along the beach.

[36] Mr Melvin submitted that evidence demonstrating an intention and ability of Ngāi Tai to control further out to sea is very limited and that, where there was such evidence, it was on a shared basis with other iwi and hapū or pertained to resource collection. This submission overlooks the importance of manaakitanga as a component of holding an area in accordance with tikanga. Sharing a resource with neighbours or with whanaunga enhances the mana of the group with mana moana rather than detracts from it.

[37] The pūkenga referred to this in their report appended to the 2021 decision. They referred to the evidence of Rikirangi Gage (a kaumātua who gave evidence for Te Whānau ā Apanui on 5 October 2020) who gave, as an illustration of the exercise of manaakitanga by a group holding mana moana, the fact that Te Whānau ā Apanui permitted neighbouring iwi (including Ngāi Tai) to come into their rohe to catch kahawai at the Motu River and moki at Whangaparaoa.[37] Mr Gage had noted that the manuhiri were welcome to have access to the resource but that did not give them mana whenua or mana moana.

[38] Mr Melvin also referred to the evidence given by Jacob Hore at the 2021 hearing. Mr Hore was the Team Manager Inshore Fisheries at Fisheries New Zealand. He referred to the Fisheries (Kaimoana Customary Fishing) Regulations 1998

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37 The 2021 decision, above n 1, at Appendix A at [2(c)].

(the Regulations). The Regulations provide for tangata whenua to manage customary fishing within the rohe for which they hold mana moana.[38] The iwi notify the Minister of their proposed area of responsibility and that area is notified in the gazette.[39] An exhibit produced by Mr Hore showed a gazetted Ngāi Tai area between Tarakeha and Te Rangi and going out to sea about two kilometres.

[39] Under the Regulations a kaitiaki nominated by the iwi may authorise any individual to take fisheries resources for customary food-gathering purposes within the gazetted rohe.[40]

[40] In his evidence in chief, Arapeta Mio explained why their iwi chose a two kilometre seaward boundary rather than any other distance. He said:[41]

> In 2009 Ngāi Tai "gazetted" their rohe moana and their kaitiaki under the Customary Fisheries Act. At the time claimed just 2 nautical miles out to sea from the shoreline as the Customary Fisheries Act was about management of those areas. Without the capacity to manage and control further than the 2 nautical miles, it was decided to rely on commercial fishing zone to help us manage our rohe.

He was not cross-examined on that evidence.

Seafood industry representative's submissions

[41] SIR accepts that there is evidence that would justify a conclusion that Ngāi Tai held the specified area in accordance with tikanga. However their submission is that the area which could be said to have been held in accordance with tikanga does not extend out to 12 nautical miles but only goes as far as one kilometre out from the coast at the eastern and western boundaries of the application area. The submission states that this would encompass the whole of the inter-tidal area, all of the bay and more than one km out from the bay, together with the associated reefs.

[42] The submission acknowledges that the Court can draw inferences and that the drawing of seaward boundary lines is to a large extent arbitrary.

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38 Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg 5(1).
39 Regulations 18 and 23.
40 Regulation 11.
41 *Re Edwards (No 2)* Transcript CIV-2011-485-817, 1 October 2020 at 87–88.

Analysis of whether specified area is held in accordance with tikanga

[43] The Court of Appeal made a number of relevant observations in relation to the operation of s 58(1)(a). It noted that the inquiry is as to whether an applicant "holds" the specified area *presently* and that the test in s 58(1)(a) "…looks to tikanga that is local, directed to the area concerned".[42] It noted that a group's use and occupation must be exclusive saying:[43]

> This distinguishes areas *held* by the group at that time from areas in respect of which the group only held specific resource rights. Use rights which are not accompanied by territorial control cannot sustain CMT.

[44] Miller J noted that in traditional Māori society hapū and iwi presumed the right to control and exclude others. He confirmed that this referred to physical exclusion and noted:[44]

> The evidence in this case confirms it, showing that the applicant groups assert the right to exclude others and recognise that other groups enjoy corresponding rights over other parts of the marine and coastal area.

[45] The Court of Appeal cited evidence from a Ngāi Tai witness, David Te Marama Peters to make the point. Mr Peters' evidence, as set out in his affidavit dated 24 July 2020, was:

> Everybody would stick to their own areas when they went fishing and gathering kai from the moana. You wouldn't have people coming in from outside to fish in our area. We would stay in our area and leave that area for that whanau. This was our cupboard and that was theirs. If we took from their cupboard, then there wouldn't be enough in their cupboard for them. That was our tikanga.

[46] Mr Peters' evidence supports Ngāi Tai's claim that they hold the specified area in accordance with tikanga.

[47] Miller J also referred to the evidence of Te Riaki Amoamo[45] who explained in his affidavit dated 3 August 2020 that:

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42 *Whakatōhea Kotahitanga Waka,* above n 4, at [140].
43 At [141].
44 At [147].
45 At [152].

> We have the right to exercise our customary authority (mana and rangatiratanga) in relation to our own seascape. For the same reason we would not go into other tribal (iwi) seascapes because we would be challenged....
>
> However, there is a distinction between permitting access to our sea territory as a matter of manaakitanga and having the customary authority to act as the kaitiaki. Ngāti Rua holds the mana in Ngāti Rua's sea territory. For instance if somebody drowns out there in our rohe, Ngāti Patu would not do the karakia, I would, because it's my customary area.

[48] In the context of discussing "exclusivity" (which is a requirement of the second limb of s 58 rather than the first limb), Miller J discussed relevant Canadian case law. He said:[46]

> I have noted that the acceptance or acquiescence of neighbouring tribes was identified as a feature of customary title in the Canadian cases. It assumes importance under MACA because there is much evidence that groups recognise the rights of other groups to control their own areas. The record confirms that mana is constantly reinforced through ritual exchanges and the practice of manaakitanga over long periods of time. It follows that acceptance by other iwi, hapū or whānau groups of the applicant group's right to speak for a specified part of the common coastal and marine area is powerful evidence of exclusivity (footnotes omitted).

[49] Based on the evidence discussed at [24]–[26] and [28]–[30] above, it is clear that Ngāi Tai's neighbours accept Ngāi Tai's right to speak for that part of the takutai moana between Tarakeha and Te Rangi and out to sea. The real issue is to identify what evidence might support a finding that the area held in accordance with tikanga extended out to 12 nautical miles.

[50] In its judgment the Court of Appeal discussed the conclusion that the pūkenga had reached that Ngāi Tai had mana whenua from Tarakeha to Te Taumata-o-Apauni and that they shared customary interest with Whakatōhea out to Whakaari and Te Paepae o Aotea. Miller J said, "this view appears to have been based entirely on consensus among the applicant groups."[47]

[51] Ms Rongo has drawn my attention to a range of other evidence that supports the pūkenga's conclusion that Ngāi Tai held the specified area in accordance with tikanga. The majority of the Court of Appeal observed:[48]

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46 At [171].
47 At [317].
48 At [401].

> We…accept the submission that evidence of activities that show control or authority over the area, as opposed to simply carrying out a particular activity in that area, will be of particular relevance in distinguishing a "holding" of the area from the use of the area to gather a particular resource.

[52] One of the strongest indicators that a particular group controls an area is the acceptance by the group's neighbours that they, and only they, have the right to impose a rāhui in relation to their takutai moana. From the evidence discussed above at [25]–[26] and [30] it is clear that Ngāi Tai's neighbours accept that they are entitled, as a matter of tikanga, to impose rāhui in their rohe moana. I find that is compelling evidence that Ngāi Tai holds the specified area in accordance with tikanga.

[53] It is also clear that there was no limit at tikanga in nautical miles over which a rāhui could be imposed. This is illustrated by the fact that, at the time of the Whakaari disaster the various coastal iwi of the Eastern Bay of Plenty imposed rāhui over their rohe moana extending out as far as Whakaari which is some 48 kilometres from the coast.

[54] The ability to designate an area as tapu and have that tapu recognised by other iwi is also an incident of control or "holding". The evidence of Mr Amoamo discussed above at [24] confirms that a Whakatōhea group that wished to visit Te Rangi observed the tapu of that place by walking in single file in each other's footsteps.

[55] The area in which Ngāi Tai exercised kaitiaki obligations is also relevant in determining what area was held in accordance with tikanga. Ms Rongo drew the Court's attention to the evidence given by Mr Mio when describing Ngāi Tai's kaitiaki obligations. This evidence is set out at [25] above. The Court of Appeal also noted[49] the answer given by the pūkenga in response to cross-examination by counsel for Ngāti Awa, that the *crucial* tikanga evidence was the ability for iwi to go offshore and locate taunga ika (fishing grounds) "by looking back and specifying where they are without GPS technology".[50] I accept that exercising access to far offshore fishing grounds by navigating by the use of landmarks is a matter that can support a finding that the claimed area is held in accordance with tikanga.

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49 At [253].

50 Written response by Pūkenga Doug Hauraki to written question of Ms Irwin-Easthop, 15 October 2020 (*Re Edwards (No 2)*) at [2(c)(iii)].

[56] The fact that under the Fisheries (Kaimoana Customary Fishing) Regulations, Ngāi Tai opted to gazette an area only two kilometres from their coastline in which to have a Kaitiaki authorise the customary taking of kaimoana does not assist in deciding whether Ngāi Tai hold the area in accordance with tikanga. The Regulations are not a tikanga concept and Mr Mio explained why Ngāi Tai felt that there was a more effective way to discharge the iwi's kaitiaki obligations further offshore.

[57] In the quote set out at [25] above, Mr Mio referred to Ngāi Tai being the kaitiaki of what was in front of them. What was "in front of" Ngāi Tai when they stood on the foreshore at Te Rangi Bay and looked out to sea did not stop at one nautical mile or two nautical miles but continued out to the horizon. No evidence was called by LCI, SIR or the Attorney-General that would support a conclusion that, at tikanga, obligations such as kaitiakitanga or manaakitanga stopped at one kilometre, two kilometres or any other particular distance. The fact that out toward the 12 nautical mile limit, there was a sharing of resources might not be congruent with common law concepts relating to the possession of land but does not offend against the concept of holding part of the takutai moana in accordance with tikanga. Manaakitanga involved the sharing of resources.

[58] Ms Jones's evidence that the local council work closely with Ngāi Tai on conservation matters related to the takutai moana is evidence that even external parties recognised that Ngāi Tai was the kaitiaki in their claimed area.

[59] The Court of Appeal noted that, although failure to disclose where the offshore fishing grounds were could not justify the CMT recognition order out to 12 nautical miles:[51]

> This is not to suggest that CMT is confined to specific fishing grounds or other resources. It may extend to all the rohe moana exclusively occupied and used by an applicant group for purposes such as passage and navigation as well as resource gathering.

[60] It was undisputed that Ngāi Tai made passage through their takutai moana well beyond the 12 nautical mile mark, out as far as Whakaari.

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51 *Whakatōhea Kotahitanga Waka,* above n 4, at [320].

[61] As to the use of the takutai moana well offshore for fishing, while Mr Mio did not disclose exactly where the fishing sites were, he did name two of the sites and explained how Ngāi Tai navigated to the sites that were far offshore. The relevant parts of his evidence said:[52]

> Further out to sea…there are fishing grounds. Ngāi Tai did not mark their fishing grounds on these maps. The reason being that these are also tapu areas for them. They are to be cared for. They are to be looked after. We are their caretakers of these places. We named them, for instance, areas further out to sea those areas are named for the lines they align to. One of them is called Maketu. The inland line would be taken from one of the maunga at the back in line with the front area, rock or whatever it was. That is the line they took out and where they crossed, intersected with another area on the side that's where the name came from…
>
> From the maunga or whatever area they are lined up with on the side. So, the further out areas were Te Kaha, in one side, and then Maketū. You were in the middle of those but the line you took was still the same line that left you out from home out to sea. So that is quite a way out… There is a channel that comes off Motuhora. Sorry, not Motuhora, White Island me Whakaari so that is how far it was. So those are some of the fishing areas…

[62] There was also other information before the High Court which clearly identified and located three Ngāi Tai offshore fishing sites. This information was found in Annexure A to the affidavit of Te Ringahuia Hata dated 29 January 2020. This document gave the latitude and longitude of several traditional fishing sites in the eastern Bay of Plenty. It described the geographic features on land that were used to locate the sites, the conditions of the seabed and what species of fish could be caught there. As Ms Rongo noted in her submission, three of those sites are in the Ngāi Tai claimed area (Te Rangi, Mawharu and Te Paru o Rangi). Two of the three sites are close to the 12 nautical mile limit and the third appears to be about nine nautical miles out.

[63] There was evidence on behalf of the neighbouring Whakatōhea iwi of identical practices to those described by Mr Mio. Bruce Stirling was an historian who gave evidence for Ngāti Ira. In his brief of evidence of January 2020, he covered the extent to which members of that applicant group fished out as far as Whakaari. At paragraphs [158] and [159] of his briefs of evidence he said:

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52 *Re Edwards (No 2)* Transcript CIV-2011-485-817, 1 October 2020 at 86–87.

> A local correspondent recalled in 1912 how in the past "fleets of fishing canoes used to visit Whakaari (White Island) from Ōpōtiki." Whakatōhea fishers drew on their intimate customary knowledge of the various fishing grounds to be found between the coast and Whakaari. As the correspondent observed:
>
> The exact position of the different grounds is still a matter of native tradition, and they have to be carefully located as a few fathoms in either direction may mean deep water and no anchorage", and no fish…
>
> The hapū of Whakatōhea have customary knowledge of more than a dozen of the main offshore fishing grounds within their application area [which was out to Whakaari]. These fishing spots are located not with maps but by traditional means, using the alignment of key landmarks. These grounds extend from Hamama, just off the Pakihi entrance to Ōpōtiki harbour, out to Matawiwi Tautoru near Whakaari.

[64] Stirling then went on to describe in detail the offshore customary fishing grounds as recorded in the map submitted to the Court as Appendix A to the affidavit dated 21 January 2020 of Te Ringahuia Hata of Ngāti Patumoana discussed above. Given the close whakapapa links between Ngāi Tai and the various Whakatōhea hapū, and the obligation of manaakitanga covered in the evidence of Ms Jones, it is unsurprising that some of the offshore fishing locations were in the rohe moana of Ngāi Tai and that the Whakatōhea hapū were aware of their location.

[65] From the fact that one of their closely related neighbours had established that the iwi on the eastern Bay of Plenty had fishing sites far out to sea which they navigated to by aligning key onshore landmarks and Mr Mio referring to Ngāi Tai using the same techniques, I draw the inference that the fishing grounds which Mr Mio refused to identify were well beyond the shoreline, to the extent that they required the use of distant onshore landmarks such as mountains as navigational aids. I infer that the fishing sites Te Rangi, Mawharu and Te Paru o Rangi were some of the sites Mr Mio had been referring to. From the fact that the Whakatōhea hapū fished at sites as far out as Whakaari and were able to locate those sites by utilising traditional knowledge with a precise description not only of the location but of the seabed and the types of fish that could be caught there, I infer that their neighbours and close relatives, Ngāi Tai, would have done so too.

[66] For the reasons acknowledged by the Court of Appeal[53] and in the 2021 judgment,[54] it is very difficult to depict Ngāi Tai's rohe moana by drawing straight lines on a map. The Court of Appeal referred to the Turanga Report of the Waitangi Tribunal which said:[55]

> A difficulty occurs today when people, both Māori and Pākehā, try to translate this customary network of rights and connections into an environment of "straight-line" boundaries. Resource rights were complex, convoluted and overlapping. They almost never phased cleanly from hapū to hapū as one panned across the customary landscapes. Instead, most resource complexes had primary, secondary, and even tertiary right holders from different hapū communities, all with individual or whanau interests held in accordance with tikanga, and therefore by consent of their respective communities. All rights vested and were sustained by the currency of whakapapa.

[67] The Court of Appeal also quoted[56] from Sir Edward Taihākurie Durie who said, "Resource boundaries were conceived of lineally, and radially with rights or authority radiating from a central heart to uncertain fringes."[57]

[68] I accept that the further out to sea they got, the boundaries between the rohe moana of Ngāi Tai and that of the Whakatōhea hapū are likely to have become blurred and indistinct and that some of the area's resources (especially fish) were shared. However as discussed above, the use of resources without more does not determine whether an area is held in accordance with tikanga.

[69] Of much more relevance is that Ngāi Tai was recognised by its neighbours as being entitled to impose rāhui over its takutai moana and to impose wāhi tapu which were respected by the neighbouring iwi.

[70] Ngāi Tai also used the takutai moana out to more than the 12 nautical mile limit for the purposes of making passage and navigation. They clearly regarded themselves as kaitiaki of the area and have been recognised as such by others, including the local council. On that basis I find that they meet the test in the first limb of s 58(1) that they hold all the specified area in accordance with tikanga.

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53 *Whakatōhea Kotahitanga Waka,* above n 4, at [363].
54 The 2021 decision, above n 1, at [307(d)].
55 Waitangi Tribunal *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa claims* (Wai 814, 2004) at [18].
56 *Whakatōhea Kotahitanga Waka,* above n 4, at [364].
57 E T Durie *Custom Law* (draft paper for the Law Commission, January 1994) at [84].

[71] While that finding meets the requirements of s 58(1)(a), I must now consider whether the requirements at the second limb of the composite test sets out in s 58(1)(b) are also met.

Exclusive use and occupation

[72] The second limb of the test in s 58(1) is that the applicant group has exclusively used and occupied the specified area from 1840 to the present day without substantial interruption.

[73] The Court of Appeal rejected[58] the submission of LCI that the second limb of the s 58(1) test was drawn from the common law of England. Miller J said that s 58(1):[59]

> …establishes a single test which must be interpreted as a whole. In particular, as I explain below, the concept of exclusive use and occupation must be viewed through the lens of tikanga, and not that of the common law alone.

[74] Miller J further noted that the group's use and occupation must be exclusive but that this was not synonymous with the position at common law, rather it was concerned with the intention and ability to exclude others from the specified area.[60] He said:[61]

> This distinguishes areas *held* by the group at that time from areas in respect of which the group had only specific resource rights. Use rights which are not accompanied by territorial control cannot sustain CMT.

[75] He went on to say:[62]

> The court must further inquire into the group's past use and occupation, asking whether exclusivity has been continuous from 1840 to the present day. Any interruption during that period must have been substantial if it is to defeat the group's claim to continuity of use and occupation.

[76] As noted at [10]–[11] above it was unsuccessfully argued by SIR in the Court of Appeal that commercial fishing activities had amounted to substantial

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58 *Whakatōhea Kotahitanga Waka,* above n 4, at [137].
59 At [138].
60 At [141].
61 At [141].
62 At [142].

interruption of Ngāi Tai's customary rights in their takutai moana. In submissions to this Court, SIR conceded that, given the approach taken to substantial interruption by the Court of Appeal, there was insufficient evidence in this particular proceeding that commercial fisheries activities within the CMT3 application area had substantially interrupted the applicant group's own use of the area. The only allegation of substantial interruption advanced before the Court of Appeal was that of commercial fishing.[63] That is relevant to the submissions made by the Attorney-General in this case to which I will return shortly.

[77] Miller J and the majority of the Court of Appeal differed on the correct interpretation of the words "exclusively used and occupied" in s 58(1)I(i). Miller J said: [64]

> The legislation envisages that the question on which most applications are likely to turn is whether exclusivity, in this tikanga-consistent sense, has been lost in the colonial and post-colonial period.

[78] Miller J described the view of the majority in substance as being:[65]

> …is that an applicant group who can show that they held an area in accordance with tikanga at 1840 will obtain CMT unless (a) their rights have been extinguished in law through action expressly authorised by statute or (b) the group abandoned the area after 1840 or ceded control of it to another Māori group as a matter of tikanga.

[79] The principal difference between the two views is that, on the approach of Miller J, exclusive use and occupation must subsist in fact from 1840 to the present day. The majorities' view was that the words in s 58(1)(b)(i) could not be read literally. The explanation for this is found at [416] where the majority said:

> We have found it exceptionally difficult to reconcile the text of s 58(1)(b) with the purpose of MACA. On a literal reading of s 58(1)(b), and its requirement — not found in the common law of New Zealand, as *Ngāti Apa* makes plain – that the group must have exclusively used and occupied the area from 1840 to the present day, it seems likely that there would be few areas of the foreshore or seabed where CMT could be made out. In some (perhaps many) areas where the common law would recognise that a group had customary title, incursions into that area over the last 180 years by third parties would deprive

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63 At [37].
64 At [186].
65 At [187].

> the group of CMT. Far from recognising and promoting customary interests, MACA would in many cases extinguish those interests. And it would do so by setting a threshold for recognition of CMT that could be met as a result of matters that would not otherwise affect common law recognition of customary title. That outcome would be inconsistent with the Treaty/te Tiriti. It would be inconsistent with the assurances given in the Government's 2010 consultation document that proceeded MACA, discussed by Miller J at [54]–[59] above. It would be inconsistent with the purposes with MACA set out in s 4: in particular, recognising mana tuku iho and providing for the exercise of customary interests in the common marine and coastal area. It would be inconsistent with the statement in s 7 that MACA recognises and promotes the exercise of customary rights to take account of the Treaty/te Tiriti.

Submissions

Ngāi Tai's submissions and relevant evidence

[80] In support of her contention that Ngāi Tai satisfied the test of exclusive use and occupation in s 58(1)(b)(i), Ms Rongo relied on the evidence of tikanga, kaitiakitanga and manaakitanga discussed above.

[81] She emphasized that unlike most of the neighbouring iwi, Ngāi Tai had not been subject to the raupatu of the 1860s. Their land had never been confiscated and almost all of the area between Tarakeha and Te Rangi, even today, was held in two Ngāi Tai Māori land blocks. Mr Melvin for the Attorney-General noted that the initial 1866 proclamation of confiscation did include both Ngāi Tai and Te Whānau ā Apanui land but the revised 1867 proclamation excluded Ngāi Tai land and in 1867 Ngāi Tai was granted 2411 acres at Awaawakino under the Confiscated Lands Act. That block runs along the coastline from Tarakeha to just before Te Rangi point.

[82] In justification of the claim that Ngāi Tai exclusively used and occupied the claimed area out to 12 nautical miles, Ms Rongo referred to the evidence of customary fishing out to Whakaari and Te Paepae o Aotea and the travel by waka of members of Ngāi Tai through their rohe moana out to those fishing grounds. Ms Rongo relied on the evidence of Heremaia Warren of Pakowhai and Larry Delamere of Whakatōhea as well as Danny Pohipi of Te Whānau-ā-Apanui who gave evidence of the shared nature of the fishing grounds at Whakaari and Te Paepae o Aotea.[66]

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66 *Re Edwards (No 2)* Transcript CIV-2011-485-817, 15 September 2020 at 45, 61 and 71.

[83] Ms Rongo also relied on the evidence discussed above that Ngāi Tai's neighbours accepted their mana over the claimed area and acknowledged their exclusive right to impose rāhui and enforce wāhi tapu in that area.

[84] Ms Rongo also noted that no other applicant has contested the fact that Ngāi Tai's rohe moana extended out to 12 nautical miles. The only challenge on that issue came from Pākehā interested parties.

[85] Ms Rongo again referred to the findings of the Pūkenga in the 2021 case that Ngāi Tai had mana whenua from Tarakeha to Taumata o Apanui and relied on those findings.

[86] She noted that the majority in the Court of Appeal in this case had expressed the requirement for satisfaction of the test of exclusive use and occupation from 1840 as involving a "strong presence" in the area which manifests itself in acts of occupation that could reasonably be interpreted as demonstrating that the area belonged to, and was controlled by, or was under the exclusive stewardship of the applicant group.[67] She submitted that the evidence of continuous occupation, resource use, the exercise of kaitiakitanga and manaakitanga, the use of the rohe moana out as far as Whakaari and the recognition of neighbouring iwi that the claimed area was their area, all conclusively established the type of "strong presence" talked about by the Court of Appeal.

[87] Ms Rongo relied on the fact that the majority in the Court of Appeal, when interpreting the words "exclusively used and occupied…from 1840 to the present day without substantial interruption", had acknowledged that this task needed to be approached in the light of the ability of Māori groups, post colonisation, to enforce their customary title rights.

[88] The relevant passage is found at [426(d)] of the Court of Appeal's decision where the majority said:

> The Crown's arrogation to itself of the power to control access to customary lands, by prohibiting (in the exercise of kāwanatanga) the use of force to

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67 *Whakatōhea Kotahitanga Waka,* above n 4, at [422].

> prevent incursions into an area controlled by a relevant group, and (from 1909 onwards) by preventing customary owners from bringing their own proceedings in the courts to prevent unauthorised access to their customary land. This meant that Māori were deprived of mechanisms for controlling access to coastal areas that they held as a matter of tikanga and as a matter of common law: they could not lawfully resort to force to protect those areas and associated resources, and they were effectively excluded from seeking to protect those areas through the courts.

[89] A further passage in the Court of Appeal judgment that Ms Rongo relied on said:[68]

> We agree with Miller J that the same must be true of public access to an area, as MACA treats such access as compatible with CMT. This confirms that activities engaged in by third parties in coastal areas, whether as a result of manaakitanga on the part of relevant groups or as a result of Anglocentric assumptions on the part of those third parties about their right to do so that Māori were unable to resist, should not be seen as relevant interruptions of the customary rights that found CMT.

[90] In relation to the submission by LCI and SIR that any substantial third party access to, (or fishing in) an area claimed by a group demonstrated that the group did not hold the area exclusively (or that exclusivity was substantially interrupted) the Court of Appeal held that such an approach:[69]

> ...misunderstands the centrality of whanaungatanga and manaakitanga to relationships between iwi Māori and whenua. It would, in effect, if accepted, have the result that MACA fails to achieve its stated purposes.

[91] Ms Rongo relied on the observations at [429] of the Court of Appeal's judgment where it said:

> It follows that we do not accept the submission by LCI and SIR that an applicant group needs to demonstrate both an intention and an ability to exclude others (including non-Māori) from the relevant area from 1840 to the present day. It would be unjust and unprincipled to require an applicant group to demonstrate an ability to exclude others, when that ability was taken away from Māori customary owners by the law as it was understood for most of the relevant period. In the absence of an ability to exclude others, an intention to do so would be futile. MACA should not be read as requiring whānau, hapū and iwi to demonstrate an intention and ability to exclude other people from coastal areas in circumstances where the law effectively deprived them of that ability.

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68 *Whakatōhea Kotahitanga Waka,* above n 4, at [426(f)].

69 At [427].

SIR submissions

[92] SIR submitted that one kilometre out from the coast was the most that could credibly be submitted to be subject to acts of occupation and control from land-based settlements.

[93] Counsel accepted that on the evidence before the Court it could not be said that in CMT3 there was sufficient evidence that Ngāi Tai's use of the fisheries resource in the area was substantially interrupted.

Attorney-General submissions

[94] The Attorney-General submitted that there was limited evidence to support a determination of CMT out to 12 nautical miles. Counsel summarised the relevant provisions of the Court of Appeal's decision which were set out in the submissions of Ms Rongo discussed above. Mr Melvin also referred to the observations of the Court of Appeal that it is likely to be more difficult for an applicant for CMT to establish its case in relation to marine areas rather than to coastal areas and more difficult to demonstrate, in respect of offshore areas visited only occasionally, than in relation to shallow areas close in shore that could be observed and controlled from coastal settlements and used on a regular basis.

[95] The Court of Appeal's reasoning for this was that the ways in which such areas further offshore are used is more akin to a use/resource right than a right of exclusive occupation of the kind that would find customary title of a territorial nature.[70] The Attorney-General's submission was that the evidence supported a finding that the area that Ngāi Tai exclusively used and occupied was limited to the inter-tidal area between Tarakeha and Te Rangi.

[96] On the topic of exclusive use and occupation without substantial interruption, the Attorney-General's submissions said:

> There is evidence that establishes that Ngāi Tai occupied the area from Tarakeha to Te Rangi at 1840 and today, and has sufficient control over the coast line and in-shore areas to exclude others in accordance with tikanga.

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70 *Whakatōhea Kotahitanga Waka,* above n 4, at [423].

[97] This concession is difficult to reconcile with some of the oral argument advanced on behalf of the Attorney-General. Mr Melvin submitted that Ngāi Tai could have difficulty in establishing its exclusivity at 1840.

[98] Mr Melvin did concede that, as a result of the findings of the Court of Appeal, that if there is a challenge to the use and occupation of a specified area from 1840, then the challenger has the burden to demonstrate that such rights have been lost through substantial interruption.

[99] Mr Melvin also submitted that the evidence demonstrating the intention and ability of Ngāi Tai to control areas further out to sea beyond the foreshore was very limited and that where there was such evidence it was on a shared basis with other iwi and hapū or pertained to resource collection.

Analysis of exclusive use and occupation

[100] I will start by addressing the Attorney-General's submission at the hearing that there has been substantial interruption of Ngāi Tai's exclusive use and occupation of its takutai moana since 1840 as a result of inter-tribal warfare in the 1830s and 1840s.

[101] The response to this is that no party to the 2021 hearing appealed to the Court of Appeal alleging that there had been this sort of substantial interruption. The Court of Appeal did not make a finding on this issue and did not direct a re-hearing on it. The Attorney-General did not appeal any of the High Court's findings to the Court of Appeal. This means that the Attorney-General cannot argue in this re-hearing that the 2021 decision was wrong in not finding that inter-tribal warfare meant that Ngāi Tai did not hold the area between Tarakeha and Te Rangi as at 1840.

[102] However, in case I am wrong in that conclusion I will address this issue.

[103] Mr Melvin relied on the evidence given by Mark Derby, the Attorney-General's historian. The relevant passage of his evidence is at paragraph [55] of exhibit MD-02 to Mr Derby's affidavit of 2 June 2020. He said:

> In the period prior to about 1820, Whakatōhea fought many battles with neighbouring iwi to establish and defend its coastal waters. The defining

> battle against Ngāi Tai, to the east, was at Awahou (Waiaua) under the leadership of Punāhamoa, around the beginning of the 19th century. The Ngāi Tai chief Tūterangikūrei was killed, and his head preserved as a trophy of war. Ngāi Tai redeemed their chief's head in exchange for the greenstone adze named Waiwaharangi, which they gave to the Whakatōhea victors...following this and successive bloody disputes with Ngāi Tai, according to Tauwhiro of Whakatōhea, "the whole of Ngāi Tai went to Hauraki to live, and left my ancestors living both inside and outside of this block [Whitikau]. When [Ngāi Tai] returned from Hauraki they went and lived at Torere".

[104] This evidence clearly relates to the 1820s and is of little assistance in establishing what the situation was at 1840.

[105] Later in his evidence,[71] Derby refers to the balance of power among the eastern Bay of Plenty tribes altering from 1818 with invasions by musket armed iwi from the north. He refers to the survivors of the various attacks, withdrawing from their coastal settlements into the mountainous interior of their territory.[72] However he acknowledges that:[73]

> Around the late 1830s the Whakatōhea refugees gradually returned to their lowland settlements around Ōpōtiki, although greatly reduced in numbers. Ngāti Rua vacated Tōrere for Ngāi Tai, and gave them food, fishing nets and a canoe named Te Kaihora to help them resettle. Although territorial disputes with neighbouring iwi were no longer as frequent or violent, relations with Ngāi Tai in particular remained tense. Soon after 1840 a party of Ngāi Tai travelled by sea from Tunapāhore to Ōpape where they attacked and burnt the coastal pā of Puketapu. In retaliation, Ngāti Rua occupied the former Ngāi Tai settlement of Omaramutu. Ngāi Tai then formed an unexpected alliance with Ngāti Rua against a combined Ngāti Porou/Te Whānau ā Apanui raiding expedition, and drove them back eastward.

[106] Derby went onto say that in 1844 Ngāti Rua built a pā near Waiaua "to prevent encroachment by Ngāi Tai". Waiaua is to the west of Tarakeha in the direction of Ōpōtiki.

[107] Derby also makes reference to events which occurred in 1844 with the CMS missionary John Wilson attempting to broker an agreement between Ngāi Tai and

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71 Affidavit of Mark Derby dated 2 June 2020 at [59].
72 At [61].
73 At [81].

Te Whakatōhea as to an appropriate boundary. After referring to that unsuccessful attempt, Derby says:[74]

> To assert Whakatōhea's claim that Te Rangi was their actual eastern boundary, the Ngāti Rua hapu occupied Maeaea, an old pā at Awaawakino. Here they also harvested kaimoana including crayfish and mussels. Walker describes these as "essentially caretaking activities in the summer months." They asserted ahi kā at the border with Ngāi Tai without having to maintain permanent settlements. With the onset of winter, Ngāti Rua preferred to return to the centre of Ōpōtiki where Rangi Matanuku and his people lived at Kareke Pā on the east side of the Otara River.

[108] Further on[75] Derby says: "...Whakatōhea recognise Ngāti Rua as holding Waiaua "for all Whakatōhea", as their sentinel on the border with Ngāi Tai".

[109] Bruce Stirling, an historian who gave evidence for Ngāti Ira o Whakatōhea expressed the view:[76]

> The boundaries of the takiwa of the hapu of Whakatōhea extend from Maraetotara (near Ohope) in the west to Tarakeha (a ridge pā between Ōpape and Awaawakino) in the east and out to Te Moana a Toi (the Bay of Plenty) to Whakaari (dubbed "White Island" by James Cook in 1769).

[110] Stirling also noted that[77] on the eastern boundary (Tarakeha) there had been, in the past, overlaps with both Ngāi Tai and Te Whānau a Apanui.

[111] In support of Te Whakatōhea's claim that Tarakeha was their eastern boundary Stirling also referred to evidence given by Wi Teria of Ngāti Ira in the Compensation Court in 1866 where Wi Teria had said "Tarakeha is the eastern boundary, Ōhiwa the western."[78]

[112] The test that the Attorney-General has to meet in asserting substantial interruption is set down by the Court of Appeal:[79]

> ...to demonstrate that the customary interests of the applicant group were not sufficient to establish effective control over the relevant area as at 1840, or

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74 At [85].
75 At [86].
76 Affidavit of Bruce Stirling dated 31 January 2020 at Appendix A at [5].
77 At [6].
78 At [7].
79 *Whakatōhea Kotahitanga Waka,* above n 4, at [436].

> have ceased to have the necessary character or being substantially interrupted after 1840…

[113] While Mr Derby's evidence establishes that there was conflict in the 1820s and 1830s between Ngāi Tai and Whakatōhea hapū in respect of their western boundary, the boundary being fought over was not Tarakeha but Waiaua. While Ngāi Tai clearly lost control of the area around Waiaua as a result of these battles, that loss of control did not extend to the east beyond Tarakeha. It can therefore be assumed, in the absence of evidence to the contrary, as at 1840 the western boundary of Ngāi Tai was Tarakeha.

[114] The events in 1844 referred to by Derby, do not establish a loss of control. They indicate the temporary occupation of the Pā Maeaea in the summer months and no permanent settlement with Ngāti Rua returning to Ōpōtiki in the winter.

[115] Ngāi Tai's ahi kā clearly was not extinguished. Dr David Vernon Williams, who had given evidence on behalf of Whakatōhea, had addressed what was required for loss of ahi kā. He said:[80]

> …an area of land continues to be ancestral land in accordance with tikanga for so long as members of the hapū retain their knowledge of whakapapa and steadfastly assert their continuing connections to places and resources…

[116] The Court of Appeal had made similar comments when it said:[81] "continuity does not require an unbroken chain of occupation. It requires only that present occupation be rooted in pre-colonial times".

[117] The temporary occupation of a pā by Ngāti Rua in the summer of 1844 did not substantially disrupt Ngāi Tai's exclusive occupation of the area between Tarakeha and Te Rangi. The warfare between Ngāi Tai and the Whakatōhea hapu in the 1820s and 1830s provides a clear example that not only did Ngāi Tai have the intention to exercise control over its mana whenua and associated mana moana, it had the capacity to do so by means of force and continued to exercise that capacity even for some years after colonisation. I therefore find that there has been no substantial interruption to Ngāi Tai's holding of the specified area.

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80 Affidavit of David Vernon Williams dated 30 July 2020 at 85.
81 *Whakatōhea Kotahitanga Waka,* above n 4, at [109].

[118] I turn now to consider exactly what the boundaries were of the area that Ngāi Tai has exclusively used and occupied from 1840.

[119] The use of an area includes using resources like kai moana and using the area for physical activities like navigating and making passage. It also includes less tangible activities such as exercising kaitiakitanga and manaakitanga. These are all activities that are undertaken in accordance with tikanga. The most compelling evidence that the boundaries of Ngāi Tai's rohe moana went at least as far as the 12 nautical mile limit comes from their imposition of rāhui out as far as Whakaari and the acknowledgement of their neighbours that they were entitled to do that. Only the iwi that has mana moana in that area has the right to do that. The same applies to the exercise of kaitiakitanga. Mr Mio's evidence is that Ngāi Tai were kaitiaki of what they saw in front of them. It is impossible to draw a line on a map which accurately defines where that ended.

[120] The evidence discussed above establishes that Ngāi Tai did use resources out as far as 12 nautical miles. Although they were not to prepared to identify their offshore fishing grounds, I am satisfied that the grounds existed and that Ngāi Tai and their neighbours fished as far out as Whakaari, fishing in places which required sophisticated navigation techniques, not required in inshore fishing, to get to. Ngāi Tai fished, navigated and made passage throughout all of their claimed area.

[121] The evidence also confirmed that, as at 1840, Ngāi Tai was actively using force to protect its boundaries. It was clearly capable of and intended to exclude others from its rohe. As detailed above, post colonisation, Ngāi Tai had neither the physical nor legal ability to eject others from its rohe.

[122] Any attempt to define a boundary short of the 12 nautical mile limit would be arbitrary and would have no connection with tikanga.

[123] I therefore conclude that Ngāi Tai presently hold the specified area in accordance with tikanga and have exclusively used and occupied it from 1840 to the present day without substantial interruption.

Outcome

[124] Ngāi Tai are entitled to an order for CMT in respect of the area covered by CMT3.

Churchman J

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