



THE HIGH COURT OF NEW ZEALAND TE KŌTI MATUA O AOTEAROA

22 December 2021

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

Re Ngāti Pāhauwera [2021] NZHC 3599

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Context

The Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) repealed and replaced the Foreshore and Seabed Act 2004, and allows whānau, hapū and iwi groups to apply for recognition orders for customary marine title and protected customary rights in a specific area of the coastal marine area (the takutai moana).

Customary marine title gives a whānau, hapū or iwi group certain rights and interests in the specified takutai moana area. Those rights are set out in s 62 of the Act. For customary marine title to be proven, an applicant group must satisfy the test in s 58 of the Act, which requires that group to show that they have held the specified takutai moana area in accordance with tikanga and exclusively used and occupied it from 1840 to the present without substantial interruption, or received it at any time after 1840 through a customary transfer.

Protected customary rights provide certain protections to customary activities carried out by the applicant group in the takutai moana. In order for a protected customary rights order to be granted, an applicant must prove under s 51 of the Act that they have engaged in that activity since 1840 in accordance with tikanga, continue to undertake the right, in one way or another, and that activity has not been extinguished as a matter of law.

Applicants seeking to have customary marine title or protected customary rights recognised apply either to have their application determined by the High Court, or by agreement with the Crown through direct engagement.

The applicants

There were four applicant parties in this case: Ngāti Pāhauwera, the Maungaharuru-Tangitū Trust, Ngāti Pārau, and Ngāi Tahu ō Mōhaka-Waikare. A number of interested parties also appeared, including the Mana Ahuriri Trust, the Attorney-General, and Hawke’s Bay Regional Council.

The applicants applied for recognition orders in the High Court, and received a ‘priority’ hearing, because the original applicant, the Ngāti Pāhauwera Development Trust, had originally applied under the Foreshore and Seabed Act 2004, and the Act directed that such applications be accorded priority for hearing.

Novel issues dealt with in this judgment

As one of the early decisions made under the Act, this judgment deals with and clarifies a number of novel issues that have not yet been considered by the Courts, including:

- the scope of wāhi tapu conditions in customary marine title,
- when customary marine title is extinguished in river mouths within the takutai moana,
- issues of extinguishment,
- the application of a number of different principles of tikanga, and
- when a shared customary title might be available to two or more of the applicants.

Summary of decision

The High Court has granted recognition orders for customary marine title and protected customary rights to each of the four applicant groups in Hawke’s Bay. These orders include joint or shared customary marine title in certain areas. In particular, the Court has granted customary marine title over five separate areas of the takutai moana, and protected customary rights for a range of activities by Ngāti Pāhauwera, the Maungaharuru-Tangitū Trust, and Ngāti Pārau.

The factual background

The applicants sought orders for customary marine title and protected customary rights in the takutai moana area from a point approximately 11km south of the entrance to Napier Harbour, northwards to the northern bank of Poututu Stream, which is just south of Wairoa. Each of the applicant groups had been residing in this area for hundreds of years, and were deeply inter-connected through whakapapa, but had also formed as distinct groups with distinct rohe. These proceedings were the culmination of a lengthy period of litigation undertaken by a number of the parties in order to achieve recognition of their rights within the takutai moana. In particular, Ngāti Pāhauwera had been engaged in different proceedings and negotiations for several decades to have their rights recognised, particularly over the Mōhaka River and its mouth.

Legal issues

In Part IV of the decision, the Court considered legal, tikanga, and technical issues. There were four issues that had particular importance.

1. **The scope of wāhi tapu conditions under the Act.** The Court concluded that wāhi tapu conditions could be utilised in limited circumstances to temporarily exclude third parties and members of the public from specified locations designated as wāhi tapu and subject to wāhi tapu conditions under a customary marine title order, through the implementation of a rāhui. However, this would only be over specified locations proven by the parties in accordance with tikanga to be wāhi tapu.
2. **Clarification of the “shared exclusivity” approach arising from *Re Edwards*.** The Court confirmed that in order for joint title to be awarded under the Act, each applicant party would need to acknowledge their shared interest in the area with the other, which may include recognition of overlapping whakapapa/whanaungatanga relationships. Complete denial of that shared interest will mean that joint title cannot be awarded.
3. **The extinguishment of customary rights in coastal river mouths within the takutai moana.** In this case, the mouth of Mōhaka River was of particular significance to Ngāti Pāhauwera. The Court, in what it declared to be an unjust result, found that it was unable to award customary marine title over the river mouth, due to it being “navigable” and therefore vested in the Crown under the Coal Mines Act 1979.

4. **Observations on extinguishment and substantial interruption.** A number of observations were made on the extinguishment and/or substantial interruption of an applicant group's exclusive use and occupation of the takutai moana, including in relation to structures such as outfall pipes, raupatu (confiscation) and significant third-party activity. The revival of customary rights via legislation was also considered.

Analysis of the applications

After considering the evidence and statutory tests, the Court determined that customary marine title should be awarded in five separate areas: an area exclusively held by Ngāti Pāhauwera between the Poututu Stream in the north and Pōnui Stream in the south, an area jointly held between Ngāti Pāhauwera and Ngāi Tahu ō Mōhaka Waikare between Pōnui Stream in the north and the Waikari River in the south, an area exclusively held by the Maungaharuru-Tangitū Trust between Arapaoanui in the north and Te Uku in the south, and specific areas exclusively held by Ngāti Pārau in and around the vicinity of Napier.

Title over Pania Reef, to be jointly held by Ngāti Pārau and the Maungaharuru-Tangitū Trust, with a proviso allowing the Mana Ahuriri Trust to be added to that title, was also awarded.

The Court then individually assessed each protected customary rights application, and issued a range of protected customary rights orders to a number of groups. These included protected customary rights over activities including use and collection of resources such as stones, sand, shells and driftwood, use and collection of rongoā including wai tapu, non-commercial whitebait fishing, use of tauranga waka sites, and the exercise of kaitiakitanga practices.

The exact boundaries of the area subject to customary marine title, and the exact form of the protected customary rights orders, will be determined at a second hearing, currently set down for May 2022.

For more information on applications under the Marine and Coastal Area (Takutai Moana) Act 2011, see the Courts of New Zealand website's [dedicated page](#).

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