

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

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

**CIV-2017-485-160; CIV-2017-485-214
CIV-2017-485-229; CIV-2017-485-273
CIV-2017-485-511; CIV-2017-485-261
CIV-2017-485-248**

**Group N, STAGE 1(a)
[2025] NZHC 1488**

UNDER the Marine and Coastal Area (Takukai
Moana Act) 2011

IN THE MATTER of applications for orders recognising
Customary Marine Title and Protected
Customary Rights

BY Continued...

Hearing: 13 May 2024 – 27 June 2024
29 October 2024 – 8 November 2024
Final submissions: 7 February 2025

Appearances: A K Irwin and O T H Neas for Ngāti Tamarangi hapū of
Muaūpoko iwi
No appearance for Margaret Morgan-Allen for David Morgan
Whānau
N R Coates, P Walker and T I M Hautapu for Ngāti Raukawa ki te
Tonga
B R Lyall, M R G van Alphen Fyfe and H L B Swedlund for
Patrick Seymour on behalf of Te Whānau Tima (Seymour) and
Ngā Ahi Kā o Te Hapū o Te Mateawa
Continued....

Judgment: 9 June 2025

Reissued:
13 June 2025

**JUDGMENT OF GRICE J
(Applications for Customary Marine Title)**

Appearances: C Shenton (self-represented) for Te Rūnanga o Ngā Wairiki Ngāti Ap
T H Bennion, E A Whiley and Kudrat for Muaūpoko Tribal Authority Incorporated
A M Cameron, T N Ahu and A J Samuels for Te Āti Awa ki Whakarongotai Charitable Trust
E K Rongo and Z JMPNR Tait for Te Rūnanga o Toa Rangatira Incorporated
D A Ward, D O Kleinsman and A H Ou for Attorney General
F R Wedde and C E Bulow for Manawatū-Whanganui Regional Council, Wellington Regional Council and Kāpiti Coast District Council
L L Black for Te Patutokotoko
C F Finlayson KC and D E Parfitt for Rangitāne o Manawatū Settlement Trust
B A Scott, T D Smith and R J J Wales for Seafood Industry Representatives
C M Hockly for Horowhenua 11 (Part) Reservation Trust

BY	William James Taueki on behalf of Ngāti Tamarangi hapū of Muaūpoko iwi (CIV-2017-485-160)
BY	Margaret Morgan-Allen for David Morgan Whānau (CIV-2017-485-214)
BY	Rachael Ann Selby on behalf of Ngāti Raukawa ki te Tonga (CIV-2017-485-229)
BY	Patrick Seymour on behalf of Te Whānau Tima (Seymour) and Ngā Ahi Kā o Te Hapū o Te Mateawa (CIV-2017-485-273)
BY	Chris Shenton on behalf of Te Rūnanga o Ngā Wairiki Ngāti Apa (CIV-2017-485-511)
BY	Muaūpoko represented by Muaūpoko Tribal Authority Incorporated (CIV-2017-485-261)
BY	Trustees of Te Ātiawa ki Whakarongotai Charitable Trust on behalf of Te Āti Awa ki Whakarongotai (CIV-2017-485-248)

INTERESTED PARTIES	Te Rūnanga o Toa Rangatira Incorporated on behalf of the iwi of Ngāti Toa Rangatira (Crown engagement) MAC-01-12-021
	Attorney-General
	Manawatū-Whanganui Regional Council, Wellington Regional Council and Kāpiti Coast District Council
	Te Patutokotoko represented by Christopher Henare Tahana, Edward (Fred) Clark, Hayden Tūroa, and Novena McGuckin (CIV-2017-485-254) (Intervener)
	Rangitāne o Manawatū Settlement Trust (applied)
	Seafood Industry Representatives
	Horowhenua 11 (Part) Reservation Trust

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WHAKATAKINGA | INTRODUCTION

[1] The Marine and Coastal Area (Takutai Moana) Act 2011 (the Takutai Moana Act) provides for the recognition of three types of legal interest in the marine and coastal area, which is the area between high-water springs and the 12 nautical mile limit of the territorial sea.¹ The first of these interests is a right to participate in conservation processes; the second is customary marine title (CMT); and the third is a protected customary right (PCR).² These legal interests may be granted to iwi, hapū or whānau groups.³

[2] This decision deals with applications by various iwi, hapū and whānau groups seeking orders recognising CMT in their various rohe in the common marine and coastal area (CMCA), also referred to as the takutai moana. The area that is the subject of this hearing runs from the northern bank of the Rangitīkei River to Whareroa (north of Paekākāriki), often referred to as the Kapiti Coast,⁴ as well as the offshore Kapiti Island and its islets.⁵ A separate judgment will deal with the PCR applications which were heard at the CMT hearing.

[3] A primary contest among the parties is, as Mr Bennion for Muaūpoko put it, between the iwi descendants of the Kurahaupō waka, being Muaūpoko and their allies (Ngāti Apa and Rangitāne) and those represented today by Ngāti Toa, Te Ātiawa, and Ngāti Raukawa who came from the north in the 1820s and 1830s. The Kurahaupō allies had occupied the Kapiti area for many hundreds of years prior to the 1820s. The groups from the north arrived in the hearing area in a series of migrations or heke and so are referred to as the Hekenga iwi. Te Ātiawa, Ngāti Raukawa, and Ngāti Toa are

¹ Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act], s 9(1) definition of “marine and coastal area”. The Takutai Moana Act is also referred to as “MACA” in various other sources cited throughout this judgment.

² Part 3.

³ Section 9(1) definition of “applicant group”.

⁴ Macrons: There remains some controversy over whether Kapiti should retain its name without the macron or adopt the macron. Generally, the macron is not used when referring to Kapiti in this judgment, however it is retained when used in quotations. The same issue arises in relation to a number of other words which I do not highlight. All quotations in this judgment are reproduced in their original form, including the omission or otherwise of macrons.

⁵ The application area is shown on the map at Attachment 1.

separate iwi but are closely related by whakapapa and collaborate to their mutual advantage on various issues under the umbrella of the ART Confederation.

[4] Te Rauparaha precipitated the move south of tribes from the Waikato and Taranaki following his expedition as part of a raiding taua or āmiowhenua (a war party expedition around the North Island), which visited the Kapiti area in 1818-1820. He had formed an intention to lead his Ngāti Toa iwi from their homeland in the Waikato (Kawhia) to escape the constant warfare between tribes in that area. The events of the 1820s and the 1830s following the arrival of the Hekenga iwi, and the subsequent effects on the various iwi and hapū involved, have been some of the most contested in historical and tribal narratives, as well as in the Native Land Court.

[5] This judgment considers those historical contested events and the groups' circumstances, in particular their relationships with the takutai moana and how those relationships have been expressed through to the present time, in the context of the application of the statutory test for CMT as recently reformulated by the Supreme Court. The final determination recognises that five applicant groups are entitled to either shared exclusive, or exclusive CMT at various specific locations across the hearing area.

The applicants and interested parties

[6] The southern boundary of the hearing area aligns with the southern boundary of the application area of Trustees of Te Ātiawa ki Whakarongotai Charitable Trust on behalf of Te Ātiawa ki Whakarongotai. The northern boundary of the hearing area aligns with the northern boundary of the claim by Rachael Ann Selby on behalf of Ngāti Raukawa ki te Tonga. The applications before the Court are as follows:

- (a) William James Taueki on behalf of Ngāti Tamarangi hapū of Muaūpoko iwi (CIV-2017-485-160) seeking recognition of CMT in the CMCA, between defined points adjacent to the Waitārere Forest and out to defined points about one kilometre offshore (Mr Taueki and Ngāti Tamarangi).

- (b) Rachael Ann Selby on behalf of Ngāti Raukawa ki te Tonga (CIV-2017-485-229) seeking recognition of CMT and PCRs in the CMCA between the Rangitīkei River and Kukutauaki from the mean high-water springs and out to the territorial sea limit (Ngāti Raukawa).
- (c) Trustees of Te Ātiawa ki Whakarongotai Charitable Trust on behalf of Te Ātiawa ki Whakarongotai (CIV-2017-485-248) seeking recognition of CMT and PCRs in the CMCA between Kukutauaki and Whareroa, from the mean high-water springs to the territorial sea limit (Te Ātiawa).
- (d) Muaūpoko Tribal Authority Incorporated on behalf of Muaūpoko (CIV-2017-485-261) seeking recognition of CMT from the Manawatū River to the Kukutauaki block and seeking recognition of PCRs from the Rangitīkei River to Whareroa (MTA and Muaūpoko).⁶
- (e) Patrick Seymour on behalf of Te Whānau Tima (Seymour) and Ngā Ahi Kā o Te Hapū o Te Mateawa (CIV-2017-485-273) seeking recognition of CMT and PCRs in the CMCA between the Ōhau River and the Waikawa River (Mr Tima, Te Whānau Tima and Te Mateawa).
- (f) Chris Shenton on behalf of Te Rūnanga o Ngā Wairiki Ngāti Apa (CIV-2017-485-511) seeking recognition of CMT and PCRs in the CMCA between Motu Karaka and Omarupapako, from the line of mean high-water springs to the outer limits of the territorial sea (Mr Shenton and Ngāti Apa).

[7] David Morgan Whānau did not appear at the hearing.⁷ As their application relates only to PCRs, I deal with that claim in the PCR judgment and do not address it further in this judgment.

⁶ I declined Muaūpoko's application to extend their CMT application to include the whole of the hearing area on 13 March 2024: *Re Muaūpoko Tribal Authority* [2024] NZHC 536. Leave to appeal was declined: *Re Muaūpoko Tribal Authority* [2024] NZHC 967.

⁷ Margaret Morgan-Allen on behalf of David Morgan Whānau (CIV-2017-485-214) seek recognition of PCRs in the CMCA between the Hōkio Stream and the Ōhau River, from the line of the mean high-water springs and out to the territorial sea limit.

[8] There are also 15 interested parties in these proceedings:

- (a) The Attorney-General;
- (b) Te Rūnanga o Toa Rangatira Incorporated on behalf of the iwi of Ngāti Toa Rangatira (Ngāti Toa);⁸
- (c) Christopher Henare Tahana, Edward (Fred) Clark, Hayden Tūroa, and Novena McGuckin on behalf of Te Patutokotoko (CIV-2017-485-254);⁹
- (d) Rangitāne o Manawatū Settlement Trust (Rangitāne);¹⁰
- (e) Edward Penetito and Donald Koroheke Tait of Ngāti Kauwhata;¹¹
- (f) Manawatū-Whanganui Regional Council;
- (g) Wellington Regional Council;
- (h) Kāpiti Coast District Council;
- (i) Landowners Coalition Incorporated;
- (j) Seafood Industry Representatives;
- (k) Simon Austin;
- (l) Carol Hardie;¹²

⁸ *Re Taueki (Ngāti Tamarangi)* HC Wellington CIV-2017-485-273, 14 September 2022 (Minute of Grice J) at [10].

⁹ A memorandum of counsel dated 14 February 2024 confirmed that Te Patutokotoko would not file evidence in these proceedings and would remain an interested party. They appeared at the hearing.

¹⁰ *Re Taueki (Ngāti Tamarangi)* HC Wellington CIV-2017-485-160, 6 March 2024 (Minute of Grice J).

¹¹ A memorandum of counsel dated 13 February 2024 indicated that Mr Penetito and Mr Tait wished to continue pursuing recognition of their customary interests through the Crown engagement pathway only, however they maintained a watching brief in these proceedings.

¹² Mr Austin and Ms Hardie both filed notices of appearance in 2017, but have taken no further steps in this proceeding since then.

- (m) Waitārere Beach Progressive and Ratepayers Association Incorporated;
- (n) New Zealand Transport Agency Waka Kotahi; and
- (o) Horowhenua 11 Part (Lake) Reservation Trust.

[9] Ten groups have made applications to the Crown to pursue an alternative process under the Takutai Moana Act in relation to the hearing area. They seek recognition of CMT and PCRs, not by way of application to the High Court, but through direct negotiation with the Crown. This is referred to as the Crown engagement pathway. The groups who have made applications under the Crown engagement pathway are:

- (a) The Waiorua Bay Ahu Whenua Trust on behalf of the owners of Waiorua Bay Kapiti and some of the owners of Motungarara (MAC-01-11-001);
- (b) George Davis for Ngā Hapū o Himatangi (MAC-01-11-004);
- (c) Huia Marae Committee and Matau Marae Committee for Ngāti Huia (MAC-01-11-006);
- (d) Kikopiri Marae Reservation Trustees on behalf of Ngāti Huia ki Kikopiri (MAC-01-11-007);
- (e) Donald Tait on behalf of Ngāti Kauwhata (MAC-01-11-008);
- (f) Kereru Marae on behalf of Ngā Hapū o Kereru Ngāti Takihiku, Ngāti Hinemata, Ngāti Ngārongo (MAC-01-11-009);
- (g) Rangitāne o Manawatū Settlement Trust on behalf of Rangitāne o Manawatū (MAC-01-11-013);
- (h) Te Iwi o Ngāti Tukorehe Trust on behalf of Te Iwi o Ngāti Tukorehe me onā hapū, whānau hoki (MAC-01-11-016);

- (i) Ropata Williams Miratana for Te Kotahitanga o Te Iwi o Ngāti Wehi Wehi (MAC-01-11-017); and
- (j) Te Rūnanga o Toa Rangatira on behalf of Ngāti Toa Rangatira (MAC-01-12-021).

[10] Two of those Crown engagement applicants, Rangitāne and Ngāti Toa, also took an active part in the hearing as interested parties.

[11] The Attorney-General appears as an interested party, noting that she acts in the interests of all the public (including Māori). Dr Ward, counsel for the Attorney-General, notes that her role is to assist the Court in interpreting and applying the Takutai Moana Act, assuming an “independent aloofness”, as she is not the advocate for any sectional interest. The Attorney-General’s submissions must be “accurate, objective and restrained, and founded firmly on a tenable exposition of the applicable legal principles”.

The application area — features of the Kapiti Coast takutai moana

[12] Numerous witnesses pointed out that, for their tūpuna, there was no line between land and sea. From the Kapiti Coast, they looked seaward to Kapiti Island and beyond to the top of the South Island. The moana which took their waka to those places was regarded as a continuation of the land — it was a highway. Everything was viewed as interconnected, a perspective informed by the lack of demarcation in the natural world. Many witnesses referred to the fact that their water flowed from the mountains, lakes, and over and under the land, through the streams and rivers (and underground) into the sea.

[13] The Kapiti area was covered in native forest in the early 19th century, providing abundant resources for its occupants. The dense forest cover made it quicker and easier for groups to travel along the coast than inland. The coastal strip, including the foreshore, was therefore the main arterial route for travellers passing through the area. By the early 20th century, much of the interior had been cleared of its bush cover and many swamps had been drained, transforming the environment.

[14] Archaeological records indicate that the earliest inhabitants of the region overwhelmingly favoured coastal residences, with more fleeting occupation of the heavily forested interior in pursuit of moa, birds, rats, and other food sources. The coast was a primary source of orientation. Over time, settlements began to emerge in the interior along the banks of the major river systems, however the coastal and lower river areas remained prominent sites of settlement. It is possible that the depletion and eventual extinction of moa would have made excursions inland less attractive. Even when the interior was settled, numbers at the coastal fishing mouths could increase substantially during the fishing season. While the soils were variable in fertility and subject to wind erosion, the coastal microclimate of the lower west North Island was milder and less susceptible to frosts than the interior, making it suitable for the cultivation of various crops. Later, deforestation of much of the interior had a significant impact on the previously relatively stable river systems, with increased runoff and erosion producing wide shingle beds. Each of the major river systems also have estuaries or lagoons where they meet the sea, which have been affected by these dramatic changes. The estuaries have become places where pollutants from upstream accumulate, resulting in significant degradation of these sites consequent upon the development of farming further inland.

[15] The coastal area features part of New Zealand's largest dune field formation. The formation stretches from Pātea to Paekākāriki — a distance of over 200 kilometres. The dunes, typically reaching 15 metres in height, with some as large as 30 metres, are formed through a combination of riverine deposits and tidal currents, and extend inland at their widest point by 18 kilometres. Without stabilisation through vegetation, they would continue to advance inland at rates of up to 100 metres per month. Multiple small lakes and swamps formed behind the dunes. They were cut off from the sea and teeming with fish, birds, and other resources that were a rich source of sustenance for local Māori. Alongside the many rivers and streams within the district, these waterways became renowned for their fisheries, including tuna (eels), kōkopu and kōaro (native trout), kākahi (freshwater mussels), inanga (whitebait), and other species, some of which migrated seasonally between fresh and seawater. The district became especially known for its abundant tuna fishery. Although these were subject to annual migrations (long-finned eels migrated to the marine environment in summer and the short-finned species in winter), a year-round

supply could be secured in various ways, including the construction and manipulation of artificial water channels in which tuna might be caught.

[16] Between the dunes running along the coastline and the sea, there is a wide beach formed mostly of fine grain sands, except for pebbles and “other coarse detritus” which are found at the mouths of rivers and larger streams. Prior to colonisation, the sand dunes were kept stable by native grasses and shrubs, particularly spinifex and pīngao. The introduction of sheep and cattle in the mid-19th century rapidly led to the destruction of these dune-binding plants. This began a process of sand-drift inland and dune expansion, which was a particular problem north of the Manawatū River. In an effort to stabilise the dunes, various plants have been used, including natives such as spinifex, and exotics such as marram grass. The non forested areas of coastline, particularly where there has been urban development, are more prone to coastal instability and erosion. In some areas, the foredune system has been entirely destroyed.

[17] The seabed is characterised by its regular and shallow incline, which very gradually slopes from the coastline down to the Cook Strait trough. It is only around 50 metres deep at around the 12-kilometre mark.

[18] The takutai moana in the relevant area looks very different today than it did in 1840. Places which were on the 1840 coastline are now further inland due to significant accretion.¹³ For instance, the *Hydrabad* ship was run aground on the Horowhenua coast in 1878 while carrying a cargo of railway equipment and locomotives. The wreck remained just offshore of Waitārere Beach near Levin for many years. It is now almost completely buried beneath the advancing sand dunes high on the beach. The wreck was used as a landmark for reference by some of the witnesses when describing events and places along the coast. There are also other places of importance, including pā sites in dunes on the coast, which are today located further inland or no longer exist.¹⁴ The Kukutauaki Stream, which was once an

¹³ Accretion does not give rise to substantial interruption under the Takutai Moana Act. However, significant reclamation works may give rise to substantial interruption. See *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka* [2024] NZSC 164 [*Re Edwards* (SC)] at [176].

¹⁴ For example, the dune pā site of Te Rangihacata which he established when he took up residence in Horowhenua in the 1860s.

important boundary marker, is now an almost indiscernible stream surrounded by urban holiday homes at Peka Peka beach.

[19] The waterways have also changed considerably over the last two centuries. Most of the rivers have changed course and the river mouths are constantly shifting. Many of the lakes, wetlands and swamps which were a feature of this coast and were rich in mahinga kai have silted up due to runoff further inland. At 1840, those same rivers were used to navigate to and from the sea by waka for many kilometres inland, transporting produce and other goods to trade. The lakes, streams, and rivers, particularly in the Horowhenua area, are also polluted, largely due to inland works causing soil to flow toward the sea, as well as the extensive use of fertilisers. Lakes that remain — such as Lake Horowhenua (or Punahau), which is located in Muaūpoko Park at the eastern side of Levin near the coast and is one of the coastal dune lakes which were typical of the region — have shrunk in size and become shallow. The present state of Lake Horowhenua is such that no recreational activities can be permitted on the lake. I address this in more detail later in the judgment.¹⁵

¹⁵ See particularly the section on Horowhenua 11 (Part) Reservation Trust.

Legislative framework

Overview

[20] In its December 2024 decision in *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka (Re Edwards)*, the Supreme Court noted that the Takutai Moana Act provides a bespoke New Zealand solution designed to reconcile the customary rights of Māori with the rights and interests of the wider community.¹⁶ The Act aims to establish a durable scheme that ensures the protection of legitimate interests of all New Zealanders in the takutai moana, while also recognising the mana tuku iho¹⁷ exercised by iwi, hapū, and whānau as tangata whenua.¹⁸ This requires the reconciliation of three sets of rights and interests: first, the customary rights of Māori; second, public rights of access, navigation, and fishing; and third, vested property rights and activities authorised by law. The provisions of the Takutai Moana Act, and judicial interpretation of those provisions, are designed to achieve a fair and balanced outcome that honours te Tiriti o Waitangi/the Treaty of Waitangi and addresses related historical and contemporary issues.

[21] The Supreme Court refer to the mechanisms that the Takutai Moana Act provides to ensure different interests can coexist harmoniously.¹⁹ The first mechanism is by way of general rules to minimise conflicts applicable to the entire takutai moana. The second is by providing fact-specific rules through the tests for customary rights recognition under ss 51 and 58 of the Act, which are designed to address specific tensions that arise in individual cases. The Supreme Court also recognised that the courts play a key role in the reconciliation process by interpreting and applying the provisions of the Act.²⁰ In light of that, the decision outlines how courts should approach the test for CMT, considering both common law concepts and tikanga Māori. I return to the Supreme Court formulation of the CMT test below.

¹⁶ *Re Edwards* (SC), above n 13, at [1]. The appeal to the Supreme Court was from the Court of Appeal judgment in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [*Re Edwards* (CA)].

¹⁷ Mana tuku iho is defined in the Takutai Moana Act, s 9 as “inherited right or authority derived in accordance with tikanga”.

¹⁸ Section 4.

¹⁹ *Re Edwards* (SC), above n 13, at [104].

²⁰ At [116].

Definitions and purpose

[22] The “marine and coastal area” and “common marine and coastal area” are central terms referred to throughout the Takutai Moana Act, which replace the term “foreshore and seabed” used in its predecessor, the Foreshore and Seabed Act 2004. The “marine and coastal area” is defined as follows:²¹

marine and coastal area—

- (a) means the area that is bounded,—
 - (i) on the landward side, by the line of mean high-water springs; and
 - (ii) on the seaward side, by the outer limits of the territorial sea; and
- (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
- (c) includes the airspace above, and the water space (but not the water) above, the areas described in paragraphs (a) and (b); and
- (d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b)

[23] The CMCA is a subset of the marine and coastal area.²²

common marine and coastal area means the marine and coastal area other than—

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

²¹ Section 9 definition of “marine and coastal area”.

²² Section 9 definition of “common marine and coastal area”.

[24] The purposes of the Takutai Moana Act are set out in s 4(1):

4 Purpose

(1) The purpose of this Act is to—

- (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
- (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
- (c) provide for the exercise of customary interests in the common marine and coastal area; and
- (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

[25] Section 4(2) then specifies the means by which these purposes are to be given effect to:

(2) To that end, this Act—

- (a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
- (b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and
- (c) gives legal expression to customary interests; and
- (d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and
- (e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—
 - (i) for its intrinsic worth; and
 - (ii) for the benefit, use, and enjoyment of the public of New Zealand.

[26] Section 5 confirms that the Foreshore and Seabed Act is repealed. Section 6 restores and gives legal expression to any customary interests that were extinguished by the Foreshore and Seabed Act:

6 Customary interests restored

- (1) Any customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with this Act.
- (2) Any application under this Act for the recognition of customary interests must be considered and determined as if the Foreshore and Seabed Act 2004 had not been enacted.

[27] In order to take account of te Tiriti o Waitangi/the Treaty of Waitangi and promote the exercise of customary Māori interests, s 7 provides:

...

- (a) ... for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and
- (b) ... for customary rights to be recognised and protected; and
- (c) ... for customary marine title to be recognised and exercised.

Customary marine title (CMT)

[28] CMT is the most extensive form of right which may be recognised under the Takutai Moana Act, as it provides for a (non-alienable) interest in land.²³ The rights conferred by a recognition order are set out under ss 60 and 62 of the Takutai Moana Act. These include permission rights under the Resource Management Act 1991 (the RMA),²⁴ conservation permission rights,²⁵ the right to protect wāhi tapu and wāhi tapu areas,²⁶ rights in relation to marine mammal watching permits,²⁷ rights in relation to New Zealand coastal policy statements,²⁸ prima facie ownership of newly found taonga tūturu,²⁹ ownership of certain minerals,³⁰ and the right to create a planning document.³¹ However, a group is not

²³ Section 60(1).

²⁴ Sections 66–70.

²⁵ Sections 71–75.

²⁶ Sections 78–81.

²⁷ Section 76.

²⁸ Section 77.

²⁹ Section 82.

³⁰ Sections 83 and 84. See also Crown Minerals Act 1991, s 10 definition of “minerals”.

³¹ Sections 85–93.

exempt from obtaining any relevant resource consent, permit, or approval that may be required by another enactment when exercising their CMT rights.³² CMT also does not give a group the right to exclude others from the area, as ss 26–28 expressly preserve public rights of access, navigation rights, and fishing rights.

[29] Applications for CMT are governed by 58 of the Takutai Moana Act, which provides:

58 Customary marine title

- (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group –
 - (a) holds the specified area in accordance with tikanga; and
 - (b) has, in relation to the specified area, –
 - (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
 - (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).
- (2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—
 - (a) the commencement of this Act, and
 - (b) the effective date.
- (3) For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—
 - (a) a customary interest in a specified area of the common marine and coastal area was transferred—
 - (i) between or among members of the applicant group; or
 - (ii) to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and
 - (b) the transfer was in accordance with tikanga; and
 - (c) the group or members of the group making the transfer—

³² Section 60(2).

- (i) held the specified area in accordance with tikanga; and
 - (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
- (d) the group or some members of the group to whom the transfer was made have—
 - (i) held the specified area in accordance with tikanga; and
 - (ii) exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.
- (4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

[30] Section 59 sets out certain matters which must be taken into account when determining whether CMT exists:

59 Matters relevant to whether customary marine title exists

- (1) Matters that may be taken into account in determining whether customary marine title exists in a specified area of the common marine and coastal area include—
 - (a) whether the applicant group or any of its members—
 - (i) own land abutting all or part of the specified area and have done so, without substantial interruption, from 1840 to the present day;
 - (ii) exercise non-commercial customary fishing rights in the specified area, and have done so from 1840 to the present day; and
 - (b) if paragraph (a) applies, the extent to which there has been such ownership or exercise of fishing rights in the specified area.
- (2) To avoid doubt, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does not limit subsection (1)(a)(ii).
- (3) The use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.
- (4) For the purpose of subsection (1)(a)(i), land abutting all or part of the specified area means—
 - (a) land that directly abuts the specified area; or

- (b) land that does not directly abut the specified area, but does directly abut any of the following:
 - (i) a marginal strip (as defined in section 2(1) of the Conservation Act 1987) that directly abuts the specified area;
 - (ii) an esplanade reserve (as defined in section 11 of the Natural and Built Environment Act 2023), but only to the extent that it directly abuts the specified area;
 - (iii) a reserve (as defined in section 2(1) of the Reserves Act 1977), but only to the extent that it directly abuts the specified area;
 - (iv) a Māori reservation (as defined in section 2(1) of the Reserves Act 1977) that directly abuts the specified area;
 - (v) a road that directly abuts the specified area;
 - (vi) a railway line that directly abuts the specified area.

[31] Section 106 outlines the burden of proof in regard to applications for PCRs and CMT:

106 Burden of proof

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

[32] The Supreme Court clarified that this means applicants for CMT under s 58 must prove that they hold the specified area in accordance with tikanga and have used and occupied the relevant area from 1840 to the present day.³³ It is then presumed that the applicant's use and occupation has been exclusive and not substantially interrupted, unless a contradictor can adduce evidence to prove the contrary.³⁴

Protected customary rights (PCRs)

[33] As noted above, PCRs claimed by the applicants will be the subject of a separate judgment. PCRs can recognise customary rights exercised by a group which may coexist in the same area in which CMT is held by another group.

[34] A PCR is an activity, use, or practice, as established in accordance with the Takutai Moana Act provisions, recognised by a PCR order or an agreement.³⁵

[35] The meaning of a PCR is set out in more detail in s 51(1), which provides:

51 Meaning of protected customary rights

- (1) A protected customary right is a right that—
- (a) has been exercised since 1840; and
 - (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
 - (c) is not extinguished as a matter of law.

[36] Section 51(2) specifically excludes certain activities from being recognised as a PCR:

- (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

³³ *Re Edwards* (SC), above n 13, at [120].

³⁴ At [120].

³⁵ Section 9 definition of “protected customary right”.

- (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 2(1) of the Resource Management Act 1991).
- (3) An applicant group does not need to have an interest in land in or abutting the specified part of the common marine and coastal area in order to establish protected customary rights.

[37] A group that has a PCR in relation to a particular area is entitled to exercise those rights without a resource consent, despite any prohibition, restriction, or imposition that would otherwise apply under the RMA.³⁶ If applications for resource consents are made in relation to an area where a PCR is held, a consent authority must not grant a resource consent if that activity is likely to have adverse effects that are more than minor on the exercise of the PCR.³⁷

Tikanga

[38] The Supreme Court in *Re Edwards* restated the test for CMT. It identified four elements of the test under s 58, albeit acknowledging that these are conceptually and evidentially overlapping. They are to be considered under the following headings:³⁸

³⁶ Section 52(1).

³⁷ Section 55.

³⁸ *Re Edwards* (SC), above n 13, at [133].

- (a) holds in accordance with tikanga;
- (b) exclusive use and occupation;
- (c) continuity from 1840 to the present day without substantial interruption; and
- (d) extinguishment.

[39] The Supreme Court emphasised that in addition to the tikanga inquiry required by the first element of the test, the second element applies a common law lens to the evidence of use and occupation according to tikanga. The court must weave together tikanga and the common law to determine whether the customary rights are “such as to require a recognition by way of a CMT”.³⁹ Tikanga Māori and Māori customary rights are therefore central to the consideration of the claims.

[40] In addition to the significant amount of tikanga evidence given by witnesses, including tikanga experts called by the parties, the Court heard evidence from two pūkenga, who were appointed as tikanga experts. Dr Robert Joseph and Ms Moe Milne were nominated by the parties and appointed by the Court under s 99 of the Takutai Moana Act. A pūkenga’s role is to assist the Court in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the proceeding.⁴⁰ The pūkenga in this case also heard the evidence and submissions and travelled to view significant historical sites identified by the applicants in the hearing area.⁴¹

[41] Dr Joseph and Ms Milne filed two reports.⁴² The first related to their expertise, experience and proposed methodology.⁴³ Their expertise and experience was not

³⁹ At [157].

⁴⁰ Evidence Act 2006, s 25(1).

⁴¹ No view took place of Kapiti Island due to funding constraints.

⁴² The quotes which appear from the evidence and the material produced to the court omit footnotes unless expressly stated otherwise.

⁴³ The first pūkenga report, dated 18 May 2024, dealt with the requirements under r 9.43 of the High Court Rules 2016 which the pūkenga were required to comply with as expert witnesses.

disputed. Their second report responded to the questions suggested by the parties.⁴⁴ That report contains a comprehensive, independent review of tikanga Māori generally, the specific tikanga applying to the application area at various times, and the different forms of take at play (as the basis for the foundational claims brought by the applicants). The pūkenga were cross-examined on this report.

[42] The pūkenga evidence is highly influential, however it is not determinative.⁴⁵ Any part of the report not accepted by all parties must be treated as information furnished to the court and be given appropriate weight.⁴⁶ In cases where expert evidence given is conflicting, the court must determine the conflict based on the evidence before it.⁴⁷

[43] The following 10 questions were put to the pūkenga:

1. What tikanga does the evidence establish applies in the areas that are the subject of the applications before the Court?
2. What evidence indicates the maintenance of a group's holding of part of the Marine and Coastal Area, as a matter of tikanga?
3. What evidence indicates that a group no longer holds part of the Marine and Coastal Area as a matter of tikanga?
4. How do the concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, tuku and related concepts apply in this hearing area between 1820 and 1840?
5. If those concepts apply, how do they apply after 1840?
6. At 1840, what applicant group or groups used and occupied the application area, or any part of it, on a sole or shared basis, in accordance with tikanga?
7. At 1840, how did groups control access to areas as a matter of tikanga?
8. Since 1840, what applicant group or groups have used and occupied the application area, or any part of it, on a sole or shared basis, in accordance with tikanga?

⁴⁴ Ms Moe Milne and Dr Robert Joseph *Pūkenga Report* (25 October 2024) [pūkenga report]. This report is attached in full at Attachment 7 to this judgment.

⁴⁵ *Re Edwards Whakatōhea (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 [*Re Edwards* (HC)] at [325].

⁴⁶ High Court Rules, r 9.38(4).

⁴⁷ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [39].

9. Having regard to the evidence, what tikanga applies today to the relationships between the iwi in this area?
10. Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

[44] An overview of the pūkenga report follows. I later return to the evidence of the pūkenga in relation to particular issues raised by the parties.

Preliminary comments of the pūkenga

[45] In describing the historical context for the present applications, the pūkenga refer to the observations of 19th century scholar John White, who said:⁴⁸

I may state without fear of contradiction that there is not one inch of land in the New Zealand Islands which is not claimed by the Maoris; and I may also state that there is not a hill, or valley, stream, river, or forest, which has not a name, the index of some point of Maori history.

[46] The pūkenga note that the Treaty of Waitangi/te Tiriti o Waitangi and its principles “will be a relevant interpretative aid where ambiguity or a lack of clarity in MACA exists”.⁴⁹ Furthermore, tikanga Māori plays an important role in fulfilling the statutory purposes of the Takutai Moana Act.⁵⁰ They warn against attempting to explain tikanga concepts from a Pākehā perspective, without an appreciation of how those concepts function within te ao Māori.⁵¹ As Dr Carwyn Jones, who gave evidence for Ngāti Raukawa, noted “fundamentally, tikanga can only be understood through a te ao Māori lens, because it reflects the Māori worldview”.⁵² In describing what this entails, the pūkenga note that:⁵³

Māori tribal worldviews generally acknowledged the natural order of living things and the kaitiakitanga (stewardship) rights, responsibilities and relationships to one another and to the environment. The overarching principle of utu (balance) underpinned all aspects of life. Māori worldviews are ones of holism and physical and metaphysical (spiritual) realities where the past, the present and the future are forever interacting. The maintenance of the worldviews of life — including within a Marine and Coastal Area

⁴⁸ Pūkenga report, above n 44, at [17], citing Raymond Firth *Economics of the New Zealand Maori*, (2nd ed, Government Printer, Wellington, 1972) at 383.

⁴⁹ At [42].

⁵⁰ At [43].

⁵¹ At [46], citing *Ngāti Hokopu ki Hokowhitu v Whakātane District Council* (2002) 9 ELRNZ 111.

⁵² At [54].

⁵³ At [55].

(Takutai Moana) Act 2011 context — are dependent upon the maintenance of the culture and its many traditions, values, practices and rituals.

[47] In recent years, the Supreme Court has expressly acknowledged tikanga Māori as “the first law of Aotearoa New Zealand”.⁵⁴ The pūkenga broadly define tikanga as “a set of abstract cultural values and ways of organising social life that are distinctively Māori”, or “values, principles or norms that determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just, right and correct”.⁵⁵ While the principles and values within tikanga Māori have some flexibility, they also provide sufficient consistency and universality across iwi, hapū, and whānau to support a degree of consensus.⁵⁶

[48] A fundamental feature of tikanga Māori is the relationships Māori have to land, water, other lifeforms, and each other.⁵⁷ In this tikanga Māori legal system, a legal responsibility to care for people and the environment is recognised.⁵⁸ The pūkenga observe that:⁵⁹

For all Māori iwi, hapū and whānau — the maunga (mountains), whenua (land), rohe moana (ocean), awa (rivers), manga (streams), moana (lakes), and puna (springs) — are integral, defining components of their personal and tribal identity, security and prosperity. The fundamental concept of whakapapa considers Te Ao Turoa — the environment — a whānaunga or relation.

[49] The pūkenga also cite the comments of Elias CJ in *Attorney-General v Ngāti Apa*, who observed that an English common law approach to the marine and coastal area is not appropriate in New Zealand, given the unique local circumstances of this country.⁶⁰ The Takutai Moana Act was therefore introduced in attempt to provide a specific statutory framework to address rights in New Zealand’s marine and coastal area based on “Māori customary values and practices”.⁶¹

⁵⁴ At [57] and [58], citing *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 at [187]; and *Ellis v R* [2022] NZSC 114.

⁵⁵ At [61].

⁵⁶ At [67].

⁵⁷ At [89].

⁵⁸ At [90] and [91].

⁵⁹ At [89].

⁶⁰ At [101] and [102], citing *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

⁶¹ At [103], citing Takutai Moana Act, s 9.

[50] In relation to the Kapiti Coast application area, the pūkenga refer to the comments of Chief Judge Francis Fenton of the Native Land Court in 1870. He observed how readily Māori could prove acts of ownership in relation to the foreshore, and “how impossible it is to contradict them if they only agree amongst themselves”.⁶² However, finding agreement between the parties is one of the major challenges in this proceeding.⁶³

Questions for the pūkenga

Question 1: What tikanga does the evidence establish applies in the areas that are the subject of the applications before the Court?

[51] The pūkenga gave a non-exhaustive list of specific tikanga Māori values, principles and fundamental signposts, which apply in the Kapiti Coast application area.⁶⁴

- (a) Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including all of the Kāpiti Coast claimant groups to each other and the respective takutai moana claimant area;
- (b) Wairuatanga — spirituality including placating the departmental Gods’ respective realms such as Tangaroa over the takutai moana realm;
- (c) Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individual’s place in the collective group;
- (d) Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;
- (e) Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;
- (f) Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;

⁶² At [104], citing Chief Judge Fenton, *Kauaeranga Judgment*, (1870) reprinted in *VUWLR* (Vol. 14, 1984) 227 at 244.

⁶³ At [105].

⁶⁴ At [111]. See also the list of general tikanga principles at [76].

- (g) Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;
- (h) Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;
- (i) Hau — respect for the vital essence of a person, place or object;
- (j) Ohaoha — distribution and sharing of prosperity;
- (k) Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;
- (l) Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;
- (m) Aroha — charity, generosity; [and]
- (n) Kaitiakitanga — stewardship and protection, often used in relation to natural resources including the takutai moana.

[52] The pūkenga note that Williams J, speaking extrajudicially, has described whanaungatanga as “the glue that held, and still holds, the system together; the idea that makes the whole system make sense — including legal sense”.⁶⁵ This links to a crucial point, which is that the tikanga Māori values described above do not stand alone, but must be read together.

[53] In addition to the above list, the following other tikanga concepts were identified as relevant:⁶⁶

- (a) Tika and Pono — being right or correct, true and genuine;
- (b) Rangatira ki te rangatira — leaders speaking directly to each other, effective diplomacy;
- (c) Te mana o te kupu — the power of one’s word which is binding;
- (d) Kawenata — covenant agreements that are binding on the mana of the group; and
- (e) Tatau pounamu — binding peace agreements to settle conflict and protracted disputes.

⁶⁵ At [78], citing Joseph Williams “Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 3.

⁶⁶ At [112].

Question 2: What evidence indicates the maintenance of a group's holding of part of the marine and coastal area, as a matter of tikanga?

[54] The pūkenga set out several salient characteristics of tikanga drawn from Palmer J's decision in *Ngāti Whātua Ōrākei Trust v Attorney-General*, noting that tikanga will vary to some extent across iwi and hapū because of their different circumstances and historical narratives:⁶⁷

- (a) There is a need to understand tikanga holistically as an interlocking set of reinforcing norms where there is a set of principles which reinforce each other in pointing the way.
- (b) Tikanga evolves around values and a value system that comprises a spectrum with values and rules but with values informing the whole range.
- (c) Tikanga is fundamental to constituting iwi and hapū tribal identity in the exercise of their rangatiratanga.
- (d) There are different versions of which principles would be regarded as “core” to tikanga depending on the context of a particular issue that arises.
- (e) As circumstances change over time, tikanga and its practices may also change over time.
- (f) Tikanga is a way of life and is performed more than stated.

[55] The pūkenga refer to recent case law in relation to the meaning of “held” in the context of the test for CMT under s 58.⁶⁸ They emphasised that the area must be held “in accordance with tikanga” — that is, any assessment of “holding” must be made bearing in mind the context of tikanga Māori and the need for a Māori worldview. As put by Churchman J in the High Court decision of *Re Edwards Whakatōhea (No 2)*, this “involves looking outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European legal concepts”.⁶⁹

[56] The pūkenga then outline what they consider to be an appropriate tikanga Māori factual inquiry framework for assessing whether or not an area is “held” in

⁶⁷ At [122]–[124], citing *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843, [2022] 3 NZLR 601.

⁶⁸ At [126]. The pūkenga report was given in evidence before the delivery of the Supreme Court decision in *Re Edwards* (SC), above n 13.

⁶⁹ At [132], citing *Re Edwards* (HC), above n 45, at [130].

accordance with tikanga.⁷⁰ Drawing on comments of the Waitangi Tribunal, they note that “the intention and ability to control a resource is more akin to notions of stewardship or kaitiakitanga”.⁷¹ Furthermore, Māori exercise the mana of tino rangatiratanga under tikanga Māori in their relationship with coastal land and waters, which includes:⁷²

- (a) A spiritual dimension including karakia, naming of places [referred to as take taunaha] and placement of rāhui;
- (b) A physical dimension including enforcing rāhui;
- (c) A dimension of reciprocal guardianship where tangata whenua were kaitiaki of taonga, caring for it in such a way as to ensure its survival for future generations. And in turn, the taonga cared for and nurtured the tangata whenua;
- (d) A dimension of use, sometimes rendered equivalent to use-rights [mana whenua] in English law and including the exclusion of others from customary practices;
- (e) Manaakitanga; and
- (f) Manuhiri from across the sea.

[57] The Waitangi Tribunal refer to a “taonga test”, which provides signposts of stewardship that are relevant in the context of the takutai moana of the Kapiti Coast.⁷³

In assessing whether a waterway was a taonga [treasured possession] to any particular group, the Waitangi Tribunal took into account the intensity of the Māori association with the waterway including originating ancestral relationship [whakapapa and take tupuna] and an ongoing cultural and spiritual relationship with the waterway [ahi kā roa]; the exercising of control and authority over the resources [mana whenua and mana moana], and the fulfilment of obligations to conserve, nurture and protect the waterway [kaitiakitanga].

[58] The Waitangi Tribunal also noted that:⁷⁴

Whether a resource or place is a taonga can be tested ... Taonga have mātauranga Māori [inherited knowledge] relating to them, and whakapapa [genealogy] that can be recited by tohunga [experts]. Certain iwi or hapū will

⁷⁰ At [141].

⁷¹ At [142], citing Waitangi Tribunal *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, 2011) at 269; and Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

⁷² At [142].

⁷³ At [144], citing Waitangi Tribunal *Ko Aotearoa Tenei*, above n 71, at 51.

⁷⁴ At [145], citing Waitangi Tribunal *Ko Aotearoa Tenei*, above n 71, at 269.

say they are kaitiaki [stewards]. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.

[59] The pūkenga identify the following non-exhaustive tikanga indicia as relevant to determining whether a group has reciprocal “stewardship” responsibilities over the takutai moana:⁷⁵

- (a) whakapapa identifying a cosmological connection with the takutai moana;
- (b) exercise of mana or rangatiratanga over the takutai moana;
- (c) exercise of kaitiakitanga;
- (d) presence of a mauri (life force);
- (e) performance of kawa or rituals central to the spiritual life of the hapū and whānau;
- (f) identification of taniwha residing in the takutai moana;
- (g) celebration or references in waiata;
- (h) celebration or references in whakatauki;
- (i) reliance on the takutai moana as a source of food;
- (j) source of textiles or other materials;
- (k) use for travel or trade; and
- (l) a continuing recognised claim to land or territory in which the takutai moana is situated, and maintaining kaitiakitanga over some, if not all of the takutai moana area.

[60] The pūkenga suggest that another relevant factor is whether the claimants are actively practicing tikanga in the common marine and coastal area through, inter alia, kawa.⁷⁶ Kawa are procedural protocols and ritual practices, governed by tikanga values, which include karakia, waiata, whakapapa, whaikōrero and debate.⁷⁷ These involve “recognising boundaries of thought that are associated with a specific place”, and are monitored by kaumātua and kaitiaki.⁷⁸ Kawa are consistent with the

⁷⁵ At [149].

⁷⁶ At [153].

⁷⁷ At [154].

⁷⁸ At [154] and [155].

importance of process and protocols in tikanga Māori, as opposed to merely achieving the desired outcome.⁷⁹

[61] The pūkenga refer to the evidence of several witnesses as examples of ways that each of the applicant groups have carried out kawa practices and protocols:⁸⁰

- (a) Always return the first fish caught out of respect to Tangaroa.
- (b) Do not eat kaimoana on the beach.
- (c) Always karakia before you travel out to sea, again when you get to sea, and once again before you dive in the sea.
- (d) Always thank Tangaroa in your karakia.
- (e) Always respect the sea, never turn your back to the sea.
- (f) Do not swear by the sea.
- (g) If you pick up a rock, make sure you turn it back the way you found it.
- (h) Only take what you need and no more.
- (i) Fish according to the tide and only catch certain kaimoana at particular times.
- (j) Don't take the breeders — if you pick up kaimoana that are female and reproducing, you should always put it back in the sea.
- (k) Only take paua that are the size of your hands.
- (l) If the fish is too small, throw it back in the water.
- (m) Always make sure your moko are protected before yourself.
- (n) No playing or running on the shore.
- (o) Don't dive alone — always have someone with you.
- (p) If you are not well, don't get in the water.
- (q) Menstruating or pregnant women are not allowed out at sea.
- (r) Always provide kai moana for the Marae.
- (s) Don't deshell or clean the kaimoana on the beach — go back to the marae to do that.

⁷⁹ At [156].

⁸⁰ At [164].

Question 3: What evidence indicates that a group no longer holds a part of the marine and coastal area as a matter of tikanga?

[62] In brief, the pūkenga said an applicant group may no longer hold an area in accordance with tikanga if it cannot meet the “taonga test” outlined above. This includes a failure to demonstrate that the group has reciprocal “stewardship” responsibilities over the area. Another important indicator is if the group is not actively upholding and adhering to their kawa protocols.

[63] The pūkenga refer to an additional list of tikanga questions formulated by Sir Hirini Mead as relevant to determining whether an area of the takutai moana is held in accordance with tikanga:⁸¹

- i. How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand], take kite [discovery], other?
...
- ii. If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?
...
- iii. The land [and takutai moana] are actually occupied [ahi kā] by people and kāinga are established.
...
- iv. A rohe is marked out in some way. How? Provide a map.
- v. Over time urupā are established over land, tūahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.
- vi. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?
- vii. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].
- viii. The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.

⁸¹ At [174], citing Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 314.

- ix. The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.
- x. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.
- ...
- xi. The new iwi is able to defend its rohe (ringa kaha) and can call on allies to help to defend the estate.
- xii. The new iwi is approved by the neighbours and its presence is validated by the experience.
- ...
- xiii. In 1840, when the Treaty of Waitangi was signed, this iwi is part of the Māori nation and is a Māori partner of the Treaty with the Queen of England.
- xiv. The name of the iwi enters the historical record through the Native (later Māori) Land Court and other institutions of Aotearoa. There is proof of this.
- xv. The iwi is here today and has a credible number of members.

[64] The tikanga concepts of manaakitanga and kaitiakitanga are also central to this question.⁸² The pūkenga noted the findings of the Court of Appeal in *Re Edwards* that it is important to focus on a group's "intention and ability to control access to an area, and the use of resources within it, *as a matter of tikanga*", including through the expression of manaakitanga, rather than on a group's intention and ability to exclude others from the land.⁸³ For instance, manaakitanga may oblige a group which holds an area in accordance with tikanga to share resources within that area, provided permission is sought from that group before the area or resources are accessed by others.⁸⁴

[65] In relation to kaitiakitanga, while the concept is perhaps most recognised today through its inclusion in ss 2 and 7 of the RMA, the pūkenga note the use of Pākehā terms "guardianship" and "stewardship" in the definition under that Act arguably do not accurately reflect the significance of kaitiaki obligations.⁸⁵ Kaitiakitanga entails

⁸² At [175].

⁸³ At [213], citing *Re Edwards* (CA), above n 16, at [403] and [404].

⁸⁴ At [214].

⁸⁵ At [209].

rights and responsibilities which are obligatory according to tikanga Māori, thus creating “a positive duty to act in a way that benefits the wider collective including in the sustainable governance of the marine and coastal area”.⁸⁶ As observed by Dr Carwyn Jones, “mana and kaitiakitanga go together as right and responsibility”, and if a whānau or hapū fails to carry out their kaitiakitanga duties adequately “not only will they lose mana, but spiritual harm will befall the members of the whānau and hapū”.⁸⁷

Question 4: How do the concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, tuku and related concepts apply in this hearing area between 1820 and 1840?

[66] At the outset, the pūkenga acknowledge that it is challenging to make any definitive determinations about how the concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, and tuku applied between 1820 and 1840, given the highly contested nature of some of the legal and cultural issues arising in the evidence.⁸⁸

[67] They refer to the impact of the Musket Wars as important context for discussing the operation of tikanga during that period. The Musket Wars took place from around 1805 to 1845, and consisted of numerous battles fought between warring tribes, triggered by the arrival of Europeans and their introduction of new technology, including muskets.⁸⁹ These battles resulted in significant loss of life, land, and resources, and disrupted the balance of power between tribes as each sought utu against the other. In relation to the present application area, Te Rauparaha and his people of Ngāti Toa made their way down the west coast of the North Island and defeated Ngāti Apa, Muaūpoko, Rangitāne and Ngāti Ira tribes, before settling, among other places, on Kapiti Island.⁹⁰ Battles were also fought against Ngāti Raukawa, which contributed to them leaving their homelands in Waikato to heke through Taranaki and eventually establish themselves in Kapiti and Horowhenua. The Musket Wars led to unprecedented dislocation of iwi and hapū, and disruption of tikanga Māori as a legal system.⁹¹ The pūkenga observe that there continue to be

⁸⁶ At [195].

⁸⁷ At [216].

⁸⁸ At [219].

⁸⁹ At [224].

⁹⁰ At [226].

⁹¹ At [228] and [229].

unresolved conflicts, disputes, and trauma amongst the applicant groups as a result of this turbulent period, as was apparent in the evidence.⁹²

[68] The pūkenga note that proprietary interests in the whenua and rohe moana were traditionally determined according to specific “take”, meaning the basis upon which a right or connection to the area was established.⁹³ Land was never “owned” by Māori in the Western sense of property ownership, but was occupied under a system of “interlocking and overlapping rights of use”.⁹⁴ Four distinct forms of take or rights have been traditionally identified: take whenua kite hou (right by discovery); take tūpuna (right by ancestry); take tuku (right by gift); and take raupatu (right by conquest).⁹⁵ These are described as “organising principles of Māori land tenure”, when combined with the necessary element of occupation, or ahi kā.⁹⁶ The pūkenga caveated this by noting that Māori also had more complex systems of traditional property rights and responsibilities under tikanga, well beyond those four distinct categories.

[69] Any right, no matter what form of take it is vested in, must be maintained through continuous occupation or acts signifying mana or use. This is referred to by the symbolic language of “ahi kā” or “ahi kā roa”, meaning “lit fire” or “long burning fire”.⁹⁷ A rule was developed by the Native Land Court that if a group left the area and remained absent for three generations, their “fire” or rights to that land would be extinguished.⁹⁸ The Māori Appellate Court and the Waitangi Tribunal noted that ahi kā could be revived if an iwi returned to and peacefully reoccupied an area within three generations of their leaving, even if they were absent at 1840.⁹⁹ Furthermore, ahi kā does not necessarily require continuous settlement, but can be maintained through continued use, such as seasonal visits for fishing, or through deep knowledge of the area.¹⁰⁰ The related concept of take taunaha refers to the connection Māori claim to

⁹² At [231].

⁹³ At [235] and [236].

⁹⁴ At [241], citing Waitangi Tribunal *Pouākani Report* (Wai 33, Wellington, 1993) at 14.

⁹⁵ At [237] and [241].

⁹⁶ At [242].

⁹⁷ At [245].

⁹⁸ At [248].

⁹⁹ At [251].

¹⁰⁰ At [252] and [253].

the land by naming particular aspects of it.¹⁰¹ Genuine demonstrations of ahi kā must be distinguished from ahi pākaurere, ahi māwhitiwhiti, or ahi māueue — terms which broadly describe acts of occupation carried out by those without the right to do so.¹⁰²

[70] Tuku whenua describes a group that occupied land allowing another group to have certain use rights in respect of that land, while the occupying group continued to hold mana whenua over the land and resources.¹⁰³ This was distinct from ahi kā and should not be understood as the occupying group conveying their mana over the land and resources to the visiting group. In some circumstances, a tuku whenua might constitute a more permanent gifting of land, if followed by ahi kā to perpetuate that permanence.¹⁰⁴

[71] Take raupatu is the process of claiming land through conquest, through the subjugation or displacement of the original inhabitants.¹⁰⁵ There is some disagreement among academics as to whether such use of force would be legitimate if not for some additional purpose other than acquiring land.¹⁰⁶ Tā Eddie Durie identifies at least five types of “conquest”:¹⁰⁷

- (1) by defeating opponents in battle;
- (2) by protecting another hapu, or throwing a cloak over them to warn off potential invaders;
- (3) by causing a hapu to vacate a resource by threatening war;
- (4) by forcing a marriage upon a hapu; [and]
- (5) by forcing a marriage alliance in return for a promise of protection.

[72] Ringa kaha was the ability of victors who had obtained land through conquest to maintain that position by continuing to defend the land against challenges.¹⁰⁸

¹⁰¹ At [254].

¹⁰² At [255].

¹⁰³ At [270].

¹⁰⁴ At [274].

¹⁰⁵ At [277].

¹⁰⁶ At [277] and [278].

¹⁰⁷ At [280].

¹⁰⁸ At [282].

[73] The pūkenga note that there was little agreement between witnesses in respect of many of the key historic events and the application of tikanga to those events.¹⁰⁹ For instance, the results of the battles fought between Kurahaupō iwi and Hekenga iwi in the region are unclear. The contested narratives of the Hekenga iwi and the Kurahaupō iwi, including their competing accounts of the operation of take raupatu, ringa kaha, take tuku, and ahi kā roa in the region, are broadly summarised below.

[74] First considering the Hekenga iwi, the evidence of Ngāti Toa was that they took Kapiti Island from its inhabitants, before establishing their influence over the Cook Strait region through further battles with other iwi.¹¹⁰ Their victories enabled them to migrate from the Kapiti Coast to settle in Te Whanganui a Tara (Wellington) and the South Island. In particular, take raupatu resulted following the battle of Waiorua on Kapiti Island in 1824.¹¹¹ Muaūpoko were living in the Kapiti region when Ngāti Toa arrived, however a bitter enmity developed between the two iwi after Muaūpoko killed several members of Te Rauparaha’s family at Papaitonga. After the battle of Waiorua, along with several others, what little was left of the Muaūpoko population became concentrated in Horowhenua.¹¹² Ngāti Toa then maintained their rights obtained under take raupatu through ringa kaha and ahi kā. Their influence and mana over the Cook Strait region was demonstrated by, among other things, deference and respect shown to Ngāti Toa by other allied and tributary tribes.¹¹³

[75] Ngāti Raukawa’s evidence was that following the murder of his children by Muaūpoko, Te Rauparaha decided to exterminate the iwi and engaged in a relentless campaign against them.¹¹⁴ Several battles were fought, culminating in the battle of Waiorua, at which Ngāti Toa defeated all opposition. Following that, Ngāti Toa made their way up the coast, killing a number of members of Ngāti Apa, Rangitāne, Ngāti Ira, and Muaūpoko. After Ngāti Toa’s take raupatu at Waiorua, they allocated land along the coast to both Ngāti Raukawa and Te Ātiawa through take tuku. Ngāti Raukawa’s mana whenua and mana moana was then affirmed through

¹⁰⁹ At [285].

¹¹⁰ At [287].

¹¹¹ At [288].

¹¹² At [289].

¹¹³ At [293].

¹¹⁴ At [299].

ringa kaha and ahi kā. The decision to allow Muaūpoko to return and live at Horowhenua was merely a permission to reside, but their mana over the land had been completely defeated and was not given back to them.¹¹⁵

[76] Te Ātiawa gave evidence that their rangatira were present at the battle of Waiorua and established customary interests on and around Kapiti Island.¹¹⁶ After the battle, a settlement pattern was established for Ngāti Toa, Te Ātiawa, and Ngāti Raukawa in the lower North Island and Te Tau Ihu. That was the beginning of the take raupatu of the previous occupiers' mana, being Muaūpoko, Rangitāne, Ngāti Apa and Ngāi Tara. Tensions then grew between Ngāti Toa, Te Ātiawa, and Ngāti Raukawa, due to competition for space and resources.¹¹⁷ This hostility ended following the Heretaunga pakanga in 1846, after which Te Ātiawa say they entered a phase of ahi kā roa, which has continued to this day.¹¹⁸

[77] The evidence for Te Whānau Tima and Te Mateawa was that their tūpuna claimed the land at Kuku Beach around the early 1830s, and they are the only whānau that has remained living there since.¹¹⁹ The area around Kuku Beach, Ōhau, was given to those rangatira and their hapū by Te Rauparaha as tuku whenua.

[78] Turning to the Kurahaupō iwi, for Ngāti Tamarangi,¹²⁰ Mr Taueki gave evidence that they have held mana whenua and mana moana over Horowhenua since the arrival of Toikairakau in Aotearoa.¹²¹ They successfully defended their land from attacks from northern iwi seeking take raupatu in the 1820s and 1830s. When Te Rauparaha raided the Horowhenua region in 1823, the rangatira Taueki withstood the attack and remained at Horowhenua, maintaining the ahi kā.¹²² In 1830, Taueki entered into he whakaaetanga (a peace arrangement) with Te Whatanui. In 1840, Taueki signed Te Tiriti o Waitangi, affirming Ngāti Tamarangi's mana motuhake and continued tino rangatiratanga over their traditional lands and fisheries. Muaūpoko

¹¹⁵ At [302].

¹¹⁶ At [308]. Ngāti Kauwhata are close cousins by descent of Ngāti Raukawa and support their application.

¹¹⁷ At [309].

¹¹⁸ At [310].

¹¹⁹ At [311].

¹²⁰ A hapū of Muaūpoko.

¹²¹ At [313].

¹²² At [314].

have maintained ahi kā in Horowhenua since that time; no other iwi or hapū has ever taken possession of that land.¹²³

[79] Muaūpoko's evidence was that Ngāti Raukawa were a migratory iwi who established themselves in Horowhenua and the Manawatū only by invitation.¹²⁴ They never participated in any battle which gave them mana in the region, nor was it accepted that they had been there long enough or participated in any other action to acquire customary interests and rights in the land prior to 1840.¹²⁵ Ngāti Raukawa's claim that they had obtained mana whenua through take raupatu was overly narrow, and disregarded connections and whakapapa to the land and sea. Furthermore, the Hekenga iwi's purported take raupatu was not completed through ahi kā, as there was not continued occupation of the area or use of its resources, nor sufficient connection over generations to establish take tūpuna.¹²⁶ Muaūpoko strongly rejected the contention that they were conquered.¹²⁷ While the Hekenga iwi may have occupied Kapiti and the coastline, they did not control movements and use of the moana.¹²⁸ Any areas of occupation were only obtained through tuku whenua.¹²⁹

[80] The pūkenga suggest that a possible means of amicably resolving these longstanding disputes is through tikanga peace processes, houhou i te rongo, to reach a binding peace agreement, referred to as a rongomau.¹³⁰ These agreements were traditionally marked by the exchange of tatau pounamu — a precious object symbolising the event that brought about the state of peace.¹³¹ In addition, a local maungārongo (hill) would be selected to act as a constant reminder that the group is bound by the agreement, and special marriages arranged between the former foes to create a new link between the two groups.¹³²

¹²³ At [316].

¹²⁴ At [317].

¹²⁵ At [317] and [318].

¹²⁶ At [320].

¹²⁷ At [323].

¹²⁸ At [321].

¹²⁹ At [322].

¹³⁰ At [328].

¹³¹ At [329].

¹³² At [333]–[335].

[81] The pūkenga set out a number of examples of tatau pounamu peace agreements in the Kapiti Coast from around 1820–1840, during the period of the Musket Wars. For instance, Ngāti Raukawa gave evidence that Te Whatanui had offered his protection to Muaūpoko, who were being pursued by Te Rauparaha, and allowed them to live at Horowhenua under his mana and rangatiratanga.¹³³ This was described as a tatau pounamu arrangement according to tikanga. There was also deliberate intermarriage across the ART Confederation to create stability between the three iwi.¹³⁴

[82] Muaūpoko noted that the disputes between Muaūpoko and the Hekenga iwi during the Musket Wars period would historically have been resolved through violence, however the agreements, tuku, and intermarriages between those iwi meant this was not the case.¹³⁵ They questioned the lack of acknowledgement of peace agreements and tuku whenua between the Hekenga iwi and Kurahaupō iwi.¹³⁶

[83] The pūkenga conclude that the ancient tikanga concepts of take whenua, take tūpuna, take kitea, take raupatu, take ringa kaha, take tuku whenua, and take ahi kā, as well as peace arrangements such as tatau pounamu, rongomau, kawenata, and takawaenga moenga rangatira continued to apply in the Kapiti Coast hearing area between 1820 and 1840.¹³⁷ However, these were affected by the upheaval to tikanga and te ao Māori precipitated by the Musket Wars. The Native Land Court’s perception of conquest as a source of title also distorted popular understanding of custom in that respect.¹³⁸ In addition, the changes to tikanga during this time were heavily influenced by increased European contact, which brought with it new diseases, addictive substances, technology, foods, and cultural and economic ideas.¹³⁹

¹³³ At [343]. It is noted earlier in the report at [323] that Muaūpoko witnesses describe this as a myth created by Ngāti Raukawa.

¹³⁴ At [345].

¹³⁵ At [352].

¹³⁶ At [357].

¹³⁷ At [358].

¹³⁸ At [360].

¹³⁹ At [361]–[363].

Question 5: If those concepts apply, how do they apply after 1840?

[84] The pūkenga note that, in short, the concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, and tuku continued to apply after the signing of the Treaty of Waitangi, however they also changed and adapted, as did tikanga Māori more broadly.¹⁴⁰ They emphasise that when tikanga Māori words are incorporated into policy and legislation, their meanings are often mistranslated, redefined, or narrowed in order to fit Pākehā legal terminology and understandings.¹⁴¹ In particular, concepts of “raupatu” and “ringa kaha” may have been mistranslated, redefined, or narrowed after 1840.¹⁴²

[85] The Treaty of Waitangi guaranteed the protection of tikanga Māori as a legal system, through the promise of tino rangatiratanga over taonga under Article 2.¹⁴³ This was supported by Ngā Puhi rangatira Tamati Waka Nene’s warnings in the debates prior to the signing of te Tiriti that the Governor “must preserve [Māori] customs”,¹⁴⁴ as well as subsequent communications among colonial officials.¹⁴⁵ While early colonial legislation recognised the application of tikanga concepts, these were inevitably altered to fit within the newly imposed legal system.¹⁴⁶ Under the 1852 Constitution Act, which established a Westminster government for settlers, tikanga was recognised as the legal system for Māori within specific “Native” districts, where the majority of the population were Māori.¹⁴⁷ However, it appears that section of the Act was never implemented.¹⁴⁸ In more recent times, the 2004 Waitangi Tribunal Foreshore and Seabed report described the duty of the Crown to “actively protect” tikanga Māori.¹⁴⁹

[86] While fundamental underlying tikanga values and principles — such as wairuatanga, whakapapa, mana, and tapu — have not fundamentally changed, the ways that those tikanga values and principles are practiced — for instance

¹⁴⁰ At [366].

¹⁴¹ At [373]–[376].

¹⁴² At [377].

¹⁴³ At [388] and [391].

¹⁴⁴ At [388]–[390].

¹⁴⁵ At [392]–[393].

¹⁴⁶ At [394]–[396].

¹⁴⁷ At [398].

¹⁴⁸ At [399].

¹⁴⁹ At [400] and [401], citing Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004) at 28.

kaitiakitanga, take raupatu, and muru — have adapted and developed over time in response to changing circumstances.¹⁵⁰ The pūkenga emphasise that while this flexibility to adapt is a core feature of tikanga Māori, the critical point is that any cultural adaptation and changes in tikanga practices should be controlled and directed by Māori, rather than external factors.¹⁵¹

[87] The pūkenga note that the Native Land Court, which was set up to individualise Māori title to land, had a particularly significant and destructive impact on Māori communities and tikanga Māori as a legal system.¹⁵² In particular, the “1840 rule”, which provided that the starting point for investigation into Māori customary titles in the Native Land Court was the acquisition of British sovereignty in 1840, posed a particular challenge for the applicants.¹⁵³ This is because, in the Kapiti region, 1840 was a year characterised by the turbulence and disruption of the Musket Wars. Furthermore, the rule meant that the tikanga concepts of take raupatu and ringa kaha theoretically applied to claims prior to 1840, but not as legitimate take for claims after that point.¹⁵⁴ Thus, the Native Land Court did not recognise the authenticity and legitimacy of tikanga Māori, but rather distorted it in an attempt to assimilate it into the colonial legal system.¹⁵⁵

[88] When a block of land was sold, Crown officials assumed that Māori also alienated all rights and responsibilities to freshwater and marine and coastal areas as part of that sale.¹⁵⁶ This notion was challenged by a number of rangatira throughout the 19th century, for instance following the proposal of the Thames Sea Beach Bill in response to disputes over title to the foreshore and seabed during the gold rush, and in relation to the Crown purporting to take pipi banks.¹⁵⁷

[89] Under tikanga Māori, a water resource and a land resource were conceptually the same, and were both capable of being under the mana of a community.¹⁵⁸ Thus,

¹⁵⁰ At [411].

¹⁵¹ At [419].

¹⁵² At [428].

¹⁵³ At [434]–[440].

¹⁵⁴ At [441].

¹⁵⁵ At [443].

¹⁵⁶ At [449].

¹⁵⁷ At [450]–[453].

¹⁵⁸ At [454].

Māori rights were considered to extend to areas of the sea such as deep-sea fishing grounds.

[90] The 1870 Native Land Court *Kauwaeranga* decision was also significant in distorting and even denying tikanga, as Chief Judge Fenton rejected the rights of Māori under the common law doctrine of aboriginal title.¹⁵⁹ He refused to recognise the operation of tikanga due to what he saw as the wider public interests of the colony.¹⁶⁰ There were also complaints that Native Land Court judges had misconstrued the tikanga of ahi kā and tuku whenua, by wrongly awarding land to groups who had supposedly demonstrated ahi kā roa, but in fact had only been allocated temporary sites for usage by tangata whenua through tuku whenua.¹⁶¹

[91] The pūkenga also refer to the infamous 1877 decision of *Wi Parata v Bishop of Wellington*, in which Prendergast CJ denied that Māori had “any kind of civil government” or legal system of tikanga, and ruled that the Treaty of Waitangi was a “simple nullity”.¹⁶² There were several further failures to recognise the legal validity of tikanga Māori in subsequent decisions.¹⁶³ However, the Privy Council in *Nireaha Tamaki v Baker* overruled the Native Land Court’s denial of tikanga.¹⁶⁴ There was continued dispute over this in the years that followed, with some rejecting the Privy Council’s decision, others suggesting the codification of Māori custom as a solution, and still others attempting to apply tikanga but often doing so in an inappropriate manner.¹⁶⁵ However, the pūkenga note that ultimately it is the rangatira of respective whānau, hapū and iwi concerned who should be declaring, adapting and modifying tikanga, not the judiciary or the government.¹⁶⁶ Moreover, this foreign and hostile environment meant that changes to tikanga concepts and processes were inevitable.¹⁶⁷

¹⁵⁹ At [455]. See Alex Frame “Kauwaeranga Judgment” (1984) 14 VUWLR 227. This is a reprint of *Kauwaeranga* (1870) 4 Hauraki MB 236.

¹⁶⁰ At [456].

¹⁶¹ At [457].

¹⁶² At [458], citing *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

¹⁶³ At [462] and [463].

¹⁶⁴ At [464], citing *Nireaha Tamaki v Baker* (1900) NZPCC 371.

¹⁶⁵ At [465]–[467] and [469]–[475].

¹⁶⁶ At [468].

¹⁶⁷ At [476].

[92] The concepts of take raupatu and ringa kaha provide the basis upon which the mana whenua of the Hekenga iwi “stand or fall” against the Kurahaupō iwi.¹⁶⁸ While raupatu and ringa kaha were closely linked in that they both involved a form of conquest by military action, ringa kaha specifically referred to the ability to protect and maintain land holdings through defensive action.¹⁶⁹ Ahi kā was critical to holding customary title — a military victory through take raupatu was not enough if it was not followed by continuous occupation.¹⁷⁰

[93] While there were many different kinds of wars of conquest, there had to be some form of take, or legitimate cause, in order for a war to be considered tika.¹⁷¹ The Musket Wars had a significant impact upon the nature and extent of warfare, which in turn influenced the Native Land Court’s perception of conquest and distorted the tikanga concepts of raupatu and ringa kaha.¹⁷² Furthermore, practices of the Court, such as threatening to buy from another iwi with competing claims to the land if an iwi would not sell their land for a low price, also had an impact on tikanga.¹⁷³ This was increasingly so due to the highly adversarial nature of the Native Land Court hearings.¹⁷⁴ By way of example, the pūkenga refer to the 1873 Horowhenua Native Land Court decision, in which almost the entire Horowhenua block was awarded to Muaūpoko, representing a complete denial of Te Rauparaha’s conquest of the area and of Te Whatanui’s mana.¹⁷⁵ This only increased tensions and conflict between iwi in the area, by pitting them against one another.

Question 6: At 1840, what applicant group or groups used and occupied the application area, or any part of it, on a sole or shared basis, in accordance with tikanga?

[94] The pūkenga acknowledge the complex and layered interests of the applicant groups over the rohe moana.¹⁷⁶ They note that under tikanga Māori, there were not clear boundaries between territories and, as discussed above, rights and responsibilities in relation to the whenua and rohe moana were derived from a number

¹⁶⁸ At [480] and [481].

¹⁶⁹ At [490]–[493].

¹⁷⁰ At [494]–[496].

¹⁷¹ At [518].

¹⁷² At [524].

¹⁷³ At [525] and [526].

¹⁷⁴ At [532] and [536].

¹⁷⁵ At [537]–[540].

¹⁷⁶ At [547].

of different sources and were often overlapping.¹⁷⁷ Furthermore, Māori have always understood their mana and territorial boundaries to extend over the sea as well as the land, the development of Te Rauparaha’s maritime empire in the Cook Strait being an example of Māori control over the rohe moana.¹⁷⁸ Therefore, there are major difficulties which arise in trying to translate these arrangements into a system of “straight line” boundaries and rights and resources that are permanent, individual, and separate.¹⁷⁹

[95] The pūkenga observe that the evidence indicates that most, if not all, of the tribal rohe areas have overlapping and intersecting claims with other groups based on tikanga.¹⁸⁰ They refer to Sir Hirini’s discussion of contested land lying between the territories of iwi and hapū groups, or “whenua tautohetohe”, and suggest that this was the norm between tribal groups on the alleged boundaries of their rohe.¹⁸¹ These areas are referred to by other scholars as “debatable lands”, or “kāinga tautohe”, which are areas that could not have been occupied by either group without leading to conflict.¹⁸²

[96] The pūkenga suggest that whenua tautohehe, although contested, could also be characterised as shared interests in the whenua and rohe moana.¹⁸³ They note that the Takutai Moana Act provides for shared exclusivity through the definition of “applicant group”, which refers to “1 or more iwi, hapū, or whānau groups” seeking recognition of their customary interests.¹⁸⁴ However, shared exclusivity would require groups to acknowledge the rights and interests of others in those shared areas.¹⁸⁵ That said, many of the applicant witnesses did acknowledge their shared whenua and whakapapa interests with their neighbours.¹⁸⁶ The pūkenga emphasised that the complex and amorphous nature of the boundary lines between applicant groups means that there is

¹⁷⁷ At [549]–[551].

¹⁷⁸ At [599]–[609].

¹⁷⁹ At [554].

¹⁸⁰ At [586].

¹⁸¹ At [589]–[591], citing Hirini Mead *Landmarks, Bridges and Visions: Aspects of Maori Culture: Essays* (Victoria University Press, Wellington, 1997) at 238.

¹⁸² At [592]–[595].

¹⁸³ At [596].

¹⁸⁴ At [614], citing Takutai Moana Act, s 9.

¹⁸⁵ I return to address the legal position around shared exclusivity later in this judgment.

¹⁸⁶ At [615].

an impetus for shared exclusivity, despite the disagreements between them.¹⁸⁷ They offered the following conclusions:

618) What all of the discussion above and evidence shows is that at 1840, it is very difficult to ascertain with precision which applicant group or groups used and occupied the application area, or any part of it, in accordance with tikanga. Each of the applicant groups asserted their rohe whenua and rohe moana interests within certain boundaries which overlapped and intersected into other group's alleged rohe areas of interest or spheres of influence.

619) To summarise our answer to Question 6) then, it appears on the evidence presented in the High Court by the claimants and expert witnesses that Ngāti Raukawa ki te Tonga, Te Ātiawa ki Whakarongotai, Muaūpoko, Ngāti Tamarangi, Ngāti Apa, Rangitāne, Ngāti Kauwhata, Ngāti Toa Rangatira, Te Patutokotoko, Te Whānau a Tima and the David Morgan Whānau applicant groups, among others, used and occupied the Kāpiti Coast application area, or parts of it, within their respective — but often amorphous and overlapping — rohe boundaries in accordance with tikanga Māori.

Question 7: At 1840, how did groups control access to areas as a matter of tikanga?

[97] The answer to question 7 draws considerably on the material from other questions, particularly question 6. The pūkenga refer to the tikanga values and principles set out under question 1 as relevant to controlling access to the takutai moana.¹⁸⁸ They also point to ringa kaha as a method of restricting access to a group's territory by using force to exclude intruders.¹⁸⁹ Kaitiakitanga responsibilities for protection of resources were also important in demonstrating a group's control, through rāhui, tapu and aukati.¹⁹⁰

[98] Aukati is a tikanga institution used to control access to particular areas, and involves damming up or otherwise restricting the passage of people by imposing a boundary line across which unauthorised movement is prohibited.¹⁹¹ While the pūkenga could not identify any instances of local aukati in the Kapiti Coast region — except perhaps Te Whatanui's sanctuary in Horowhenua — they refer to examples in

¹⁸⁷ At [616] and [617].

¹⁸⁸ At [621].

¹⁸⁹ At [622].

¹⁹⁰ At [622]–[624].

¹⁹¹ At [625].

Waikato during the Waikato Wars to illustrate the effect of this tikanga concept as a means of controlling access to an area.¹⁹²

[99] Two further means of exercising control are the establishment wāhi tapu and rāhui.¹⁹³ These practices engage many of the tikanga principles defined above, including wairuatanga, rangatiratanga, mana tangata, tapu, noa, mauri, manaakitanga, and kaitiakitanga. One of the rights conferred by CMT is the right to protect wāhi tapu, which is defined in s 9 of the Takutai Moana Act as “a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense”.¹⁹⁴ This can include a body of water.¹⁹⁵ A rāhui, on the other hand, is established specifically over a body of water, often after there has been a death or as a means to conserve food supplies.¹⁹⁶ The area will become a prohibited zone for a temporary and specified time period. An early example of wāhi tapu and rāhui in the Kāpiti Coast region in 1840 was recorded by Edward J Wakefield, when Ngāti Raukawa prevented anyone from passing through the area after a trading boat was wrecked near the Rangitīkei River and the crew had drowned.¹⁹⁷

Question 8: Since 1840, what applicant group or groups have used and occupied the application area, or any part of it, on a sole or shared basis, in accordance with tikanga?

[100] The pūkenga take the view that since 1840, all of the applicant groups have used and occupied the application area, or a part of it, on a sole or shared basis in accordance with tikanga. They acknowledge the challenge posed by the highly contested historical narratives of each of the applicants and highlight the need to apply tikanga principles in assessing use and occupation interests.¹⁹⁸ They conclude that all of the groups have used and occupied the area to “differing degrees on a sole and more likely shared basis since 1840” but that:

¹⁹² At [625]. For a more detailed explanation of the example in the Waikato region, see [626] and following.

¹⁹³ At [635].

¹⁹⁴ At [636].

¹⁹⁵ At [637].

¹⁹⁶ At [638].

¹⁹⁷ At [639] and [640], citing Edward Wakefield *Adventure in New Zealand* (John Murray, London, 1845) at 24 and 25.

¹⁹⁸ At [652].

654) Given the complex overlapping and intersecting layers of proprietary interests and kaitiaki and manaakitanga responsibilities among the respective claimant groups, it is difficult to decide with any precision the boundaries and interests of the tribal group whakapapa, let alone the tribal group whenua and rohe moana interests on a sole or shared basis in the application areas.

Question 9: Having regard to the evidence, what tikanga applies today to the relationships between the iwi in this area?

[101] The pūkenga note that the tikanga values which apply to the relationships between iwi, hapū, and whānau groups in the Kapiti Coast area today are the fundamental tikanga values which they set out under question 1.¹⁹⁹ They reiterate that although it is difficult to ascertain precise territorial boundaries between the applicant groups, it is clear that all used and occupied the application area, or parts within it, in accordance with tikanga Māori.²⁰⁰

[102] They point out that the tikanga Māori legal system depends upon the maintenance of strong relationships, which have been somewhat strained since the Musket Wars and the impact of the Native Land Court hearings.²⁰¹ To this end, the pūkenga recommend engaging several other tikanga concepts to assist in the reconciliation of broken relationships within the Kapiti Coast area, including utu, muru and ea, mana rangatira, tatau pounamu, takawaenga whānau, and mana huihui.²⁰²

[103] The pūkenga describe the object of utu as being “to restore mana where it has been diminished and to maintain balance and harmony in relationships between individuals and groups”.²⁰³ This restoration can take place through war, or more peaceful means such as compensation or reparation.

[104] Muru (to plunder) was a further device under tikanga for avoiding war, and was often practised as a form of utu.²⁰⁴ It involves the community stripping a whānau of their goods in response to some aituā (misfortune), for instance the careless loss of

¹⁹⁹ At [657].

²⁰⁰ At [658]–[661].

²⁰¹ At [664].

²⁰² At [665].

²⁰³ At [666].

²⁰⁴ At [671].

life or property, or a breach of social laws. This was often undertaken with full and voluntary acquiescence of the whānau, thus making it akin to a form of damages.²⁰⁵

[105] Ea broadly means to indicate the successful completion of a process of resolution or the settlement of a dispute, and underpins many other tikanga concepts.²⁰⁶ It denotes that the cycle of utu has been completed and the status quo has been restored.²⁰⁷ In the context of prolonged and serious disputes such as those in the Kapiti Coast, the process for achieving ea was through hohou te rongo or rongomau.²⁰⁸ However, where disagreements between applicants persist, conflicts have continued to arise, which the pūkenga say can only be reconciled in a tikanga Māori context if there is the political will among the applicant groups to do so.²⁰⁹

[106] Effective rangatira leadership, or mana rangatira, is essential to reconciling the differences between the applicant groups.²¹⁰ While whakapapa is a central aspect of leadership, there are many other qualities recognised in a good rangatira, such as the ability to weave people together, skills in mediation and dispute resolution, hospitality, kindness, and liberality.²¹¹ In particular, the pūkenga note that the Kapiti Coast applicant groups require mana rangatira who can weave or blend the mana of the various whānau, hapū, and iwi going forward.²¹² They note that the evidence of the witnesses in this hearing has highlighted that they may readily prove their claims if they can only agree amongst themselves.²¹³ Thus, the challenge before the applicants is to reach a 21st century tatau pounamu kawenata based on tikanga Māori.

[107] The pūkenga also note that mana need not be considered exclusive, referring to the concept of mana huihui, which describes shared mana between hapū and iwi over land and resources, particularly where the boundaries of their territories are

²⁰⁵ At [671] and [672].

²⁰⁶ At [677].

²⁰⁷ At [679].

²⁰⁸ At [681].

²⁰⁹ At [682].

²¹⁰ At [683].

²¹¹ At [686]–[693].

²¹² At [694] and [695].

²¹³ At [696] and [697].

connected.²¹⁴ There have been examples of mana huihui in the Kapiti Coast region between the Hekenga iwi allies who supported Te Rauparaha during the Musket Wars, and are now known as the ART Confederation.²¹⁵ However, the challenge laid was for those iwi to reach out and include the Kurahaupō iwi in the Confederation.²¹⁶ The pūkenga observed that:

Neither group is leaving the rohe, neither group are backing down in progressing and processing their inherent rangatiratanga and kaitiakitanga responsibilities in the whenua and rohe moana; neither group solely carries out kaitiakitanga responsibilities over the whenua and rohe moana for such matters as rāhui and dealing with stranded whales, issuing customary fishing permits, and dealing with Local Government.

[108] In addition, there are intermarriages between the different iwi, and many members of the applicant groups have whakapapa connections across iwi both within and outside of the ART Confederation.²¹⁷ There are also examples of the applicant groups working together to uphold tikanga Māori, for instance where a rāhui needs to be placed across different parts of the coast.²¹⁸

[109] Mana huihui should not be about assimilating one group within another, but about mutually beneficial alliances in day-to-day life, expressed through whanaungatanga.²¹⁹ The crucial element is the consent and acquiescence of all parties in the kawenata arrangement — that is, all parties agree to share mana (as opposed to merely sharing resources or rights).²²⁰ The pūkenga conclude by referring to the evidence of Ngāti Raukawa rangatira, Te Kahu o Te Ranga Rōpata:

We all have shared history on traditional customs now lost in time immemorial — mana inherited, mana bestowed, mana lost and mana regained ... Unfortunately, the divisive nature of this [MACA High Court] process and a propensity for iwi to be reactionary to Crown policies and legislation that continually seek to undermine our tikanga and the shared nature of iwi relationships, is always challenging. Unless we make sure we are proactive within the parameters of these Crown policies and legislations to enhance the relationships of iwi to iwi then we are doing our whānau, hapū and iwi a disservice.

²¹⁴ At [700].

²¹⁵ At [702] and [703].

²¹⁶ At [708].

²¹⁷ At [709].

²¹⁸ At [710] and [711].

²¹⁹ At [713].

²²⁰ At [716].

...

No matter what the result, we are stronger working things out in accordance with our own tikanga.

Question 10: Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

[110] In answering question 10, the pūkenga refer to the tikanga indicia and other relevant tikanga concepts set out above in the answers to questions 1, 2 and 3.²²¹

Concluding remarks

[111] A dominant theme in this hearing was the intractable differences between some of the applicant groups. As the pūkenga note:²²²

With such heated take raupatu, take ringa kaha, take tuku whenua and take ahi kā roa disputes that have been burning for over 200 years, one suggestion for amicably resolving such heated disputes is the traditional tikanga institution of houhou te rongo and tatau pounamu peace agreements.

[112] The pūkenga emphasise that the tikanga indicia and questions provided in questions 1 and 2 are not exhaustive, but rather provide appropriate starting points to assessing whether the area in question is held in accordance with tikanga Māori.²²³ They note that while tikanga Māori practices inevitably adapt over time, they must remain premised on underlying fundamental tikanga values.²²⁴ In the concluding remarks of their report they say:

We believe Māori are still prepared to enter into respectful tikanga relationships with landowners, fishers and others where they are prepared to extend manaakitanga and whanaungatanga to share the responsibility of the sustainable well-being of the takutai moana for all New Zealanders.

Whatever the outcomes of the current MACA hearing, maintaining the mana of the Kāpiti Coast claimants and the integrity of tikanga Māori are imperative. As outlined throughout this report, tikanga Māori is about “doing things right, doing things the right way, and doing things for the right reasons” within a mātauranga and tikanga Māori worldview underpinned by wairuatanga and whānaungatanga relationships.

²²¹ At [721] and [722].

²²² At [327].

²²³ At [726].

²²⁴ At [727].

[113] The claimant groups have shown that the tikanga customary laws and institutions are “flourishing, vibrant and there are still relevant”.²²⁵ The pūkenga consider that the applicants “may have delivered on the statutory tests” for CMT and PCRs, although of course they did not, nor were they required to, go further and particularise where those statutory tests had been met in the hearing area.

Issues arising from the pūkenga report and evidence

[114] Some of the claimant groups cautioned against relying on the pūkenga’s observations that “all the claimant groups have used and occupied the application areas to different degrees on a sole or more likely shared basis since 1840”.²²⁶ That can only be in general terms as, for instance, the David Morgan Whānau and Te Patutokotoko, adduced no evidence apart from their initial affidavits, and were not cross-examined. In addition, the pūkenga report said that the claimants used and occupied the takutai moana to “differing degrees”. However, as the pūkenga acknowledged in cross-examination, the report did not make any finding on the tikanga of a particular iwi and its interplay with others in relation to specific areas.

[115] I also bear in mind the submissions of Ngāti Raukawa that the pūkenga were not required to make a determination on contested tikanga on the ground. That was not the task of the pūkenga. Ms Coates also submits that care must be taken not to romanticise tikanga. The events of the past and the tikanga governing the actions of the various parties were at times brutal and unforgiving when looked at through a modern lens, but that is the tikanga which must be considered as at 1840.

[116] The pūkenga accept that the narratives of the various iwi differ, as do the historical accounts, and acknowledge that their interpretation is dependent on the various narratives. For instance, the Te Ātiawa narrative does not heavily feature the “feast of pumpkins”, whereas this was a significant event for other iwi such as Muaūpoko.²²⁷

²²⁵ At [731].

²²⁶ At [655].

²²⁷ Walzl, the historian called by Te Ātiawa, referred to the incident happening in Ōhāriu, well south of the hearing rohe. Dr Baker, a witness for Te Ātiawa, said she did not know “a great deal about the event”.

[117] The conclusion in the pūkenga report at [655] does not suggest that all applicants meet the CMT test across the whole coastline. The pūkenga report properly did not attempt to make determinative findings in that regard. It is the Court’s task to make findings of sole and shared exclusivity relevant to CMT, in regard to specific locations in the hearing area.²²⁸

[118] The pūkenga provide the tools and pointers to enable the Court to undertake the next stage of the inquiry. That is, the assessment of the applicants’ claims to determine which of them, if any, hold their claimed areas, or parts thereof in accordance with tikanga and whether they have exclusively used and occupied the relevant rohe from 1840 to the present day, in terms of the statutory requirements. I now return to the Supreme Court’s reformulation of that test.

Interpretation: Supreme Court test for CMT in *Re Edwards*

[119] The Supreme Court judgment in *Re Edwards* had not been delivered at the time of the hearing, however insofar as it relates to tikanga and its application to the test for CMT it is consistent with the evidence of the pūkenga. I now return in more detail to the Supreme Court’s formulation of the elements of the test under s 58.²²⁹

Holds in accordance with tikanga

[120] The Supreme Court emphasised that the operative verb under s 58(1)(a) is “holds”, and suggested that this has two important implications.²³⁰ First, CMT is *held* in accordance with tikanga, whereas PCRs are *exercised* in accordance with tikanga, which reflects the more significant nature and extent of CMT.²³¹ In particular, CMT “must amount to an integrated or holistic relationship with a seascape”, rather than a mere “collection of unconnected activities or uses”.²³² In other words, mana must be claimed and exercised over the relevant area.²³³ The Supreme Court agreed with the Court of Appeal’s observation that the exercise of mana as control and the

²²⁸ *Re Edwards* (CA), above n 16, at [404]; and *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [180].

²²⁹ *Re Edwards* (SC), above n 13, at [133].

²³⁰ At [140].

²³¹ At [140].

²³² At [140].

²³³ At [141].

practical expression of the claimed source of the right will be a focus of the inquiry under s 58(1)(a).²³⁴

[121] Second, the fact that “holds” is expressed in the present tense indicates that the tikanga relationship with the area must be a continuing one; it is not sufficient to demonstrate that the area was held under tikanga in the past.²³⁵ This is consistent with the tikanga principle of ahi kā — literally the keeping of the fires burning on the land, or continuous occupation.²³⁶ The court will be required to consider whether the connection with the claimed area has been lost or merely impaired.²³⁷

Exclusive use and occupation

[122] Drawing on parliamentary material and overseas authorities, the Supreme Court considered that common law concepts of exclusive use and occupation are “plainly relevant” to the assessment under s 58(1)(b)(i).²³⁸ It referred to the test articulated by the Canadian Supreme Court in *Tsilhqot’in Nation v British Columbia*, suggesting that what is required is a “strong presence on or over the land claimed, manifesting itself in acts of occupation” and an “intention and capacity to control the land”.²³⁹ How that is expressed in practice will depend on the specific context of the applicant group, the claimed area, and the relevant tikanga regulating the relationship with and use of that area.²⁴⁰

[123] The Supreme Court acknowledged that there would be substantial overlap between demonstrating that a place is held in accordance with tikanga in terms of s 58(1)(a), and showing its exclusive use and occupation in terms of s 58(1)(b)(i).²⁴¹ However, the exclusive use and occupation element involves a weaving together of tikanga with an additional common law lens, reflecting the reconciliation purpose of the Act.²⁴²

²³⁴ At [141].

²³⁵ At [142].

²³⁶ At [142].

²³⁷ At [142].

²³⁸ At [154].

²³⁹ At [154], citing *Tsilhqot’in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38] and [48].

²⁴⁰ At [154].

²⁴¹ At [157].

²⁴² At [157].

[124] Furthermore, the Supreme Court noted that the meaning of “exclusive” is coloured by the context of the seascape, which cannot be divided up or occupied in the same way as dry land, as well as the fact that the Takutai Moana Act expressly confirms that customary rights and public rights of access, navigation and fishing may coexist.²⁴³ Exclusivity must also take into account the fact that, under tikanga, mana “is derived not from the acquisition of wealth and resources, but from the ability to demonstrate generosity with them”, in accordance with values of whanaungatanga and manaakitanga.²⁴⁴ Therefore, “exclusive cannot mean literally to the exclusion of all others”.²⁴⁵ Any assessment must take into account the effects of colonisation on an applicant group’s ability to use and occupy the area, which is reflected in the fact that exclusivity is presumed unless it is proved otherwise under s 106.²⁴⁶

[125] Nor can occupation mean actual physical occupation of the seascape is required. Rather, the use and occupation test requires applicants to demonstrate that they have made extensive use of the space, coupled with an intention and some capacity to assert control over the area.²⁴⁷ An applicant group’s use and occupation of the claimed area must be integrated or holistic, in order for those acts or circumstances to be seen as practical expressions of mana or control.²⁴⁸

[126] The Supreme Court provided a non-exhaustive list of indicators of exclusive use and occupation, referring to the Attorney-General’s suggested indicia as well as other examples that might be seen as relevant to the wider assessment. These are broadly consistent with the tikanga indicia referred to in the pūkenga report. The Court said:

[162] In written submissions, counsel for the Attorney-General helpfully set out relevant factors that may support a conclusion that the applicant group has demonstrated sufficient use and control of an area as against third parties. These were drawn in the main from existing MACA decisions. They were:

- (a) ownership of abutting land and in particular control over access points to the takutai moana;

²⁴³ At [158] and [159].

²⁴⁴ At [173] and [174].

²⁴⁵ At [161].

²⁴⁶ At [160].

²⁴⁷ At [161].

²⁴⁸ At [163].

- (b) the exercise of non-commercial customary fishing rights;
- (c) the presence of fishing grounds that “belong to” a group and which may be used exclusively and kept confidential by that group;
- (d) the existence of coastal marae and tauranga waka within the area;
- (e) the observance of tikanga associated with wāhi tapu as a way of restricting access;
- (f) the imposition of rāhui, and their observance by third parties;
- (g) evidence of members of the applicant group educating and correcting the way third parties carry out activities within the area; and
- (h) the applicant group’s involvement in resource management and other regulatory processes concerning the takutai moana.

[163] ... Alongside the examples provided by the Attorney-General, the following may also be seen as relevant to that wider assessment:

- (a) engaging in tikanga-based ceremonies in relation to the area including, but not only, the imposition of rāhui;
- (b) organising or being involved in fora, events or collective activities that reflect practical kaitiakitanga of the claim area—for example, environmental clean ups or public discussions in relation to the health of an aspect of the seascape;
- (c) educating members of the iwi or hapū about tikanga and the claim area—for example, by holding wānanga on the subject and facilitating practical exercises of kaitiakitanga in the area;
- (d) maintaining deep cultural and spiritual connection with the area—for example, through regular performance of karakia, and regular repetition of place-based kōrero, waiata and so forth at hui or other public occasions;
- (e) appointing kaitiaki and exercising powers under customary fishing regulations in relation to the area; and
- (f) establishing formal relations and maintaining ongoing consultations with public authorities having regulatory power over the area.

Continuity from 1840 to the present day without substantial interruption

[127] The Supreme Court described this element as “the key reconciliation mechanism” in relation to CMT, and also the most difficult to apply.²⁴⁹ In explaining the requirement of continuity, it noted that the distribution of the burden of proof under s 106 must be borne in mind, as the onus is on the contradictors to prove that use and occupation was not exclusive or that there was substantial interruption, if the applicant group has proven the first elements of the test.²⁵⁰

[128] The phrase “from 1840 to the present day” expressly introduces the requirement of continuity, however this overlaps significantly with several other elements of the test, as discussed above.²⁵¹ For instance, evidence which goes to demonstrating whether ahi kā has been maintained, and therefore whether the area is held in accordance with tikanga, will also be relevant to assessing the continuity of exclusive use and occupation. Furthermore, evidence that goes to proving substantial interruption is likely to overlap with evidence demonstrating whether use and occupation was exclusive, and evidence that suggests substantial interruption will also suggest that there has not been continuous use and occupation from 1840 to the present day.²⁵²

[129] In terms of what constitutes sufficient continuity, the Supreme Court warned against approaching the question from extremes — either by suggesting that any non-trivial impairment of the right will be fatal to its continued recognition, or, on the other end of the spectrum, by adopting a reading of the requirement that assumes colonisation did not happen at all.²⁵³ Both approaches are unrealistic and fail to give effect to the Takutai Moana Act’s reconciliatory purpose.

[130] Regarding what will amount to “substantial interruption”, the Court noted that the term was left deliberately undefined in the Act, to allow for a flexible and fact-specific inquiry.²⁵⁴ That said, the physical extent and duration of any interruption

²⁴⁹ At [188].

²⁵⁰ At [189].

²⁵¹ At [190].

²⁵² At [191].

²⁵³ At [192].

²⁵⁴ At [193].

will be relevant.²⁵⁵ Moreover, the interruption must be “substantial”, meaning a “mere interference” will not be sufficient.²⁵⁶

[131] The Supreme Court disagreed with the Court of Appeal’s finding that substantial interruptions could only be those *expressly* authorised by statute, saying that this was too narrow.²⁵⁷ Rather, it considered that the:

...substantial interruption inquiry is primarily a factual one, subject only to the requirement that unlawful interferences must be disregarded. In other words, lawful activities and structures that interfere with the exercise of customary rights will be relevant whether they are expressly authorised by statute, or simply not unlawful.

[132] It described circumstances in which substantial interruption would be made out as follows:²⁵⁸

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

Extinguishment

[133] In relation to the final element of the test for CMT, the Supreme Court noted that “it is well established that customary title and rights can only be extinguished by clear and plain statutory authority to that effect”.²⁵⁹ This is not to be presumed lightly, as it is important that customary rights are not extinguished by a “side wind”.²⁶⁰

Shared or joint exclusive CMT

[134] In the High Court decision in *Re Edwards*, Churchman J concluded that the structure of the Takutai Moana Act allowed for CMT to be jointly held.²⁶¹ Furthermore, tikanga in the past had provided for “a complex web of overlapping

²⁵⁵ At [194].

²⁵⁶ At [194].

²⁵⁷ At [199].

²⁵⁸ At [198].

²⁵⁹ At [206].

²⁶⁰ At [206], citing *Attorney-General v Ngāti Apa*, above n 60, at [154].

²⁶¹ *Re Edwards* (HC), above n 45, at [169].

rights”, therefore it should be able to provide a framework to assist the parties before him to determine how to justly exercise the rights conferred by such CMT.²⁶² He referred to Canadian jurisprudence which made clear that shared exclusivity could not exist if the complainant parties “completely deny” each other’s claims.²⁶³ For that reason, he rejected the possibility of joint CMT where two groups asserted primary rights and there was no acknowledgement of a joint holding of mana moana (although one group might acknowledge that the other had resource gathering rights).²⁶⁴ That said, it was not a requirement for joint CMT that the parties had been “amicable” throughout their entire history.²⁶⁵

[135] The present position is that the majority of the Court of Appeal has indicated that orders can be made for shared CMT, recognising the exclusivity of two or more groups against any other third parties, including other Māori groups.²⁶⁶ The majority considered that shared exclusivity would be available even where two applicant groups did not acknowledge the rights of the other.²⁶⁷ They did not see any contradiction in finding that two different groups could hold a specified area in accordance with tikanga, and between them exclusively use and occupy the area, whilst “vigorously contesting” their respective rights between themselves.²⁶⁸ They gave the example of two hapū with close whakapapa links, each of whom claimed primary connection to the area and opposed a grant of recognition of CMT to the other, but would likely come together to defend the rohe against a third party.²⁶⁹ A refusal to grant CMT in those circumstances (where it was clear no other group had customary interests in the area) would effectively mean that areas which were unquestionably in Māori customary ownership in 1840 would be taken out of Māori ownership. Customary rights and interests would be lost, “because a currently unresolved tikanga difference between two or more hapū cannot be resolved in the High Court in the context of competing applications for CMT”.²⁷⁰

²⁶² At [170].

²⁶³ At [166].

²⁶⁴ At [476].

²⁶⁵ At [166].

²⁶⁶ *Re Edwards* (CA), above n 16, at [439].

²⁶⁷ At [440].

²⁶⁸ At [440].

²⁶⁹ At [441].

²⁷⁰ At [442].

[136] The Supreme Court has indicated that it will address the issue of whether shared exclusivity is possible when the applicants assert CMT to the exclusion of all others, as well as whether a finding of shared exclusivity should result in joint CMT or separate overlapping titles, in a later judgment.²⁷¹ Nevertheless, it gave some indications about the nature of shared CMT. In particular, it emphasised that shared exclusivity is the rule “rather than the exception”, given the “complex interweaving of rights between iwi, hapū and whānau with respect to the common marine and coastal area”.²⁷² It also noted that the Ministry of Justice’s consultation paper on the proposed test for CMT allowed for shared exclusivity between coastal hapū/iwi as against third-party interruptions.²⁷³

[137] It is also relevant that one group can rely on another’s activities in support of its application for CMT where the relationship between them provides a context which supports their intention for that to occur. In *Ngāi Tūmapūhia-a-Rangi*, the nature of the whakapapa and whanaungatanga connections was such that the Court recognised that evidence of witnesses for each iwi or hapū would often be evidence of the rights and interests of more than one of those groups.²⁷⁴ This will occur where iwi is relying on their hapū for the physical manifestation suggesting control or presence. But it may also be present in other cases, for instance where other strong ties, such as through whakapapa and whanaungatanga, are at play. However, in some cases, this may indicate that in fact the reliant group is part of other group and cannot claim on its own.

[138] A CMT sharing agreement was recognised in *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, the closely interconnected whakapapa of all the applicants allowing a “mana moana agreement” to be put in place between them.²⁷⁵ The pūkenga there considered that the agreement was consistent with tikanga and had achieved a state of balance (ea).²⁷⁶ The Judge observed that the agreement also represented a contemporary

²⁷¹ *Re Edwards* (SC), above n 13, at [172].

²⁷² At [170].

²⁷³ At [171].

²⁷⁴ At [136].

²⁷⁵ *Re Ngāi Tūmapūhia-a-Rangi*, above n 228, at [124] and [125].

²⁷⁶ At [126].

exercise of rangatiratanga on the part of the contesting iwi and hapū applicant groups and was in itself a customary agreement in accordance with tikanga.²⁷⁷

[139] I return to the issue of joint (or shared) exclusive CMT in relation to specific issues that arise in relation to the various overlapping claims.

Yet to be determined by the Supreme Court

[140] The second Supreme Court judgment in *Re Edwards* will deal with the fact specific issues arising under s 58 in the cases on appeal, as well as the lesser form of right provided for by PCRs under s 51, the application of s 58 to navigable rivers, and mandate and procedural issues.²⁷⁸

Parties' submissions on the Supreme Court decision

[141] As the Supreme Court decision was delivered after the completion of this hearing, the parties were granted leave to file submissions on the impact of the judgment on their applications.²⁷⁹ The following issues arise from the submissions.

[142] The parties generally accept that while there were some changes to the framing of the test, the Supreme Court's primary departure from the Court of Appeal majority concerns substantial interruption, in that this is no longer limited to interruptions caused by statutorily authorised activities. The submissions of the parties in relation to substantial interruption are addressed in the third-party use and occupation section of this judgment.

[143] Generally, the parties did not see any need to depart from their closing submissions in relation to the application of the CMT test in the Kapiti Coast hearing area. The exception is the submissions made by Mr Bennion for MTA. In addition to substantial interruption, he identifies two other areas in which the Supreme Court "departs markedly" from the Court of Appeal majority, and suggests that Muaūpoko's case is consequentially strengthened. The first area is the Supreme Court's general

²⁷⁷ At [128].

²⁷⁸ *Re Edwards* (SC), above n 13, at [5].

²⁷⁹ Not all parties filed submissions, however of those that did most indicated that the decision did not materially affect their cases.

focus on reconciliation as an interpretive lens, which Mr Bennion said promotes recognition of customary rights “unless there is a good reason not to”. The second is the Court’s emphasis on the lack of physical boundaries in the seascape, which must be borne in mind when determining whether an area is “held” in accordance with tikanga. However, I note that the Supreme Court still endorses the requirement for an applicant group to demonstrate a “strong presence” in the relevant area.²⁸⁰

[144] Mr Bennion also refers to the Supreme Court’s comments that the Takutai Moana Act provides the only avenue for customary rights to be recognised, and therefore the refusal of an application is effectively an extinguishment of those rights. However, as the Attorney-General notes, the Supreme Court’s observations that s 98 of the Act “covers the entire field” of “aboriginal rights claims” in the High Court, were made in a jurisdictional sense.²⁸¹ The tikanga of an applicant group is not affected by the formal recognition or otherwise of CMT rights by the court.

[145] Mr Bennion also emphasises the Supreme Court’s comment that take tūpuna is the most important right, and its criticisms of the Native Land Court as over-valuing rights derived by conquest. He contends that if this Court were to accept the arguments of Ngāti Raukawa as to the extent of their claim, the court would go well beyond even what the Native Land Court was prepared to find. However, as Ngāti Raukawa and Te Ātiawa highlighted, the Supreme Court still acknowledge the legitimate role of take raupatu as a source of customary rights.²⁸² The interplay between the various take operating at 1840 is something that requires careful assessment in relation to the claims in this judgment.

[146] Issues raised by the Attorney-General and the applicant groups in relation to the impact of the Supreme Court’s decision on the seaward extent of their applications are addressed in a later section of this judgment.

²⁸⁰ *Re Edwards* (SC), above n 13, at [154].

²⁸¹ At [114] and [215].

²⁸² At [38] and [202].

APPROACH IN THIS JUDGMENT

Foundational take and the Supreme Court's CMT test

[147] The Supreme Court cautioned that while it had reformulated the CMT test into four elements, they were not to be applied in isolation.²⁸³ The four component elements interact and overlap both conceptually and evidentially. In keeping with the approach of the Supreme Court, in relation to each claim, I discuss aspects relevant to multiple headings under only one of the component headings for convenience.²⁸⁴

[148] The first three elements of the test for CMT, for different reasons, require the demonstration of the exercise of a degree of control by the applicant group. The Supreme Court explained in some detail how the indicia demonstrating holding in accordance with tikanga and exclusive use and occupation might manifest in modern times. That is particularly so given the inability of Māori groups to manifest that control today in ways that were acceptable at customary law pre-1840. Those hitherto historical manifestations included, for instance, warfare and the use of force to establish take raupatu and ringa kaha.²⁸⁵ As the pūkenga emphasised, the operation of tikanga in practice was disrupted by the imposition of a colonial government.²⁸⁶ While not a focus of the Supreme Court's discussion in *Re Edwards*, the Court noted, in line with earlier jurisprudence, that in order to establish the elements of the CMT test a foundational right at customary law must be established, based on a legitimate take.²⁸⁷

[149] All claims in this hearing are based on the criteria under s 58(1)(b)(i).²⁸⁸ The foundational take is essential to demonstrating that both the criteria of holding in accordance with tikanga and exclusive use and occupation from 1840 to the present day are met. A group cannot presently hold an area in accordance with tikanga unless

²⁸³ At [6].

²⁸⁴ At [134].

²⁸⁵ *Re Edwards* (CA), above n 16, at [426].

²⁸⁶ *Re Edwards* (SC), above n 13, at [4]. The Supreme Court pointed out that writing modern laws reconciling the tensions between the reconciliation of rights and expectations under the prior Māori customary legal order and those under the (relatively) new state legal order had proven "difficult and controversial".

²⁸⁷ At [38], [141], [142], [190] and [220].

²⁸⁸ Section 58(1)(b)(ii) provides an alternative route to demonstrating CMT if a group holds the specified area in accordance with tikanga and has received it, at any time after 1840, through a customary transfer in accordance with s 58(3). In such circumstances, it would be for the group who made the transfer to establish that they had the foundational take which established their customary rights to the area as at 1840.

they have a legitimate basis for doing so under tikanga. Similarly, in order for a group to establish that they had exclusive use and occupation over the claimed rohe at 1840 (which has then continued to the present day), they must be able to demonstrate that they had a legitimate foundational claim to that area at that time. The majority of the Court of Appeal clearly communicated that in order to demonstrate exclusive use and occupation of an area at 1840, the applicant group’s “customary rights must have existed at 1840”,²⁸⁹ and they “must have had the intention and ability as a matter of tikanga to control access to the relevant area by other groups” at that time.²⁹⁰ This position was not materially altered by the Supreme Court, who confirmed that tikanga will be relevant to the exclusive use and occupation enquiry.²⁹¹ Long occupation founded on a group squatting on the whenua without more, lacks a proper foundational claim or take, so will not give support to a CMT claim.

[150] The Supreme Court pointed to the four essential sources of tikanga rights in land, being discovery, ancestral rights, rights by conquest, and rights by transfer.²⁹² I go into more detail in relation to the take relevant to the various claims below.

[151] In this case most of the claimants led considerable evidence and devoted much of their argument toward establishing their foundational take. Some of the inter-group challenges involve one group denying the foundation take claimed by another. For instance, Rangitāne argue that Ngāti Raukawa are a migratory group who cannot establish a legitimate foundational claim.

[152] In view of the contests involved, for each claim I have addressed the foundational take evidence as at 1840 as a preliminary step, before moving on to assess the evidence under the headings reflecting the relevant elements of the test formulated by the Supreme Court.

²⁸⁹ *Re Edwards* (CA), above n 16, at [419].

²⁹⁰ At [421].

²⁹¹ *Re Edwards* (SC), above n 13, at [154]–[157].

²⁹² At [38].

The claimants' evidence

[153] Witnesses for each of the applicants noted that their whakapapa, kōrero and histories, and those of their iwi, hapū, and whānau, belonged to their respective groups. They did not presume to speak for other iwi, hapū or whānau. Each group told their own narrative.

[154] As well as the tikanga experts, most of the claimant groups called expert historians who had prepared research reports.²⁹³ Many thousands of pages of historical documents and reports, including Waitangi Tribunal reports and minutes and decisions of the Native Land Court, were also referred to.²⁹⁴ The contested events and actions are interpreted by different groups based on their attribution of motive and intent to the rangatira involved in those events. While the expert reports are based on research and include the expert analysis of their authors, the authors acknowledge that they have relied on and supported the kōrero and narratives of the particular iwi or hapū who commissioned their report.

[155] In addition, much of the material relied upon by the historians came from 19th century Native Land Court records. While the evidence given in these cases occurred some time after the events of the 1820s and 1830s, the first of the relevant hearings took place less than 30 years after 1840. So, the evidence is useful and relatively contemporary. It sheds some light on how those witnesses viewed the foundational claims of the applicant groups. However, the adversarial nature of the competing claims to land rights resulted in inconsistent narratives being given by different witnesses in a hearing, but also by the same witnesses at different hearings. That material must be treated cautiously, as the evidence is often intended to support the particular cause at issue in the relevant hearing.

[156] Given the historical nature of the evidence and the myriad of sources from which it is derived, including iwi narratives handed down many generations, as would be expected, the dates given for events and the places they occurred at are not exact or

²⁹³ As noted earlier for ease of reference in this judgment I generally refer experts by their surname rather than using their academic titles.

²⁹⁴ The hearing and related time amounted to some 41 days (including visits, conferences and interlocutories), the evidence of 71 witnesses and deponents (some of which was taken as read) and 37,000 pages of evidence and exhibits.

precise. On occasions different parties refer to different dates for the same event. The parties were able to agree on some dates (tentatively) for the purpose of this hearing.²⁹⁵

[157] I approach the evidence in a similar manner to that of the trial Judge in *Tsilhqot'in Nation*.²⁹⁶ The character of the Kapiti hearing area and the small numbers in the various applicant groups as at 1840, as well as the imprecise identification of locations means that I must draw inferences based on the evidence before me. The evidence is from an array of sources including: kōrero of kaumatua; evidence of group members; experts including tikanga experts and historians; and archaeological evidence and material in various reports, books and other publications. In addition, there was much conflicting evidence. I have made my determinations based on assessing the evidence I found most relevant to the issue at hand and putting such weight on that material as I considered appropriate. Where locations and times are imprecise, I have made inferences as to the likely dates and extrapolated beyond the specific locations based on the evidence.

Structure of judgment

[158] The issue of substantial interruption by third parties was addressed in the evidence of the Attorney-General and the local authorities. I consider that first to set the backdrop for the relationship between the Māori groups who were in place in the hearing area at 1840 and the colonial government, settlers, and other third parties.

[159] I then consider each of the claimants' evidence, together with that of the interested parties who contest claims, in relation to the coastal whenua. As the Supreme Court noted, the statutory test for CMT involves a "weaving together of tikanga and the common law". This is necessary for the court to determine whether to allow a recognition of customary rights by way of an order for CMT.²⁹⁷ This means that the evidence of tikanga indicia, which is highlighted in the evidence relating to each of the applicants' claims, is relevant to the assessment of whether the area is held in accordance with tikanga, as well as whether it has been exclusively used and occupied from 1840 to the present day.

²⁹⁵ See Agreed Chronology at Attachment 1.

²⁹⁶ *Tsilhqot'in Nation*, above n 239, at [60] and [61].

²⁹⁷ At [157].

[160] I start with the claims for CMT orders south of Kukutauaki and in relation to Kapiti Island and its islets. This involves the evidence of Ngāti Toa, as its heke originating in the Waikato set in train the series of migrations to Kapiti. Te Rauparaha, having seen the Kapiti area in a taua (war party) around 1818-20, led Ngāti Toa first to Taranaki and then joined by the Taranaki tūpuna of Te Ātiawa migrated south to Kapiti/Manawatū area in the early 1820s. As Ngāti Toa's involvement in the hearing as an interested party primarily related to Te Ātiawa's CMT claim, I consider the evidence of those two iwi and analyse Te Ātiawa's claim in that context.

[161] Moving north from Kukutauaki, I then consider the claims of Ngāti Raukawa and Mr Tima, and Muaūpoko, Mr Taueki and Ngāti Apa. In the context of the Ngāti Raukawa claim, I also consider the evidence of Rangitāne, an interested party.

[162] Finally, I deal with the seaward boundary determinations of each of the successful claimants. In that section I also deal with the submissions of the Seafood Industry.

THIRD-PARTY USE AND OCCUPATION OF THE TAKUTAI MOANA

Historical evidence

[163] Dr Terence Green,²⁹⁸ an expert professional historian called by the Attorney-General, prepared a report entitled “Third-party use and occupation report — Kāpiti-Manawatū Coast” (the Green report), which provides an extensive overview of the third-party use of the application area from 1840 to the present day. He also produced volumes of supporting images and papers. Green drew mainly on primary sources (newspapers, archival documents and official papers), supplemented by secondary sources to give the broader context in which events occurred.

[164] The report did not look specifically at Māori use and occupation. However, as Green indicated in response to a question from Mr Bennion, it was likely that some people referred to in the newspaper articles and photographs he produced would be members of the applicant groups or interested parties.

Early third-party use of the application area

[165] The Green report noted that the earliest third-party users of the application area were whalers and traders. Whaling stations were established on Kapiti Island at least as early as 1831. By 1840, there were two stations on Kapiti Island, three on nearby islets, and a further three around the mouth of Porirua Harbour. Both Māori and non-Māori were engaged in this trade, working in boat crews and in the stations onshore. Some Pākehā whalers took Māori wives, who often worked alongside them in their various enterprises. In 1839, the various Kapiti stations ran 22 whaleboats between them, and took in 44 tuns (large barrels, each holding 200 gallons, or almost 1,000 litres) of whale oil. In 1840, one observer noted the abundance of “kawai” in the “Wanganui and other rivers on the coast”, that were caught “in great numbers” by Māori. After the collapse of the whaling industry in around 1847, some whalers joined the traders along the coast, mostly trading in flax and timber.

²⁹⁸ For ease of reference in many places I refer to the experts by their surname rather than using their academic titles.

[166] A sawmill and rope-walk²⁹⁹ were established on the Manawatū River between 1842 and 1845. A further rope-walk was established by Thomas Bevan on the Waikawa River in 1844. Mr Bevan also bought (or possibly chartered) a schooner which he used to export his rope. A flour mill was set up by the Kebbell brothers in 1846 to mill wheat grown along the coast by both Māori and Pākehā. It was also around this time that the concept of leasing was introduced to iwi and hapū by pastoralists, which enabled them to retain their lands while turning them into a “regular and increasingly significant source of wealth”.

[167] Green noted that coastal traders operated in the waters between Wellington and Whanganui and further afield, stopping along the way at the coastal ports in Waikanae, Ōtaki, Waikawa/Ōhau, Manawatū, and Rangitīkei. In the absence of roads, coastal vessels were a vital link between the growing settlements, and remained so for about 40 years until the establishment of the railway.

The coastal highway

[168] The beach road was referred to in a newspaper article as the “beautiful road of hard sand”. The road followed the beach its entire length from Paekākāriki to Whanganui, only diverting inland when necessary to cross certain rivers. Journeys along the road were made on foot, by horseback, or by coach. An early postal service was established by 1841. At that time, a detailed map of New Zealand was also produced, showing the route of the beach road and places where a traveller might stay along the route. In 1842, Amos Burr announced he was building an inn at the mouth of the Manawatū River.

[169] The road was used by the first mail carrier, Te Ātiawa rangatira Wī Hape Pākau. His position was taken over by an English settler named Henry Burling in 1842. The service was suspended in 1845 due to the outbreak of conflict in the north, before resuming in 1847, with mail being carried by Māori constables operating out of the police station at Waikanae. The service continued operating until 1886. Green noted that the beach road was still shown in maps as the main route along the coast in 1888.

²⁹⁹ Used for the production of long pieces of rope made from flax.

[170] Green referred to an account of Edward Wakefield in 1845 of a “tedious walk” of 15 miles along the beach, after which he paid the locals from a small village to ferry him and his companion over the Manawatū and Rangitīkei rivers in their waka.³⁰⁰ Around this time, many settlers were calling on the government to establish ferry services. In their absence, travellers were forced to wait for hours for waka to make river crossings, for which they were charged “ten shillings” by Māori who would take them across. Māori did not charge missionaries for the crossings. By around 1849, inns and ferries were established at the Ōtaki, Ōhau, and Rangitīkei rivers, and by 1850 there was a ferry service at the Manawatū River. On 22 June 1850, it was reported in the *Wellington Independent* newspaper that there were now ferries “in charge of white men ... at every river between this and Wanganui”. However, it appears that waka continued to be used, as is apparent in an account of a journey along the beach by Charlotte Godley in 1850.

[171] The ferry services became sufficiently important for the Wellington Provincial Council to assume control of them in 1854. The Ferries Act was passed in 1854, empowering the “Superintendent to establish ferries at such places within the Province as he may deem expedient”. In 1855, the Manawatū ferry seems to have still been operated by Māori as, following an inquiry undertaken that year, the Ferries Committee recommended that the owner be compensated and the running of the ferry be relinquished to a Pākehā. Land was leased from Māori for that ferry reserve at Manawatū. Land was also purchased from Māori for a ferry reserve and a “house of entertainment” at Ōtaki.

[172] By 1865, a regular mail and coach service was being run by “Cobb & Co”. The beach road remained important. In 1878, two Ōtaki ferries and the Waikawa ferry were recorded as being on “Native Land”. The Waikanae and Rangitīkei ferries may also have been operating.

[173] Green noted that in December 1879, there were reports of Māori who owned the land which the road from the beach to the ferry at Foxton ran across, threatening to close the road due to the ferryman attempting to charge Māori who crossed the river

³⁰⁰ Wakefield, above n 197, at 376–378.

in their waka instead of using his ferry. In March the following year, the affected Māori imposed a toll on the mail coach. The *Manawatu Herald* sided with those Māori, noting that the Europeans were using their land from the beach to the Foxton ferry without payment. It wrote that the affected Māori had been “more forbearing in this matter than European proprietors would have been under similar circumstances”. The matter was resolved in August 1880 by the intervention of the Native Lands Purchase Commissioner.

Pākehā settlement and trade

[174] The Green report indicated that Pākehā settlement in this area was relatively slow compared to other places. It came to a halt in 1841, when William Spain was appointed to inquire into the validity of purchases of land from Māori allegedly made by the New Zealand Company. Nevertheless, with grazing lands around Wellington at capacity, settlers began entering into informal lease arrangements with Māori along the coastal plain.³⁰¹ The lessees were considered by Crown officials to be squatters, and (largely unsuccessful) attempts were made to put a stop to such leases. The Land Claims Ordinance of 1841 declared these leases invalid but was not enforced. In 1846, the Native Land Purchase Ordinance both declared such arrangements illegal and restated the Crown’s right of pre-emption. Between 1840 and 1876, the Crown purchased 923,000 acres in the Rangitīkei and Manawatū-Horowhenua districts, thereby enabling the transfer of land ownership from Māori to Pākehā. The various inquiries and Native Land Court investigations relating to these blocks featured in the historical research carried out for this hearing.

[175] Most of the outward cargo from the port of Rangitīkei was provided by local Māori farmers, including flax, potatoes, pigs, and wheat. In April 1850, the *Emma Jane* became the first trading vessel at the port of Rangitīkei. It carried produce grown by local Māori to the market in Wellington to be sold to settlers. An increasing number of Pākehā were settling in the Horowhenua, Manawatū, and Rangitīkei

³⁰¹ A report of Nepia (likely a reference to the Ngāti Raukawa chief Nepia Taratoa) seeking to recover rental for land through the Magistrate’s Court at Rangitīkei appears in a diary of the Crown agent James Grindell from 1 March to 30 April 1859. See National Library of New Zealand “20 pages to James Grindell” (1859) Papers Past <paperspast.natlib.govt.nz>.

districts at this time. From 1852, another “port” on the coast was functioning at the mouth of the Waikawa River. George Bevan, a local farmer, regularly ran a chartered schooner from there. In 1856, a store and a wharf were established by Thomas Upperdine Cook on the Manawatū River, on the site of what would become Foxton. Until the government built a wharf there in 1873, this private wharf was the only one available for all vessels visiting the port.

[176] In 1862, it was recorded as “a well known fact” that most of the “native land” between the Manawatū and Rangitīkei rivers was held under lease by European stockowners. About two years later, the first sections were sold at what would become Bulls, which prompted an increase in trade through the port at Rangitīkei. The first steamer crossed the Manawatū River in 1860, and in July 1867 the *Waipara* became the first steamer to visit the port of Rangitīkei, having begun trading in the area earlier that year. The ports along the river continued to develop but were affected from time to time by the economy, as well as silting, changes in course, and flooding of the relevant rivers.

The telegraph debate

[177] Green referred to a disagreement between local Māori and the government about the erection of a telegraph wire between Wellington and Whanganui. A newspaper article from the *Evening Post* of 14 May 1869 recounted the meeting at Waikanae between Dr Featherston and the Hauhau,³⁰² debating the proposal. Initially, the Hauhau had voiced opposition about the “waia” crossing their land. Dr Featherston indicated that the telegraph would be erected on the beach, which he said was the Queen’s by right. The article recorded that the Hauhau eventually withdrew their opposition, except for a woman “named Sarah”, and consented to the telegraph wires being run along the beach. They also agreed to supply the poles required for the line and erect it across the whole distance from Paekākāriki to Rangitīkei.

³⁰² The Hauhau were part of a religious-based Māori movement founded in 1862 by Taranaki iwi in response to confiscation of land from the New Zealand Wars.

[178] Other articles gave further detail outlining the spirited opposition to the erection of the telegraph by Māori. An article dated 18 May 1869 from the *Wellington Independent*, produced by Green, described a preliminary meeting held with Dr Featherston and the Hauhau, who expressed their opposition to the telegraph. It was reported as being called at the instigation of one Wi Tako. That report also said that a letter from Wi Hapi was read, declaring that “the Hauhaus regarded death in defence of their rights to be better than life without them, and that contention and bloodshed must ensue if the telegraph was persevered in”. It reported that “Parakaia, according to his usual custom, declared the greater part of the sea beach was his, and if his right was disputed he would take it into the Land Court”. At the meeting proper the next day, it was reported that “Hohepa” and “Ngatiawa” were “determined to prevent the wire being erected, but if possible, without bloodshed”. The ensuing discussion and speech by Dr Featherston, as reported, indicate that the construction of the telegraph had attracted threats to pull up the survey pegs and pull down the wire posts. Dr Featherston reasoned that Māori had already allowed access by travellers and vehicles and the wire would do no further damage.

[179] Dr Featherston then contended that the area between the low and high-water mark belonged to the Queen, and as she also claimed a right of access to the high-water mark, she must necessarily own the land above it. In any event, as there was a road along the beach which had been used by settlers for thirty years, the land above the high tide had become public property and could not now be “shut up”. Therefore, he said, the government had the right to erect the telegraph wire on the land. Dr Featherston added that, like the mail service, which was used by both Māori and Pākehā, the use of the telegraph would be heavily subsidised. The newspaper report also included the text of a letter from one of the Māori objectors, which was read out at the meeting. As well as opposing the telegraph, the Māori objector apparently claimed sovereignty over the island and expressed opposition to the beach road. Dr Featherston responded that the letter was a testing of the Queen’s sovereignty. Wi Parata then suggested that rent be paid for the telegraph poles, however that proposal was rejected.

[180] The following morning, Wi Parata and others who had opposed the telegraph spoke to Dr Featherston concerning an old woman called Hera (Sarah). She claimed

a portion of the sea beach (about a half mile) between Puka and Urui, and said that she would “never” consent to the poles being put up. In the end, an agreement was reached, and a letter was sent confirming this on behalf of Ngāti Awa. A later report in the *Wellington Independent* of 18 September 1869 indicated the poles were to be erected between Ōtaki and Manawatū by Māori.

Late 19th century to present day

[181] The leasing of land by Māori and the disputes between iwi about sales of land to Pākehā precipitated the Himatangi Native Land Court investigations and hearings in the 1860s. In 1872, according to the *Wellington Independent*, the Manawatū remained “terra incognita of everyone except the actual residents”. The Ōtaki district, from the Waikanae River to the Ōhau River, remained entirely owned by Māori in 1875. Trade in the Ōtaki township was small and largely involved the exchange of goods with Māori for fresh produce.

[182] Green noted that by the middle of the 1880s, considerable tracts of Māori land had been sold to Pākehā, whose numbers were gradually increasing. In turn, their impact on the landscape was also increasing, with the bush being cleared to make way for large farms that began to cover broad swathes of the countryside. Still, access to the inland areas was limited by the lack of roads and railway, and the coast and its several ports remained the primary means by which goods and passengers travelled.

[183] The advent of a regular rail service connecting Wellington to Palmerston North (via Foxton) in December 1886 led to a further increase in the Pākehā population along the coastline, which soon outstripped the Māori population. Most of the land over which the railway was to be constructed was owned by Māori. At the same time, the rapid subdivision of Māori land eased the way for private purchases. This prompted what Green described as a period of “unprecedented change”. As the Pākehā population increased, so too did the amount of farming, along with coastal tourism. This presaged the fundamental shift that would lead people to view the coast no longer as a means of travel and trade, but as a place of recreation.

[184] In 1891, a proposal was made to establish the Castlecliff Deep Sea Fishing Company, for the specific purpose of fishing in the area. The company’s promoter

said there was a “splendid opening” for such a venture, as there was a “long stretch of good trawling ground on this coast, and an inexhaustible supply of fish at Kapiti”. However, with limited support, the project was abandoned.

[185] Coastal trade continued into the early 20th century, particularly using the Foxton port, although the flax trade tailed off after World War I and was more or less finished by the 1930s.

[186] Today, the area continues to attract residents and holiday-makers. 18 kilometres of the “beach highway” now forms part of the designated track for Te Araroa, a walkway which spans the entire length of New Zealand. The path over the beach runs south from the Whangaehu River, crossing the Turakina River mouth and continuing inland for some distance.

Evidence of local authorities

[187] A number of local councils appeared as interested parties to assist the Court. They outlined their statutory responsibilities and activities, as well as their relationships with the applicant groups in various parts of the coast. An overview of each council’s coverage area and relevant issues is set out in this section of the judgment. I elaborate on the specific relationships between the respective councils and various applicant groups in later sections dealing with each claim.

[188] Evidence and submissions were given on behalf of: the Kāpiti Coast District Council, which governs an area along the western coastline of New Zealand's North Island; the Greater Wellington Regional Council, which covers the area from south of Whareroa to Ōtaki; and the Manawatū-Whanganui Regional Council (Horizons) which covers the area from a point north of Ōtaki to the Rangitīkei River. The Attorney-General also obtained information from those councils regarding their relationships with the applicants and interested parties through requests under the Local Government Official Information and Meetings Act 1987. In addition, she

obtained relevant information from the Horowhenua District Council, which did not provide evidence in the hearing.³⁰³

[189] Each of the councils who participated in the hearing noted that they have obligations in relation to the recognition and protection of rights granted under the Takutai Moana Act. They were concerned to ensure that any CMT and/or PCR areas are clearly and accurately surveyed, only include areas that fall within the definition of the takutai moana, and that the scope of any wāhi tapu protection rights is clear. They also seek the opportunity to address issues relating to PCRs at the appropriate time.

[190] The Kāpiti Coast District Council's area of responsibility runs from Paekākāriki in the south to Ōtaki in the north. The District Council noted that the Kapiti coastline is dynamic, with areas experiencing erosion and accretion. Climate change, sea level rise, and tectonic drawdown contribute to changes in the line of mean high-water springs. Accurate surveying of any CMT or PCR areas is essential to account for these changes and ensure clarity regarding the inclusion of structures and land within the takutai moana.

[191] The Kāpiti Coast District Council noted that it has regulatory responsibilities under the RMA and Local Government Act 2002 (LGA). Like other district councils, under the RMA the Council's regulatory functions in the takutai moana are minimal, as coastal marine areas are generally excluded from their jurisdiction. However, under the LGA, the District Council's district is defined to include the area between mean high-water springs and mean low-water springs, allowing it to make bylaws regulating activities in this area, such as the Beach Bylaw 2021 and Dog Control Bylaw 2019.

[192] The Kāpiti Coast District Council's more significant infrastructure within or near the hearing area includes: numerous beach access points along the coastline which are maintained under a global resource consent; seawalls and coastal protection infrastructure, including holding resource consents for improvements to seawalls and

³⁰³ The documentation provided in response to the requests was produced by Crown Law through Celine Jeanne Dabuet. The Horowhenua District Council information was provided in a letter to Crown Law dated 15 March 2024.

other coastal protection works; stormwater infrastructure including pipes, culverts, and outlets (many in poor condition necessitating ongoing renewal), as well as holding resource consents for discharges into coastal areas; and flood protection infrastructure for which it holds resource consents. In addition, it carries out river and stream mouth cutting for flood mitigation.

[193] The Kāpiti Coast District Council is party to a memorandum of partnership signed in December 2017 with Ngāti Toa, Te Ātiawa, and Ngā Hapū o Ōtaki. The partnership arrangements between the council and those iwi groups date back to 1994. Te Ātiawa withdrew from the partnership in 2019 and the partnership has since been reviewed. The three named iwi groups continue to work collaboratively with the District Council on various projects in the area and participate in various committees of the council. Te Ātiawa works with the District Council and the Greater Wellington Regional Council on revitalising the Waikanae River in a project known as the Waikanae Ki Uta Ki Tai Project.

[194] The Greater Wellington Regional Council is in partnership with iwi representatives through a governance committee which gives advice to the Council. The Whaitua Kāpiti Committee has operated since 1 September 2022. It includes one representative from Ngāti Toa, two from Ngā Hapū o Ōtaki and two from Te Ātiawa. The Committee also has representatives from the community as well as the Council. The Committee advises on freshwater governance from Paekākāriki south of the hearing area to Ōtaki in the north. The terms of reference record that the iwi represented in that group have mana whenua status in that area.

[195] The Horowhenua District Council covers the Horowhenua area including coastal areas such as Waitārere and Hōkio beaches. The Council engages with several iwi and hapū groups in various projects and initiatives and has formal arrangements with MTA, various hapū of Ngāti Raukawa, as well as a memorandum of partnership with Rangitāne pursuant to their deed of settlement. It also has a key relationship with Ngāti Apa recognising its historic and cultural interests particularly around Omarupapako (Round Bush Scenic Reserve). In the Lake Horowhenua area, the Horowhenua District Council works with Horizons Regional Council (Horizons) and iwi/hapū groups to improve water quality through initiatives like transitioning

wastewater discharge to land, stormwater quality improvements, weed harvesting, pest control, and the Arawhata Constructed Wetland Complex.

[196] Horizons has statutory functions under the RMA, including preparing a Regional Policy Statement and Regional Coastal Plan. If recognition orders are granted, the Council must ensure that those plans recognise planning documents prepared by groups with CMT, who also will consider permission rights for resource consents in CMT areas.³⁰⁴

[197] Horizons confirmed the dynamic nature of the coastline, with shifting river mouths and dune belts. It noted accretion in areas like Himatangi Beach averaged a rate of 1.5 metres per year between 1963 and 2011. Horizons' assets and activities include flood protection infrastructure, water level monitoring, and pest plant control. It also manages stop banks, bank protection structures, and flood protection assets, some of which are authorised by resource consents. Relevant to this application, the resource consents cover structures in the Manawatū River and the Rangitīkei River. Horizons also operates tidal water level recorders and web-cameras at locations such as the Manawatū River at Foxton Beach, Himatangi Beach, and the Rangitīkei River. It has a relationship with Muaūpoko and is working on a review of the relevant partnership memorandum. It also has a relationship with Ngāti Tamarangi and Ngāti Raukawa and a number of their hapū.

[198] The evidence of the councils did not suggest that the works being carried out under their resource consents nor the infrastructure for which those authorities are responsible have interfered with the exclusive occupation or use of the rohe by relevant Māori groups. The councils all indicated that they work with iwi and hapū and welcome the involvement of those groups in planning, regulation, and consent processes.

Assessment of substantial interruption by third parties

[199] Lawful activities and structures which “interfere with customary rights” are relevant to the issue of substantial interruption. The evidence of Green and

³⁰⁴ Resource Management Act 1991, ss 61 and 66; and Takutai Moana Act, ss 55, 68, and 93.

Mr Brent Parker,³⁰⁵ called by the Attorney-General, referred to infrastructure and a number of activities which might give rise to substantial interruption. These included public use of the coastal highway and the historical port of Foxton, both of which I deal with below.

[200] Substantial interruption should be considered in terms of the spatial and temporal extent of interrupting activities, in the context of the claim area.³⁰⁶ This involves questions of fact and degree. The Attorney-General submits that use and occupation may be substantially interrupted in relation to one part of an application area and not another. The Supreme Court in *Re Edwards* gave the example of substantial interruption occurring in the immediate vicinity of intensive activity related to extensive commercial shipping or major port infrastructure.³⁰⁷

[201] As noted above, if exclusive use and occupation have been demonstrated, it is for a contradictor to adduce evidence of non-exclusivity or substantial interruption.³⁰⁸ There were some suggested sources of substantial interruption, including use of the coastal highway and the works on the Manawatū River.

Public use of the takutai moana

[202] As at 1840, the coastal highway was not in heavy use by third parties. Green noted that Octavius Hadfield arrived on the coast in October 1839, and was the first missionary to settle in the area, initially at Waikanae, and later at Ōtaki. He had been invited to travel to the region by local iwi, and as the only missionary in the vicinity, he would travel up and down the coast. Green noted that Mr Hadfield was one of the earliest Pākehā users of the route.

[203] On the other hand, Green's evidence, which is largely uncontradicted, suggests that Māori were controlling the use of the coastal area at 1840 and beyond. This included allowing for the passage of third parties, which can be seen as an expression of manaakitanga.

³⁰⁵ Mr Parker is the Historical Research Manager at Crown Law.

³⁰⁶ *Re Edwards* (SC), above n 13, at [194]–[195] and [225]–[226].

³⁰⁷ At [200].

³⁰⁸ At [120] and [189].

[204] The evidence of control by Māori derives from inferences which may be drawn from the ownership and control of the land adjoining the coast from pre-1840 until the late 1890s, examples of control over trade on the coastal highway and their involvement in that trade, as well as reports of action and threats when Māori customary rights were challenged. These acts of protest attracted interest and reporting due to the level of interruption they caused to travel and infrastructure. However, in the period from the 20th century to the present day, there were fewer tangible examples of control, and they largely related to the exercise of kaitiakitanga by Māori in the takutai moana. While some examples come from places further inland, the nature of the control exhibited enables the inference to be drawn that it extended to the beach areas.

Early expressions of Māori control from 1840

[205] Māori were involved in trade and allowed the coastal highway to be used in order to encourage that trade, which was seen as to their advantage. The coastal river crossings were facilitated by Māori, which is confirmed, for instance, by Edward Wakefield's account in 1845 of the locals being paid to ferry the travellers over the rivers. A further example is of the ferry service across the Manawatū which was run by Māori. In addition, Māori were involved in the early postal services.

[206] An early example of marriages of high ranking wahine to Pākehā in order to ensure Māori retained control over enterprise, is that of the Kapiti Island whaler, John Nicoll and Kahe Te Rau-o-Te-Rangi (of Ngāti Toa and Ngāti Mutunga descent). Meretini Te Akau also married the Foxton businessman and trader Thomas Upperdine Cook in the Manawatū. Also relevant is Mr Jenkins, who was only able to trade in the provision of accommodation and refreshments for travellers under the auspices of a Te Ātiawa hapū after marrying a woman from that hapū.

[207] Local Māori provided fruit, vegetables, and other supplies such as flax and pigs, to Europeans in the area. Green noted that trading vessels came in and out of the port of Rangitīkei and the Waikawa River from 1850, primarily carrying produce grown by local Māori to market in Wellington.

[208] Kapiti Island was also held by Māori as at 1840. Whaling was a significant enterprise in the area at that time. John Nicoll and Kahe Te Rau-o-Te-Rangi ran the first whaling station on Kapiti Island. The pūkenga refer to the development of Te Rauparaha's maritime empire in the Cook Strait provides an example of Māori control over the rohe moana.³⁰⁹ While his empire extended to the South Island, the key strategic stronghold in the 1830s and 1840s was Kapiti Island and its surrounds.

Protest against telegraph as an expression of control

[209] The protracted and tense discussions over the erection of the telegraph poles provide a tangible assertion of Māori customary rights in 1869 which is well documented. A report in the *Evening Post* of 7 July 1869 referred to the opposition not being an objection to the line itself, but arising "from a fear that the erection would be considered an act by which ownership was weakened". The article referred to the common practice of lawyers instructing Māori to hand over a handful of grass to the purchaser as a token that the land had been sold and they had parted with ownership. It went on to report:

This feeling — the fear of in any way having their title or mana to the land disturbed — was the secret of the opposition to the extension of the telegraph on the West Coast. Their title to their own lands was admitted by Dr Featherston, but the superior mana of the Queen over the sea beach, entitling her to carry the wire along it, was so convincingly argued by his Honor, that those most opposed thereto not only submitted, but consented to supply and erect the poles on contract terms.

[210] There is a suggestion that the concerns expressed by Māori about the taking of their land harked back to assurances they had received in signing of te Tiriti o Waitangi. Henry Williams had stressed the ability of the Treaty to protect Māori land rights at the initial Waitangi meeting, and again at Putiki-Wharanui pā, when he made a return visit to persuade rangatira there to assent to the Treaty. It is suggested that Williams used similar arguments in order to persuade other iwi to sign. This would have resonated with the people in Kapiti given the tumultuous times they had experienced, including the heke migrations to the area and the continuing struggles among iwi and hapū to adjust their rights.

³⁰⁹ Pūkenga report, above n 44, at [610].

[211] The *Evening Post* on 14 July 1869 reported that the “Waikanae Maoris” prevented work on the telegraph beyond the foot of the Paekākāriki Hill. In the course of his attempts to procure the erection of the telegraph lines, Dr Featherston made statements to deter Māori from taking further steps to protect their rights to the coast and the surrounding land, including assertions of Crown ownership of the coastal area and land above high-tide mark. The persistence shown by Māori in their objection to this is noteworthy. Even in the face of the insistence by the government that the public had the right to use the beach and Māori land above the high-tide mark, Māori protested, saying death would be a better alternative than allowing the project to proceed on their lands. They wrote letters, verbally opposed the lines being installed over the coastal area, and threatened bloodshed and the pulling out of survey pegs and wires. They made clear their position regarding their mana and control over the land, however, confronted with the Crown’s representations, they had no choice but to eventually agree to the proposed erection of the telegraph. Nevertheless, they were able to obtain some commercial benefit from the arrangement by securing the contract for the supply and erection of the poles. Ultimately, the poles were placed further inland.

[212] At the same time Featherston acknowledged that it was Māori who allowed the use of the beach, as he is reported as saying to the protesters at one of their meetings:

... What harm, what possible damage can the wire do either you or your lands. If you object to the wire, why not object to every vehicle, every horse, every traveller that passes over the land. Why allow the mails to be carried over? Surely carriages and carts and horses and foot travellers must do more harm, more damage to the land than a few posts stuck in here and there. ...

[213] This suggestion by Featherston that Māori were “allowing” passage over the land, could in tikanga terms be interpreted as an acknowledgement of the exercise of manaakitanga by the Māori groups controlling the beach.

[214] The claims on behalf of the colonial government that the Crown owned the beach and the land used by travellers above the high-tide mark were incorrect at law. This was eventually affirmed in 2003, when the Court of Appeal in *Attorney-General v Ngāti Apa* determined that:³¹⁰

³¹⁰ *Attorney-General v Ngāti Apa*, above n 60, at [49].

Maori custom and usage recognising property in foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law, unless such property interests have been lawfully extinguished.

Other manifestations of control

[215] Dr Vincent O'Malley, the expert historian for Ngāti Raukawa, referred to the fact that when Māori did want to assert control over the coast, they had the ability to block the route. He noted that there were periods when it was considered unsafe to travel on sections of coastline, for example when Te Rangihaeata³¹¹ refused to allow travellers to pass over the beach, which was extensively reported. His presence deterred travellers. Ms Mikaere, a witness for Ngāti Raukawa, said that Te Rangihaeata had sent word ahead that he would kill any Pākehā that he came across. Ms Mikaere's great, great grandfather, a Pākehā, took that threat seriously and fled, leaving his wife and child, Hoana, who would become her great-grandmother.

[216] It was suggested to O'Malley in cross-examination that this was an isolated event in a time of war. However, regardless of the circumstances, Te Rangihaeata's threats and the fact they were taken seriously suggests firm control by Māori over the coastal route, including the ability to restrict access by withdrawing their extension of manaakitanga to Pākehā. Other witnesses also referred to Te Rangihaeata in 1847 charging a toll at his pā on the dunes near Poroutawhao to travellers passing through the district. He ultimately reached an agreement with Governor Grey to end the tolling.

[217] Another physical manifestation of control recounted by Green was when Māori who owned land which the road from the beach to the Foxton ferry ran across, threatened to close the road in 1879. This was in response to the ferryman charging Māori who crossed the river in their waka. A further example was in 1880, when

³¹¹ Te Rangihaeata was Te Rauparaha's nephew and a rangatira of Ngāti Toa. He left the Wellington region after the Wellington Wars (between Ngāti Toa under the leadership of Te Rangihaeata, and settlers). He returned in 1846 to Poroutawhao (in the Horowhenua area) to evade the colonial forces who had imprisoned Te Rauparaha. Te Rangihaeata died in Poroutawhao in 1855 and is buried at the urupā there, as is his wife of Ngāti Apa descent, Te Pikinga. Te Rangihaeata was also closely related and aligned to Ngāti Raukawa which is relevant to the applicant claims dealt with below.

Māori imposed a toll on the mail coach, due to failure by the Europeans to pay rental for using the land for the road from the beach to the Foxton ferry.

[218] The land adjoining the coast remained in Māori ownership, until sales began following the Himatangi investigations in the northern end of the rohe, around the 1870s. Green referred to the strategic commercial leasing arrangements which had left Māori in control of land in the vicinity of the coast. The colonial government attempted to stop the leasing arrangements and outlawed them by legislation. However, that did not stop such arrangements from occurring. Some of the divisive Native Land Court investigations in the area, from which the historians for the various applicants drew heavily, were in part instigated as a result of those leasing arrangements. O'Malley referred to the research of Dr Ann Parsonson,³¹² who argued that Māori transacting lands in the 19th century was a way of demonstrating their mana to the world. From that perspective, agreeing to transact or sell those lands was not viewed by those groups as a diminution of their mana but, if anything, was a confirmation of it.

Kaitiakitanga

[219] As previously indicated, the 20th century examples of the manifestation of control generally take the form of the exercise of kaitiakitanga. An example is a report concerning steps taken by Māori to protect the survival of the whitebait population, which was being depleted due to the failure of whitebaiters to understand the life cycle of whitebait. On 20 May 1922, some “natives of Foxton” submitted a petition signed by “Hokowhitu Maki Rika, Papa Tei Ra, Potaka Hotoreni and Haretini Makarika, etc” to the Inspector of Fisheries, seeking the closure of some lakes including “Tewhkapu, Koputara, and Kaikokopu”. The petition also sought closure of the “drains or creeks running from swamp into the Manawatu”, because “in such places whitebait are free to grow into mother-fish without being eaten by other fishes”. The report of the Inspector in response to the petition indicated that according to Māori, large numbers of whitebait would go up the drain into the lakes and then return to sea in autumn to spawn. Taking whitebait from the refuges where they grew interfered with that cycle. The Inspector said that this was beyond his knowledge, but he did

³¹² Dr Parsonson is a historian. Presently she is an academic and a member of the Waitangi Tribunal.

know that the whitebait in the Manawatū River had been decreasing each year. He said:

The request of the Maoris is quite a reasonable one and no hardship would be inflicted on anyone, as those few persons who have monopolised the drain referred to above in the past could take up positions in the river the same as the other whitebaiters do. There is ample room for all of them. ...

[220] A ban or rāhui was put in place, preventing the taking of whitebait from the tributaries or drains flowing from the Tewhkapu, Koputara, and Kaikokopu lakes into the Manawatū River. Other restrictions were also introduced in relation to whitebaiting, however it remained a viable commercial undertaking in the area. The whitebait were shipped from Foxton to Wellington, and were primarily caught in the Manawatū, Ōtaki, and Waikanae rivers, as well as the Hōkio Stream.

[221] O'Malley also referred in cross-examination to contemporary examples of Māori complaining about Europeans accessing fish along the coastline in a disproportionate way. He noted that there were complaints from Ngāti Raukawa about vehicles being allowed access along the beach and destroying toheroa.

[222] The evidence indicates that by the latter part of the 20th century and into the 21st century there was increasing public recognition of the role of Māori as kaitiaki of the takutai moana along the application area. The evidence relevant to the respective applicants on their exercise of tikanga varies, and I deal with each of these in the sections below.

Recreational use

[223] In the 20th century, the coast and adjoining sea gradually transitioned from being primarily a trading corridor, to being used for recreational purposes. This did not interfere with Māori use and occupation of the relevant coastal area and adjoining moana.

[224] While Pākehā also used the area for recreation and fishing, the continued Māori use and occupation was physically manifested in the many fishing and resource gathering excursions recounted in the evidence at this hearing to which I refer below, as well as the exercise of kaitiakitanga and their continued presence in the area as

indicated, in particular, by their marae. The pūkenga described kaitiakitanga as “[e]mbedded in tikanga Māori”, being “the responsibility to use and to maintain ... pure, clean coastal marine resources”.³¹³ Here, this is demonstrated through the evidence of interventions by various Māori groups to protect the area and its taonga, including kaimoana and plant life.

[225] The provision in s 59(3) of the Takutai Moana Act noting that third-party fishing and navigation are not necessarily disqualifying, is also relevant. There has been substantial recreational, as well as an amount of commercial, fishing off this coast, but it has not affected the use and control of it by Māori groups.

Recognition of control

[226] Recognition by third parties of the importance of the coastal area to Māori is evident in the publication of lists and maps of sites of significance to Māori in planning documents by local authorities. Māori groups are also consulted by local authorities to varying degrees on resource management and regulatory issues as well as kaitiakitanga. The applicants gave evidence of the exercise of control through their involvement in governmental and non-governmental projects through the resource consent approval process, provision of cultural reports, review of infrastructure reports, and the preparation of plans for the area. I look at those in more detail when I consider the relevant iwi applicants’ evidence.

Structures and infrastructure

[227] The applicants do not have to prove exclusivity and the absence of substantial interruption across every single moment of time and at every location since 1840.³¹⁴ Nevertheless, the test requires the Court to consider and weigh the evidence, and in particular the “context and degree” of interruption indicated by the evidence.³¹⁵ This formulation does not mean that the applicants bear the burden of proof to demonstrate the absence of substantial interruption, as suggested by counsel for the

³¹³ Pūkenga report, above n 44, at [191].

³¹⁴ *Re Edwards* (SC), above n 13, at [120] and [194].

³¹⁵ At [200]

Seafood Industry in their submissions. The extent of any substantial interruption depends upon a location-specific assessment.

[228] In *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare ki Tokomaru*, the Waima wharf and its structures impeded some customary uses, for instance the washing of the dead in the immediate vicinity, while other customary activities such as fishing usage were modified to take advantage of the structure.³¹⁶ This weighed against a finding of substantial interruption.³¹⁷ Also relevant was the applicants' participation in relevant consent processes and the fact that the "heyday" of third-party use lasted only from 1910 to around 1950.³¹⁸ This contrasts with the third-party use and occupation which occurred in *Re Ngāti Pāhauwera*.³¹⁹ In that case the interruption involved intensive third-party use of a marina, walking tracks, highways, and roads from the 1900s to the present day, and prevented the applicants there from using their tauranga waka rights, therefore amounting to substantial interruption.³²⁰

[229] Structures erected by third parties on the coastal areas in this case have been limited. There are a number of small boat launch ramps. However, there is no evidence that those ramps have interfered with the relevant applicants' exercise of customary rights or their exclusive use and occupation of the area.

[230] Mr Parker's evidence detailed the development of the Foxton port. The wharf was built at Foxton township by the government in 1873. Over the ensuing years, a railway operated on reclaimed land from the river to enable additional berths for ships and various licences were granted to third parties. In 1876, Foxton was receiving an average of 30 vessels a month. In 1879, the port of Foxton was formally established, with its seaward limits being the mouth of the Manawatū River.

[231] Coastal trade remained buoyed by the flax industry, which flourished through the 1880s while the rest of the country was in depression. However, a downturn in commerce and the establishment of the railway had an adverse effect on the

³¹⁶ *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare ki Tokomaru* [2024] NZHC 682 at [402]–[410].

³¹⁷ At [416].

³¹⁸ At [414]–[415].

³¹⁹ *Re Ngāti Pāhauwera* [2021] NZHC 3599.

³²⁰ *Ngā Hapū o Tokomaru Ākau*, above n 316, at [413]–[414].

coastal ports, all of which suffered a decrease in trade that either immediately, or in a somewhat drawn-out fashion (as with Foxton), led to their closure. The closure of the port at Rangitīkei was hastened by the massive flood of April 1897 that silted up the river, making it impassable.

[232] In relation to Foxton port, the “Whirokino Diversion” (also referred to as the “Whirokino Cut”) involved “shifting 370,0000 cubic yards of spoil” to reduce the length of the Manawatū River by about five miles in order to lower the risk of flooding. The once “running navigable river” ultimately became a “tidal brackish backwater”, following the work being carried out in 1943–1944. Mr Parker described the Foxton wharves as becoming “stranded in a backwater” by 1943. This heralded the end of the port of Foxton. The Foxton Harbour Board was abolished finally in 1956.

[233] An example of activities and infrastructure which did substantially interfere with the customary rights being exercised in the area is described in *Re Edwards Whakatōhea (No 2)*.³²¹ In that case, earthworks had fundamentally changed the landscape and use of a particular area such that it was no longer part of the takutai moana, preventing the applicant groups from using it at all.

[234] In this case, as Green and Mr Parker noted, most of the reclamations and structures associated with the port access along the Manawatū River, including the cut made in the river, fall outside the takutai moana area. I am satisfied that these structures and infrastructure do not amount to substantial interruption for the purposes of the CMT test.

[235] First, Māori continued to use the environs of the Manawatū River for customary fishing and gathering of resources, according to the detailed evidence. The evidence of the applicants provides numerous examples of groups continuing to use and occupy the river area, including the river mouth, until the present time. They engaged in trade and benefitted from the port by supplying produce for the return runs of the vessels using it. Given that context, it is not surprising there are few reports of Māori interfering with third-party use of the river, as they were able to use the activity to their advantage.

³²¹ *Re Edwards (HC)*, above n 45, at [245]–[250].

[236] Secondly, the effective time span during which the port operated as a hub of trade with high levels of usage was, at best, from the late 1870s until the early 1900s. It was for all intents and purposes entirely defunct by the 1940s. Its period of high use is comparable to the 40 years of the “heyday” of use of the structures in *Ngā Hapū o Tokomaru Ākau*, where there was found to be no substantial interruption. While there has been general pollution and depletion of resources, particularly over the last 50 years due to development and faulty infrastructure, Māori groups have continued to exert their rights through occupation of the coastal area and use of its resources. The exercise of kaitiakitanga is evidenced by examples of rāhui, and through initiatives and collaboration with government and other parties to rehabilitate the health of the takutai moana and the waterways.

Conclusion on third-party substantial interruption

[237] For the reasons set out above, the third-party use of the coastal highway does not give rise to substantial interruption. Nor does the erection and use of structures on the Manawatū River by third parties as a result of the Foxton port give rise to substantial interruption, insofar as the works relate to the mouth of the river and foreshore.³²²

[238] Later sections in this judgment deal with the merits of the respective the applications based on the evidence relevant to the particular claim. Nevertheless, in relation to non-Māori, it is apparent that there has been no substantial interruption by the erection of structures or other works or activities in the area, based on the evidence of Dr Green and the local authorities.

Extinguishment

[239] The Supreme Court confirmed in *Re Edwards* that:³²³

...it is well established that customary title and rights can only be extinguished by clear and plain statutory authority to that effect; extinguishment only occurs where Parliament’s purpose is demonstrated by express words or at least necessary implication.

³²² The effect on the use of the moana is considered elsewhere in the judgment.

³²³ *Re Edwards* (SC), above n 13, at [206].

[240] The Supreme Court is to return to this issue in its next judgment.³²⁴ Given that indication, the Attorney-General suggested it may be appropriate to await the Supreme Court's further decision on the issue of whether the Takutai Moana Act revives rights in the Manawatū River that may have been extinguished pursuant to the Coal-Mines Act Amendment Act 1903. However, she subsequently indicated that this was not necessary, as she accepts that this Court is bound by the Court of Appeal's determination that such rights are not extinguished. Therefore, the issue of extinguishment does not arise in this case in relation to the Manawatū riverbed.

[241] Mr Scott, for the Seafood Industry Representatives, raised another issue relevant to extinguishment. He noted that fisheries were an example of a use of the coastal and marine area authorised by legislation. He pointed out that fisheries have been managed and authorised by increasingly complex regulation of the business and activity of fishing from the early 1900s. All lawful commercial fishing must be undertaken pursuant to a statutory authorisation. However, this regulation does not extinguish customary rights either by express words or necessary implication, nor did Mr Scott pursue that argument.

[242] No other matters were raised which might give rise to extinguishment of customary rights, therefore I do not consider that issue further in this judgment.

[243] I now turn to the evidence of the parties.

[244] I begin with the claim for CMT orders south of Kukutauaki and in relation to Kapiti Island and its islets. I start with the evidence of Ngāti Toa, as their heke from the Waikato set in train the migrations to Kapiti.

³²⁴ At [207].

NGĀTI TOA RANGATIRA

Whakapapa

[245] Mr Hohepa Potini, the cultural adviser to Ngāti Toa, gave evidence of Ngāti Toa's connection to Ranginui and Papatūānuku and the creation of Aotearoa. Dr Te Taku Parai narrated the whakapapa from Toa Rangatira, the eponymous ancestor of Ngāti Toa Rangatira, who descended from Hoturoa and Kākati. From Kākati and his wife Kurawakaimua, of Aotea waka, came Tuhianga, who had Poutama, who then had Mangō, the eponymous ancestor of Ngāti Mangō, which was a previous name of Ngāti Toa. Another wife of Kākati, Ururangi of the Kurahaupō waka, was the tupuna of the eponymous ancestor Raukawa.

[246] Mr Te Kahu o Te Rangi Rōpata, who is a descendant of the famous rangatira Te Rauparaha, explained the close connection that his tupuna had with Ngāti Raukawa. Te Rauparaha was not born into leadership, nor was he a tuakana (first born). Te Rauparaha's mother, Parekōhatu, was a junior daughter of a junior line of Ngāti Huia of Ngāti Raukawa. His father was Werawera, of Ngāti Toa. His grandfather was Kimihia, who featured in the battles of the senior line of Ngāti Toa. Te Rauparaha was taught warfare by his Ngāti Raukawa uncle, Hapekituarangi (Hape),³²⁵ and became his personal arms bearer. Upon the death of his father, Te Rauparaha became the leader of Ngāti Kimihia and Ngāti Huia (following the death of Hape).

[247] These relationships were important in the events that took place on the Kapiti Coast. Through his sister Waitohi, Te Rauparaha eventually persuaded his Ngāti Raukawa whānau from Mangatautari to follow him in a heke to settle in Kapiti, after the battle of Waiorua. In addition, Te Rauparaha had many close connections with the Taranaki iwi, Te Ātiawa. Te Pēhi Kupe³²⁶ and his brother Te Rangihīroa, hereditary chiefs of Ngāti Toa, both had Taranaki whakapapa. They were involved with Te Rauparaha in the planning and execution of the heke to Kapiti. Te Rangihīroa's daughter, Metapere Te Waipunahau, was a revered wahine rangatira of Ngāti Mutunga and Te Ātiawa.

³²⁵ Also referred to as Hape-ki-tūārangi: see the Ngāti Raukawa evidence section of the judgment.

³²⁶ Also referred to as Te Pēhi, Te Peehi Kupe, and Te Peehi.

[248] Another key whakapapa connection, which established an important early relationship between Ngāti Apa and Ngāti Toa, was the marriage of Te Pikinga and Te Rangihaeata, the son of Waitohi and nephew of Te Rauparaha. The marriage, accompanied by a slab of pounamu, constituted a peace arrangement between the two iwi. Te Pikinga had been captured after a battle at Turakina between Ngāti Toa and Ngāti Apa during Te Rauparaha's first foray to Kapiti as part of the taua of 1818–1820. The arrangement secured a peaceful crossing for the Ngāti Toa heke over the Ngāti Apa lands north of Kapiti.

[249] In 1821, in Te Heke Tahutahu-ahi, the whole of Ngāti Toa left their homeland in Kawhia (in the Waikato) to travel to Taranaki in the first stage of their migration south. From there, relying on their Taranaki whakapapa connections, Ngāti Toa travelled with some members of the Taranaki tribes (and possibly some Ngāti Raukawa) to Kapiti in Te Heke Tātaramoa in 1821–1822. Further heke followed, with the first of the Ngāti Raukawa heke to Kapiti, Te Heke Whirinui, occurring in 1826-1827.³²⁷

[250] Ms Miria Pomare, who gave cultural and whakapapa evidence for Ngāti Toa, is a kaitiaki of important taonga for the whānau and tribes of the ART Confederation. She explained the whakapapa of a number of taonga which she displayed for the Court. As she described their origin, she emphasised that these taonga were “instilled with the mana, the mauri, and the wairua of all those tūpuna who possessed them” and who were involved in the events and battles which formed the history and identity of the iwi. One example was a wahaika paraoa that had belonged to Te Rauparaha. Ms Pomare noted that the taonga reminded the iwi of the importance of their interrelationships and whanaungatanga, “not only as a matter of historical interest, but more importantly as a way forward in achieving goals and aspirations for the benefit of ... future generations”.

[251] Ms Pomare also spoke to the interwoven whakapapa of Te Ātiawa and Ngāti Toa by reference to a taonga that she was wearing — a tiki that had belonged to her ancestor Kahe Te Rau-o-te-Rangi. She described this as a physical and tangible

³²⁷ It is not known exactly how many heke were made in total. The approximate dates of and the iwi involved in those heke are listed in the Agreed Chronology at Attachment 1.

expression of Kahe’s personal mana as a high-ranking female leader. Kahe’s whakapapa demonstrates the inextricably close interconnections and relationships between Ngāti Toa and the Taranaki tribe Ngāti Mutunga, extending back generations to the eponymous ancestors of those tribes. Ms Pomare said the close familial nature of this relationship means that it is not possible to be a descendant of Ngāti Toa without also being a descendant of Ngāti Mutunga.

[252] Kahe is mentioned in the historical narrative of Ngāti Toa on a number of occasions, including most famously for her epic swim from Kapiti Island to the mainland at Te Uruhi, with her baby strapped on her back, to warn her father and close relations of the impending attack at Waiorua. Ms Pomare said that Kahe had migrated with Ngāti Toa from Kawhia as part of the “original heke” in 1822. She belonged to the Ngāti Te Maunu hapū of Ngāti Toa, which was closely linked to the Taranaki iwi, particularly Ngāti Mutunga. These close inter-relationships were the result of generations of inter-marriage extending back to Toa Rangatira, whose mother, Tuwhareiti, was the daughter of Mutunga — the eponymous ancestor of Ngāti Mutunga.

[253] Each of the three iwi that now make up the ART Confederation highlight the strong whanaungatanga and whakapapa links shared between them. However, the Ngāti Toa witnesses emphasise that the chiefs referred to above were first and foremost Ngāti Toa leaders.

Foundational take at 1840

[254] Professor Richard Boast KC gave evidence for Ngāti Toa, and produced an historical report entitled “Ngāti Toa Rangatira Takutai Moana: Rangitīkei to Whareroa” (the Boast report). He is an expert historian and lawyer who has undertaken work on several other research reports for Ngāti Toa and the other ART Confederation iwi. Due to the complex history of the region from 1820 to 1860 and the large amount of material, including that generated in Native Land Court investigations and in academic research, Boast said it was impossible to reach an authoritative interpretation as to “what really happened”. However, he presented a

detailed and carefully researched historical report which focussed on addressing the claim for CMT by Ngāti Toa.

[255] The Boast report noted that Ngāti Toa made the radical decision to abandon Kawhia and move to Kapiti after suffering several defeats. Careful planning went into the migration, and it was a hazardous and slow journey involving many “comings and goings, pauses, [and] shifts of direction”. Ngāti Toa were joined by some members of Te Ātiawa in Taranaki, although their exact numbers are unknown. The heke was given a friendly welcome by Ngāti Apa. Boast commented that, based on Ngāti Toa sources, some of the Te Ātiawa participants may have returned to Taranaki as the heke travelled south through Rangitīkei and the Manawatū. The migrating group then bifurcated, and some went further south to Pukerua Bay. Boast said that most sources gave the impression that the coastline was more or less deserted at that time, with Muaūpoko located mainly inland.

[256] The migrating group then settled around Waikanae within sight of Kapiti Island. Boast said that almost all the members of Te Ātiawa who were still with the group then returned to Taranaki. At some stage, a substantial number crossed to Kapiti Island, which at that time was deserted. Those who had remained at Waikanae were later attacked, and Te Pēhi’s children were killed. The attackers ran off after the group on Kapiti Island were alerted and returned to the mainland. Te Pēhi then joined an English whaling vessel and went to England. He was still absent at the time of the battle of Waiorua.

[257] The battle of Waiorua is generally agreed to have taken place in around 1824. The local iwi, including Muaūpoko and its allies, attacked Kapiti Island. The battle resulted in a significant defeat of the attackers by those on the island. Boast described Waiorua as “Ngāti Toa’s own victory”. He said that while there may have been some Te Ātiawa on the island at the time of the battle, they were few in number, as most had returned to Taranaki.

[258] The news of the victory at Waiorua encouraged other groups to come and settle in the area, resulting in the series of heke of the Taranaki tribes, as well as Ngāti Raukawa, led by their great chiefs Te Whatanui (who was a relative of

Te Rauparaha) and Te Ahu Karamu. Ngāti Raukawa had earlier refused to follow Ngāti Toa to Kapiti. Boast noted that while there may have been a number of reasons for their change of mind, Ngāti Toa sources suggest that Ngāti Raukawa came only when invited by the Ngāti Toa wahine rangatira Waitohi.

[259] Much of the Ngāti Toa story then played out outside of the Kapiti area in the South Island, where Ngāti Toa and its allies fought battles and acquired resources. Boast suggests that at that stage, some equilibrium had been reached in the Kapiti region, with Ngāti Toa based around Porirua harbour and on Kapiti Island. A very substantial group of Ngāti Raukawa was established around Ōtaki and Ōhau, and Te Ātiawa were based at Waikanae.

[260] While the iwi narratives vary in detail, there is no significant contest about the general historical events between the respective ART iwi, except that Te Ātiawa say they had a much greater presence and role in the first heke and the battle of Waiorua than Ngāti Toa might acknowledge.

[261] The kōrero of the late Ngarongo Iwikatea Nicholson (a kaumatua of both Ngāti Toa and Ngāti Raukawa), as recounted by Ms Pomare, was that all of the ART iwi who had arrived with the various heke accepted that their customary rights to the whenua were founded on the Ngāti Toa take raupatu. He said:

The custom (tikanga) or right of Raupatu was established completely by Ngāti Toa and their kinsmen of Ngāti Koata and Ngāti Rarua, Ngāti Raukawa (there were some present with the initial arrivals) and their Taranaki whanau (relations), forcefully suppressing any resistance. Later arrivals of their Raukawa and Taranaki whanau (relations) helped to support, to fight and maintain the Raupatu custom (tikanga). They all have Raupatu right it is for that collective to reach consensus as to the extent each of them should be entitled and what the entitlement is to be. They must as a matter of custom (tikanga) recognise one another's contribution in having achieved the goal.

[262] Ms Pomare said that while Te Rauparaha showed generosity in recognising his Te Ātiawa and Ngāti Raukawa allies though a *tuku whenua*, this was also commensurate with his obligations. Furthermore, Mr Ropata noted that Ngāti Toa had left their home in Kawhia as a “one-way trip”, bringing all their people and their *taniwha* with them. When they arrived, they took the *mana* of the land and the *moana* in Kapiti.

[263] Waitohi settled the boundaries between Ngāti Raukawa, Te Ātiawa, and Ngāti Toa following the battle of Waiorua. These arrangements were later altered, requiring Te Ātiawa to move from Ōtaki after the land was re-allocated to Ngāti Raukawa. This was following the battles of the early 1830s at and around Haowhenua, near the Ōtaki River mouth, involving Te Ātiawa and Ngāti Raukawa. The conflict was precipitated by the arrival of the largest Te Ātiawa migration, known as the “Ngamotu” group, which caused resources in the area to become stretched.

[264] The *tuku whenua* from Ngāti Toa to Te Ātiawa and Ngāti Raukawa was described in Ms Pomare’s evidence as follows:³²⁸

...when the heke arrived at Waikanae in 1822 there was a division and allocation of land amongst the leading chiefs of the key hapū and this *tuku whenua* was made by Waitohi. My understanding is that the *tuku* included an allocation of land from Waitohu Stream near Ōtaki and extended to Waikanae and that that allocation was given to Ngāti Kimihia the section of Ngāti Toa that was most closely related to Ngāti Raukawa and Ngāti Huia and the land from Waikanae to Paekākāriki was allocated to Te Peehi and Te Rangihiroa and their relatives of Ngāti Te Maunu.

Te Peehi was said to have then invited the Taranaki iwi, including his Ngāti Mutunga whanaunga, to settle with Ngāti Te Maunu at Waikanae. Amongst those who took up the invitation were my own tūpuna from both Ngāti Toa and Ngāti Mutunga, including Te Matoha and Hautonga (Kahe’s parents), and Pakaiahi and Manukonga (Pomare Ngatata’s uncle and grandfather).

After the battle of Haowhenua, Waitohi was also responsible for the reallocation of the land and the restipulating of boundaries. Following this battle there was a rearrangement of tribal boundaries which required Waitohi’s intervention to settle disputes. She had considerable influence due to her whakapapa links and personal connections to the chiefly lines of both Ngāti Toa and Ngāti Raukawa, and she was a formidable leader in her own right. It was at her request, and with the agreement of Te Rangihiroa and the other Rangatira, that the Taranaki iwi moved south of the Kukutauaki Stream to Waikanae. Ngāti Raukawa agreed to occupy the land from the northern bank of Kukutauaki Stream as far as the Manawatu River. Ngāti Toa remained mainly on Kapiti Island and also later occupied Mana Island, Pukerua Bay, Porirua and up the mainland alongside Kapiti Island to Waikanae.

[265] After Haowhenua, there was a further and final battle between Te Ātiawa and Ngāti Raukawa at Kūititanga in 1839, following Waitohi’s death. While Ngāti Toa did not participate in those battles, some members of the iwi were more sympathetic to Te Ātiawa, whereas others favoured Ngāti Raukawa. Boast noted that the outcome of

³²⁸ The exact dates of the various battles and heke vary from witness to witness.

those battles is highly debated, and it is difficult to determine who was the victor. However, he considered it safe to say that it was a draw, the honours being “more or less even” between Te Ātiawa and Ngāti Raukawa.

[266] Many members of Te Ātiawa left Waikanae in 1848 to return to their home in Taranaki. The iwi left its settlements largely abandoned, but a small group led by Metapere Te Waipunahau remained to act as caretakers over the lands for Te Ātiawa.

[267] The Boast report refers to the Native Land Court investigation into Kapiti Island. The claimants for Kapiti were almost entirely from Ngāti Toa — the only other claimant group was Ngāti Whakitere, a group affiliated to Ngāti Raukawa. The Native Land Court partitioned the island at the same time it investigated it, with all partitions being awarded to people affiliated to Ngāti Toa, aside from a small allocation to Ngāti Whakitere. Boast pointed out that Te Ātiawa were not involved in that case.

[268] It is common ground that the customary rights of Ngāti Toa in the application area date back to their arrival under the primary leadership of Te Rauparaha. They point to the take raupatu as the first disruption to the pre-existing customary rights in the application area. All the Hekenga iwi to some degree point to their foundational take being based on conquest achieved at the battle at Waiorua and consequent raupatu. I therefore review the expert tikanga evidence on that take.

Take raupatu

[269] The tikanga concepts of raupatu and ringa kaha are critical, according to the pūkenga, because they provide the basis for “legitimizing” the mana whenua of the Hekenga iwi.³²⁹ While these ancient tikanga concepts continued to apply in the decades preceding 1840, the effects of the social, economic, and political upheaval at that time required Māori communities to adapt, while still maintaining their group’s cultural uniqueness and fundamental tikanga values.³³⁰ The Native Land Court

³²⁹ Pukenga report, above n 44, at [489].

³³⁰ At [421].

hearings also distorted tikanga concepts, institutions, and processes, and relied upon European concepts of conquest.³³¹

[270] The pūkenga note that, at tikanga, the situation of a defeated tangata whenua iwi and their claim on the land by virtue of existing rights was not straightforward, particularly in the present application area. In relation to a claim of take raupatu and ringa kaha, military action and “conquest” were generally insufficient to extinguish all rights to the land by the tangata whenua. Further steps had to be taken to establish the land as “home” to the newcomers.³³² The new group was required to occupy the land and takutai moana, thus demonstrating ahi kā, while also establishing kāinga, structures and organisations.³³³ Over time, the rohe would be marked out in some way, urupā established, and tūahu (shrines) placed in appropriate locations.³³⁴ The group would embrace their new environment by taking charge and placing their cultural imprint upon it, including by renaming or giving names to significant features of the land and takutai moana.³³⁵ Neighbours would validate the newcomers’ presence. Alliances would also be established with neighbours and distant iwi, allowing military support to be exchanged.³³⁶ The rohe would provide sufficient sustenance for the people over time, and they would be able to successfully defend it (with the help of their allies).³³⁷

[271] Other relevant factors which the pūkenga point to include whether the newcomers were part of the Māori nation and signed the Treaty of Waitangi, whether they entered the historical record through the Native Land Court and other national institutions, and whether the iwi remain in the area today.³³⁸ The pūkenga cite the comments of rangatira and anthropologist Te Rangihīroa (Sir Peter Buck) of Ngāti Toa and Ngāti Mutunga, that the ownership rights of a defeated people were not extinguished as long as they remained on the land to keep the fires alight.³³⁹ However, when the conquerors occupied the territory for some generations, the title by conquest

³³¹ At [445].

³³² At [284(a)].

³³³ At [284(b)].

³³⁴ At [284(c)–(d)].

³³⁵ At [284(e)–(f)].

³³⁶ At [284(h)].

³³⁷ At [284(i)–(j)].

³³⁸ At [284(l)–(n)].

³³⁹ At [324].

became historical and the functioning title became one of native ancestral inheritance (take tūpuna).³⁴⁰

[272] Conquered groups could, however, retain their mana in various ways. The pūkenga, citing academic Dr Angela Ballara and anthropologist Raymond Firth, note that when a group was defeated, they could restore their mana through longstanding continued occupation, whatever the circumstances of that occupation had originally been.³⁴¹

[273] The pūkenga consider that the notions of raupatu and ringa kaha were less prominent in determining mana whenua interests than some had claimed in the Native Land Court hearings and in contemporary times.³⁴² They say claims based on ancestry are the strongest, and while raupatu claims are legitimate, they must be followed by continuous occupation.³⁴³

[274] The pūkenga acknowledge the basis of the take raupatu claim according to the evidence of Ngāti Toa witnesses. They note Ms Pomare’s evidence that take raupatu was the foundational or underpinning right, and Ngāti Toa’s leadership was acknowledged by other iwi in the area. The claims of Ngāti Raukawa and Te Ātiawa rest on that initial foundation, by virtue of their support of Ngāti Toa in forcefully suppressing any resistance and fighting to maintain the raupatu. However, as Iwikatea Nicholson observed, it was for that collective to determine the nature and extent of the entitlement of each iwi in light of their contribution and in accordance with tikanga.

[275] The pūkenga refer to Ms Pomare’s evidence that “occupation” did not require actual physical occupation, rather, ahi kā could be maintained “under the influence and mana of the conquering group”. She emphasised that the layered and overlapping rights and interests reflected the way in which the tuku whenua was allocated. Ms Pomare concluded that Ngāti Toa’s ahi kā was therefore established and had never been displaced in their areas of interest.

³⁴⁰ At [325].

³⁴¹ At [502]–[507].

³⁴² At [512].

³⁴³ At [514].

[276] That evidence was supported by the narratives of the other witnesses for the ART Confederation iwi, including Ngāti Kauwhata, who came to the area with Ngāti Raukawa at Te Rapauraha's invitation.³⁴⁴ Ngāti Kauwhata established themselves inland at the Oroua River basin, where they remain today.³⁴⁵

[277] The Ngāti Toa kōrero is that the Muaūpoko people were virtually extinguished. Ms Pomare said that at that time it was very dangerous for Muaūpoko to venture onto the coast in particular areas such as Waikanae. She said Muaūpoko existed only at a subsistence level, and were not exercising customary rights, even at the Hōkio Stream. From her perspective, they had lost any rights they had through the raupatu and had no ability to regain or re-establish those rights.

Evidence of tikanga indicia

[278] Tā Matiu, who held the position of executive director of Te Rūnanga o Toa Rangatira from its inception in 1989 until he retired in 2020, pointed out that the strong position of Ngāti Toa was based on military victories, or take raupatu, and relationships with other tribal groups, as well as trade with Europeans. He noted:

... Ngāti Toa Rangatira consider that by the mid-1830s they held a powerful and unique strategic position in the Cook Strait region, which was largely founded on their occupation of key locations on both sides of Cook Strait (particularly Kapiti Island); the tremendous mana of Te Rauparaha; a complex network of customary relationships with other iwi, and the virtual monopoly Ngāti Toa Rangatira held over access to European goods and coastal trade in the Cook Strait district.

[279] Kapiti Island was a centre for trade. Whaling stations were established on the island, with the last major station continuing to operate until 1844 at Waiorua. There was evidence of Pākehā whalers marrying Ngāti Toa tūpuna. For instance, Kahe te Rau-o-te-Rangi married John Nicoll, a whaler on the island, and they later established a traveller's inn at Paekākāriki. With the demise of the whaling industry, Ngāti Toa continued to trade in other resources, including flax, timber, and fish. Kapiti Island was referred to by Ngāti Toa witnesses as the centre of Te Rauparaha's maritime and economic empire.

³⁴⁴ At [305].

³⁴⁵ At [307].

[280] A number of notable Ngāti Toa rangatira signed Te Tiriti o Waitangi, including Te Rauparaha (who did so twice) and Te Rangihacata. Kahe Te Rau-o-te-Rangi was one of the few women who signed Te Tiriti. Ms Pomare noted that while Kahe could have signed Te Tiriti on Kapiti Island “along with her Te Ātiawa and Ngāti Toa whanaunga by virtue of her whakapapa”, she instead chose to sign at Port Nicholson in Wellington on 29 April 1840. Nevertheless, Kahe left a continuing legacy on Kapiti Island, as there is still land set aside for her descendants at the northern end of Waiorua. Ms Pomare said her whānau were among a very small number of Ngāti Toa to still have land on the island today.

[281] Dr Parai gave evidence of Te Rauparaha charging levies on ships anchoring in the area, trading with Pākehā for guns, and using Te Moana o Raukawa to trade with Europeans. Mr Potini further told of Ngāti Toa using sea routes to maintain tribal connections. Waka were used for transport and trade from the island to the Kapiti Coast, with people often travelling far inland from the river mouths on the coast.

[282] Following the signing of Treaty, when Kapiti Island’s value as a fortress diminished, Ngāti Toa remained on the island. Of note is the report that Te Rangihīroa and his family continued to live at Waiorua. Their continuing presence would later be used as evidence in tribal disputes over land settled through the Native Land Court, which historian Chris McLean refers to as “a new venue for old conflicts”.³⁴⁶

[283] Moving to the present day, it is not in dispute that many of the relevant tikanga indicia suggest that Ngāti Toa has a strong, ongoing, holistic relationship with Kapiti Island and parts of the mainland coast. The evidence adduced satisfies the pūkenga that, under tikanga, Ngāti Toa have demonstrated appropriate whakapapa, wairuatanga, mana, observance of tapu, maintenance of utu, recognition of mauri, respect for hau, involvement in distribution and sharing of prosperity, rangatiratanga, manaakitanga, aroha, and kaitiakitanga in the area. They note that an important aspect in demonstrating that a group is presently “holding” an application area in accordance

³⁴⁶ Chris MacLean *Kapiti* (Whitcombe Press, Wellington, 1999) at 151.

with tikanga is that members of the group are actively abiding by the rohe moana and kawa protocols which they had listed.³⁴⁷

[284] Ngāti Toa witnesses gave evidence of their maintenance of customary knowledge and rituals in relation to the takutai moana. For instance, Mr Potini, who has spent all his life fishing and diving in the rohe, said he was taught how to fish according to the maramataka, a calendar which regulates fishing in accordance with the moon, the seasons, and the habits of the fisheries. This had been passed down through numerous generations. He was taught about the currents and techniques for gathering shellfish and eels, as well as the best places to fish for certain species. Similarly, Mr Elkington, who fishes both customarily and through his charter business, said his father had taught him to navigate the waters relying solely on natural forces and generational mātauranga. He itemised the species of fish they would catch and the appropriate conditions for fishing around Kapiti Island.

[285] Mr Solomon gave similar evidence in regard to fishing practices. He referred to the proper grounds located in the deep sea, about 12–15 miles out. In addition, he noted that their “old people” would talk to others about not eating kaimoana on the beach. Other witnesses spoke of returning the first catch, reciting karakia before going to sea, taking only what was needed, and not wasting the kaimoana, as well as other kawa.

[286] The witnesses also gave evidence of their knowledge of taniwha residing in the application area, as well as the handing down of waiata and various demonstrations of manaakitanga. The tangata kaitiaki for the iwi, Mr Elkington, who was appointed to issue customary fishing permits, said he observed tikanga practices and exhibited manaakitanga through that process. Ngāti Toa has developed guidelines for the issuing of those permits. These note, among other things, that the amounts of certain species which can be taken may vary depending on the state of stocks, purpose of authorisation, and area of gathering.

[287] Evidence was also given of Ngāti Toa’s demonstration of kaitiakitanga through protecting the environment and the sustainability of fisheries. In particular, Ngāti Toa

³⁴⁷ Pūkenga report, above n 44, at [166].

have developed relationships to actively manage their rohe. They have been involved in: the Kapiti Marine Reserve; fighting poaching, illegal fishing, and overfishing; managing commercial fisheries; managing customary fishing; coastal development; and engaging with the local authority in regard to resource management.

[288] A related issue was the imposition of rāhui. Mr Solomon gave the example of a rāhui placed on gathering kaimoana and fishing when someone had died in the area. He also said there were some places where rāhui had been set down that still had not been lifted, such as at Ship Cove (which is outside the application area in Te Tau Ihu). Rāhui are placed in recognition of the tikanga related to the mauri or life source of all things and, as the pūkenga identified, are an important manifestation of wairuatanga, rangatiratanga, mana tangata, tapu, noa, manaakitanga, mauri, and kaitiakitanga.

[289] Witnesses also referred to the list of sites of significance to Ngāti Toa, including sites from the Waikanae River south to the Whareroa Stream (such as pā sites), as well as a number of sites on Kapiti Island. As part of the regional planning process, sites of significance to Te Rūnanga o Toa Rangatira are identified in Schedule C of the Natural Resources Plan for the Greater Wellington area. These include a number of wahi tapū and historical sites. Mr Faulkner noted that the sites of significance relevant to this hearing area are located at Tikotu Stream, Wainui Stream, Whareroa, and Te Uruhi. On Kapiti Island, the sites include Wharekohu, which was a pā where rangatira of Ngāti Toa, including Nopera Te Ngiha, resided. It is one of the three main pā on Kapiti and is located at the southern end of the island. It is the location of burial caves which are regarded as highly tapu by Ngāti Toa. The caves also hold significance for other iwi whose tūpuna lie there, including Muaūpoko.

[290] Ngāti Toa point to the fact that they reached a Treaty settlement agreement with the Crown in 2009, which included the return and gift back of most of Kapiti Island. Section 9 of the Ngati Toa Rangatira Claims Settlement Act 2014 sets out the Crown's acknowledgments in reaching that settlement, as relevant to Kapiti Island:

9 Text of acknowledgements

The text of the acknowledgements set out in the deed of settlement is as follows:

...

10 The Crown acknowledges that—

- (a) at 1895 Kapiti Island was one of the last remaining areas of Ngati Toa Rangatira land:
- (b) Ngati Toa Rangatira strongly objected to legislation promoted by the Crown to acquire Kapiti Island for a nature reserve:
- (c) the Kapiti Island Public Reserve Act 1897 gave the Crown a monopoly over purchasing land on Kapiti Island:
- (d) between 1897 and 1911 the Crown purchased the individual interests of the majority of the Ngati Toa Rangatira owners of Kapiti Island.

The Crown acknowledges that the loss of ownership of Kapiti Island has remained a source of grievance and sorrow for Ngati Toa Rangatira.

...

[291] Other recognitions include special association with the burial caves at Wharekohu Bay, and of Ngāti Toa's role as kaitiaki over the coastal marine area, including the waters around Kapiti. An overlay classification called Ngā Paihau was created over Kapiti Island, which directs the Minister of Conservation to prevent harm to or the diminishing of Ngāti Toa values by following certain protection principles. The redress under the settlement agreement includes the establishment of the Kapiti Island Strategic Advisory Committee (KISAC), which exercises functions over Department of Conservation (DOC) land — which covers most of the island. Ngāti Toa have the power to appoint two out of six of the members of KISAC, as well as the chairperson.³⁴⁸ A new conservation management plan for the island has been jointly approved by KISAC and the Wellington Conservation Board. In addition, the settlement agreement provides that the trustee of Toa Rangatira Trust will be made the administering body of the Queen Elizabeth Park campground site at Whareroa.³⁴⁹ Ngāti Toa said they had not sought cultural redress on the coast north of Kapiti Island nor at Te Uruhi, in order to leave cultural redress available for Te Ātiawa and Ngāti Raukawa in those areas.

³⁴⁸ Ngati Toa Rangatira Claims Settlement Act 2014, s 122.

³⁴⁹ Section 158.

[292] Ngāti Toa’s evidence included an overview of their present-day activities. Ngāti Toa established Kapiti Tours, a ferry service between Kapiti Island and Te Uruhi, which has operated since about the 1990s. Mr Elkington also gave evidence of his charter business fishing around the Ngāti Toa rohe.

[293] Ngāti Toa have two extant marae, Takapūwāhia (in Porirua) and Hongoeka (to the south of Whareroa), neither of which are in the hearing area. Mr Faulkner provided evidence on the role and purpose of Te Rūnanga o Toa Rangatira, which is active in kaitiaki activities and is responsible for leading the iwi, including in its Takutai Moana Act applications. Its objectives include “revitalising [Ngāti Toa’s] culture and identity, growing a sustainable economic base, nurturing a resilient environment, and building a strong organisation”.

[294] Te Rūnanga o Toa Rangatira has relationships with a number of local authorities, and has a long-standing partnership, together with Te Ātiawa,³⁵⁰ with Kāpiti Coast District Council dating back to 1994. It is also a nominated iwi organisation under s 35A of the RMA. In that role, Te Rūnanga o Toa Rangatira reviews and provides comment on resource consent applications from the Kāpiti Coast District Council, as well as actively monitoring and submitting on relevant plan changes, developing environmental policy, and working alongside iwi members to act as kaitiaki and engage in relevant matters.³⁵¹ Ngāti Toa is also recognised as mana whenua by the Greater Wellington Regional Council, and Ngāti Toa sites of significance are included in the Council’s Natural Resources Plan. On the mainland these are largely outside the hearing area to the south, however they do include the Whareroa shoreline and the Whareroa Stream, as well as at Tikotu Stream mouth (Te Uruhi lagoon).

³⁵⁰ Recorded in a Memorandum of Partnership signed in December 2017 with Te Runanga o Ngāti Toa Rangatira Incorporated, Te Ati Awa Ki Whakarongotai Charitable Trust, and Nga Hapū o Otaki.

³⁵¹ The Whaitua Kāpiti Committee of the Greater Wellington Regional Council includes one representative from Ngāti Toa, two from Ngā Hapū o Ōtaki and two from Te Ātiawa. It advises on the freshwater governance over the area from Paekākāriki south of the hearing area to Ōtaki in the north. The terms of reference record that the iwi represented in that group have mana whenua status in the area. The Committee also has representatives from the community as well as the council.

[295] Mr Faulkner noted that methods had been established to facilitate the processing of consents and ensure appropriate consultation, which would at times involve contacting ART Confederation members and other iwi. A practical example of this was given by Mr Potini, who recounted a tika process involving a meeting with Mr Dean Wilson of Muaūpoko concerning some koiwi found at the Paekākāriki Boat Club redevelopment. At that meeting, Mr Wilson deferred to Mr Potini regarding what should be done. Mr Potini then invited some members of Ngāti Toa who had married into Muaūpoko to perform karakia and reinter the koiwi.

[296] Mr Faulkner said that Te Rūnanga o Toa Rangatira worked closely with other members of the ART Confederation. He referred to several joint initiatives including the ART Rongoā Collective's August 2022 commitment to returning and restoring rongoā back into Queen Elizabeth Park (at Whareroa). The aim was to bring Whareroa back to its original Pataka status, including the recognition of its significance as a rongoā destination. Mr Faulkner noted that the collective engaged with taiao management of Te Rūnanga and Te Ātiawa in an advisory capacity. They would also act as primary kaitiaki/kaititiro to the needs of the whenua, ngā ara and puna wai, as well as managing the various human relationships onsite.

[297] The mana of Ngāti Toa was acknowledged not only by the ART Confederation iwi but also by others. For instance, Mr Wilson of Muaūpoko said he recognised the mana of Ngāti Toa on Kapiti Island, and accepted that after the battle of Waiorua Ngāti Toa established ahi kā on the island.

[298] Ngāti Toa, in their map filed in closing submissions, indicate that their exclusive area is to the south of the Wharemauku Stream, and the area from Wharemauku to the Waikanae River is claimed on a shared basis with Te Ātiawa. However, Ngāti Toa put forward little evidence to support their continued control over the area north of Whareroa. The focus of their presence is to the south of Whareroa, where their marae are located — Hongoeka at Plimmerton and Takapūwāhiā at Porirua — although they have interests at Whareroa.

[299] As far as Ngāti Toa is concerned, its focus in the hearing was on its contest with Te Ātiawa. I now turn to the application for CMT by Te Ātiawa.

TE ĀTIAWA KI WHAKARONGOTAI

[300] Te Ātiawa apply for recognition orders for CMT from the coastal boundary of Kukutauaki to Whareroa, to the seaward boundary of 12 nautical miles from shore (including Kapiti Island). In February 2024, Te Ātiawa and Ngāti Raukawa agreed to an “exclusive shared area” to the north of the boundary at Kukutauaki, and sought to amend their applications to reflect this. No objection was made to the amendment application, which amounted to a minor adjustment of the respective applications reflecting the evidence. Leave is granted for the amendment.

Whakapapa

[301] Mr Benjamin Ngaia is the chairperson of the Takamore Trust. He is of Manukorihi and Otaraua descent — matua hapū which are part of a collective lineage forming the iwi Te Ātiawa. He has lived most of his life amongst his people in Paraparaumu and Waikanae. Mr Ngaia has expertise in mātauranga Māori, with specialised knowledge and experience pertaining to Te Ātiawa and Taranaki Whānui ki te Upoko-o-te-Ika (the collective of Taranaki tribes that settled the Wellington region). He has been active in iwi matters, having held several roles relating to cultural and historical representation and the revitalisation of te reo Māori. This has included acting as a kaikōrero for Whakarongotai marae at Waikanae. He has also had considerable involvement on behalf of his iwi in resource management, local government and related matters, and has high standing in the iwi.

[302] Mr Ngaia described the origins of Te Ātiawa, which has a strong affiliation to northern Taranaki iwi. He explained the complex whakapapa connections and relationships involved, including a pact made by the tūpuna of the four ariki of the Tokomaru waka, which led to an alliance of northern Taranaki tribes known as “Te Ātiawa Nui Tonu”. This alliance was important in the migration of his northern Taranaki iwi to the areas of the coast relevant to this application in the 1820s and 1830s, and in the later relationships and reciprocal arrangements and dealings between Te Ātiawa, Ngāti Toa, and Ngāti Raukawa in the area. Mr Ngaia noted that Te Ātiawa

represented the Taranaki tribes who came to Kapiti in the heke, including specifically Ngāti Tama and Ngāti Mutunga.³⁵²

[303] Mr André Baker, a kaumatua and cultural adviser who gave evidence for Te Ātiawa, described his whakapapa as a descendant of takawaenga marriages. His grandmother, Hauā Kiriona, was a direct descendant of Te Maunu, the senior tuakana to Kimihia (Te Rauparaha's grandmother). His grandfather Mātenga also had senior whakapapa from Te Akamapuhia and her youngest sibling Te Haunga. He noted that his great-great-grandfather Te Kākākura Wi Parata, the son of Metapere Waipunahau, had whakapapa to Ngāti Mutunga and Ngāti Hinetuhi. Te Pēhi Kupe and Te Rangihīroa also shared whakapapa to Te Ātiawa. Additionally, Mr Baker has whakapapa to Ngāti Raukawa through his great-great-grandmother, Unaiki Whareangi Pukehi. Mr Baker said, "[w]hen you talk about Te Pēhi Kupe, Te Rangihīroa, Pikauterangi, you're talking about me. You're about those koroua in this room." He said this whakapapa created "an unconditional responsibility for maintaining your rangatiratanga and your kaitiakitanga, and for Te Ātiawa ki Whakarongotai, those Ngāti Te Maunu descendants I am satisfied, have continued to exercise that". He further stated:

...there's no question in my mind that we clearly define our unique whakapapa but most importantly for those of us that have these whakapapa lines that inherited responsibility for respecting the mana of all of those Taranaki iwi, matua hapū, and those matua hapū of Toa Rangatira.

[304] Mr Baker further explained his whakapapa to Metapere Waipunahau, who shared Te Ātiawa whakapapa through both of her parents and became one of the primary Te Ātiawa rangatira of her time. In addition, Metapere Waipunahau is a recognised rangatira of Ngāti Toa. Mr Baker explained that Te Peehi, Te Hiko-o-te-rangi, Te Rangihīroa and Metapere Te Waipunahau were of one whānau and shared the same mana. Their strong whakapapa connections across Ngāti Mutunga, Ngāti Hinetuhi, Ngāti Kaitangata, and Te Ātiawa were especially instrumental in the process of tuku whenua to their Taranaki relations, who represented the senior northern Taranaki leadership of the time. Mr Baker said that when Te Rauparaha's tuākana, Te Peehi Kupe, was killed at Kaiapoi Pā by Ngāi Tahu, his

³⁵² No issue was taken concerning representation.

mana and interests were inherited by his younger brother, Te Rangihīroa. Te Peehi Kupe did not have children that were active at the time, and Te Rangihīroa's mana and interests were inherited by Metapere Te Waipunahau.

[305] Mr John Barrett gave evidence of the iwi's present-day relationship with Kapiti Island. He is of Te Ātiawa, Ngāti Toa, and Ngāti Raukawa descent, and has lived on Kapiti Island for much of his life. His whakapapa is a further example of the interwoven links between Ngāti Toa and Te Ātiawa. He recounted his whakapapa on his mother's side as follows:

Toarangatira = Parehounuku
 |
 Te Maunu = Kahutaiki
 |
 Pikauterangi = Te Kahurangi
 |
 Toitoi = Waipunahau
 |
 Te Rangihīroa = Pohe
 |
 Metapere Waipunahau (1793–1853) = George Stubbs
 |
 Te Kākākura Wi Parata = Unaiki
 |
 Utauta = Hona Webber
 |
 Pikitia

Foundational take at 1840

[306] Mr Ngaia outlined the migration of his iwi to the Kapiti and Wellington region. In summary, during the 1820s and 1830s, Taranaki was experiencing incursions by northern iwi, primarily Waikato and Ngāti Maniapoto. The continued threat of violence and conflict resulted in many Te Ātiawa whānau and hapū migrating alongside their Ngāti Toa kin to Kapiti, Wellington, and the top of the South Island. This occurred over a series of migrations south in response to various events over several decades.

[307] The Taranaki iwi migrations included Te Heke Nihoputa (1824–25), Tama Te Uaua (1832), Te Heke Paukena (1833), and Te Heke Hauhauā (1834), as well some presence in Te Heke Tahutahu-ahi with Ngāti Toa (1821–22). Boast acknowledged that Te Heke Tama-te-Uaua was a “large migration”, citing

Angela Ballara in estimating that as many as 2,000 from northern Taranaki made the journey south.³⁵³

[308] Mr Ngaia said the heke south from Kawhia to Taranaki began with Ngāti Toa under the leadership of rangatira Te Pēhi Kupe, Te Rangihīroa, Tungia, Te Rauparaha, and Te Rangihaeata. The decision to journey further south to Wellington and Kapiti was influenced by Te Pēhi, Te Rangihīroa and Te Rauparaha of Ngāti Toa, Takaratai of Te Ātiawa, and Te Puoho-o-te-Rangi and Te Rangitakaroro of Ngāti Tama. Mr Ngaia noted that these initial heke were known collectively as ‘Te Heke Mai Raro’.

[309] Mr Ngaia said his Te Ātiawa ancestors played a formative role in the battle of Waiorua. Therefore, he said any rights that Ngāti Toa asserted based on raupatu were rights that his iwi also held as participants and victors in that battle. The long-term establishment of Te Ātiawa in the relevant area was also based on a *tuku whenua* by Ngāti Toa to Te Ātiawa. Mr Ngaia described a *tuku whenua* as a customary transfer of land that creates a relationship between the donor and recipient based on *mana* and shared historical events. Generally, it was made by a leading rangatira to another leading rangatira. He said that it was not some kind of lease agreement, nor an agreement for sharing *whenua* in perpetuity. It was not given for nothing, but rather in recognition of a debt owed by Ngāti Toa.

[310] Mr Ngaia explained that Te Rauparaha’s *mana* required him to recognise the role that Te Ātiawa ancestors played in the battle at Waiorua. Therefore, the *tuku whenua* was not merely a gesture of goodwill or some kind of privilege extended by Ngāti Toa to Te Ātiawa. Rather, it was an obligation incumbent upon Te Rauparaha as a rangatira to recognise Te Ātiawa’s role in securing raupatu from the original inhabitants, and to uphold the close kinship ties that Te Ātiawa shared with Ngāti Toa. Mr Ngaia said the *tuku whenua* was then cemented by subsequent settlement, occupation and use of the land and waterways by Te Ātiawa ancestors and their present descendants.

³⁵³ William Ernest Carter for Te Ātiawa estimated that some 4,000–5,000 northern Taranaki occupied the Ōtaki River mouth to Pukerua Bay by 1832.

[311] Mr Ngaia said the *tuku whenua*, which was supported by Te Peehi Kupe as a *rangatira* and *ariki* of both Ngāti Toa and Ngāti Mutunga, was an acknowledgment that the Taranaki tribes had provided territory as a safe haven for Ngāti Toa to recover for a sustained period of time following their *heke* from the Waikato. This enabled Ngāti Toa to prepare for their further migration south. Mr Ngaia said there were serious consequences for Te Ātiawa in doing so at a time when Ngāti Toa were refugees, as their enemies had followed them from the Waikato.

[312] Mr Ngaia rejected assertions by witnesses for Ngāti Toa that Te Ātiawa was not at the battle of Waiorua. In addition, while he agreed that the Taranaki *iwi* (or some of them) did move between the Kapiti region and their kin in northern Taranaki, he said that did not extinguish their *ahi kā* in their claimed *rohe*. He emphasised that the links and shared *whakapapa* were important and a respected part of his *iwi*'s relationship with Ngāti Toa. That is also why, for instance, when it came to the battle of Haowhenua, Te Peehi Kupe and Te Hiko o te Rangi supported Te Ātiawa.

[313] Dr Mahina-a-rangi Joy Baker is the daughter of Andre Baker. She has lived in Ōtaki for most of her life but has maintained consistent connections to Waikanae, and has grown up learning the culture and traditions of her *iwi*, Te Ātiawa. Dr Baker gave evidence of her *whakapapa* and of the *iwi* narratives she has learnt from *kaumatua*. She has qualifications and expertise in environment and resource management issues with a background in implementing *kaitiakitanga* for her *iwi*. She is presently the Managing Director and Principal Consultant of Te Kōnae Ltd, an environmental consultancy service which carries out substantial work for her *iwi* and others, including Ngā Hapū o Ōtaki.³⁵⁴ She said her shared *whakapapa* with all the Hekenga *iwi* enables her to work around shared boundaries and sites.

[314] Dr Baker recounted the history of the *iwi* and the important relationship it retains with Ngāti Toa and Ngāti Raukawa. She said the ties of *whakapapa* and events leading up to and including the various *heke* were critical to understanding the rights that Te Ātiawa now claimed. While all *iwi* within the ART Confederation played a role in ensuring their settlement and the maintenance of *mana whenua* and *mana*

³⁵⁴ Dr Baker provided two briefs of evidence, one on behalf of both Ngāti Raukawa ki te Tonga and Te Ātiawa, and one on behalf of Te Ātiawa only.

moana as ahi kā, the battle of Waiorua was the definitive moment. Following that take raupatu, Ngāti Toa proceeded to allocate land (take tuku) along the coast to rangatira and hapū of both Ngāti Raukawa and Te Ātiawa. Dr Baker said the mana moana and mana whenua of Te Ātiawa was acquired through this allocation and take tuku. It was then affirmed through ongoing defence of the territory and Te Ātiawa's settlement of the area, eventually establishing ahi kā.

[315] Dr Baker said that control of the whenua and the role of making important decisions, which is a critical ingredient of mana whenua, "solidified" in the hands of Te Ātiawa and Ngāti Toa after 1824. She said the battle of Waiorua was "a clear marker to say the Kurahaupō people could no longer have any influence over us".

[316] Drawing on the evidence of the key events described above, Mr Cameron for Te Ātiawa submits that their application for CMT is founded on take raupatu, ahi kā, whānau takawaenga (shared whakapapa), and ringa kaha. He contends that the source and timing of the tuku from Ngāti Toa is immaterial to Te Ātiawa's case, as all of the ART iwi acknowledge the existence of the tuku and the setting of the boundaries. That arrangement is an illustration of whānau takawaenga, or the exercise of kaitiakitanga by the observance of obligations inherent in the shared and common whakapapa amongst the ART Confederation.

[317] Mr Cameron submits that the original foundation for Te Ātiawa's claim was both take raupatu and a permanent tuku through the allocation by Waitohi, rather than one giving only temporary rights to resources in the area. He submits that this was commensurate with the strong support Te Ātiawa had given Ngāti Toa.³⁵⁵ He says that, at tikanga, the raupatu and the tuku from Ngāti Toa were key originating sources for the establishment of Te Ātiawa in the rohe following the expulsion of the Kurahaupō iwi, after which Te Ātiawa developed its ahi kā and ahi kā roa.

[318] The claim to ahi kā and ahi kā roa stems from the series of migrations by Te Ātiawa following Te Rauparaha's visit to Kapiti in the 1818–1820 taua, also known

³⁵⁵ The pūkenga note that a tuku could be permanent depending on context (generally only on occasions of great significance), but needed to be followed up by ahi kā to perpetuate permanency.

as an āmiowhenua expedition.³⁵⁶ Mr Cameron submits that the land had largely been cleared of the pre-1820 tangata whenua as a result of the battles and skirmishes of the mid-1820s, by the time the numerous Te Ātiawa immigrants settled in the rohe. In view of the numbers of people involved in the heke, he suggests numerous men would have been on the ground in Kapiti and presumably played “a major role in the fighting”.

[319] Te Ātiawa do not dispute that many northern Taranaki rangatira left for Waitara in 1848, however they say that the iwi maintained ahi kā by leaving caretakers in place. Boast acknowledges that “some Te Ati Awa people” did remain at Waikanae. Te Ātiawa claim that their rohe was secured under the mantle of Metapere Te Waipunahau. Their historical expert evidence, given by Mr Tony Walzl, was that somewhere between 66 to 300 people remained in the vicinity of Waikanae. The pūkenga note that the presence of Metapere Te Waipunahau demonstrates an ongoing association with the whenua, an expression of mana whenua, and the maintenance of ahi kā.

[320] Te Ātiawa say that they established mana whenua at the expense of Muaūpoko, who suffered a dramatic decline in numbers. The Muaūpoko historian Mr David Armstrong acknowledges that many Muaūpoko left the district following the events of the 1820s, and were described as “kōura māwhitiwhiti”, or “wandering crayfish”. Armstrong also confirmed that as many as 250 Muaūpoko went to the South Island under the leadership of Te Kotuku. Mr Bruce Stirling for Muaūpoko noted that this exodus removed a “significant element of the opposition” to the Hekenga iwi, who were able to make a number of areas “more secure”, including at Waikanae, where Te Ātiawa and other Taranaki iwi were present in greater numbers from 1824 onwards.

[321] Ms Pomare said that Waitohi made the tuku whenua to Te Ātiawa, but it was subject to the retention of “dominion” by Te Rauparaha. She said this dominance was within the context of “mutually reciprocal rights and obligations” that existed at the

³⁵⁶ Angela Ballara notes that “Amiowhenua means, literally, to go around or circle around the land/country”: Angela Ballara *Taua: ‘musket wars’, ‘land wars’ or tikanga?* (Penguin Books, Auckland, 2023) at 20.

time, and which still exist today. She referred to Te Rauparaha's "sovereignty over the sea" and his right "to exploit resources from anywhere along the Kāpiti Coast".³⁵⁷

[322] Te Ātiawa say the boundary at Kukutauaki was fixed as a result of their defence of their rohe in the battle of Kūititanga between Te Ātiawa and Ngāti Raukawa, in which Ngāti Toa did not participate. They assert that from at least 1840 they have held in accordance with tikanga and exclusively used and occupied the coastline from Whareroa to Kukutauaki. The mutual tikanga rights and obligations between Ngāti Toa and Te Ātiawa are complex and nuanced, as is illustrated by Ms Pomare's acknowledgement that Ngāti Toa would not these days expect to be consulted on a resource consent at Waikanae, but would expect to be consulted at Te Uruhi, as they retain a strong historic connection with that area. She noted that outside the specific areas of mutual significance, the kaitiakitanga obligations on both iwi would generally require Ngāti Toa to take more of a supporting role, rather than a "proactive ... lead in exercising those guardianship rights and responsibilities".

[323] The Te Ātiawa claim is also consistent with the historical evidence of Walzl. He referred to 1888 Native Land Court evidence given by Wi Hape Pakau that a Puketapu (Te Ātiawa) chief, Tamati Whakake, was said "by some" to have mana as far south as Whareroa pā. The source of this mana was through a gift from Ngāti Toa of the whole of that land, and in "subsequent time" the "mana was his own". Other evidence was given by Wi Hape Pakau that Puketapu had pre-eminence from Te Uruhi to Raumati South through other avenues.

[324] Based on this evidence, it is contended that Te Ātiawa have established the foundational take giving rise to their present mana whenua and mana moana over the rohe. This forms the basis for their CMT claim, along with the evidence in relation to the pūkenga's tikanga indicia referred to below.

³⁵⁷ Ms Pomare explained she had learnt this from her research on the oral history project for Ngāti Toa and in particular the testimony of Uncle Matuaiwi Solomon.

Evidence of tikanga indicia

Historical evidence

[325] Walzl provided evidence of the continuous presence of Te Ātiawa communities on the Kapiti Coast in a report entitled “Te Ātiawa ki Whakarongotai and the Takutai Moana”. His evidence was that from 1840, Te Ātiawa participated in the developing post-European economy, and were involved in cleaning flax, growing wheat, and running stock, in addition to continuing to use their traditional resources. The population on the mainland from 1849 until 1886 was focused in Tukurākau, an area located inland from the coast between the Waimea and Waikanae streams, close to a place called Kawewai, between the present-day Waikanae Beach community and Waikanae town. The urupā in the village became used more extensively after Te Ātiawa moved to the settlement.

[326] In 1850, the Māori population in Waikanae was 231, but Walzl noted that population figures for Māori in the Wellington district fluctuated due to long visits of friends and relatives from Taranaki. The Native Secretary Kemp, who produced the census, noted that very few huts had been erected in the village at that time “but material for a new Church of preparation”.³⁵⁸ The Secretary described the Te Ātiawa settlement at Whareroa, recording that it had a “[t]otal native population of 104”, and 10 canoes. He noted that while the pā was small, it was one of the most compact and perhaps in “better order” than any he had visited, and the cultivations were also in excellent order. He commented on the industriousness of the “little body of people”, noting that preparation of flax was done in their own manner. Other kāinga were also referred to, for instance, a settlement in Mataihuka about three miles north of Whareroa, which included Ngāti Toa and Te Ātiawa. He also noted there was a population of Te Ātiawa to the south of Whareroa at Paripari, living there with the consent of Ngāti Toa.

[327] The Walzl report indicates that there were other small coastal settlements at Te Uruhi and Arapawaiti pā sites, where Te Ātiawa had remained. In addition, when most of the population moved to Tukurākau following the exodus to Waitara in 1848,

³⁵⁸ Presumably this is a reference to preparation to build a new church.

some whānau remained at Kenakena Pā. A fortified pā was also established at Kaitoenga on the southern side of the Waikanae River. Walzl referred to other settlements established by hapū at various places in the rohe in the 1850s, as well as sheep farming and the growing of wheat in the area. He noted examples of customary fishing, records of disputes over the use of eel weirs, and cultivation of the land. Wiremu Te Kākākura Parata (Wi Parata) had an eel weir at Harakeke in the Kukutauaki area which had been passed down to him from his mother, Metapere Te Waipunahau, as well as one north of the Waikanae River.

[328] The Whakarongotai marae at Waikanae was established in 1850. The name was given by Wi Parata, who said it referred to listening to the voices of the tide — not only to the “wild waves”, but to “the tides of progress and advancement”. Mr Tutere Parata, who gave evidence for Te Ātiawa, grew up in a house next to the marae, which had been built in around 1900 by the Parata whānau.

[329] From the patchy demographic evidence available, it is suggested that there was a Māori population in the vicinity of 1000 persons in Waikanae during the 1860s. Walzl observed that while there was some depopulation in the 1870s due to the politically unstable environment caused by Crown actions in Taranaki, Te Ātiawa nevertheless maintained a core population in the Waikanae area. The population was also affected by high death rates due to sickness. By 1874, there was estimated to be under 100 persons living in the area. This was confirmed by the census of that year, which recorded that 70 Māori were residing in the area from Whareroa to Waikanae. By 1878, the number had reduced to 67.

[330] Nevertheless, various reports over that period indicate that a Te Ātiawa population remained in place. There were negotiations over plans for a railway, and local Māori agreed to give land for its development on the condition that all trains would stop at Waikanae. In the late 1880s and 1890s, many of the residents of Tukurakau relocated again to be beside the newly opened railway line, at what is now Waikanae township. This proximity to the railway lines, according to Wi Parata, would benefit the people by enabling them to transport their stock. The marae was hauled to the new location around the same time, to host the manuhiri who were using the train and bus service to travel to Wellington and other areas. Māori also leased

land to Europeans who began arriving in the district. A school was established in 1895 on land leased to the Education Board by Wi Parata. In 1896, of a total of 39 pupils, 16 were Māori, and by the end of 1898 there were 112 pupils, of whom 23 were Māori. The church was also moved to the township in 1898. Wi Parata, who had taken sole title to the large Ngarara West C41 block, envisaged “a commercial and residential centre around the railway line and station with clearly defined spaces for Te Ātiawa/Ngāti Awa ki Kapiti and European communities”.

[331] Walzl noted that following the loss of the whaling and flax industries, Te Ātiawa whānau who remained on Kapiti Island (including Mr Barrett’s whānau) became engaged in farming activity, along with some Pākehā who were able to lease and, in some instances, purchase certain areas on the island. Mr Barrett described how his tupuna, Wi Parata and his brother Hemi Matenga, were among those to become involved at Waiorua, and they maintained a farm there from the 1880s to the early 1900s. Wi Parata built a small whare at Waiorua after the loss of his parliamentary seat in 1876. He also purchased a steam launch to run between the mainland and Kapiti Island.

[332] Te Ātiawa’s presence on the island continued through the 20th century. In the early 1900s, Wi Parata was active in promoting the township and tourism in the area, building a racecourse and buying a boat to take tourists to Kapiti Island. The land owned by Māori was gradually sold to Europeans and the area became popular for recreation. However, events such as World War I and the influenza epidemic of 1915-1919 affected the population. To inhibit the spread of the disease, following a request by European members of the community, Te Ātiawa representatives agreed to allow the interring of Pākehā within the Takamore urupā, near Waikanae, and two mass burial graves were dug. By the late 20th century, Waikanae township had grown to become the second-largest settlement on the Kapiti Coast.

[333] The Whakarongotai marae continued to be a focal point for the community throughout this time, with several whānau living in the neighbouring homestead built by the grandfather of Tutere Parata. Other whānau were also based nearby. Mr Parata described the homestead and the marae as “the centre of political conversation”, and a place where people would stop when travelling through the area. Other witnesses

recalled that those who lived there were known as the “beach whānau” or “beach crew” and spoke of the support derived from that community, with Hariata Higgot commenting that “this was an expression of our Māori way of living, events were community based, we would look after one another”. Some whānau members left during the 1950s and 1960s to work in the cities, while others who worked in Wellington continued to return at weekends.

[334] Mr Parata has lived in Waikanae his whole life and was nearing his 80s when he swore his affidavit. He confirmed the iwi's extensive involvement and his personal experience of fishing in the rohe from when he was a child. He recalled hauling nets along the beaches, particularly near the mouths of the rivers, as well as setting nets and catching kahawai, herring, flounder, sole, mullet, red cod, frostfish, and snapper. He noted that frostfish would be left behind on the beach as the tide went out and they would collect them where they were stranded. Mr Parata also referred to special nets that were used for catching crabs, which was a traditional practice. He described fishing for rig and sharks, and the traditional method of drying shark, which was brought down with his tūpuna from Taranaki in the 1820s. He also recalled gathering kina, paua, surf clams, pupu, pipi, and tuatua on the beaches.

[335] The Walzl report describes the importance of kaimoana gathering to the community living on the coast at the time, noting that it formed an essential part of their diet. In addition, they relied on food grown in the large gardens of Mr Parata's father at the homestead. The crops included kumara, potatoes, corn, tomatoes, and cabbages. The whānau also kept cows, pigs and sheep.

[336] Te Ātiawa lived in areas near the coast during the 20th century, as well as on Kapiti Island. Walzl noted that there were close connections between those on the mainland and those on the island.

The Barrett whānau and Kapiti Island

[337] Mr Barrett gave evidence of his whānau's presence in Kapiti. He now resides in Ōtaki and on Kapiti Island, runs a tourism business on the island, and has held governance and advisory positions on behalf of Te Ātiawa and descendants of both iwi. These have included: acting with DOC on the Wellington Conservation Board;

as a foundation member of the Kapiti Island Marine Reserve Committee, which provided public input into the management of the reserve and was a joint iwi initiative with DOC established in 1992 (disestablished in 2011 due to the Treaty settlement negotiations with Ngāti Toa); a representative in the Greater Wellington Regional Council; and a founding member of Te Whakaminenga of Kapiti, which is the representative forum for mana whenua at the Kāpiti Coast District Council. He noted that Te Ātiawa also worked with Ngāti Toa and Ngāti Raukawa to protect the marine and coastal area, in particular in any overlapping areas, as well as to ensure that the arrangements made to receive the assets of the Māori Fisheries settlement were satisfactory for all parties involved.

[338] Mr Barrett noted that Hemi Matenga continued the farming operation on Kapiti Island following Wi Parata's death in 1906, and improved and expanded the whare at Waiorua. He was a staunch opponent of the Crown's intention to acquire land at Waiorua, and was particularly critical of the government's proposal to turn Kapiti into a leprosy colony. He was joined by his niece Utauta and her husband Hona Webber at his farm in 1909, who remained there to continue farming following Hemi Matenga's death in 1912.

[339] Utauta, built a whare called "Manaaki" at Waiorua. Mr Barrett's mother was born on Kapiti Island, and spent a substantial portion of her life there, as well as with her Te Ātiawa whānau in Taranaki. She married Mr Barrett's father in 1935, and they lived at Ōtaki, travelling backwards and forwards regularly to Kapiti Island to visit the farm run by her uncles.

[340] Utauta maintained a strong stance against Crown acquisition of Māori land on Kapiti. Her whānau also established a tourism industry which provided entertainment for visitors to the island, including a bowling green, horses, birdwatching, and tramping. After Utauta's death, her son Winara took over the farm, and it was later passed down to Winara's son, Wiremu. Mr Barrett described living with his whānau at Paraparaumu during his childhood, where Utauta spent her last years. In addition, Mr Barrett recalled visiting his Uncle Mike at his house on the Waikanae River mouth, where several other whānau would also gather, forming a close community. He said

their boat, Manaaki, “was always in the water”, and they would use it to travel back and forth between Kapiti Island and the mainland.

[341] Visits to the island were common, particularly for fishing. Their practice was to “fish one area, and then leave it for a while to ensure the sustainability of the fish stock”. Mr Barrett’s uncles would also often take fishing groups out off Paraparaumu. He said there were only a few years between 1967 and 1971 when there were no whānau in permanent residence on Kapiti Island, however they continued to visit over weekends. From the 1970s to the 1990s, the kaumātua on Kapiti Island, who were the first point of contact for anything to do with the island, all had Te Ātiawa whakapapa.

[342] Mr Barrett and his wife built a whare on the island in 1971, at which time they were the only people living on the island, aside from two DOC workers. Their whare became Waiorua Lodge and is now used to accommodate tourists and whānau. He described Te Ātiawa’s crucial involvement in conservation work carried out on Kapiti Island and the development of tourism ventures from the late 20th century until the present day.

[343] Mr Barrett co-founded Kapiti Island Nature Tours with his sister in 1999. This offers walking and overnight tours, kiwi spotting, and wildlife visits. He gave evidence of the sites of significance on the island, including Wharekohu (a burial site), pā sites such as Kaitangata, Waiorua, Rangatira, Tokakawau, and Taipero, and ancient māra kai cultivation sites at Kurukohatu and Kahu o Te Rangi. He represents the iwi on the Kapiti Marine Reserve Committee. Mr Barrett also gave evidence of fishing around Kapiti Island.

[344] Mr Barrett demonstrated his knowledge of the legends and stories associated with Kapiti Island. For instance, he explained that the cliffs area south of Waiorua was named Kaititi by Rene Te Tahua, a rangatira from both Ngāti Toa and Te Ātiawa, on account of its abundance of titi. He also noted that the mauri associated with Kapiti Island is known as Te Mango, the great shark. He said that Te Mango comes looking with its head out of the water. Mr Barrett’s late Uncle Arona Webber said he saw Te Mango on three occasions during his time on Kapiti Island, but it is not often seen.

Treaty settlement

[345] In relation to Kapiti Island, Te Ātiawa point out that they have not yet completed their Treaty settlement. Mr Tihema Baker, who has experience in the Crown Treaty settlement process, said that Te Ātiawa were not properly consulted on the redress granted to Ngāti Toa, and they repeatedly raised concerns about the process followed by the Crown and Ngāti Toa in negotiating the redress package. Te Ātiawa pointed to the lack of recognition or acknowledgement of Te Ātiawa's interests, as well as the lack of clarity about the basis for Ngāti Toa being offered redress within the Te Ātiawa Treaty settlement claim area (including over Kapiti Island), and the lack of resourcing available to unsettled groups to participate in Treaty settlement processes of other groups.

[346] Mr Tihema Baker noted that various items of redress initially offered to Ngāti Toa had been withdrawn due to Te Ātiawa's concerns. In addition, a memorandum of understanding reached between Ngāti Toa and Te Ātiawa expressed a desire to work in good faith with one another and affirmed that the Treaty settlement process is aimed at addressing the claims each party has against the Crown and "is not intended to affect the close traditional relationship between the parties or re-define the mana whenua of each party".

[347] Mr Baker suggested that Ngāti Toa were not acting in good faith by relying on their Treaty settlement to support their position against Te Ātiawa. He also pointed out that the responsible Minister had recorded that "the return of cultural redress sites ... does not constitute an acknowledgement that the applicant has exclusively used and occupied the site without substantial interruption". In those circumstances, while the Treaty claim settlement is an acknowledgment of Ngāti Toa's mana by the Crown, it does not affect the mana of Te Ātiawa on Kapiti Island.³⁵⁹

Present-day activities

[348] Witnesses gave evidence of the iwi's continued involvement in kaitiaki activities and control of the use of the takutai moana. These included iwi

³⁵⁹ See Ngāti Toa Rangatira Claims Settlement Act 2014, ss 36 and 37.

involvement in managing whale strandings as a form of kaitiakitanga. Dr Baker also provided evidence highlighting the critical role of mahinga kai to the iwi, the impact of environmental changes on traditional food sources, the importance of resource consents, the sustainable management of whitebait, and the centrality of tikanga in resource management practices, as well as the identification of sites of significance. In particular, she gave evidence on the following:

- (a) *Mahinga kai and harvesting*: Dr Baker emphasised the importance of mahinga kai (traditional food gathering) for Te Ātiawa, including the harvesting of inanga, kōkopu, kōaro, kahawai, kanae, pātiki, kōura, tāmure, watercress, tuna, piharau, tipitipi, surf clams, and tuatua. She noted that the availability of these species has been significantly impacted by overuse, land use changes, and climate change, with the whitebait fishery particularly affected by overuse and habitat loss.
- (b) *Regulating the environment by various mechanisms including rāhui*: Dr Baker discussed the customary use of whitebait and the protocols established by Te Ātiawa for its harvesting, which were developed in consultation with DOC and apply to the issue of permits under the Whitebait Fishing Regulations 1994. She highlighted the importance of these protocols in maintaining the health of the whitebait fishery and ensuring sustainable harvesting so that it remains a viable food source for the community. The regulations include the ability to limit the taking of whitebait within 20 metres of the fish pass at the Waikanae Estuary, and allows kaunihera (local authority) kaumātua to place rāhui on the taking of whitebait. She noted that Te Ātiawa had been called upon to enforce the protocols. The iwi also has a Kaitiakitanga Plan called “Whakarongotai o te moana, whakarongotai o te wā”, which was adopted by the iwi in 2019. It includes various protocols such as Te Ātiawa ki Whakarongotai Freshwater Use Customary Tikanga, which relates to whitebaiting, as well as Ngā Tikanga Tohorā o Te Ātiawa ki Whakarongotai.

- (c) *Tikanga*: Dr Baker emphasised the importance of tikanga in managing natural resources, noting that Te Ātiawa's approach to resource management is deeply rooted in their tikanga and involves regulating how people interact with the environment. She discussed the role of tikanga in placing rāhui to protect resources and ensure their sustainable use, mentioning that Te Ātiawa has successfully imposed rāhui in their rohe which have been respected by the local community. She noted that the rāhui placed on whitebaiting in all the waterways from Whareroa to the Waimeha Stream remains in force today. She said this demonstrates Te Ātiawa's rangatiratanga, and how it has in this case been affirmed by kāwanatanga.

[349] In addition, Dr Baker outlined the significant engagement by Te Ātiawa with the relevant local authorities. For instance, she discussed the role of Te Ātiawa's Taiao Unit in responding to resource consents. She suggested that Te Ātiawa has agreements with the relevant regional and district councils (Kāpiti District Council and Greater Wellington Regional Council) to review all consents (including non-notified consents) and to provide technical advice to councils. However, the Kāpiti Coast District Council when asked by the Attorney-General about the claim did not confirm that arrangement. It noted that it did not, generally speaking, have jurisdiction under the RMA to grant resource consents for activities in the takutai moana, but that its consent processes involved consulting mana whenua for certain activities. Kāpiti Coast District Council reviews the adequacy of any cultural impact assessment provided and will obtain one if necessary. It carries out assessments on a case-by-case basis and plans to review its internal processes in the future. The Council is party to a Memorandum of Partnership, which records that it was signed in December 2017 by Ngāti Toa Rangatira, Āti Awa ki Whakarongotai, Ngāti Haumia, and Ngāti Raukawa ki te Tonga me Ngā Hapū o Ōtaki. However, Te Ātiawa has pulled out of that partnership and its engagement with the Council now occurs outside that arrangement on an individual project basis.

[350] The Greater Wellington Regional Council, which deals with a significant number of resource consent applications, said it engages with mana whenua who determine whether a cultural impact assessment is required, and only mana whenua

can prepare that assessment. In response to the suggestion that Te Ātiawa had an agreement ensuring that every single consent went to them, it said that it consults with “iwi” on all resource consent applications. For non-notified resource consents, it uses SharePoint to securely share documents online with mana whenua, who determine the cultural effects relevant to the proposed activity. Despite the lack of clarity on the arrangements, I am satisfied that Te Ātiawa is involved in reviewing a number of consents for the relevant councils.

[351] Dr Baker identified 33 water-related sites of significance registered by Te Ātiawa in the Greater Wellington Regional Council's natural resources plan. This identification emphasises the importance of those sites for the cultural and ecological wellbeing of the area, and underscores their significance for the iwi. Dr Baker provided a map and a list of the sites, which include areas in or abutting the takutai moana, such as the Tikotu Stream mouth, Te Uruhi lagoon, Paraparaumu coastal marine area, the Waikanae River mouth, the Waikanae coastal marine area, the Waimeha River mouth, and Te Uruhi access at the Paraparaumu Boat Club. The map of these sites shows their concentration north of Te Uruhi to the Waimeha Stream, but also includes the Whareroa coastal marine area and the river mouth of the Whareroa Stream.

[352] Today, Waikanae is known as a holiday and retirement centre. Its total population has increased over the 21st century, as has its Māori population, with 357 Māori recorded as living at Waikanae beach in 2018, and 774 in the inland residential area. Walzl observed that Te Ātiawa have maintained their connections with Kapiti Island throughout the 21st century, as is revealed in their evidence relating to the takutai moana. While there is some variation in figures across different sources, the Te Ātiawa ki Whakarongotai Charitable Trust 2015 annual report identified the iwi as having 720 members, just over 500 of whom lived within two hours' drive of the iwi marae. The Whakarongotai marae remains a focus for Te Ātiawa, being the location of many important iwi hui, and acting as a symbol of their place in the rohe.

ASSESSMENT OF TE ĀTIAWA'S CMT CLAIM

[353] Te Ātiawa faced a contest from Ngāti Toa for CMT in relation to Kapiti Island and part of the mainland. The dispute centres on the events leading up to 1840 and the shared whakapapa of the two iwi. As outlined above, Ngāti Toa have not made an application to the High Court, and therefore recognition orders cannot be made in their favour here. Counsel for Ngāti Toa noted that while the Takutai Moana Act does not deal with the situation where applications are being heard in the High Court in relation to an area that is also the subject of a Crown negotiation, Miller J in *Re Edwards* provided some guidance as to how this may be addressed.³⁶⁰ He suggested that where an applicant under the Crown engagement pathway has participated in the relevant High Court proceeding (as Ngāti Toa has done here), the Court may make findings as to shared exclusivity, then allow an opportunity for a tikanga process among affected groups and engagement with the Crown outside of court. I therefore address Ngāti Toa's claim to the extent that it relates to Te Ātiawa's application for CMT.

The positions of Te Ātiawa and Ngāti Toa

[354] To establish the basis of the foundational take raupatu and customary rights in support of Ngāti Toa's claim, Ms Rongo relied on the role of Ngāti Toa, and specifically Te Rauparaha, as the leader and instigator of the heke south. Te Rauparaha was given assistance by Te Ātiawa, and later Ngāti Raukawa, in establishing Ngāti Toa's occupation of the whenua and defending it against the Kurahaupō allies. Ngāti Toa suggest that the foundation of Te Ātiawa's claim for CMT, based on customary rights and tikanga, rests on Ngāti Toa's victory at Waiorua. They say the tuku and settlement of the Te Ātiawa boundary was effected by Waitohi and carried with it ongoing obligations on Te Ātiawa to recognise Ngāti Toa's mana. Furthermore, Ngāti Toa indicate that, in general terms, they recognise Te Ātiawa's right to exercise rangatiratanga within their claimed rohe on the mainland coast.

[355] Ms Pomare said that, at tikanga, Te Ātiawa and Ngāti Toa recognise that they both have mutual, shared, and overlapping rights and interests along the Kapiti Coast. However, she said that in this proceeding, which is a Crown process, Ngāti Toa were

³⁶⁰ *Re Edwards* (CA), above n 16, at [238].

being forced to protect their own particular rights and interests, which were established through raupatu. In that context, Ms Pomare said that from a Ngāti Toa perspective, CMT should be exclusive to Ngāti Toa from Whareroa to Wharemauku. However, from Wharemauku to Te Uruhi, she said CMT should be shared with Te Ātiawa. She highlighted the importance of Te Uruhi to Ngāti Toa, noting that it was first occupied and settled by Te Rangihaeata after arriving on the Kapiti Coast in 1822. Te Rangihaeata took up occupation of Te Uruhi because of its strategic importance as the gateway to Kapiti Island and as a central node, or a tauranga waka, that provided for connections, relationships, and access along the coast. This included access both from Taranaki to the Kapiti area, from Kapiti to Wellington, and from Kapiti across to Te Tau Ihu. Ms Pomare said the area from Te Uruhi north to the Waikanae River mouth should be shared amongst the three ART Confederation iwi for the purposes of CMT, however she acknowledged that Ngāti Raukawa's application does not extend that far south.

[356] Turning to Kapiti Island and the smaller islets around it, Ms Pomare said that the island itself should be recognised as exclusively held by Ngāti Toa. However, the surrounding waters from the high-water mark out to sea should be shared between Ngāti Toa and Te Ātiawa, including the privately-owned islands. She noted that both the rangatira Te Rangihīroa and Te Hiko had occupied those islands, and they had important cultural and historical significance to Ngāti Toa, representing the mana of the iwi. In relation to Te Rau o Te Rangi Channel, the channel between the mainland and Kapiti Island should be divided to reflect the nature of the shared CMT on the mainland. On that basis, she said that from Wharemauku to Te Uruhi, orders should be made recognising shared CMT between Ngāti Toa and Te Ātiawa across the channel. Then, from Te Uruhi to the mouth of the Waikanae River, CMT across the channel would be shared between the iwi of the ART Confederation.

[357] In response, Te Ātiawa say they recognise Ngāti Toa's mana, but that their own mana has also been established. They say they are entitled to rely independently on the take raupatu due to their significant role as an ally to Ngāti Toa in the heke south and the battle of Waiorua, as well as in the skirmishes and battles that followed against Muaūpoko and their allies, all of which allowed the Hekenga iwi to settle in the Kapiti area.

[358] Te Ātiawa assert that each of the three ART Confederation iwi have their own distinct rights, including of mana whenua and mana moana, which is acknowledged by those iwi. However, through whānau takawaenga, the mana shared by all three ART Confederation iwi in relation to Te Ātiawa’s application area is reflected by those Te Ātiawa descendants who also have closely intertwined and senior whakapapa to Ngāti Toa (and Ngāti Raukawa). Mr Cameron submits that this embodies the spirit of whanaungatanga, which the pūkenga identified as a key tikanga value.

[359] Mr Cameron submits that aside from Ngāti Toa, the fact of Te Ātiawa’s participation in the battle of Waiorua is not challenged by other parties in the proceeding. Their role was supported by the kōrero of their own witnesses, including Walzl who, in his evidence in reply, referred to historical evidence from the Native Land Court’s investigation into the Ngarara block, which was awarded to “Ngātiawa” in 1873. A number of the witnesses for Te Ātiawa, in particular Dr Baker, referred to ongoing discussions with Ngāti Toa concerning their application for CMT, specifically in the area surrounding Kapiti Island. Similarly, witnesses for Ngāti Toa such as Mr Faulkner noted that there were continuing discussions between the two iwi.

The pūkenga’s assessment

[360] The pūkenga considered that both iwi “to differing degrees on a sole and more likely shared basis since 1840” had occupied the Kapiti Coast application area.³⁶¹ Dr Parai of Ngāti Toa acknowledged the challenge of drawing clear boundaries given their shared whanaungatanga with Te Ātiawa.³⁶² The pūkenga noted that the boundaries between groups were “often amorphous and overlapping”. They emphasised the intersecting nature of the claims based on tikanga and take whenua, and the “holistic, ecosystemic and multi-dimensional nature of rohe interests”, which makes it difficult to clearly delineate between the parties’ respective rohe.³⁶³

[361] The pūkenga noted that Mr Barrett had stated that the southern boundary of Te Ātiawa (located south of Whareroa) was shared with Ngāti Toa.³⁶⁴ Dr Joseph

³⁶¹ Pūkenga Report, above n 44, at [649].

³⁶² At [584].

³⁶³ At [586].

³⁶⁴ At [574].

agreed under cross-examination that the area of overlapping claims of interest between Ngāti Toa and Te Ātiawa on the mainland coast was an example of “debatable lands”. These lands were referred to in the pūkenga report as “whenua tautohetohe”, which can be characterised as contested areas where shared interests in the whenua and rohe moana are held between multiple groups. Angela Ballara described them as a problem arising “...because of the intersecting rights, not definable by hapū”.³⁶⁵ The pūkenga indicated that, at tikanga, these lands were the norm, and suggested that they may be an example of land which calls for “shared exclusivity” recognition in terms of CMT.

[362] In discussing how to navigate this, Dr Joseph made the following comments:

...its best we do this through our tikanga ... here is how we dealt with these issues historically under our tikanga and having the rangatira, having our modern-day Waitohi to be able to say: “Let’s come together, our mana huihui, acknowledging the mana of everyone here or in these particular areas and our being able to come up our own kawenata, our own agreement in terms of: ‘Here’s our exclusive areas we have those and here’s our shared areas,’ right and coming forward.” I know from what we’ve discussed here that’s tikanga. That’s us practising it in a modern context. ...

[363] Dr Joseph noted that in the context of whenua tautohetohe, “tikanga plays out even more importantly”. In his view, that “buffer zone” between groups’ respective rohe should be shared. He said the manner in which that would occur was for the parties to navigate and negotiate “[r]angatira ki te rangatira”.

[364] The pūkenga of course were not required to isolate the parts of the takutai moana in which overlapping rights gave rise to shared exclusive CMT, and Dr Joseph confirmed that the pūkenga were not asserting that every applicant had an equal degree of mana across the whole application area.

The tuku whenua

[365] The customary rights at play in relation to the claimed rohe and the contest between Ngāti Toa and Te Ātiawa are complex, and reaching any definitive view on the historical events is viewed as impossible by most historians. The ringa kaha demonstrated through the battles over boundaries between Ngāti Raukawa and

³⁶⁵ At [595].

Te Ātiawa, without Ngāti Toa’s involvement, add to the complex tikanga relationship at play.

[366] While Boast minimised Te Ātiawa’s role in the battle of Waiorua, there was a general acceptance of their important part not only in the heke but at Waiorua, as well as their subsequent leadership in battles against the Kurahaupō allies on the mainland.³⁶⁶

[367] In explaining the importance of Te Ātiawa’s support, Mr André Baker said:

Were it not for Ngāti Mutunga, the heke of our Ngāti Toa iwi under the authority of Te Rauparaha and our tupuna rangatira Te Peehi Kupe and Te Rangihīroa may not have made it safely from Taranaki. “Ngāti Mutunga put food in the ground to support the Ngāti Toa Rangatira hekenga”.³⁶⁷ This was an expression of manaakitanga borne by hononga rangatira and whakapapa, that enabled Ngāti Toa to migrate south safely.

Similarly, Te Rauparaha’s relationship with Te Peehi Kupe and Te Rangihīroa was important in terms of Ngāti Toa seeking refuge at Taranaki. Te Rauparaha also on numerous occasions would have consulted with his tuakana.

[368] The obligations incumbent upon each iwi deriving from customary rights and obligations attaching to the *tuku* are important to the resolution of the contest between the iwi. Ms Rongo submits that the *tuku* came with the condition that the land would revert to Ngāti Toa if it was sold. Therefore, she says at tikanga this gave Ngāti Toa some control over the land, despite the acknowledged occupation and rights that went with the *tuku*. Ms Rongo points to a letter of 2 August 1853 from Metapere Te Waipunahau to Governor Grey, which was produced before the Waitangi Tribunal.³⁶⁸ Metapere Te Waipunahau wrote to the Governor asking that he stop the sale of land at Waikanae and Waimahea by Te Ātiawa (Ngāti Awa), claiming the land had been given by Ngāti Toa to Ngāti Mutunga, and then left to, among others, “all of the Ngāti Awa and for myself to reside here along with my fathers Te Peehi and Te Rangihīroa”. Metapere Te Waipunahau noted that when her father was alive, “the

³⁶⁶ See, for instance, Ms Pomare’s reference to the comments of Iwikatea Nicholson. Te Ātiawa’s role in the Feast of the Pumpkins attack on Kurahaupō iwi, including Muaūpoko, is not referred to in Te Ātiawa’s narratives, but was said to be at the instigation of Te Rauparaha who was seeking *utu*. See the section of this judgment on Muaūpoko.

³⁶⁷ Ngāti Mutunga kaumātua Bill Carter.

³⁶⁸ See Waitangi Tribunal *Waikanae: Report on Te Ātiawa/Ngāti Awa Claims* (Wai 2200, 2022) at 133.

intention was that the land be left as a resource for me, my children and his descendants”.

[369] Metapere Te Waipunahau looked out for Te Ātiawa’s interests, not only by remaining on the Kapiti Coast to maintain the iwi’s ahi kā, but also in relation to setting boundaries for land. Mr Baker referred to accounts of a debate between her and Tamihana Te Rauparaha (Te Rauparaha’s son) and Matene Te Whiwhi over the Kukutauaki boundary. Metapere Te Waipunahau took a very strong view on these issues and advocated for the northern boundary being at Te Hāpua rather than Te Maire, a point slightly further south that was argued for by Tamihana Te Rauparaha and Matene Te Whiwhi.

[370] The Waitangi Tribunal noted that in the 1850s, both Ngāti Toa and Te Ātiawa/Ngāti Awa claimed the lands south of Te Uruhi to Paekākāriki. The Tribunal examined the Crown’s attempt to purchase land at Waikanae through negotiations with Te Ātiawa and Ngāti Toa between 1849 and 1853. It noted that according to Donald McLean, the Crown agent, Ngāti Toa did not dispute the right of Te Ātiawa to possess and occupy the land for their own use, but they strongly objected to its disposal to the government. This was based on the claim that Ngāti Toa were the “original conquerors”. Te Ātiawa countered that by asserting that they had “assisted in finally conquering the district” when Ngāti Toa had been forced to retreat to Kapiti Island, and Ngāti Toa had transferred all rights (including the right of sale) to them at a “public feast”.³⁶⁹ This is consistent with Walzl’s historical narrative that Te Rauparaha acknowledged the independence of Te Ātiawa after the battle of Kūititanga in 1839. These initial purchase negotiations were ultimately unsuccessful. However in 1858, following further complex negotiations, Ngāti Toa sold their portion of the original Waikanae block and received the purchase money for it.

[371] The overlapping claims of Ngāti Toa and Te Ātiawa were also an area of contest between witnesses in the 1868 Himatangi case. Emeritus Professor Michael Belgrave, an historian for Muaūpoko, notes that one of the witnesses for

³⁶⁹ See Waitangi Tribunal *Te Whanganui a Tara me ona Takiwa* (Wai-145, 2003) at 13 and 29, which notes that Te Ātiawa saw the battle at Kūititanga as a victory over Te Rauparaha and final severing of their obligations. This was against a background of insecurity among the Hekenga iwi who were fragmenting and openly competing against each other.

Te Ātiawa³⁷⁰ explained that when Ngāti Awa vacated Ōtaki for Waikanae, allowing Ngāti Raukawa to move in, this was not on instruction from Te Rauparaha but was to be closer to the Pākehā. The witness said that together Ngāti Toa and Ngāti Awa should have been consulted about any sale.³⁷¹ The Ngāti Toa witnesses claimed the overarching mana belonged to Ngāti Toa and to Te Rauparaha personally. Ms Pomare agreed with the following definition of *tuku* as described by Mr Ropata in his evidence for Ngāti Raukawa, which was put to her in cross-examination:

In general, any time land was given to another whānau, hapū, or iwi it was theirs to hold in perpetuity, to do with as they pleased, what they pleased, and for as long as they pleased whether that be for a year, 100 years, 1,000 years, and so on. But as soon as that land was not occupied, regardless of the time period, it was returned to the people or the descendants that the relationship between Ngāti Raukawa and Ngāti Toa.³⁷²

[373] This suggests that as the recipient of the *tuku* whenua, Te Ātiawa, would not require Ngāti Toa's permission to use resources or exercise control within their rohe. However, Ms Pomare's evidence was that the amount of control that could be exercised by the respective iwi was nuanced and location specific. For instance, Ms Pomare indicated that she would not expect Ngāti Toa to exert a great degree of influence at Waikanae in the face of Te Ātiawa's mana in that area, and they would instead act merely in a supporting capacity.

Shared whakapapa

[374] The contested claims by Te Ātiawa and Ngāti Toa play out against the strong ties of the intertwined whakapapa of the two iwi. Ms Pomare said this was not only because all Ngāti Toa descendants are also descendants of Ngāti Mutunga, but also due to the ongoing and historical web of marriages and connections between the two groups over successive generations. The *takawaenga* relationships formed through the marriages of prominent rangatira from the two iwi were also particularly important for Ngāti Toa in their migration south. She acknowledged the important bearing this

³⁷⁰ Wi Tamehana Te Neke, of Ngāti Awa and Taranaki, was Fox's first Ngāti Awa witness.

³⁷¹ See the Te Ātiawa section of this judgment.

³⁷² The latter half of the original quote in Mr Ropata's brief of evidence read: "But as soon as that land was not occupied, regardless of the time period, it was returned to the people or descendants *that originally gave them the whenua*. This is my understanding of the relationship between Ngāti Raukawa and Ngāti Toa" (emphasis added). However, the quote is reproduced as it was read to Ms Pomare by counsel in cross-examination.

intertwined whakapapa had on all subsequent major events between Ngāti Toa and Te Ātiawa, and how this determined the interrelationships and settlement patterns on both sides of the Raukawa Moana. She recognised the rangatiratanga of Te Ātiawa in their claimed rohe, but said that their assertions of exclusive rangatiratanga ignored the “long-established provenance of our shared whakapapa and historical relationships that provided the basis for the close alliances formed between Ngāti Toa and the Taranaki Iwi during the heke and raupatu”.

[375] Mr André Baker’s account of his whakapapa demonstrates the close and intermingled whakapapa relationship between the two iwi. He explained the impact of this intertwined whakapapa by reference to his personal experience. He has had significant involvement in the affairs of all three ART iwi. For instance, he led the project management for the reconstruction of Rangiātea Church in Ōtaki after it was destroyed in a fire in 1995, and is presently employed by Te Rūnanga o Toa Rangatira as Team Lead for Iwi Led Social Services. He is also a Care and Protection coordinator and Youth Justice coordinator, with statutory delegations for working with children, youth, and their parents and extended whānau. He said his many roles across the three iwi were because of his shared whakapapa to all three iwi and “the inherited responsibility as whānau takawaenga to express kaitiakitanga in a way that upholds the mana of all ART iwi but recognises the uniqueness of each iwi’s rangatiratanga”.

[376] Under cross-examination, Ms Pomare agreed there were strong whakapapa links between the rangatira of Ngāti Toa and Te Ātiawa, but denied that various rangatira with whakapapa to both iwi could be seen as agents for Te Ātiawa when it came to the actions supporting Ngāti Toa’s claim for CMT. Rather, in her view, the interconnected whakapapa of Ngāti Toa rangatira such as Te Pēhi was important in garnering support from his Taranaki whanaunga to join their heke south. She also accepted that this shared whakapapa had a “huge bearing on all subsequent events” following the heke, for instance, it meant that Te Pēhi had a responsibility to take care of those who relocated to the Kapiti Coast. While acknowledging that Te Pēhi was a significant rangatira for Te Ātiawa through his mother, Metapere Te Waipunahau, Ms Pomare said his primary obligations were to Ngāti Toa as the ariki and hereditary chief of that iwi.

[377] Ms Pomare also agreed that the takawaenga marriages were designed to strengthen the relationships between Ngāti Mutunga and Ngāti Toa.³⁷³ The proposition that “he mana tō tētahi taha o te whakapapa”, or “one side of the genealogy has mana” was also raised. Ms Pomare emphasised that the mana of those whakapapa connections and whether their status could be considered equal was dependent on context, so it was important to examine specific circumstances in which those rangatira were operating.

[378] The strong links though whakapapa are also demonstrated on the ground. For instance, Dr Baker acknowledged that the significant sites for Te Ātiawa which she referred to were also sites of significance for Ngāti Toa, although she questioned whether some only reflected a historic Ngāti Toa connection which was not active today. Dr Baker also noted that Ngāti Toa was involved in Te Whakaminenga o Kapiti, a longstanding partnership with the Kapiti District Council and the mana whenua of the area, through which major policy, planning, and consenting matters are discussed. All three ART iwi are part of that arrangement. Dr Baker confirmed that on the Kapiti Coast, Ngāti Toa are also recognised by the Kāpiti Coast District Council and Greater Wellington Regional Council as mana whenua. However, she saw Te Ātiawa’s exclusive area as extending to Whareroa, whereas Ngāti Toa (or its hapū Ngāti Haumia)³⁷⁴ had mana whenua interests further south, referring to “in general terms ... the area in so-called Queen Elizabeth Park and Paekākāriki”.

[379] Ms Pomare indicated in response to questions put to her by Dr Ward that Ngāti Toa did not suggest they controlled Te Ātiawa or Ngāti Raukawa when travelling along the coast for trading purposes. Rather, they were “part of the alliance of iwi who came from Kawhia and Taranaki and established rights and interests in Raukawa Moana”.

[380] Mr Ngaia said that at the Whakarongotai marae, Te Ātiawa took a deliberately flexible, holistic, and accommodating approach to welcoming other iwi and

³⁷³ For instance, the marriage of Te Rangihīroa and Pohe, a Te Ātiawa wahine rangatira. Kahe Te Rau-o-te-Rangi, also had both strong Ngāti Toa and Ngāti Mutunga whakapapa. Both Te Rangihīroa and Kahe were buried on Kapiti Island.

³⁷⁴ Ngāti Haumia is claimed as a hapū of Ngāti Toa, although Dr Baker said she would leave it for Ngāti Haumia to define themselves.

representatives.³⁷⁵ However, he was also careful to emphasise that Te Ātiawa still held firm views about the kawa and tikanga on their marae, and while they adopted this inclusive and flexible approach on certain matters, there were other situations where that would not be acceptable.

[381] Ms Pomare said that Matua-a-Iwi Solomon had understood Whakarongotai to originally be a Ngāti Toa marae. She also said the kawa adopted there was that of Tainui, before it eventually changed to become the kawa of Te Ātiawa. Ms Pomare was unsure of when the marae had adopted the Te Ātiawa kawa, but referred to kaumatua “Uncle Peehi” and “Parata” having decided it was timely and “in the best interests of Whakarongotai” to “rekindle and restrengthen their ties to Taranaki”.

Te Ātiawa’s CMT claim on the mainland

[382] I now turn to assess Te Ātiawa’s claim as it relates to the mainland. I will then separately address the application in respect of Kapiti Island.

Foundational take at 1840

[383] The pūkenga note that take raupatu and take tuku whenua could be the basis for a claim of foundational rights, however they must be followed up by ahi kā in order to be fully established. Ahi kā can be established under the influence and mana of the conquering group. This is consistent with the Supreme Court’s observation that such interests may otherwise die away (ahi mātaotao).³⁷⁶ As part of that inquiry, the Court must assess whether the rights have been lost or merely impaired (ahi teretere). I am satisfied that Te Ātiawa can rely on the foundational take as follows:

- (a) *Participation in the take raupatu*: this relies on Te Ātiawa’s role alongside Ngāti Toa, dating back to the first heke south in the early 1820s, including the battle of Waiorua and the “clearing” of the mainland coast in its aftermath, as well as their subsequent settlement on the mainland coast in their claimed rohe, to the virtual exclusion of

³⁷⁵ This included allowing visitors to be on the paepae and to speak, and was said to explain the reason that Dean Wilson (of Muaūpoko) was welcome and not subservient on that marae. Te Ātiawa said this was because of the manaakitanga which they exercised.

³⁷⁶ At [142].

Muaūpoko and their allies. The evidence satisfies me that it was Ngāti Toa who led the heke to Kapiti as a result of Te Rauparaha's plan which he developed after seeing the area in the taua. He led Ngāti Toa from Kawhia to Taranaki. Te Ātiawa were certainly there as a key ally, however the evidence does not suggest they left in numbers for Kapiti until after the Ngāti Toa heke. The initial terms of their tuku carried obligations to Ngāti Toa which Te Ātiawa does not dispute. Many of those who arrived in the Ngāti Toa heke returned to their homelands shortly after for a period. Nevertheless, they were assisting and supporting Ngāti Toa in their strategy to control the Kapiti area. It is not contested that many Te Ātiawa later left the area, leaving caretakers in place to maintain their customary rights on the mainland rohe.

- (b) *Take tuku from Ngāti Toa*: Walzl referred to aspects of his research which suggested that, in addition to the land that was the subject of the tuku through Waitohi, Te Ātiawa gained parts of their rohe through tuku from other rangatira. This included evidence that Te Pēhi gave land to Te Haukaione when he arrived in Waikanae. Another narrative was that land was given to Te Ātiawa by Ngāti Toa following Te Heke Mai-i-raro, from Te Uruhi to “the top of the ridge at Whareroa”. Land further south of the Waikanae River was given by Ngāti Mutunga. I am satisfied that Te Ātiawa exclusively held the mainland rohe which was the subject of the tuku at 1840, except for an area at the Whareroa boundary. I consider this issue further below in the section on the shared boundary area with Ngāti Toa.
- (c) *Take ringa kaha*: a prolonged series of battles with Ngāti Raukawa ultimately settled the longstanding boundary with Te Ātiawa at Kukutauaki. There is no dispute that Te Ātiawa defended their lands in the battles of Haowhenua and Kūititanga, and while there is some debate as to the victor in those battles, they demonstrate ringa kaha exercised by Te Ātiawa.

- (d) *Ahi kā*: Te Ātiawa have maintained continuous occupation of the area from before 1840 to the present time. This was led by Metapere Te Waipunahau during the early period of their settlement in the area, when many of Te Ātiawa’s members returned to Taranaki. The longstanding occupation of the mainland area by Te Ātiawa has established take tūpuna. Six to eight generations have come and gone since 1840 (depending on whether there are 25 or 30 years in a generation).

[384] In summary, the initial foundational take raupatu was achieved with Ngāti Toa following Waiorua and the battles of the 1820s. The relevant mainland rohe was allocated to Te Ātiawa through the *tuku*, whilst Ngāti Toa took Kapiti Island and areas south of and including Whareroa.

Holds in accordance with tikanga

[385] In formulating the test for CMT, the Supreme Court noted the need for an applicant to demonstrate an “integrated or holistic relationship with the seascape”.³⁷⁷ To demonstrate this, evidence may be led as to the applicant’s involvement in acts of “reverence, exploitation, control and memory”, and to show that the group has *mana* in the rohe through its exercise of control and *kaitiakitanga*, which is the corollary of *mana*.

[386] The significant ongoing presence of Te Ātiawa in the claimed area to the present day, and their active involvement in *kaitiakitanga* in close association with local councils, demonstrates their holistic relationship with the *takutai moana* in the rohe. Relevantly, their activities include:

- (a) The presence of a large community and Whakarongotai Marae at Waikanae, which provides the community hub and centre of activity for Te Ātiawa.
- (b) Extensive use of the area for fishing, *kaimoana* collection and

³⁷⁷ *Re Edwards* (SC), above n 13, at [140].

resource gathering, as well as for rongoā.

- (c) Identification of various water bodies and sites of significance, including historical sites, as well as areas for collecting mahinga kai and present-day launching sites.
- (d) Extensive involvement not only of kaitiakitanga but cultural activities in the area, often in association with other ART iwi. For instance, Mr Barrett's involvement on behalf of Te Ātiawa in the establishment of the Kapiti Marine Reserve and identification of customary fishing areas excluded from that reserve.
- (e) Mr Barrett's evidence of the use of waterways between Waiorua and Waikanae/Paraparaumu Beach.
- (f) Mr Barrett's evidence of the control of access to the Waikanae Estuary through the distribution of keys, to enable Te Ātiawa's members to undertake customary fishing.

[387] Te Ātiawa are recognised by the relevant councils in the rohe, Kāpiti District Council and Greater Wellington Regional Council, as having mana whenua status, and are or were party to partnership arrangements with those councils. They work with the councils on a number of projects and provide input into resource consents and regulatory issues, finding modern ways to be effective in their kaitiakitanga responsibilities. Te Ātiawa, together with Ngāti Toa and Ngāti Raukawa, worked with the Greater Wellington Regional Council to identify freshwater sites of significance for the National Greater Wellington Natural Resources Plan. Those sites are mapped in the plan, which shows a concentration of sites from Te Uruhi lagoon (Tikotu Stream) north to the mouth of the Waimeha Stream, as well as sites at Wharemauku and the Whareroa Coastal Marine area. Te Ātiawa is also working with the council on the Waikanae River project.

[388] Furthermore, there is evidence relevant to a number of other tikanga indicia identified by the pūkenga, demonstrating that Te Ātiawa presently hold the application

area in accordance with tikanga. The pūkenga note that while tikanga evolves, the core values remain. Tikanga is “a way of life and is performed more than stated”. Te Ātiawa pointed to a number of demonstrations of lived tikanga, including: the exercise of kaitiakitanga in a variety of ways, both independently and in conjunction with local authorities; performance of kawa; imposition of rāhui; reliance on the takutai moana as a source of food and other materials, particularly through fishing; and regular travel up and down the coastline as well as to and from Kapiti Island.

[389] The evidence supports the fact that Te Ātiawa continue to maintain a holistic relationship with the seascape to the present day on the mainland. Overall, I am satisfied that Te Ātiawa have shown that they hold their application area on the mainland in accordance with tikanga, subject to shared exclusivity with Ngāti Toa and Ngāti Raukawa in the boundary areas outlined below. On the evidence, it is Te Ātiawa alone that have the holistic relationship with the seascape required to satisfy the test for CMT, apart from in those boundary areas.

Exclusive use and occupation

[390] The Supreme Court referred to a number of indicia which may assist in the analysis under this head.³⁷⁸ Many of these are present here, including: Te Ātiawa’s exercise of customary fishing rights;³⁷⁹ the existence of marae (near the coast) and tauranga waka within the area;³⁸⁰ the observation of tikanga associated with wahi tāpu as a way of restricting access;³⁸¹ imposition of rāhui and their observance by third parties;³⁸² evidence of members of the group educating and correcting the way third parties carry out activities in the area;³⁸³ and the group’s involvement in resource management and other regulatory processes concerning the takutai moana.³⁸⁴

[391] Other indicia suggested by the pūkenga as demonstrating exclusive use and occupation include external recognition of the applicant’s customary authority. Here, Ms Pomare confirmed that she recognised Te Ātiawa’s rangatiratanga and ahi kā from

³⁷⁸ *Re Edwards* (SC), above n 13, at [162].

³⁷⁹ At [162(b)].

³⁸⁰ At [162(d)].

³⁸¹ At [162(e)].

³⁸² At [162(f)].

³⁸³ At [162(g)].

³⁸⁴ At [162(h)].

Kukutauaki to Wharemauku, although other Ngāti Toa witnesses (such as Dr Parai) suggested that Te Ātiawa's rohe only went to Te Uruhi in the south, and Mr Potini considered the rohe from Waikanae to Whareroa was shared with Ngāti Toa.

[392] Witnesses from other iwi, such as Muaūpoko, also acknowledged the presence of Te Ātiawa at 1840 between Kukutauaki and Whareroa. Mr Moses referred to Te Ātiawa having customary interests in that area by reference to his interest matrix, although maintaining that similar customary interests existed in the area for Muaūpoko.

[393] The Walzl report describes Te Ātiawa's involvement in land sales and Native Land Court hearings, indicating their continued significant presence and customary authority evident from Kukutauaki to Whareroa. Walzl noted that Kukutauaki was named for an incident involving Te Pēhi Kupe, who was speared and wounded by a Muaūpoko chief, Ratu. Ngāti Toa wanted to kill Ratu, but Te Pēhi saved him. According to Wi Parata, given that Te Pēhi's blood had been spilt he was allowed to claim the whenua. Te Pēhi is said to have gifted Kukutauaki to Haukaione (a Te Ātiawa chief and an ancestor of Wi Parata) in the 1820s.

[394] Another example of the iwi's exercise of control is the Te Ātiawa hapū who ejected Mr Jenkins from his business around Te Uruhi in the 1840s, after his wife died and he did not marry another woman of the hapū. Examples from 1849 to 1858 include the Crown's attempts to purchase land at Waikanae. This was resisted by a section of Te Ātiawa members, as demonstrated, for instance, by the letter which Metapere Te Waipunahau sent to Governor Grey asking him to stop the sales.

[395] A further manifestation of control is Te Ātiawa's resistance to the erection of the telegraph. They robustly sought recognition of their customary rights until they had exhausted all their options, short of bloodshed.

[396] Walzl also gave evidence concerning the population and demographics of the area, which indicates Te Ātiawa's continuous presence. He produced a map showing the presence of Te Ātiawa from Kukutauaki to Whareroa, highlighting 20 pā and other

Te Ātiawa sites over the 1830s and 1840s, as well as referring to several other locations not marked on the map.

[397] While the increasing urbanisation led to many Te Ātiawa relocating from Tukurākau to present-day Waikanae in the 1880s (along with their marae), small coastal settlements associated with Te Ātiawa remained, including at Te Uruhi, Arapawaiti Pā, Kenakena Pā (although the pā was dilapidated), Kaitoenga (on the southern side of the Waikanae River), and on the northern side of the Waimea River.

[398] While Ms Pomare recognises that Te Ātiawa do not need to consult with Ngāti Toa about significant resource management issues in relation to Waikanae, Ngāti Toa would expect to be consulted if the proposals affected Te Uruhi, given the historical association of Ngāti Toa with that area. That constitutes some recognition of Te Ātiawa's rangatiratanga in Te Uruhi, as Ngāti Toa's rights in that area are now reduced to an entitlement to consultation. This suggests it is Te Ātiawa who hold the area in accordance with tikanga and have retained exclusive use and occupation since 1840. The customary rights of Ngāti Toa remain, however these are historical and do not demonstrate a present-day holding of the area as required for CMT. That the two iwi may have controlled the area in the past and now only one maintains that control does not preclude an award of CMT. In any event, I have found that Te Ātiawa was controlling the area as at 1840.

[399] Subject to the shared boundaries described below, I am satisfied that Te Ātiawa have demonstrated exclusive use and occupation of their claimed rohe on the mainland.

Continuity "from 1840 to the present day without substantial interruption"

[400] It is for the contradictors to prove that use and occupation were not exclusive or that there has been a substantial interruption, once the applicant group has proven that they hold the area in accordance with tikanga and have used and occupied it from 1840 to the present day.³⁸⁵ The effects of colonisation are very apparent on this

³⁸⁵ *Re Edwards* (SC), above n 13, at [189].

coastline. However, the public use of the area largely amounts to recreational fishing and activities on the beach and the water.

[401] The use of the takutai moana by third parties, Pākehā, and other Māori groups can be seen as an expression of manaakitanga. While there are some examples of commercial fishing, this is at a low-level and does not occur near the coastline, apart from the apparently small-scale surf clam dredging. Despite the depletion of resources, particularly mahinga kai and kaimoana in general, the iwi has not been deterred from continuing to fish and gather resources, while taking steps to stem the reduction. No structures have been identified in the rohe which might give rise to substantial interference.

[402] Based on this and the evidence referred in relation to the elements above, I conclude that Te Ātiawa have established continuity to the present day without substantial interruption in the claimed mainland rohe.

Conclusion

[403] I am satisfied that Te Ātiawa hold, in accordance with tikanga, the takutai moana on the mainland from Kukutauaki to Whareroa and have exclusively used and occupied the area from 1840 to the present day without substantial interruption. This excludes contested boundary areas shared with Ngāti Toa and Ngāti Raukawa, which I turn to below. Te Ātiawa have established their claim by virtue of take raupatu, ringa kaha, and take tuku (in relation to the mainland part of their claim). They have also maintained ahi kā and established take tūpuna from the time they settled in the rohe in the 1820s to 1840 and thereafter. Thus, they have met the test for CMT under s 58 of the Takutai Moana Act in relation to the mainland area claimed, some of which is on a shared basis with other applicants.

Shared boundary area — Ngāti Toa

[404] While Ngāti Toa have pointed to historical evidence of presence and control together with Te Ātiawa, control over most of the Te Ātiawa claim area on the

mainland coast became exclusive (in terms of the CMT test) to Te Ātiawa following events prior to 1840.³⁸⁶

[405] Te Ātiawa had established kāinga at Te Uruhi in the 1840s. They fought the battle of Kūititanga and protected their boundary without the support of Ngāti Toa. By 1844, the Commissioner William Spain, who was investigating land purchases, commented that Ngāti Raukawa and Te Ātiawa “maintain[ed] a possession” at Manawatū, Ōtaki, and Waikanae, which Te Rauparaha “would find it fruitless to oppose or deny”. He went on to observe that:

...At Taranaki, Manawatu, Otaki, Waikanae and Wellington, Rauparaha has no claim whatever, as against the resident natives, who, having assisted him to conquer those places, located themselves there, and have kept possession ever since, and they would not for one moment recognize or allow any act of his to alienate these places without their consent...

[406] Mr Ngaia said Te Ātiawa acknowledge Ngāti Toa and recognise that their claim was in part the result of the *tuku*. He said that will never change, no matter the outcome in these proceedings. The *tuku whenua* creates a relationship between the donor and recipient based on *mana* and shared historical events, but fundamentally as Mr Ngaia emphasises it is a *tuku* — a gifting of land with lasting *tikanga* implications.

[407] Ngāti Toa’s main focus on the mainland coast is to the south of Whareroa, including the location of their *marae*. However, their claim to the *rohe* on the mainland, which overlaps with Te Ātiawa’s application, is based on *take raupatu* and subsequent defence of the area from the previous *tangata whenua*. Their *tuku whenua* to Te Ātiawa was reinforced or overtaken by other *tuku* to Te Ātiawa and by Te Ātiawa’s defence, or *ringa kaha*, of their *whenua* against Ngāti Raukawa without Ngāti Toa assistance. Te Ātiawa have maintained *ahi kā* to the south of Kūkutaaki. Nevertheless, there is a limited area at the boundary at Whareroa in which Ngāti Toa, through the continued presence of *hapū* and recognition by *kāwanatanga* (local authorities) and other *iwi*, demonstrate control for the purposes of CMT on a shared basis with Te Ātiawa.

³⁸⁶ As I note above, it may also be possible for one group to obtain CMT even if they were one of two groups controlling the area at 1840. This is particularly the case if they are closely related by *whakapapa* and cooperate with each other. However, that assessment will be fact specific.

[408] Ngāti Toa have demonstrated that, together with Te Ātiawa, they hold the boundary area at Whareroa in accordance with tikanga and have shown sufficient expression of their mana over the area to share exclusive use and occupation from 1840 to the present day, in accordance with the statutory test for CMT. Ngāti Toa had a presence to the south of Waikanae at the time of the original *tuku*. There was evidence of their regular travel between Kapiti Island and the mainland, both historically and in more recent times, however their main interests are to the south and do not go beyond Whareroa. Dr Baker also acknowledged that she understood Ngāti Toa to have mana whenua interests in “the area in ... Queen Elizabeth Park”.

[409] The recognition of CMT does not sit comfortably with tikanga and the complexity of the relationships between various groups, as well as the interwoven customary rights which fluctuate with time and circumstance. Tikanga also operates to mediate shared and amorphous boundaries. The *pūkenga* note that the boundary between Te Ātiawa and Ngāti Toa on the mainland might be seen as a zone that is shared, or a “buffer zone” in terms of CMT. They suggest that arrangements between the groups sharing that area should be dealt with through tikanga processes.

[410] The *pūkenga* explain that the coming together of groups to enhance each other’s mana is known as *mana huihui*. They say:

699) Depending on the context, mana can be considered inclusive as well as all-encompassing and not necessarily confer exclusivity or predominant rights. But it depends on the kind of mana at issue. An interesting and relevant tikanga concept is *mana huihui* – gathering of mana.

700) *Mana huihui* describes instances where hapu and iwi came together and shared the mana over land and resources, particularly those lands lying contiguous to tribal boundaries – *whenua tautohetohe* or *rohe tautohe* [debated lands] as noted above – where interests were more fluid, layered, convoluted and complex, than patrolled and delineated.

701) There are numerous historic examples where hapū and iwi came together and shared land and resources such as the Kīngitanga Movement within Tainui, and the Paremata Māori Kotahitanga Movement which was situated at Pāpāwai at the end of the 19th century. Not enough attention has been given to the complex relationships between kinship groups with shared *whakapapa* (genealogy), history and occupation of *kainga* or settlements; where members from multiple hapū and iwi could be found in common occupation.

...

[411] The relationship between Te Ātiawa and Ngāti Toa arises out of their close whakapapa and mana huihui. The concept of mana huihui gave rise to the mutual benefits and obligations which continue to govern the relationship between the groups based on the take raupatu and subsequent tuku.

[412] In particular, the pūkenga note that this tikanga institution is evident between the Hekenga iwi. They say:

702) An amazing historic example of mana huihui in the Kāpiti Coast region was the initial hekenga iwi alliances who supported Te Rauparaha and Ngāti Toa Rangatira in their settlement of Te Whanganui a Tara, Porirua, Kāpiti, Te Tau Ihu and elsewhere during the turbulent Musket Wars period. It is also important to acknowledge that there were tensions at times in the alliance such as the Battles of Haowhenua in 1834 and Kuititanga in 1839.

703) But the strength of the ART (Āti Awa, Raukawa and Toa Rangatira) Confederation historically and today is in mana huihui – unity not division. The ART Confederation today has accomplished some amazing results in catalysing te reo, tikanga, mātauranga and cultural renaissance and pride in the region, not to mention establishing Te Wānanga o Raukawa, and other significant accomplishments.

[413] Mana huihui existed when the coast was taken and settled, and continues today, illustrating the flexibility of tikanga governing the relationships between the ART Confederation iwi. However, the pūkenga also warned that:

727) While tikanga Māori inevitably adapts and evolves in time and space, we need to ensure that we do not stray so far that our contemporary tikanga Māori customary institutions and practices are no longer premised on those underlying fundamental tāhuhu – Te Ao Māori values and principles outlined earlier such as, inter alia, whānaungatanga, whakapapa, wairuatanga, mana, and manaakitanga.

[414] The concept of drawing lines is a foreign and modern one that does not reflect tikanga Māori.³⁸⁷ The Te Ātiawa and Ngāti Toa share whakapapa and history of mana huihui which provides the tikanga basis for those iwi to hold the disputed boundary at Whareroa as shared exclusive CMT, despite their present lack of agreement.

[415] In summary, I conclude that the closely intertwined whakapapa of Te Ātiawa and Ngāti Toa, and the tikanga upon which they each rely to establish their

³⁸⁷ Pūkenga report, above n 44, at [585].

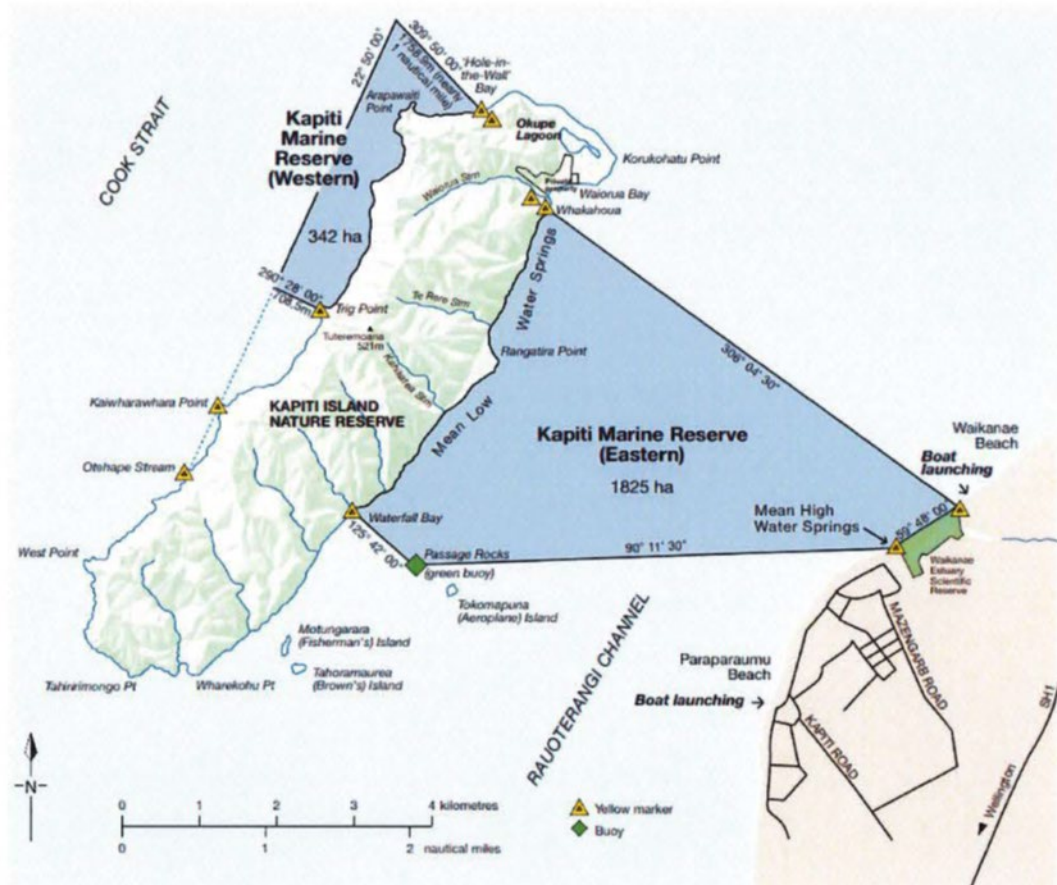
customary rights, along with the strong presence that both iwi have demonstrated in the relevant area of the takutai moana, makes it appropriate for CMT to be shared between the two iwi in the boundary area around Whareroa. However, that is of course subject to Ngāti Toa receiving recognition of CMT in the Crown engagement pathway. It is not for this Court to reach any final conclusion as to the outcome of Ngāti Toa's claim for CMT. I make further directions on this aspect below.

Te Ātiawa's CMT claim on Kapiti Island

[416] Ngāti Toa say that they are entitled to sole exclusive CMT in the takutai moana of Kapiti Island, therefore precluding Te Ātiawa from recognition. Ngāti Toa say that on the island, their mana is paramount and that this has been recognised by the government in various ways. They refer to their role in conservation matters before and after their Treaty settlement, and their ongoing strong presence on the island.

[417] Mr Barrett said that he recognised and respected that Ngāti Toa has particular mana associated with Kapiti Island. While acknowledging that he was giving his evidence on behalf of Te Ātiawa and had focussed on their connections to Kapiti and the takutai moana, he said that the mana moana over the area of takutai moana immediately surrounding Kapiti Island including Tokomāpuna, Motungārara, and Tahoramea, was shared by Te Ātiawa and Ngāti Toa.

[418] In Mr Barrett's view, the particular mana of Ngāti Toa in relation to Kapiti Island comes from the rangatiratanga that was exercised by Te Rauparaha and Te Rangihaeata. Nevertheless, Mr Barrett noted that Te Ātiawa had since led many initiatives in relation to Kapiti Island, a sign that Ngāti Toa were happy with the way things were being done and that the island was being looked after. This included Mr Barrett's leadership in the creation of the marine reserve around Kapiti Island in 1991, covering an area of 2,167 hectares and approximately a third of the island, depicted in the following map:



[419] Mr Barrett emphasised the shared whakapapa and history of occupation and connection to Kapiti Island among the ART Confederation. He considered that all three iwi had relationships with Kapiti and held a degree of mana on that basis. He said his presence on Kapiti was as a descendant of Te Kākākura Wi Parata and that, like his ancestor, he has whakapapa to Ngāti Toa, Te Ātiawa, and Ngāti Raukawa. He said he does not regard questions such as whether Kākākura “was wearing his Ngāti Toa hat or his Te Ātiawa one” when on the island as helpful or meaningful, and that similarly if someone were to ask him in what capacity he was on the island, “it would not make sense” to say that he was there as either Ngāti Toa or Te Ātiawa. He noted that Kākākura resided at Waiorua, which he said is an area particularly associated with Te Ātiawa. Furthermore, in relation to the present-day ecotourism ventures on the island, particularly Kapiti Island Nature Tours, Mr Barrett noted that of the 50 staff, 28 were whānau who whakapapa to Te Ātiawa, Ngāti Toa, and Ngāti Raukawa. His impression was that “they would consider themselves as exercising kaitiakitanga on behalf of ART iwi in their work”.

[420] Mr Barrett emphasised that Te Ātiawa consider Kapiti Island to be their “Motu Tapu” (sacred island), and they have a long history of exercising mana and customary rights in the surrounding rohe moana. This includes through fishing activities, as well as the establishment of the marine reserve around Kapiti and involvement in its operations.

[421] The occupation of Kapiti Island in modern times must be considered in light of the fact that the island has largely been under conservation control for many years. This affects the assessment of a group’s “significant presence” and practical demonstrations of control. Few iwi members have lived on the island in recent years.

[422] The island is regarded as a place of significance for all iwi in the Kapiti region. In particular, the burial caves were used by the Kurahaupō iwi as well as the Hekenga iwi. Regular visits are made to the island by those iwi members. For instance, Ms Montgomery-Nuetze of Muaūpoko referred to her visit, with a group to Wharekōhu, which is at the southern end of the island. She said they notified Ngāti Toa in advance and “had a little whakatau” with them when they arrived. Nevertheless, she said Muaūpoko were not going to the island “as manuhiri” and therefore did not seek permission from Ngāti Toa for their visit. However, a permit is required from DOC to visit the burial caves, and DOC refers applications to the Kapiti Island Strategic Advisory Committee, which includes two appointees of Ngāti Toa (including the chairperson).

[423] While Mr Barrett noted that he spoke for Te Ātiawa at the present hearing, he had given evidence for Ngāti Toa in the Waitangi Tribunal in 2003.³⁸⁸ In that evidence, he supported Ngāti Toa’s claim of mana over Kapiti Island, noting their role in leading the heke to the region and describing their occupation of the island as “the result of the tactical skills” of chiefs such as Te Rauparaha and Te Pēhi. Furthermore, he commented that the victory at the battle of Waiorua “established Ngāti Toa’s mana both on the island, and also along the adjoining mainland”.

³⁸⁸ His evidence was given to assist in the preparation of Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008).

[424] Although Te Ātiawa have made various claims to the island over the years, no claims asserting an interest over the island in the Native Land Court were brought to my attention. Ngāti Whakare (who are associated with Ngāti Raukawa and have made no claim in their own right) were the only group other than Ngāti Toa to claim such an interest in the island.

[425] Ngāti Raukawa have made no claim to the island. They have observed the terms of Waitohi's tuku to the present day, having claimed their rohe on the mainland coast with the boundary at Kukutauaki, originally established by Waitohi.

[426] Through Te Rauparaha, Ngāti Toa maintained a high degree of visible presence as he directed his "maritime empire", including taxing ships who called in. Ngāti Toa have consistently been referred to as having retained mana over the island. That is not to say that Te Ātiawa do not have customary interests there. While Te Ātiawa have maintained a presence on Kapiti Island, particularly through the Barrett family, it is Ngāti Toa who have the holistic relationship and significant presence on the island and its surrounds. Mr Barrett signalled that his considerable involvement in relation to the island and conservation was carried out with Ngāti Toa's approval. He noted that Ngāti Toa were happy with the way things were being done and that the island was being looked after. Reference was also made to the rangatira of Ngāti Toa who strongly whakapapa to Te Ātiawa as well who "supported" Te Ātiawa, rather than acting as Te Ātiawa, for instance in the Battle of Haowhenua.

[427] While the outcome of a Treaty settlement process does not of itself weigh heavily in favour of Ngāti Toa in this process, the fact that Ngāti Toa have been granted acknowledgments and exclusive redress, including on the island and its surrounding moana, indicates a recognition by kāwanatanga of the mana of Ngāti Toa in relation to the island. They are formally recognised as kaitiaki over the coastal marine area, which includes the waters around Kapiti. In addition, Ngāti Toa have an exclusive role in relation to managing and greeting those who visit places on the island, as well as a significant role in the strategic governance of the island and its surrounds.

[428] There was no suggestion that Te Ātiawa or Ngāti Raukawa received the island or any part of it as a tuku. Rather the preponderance of evidence suggests Ngāti Toa

took an “overlord” position and maintained control in terms of tikanga in relation to the island as part of the reckoning between the Hekenga iwi.

[429] While members of Te Ātiawa have continued to maintain a presence on the island, it is Ngāti Toa who have dominated and are widely recognised as having the “significant presence” on Kapiti Island.

[430] As all parties were careful to emphasise, whatever the outcomes in terms of CMT, that does not diminish the respective customary rights and interests of the ART iwi at tikanga.

[431] In relation to Kapiti Island, I am not satisfied that Te Ātiawa have established customary rights amounting to CMT either exclusively or on a shared basis with Ngāti Toa. I accept that by virtue of the ties of whakapapa and whanaungatanga, as well as their own role in Waiorua and securing the whenua after that battle, Te Ātiawa have customary interests and rights in parts of the island, however those do not give rise to the holistic relationship with the seascape that is needed to establish CMT in face of the evidence provided by Ngāti Toa. In particular, I note that insofar as the foundational take raupatu relates to the island, it was Ngāti Toa who claimed victory and were recognised by the Hekenga allies as entitled to that victory and take raupatu. This is illustrated by the allies allowing Waitohi to set the boundaries on the mainland for Te Ātiawa and Ngāti Raukawa. In light of the recognised leadership of Te Rauparaha and Ngāti Toa, the fact that no tuku was made to Te Ātiawa in relation to the island, and Ngāti Toa’s continued dominance in the modern day management and control of the island, Te Ātiawa are unable to establish that they hold Kapiti Island in accordance with tikanga, nor have they demonstrated exclusive use and occupation in the area.

Shared CMT with Ngāti Raukawa

[432] Ngāti Raukawa and Te Ātiawa have reached agreement as to shared CMT at Kukutauaki. This properly reflects their joint control of that shared boundary since 1840 (and following the battle of Kūititanga), as well as the joint presence and control to the present time.

CMT is granted to Te Ātiawa in relation to the mainland takutai moana claim area, excluding the agreed boundary at Kukutauaki, which is an area of shared exclusive CMT for Te Ātiawa and Ngāti Raukawa. This is consistent with the foundational claim of take raupatu and take tuku and reflects the tikanga of ringa kaha in establishing the Kukutauaki boundary with Ngāti Raukawa. The agreement reached between Ngāti Raukawa and Te Ātiawa is in the nature of a mana moana agreement, demonstrating the exercise of rangatiratanga, mana huihui and modern tikanga arrangements.

[433] Accordingly, the boundary at Kukutauaki is to be recognised as shared exclusive CMT between Ngāti Raukawa and Te Ātiawa. Leave is reserved to apply for any further determinations and the finalisation of the orders in relation to that boundary.

Ngāti Toa and Te Ātiawa: Next steps

[434] In relation to the boundary area at Whareroa, I have found that Te Ātiawa would be entitled to shared exclusive CMT with Ngāti Toa, if Ngāti Toa is able to achieve recognition of CMT for that area. It is now for the two iwi to reach an agreement on how the findings in this judgment should be practically implemented. This Court in previous decisions has been reluctant to leave matters to be finally determined following a Crown engagement process due to the length of time that the process may take,³⁸⁹ acknowledging that this may lead to some injustice for those involved in the Crown engagement pathway. However, in this case, unlike the affected parties in *Re Edwards*, both iwi recognise the mana of the other, they have closely intertwined whakapapa but separate identities and were both ready to accept some shared CMT in at least parts of their respective claim areas.

[435] It will be for the parties to consider whether there may be a mechanism allowing Te Ātiawa to apply for a variation in the entity holding the CMT if Ngāti Toa is recognised in its Crown process. An alternative option may involve an interim declaration relating to the shared area pending the completion of the Ngāti Toa's Crown engagement process. The resolution including on an interim basis is a matter I will leave for further submission.

[436] This determines the application in relation to the coastal rohe claim by Te Ātiawa. The seaward extent of the claim is dealt with in the "seaward" section of this judgment.

[437] I now turn to the evidence of Ngāti Raukawa and their associated hapū represented by Mr Tima. I then outline the evidence of Mr Taueki, MTA, Ngāti Apa and Rangitāne.

³⁸⁹ *Re Edwards* (HC), above n 16, at [409] and [410].

NGĀTI RAUKAWA

[438] Ngāti Raukawa seek recognition orders for CMT in the takutai moana from Kukutauaki in the south to the northern bank of the Rangitīkei River in the north (including Ōtaki, Horowhenua, and the Manawatū), and extending 12 nautical miles seaward from that coastline.

[439] Ngāti Raukawa agree that the southern boundary area at Kukutauaki is an area of shared exclusive CMT with Te Ātiawa. However, they seek exclusive CMT in the area north of that boundary. They take an initial position broadly opposing the claims of Muaūpoko, Ngāti Tamarangi, Ngāti Apa, and Rangitāne (on the Crown engagement pathway). Ngāti Raukawa maintain their claim to exclusivity but, in the alternative, would accept an order for shared exclusive CMT between themselves, Muaūpoko, and Ngāti Tamarangi in the takutai moana from Te Uamairangi to Ngā Manu, as “a contemporary expression of Te Whatanui’s protection”.

[440] In addition, Ngāti Raukawa support the application for CMT filed by Mr Seymour/Tima. Te Whānau Tima and Te Mateawa are linked by whakapapa to Ngāti Raukawa.

[441] Ngāti Raukawa called numerous witnesses to support their claim. They also, through Ms Selby, produced a two-volume record of oral histories taken from the kōrero of people from the iwi, entitled “He Iti Nā Mōtai”. It records the recollections of those interviewed as to the origins, migration, and challenges faced by Ngāti Raukawa over the past 180 years. I refer to excerpts from that record in places. These stories represent the handed-down kōrero of many kaumatua, but I bear in mind that undue weight cannot be placed on that material, as it was not considered in detail in the hearing.

Whakapapa

[442] Dr O’Malley was commissioned by Ngāti Raukawa to produce an historical report, entitled “Ngāti Raukawa ki te Tonga: Customary Interests and Marine and Coastal Usage” (the O’Malley report). His report relied on primary and secondary sources, including evidence prepared for the Waitangi Tribunal's Porirua ki Manawatū

inquiry.³⁹⁰ The O'Malley report also reviewed the whakapapa history of Ngāti Raukawa.

[443] The Ngāti Raukawa worldview is that all aspects of life are interconnected, and mauri flows through everything. Ms Mikaere³⁹¹ outlined Ngāti Raukawa's theory of existence, which draws on the kōrero of their tūpuna, to understand the foundational concept of whakapapa. She learnt her whakapapa and iwi narrative from kaumātua.³⁹² She described whakapapa as an inclusive and expansive web, which draws together a complex and constantly evolving network of relationships. This theory of existence presumes intimate connections between people and all other aspects of creation, and between elements and life forms (such as the land and sky). There are also important connections with tūpuna associated with forests (Tāne), and the sea (Tangaroa). The centrality of the ocean as a constant backdrop to the lives of the people is reinforced by the stories and waiata which have been handed down through generations.

[444] Ms Mikaere noted that the reo, mātauranga, and tikanga of each hapū are rooted in the relationships between people and the natural world and are shaped by their unique circumstances (including their physical environment, history, and the deeds of key tūpuna). Ngāti Raukawa's whakapapa and cosmological connection to the environment explains their in-born obligations of kaitiakitanga and manaakitanga. They manifest those obligations as a responsibility to respect the whenua and the waterways, and to maintain balance in all things.

[445] Mr Pātaka Moore said:³⁹³

Central to our tikanga is our te taha wairua or our spiritual connections. This includes our hononga and obligations to the atua (gods) that are manifested in the natural world. These obligations are borne from our whakapapa (genealogical connection) that we trace right back to these atua.

³⁹⁰ The present application area covers a large part of that Waitangi Tribunal's Porirua ki Manawatū inquiry area.

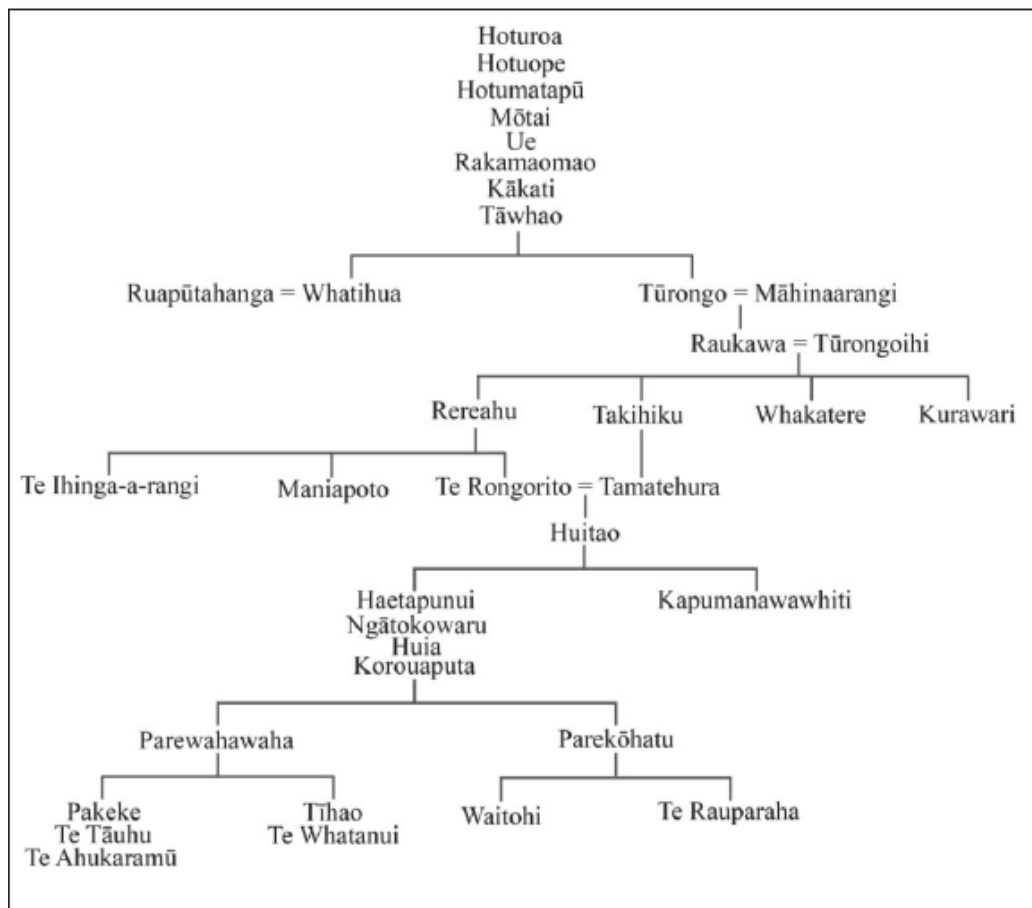
³⁹¹ Ms Mikaere is of Ngāti Raukawa (Ngāti Huia, Ngāti Pareraukawa) and Ngāti Porou descent. She is a senior university academic who has studied and taught law and tikanga. She has published about the history of Ngāti Raukawa.

³⁹² Including the highly respected Iwikatea Nicholson, who was handed down knowledge from the 1860s, so provided a window into that time. Ms Mikaere noted that Iwikatea Nicholson had regularly reminded her to take care when recounting their histories and tikanga.

³⁹³ Mr Moore, whose hapū is Ngāti Pareraukawa of Ngāti Raukawa (located inland from the Hōkio Stream), was one of the compilers of the iwi's oral history on the environment.

... It is therefore important in tikanga for us to acknowledge ngā atua and to pay deep respect to the natural world. This is reflected in the use of karakia and observing tikanga of giving the first catch from the sea back to Tangaroa. This is captured in the saying ‘tahi ki a Maru’. Maru is one of the atua related to water.

[446] Ngāti Raukawa trace their origins back to the Tainui waka, which journeyed from Hawaiki to Aotearoa, making first landfall at Whangaparāoa and eventually settling at Kawhia. Hoturoa was the captain of the Tainui waka. The eponymous ancestor Raukawa is a direct descendent of Hoturoa. Raukawa’s father was Tūrongo, and his mother was Māhinaarangi. Raukawa married Tūrongoihi. Each of their children except Kurawari, namely Rereahu, Takihiku, and Whakatere, would later have a distinct iwi or hapū named after them. Rereahu married Hineaupounamu, and one of their son’s was Maniapoto, the eponymous ancestor of Ngāti Maniapoto. A whakapapa overview from Hoturoa, Raukawa and other chiefs was produced by Ms Selby, as follows:



[447] O'Malley pointed out that historically, the broader Ngāti Raukawa confederation included groups such as Ngāti Kauwhata (along with Ngāti Matakore and Ngāti Rangatahi) who do not trace their descent to the ancestor Raukawa.

[448] Many of the witnesses recounted whakapapa, legends, kōrero, and waiata that had been handed down to them. For instance, Mr Jerald Twomey recited the waiata “Takoto Rawa Iho” by Matangi-Hauroa, which is still sung on Ngāti Raukawa marae today. It told of a plea for assistance in war and a request to avenge the death of Te Ruamaioro, who died in Whanganui. Later, two houses were built in remembrance of these events, known as Te Umu ki Whanganui and Te Umu ki Ōhau.

Foundational take at 1840

[449] The O'Malley report also provided a historical narrative. He focussed on changing settlement patterns, noting that Ngāti Raukawa were part of the Hekenga iwi who disrupted the social and political dynamics in the Kapiti area and displaced the Kurahaupō iwi, who were tangata whenua in the region. He described the tribal structures of governance, the nature and extent of Ngāti Raukawa's customary use and occupation of the takutai moana, the extent to which those customary rights were recognised in Crown land purchasing and by the Native Land Court, and the subsequent alienation of land.

Waikato homelands

[450] O'Malley noted that Ngāti Raukawa had become one of the largest and most powerful Tainui tribes, observing that:

The descendants of Raukawa occupied Waikato from Maungatautari and Whakamaru, and north towards the Kaimai Range, over time pushing further south into the area between Whakamaru and Lake Taupō. Over generations Ngāti Raukawa cemented their claims to the land through ancestry and occupation, along with conquest, in the latter case over an earlier tribe known as Ngāti Kahupungapunga who had once occupied much the same area.

[451] The history prior to the heke to Kapiti informed the actions of Ngāti Raukawa and their rangatira. O'Malley observed the strength of the alliances and whakapapa connections with Ngāti Toa in particular, but also with the Taranaki tribes who immigrated to the Kapiti Coast. Over time, tribes in the Waikato (many originally

founded by descendants of Ngāti Raukawa) clashed with one another due to population growth and increased competition for scarce resources. Ngāti Raukawa grew into a loose confederation of over 90 separate hapū. Despite many of those hapū acting independently of one another (even to the extent of going to war against each other), Angela Ballara has described the emergence of their “grand alliance” against Ngāti Maniapoto and Waikato.³⁹⁴

[452] The battle of Hingakākā,³⁹⁵ which took place around 1807, was a significant victory for the Waikato-Maniapoto alliance. O’Malley quoted Arini Loader, who said:³⁹⁶

...the loss of so many Ngāti Raukawa, Ngāti Kauwhata and Ngāti Toa rangatira was a devastating blow to the security of these iwi and the already fragile balance of peace and order within the region.

[453] A descendant of Te Rauparaha, Mr Rōpata, gave evidence that according to the kōrero handed down to him, following that battle there was no celebration or smiling for a whole generation. The battle would result in the defeated coalition contemplating a move from the Waikato a decade later. O’Malley, referring to the comments of Boast,³⁹⁷ noted that:

...the roll-call of iwi and hapū who would much later migrate to the west coast of the lower North Island correlates almost precisely with those on the losing side at Hingakākā. They did not leave because they were forced to go. But the alliances forged and reinforced at Hingakākā meant that if one group left, there was every incentive for their old allies to go too.

[454] In 1818–1820, Te Rauparaha was part of a taua³⁹⁸ including warriors from Ngāti Toa, Ngā Puhi, and possibly Ngāti Raukawa, which passed through the Kapiti region.³⁹⁹ He formed the idea of leading his iwi to the Kapiti area, which was rich in

³⁹⁴ Ballara, above n 356, at 235.

³⁹⁵ The numbers killed was likened to the fall of kaka during birding season, giving rise to the name Hingakākā (the fall of the parrots).

³⁹⁶ Arini Loader “He Iti Nā Motai: Te Hono ki Raukawa Oral and Traditional History Report” (Victoria University, January 2019) at 65.

³⁹⁷ Richard Boast “Ngāti Raukawa: Custom, Colonisation and the Crown, 1820-1900” (Crown Forestry Rental Trust, 5 December 2018) at 104.

³⁹⁸ This expedition is generally referred to as an āmiowhenua expedition.

³⁹⁹ Mr Rōpota suggests these tribes were involved. The taua is dated 1818–1819 in the chronology by Tamihana Te Rauparaha. See the translation by Ross Calman (ed and translator) *He Pukapuka Tātaku i Ngā Mahi a Te Rauparaha Nui: A Record of the Life of the Great Te Rauparaha* (Auckland, Auckland University Press, 2020) at 292. It is referred to as 1818–1820 in the Agreed Chronology of the parties.

resources and provided opportunities to trade with Europeans, as well as offering an escape from the fighting in the Waikato. In about 1821, Te Rauparaha led the first heke to Taranaki, Te Heke Tahutahuahi. It was in that heke that Ngāti Toa in its entirety migrated from the Waikato south. Te Rauparaha had unsuccessfully tried to persuade Ngāti Raukawa to join the migration.

The battle of Waiorua and its aftermath

[455] The historical narratives of the ART Confederation iwi differ in detail in relation to the heke and the battle of Waiorua of 1824. While there is disagreement between Ngāti Toa and Te Ātiawa regarding the involvement of the latter in the battle of Waiorua, Ngāti Raukawa makes no claim to have been involved in that battle. However, the evidence suggests some Ngāti Raukawa warriors may have been there at the time. In any event, Ngāti Raukawa's first heke south was likely prompted by the news of Waiorua.

[456] O'Malley commented that the battle of Waiorua resulted in Ngāti Toa establishing mana on Kapiti Island and the adjoining mainland. He referred to Dr Ann Parsonson's description of Te Rauparaha then being "no longer a mere intruder, but an established occupant of the district".⁴⁰⁰ Te Rauparaha's plan to settle Kapiti was ultimately successful.

[457] As recounted earlier in the judgment, Te Rauparaha was a powerful leader not only within Ngāti Toa, but also for Ngāti Raukawa. While his father was from Ngāti Toa, his mother was from Ngāti Raukawa. Before leaving the Waikato, these whakapapa connections were reinforced by other ties to Ngāti Raukawa. Hape-ki-tūāurangi was the most senior Ngāti Raukawa leader. When he was dying, he had asked who would take his place. Te Rauparaha stepped forward and accepted that leadership and mana.⁴⁰¹ Hape-ki-tūāurangi gifted Te Rauparaha a mere pounamu named Amokura, as a symbol of their connection. Te Rauparaha also married the widow of Hape-ki-tūāurangi. This leadership led to the expectation that Te Rauparaha would also act in the long-term interests of Ngāti Raukawa.

⁴⁰⁰ Ann Parsonson, "He Whenua Te Utu (The Payment Will Be Land)" (PhD thesis, University of Canterbury, 1978) at 166.

⁴⁰¹ This event is put at circa 1818 by Tamihana Te Rauparaha. See Calman, above n 399, at 292.

[458] Mr Wayne Kiriona confirmed the significance of the connected whakapapa of Ngāti Raukawa rangatira.⁴⁰² He noted that Te Rauparaha’s nephew Te Rangihaeata — the son of his sister Waitohi — was considered a rangatira of Ngāti Huia (a Ngāti Raukawa hapū), as well as being a great leader of Ngāti Toa.

[459] Waitohi, a famed wahine rangatira of Ngāti Toa, also had strong whakapapa to Ngāti Raukawa. These whakapapa connections, coupled with the mana of Waitohi, persuaded Te Whatanui to make the heke south to the Kapiti region after the battle of Waiorua to assist Ngāti Toa. Waitohi is credited with allocating whenua through a tuku to those who responded to her request, including to Te Whatanui at Horowhenua.

[460] O’Malley noted that before 1840, many Muaūpoko who had not fled inland or been killed were taken captive by Te Rauparaha, estimating as many as 2000. These captives were treated as slaves. They were forced to work in cultivation, or in the case of many younger females, provide sexual services to visiting whalers and traders. The income derived from that trade was used to acquire more muskets, a key to maintaining control of the Kapiti area. O’Malley also referred to an account in 1837 of a European being told to “take his pick” from 17 live slaves on Kapiti Island. He noted that as late as 1839, Te Rauparaha was known to have had a slave killed for a feast.

[461] O’Malley detailed the first Ngāti Raukawa heke of 1826, Te Heke Whirinui. The second was Te Heke Kariritahi, which occurred in about 1827. It was led by Nēpia Taratoa, accompanied for at least part of the journey by Te Whatanui.⁴⁰³ The third was Te Heke Mai-i-raro, which took place in around 1828 or 1829, and was led by Te Whatanui.

[462] Ngāti Raukawa were welcomed by Te Rauparaha, and may have lived with Ngāti Toa on Kapiti Island for a few years. O’Malley referred to Angela Ballara’s comment that:⁴⁰⁴

⁴⁰² He had lived all his life among his Ngāti Huia hapū at Poroutawhao, where he learnt the kōrero of the iwi from kaumātua.

⁴⁰³ The O’Malley report notes that “it seems that he returned north again later, possibly to escort the rest of his people south”.

⁴⁰⁴ Angela Ballara “Te Whatanui” (1990) *Te Ara – the Encyclopedia of New Zealand* <<https://teara.govt.nz/en/biographies/1t86/te-whatanui>>.

... Later Te Rauparaha, because of his relationship to Te Whatanui, made him a gift of Manawatū, the Horowhenua district and Ōtaki. He is said to have remarked: ‘Live at Ōtaki, but be careful of Muaupoko’. ...

[463] Ngāti Raukawa point out that the word “gift” does not convey the true meaning of the word “tuku”. Tuku is nuanced and may have conditions attached. Mr Twomey commented that the tuku carried obligations of responsibility and reciprocity between the two iwi, which Ngāti Raukawa fulfilled. The tuku whenua from Ngāti Toa to Ngāti Raukawa was in return for the substantial support the latter had provided in taking and settling the Kapiti whenua and moana and defending it against Muaupoko and their allies. Ngāti Raukawa say that Kapiti was a large area and Ngāti Toa could not have secured it alone, so they needed Ngāti Raukawa’s support.

Te Whatanui and Taueki

[464] O’Malley noted that the basis upon which Ngāti Raukawa settled in the Kapiti area would later be litigated and disputed in the Native Land Court. He observed that Te Rauparaha had implored Te Whatanui to “clear the weeds from my field”, meaning to kill the remaining Muaupoko (who had killed Te Rauparaha’s children), but Te Whatanui declined, responding that they would be kept as his servants instead.⁴⁰⁵ In this way, Te Whatanui, who had previously been prominent in leading Ngāti Raukawa taua in clashes with other iwi, also played a key role in making peace. An arrangement was made by Te Whatanui with the Muaupoko rangatira, Taueki, at Horowhenua.⁴⁰⁶

[465] The O’Malley report records Angela Ballara’s comment that:⁴⁰⁷

Te Whatanui succeeded in making peace with Rangitāne, Ngāti Apa and Muaupoko. He made the famous speech to the 100 or so Muaupoko still living at Horowhenua ... offering to be the rata tree that sheltered them.

[466] Te Whatanui decided to shelter the Muaupoko survivors and reassured a doubting Taueki of his ability to do so with the statement “heoi ano ra, ko te mea e pa

⁴⁰⁵ The Agreed Chronology dates the killing of Te Rauparaha’s children at Te Wī in Ōhau at 1822-23.

⁴⁰⁶ This occurred around 1830. An earlier arrangement between Te Whatanui and Kurahaupō iwi occurred around 1825-1829 at Karekare involving Ngāti Apa and Rangitāne, and is referred to in the Agreed Chronology.

⁴⁰⁷ Ballara, above n 404. The Agreed Chronology puts the Te Whatanui/Taueki arrangement at 1828/1829.

ki au ko te ua anake o te rangi”, which Ms Mikaere noted has been widely misquoted. She said the correct translation of his statement is “nothing but rain from the heavens can touch me”.⁴⁰⁸ The fact that Taueki was willing to take Te Whatanui’s word and entrust his people’s safety to him, emphasises Te Whatanui’s mana. Ms Mikaere says that it was Ngāti Raukawa who were in control of the Horowhenua takutai moana and lands following the arrangement between Te Whatanui and Taueki.

[467] Te Whatanui set aside 20,000 acres of land for the Muaūpoko survivors at Horowhenua,⁴⁰⁹ which became known as “Te Whatanui’s sanctuary”. The coastal boundary is said to have run from Ngā Manu in the south to carved posts at Te Uamairangi in the north.

[468] Ms Mikaere suggested that Te Whatanui showed strength of character and confidence in testing the resolve of Te Rauparaha by choosing to spare Muaūpoko. She said the decision to thwart Te Rauparaha’s agenda was a carefully considered assertion by Te Whatanui of his mana over his recently acquired lands. She noted that the balance to be struck between their respective spheres of authority was a fine one, and was dependent on the ability of all concerned to negotiate the subtleties of personal relationships and political power.

[469] Ms Mikaere referred to the late kaumātua, Iwikatea Nicholson’s belief that Te Whatanui would have suspected that the Muaūpoko he contacted had been involved in the killing of Te Rauparaha’s children. Mr Nicholson suggested Te Whatanui took the opportunity to test the respect Te Rauparaha would show him, arguably a significant gamble given that Te Rauparaha was still grieving.⁴¹⁰ While Te Rauparaha was disappointed with the arrangement, he conceded and said there were “enough stars”. However, Te Rangihaeata was less equivocal, and warned that if Muaūpoko ventured out beyond the protection of their benefactor’s domain then the promise of shelter would not apply, as the killings had yet to be avenged.

⁴⁰⁸ The statement would be commonly misconstrued as “nothing but the rain from Heaven can touch *you*”, which is an entirely different message.

⁴⁰⁹ Within the 52,000 acres allocated to Te Whatanui.

⁴¹⁰ See Iwikatea Nicholson “Māori customs and traditional practices (some examples): Hohou rongo. Takawaenga” (2016) 1 Whakatupu Mātauranga 73 at 77.

[470] Mr Wayne Kiriona, of Ngāti Huia, confirmed that he was told by kaumātua about the arrangement between Te Whatanui and Taueki, as an illustration of Te Whatanui making his own decisions and honouring his word to Muaūpoko, despite Ngāti Toa's remonstrations. He disagreed with the Muaūpoko narrative that it was them who held the mana and offered Ngāti Raukawa land at Horowhenua out of pity. Mr Kiriona reasoned that Muaūpoko would have remained there and Ngāti Raukawa would have lived with them if that were the case. He said that Te Whatanui set aside his own area in which to live at Horowhenua.

[471] Ms Mikaere warned against attributing intent through a modern lens and emphasised the need for context when considering the actions of rangatira. She commented that many historical accounts were written by Pākehā men and therefore shaped by a Eurocentric worldview, without the layers of complexity and nuance that were present in reality. Women were almost entirely absent from those Pākehā narratives, when in fact they had played an important role.

[472] Ms Mikaere's view was that Te Whatanui's actions had been misinterpreted in subsequent years. She criticised the overlay that some had placed on Te Whatanui's actions as being motivated by Christian charity, and the mistranslation of his words in the process.

[473] Te Whatanui was a key figure, and his actions are why many hapū associated with Ngāti Raukawa are now located in the Horowhenua. Ms Mikaere noted that by the early 1830s, Te Whatanui had established cultivations and several pā around Lake Horowhenua, with his first settlement located at Raumātangi. Te Whatanui's wife, his three sons, his niece, and his nephew, together with their spouses and children, all stayed with him. He used natural resources, including placing pā tuna along the waterways.⁴¹¹ Ms Mikaere referred to Te Herekau's evidence before the Native Land Court in 1873, describing the industrious possession by Ngāti Raukawa of the lakeside and various settlements.⁴¹²

⁴¹¹ Te Whatanui had a pā tuna situated where the lake ran into the Hōkio Stream.

⁴¹² He explained that he had lived on the land for eight years, and his sister had married Te Whatanui Tūtaki.

[474] Te Whatanui also journeyed to Taupō to bring back a group of approximately 100 relatives, who settled at the south end of Lake Horowhenua in around 1835. Ms Mikaere noted that by 1829 or 1830, Te Whatanui would have been well-established in the area, although population records from the time were unreliable.

[475] Mr Kiriona said that things were stable for a period after the arrangement between Te Whatanui and Taueki, but disputes arose at the time of Te Rangihaeata's death in 1855.⁴¹³ Mr Kiriona said that Muaūpoko tried to expel Ngāti Huia from Poroutawhao, but after attempts to shift the boundary, an agreement was reached.

[476] Ngāti Raukawa say their right of continued occupation is also supported by the recognition of the arrangement with Te Whatanui by third-party observers, including Pākehā.⁴¹⁴ Historical European commentators referred to the dominance of Ngāti Raukawa and their subjugation of Muaūpoko and their allies. For example:

- (a) In 1841–43, a New Zealand Company surveyor informed a select committee in the House of Commons in London that Muaūpoko had been decimated, but Te Whatanui had “set them at liberty” and both tribes lived together at Horowhenua.
- (b) In 1850, Native Secretary Kemp reported that Ngāti Raukawa had taken possession of the country and Muaūpoko owed their existence to “the late Te Whatanui”, who had made his residence in Horowhenua.
- (c) An 1868 report by Mr Hadfield said that he believed Muaūpoko had “no mana over the land at that time”. Mr Hadfield described his visit to the Horowhenua in 1840 and noted that Te Whatanui was:

“without any question or doubt at all, the owner of the whole of that part of the country... The Muaūpoko were then very small in number. They were in a state of slavery to Te Whatanui, and

⁴¹³ Te Rangihaeata was exiled after the signing of the Treaty. Mr Kiriona noted that in around 1846, following conflict with settlers and the military in the Hutt Valley and his pursuit by colonial troops, Te Rangihaeata, returned to settle at Poroutawhao. There his whānau provided refuge and security for him. He is buried in the nearby urupā at Paeroa.

⁴¹⁴ For instance, Edward Wakefield and others who reported the subjugation of Muaūpoko.

entirely under his command — catching eels for him, and doing anything for him that he thought proper to require of them...”

- (d) In 1871 Mr Travers, a Wellington lawyer commissioned by the Government to carry out an investigation into customary rights in the district, said that Muaūpoko had been defeated by Te Rauparaha and his allies. He said they were saved from complete extermination by the protection of Te Whatanui, who took the surviving “remnant” under his wing. He said Muaūpoko then lived “in the character of tributaries, if not actual slaves”, on a much-reduced area at Horowhenua “given” to them by Te Whatanui.

[477] Later commentators also referred to Te Whatanui saving and enslaving Muaūpoko. T L Buick characterised Te Whatanui as a saviour who “spread the mantle of protection over the supplicating remnant of the original people”.

[478] Te Whatanui is said to have warned Muaūpoko, Rangitāne, Ngāti Apa, and others against accepting an invitation to a feast known as “the feast of the pumpkins” in 1833/1834. They ignored his advice, and Te Ātiawa massacred the visitors at the instigation of Te Rauparaha.

[479] At this time, Ngāti Raukawa and Ngāti Apa had developed particularly close bonds. Angela Ballara has observed that peace with the Kurahaupō allies meant they subsequently assisted Ngāti Raukawa in battles against Ngāti Awa (Te Ātiawa).

Battle at Haowhenua

[480] O’Malley recounted the battle at Haowhenua between Ngāti Raukawa and Te Ātiawa, which took place around 1834. Ngāti Toa was divided in its support. Te Rauparaha and Te Rangihaeata supported Ngāti Raukawa, but most of the tribe sided with Te Ātiawa. There is much debate among historians about which iwi was victorious. Boast describes the outcome as “inconclusive”, noting the “uncertainty on the part of historians as to which side was victorious”, but that “all agree it was a finely balanced outcome”.

Battle of Te Kūititanga

[481] O'Malley's research indicated that Haowhenua led to the setting of the Kukutauaki boundary, which was widely understood and observed to be the dividing line between those Te Ātiawa left in the Kapiti district, and their Ngāti Raukawa neighbours to the north. Boast noted that the boundary was established to prevent further fighting.

[482] The battle of Te Kūititanga took place in 1839, when Ngāti Raukawa attacked a Te Ātiawa pā at Te Kūititanga in Waikanae.⁴¹⁵ Ngāti Toa did not take part. While still debated, the preponderance of evidence suggests Te Ātiawa won and viewed the victory as a final severing of their obligations to Te Rauparaha.⁴¹⁶

Native Land Court decisions

[483] Mr Kiriona referred to the sale of the Rangitīkei-Manawatū block to the Crown in the mid-1860s. He said that the Poroutawhao people (and other Ngāti Raukawa) found themselves dispossessed. Although some Ngāti Raukawa supported the sale, 151 members of the iwi (and affiliated hapū) signed an affidavit expressing opposition to the Crown's purchase of the block. Ngāti Raukawa also sent petitions to Queen Victoria. The Poroutawhao opponents were labelled as non-residents, and received no money for the block, nor any reserves. There was no investigation into the Rangitīkei-Manawatū block sale, and this grievance is currently before the Waitangi Tribunal.

[484] Mr Kiriona noted that a Native Land Court decision on 5 April 1873 gave nearly the entire Horowhenua block to Muaūpoko. That included the 20,000 acres that Muaūpoko had previously occupied, as well as an additional 30,000 acres to the north and south of Horowhenua (including land at Waiwiri and Mahoenui), which Mr Kiriona said had long been occupied by Ngāti Raukawa hapū such as Ngāti Pareraukawa and Ngāti Hikitanga. Approximately 7,000 acres of land to the north of Horowhenua which had been occupied by Ngāti Huia and Ngāti Matau was also awarded to Muaūpoko.

⁴¹⁵ This battle is also referred to as the battle of Kūititanga.

⁴¹⁶ See above the Te Ātiawa section of this judgment.

[485] The Native Land Court decision only allotted 100 acres of the Horowhenua Block to Ngāti Raukawa at Raumatangi. That 100 acres was said to be land that Muaūpoko had given to Te Whatanui out of gratitude for keeping them safe from Te Rauparaha’s vengeance. Following the Horowhenua decision and due to hostilities between the iwi, various agreements were brokered between the government, Muaūpoko, and Ngāti Raukawa, to give Ngāti Raukawa further land.⁴¹⁷

[486] Mr Kiriona said this Native Land Court decision was wrong. Ngāti Raukawa has always claimed that it has tikanga-based rights across the whole rohe from Kukutauaki to the Rangitīkei River, including the adjacent takutai moana.

[487] Ngāti Raukawa maintain that the Native Land Court investigations were flawed and its findings in the earlier Himatangi cases were wrong.⁴¹⁸ By 1898, the beneficiaries of the Te Whatanui land had received a total of approximately 1,600 acres. Ngāti Raukawa claims were recognised in 1912 in a Court decision, in which O’Malley says Ngāti Raukawa hapū were:

...recognised as having customary rights over the lands between the Rangitīkei River and Kukutauaki (minus most of the Horowhenua block), with the main issues being the basis of those interests and the extent to which they were shared with other iwi.

[488] The Court found that the block of land which was the subject of the appeal was held by Te Whatanui “under an effective conquest”.⁴¹⁹ It said that this had been established by 1840.⁴²⁰ The Appellate Court was in fact dealing with an appeal concerning only 132 acres in the Horowhenua. However, in the course of its judgment, the Court noted:

It is clear that Whatanui’s people were the owners of the rights of fishing in the Hōkio Stream, and there is not a particle of doubt, that the Ngāti Raukawa were the absolute masterful owners of the block.

⁴¹⁷ Richard Boast (ed) *The Native/Māori Land Court: Volume 3, 1910–1953* (Thomson Reuters, Wellington, 2019) at 597.

⁴¹⁸ Professor Belgrave, for Muaūpoko, provides a detailed analysis of the 1868 and 1869 Himatangi hearings which is referred to in the Muaūpoko section of this judgment.

⁴¹⁹ Boast, above n 417, at 598.

⁴²⁰ At 599.

[489] Boast notes in his commentary on the Appellate Court decision that the Horowhenua investigations are the “strongest contender” for the “most contested and intricate legal history: of all of the many Māori Land blocks in contention for that dubious honour”.⁴²¹

[490] O’Malley also cautioned against relying too heavily on the Native Land Court decisions. He said they involved interested parties who had a lot at stake and were committed to a course of action concerning the sales, and sometimes evidence was suppressed. O’Malley suggested that demographic information was a more reliable indicator of the situation on the ground and was indicative of the dominant position of Ngāti Raukawa in the rohe.

Take raupatu and take tuku

[491] The pūkenga addressed a set of questions to assist in determining how the tikanga concepts of take raupatu, ringa kaha, ahi kā, take tuku and tatau pounamu apply between 1820 and 1840 in the context of this hearing. The framework assists in considering military action by which people were displaced and a new group established through subsequent long continuous occupation (ahi kā roa). This is similar to the framework of Sir Hirini Mead, which was referred to by the tikanga legal expert called by Ngāti Raukawa, Dr Carwyn Jones.⁴²²

[492] The framework involves the following indicia that tikanga is operating to establish mana whenua following raupatu: often intermarriage with original occupants (moe whenua); acknowledgement by neighbouring iwi; the estate meeting the needs of the new group of occupiers and former citizens being allowed to remain; the establishment of alliances (whanaungatanga); establishing a governance structure (rangatiratanga); defending the new realm (ringa kaha); relative peace ensuing (rongomau); the next generation claiming ancestral rights (take tūpuna); and rangatiratanga (flowing from securing mana whenua).

⁴²¹ At 598.

⁴²² Mead, above n 81, at 306-308.

[493] Ngāti Raukawa say with the addition of take tuku by Waitohi of the rohe from to Kukutauaki to Rangitīkei, the framework maps how Ngāti Raukawa came to occupy the claimed rohe. They also emphasise that the tuku was not simply a gift but a reciprocal obligation, as Ngāti Raukawa were a key part of the raupatu process. Ngāti Toa were not large enough to secure the area on their own. Ngāti Raukawa say that since then, they have continued the process of ahi kā roa, and can also rely on take tūpuna.

[494] Ngāti Raukawa note that context is important. For instance, while intermarriage between tangata whenua and the newcomers to secure their position was generally common, this was not a strong feature of Ngāti Raukawa settlement due to the animosity felt by Te Rauparaha toward Muaūpoko.

[495] The pūkenga agreed that everything was context specific. They emphasised that while ideals existed at tikanga, the application to the situation at hand was nuanced and depended on how events had played out. The pūkenga accepted under cross-examination that raupatu involved a “process”, although a form of authority might be established immediately.

Evidence of tikanga indicia

[496] To establish their ahi kā, the Ngāti Raukawa evidence was referred to under the following headings: physical occupation markers; naming of places; the exercise of kaitiakitanga; taniwha; extensive use; the placing of rāhui; the exercise of manaakitanga and whanaungatanga; kawa and the performance of rituals (tikanga moana); the establishment of a separate but connected identity; and recognition by others. I summarise this evidence below.⁴²³

Physical occupation markers

[497] Physical occupation markers include historical sites where the iwi have kāinga, pā, urupā, marae, and wāhi tapu.

⁴²³ I largely rely on the same headings in summarising the evidence of tikanga indicia for Muaūpoko, given the contest between those two iwi.

[498] Mr Pātaka Moore gave evidence of “dozens of kāinga”, both seasonal and permanent, where Ngāti Raukawa had lived over the last 200 years, as well as pā sites and urupā sites that he had tabulated and mapped. He worked with Mr Caleb Royal, who gave examples of sites identified on the coast.⁴²⁴ These included Pakakutu pā, which was established by Mr Royal’s hapū, Ngāti Tūranga, in around 1822.⁴²⁵ Mr Royal explained that this was a major fortified pā and its site was chosen for its proximity to the Ōtaki River and the beach.

[499] Mr Denis Emery⁴²⁶ noted that Tāwhirihoē Pā, near the Rangitīkei River, was the last fighting pā of Nēpia Taratoa and Īhakara Tukumarū of Ngāti Raukawa. He said the pā was built to keep Ngāti Apa on the northern side of the Rangitīkei River. It is now a scenic reserve under DOC, but is wāhi tapu to Ngāti Raukawa. Mr Emery noted that two rare white lily composites were found inside the reserve, which cannot be found anywhere else in the world. He also said that the katipo spider is prevalent in the reserve.

[500] Ngāti Raukawa refer to 20 current marae, whose hapū are associated with Ngāti Raukawa and support their claim. Mr Twomey listed those marae from the northern end of Ngāti Raukawa’s claimed rohe at Rangitīkei to below Ōtaki in the south. He recounted the names and history of the marae, as well as the whakapapa connections of the hapū/iwi occupying the relevant areas. Mr Twomey said it is important to note that current marae locations may not reflect where the hapū were when they first settled in the area, prior to land sales, or prior to the allocation of reserves. It should not be inferred that the marae area described is solely where their interests lie. Ms Selby also produced a table of marae and associated hapū across the rohe.⁴²⁷

⁴²⁴ Mr Caleb Royal gave evidence by affidavit.

⁴²⁵ Marked on the map at Attachment 3.

⁴²⁶ Mr Emery gave evidence by affidavit.

⁴²⁷ Ngāti Whakare: Whakawehi/Poutū Marae. Ngāti Takihiku and Ngāti Ngārongo: Kererū Marae. Ngāti Huia ki Matau: Matau Marae. Ngāti Huia ki Poroutāwhao: Huia Marae. Ngāt Pareraukawa: Ngātokowaru Marae. Ngāti Kikopiri and Ngāti Hikitunga: Kikopiri Marae. Ngāti Tūkorehe: Tūkorehe Marae. Ngāti Wehiwehi: Wehi Wehi Marae. Ngāti Korokī, Ngāti Maiōtaki, and Ngāti Pare: Raukawa Marae. Ngāti Kapumanawawhiti: Te Pou o Tainui Marae. Ngāti Huia ki Katihiku: Katihiku Marae.

[501] Ngāti Raukawa refer to the following statement of Tā Hirini regarding the centrality of marae to Māori culture:

What the marae does very effectively is provide a tūrangawaewae, a place for the feet to stand. It confirms one's position in the world, where one can say, "this is where I belong and over there is where I shall be buried so that I am with my uncles and aunties, my grandparents and parents, my siblings and cousins".

[502] Mr Moore confirmed the significance of marae as the "cultural hub" of a hapū community, describing the marae as a "mark of mana and ... a mark of our longstanding occupation and ahi kā in our rohe".

[503] Mr Moore also produced a map outlining takutai moana sites of significance to Ngāti Raukawa, including mahinga kai, fishing sites, ancestral places, tauranga waka, and protected areas where rāhui have been placed, marking 26 sites on or near the coast between the Rangitīkei River and Peka Peka Beach (Kukutauaki).

Naming of places

[504] Ngāti Raukawa acknowledge that many existing place names were retained when they settled in the rohe, but say that this adoption of names does not weigh against their establishment of ahi kā. Tā Matiu Rei (of Ngāti Toa) noted that many ancestors are common to various iwi. For instance, Ngāti Raukawa (and many iwi around Aotearoa) have whakapapa to the famous navigator Kupe, so that would be respected. He said:

...of course all Māori respect Kupe, and it could be said that, you know, Kupe was, you know, that the people from Kurahaupō were descendants, but you can always just say that for Tainui and every other tribe in the country, that we all recognise that Kupe was the one who led us here.

[505] It follows that some place names are based on the common ancestors.

[506] Mr Moore noted that when iwi moved to a new rohe they would make use of the resources and places such as fishing holes, tracks, and areas of housing, so names would sometimes be retained for ease of reference. However, over time, places were

renamed for important events and tūpuna. For instance, areas in which Ngāti Raukawa had established marae were renamed to reflect Ngāti Raukawa tūpuna and events.⁴²⁸

Kaitiakitanga

[507] Ngāti Raukawa's whakapapa connections to the sea (and sea life), deriving from the atua and the physical environment in an uninterrupted descent through tūpuna to the present day, give rise to their kaitiakitanga responsibilities. The pūkenga noted that the kaitiakitanga obligation to use and maintain marine resources is an intergenerational responsibility.

[508] Mr Kiriona referred to kaitiakitanga being exercised over the rohe through tikanga practices. These practices include appropriate karakia for specific occasions, for instance, putting the first fish back as an acknowledgement of respect for Tangaroa, and understanding the seasons and tides to know when kai is at its most abundant and best condition. It also includes fishing sustainably by only taking what is needed. Mr Kiriona is an authorised kaitiaki responsible for granting customary fishing permits, and said that he rarely issues permits to collect tohemanga (toheroa) due to their scarcity in numbers, which the iwi are trying to build up. Ngāti Raukawa are also trying to restore and rebuild pipi beds, using both proactive and reactive responses to fulfil their kaitiaki obligations. Mr Kiriona noted that kaitiakitanga can also be expressed in other ways, for instance his parents' generation had lobbied against a dairy company that was discharging into the Manawatū River.

[509] Mr Tamihana noted particular tikanga in relation to the tuna heke (eel migration). For instance, they would leave the first run of tuna so they could continue on their journey and harvest after that, according to the iwi's needs. Mr Tamihana was taught to leave the smallest tuna and also largest tuna (which are full of thousands of eggs). He said that given the threatened or endangered status of the long-finned tuna today, more of the short-finned tuna are fished to ensure sustainability.

⁴²⁸ An example was given in submissions of Te Tuarā Tapu o Te Rangihaeata, which references the Ngāti Raukawa tūpuna in the name given to the Tararua ranges.

[510] Mr Kiriona gave a present-day example of iwi lobbying to stop the commercial dredging of surf clams just offshore. He personally took pictures of a dredge off the beach, and noted patterns of shells at the time of the dredging and again later to compare any changes.

[511] Mr Royal and Mr Tamihana referred to a range of kaitiaki projects and monitoring activities undertaken by the iwi, sometimes in collaboration with others, including with the Ministry of Primary Industries (MPI). Kaitiakitanga is illustrated in Mr Royal's day-to-day work. He tracks mass die-back events of shellfish, and noted that the dead shellfish numbers have "gone off the charts". His view was that those deaths relate to the dredging of surf clams. Ngāti Raukawa say the dredging should stop, and express opposition to it by not using their entitlement in their commercial fishing quota for surf clams.

[512] As another example of kaitiakitanga on the ground, Mr Royal referred to the apprehension of a group who were in the process of filling a 44-gallon drum with tuatua. The local kaitiaki questioned the offenders and made them return the tuatua. Mr Royal also reported incidents where commercial nets had been removed by iwi members.

[513] Mr Moore said that local kaumātua take responsibility for preserving and maintaining the local water resources and fish species. The elders teach younger generations about fishing and ensure those practices are safe and sustainable. These are the kaitiakitanga obligations which are handed down to the next generations.

[514] Mr Tūroa Andrew Karatea is based in the northern part of the rohe, at Rangitīkei. He has been nominated by his marae as a kaitiaki to issue customary fishing permits, although he has not received confirmation from MPI. He noted that toheroa had been plentiful in the area in the past, but were now depleted. He said this was caused by pollution from the rivers. Mr Karatea is involved in kaitiakitanga activities such as water testing on the coast from Waitōtara to the Rangitīkei River, which has shown that the rivers are heavily polluted.

[515] Mr Emery is from Feilding, which is at the north of the Ngāti Raukawa rohe. He is involved in a number of kaitiaki activities for Ngāti Raukawa and was a former CEO of Te Rūnanga o Raukawa Inc. He is presently the representative for the iwi's interests along the coastline from Kukutauaki to the Rangitīkei. He was also involved in negotiating the Māori Fisheries Settlement in 2004 and continues his involvement in the management of the commercial fishing quota for the iwi. Mr Emery noted that kaitiakitanga ensures sustainability of resources, in a physical, spiritual, economic and political sense. He said the authority to protect a resource stems from the broader understanding of whakapapa and its linkages back to atua, who have delegated the responsibility and obligations to tāngata for the protection of all things. Mr Emery saw it locally as an exercise of obligation, mana, and prestige, by those whānau, hapū, and iwi who claim close ties to their rohe. He regarded it as an obligation to ensure sustainability of the resources for future generations. For instance, he said when they needed to take kaimoana exceeding the catch limits (for example, more than 10 pāua), usually for tangihanga, they would consult the local kaitiaki and tangata whenua (kaumātua appointed by Ngāti Raukawa) to get a permit.

[516] Mr Emery produced a newspaper article entitled “Maori make claims to control river” dated June 2010. The article referred to the battles that Te Reureu at Rangitīkei, and Ngāti Kauwhata at Ōroua and the Manawatū have had with local and regional authorities, trying to get them to listen to their knowledge and mātauranga Māori relating to the river. He noted that Parewahawaha marae is known as “the northern gateway into Ngāti Raukawa”. Mr Emery referred to a recent incident where Ngāti Parewahawaha found a seal skinned at Tangimoana Beach near Tāwhirihoe Pā. He was alerted due to his kaitiakitanga responsibilities for Ngāti Raukawa. He gave a further example of a seal stranding at the old pā Tāwhirihoe at Tangimoana Beach in September 2023. He was called by DOC, who had also spoken to neighbouring iwi including Ngāti Apa, Rangitāne, and Muaūpoko. Eventually, Ngāti Kauwhata and Ngāti Kahoro dealt with the stranding, as they were “the proper people” to do so. Mr Emery gave that as an example of the iwi's ahi kā status, noting that Tangimoana Beach is in Ngāti Raukawa's rohe and is their kaimoana collection base.

[517] Mr Emery notes that spinifex and pīngao used to be planted at the Tāwhirihoe Pā reserve to aid the spats from their tohemanga. However, beach buggies and

four-wheel drives have knocked them back over time. He emphasised the importance of flora and fauna to Ngāti Raukawa. Mr Emery also said they were still dealing with the aftermath of Cyclone Gabrielle, which affected the Rangitīkei, Ōroua, and Manawatū rivers, all of which flow through to Tangaroa. The cyclone had gouged out part of their wharf, which remained damaged, however he said the iwi still had to get kai for themselves.

[518] Dr Mahina-a-rangi Joy Baker gave evidence for Ngāti Raukawa as to the connections between environmental well-being and the well-being of the people.⁴²⁹ She emphasised the holistic relationship between the iwi and the seascape.

[519] Dr Baker noted the involvement of the iwi in the modern-day exercise of tikanga through their responses to kāwanatanga (Crown and local government) processes, such as resource consents, strategies, regional district plans, and relevant legislation and its implementation. The freshwater sites of significance to Ngāti Raukawa were mapped by Ngā Hapū o Ōtaki and are now listed in the Greater Wellington Regional Council Natural Resources Plan. The plan registered 35 streams and other waterways which are ascribed particular value, such as being related to food gathering, papakāinga, or other iwi activities or historical sites. Most sites are concentrated around the Ōtaki area, however the sites span from the Kōwhai Stream and mouth in the south to the Wairongomai roto and awa in the north.

[520] Mr Tamihana gave an example of reactive kaitiakitanga, referring to the approximately 15–20 whale strandings that he has been involved with. He said that when a Bryde’s baleen whale was stranded at Hōkio Beach in September 2020, many Ngāti Raukawa hapū were onsite from the beginning and were the last to leave. Additionally, in the Foxton area in 2023, a beluga whale was stranded and local Ngāti Raukawa hapū were involved in the response, including in performing karakia.

[521] Mr Tamihana was critical of the current DOC rotation system introduced in 2017, which allocates responsibility for whale strandings on a rotational basis to the

⁴²⁹ Dr Baker holds a number of government roles relating to environmental issues such as the ministerial advisory group, Kāhui Wai Māori (Māori Freshwater Forum). She also gave evidence on behalf of Te Ātiawa.

iwi along the Kapiti Coast. He said that Ngāti Raukawa formally objected to the process and that it creates conflict among iwi. Mr Tamihana also described attending another whale stranding at Hōkio Beach in September 2023, and criticised its handling by Muaūpoko, who had taken the lead on managing it.

[522] Mr Emery also indicated he was not amenable to the DOC rotational system. He added that if there was a stranding in his area, he would ensure his iwi attended to it, and if other iwi sought to take their place they would “fight them out on the beach over it” if necessary.

[523] The ART Confederation iwi work together on projects to better maintain custodial rights and kaitiakitanga. Mr Tamihana noted that the iwi nevertheless acknowledge each other’s mana and kaitiakitanga obligations in their respective rohe. He said that kaitiakitanga is recognised as an expression of tino rangatiratanga, and they share in this mahi to ensure that tikanga and kawa are properly applied and knowledge is handed down to the next generations. Mr Tamihana noted that when whales were beached, taonga (such as art) would be commissioned and exchanged with other iwi to maintain relationships. He said that art is important to maintain whakapapa connections, and to develop and maintain iwi stories.

Taniwha

[524] The pūkenga confirmed that the reference to taniwha is another indicator of ahi kā. Taniwha often act as warnings of danger or signs in the environment. For example, Mukukai is a tohu (sign) of abundant fishing. Dr Baker referred to seeing Mukukai in the form of a log with “goose neck” barnacles over him, “a couple of times” on Ōtaki beach. Mr Moore also recounted seeing Mukukai,⁴³⁰ as well as referring to other taniwha which he had been told about, including a white shark and large pātiki (flounder).

⁴³⁰ Mukukai is also depicted in artwork around Ōtaki town and is the name of the wharekai at Te Pou o Tainui in Ōtaki.

Extensive use

[525] The flat and sandy nature of the coastline allows for fishing and gathering of kaimoana and other resources. Ngāti Raukawa say they brought with them their knowledge of fishing and other moana practices developed over 700 years in the Waikato, but were also required to adapt quickly to the new environment. This mātauranga has been passed down to present generations. Ngāti Raukawa were dependent on fishing and collecting mahinga kai for sustenance. Kaimoana would be exchanged among the ART Confederation iwi (mainly with Ngāti Toa) for other kaimoana that were not available in the local rohe moana.⁴³¹ Mr Teira noted that it was a way of life for his people, and during the Great Depression the coastline provided food when there was little else.

[526] Ngāti Raukawa witnesses claimed that the iwi had used the Manawatū, Rangitīkei, and Ōtaki rivers and river mouths from 1840 until the present day for fishing and gathering kaimoana. Mr Moore identified some significant streams, rivers, and lakes as fishing sites. For example, the Hōkio Stream had over 30 eel weirs along it.

[527] Mr Royal noted that he had inherited knowledge from his kaumātua (including about customary resources and how to find and manage them), as well as from his personal experience. Evidence was given of various techniques for gathering kaimoana, including boat fishing, netting, and foraging up and down the coastline. Mr Kiriona said that his father and other kaumātua directed him as a child to specific areas on the beach for gathering shellfish, fishing, or catching tuna, and even specific trees for snaring birds.⁴³² Mr Kiriona now passes that mātauranga down to his own sons.⁴³³

[528] Mr Royal referred to particular places in the rohe to collect pipi and tuatua (down to Mangaone inland). He recalled gathering and eating toheroa quite frequently when he was young. He said his father was irate when he was prosecuted and fined

⁴³¹ Such as kōura, pāua, and kina.

⁴³² Mr Kiriona spoke about his father always being on the beach and at the river when he was growing up. Mr Kiriona said he learnt his knowledge and skills in tikanga from his father, who had in turn learnt it as a way of life from the old people of Ngāti Huia.

⁴³³ Mr Kiriona also passes on this knowledge to his own sons who fish and dive.

\$200 for gathering toheroa for customary purposes in the 1980s. His uncle had compiled a detailed list for identifying places where toheroa might be found.

[529] Mr Royal described other special fishing knowledge, such as the behaviour of gurnard as an indicator of their likely habitat. He also recalled fishing in water filled holes on the beach, which were full of surf algae that the fish fed on. The species identified by Ngāti Raukawa as particular taonga or rangatira species were toheroa and tuna, and they also gave evidence about certain signs which suggested where those species might be found.

[530] Mr Emery referred to customary fishing in the Rangitīkei River area in order to feed his whānau. He would catch flounder, kahawai, pātiki, and the odd small kingfish, using a gaff. He noted that fishing was not as good as it used to be, and it was harder to collect kai due to changing conditions. He said whitebait from Tangimoana Beach is less plentiful than before, and gathering shellfish (pipi, tuatua and tohemanga) is now problematic because pollution infects them with E coli. Mr Emery said he knew the areas to go, noting that the coarse black sand of Tangimoana has different kai than the white sand beaches of Himatangi and Waitārere. Other witnesses referred to gathering tipitipi (a round orange shellfish) and surf clams.

[531] Mr Kiriona recalled routinely collecting shellfish, including tohemanga/toheroa (although those are scarcer today), pipi, tuatua, and tuangi. He noted that Ngāti Huia would fish and gather shellfish from the Hōkio Stream up to the Manawatū River, including at Waitārere Beach.⁴³⁴ He also referred to fishing for flounder, kahawai, mullet, herring, and snapper. He would set whitebait nets and hīnaki between Whirokino, Koputaroa and Waitārere.⁴³⁵ In addition, the local wetlands provided “crawlies” and carp. Mr Kiriona’s father would sometimes build concrete ponds to store tuna in a net so they could be retrieved live for marae hui. He described those ponds as a modern version of the tuna “blocks” which were

⁴³⁴ He referred to the shipwreck of “Hydrabad” which sunk off Waitārere Beach in 1878. See Manawatū Heritage “‘Hydrabad’ shipwreck, Waitārere Beach” (1966) <www.manawatuheritage.pncc.govt.nz>. It was once a good fishing spot, but is now in the dunes.

⁴³⁵ Whitebait nets would be set mainly in the Manawatū River and estuary, but this would vary between seasons.

traditionally placed in streams to catch tuna, but could not be left in streams safely these days.

[532] Mr Kiriona said Ngāti Huia went to the Hōkio Stream entrance to fish for tuna. They travel far out to sea, including around the 12 nautical mile mark to fish for kingfish and tuna in March and April. It is necessary to travel that distance due to the water currents, temperature, and the migratory patterns of the fish at those times. Beyond Mr Kiriona's own personal and whānau use, in the wider Ngāti Raukawa takutai moana area the iwi would fish for kahawai, snapper, gurnard, mullet, herring, shark, stingray, flounder, kingfish, and tuna. Other witnesses also referred to īnanga, red cod, sole, trevally, stargazers, frost fish, and John Dory.

[533] Mr Twomey's hapū, Ngāti Manomano, occupies the Manawatū coastal plains.⁴³⁶ Parallel to that, in the once forested and swampy interior, is the Ōroua Valley, which is occupied by Ngāti Kauwhata. Mr Twomey said that the Manawatū coastal plains were held by a mixture of persons who, by 1866, identified as Ngāti Parewahawaha, a hapū of Ngāti Raukawa. He said some Ngāti Apa had small holdings in the area, but they lived under Ngāti Raukawa consideration, and eventually moved to the northern side of the Rangitīkei River to be with the rest of their tribe. Other hapū also reside in the area with roots from Ngāti Raukawa allied iwi.⁴³⁷

[534] Mr Twomey said that while Ngāti Raukawa acknowledge that their Rangatahi, Matakore, Waewae, and Pikiahu whanaunga have distinct whakapapa, they have always worked together to benefit the whole, and therefore consider them to be part of Ngāti Raukawa's presence in the rohe today. Mr Twomey referred to the position at the time of Haowhenua as follows:

Now when the tribe became troubled, from the Haowhenua, Te Heuheu came to support, Taonui and them came also. Taonui Hikaka and them came to support the tribe. That is what relationships are all about. The people living together as one — according to them — but to me, the Ngāti Huia lived below above and within the hapū, Parewahawaha. Ngāti Huia below to Katu and in the middle is Te Whatanui and them.

⁴³⁶ Mr Twomey is of Ngāti Raukawa descent and has been involved in the iwi organisation. He was a New Zealand Defence Force Cultural Advisor, and a Policy Analyst (Māori) for Horizons Regional Council. He is currently works for Manawatū District Council in policy development and strategic planning.

⁴³⁷ Namely Maniapoto, Whakatere and Tūwharetoa.

[535] Mr Tūroa Karatea has spent his life in Te Reureu (the Rangitīkei River valley). He said that although the hapū of Te Reureu have different whakapapa and histories, they come under the confederation of Ngāti Raukawa. His understanding was that the Ngāti Raukawa territory extended to Whangaehu. Mr Karatea noted that while Te Reureu is located inland, the people of that area would exercise their customary rights at the Rangitīkei River. He said he would fish from the Rangitīkei River mouth, as far down as Waitārere Beach (50 kilometres south of Tangimoana). He also noted that there are many marae and kāinga located along the banks of the Rangitīkei River (between the Waitapu and Rangataua streams) including Kōtuku, Poupatatē, Te Tikanga, Te Marae o Hine, Te Hiiri o Mahuta, and Mīria Te Kakara. Mr Karatea referred to learning the tikanga related to fishing such as karakia from his uncles, as well as effective customary techniques to catch eel and whitebait. He, in turn, is now teaching the next generations.

[536] Mr Emery's iwi is Ngāti Kauwhata, which descends from Whatihua, who was the brother of Tūrongo, one of the primary Ngāti Raukawa tūpuna. While Ngāti Kauwhata is an iwi in its own right, it has very close whakapapa associations with Ngāti Raukawa, and arrived in the Manawatū-Rangitīkei area in 1822 with the Ngāti Raukawa heke to assist Ngāti Toa.⁴³⁸ Mr Emery said that despite being primarily inland, Ngāti Kauwhata used the coast for resources and travelled down the Rangitīkei River and along the coast, using it as their highway. He noted that colonisation had left the iwi with only small remnants of land, including reserves by the Rangitīkei River and Tangimoana Beach.

[537] Other witnesses gave evidence of their experiences in different locations around the rohe. I note that these broadly reflected similar experience to those of Mr Twomey, Mr Karatea and Mr Kiriona of growing up in the area and occupying the takutai moana.

[538] Mr Kiriona noted that many resources provided by the takutai moana continue to be used in customary ways. For instance, his father found a large totara log that had washed down the Manawatū River and onto Waitārere Beach, and arranged for it to

⁴³⁸ Allowance is made for imprecision with dates.

be recovered, milled, and carved for the Matau marae, which they were rebuilding. The carving was put on the marae in 1985 and is still there today. Mr Kiriona also noted three other occasions when timber was required, and a totara log was retrieved from the beach. Sometimes, if his hapū had excess, the logs would be given away to another marae.

[539] Mr Tamihana referred to the collection of kōtahu (stones from the beach to use as hāngī stones) and described the types of stones which were washed up — some of which were better to use for cooking. They had been found in midden sites, indicating use for cooking in the past.

Rāhui

[540] Ngāti Raukawa’s evidence of continued authority and control in 1840 and afterwards includes an account of them placing rāhui on the coast from Ōtaki to Rangitīkei in 1840. Edward Wakefield refers to this rāhui in his book.⁴³⁹ The author recorded that Ngāti Raukawa placed a “tapu” over the beach from Ōtaki to Rangitīkei, preventing both Māori and Pākehā from travelling over the beach. This was “rigidly enforced”. Ngāti Apa people had interfered with the body of the Ngāti Raukawa chief Koraria (a nephew of Te Whatanui), who had died in a shipwreck off the Rangitīkei coast. In response, Ngāti Raukawa took the wife of Hākeke, a Ngāti Apa rangatira, as a captive, and killed 100 pigs. This incident disrupted friendly relations between the Ngāti Raukawa rangatira and Hākeke. Travellers also complained to the police magistrate, who took no action and suggested that they should not interfere.

[541] When that incident was put to Mr Moses of Muaūpoko, who is a descendent of Hākeke (and his wife Kaewa), he said that he had not heard of it, and only knew of one incident when Kaewa had been captured, which was at Hotuiti. He also noted that Mr Wakefield was close to Ngāti Toa and Te Ātiawa, so he would view the passage in the book with caution, absent comment from Ngāti Apa. Furthermore, he said the usual process for placing a rāhui when someone died was for it to be imposed at the place where the event occurred, rather than over the whole beach.

⁴³⁹ Wakefield, above n 197, at 22–24.

[542] Mr Kiriona gave more recent examples of rāhui placed by Ngāti Raukawa in the area and noted that they had been respected by others. He recalled an instance in 2013 or 2014, when “Uncle Iwi” (Nicholson) had carried out a whakawātea (cleansing) at the south end of Waitārere Beach because a young boy had died in the sand dunes.⁴⁴⁰ He also referred to a recent rāhui that was placed after a body was found on the beach at Waitārere.

[543] Mr Emery noted that when there was a mate (death), the hapū leadership and kaumātua of the area affected would respond accordingly.

Manaakitanga and whanaungatanga

[544] Mr Moore gave examples of manaakitanga and whanaungatanga from personal experience as well as from his research and oral history reports. These included sharing kaimoana among local whānau and hapū, and ensuring that the marae had enough food for events. He said that whānau would uphold the mana of the marae by adorning the tables with kai Māori.

[545] Similarly, whanaungatanga, or strengthening whakapapa ties, is central to iwi tikanga. Witnesses gave evidence of fishing along the coastline as a whānau activity, and passing the kawa and tikanga from the older generations to the younger.

Kawa and performance of rituals

[546] Ngāti Raukawa also point to their kawa and the performance of rituals (tikanga moana), practised continuously from 1840 to today.

[547] Mr Emery said that he and Mr Karatea would take groups of rangatahi out in the canoe and teach them how to fish. The lessons included teaching them whakapapa connections and the history of Tangimoana Beach and whose whenua it was. They would always begin with a karakia, and were taught about the tikanga of fishing, such as putting back the first fish and not abusing the whenua and moana. The rangatahi

⁴⁴⁰ Ngarongo Iwikatea Nicholson was a highly regarded kaumātua who played a significant role in the revitalisation of the iwi. He died in 2017. His knowledge was passed onto some witnesses who gave evidence and referred to him with great respect.

were taught how to catch and gut flounders and kahawai at the mouth of the Rangitīkei River, and would take the fish back to give to their old people. The rangatahi were drawn from schools and from north of the Ngāti Raukawa rohe from Ngāti Parewahawaha, Te Reureu, Ngāti Kauwhata, Ngāti Kahoro, Tūkorehe, and Ngāti Pareraukawa.

[548] Mr Emery also noted that he and Mr Karatea have hui and wānanga for iwi kaupapa, for instance as representatives of fisheries. They have been asked by MPI to speak on sea-life and sea-activities in their area, including pāua, hector dolphins, oil drilling, kingfish, and karengo or southern laver (edible seaweed). He said they use those opportunities to:

...tell our side of the story and what we have known since growing up as kids out there on the Rangitīkei River, which was the lifeblood of our people that flowed down to our moana, our vital pataka kai.

[549] Mr Moore gave examples of Ngāti Raukawa kawa including to: gather kai first (before playing); always give attention to the ocean, including facing the ocean and keeping children landward of you; karakia as appropriate; tahi ki a Maru/Tangaroa (offer the first fish back to Maru or Tangaroa); acknowledge the ocean for its bounty; return shells to the beach; do not eat on the beach front; do not cook ocean-caught food on the beach; do not curse Tangaroa; do not begin to eat while people from your party are still in the water; females who are hapū or are on their monthly cycle should not be in the water or on a boat; do not take more than you need; and do not place caught food within the tidal area.

[550] As witnesses pointed out, the tikanga moana is not merely ritualistic but has practical implications. For instance, Mr Moore said a kaumātua told him it was safer to take mokopuna to the beach when the tide was coming in, so that they would be pushed towards the shore instead of being dragged out to sea. Furthermore, the kawa of not eating kaimoana on the takutai moana has a spiritual aspect of showing respect to Tangaroa. However, the practical element is that some shellfish excrete an enzyme when they die that can cause other shellfish to move away from the area. Therefore, the tikanga prevents negative impacts on the shellfish beds.

[551] To the north of the rohe, Mr Karatea said that as a commercial fisherman, he applies his tikanga to his fishing practices. This includes throwing back the first fish in gratitude to Maru the protector at sea. He brings customary knowledge and modern techniques together in his fishing around Aotearoa to promote sustainable fisheries.

[552] Despite some difficulties faced by the imposition of external non-tikanga requirements,⁴⁴¹ Ngāti Raukawa members keep their practice of tikanga alive. This includes saying karakia to Tangaroa when iwi members go to the beach. Mr Moore said his father and kaumātua emphasised the need to say karakia when going out fishing and returning. This is an integral part of fishing and that tikanga continues to be passed down to the next generation.

[553] Mr Kiriona said that he practises tikanga relating to the takutai moana daily through application of tapu and noa. Although the ocean is tapu, it is able to be made noa, for instance by protecting his safety through ensuring he has a life jacket, phone, and radio. Mr Kiriona noted that utu does not only apply in the context of warfare, but also embraces the concept that good behaviour is reciprocated with good behaviour, and is dependent on the circumstances and the relationship in question.

[554] Areas are known and recognised by whānau and hapū, and if necessary, will be defended. Mr Kiriona said the use of the coast by others reflected the permission of Ngāti Raukawa, as they chose not to prevent others from accessing the coast for kaimoana as a matter of tikanga. Nevertheless, the iwi (or hapū) reserved right to do so as part of their mana and rangatiratanga.

[555] Mr Kiriona's view was that Muaūpoko's unrestricted access to the relevant coastline was derived from the protection granted to them by Te Whatanui, which gave them access to the resources within the rohe. However, this did not mean that they held mana in the area. He said he would always seek the permission of the relevant iwi (or hapū) before fishing in their rohe.

⁴⁴¹ Such as the DOC rotational system for dealing with stranded mammals.

Recognition by others

[556] Ms Mikaere noted that by 1840, the few Pākehā in the rohe were all there with permission from the local rangatira. She recounted examples of control in the Ngāti Raukawa rohe. One method of control was that Pākehā were required to marry local women if they sought to trade or occupy land. She gave the examples referred to earlier of Mr Jenkins at Te Uruhi and her own great, great grandfather, a Pākehā who fled following threats by Te Rangihaeata.⁴⁴²

[557] A further example of control was that of Te Rangihaeata charging a toll on the beach near Ngā Manu, after he had gone to Poroutawhao, in around 1847. It is said that it was only lifted when Governor Grey promised to assist him with money for a road from the seabeach to Poroutawhao. Pākehā observer Thomas Bevan noted that Governor Grey would have been aware that Te Rangihaeata was “quite within his rights according to Maori ideas”.⁴⁴³ At tikanga this might be described as an example of aukati, or control by restricting the movements of third parties.

[558] He Iti Nā Mōtai also provides examples of recognition by travellers in early times of the control exerted by local hapū along the coast. There were kāinga at every river mouth along the west coast, which offered resources from the ocean and river, as well as the wetlands and forest. European settlers wanting to cross the river would seek local knowledge and assistance, and were willing to pay. Te Wharangi, named after a small tree, was a place near the Manawatū River mouth occupied by many Ngāti Raukawa hapū. Ngāti Ngarongo, including Ihakara Tukumarū and Paora Taikapurua, had a business there, taking people across the river by canoe and providing accommodation in a wooden house and stable. A further example was taken from Native Land Court minutes which took place in the 1840s. Ihakara Tukumarū leased land on the north end of the Matararapa block to Europeans and gave consent for a ferry to be run from Matararapa to Te Awahou. He was also in control of the

⁴⁴² Ms Mikaere elaborated on these examples. Mr Jenkins was evicted from his accommodation business at Te Uruhi when his wife Pairoke, who was of Ngāti Puketapu (Te Ātiawa) died, and instead of marrying her sister (as was expected), he married a Pākehā woman. Te Rangihaeata made a threat to kill any Pākehā found in the area. Ms Mikaere’s great, great grandfather, a Pākehā took Te Rangihaeata’s threat very seriously and fled Poroutawhao, leaving his wife and child, Hoana, Ms Mikaere’s great grandmother.

⁴⁴³ Thomas Bevan *The Reminiscences of an Old Colonist* (Otaki Mail, Otaki, 1907) at 15.

ferry four miles up-river at Whirokino, operated by Thomas Upperdine Cook, husband of Meretini Te Akau of Ngāti Kikopiri. Ihakara had a dispute with the ferryman, Thomas Bowe, who claimed that his contract allowed him to charge fees from people who took their own waka across within a certain distance of the ferry. In response, Ihakara and two other chiefs closed the road to the beach which went through their land, and set up a toll on it, near his house on Matararapa.

[559] Ngāti Raukawa also point to the treatment of a Ngāti Kahungunu child, Īhāia Hūtana who was born in captivity in Poroutawhao.⁴⁴⁴ During a battle in the Hawke's Bay, Ngāti Raukawa had captured his parents. His mother died shortly after and Īhāia (as a child) was released to relatives in the Hawke's Bay due to his mother's kinship links to Ngāti Raukawa. Later, Īhāia would become a chief of Ngāti Kahungunu as well as a prominent Māori leader. Ngāti Raukawa submit that this shows mana as well as the iwi's adherence to the tikanga relating to warfare and captives.

[560] Ngāti Raukawa point to recognition of their mana in the rohe by other iwi. The other members of the ART Confederation support Ngāti Raukawa's claim. Te Ātiawa and Ngāti Toa were involved in early shared endeavours such as Rangiātea Church, Raukawa Marae, and more recently the Whakatupuranga Rua Mano programme, and Te Wānanga o Raukawa. Ngāti Toa witnesses Miria Pomare and Ta Matiu Rei, acknowledge Ngāti Raukawa's status as a distinct entity and their ability to defend their status from 1840 to the present day. Mr Ngaia, for Te Ātiawa, recognised the mana whenua and mana moana of Ngāti Raukawa from Kukutauaki to Rangitīkei, and his view was they had held mana from at least 1840 to the present day. Other iwi, including Muaūpoko (through Mr Moses), acknowledged the mana whenua of Ngāti Raukawa in their claimed rohe.

[561] Mr Tamihana emphasised that while Ngāti Raukawa's mana is unbroken, they work together with other iwi to share parts of the Kapiti Coast. He gave a personal example of Rangitāne going out to sea via the Manawatū River and sharing their catch

⁴⁴⁴ Īhāia Hūtana's birth date is recorded to be around 1843 or 1844: see Angela Ballara and Don Hutana "Hūtana, Īhāia" (1993) *Te Ara — the Encyclopedia of New Zealand* <<https://teara.govt.nz/en/biographies/2h58/hutana-ihāia>>.

on their return with Ngāti Raukawa's hapū encampments and settlements in the lower reaches of the awa. He said this was a gesture to acknowledge the status of Ngāti Raukawa, as well as a display of whanaungatanga, given that the iwi had started to inter-marry. Mr Kiriona noted that there never used to be a need for Ngāti Raukawa to prevent other iwi from coming into their rohe, because they would know where they could and could not fish.

[562] In addition, Ngāti Raukawa is recognised by and has significant engagement with the local authorities in the area. The Horowhenua District Council engages with Ngāti Raukawa on dune works at Waitārere and Foxton beaches. The iwi also provides approval for the annual cut and cultural monitoring of that activity at the Wairarawa Stream. The Council works with many Ngāti Raukawa hapū in various locations. It was also involved with Muaūpoko and Ngāti Raukawa hapū in work on the renewal of Levin's wastewater treatment consent, in relation to the Levin landfill and wastewater treatment plant, as well as on Lake Horowhenua water quality projects, including through the Arawhata wetland project.

[563] The Horowhenua District Council has partnership arrangements with Ngāti Tukorehe Trust which represents: hapū of Ngāti Raukawa, being Ngāti Tukorehe, Te Mateawa, Ngāti Te Rangitawhia, and Ngāti Kapu; Te Kotahitanga o Te Iwi o Ngāti Wehi Wehi representing Ngāti Raukawa hapū; and Te Tūmatakahuki, a collective of Ngāti Raukawa hapū representatives, including Ngāti Turanga, Ngāti Rakau, Ngāti Te Au, Ngāti Takihiku, Ngāti Ngārongo, Ngāti Whakatere, Ngāti Pareraukawa, Ngāti Huia ki Poroutawhao, Ngāti Huia ki Matau, Ngāti Kikopiri, Ngāti Hikitunga, and Ngāti Wehi Wehi. The Council does not have memoranda of partnership with Ngāti Apa or Te Rūnanga o Raukawa Inc, nor with its hapū Ngāti Huia ki Matau, Ngāti Huia ki Poroutawhao or Ngāti Whakatere, although it still recognises its key relationships with those groups.

[564] Horizons has also been engaged with Ngāti Raukawa in dune system replacement, land management, and water quality work. The iwi partners with Horizons in the Council's southwestern area. The Council engages with Ngāti Raukawa through Te Rūnanga o Raukawa as well as the other Ngāti Raukawa iwi/hapū entities such as Ngāti Whakatere, Te Tūmatakahuki, Ngāti Turanga,

Ngāti Tukorehe, Ngāti Kauwhata, and Ngāti Parewahawaha. It signed a memorandum of partnership with Ngāti Whakare in 2022. Horizons is co-funding an Iwi Management Plan with Te Rūnanga o Raukawa and the Ministry for the Environment. The Council is also implementing the National Policy Statement for Freshwater Management through the Oranga Wai process, working closely with iwi/hapū partners. In addition, it funds and collaborates on the Arawhata wetland project.

The Treaty of Waitangi/Te Tiriti o Waitangi

[565] As O'Malley notes, of the 132 rangatira who signed Te Tiriti in the Cook Strait region in 1840, at least 13 were associated with Ngāti Raukawa.⁴⁴⁵ This is important evidence of Ngāti Raukawa's recognition in the area. Ngāti Raukawa rangatira also signed at various other places within the claimed rohe. For instance, two Ngāti Raukawa rangatira signed on 16 May 1840 at Waikanae, and there were seven Ngāti Raukawa signatures on 19 May 1840 at Ōtaki. A further two Ngāti Raukawa rangatira signed at Manawatū, alongside a number of rangatira from Kurahaupō iwi.

Demographic information as evidence of continued occupation

[566] O'Malley recorded that data from the mid-1840s indicates that Ngāti Raukawa outnumbered Muaūpoko by around 15–20 to one. Ngāti Raukawa also point out that the 19th century figures only record Muaūpoko as being present in the Horowhenua area. O'Malley noted that from the mid-1840s, the Church Missionary Society register recorded the Ngāti Raukawa population between Ōtaki and the Manawatū River at 1,710, with 92 Muaūpoko living in the same region. Another analysis from the time suggests a total Muaūpoko population of 98, constituting four per cent of the total Māori in the district.

[567] In 1850, an unofficial census conducted by Henry Kemp, a Crown official and Native Secretary, put the Muaūpoko population at 122 and Ngāti Raukawa at 2,005.

⁴⁴⁵ Te Whetū (Ngāti Te Ihi Ihi), Mātene Te Whiwhi (Ngāti Huia, Ngāti Kikopiri), Tāmihana Te Rauparaha, Āperahama Te Ruru (Ngāti Huia), Matia Matenga (Ngāti Pare), Te Moroati Kiharoa (Ngāti Pane, Ngāti Turanga), Kīngi Hōri Te Puke (Ngāti Pare, Ngāti Waihurīhia), Horomona Toremi (Ngāti Raukawa, Rangitāne), Kīngi Te Ahoaho (Ngāti Maiotaki), Whitiopai, Hohepa Matahau, Te Rauparaha (Ngāti Raukawa and Ngāti Toa Rangatira) and Te Rangitopeora (Ngāti Raukawa and Ngāti Toa Rangatira).

O'Malley noted that Mr Kemp estimated the total Māori population of that area at 2,550. He described Ngāti Raukawa as the most powerful tribe in the Cook Strait, occupying "all that country lying between Kukutauaki (a small stream two miles north of Waikanae) and the main river of Rangitikei". Mr Kemp described his belief that Ngāti Raukawa's claim to the whole of the district was "undisputed", regarding Muaūpoko as "a remnant of the original occupants of the soil", who were "allowed to remain there" ever since Ngāti Raukawa took possession, and owed their existence "in a great measure" to Te Whatanui.

[568] The 1881 census recorded a population of 759 Ngāti Raukawa and 81 Muaūpoko.⁴⁴⁶ The latest 2018 census data recorded an estimated population of Ngāti Raukawa at 22,854, and Muaūpoko at 3,375.

[569] The trend is evident that Ngāti Raukawa numbers are consistently significantly higher than those of Muaūpoko in the region. O'Malley commented that Ngāti Raukawa has been the dominant presence in their claimed rohe, outnumbering Muaūpoko many times over:

...Ngāti Raukawa have been in continuous occupation of lands in this area for nearly two centuries. And that occupation has not been a light one but a very significant and highly visible presence in the region. In this respect, the reality of overwhelming Ngāti Raukawa possession seems clear.

[570] I now consider the application by Mr Tima on behalf of his whānau and hapū, which are associated with Ngāti Raukawa.

⁴⁴⁶ Some care must be taken with the figures recorded during the 19th century given the absence of many Māori at the time the censuses were taken due to seasonal movements and, later, Native Land Court hearings.

MR TIMA

[571] The application of Mr Tima (Seymour), for Te Whānau Tima and Te Mateawa, is described as relating to the west coast of Horowhenua and the Tasman Sea between the Ōhau River and the Waikawa River.⁴⁴⁷ The approximate area over which CMT is sought is less than 500 m along the length of the coast and extending to 12 nautical miles seaward. The area is generally known as Kuku Beach.

[572] Mr Tima is a natural person appointed by the hapū or whānau group to bring the application on behalf of the applicant group.⁴⁴⁸ Mr Peter McBurney produced an expert historical report on behalf of Mr Tima, entitled “Te Ahikā o Te Mateawa and Te Whānau Tima Customary Interests in the CMCA at Kuku Beach, Horowhenua” (the McBurney report).

Whakapapa

[573] Mr Tima is linked through whakapapa to the iwi and hapū who have rights and interests in this region, including Te Mateawa, Ngāti Te Rangitāwhia, Ngāti Tukorehe, Ngāti Kapumanawawhiti, Ngāti Toa, Te Atiawa, Ngāi Te Rangi, and Ngāti Raukawa. Mr Tima said he and members of the applicant group continue to own whenua including at Ōhau and Tahamata today. The applicants are direct descendants of those who claimed the whenua in the early 1830s, where the applicants still reside. He and his family are the only ones with houses at Kuku Beach in the claim area. Ngāti Raukawa recognise Mr Tima’s group as a whānau and hapū which form part of the broader collective of Ngāti Raukawa.

[574] Mr Tima explained that for many years he had been fighting for recognition for those maintaining the ahi kā in the area. He felt responsible for passing the tikanga knowledge and recognition on to the coming generations. Mr Tima indicated that he supported other hapū and whānau applications, and did not seek to undermine those

⁴⁴⁷ The application was filed on 3 April 2017 which attached a map. Subsequently, a first amended (12 March 2024) application was filed which describes the area in line with the indications on the map in the first application, followed by a second amended application. The first and second amended applications detailed the PCR rights sought.

⁴⁴⁸ Takutai Moana Act, s 9, definition of “applicant group”.

applicants. He took no issue with sharing exclusive CMT with those applicants who could also satisfy the statutory requirements.

[575] Mr Tima says his whānau name derives from the tupuna Tāmāti Tima (also known as Thomas Seymour), his great-grandfather. Tāmāti was the son of Katarina Rangitāwaka of Ngāti Tukorehe and William Seymour, an Irish carpenter. He married Tuihana Rangitāwhia, the great-granddaughter of Te Wharekaramū, with whom he had a son, Whareao, before Tuihana passed away in 1886 aged 23.

[576] Tāmāti's sister, Mākere Tima, married Tāmāti Ranapiri, whose brother, Ropata Ranapiri, grew up at Tahamata as a whāngai to Te Peina Tahipara.

[577] Whareao Tima was raised by Tuihana's brother, Heremia Rangitāwhia, who was an owner of Tahamata No. 3 block, due to his descent from Te Wharekaramū. Whareao later married Delia Richardson, with whom he had twelve children. Mr Tima and McBurney both stated that Heremia left equal shares in this land block to Whareao's children. One of those children was Mr Tima's father, Parekura Tima.

[578] Parekura Tima married Rita Ellison. They had six children, including the applicant, Mr Tima. Mr Tima and his siblings were raised on the homestead at Tahamata No 1, in a whare built by their father in 1958. That whare burnt down in 2023 and Mr Tima is currently rebuilding it.

[579] Mr Tima referred to his tupuna, Nēpia Taratoa,⁴⁴⁹ a chief in his own right whose mother was Te Mateawa. That rangatira had left the area out at Tahamata (adjoining Kuku Beach) to go up into the Manawatū-Rangitīkei. He was held in high esteem as a chief and passed away in the early 1860s, at the time the land deals were being transacted. Nēpia Taratoa played a significant part in the events in the rohe leading to the Himatangi cases.

[580] As noted in the McBurney report, Te Mateawa is a hapū affiliated to Ngāti Raukawa, who descend from the Tainui Waka. Kāhoro-te-tini, the tūpuna of Ngāti Kāhoro, traces her descent from Tūrongo, son of Tāwhao, and Tūrongo's son

⁴⁴⁹ A rangatira of Ngāti-Parewahawaha, a hapū associated with Ngāti Raukawa.

Raukawa, through to his grandsons, Kauwhata and Tukorehe. Kāhoro’s grandson Tahuapakipaki married Turangawatea of Ngāti Tukorehe, and their great-grandson Hinganui married Toko-one, Tokopiko’s grandchild, whose son was the prominent Te Mateawa tupuna, Te Wharekaramū.⁴⁵⁰

[581] The name “Te Mateawa” is derived from the circumstances surrounding the death of the Ngāti Raukawa ancestor Te Hiwi (also known as Te Iwi) who was a descendant of Kāhoro-te-tini and Tukorehe through the marriage of Tahuapakipaki and Tūrangaawatea. Around the time of the first large-scale Ngāti Raukawa heke (Te Heke Whirinui), Te Hiwi travelled to Tauranga and was killed in a nearby river. The name Te Mateawa was adopted by his descendants and close relatives to memorialise him and commemorate his death.

[582] Te Mateawa was recorded as a hapū in its own right in the 19th century, although it is not apparent in records from the 20th century. Nevertheless, they have retained the hapū identity and customary rights following from their tūpuna. Rights under the Takutai Moana Act can be held by groups of hapū and whānau as well as iwi.⁴⁵¹

Foundational take at 1840

[583] In his evidence, Mr Tima explained that he was descended from the ancestors of Te Mateawa, including Te Wharekaramū, Terepata Te Rangitāwhia, Heremia Terepata and Whareao Tima, and that their tūpuna were part of the series of migrations into Kapiti by Waikato peoples in the 1820s and 1830s.

[584] According to the McBurney report, there were three major heke from Mangatautari (in the Waikato) to Kapiti, and the tūpuna of Te Mateawa were part of the second of these heke — Te Heke Kariritahi. This heke was led by Te Hiwi’s grandson, Nēpia Taratoa. The McBurney report and Mr Tima’s evidence describe Nēpia Taratoa as being of both Ngāti Parewahawaha and Te Mateawa descent.

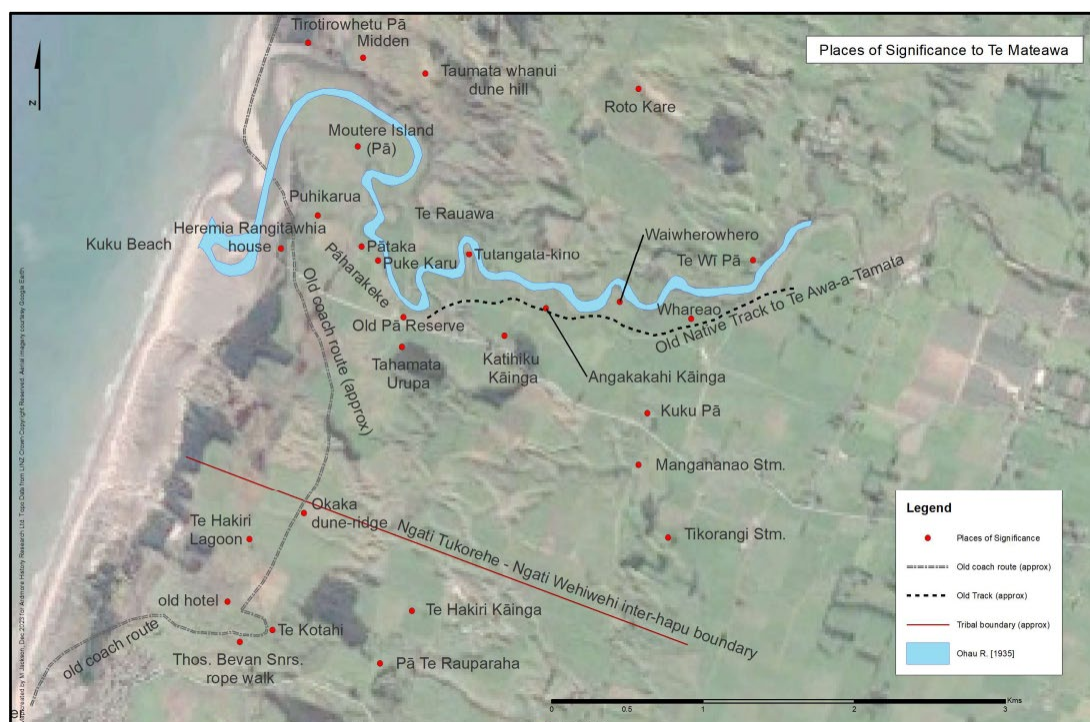
⁴⁵⁰ There are two versions of Te Wharekaramū’s descent. The other is that Tokopiko’s granddaughter married Hinganui and their child was Te Wharekaramū.

⁴⁵¹ See Takutai Moana Act, s 9 definition of “applicant group”, which refers to “1 or more iwi, hapū, or whānau groups that seek recognition” of CMT or PCRs.

Nēpia Taratoa is said to have led 140 warriors and their wives and children to Ōtaki. After visiting Te Rauparaha and Ngāti Toa at Kapiti Island, the migrants of Te Heke Kariritahi went to Wharemauku, just south of Paraparaumu, in around 1827, where they stayed with Ngāti Tama.

[585] Mr Tima said that after arriving in Kapiti, Ngāti Tukorehe, Te Mateawa, Ngāti Parewahawaha and Ngāti Kapumanawawhiti embarked on a heke from Wharemauku and Ōtaki to Kuku Beach, or what is now Ōhau. The rōpū crossed over the Waikawa awa and arrived at a lagoon called Te Hakiri. They camped the first night at Te Hakiri in an area that later became known as the Kukutauaki block. The following morning, they went northwards and appropriated the whenua that Te Rauparaha had given to them. He said that Nēpia Taratoa, along with the other Mateawa rangatira Piahana Potaua,⁴⁵² Nēpia's brother Taiaho, Te Wharekaramū, Te Nge and Rongorongo decided to push on and find another camping site. They ended up at Tahamata (near Kuku and the Ōhau River) at a place called Te Moutere — which means island — which was given its name because it was where the Ōhau Awa came from Tararua to the moana and encircled part of the whenua. They came back over the Ōhau River to the south and named the place there Puhikarua. In later years, they appropriated this whenua and a pā was built there by Piahana Potaua's son, Te Hiwi Piahana. These areas can be seen in the map of places significant to Te Mateawa below:

⁴⁵² Piahana Potaua was Nēpia Taratoa's first cousin. Te Hiwi's daughter Te Au was the mother of Taratoa and Taiaho, whereas Te Hiwi's son Te Ure was the father of Piahana.



[586] The McBurney report noted that although this land had previously been occupied by Muaūpoko, these former inhabitants had abandoned their pā and kāinga, having been subdued by Ngāti Toa and their Te Ātiawa allies. Although Te Rauparaha had directed where his relatives from Ngāti Raukawa should reside, they still had to formally take possession of the land. By travelling around and giving place names they were appropriating the land, or “kutikuti whenua”.⁴⁵³

[587] Mr Tima described how the chiefs moved northwards appropriating the whenua, and how his own tūpuna, Te Wharekaramū, had travelled inland and arrived in an area that was not named at the time, so he appropriated it first. It became known as Tahamata No 1. He lit a fire on a hill called Mauku (which Mr Tima could point out). Mr Tima noted the Ngāti Tukorehe chiefs were also moving northwards but moved inland out of respect, having seen the smoke from the fire.

[588] Mr Tima said the chiefs continued appropriating the land as they travelled. He explained that Ngāti Tukorehe appropriated Kukutauaki, Ōhau, Katihiku and

⁴⁵³ Translated literally as “scissoring land”.

Angakakahi/Angamate, whilst the rūpū of six chiefs connected to Te Mateawa appropriated Tahamata. Nēpia Taratoa's son is buried at the wāhi tapu at Tahamata.

[589] Te Peina Tahipara, who was Te Wharekaramū's uncle, arrived later. He and Te Wharekaramū went onto the land that Te Wharekaramū had appropriated and set up a kāinga, gardens, and later a pā. Mr Tima stated in his evidence that after spending some time in the Rangitīkei area alongside the Oroua awa, Te Peina Tahipara returned to Tahamata in the mid-1870s. Upon his return, he and his whānau dug a ditch and bank fence as a boundary marker. Mr Tima said that following Te Wharekaramū's death, Te Peina took a prominent place in the hapū, placing rāhui on harakeke and tuna weirs and leasing out parts of the whenua. Nēpia Taratoa built a coastal pā beside the Ōhau awa, naming it Pā Harakeke, although it was also known as Nēpia's Pā, and later Ōhau Pā. Mr Tima also noted that when Nēpia lived at Pā Harakeke and Te Hiwi Piahana lived at Moutere no one encroached on the others' areas, despite there being no fence or boundaries. However, after the battle of Haowhenua in 1834, Nēpia is said to have moved up into the Rangitīkei-Manawatū area at Matahiwi to live with Ngāti Apa. As noted above, Nēpia died in the early 1860s.

[590] The land at Tahamata was later leased out to Pākehā, and the Ferry Hotel was constructed on land block Tahamata No 3A.

[591] According to the McBurney report, the Ōhau No 1 block, north of the Ōhau River near the mouth, was investigated and partitioned by the Native Land Court in April 1873, with Te Mateawa being one of seven hapū claiming an interest. The Court's ruling named a mix of Te Mateawa and Ngāti Tukorehe individuals.⁴⁵⁴ In 1881, the Native Land Court considered the partitioning of Ōhau No 3 block. The Court found Te Mateawa were entitled to 1,000 acres of the Ōhau No 3 block, naming persons such as Piahana Potaua and Te Peina Tahipara as registered owners. The Tahamata title was investigated in June 1885. Following agreement between Ngāti Tukorehe and Te Mateawa, a 15-acre reserve was established on the site of an old pā, to be held jointly by the two parties, and Ngāti Tukorehe was given two small pieces of land, namely Angakākahi and Katihiku. The remainder of the Tahamata

⁴⁵⁴ The northwestern corner of this block is Peho (near the Waiwiri Stream and the northern boundary of this claim).

block — subdivided into four sections, Tahamata No 1, 2, 2A and 3 — was vested in Te Mateawa.

[592] Following a relative interests investigation into Tahamata No 1, conducted by the Native Land Court in 1902, the Court ruled that Te Wharekaramū was the first to appropriate the Tahamata No 1 block, and that both Te Peina Tahipara and Te Tewe joined him there at his invitation. This finding is significant for Te Whānau Tima's Takutai Moana Act application, given that they are direct descendants of Te Wharekaramū.

Evidence of tikanga indicia

[593] McBurney gave evidence regarding information imparted to him by Mr Tima during a day-long hui and interview at Mr Tima's home in Foxton Beach in January 2023. The beach north of the Ōhau River mouth was called Tirotirowhetū, while the south side was called Kuku. Mr Tima mentioned the shell middens containing discarded shells of kaimoana harvested by past generations that were located north of the Ōhau River mouth, which were disturbed by pine trees that were later planted along the coast to stabilise the dunes. McBurney noted that Mr Tima's knowledge of taniwha at Kuku Beach and the wider rohe is indicative of his kaitiakitanga.

[594] The report notes that Mr Tima identified the fish taken and consumed by local Māori over the generations from the shell middens, and that these included mature tohemanga, toheroa, mactra, tuatua, titiko, kokita, peraroa, and cockles.

[595] In one incident, Mr Tima and his cousins brought coloured stones home from the beach at Tirotirowhetū, and in doing so unknowingly contravened a tapu. Almost immediately his cousins fell ill, and so they were told to take the stones back. They all hobbled back for three quarters of a mile to the beach to return the stones and sprinted home.

[596] McBurney recounted a kōrero from the 1880s. John Kebbell, one of the first Pākehā to settle in the area, found an old waka on his property, or in the adjacent sand dunes. He reportedly took the top boards of the vessel to be used as pillars for the

entrance of his house. This was a violation of tapu, and as a result Mr Kebbell's two young daughters drowned at Blind Creek, a short water course at Kuku Beach. In 2018, Mr Tima was visited by the great grandson of Mr Kebbell (Mr Kirkcaldie) who asked Mr Tima to show him Blind Creek. Mr Kirkcaldie asked how they could find a resolution. Mr Tima replied that they had taken the first step already by standing in Blind Creek in 2018 as descendants of those who were there at the time of the tragedy. They exchanged hongi and shook hands.

[597] McBurney noted several sites of significance to Te Whānau Tima and Te Mateawa in and around the takutai moana at Kuku Beach. These included pā sites, namely:

- (a) the Pā at Moutere Island in the delta of the Ōhau River, now part of Tahamata No 3 block;
- (b) Pāharakeke, built by Nēpia Taratoa and the principal pā of Te Mateawa after Taratoa left for Rangitīkei; and
- (c) Puhikarua, a pā built by Te Hiwi Piahana at the southern-most point of the bend of the Ōhau River at Moutere island.

[598] Mr Tima described Te Mateawa as “a fishing people”. Since they are the only ones living out at the beach, they have held on to the knowledge of identifying types of kaimoana, where to get it and how to cook it, and have passed down that kōrero.

[599] Mr Tima said that firewood is gathered from the beach today as it has always been to fuel their coal range. He said kaimoana was part of their life in the rohe, as is captured by the following whakatauki:

Ko ēnei aku Tikanga. He whenua, he wai, he oranga he kai — ko au te tuna
ko te tuna ko au. Kaimoana, kaiawa, kaiwhenua

These are my protocols. Land, water, living, food — I am the eel and the eel is me. Food from the sea, food from the river, food from land.

[600] In his evidence Mr Tima describes Raurēkau Tuna, a special means of preparing tuna, which is the Raukawa way taught to him by his father. He stated that

he continues to prepare tuna this way. Mr Tima supplies tuna to Tukorehe Marae and many other marae.

[601] Mr Tima also described tikanga tuku iho during whitebait season. He said the same whānau had fished in the same spots for many generations. This is a tikanga through which many whanaunga keep in touch with the land and beach by returning each year during whitebait season. Mr Tima said that “you wouldn’t fish in someone else’s possie”. This Mātauranga helps keep iwi members connected and in tune with nature. Mr Tima produced photographs of his parents whitebaiting there in the early 1960s.

[602] Mr Tima also emphasised the importance of kaitiakitanga in respect of kaimoana. He noted that some of the kaimoana had already disappeared or is endangered, such as toheroa. This had been used as sustenance for their many people and visitors, and played a significant role in upholding the mana of his people and marae. Until it was depleted in more recent years, traditional protocols and practices for harvesting toheroa — such as specific gathering seasons, methods and areas — had ensured a sustainable harvest of toheroa by allowing for their reproductive cycles and population replenishment.

[603] Mr Tima told of learning some of the kawa the hard way. His grandfather remonstrated with him when he was young after he took a large, long-finned tuna (Tohemaro) from the creek at Kuku Beach. It had wound itself around the handle of a long wooden spoon handle. His grandfather gave the boy a telling off and sent him back to put it back. Mr Tima recalled he was already exhausted but took it all the way back and never forgot the lesson. He also outlined other kawa and mātauranga relating to fishing and preparation of kaimoana including tuna.

[604] Mr Tima deposed that another form of kaitiakitanga he exercised was as a permit book holder for customary fishing permits on behalf of Ngāti Tukorehe and Te Mateawa. He is the tangata kaitiaki, or tiaki, for Tūkorehe marae. He writes permits for his people to gather kaimoana.

[605] Mr Tima said he had a number of experiences with taniwha, some of which he could not share. One taniwha only he knew the name of, and it followed him for weeks in his dreams. He also saw the taniwha Murikai that appeared in the form of a log. Mr Tima noted that Te Rauparaha's first pā was beside the Waikawa River and taniwha in the form of large, long-finned tuna still live in that area. He calls them Te Rauparaha's kaitiaki.

[606] In terms of rāhui, Mr Tima detailed an incident in September 2023 where an individual passed away whitebaiting after suffering a heart attack, and his body was found in the river. Mr Tima was notified soon after the incident, and the following morning went to his farm from the northern side, and conducted a traditional karakia at the location along the riverbank. Mr Tima then placed a rāhui on the river for a period of seven days, and informed farmworkers of the passing of the individual and the placement of a rāhui. This rāhui was acknowledged by Yvonne Wilson, a respected elder of Ngāti Tukorehe.

[607] Mr Tima fished under a fishing licence in the late 1970s, and fished commercially in the early 1980s. He fished right along Kapiti Island, Pukerua Bay, the southwest corner along Kapiti, and back up as far as Hōkio. Much of the knowledge had been passed down from his father. Now his nephews go and get the fish, pāua and kina for the whānau. They use the same techniques that his father used, namely lining up the hills and other landmarks to navigate instead of using coordinates. Mr Tima described this methodology as follows:

There were certain big trees standing on the hills inland, and you'd line two points up. You would line up the peaks, the hills and valleys. We had our markers like that for going out there when we got a long way offshore because they could clearly be seen way out offshore. Then you'd line up Kapiti Island, you looked up the hill this way, a direction from your right down to Kapiti back to the Kuku area then up to the hills. This is how we'd find our spots. My nephew still uses this traditional knowledge to mark fishing spots. His boat doesn't have flash navigation equipment. He relies on landmarking for his reference.

[608] Mr Tima clarified that he had fished across to the South Island, right across the strait of Raukawa — a lot further than 12 nautical miles out to sea.

[609] Mr Tima described the hapū's customary activities of gathering kaimoana shellfish including pipi, tuatua, kaitua, kokota, tohemanga, toheroa, peraro, tuangi, tītiko, clams, storm clams, scallops and other species. They also fished for kahawai, kanae, tāmure, mako, inanga, tuna, piharau, patiki sole, cod, ling, stargazers, lemon fish, grey nurse, hapuku, herrings, yellow eyed mullet, and red gurnard. Crustaceans such as kōura, pāpaka, kēwai are also gathered, alongside kaiwhenua like watakirahi (watercress), puha and kelp. The area is called “Te pātaka kai a te Mateawa” or “the food basket of Te Mateawa”.

[610] Mr Tima also detailed other activities like whakatō kai (gardening) along beaches, including planting species like grasses to stop erosion. Kohikohi rauemi (resource gathering) is also practiced including gathering wāhie (driftwood), rākau, harakeke, mahi rongoa, tunu kai, tahu ahi, hāngī, tuna rau rēkau, hopu manu, whakaterere waka, and kaitiaki taiao.

[611] McBurney reported comments by Te Tumatakuru O'Connell, Mr Tima's nephew, that the government's ban on setting nets to protect endangered marine mammals is a direct interference with tikanga.

[612] At times there has been poor behaviour at Kuku Beach, including motorbikes ripping up the dunes and people dumping their rubbish at the beach. In response, Mr Tima said the Tahamata Corporation Farm Board, of which Mr Tima was previously a member, erected a gate at the end of Kuku Beach Road to prevent motorbikes and trailers from getting to the beach. He stated there had been no problems with people taking loads of shellfish, as although this occurred many years ago when he was younger, the depletion of the toheroa meant there was no shellfish to be taken.

[613] The McBurney report noted that although Te Mateawa has no marae, the rituals associated with marae, including tangihanga, took place in the Tima whānau home. Until it was burnt down in 2023, it was occupied by Mr Tima's brother David. The whānau continue to be a significant presence in the area.

MR TAUEKI

[614] The claim of Mr Bill Taueki on behalf of Ngāti Tamarangi focuses on the takutai moana in the vicinity of Lake Horowhenua (Punahau) and its waterways, which is the “heartland” of Muaūpoko. Also relevant to the area is the role of the Horowhenua 11 Part (Lake) Reservation Trust (the Horowhenua Lake Trust) which appeared and provided evidence as an interested party. The Trust supports the applications by the two Muaūpoko applicant groups: Muaūpoko and Ngāti Tamarangi. It says the two applications are not in conflict with each other, as one is on behalf of the full iwi and the other on behalf of one of the hapū within the iwi of Muaūpoko. It submits that a title that recognises both applications and allows the overlap of the two to coexist is both tika and is permitted under the Takutai Moana Act. The trustees say that this legal recognition reflects the ancient customary rights of Muaūpoko in Punahau and the wider area.

[615] Mr Taueki applies for CMT and recognition of wāhi tapu areas. The area over which CMT is claimed is described as extending one kilometre out to sea, between a coastal point adjacent to the southwestern corner of the Waitārere Forest to a point adjacent to the northwestern corner of the Waitārere Forest.⁴⁵⁵ Mr Taueki’s whānau and hapū, Ngāti Tamarangi have occupied the whenua and takutai moana there from time immemorial until the present day. He says they have never left and were not displaced by the arrival of other groups in the 1820s and 1830s, nor during the subsequent decades of colonisation. Mr Taueki further asserts that their occupation of Horowhenua has been in accordance with tikanga, and has not been substantially interrupted.

[616] Mr Taueki said what he sought was recognition for his hapū and to be included in CMT orders. He said if “we have to share it” and “keep respect amongst ourselves” then he was all for it. He took the view that exclusivity was not part of Ngāti Tamarangi tikanga, but they favoured “tātou tātou”. Mr Taueki said he had

⁴⁵⁵ Mr Taueki’s application area is also described in the evidence as being between Te Uamarangi and Ngā Manu, however the northern boundary (at the northwestern corner of the Waitārere Forest) is somewhat north of Ngā Manu, as shown on Adkin’s map at Attachment 5. When I refer to the Te Uamarangi and Ngā Manu boundaries in the context of the Taueki and Muaūpoko applications, I am referring to the boundaries designated in Mr Taueki’s application.

grown up alongside families from other hapū and iwi and no one's tribal affiliation prevented them from using the beach. Mr Taueki often went fishing with his Ngāti Raukawa friends, but people "knew" this area was Ngāti Tamarangi's. He took the view that as long as others used it responsibly and respectfully, there was no problem.

Whakapapa

[617] Mr Taueki recited his whakapapa noting that Hohepa Te Pae was his father. Ngāti Tamarangi and the Taueki whānau are the descendants of Potangotango. Potangotango had a son Tapuwae. Tapuwae had a son named Taueki and Mr Taueki is a direct descendent of Taueki, who lived his entire life at Lake Horowhenua. Ngāti Tamarangi has a male and female whakapapa line. The male line is the Māui line which traces back to Toikairākau. This line traces back from father to son to grandfather and beyond to other tūpuna. Through this line is the whakapapa directly to Ihaia Taueki, Taueki, Tapuwae and Potangotango. The female line is from the wife of Te Mou, who was Puawai ki te Ao. This line ultimately traces back to Kupe.

[618] Mr Taueki said that Māui fished up Te Ika a Māui. The upoko (head) of the fish was the picture in the minds of tūpuna i taua wā (his ancestors of that time). Te Upoko o te Ika is the name of the lower part of the North Island. Since it is the head of the fish, it is tapu. Ngā roro, or the brains of the fish, are at Horowhenua, and Ngāti Tamarangi is related to that description. Mr Taueki explained that Te Ika a Māui connects all tangata whenua hapū and uri and forms the basis for their customary marine title claims.

[619] Ngāti Tamarangi's core lands are at Horowhenua and from the Maunga Tararua to the lake and to the sea. The mountain, the lake and the sea were all connected by ngā puna or freshwater springs, flowing beneath the whenua, and which complete the hurihanga o te wai (turning of the tide).

[620] Mr Taueki's evidence based on his experience on the ground is largely uncontradicted. Ngāti Tamarangi had lived at Horowhenua for many generations before 1840 with several kāinga and extensive cultivations. Traditionally, Ngāti Tamarangi buried their dead in the sand dunes along the coast. Members of

Ngāti Tamarangi, both past and present, are also buried in the whenua surrounding Lake Horowhenua. Ihaia Taueki, the son of Taueki and Mr Taueki's great, great grandfather, is buried on the western banks of Lake Horowhenua where the Ngāti Tamarangi pā, Te Rae o te Karaka, was once located. Mr Taueki's whānau urupā, Te Kapa, is located on the northern banks of the lake. Mr Taueki's parents are buried here. This was once the pā tūwatawata (fortified pā) of Pōtangotango, Ngāti Tamarangi's tūpuna. Te Kapa is a stone's throw from the lake. The pūkenga noted that the whakapapa shows an important physical and spiritual connection of Ngāti Tamarangi to the land at Horowhenua, and an "intergenerational connection between ... the past, the present and the future".

Foundational take at 1840

[621] Mr Armstrong gave expert historical evidence on behalf of Ngāti Tamarangi, and produced a report entitled "Historical Research Report in Support of Ngāti Tamarangi Application CIV-2017-485-160 for Customary Marine Title and Protected Customary Rights Under the Marine and Coastal Area (Takutai Moana) Act 2011" (the Armstrong report), in support of their application. Armstrong said that he had focused on the nature and extent of the customary rights and interests held and exercised by Ngāti Tamarangi within their application area from 1840 to the present day. In particular, he considered the origins of Ngāti Tamarangi, early Māori settlement patterns in the region, the traditional rohe, the nature and impact of the northern (tangata heke) incursions and migrations as well as relationships with the Crown and settlers, and the impact of Native Land Court determinations on mana whenua and mana moana. In addition, he looked at population numbers and tribal structure, Ngāti Tamarangi's use of the marine and coastal area and land remaining in Ngāti Tamarangi ownership. Armstrong said his report had been updated following further research he had undertaken with Mr Stirling, the expert historian for Muaūpoko.

[622] Based on the agreed chronology of pre-1840 events, it is common ground that prior to 1818 Muaūpoko, Rangitāne, and Ngāti Apa (and their predecessors) occupied the coast from Rangitīkei to Whareroa. Armstrong traces the origins of Ngāti Tamarangi, noting that they (and other hapū of Muaūpoko) descend from tūpuna

who arrived in Aotearoa on the Kurahaupō waka, including Toi-Te-Huatahi, Whatonga and his son Tara. Their descendants eventually migrated to the territory between the Rangitīkei River and Te Whanganui-a-Tara, where they overcame and intermarried with the people they found there, who are often referred to as Mua-Te-Tangata. As to whakapapa, consistent with the evidence of Mr Taueki, Armstrong recorded that the Ngāti Tamarangi hapū trace their immediate descent from Te Mou and Potangotango. Tapuwae was a child of Tokai, the wife of Potangotango. The rangatira Taueki, who was a son of Tapuwae and Kuraituhi, was born in around 1780.

[623] Armstrong refers to the taua in 1819, which included Ngāti Toa warriors led by Te Rauparaha. There was an attack by the taua on Ngāti Apa in the Rangitīkei, in which the high ranking rangatira, Pikinga, was taken prisoner. An unsuccessful attack was then made on Muaūpoko at Kapiti Island. A peace agreement was arranged and cemented by a gift from the Muaūpoko rangatira Poutou of a greenstone mere. The period is noteworthy for the peace-making marriage of Te Rangihaeata and Te Pikinga (of Ngāti Apa).

[624] Migrations of Ngāti Toa and Taranaki tribes occurred in the period from 1821-1822. The agreed chronology records that in the period between 1822–1824, various attacks and battles occurred, largely between the Kurahaupō iwi and Ngāti Toa and their allies.

[625] Ngāti Tamarangi say take raupatu was not effective in their rohe. This is because while Te Rauparaha and his allies were successful in securing a victory against Muaūpoko and their allies, when the latter attempted an attack at Waiorua in 1824, there is no evidence that Taueki was involved. In addition, there has never been a defeat of Ngāti Tamarangi at Horowhenua and so there can be no take raupatu in respect of their rohe.

[626] Mr Irwin for Ngāti Tamarangi summarised the evidence of Mr Armstrong on the relevant historical battles and attacks around Horowhenua. The first attack was by Ngāpuhi and Ngāti Toa (including Te Rauparaha) at Waikiekie pā on Lake Horowhenua around 1819. The invaders failed to take the pā. The second attack was around 1820 or 1821, when an āmiowhenua group (of Waikato and Ngāti Whatua)

attacked Muaūpoko at Lake Papaitonga, and resulted in a victory for Muaūpoko, who named the battle site Whakawhata-kāhu. “Kāhu”, which means hawk, was a reference to the number of bodies suspended in trees for hawks. The third attack in 1822 was led by Te Rauparaha and followed the attack on him and his family at Ōhau.⁴⁵⁶ The Ngāti Toa attack was probably at the island pā on Lake Horowhenua, being Waipāta, Waikiekie, and its associated (and very close) pā Te Roha o te Kawau. There have been disputes about how many Muaūpoko were killed in this attack, with Ngāti Toa sources such as Tamihana Te Rauparaha claiming that as many as 170 (or possibly 340) were killed.⁴⁵⁷ In contrast, Mr Armstrong suggested the figure of 30-40 was more realistic, given the islet pā were very small and likely housed no more than 50 or 60 warriors.⁴⁵⁸ He concluded that before the battle of Waiorua in 1824, Ngāti Tamarangi (and Muaūpoko) had only suffered one defeat to Te Rauparaha at Horowhenua which was not followed up by occupation.

[627] Armstrong suggests that after attacking Muaūpoko in 1822 around Lake Horowhenua, Ngāti Toa did not return to or seek to occupy the Horowhenua area, even following the battle of Waiorua. O’Malley for Ngāti Raukawa accepted that Ngāti Toa did not follow up on their Waiorua victory at that time with any occupation of the land at Horowhenua.

[628] In addition, Ngāti Tamarangi say their interests at Horowhenua were never abandoned. Taueki and Ngāti Tamarangi remained at Horowhenua. Taueki offered the survivors of Muaūpoko who had fled to Arapaoa a place to return at Horowhenua. Mr Irwin points out that Ngāti Toa’s map book of sites of significance does not refer to any signs of the kind of occupation at Horowhenua that would indicate ahi kā, such as pā, kāinga, urupā, or cultivation. The pūkenga noted that while Waiorua was a significant battle and there was “some defeat in that particular space,” it was not necessarily a raupatu or conquest along the whole coast.

⁴⁵⁶ Te Rauparaha’s children were killed in the attack at Ōhau, or in that vicinity.

⁴⁵⁷ Tamihana Te Rauparaha, in his biography of this father, records that “kotahi rau mā whitu” were killed. This was initially translated as 170, but more recently was doubled to 340 by Ross Calman (of Ngāti Toa and Ngāti Raukawa) on the basis that sometimes Māori counted in pairs: Calman, above n 399, at [33.4].

⁴⁵⁸ Armstrong also noted that the defenders fled in their own waka after the battle.

[629] Ngāti Tamarangi say Ngāti Toa’s claim that they had cleared Ngāti Tamarangi (and Muaūpoko) from the Horowhenua area whether before or after Waiorua is baseless. The coastline was not “cleared” after the battle of Waiorua, and according to Armstrong many sources acknowledged Muaūpoko remained, particularly at Horowhenua.

[630] The Ngāti Tamarangi narrative, supported by Mr Armstrong and the other Muaūpoko historians, is that events unfolded in 1830 which gave rise to Taueki reaching a peace agreement, or *tuku whenua*, with the Ngāti Raukawa rangatira Te Whatanui.

1830 arrangement: Te Whatanui and Taueki

[631] It is common ground that in 1830 an arrangement was entered into by Te Whatanui of Ngāti Raukawa and the rangatira Taueki. However, the nature of the arrangement is disputed between the ART Confederation iwi on the one hand and the Kurahaupō iwi on the other.

[632] The narrative from the kōrero of Ngati Tamarangi is summarised by Armstrong based on his research as follows:

Ngati Tamarangi were not conquered or driven from their land by any other tribe. After 1830 peace prevailed as the result an agreement involving the Ngati Tamarangi rangatira Taueki and Te Whatanui of Ngati Raukawa. Ngāti Raukawa were assailed by enemies at Maungatautari, and experienced a prolonged period of fighting in Heretaunga (Hawkes Bay) and elsewhere as they searched for a new home. When they arrived in the Otaki district their overarching desire was for peace and security. This security could not be found by attacking Muaupoko, which would almost inevitably involve them in destructive conflict with all the tangata whenua tribes – Rangitane, Ngāti Apa and Whanganui.

[633] In his report, Armstrong elaborated on the events leading to the peace agreement in 1830. His research indicated that the Te Whatanui’s heke of 200 to 400 people likely arrived in Kapiti in 1830. It met a force led by Taueki near the Manawatū River at Te Karekare (near present-day Foxton). A broad agreement or whakaetanga was reached to avoid conflict which, Armstrong’s research indicates, was given more shape in further whakaetanga including the peace-making arrangement at Te Namu-iti in 1830. Arranged marriages between the tangata whenua and

Ngāti Raukawa followed. Armstrong says there was good reason for Te Whatanui to seek peace in this way.⁴⁵⁹

Ngati Raukawa had experienced a lengthy period of warfare and had suffered significant defeats. ... Under these circumstances Te Whatanui and the broader Ngati Raukawa leadership clearly had little appetite for embarking on a further period of extended warfare, especially as not only Muaupoko, but also increasingly well-armed Rangitane and Ngati Apa, and quite possibly the Whanganui tribes and Ngati Kahungunu, would be arrayed against them. The combined forces of these tribes remained formidable, even after Waiorua. In short, Te Whatanui's main priority was peace and security.

[634] Muaūpoko and Te Whatanui enjoyed an amicable relationship for a lengthy time after the 1830 agreement. Armstrong noted that the land in “Taueki’s tuku involved a relatively small area at Raumatangi” and that Te Whatanui had a shared access sea pā on the southern bank of the Hōkio Stream, with a degree of flexibility in those arrangements. Armstrong interprets this as a manifestation of Muaūpoko manaakitanga which conferred additional rights on Ngāti Raukawa. He notes that very few of Te Whatanui’s people remained at Horowhenua when the Anglican Church compiled its Horowhenua Register in 1845. Te Whatanui died in 1846. In cross-examination by Mr Irwin, Ms Mikaere was shown the church register recording the names of some, but not all, of the people she had listed as residing with Te Whatanui. Ms Mikaere responded that the names on the list were not comprehensive, included misspellings, and not all of the names of the people who settled were known and therefore able to be included.

[635] Armstrong said the good relationship which, according to Muaūpoko, had existed between them and Te Whatanui, began to unravel when Te Whatanui’s son, Tutaki, “violated” leasing agreements by trying to confine Muaūpoko to a comparatively small area. These contentious lease issues involved the settler Hector McDonald who had arrived in the district in 1832. Starting out as a whaler, he married a niece of Te Rauparaha and established himself as a trader at Ōtaki. In 1857 he moved to the mouth of the Hōkio Stream apparently at the invitation of Tutaki, and informally leased land under several arrangements. Such leases from Māori were illegal but the Crown had been turning a blind eye. Disputes arose between Muaūpoko and McDonald, who initially had a lease of land south of the Hōkio Stream, and then

⁴⁵⁹ Professor Belgrave reaches a similar conclusion: see Muaūpoko section of this judgment.

arranged a new lease with Muaūpoko and the Ngāti Huia community based at Poroutawhao involving land north of the Hōkio Stream. According to Armstrong, following Tutaki's death McDonald had further disputes with Te Whatanui's grand-nieces, who wanted to retain the land themselves. This developed into a more fundamental conflict between Muaūpoko and Ngāti Raukawa over their respective rights at Horowhenua. The Himatangi Native Land Court hearings (1868/1869) were taking place at the same time and Muaūpoko concluded that Ngāti Raukawa had abandoned the compact between Taueki and Te Whatanui, or at least breached its terms.

[636] Disturbances arose in 1869 concerning the dispute and in September 1870 Ihaia Taueki, Kawana Hunia and other Muaūpoko chiefs met Ngāti Raukawa to reject the Ngāti Raukawa claims. Muaūpoko built a fighting pā called Pipiriki on the western shore of Lake Horowhenua just south of the boundary claim by Ngāti Raukawa at Tauateruru. In response, Ngāti Raukawa built their own pā, Poroutawhao. This tension resulted in a government enquiry being undertaken by William Travers.

[637] The resulting report found that Muaūpoko had been unable to resist Te Rauparaha and his allies and would have been exterminated but for the protection of Te Whatanui, and that they now lived in "quasi subjection" on a reduced area of land. In contrast, Te Whatanui and his descendants were described as having "remained in undisturbed possession of the balance of Horowhenua until relatively recently". However, Armstrong notes that Mr Travers had been the Ngāti Raukawa advocate during the second Himatangi case in 1869 so was "hardly a disinterested observer", and he did not lay out the facts but "maintained his role as a Ngati Raukawa advocate".

[638] Armstrong outlined in detail the evidence in the 1868 Himatangi case held at Ōtaki. He noted the case had a complex background and was heard under a special jurisdiction of the Native Land Court to determine the interests of those Ngāti Raukawa who had declined to participate in the Rangitīkei-Manawatū

transaction. They were seeking to have their interests recognised.⁴⁶⁰ The judgment was delivered by a bench of three judges, with the case taking 40 days of hearing time and generating extensive minutes. Hundreds of Māori were in attendance. Armstrong notes that the judges decided that Ngāti Raukawa were undoubtedly in occupation before 1840, but the “original occupiers” had never been entirely dispossessed, nor had they parted with the assertion and exercise of rights of ownership. Armstrong describes the decision as not grasping the customary nuances which had led to the shared occupation, but nevertheless accurately summing up “the general position of Ngāti Raukawa vis-à-vis the tangata whenua tribes”. The Court noted that the tangata whenua tribes may have suffered “defeats, but they were not conquered and there had been no ‘extinction’ of their rights”. The Court determined that the tangata whenua iwi had shared their territory with Ngāti Raukawa and acquiesced in a form of “joint ownership”. Therefore, they possessed “equal interests and rights over the land in question at the time when the negotiations for full cessation to the Crown of the Rangitikei Manawatu block were entered upon”.

[639] The second Himatangi adjudication involved all the remaining Ngāti Raukawa non-sellers and was held in Wellington in July 1869. Two senior members of the bench sat as judges, together with a Māori assessor Ihaia Porutu. According to Armstrong the judgment focused primarily on the competing claims of Ngāti Apa and Ngāti Raukawa, and the Court reached essentially the same decision as the first Himatangi decision. This was seen by Ngāti Raukawa and their rich European supporters as “monstrously unjust” given the conclusion that no conquest had been effected by Ngāti Raukawa. Armstrong stated that nonetheless five judges and three Māori assessors had found Ngāti Raukawa’s rights stemmed from occupation, which was acquiesced to by the tangata whenua tribes, whether implicitly or through negotiated agreements. He further contended that given the relationships between Ngāti Raukawa, Muaūpoko and other tangata whenua tribes, the Court’s rejection of rights based on conquest was justified.

⁴⁶⁰ Although the case involved only a small part of the Rangitikei-Manawātū block, it had wide implications as the claims of the non-selling Ngāti Raukawa group were based on claims of conquest and subjugation of the tangata whenua tribes.

Armstrong also referred to the Manawatū-Kukutauaki hearings of the Native Land Court at Foxton in November 1872. The Ngāti Raukawa witnesses gave evidence that they had been invited to reside in the district by Te Rauparaha after he had conquered the tangata whenua tribes, and that they lived on land “gifted” to them by the Ngāti Toa chief. Armstrong commented that while Ngāti Toa witnesses had supported tangata whenua during the Himatangi cases, they changed their stance when it came to land south of the Manawatū River. Matene Te Whiwhi asserted that Muaūpoko had never cultivated land south of the Manawatū, whilst Tamihana Te Rauparaha stated that his father had the right to give Horowhenua to Ngāti Raukawa, as Muaūpoko were living there as his slaves. Armstrong questions why, if Muaūpoko were already living as slaves, Te Rauparaha would have urged Te Whatanui to attack Muaūpoko and why Te Whatanui would seek peace with Taueki. Armstrong also queries whether Tamihana Te Rauparaha harboured a particular animus towards Muaūpoko given they had killed his siblings.

[640] The Ngāti Toa claims were rejected by Muaūpoko. Their main witness in the Native Land Court hearing was Keepa Te Rangihwinui, who spent four days setting out the tangata whenua claims in detail, describing the history of the district since the arrival of the original taua until recent events. He complained of the “many evil things” that Ngāti Raukawa said, namely the claims that Muaūpoko were slaves and had been conquered. He emphasised the shared ancestry of the tribes he represented, beginning with Kupe, who was “the first man who came to New Zealand”. He went on to note that “...we all joined together to come on this land... all Kupe’s descendants who are in this part of the country are interested in this land”.

[641] A further point made by Mr Taueki is that Te Rauparaha’s son, Tamihana Te Rauparaha, gave evidence to the Native in 1868 that Muaūpoko had “mana within the fences — at Horowhenua only” and had no other mana “this side of the Manawatu”. While Muaūpoko does not accept Tamihana’s statement as it relates to outside Horowhenua, they do point to it as an admission of Muaūpoko’s mana at Horowhenua. Boast suggested that Tamihana’s reference to fences was likely a reference to the coastal land boundaries agreed between Te Whatanui and Taueki at Te Uamairangi and Ngā Manu.

Evidence of tikanga indicia

Treaty signatories

[642] Ngāti Tamarangi point to the fact that on 26 May 1840 Taueki signed Te Tiriti, which indicates that they had mana motuhake and were a sovereign people with tino rangatiratanga over their lands and fisheries. Armstrong says that Taueki signed the Treaty along with six others, including Ngāti Raukawa rangatira who would not have tolerated a conquered rangatira signing such an important document. He points to the evidence of Hoani Meihana (of Rangitāne) during the Manawatū-Kukutauaki block hearing that “men of substance” were sought for their signature and that Ngāti Raukawa did not come and tell the Crown that Muaūpoko were slaves. Hoani Meihana also argued before the Native Land Court that the involvement of Muaūpoko in the Haowhenua conflict as allies of Ngāti Raukawa against Te Ātiawa suggests they were not slaves but rather “people of influence and power”. Mr Irwin points to this as an acceptance by Ngāti Raukawa of the mana of Taueki.

[643] In addition, Ngāti Tamarangi say that from the mid-1830s to the mid-1840s Muaūpoko outnumbered Ngāti Raukawa at Horowhenua. Armstrong’s research indicates that there were 95 Muaūpoko living there in 1845, excluding Te Whatanui, his wife and his two sons (who were included in the count as Muaūpoko). Other records suggested that 200 Muaūpoko were living at Rae-o-te Karaka on the lakeside at Lake Horowhenua in 1830, among others in that vicinity. Mr Taueki accepts that there is some evidence that Ngāti Raukawa outnumbered Muaūpoko between Waikanae and Manawatū as at 1845. Nevertheless, those historical records support the fact that Ngāti Tamarangi have occupied the rohe they claim in Horowhenua from 1840 to the present day. Ngāti Tamarangi continued to own land within the abutting Horowhenua block through its partition in 1886, subsequent partitions and consolidation in the mid-1940s.

Historical evidence of use of resources

[644] The historical evidence gathered in the Armstrong research supports Ngāti Tamarangi’s use of the takutai moana in various ways in the 19th and early to mid-20th century including:

- (a) collecting toheroa, pipi and mussels;
- (b) scraping flax with kakahi (mussel) shells;
- (c) fishing for various species including kahawai, hapuka and sharks, which were dried as a delicacy;
- (d) operating a fishing station at the mouth of the Hōkio Stream;
- (e) placing various pā tuna (eel weirs) in the Hōkio, including one at the mouth called Tarere-Mango (the flying shark); and
- (f) whitebaiting at the mouth of the Hōkio Stream.

[645] The Armstrong report referred to the confirmatory evidence to be found concerning the connection of Muaūpoko to the whenua and the moana in the Native Land Court Horowhenua case which started in March 1873. Ihaia Taueki, the son of Taueki did not give evidence. However, evidence was given over five days of the locations of the Muaūpoko hapū pā, kāinga, cultivations, whare, trails, orchards, wetlands, pā tuna, fishing spots, karaka groves, flax dressing areas, birding places, berry and forest resources, wāhi tapu, and urupā in the vicinity of Lake Horowhenua.

[646] Armstrong tabulated the references (running to 18 pages) based on activities at various places mentioned by Muaūpoko witnesses in the 1873 hearing. The listed activities and value associated with various sites include cultivation, duck snaring, fishing (including on the Ōhau River and on the coast north of the Hōkio Stream mouth), eeling, orchards, wetland resources, pā tuna, swamps and mahinga kai, and bird gathering. The activities associated with O Katia (or Katia or Okatia), a beach north of Ōtaki, include fishing, pipi gathering between Namana (near the north-western boundary of the block on the coast) south to Tawhituri. Reference was also made to the beach from Waingaio (the north-western extremity of the Horowhenua block) to Ōtaki, which was described as “Muaūpoko fishing grounds”. In addition, a witness referred to the mouth of the Hōkio Stream as a principal place for fishing, as well as for eeling and pipi gathering. Armstrong also notes that

Uamairangi — one of the boundary points for the CMT claim — was referred to as a coastal fishing station north of the Hōkio Stream mouth. Te Rere Maunga is also listed as a fishing station located near the mouth of the Hōkio Stream, and Waiwiri Stream is listed as a place for eeling. The locations are set out in a map produced at the request of the Court during the hearing at Attachment 4. The map also shows the location of the Te Whatanui pā at Raumatangi on the Hōkio Stream and Te Namuiti, where the peace arrangement between Te Whatanui and Taueki is said to have taken place.

[647] That Muaūpoko assert these claims relatively close in time to 1840 gives credence to their present-day assertions. The events of the 1820s and 1830s were within the memory of many who gave evidence or had been handed down only one generation. While some caution is required due to the purposes for which the witnesses gave their evidence, it is nevertheless supportive of the present claim to the Horowhenua. Many of the examples referred to are places in and around Lake Horowhenua and related islands, rather than the takutai moana. However, at the relevant time, the coast was closer to the Lake and islands and the area was dotted with dune lakes, so the activities and events recounted were generally relatively close to the coast and sea.

Present-day activities

[648] Mr Taueki, born in 1955, has lived his entire life in the Horowhenua, like his parents and grandparents. He gave first-hand evidence of the ongoing utilisation of the takutai moana at Horowhenua by Ngāti Tamarangi in accordance with tikanga in his lifetime. Mr Taueki noted that archaeological evidence since demonstrated the importance of shellfish to Ngāti Tamarangi, and kaimoana was often shared with other families in the area. He said kaimoana gathering in a contemporary context became more about maintaining family relationships — going down to the beach or gathering toheroa was a way to connect generations of Ngāti Tamarangi's people. Mr Taueki said that many of the activities undertaken in 1873, referred to in the Native Land Court hearing and listed above, were still carried out by his hapū and whānau today.

[649] Mr Taueki said that shellfish were important for tangihanga. He was taught by his grandmother in the 1960s how to make flax kete for harvesting shellfish. He also

had great knowledge about the eel lifecycle, including when they began breeding, travelling down the Hōkio Stream and crawling across the sand to reach the sea. His father would take eels for smoking. Knowledge about the heke tuna has been handed down to Mr Taueki from his tūpuna and he now passes it down to his grandchildren.

[650] Mr Taueki noted that Ngāti Tamarangi exercise kaitiakitanga by looking after their resources and protecting the coast. He gave the example from the late 1980s of working with other Hōkio Beach residents to have a car dump removed from the coast. Mr Taueki also gave evidence that at times Ngāti Tamarangi members intervened to restrict people from driving cars and motorbikes along the beach, as this destroys toheroa and pipi feeding beds.

[651] Other events for which beach access was restricted included a local Māori Women's Welfare League beach carnival and race held at the foreshore (between the Hyderabad wreck site and the Waiwiri Stream) in the 1960s. They charged an entry fee of one shilling. Armstrong also referred to Ngāti Tamarangi's efforts to restrict third-party access to and use of Hōkio Stream and Beach, and to exercise kaitiakitanga in protection of the takutai moana. Other evidence suggesting a degree of control over the takutai moana throughout the 20th century included a 1935 complaint to the Marine Department from a European resident based on claims by Māori to the beach between Foxton and Paekākāriki. Māori were putting certain restrictions on use of the beach, and saying that it had not been ceded to the Crown but continued to be held by Māori.

[652] Further complaints about Māori claiming fishing rights in the Hōkio Stream were made in the 1940s and 1950s. The rights of Muaūpoko to fish in that area is dealt with in more detail in the next section relating to the evidence of the Horowhenua 11 Part (Lake) Reservation Trust.⁴⁶¹

⁴⁶¹ The Reserves and Other Lands Disposals Act 1956 [ROLD Act] was enacted to protect the bed of the Hōkio Stream and Lake Horowhenua, vesting the freehold title in a trust (the Horowhenua Lake Trust) for the benefit of Muaūpoko.

HOROWHENUA 11 PART (LAKE RESERVATION TRUST)

[653] In view of the importance of Lake Horowhenua/Punahau and its waterways to the Muaūpoko applicants, it is appropriate to refer to the evidence and submissions of Horowhenua 11 Part Lake Trust (the Trust), an interested party.

[654] Mr Dean Wilson, one of the trustees of the Trust, gave evidence on behalf of the Trust and the trustees.⁴⁶² He also gave evidence in support of the Muaūpoko application. He is employed as the Taiao of MTA. Mr Wilson's whakapapa goes back more than 22 generations directly to the shores of the lake and the land of Horowhenua.

[655] The Trust is the legal owner of the bed of Lake Horowhenua, which Muaūpoko call Punahau. That title includes the 400 hectares of land, and extends over the bed of Hōkio Stream out to the Hōkio River mouth where it meets the sea. The lakebed is defined as extending to one chain in width around the original margin of the lake. The Trust is a legal entity and represents current Muaūpoko owners and their tūpuna, who were the original named owners of Punahau.⁴⁶³ Mr Wilson noted there were 2,118 beneficial owners in 2022. It is estimated that 10 to 20 per cent of those could be deceased owners for whom succession arrangements are needed. The successions will increase the numbers of beneficial owners. He confirmed that many of the beneficial owners belonged to the Muaūpoko hapū, Ngāti Tamarangi.

[656] Mr Hockly, counsel for the Trust, explains that it seeks to ensure that the freehold title to the bed of the lake and associated rights are not compromised by the recognition of any CMT and/or PCRs in this proceeding. He notes that in the Crown maps, around the mouth of the Hōkio Stream, there is a mark indicating where the title

⁴⁶² The other trustees noted are Deanna Paki, Anahera Winiata, Marakopa Wiremu-Matakatea, Kelly Tahiwī, Clinton Hemana, Adrian Henare, Selena Hunt, Keri Hori Te Pa, Haden Dempsey and Sherry Hurinui.

⁴⁶³ The title reference identifier 500039 (Wellington Land Registration District) describes the relevant freehold interest as comprising 400.9234 hectares, being the bed of the Horowhenua Lake and the islands therein, and the dewatered area and the strip one chain in width around the original margin of the Lake, as well as the Hōkio stream and a one chain strip along the north bank of the stream. The owners are recorded as the responsible trustees jointly, no survivorship.

to the stream ends and the river mouth begins. That mark has not yet been the subject of a specific survey.

[657] The Trust works with the Domain Board, which is legally responsible for the surface of Lake Horowhenua. The lake area comprises some 14 acres of land acquired in 1907 for a domain reserve and boatshed, as well as the dewatered margin of the lake around the domain reserve. The Domain Board consists of a chairperson appointed by DOC, three members appointed by the Horowhenua District Council, and four members appointed by Muaūpoko iwi through MTA.

[658] The Trust emphasises that the area has been held, defended and retained by Muaūpoko from 1840 to the present time. Fourteen Muaūpoko rangatira were the first named owners and trustees of a title issued by the native appellate court in October 1898.⁴⁶⁴ That title was issued for 901 acres for the purposes of a fishery easement, recognising the continued and ongoing customary ownership of the lake and the bed of the lake. The Reserves and Other Lands Disposals Act 1956 makes special provision for the lake and describes the land comprising the freehold title that is part of Horowhenua XI Block.⁴⁶⁵

[659] Mr Wilson reiterated that Lake Horowhenua lies at the heart of the Muaūpoko tribal lands, occupying a special place in the history and life of Muaūpoko. It lies directly between the two Muaūpoko marae: Kawiu Marae to the northeast, which sits on Kawiu Road; and Pāriri or Kohuturoa Marae to the south, which lies at the southern-most end of the lake's shore. He said that Muaūpoko had been at the lake and the broader rohe since time immemorial, having established ahi kā roa there many centuries ago. Muaūpoko have never moved from the area nor relinquished their whenua, their lake or their defence of it, and intend that it will once again be seen as a significant fishery and resource. A park on the road leading into Lake Horowhenua is named Muaūpoko Park, and Muaūpoko Road runs from Levin to the lake and the nearby beach from the Levin township.

⁴⁶⁴ The fourteen Muaūpoko rangatira who were the first named owners and trustees under the native court legislation were: Makere Te Rou; Hema Henare; Himiona Kowhai; Haare Taueki; Taare Porotene; Ariki Raorao; Kerehi Tomo; Waata Muruahi; Rhipeti Tamaki; Rewi Wirihana; Wirihana Hunia; Te Rangimairehau; Hoani Puihi; and Raniera Te Whata.

⁴⁶⁵ ROLD Act, s 18.

[660] Mr Wilson’s uncles (one of them, Uncle Johnny, was in the courtroom for Mr Wilson’s evidence) were renowned fisherman. Mr Wilson said Muaūpoko knew where to go, when to go, when the right season was, and where to get fish and tuna as well as birds, swans, and rakiraki.

[661] Muaūpoko’s right to fish in Lake Horowhenua and the Hōkio Stream was upheld in the well-known Supreme Court decision involving Mr Wilson’s Uncle Joe Tukapua.⁴⁶⁶ In that case Cooke J found that Mr Tukapua had “proved the right of the Maori owners to fish in these waters free from disturbance by fishery officers”.⁴⁶⁷

[662] Mr Wilson said that his uncle had always said “the lakes goes to the stream, goes to the sea” and “when we’re at the ocean, or at the beach, we fish as far as the eye can see”. Mr Wilson spoke to the fact that he had been taught by his forebears that:

All the waterways that come in, all the connections around the land blocks, everything from the mountains to the sea, ... the springs up in the mountains, the puna [springs] up there, they feed into the lands and all the puna that are on the land, all the waterways that come in, that one there being for our lake, goes into Tāwhirikohukohu, comes down to the Arawhata and then filters through. But even though it’s ... outside of the Lake Trusts’ ownership of where they are, but they affect, they connect and that is the beating heart of our people, as Uncle Marakopa and others have said and that everything affects our lake and so it affects us as people, Te Mana o Te Wai [The Power of the Water].

[663] Mr Wilson referred to work being done by the Trust and Muaūpoko, raising plants in nurseries and planting native plants, and projects done with the local authority in relation to Levin drainage which flows down to the lake. He gave the example of the Levin landfill which was on land that was sold off and is now closed. However, a “plume” from the landfill was still filtering through to the stream, so Muaūpoko remain involved in attempting to resolve issues outside the area which continue to affect the lake.

⁴⁶⁶ *Regional Fisheries Officer v Tukapua* SC Palmerston North M 33/75, 13 June 1975.

⁴⁶⁷ At 11. The case concerned fishing rights in Lake Horowhenua and the Hōkio Stream, the bed of which is in Muaūpoko ownership. However, a decision in 1978 rejected Muaūpoko’s rights to whitebait in the closed season in the Hōkio Stream at a point below the mean high-water mark.

[664] Mr Wilson gave evidence that as the trust deed and history of Lake Horowhenua and Hōkio Stream title show, the lake was once a significant fishery and resource for Muaūpoko.⁴⁶⁸ The lake has suffered greatly through the impact of others, to the stage where it no longer serves Muaūpoko as a fishery and safe body of water to use. In the 1950s, raw sewage started getting put into the lake and things changed for about 30 years. The dumping of raw sewage stopped in the early 1990s, but the lake continues to be affected.

[665] Even during periods of inactivity by the Domain Board, Mr Wilson notes that the Muaūpoko owners and trustees had been active in guarding the health of the lake. Mr Wilson pointed out that the Domain Board does not lead or guide the Trust in its role as owner and kaitiaki of Punahau. That is done by Muaūpoko through the trustees and the owners.

[666] The major issues concerning the health of the lake and related waterways led to the entry into an agreement called the Lake Horowhenua Accord. The accord involves five parties including the Trust. The other parties are the Horowhenua Lake Domain Board, Horowhenua District Council, Horizons, and DOC. It established an action plan which records that the Trust is responsible for managing the fishing easement and fishing rights on behalf of Muaūpoko in accordance with the Act, and also records the other parties' responsibilities. The eight projects currently underway include the purchase of lake weed harvesting equipment, installing stormwater treatment systems and related works including a sediment trap/treatment wetland on an inflow to the lake, integrated drainage and sediment control plans for up to

⁴⁶⁸ This is referred to in the Māori Land Court Records Title Details Report as Block 20458. The land is described as Māori Freehold Land. LINZ Identifier 500039 describes the owners' entitlement as "the free and unrestricted use of the lake and that part of the dewatered area and the part one chain in width... and of their fishing rights over the lake in Hokio stream but so as not to interfere with the reasonable rights of the public as may be determined by the Domain Board constituted under Section 18 Reserves and Other Plans Disposal Act 1956 to use as a public domain the lake and that part of the dewatered area and the part one chain in width ... as shown on the said Plan." It states "The Maori Owners" are entitled to the fishing rights granted by s 9 of the Horowhenua Block Act 1896 except such parts of the bed of the Hōkio Stream as may have at any time been alienated or disposed of by "the Maori Owners" or any of them. It reserves to the public the free right of access over and the use and enjoyment of the dewatered area and one chain. Identifier 500039 further records "the surface waters of the Lake together with the dewatered area and the part one chain in width both fronting Subdivision... are declared to be a public domain subject to the provisions of part III Reserves and Domains Act 1953. Provided that this shall not affect the Maori title to the bed of the Lake or dewatered area" and the area one chain in width fronting the specified subdivision.

500 hectares of cropping farms, and a fish pass and habitat improvement for native fish.

[667] The Trust sees the restoration of the lake and its health as fundamental to its role as kaitiaki for Muaūpoko and as the voice of Punahau in defending its health. That kaitiakitanga has led the Trust and Muaūpoko to engage not only with the Domain Board, but with local and regional authorities in the area, as well as the Minister for the Environment, DOC, and Waka Kotahi. The Trust has fought to protect Punahau through court actions, including in the Māori Land Court, Environment Court, the High Court, and the Court of Appeal. This is in addition to numerous discussions with local authority and ministry staff, Ministers, and mayors in attempts to get policies changed.

[668] Recently the Trust, as an intervenor, supported both Muaūpoko and Ngāti Raukawa in taking court action over their concerns about a proposed vegetable grower exemption from the National Policy Statement for Freshwater Management 2020 to the Court of Appeal.⁴⁶⁹ The Court of Appeal allowed an appeal from the High Court's refusal to grant the orders sought and quashed the relevant exemption due to inadequate consultation by the Minister.⁴⁷⁰ The Court described the lake as:⁴⁷¹

...now one of the most polluted and degraded lakes in the country. It is classified as hypertrophic — in other words, it is highly fertile and supersaturated in phosphorus and nitrogen.

[669] The Court recorded the findings of the Waitangi Tribunal in its 2017 report as including the observation that:⁴⁷²

Muaūpoko has objected over the years to the cultural offence of contaminating waters used for food with human waste. The Crown was aware of these

⁴⁶⁹ *Muaūpoko Tribal Authority Inc v Minister for the Environment* [2023] NZCA 641, [2024] NZRMA 285. Muaūpoko Tribal Authority Inc and Te Rūnanga o Raukawa Inc judicially reviewed the vegetable exemption in the National Policy Statement for Freshwater Management 2020, which had been developed as a result of concerns raised by vegetable growers in the Horowhenua and Pukekohe areas that the run off into freshwater bodies from their land use activities would not meet the new standards in the Policy, in particular due to dissolved inorganic nitrogen resulting from application of fertilisers to their crops.

⁴⁷⁰ At [144].

⁴⁷¹ At [10].

⁴⁷² At [22(f)], recording the findings of the Waitangi Tribunal in *The Muaūpoko Priority Report, Pre-publication version* (Wai 2200, 2017) at 585–586.

protests. They are expressed through petitions, Domain Board meetings, litigation and in various Tribunal claims.

[670] The Court of Appeal recorded that Muaūpoko iwi and hapū had been present in the area since at least the 12th century and that its members had lived alongside the rivers and lakes in the region, including Lake Horowhenua.⁴⁷³ The Court of Appeal also noted the Ngāti Raukawa assertion that those who hold mana whenua in the catchment were of Ngāti Raukawa descent.⁴⁷⁴ While Muaūpoko and Ngāti Raukawa had competing claims to the water bodies in the Horowhenua area, the Court noted that both “shared a common objective in” the appeal and that they and their members had a “deep sense of grievance that Lake Horowhenua and the Hōkio Stream and other waterways in the Horowhenua area may have been significantly compromised over a long period”.⁴⁷⁵ The Court found it unnecessary to consider the competing claims of the iwi, nor was the Minister required to have considered the relative strength of the claims to the lake.⁴⁷⁶

[671] Mr Wilson referred to the constant physical work associated with the care of the rohe undertaken by the Trust members. This included recently removing dead birds from the lake when disease killed them in large numbers, as well as placing rāhui around certain places — or sometimes the lake as a whole — when the areas were not safe, when there had been accidents, or when the water quality of the lake became life-threatening to humans. He discussed in detail the death of about 6,000 manu (birds) and 1,800 tuna (eels) due to outbreaks of botulism. Muaūpoko kaimahi on the ground supported the Trust in picking up all the dead wildlife. This “gut wrenching mahi” was undertaken with two canoes, buckets and pitch forks. He described vividly the effect on him of seeing the taonga being desecrated in that way.

[672] Mr Wilson’s uncles had been concerned about and attempting to stop this desecration for years. He noted that Punahau and the Hōkio Stream were where the Muaūpoko tūpuna stood. The polluted water that flows from the lake to the marine area compromises the coastal area and the shellfish and coastal fisheries which

⁴⁷³ At [13].

⁴⁷⁴ At [14].

⁴⁷⁵ At [15].

⁴⁷⁶ At [15] and [145].

Muaūpoko rely upon. Kaitiaki responsibilities require that Muaūpoko care for the waters flowing from Punahau, as it affects other parts of the Muaūpoko takutai moana.

[673] Mr Wilson spoke of the complex history of Punahau and its surrounds over the past 150 years or so, which has been documented by the Waitangi Tribunal and summarised in the recent Court of Appeal decision in *Muaūpoko Tribal Authority Inc v Minister for the Environment* (as discussed above).⁴⁷⁷ That history indicates the strong relationship with the lake and its surrounds and the firm commitment that the Trust and Muaūpoko have had over generations to protecting the lake and its health. Currently, drainage control, wastewater, and nitrogen pollution are causing eutrophication which may lead to the release of ammonia and is presently regarded as the primary threat to the lake. This threat is behind the proposal by the District Council to cut weed from the lake before it seeds, with the aim to cut back the exotic species so they will not reseed and to allow native water plants currently being smothered to re-establish themselves.

[674] Mr Wilson noted that it was not Ngāti Raukawa who were responsible for Lake Horowhenua and the Hōkio Stream in accordance with tikanga, but rather the Trust and Muaūpoko. He said that while people from Ngāti Raukawa, as well as others, fish there and in the ocean where the water meets the sea, it was Muaūpoko who were responsible for the clean-up and who had been doing the restoration work since 1986. He acknowledged the work of his Uncle Marokopa, who was present in the courtroom, and the other workers involved in the cleaning and planting at the lake and its surrounds.

[675] Mr Wilson laid out the concerns of Muaūpoko and the trustees, saying:

For as long as the lake is sick, the owners of the lake share that sickness. For as long as the lake is toxic, the well-being of the owners of the lake is diminished. But for as long as Muaūpoko are here, we will be at Punahau, we will be its kaitiaki and do all in our power to protect it, in the hope for the restoration that it deserves, and which is now long overdue. That is our tikanga, that is our law and our place here.

I now consider the evidence for the wider Muaūpoko iwi claim brought by MTA.

⁴⁷⁷ The complex and lengthy history of Lake Horowhenua and the Hōkio Stream was set out in the decision at [21] and [22].

MUAŪPOKO TRIBAL AUTHORITY

[676] MTA seek CMT over the takutai moana from the Kukutauaki block (just south of Peka Peka) to the northern side of the Manawatū River and 12 nautical miles seaward. They also seek PCRs beyond that area.⁴⁷⁸

[677] In relation to areas in which the Muaūpoko claim area overlaps with other applications, Mr Bennion for Muaūpoko suggests that while the application before the Court seeks CMT on an exclusive basis, Muaūpoko would recognise other claims through shared exclusive CMT in the overlapping areas. The overlapping claims include those of Ngāti Tamarangi and Ngāti Raukawa.

Whakapapa

[678] The Muaūpoko iwi descends from Whātonga, who was the captain of the Kurahaupō canoe. Other key tūpuna are Tara, Tūteremoana, and Tupatunui. These tūpuna divided and named the lands in Te Whanganui-a-Tara.

[679] The first people to be known as Muaūpoko were the children of Te Mou and Puaki-Te-Ao: Tireo, Te Ruinga, Ruatapu and Potangotango. From them, the hapū of the Muaūpoko tribe grew to be a distinct and powerful entity from around the mid-18th century. Its large rohe extended south from the Rangitīkei River to Te Whanganui-a-Tara, across the Tararua Ranges and into the northern South Island (Te Tau Ihu). Their customary rights and interests intersected and overlapped with Ngāti Apa, Rangitāne, and hapū of Ngāti Kahungunu.

[680] The name Muaūpoko is said to be the imagined location of their lands extending from Rangitīkei south towards Te Whanganui-a-Tara, in relation to the anatomy of the fish of Maui, Te-ika-a-Maui. “Muaūpoko” means people who lived at the front of the head of the fish of Maui. In 1852 the tupuna Himiona Taiweherua named 18 hapū, representing the “majority” of Muaūpoko. Muaūpoko is defined for organisational purposes by MTA as the descendants of Tara, Tūteremoana, and

⁴⁷⁸ The MTA application for CMT on behalf of Muaūpoko is dated 31 March 2017. It has since filed amended applications for PCRs dated 24 October 2024. I refer to the applicant as both MTA and Muaūpoko interchangeably, and to the iwi as Muaūpoko.

Tupatanui, who also affiliate to one of the following seven hapū active today: Ngāi Te Ao, Ngārue, Ngāti Hine, Ngāti Pāriri, Ngāti Tamarangi, Ngāti Whanokirangi, and Punahau. The mandate also covers the following historical hapū as they relate to Muaūpoko: Ngāti Tairatu, Ngāti Kuratuauro, Ngāti Rongopatahi, Ngāti Te Riunga, Ngāti Puri, Ngāti Akahu and Ngāti Rangi.

[681] Mr Mark Moses gave evidence as a tikanga expert for Muaūpoko. He descends from a Taueki daughter, Hereora Taueki, whose son was John Broughton, also known as Taare Matai. Mr Moses explained that, unlike Ngāti Apa and Rangitāne, who descend from a common tūpuna for whom they are named, Muaūpoko is a confederation and collection of hapū. They share a common whakapapa from the Kurahaupō iwi, primarily through Ngāi Tara to Taraika, but also through the whakapapa relationships of their neighbours, being Ngāti Apa and Rangitāne, and through Ngāti Kahungunu. Mr Moses produced comprehensive whakapapa charts descending from Maui, which illustrate the links to Ngāti Apa, Rangitāne, and Ngāti Kahungunu, as well as the older tribes such as Ngāti Ira that have been absorbed into Muaūpoko, Rangitāne, and Ngāti Kahungunu.

[682] Mr Moses noted that whānau remember their whakapapa and kōrero as it pertains to them, which is why there are different versions for different descendants. He said his knowledge of whakapapa was nurtured by his whānau and his own research on their tātai to Ngāti Apa, Ngāti Kuia, Muaūpoko, Ngāti Raukawa, Ngāti Toa, and Rangitāne. His knowledge includes an understanding of how they received the whenua Māori, although different members of hapū and iwi would have their own accounts which differ from his.

[683] Mr Moses noted that whakapapa is a communal and deeply personal taonga. He said that those who claim tūpuna should be able to recite their whakapapa from them, as he could to his tūpuna and their hapū. Mr Moses produced three whakapapa charts. The first was entitled “Whakapapa 1”.⁴⁷⁹ This demonstrated his whakapapa to significant tūpuna who explored, named places and settled in the Muaūpoko rohe,

⁴⁷⁹ Mr Moses also produced the chart “Whakapapa 2”. This illustrates lines of descent to Mr Moses’ Muaūpoko tūpuna lineage to: Te Aonui and his brother Te Rangi Māwake; Raikapua; Ngā Taitoko and Hika Otaota; Tā Whakahiku and Te Umutahi. In addition, Mr Moses produced “Whakapapa 3 and 4”, which illustrates Mr Moses’ whakapapa to Muaūpoko hapū.

so illustrating the take kitea (discovery) and take taunaha (naming places) which merges into the take tūpuna (ancestry). The chart referred to Maui, Kupe, Toi, Kurahaupō — ko ngā tūpuna pūtaka, the source ancestors. Maui discovered Te Ika a Maui (the North Island) from Te Waka a Maui (the South Island). He named the Tasman Sea, Te Moana a Maui, after himself. Kupe was a significant Muaūpoko tupuna and a source of the take tūpuna, who came to Aotearoa in the Matahourua canoe. Another significant tupuna was Toi, who came to Aotearoa from Hawaiki looking for his mokopuna Whātonga. Toi settled at Whakatane. Whātonga had come in the Kurahaupō waka, and disembarked at Te Mahia, settling at Heretaunga. He explored the lower half of the North Island, naming some places as he went. He encouraged his sons Tara and Tautoki to settle at Wellington, which they did. Mr Moses said the placenames left by his many tūpuna illustrated take taunaha. He noted that Whātonga's descendants, Tara and Rangitāne, had descendants who lived in the region for many generations. They named places, such as Te Whanganui a Tara, and Te Waewae Kapiti o Tara raua ko Rangitāne (or Tautoki), the original name for Kapiti Island. Mr Moses said that name reflects a boundary which once existed between Ngāi Tara and Rangitāne.

[684] Mr Moses gave examples of Muaūpoko's connections to various places on the Kapiti Coast, which were reinforced by similar stories recounted by witnesses for the applicants. He commented that "other people use our stories as if they are their own". He particularly mentioned Hinepōpō or Hinepoupou, as part of the Muaūpoko whakapapa and a Kurahaupō tupuna. Mr Moses told of her swimming from Kapiti Island to Rangitoto, a legend handed down from Ngāi Tara and Ngāti Kuia. Mr Moses also pointed out that two witnesses used a Kurahaupō pūrākau regarding Hinepōpō in their evidence as if it were a Tainui pūrākau wāhi tapu (place of significance) on or near the takutai moana.

Foundational take at 1840

[685] Muaūpoko say they are the long established tangata whenua in the whole of the hearing area and they were never conquered. Their fundamental claims are largely based on take tūpuna and ahi kā. In addition, they say that the 1830 peace-making,

particularly through the rangatira Taueki and Te Whatanui, brought an end to hostilities and they have lived side by side with Ngāti Raukawa since then.

Historical narratives

[686] Muaūpoko witnesses rejected the claim of Ngāti Raukawa and its allies that they dispossessed Muaūpoko by virtue of take raupatu and ahi kā. Mr Stirling, who gave evidence for Muaūpoko referred to his joint report with Mr Armstrong, entitled “A History of Muaūpoko” (the Armstrong/Stirling report).

[687] Muaūpoko also commissioned a report by the expert historian Professor Belgrave entitled “Unravelling Historical Narratives and Customary Disputes: The Himatangi Hearings” (the Belgrave report). That report covers the Himatangi investigations of the Native Land Court in 1868 and the Rangitīkei-Manawatū hearing which followed in 1869.⁴⁸⁰ The decisions issued following those hearings rejected Ngāti Raukawa’s claims to the land in question based on conquest. Muaūpoko rely on evidence in those cases to support their claim that they retained their rights to the Kapiti Coast in their entirety, from Kukutauaki to the Manawatū River (its application area).⁴⁸¹

[688] Belgrave indicated that his analysis of the Himatangi evidence and decisions goes into more depth than that of many other historians and takes into account the context and other events of the time. He said other historians’ accounts of the Himatangi hearings often concluded that the Himatangi cases were politically driven, however their research was brief or was based on secondary sources. Belgrave notes the impressive nature of Boast’s work and his decades of research covering Native Land Court minutes and decisions, rehearings, appeals, petitions and commissions of inquiry. Boast’s research was presented in a 2018 Waitangi Tribunal report for Ngāti Raukawa. Belgrave says that Boast’s present report in this hearing (for Ngāti Toa) builds on that earlier research and his two previous works on Ngāti Toa. Belgrave suggests that, while it is the “most substantial coverage” of the

⁴⁸⁰ Professor Belgrave noted they were separate inquiries, although the witnesses canvassed similar evidence. He said his review of the second hearing had limitations due to it being less systematic and having difficulty with the records.

Native Land Court's activities, the underlying themes of Boast's narrative presents Ngāti Raukawa's history at the expense of "everyone else".

[689] The Belgrave report notes that Ngāti Raukawa claim that successive Native Land Court and commission decisions, "with the collusion of the Crown", shut them out of their customary interests in the lands where they had had long histories of customary occupation. The report concludes in regard to previous commentaries and histories of the Native Land Court cases that:

Ultimately, many of the historians covering this case have, for reasons associated with their brief, relied on secondary sources, particularly on Angela Ballara's ground-breaking *Taua*. Those who have considered the evidence from the hearing have not systematically asked the questions, how were the court's decisions made and to what extent were they consistent with the evidence produced in the hearings? This has left the most important question unanswered: Did the court come to a reasonable conclusion from the evidence presented to it that Ngāti Raukawa were unable to sustain their claims of conquest? There are subsequent questions, which emerged as this research was being undertaken, can this evidence shed light on the way that Māori related to each other on customary terms prior to 1840? How did the witnesses from different iwi approach the meaning of mana in their evidence before the court?

[690] Belgrave noted that iwi members produce histories to suit their own iwi or hapū and to disrupt those of other groups. Nevertheless, he pointed to the evidence of O'Malley for Ngāti Raukawa, as an acknowledgement that the Te Whatanui and Taueki relationship was closer to a peace agreement. Belgrave said:

164. Vincent O'Malley's evidence has been presented on behalf of Ngāti Raukawa and tells the story from the origins of Ngāti Raukawa. In contrast to almost all the other evidence presented on Ngāti Raukawa's behalf, O'Malley acknowledges the different interpretations of history. In discussing the relationship between Te Whatanui and Taueki, the Muaūpoko rangatira, he gives credit to a narrative almost completely ignored by other Ngāti Raukawa evidence. Te Whatanui in O'Malley's account is not sheltering a defeated people, the people without mana, protecting them from the wrath of Te Rauparaha. Instead, O'Malley seems to favour the Ngāti Apa, Rangitāne and Muaūpoko narrative, which suggests something much more akin to a peace agreement among equals. However, while being cautious about the use of terms such as slavery and servitude, he rates Te Whatanui 'as the dominant party in the relationship'.
165. Citing Terry Hearn, whose report title *One Past: Many Histories* encapsulates the problem, O'Malley acknowledges that narratives which 'present total conquest and subjugation on the one hand,

against others which deny any form of subservience appear, on the face of it irreconcilable, presenting stark binary positions that are wholly at odds with one another'. Having said that, he then argues that it is possible to 'disentangle the realities of inter-iwi relationships before 1840 from the deeply divided and entrenched positions adopted decades later in the Native Land Court'. While stepping away from the completely divisive positions which were illustrated before the Court, in the nineteenth century, O'Malley concludes that there can be no doubt that Ngāti Raukawa were in a dominant position. Te Whatanui as the Ngāti Raukawa rangatira was able to provide valued protection. If Ngāti Raukawa were not dominant in 1840, then they would become so demographically very soon after. Those polarised narratives before the court can be explained by the need to 'appeal to the prejudices and preconceptions of the Pākehā-dominated Native Land Court'.

[691] Belgrave concluded that the Ngāti Toa history gained status as those searching the records "were looking for their own reflection in these ancestral voices. Lost in memory where the more nuanced and more conciliatory histories of negotiation and peace-making".

[692] In relation to Ngāti Toa witnesses in this hearing, Belgrave said:

157. Ngāti Toa witnesses also provide an iwi specific and an iwi centred history, although they often referred to non-Ngāti Toa sources. Miri Pomare's evidence was largely focused on the relationship between Ngāti Toa and Te Ātiawa, and held that through Te Rauparaha, Ngāti Toa maintained a superior mana from Whangaehu south, through Te Rauparaha's leadership of the great migration. With Te Ātiawa, Ngāti Toa were responsible for the conquest of the earlier inhabitants, whose mana was completely eradicated. She relies heavily on Alan Ward's evidence regarding conquest but makes no attempt to deal with it in detail. Ngāti Raukawa are placed as a subordinate tribe, assisting in the suppression of the earlier tribes but forced to acknowledge Ngāti Toa's overall mana in areas such as land sales. Rawiri Faulker makes it clear why these issues are important to him in the Te Takutai Moana proceedings: concern from his Ngāti Toa perspective that their understanding of mana will not prevail, and that rights in his understanding of tikanga should not wrongly recognised. This has been a motivation for iwi in their dealings with the Crown and ongoing proceedings with the courts though nigh on two centuries.

[693] Belgrave said that customary historical narratives:

...are statements of identity, relationships in the present and in the past, between rangatira and rangatira, between hapū and hapū, and at their most abstract, between iwi and iwi. They are statements of relationships with the

whenua, awa, maunga and moana, but more importantly they define relationships between people.

Background to Himatangi hearings

[694] Belgrave put the Himatangi case in context as the culmination of a three-year controversy over the sale of the relevant land, which pitched iwi against iwi. He said it was also “a bitter, ideological and highly personal grudge match” between Thomas Williams and the missionary Octavius Hadfield on the one hand, and the politicians and government agents (Isaac Featherstone, Walter Buller and William Fox) on the other. Divisions also occurred within various iwi about whether or not to sell pieces of land in the Rangitīkei-Manawatū block to the Crown. Unusually, the Crown was involved essentially to present the case of Ngāti Apa in favour of the sales. The Crown did not generally become involved in Native Land Court matters. All parties were involved in a bitter dispute about the right to control land in the face of Crown purchase efforts. Belgrave said this was part of a larger argument about how best to deal with the new colonial economy. He noted that in 1868, when the Himatangi case was heard, the Native Land Court was still new, and the disastrous outcomes for Māori land ownership were yet to come. Therefore, Māori who came before it still expected that Court to be a useful way of resolving land disputes.

[695] Belgrave noted that at the time there were dramatic events occurring in other parts of the North Island, and many of the iwi of the lower North Island had been drawn into the conflicts in Taranaki and the central North. The hearing was sandwiched between wars with Te Kooti on the West Coast and Tītiokowaru on the West. Pai Mārire was a Māori religious movement associated with political and military resistance, whose adherents were referred to as “Hau Hau”. That name became a general description of those Māori showing resistance to the Crown. Featherston and Buller saw those resisting the Crown purchase as Hau Hau when it suited them. Belgrave noted the tensions between warfare and peaceful coexistence must be seen in context, as they were not only as a result of the rift between sellers and non-sellers but were against a background of what was seen by one side (the non-sellers) as Treaty violations in Taranaki, the invasion of the Waikato, and the confiscation of Māori land.

[696] The Himatangi disputes between iwi had arisen following the death of Nepia Taratoa.⁴⁸² Taratoa (of Ngāti Raukawa) had played a critical role in arranging leases and doing deals with Ngāti Apa to share in the lease monies as well as distributing the income and receiving the money. He died on 14 January 1863. Belgrave commented that his death removed a “key restraint constraining competition between the two iwi”. When the threat of civil disturbance emerged, the government became involved. Featherston turned up apparently intending to run a government led arbitration, but Ngāti Apa rejected that outright. Featherston then began to negotiate a purchase of what would become the 250,000-acre Rangitīkei-Manawatū block, while ensuring that income from the leases was cut off. The Ngāti Raukawa non-sellers were dramatically outnumbered due to the government bringing into the purchase negotiation a series of iwi with distant interests in the land. Featherston, assisted by William Fox and Walter Buller, set about completing a purchase with “single-minded determination”.

[697] Belgrave noted that the Ngāti Raukawa who refused to sell sought that the land issues be determined by the Court, believing this would bring them vindication. The willingness of the iwi to put these complex questions of mana to the Crown, or the Crown-established courts, indicated confidence that the iwi’s arguments would be understood and an equitable decision would be made. This confidence:

...was an attempt to use a new institution to help resolve questions about the nature of custom in a world where war and violence between Māori was an option available no longer, despite some threats of violence being exchanged.

[698] Belgrave said that while the hearings were not about land on the coast or about the sea, the minutes of the hearings nevertheless provided information on customary rights, how the relevant participants viewed events, and the relationships at play (particularly, between rangatira). Many of the rangatira were involved in events, including the heke and the battles of the 1820s and 1830s (and beyond), therefore their evidence sheds light on those events, their implications and effects, thus indicating the position at 1840. This is useful given that the interpretation of events, such as the arrangements between Taueki and Te Whatanui, are hotly contested. In the first

⁴⁸² He was a nephew of Te Rauparaha and came south with Te Whatanui and others of the Ngāti Raukawa tribe in the “Heke Kariritahi” (great migration) about 1827.

Himatangi hearing, the Crown supported Ngāti Raukawa members (and other iwi) who wished to sell the land, arguably acting also in the Crown's interests against those Ngāti Raukawa members (and other iwi) who did not wish to sell. Those Ngāti Raukawa objecting to the sale sought to assert their control by arguing for an unequivocal conquest over a very large area said to encompass these blocks.

[699] Belgrave suggested that any assessment that this Court makes based on those Native Land Court decisions must consider their context carefully and focus on why groups had different accounts, while being cautious about synthesising an overarching explanatory narrative. That would be highly unlikely ever to satisfactorily explain the complexities of the customary narratives advanced. He considered that one needed to look through that lens at the large amounts of customary evidence generated by that litigation, to better discern what tikanga operated in the area at the time.

Evidence in the Himatangi hearing

[700] Belgrave described Fox's comments (Crown counsel) in closing submissions in the 1868 hearing as "insightful" and referred to the difficulty of interpreting custom at a particular time in that area:

At that period owing to a series of events which have been related to this Court by the witnesses for the Crown, the sovereign rights of the tribes and the titles to land were evidently in a state of fusion: old political landmarks were broken down; new ones hardly yet defined or established. "In those days of Satan," said one of the old witnesses, "the tribes were fighting with each other. I cannot say where was the mana," At this moment this Court crystallizes, if I may so express it, the title of the lucky holders of 1840, whoever they might be: utterly regardless of the events of previous periods and the interests of those whose claims, if momentarily in abeyance, had never been abandoned or transferred.

[701] The evidence included rangatira witnesses from Ngāti Toa, Ngāti Apa, Whanganui, Muaūpoko, Ngāti Kahungunu, Rangitāne, Ngāti Raukawa (sellers and non-sellers) and Ngāti Kauwhata. Some of the witnesses were participants or eyewitnesses to the earlier events, some as children or as young adults. Some were children of rangatira who participated in those events. Belgrave said that the narratives were important because they were given close in time to the events and were highly detailed. Further, although some of the histories were told elsewhere and developed

prior to the Native Land Court hearings, much of the evidence of history only emerged during the hearing.⁴⁸³

[702] Belgrave noted that the hearings divided kin on ideological and political issues. He said that the universalising of Christianity also affected later interpretations of evidence of those earlier events. For instance, Thomas Williams, who was counsel at the hearing and one of Henry Williams' sons, described Ngāti Raukawa's acts toward Muaūpoko to spare them from Te Rauparaha as "acts of kindness".

[703] Belgrave says that Tamihana Te Rauparaha's evidence indicates he was resolute in his position that his father had overall authority over all the land, and could dictate where people lived, whether their mana was restored, and whether land should be sold or not. His evidence was that the "great boundary of the 'mana'" of Ngāti Apa, Rangitāne, and Muaūpoko was the Manawatū River. He said:

...All the land on the other side belongs to them. On the side of Manawatu, the Muaupoko will have no "mana," except within their own fences at Horowhenua. Te Rauparaha fixed the Manawatu river as the tribal boundary.

[704] Belgrave noted the evidence of the Ngāti Toa witnesses told a story of "personal mana based on individual relationships and agreements". In the layers of mana, Ngāti Toa had mana above all others, and that mana was personal to Te Rauparaha. On the other hand, the Te Ātiawa witnesses in the hearing claimed the overarching mana was that of Ngāti Toa and Ngāti Awa together.

[705] Belgrave said that Ngāti Raukawa witnesses gave consistent evidence that the region had been conquered. For instance, the report recounts the evidence of Hare Hemi Taharape, of Te Mateawa, Ngāti Raukawa, who came from Ōhau. He said:

Ngatitoa and Ngatiawa first conquered the country from Ngati Apa, Muaupoko and Rangitāne — the survivors ran away into the bush — when Ngatiraukawa came they also conquered them — Te Rauparaha invited Ngatiraukawa to come here — Ngatiawa were at Waikanae — Ngatiraukawa came and they went to Waikanae — Ngatiraukawa occupied up to Rangitikei and also the other side of Rangitikei — Rauparaha sent Ngati Awa away to Waikanae to leave the country clear for Ngatiraukawa — Ngati Awa assented and went and

⁴⁸³ Belgrave notes that Ngāti Toa's most certainly was developed prior to the hearing and would be consistent with later historical traditions.

left this land free — in 1840 the ‘mana’ of this land was wholly kawa — the 3 tribes were under them.

[706] Other Ngāti Raukawa evidence in the Native Land Court hearings described the allocation of lands to Ngāti Raukawa following Haowhenua, saying the Manawatū marked the northern boundary of the allocation, not the Turakina or the Whangaehu. The allocation by Te Rauparaha was described as follows:⁴⁸⁴

Waikawa was given to Moko Whiti Ngati Te Ihi ihi

Huritini given by Te Whetu a Ngati Toa chief Ngati Koata ‘hapu’ to Haerewharara

Omawhiti beyond Ohau was given by Rauparaha to Te Ahu Karamu

Katihiku and Pahiko were given by Rauparaha to Ngati Huia (Aperahama Te Ruru the present Chief)

Waitaheke at Haowhenua was given by Te Pokaitara to Ngati Kauhata

Otaki was given by Tungia to Ngati Raukawa Ngati Maiotaki — Kingi Te Aho aho.

I heard that Horowhenua was given by Rauparaha to Te Whatanui — the lands on the other side of Manawatū were not ‘tapatapahia’ (sliced up or divided)

Peace-making

[707] Belgrave emphasised that a substantial amount of evidence suggests peace-making paid a significant part in the history of Kapiti. In relation to Te Hunia Te Hākeke’s evidence, he said:

483. Hūnia’s evidence continued to present a Kurahaupō perspective of the conflict over leasing, with many of the negotiations for leasing being undertaken by himself and Nepia. It rested partly on his own experience, but like Tamihana Te Rauparaha’s, on numerous discussions with his father. But as with both these younger rangatira, their interpretation reflected their current situations as iwi leaders. As a historical narrative it rested not so much on the violence of battles between different iwi, and there is a great deal of these, but the negotiations between rangatira, who could be committed to negotiating peace not just at the end of hostilities, but to prevent hostilities taking place. Both in his descriptions of the agreement reached between Ngāti Toa and Ngāti Apa, and in what he described as Te Whatanui’s peace, peace was only achieved after tense and cautious negotiations, where each side feared the treachery of the other and where these fears could be overcome. And once

⁴⁸⁴ Evidence of Horomona Toremi was identified as being of Te Patutukituki, Ngāti Raukawa and Ngāti Whakane.

achieved, it was these peaceful relationships that determined what happened later, rather than the battles which preceded them.

[708] Belgrave noted that later suggestions that Te Whatanui was “sheltering” Muaūpoko out of a sense of Christian kindness (in support of the narrative that he was protecting the dispossessed Muaūpoko by offering them a sanctuary in the Horowhenua lands), reflected “a very Ringatū understanding of Christianity and tikanga”.⁴⁸⁵ That is, “smoothing the relationships” between concepts of Christianity and tikanga. The present secular generation of Māori dismiss this, Belgrave suggested, as illustrated by the rejection of that description of Te Whatanui’s motivation by Ani Mikaere for Ngāti Raukawa.

[709] Wi Tamehana Te Neke who was a witness called for Ngāti Awa, said that beyond the Manawatū, mana was retained by Ngāti Apa, Rangitāne and Muaūpoko. He suggested, as did other witnesses, that Ngāti Raukawa’s move north was with the aim of avoiding the conflicts taking place further south as a form of retreat and that the “Ngatiraukawa went to Rangitikei to escape from their enemies”.

[710] Belgrave suggested that based on the evidence of the Ngāti Toa witnesses the significant movement into the Horowhenua by Ngāti Raukawa took place after Te Kūititanga in late 1839. He said that Ngāti Raukawa went to live with Ngāti Apa as friends until Ngāti Raukawa moved into their own settlements. Belgrave referred to one narrative described by Kāwana Paipai from Ngāti Ruaka at Whanganui, suggesting that Ngāti Raukawa had been “badly mauled by Haowhenua” and left as “half starved wretches”, moving from Ōtaki to the Himatangi area after that battle. The notion that Ngāti Apa were not living under Ngāti Raukawa’s mana was repeated by other Ngāti Toa witnesses.

[711] In the Himatangi Native Land Court hearings, the rangatira Hūnia Te Hākeke, who came from Rangitikei and Horowhenua, was the only witness to identify himself with the three Kurahaupō iwi — Ngāti Apa, Rangitāne, and Muaūpoko. He gave evidence that he had been born in the early 1820s and his father had been one of the Ngāti Apa signatories of the Treaty. He noted that “Muaupoko and Rangitane lived

⁴⁸⁵ The Ringatū church is a Māori church in New Zealand, founded in 1868 by Te Kooti Arikirangi te Turuki, commonly called Te Kooti.

within one ‘rohe’ — related through the same ancestors,” and that the three iwi were “living at peace with one another when Te Rauparaha came”.

[712] Hūnia Te Hākeke also spoke of the peace arrangements between Ngāti Toa and Ngāti Apa when Te Rangihaeata took Te Pikinga as his wife, the agreement being sealed by a slab of pounamu. The Ngāti Toa/Te Ātiawa heke then were welcomed by Ngāti Apa when they came down, and were warned to go carefully “lest they have trouble with Muaūpoko”. What followed was a killing by Te Whatarauhi of a Muaūpoko woman, Waimai, as a result of which Muaūpoko said that Te Rauparaha had “begun to kill”. The witness did not describe the attack on Te Rauparaha and his children at Ōhau by Muaūpoko. This was because his father allegedly had a role in the killings, which Belgrave said the listeners would have appreciated.

[713] Hunia Te Hākeke said that when Ngāti Raukawa arrived at Kapiti they were welcomed, and then told by Te Rauparaha to go back to Ōtaki where there was plenty of food. Te Rauparaha also told Te Whatanui to be careful of Muaūpoko, referring to the killings at Ōhau (ki a tupato ki Muaūpoko — i mate au ki Ōhau) (be careful of Muaūpoko — I died in Ōhau), to which Te Whatanui replied “yes: I shall live in peace”. That resulted ultimately in Te Whatanui making peace with Muaūpoko and staying at Horowhenua (referred to as “Te Whatanui’s peace”), and there was no fighting between the tribes from then on.

[714] Belgrave noted that Ngāti Raukawa was asking the Native Land Court to confirm that other iwi were allowed into the area on the basis that the “underlying relationship was one of generosity to another defeated iwi without mana”. However, there were weaknesses in the Ngāti Raukawa case, including the number of concessions it made to Ngāti Apa.

[715] The determination of the court was delivered only days after the hearing closed. Belgrave summarised it as follows:

598. ... Ngāti Raukawa had proven that they had ‘acquired and exercised rights of ownership over the territory in question’, based on evidence of their involvement in the three earlier Crown purchases and in the leasing.

599. However, evidence showed that the original occupiers ‘were never absolutely dispossessed and that they have never ceased on their part to assert

and exercise rights of ownership'. The court argued that 'Ngatipapa-Rangitane' had been weakened by the Ngāti Toa invasion under Te Rauparaha and had been forced to share their territory with his 'powerful allies the Ngatiruakawa into acquisition as a joint ownership'.

600. As a result, they divided the land 50-50, with a slight adjustment for two of the applicants, who had turned out to be sellers. The most important aspect of the judgment was how this decision for Ngāti Raukawa was to play out, with only 27 individuals jointly granted interests with Parakaia.

The 1869 Himatangi hearing

[716] The next Himatangi hearing dealt with the unheard claims and was convened in Wellington only a year later, in 1869. The Court heard from 84 witnesses over 45 days.

[717] The Court's decision was delivered on 23 August 1869, followed by its reasons on 25 September 1869. It rejected any suggestion that Ngāti Raukawa or any other tribe had acquired rights of conquest to the Rangitīkei-Manawatū block as at 1840, although three Ngāti Raukawa hapū (Ngāti Kahoro, Ngāti Parewahawaha, and Ngāti Kauwhata) were acknowledged to have acquired rights through occupation. However, this occupation did not extinguish the rights of the tangata whenua. Belgrave commented that the decision was yet another setback for Ngāti Raukawa non-sellers. The Court found that conquest was not established as a basis for any Ngāti Raukawa right through Te Rauparaha's allocation north of the Manawatū River, as that area belonged to his ally, Ngāti Apa.

[718] However, Belgrave said that Ngāti Raukawa's conquest argument was not strongly put to the Court and was rebutted in detail, including by Ngāti Raukawa witnesses. Some Ngāti Toa and Ngāti Raukawa witnesses had also rejected any argument that Te Rauparaha had allocated land to Ngāti Raukawa above the Manawatū River.

[719] In terms of ahi kā, Belgrave noted that the Ngāti Apa witnesses who lived on the land provided more direct evidence of a range of fishing, cultivating activities, and pā locations than did the Ngāti Raukawa witnesses living there.

Evidence of tikanga indicia

[720] The Muaūpoko evidence supporting ahi kā covered ancient waiata and kōrero handed down from tūpuna, physical occupation markers, naming of places, the exercise of kaitiakitanga, taniwha, extensive use, exercise of manaakitanga and whanaungatanga, kawa and the performance of rituals, as well as the establishment of a separated but connected entity and recognition by others.

Physical occupation markers

[721] The long-established occupation by Muaūpoko along the Kapiti area including on Kapiti Island, prior to the arrival of the Hekenga iwi was not contested. Numerous sites of significance to Muaūpoko are dotted along the Kapiti Coast.

[722] The Armstrong/Stirling report notes that Muaūpoko hapū had occupied territories along the coast from Horowhenua near modern Levin to Tītahi Bay, and on Kapiti and Mana islands. Their pā included six on artificial islands in Lake Horowhenua, as well as others at Papaitonga [Waiwiri], Ōhau, Ōtehape on Kapiti Island, and a large pā at Pukerua Bay. A number of important Muaūpoko ancestors are buried on the southern end of Kapiti Island in a cave urupā named Te Ana-o-Wharekohu. The report also refers to numerous other pā sites which existed along the Kapiti coast and beyond.

Naming of places

[723] Te Haunui-a-nanaia is a descendant of Kupe and a son of Popoto, and one of the rangatira of the Kurahaupō waka. His brother Tahu Mataura was the tohunga for Popoto on the Kurahaupō waka. Muaūpoko, Ngāti Apa, and Rangitāne are descendants of Te Haunui-a-nanaia. Mr Moses told of the Muaūpoko pūrakau of Te Haunui chasing his wife, Wairaka, which is well-known and is recited in the lullaby, “He oriori mō Wharaurangi”. Mr Moses set out the places named by Te Haunui within the Muaūpoko rohe from Manawatū to Kapiti Coast to Tararua as follows:

When Te Haunui arrived at this river his heart stood still as he was surprised and apprehensive at crossing it. At Te Rerenga o Hau: After Te Haunui crossed the Manawatū River, he came across some local inhabitants, and took flight to avoid conflict. At Hokio: when Te Hau reached this spot he ran so fast the

wind whistled passed his ears, or another kōrero is he heard the cry of the Hokio a giant bird. In Ohau: Te Haunui named this river after himself, the place of Hau. At Otaki: This was the place where Hau made a speech to his followers, while another tradition says this was the place, he held his taiaha ready for action. A little further on, Hau stopped on the banks to say a karakia to guide him in his quest, naming the little stream Waimeha, derived from mehameha — to say an incantation. Then Waikanae is named from Hau glancing sideways as he crossed the river cautiously, looking from side to side as he edged across the stream like the mullet, kanae. At Te Ana a Hau, Te Hau was blocked by the rocks, so he blasted his way through using incantation to make the cave of Te Hau. The rock Wairaka is the petrified body of Te Hau's wife.

[724] Mr Moses referred to ancient fishing stations such as Te Uamairangi (a dune now gone which was near the south bank of the Hōkio Stream), mentioning others but without precise location including Tawhiti Kuri, Pai Keka Tari, and Pari Mangō. The fish station was a camper pahi, a fishing space where you could camp to go fishing and come back to. The fishing stations had fresh water (streams) and the waka launching places were close by, so there was a supply of fresh water to take out to sea. Mr Moses noted that “there might be other areas you set aside for putting your waste or your rubbish”. He also referred to the ancient fishing structures and noted that people at sea (up to and beyond 12 nautical miles from the coast) learnt to triangulate from points, for instance how to find a point to safely anchor by reference to the fires or points such as Tararua or Tuteremoana.

Kaitiakitanga

[725] Mr Moses explained tikanga inherited from Muaūpoko tūpuna who had extensive mātauranga of the natural world, including an understanding of biophysical phenomena and processes over time. This allowed understanding of the mauri of a place, or its wairua. He noted this knowledge was used to:

- Identify wāhi — where to do things and where not to do things.
- Identify wā — when it is the right time to do things and when not to do things.
- Inform tikanga/practices and kawa/ceremonies — how to do things in the right way according to our customs.

[726] Mr Moses gave examples of the inherited knowledge in managing fisheries stock. For instance, he noted that fish such as snapper swim everywhere, whereas

rāwaru and blue cod do not, and if they were fished out of an area they would not return. He explained the need to take care where there is a mātaiai (shellfish fishery) with an abundance of shellfish to ensure the shellfish grow to a reasonable size. In particular, it was important to harvest seasonally to make sure there was enough food in the water to maintain supplies. Mr Moses also referred to knowing when the shellfish might be paru, for instance when the wind has stirred up the sand, as well as the importance of performing karakia on the beach to acknowledge the presence of tūpuna and atua. He noted there was a way to order things on the boat to ensure that the lines and nets would not get tangled — these practical things were learnt as part of the tikanga. In addition, it was essential to know the currents and how to use them, particularly around Kapiti Island and Cook Strait. For instance, when fishing off the coast at several nautical miles seaward a knowledge of the currents was needed to ensure navigation was accurate.

[727] Mr Moses also referred to whale strandings and the obligation borne of kaitiakitanga responsibilities on iwi to look after the whale, not just harvest it. This involved responding to its mauri and wairua, for instance by cracking the jaw to set the spirit free, as well as not leaving it to rot and pollute the area. Other witnesses gave more detailed evidence on whale strandings and how the iwi had managed a stranding at Hōkio beach in 2023. Muaūpoko were subsequently invited by Ngāti Apa to a wānanga, also involving Rangitāne and Ngāti Toa.

[728] Ms Sandra Williams is a descendant of the Matahourua and Kurahaupō waka. Her marae are Kohutoroa and Kawiu. Her hapū are Ngāti Whanokirangi, Ngāti Tamarangi, Ngārue, Ngāti Hine, Ngāi Te Ao and Ngāti Pariri, and Muaūpoko is her iwi. She gave evidence of tikanga practices passed onto her by her parents as well as the continued use of takutai moana.

[729] Ms Williams is designated as kaitiaki for Muaūpoko within the gazetted rohe moana under the Fisheries (Amateur Fishing) Regulations 2013. She was one of three appointed for MTA in 2017, together with Rob Warrington and Russell Packer, who she said are no longer issuing authorisations. She exercises kaitiakitanga by ensuring that the permits are issued on proof that the applicants are only fishing for tangi for the two Muaūpoko marae. Following a meeting with Kawiu and Kohutoroa marae, it

was decided that she would only issue permits for tangi held on those marae, to ensure that the fish population is conserved. She could issue the permits for fishing anywhere within the permit area, and now issued about three permits per year. She noted that most marae had their own permit system so she was not so concerned with other marae. Ms Williams indicated that she had stood up for Muaūpoko by authorised kaitiaki issuing customary permits rather than allowing Ngāti Raukawa's representative to do so on their behalf.

[730] Authorisation to issue permits for customary take does not itself provide conclusive evidence of Muaūpoko's use of and control in the application area. Nevertheless, it does demonstrate the exercise of manaakitanga and kaitiakitanga by permitting customary use and gathering of resources in the area.

[731] Other examples include organised kaitiakitanga through MTA and the Lake Horowhenua Trust. Mr Wilson has had a lengthy involvement in assisting and supporting MTA including, at present, as the Taiao manager. He is heavily involved in many kaitiaki activities which are referred to in more detail in the Horowhenua Lake Trust section of this judgment.

[732] Ms Dianne Rump gave an example of undertaking pest control of sea spurge which has seeded on the coastline from Ōtaki to north of Waitārere. She also noted the involvement of Muaūpoko with the Council in the wider lower North Island in marine spill training exercises. In addition to the work in relation to Lake Horowhenua and the rivers, she noted the work undertaken by Muaūpoko kaumātua Rob Warrington and others on the glass eel repatriation and marine coast projects. She also noted that Muaūpoko were involved in consent applications and preparing cultural reports. Ms Rump referred to an example of cooperation with Ngāti Raukawa relating a large development in Ōtaki, in which Muaūpoko withdrew their submission and supported Ngāti Raukawa in their application.

[733] Muaūpoko also have strong relationships with the relevant local authorities. They have a memorandum of partnership with the Horowhenua District Council and work with it to improve water quality, particularly in relation to Lake Horowhenua. Together with Horizons, the Council works with Muaūpoko and Ngāti Raukawa to

improve water quality through initiatives such as transitioning wastewater discharge to land, stormwater quality improvements, weed harvesting, pest control, and the Arawhata Constructed Wetland Complex.

[734] Horizons confirmed it entered into a memorandum of partnership with MTA in 2014. Discussions to update this agreement began in the late 2010s but were not concluded. Horizons is also developing a working relationship with Ngāti Tamarangi following correspondence in 2019. MTA has been actively working with Horizons since 2021 on the Oranga Wai freshwater plan change under the National Policy Statement for Freshwater Management. Horizons co-funded the development of a Muaūpoko Iwi Management Plan with the Ministry for the Environment. Horizons also works with Muaūpoko on water quality issues, particularly relating to the Lake Horowhenua area as well as the Levin landfill and wastewater treatment plant. Muaūpoko provides cultural assessments for Horizons.

Rāhui

[735] Mr Wilson described how iwi had worked along on the coast together in exercising kaitiaki responsibilities, including rāhui. He said his Uncle Marakopa had performed kaitiaki roles, referring in general terms to Waitārere or the mouth of the Manawatū. His uncle Joe Tukapua had also placed rāhui near Ōtaki. He emphasised that who placed the rāhui and who would be called in depended on the relationships between the iwi. For example, his Uncle Bruce had received a phone call asking if he was planning to organise a rāhui when someone passed away on the Ōhau. In the end a member of the Ngāti Raukawa whānau placed the rāhui. From Mr Wilson's perspective it did not matter who placed the rāhui as long as it was done.

[736] Mr Moses noted that there are both spiritual and practical reasons for tikanga practices such as rāhui. He gave an example of a body which has been in the water and may have been eaten by sea creatures. If a person were to fish from that area, they might eat something that has eaten that body, or tūpāpaku. In addition, if the body had been there for some time, it might have attracted predators such as sharks, and it would therefore be unsafe to swim in the area.

Kawa and the performance of rituals

[737] Mr Wilson and other witnesses gave evidence of kawa surrounding fishing, including the importance of karakia. Mr Packer recalled that his father would always say a karakia, especially if they were going across the river in their boat, or travelling along the coast while working in the ocean.

Abutting land

[738] Mr Bennion submitted that the ownership by Muaūpoko of the bed of Lake Horowhenua and the Hōkio Stream should be treated as falling within the principle of abutting land. He said the lake was used as a base and preparation site for ocean fishing expeditions which would be a significant factor in the assessment under s 59 of the Takutai Moana Act.

Taniwha

[739] Mr Moses noted that some place names come from pūrakau (traditional narratives) of taniwha, which are remembered and recited for generations. For instance, Ōkatia has special significance to Muaūpoko and Rangitāne. Ōkatia was a spirit who occupied a tōtara tree in the Puketoi ranges. Ōkatia cut a path through the mountains and travelled to the sea, creating the Manawatū River. Ōkatia is the general name of the beach area from Manawatū to Ōtaki.

[740] Ms Rump noted that her uncle had told her that if you gazed on the horizon you might see Ōkatia floating. He said that if you saw it you were “a good person of heart”.

[741] Mr Moses spoke of his tūpuna’s ancient crossing of Te Moana o Raukawakawa and the naming of places on the way. He explained that this was how take kitea (discovery) linked to take taunaha (naming). He recounted the kōrero of Kupe slaying Te Wheke-a-Muturangi (a giant octopus) and casting Te Wheke’s eyes into the ocean — whatu tīpare and whatu kaipono. They are now known as the Brother Islands (in the Cook Strait near Arapaoa Island). Mr Moses said Kupe had left a crew member, Komakohua, behind to be a kaitiaki for his descendants. Komakohua is now an island

at the entrance to Tōtaranui. The spirit of Komakohua appears as a bird to guide people into Tōtaranui from Te Moana o Raukawakawa. His job is to make sure Te Wheke-a-Muturangi never rises, as well as ensuring that Kupe’s descendants can cross the water safely and looking after their mauri and wairua. Mr Moses also noted that first time travellers would wear blindfolds, or whatu tīpare, while crossing the strait as a form of tiaki or protection. They would also wear a pare (headband) of kawakawa leaves, hence the origins of the name Te Moana o Raukawakawa — the ocean of kawakawa leaves. This ritual was referred to in the hearing by a number of witnesses from the Hekenga iwi.

Tikanga

[742] Mr Moses said that pre-1820 Muaūpoko had established communities with spheres of influence along the coastline around Kapiti Island and the South Island. He said that travelling on waka to these places required mātauranga (knowledge) of the moana. He noted that the ocean holds their dead — *kō te moana he urupā* — and that memories of tūpuna who had drowned were sometimes recorded in waiata. Mr Moses said that pūrakau connected Muaūpoko to the deeds of their tūpuna, such as the waiata tangi for the ancestor Wakanui, who was traveling from Maui Island to Kapiti Island when his waka overturned in Te Moana o Raukawakawa.

[743] Mr Moses also gave examples of Muaūpoko continuing to exercise their tikanga handed down from their tūpuna in relation to the takutai moana, for instance, knowing when and where to collect kaimoana and fish. He referred to Rēhua, an atua associated with the star Antares, which appears in summertime and is often a symbol or tohu of abundance at the beginning of the fishing season.

[744] Mr Wilson also gave evidence of the tikanga in relation to fishing practices handed down to him from his uncles. He now passes that fishing tikanga and knowledge, as well as the past and present uses of takutai moana resources, on to his children and mokopuna.

[745] Muaūpoko also own commercial fisheries quota, which is a contemporary manifestation of their traditional fishing rights.

Extensive use

[746] Mr Moses showed the Court a number of items which he had made, demonstrating the old Muaūpoko craft of using resources harvested from the takutai moana. These included special types of stone used to create various implements. He also produced to the Court some ancient artefacts, for example a toki made out of hurihuri, a type of bark that comes from Rangitōtō ki te Tonga. In addition, he showed the Court a stone that was used and traded with relations from the South Island, Ngāi Tara, and Tūmatakōkiri by tūpuna when they first arrived in Aotearoa. It is found in sites that archaeologists indicate are pre-1700.

[747] Mr Moses demonstrated his knowledge of the types of stone to be used for various tasks such as kuru, or hammerstone, which is very hard, and knew where to find the appropriate stone or resource. He described this work as part of his heritage and something which he puts his mauri into, using these resources to fashion implements which might take days of mahi to complete, in the same way as his tūpuna. Mr Moses referred to the use of many resources on the coastline which he called his “tool shack”. He pointed to his inherited knowledge for using the resources, such as pumice which, from the knowledge handed down by his tūpuna, he knew had many uses including for fishing net floats. In addition, he gave detailed evidence as to shells he collected from the coast and their uses, as well as sand which was mixed with soil, gravel, and charcoal to grow vegetables.

[748] Mr Moses also produced photographs of his whānau diving and fishing on the coast, as well as of the seascape, and pointed out different landmarks such as Whatu Kaiponu and Whatu Tīpare (the Brother Islands) and how they could be recognised.

[749] Ms Sian Montgomery-Nuetze is a descendant of the Kurahaupō waka, through Ngai Tara and Muaūpoko, and has whakapapa connections to Ngāti Apa from the Ngāti Pariri hapū. She is an artist, designer, weaver, writer and Māori translator. In particular she gave evidence as a ringatoi practitioner, or cultural practitioner, who is skilled in the use of natural materials to create intergenerational taonga. She showed the court a number of examples of her work, describing tikanga toi as the material

manifestation of the relationship of iwi to the environment. She noted that *toi Māori* is also a framework for understanding the Māori world and for engaging with, understanding, and interpreting the environment and *whakapapa kōrero*, *tuku iho kōrero*, *pūrākau e hāngai ana ki te Taiao*. Ms Montgomery-Nuetze explained that the resources which she was able to gather and harvest, as well as the *waiata* and compositions, relate to the places that iwi value and their *hononga whakapapa* to those places.

[750] Ms Montgomery-Nuetze went on to explain how she gathered resources and, through her relationships with other practitioners across Aotearoa, exchanged knowledge and resources. She noted the importance of understanding and handing down not just the articles made from the resources but the *whakapapa* and *mauri* which they carried. Furthermore, she provided illustrations of present-day use of materials taken from the *takutai moana*, as well as how they had been used in the past. This included baleen floaters, which are dated at 300 years old. She also showed shells, pigments, fibres and items from sea creatures, including whales. Ms Montgomery-Nuetze and other practitioners also display and trade resources from Aotearoa with other Pacific Islands. She also referred to *tikanga* existing within *te ao toi* (the world of art and creativity) which was handed down and practiced today. She said *tikanga* often exists for safety reasons, such as the requirement to seek permission for gathering from some sites and practising *karakia* and rituals when dealing with and harvesting from dead sea creatures.

Layers of interest

[751] Mr Moses provided a table showing how various *take* and *tikanga* might be aligned with the layers of interest in the *whenua* and *moana* claimed by various iwi. By way of example, *taonga tuku iho* are heritage interests and rights which are relevant to, for instance, resource consent applications as well as the present application. They might be linked to *kōiwi tūpuna*, or ancestral remains, and would support claims of *take tūpuna* and *take kitea*. Similarly, *taonga tūturu* (ancestral artefacts), *wāhi taonga*, *wāhi tapu*, *wāhi tūpuna* (ancestral and sacred places), and *taunaha* (place names), could be linked to relevant *take*. Examples of relevant *tikanga* concepts included *kaitiakitanga*, *manākitanga*, *tapū* and *noa*, *wairua*, and *mauri*, all of which are linked

to tiakina tāngata me te taiao or the protection of people, resources, and the environment, through actions such as taking care of te ao. This includes, for example, practices of rāhui and karakia. Mr Moses emphasised that each iwi had a “dynamic bundle and layers of take whenua, which may change over time”. He noted that those who acquire land through tuku or raupatu must have a long-term occupation of the land, or ahi kā, to develop an ancestral association — take tūpuna. He said that those who have suffered from raupatu can recover their take tūpuna, and several groups may have overlapping and intersecting interests or rights in an area.

[752] Mr Moses also noted that Kurahaupō iwi heritage layers predate those of the Hekenga iwi, as illustrated by their taonga tūturu (artefacts) and kōiwi tūpuna (ancestral remains), as well as wāhi tapu across the Kapiti Coast. These interests were recognised by several witnesses for the ART Confederation iwi.

[753] Mr Moses observed that a number of iwi had overlapping interests in significant sites. For example, in Te Uruhi and Paraparaumu, where a number of different iwi (Muaūpoko, Ngāti Toa, Te Āti Awa, and Ngāti Tama) have lived over a period of many years. Each had a layer of different interests in the area (which includes the beach). The relationships are managed by tikanga between iwi, which works particularly well within whakapapa groups. He noted that the same applied to the layered interests on Kapiti Island. The tribal stories of Muaūpoko are kept alive by telling the next generation about their tūpuna who are buried on Kapiti Island, which gives the iwi an interest there.

[754] Mr Moses also noted that there remains an unresolved dispute between the applicant iwi regarding who has interests on the coast in relation to inshore fisheries (as opposed to offshore fisheries). He said these rights allow Muaūpoko and other iwi to go to all areas of the coast and to maintain an interest in those areas. For instance, while acknowledging that Te Ātiawa and Ngāti Toa have an interest in the coast and ocean around Waikanae, nevertheless Muaūpoko are entitled to go by foot or waka through Ōtaki, Paekākāriki, and Waikanae to gather paua, kina and koura at Pukerua Bay. He said all applicant iwi have an ability to move along the coastline unmolested, without being stopped, to collect resources, regardless of any arrangements between others such as Ngāti Raukawa and Te Ātiawa.

Manaakitanga and whanaungatanga

[755] Mr Wilson noted there was an old kōrero from Ngāti Raukawa describing how Muaūpoko would call Ngāti Raukawa to come to Hōkio when fish were plenty, and Ngāti Raukawa would do the same for Muaūpoko at places where they were living near the coast. Mr Wilson said he had been fishing at Tangimoana for the last 28 years and taking catches from there to feed the whānau for tangi and other marae occasions such as fundraising events.

[756] Ms Montgomery-Nuetze also described how ringatoi practitioners felt a responsibility to help build capacity within other iwi. For instance, she was teaching taura of Ngāti Toa and Te Ātiawa descent.

[757] Mr Potini of Ngāti Toa gave an example of the cooperation between it and Muaūpoko relating to an event where he called Mr Wilson who represented Muaūpoko and they discussed how best to deal with kōiwi who, given their age, might have been Muaūpoko (subject to DNA testing). Mr Wilson had agreed he was happy to leave it to Ngāti Toa to determine.

[758] Mr Moses also gave the example of when people recited a pepeha using shared wāhi tupuna, referring to the Tararua Range as their mountain. For Muaūpoko, the name Tararua comes from Tara, who named it after his two wives, Hineaku and Tumuroimata. It therefore has a whakapapa perspective asroct a wāhi tupuna. He said “[a] number of us will look at Tararua Range and claim it as our maunga, and that’s okay, because ... a lot of us have overlapping and intersecting interests”. Similarly, Lake Horowhenua/Punahau, Muaūpoko’s lake, has a hapū named after it. Mr Moses emphasised the sense of identity in these connections. He noted that the cultural indicators, such as “my river, my sea, Te Tai o Rēhua.” were shared and could be claimed by many.

[759] The other Kurahaupō iwi applicant was Ngāti Apa. I now turn to their application brought by Mr Shenton on behalf of that iwi.

NGĀTI APA

[760] Mr Chris Shenton, who was self-represented, pursued an application on behalf of Ngāti Apa. Mr Shenton gave evidence, as did his cousin Mr Grant Huwyler.⁴⁸⁶

[761] The application, dated 3 April 2017, seeks CMT from Omarupapako/Round Bush to Rangitīkei. Ngāti Apa's interests generally extend north from a point on the coastline at Motu Karaka outside of the application area to Omarupapako and from the line of mean high-water springs to the outer limits of the territorial sea.

Whakapapa

[762] Mr Shenton said that Ngāti Apa take their name from the ancestor Apa-hāpai-taketake, who was the son of Ruatea. The iwi kōrero places their origins in the Bay of Plenty. Various migrations of Ngāti Apa's descendants reached the Rangitīkei, Kapiti, Porirua, and some ventured across the Cook Strait. South of the Rangitīkei they became associated with others whose ancestors had arrived in the Kurahaupō canoe and had originally lived on the Māhia peninsula and Hawke's Bay. From these descendants emerged the Ngāti Apa, Rangitāne, and Muaūpoko tribes.

[763] Ngā Wairiki's ancestral base derived from Paerangi from Whanganui, and Aotea Waka from Southern Taranaki. Ngāti Apa's ancestry is from the Kurahaupō waka, with intermarriage to descendants of Kupe, as well as connections to Matangi and Tumokai, which in turn links them to Rangitāne and Ngāti Hauiti in terms of their interests within the Ōroua River catchment. Mr Shenton noted that their hapū settled around the rivers of Whangaehu, Turakina, and Rangitīkei. There were some permanent settlements inland along the rivers, as well as more seasonal settlements towards the coast. Mr Shenton referred to Harakeke, a Tauranga waka at Whangaehu, as well as Te Ope o Te Wai on the Turakina and Tawhirihoe, and the Rangitīkei Heads on the Rangitīkei River.

⁴⁸⁶ Mr Shenton appeared at the opening of the hearing and for the evidence in support of his claim, but did not otherwise participate in the hearing, nor did he make any closing submissions.

Foundational take

[764] As well as giving evidence based on his knowledge of the iwi's traditional history and his own extensive research, Mr Shenton relied on a 2004 historical report for the Waitangi Tribunal by Mr Armstrong entitled "A Sure and Certain Possession: the 1849 Rangitīkei/Turakina Transaction and its Aftermath". He also referred to a draft report from Armstrong which had not yet been finalised, concerning the Rangitīkei-Manawatū purchase. The status of that report is uncertain, and therefore I place little weight on it.

[765] The thrust of the evidence for the applicant is that Ngāti Apa occupied and controlled their claimed rohe as at 1840, however they recognise the rights of Ngāti Raukawa. Mr Huwyler said that history shows that the Ngāti Apa ancestors entered into positive relationships with Ngāti Kauwhata, who were the earliest of the new arrivals to settle north of Manawatū, and also with Ngāti Kahoro and Ngāti Parewahawaha, who came later after the Haowhenua campaign. He pointed out that the two iwi had collaborated in various battles, some of which were outside the application area. Mr Huwyler recounted the following notable collaborations: a battle with Ngāti Kahungunu including Ngāti Apa, Rangitāne, and Ngāti Kauwhata in relation to a grievance by Rangitāne; the Kātanui battle where Ngāti Kauwhata and Ngāti Kahoro went to south Taranaki with Ngā Wairiki and Ngāti Apa to avenge the deaths of Te Aohehu and Paetahi; Ngā Wairiki and Ngāti Apa's support of Ngāti Raukawa and Ngāti Toa in the attack on the Taumata Karoro pā in Whanganui; Ngāti Raukawa's support of Ngāti Apa to destroy Turoa's seed potatoes at Matatera; Ngāti Kahoro and Ngāti Kauwhata's support of Ngā Wairiki and Ngāti Apa in defending the Kohurupo pā on the Whangaehu River against Whanganui iwi and Ngā Wairiki and Ngāti Apa's support of Ngāti Raukawa in the battle of Haowhenua.

[766] Mr Huwyler said that in addition to the extensive list of battles and events in which these iwi had collaborated, Ngāti Apa ancestors recorded the formal gifting of land at Rangitīkei to Ngāti Kahoro and Ngāti Parewahawaha after their support in the battle at Kōatanui in south Taranaki.

[767] Tensions emerged in the 1840s and 1850s. It was then that Te Rangihaeata and Te Heuheu (from the north) placed more hapū at Rangitīkei to prevent European settlement. Mr Huwyler said that at same time Ngā Wairiki and Ngāti Apa, under the leadership of Kawana Te Hakeke and Āperahama Tipae, sought to enter into land transactions with the Crown.

[768] During this period, Ngāti Raukawa, Ngāti Maniapoto, Upper Whanganui River, and Ngāti Tūwharetoa hapū congregated on what is now referred to as Te Reureu to resist the Rangitīkei Turakina and Rangitīkei Manawatū land transactions. Mr Huwyler said that from a Ngāti Apa perspective, this occupation at Rangitīkei represented a fresh effort by Te Heuheu and Te Rangihaeata to bring those lands under their control. Te Rangihaeata had just finished fighting European settlement and expansion at the top of the South Island and in the Wellington region and had moved to live with his Ngāti Raukawa relations at Poroutawhao, south of the Manawatū River. He would visit Kāwana Te Hākeke at Rangitīkei to debate land issues and he interfered with an early lease at Tawhirihoe that Te Hakeke had made.

[769] Mr Shenton's said that that the events from 1820 to 1840 initiated a centralisation of Ngāti Apa occupation at Parewanui, in the southern part of the Ngā Wairiki Ngāti Apa rohe, retaining only small occupations at Te Kawau and Te Awahou, and seasonal occupations at mahinga kai sites at Kaikokopu and Pukepuke outside of Parewanui.

[770] In 1840, the Ngāti Kauae and Ngāti Tauira people were living in force at Te Awahou Pā, which was located one kilometre inland of Tawhirihoe on the south bank of the Rangitīkei River. When Te Tiriti o Waitangi was brought to Tawhirihoe on 21 May 1840, three Ngāti Kauae and Ngāti Tauira leaders from the Te Awahou Pā signed — Kāwana Te Hākeke, Mohi Mahi, and Taumaru.

[771] Mr Huwyler said that when the old chiefs Kāwana Te Hākeke and Nepia Taratoa were alive, the relationship between the groups was managed. He noted Nepia Taratoa is famed for having set the modern boundary at Omarupapako (slightly north of Foxton) in an attempt to stop further northern expansion of Manawatū-based Ngāti Raukawa hapū. Taratoa's actions were designed to protect the balance at

Rangitīkei, which is suggested was probably with a view to protecting land leases which Ngāti Apa, Rangitāne, Ngāti Kauwhata, the established Ngāti Raukawa hapū of Ngāti Parewahawaha and Ngāti Kahoro, and the Te Reureu based hapū were entering into. Some did so exclusively, but many did so on a shared basis. This was a role that Taratoa played after the death of Kāwana Te Hākeke in 1848, and he generally ensured that Ngāti Apa were included in leases that he organised on the lands south of the Rangitīkei River.

[772] Mr Huwyler said this situation changed when Taratoa died in 1863. The relationships deteriorated as parties contended for whenua and the colonisation process ramped up. During this period, and up until the Native Land Court investigations for remaining whenua Māori, there were extreme views expressed on all sides as tūpuna participated in adversarial settings to argue over land rights.

[773] Mr Huwyler said that “if you take the extreme views away, there is rich kōrero of accommodation and collaboration which has barely seen the light of day in subsequent research and writing.” For example, the accounts of Ngāti Kauwhata occupation expressed in the Aorangi block Native Land Court proceedings said very little about fighting, and said more about peaceful settlement and coexistence on the Oroua River.

Evidence of tikanga indicia

[774] Mr Shenton referred to quotes from James G Wilson’s *Early Rangitīkei*, first published in 1914, which described early fishing by Māori in rivers and at sea. The book referred to people fishing “while standing in the surf, or a canoe outside, as was frequently seen from the coach as it travelled along the coast”. It also referred to a pā in the Rangitīkei on the south side of the river being used “as a sea-side resort, where the Maoris caught and dried their supply of fish”, including by Ngāti Raukawa chief “Ihakara”,⁴⁸⁷ who lived near Foxton. The next pā on the same side of the river was occupied by Te Hākeke (who had apparently been involved the battle of Waiorua). The excerpts also referred to rivers (which were travelled over by waka) and the beach

⁴⁸⁷ Mr Shenton clarified that this was a reference to Ihākara Tukumarū.

being used as a transport route for sheep. It described fish and whitebait being served at the 1849 Rangitīkei-Manawatū purchase negotiations.

[775] Another feature described by Mr Shenton was the presence of puke, which are prominent raised areas near the coast which assist with navigation out at sea. For instance, he referred to Motu Karaka at the northern boundary between Whangaeahu and the Whanganui Rivers, which was understood to be a fishing boundary. Urutaukawe was a permanent sand hill at the mouth of the Turakina River. Omarupapako (Round Bush which, although much depleted still contains a grove of tall Kahikatea) was understood to have been visible off the coast as well.

[776] Other excerpts from the Armstrong report described Pākehā encounters with Ngāti Apa. For instance, in 1847 a British army officer W T Power was ferried across the Turakina River, where he found “several whare on the south side. That officer also went to the Rangitīkei River where a Pākehā who operated a ferry was said to have both a business and personal relationship with the Ngāti Apa people.

[777] Mr Huwyler said many kai gathering customs and practices which required travelling across the full extent of the rohe became superfluous. Parewānui and Te Awahou Pā were both close to the coast, however there is a considerable distance south before reaching the next marae, Parānui Pā, which is a Ngāti Raukawa marae located somewhat close to the coastline.

[778] Prior to the rise of Parewanui, Oroua had been a base of occupation for many Ngāti Taura people. Mr Huwyler said the settlements there were largely abandoned when the people moved to Te Awahou and Parewanui. Mr Huwyler emphasised that they left of their own accord, and were not driven out by Ngāti Kauwhata. Some elders did not leave and are buried at Te Awahuri, including Kereopa Te Rangitakorou, Matiaha, Te Auahi Turoa, and Mokokoko. Matiaha and Turoa have many Ngāti Apa descendants. This urupā is maintained by Ngāti Kauwhata. Mr Huwyler said this was important evidence which indicates the true nature of the early relationships between the groups. He was saddened to read Ngāti Raukawa’s statement that Tangimoana is their place. He said the former name for the site was Tawhirihoe, and it had been a fishing kāinga for the Ngāti Apa people mai rānō (from long ago). Mr Huwyler said

that when Ngāti Kahoro and Ngāti Parewahawaha (Ngāti Raukawa) settled at Rangitīkei, it became a shared site.

[779] Mr Shenton, in response to questions by Mr Scott for the Seafood Industry, agreed that while there was historical evidence of seagoing waka, most customary fishing was done either from the beach or close to the coast. This was because of the availability of prolific mahinga kai from the beach and the rivers, which meant it was not necessary to go further seaward to feed the small population. Mr Shenton referred to the present work being undertaken to revive the fishing practices. He also noted that food gathering was seasonal and at times the people left the coast and went to the bush to hunt birds.

[780] In response to Ngāti Raukawa evidence that Ngāti Apa has no marae on this particular coastline, Mr Huwyler said it was a very well documented fact that Ngāti Apa chose Parewanui, on the north bank of the Rangitīkei River, as a modern centre of settlement for the purposes of security and engagement with Europeans. Mr Huwyler said that because of the population that was living there from the late 1830s to the late 1840s, the Te Awahou Pā (located one kilometre from the coast on the south bank of the Rangitīkei River) also remained heavily populated. He said the arrival of missionaries on the coast was instrumental in the rise of Parewanui. His ancestors flocked to the missionaries and learnt about Christianity, as well as reading and writing. They also learnt about European horticulture and agriculture, which improved access to kai and dramatically transformed their traditional practices and lifestyles.

[781] Mr Shenton's evidence was that Crown reserves had been set aside for Ngāti Apa for their customary usage of the area, including many rototuna and tauranga waka in the coastal section from the Rangitīkei River mouth down to Omarupapako. Mr Shenton said that other areas of occupation were reserved at Te Kawau, Waitohi, Pakapakatea, and Taurerua, but these were located further inland on the Rangitīkei and Makowhai waterways.

[782] A site of some significance for Ngāti Apa is Omarupapako, although they were not given a reserve there. The area, also known as "Round Bush", contains a remnant

of swamp forest which includes kahikatea, New Zealand's tallest tree. The forest is much depleted by use and damage. It is an area used for brown mud fishing. Mr Shenton also described the iwi's involvement in planting in the coastal marine area, although that appeared to be generally north of the application area.

[783] Mr Shenton said that Ngāti Apa still own Māori land in the area, and continue to use those areas and have relationships with hapū of Ngāti Raukawa today. He described the relationship with Ngāti Raukawa as not a "busy relationship", although it is growing in the areas of Ngāti Apa's interests. He gave an example of a hui of a number of iwi to consider the naming of some land at Tangimoana which was being transferred to DOC. Ngāti Apa suggested the name of Tawhirihoe, which was agreed to by Ngāti Raukawa.

[784] Mr Shenton also referred to a Ngāti Apa hapū, Nga Ariki which was involved in sperm whale stranding on 12 September 2023 at the Turakina river mouth. He also referred to an article about a whale stranding at Turakina Beach in 2006 and a Ngāti Apa running wānanga in February 2023 about whale strandings.

[785] Mr Shenton noted that Ngāti Apa had not been involved in placing any rāhui in the area.

[786] Mr Shenton also described the Ngāti Apa Treaty Settlement with the Crown on 16 November 2004, which was ratified by Ngāti Apa and signed on 8 October 2008. The settlement records that the Rangitīkei River is located in Ngāti Apa's North Island "area of interest". It records the use of the lower reaches of the Rangitīkei River and the coastal lakes to the south of the river for fishing and pā tuna or eel weirs. Mr Shenton pointed out that the statutory acknowledgement of the Ngāti Apa coastal region extends south of the Rangitīkei River mouth to Omarupapako. The Horowhenua District Council engages with Ngāti Apa for work affecting Omarupapako (Round Bush Scenic Reserve), which it acknowledges holds historical and cultural significance for Ngāti Apa.

[787] The third Kurahaupō iwi who gave evidence is Rangitāne, an interested party in this proceeding. Rangitāne called evidence and made submissions which I now consider.

RANGITĀNE O MANAWATŪ SETTLEMENT TRUST

[788] Rangitāne o Manawatū Settlement Trust (Rangitāne) applies for CMT and PCRs under the Takutai Moana Act through the Crown engagement pathway.⁴⁸⁸ Their claim extends from the northern bank of the Rangitīkei River to the southern bank of the Manawatū River.⁴⁸⁹

[789] Rangitāne’s involvement in the proceedings as an interested party is for the narrow purpose of alerting the Court to particular matters related to the Manawatū coastline, and specifically Ngāti Raukawa’s claimed authority and competing interests in that area. They note that as they are not an applicant group, they therefore do not bear a burden under s 106(2) to prove the elements of CMT. Any finding made by the Court in relation to Rangitāne (including any failure to prove the elements of CMT) will not be binding on any future decision making or any aspect of the direct engagement process.

Summary of Rangitāne’s position

[790] Rangitāne says that Ngāti Raukawa have not established that they currently hold Rangitāne’s claimed area as a matter of tikanga, and that the best Ngāti Raukawa can so is that it is an area of interest to them. Mr Finlayson KC, for Rangitāne, submits that the evidence at least demonstrates that Ngāti Raukawa’s claimed authority is contested. Furthermore, Rangitāne does not accept that Ngāti Raukawa had sufficient control over the area as at 1840 to exclude others, if they wished to do so.

[791] Mr Finlayson submits that the Manawatū coastline must be considered in its own terms, and not as an extension of the Kapiti Horowhenua coastline. There was very little focus throughout the hearing on the area around the Manawatū coastline, in terms of evidence or cross-examination. He contends that it would be a “very serious error” to extrapolate conclusions drawn in relation to the Kapiti and Horowhenua coast, to which most of the evidence related, and apply them to the Manawatū coastline without further analysis. Mr Finlayson further submits that much of the evidence

⁴⁸⁸ I use Rangitāne to refer to both the Trust and the iwi, Rangitāne o Manawatū.

⁴⁸⁹ I granted the application by Rangitāne to be an interested party in this proceeding: *Re Taueki (Ngāti Tamarangi)* HC Wellington CIV-2017-485-160, 6 March 2024 (Minute of Grice J).

adduced by Ngāti Raukawa in relation to the Manawatū coast is “of dubious relevance”.⁴⁹⁰

[792] Mr Finlayson says the central themes of the Ngāti Raukawa evidence are that Ngāti Raukawa were successful in various battles along the Kapiti and Horowhenua coast, largely as a result of their alliance with Ngāti Toa and other iwi, and therefore they claim to have taken the Manawatū coast through take raupatu. Furthermore, he suggests that various Ngāti Raukawa rangatira have maintained certain narratives asserting the mana of Ngāti Raukawa along the Manawatū coast, which have been relied upon as a basis for the truth of that claim. Rangitāne opposes both of those perspectives. Mr Finlayson submits that the Kurahaupō iwi have cultural identities that had been shaped through hundreds of years of unbroken connection with the takutai moana in the area, and that Ngāti Raukawa have falsely portrayed their migrations as a single determinative event that led to “a new reality consisting of one iwi now in total control and domination”.

Expert evidence

[793] Professor Johnathan Procter gave evidence as an expert witness for Rangitāne on the iwi’s historical and modern-day association with the coastline from the Rangitīkei River to the Manawatū River.⁴⁹¹ His iwi affiliations are to the Kurahaupō iwi — Muaūpoko, Rangitāne, and Ngāti Apa. He noted that his whakapapa connection to Rangitāne was an ancient one, which was generally not relied upon in a contemporary context. He has held numerous advisory positions for Rangitāne in environmental management and related areas. He has also led several research projects for the iwi. As part of preparing for the Rangitāne Treaty settlement, Procter said he had carried out considerable work in relation to mahinga kai, and produced several maps reviewing Rangitāne sites across the Manawatū rohe.

[794] Ngāti Raukawa criticised Professor Procter’s evidence on the basis that he had appeared as a tangata whenua witness for Muaūpoko.⁴⁹² In cross-examination he also

⁴⁹⁰ See Evidence Act 2006, s 7(3).

⁴⁹¹ Professor Procter is a professor of Natural Hazards at Massey University, as well as Associate Dean Māori in the university’s College of Sciences.

⁴⁹² Professor Procter is a board member of MTA, and also gave evidence for them in his capacity as tangata whenua in this proceeding.

acknowledged that no references were given in his brief of evidence. Ngāti Raukawa also questioned his independence.

[795] In response, Mr Finlayson submitted that Procter had set out his qualifications in accordance with the High Court Rules 2016 and affirmed he was familiar with the rules and the understood and agreed to comply with the Code of Conduct. Mr Finlayson said that the evidence was detailed and helpful in relation to the Manawatū coast, its cultural landscape, and the Manawatū estuary, as well as the contemporary practices of Rangitāne. He also noted that Procter had emphasised the importance of the estuary to Rangitāne.

[796] Statements of opinion are generally not admissible under the Evidence Act 2006.⁴⁹³ An exception is provided for expert evidence where the witness qualifies as an expert and the evidence given is likely to provide substantial help to the court.⁴⁹⁴ An expert is defined as someone who has specialised knowledge based on training, study or experience.⁴⁹⁵ Case law has long established that expert opinion evidence from those qualified or experienced in Māori culture is admissible.⁴⁹⁶ As the Law Commission noted in *He Poutama*, such evidence (particularly tikanga evidence) is rarely challenged on admissibility grounds.⁴⁹⁷

[797] Also relevant is s 105 of the Takutai Moana Act, which allows the court to receive as evidence “any oral or written statement, document, matter, or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible”. Much of the evidence adduced in this hearing, including whakapapa evidence, is received under that provision. Similarly, many of the reports and material put before the Court rely on that provision for their admissibility. However, as Mr Finlayson pointed out in his criticism of Ngāti Raukawa’s reliance on evidence of the kōrero of their own people in supporting their foundational claims, the evidence must still be relevant.

⁴⁹³ Evidence Act 2006, s 23.

⁴⁹⁴ Section 25.

⁴⁹⁵ Section 4.

⁴⁹⁶ For example, *Ministry of Agriculture and Fisheries v Hakaria and Scott* [1989] DCR 289 at 294. See also: Law Commission *He Poutama* (NZLC SP 24, 2023) at [7.110]–[7.117].

⁴⁹⁷ At [7.123].

[798] Procter qualifies himself as an expert on Rangitāne’s historical, cultural, and modern-day association with the relevant coastline. However, I do not consider much weight can be placed on his evidence as to Rangitāne’s history and the position at 1840 in the area, as he provides that evidence without references, citations, or other material he has taken into account to form the expert opinions he proffers. While many of the witnesses giving whakapapa evidence did not give historical evidence most were supported by the work of historical reports prepared for the hearing which provided detailed and careful referencing. As I note later in this section, the only reference to historical material is in Procter’s evidence given for Muaūpoko.

[799] Nevertheless, the parties properly have not taken rigid stances on admissibility of evidence in these proceedings. I therefore admit the evidence of Procter for Rangitāne, however place little weight on the historical evidence he gives.

Whakapapa

[800] Procter describes the coastline within Rangitāne’s rohe as being of historical, cultural, spiritual, and traditional significance to the iwi. The Manawatū estuary is of particular significance. Rangitāne’s connections to the Manawatū coast have been unbroken for over 800 years, and are recorded through waiata, kōrero, and whaikaro. Procter gives a detailed review of the historical, cultural and natural features of the coastline.

[801] Procter notes that the coastal area was traditionally referred to as Okatia, the name of the spirit that created the Manawatū River, and who now resides on the coast. The Holocene dune sequence and unique landscape are also part of Rangitāne identity and spiritual practice. The sand country of the west coast adjacent to Te Awahou was formed by the combined perpetual force of water and wind, representing the legendary battle between Tangaroa and Tawhiriamatea.

[802] Rangitāne’s earliest connections with the coast are recorded by their Kurahaupō tūpuna, the first being Kupe, who navigated from the east coast around Te Whanganui a Tara and along the Manawatū coastline. Procter says it was common knowledge among Rangitāne that on his travels, Kupe followed the migratory paths of the wetland birds that seasonally resided in the Manawatū River estuary. Procter

recounts the oriori of Haunui a Nanaia, a Rangitāne tupuna and Kurahaupō tohunga, who on his journey south named the Manawatū River after becoming disillusioned by his inability to cross the wide river to continue his search for his wife.⁴⁹⁸

[803] Whatonga, the grandfather of Tanenuiarangi (Rangitāne), and his descendants settled in the Manawatū after initially journeying up the coastline from Te Whanganui a Tara and being impressed by the natural resources they found. The area became known as Te Taperenui o Whatonga, which means “the great supply of food for Whatonga”. Kapiti Island also became an important point of connection to the coastline for Rangitāne, both as a navigational marker and a place for spiritual and ritualistic practices.

[804] Himatangi was an important source of food for Rangitāne. It was famous for its abundance of eel and birds, and numerous eel weir were constructed there. Island pā were also established and used as a refuge in times of battle, as they were only accessible by waka. The mouth of the Rangitīkei River was also of strategic significance to Rangitāne, which led to heavy settlement in the area.

[805] Later, Procter notes, the Manawatū coast became an important route for trade, transport, and communication between the North Island and the South Island. The most significant settlement areas along the coast were Te Wharangi and Te Papa Ngaio. Rangitāne used Te Wharangi seasonally to catch whitebait, flounder, and other tidal river species, and controlled the river crossing service for Europeans upon their arrival.

[806] Rangitāne negotiated and signed a Treaty settlement agreement with the Crown in 2015, which was passed into law in 2016.

Evidence of tikanga indicia

[807] Procter gave evidence about the cultural importance of the Manawatū landscape to Rangitāne. He notes that the dune landscape remains relatively unaltered. Some of the culturally significant features of the area to which he refers were the

⁴⁹⁸ The oriori is set out in the evidence of Mr Moses in the Muaūpoko section of this judgment.

wetland areas and small dune lakes which were found between large dune structures. He says the most significant feature was the shellfish that were found in areas where the freshwater met the ocean. These included toheroa, pipi, tuatua, tuangi, and surf clams. Procter provided a list of Rangitāne's significant sites in the area.

[808] The primary areas of Rangitāne control had been Te Wharangi (a fishing station and waka mooring area), Te Waka Puni (kāinga and waka mooring area), Whirokino (waka crossing and pā), and Mikihi (resource gathering area). Procter says Rangitāne never lost control of those sites north of the Manawatū River. However, he says that following the sale of the Te Awahou block by a migrant iwi (despite Rangitāne's heavy protest), all indigenous rights to the river and its food sources were lost to the Crown.

[809] The Te Awahou district was an area particularly renowned for its eels. Shell-bound and other finned forms of kaimoana were also plentiful, including tohemanga, pipi, cockles, tuangi, tuatua, surf crabs and clams, kahawai, freshwater and salt-water patiki, shark, and trout. Rangitāne made use of this kaimoana for generations prior to the imposition of Crown controls.

[810] Procter acknowledges that in the 19th century, following European arrival, the use of the takutai moana and fishery resources became shared between Māori and Pākehā generally, and Pākehā were not prevented from ordinary recreational fishing. However, Māori never believed they had lost control or ownership of the seabed, and there remained certain practices which would be challenged if Pākehā attempted to engage in them, for instance accessing toheroa or whitebait.

[811] Procter says that today Rangitāne continue to access the coastline regularly for recreation, harvesting kai, spiritual wellbeing, gathering resources, and ritualistic purposes. They continue to access known pipi and tuatua beds at Okatia, Hīmatangi, and Tangimoana. Procter refers to undulations in the land which created fishing holes. One is described as being two kilometres offshore from a midway point between Pukepuke and Tangimoana, and another two kilometres offshore from Foxton. In addition, Rangitāne continues to harvest clams and kahawai from the Manawatū estuary. Surfcasting is also carried out at traditional locations at Te Awahou/Foxton and Tangimoana.

[812] Rangitāne also use long line fishing methods in deeper waters. Although this has been modernised in some ways, the tikanga and kawa surrounding the practice remains. Fishing is also carried out by waka and motorised boats, with some who are more experienced travelling 30–50 kilometres offshore. In addition, Rangitāne claim and process whales washed up onto shore, harvesting bone and other materials. They also collect resources such as sand and driftwood for various purposes ranging from firewood to artwork. In addition, they have been involved in a number of archaeological investigations, as well as research around the behaviour of eels in the freshwater/saltwater interface.

[813] I now assess the claims of Ngāti Raukawa and Mr Tima, before moving on to the claims of Ngāti Apa, Mr Taueki, and MTA. For each claim, I deal with the coastline first and address the seaward extent of the claim later in a separate section of the judgment.

ASSESSMENT OF NGĀTI RAUKAWA'S CMT CLAIM

[814] The Ngāti Raukawa CMT claim extends along the coastline from Kukutauaki in the south to the Rangitīkei River in the north and 12 nautical miles seaward. The parties who challenge Ngāti Raukawa's claim to exclusive CMT are Rangitāne, Ngāti Apa, and Muaūpoko, all of whom have claims which overlap in part with the area claimed by Ngāti Raukawa. A key contest relates to whether Ngāti Raukawa can establish a foundational take as the basis for its CMT claim.

[815] As with the previous sections, I first consider Ngāti Raukawa's application, starting with their foundational claim. This preliminary assessment overlaps with the elements of the Supreme Court's test in *Re Edwards*. I then move on to consider the evidence in terms of each element. I also deal with Rangitāne's evidence and submissions in this section, as it challenged the Ngāti Raukawa claim.

Foundational take at 1840

[816] Ngāti Raukawa identify the foundational source or take by which they became connected to the relevant area of the takutai moana as take raupatu. This was supported by Ngāti Toa's victory at Waiorua, as well as Ngāti Raukawa's subsequent forays and battles in support of Ngāti Toa to secure the rohe and settle on it. They also rely on the *tuku whenua* by Ngāti Toa and Waitohi's land allocations. The validity of those take was contested, in particular by Mr Irwin for Ngāti Tamarangi and Mr Finlayson for Rangitāne.

[817] The factual basis for the take raupatu starts with the battle of Waiorua. The expert historians generally agree that the battle of Waiorua was a victory for Ngāti Toa and its allies. This took place before the first Ngāti Raukawa heke to the area. It is accepted by the Muaūpoko historians that after the battle of Waiorua, many Muaūpoko left the area to go inland or to other parts of the country (including Te Tau Ihu).⁴⁹⁹

⁴⁹⁹ Both Stirling and Armstrong, the historians called by Muaūpoko and Ngāti Tamarangi, agree that many Muaūpoko left the district after the battle of Waiorua, where they had been defeated. Stirling estimates as many as 200 moved to the northern part of the South Island and Armstrong estimated between 200 and 250. The Armstrong/Stirling notes that "[m]any of those who went to Te Tau Ihu were later killed or captured by Te Rauparaha and his allies in their subsequent attacks on the South Island".

[818] At the same time, the claim by Ngāti Toa and its allies that Muaūpoko were annihilated following that victory and its aftermath is not sustainable on the evidence, for reasons set out in the assessment of Muaūpoko's claim below. Taueki had refused to leave his rohe and lamented the exit of so many Muaūpoko, offering a place for them to return at Lake Horowhenua. Nevertheless, the exodus of many Muaūpoko allowed the Hekenga iwi to settle along parts of the coast and on Kapiti Island.

[819] While the pūkenga report was not location specific, it outlined the tikanga and take relevant to Ngāti Raukawa's claim. In addition, the pūkenga explored the notion that take raupatu and ringa kaha were "less prominent for determining mana whenua interests than some claimed in the Native Land Court hearings, and in contemporary times".⁵⁰⁰ The pūkenga also said that under the take of raupatu and ringa kaha, conquered groups such as Muaūpoko, Ngāti Apa, and Rangitāne could and did retain some of their mana over their people, whenua, and the takutai moana, even after the Treaty was signed in 1840.⁵⁰¹ Dr Carwyn Jones also notes the effect of raupatu is context specific, and does not arise from every military defeat. Rather, occupation by the victorious tribe must follow. The pūkenga similarly emphasised that a tuku whenua had to be followed up by continuous occupation to perpetuate permanency.⁵⁰² However, they said that while developing ahi kā was a process, authority could be established by the newcomers early in the process.

[820] It is also not contested that Ngāti Raukawa arrived at the invitation of Ngāti Toa in order to assist it to secure and settle the Kapiti area. The tuku from Waitohi directed the orderly settlement of Ngāti Toa and its allies on the coast.

[821] Insofar as the tuku is concerned, the pūkenga noted the great significance of a permanent tuku whenua, such as that said to have been bestowed on Ngāti Raukawa by Ngāti Toa. Referring to research on the issue, they observed that "the cession of land to another tribe seems to have been regarded as one of the most valuable gifts to be made only on occasions of great significance".⁵⁰³ Ngāti Raukawa point to the

⁵⁰⁰ Pūkenga report, above n 44, at [512].

⁵⁰¹ At [511].

⁵⁰² At [274].

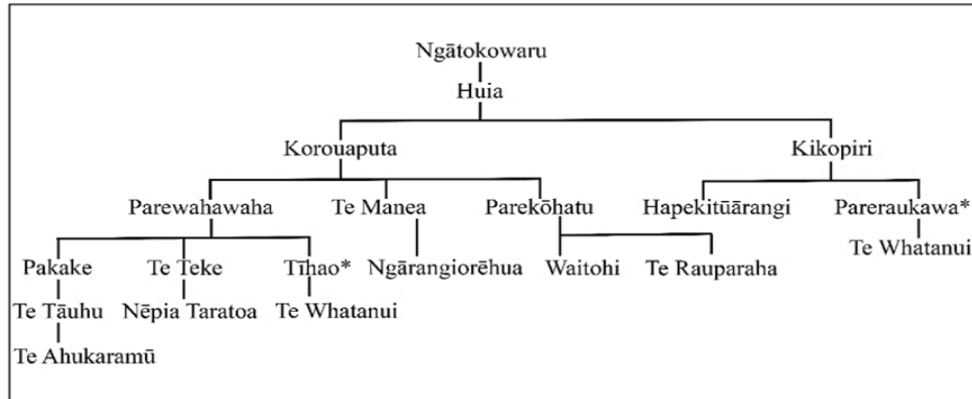
⁵⁰³ At [273], citing Raymond Firth *Economics of the New Zealand Maori* (2nd ed, Government Printer, Wellington, 1972) at 390.

significance of the support they gave Ngāti Toa in their quest to secure the Kapiti area, including by leaving their homeland to respond to Waitohi's invitation. I note that the constant warfare in the Waikato was also a factor in prompting Ngāti Raukawa to venture to Kapiti.

[822] Bearing in mind that it is impossible to be precise with the dates of these events, Ngāti Raukawa appear to have fanned out to claim the rohe from around 1825 and into the 1830s. I note that somewhere around 1830, Te Whatanui reached the arrangement with Taueki allowing for Ngāti Raukawa and Muaūpoko's peaceful co-occupation of the Horowhenua, until the lease disputes which arose after 1840.

[823] Ngāti Raukawa point out that Ngāti Raukawa rangatira who were leaders in the first four migrations had spread themselves across the rohe by 1840. This included Nēpia Taratoa, a key figure in the leasing arrangements and whose death indirectly precipitated the land disputes which were the subject of the Himatangi cases in the Rangitīkei area. A whakapapa diagram showing leaders of the four major migrations and their relationships, together with a table outlining their hapū connections and claimed localities, is set out below:

Whakapapa 27: Connections of leaders of the four main migrations



Hapū	Key Rangatira	Locality
Ngāti Parewahawaha, Ngāti Kahoro, Ngāti Kauwhata, Ngā Hapū o Te Reureu	Nepia Taratoa, Tapa Te Whata	Rangitīkei (coastal and inland)
Ngāti Tūranga, Ngāti Te Au, Ngāti Rākau, Ngāti Whakaterere, Ngāti Ngārongo, Ngāti Takihihi	Ihakara Tukumarū, Te Whetū, Hikapounamu	Himatangi/Manawatū
Ngāti Huia, Ngāti Pareraukawa	Ngārangiorēhua, Te Whatanui, Te Ahukaramū, Te Rangihaeata, Te Rauparaha, Waitohi, Tuainuku, Kiharoa, Aperahama Te Ruru, Hape Te Horohau	Poroutawhao/ Horowhenua
Ngāti Kikopiri, Ngāti Hikitanga, Ngāti Tukorehe, Te Mateawa	Ngārangiorēhua, Te Whatanui, Te Ahukaramū, Te Rangihaeata, Te Rauparaha, Waitohi, Tuainuku, Hape Te Horohau	Ōhau
Ngāti Wehiwehi		Waikawa / Waitohu
Ngāti Maiotaki, Ngāti Pare, Ngāti Koroki, Ngāti Kapu, Ngāti Huia	Te Rangihaeata, Te Rauparaha, Waitohi, Tūngia, Te Whatanui, Kīngi Te Ahoaho, Matenga Te Matia, , Hori Kingi (Te Puke), Horomona Toremi	Ōtaki / Katihiku

[824] Mr Irwin and Mr Finlayson made a number of points about the foundational claims by Ngāti Raukawa. Their challenges fall into two main areas. The first is the nature of the take claimed by Ngāti Raukawa and whether the circumstances were such that their foundational claims existed at all at tikanga. The second area of challenge is by Rangitāne and focusses on whether any claimed foundational take extends to the rohe between the Manawatū and the Rangitīkei River. The latter challenge largely centres on whether Ngāti Raukawa can establish that they held the area according to tikanga based on a legitimate take and are able to establish exclusive use and occupation since 1840.

[825] Mr Irwin argues that Ngāti Raukawa could not rely on the *tuku* from Ngāti Toa, as the take *raupatu* upon which it was founded belonged only to Ngāti Toa, who did not occupy the relevant area of the *takutai moana*. He says that Ngāti Tamarangi did not fight at Waiorua and they remained in place at Punahau.

[826] The *pūkenga* did not specifically address the tikanga which might allow Ngāti Raukawa to base a *raupatu* claim upon another's conquest. However, they did not criticise Ms Pomare's assertion that the concepts of occupation and *ahi kā* could take a number of forms but the important factor "appears to be that the land remained under influence and *mana* of the conquering group".⁵⁰⁴ The *pūkenga* also note that tikanga values are integrated and must be viewed holistically, rather than treating tikanga as a "grab bag" from which isolated values can be extracted.⁵⁰⁵ As noted above, *whanaungatanga* is the "glue" which holds the various strands of tikanga together.⁵⁰⁶ The *pūkenga* also cautioned against using common law concepts to analyse tikanga. Similar points were made by Dr Jones, who pointed to the prioritisation of relationships and connections, noting that this holistic and relational perspective is foundational to tikanga Māori. He also noted that *whanaungatanga* determines which *iwi* or *hapū* will exercise authority in specific areas.

⁵⁰⁴ Pūkenga report, above n 44, at [293].

⁵⁰⁵ At [84].

⁵⁰⁶ At [78], citing Williams, above n 65, at 3.

[827] The pūkenga did not question Ngāti Raukawa’s reliance on the raupatu or the tuku. Nor was there any suggestion by Dr Jones, who is an expert in tikanga and law, that there was a rigid requirement that only those present at a battle could rely on the raupatu when they had been called in to support whanaunga and took up arms to do so. Those types of alliances were the norm. While Ngāti Raukawa and Ngāti Toa are separate iwi, their whakapapa connections are very close. Ngāti Toa, being a small iwi, could not have effected the coastal settlement without the assistance of Ngāti Raukawa. Ngāti Toa in turn recognised their obligations to share the fruits of the raupatu with Ngāti Raukawa through the tuku. This is consistent with the complex tikanga rights at play, and demonstrates whanaungatanga as well as manaakitanga and mana huihui by both groups coming together for a common purpose. The tikanga experts emphasise that tikanga is nuanced and context specific. There is an overlay of whakapapa and whanaungatanga, in Ngāti Raukawa’s support of Ngāti Toa as well as Ngāti Raukawa’s own involvement in the battles and forays following Waiorua.

[828] In any event, Ngāti Raukawa do not solely rely on Ngāti Toa’s victory at the battle of Waiorua to establish their take raupatu. They say the series of Ngāti Raukawa heke arriving from 1825 and the support that they gave Te Rauparaha to exact utu when required enabled them to claim take raupatu independently of Ngāti Toa.

[829] Furthermore, the tuku must be viewed through a tikanga lens. Ngāti Raukawa point to their strong kinship with Ngāti Toa, which was material in their decision to permanently leave their Waikato homelands to assist Ngāti Toa. I note that at the same time, Ngāti Raukawa were under pressure in the Waikato, as Ngāti Toa had been before they left. Importantly, Te Rauparaha was a rangatira of both Ngāti Toa and Ngāti Raukawa. He was bent on revenge against Muaūpoko for the killing of his children, and relied on Ngāti Raukawa to pursue that objective. To this end, and in view of the attack repelled by Ngāti Toa at Waiorua, there was justification for them to seek Ngāti Raukawa’s support. After Ngāti Raukawa arrived, they were involved in battles and skirmishes with Muaūpoko, leading to Muaūpoko’s withdrawal from most of the coastal area.

[830] As the pūkenga noted, establishing raupatu and ahi kā was a process. This is consistent with the comments of the Waitangi Tribunal, which noted that a group could

have non-contestable take raupatu rights only if there was actual or seasonal occupation of the area, it made use of the area's resources, and if it was accepted as having such rights by other Māori groups.⁵⁰⁷ That is not to say that the raupatu could not give rise to the ability of the incoming group to exercise authority from the time of their initial occupation. Here, Ngāti Raukawa were in the process of establishing ahi kā, and their interests were recognised by the incumbent groups. This is evidenced by the peace-making arrangements said to have taken place at Namuiti and Karekare. In addition, Ngāti Raukawa shared in the rentals from the leasing arrangements.

[831] I am satisfied that the take raupatu and the tuku whenua can be claimed by Ngāti Raukawa. In those circumstances, the contention that the raupatu could only be attributed to Ngāti Toa "in person" is unduly simplistic and overlooks the complex layers of tikanga at play.

[832] In relation to Mr Irwin's point that Taueki was not a participant in the battle of Waiorua, he was nevertheless part of the Muaūpoko iwi and had offered a place of refuge for those Muaūpoko who had fled. His lack of personal involvement in the battle would have been unlikely to make him immune to the Ngāti Toa claim to raupatu or utu. In addition, I have concluded that Taueki and Te Whatanui made a peace agreement around 1830 which allowed them both to coexist in the Punahau/Hōkio Stream area. This was a rangatira-ki-rangatira agreement made between Muaūpoko and Ngāti Raukawa.

The rohe between Manawatū and the Rangitīkei River

[833] Rangitāne argue that Ngāti Raukawa did not hold the Manawatū/Rangitīkei takutai moana in accordance with tikanga and that they were not able to control that area at 1840. Mr Finlayson submits that in the short time between the arrival of Ngāti Raukawa and 1840, there was not sufficient time to establish ahi kā, and it was only after 1840 that they became dominant. In addition, he points to the fact that Ngāti Raukawa were from an inland area and would not have been able to adapt quickly to the local seascape.

⁵⁰⁷ Waitangi Tribunal *Te Whanganui a Tara me ona Takiwa* (Wai 145, 2003) at 16.

[834] As Mr Finlayson emphasises, given Rangitāne is not a claimant in this hearing and was only granted interested party status shortly before the hearing commenced, they only sought to put evidence before the Court to assist in its assessment of the Ngāti Raukawa claim.

[835] Focussing on the takutai moana from Himatangi to the north, Mr Finlayson also points to inconsistency in the evidence of Ms Pomare (called by Ngāti Toa), who initially said that the tuku from Ngāti Toa to Ngāti Raukawa was from Kukutauaki to the Manawatū. Subsequently, in cross-examination, she agreed that it was from Kukutauaki to Whangaehu, north of the Rangitīkei River.⁵⁰⁸ Ms Pomare based much of her evidence on the kōrero of Ngāti Toa kaumatua. For instance, the reference to the northern boundary being at Whangaehu was confirmed by kaumatua Iwikatea Nicholson.

[836] The pūkenga's evidence was also criticised by Mr Finlayson as failing to precisely describe the relevant areas and provide a "compelling answer" on questions relating to whether take raupatu could involve a transfer of all rights beyond the area where the critical events occurred. Mr Finlayson says those events, which took place in the south, are largely irrelevant to the area north of the Manawatū River.

[837] Rangitāne relies on the evidence of Procter as an expert, as well as the evidence of other Kurahaupō iwi produced for the hearing. However, as Ngāti Raukawa point out, Procter does not provide any research references in his evidence for Rangitāne in relation to the events of the 1820s and 1830s, although he said that he had been involved in extensive research for the Rangitāne Treaty settlement claim. He also gave evidence for Muaūpoko in his capacity as a member and representative of that iwi. In that evidence, he referred to the events of the 1820s and 1830s leading up to the battle of Waiorua, citing G Leslie Adkin's 1948 book, *Horowhenua: its Maori place-names and their topographic and historical background*.⁵⁰⁹ Procter provided a page reference in a footnote referencing his source for his comment that "600 waka gathered to attack Waiora on Kapiti, but bad weather and muskets contributed to their failure to

⁵⁰⁸ She explained that her previous reference to the Manawatū boundary was made in the context of describing evidence given by a witness in the Native Land Court.

⁵⁰⁹ G Leslie Adkin *Horowhenua: its Maori place-names and their topographic and historical background* (Department of Internal Affairs, Wellington, 1948).

take the pa”. This is apparently a reference to the battle of Waiorua of 1824 when the tangata whenua attacked the newcomers on Kapiti Island, leading to the defeat of the tangata whenua. However the page number cited from Adkin does not refer to the battle nor the surrounding events.⁵¹⁰

[838] Adkin’s book refers to the conquest by Te Rauparaha and Ngāti Toa over the Kurahaupō iwi, which “ruthlessly brought to an end” the “older, long-founded, independent regime of Ngati-Apa, Rangitane and Mua-upoko”.⁵¹¹ Adkin also notes that the incoming Ngāti Raukawa initially settled on the coast, as the inland area was covered in heavy virgin forest, which naturally led to their settlements being erected adjacent to the sea-beach near ample supplies of sea fish and shellfish.⁵¹²

[839] J M McEwen’s *Rangitāne: A Tribal History* is a history specific to Rangitāne,⁵¹³ which is referenced in the Armstrong/Stirling report as a secondary source.⁵¹⁴ McEwen notes that following Waiorua and the subsequent battles, Rangitāne “remained relatively intact as a tribe, especially when compared to their neighbours, the Muaūpoko and Ngāti Apa”.⁵¹⁵ He considered their inland location was a key reason for this, as:⁵¹⁶

There was more scope for raiding parties by Ngāti Toa in the open sand dune country of Rangitikei and Horowhenua than there was in the impenetrable forests of the Manawatu, where the rivers provided the only practicable access.

[840] This supports the evidence of O’Malley’s that:

Put simply, Muaūpoko were hit much harder than Ngāti Apa, or how Rangitāne coped is of less relevance here given their customary claims appear to have been confined to the interior.

⁵¹⁰ Procter refers to 390, however that page is part of the “notes on place-names”, and refers to various artefacts found in the vicinity of the “Wai-kawa” river, as well as describing the “Wai-kehu” lagoon and “Wai-kiekie” island pā located in Lake Horowhenua.

⁵¹¹ At 126.

⁵¹² At 127.

⁵¹³ J M McEwen *Rangitāne: A Tribal History* (Reed Books, Auckland, 1986). McEwen worked for and was Secretary of the Department of Māori and Island Affairs for many years. The blurb notes that the book is based on the collection, recording and translating of Rangitāne traditions based on written and oral sources obtained by the author whose family had settled in the area in 1850.

⁵¹⁴ It was also referred to in Ngāti Raukawa’s submissions in relation to the 1997/1998 Wetfish Round parts of which were put to Procter.

⁵¹⁵ McEwen, above n 513, at 137.

⁵¹⁶ At 137.

[841] McEwen says that while some Rangitāne hapū in the lower Manawatū had part of their lands occupied by various branches of Ngāti Raukawa, those higher up in the Manawatū Gorge “remained practically undisturbed”.⁵¹⁷ He comments that Ngāti Raukawa had settled along the coast on both sides of the river mouth and inland toward Shannon. He says most of the land Ngāti Raukawa occupied “had previously been held by Ngāti Apa and Muaūpoko, but a sizable area of Rangitāne land was involved”.⁵¹⁸

[842] McEwen also refers to the fact that in 1858, “[n]o questions were raised either by Rangitāne or Ngāti Apa as to the right of Ngāti Raukawa to sell” land known as the Awahou Block.⁵¹⁹ This comprised 37,000 acres which ran from the mouth of the Manawatū up the coast to Himatangi and inland to the river. At the same time, the Ahuatūranga land block, located inland in the upper Manawatū, was acknowledged by Ngāti Raukawa to belong to Rangitāne.

[843] Ngāti Raukawa’s submission to Te Ohu Kai Moana and Disputes Committee in relation to the 1997–1998 Wetfish Lease Round (as part of negotiations on the National Total Allowable Catch Quota) was put to Procter in cross-examination. The submission had been made in response to Rangitāne’s claim from the Rangitīkei River to the Makorokio Stream.⁵²⁰ The submission maintained that Ngāti Raukawa controlled the coastline south of the Whangaehu River. Iwikatea Nicholson, who made the Submission, said that there had been remnants of the other tribes still in the area, as well as some arranged inter-iwi marriages with Ngāti Raukawa which may have facilitated access to the coast, but otherwise Rangitāne had “not occupied any where on the coast in the last 160 years”. The submission also referred to Te Rangimarie Church being built in 1868 to commemorate the peace between the tribes. In response, Procter said there had been marriages between Ngāti Raukawa and Rangitāne, which had been recognised through Motuiti Marae, a shared Rangitāne and Ngāti Raukawa marae located near Foxton. He also noted that Rangitāne had received

⁵¹⁷ At 137.

⁵¹⁸ At 137–138.

⁵¹⁹ At 144.

⁵²⁰ See Adkin, above n 509, at 208, where the author refers to Makorokio as a “lesser tributary of the Ohau River falling in on the left bank a mile and a half above the railway-bridge. The name signifies, ‘the tributary of the long hard-fern...’.”

coastal statutory acknowledgements and the Tangimoana Forest had been returned to them.

[844] Rangitāne criticises Ngāti Raukawa’s reliance on the kōrero of their tangata whenua, rather than independent sources, to establish their claim. Rangitāne points to the evidence of various Ngāti Raukawa witnesses such as Mr Emery, Mr Tamihana, Mr Royal, Ms Selby, and Ms Collins, and emphasises that repetition does not establish the truth of the Ngāti Raukawa narrative. Mr Finlayson also refers to the cross-examination of O’Malley, where he had acknowledged that arrangements between the Manawatū and the Rangitīkei awa were unclear until the 1840s, and that it generally took time for an iwi to adjust to a new environment.

[845] However, there is independent historical evidence which supports the Ngāti Raukawa narrative that by 1840 their hapū were well-established and exercising control in the area south of the Rangitīkei River. This followed the original settlements having been secured by Nepia Taratoa and other rangatira after the Ngāti Toa tuku.

[846] For example, Ngāti Raukawa exerted control over the northern part of the rohe by placing a rāhui over the beach from Ōtaki to Rangitīkei in around 1840, in response to Ngāti Apa interfering with a shipwreck in the vicinity of the Rangitīkei River. It was independently reported as being rigidly enforced. Dr Jones noted that the “application of a rāhui “can be seen as evidence of exercising mana and authority over the takutai moana”.

[847] McEwen refers to another incident in 1840 involving Ngāti Raukawa, recounted by Edward Jerningham Wakefield.⁵²¹ A group of Ngāti Raukawa people twice plundered a survey party of up to 40 people who were preparing for sales by the New Zealand Company of land along the southern bank of the Manawatū River, even taking the clothing that they were wearing. Frederick Hunt, one of the surveyors, realised they were wasting their time resisting, so accepted an invitation from Te Rauparaha to go to Kapiti, where he became Te Rauparaha’s “tame Pakeha”.

⁵²¹ McEwen, above n 513, at 140.

[848] The pūkenga considered that Ngāti Toa would have adapted to the Kapiti seascape quickly, as they had come from a seascape at Kāwhia. Although it would have taken them time to learn to navigate the treacherous parts of the area, such as crossing Te Moana o Raukawa, they would have learnt from locals and overall the process may have taken five to 10 years. Ngāti Raukawa travelled from Maungatautari, which is an inland area. However, there was no evidence that they had difficulty settling in their claimed rohe or finding food. No doubt they were assisted in this by the Ngāti Toa, whom they lived with when they initially arrived in the area, as well as learning from locals. The middens across the coast suggest the main source of food was shellfish. This was taken from the coastline, not far out to sea. The evidence suggests Ngāti Raukawa adapted quickly, likely bringing skills such as constructing eel weirs from the Waikato.

[849] At the same time, Procter makes the valid point that when examined through a tikanga lens, one battle did not define the recognition of mana across the landscape. He noted that mana is about connections, and many leaders in fact avoided battle for fear of the impact on their mana. He said that sometimes welcoming people and showing them manaakitanga would demonstrate greater mana than killing them. Hayden Turoa also noted that there had been many arrangements made between Ngāti Raukawa and Rangitāne which reflected the mana of Ngāti Raukawa in the relevant coastal area. An example he gave was the agreement reached after the battle of Tūwhakatupua, that Rangitāne would never claim west of Puketōtara. He said this has been referred to in present-day discussions between the iwi members at the Rangimarie Marae. Procter also noted that around 1840, there was fluidity and uncertainty around the boundaries delineating the rights of iwi between the Manawatū and Rangitīkei Awa.

[850] However, I am satisfied on the evidence that Ngāti Raukawa have established a legitimate foundational take upon which to base their claim to CMT. As I outline in the section on the Ngāti Apa claim below, Ngāti Raukawa had settled in the area from the Manawatū to the Rangitīkei Awa before 1840. I can infer from the acquiescence of Ngāti Apa to Te Rangihaeata's control of the land south of the Rangitīkei Awa in the late 1840s, as well as the other evidence set out above, that Ngāti Raukawa had control of the area at 1840. This is also consistent with the historical accounts of

Rangitāne retreating to their strongholds inland and to the north of the Rangitīkei River in the face of the Ngāti Toa initiated forays into the Rangitīkei area. While the evidence is not consistent as to the exact northern boundary of the *tuku*, there is sufficient evidence suggesting it extended at least as far as the Rangitīkei River which, together with the action by Ngāti Raukawa of settling in the area and imposing *rāhui*, satisfies me that the *tuku* extended to that boundary.

[851] In those circumstances, I conclude that Ngāti Raukawa are entitled to rely on the foundational take of not only Ngāti Toa’s *raupatu* but their own exercise of *ringa kaha*, as well as the *tuku whenua*. They also defended their boundaries against Te Ātiawa both at Haowhenua and Kūititanga, thus exercising *ringa kaha* in respect of their southern boundary.

[852] Accordingly, I am satisfied that Ngāti Raukawa had established a foundational take as at 1840. I now move on to consider the elements of the Supreme Court test, noting that the foundational take is relevant to both the holding in accordance with *tikanga* and exclusive use and occupation since 1840.

Holds in accordance with *tikanga*

[853] In order to demonstrate their holistic relationship with the seascape and the *mana* they hold over the claimed area, Ngāti Raukawa gave evidence under various headings, based on the *pūkenga*’s identified *tikanga* indicia. These indicia provide illustrations of reciprocal “stewardship” responsibilities for the *takutai moana*, pointing to the area being held in accordance with *tikanga*. This includes evidence of ongoing *kaitiakitanga*, which the Supreme Court noted was the corollary of *mana*.⁵²² As the *pūkenga* noted, *mana* is not just about power but also about responsibility.

[854] The Ngāti Raukawa presence increased in numbers later in the 1840s, as Te Rangihaeata moved more Ngāti Raukawa *hapū* there to interfere with the Crown’s plans for settlement of the area. That Ngāti Raukawa took up the lands north to the Rangitīkei River following the *tuku* was also the tenor of their claims in the Native Land Court. Ngāti Raukawa’s narrative of conquest had also been articulated

⁵²² *Re Edwards* (SC), above n 13, at [141].

earlier in an 1867 petition to Queen Victoria. This was noted by Boast and referred to in the O'Malley report for Ngāti Raukawa. O'Malley noted that Te Rangihaeata opposed any land alienation as far north as the Whangaehu River. Ngāti Raukawa initially took the position that no part of the Rangitīkei or Manawātū was to be sold, however that was later modified to the “unambiguous opposition” of any transaction that extended south of the Rangitīkei River. O'Malley also referred to an address given by McLean at a hui on 20 January 1849, where he stated that the Ngāti Raukawa boundary was at Rangitīkei.

[855] In 1868 Hare Hemi Taharape (of Ngāti Raukawa) gave evidence as a witness in the Himatangi hearing that Te Rauparaha had conquered the Kurahaupō iwi and Ngāti Raukawa had settled on both sides of the Rangitīkei River. O'Malley also cites an 1880 petition by Ngāti Raukawa referring to Te Rauparaha promising Te Whatanui that Ngāti Raukawa could live on the land, “at Whangaehu, Rangitīkei, Manawatu and Otaki” if they came to Kapiti.

[856] By 1849, Ngāti Raukawa were sufficiently powerful that McLean had deemed it necessary to gain their consent to the Rangitīkei-Turakina transaction. From Ngāti Raukawa's perspective, an agreement had been reached “as to where rangatiratanga rested”, which involved a degree of accommodation of the rights of Ngāti Apa. The O'Malley report notes while Ngāti Raukawa may have “conquered” Ngāti Apa, “there had never been any determination to exterminate”.⁵²³ There were still some Ngāti Apa living south of the river, just as there were some Ngāti Raukawa were living on the northern bank. However, Ngāti Raukawa's permission was required for Ngāti Apa to transact any lands south of the Rangitīkei River.

[857] Te Rangihaeata successfully exerted control to stop the land sales in the Rangitīkei-Manawātū area, leaving Te Hakeke (Ngāti Apa) to focus on the land sales to the north of the Rangitīkei River. O'Malley records that on 15 May 1849, nearly 200 members of Ngāti Apa signed the Rangitīkei-Turakina deed at Whanganui and

⁵²³ Citing Robyn Anderson, Terence Green and Louis Chase “Crown Action and Māori Response: Land and Politics, 1840–1900” (commissioned by Crown Forestry Rental Trust for the Waitangi Tribunal, Wai-2200, 2018) at 157.

payment was made. There is no evidence that Ngāti Raukawa directly shared in the payment for that block.

[858] At the same time, the evidence suggests that Ngāti Raukawa had peaceful relations with both Rangitāne and Ngāti Apa from the 1830s, at least until the leasing disputes some years later which is consistent with peace-making.

[859] Ngāti Raukawa also identified historical sites along the coast up to the Rangitīkei River. Hapū associated with Ngāti Raukawa were active in the Native Land Court hearings in that northern area. They largely opposed the sale of land in the 1860s. Evidence was also given before the Native Land that after the battle of Kūititanga, Ngāti Raukawa was present from Ōtaki to Himatangi and lived “as friends” with Ngāti Apa at Rangitīkei.

[860] Ngāti Raukawa gave evidence of having maintained ahi kā, pointing to active marae, pā sites, urupā, kāinga, wāhi tapu, and taniwha along the coastline, as well as other historically significant sites. They say they have “imprinted” themselves onto the landscape by: naming places; maintaining the mauri (lifeforce) of the land, rivers, and oceans through the exercise of kaitiakitanga; extensively using the landscape including for fishing; placing rāhui; exercising manaakitanga and whanaungatanga; and practising tikanga and kawa in their engagement with the moana.

[861] The naming of places was one of the indicia referred to in the pūkenga report. Muaūpoko placed some emphasis on their tūpuna originally naming places within the relevant area. For example, Ms Montgomery-Nuetze gave evidence of an old waiata which referred to the naming of places such as Matiu Island. The retention of place names predating the heke was acknowledged by Ngāti Raukawa witnesses such as Mr Pātaka, who referred to those taken from the story of Te Haunui a Nanaia, as captured in the waiata “He Oriori mō Wharaurangi”, referred to above.⁵²⁴ Place names such as Ōtaki, Ōhau and Hōkio derive from that story. However, other places were renamed or acquired names over time when the Hekenga iwi tūpuna settled. One example is Te Tuarā nui o Te Rangihaeata (also known as Te Tuarā o te Rangihaeata), which is the name for part of the Tararua Ranges.

⁵²⁴ The oriori is referred to in more detail by Mr Moses of Muaūpoko above.

[862] While accepting that the naming of places is one factor relevant to determining whether an area of the takutai moana is held in accordance with tikanga, Ngāti Raukawa say that caution must be exercised in assessing this. As Dr Jones explains, take taunaha⁵²⁵ speaks to the origins of an ancestral connection to land, but does not in and of itself reflect ahi kā roa or the existence or nature of any ongoing connection to that land. Rather:

Naming of sites and landscape features is certainly evidence of an ancestral connection but is not necessarily evidence of continued exercise of the rights and obligations of mana whenua and mana moana. For example, names bestowed by tūpuna such as Kupe do not necessarily provide much guidance as to who, from amongst all the iwi and hapū who claim whakapapa to Kupe, holds mana whenua or mana moana. More recent placenames are likely to provide a better indication of the kind of ongoing, active connection to lands and waters that would contribute to the exercise of ahi kā roa.

[863] Ngāti Raukawa also note that their authority has been recognised by third-party Pākehā observers since 1840, as well as by other iwi today. According to O'Malley, at least 13 Ngāti Raukawa rangatira signed te Tiriti o Waitangi in Te Whanganui-a-Tara, as well as two who signed in Waikanae, seven at Ōtaki, and two at Manawatū, which is another indicia of mana. In addition, Ngāti Raukawa point to their active defence of their rohe and their vast numerical dominance in population within the area.

[864] The Ngāti Raukawa evidence included references to: their common whakapapa (a cosmological connection); exercising mana and kaitiakitanga; performing rituals; identifying taniwha; celebrating and waiata; remembrance and kōrero; and using the takutai moana for food, textiles and other materials, as well as for travel and trade. It also demonstrated the iwi's spiritual relationship with the takutai moana, as well as their practical applications of control, such as rāhui and in modern times involvement with local government in resource consents and other controls over land use.

[865] Muaūpoko witnesses recognise the presence of Ngāti Raukawa and their involvement in kaitiakitanga, including in the vicinity of Lake Horowhenua and the Hōkio Stream. The Ngāti Pareraukawa (a hapū of Raukawa) urupā is situated there. Mr Wilson noted there is also an urupā there for Muaūpoko where kaumātua rangatira

⁵²⁵ A claim to land by discovery and naming.

are buried. He also confirmed that further down is the Ngāti Raukawa Ngātōkōwaru Marae, and it was the Ngāti Pareraukawa view that the Hōkio Stream was their taonga as well. In addition, Mr Wilson noted that Ngāti Raukawa and the wider community have been involved in kaupapa related to the health of the relevant waterways and the surrounding land.

[866] Mr Wilson said that Ngāti Raukawa and Muaūpoko cooperate in the area at a number of levels. While the 2014 Lake Accord did not involve Ngāti Raukawa, Muaūpoko agreed to the inclusion of a Ngāti Raukawa representative with one vote in the 2019 Arawhata Wetland Alliance governance group, following the addition to the project of the Ōhau River and the Waikawa River.

[867] As the pūkenga noted “tikanga is the way of life and more performed than stated”. Considerable evidence of kaitiakitanga “on the ground” was given. An example of kaitiakitanga was given by Dr Baker and Mr Teira, who manage and assist with whale strandings in the area. The strandings were at locations north of Peka Peka Beach, near the Kaikōkopu Stream (north of Himatangi Beach), at Hōkio Beach, and near Ōtaki. Dr Baker also gave evidence of Ngāti Raukawa’s involvement in many aspects of kaitiakitanga.

[868] Ngāti Raukawa also gave evidence of using resources, including fishing and continuing active practices of tikanga and kawa associated with fishing, in the takutai moana until the present day. In addition, they referred to sharing fish caught with others as a demonstration of manaakitanga.

[869] Overall, based on the evidence in relation to the pūkenga’s tikanga indicia, I am satisfied that Ngāti Raukawa have established an ongoing holistic relationship with the seascape and have mana over their claimed rohe. Therefore, the “holds in accordance with tikanga” element of the CMT test is met.

Exclusive use and occupation

[870] As the Supreme Court noted, possession need not be exclusive in the literal sense for the purposes of CMT. The test requires a “strong presence in the area”,

demonstrating an “intention and capacity to control the land”.⁵²⁶ A large amount of evidence demonstrated the presence of Ngāti Raukawa in the rohe from Kukutauaki to the Horowhenua. This included the evidence concerning Mr Tima’s whānau in relation to the Kuku Beach area.

[871] Ngāti Raukawa’s possession of their rohe was recognised in a report of Commissioner William Spain investigating land purchases in 1844 on the New Zealand Company claims cited by O’Malley. The O’Malley report cited above confirms the settlement and control by Ngāti Raukawa and Te Ātiawa as “Manawatu, Otaki, and Waikanae” as against “Rauparaha”.

[872] The significant presence of Ngāti Raukawa in the relevant takutai moana is illustrated by the presence of the marae maintained by their hapū and associated hapū and iwi. While many of the marae are located further inland now, the areas in which Ngāti Raukawa have an interest on the coastline generally correlate to those inland marae. They have marae from near the Rangitīkei River, Parewahawaha (Ohinepuhiawe), and at regular intervals over the claimed rohe. The principal Ngāti Raukawa marae is in Ōtaki, with three hapū there — Ngāti Korokī, Ngāti Maiotaki, and Ngāti Pare. The iwi has also demonstrated a strong presence through their cultural revival and various related projects, centred at their wānanga in Ōtaki. A map of current marae locations of Ngāti Raukawa and their associated hapū is set out below:

⁵²⁶ *Re Edwards* (SC), above n 13, at [154].

- (b) Ngāti Pīkiahū-Wāewae — Poupatatē Marae and Te Tikanga Marae;
- (c) Ngāti Manomano — Taumata o Te Rā Marae;
- (d) Ngāti Parewāhāwaha — Parewāhāwaha Marae;
- (e) Ngāti Kauwhata (including hapū of Ngāti Hīnepare, Ngāti Tahuriwakanui, and Ngāti Tūroa) — Kauwhata Marae and Aorangi Marae;
- (f) Ngāti Tūranga and Ngāti Te Au — Paranui Marae;
- (g) Ngāti Rākau and Ngāti Te Au — Motuiti Marae;
- (h) Ngāti Whakātere — Whakāwehi/Poutū Marae;
- (i) Ngāti Takihiku and Ngāti Ngārongo — Kererū Marae;
- (j) Ngāti Huia ki Matau — Matau Marae;
- (k) Ngāti Huia ki Poroutāwhao — Huia Marae;
- (l) Ngāti Pareraukawa — Ngātōkōwaru Marae;
- (m) Ngāti Kikopiri and Ngāti Hikitanga — Kikopiri Marae;
- (n) Ngāti Tūkorehe (including the hapū of Te Mateawa and Te Rangitāwhia) — Tūkorehe Marae;
- (o) Ngāti Wehiwehi — Wehiwehi Marae;
- (p) Ngāti Korokī, Ngāti Maiōtaki, and Ngāti Pare — Raukawa Marae;
- (q) Ngāti Kapumanawawhiti — Te Pou o Tainui Marae; and
- (r) Ngāti Huia ki Katihiku — Katihiku Marae.

[874] Finally, Ms Coates in her closing submissions noted that Ngāti Raukawa’s claim incorporated the claims of a number of the iwi, hapū, and whānau associated with Ngāti Raukawa. They had not all joined as interested parties, as they had agreed that the claim was “hapū centric” within the grouping and tikanga would operate between them as to their rights and obligations on the ground. In addition to the Te Whānau Tima/Te Hapū a Mateawa claim at Kuku Beach/Ōhau, the Ngāti Raukawa claim incorporated associated hapū and iwi claims as follows:

- (a) Ngāti Tukorehe, Ngāti Te Rangi, and Ngāti Raukawa — around the Ōhau River;
- (b) Ngā Hapū o Hīmatangi comprising Ngāti Te Au, Ngāti Tūranga, and Ngāti Rākau — from the Manawatū to the Whangachu Awa;
- (c) Ngāti Huia — from the north of the Hōkio Stream to the south of the Manawatū River;
- (d) Ngāti Huia ki Kikopiri — from the Ōhau River mouth to the Hōkio Stream;
- (e) Ngāti Kauwhata — from the Manawatū to the Rangitīkei River;
- (f) Ngā Hapū o Kererū, comprising Ngāti Takihiku, Ngāti Hinemata, and Ngāti Ngārongo — from Rangitīkei to Waitārere;
- (g) Te Kotahitanga o te Iwi o Ngāti Wehiwehi, who did not identify a claim area; and
- (h) Te Iwi o Ngāti Tūkorehe me ōna hapū, whānau hoki — Ōhau to the Wairongomai and Waitohu streams.

[875] I am satisfied that, based on the evidence adduced, Ngāti Raukawa has demonstrated the “strong presence” required to satisfy the exclusive use and occupation aspect of the CMT test.

Continuity from 1840 to the present day without substantial interruption

[876] Based on the evidence referred to above, I have concluded that the continuity element of maintaining exclusive use and occupation from 1840 to the present day has also been satisfied. There is nothing to suggest that their strong presence in the rohe has been substantially interrupted by any third party, be that other Māori groups or Pākehā settlers.⁵²⁸

Rangitāne

[877] I now address the evidence of Rangitāne in relation to the Ngāti Raukawa rohe. I consider the overlapping interests of Muaūpoko under the assessment of Muaūpoko's CMT claim later in the judgment.

[878] In relation to Rangitāne, Ms Coates for Ngāti Raukawa submits that while Ngāti Raukawa respect the inland rohe of Rangitāne, their interests are centred around modern Te Papaioea/Palmerston North and do not extend to the coast.

[879] Rangitāne's focus to the north and east of the rohe relevant to this hearing area is borne out by the recitals contained in the summary of the Rangitāne Deed of Settlement, which Procter refers to. This records the Treaty claims and details of the settlement between the Crown and Rangitāne. It says:⁵²⁹

Rangitāne tradition records their centuries-long history of settlement in Wairarapa and Tamaki nui-ā-Rua before 1840 and their special association with many places including the Wairarapa Lakes, eastern coast, and Te Tapere Nui o Whātonga (also known as Seventy Mile Bush).

[880] The Rangitāne Treaty settlement claim largely relates to land loss to the east as well as inland from the present claim area. Nevertheless, as Procter points out, a statutory acknowledgement of the association of Rangitāne with the Manawatū River is recorded in the Rangitāne Deed of Settlement. The settlement also established the Manawatū River catchment advisory board, to advise Horizons.⁵³⁰ Horowhenua District Council has also entered into a memorandum of partnership with

⁵²⁸ See the section of this judgment on third-party use and occupation.

⁵²⁹ Tāmaki nui-a-Rua is located outside the hearing area.

⁵³⁰ Rangitāne o Manawatu Claims Settlement Act 2016, s 42.

Rangitāne in relation to work affecting the Manawatū River and its tributaries. Horizons also engages with Rangitāne for work affecting the Manawatū River due to the statutory acknowledgments.

[881] As Procter notes no reserves were created for Rangitāne in the hearing area following the land sales of the mid-19th century.

[882] Ngāti Raukawa have also resisted Rangitāne claims in the Ngāti Raukawa rohe and the coast before the Waitangi Tribunal. As was put to Procter, Ngāti Raukawa, through kaumatua Iwikatea Nicholson, submitted to the Waitangi Tribunal's Porirua ki Manawatu Inquiry that Rangitāne had no interests on the coast, and that it was due to Ngāti Raukawa's generosity that Rangitāne had never been denied access to the coast.

[883] I am satisfied that Ngāti Raukawa hold the northern area of their claimed coastline rohe in accordance with tikanga, and have exclusively used and occupied the area since 1840 without substantial inference, as against Rangitāne. The evidence and history of Rangitāne suggests that their focus of interest is and was to the north of the Rangitīkei River and inland to the east.

Interests of the ART Confederation iwi

[884] The Attorney-General noted that the customary rights of Ngāti Raukawa and Ngāti Toa in their respective claimed areas require further consideration.

[885] Ngāti Raukawa and Te Ātiawa both base their foundational claims at least to some extent on the victory at Waiorua and the tuku from Ngāti Toa. They have also established their own foundational take. I have dealt with the position of Ngāti Toa and Te Ātiawa earlier in this judgment. In addition, as noted in my conclusions above, Ngāti Raukawa defended their boundary at Kukutauaki in the south without the assistance of Ngāti Toa, demonstrating ringa kaha, and by 1840 had established their control independently of Ngāti Toa.

[886] In 1830, Te Whatanui's peace arrangements in Horowhenua appear to have been inconsistent with the directions of Te Rauparaha to seek utu against Muaūpoko for the death of his children. This suggests that Te Whatanui was asserting his

independence from Ngāti Toa for his own reasons. The arrangements were settled in defiance of Te Rauparaha, and resulted in peace with Muaūpoko, around 1829/1830.

[887] In addition, by 1844 Commissioner Spain was reporting to his superiors that Ngāti Toa had “no claims” as against the iwi in possession of lands in “Taranaki, Manawatu, Ōtaki, Waikanae and Wellington”, and at “Manawatu, Ōtaki and Waikanae”. Ngāti Raukawa and Te Ātiawa maintained possession which Te Rauparaha would find it “fruitless to oppose or deny”. Commissioner Spain noted that having assisted Te Rauparaha to conquer those places, those “resident natives” had “located themselves there”.

[888] Since that time, Ngāti Raukawa have established ahi kā in their claimed rohe. Over approximately eight generations, they have established take tūpuna. That process was already well underway shortly after the first Ngāti Raukawa heke to the Kapiti region.

[889] It is also significant that Ngāti Toa recognise Ngāti Raukawa’s claim to CMT today. Ngāti Toa make no claim in the Ngāti Raukawa rohe. The rights and obligations flowing from the role of Ngāti Toa in bringing Ngāti Raukawa to support them and settle there are for those iwi to deal with as a matter of tikanga.

[890] Conversely, while Ngāti Raukawa assisted Ngāti Toa in securing the takutai moana, there is no evidence to suggest they hold Kapiti Island or the mainland coast to the south of Kukutauaki, either jointly with Ngāti Toa and/or Te Ātiawa. The suggestion in parts of the Ngāti Toa evidence that the three ART Confederation iwi should hold part of the mainland and moana together is not supported by the evidence, nor did Ngāti Toa maintain that position in their submissions. Waitohi’s tuku allocated the mainland coast to Te Ātiawa and Ngāti Raukawa, but Ngāti Toa took Kapiti Island and to the south.

[891] For CMT purposes, Ngāti Raukawa makes no claim over the area of interest of Ngāti Toa, nor does Ngāti Toa make a claim on Ngāti Raukawa’s rohe. That does not mean that each of those iwi do not have customary rights which might be recognised at tikanga in each other’s rohe. However, that is a matter for the parties.

[892] I conclude that the interests of Te Ātiawa and Ngāti Raukawa for the purposes of CMT do not overlap except at the Kukutauaki boundary. Nor does Ngāti Toa's historical association with the claimed Ngāti Raukawa rohe give rise to substantial interference.

Tikanga not affected by judgment

[893] Ngāti Raukawa say they respect the inland rohe of Rangitāne which was used for the sustenance of their people. However, Ngāti Raukawa say their rohe has always been in the coastal areas where their marae and papakāinga are located, from the Rangitīkei River in the north (Parewahawaha Marae) to Kukutauaki (Katihiku Marae) in the south. This is the area in which they have gathered and used customary resources for the sustenance of their people.

[894] Procter's evidence provides support for Rangitāne's claimed historically based customary interests along the coastline. He notes significant sites of cultural importance to Rangitāne such as fishing stations, waka moorings, and resource gathering areas in and around the Manawatū coastal waterways. He also refers to the elevated connection of Rangitāne to the coast and the recognition of the concomitant obligations that creates. Procter notes that Rangitāne continue to fish and use the takutai moana in the Manawatū to Rangitīkei Awa area, and refers to present-day involvement in kaitiaki activities, such as dealing with a whale washed up on the shore without interference from others, although the location of this was not clear. However, these historically based interests do not give rise to substantial interruption in relation to Ngāti Raukawa's CMT claim.

[895] This hearing concerns the application of the statutory test for CMT. As the parties noted, the findings of the Court do not in any way interfere with the rights and obligations of Ngāti Raukawa at tikanga in relation to others with customary interests in the claimed rohe. The nature of those relationships at a tikanga level is a matter for the parties outside this court process.

Conclusion on claim

[896] I am therefore satisfied that Ngāti Raukawa is entitled to CMT as claimed, including on a shared exclusive basis with other iwi and applicants at various locations along the rohe. I deal with that issue and the seaward extent of the recognition of CMT below.

ASSESSMENT OF MR TIMA'S CMT CLAIM

[897] Mr Tima's claim relates to an area within the larger rohe claimed by Ngāti Raukawa. The two applicant groups are supportive of each other's claims. The foundational take which is the basis of the Ngāti Raukawa claim applies to the Tima claim.

[898] Mr Tima is not opposed to shared CMT with Ngāti Raukawa, with whom his hapū is associated. A number of witnesses, including Mr Teira for Ngāti Raukawa, also acknowledged the occupation rights of Mr Tima at Kuku Beach. Mr Tima's claim area runs approximately from the Waikawa Stream to the Waiwiri Stream, which was part of the larger tuku to Ngāti Raukawa hapū and rangatira by Ngāti Toa. Ngāti Raukawa and Mr Tima (on behalf of the applicants) mutually recognise each other's presence and mana. This is based on the strong links of whakapapa and whanaungatanga which bind them.

Foundational take at 1840

[899] I have found that the foundational claims by Ngāti Raukawa of take raupatu and take tuku whenua by Waitohi on behalf of Ngāti Toa were established as at 1840. The reasons for that finding are set out in the assessment of the Ngāti Raukawa claim above. Te Whānau Tima's tupuna Te Wharekaramū secured the rohe claimed following the tuku whenua.

Holds in accordance with tikanga

[900] I am satisfied that the applicant group holds their claimed area in accordance with tikanga. Te Wharekaramū and other Ngāti Raukawa rangatira led the heke from the Waikato to support their Ngāti Toa whanaunga, following the battle of Waiorua. The applicants defended the land, as evidenced by their participation in the Native Land Court processes from the 1860s to the 1880s. They established ahi kā from the time they settled in the rohe in the 1820s and have remained there ever since. Mr Tima has demonstrated this through his narrative indicating continuous settlement by whānau and hapū near the takutai moana for many generations since Te Wharekaramū arrived in the 1820s.

[901] Mr Tima also demonstrated activities and uses which give rise to a holistic relationship with the seascape, as required to meet this element of the test.⁵³¹ The whānau and hapū have demonstrated their mana over the area, based on the spiritual and physical dimensions of their association with the takutai moana. This has been established through acts of reverence, naming, memories, and whakapapa. Mr Tima has extensive knowledge of the takutai moana handed down from his tūpuna as well as mātauranga Māori which he has inherited and is now handing down to the next generations. Mr Tima also has a deep knowledge of the kōrero of the hapū and continues to use the area's resources in accordance with tikanga. In addition, Mr Tima gave a number of examples of the effects of breaches of tikanga. He is attuned to spiritual nuances, tikanga, and the natural world.

Exclusive use and occupation

[902] The whānau and hapū's exclusive use and occupation of the area is demonstrated by their strong presence in the area, continued extensive use of resources, undertaking of kaitiaki activities as detailed in the evidence, and the continued application of kawa and tikanga. Mr Tima noted that his nephews use the traditional navigation techniques handed down through generations, rather than more modern means.

[903] The intention or capacity to control the area has been physically manifested in the claims pursued in the Native Land Court, as well as in more modern endeavours such as the placing of rāhui and the erecting of gates to prevent the destruction of the takutai moana and its resources by motor vehicles.

[904] The applicants have also demonstrated manaakitanga and whanaungatanga. Mr Tima spoke of the early rangatira having respect for the boundaries between their rohe and the kai being shared around. In modern times, he gave the example of the provision of kaimoana for the marae, which was not only shared locally but also more widely with others.

⁵³¹ *Re Edwards* (SC), above n 13, at [140].

[905] Mr Wilson of Muaūpoko noted that at the Ōhau River mouth “the locals rule the roost”. He agreed, for instance, that Mr Lyall, counsel for Mr Tima, could go to the area safely under the wing of his “Mateawa clients”.

[906] The Supreme Court noted that shared CMT is the norm “rather than the exception”, particularly where two groups recognise each other’s entitlement and seek CMT over the same area.⁵³² Furthermore, this is a case where “the kin-based ethic of mutuality and the value of generosity” — whanaungatanga and manaakitanga — support the mana of both Ngāti Raukawa and the Tima whānau and hapū in the area.⁵³³

[907] The relationship between Ngāti Raukawa iwi and hapū in this case is distinguishable from that in *Re Edwards*, where the Court of Appeal noted with approval that the initial “iwi tipuna” application covering the entire rohe was impliedly dismissed by the High Court when it granted applications made by the hapū over the same area.⁵³⁴ The hapū there had disputed the iwi’s right to make a claim on their behalf. The Court of Appeal said that in those circumstances the iwi had lost the mandate from the applicant group despite the iwi’s contention that its authority had never been formally revoked. By contrast, here the applications of iwi and hapū are mutually supportive. There are strong whānau connections, they recognise each other, and together they control the area and exclusively occupy it, albeit in different ways, at tikanga.

Continuity from 1840 to the present day without substantial interruption

[908] It is relevant to the grant of CMT that the applicant group (or its members) continue to own the land at Tahamata,⁵³⁵ and have done so without interruption from 1840 to the present day. As I find below, Muaūpoko have not established CMT in this area.

[909] The evidence referred to above has demonstrated the continuity of the mana of Mr Tima, for his whānau and hapū, since 1840.

⁵³² At [169]–[170].

⁵³³ At [173].

⁵³⁴ *Re Edwards* (CA), above n 16, at [272]–[276]

⁵³⁵ See Takutai Moana Act, s 59(a)(i).

Conclusion on claim

[910] In conclusion, I am satisfied that Mr Tima should be granted shared CMT with Ngāti Raukawa over the Tima application area.

ASSESSMENT OF NGĀTI APA'S CMT CLAIM

Foundational take at 1840

[911] Ngāti Apa's CMT claim extends from Omarupapako/Round Bush to Rangitikei. The historical evidence confirms that Ngāti Apa, together with Rangitāne and Muaūpoko, were the tangata whenua in the claimed rohe at least up until the battle of Waiorua. Mr Huwyler said that of the three Kurahaupō iwi, Ngāti Apa was dominant in the claimed rohe. The evidence supports the Ngāti Apa ancestral connections to it. The historical evidence also indicates they continued to occupy the rohe following the battle of Waiorua.

[912] Mr Shenton's evidence, based on Armstrong's research, confirms that Ngāti Raukawa were occupying the area in the 1830s. Mr Shenton noted that Ngāti Raukawa and Ngāti Apa hapū lived in peaceful coexistence during that time. This is consistent with the evidence of Tamihana Te Rauparaha in the 1868 Himatangi Native Land Court hearings, who said that "when the fighting was over" his father Te Rauparaha "always treated the Ngatiapa and other resident tribes as friends on an independent footing" and "never abolished their 'mana' over their own lands, or interfered with their occupation of them".

[913] Mr Shenton agreed that a significant factor in fostering the early relationship between Ngāti Apa and Ngāti Toa (and the other Hekenga iwi) had been the marriage of Te Rangihaeata and Te Pikinga. However, this relationship was disrupted by the battle of Waiorua, in which Ngāti Apa sided with the Kurahaupō allies. Mr Shenton also referred to peace agreements with Ngāti Raukawa iwi as examples of the "willingness for coexistence" not only at Te Karekare, but more broadly. He agreed with the description that at the time there was a "fluidity of interests and relationships". Another illustration was the relationship between Te Rangihaeata and the Ngāti Apa rangatira Te Hakeke. Te Hakeke's parent had told Te Rangihaeata that the latter could reside at Poroutawhao and that "there should be no customary allocation of ground". Similar respect can be seen in the relationships between the rangatira Nepia Taratoa and Te Hakeke. Although Nepia's arrival in the area, according to the Ngāti Raukawa narrative, was to secure rights for Ngāti Raukawa following the tuku whenua by Waitohi.

[914] The Ngāti Apa kōrero confirms Ngāti Raukawa arrived in greater numbers following Haowhenua in 1839. From that point, conflicts erupted from time to time. In one incident in around 1840, E J Wakefield encountered a deserted pā on the south bank of the Rangitīkei River with no signs of life evident. Two Māori, who Wakefield understood to be members of Ngāti Apa, approached him and said that they:

...had feared to cross over, thinking that we were a party of Ngati Raukawa, to whom... [the pā] belonged, and some of whom they described to be little scrupulous in plundering or tyrannizing over the remnants of the aboriginal tribe, under very slight pretexts.

[915] The placing of a rāhui is a right reserved to the group controlling the area concerned.⁵³⁶ Ngāti Raukawa was able to place a rāhui on the coast near the Rangitīkei following a shipwreck, after Ngāti Apa had interfered with the wreckage which contained the body of a Ngāti Raukawa rangatira. This rāhui points to Ngāti Raukawa having customary control over the area south of the Rangitīkei River in 1840.

[916] By 1848, Te Rangihaeata had settled with Ngāti Huia (a hapū of Ngāti Raukawa) at Poroutawhao. While he was a Ngāti Toa rangatira, he was also closely linked by whakapapa to Ngāti Raukawa, and it was under his direction that more Ngāti Raukawa hapū had settled in the northern part of the claimed rohe near the Rangitīkei River, in order to prevent Pākehā occupation.

[917] The intervention of Te Rangihaeata in 1848, who was adamant that Ngāti Apa should not be permitted to sell Rangitīkei, Turakina, or Whangaehu, resulted in Te Hakeke sending a report to McLean (the Crown land purchase agent) advising that he had told Te Rangihaeata that “the northern side of Rangitikei would be disposed of by Ngati Apa without interference from other iwi”. Ngāti Apa suggest that limiting their sale aspirations to the north of the Rangitīkei River was a strategic decision for the purposes of the land transaction, but they maintained that they had continuing rights further south to the Koputara Stream.⁵³⁷

⁵³⁶ *Re Edwards* (CA), above n 16, at [165].

⁵³⁷ The location is described in the Armstrong Report as “about four miles north of the Manawatū River”.

[918] I accept that before 1840 both Ngāti Apa and Ngāti Raukawa had customary rights such that together they could exclude others from the takutai moana now claimed by Ngāti Apa. These rights were recognised by each other as evidenced by their peaceful coexistence. It may be that both could be said to have “held” the rohe, however by 1839/1840 that situation had changed and it was Ngāti Raukawa who were controlling the area.

[919] I am not satisfied that Ngāti Apa have established a foundational take as at 1840. Therefore, as outlined below, they cannot succeed in meeting the elements of the test for CMT.

Holds in accordance with tikanga

[920] The narratives that have emerged at this hearing, both traditional as recounted by the witnesses and through the historical research, suggest a history of coexistence and peace making between Ngāti Apa and Ngāti Raukawa. Nevertheless, by 1840 Ngāti Apa had recognised that Ngāti Raukawa had rights in the area south of the Rangitīkei River, and had conceded to Ngāti Raukawa’s control. The rāhui and evidence concerning Te Rangihaeata’s ability to control the land sales to the south of the Rangitīkei River indicates that by then Ngāti Raukawa were holding the relevant area. That does not diminish the customary rights of Ngāti Apa over the rohe at tikanga, nor their continued recognition by Ngāti Raukawa in that context. Ngāti Raukawa note that more recently Ngāti Apa and Ngāti Raukawa agreed to a boundary at the Rangitīkei River for commercial inshore fisheries entitlement purposes.

[921] This Court must apply the statutory test for CMT, and I am not satisfied that Ngāti Apa holds the claimed area in accordance with tikanga. Te Hakeke’s agreement that Ngāti Apa would only sell the land to the north of the river and leave the south to Ngāti Raukawa and Te Rangihaeata recognises that Ngāti Raukawa held the area. By 1840 Ngāti Apa, interests had moved to the north and in the rohe that is the subject of this hearing, the Ngāti Apa interests demonstrated such as fishing and gathering mahinga kai are more in the nature of a collection of unrelated activities.

Exclusive use and occupation

[922] While Ngāti Apa people continue to use and occupy the area around the Rangitīkei River mouth on an individual basis, their sphere of interest is largely focussed to the north where their marae are located. The evidence for Ngāti Apa suggests they maintain interests in historic sites and continue to engage in activities such as fishing in various areas of the rohe. No examples of physical manifestations of control were provided by Ngāti Apa, although they collaborate with Ngāti Raukawa on various projects. In addition, Ngāti Apa presented little evidence of their exercising authority from 1840 to the present day, other than the Treaty settlement acknowledgements which are associated with historical grievances against the Crown.⁵³⁸

[923] Ngāti Apa has failed to meet this limb of the statutory test.

Continuity from 1840 to the present day without substantial interruption

[924] Ngāti Apa have ancestral connections to the claimed rohe. However, their use and occupation has not been continuous since 1840.

Conclusion on claim

[925] The evidence suggests that Ngāti Apa's claim is based on historic association with the area, and they have not demonstrated that they hold the claimed rohe at tikanga nor that they have had exclusive use and occupation since 1840. The evidence showed the historical importance of sites in the area to Ngāti Apa. Nevertheless, the claim for CMT fails. As I have noted that does not diminish the customary rights that Ngāti Apa may retain at tikanga, but that is a matter for the parties to resolve.

[926] The application for CMT by Ngāti Apa is dismissed.

[927] I now turn to consider the Muaūpoko claims and begin with that of Mr Taueki, whose claim on behalf of Ngāti Tamarangi relates to the Muaūpoko heartland.

⁵³⁸ See Ngāti Apa (North Island) Claims Settlement Act 2010, ss 23, 34 and 39.

ASSESSMENT OF MR TAUEKI'S CMT CLAIM

[928] The pūkenga take the view that Mr Taueki's evidence has demonstrated the following sources of take to the claimed takutai moana: take kitenga (rights through discovery), take taunaha (rights through naming), take tūpuna (rights through ancestry), and take ahi kā (rights through continual occupation).⁵³⁹ I have also concluded that the application meets the test for CMT for the reasons set out below.

Foundational take at 1840

[929] Mr Taueki relies on take tūpuna as his foundational take. He has been immersed in the kōrero of his hapū, handed down from his tūpuna Taueki. He made it clear he did not seek to claim any more than what he knew from his tūpuna was the Ngāti Tamarangi rohe. The initial CMT claim that he filed followed the 1873 Horowhenua block delineation in the north (the Manawatū Awa), the Waiwiri Stream in the south, and out to the territorial limit seaward. When asked about the subsequent claim amendments, Mr Taueki said that he wanted to claim no more than the area of his tūpuna, where his whānau and hapū have remained to the present time. Thus, he limited the claim to the Te Uamairangi and Ngā Manu boundaries and only one nautical kilometre seaward. He said the earlier applications had been made on the insistence of his former lawyer, and he had made sure the claim was amended by his present lawyer to accord with his hapū's kōrero.

[930] I am satisfied that the foundational take has been established as at 1840.

Holds in accordance with tikanga

[931] The pūkenga report notes that the evidence of Ngāti Tamarangi demonstrated a number of the tikanga values and principles identified as relevant to the present inquiry, and which are set out earlier in this judgment.⁵⁴⁰ They also point to the evidence that a peace agreement had been reached between Taueki and Te Whatanui. Whatever the reasons motivating those rangatira, the pūkenga consider that both Ngāti Tamarangi and Ngāti Raukawa held the takutai moana at Horowhenua at 1840,

⁵³⁹ Pūkenga report, above n 44, at [237] and [313]–[316].

⁵⁴⁰ At [111] and [112]. See the summary of the pūkenga report earlier in this judgment.

and have continued to hold it since. Such a conclusion, they say, is consistent with tikanga.⁵⁴¹ I agree.

[932] Also supporting Mr Taueki's claim are the acknowledgements of witnesses for other iwi as to the particular importance of Horowhenua to Ngāti Tamarangi. For instance, Mr Tamihana of Ngāti Raukawa noted that the area from Te Uamairangi to Ngā Manu was not Ngāti Raukawa's exclusive domain. Similarly, Mr Kiriona of Ngāti Raukawa referred to the "complex history" of the Horowhenua, and confirmed that given the layers of interests at play within Ngāti Tamarangi's application area, they would tick all the boxes in his tikanga matrix, as would Ngāti Raukawa. Ms Selby properly acknowledged that the area at Horowhenua was different to the rest of Ngāti Raukawa's application area, and that Muaūpoko also had interests in Ngāti Tamarangi's application area. Similarly, Mr Potini acknowledged Muaūpoko's rights at Horowhenua during cross-examination. While Ms Selby referred to it as a "right of use", it is clear that almost universally there is a recognition of the special significance of the area surrounding Punahau and Hōkio Stream to Muaūpoko.

Exclusive use and occupation

[933] Mr Taueki demonstrated that his whānau and hapū extensively use the resources of the takutai moana, and act as kaitiaki of the area, having done so since before 1840. As a matter of manaakitanga, they have allowed others on the beach to collect mahinga kai and fish in the moana in their rohe.

Continuity from 1840 to the present without significant interruption

[934] I accept the evidence of Mr Taueki that he and his tūpuna have exercised customary rights in the claimed area from 1840 to the present day. They have continuously maintained their presence in the area throughout that time.

[935] Furthermore, no other applicant for CMT (including those interested parties seeking to establish claims through Crown engagement) has caused substantial interruption in the rohe.

⁵⁴¹ At [313]–[316] and [320]–[323].

[936] Mr Taueki has demonstrated on behalf of Ngāti Tamarangi (on a shared basis, to which I refer below) that they hold the claimed rohe in accordance with tikanga, and have exclusively used and occupied the area since 1840 to the present day without substantial interruption. They are therefore entitled to CMT in the claimed rohe.

ASSESSMENT OF MUAŪPOKO'S CMT CLAIM

[937] MTA seeks CMT over the rohe from Kukutauaki to the northern side of the Manawatū River, and to 12 nautical miles seaward.⁵⁴² This overlaps with part of Ngāti Raukawa's claim, as well as the claim of Mr Taueki on behalf of Ngāti Tamarangi, a hapū of Muaūpoko. The Taueki and MTA claims are supportive of each other.

[938] Before the hearing, Muaūpoko sought to extend its CMT application to cover the takutai moana from Whareroa to the northern bank of the Rangitīkei River, being the whole of the Stage 1(a) hearing area. I declined that extension application in an earlier judgment.⁵⁴³ Mr Bennion also suggested during the hearing that the Court should treat MTA's applications for PCR orders across the whole hearing application area as an application for CMT.⁵⁴⁴ The evidence does not support the extension of Muaūpoko's CMT area beyond that claimed in the application filed.

[939] As with the other claims, I begin by considering the foundational take upon which Muaūpoko's application for CMT rests, before addressing the elements of the test as set out by the Supreme Court.

Foundational take at 1840

[940] The evidence establishes that Muaūpoko and their antecedents had been on the Kapiti Coast for hundreds of years before the arrival of Te Rauparaha. There is no dispute that their burial sites can be found along the length of the coast, including on Kapiti Island, where Muaūpoko still journey to venerate their tūpuna and carry out rituals. Urupā, middens and historical sites of significance connected to Muaūpoko and their tūpuna are present across the whole of the hearing area. The pūkenga's evidence was that Muaūpoko had demonstrated their foundational take through their whakapapa, as well as their cultural and historical connection to the natural world and the takutai moana in the hearing area.

⁵⁴² The seaward extend of all claims are dealt with in a later section of the judgment.

⁵⁴³ *Re Muaūpoko Tribal Authority* [2024] NZHC 536.

⁵⁴⁴ See Takutai Moana Act, s 107(1), which enables the Court, if it considers that an application for recognition of a PCR is more appropriately decided as an application for recognition of CMT, to treat it as the latter.

[941] The pūkenga criticise the Native Land Court processes for distorting tikanga “to fit its purposes, and for political efficacy ... or legal efficacy”. In particular, “take raupatu was distorted in the Native Land Court process to being a winner takes all, total annihilation of those who have been conquered, [and] total usurpation of their mana”. While the take still applied, those kupu were changing, as was the tikanga. The pūkenga observe that the Native Land Court elevated take raupatu over other take, and thereby undermined the “legitimacy of a lot of ... different mana whenua groups”. This approach amounted to a Europeanisation of tikanga concepts. The distortion was also related to forces brought to bear on Māori by their participation in the modern economy and legal processes. Dr Joseph commented that this was due to the influence of money, which led to the move to “case economy versus a mana reciprocity economy”. This led to a commoditisation of tikanga rights and a pitting of people against each other. Dr Joseph noted that this shift away from and erosion of tikanga began in the Native Land Court and continues to the present day.

[942] The pūkenga note, consistent with the comments of the Supreme Court, that take tūpuna, which is dependent on whakapapa, is generally considered a more secure form of right than take raupatu. However, whakapapa interests and connections do not necessarily translate into rights and interests such as mana whenua and mana moana, and must be considered alongside other relevant take and factors such as ahi kā. Furthermore, anthropologist Te Rangihīroa noted that if a conquered territory initially acquired through take raupatu was occupied for several generations, the take raupatu would become an historic event and the functioning title would become one of take tūpuna.

[943] The pūkenga in cross-examination noted that those claiming ancestral rights do not lose “mana” over the land merely because they no longer occupy it. In a sense their mana is “vested in that land and that place” and whether they “still have access to it or not, [their] mana whenua is still in that bit of land”. Ms Milne said that a tuku was one way of “allowing mana whenua to be shifted to another whenua”. The “burying of bones and of whenua the placenta ... consolidates ... mana whenua”. Furthermore, the peace process is about the protection of mana, which “doesn’t go away”.

[944] While the mana of the group over the land never dissipates, nevertheless by effluxion of time, the pūkenga say that the rights that give rise to a group holding the land in accordance with tikanga may become impaired. The Supreme Court noted that while the Native Land Court had generally adopted the approach that an absence of three generations would lead to a loss of rights, the preferable view is that “the degree of discontinuity sufficient to end a take in land was contextual”.⁵⁴⁵ This would depend on the relationship between the prior right holder and the more recent counterclaimant, the nature and use of the relevant area, and the nature of the right or rights claimed over it.

[945] In terms of what would happen to surviving members of the conquered groups, those who were allowed to remain on their ancestral land were generally treated as slaves, while others moved to live elsewhere as refugees. The pūkenga acknowledge that this experience undermined the mana of conquered groups, often resulting in intergenerational trauma. They refer to the discussion of Angela Ballara concerning the extent to which a defeated people could continue to live on their own land with mana.⁵⁴⁶ On one view, utu required the defeated group to obtain satisfaction for the killing of their people in order for mana to be restored. Arguably Ngāti Apa, Muaūpoko, and Rangitāne never had that opportunity. However, another view is that defeated groups could retain their mana in other ways without requiring utu, for instance by making peace through rangatira marriage alliances, or if the conquerors treated the defeated group as guests rather than slaves. That said, Ballara notes that most Ngāti Raukawa witnesses considered Muaūpoko to be living at Horowhenua under the protection of Te Whatanui, with no rights to the land. Thus, the question of whether a group who had been conquered could remain on the land with mana remains a contested one. Furthermore, she says that in the Kapiti region, by the 1890s most formerly conquered people considered that their mana had been restored through ahi kā roa, as they had lived with their conquerors for three generations and intermarried with them.

[946] Other commentators have suggested that even if the conquering group settled on the land for a time, if the defeated group were able to maintain its freedom within

⁵⁴⁵ *Re Edwards* (SC), above n 13, at [43].

⁵⁴⁶ Pūkenga report, above n 44, at [502]–[506].

those borders they would retain a portion of their rights.⁵⁴⁷ Therefore, the pūkenga report concludes that:⁵⁴⁸

Under the take of raupatu and ringa kaha then, conquered groups such as Muaūpoko, Ngāti Apa and Rangitāne could and did retain some of their mana over their people, whenua and marine and coastal areas even after the Treaty of Waitangi in 1840.

[947] The pūkenga note that while Waiorua was a significant battle and there was “some defeat in that particular space”, it was not necessarily a raupatu or conquest along the whole coast. The assertions of Ngāti Raukawa that Muaūpoko were entirely cleared from the Kapiti Coast is self-evidentially incorrect. The pūkenga in cross-examination said:

...Muaūpoko, the Kurahaupō iwi weren’t going away. All right, they still maintained their presence, they still maintained their interests, they were still practicing a lot of their tikanga... On the whenua and on the rohe moana and continue to do so today. They may have been defeated in certain battles, but they were still there. May have gone into the maunga for a bit, but then they came back. ...they weren’t, in terms of a total raupatu conquered group as it were.

[948] Belgrave referred to the Waitangi Tribunal’s “bottom line”, which made it difficult in a case where earlier peoples were still living on the land to argue that the conquerors had extinguished their interest. The Tribunal’s position was that:⁵⁴⁹

The absolute alienation of land in Maori custom required the total and permanent removal of people from the land — either voluntarily, as in the case of the migration in which nobody was left behind to keep fires alight and nobody intended to return, or involuntarily, when defeated peoples were entirely exiled from their lands without ability or hope of ever returning. The proof of either was, of course, the function of time.

[949] Nevertheless, the Ngāti Raukawa version of events is repeated even in some Kurahaupō narratives, for instance in McEwen’s history of Rangitāne.⁵⁵⁰

⁵⁴⁷ At [507].

⁵⁴⁸ At [511].

⁵⁴⁹ Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on the Northern South Island Claims* (Wai-785, 2008) at 82.

⁵⁵⁰ See McEwen, above n 513, at 136. He describes Te Whatanui as the “protector” of Muaūpoko and notes that Muaūpoko suffered the most from Te Rauparaha’s invasion. McEwen says that in later years, Muaūpoko turned on their Ngāti Raukawa protectors, resorting to arms and protracted litigation to succeed in recovering a large tract of the Horowhenua lands. McEwen’s sources, which are outlined in the introduction at viii–ix, include Native Land Court records, other books and research, and the narratives of Rangitāne elders, as well as his firsthand knowledge of the Manawatū area. He spoke te reo Māori from an early age.

[950] The Muaūpoko historians suggest that the narrative adopted by a succession of Crown officials and European observers, that Muaūpoko were a defeated remnant “cowering in the bush” who were saved from extermination of Te Whatanui, was a distorted view promoted by Ngāti Raukawa. They note that this “outlandish interpretation” was adopted by people “largely ignorant of the context within which the 1830 peace agreement had been made and the customary principles and tikanga which underpinned it,” and also “[d]espite a wealth of evidence to the contrary”. It had its genesis in the evidence given by Charles Kettle, a New Zealand Company Surveyor who had been present in the district in 1841–1843, before a select committee of the House of Commons in London. The evidence also suggested there were fluid movements of people up and down the coast, including those from the migrant iwi and the original residents.

[951] The historians generally agree that it is not possible to reach a determinative conclusion about the events of the 1820s and 1830s. Boast comments that the history of the Kapiti region from 1820–1860 continues to be much debated, despite “numerous inquiries, and many massive cases in the Native Land Court, a great deal of primary documents, and an endless array of scholarly books”. He said no final determination “as to what really happened” is possible.

[952] The Native Land Court records provide witness narratives given relatively close in time to when the events occurred. While there are issues about relying on the evidence of one witness over another given the vested interests at play, it is possible to extract some common themes.

[953] Belgrave says that the evidence in the Himatangi hearings, which were held in both te reo Māori and English, dealt with terms such as conquest and slavery, as well as “who had mana, how it was lost and how it had been retained or regained”. However, a predominant theme in the evidence was one of peace-making. The witnesses not only described the battles and killings as the mechanism for Ngāti Toa and Ngāti Raukawa to establish themselves on the land, but relevantly:

They also described peace-making, including marriage between newcomers and tangata whenua. From these historical narratives, there is evidence of extensive peace-making, not following violence, but to pre-empt violence from taking place. There was warfare discussed, particularly following the

killing of Te Rauparaha's children at Ōhau and the long campaign of revenge waged by Te Rauparaha against Muaūpoko as a result. But other aspects of the relocation of Ngāti Toa, Ngāti Raukawa and Ngāti Kauwhata were far less violent. When it came to the migration of Ngāti Raukawa and Ngāti Kauwhata to these new homes, there was almost no evidence of battles and limited evidence of killings, and most of those killings took place during the migration of heke, rather than after their settlement. The lack of violence is explained in historical accounts from iwi on both sides of agreements which allowed the newcomers to settle on the land, without violence, through the return of captives, particularly the return of high-born women.

[954] The pūkenga also emphasise traditional tikanga Māori concepts and institutions for resolving disputes and peace-making. They note that peace-making processes might include hohou i te rongo, rangatira marriages, and the exchange of pounamu — referred to as tatau pounamu (a “greenstone door”) — as a metaphor for enduring peace.⁵⁵¹ Whereas the desired outcome in warfare was revenge or the restoration of mana, the process of hohou i te rongo was to stop further hostilities and to secure a state of enduring peace.⁵⁵²

[955] In relation to the conflicted kōrero of the two iwi, the pūkenga comment that while events may be recounted in good faith, they could be written down differently, which changes the tikanga. Regarding peace-making, Ms Milne said:

...the writing changes the take of the tikanga as well. Because ... there's tatau pounamu, there's the kawenata, there's tuku, there's all sorts of peace-making situations that have happened with all the different groups, actually. But then those tatau pounamu are misinterpreted or reinterpreted because of the way in which they're being examined for what was wrong with them rather than what was right with them. The notion and the use of tatau pounamu in modern days has quite changed from what its intent was at that time. In traditional tikanga, if you break the spears, there's no way you can take up arms again. Yes, kua oti, kua tau. It's done.

[956] The preponderance of evidence supports the fact that immediately following the battle of Waiorua, Muaūpoko retreated from the Kapiti Coast. Many left the region, and those who remained went inland or to the Lake Horowhenua area, north of the Hōkio Stream. Mr Moses said they left due to conflict, while Mr Wilson commented that the iwi was not wiped out but “some went home”. He said that while Ngāti Toa became ahi kā on Kapiti Island, it was not safe for them on the mainland, because Muaūpoko had the numbers and were gathering to plan revenge.

⁵⁵¹ Pūkenga report, above n 44, at [328].

⁵⁵² At [332]

[957] Later events recounted by the Muaūpoko historians describe peace making between Ngāti Huia and Muaūpoko at Poroutawhao. The Armstrong/Stirling report noted:

Peter McBurney discusses the Poroutawhao tuku in a report prepared for Ngāti Kauwhata in connection with their Treaty claims. He refers to Ngarangiorehua of Ngāti Huia being gifted land at Poroutawhao by Tawhiti of Muaupoko, which McBurney says was ‘more than a straightforward transactional exchange’. The encounter between Ngarangiorehua and Tawhiti was ‘imbued with ceremony and the sacred commitment of chiefs’. The Ngāti Raukawa chief walked over the land with Tawhiti and a party of Muaupoko chiefs: naming the swamps, the pa tuna, the patches of bush and the lakes... Ngarangiorehua hung his patu paraoa in a tutu bush as a sign of having taken possession and to symbolise the cessation of warfare and the establishment of peace.

[958] As already discussed, the arrangements between Te Whatanui and Taueki are particularly relevant to the Ngāti Raukawa and Muaūpoko overlapping claims. The historic arrangement at Karekare between Ngāti Raukawa and Muaūpoko and other Kurahaupō iwi was said to have occurred on the Manawatū River near Foxton (although there is some dispute about the location). This was followed by further peace and tuku whenua agreements made by Muaūpoko, Ngāti Apa and Rangitāne with Ngāti Raukawa.⁵⁵³ According to Mr Moses, Te Whatanui and Taueki reached the Namuiti peace agreement.⁵⁵⁴ Subsequently, Taueki made a tuku whenua of land called Raumatangi⁵⁵⁵ to Te Whatanui, who then came and resided with Muaūpoko. Mr Moses also pointed to other peace-making, including between Te Rangihaeata of Ngāti Toa and Taiweherua of Muaūpoko, which was marked by each breaking a spear in the presence of all the people as a sign that there was to be no more fighting.

[959] Both Ngāti Raukawa and Muaūpoko agree that Te Whatanui and Taueki reached an arrangement. That is important evidence as to what was happening on the ground.

⁵⁵³ Pūkenga report, above n 44, at [354]. A report of the evidence of Hoani Meihana to the Native Land Court at Foxton reported in the *Waka Maori* newspaper of 24 December 1872, recorded that the witness recounting the peace arrangement was at “Te Karekare on the Manawatu.”

⁵⁵⁴ Te Namuiti was an island pā. It is depicted on the map at Attachment 4 as being on Lake Horowhenua.

⁵⁵⁵ See map at Attachment 4.

[960] The evidence of Mr Taueki was that some Muaūpoko remained in the Horowhenua, which was held by his tupuna, the rangatira Taueki. Taueki offered a refuge for Muaūpoko who had left the area. This narrative was reiterated in material respects by other witnesses for Muaūpoko. Mr Packer was told by his father that Muaūpoko could fish under the ROLD Act from Tangimoana to the Ōtaki River mouth. His father also said “don’t worry about what Raukawa say ... [o]ur ancestors never left Hōkio. We stayed in [the] swamp and used toi toetoe to breathe”.

[961] However, Muaūpoko numbers had dwindled across the hearing area. Armstrong accepted in cross-examination that by 1840, the Muaūpoko population in the area had significantly reduced including the Horowhenua area, from what it was before the arrival of Ngāti Toa, the Taranaki tribes and Ngāti Raukawa. In response to Ms Coates’ question of whether he would acknowledge this reduction in numbers, Armstrong said:

At Horowhenua yeah, but there were plenty of Muaūpoko people living in other areas, Whanganui with Rangitāne, with Kahungūnu, quite a few in the South Island, even though they suffered some attrition when Te Rauparaha invaded the South Island, so yeah, that would be my response.

[962] The Muaūpoko claim is supported by Mr Taueki’s evidence.⁵⁵⁶ Mr Taueki’s tupuna maintained their position on the takutai moana from Te Uamairangi to Ngā Manu in the north following Waiorua.⁵⁵⁷ Putting aside the contested interpretation, the arrangement between Te Whatanui and Taueki supports the Muaūpoko narrative that they retained their hold over the Horowhenua, and provides confirmation that Muaūpoko were present in that area at around 1829/1830.⁵⁵⁸ It

⁵⁵⁶ Mr Taueki’s claim dated 14 March 2017 as originally filed was for, inter alia, CMT “from the northern bank of the mouth of the Manawatu River in the north to the southern bank of the mouth of the Waiwiri Stream in the south, and 12 nautical miles seaward from each point on the coastline between these boundary points”. It was made on behalf of Muaūpoko iwi but recorded that Horowhenua was the primary location of Muaūpoko in modern times. An amended claim was filed dated 18 December 2017, extending the claim to the south to Plimmerton (south of Whareroa), followed by a further amended claim dated 31 July 2023, amending the area to that bounded by the Waiwiri Stream in the south to the Waitarere Forest in the north. However, Mr Taueki in his evidence said that the earlier claims to that area had been prepared and filed by his lawyer at the time and were not in line with his intent. The fourth amended claim dated 2 February 2024 filed by his current lawyer specifically replaces all previous applications.

⁵⁵⁷ Te Uamairangi and Ngā Manu are marked on the Adkin map at Attachment 5. Mr Taueki’s application is described as covering an area from the south-western corner to the north-western corner of the Waitārere forest.

⁵⁵⁸ The Agreed Chronology notes that Te Whatanui’s agreement with the Kurahaupō at Karekare took place in 1828/1829, and Te Whatanui’s arrangement with Muaūpoko was in 1830.

supports the long-term relationship Muaūpoko has with the Horowhenua rohe as its heartland, particularly Punahau and the Hōkio Stream.

[963] Ngāti Raukawa say that Te Whatanui was the dominant party and it was he who offered a place to Muaūpoko to protect them from the revenge sought by Te Rauparaha for killing his children. However, the evidence satisfies me that the takutai moana in relevant area remained under the control of both Muaūpoko and Ngāti Raukawa following their coming together. Muaūpoko held that area in accordance with tikanga and its take tūpuna was not impaired.⁵⁵⁹ To reach that conclusion it is not necessary to ascertain the exact nature of the arrangement between Taueki and Te Whatanui. It is sufficient to recognise that each side had entered an arrangement around 1830 through their significant rangatira, leading to the peaceful co-occupation of the relevant rohe until the lease disputes broke out after 1840. This arrangement follows what the evidence suggests is the more general arrangement involving Kurahaupō iwi and Te Whatanui further to the north at Karekare.

[964] As Armstrong notes, the agreement between Taueki and Te Whatanui was not one-sided. Rather, it was:

...a negotiated compact involving a *tuku whenua* and arranged (*takawaenga*, peacemaking) marriages, with both parties assuming certain obligations towards the other. As Luiten observes, peacemaking inevitably involved a cession of some kind, including land or access to resources, but in doing so the *mana* of both groups was enhanced, and building relationships with *tangata whenua* was desirable as a means of both securing and legitimising the tenure of newcomers to the district.

[965] The events that followed indicate that each side accepted the reciprocal obligations to one another in return for the benefits of their arrangement. An example of this was Te Whatanui's intervention warning Muaūpoko and other Kurahaupō iwi about the Feast of the Pumpkins in 1833 or 1834.⁵⁶⁰ Both Ngāti Raukawa and Muaūpoko historians refer to this event, but Te Ātiawa do not refer to it in their narratives. The historical evidence suggests that Te Ātiawa invited Muaūpoko and other Kurahaupō iwi to the feast to taste a new European delicacy, said

⁵⁵⁹ I go into detail on the take relied on by Ngāti Raukawa in the section of the judgment relating to their claim.

⁵⁶⁰ This does not appear in the Te Ātiawa ki Whakarongotai narrative according to the comments in the agreed chronology.

to have been either pumpkins or melons.⁵⁶¹ The Armstrong/Stirling report noted that the Kurahaupō iwi were warned by Te Whatanui, “whose writ did not extend to Waikanae” not to attend. Some ignored the advice, and at the feast Te Ātiawa “treacherously attacked them killing many”. Boast suggests that Ngāti Toa were behind the scheme. This indicates that Muaūpoko relied on Ngāti Raukawa for protection, at least to the south.

[966] The Armstrong/Stirling report also said that Te Whatanui used his influence in peace-making following an attack on Muaūpoko at Papaitonga (on a lake south of the Waiwiri Stream), apparently earlier than the Feast of the Pumpkins. Te Rangihaeata and a mixed party of Ngāti Toa/Ngāti Raukawa attacked, leaving some Muaūpoko dead. Muaūpoko say that following the intervention of Te Whatanui, the affray ended in peace-making and Te Rangihaeata and Taiweherua each broke a spear in the presence of people as a sign that there was to be no more fighting. Armstrong/Stirling suggest that “Te Rangihaeata probably agreed to this to assuage Te Whatanui, whose ‘backbone’ he had climbed”.

[967] Consistent with Muaūpoko’s narrative that the arrangement between the two rangatira was one of peace-making and the two had mutual obligations, Muaūpoko supported Ngāti Raukawa in defending their boundary against Te Ātiawa at the series of battles known as Haowhenua in 1834. Although Ngāti Raukawa say Muaūpoko were subservient and so were obliged to assist, the historical evidence indicates that Muaūpoko were not willing to assist Ngāti Raukawa in the battle of Kūititanga against Te Ātiawa, which took place to the south at Waikanae. This suggests no obligation based on servitude was operating at least by 1839. However, it equally indicates that Muaūpoko did not have a strong presence in that part of the rohe, as they were not involved in securing the boundary at Kukutauaki against Te Ātiawa.

[968] The Armstrong/Stirling report observes that the 1830s saw the return of many Muaūpoko from the South Island, marking a “period of rebuilding and consolidation” for the iwi. Missionary Richard Taylor, recounting his observations at Lake Horowhenua in April 1845, noted that Muaūpoko had moved from their island

⁵⁶¹ McEwen, above n 513, at 136.

pā to take up residence on the lake shores. The account, which was accompanied by a drawing captioned “Food Stores in Horowhenua Lake”, did not suggest that Muaūpoko were living as cowering slaves in fear of their lives”, but rather “painted a picture of tranquillity and plenty”. Mr Taylor described Te Whatanui’s pā in the area at Raumatangi as “little but pretty”, and further observed that:

...he has a noble house according to native ideas and an equally noble w[h]ata, this great man has his European who lives in a hut near him and appears to be of great use to him...

[969] By 1839 there is evidence that members of the Muaūpoko iwi were moving freely in the vicinity of the Kapiti Coast. The Armstrong/Stirling report noted that instead of participating in the battle of Kūititanga in 1839, Muaūpoko focussed on developing trading relationships with Europeans at Kapiti. Kawana Hunia (of Muaūpoko) said that when Te Whatanui asked his father, Te Hakeke, to join him, Te Hakeke replied, “I am going to Kapiti to sell pigs [to Europeans;] I do not want to fight”.

[970] Also relevant is the Crown’s recognition of Muaūpoko, as illustrated by the fact that in 1840 several Muaūpoko rangatira signed the Treaty of Waitangi. The Waitangi Tribunal recorded that Muaūpoko rangatira Tauheke (Taueki) signed the Treaty with six others in the Manawatū district on 26 May 1840.⁵⁶² Te Hakeke Hunia signed the Treaty on 21 May 1840 at Tāwhirihoe on the Manawatū River. Rere-o-maki (Tanguru’s wife and Te Keepa’s mother) signed at Whanganui on 23 May 1840. However, it is difficult to pinpoint the actual location of the signing or how many Muaūpoko signed in total.⁵⁶³

[971] O’Malley refers to Hector McDonald, a farmer who leased 12,000 acres of land between the Ōhau River and Poroutawhao from Muaūpoko and Ngāti Raukawa to run sheep and cattle. This would have been in a period after 1840. Mr McDonald paid rent for land north of the Hōkio Stream to Muaūpoko, whereas from the Waiwiri creek

⁵⁶² Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai-2200, 2017) at 106.

⁵⁶³ The evidence before the Tribunal indicated that Taueki signed at the mouth of the Hōkio Stream. The Tribunal referred to questions being raised as to whether Taueki was the sole Muaūpoko signatory, as it is possible that two further Muaūpoko rangatira signed with him on 26 May 1840.

to the Hōkio Stream, as well as further north of the Muaūpoko block, rent was paid to Ngāti Raukawa. Mr McDonald's son explained the arrangement as follows:

For the land from the Waiwiri creek to the Hokio stream my father dealt with Te Whatanui alone, having received a lease from him, and paying him the whole of the rent. North of the Hokio, in the Muaūpoko country, a number of the leading men — old Taueki, Rangi Rurupuni, Matene and old Makere (Margaret) each received rent. North of the Muaupoko block again, the run extended into the country of the Ngati-Huia hapu of the Ngati-Raukawa tribe, and rent was paid to He Hoia, Te Rau, and Hutana — perhaps to others. ...

[972] The Muaūpoko historians point out that the protracted negotiations which led to the 1866 Manawatū-Rangitīkei transaction involved Ngāti Apa, Ngāti Raukawa, Rangitāne and Muaūpoko. At that stage, they all agreed to some extent that they shared interests in the block, and they all shared in the payment received for it.⁵⁶⁴

[973] These accounts are not inconsistent with Belgrave's view that there were a series of peace agreements which had led to Muaūpoko and Ngāti Raukawa's coexistence in the area.

[974] In addition, Muaūpoko's position that peace-making was predominant in their relationship with Ngāti Raukawa is supported by the references to Muaūpoko giving Poroutawhao to Ngāti Huia. The Poroutawhao tuku is also mentioned in the Armstrong/Stirling report, and by the historian Peter McBurney in his report for Ngāti Kauwhata in connection with their Treaty settlement claim.

[975] I accept that little weight can be placed on the outcome of the Himatangi Native Land Court decisions of 1868 and 1869, or the Horowhenua block case of 1873,⁵⁶⁵ all of which resulted in findings that Ngāti Raukawa could not rely on conquest to claim the land. These decisions, according to most of the historians, do not provide the analysis required to support their conclusions. Similarly, the Native Appellate Court decision of 1912 which adopted the Ngāti Raukawa narrative of conquest has been criticised. The Armstrong/Stirling report, for instance, notes that the appellate decision did not explain why Te Whatanui spared Muaūpoko, and the decision relied on evidence from the late 1860s without reference to evidence of

⁵⁶⁴ The Armstrong/Stirling report notes that there was no talk of "conquest, slavery or extirpation".

⁵⁶⁵ This involved some 52,000 acres bounded by the takutai moana.

Muaūpoko's earlier occupation. Nevertheless, the evidence given by witnesses in the hearings show that both Muaūpoko and Ngāti Raukawa vigorously maintained their claims to customary rights and mana in the rohe in the colonial courts.

[976] I am satisfied that by 1840, Muaūpoko had not lost their rights based on take tūpuna in the area from the Hōkio Stream to Ngā Manu (defined in the Taueki claim as being the north-western corner of the Waitārere Forest), as a result of the take raupatu. They maintained their presence in that area. In addition, their rights were supported by the peace-making between Te Whatanui and Taueki for their respective iwi and hapū. In any event, even if Muaūpoko's ancestral rights in the area were impaired, they had been reasserted by 1840. As the pūkenga emphasise, rights that have been impaired are capable of being revived.

[977] I now turn to consider the boundaries of the area in which they have demonstrated customary rights amounting to CMT.

Boundaries

[978] Belgrave made the point that boundaries between iwi and hapū were unnecessary prior to 1840, as large areas were inhabited by small groups, and there were no surveys. It was the expediency of land sales that drove the need for boundaries around the land.

[979] The fact that the Te Uamairangi boundary line, if followed inland, bifurcates Punahau, suggests that it is unlikely to have been observed when Muaūpoko resettled and reasserted themselves in the 1830s. The evidence before this Court was that Muaūpoko's holistic relationship with the seascape included the Hōkio Stream. The Hōkio Stream bed belongs to Muaūpoko under the ROLD Act. While that is a mid-20th century statutory recognition, the evidence also shows strong kaitiakitanga around that stream, as well as Punahau and the relevant coastal area, dating back to 1840. The area has long been regarded as the Muaūpoko heartland. The Hōkio Stream and Te Uamairangi boundary are shown in the Adkin map at Attachment 5.

[980] The source of the Te Uamairangi to Ngā Manu boundary markers are unclear, and as the pūkenga emphasised, boundaries at tikanga are amorphous and often

disputed. As I have noted, the southern boundary would likely have followed the Hōkio Stream. To the north, I consider the most likely boundary for the heartland Muaūpoko claim would be that of the Taueki claim — called Ngā Manu. However, that point is slightly north of Ngā Manu marker shown on the Adkin map and at the southern end of Waitārere Forest. I consider the evidence of Mr Taueki, as to his ancestral connections with the area to be reliable. He narrated in detail his unbroken connection and his whakapapa to the rohe, and his tūpuna have been a constant presence there for many generations before the Hekenga iwi arrived.

[981] I am of the view that the Muaūpoko boundary extends to the Hōkio Stream in the south, and to the north to the northern boundary of the Taueki claim.

[982] However based on the evidence at 1840, beyond the area over which they could exercise shared control with Ngāti Raukawa due to their relationship with Te Whatanui, Muaūpoko’s customary rights based on take tūpuna were impaired.

Holds in accordance with tikanga

[983] The Supreme Court noted that “holds” requires the customary interests had not become “ahi mātaotao” — that the fires had not become cold.⁵⁶⁶ The enquiry therefore must be whether the interests in the claimed area have been lost or merely impaired (ahi teretere).

[984] I have concluded that Muaūpoko’s customary ancestral rights, which establish take tūpuna, were impaired following the battle of Waiorua and subsequent events. The iwi retreated to the Horowhenua area, where they were able to maintain a presence and hold off the Hekenga iwi, in the environs of Punahau and the wetlands, streams and corresponding coastal area. As a result of the arrangement with Te Whatanui, both iwi together were able to hold that area. However, this left the balance of the Kapiti takutai moana for the newcomers to claim. In the ensuing years to 1840, Muaūpoko’s historical and ancestral connections over the wider rohe remained impaired. For the purposes of recognition of CMT I am not satisfied that MTA held that area, whether together or exclusively, in accordance with tikanga at 1840 beyond the Ngā Manu

⁵⁶⁶ *Re Edwards* (SC), above n 13, at [142].

boundary (as defined in the Taueki claim) in the north or the Hōkio Stream to the south.

[985] However, the pūkenga report supports the immense significance of Punahau, the Hōkio Stream, and the surrounding area to Muaūpoko by reference to the evidence. This evidence included:

- (a) Cultural and historical connection: It is central to Muaūpoko's identity and history, deeply connected to their whakapapa (genealogy) and cultural heritage.
- (b) Resource and sustenance: The lake has historically provided essential resources, including food and materials, supporting their way of life and well-being.
- (c) Spiritual significance: It is a place for rituals, karakia (prayers), and other cultural practices, connecting them to their ancestors and the spiritual realm.
- (d) Kaitiakitanga (Guardianship): Muaūpoko have a responsibility to protect and care for the lake, ensuring its health and sustainability for future generations.
- (e) Symbol of identity and sovereignty: Punahau represents Muaūpoko's enduring presence and authority over their traditional lands and waters.

[986] In the rohe from the northern Taueki boundary to the Hōkio Stream in the south, I am satisfied that Muaūpoko have a holistic relationship with seascape. They hold this area in accordance with tikanga, together with Ngāti Raukawa. Their control has also been demonstrated over the years, including impressive efforts recently in their numerous expressions of kaitiakitanga, covered in the evidence summarised above.

[987] As the Supreme Court noted, the requirement to hold the area at tikanga is a continuous one — although, if impaired, it can be restored. There is no doubt that

Muaūpoko people use and have been active in the takutai moana outside the Hōkio Stream to Ngā Manu area. However, that presence has been as individuals exercising activities and is based on historical connections.⁵⁶⁷

[988] From time to time there may have been incidents where they have taken steps to re-establish themselves. For instance, based on the evidence of the Muaūpoko historians and kōrero they took steps to regain the area to the north in an attempt to oust Ngāti Huia who were established at Poroutawhao. In addition, they were actively pursuing their claims to the areas to the north in the land courts with some success. However they have not satisfied me that they have continuously held the rohe beyond that area in accordance with tikanga. Today it is noteworthy their marae and most of their members are in and around Levin in the Horowhenua. Therefore, their relationship with the larger rohe is more akin to a collection of unconnected activities or uses exercised in accordance with tikanga, rather than the integrated or holistic relationship with the seascape and manifestation of control required to meet the statutory test.

[989] My findings do not diminish the relationship of Muaūpoko with the takutai moana based on their customary rights and ancestral connections. The pūkenga emphasised that relationship is never lost. How that is recognised in practice is a matter for the parties at tikanga.

Exclusive use and occupation

[990] The Supreme Court confirmed the indicia suggested by the Attorney-General were non-exclusive. However, “it is what they must share in common that is important”.⁵⁶⁸ Isolated acts or circumstances alone are not sufficient. The Supreme Court emphasised that the circumstances must reflect that the applicant group still uses and relates to the claimed seascape “in a way that is integrated or

⁵⁶⁷ The recognition of CMT requires the use and occupation of the claimed area as a group, although evidence of use and occupation by individuals may give rise to an inference of group use or occupation. Similarly in Canada aboriginal title is held for the collective: *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [115]. Aboriginal title “is a collective title held not only for the present generation but for all succeeding generations”: *Tsilhqot'in Nation*, above n 239, at [74].

⁵⁶⁸ *Re Edwards* (SC), above n 13, at [163].

holistic—that is, as part of a continuing order within the applicant group community”.⁵⁶⁹

[991] The Supreme Court said that if it was part of the continuing order of the applicant group community, then “such acts or circumstances will be properly seen as practical expressions of mana or control over the seascape. They will accordingly contribute to satisfying the exclusive use and control requirement.”⁵⁷⁰

[992] Ownership of the abutting land is a relevant factor, and was noted by the Supreme Court as one of the indicia of exclusive use and occupation.⁵⁷¹ There appear to be pockets of Muaūpoko-owned land which have been continuously held, but the most significant is the ownership of the Hōkio Stream bed adjacent to the takutai moana, where Muaūpoko have exercised non-commercial fishing rights. While the Manawatū River remains an important area for fishing and collection of mahinga kai and resources, it is Muaūpoko’s heartland around the Hōkio Stream that was extensively referred to by witnesses.

[993] A further important indicia is kaitiakitanga. Many examples of kaitiakitanga by Muaūpoko, both individually and coordinated through MTA and the Lake Trust were given, particularly in relation to Lake Horowhenua and the Hōkio Stream. They are also involved in whale strandings in the area (albeit on the rotational system that has been put in place by DOC in recent times) and have demonstrated a deep cultural and spiritual connection with the area by regular performance of karakia and waiata at public occasions, including at this Court hearing. They also provided cultural reports, and have input into resource management processes and local government issues in the area.

[994] Muaūpoko’s long-standing presence in the area is demonstrated by the place names which have not been changed and kōrero that has been adopted by other iwi. They have also appointed a kaitiaki for customary fishing permits, Ms Williams, despite Ngāti Raukawa not initially recognising Muaūpoko’s right to appoint.

⁵⁶⁹ At [163].

⁵⁷⁰ At [163].

⁵⁷¹ At [162(a)].

[995] Nevertheless, it is apparent that Muaūpoko's rights have been generally respected by Ngāti Raukawa iwi members, even at an organisational level. For instance, Mr Tamihana produced a letter from Te Rūnanga o Raukawa to DOC concerning mammal strandings, which referred to the area between Ngā Manu and Te Uamairangi being "provided" to Muaūpoko and falling outside the exclusive "domain" of Ngāti Raukawa.

[996] Mr Wilson described Muaūpoko's main area as the coastline between Ōhau and the Manawatū River, and said they were able to "move freely" in that area. When asked to compare the relationships of Ngāti Raukawa and Muaūpoko with Ōhau to Tangimoana, for instance their respective rights to fish in those areas, Mr Wilson said they were the same. Muaūpoko witnesses also referred to their observance of tikanga in relation to fishing and other active resource gathering on the beaches, as well as their imposition of rāhui. However, they generally accepted that it was appropriate that the hapū based at the specific location should be responsible for placing the rāhui. At an organisational level, MTA is also involved in resource management and other regulatory processes, particularly concerning the takutai moana around Horowhenua.

[997] While the iwi members gave evidence of fishing, whitebaiting, and collection of mahinga kai and resources beyond the Horowhenua, these are primarily isolated recreational activities or based on historical associations. Evidence was given of the exercise of their customary rights in the wider area such as fishing, isolated excursions to the south of the area to gather kaimoana, or visiting the burial caves of their tūpuna on Kapiti Island. The various excursions, such as Ms Wilson's description of bus trips to Pukerua Bay, and Ms Montgomery Neutze's description of trips to Kapiti Island, are evidence of activities in the area but not of occupation. Similarly, it was considered tika that Mr Wilson was called in on the finding of a koiwi disturbed in the construction to the south of the hearing area.

[998] Muaūpoko do not point to any current coastal marae within their claim area. Nevertheless, their marae, Kawiū and Kohuturoa, are relatively close to Hōkio beach. Historical sites for tauranga waka, such as the fishing stations, were identified in the area. Evidence was also given of the Muaūpoko waka coming from Lake Horowhenua down the Hōkio Stream in the 20th century. The narrowing and silting of the stream

has obviously made the bringing of waka up and down the rivers difficult in modern times.

[999] The indicia that may support exclusive use and occupation referred to by the Supreme Court are relevant, although the list is neither exhaustive nor cumulative.⁵⁷² The evidence of Muaūpoko to which I have referred reflects their use of the seascape in the relevant area in a way that is integrated or holistic.

Continuity from 1840 to the present day without substantial interruption

[1000] In accordance with my above assessment, I conclude that shared exclusive use and occupation has been maintained from 1840 to the present day in the area from the Hōkio Stream to Ngā Manu (Waitārere Forest). There is nothing to suggest that Muaūpoko's strong presence in the relevant area has been substantially interrupted by third parties.⁵⁷³

[1001] Muaūpoko are therefore entitled to CMT on a shared basis with both Taueki and Ngāti Raukawa, whose claims I have dealt with above.

Shared exclusivity with Muaūpoko

[1002] Both the majority and minority of the Court of Appeal in *Re Edwards* confirmed that it would be “unworkable” and inconsistent with the scheme of the Takutai Moana Act to allow two or more overlapping orders for CMT in the same area.⁵⁷⁴ However, the majority said a single grant of recognition of shared CMT could be made in favour of two or more groups in respect of a particular area, noting that:⁵⁷⁵

...where an area is used by two or more groups, the appropriate conclusion may well be that the two groups together meet the test, or that some broader group that includes the two applicant groups meets that test.

[1003] With that in mind, I now consider the overlapping claims as they relate to Muaūpoko.

⁵⁷² At [223].

⁵⁷³ See the section of this judgment on third-party use and occupation.

⁵⁷⁴ *Re Edwards* (CA), above n 16, at [439] per Cooper P and Goddard J; and [169] per Miller J.

⁵⁷⁵ At [425].

Muaūpoko and Mr Taueki

[1004] The claims of Ngāti Tamarangi and Muaūpoko are mutually supportive. There are strong whānau connections between the two groups and together they control and exclusively occupy the area from Te Uamairangi to Ngā Manu, albeit in different ways.

[1005] I am satisfied that Mr Taueki, on behalf of his whānau and iwi, is entitled to shared exclusive CMT with Muaūpoko in the relevant area.

Muaūpoko and Ngāti Raukawa

[1006] Mr Kiriona noted that the relationship between Ngāti Raukawa and Muaūpoko remains complex, and the “history with them is not always pretty”. However, Ngāti Raukawa still recognise and respect the rights put in place by their tūpuna to keep the peace between the two iwi. Mr Kiriona said that Muaūpoko were invited to participate in a recent hui, however that invitation was made at the discretion of Ngāti Raukawa as an expression of mana.

[1007] Mr Kiriona said that after the death of Te Rangihaeata (who had been living at Poroutawhao) in 1855, Muaūpoko attempted to expel Ngāti Raukawa, but they eventually came to an agreement. He agreed that peace-making continued to characterise and maintain the relationship between the iwi until about the 1960s. As a tangible example of this, he referred to a hei tiki that would be passed between the different iwi when they had tangi. That tradition continued from Te Whatanui’s time until the 1950s or 1960s, when the taonga was lost.

[1008] Mr Kiriona is involved with the Ngāti Raukawa iwi organisation and undertakes cultural assessments for various projects. He refers to the relevant tikanga rights at play in any assessment. He produced a copy of a Cultural Impact Appreciation Report commissioned by Waka Kotahi for the Ōtaki to Levin highway

consultation.⁵⁷⁶ In that report he explains some concepts of Māori customary law in the context of assessing overlapping interests by different groups. He said:

The different intensities of rights are conceptualised within our tikanga matrix and are summarised as follows: primary (by descent and residence), secondary (by descent but not residence), contingent (by descent with an intention to return) and permissive (by residence but no descent). These categories do not represent rankings or predominance for the purposes of absolute ownership; rather, they illustrate the broader tikanga matrix in which overlapping rights to land were acquired, lost or maintained.

[1009] Mr Kiriona acknowledged that for the area of the Ngāti Tamarangi claim, Muaūpoko ticked all the boxes in the tikanga assessment tool which he used in his cultural assessment, as did Ngāti Raukawa. These included presence of marae, urupā, kāinga, mahinga kai, recognition by others, wahi tapu, as well as historical occupation and sites.

[1010] In their closing submissions, Ngāti Raukawa recognised as a fall-back position, that the arrangements between Te Whatanui and Taueki (without conceding that the nature of the agreement was a peace agreement) could be viewed as a tikanga agreement. This is consistent with the pūkenga evidence regarding the adaptation of tikanga over time.

[1011] Such agreements reached prior to the determination of a CMT application have been recognised in other cases, such as *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, where an agreement was reached between seven competing applicants as to the manner in which the Court should award shared exclusive CMT.⁵⁷⁷ The Court adopted the terms of that agreement, noting that the mana moana agreement was “in itself a customary agreement in accordance with tikanga”.⁵⁷⁸ Most if not all of the applicants in that case were connected through whakapapa and whanaungatanga.

[1012] The pūkenga also note that an important tikanga Māori leadership skill that mana rangatira need is the ability “to weave or blend the mana of the various claimant

⁵⁷⁶ The document was published by the Ngāti Huia Collective and signed off by the following hapū: Ngāti Kikopiri; Ngāti Hikitanga; Ngāti Pareraukawa; Ngāti Huia ki Matau and Ngāti Huia ki Poroutawhao.

⁵⁷⁷ *Re Ngāi Tūmapūhia-a-Rangi*, above n 228, at [121]–[125] and [815].

⁵⁷⁸ At [128].

groups going forward”.⁵⁷⁹ They acknowledge that this is “a very challenging wero”. They recognise the particularly difficult challenge for the Hekenga iwi rangatira would be to implement “mana huihui” in the area by reaching out to include the Kurahaupō iwi in what is presently the ART Confederation.⁵⁸⁰ However, the inter-marriage between the two groups provides an existing “tikanga whakapapa connection and precedent to provide the impetus for mana huihui”.⁵⁸¹ The groups have also worked together on some matters, trying their best to implement tikanga Māori. The pūkenga cite the evidence of Mr Wilson around the finding of ancient tūpāpaku/koiwi or taonga and involving Muaūpoko. Mr Wilson had noted the need for everyone “to be a part of the equation to resolve those things and keep everyone safe”.⁵⁸²

[1013] However, Ngāti Raukawa denied significant intermarriage between themselves and Muaūpoko until recent times. Ms Selby, the present chairperson of the Ngāti Raukawa ki te Tonga Trust, also commented on the tense relationship with Muaūpoko over issues of commercial fisheries distribution. She said that despite many discussions and the intervention of a respected facilitator, the two iwi have been unable to agree since 2011. Ms Selby accepted that the negotiation process engaged in to date was as a tikanga dispute resolution process. However, numerous issues remain unresolved between Ngāti Raukawa on one side, and Muaūpoko and Rangitāne on the other. Therefore, they have resorted to taking the dispute to the Māori Land Court for determination, meaning it is now the outside a tikanga-based system.

[1014] The pūkenga note that mana huihui is about “mutually beneficial alliances for their very day to day existence and partly expressed through the concept of whanaungatanga”, emphasising relationships rather than the demarcation of interests.⁵⁸³ They further explained:⁵⁸⁴

The crucial element of mana huihui is that it required consent and acquiescence by all parties in the kawenata sharing arrangement. Unless

⁵⁷⁹ Pūkenga report, above n 44, at [695].

⁵⁸⁰ At [708].

⁵⁸¹ At [709].

⁵⁸² At [711].

⁵⁸³ At [713].

⁵⁸⁴ At [716].

parties agreed to share mana, there was no mana huihui. Mana huihui is contrasted with sharing resources or use rights which is not the same as sharing mana over an area or resource.

[1015] The pūkenga also refer to the following advice of Ngāti Raukawa rangatira Te Kahu o Te Rangi Rōpata regarding mana huihui:⁵⁸⁵

We all have shared history on traditional customs now lost in time immemorial — mana inherited, mana bestowed, mana lost and mana regained ... Unfortunately, the divisive nature of this [MACA High Court] process and a propensity for iwi to be reactionary to Crown policies and legislation that continually seek as to undermine our tikanga and the shared nature of iwi relationships, is always challenging. Unless we make sure we are proactive within the parameters of these Crown policies and legislations to enhance the relationships of iwi to iwi then we are doing our whanau, hapu and iwi a disservice.

[1016] Ngāti Raukawa’s recognition of the possibility of shared exclusive CMT and therefore recognising the mana of Muaūpoko in the rohe, subject to Muaūpoko satisfying the Court that they are entitled to CMT, is appropriate based on the evidence. Similarly, Muaūpoko’s recognition (and I include Mr Taueki in my comments on Muaūpoko) of Ngāti Raukawa rights demonstrates their mana — reflecting the mana huihui expressed in the peace-making of the 1830s.

[1017] Muaūpoko and Ngāti Raukawa have each demonstrated that they meet the tests for CMT in the areas specified above. I am satisfied that their rights in the relevant area is established on a shared exclusive basis. While there have historically been tensions between the iwi, which remain at the organisational level, the members of the two iwi have been living and working together in the shared rohe for many years at a local level. The foundational basis for their respective claims rest on different take, however this does not preclude the recognition of shared exclusive CMT, particularly given the history and peace-making which preceded their peaceable co-occupation. The relationship had ebbed and flowed, but by 1840 a state of ea had been reached. Also germane to this issue is the pūkenga’s reiteration that “tikanga Māori inevitably adapts and evolves in time and space”, but it does not stray from the underlying te ao

⁵⁸⁵ At [718]. It appears he was referring to the relationships between the Hekenga iwi, in particular between Ngāti Toa and Ngāti Raukawa, rather than the relationship between Ngāti Raukawa and Muaūpoko.

Māori values and principles such as whānaungatanga, whakapapa, wairuatanga, mana and manaakitanga.⁵⁸⁶ The pūkenga further explained:

The key ... with tikanga adaptation, as we highlight there, is [who is] influencing the change, [who is] controlling the change, the pace and it should be Māori changing that, not in respect of government policies and laws, and so on and so forth.

[1018] The evidence of Mr Kiriona for Ngāti Raukawa showed the respect and recognition of the underlying tikanga based rights and obligations of Muaūpoko. Mr Wilson, on behalf of Muaūpoko demonstrated rangatiratanga and respect for Ngāti Raukawa. While other iwi members suggested that the present-day relationship between the iwi at their respective organisational levels has difficulties, the evidence has established cooperation on the ground.

[1019] I am satisfied that Muaūpoko and Ngāti Raukawa together satisfy the statutory test, in that they hold the area (from the Hōkio Stream to the northern boundary of the Taueki claim at Ngā Manu) in accordance with tikanga, and have exclusively used and occupied that area consistently since 1840 without substantial interruption. They are entitled to shared exclusive CMT on that basis.

Te Ātiawa and Ngāti Toa and the Muaūpoko claim area

[1020] Te Ātiawa and Ngāti Toa make no CMT claim beyond Kukutauaki. While they did have a presence in the area from time to time, they did so in support of Ngāti Raukawa. Te Rangihaeata's presence at Poroutawhao and north was through his Ngāti Raukawa relations, who gave him shelter when he was fleeing colonial troops following the battles in the south. That is not to say there is not a high degree of co-operation between all iwi, particularly the ART Confederation in issues generally related to the Kapiti area. However, it is Ngāti Raukawa who have established the right to CMT in their claim area, together with Muaūpoko in the shared exclusive area specified.

⁵⁸⁶ At [727].

Tikanga not affected by CMT findings

[1021] The pūkenga’s evidence is that that the mana attached to the whenua did not disappear over time. While that may endure and remains unaffected at tikanga, Muaūpoko have not satisfied me that they “hold” at tikanga or exclusively occupy and use the area beyond the Hōkio Stream to Ngā Manu, for the purposes of the statutory test. Muaūpoko’s evidence showed that they fish and use resources in the wider area and continue to practice their tikanga, venerating their tūpuna and historical connections, as far down as Pukerua Bay (south of Whareroa). However, these are in the nature of isolated activities whether in a customary or recreational capacity, rather than demonstrating an integrated or holistic relationship with the seascape.

[1022] The evidence does not demonstrate a strong presence and intention and capacity to control the area beyond Punahau/Hōkio Stream. Muaūpoko use and occupy the hearing area in various ways and have ancestral interests which exist at tikanga. However, the recognition of those interests is outside this process and the Takutai Moana Act framework. Tikanga of course continues to operate outside this process.

Ngāti Raukawa and Muaūpoko: Next steps

[1023] I have concluded that the arrangements between Ngāti Raukawa and Muaūpoko were, at tikanga, in the nature of peace arrangements, as explained by the pūkenga in their report.

[1024] The arrangements for the holding of CMT cannot be finalised until each iwi have had the opportunity to kōrero with their constituents. In addition, in view of the fact that Ngāti Raukawa only recognise Muaūpoko between Te Uamairangi and Ngā Manu in their submissions (and it is unclear as to where they envisage the specific markers of those boundaries to be), this matter must be further discussed between Muaūpoko and Ngāti Tamarangi on the one hand and Ngāti Raukawa on the other, in a tikanga consistent process.

SEAWARD EXTENT OF CMT

[1025] All the applicants (except Mr Taueki, who seeks a seaward boundary of one kilometre offshore)⁵⁸⁷ seek CMT orders to 12 nautical miles out to sea. This is referred to as the “12 nautical mile limit” and extends from the baseline of the territorial sea at the mean high-water springs.⁵⁸⁸ The Attorney-General and the Seafood Industry Representatives say CMT to that distance has not been established on the evidence.

The law

[1026] The starting point is that before colonisation, all of Aotearoa New Zealand was held by Māori according to tikanga and customs, and “ownership” extended beyond the dry land to include the marine and coastal areas.⁵⁸⁹ The applicants’ tūpuna did not draw a sharp distinction between rights in land and water, consistent with their whakapapa to the natural world, in which waterways ran from the whenua to the sea. All the applicants have noted that the 12 nautical mile limit is an artificial limit imposed by the Takutai Moana Act that does not align with tikanga and te ao Māori.

[1027] Nevertheless, as the Supreme Court noted in *Re Edwards*, establishing the mana and control required to satisfy the CMT test is a practical question of fact and degree considered in light of the Act’s context and purpose. Because the seascape cannot be fenced off, built up, or occupied in the same way dry land can be, the indicia and intensity of a group’s use and occupation will be “distinctive to the seascape”.⁵⁹⁰

[1028] The concepts of sufficiency of occupancy and continuity developed by the Canadian Supreme Court have been adopted in New Zealand cases.⁵⁹¹ In *Tsilhqot’in Nation v British Columbia*, the Canadian Supreme Court was dealing with a territorial claim for Aboriginal title by nomadic and seminomadic groups over a

⁵⁸⁷ One kilometre is approximately equal to 0.539957 nautical miles. The seaward boundary of the marine and coastal area is defined in the Takutai Moana Act, s 9 as being “the outer limits of the territorial sea”.

⁵⁸⁸ Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 5.

⁵⁸⁹ *Attorney-General v Ngāti Apa* [2002] 2 NZLR 661 (CA) at [51].

⁵⁹⁰ *Re Edwards* (SC), above n 13, at [159].

⁵⁹¹ *Re Edwards* (CA), above n 16, at [420]. The statutory CMT test differs from the test for Aboriginal title in Canada which relies on establishing a sufficient, continuous and exclusive occupation from the time of sovereignty: *Tsilhqot’in Nation*, above n 239, at [25].

sparsely populated area of 1,900 square kilometres of land.⁵⁹² The Court noted that the “strong presence” on the land must be taken in the context of the culture and usages of the group.⁵⁹³ Nevertheless, it must manifest itself in acts of occupation that “could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship” of the group.⁵⁹⁴ Occasional passage alone might be insufficient to give rise to such presence.

[1029] Drawing on the Canadian jurisprudence, the majority of the New Zealand Court of Appeal noted that it is more difficult to demonstrate a “strong presence” in relation to marine areas compared with coastal areas. This is because of their nature and the “different ways in which such areas can in practice be used”.⁵⁹⁵ The further out to sea, the more difficult it may be to establish territorial rights. This is in comparison to places close to shore, such as inlets, where there is regular food gathering and use of resources.⁵⁹⁶ Occasional visits, for instance for the purposes of fishing, may be more akin to a use-resource right than a right of exclusive occupation — although actual physical occupation is not required.⁵⁹⁷

[1030] To recap the earlier discussion, the Supreme Court in *Re Edwards* noted that when considering whether an application group “held” the seascape, the focus was on examining the groups’ “integrated or holistic relationship with a seascape” at tikanga.⁵⁹⁸ This could be ascertained by reference to expressions of their rights, demonstrated through “acts of reverence, exploitation, control and memory”.⁵⁹⁹

[1031] The Supreme Court went on to say that “holds” suggests that in addition to the special relationship with the seascape and the carrying on of activities, mana over the area is claimed and exercised by the group. The practical expression of the group’s claim, take, or source of right will be a focus. Mana carries with it notions of control, although the Supreme Court warned against “the common law’s tendency to

⁵⁹² *Tsilhqot'in Nation*, above n 239, at [37] and [59].

⁵⁹³ At [38]. This is the approach which was adopted by the majority in *Re Edwards* (CA), above n 16, at [420].

⁵⁹⁴ *Tsilhqot'in Nation*, above n 239, at [39].

⁵⁹⁵ *Re Edwards* (CA), above n 16, at [422].

⁵⁹⁶ At [423].

⁵⁹⁷ *Re Edwards* (SC), above n 13, at [161].

⁵⁹⁸ At [140].

⁵⁹⁹ At [140].

disaggregate for the purposes of analysis”.⁶⁰⁰ It said that maintaining a spiritual relationship “with place” and carrying out activities in that place were themselves expressions of mana. Mana is the corollary of kaitiakitanga and is about “the way these things are remembered, maintained and done”.⁶⁰¹

[1032] The Supreme Court noted that “holds” requires a demonstration that the seascape was held in the past, but also that the tikanga relationship with the claimed area is a continuing one. Even if it had become impacted by forces such as colonisation, the claim might not have been lost (ahi mātaotao) but merely impaired (ahi teretere).⁶⁰²

[1033] The Supreme Court highlighted that occupation in the context of s 58 means control, rather than residence.⁶⁰³ Similarly, exclusive does not literally mean excluding all others, but making “extensive use of the space (in light of its nature and resources) coupled with an intention and some capacity to exert control to the extent permitted by law”.⁶⁰⁴ The Supreme Court’s focus was on the practical ways in which, for instance, kaitiakitanga might be demonstrated. It adopted the (non-exclusive) indicia set earlier in this judgment.⁶⁰⁵

[1034] The Supreme Court’s comments are consistent with Gwyn J’s analysis of the applicant’s evidence concerning the seaward boundary in *Re Te Hika o Pāpāuma Mandated Iwi Authority*.⁶⁰⁶ The indicia that the Judge found supported the grant of CMT further out to sea in that case included:

- (a) rāhui following deaths where the bodies had been swept out to sea, where there was no limit on the seaward extent of the rāhui;⁶⁰⁷

⁶⁰⁰ At [141].

⁶⁰¹ At [141] (original emphasis).

⁶⁰² At [142].

⁶⁰³ At [161].

⁶⁰⁴ At [161].

⁶⁰⁵ At [162] and [163].

⁶⁰⁶ *Re Te Hika o Pāpāuma Mandated Iwi Authority* [2024] NZHC 3745.

⁶⁰⁷ At [626].

- (b) voyages to the Hikurangi Trench which was established as an identified fishing ground lying 65 to 125 kilometres southeast of the Wairarapa Coast;⁶⁰⁸
- (c) catching fish which could only be found in deeper waters, as confirmed by the fish remains found in middens;⁶⁰⁹
- (d) examples of traditional methods of deep-sea fishing around the coast by reference to the Hikurangi Trench in the Uriti Bank;⁶¹⁰
- (e) naming the seabed and the archaeological recovery of hāpuka bones;⁶¹¹
- (f) current catching of hāpuka, groper, blue cod at the Uriti Bank beyond the 12 nautical mile limit;⁶¹²
- (g) evidence of kaitiakitanga including in the applicants' role as tangata/kaitiaki under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 which specifically outlines authority to issue customary fishing permits to 12 nautical miles;⁶¹³
- (h) holding commercial fishers to account regarding catch limits;⁶¹⁴ and
- (i) active involvement in the fisheries quota management regime through the 1992 fishery settlement and allocated quota.⁶¹⁵

[1035] The Judge noted that the identification of significant landmarks, imposition of rāhui, and exercise of kaitiakitanga might all constitute manifestations of mana and control.⁶¹⁶ She agreed that it might be possible to grant CMT up to 12 nautical miles for the whole of the area, allowing for less intensive use and occupation than would

⁶⁰⁸ At [627].

⁶⁰⁹ At [628]–[631].

⁶¹⁰ At [627], [629], [631] and [632].

⁶¹¹ At [624] and [631].

⁶¹² At [631].

⁶¹³ At [638]–[645].

⁶¹⁴ At [640].

⁶¹⁵ At [646].

⁶¹⁶ At [648].

be required in other parts of the takutai moana. This would be based on the combined evidence of fishing, exercising kaitiakitanga, using the sea as a place of passage, and exercising mana in various forms.⁶¹⁷

[1036] However, in that case, the Judge ultimately concluded that the evidence, “even taken as a whole and allowing for inference”, was patchy and not sufficiently consistent to demonstrate that the applicants presently held the outer sea area and had a “strong presence” out to 12 nautical miles, as required by the Takutai Moana Act.⁶¹⁸ Despite this finding, and noting that the evidence varied from applicant to applicant, she considered there were consistent elements which allowed her to conclude that the relevant sea area was held in accordance with tikanga to a distance of five kilometres out from the low-water mark.⁶¹⁹

[1037] In the *Re Edwards* decision of the Court of Appeal, Miller J agreed with the Attorney-General that the evidence of Ngāi Tai and Ririwhenua was insufficient to justify a CMT recognition order out to the 12 nautical mile limit.⁶²⁰ However, he clarified that:

This is not to suggest that CMT is confined to specific fishing grounds or other resources. It may extend to all the rohe moana exclusively occupied and used by an applicant group for purposes such as passage and navigation as well as resource-gathering. I have noted evidence that a group’s takutai moana includes areas adjacent to their land. There is also evidence that in Māori customary law, rights of control are also linked to resources, and most of the evidence about offshore use in this case concerned resources; in particular, fish. So the inquiry into CMT must recognise resource boundaries. It must further consider whether territorial authority extends to exclusive use and occupation of these resource areas...

[1038] The Court of Appeal referred the applications of Ngāi Tai and Ririwhenua back to the High Court to be reconsidered in relation to the setting of the seaward CMT boundaries at 12 nautical miles. In his reconsideration, Churchman J found that the applicants had in fact established CMT out to the 12 nautical mile limit.⁶²¹ He pointed

⁶¹⁷ At [650].

⁶¹⁸ At [651].

⁶¹⁹ At [652].

⁶²⁰ *Re Edwards* (CA), above n 16, at [319].

⁶²¹ *Re Jones* [2024] NZHC 1373 at [70].

to the evidence supporting a finding that they held the specified area in accordance with tikanga, which included:

- (a) recognition by Ngāi Tai’s neighbours of their right to impose rāhui and wāhi tapu in their rohe moana;⁶²²
- (b) their imposition of a rāhui which extended 48 kilometres out to sea in response to the eruption of Whakaari in 2019;⁶²³
- (c) their navigation out to offshore fishing grounds through lining up landmarks, particularly distant landmarks such as mountains;⁶²⁴
- (d) their exercise of kaitiakitanga over their rohe moana;⁶²⁵
- (e) their passage through the takutai moana out to Whakaari;⁶²⁶ and
- (f) a map specifying the location of three traditional fishing sites within their rohe moana, one around nine nautical miles and the other two close to 12 nautical miles out to sea.⁶²⁷

[1039] Related to use and occupation is “substantial interruption” by non-Māori, or other Māori groups when not exercising their shared customary rights.⁶²⁸ The Supreme Court noted that prior to te Tiriti, raupatu between Māori groups was the customary example of this kind of interruption. But abandonment of customary rights could also amount to substantial interruption of exclusive use and occupation. The Court noted the question is not who caused the interruption but “whether, in fact, a substantial interruption occurred”.⁶²⁹

⁶²² At [52] and [69].

⁶²³ At [53].

⁶²⁴ At [55], [61] and [65].

⁶²⁵ At [57] and [58].

⁶²⁶ At [59] and [60].

⁶²⁷ At [62]–[65].

⁶²⁸ *Re Edwards* (SC), above n 13, at [202].

⁶²⁹ At [202].

Seaward extent at tikanga

[1040] Mr Scott, for the Seafood Industry, submits that none of the applicants have explained how the 12 nautical mile limit had origins in tikanga. He says this was a Pākehā concept contrary to tikanga, and that there is little evidence of the 12 nautical mile boundary or the applicants’ actual control at 1840. He submits there have been no fishing grounds identified, minimal evidence as to how the areas were used for navigation, and little discussion of how the offshore marine areas were used. He says the only relevant evidence is that the applicant groups would cross the boundary to travel across the Cook Strait.

[1041] The applicants themselves point out there is no 12 nautical mile limit at tikanga, so the point is irrelevant — what the Court must examine is the evidence as to where the boundary might lie in terms of the legislation.

[1042] The applicants who seek the entire CMT zone out to 12 nautical miles are basing their applications on the position at tikanga. That puts no limits on the seaward extent of their rohe. However, for the purposes of CMT, these Māori customary rights must be put into the framework prescribed by the statute. I do not consider that the applicants need to explain how the 12 nautical miles had origins in tikanga, as suggested by Mr Scott.⁶³⁰

[1043] One difficulty under the CMT test is in demonstrating a “strong presence” in marine areas as opposed to coastal areas. However, combination of various indicia such as kaitiakitanga, imposition of rāhui, passage through the rohe moana, utilisation of clearly identified fishing grounds, and evidence of longstanding deep-sea fishing practices will often be enough.

⁶³⁰ A similar argument failed in *Re Te Hika o Pāpāuma*, above n 606, at [597]–[600].

Seafood Industry and Attorney-General on 12 nautical mile extent

Seafood Industry

[1044] The Seafood Industry opposes a grant of CMT out to 12 nautical miles, submitting that a sufficient level of control has only been demonstrated in respect of the close inshore coastal waters, particularly those near coastal settlements.

[1045] Mr Scott submits there is no available evidence to draw inferences that the applicants could demonstrate control of access out to the 12 nautical mile limit as at 1840. He contends that evidence of the use of fisheries in a particular area by the applicants is relevant, but does not of itself establish that the user had the right to control access by others. He notes that control of an area must be manifested through occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the exclusive stewardship, of the applicants.

[1046] In his submissions, Mr Scott argues that the applicants' evidence of fishing out any particular distance from shore with modern technology and techniques is, without more, only evidence of contemporary use. The developments in technology and changes to the underlying fish stocks means it is not possible to infer that fishing at any given location today is evidence that the area was fished prior to 1840, let alone that the necessary level of control of access to that resource was exercised at 1840.

[1047] Mr Scott argues that any inference as to how far off the coast the applicants were able to, and likely did, control access in 1840, should consider factors such as the size of the application area, the population size, weather, and sea conditions. Also relevant is the availability and abundance of seafood in the inter-tidal area and close coastal waters encompassing any adjacent reefs. He says it would be more difficult to demonstrate this level of control in relation to offshore marine areas visited only occasionally to fish, in comparison to close inshore coastal waters, particularly those near coastal settlements that could be (and were) observed, controlled, and used regularly.

Attorney-General

[1048] The Attorney-General submits that there is a lack of evidence supporting any applicant group controlling the takutai moana to 12 nautical miles, and good evidence that iwi considered the offshore area to be shared. She accepts that there is some evidence of use of marine and offshore areas for the purposes of navigation and fishing, and particularly access to Kapiti Island. However, she considers that there is insufficient evidence of regular use or a strong presence at particular locations from 1840 to today, to establish exclusive stewardship or control over those areas. The Attorney-General instead submits that the evidence of use and occupation, and exercise of authority and control, including in terms of kaitiakitanga and resource management, is focused on the foreshore, river mouths, and inshore fisheries.

[1049] The Attorney-General submits there is some limited evidence of the placement of rāhui and evidence that extends to the marine and offshore area, referring to the evidence of Dr Baker for Te Ātiawa. She also submits that the evidence of travelling significant distances offshore does not demonstrate regular use and control of the marine space offshore. The Attorney-General says that the evidence which described the coastal area as an “open highway” which was unable to be controlled or restricted, reflects the absence of control by any of the applicant groups.

[1050] Overall, the Attorney-General considers there may be sufficient evidence of shared use and occupation within the immediate inshore area, which she suggests would not exceed one nautical mile from the shore for much of the hearing area.

Relevant pūkenga findings

[1051] I have already summarised the pūkenga’s findings earlier in the judgment, but I recap them here insofar as is relevant to the determination of the seaward boundary.

[1052] The exercise of mana in respect of coastal lands and waters includes a spiritual dimension (karakia, placing rāhui), physical dimension (enforcing rāhui), kaitiakitanga dimension (in respect of taonga), use dimension (in respect of resources), and manaakitanga dimension (in sharing resources). The pūkenga refer to the findings of the Waitangi Tribunal around relevant factors for determining whether a waterway

is a taonga for a particular group. These include the intensity of the group's association with the waterway, such as whakapapa and ahi kā roa, the exercise of control and authority over the resource, and the fulfilment of kaitiaki obligations. Other indicia include identifying taniwha that reside in the takutai moana, celebrating or referring to the area in waiata and whakatauki, relying on the takutai moana as a source of food and materials, and traveling through or trading in the takutai moana. The practice of kawa in the common marine and coastal area, such as karakia and ensuring compliance with the tika (correct) ways of doing things, is also noted as relevant.

[1053] At tikanga, mana extends beyond the whenua out to sea. The pūkenga points to the finding of the 1921 Native Land Claims Commission in respect of the Napier Inner Harbour, that Māori rights were not confined to the mainland but extended as well to the sea where “deep-sea fishing grounds were recognised by boundaries fixed by [Māori] in their own way; they were well known, and woe betide any alien who attempted to trespass upon them”.

[1054] The pūkenga also affirm various means of demonstrating exclusive use and occupation that have been confirmed by the Courts, such as wāhi tapu, ringa kaha and rāhui, as well as aukati — the restriction of the passage of people across notional political boundaries.⁶³¹

General comments in relation to the hearing area

[1055] The evidence indicates that Māori from the Kapiti Coast navigated to distant Te Tau Ihu for, among other things, warfare, visiting whanaunga, fishing, and gathering resources. This appears to be an ancient passage which predates the Hekenga iwi. The evidence also supports navigation to that area for fishing in modern times.

[1056] However, unlike the seabed in *Re Te Hika o Pāpāuma Mandated Iwi Authority*, or indeed *Re Edwards*, the seabed along the Kapiti Coastline is shallow and of sandy or muddy composition, being only approximately 50 metres deep at the 12-kilometre mark. The exception is around Kapiti Island. Otherwise, there are no pinnacles, rocky

⁶³¹ Pūkenga report, above n 44, at [622]–[624].

features, or other contours on the seabed which often result in larger aggregations of fish. Because of this geology/bathymetry, there is virtually no evidence of identified deep sea fishing grounds such as those which have featured in other Takutai Moana Act applications. The great rivers, lakes, streams, coastal lagoons and wetlands of the area were generally the main places for mahinga kai/gathering of resources, fishing, and settlement, both by the Kurahaupō iwi and Hekenga iwi.

[1057] However, the area around Kapiti Island and the channel between Kapiti Island and the mainland, Te Rau o te Rangi Channel,⁶³² remains more regularly used and more readily lends itself to evidence demonstrating the elements of the CMT test. It was heavily used by Māori at 1840 for both trade and passage, when Kapiti Island was the stronghold of Ngāti Toa and the Hekenga iwi. It was the centre for Māori trade leading up to and during the 1840s, and has been used more recently for commercial tours and taking visitors to the island. Kapiti Island was also referred to regularly as a place for fishing, due to its rockier features and contours compared to the balance of the seascape. The island was important to the earlier tangata whenua as well as the Hekenga iwi, and continues to host people from both groups. Members of the applicant groups will travel to Kapiti Island for a variety of reasons, including to honour their tūpuna who are buried on the island, and to fish using their customary rights.

[1058] Mr Petrie for the Attorney-General comments on the structure and operation of New Zealand fisheries. There are two gazetted rohe moana adjacent to the hearing area,⁶³³ but there is no rohe moana in the hearing area itself. Nor is there any other management arrangement in place under the Kaimoana Customary Fishing Regulations or Fisheries Act, or areas designated as areas of customary special significance to any iwi or hapū in the area.

[1059] However, as the Attorney-General acknowledges, Ngāti Raukawa, Ngāti Toa, Te Ātiawa, Rangitāne and Muaūpoko all have authorised representatives who are able to issue customary fishing permits under the Fisheries (Amateur Fishing)

⁶³² Referred to as Rauoterangi Channel on the map at [418].

⁶³³ Namely Te Tai Hauauro and Te Atihaunui a Paparangi and Ngā Rauru.

Regulations.⁶³⁴ Records produced during the hearing of authorisations made by those representatives show that the total number of permits recorded from 2006 to 2016 in the Kapiti Coast was less than 100, with species taken including eels, toheroa, pipi, pāua, and other shellfish, as well as kina, lobster, rig, and snapper in lesser quantities.⁶³⁵ A “heat map” produced by Mr Petrie of fishing activity in the hearing area indicated that higher numbers of fish were taken from the northern end of the hearing area. Mr Petrie further notes the hearing area is part of a high-use zone for recreational fishing, with the highest use from November to Easter when the waters are warmer. Most of this fishing was reported to occur along depth contour lines adjacent to the shore, with slightly greater intensity north of Kapiti Island in the area roughly adjacent to Foxton.

[1060] Due to this high use, kaimoana (particularly shellfish such as toheroa and whitebait) have been seriously depleted in modern times. In addition, pollution from untreated waste, earthworks, development, and market garden run-off has damaged resources, particularly in the Horowhenua area where local Māori have taken steps to redress that damage.

[1061] Ngāti Apa, Te Ātiawa, MTA, Ngāti Raukawa, and Rangitāne all have commercial fishing quota and are represented in the Tauhauauru Iwi Fisheries Forum.⁶³⁶ This forum is a platform for direct engagement between tangata whenua and MPI on fisheries management issues and policy, in the area from Taranaki to Waikanae.

[1062] Also relevant is the Kapiti Marine Reserve, located in part of the moana between Kapiti Island and the mainland. The reserve was established in accordance with the Marine Reserves Act 1971. It comprises two areas — the eastern reserve

⁶³⁴ Fisheries (Amateur Fishing) Regulations 2013, regs 50 and 51.

⁶³⁵ It is important to note the limitations in the recording of authorisations made by authorised representatives at specified locations. Reporting on customary rights is not mandatory, meaning records held by MPI are not comprehensive. Permits issued for unspecified locations are not included. The records also do not indicate whether the permitted customary take was within the hearing area or from another site within the broader statistical area. Even if an authorisation is for customary take at a specified site, it is possible that some of the catch reported was taken at a different site outside the hearing area. Attribution is also difficult as the names of authorised representatives and affiliations were not included in the evidence produced for privacy reasons.

⁶³⁶ Ngāti Toa also have a commercial fishing quota under the Treaty of Waitangi (Fisheries Claims Settlement) Act 1992.

situated between Kapiti Island and the mainland (1,825 hectares), and the western reserve on the north-western end of Kapiti Island (342 hectares). Together these two portions cover an area of 2,167 hectares.⁶³⁷ The boundary of the reserve adjoining the mainland is a line between two points along mean high-water springs on boundaries to the north-west and south-west of Waikanae Estuary. The boundary along the Kapiti Island shoreline is set on the mean low-water springs tide line.⁶³⁸

Seaward extent findings

Substantial interruption by third parties

[1063] I now return to the issue of substantial interruption, in terms of its relevance to the seaward extent of the CMT claims. No evidence of third-party interruption in the moana in the nature of relevant infrastructure or activities was adduced.⁶³⁹ There is nothing to suggest that commercial or recreational activities substantially interfered with the applicant groups' use or occupation of the moana (to the extent of the seaward boundary determinations below) from 1840 to the present day. Whether an authorised activity amounts to substantial interference is a question of fact in each case.⁶⁴⁰

[1064] Mr Scott points to the evidence of: the whaling industry at Kapiti Island during the 1830s and 1840s; commercial fishing in the area in the early 20th century, with reports of extensive and prolific fishing grounds; a trawling operation in the Manawatū area by 1914; fishing continuing in the 20th century by commercial line fishers; and the Kapiti Marine Reserve formation and the restrictions imposed in 1991. Based on this history, he concludes that the fishing stocks have been reduced.

[1065] In *Re Te Hika o Pāpāuma Mandated Iwi Authority*,⁶⁴¹ there had been a significant commercial inshore fishery running since at least the 1930s, which involved trawlers operating from Wellington and Napier. Over many decades

⁶³⁷ The map is at [418] above.

⁶³⁸ Kapiti Marine Reserve Conservation Management Plan 1998. This records that DOC is responsible for the reserve and has input from the Kapiti Marine Reserve Committee which comprised half of iwi representatives nominated by the ART Confederation iwi and half from representatives of the community, scientific and local interest groups.

⁶³⁹ The works related to Foxton Port are considered in the section of this judgment on third parties.

⁶⁴⁰ *Re Edwards* (HC), above n 45, at [230].

⁶⁴¹ *Re Te Hika o Pāpāuma*, above n 606, at [577].

thousands of tonnes of fish were caught, with over 700 tonnes per annum still being caught in that application area along the northern Wairarapa Coast. The depletion of the fish stocks was held not to substantially interfere with the assertion of customary rights to fish and gather kaimoana in the rohe moana in accordance with the applicants' custom. Gwyn J noted that the evidence of the Seafood Industry had been that commercial fishing had a material impact on the size of fish stocks (biomass or abundance), resulting in a biomass now 30–40 per cent below that when commercial fishing commenced.

[1066] Mr Petrie, the Manager of Inshore Fisheries Central to Fisheries New Zealand, was also questioned by Mr Scott on the proposition that there was a general depletion in the size of fish stocks in the vicinity of 30–40 per cent in the present application area.

[1067] However, unlike in *Re Te Hika o Pāpāuma Mandated Iwi Authority*, in this case there was no evidence of significant commercial inshore fisheries, nor any rock lobster or pāua commercial fishing.⁶⁴²

[1068] There is no doubt that commercial fishing has had an impact on the applicants. That was confirmed by the evidence of many witnesses in this case, as was the consequent impact on their ability to fish and gather kaimoana for their own sustenance. Nevertheless, that did not deter Māori from continuing to assert their customary rights to fish and gather kaimoana in the rohe in accordance with custom, and exerting kaitiakitanga to preserve and recover (where possible) the stocks of kaimoana, particularly in modern times.

[1069] I therefore conclude that commercial fishing in this area does not give rise to substantial interruption of the applicants' rights in the application area.

Evidence of the applicant groups

[1070] Turning to the evidence of the applicant groups, a number of general points emerge.

⁶⁴² At [578].

[1071] The applicants' evidence, as discussed below, has focussed on the use of resources, activities, kaimoana collection and fishing, and manifestations of kaitiakitanga and mana in relation to inshore areas of the takutai moana. In particular, these have included beaches, the mouths of streams and rivers, and the sea immediately around those areas. Prior to the impacts of overfishing, commercial fishing, and pollution, these inshore areas were so bountiful in shellfish, coastal fish species, inanga, tuna, and other kaimoana, that most resource gathering activities occurred in the moana on the shore or close to it, rather than further out to sea. Similarly, the applicants' means of exercising control over their rohe moana — including rāhui, efforts to prevent or restrict access by members of the public, and acts of kaitiakitanga like clean ups — are almost exclusively undertaken in nearshore areas.

[1072] Many applicants referred to the historical passage by waka over the moana to places such as Kapiti Island and Te Tau Ihu, however this does not automatically translate into the manifestation of a significant physical presence in the seaward area. The use of an area for occasional passage may be relevant but, without more, is not sufficient to satisfy the elements of the CMT test. Additionally, evidence of fishing far out to sea, which included using tohu or landmarks such as maunga, trees, rocks, and fires to navigate to their respective fishing grounds, in most cases lacked the specificity required to determine how far out these fishing grounds were located, or how it was known that the areas belonged to a particular group.

[1073] The Attorney-General says the applicants' claims are unaffected by the Supreme Court's findings in *Re Edwards*. The Supreme Court's interpretation reinforced a concern with practical and physical manifestations of control, assessed in both tikanga and western terms. The Supreme Court made clear that what was meant by exclusive use and occupation was extensive use, along with an intention and "some capacity" to exert control, taking into account the nature of the takutai moana.

Ngāti Apa

[1074] As noted above, despite demonstrating a clear and longstanding historical relationship with the takutai moana, Ngāti Apa has not been able to establish the requirements for an order recognising CMT. However, if the test had been made out,

the extent of their CMT would not have extended more than around 500 metres out to sea.

[1075] Mr Shenton in his affidavit referred the Court to various evidence of activities by Ngāti Apa in the takutai moana, particularly from James G Wilson’s history of Rangitīkei published in 1914.⁶⁴³ Wilson’s account describes the area around the Rangitīkei River, where Ngāti Apa were present, as being a bountiful area in which “the streams, lakes and lagoons gave the patient fisher eels and Upokoro in plenty, and a visit to the sea or the mouth of the river generally resulted in plenty of kawai and shark”. Mr Shenton also referred to the harvest of eels during their migration out to sea in order to breed, and said their numbers remained plentiful in 1914. He commented that “even now, when this [migration] occurs, it is not difficult to get a dray load of these fish in a very short while”. Further, Wilson said:

There were times for fishing at sea, and, without doubt, the whole coast was carefully fished either by a line while standing in the surf, or a canoe outside, as was frequently seen from the coach as it travelled along the coast.

[1076] Ngāti Apa’s activities in the takutai moana remained close to shore, as evidenced by descriptions of line fishing from the beach, or by canoes that were close enough to be seen by the coach travelling along the coast.

[1077] Mr Shenton also noted Ngāti Apa had pā on either side of the mouth of the Rangitīkei Awa, and that Ngāti Apa’s permanent settlements were located inland along the rivers, whilst their seasonal settlements were based on the coast. Mr Huwyler said Ngāti Apa whānau continue to live in Tangimoana and access fisheries there, and they collaborate with Whanganui and Ngāti Raukawa in selling their annual catch entitlement from their fisheries settlement quota.

[1078] Mr Shenton explained, in response to questions by Mr Scott, that Ngāti Apa’s activities and presence in the takutai moana were primarily limited to the river mouths and beaches, which were used for gathering shellfish such as clams, toheroa, tuatua, eels and whitebait. Mr Shenton also accepted that the other species of fish identified by Ngāti Apa, such as frost fish and tarakihi, were able to be caught from the shore.

⁶⁴³ James G Wilson *Early Rangitikei* (Whitcombe & Tombs, Christchurch, 1914).

[1079] Ngāti Apa’s limited population in the area as at 1840, and the abundant food sources and mahinga kai at the coast meant it was unnecessary for Mr Shenton and Mr Huwyler’s tūpuna to go far out to sea in order to provide for their whānau.

[1080] Although there may have been voyages on seagoing waka to Te Waipounamu, the use of the moana for crossings was apparently common to all iwi in the Kapiti area. There is no evidence the passage to the Cook Strait was exclusively used or occupied by any particular group, nor were there manifestations of control of that passage. In addition, although Mr Shenton referred to use of puke or prominent raised areas near the coast to assist with navigation out at sea, there is no detail as to where the fishing grounds were.

[1081] In conclusion, even if Ngāti Apa had satisfied me as to their claim for CMT on the coastline, there is insufficient evidence to support a claim by Ngāti Apa to CMT out to the 12 nautical mile limit. They have not demonstrated that they held that area of the sea in accordance with tikanga, or exclusively used and occupied it from 1840 to the present day. The seaward extent of their claim would have been limited to 500 metres to one kilometre at most.

Muaūpoko

The claim

[1082] Mr Bennion for Muaūpoko points to the comments of the Supreme Court in *Re Edwards* that the court should be slow to “conclude that one set of important rights will override another — and, when that cannot be avoided, they will allow such override only to the extent necessary”.⁶⁴⁴ He refers to the strong cultural connection of Muaūpoko to the moana, and their recognition that there is no divide between the land and the sea. He says that this, along with their historic references to waka journeys across the Cook Strait, and their present-day deep-sea fishing and expressions of kaitiakitanga are sufficient to establish the “strong presence” required for CMT out to 12 nautical miles. Mr Bennion says the iwi presently demonstrate an ongoing

⁶⁴⁴ *Re Edwards* (SC), above n 13, at [113].

connection and use, such as to amount to exclusive use and occupation (on a shared basis with others who can satisfy the CMT test in the area).

[1083] Mr Bennion points to six factors listed by the Supreme Court, which Muaūpoko say they have satisfied, in order to demonstrate their qualifying relationship:

- (a) engaging in tikanga-based ceremonies in relation to the area, including the imposition of rāhui;
- (b) organising or being involved in fora, events or collective activities that reflect practical kaitiakitanga of the claim area — for example, environmental clean ups or public discussions in relation to the health of an aspect of the seascape;
- (c) educating members of the iwi or hapū about tikanga in the claim area — for example, by holding wānanga on the subject and facilitating practical exercises of kaitiakitanga in the area;
- (d) maintaining deep cultural and spiritual connection with the area — for example, through regular performance of karakia, and regular repetition of place-based kōrero, waiata and so forth at hui or other public occasions;
- (e) appointing kaitiaki and exercising powers under customary fishing regulations in relation to the area; and
- (f) establishing formal relations and maintaining ongoing consultations with public authorities having regulatory power over the area.

[1084] Mr Bennion emphasises that the lack of any record of divided sea areas associated with particular kāinga of Kurahaupō iwi, hapū, and whānau was due to the nature of the takutai moana in this area. It lacks embayments, reefs, close high hills and similar features, and is instead comprised of a wide-open coastline with volatile

river mouths. This means there is a lack of natural features available to help demarcate the rohe moana for each group.

[1085] Muaūpoko witnesses gave evidence of acts of reverence in the passage through the takutai moana. The kōrero handed down by their tūpuna included rituals surrounding waka journeys to Te Tau Ihu o Te Waka-a-Māui (the top of the South Island) and the naming of places and islands by reference to the acts of their tūpuna and taniwha in ancient times. The rituals, such as blindfolding, were also recounted by witnesses for the Hekenga iwi, although the evidence satisfies me that those practices were well-established by the time those iwi arrived.

[1086] There was evidence of Muaūpoko's cultural relationship with the moana and their continued relationship as demonstrated by the ongoing exercise of tikanga associated with fishing. Mr Moses gave particularly detailed examples of the inherited knowledge in managing fisheries stock, including the species of fish which do not return if fished out of an area, the need to harvest seasonally from mātaimai (shellfish fisheries), how to tell if shellfish could be paru, and how to order things on the boat to make sure lines and nets do not become tangled. He stated these practical things were learnt as part of the tikanga. Mr Moses also referred to the reciting of karakia on the beach to acknowledge the presence of tūpuna and atua.

[1087] As in *Re Edwards*, there is evidence of Muaūpoko using traditional techniques, such as use of landmarks, to navigate to fishing grounds out to sea. Mr Bennion refers to the account of an early settler, Thomas Bevan Jr, who stated that the highest peak of the Tararua Ranges, Mitre Peak, standing at 5,154 feet and not visible from the beach, was used by Māori fishermen to navigate to fishing spots out at sea.⁶⁴⁵ Bevan stated they would go out at dawn from the mouth of the Waikawa River until the peak appeared over the nearer range and they were out of sight of the coastal lands. Ngāti Raukawa claim that these descriptions by Bevan are more likely to be of their tūpuna, as he had a close association with Ngāti Raukawa.

⁶⁴⁵ Francis Selwyn Simcox *Otaki: The Town and District* (AH & AW Reed, Kapiti Coast, 1952) at 106.

[1088] Mr Moses spoke of Muaūpoko fishermen learning to triangulate from points such as Tararua or Tuteremoana to find a safe place to anchor. Mr Wilson also referred to the fishing stations along the coast and the use of fires on the beach as a navigational signal to those offshore. This was further supported by Ms Williams, who described the waka Haumarea being taken out in autumn for fishing. She said that those on the beach had to keep the fire going so those out on the waka could navigate back to shore.

[1089] Mr Moses described the Muaūpoko fishing stations as having fresh-water sources and waka launching places close by, so there was a supply of fresh water to take out to sea. He also noted the importance of knowing the currents, particularly around Kapiti Island and the Cook Strait, so that navigation several nautical miles out to sea remained accurate.

[1090] Before the arrival of the Hekenga iwi, Muaūpoko often made trips to Kapiti Island, with their strong ancestral links to the island clear from the evidence. The ancient and sacred wāhi tapu Wharekohu, situated at the southern end of Kapiti Island, is a Muaūpoko urupā, where ariki and rangatira are buried.

[1091] The evidence also shows that although many Muaūpoko left Horowhenua in 1824 after the battle of Waiorua, once the arrangement between Taueki and Te Whatanui was forged, many Muaūpoko settled back in the district and moved about that area. Mr Bennion refers to the historical account, as noted earlier, of Te Hākeke and his Muaūpoko followers landing at Kapiti Island around the time of the Battle of Kūititanga in 1839, having bartered with Europeans for goods in exchange for pigs.⁶⁴⁶

[1092] However, there is a general recognition of the mana of, in particular, Ngāti Toa on that island. For instance, Ms Montgomery-Nuetze was received by Ngāti Toa on her last visit to Kapiti Island. Nevertheless, Muaūpoko's rights to visit the island are recognised and honoured at tikanga, based on their historic association with the island, and in particular the presence of their tūpuna in the burial areas.

⁶⁴⁶ W C Carkeek *The Kapiti Coast: Maori History and Place Names* (Capper Press, Christchurch, 1978) at 62.

[1093] Mr Bennion suggests that the moana traversed from the Muaūpoko claim area diagonally to the island gives rise to evidence in support of CMT. However, the channel is outside Muaūpoko claim area and the occasional visits to the island for historical reasons or for fishing are insufficient to demonstrate the elements of control required for a CMT claim.

[1094] A substantial amount of evidence was given on behalf of Muaūpoko regarding activities in and the exercise of rights over the takutai moana close to shore. These activities included fishing and the collection of resources, as well as kaitiakitanga such as planting pīngao grass, along the Horowhenua coastline and at river mouths, particularly around Lake Horowhenua and the Hōkio Stream. The evidence of use and occupation of Muaūpoko in other parts of the takutai moana in the application area suggests isolated activities that are based close to shore. For instance, Mr Packer gave evidence of his enterprising foray into surf clam dredging, which took place near the shoreline at about 220m offshore below the tide watermark. Additionally, Ms Williams and Mr Murray both referred to summer bus trips of groups of Muaūpoko to Pukerua Bay to collect kina, pāua, mussels, and crayfish from the rocky coastline, which were brought back to distribute among the whānau.

[1095] The iwi has appointed Ms Williams as an authorised representative (described a kaitiaki in evidence) under the Fisheries (Amateur Fishing) Regulations. She issues permits covering the whole hearing area and beyond, but only for kaimoana for use for tangi on the Muaūpoko marae, both of which are situated in the Horowhenua.⁶⁴⁷

[1096] Mr Bennion also pointed to Muaūpoko's advocacy in relation to the proposed protection of the marine space around Kapiti, to ensure their customary fishing rights were recognised. However, the Kapiti Marine Reserve was largely the initiative of Ngāti Toa, Te Ātiawa, and Ngāti Raukawa, as I have outlined earlier in this judgment. Other significant kaitiakitanga activities of Muaūpoko, such as the Rivers Accord, are focussed on Lake Horowhenua and the related whenua and waterways.

⁶⁴⁷ This role is different to a tangata kaitiaki/tiaki under the Fisheries (Kaimoana Customary Fishing) Regulations 1998, which has a greater role in advocating for sustainability measures. Muaūpoko and other iwi have not appointed kaitiaki under the Kaimoana Regulations due to disagreements between iwi over their mana whenua status.

Assessment

[1097] Although some of the above evidence suggests the use of the moana beyond the nearshore, there are few illustrations of the indicia which would support a finding of CMT beyond an area extending a short distance offshore.

[1098] Muaūpoko have established an historic association with places visited across Te Moana-o-Raukawa by the naming of islands and kōrero about the crossing. Muaūpoko tūpuna navigated the passage across the strait to visit Te Tau Ihu. However, the passage was not controlled by Muaūpoko. It was used by a range of other groups, at least by 1840. There is no evidence that boundaries of any kind were in place, nor was there evidence of any efforts by specific groups to control or mark those boundaries as would indicate a group's mana in a particular deep-sea area, in the manner contemplated by the pūkenga.⁶⁴⁸

[1099] While Muaūpoko have provided evidence of their tūpuna navigating out to sea using landmarks, there is no evidence of specific fishing grounds which belonged or were regularly used by them, or other detail which might suggest the fishing was more than an isolated activity. The evidence lacks the requisite specificity to enable the Court to determine how far out to sea Muaūpoko fishermen were travelling, and that the area was held in accordance with tikanga and exclusively used and occupied since 1840.

[1100] There is no evidence suggesting Muaūpoko imposed rāhui out to sea during the period from 1840 to the present day, such as the rāhui evidence in *Re Edwards Whakatōhea (No 2)*.

[1101] The kaitiakitanga activities of Muaūpoko are largely focussed on the coastline and in the riverways, particularly around Lake Horowhenua and the waterways connected to it, where their waka were based.

[1102] Although Muaūpoko would have been travelling to Kapiti Island on a regular basis prior to the arrival of the Hekenga iwi, from the time the newcomers established

⁶⁴⁸ See above at [1053].

themselves in the area, Muaūpoko's relationship with the area beyond Horowhenua was disrupted. Although there is evidence of travel to Kapiti Island for trade in 1839, as well as a number of fishing trips and other visits to the island and across the application area more broadly, these are more in the nature of isolated activities rather than manifesting a "holistic relationship" with the moana beyond the area from the Hōkio Stream to Ngā Manu.

[1103] The evidence of a "strong presence" further out to sea in *Re Te Hika o Pāpāuma Mandated Iwi Authority* was described by the Judge as "patchy" at best, and did not support an award of CMT to the 12 nautical mile limit. In that case, this was despite evidence by the applicants of their knowledge of the location of a particular deep sea fishing area just beyond the 12 nautical mile, and use of that area for fishing from 1840 to the present day. The evidence here is even less.

[1104] However, in the area from Hōkio Stream to Ngā Manu, I am satisfied that Muaūpoko are entitled to shared exclusive CMT to one nautical mile seaward. They continue to use that area to the present day for fishing and gathering kaimoana, and use the resources as their tūpuna did, exercising their customary rights. The fact that they hold that area in accordance with tikanga is also shown by their consistent and impressive acts of kaitiakitanga, including in association with the local authorities and other groups. From that evidence I am also able to infer the requisite control to satisfy the exclusive use and occupation element of the test. This has continued from 1840 to the present day without substantial interruption. Together with Ngāti Raukawa and Mr Taueki, Muaūpoko have demonstrated a holistic presence and relationship with the seascape amounting to CMT to the extent of one nautical mile seaward in their shared rohe.

Mr Taueki

[1105] Mr Taueki for Ngāti Tamarangi seeks CMT to one kilometre out to sea. I have already determined that the claim for the rohe from Te Uamairangi to Ngā Manu has been established on the coastal whenua.

[1106] Mr Taueki's kōrero records that the mountain, the lake and the sea are all connected by ngā puna or freshwater springs that flow beneath the whenua and which

complete te hurihanga o te wai (the cycle of water). He refers to the spiritual, cultural, and physical connection of Muaūpoko and Ngāti Tamarangi to the takutai moana, describing the area as “part of [their] being”.

[1107] Although Mr Taueki’s evidence was largely focussed on claims to the whenua on the coast, the evidence supports Ngāti Tamarangi’s use of the takutai moana from the nineteenth century to the early to mid-twentieth century at least, including for the collection of kaimoana. Much of this evidence related to the collection of resources in waterways, the mouths of waterways, and on the beach. As with the evidence for Ngāti Apa, Mr Taueki emphasised the abundance of resources from “the nearby moana” with shellfish like pipi and toheroa being noted as a staple food for Muaūpoko. This was clear from the archaeological evidence, such as the middens, with Mr Taueki referring to Mr Chase’s traditional history report, which noted 70 such midden-heaps between Lake Horowhenua and the sea, comprised of pipi, tohemanga, and cockle shells.⁶⁴⁹

[1108] The references made to the coastal fishing stations at Te Uamairangi, Te Rere Maunga, and the Wiriwiri Stream lend further support to the hapū engaging in fishing and other resource gathering activities in the takutai moana close to shore. While the kinds of fish gathered by Ngāti Tamarangi, such as hāpuka (in early times), indicate that their customary fishing and usage extended beyond the Hōkio Stream to the wider takutai moana, the vast majority of their past and present activities are based in the nearshore. They relied on the abundance of tuna, whitebait, shellfish, and coastal fish species.

[1109] The kaitiakitanga exercised by Ngāti Tamarangi and the Taueki whānau has been largely centred on restricting use of Hōkio Beach, as well as in relation to Lake Horowhenua. This includes restricting people driving on the beach to prevent damage to pipi and toheroa breeding grounds, and the removal of a car dump. There is no specific evidence that the applicants imposed rāhui during the period from 1840 to the present day. They point to wāhi tapu in the dunes where the bones of their tūpuna are buried and other historic sites on the mainland coast and Kapiti Island.

⁶⁴⁹ L Chase “Muaūpoko Oral Evidence and Traditional History Report” (Wai 2200, #A160, Waitangi Tribunal, August 2015), at 3.

[1110] I am satisfied that Ngāti Tamarangi has CMT over the takutai moana along the one-kilometre strip of coast claimed. Mr Taueki has properly limited the area in which CMT is sought in his application, as there is little evidence that would support a claim further out to sea. Nevertheless, I am satisfied that he has demonstrated that Ngāti Tamarangi hold the area of the moana in accordance with tikanga and have exclusively used and occupied it from 1840 to the present day.

[1111] Accordingly, Mr Taueki is entitled to CMT orders in his claimed rohe to a seaward boundary of one kilometre.

Ngāti Raukawa

The claim

[1112] Ngāti Raukawa seek CMT to the 12 nautical mile limit. They say there are no territorial limits imposed between the land and the sea in te ao Māori, and those “arbitrary” lines are a Pākehā concept. Across generations they have traversed and used the rohe moana, including the deep sea well beyond 12 nautical miles, for instance as a “highway” for waka. They point to their waka going well out beyond the territorial limit, for fishing and establishing pātaka kai.

[1113] Ngāti Raukawa say that their mana and kaitiakitanga obligations reflect their interconnectedness with nature, pointing to the fact that species such as tuna and whitebait have a life cycle that take them from the Tararua Ranges through the Ngāti Raukawa whenua and rivers, out to the moana past 12 nautical miles. In addition, they point out that the inshore fisheries rely on healthy interconnected systems in deeper waters, which are part of the ecosystem that Ngāti Raukawa whakapapa to.

[1114] Mr Teira referred to the relationship between the settler Thomas Bevan and Ngāti Raukawa hapū. As I noted earlier, Muaūpoko also claim the benefit of Mr Bevan’s accounts, which referred to Māori going fishing and using the Mitre peak (in the Tararua Ranges) as a navigational point.⁶⁵⁰ He described how “in the early

⁶⁵⁰ Francis Simcox *Ōtaki: The Town and District* (AH & AW Reed, Wellington, 1952) at 106.

days”, Māori fisherman would go out to sea at dawn “from the beach at the mouth of the Waikawa River, till the Mitre peak appeared over the top of the nearer range”.⁶⁵¹ He said they would drop anchor there, out of sight of the coastal lands, and would return in the evening “with great hauls of fish”.⁶⁵²

[1115] Ngāti Raukawa submit that while the fisheries closer to shore may have been used more intensively, these examples show that their people engaged in deep sea fishing historically. Mr Karatea said a kaumātua told him that Māori used to go out on waka for deep sea fishing and would join up their canoes for the purpose of netting fish.

[1116] Mr Kiriona noted that to catch kingfish and tuna during the months of March and April, it was necessary to go out to 12 nautical miles and beyond. Mr Richmond also said that due to overfishing these days, there is now a need to go out to deeper seas to catch fish.

[1117] Ngāti Raukawa hold a commercial fisheries quota, and say this is a contemporary manifestation of their traditional customary fishing rights. They refer to the Waitangi Tribunal report on the Muriwhenua Fishing Claim, which found that Muriwhenua held an “inner band” out to 12 nautical miles, and observed that they would use the whole of the band for fishing, and exercised strong authority in tikanga, including having mana, within that area.⁶⁵³

[1118] Ngāti Raukawa also point to the High Court decisions of *Re Ngāti Pāhauwera* and *Re Edwards Whakatōhea (No 2)*, which recognised CMT to the 12 nautical mile limit.⁶⁵⁴ Ngāti Raukawa submit that there is nothing in the Supreme Court’s decision, to suggest it does not support the seaward extent claimed by the applicants. They say the decision emphasises the importance of the continuing integrated or holistic order under which the applicant community uses and controls the claim area, which they say

⁶⁵¹ Mitre Peak is recorded by the author as being at about 4,500 feet high.

⁶⁵² Mr Bevan would likely have been recounting stories from the mid to late 1800s. He lived from 1836 to 1913 and passed away in Ōtaki, Horowhenua.

⁶⁵³ Waitangi Tribunal *Muriwhenua Fishing Claim* (Wai 22, 1988) at 197.

⁶⁵⁴ *Re Ngāti Pāhauwera*, above n 319, at [598]; and *Re Edwards* (HC), above n 45, at [660].

is consistent with the evidence and submissions of Ngāti Raukawa supporting CMT out to 12 nautical miles.

[1119] Furthermore, Ngāti Raukawa submit that the assertion by the Crown that there is good evidence that iwi considered the offshore area to be shared is misplaced. The fact that more than one group may have fished offshore needs to be read in context of the evidence around the nature of the holding of the area, including the generally permissive approach taken by Ngāti Raukawa as being an expression of mana and manaakitanga.

[1120] Ngāti Raukawa adduced evidence of activities and uses that have been identified by the courts as indicia of holding in accordance with tikanga and exclusively using and occupying the takutai moana. For instance, evidence was provided of various rāhui imposed by Ngāti Raukawa from 1841 to the present day, with recent rāhui placed in 2020, 2022 and 2023. However, these rāhui were largely imposed on the beaches or over the awa and streams within their takutai moana. Although it was noted in evidence of witnesses such as Mr Tamihana that other rāhui had been placed in response to overfishing or health warnings, there was little evidence to suggest that these rāhui extended far out into the wider moana.

[1121] There is also some evidence of Ngāti Raukawa utilising fishing grounds further out to sea, although these were not identified in any detail. Mr Royal noted that during his grandparents' time, his whānau would not go out far to fish, as they lacked the resources to afford a boat and were able to catch fish off the beach. Mr Richmond said that traditionally they caught fish relatively close to shore, but they also exercised their tikanga in the deeper seas, with tikanga extending out as far as it needed to. As has been the case with all applicants, the witnesses for Ngāti Raukawa, particularly Mr Richmond and Mr Moore, emphasised the importance of species found inshore or in waterways and the mouths of waterways, including toheroa/tohemanga, tuna, pipi, and whitebait. Mr Moore's list of the species of kaimoana caught and the locations they were found in was restricted to nearshore and freshwater species in waterways, lakes, and beaches.

[1122] However, Mr Royal did note his tūpuna used to use three reefs that sit off the coast, which were fished at least six to seven generations back. He said they used to have an alloy dingy when he was younger which they would take out, with the three reefs off the Ōtaki River being good fishing spots. There was a close, middle, and far reef between one to four kilometres off the coastline, as well as a couple of reefs between Waiorongomai and Waitohu that were described as “good spots”. The reefs off Ōtaki were also referred to by Mr Richmond during his cross-examination by Mr Scott. However, no maps have been produced identifying the location of these reefs.

[1123] Mr Royal also recounted trips with his uncle out to around five kilometres or so offshore at depths of 30–50 metres, and stated his whanaunga David Royal would go out for days in his boat, including out beyond the 12 nautical mile mark. Similarly, Mr Kiriona noted he and his whānau would go out around the 12 nautical mile mark to fish for kingfish and tuna during March and April, as this was when the water currents, temperature, and migratory patterns of the fish were favourable to catching those kinds of fish. Mr Richmond noted the shallow depth along the shore meant you needed to go quite far out to get deeper-sea fish, and stated the impact of overfishing meant they needed to utilise the whole rohe moana (including the deeper seas) to be able to catch fish for sustenance and cultural purposes. However, again, references to specific fishing grounds and maps to indicate the location of fishing grounds were absent from the evidence.

[1124] Additionally, evidence was presented of passage through the takutai moana by Ngāti Raukawa. This included Mr Teira describing how their people would row from Foxton to the mouth of the Manawatū and out to sea in their longboats and flatboats, as well as waka in earlier times, to catch tāmure (snapper). He noted that waka were used to travel up and down rivers, along the coast, and out to sea, with waka being carved at sites in Ōtaki.

[1125] In respect of kaitiakitanga (beyond rāhui), Mr Royal noted the limits of what Ngāti Raukawa could do to protect their rohe moana, as they could not prevent commercial fishers from pillaging their fisheries within the confines of Pākehā law.

[1126] Those acts of kaitiakitanga were largely limited to areas close to shore, such as calling out overfishers harvesting tuatua on the beach or in the awa.

[1127] Ngāti Raukawa witnesses also emphasised certain tikanga when fishing such as returning the first catch to Tangaroa, reciting karakia, and not eating or cooking kaimoana on the beach. They also undertook certain spiritual practices, including undertaking tikanga whakahaere (ceremonies) to note the arrival of taniwha, such as Mukukai who appeared in the form of a log and is a tohu of good fishing.

[1128] Mr Tewera Henare for Ngāti Raukawa gave evidence of his involvement in the revitalisation of traditional waka building, navigation and fishing. He noted that the ancient waka were well-equipped for use in deeper waters and in particular for trade. He commented that a wharf had existed at the Ōtaki River mouth, and ships came up there to trade. Māori sent totara (for spas and masts) and muka muka (for rope) to Australia. Many of the ships belonged to Pākehā, but there were frequently waka sailings from there and from Te Awahou (Foxton).

Assessment

[1129] I am satisfied that Ngāti Raukawa's evidence meets the CMT test to one nautical mile out to sea in their rohe. While there is evidence of fishing out further to sea with a greater degree of specificity than the evidence of some other applicants, there remains a lack of particularisation, such as directions or maps, to help indicate where those deep-sea fishing grounds are. The evidence as a whole suggests the practice of deep-sea fishing was more of an isolated activity than contributing to a holistic and integrated relationship with the moana, as required to satisfy the elements of the CMT test.

[1130] While there were historically regular crossings by waka across Te Moana-o-Raukawa, these indicate use of the moana for passage rather than holding in accordance with tikanga or exclusive use and occupation since 1840. Nor can I infer continuity to the present time. The passage was also used by all of the Hekenga iwi.

[1131] The evidence suggests the integrated and holistic relationship with the takutai moana required to satisfy the CMT test is limited to the foreshore, waterway mouths, and the moana closer to shore. Relevant to this is the extensive collection of mahinga kai, fishing, rāhui, kaitiakitanga and Ngāti Raukawa making passage through their rohe moana along the coast to visit these different areas. It is around the rivers, beach and inshore that the physical manifestations of both holding at tikanga and exclusive use and occupation are demonstrated.

[1132] I find that Ngāti Raukawa are entitled to exclusive CMT out to one nautical mile from the territorial sea baseline. In parts, this is on a shared basis with Ngāti Tamarangi and Muaūpoko, as well as Te Whānau Tima and Te Ātiawa as described below.

Mr Tima

The claim

[1133] Mr Tima submits that following the Supreme Court’s decision, the application area must be viewed as one holistic area in which the applicants hold rights and are subject to responsibilities. He submits that an approach which looks at each section of an application area by gridline or kilometre fails to appreciate how those rights and obligations change throughout the area as a holistic whole.

[1134] Mr Tima notes that for offshore fisheries, ahi kā requirements might be satisfied by occasional use during the relevant seasons, and that due to the nature of the seascape, indicia of intensity of use and occupation will be different in scope and scale depending on distance from dry land, location of resources, current patterns, and other factors. Counsel refers to the findings of Gwyn J that CMT could be granted out to 12 nautical miles, allowing for less intensive use and occupation than would be required in other parts of the common marine and coastal area.⁶⁵⁵

[1135] Te Mateawa and Te Whānau Tima, have been at Kuku Beach from around the 1830s to the present day. Through Mr Tima and his tūpuna, they have maintained a

⁶⁵⁵ *Re Te Hika o Pāpāuma*, above n 606, at [650].

continuous and significant presence in the takutai moana. They have occupied and used the area consistently since 1840. Much of Mr Tima's evidence is focussed on activities in nearshore areas, namely at Kuku Beach and the Ōhau River. This includes gathering tuna, inanga, driftwood, toheroa, and the imposition of a rāhui over part of the Ōhau River following the death of a whitebaiter who fell into the awa. The shell middens north of the Ōhau River indicate that Te Whānau Tima's tūpuna were harvesting shellfish for many generations.

[1136] Nevertheless, in the 1970s and 1980s, Mr Tima fished along Kapiti Island, Pukerua Bay, and up to Hōkio while he was working fishing commercially. He used the traditional knowledge handed down to him, and which he now passes on to his nephews, who continue to use traditional techniques to navigate to traditional fishing spots. This involves lining up big trees on the hills inland, as well as the peaks, hills and valleys to navigate to points "a long way offshore". These techniques were relied on because their boats did not have "flash navigation equipment".

[1137] The evidence suggests fishing along the coastal areas, specifically noting Kapiti Island and Pukerua Bay, which are outside Mr Tima's claim area. While there is evidence of Mr Tima's hapū and whānau continuing to fish further off shore, this is evidence of isolated activities and there is little evidence of specific fishing grounds.

[1138] While there was no evidence of rāhui out to sea, Mr Tima's kōrero about his experiences with taniwha manifestations in the inshore waters support his strong connection with the takutai moana in the coastal area.

[1139] In terms of the types of kaimoana collected by Mr Tima's hapū up until the present day, these were almost entirely coastal species, other than hāpuka.

[1140] As well as being a kaitiaki under the Fisheries Regulations, Mr Tima gave evidence of the careful kaitiakitanga he exercised in his efforts to protect Kuku Beach from being polluted or damaged by vehicles.

Analysis

[1141] I am satisfied based on Mr Tima's evidence that he is entitled to CMT to a seaward extent of one nautical mile. Mr Tima's whānau, hapū, and his tūpuna have had a strong presence at Kuku Beach from 1840 to the present day. They have fished out to sea from Kuku Beach, and made extensive use of the resources and mahinga kai. Their mana whenua meant they also exercised mana moana over the sea in that area.

[1142] While I accept that less intensive use and occupation is required for establishing CMT in the moana further out to sea, there is a lack of specific detail as to how far out Mr Tima's hapū and whānau have fished, and of other supporting factors, such as seaward rāhui and specified fishing areas. Therefore, I am not satisfied that they have established the required holistic and integrated relationship with the takutai moana beyond one nautical mile seaward. Like the other applicants, Te Mateawa and Te Whānau Tima's use and control of the takutai moana is concentrated in nearshore areas, with fishing further out to sea occurring on a less frequent basis, and often either outside the application area, or in a non-customary and commercial manner. Therefore, they have not demonstrated that they hold that extensive area of the moana in accordance with tikanga, nor that they have exclusively used and occupied it from 1840 to the present day.

[1143] I find that Mr Tima, on behalf of his whānau and hapū, is entitled to shared exclusive CMT out to one nautical mile with Ngāti Raukawa.

Te Ātiawa and Ngāti Toa

Te Ātiawa's claim

[1144] Te Ātiawa seeks CMT to 12 nautical miles from the mainland coast in the area from Kukutauaki to Whareroa, and to 12 nautical miles seaward from Kapiti Island. They seek shared exclusive CMT with Ngāti Toa in the coastal marine area immediately surrounding Kāpiti Island, including the islands of Motungarara, Tahorameaurea and Tokomapuna.

[1145] In her brief of evidence, Dr Baker noted that mana moana extends offshore from where you have land-based ahi kā or mana whenua, and that if something were

occurring in the moana within your rohe, you would naturally have a responsibility to act. Like other witnesses, Dr Baker noted that the limitation of 12 nautical miles does not exist in te ao Māori. She said that if an incident occurred 12 nautical miles or more off the coast, it would be the responsibility of Te Ātiawa to respond to that incident, as kaitiaki.

[1146] Dr Baker described mana moana, and by extension kaitiaki responses, as being very contextual and dependent on the impact of activities across a rohe. She noted that activities or events as far afield as the Manawatū River remained of huge significance to Te Ātiawa, despite the Manawatū not being in their rohe, as the sediment of the river had implications for those downstream. Dr Baker also noted that it was not easy to draw a firm line to define the boundaries of your mana moana, as it is dynamic and extensive.

[1147] Dr Baker referred to rāhui that had been applied since the time her tūpuna became mana whenua and mana moana, and asserted that they had never been challenged by other iwi in imposing rāhui and expressing their rangatiratanga in this way. She said multiple rāhui had been imposed in her lifetime for people who had passed, when there had been fish deaths, to address toxicity in the environment, or to restrict particular methods of catching fish. However, the specific examples provided largely related to activities in the Waikanae River mouth, and in the case of the whitebaiting rāhui, were imposed under regulations effective in inshore areas. There was no indication of significant rāhui imposed that extended far out in the moana, such as the specific extent of the rāhui to Whakaari/White Island identified in *Re Edwards*, which was observed by all. Other manifestations of kaitiakitanga, such as Te Ātiawa's Kaitiakitanga Plan and Taiao Unit, are also focussed on freshwater bodies.

[1148] In terms of the types of kaimoana caught and gathered by Te Ātiawa, Dr Baker's evidence made clear this was not just limited to shellfish and other kaimoana found on beaches and in waterways, but also fish found further out to sea such as hāpuka and cod.

[1149] I have already detailed the evidence that Mr Barrett gave regarding Te Ātiawa's connection to and activities on and around Kapiti Island, which he described as their

Motu Tapu (sacred island). He also noted the conservation efforts in which he has been involved on behalf of Te Ātiawa, including the establishment of the Kapiti Island Marine Reserve. Parts of the island had been deliberately excluded from the Marine Reserve to enable Ngāti Toa and Te Ātiawa to continue to undertake their customary fishing practices. Mr Barrett also referred to the various trading activities that occurred in their rohe moana from 1840, including the whaling industry and the flax trade, with Kapiti Island central to both. He noted that once the flax trade faded, most hapū and whānau based on the island moved back to the mainland, although a handful of Ngāti Toa and Te Ātiawa remained, with the island regularly used as a source of kai on a customary basis.

[1150] Mr Barrett described using landmarks to identify where they were to locate various fishing spots, which included lining up specific peaks with specific trees or hills. He stated these were tohu which were followed and passed down by his uncles, especially for fishing between the island and the mainland. He said that if they were fishing the mid-channel, they would line up the peaks on the Tararua Ranges down as far as the Wainui and Kapakapanui and combine those with markers on Kapiti Island to show where certain spots were. The further out you went, the more important the peaks were. Mr Barrett noted there were several spots around Kapiti Island that you would line up to catch certain species of fish, such as tarakihi at Tokohake and Tokoaita (rocky outcrops on the northern end of the island), and Kahu o te Rangi. He remarked that there were also markers for the western side of Kapiti, out to sea, where they would line up points of reference on Te Tau Ihu and Kapiti Island, which would enable them to get into a good position for fishing if the conditions were favourable.

Ngāti Toa's claim

[1151] When considering Te Ātiawa's application for CMT, it is also necessary to consider the evidence of Ngāti Toa. Mr Barrett took the view that the mana moana over the takutai immediately surrounding Kapiti Island is shared by both Te Ātiawa and Ngāti Toa Rangatira.

[1152] Mr Pomare also noted statements from Matua-a-Iwi Solomon which, although mostly detailing fishing activities in the nearshore, included him saying there was no

doubt in his mind Ngāti Toa would have gone beyond the proper fishing grounds around 12 to 15 miles out to sea.

[1153] Ngāti Toa also gave evidence of their tūpuna sailing beyond the 12 nautical mile mark in the passage to Te Tau Ihu.

[1154] Ngāti Toa's participation in the whaling industry was highlighted, as well as their involvement in trade, particularly the flax trade. In particular, Dr Te Taku Parai noted Te Rauparaha charged levies for ships anchoring in the area, a manifestation of his mana and rangatiratanga over the rohe moana. The evidence confirms that although many Ngāti Toa left the motu after the whaling and flax industries declined, those such as Te Rangihiroa and his whānau continued to live there and maintained a Ngāti Toa presence. More recent evidence of their strong presence on Kapiti Island includes their involvement in the governance of the island and surrounding moana, as well as commercial transport to and from the island in modern times.

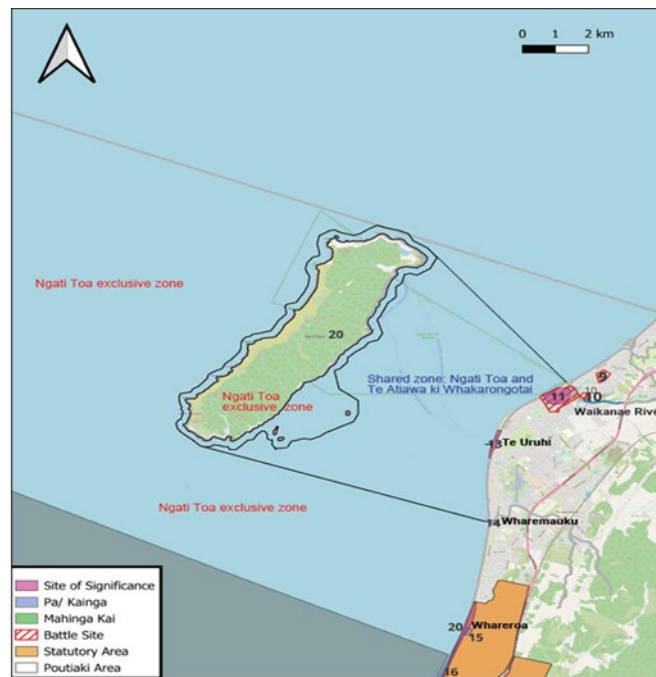
[1155] Ngāti Toa's kaitiaki role in relation to Kapiti Island is recognised in their Treaty settlement legislation, which also resulted in the creation of the Poutiaki Plan and the Cook Strait Forum. These are means by which Ngāti Toa work with Crown agencies and councils in monitoring and managing the Cook Strait. Mr Elkington is appointed as a kaitiaki under the Fishing Regulations.

Assessment

[1156] I have found that Te Ātiawa are not entitled to CMT in relation to Kapiti Island, but left for consideration here their claim to the moana between the island and their rohe on the mainland.

[1157] In view of my findings in relation to Kapiti Island, it follows that I am not satisfied Te Ātiawa have established a right to CMT in the moana on the sides of the island outside this channel. While there may have been evidence of fishing on the sides of the island, these were isolated activities. However, the position is different in relation to the side of the island which faces the mainland. In that area, Ngāti Toa recognise Te Ātiawa's right to shared exclusive CMT over Te Rau o te Rangi Channel,

bounded by points at the Waikanae River, Wharemauku, and Kapiti Island, as set out in the map attached to their closing submissions:



[1158] Te Rau o te Rangi Channel, was regularly used due to its strategic position, in particular by Ngāti Toa, Te Ātiawa, and Ngāti Raukawa after the battle of Waiorua. That has continued down to the present time particularly in relation to Ngāti Toa and Te Ātiawa.

[1159] This is also supported by the evidence of Te Ātiawa as to its holding of the mainland coast in that area in terms of CMT, while Ngāti Toa claims to hold Kapiti Island's takutai moana. Both have used the channel consistently for the purposes of commerce — initially in relation to trade and more recently for tourism purposes. The fact that the channel is some 5.5 kilometres wide allows the physical manifestation of control to more easily be established, given the regular commuting between the island and the mainland. This contrasts with the much longer distance to Te Tau Ihu from the other parts of the coast. While other applicants have travelled to the island, this is not on a regular basis and is largely based on historical connections. For instance, as noted above, when Ms Montgomery-Nuetze of Muaūpoko took a group to the island she notified Ngāti Toa beforehand and met with them on arrival.

[1160] As well as controlling the visitors to the island (by providing commercial services) together with Ngāti Toa, Te Ātiawa also gave evidence of fishing with more particularity, including fishing “mid-channel”, as described by Mr Barrett.

[1161] Ngāti Toa led the establishment of the trade enterprises on and around Kapiti Island, including the imposition of tolls on European ships. Te Ātiawa were involved in this trade, both on the island and the mainland, and regularly used the moana to travel between the two points. Historically, this was in the context of the whaling and flax trades.

[1162] Both Te Ātiawa and Ngāti Toa have established commercial tourism operations from time to time to take visitors to the island. Mr Barrett is presently involved in an operation which promotes eco-tourism. He has whakapapa to both iwi, and while he spoke for Te Ātiawa at this hearing, he was strongly in support of Ngāti Toa having the mana on the island at Ngāti Toa’s Treaty claim hearings. That is an indication of the interwoven, and indeed confluence, of whakapapa, described by Ms Pomare and Mr Barrett in particular, which I have referred to earlier in this judgment.

[1163] The physical manifestations of the control of those iwi over the channel is also demonstrated today by their exercise of kaitiakitanga, including their involvement in the Kapiti Marine Reserve, and their cooperation over the commercialisation of the tourism to the island. Their general mutual recognition of each other’s rights amounting to their respective and joint areas of CMT (although they disagree in some parts) reinforces these physical manifestations. Taken together, this demonstrates a clear holistic and integrated relationship by both iwi with Te Rau o Te Rangi in the area described.

[1164] While Te Ātiawa has indicated they seek exclusive CMT to 12 nautical miles seaward from their coastal claim area points, I am not satisfied that they have met the elements required under the CMT test on an exclusive basis in the channel. It is both Ngāti Toa and Te Ātiawa who control the channel, and one cannot do so without the other. It was Te Rauparaha who spearheaded the trade which provided a significant presence for Ngāti Toa, supported by Te Ātiawa from 1840. Furthermore, while Mr Barrett is operating the tour company which crosses to Kapiti Island, he cannot do

so without the cooperation and consent of Ngāti Toa to people coming to the island. Ngāti Toa largely control the access to the island through their arrangements with DOC.

[1165] There is no inconsistency in awarding Te Ātiawa CMT on the mainland and in the channel, but not on Kapiti Island itself. Ngāti Toa's mana on the island is recognised by the Hekenga iwi and Muaūpoko. For the reasons set out earlier in this judgment, Te Ātiawa's evidence, when taken together with Ngāti Toa's evidence, precludes recognition of CMT in favour of Te Ātiawa on the island. Nevertheless, Te Ātiawa and Ngāti Toa have together been involved in kaitiaki activities and commercial enterprise in using the channel.

[1166] This is recognised by Ngāti Toa. While Te Ātiawa formally disputes the recognition of Ngāti Toa through shared exclusive CMT in the channel, the evidence indicates that is not the case on the ground. There is no dispute between those people who are actually demonstrating the elements of holding in accordance with tikanga and exclusive use and occupation of the channel. For instance, Mr Barrett gave evidence for Te Ātiawa as to his involvement in kaitiakitanga and conservation in the channel, however his evidence indicated that he did this with Ngāti Toa's approval. This is explained by the close whakapapa connections between the two iwi, and Ngāti Toa's recognition of Te Ātiawa's mana in the channel, as well as the recognition of the mana of Ngāti Toa by Te Ātiawa (for instance in the evidence of Mr Barrett). It would not make any sense to draw a notional line and award the coastal area, along with the moana to only a midpoint in the channel, to Te Ātiawa. The channel is used for passage from point to point, not to just to the midpoint. For similar reasons to those given in relation to the shared boundary area at Whareroa, I am satisfied the two iwi share exclusive CMT in the channel from Kapiti Island across to Wharemauku to the Waikanae River.

[1167] In relation to the moana outside the channel, the evidence satisfies me that Te Ātiawa are entitled to CMT to an extent of one nautical mile seaward. Historical evidence of use of Te Moana o Raukawa for passage does not give rise to an integrated holistic relationship with the passage. However, the evidence supports consistent extensive use of the inshore coastal area for gathering mahinga kai and other resources,

as well as acts of kaitiakitanga and working with local government concentrated in the coastal inshore area. Rāhui, such as that established for whitebaiting, generally relate to the inshore coastal area and awa. Mr Barrett gave evidence of his fishing and particularised places in the channel, but otherwise the fishing undertaken further offshore was more in the nature of isolated activities.

[1168] As a result, I find that Ngāti Toa and Te Ātiawa, have provided evidence such as to support a recognition of shared CMT in the channel area. Pending the resolution of Ngāti Toa's claim through the Crown engagement pathway, the arrangements between the iwi for the holding of CMT will be dealt with in the same manner as I have outlined above with respect to the resolution of the shared boundary area.

[1169] Te Ātiawa are entitled to CMT to a distance of one nautical mile in their claim area outside the channel, and that area is shared in part with Ngāti Raukawa and at the boundary at Whareroa with Ngāti Toa.

Conclusions on overlapping claims seaward

[1170] I conclude that, apart from the channel and Mr Taueki's claim, CMT is recognised to one nautical mile seaward across the application area. This is consistent with the evidence of Mr McClean (for Ngāti Toa) on the terms of a voluntary agreement with commercial fishers not to trawl within one nautical mile of the mainland, from Pukerua Bay to the Ōtaki River. This also reinforces the importance of inshore fisheries for customary purposes.

TE WHAKATAU | THE DECISION

[1171] For the reasons set out above, I have concluded that the applicants have met the test for CMT in the following areas:

- (a) Exclusive CMT for Te Ātiawa over the takutai moana from Whareroa to Kukutauaki, subject to shared exclusive CMT:
 - (i) with Ngāti Toa at the Whareroa boundary (if they are granted CMT for that area through the Crown negotiation pathway); and
 - (ii) with Ngāti Raukawa at the Kukutauaki boundary.
- (b) Exclusive CMT for Ngāti Raukawa over the takutai moana from Kukutauaki to the Rangitīkei River, subject to shared exclusive CMT:
 - (i) with Te Ātiawa at the Kukutauaki boundary;
 - (ii) with Mr Tima from the Ōhau River to the Waikawa River;
 - (iii) with Muaūpoko over the takutai moana from the Hōkio Stream to Ngā Manu (at the north-western corner of the Waitārere Forest); and
 - (iv) with Mr Taueki over the takutai moana from Te Uamairangi to Ngā Manu (at the north-western corner of the Waitārere Forest).
- (c) Shared exclusive CMT for Muaūpoko over the takutai moana:
 - (i) with Ngāti Raukawa from the Hōkio Stream to Ngā Manu (at the north-western corner of the Waitārere Forest); and
 - (ii) with Mr Taueki from Te Uamairangi to Ngā Manu (at the north-western corner of the Waitārere Forest).

- (d) Shared exclusive CMT for Mr Taueki over the takutai moana from Te Uamairangi to Ngā Manu (at the north-western corner of the Waitārere Forest) with Muaūpoko and Ngāti Raukawa.
- (e) Shared exclusive CMT for Mr Tima over the takutai moana from the Ōhau River to the Waikawa River with Ngāti Raukawa.

[1172] The seaward extent of the various CMT areas to be held as exclusive and shared exclusive CMT as indicated above, is as follows:

- (a) For Muaūpoko, one nautical mile out to sea from the mean high-water springs from the Hōkio Stream to Ngā Manu (at the north-western corner of the Waitārere Forest).
- (b) For Mr Taueki, one kilometre out to sea from the mean high-water springs running from Te Uamairangi to Ngā Manu (at the north-western corner of the Waitārere Forest).
- (c) For Ngāti Raukawa, one nautical mile from the mean high-water springs running from Kūkūtauaki to the northern bank of the Rangtīkei River.
- (d) For Mr Tima, one nautical mile from the mean high-water springs running from the Ōhau River to the Waikawa River.
- (e) For Te Ātiawa:
 - (i) from the Waikanae River to Wharemauku on the mainland across the Te Rau o Te Rangi Channel to Kapiti Island; and
 - (ii) one nautical mile from the mean high-water springs on the claimed mainland coast not abutting the channel.

[1173] In the case of shared exclusive CMT between Te Ātiawa and Ngāti Toa, further consideration is required as to the holding of CMT pending resolution of the Ngāti Toa

Crown engagement application. Similarly, in the case of shared CMT between Muaūpoko, Mr Taueki, and Ngāti Raukawa further consideration is required as to the holding of the title. Consideration also needs to be given to the further steps required to be taken in relation to the surveying of the Hōkio Stream mark. In relation to the iwi applicants, I am aware they will need to discuss the matter with their associated hapū, and further consideration needs to be given to the exact definition of the boundaries.

[1174] To that end, the Registrar will set down a conference to discuss these matters, including dealing with the possibility of a further report from the pūkenga on the issues. The determinations are made as outlined above, but I make no orders at this stage.

[1175] Having been given the opportunity to review the judgment, particularly in relation to whakapapa, the parties identified a number of errors and omissions. The judgment incorporates the parties' feedback, and corrects errors or omissions pursuant to r 11.10 of the High Court Rules 2016.

Solicitors

Kāhui Legal, Wellington
Bennion Law, Wellington
Whāia Legal, Wellington
Oranganui Legal Limited, Paraparaumu
Crown Law, Wellington
Buddle Findlay, Wellington
Black Law, Nelson
Innes Dean Lawyers, Palmerston North
Chapman Tripp, Wellington
Hockly Legal, Auckland

ATTACHMENT 1 — AGREED CHRONOLOGY

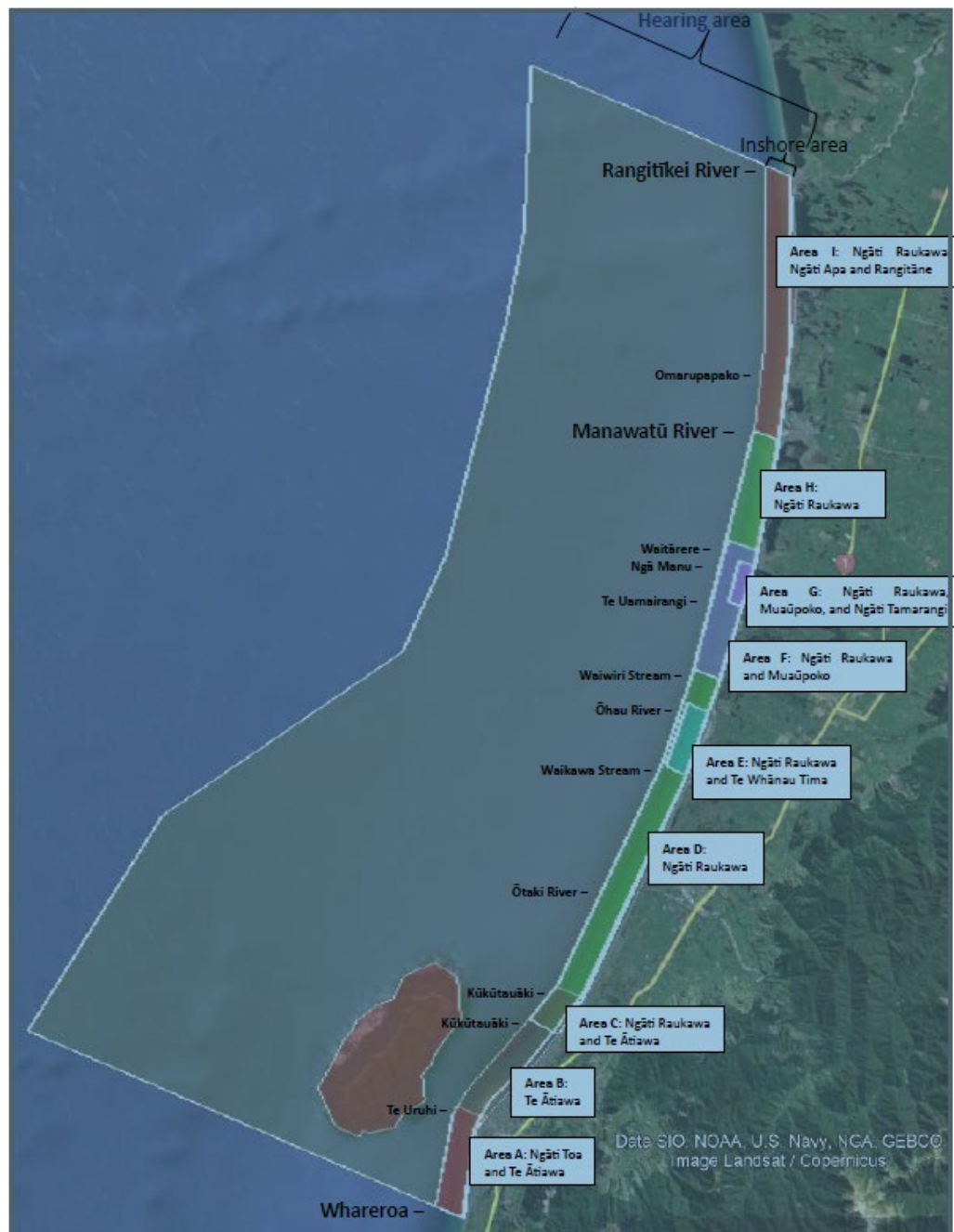
MACA Group N Stage 1(a) Kapiti-Manawatū - AGREED CHRONOLOGY OF SOME IMPORTANT EVENTS PRE-1840

Below are best estimated timeframes for some important events before 1840, based on the evidence filed, to assist the Court. Applicants do not agree that these are the only important events.

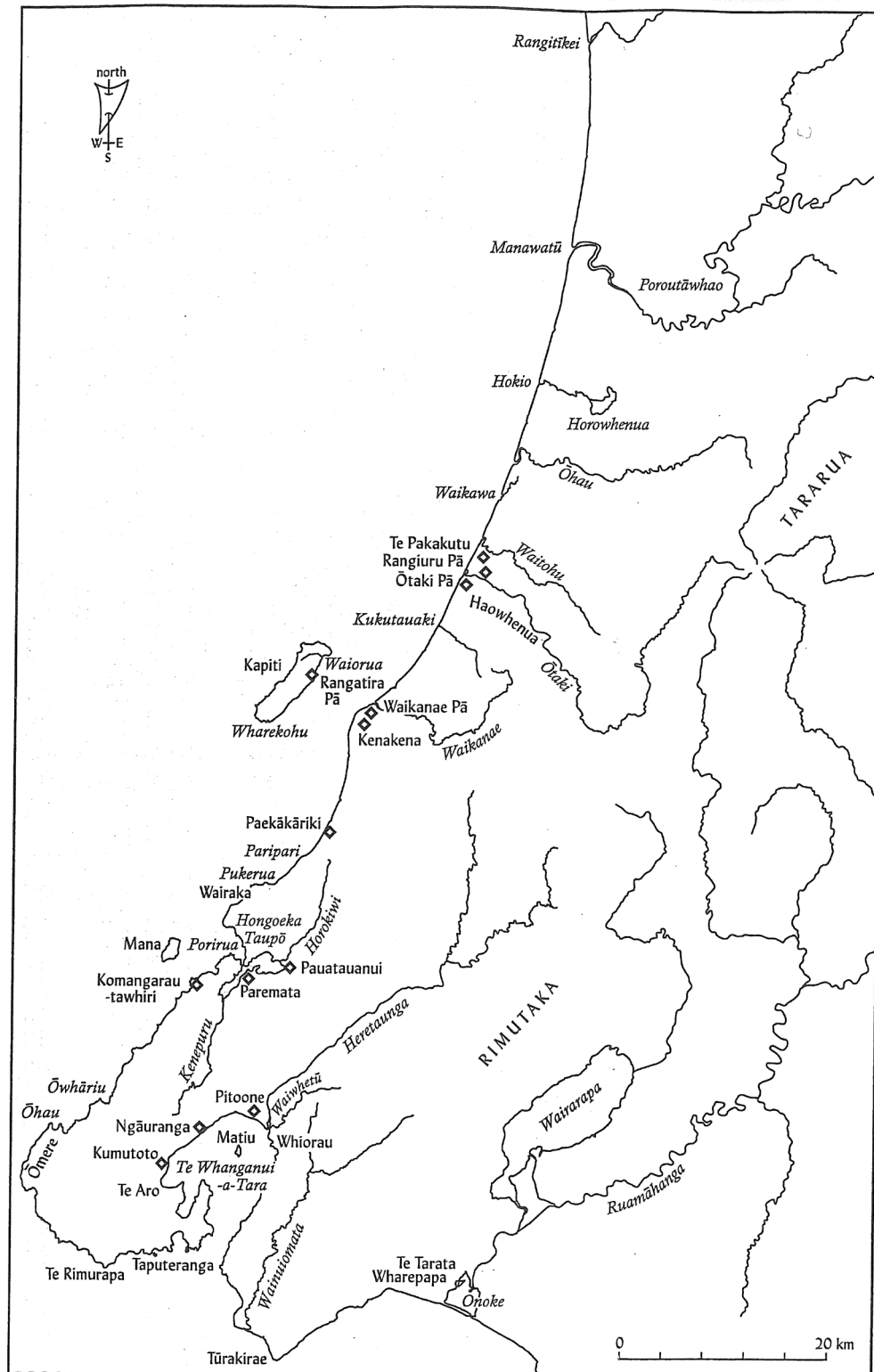
Date	Event
Pre-1818	Muaūpoko, Rangitāne, Ngāti Apa occupy the coast from Rangitīkei to Whareroa
1818-20	Āmiowhenua (Te Tai Tokerau tribes and Ngāti Toa expedition, along with Taranaki chiefs, to the district and around North Island), including at Waimāpihi (Pukerua Bay) and attacked at Horowhenua Battle at Turakina between Ngāti Apa and Ngāti Toa, marriage of Te Rangihaeata and Te Pikinga (Ngāti Apa)
1821	Te Heke Tahutahu-ahi of Ngāti Toa (to Taranaki)
1821-22	Te Heke Tātārāmoa of Ngāti Toa and Taranaki tribes
1822-23	Muaūpoko attempt to kill Te Rauparaha, and kill some of Te Rauparaha's children at Te Wī in Ōhau. Te Rauparaha retaliates by attacking Muaūpoko at two island pā, Waipatā and Waikiekie, on Lake Horowhenua
1822-23	Ngāti Toa and Taranaki tribes attack Muaūpoko and Ngāti Apa on Kapiti Island, who withdraw
1822-23	Ngāti Apa, Muaūpoko, Rangitāne attack Ngāti Toa at Paekākāriki, Waimeha (Waikanae) and Waimāpihi (Pukerua Bay)
1824	Battle of Waiorua / Whakapaetai / Te Umupakaroa
1824-25	Te Heke Nihoputa
1825	Tono from Waitohi to Ngāti Raukawa and Te Heke Karere of Ngāti Raukawa
1826-27	Te Heke Whirinui of Ngāti Raukawa
1826-27	Ngāti Toa and Ngāti Huia attack Muaūpoko at Lake Papaitonga/Waiwiri
1826-27	Te Heke Kariritahi of Ngāti Raukawa
1826-27	Te Heke Rua Maioro Te Heke Taranaki
1828 (Feb)	Te Peehi Kupe returns from Sydney to Kapiti with guns

1828	Te Heke Whirinui
1828-29	Te Heke Mai-i-raro of Ngāti Raukawa
1828-29	Te Whatanui arrangement with Kurahaupō tribes at Karekare
1829	Battle at Pūtiki Wharanui (Ngāti Toa, Ngāti Raukawa and Te Ātiawa against Whanganui)
1830-31	Battle at Kaiāpoi (Ngāti Toa, Ngāti Raukawa and Te Ātiawa tribes against Ngāi Tahu)
1830	Te Whatanui arrangement with Muaūpoko
1832-34	Te Heke Tama Te Uaua Heke Paukena
1833-34	Feast of Pumpkins / Mahurangi
1834	Te Heke Hauhaua
1834	Battle of Haowhenua
1835-38	Kōhuru Pō (Ngāti Apa and Ngāti Raukawa fight against Whanganui tribes)
1839	Battle of Te Kuititanga
1840	Signing of te Tiriti o Waitangi / the Treaty of Waitangi

ATTACHMENT 2 — ATTORNEY-GENERAL'S MAP OF OVERLAPPING CLAIMS

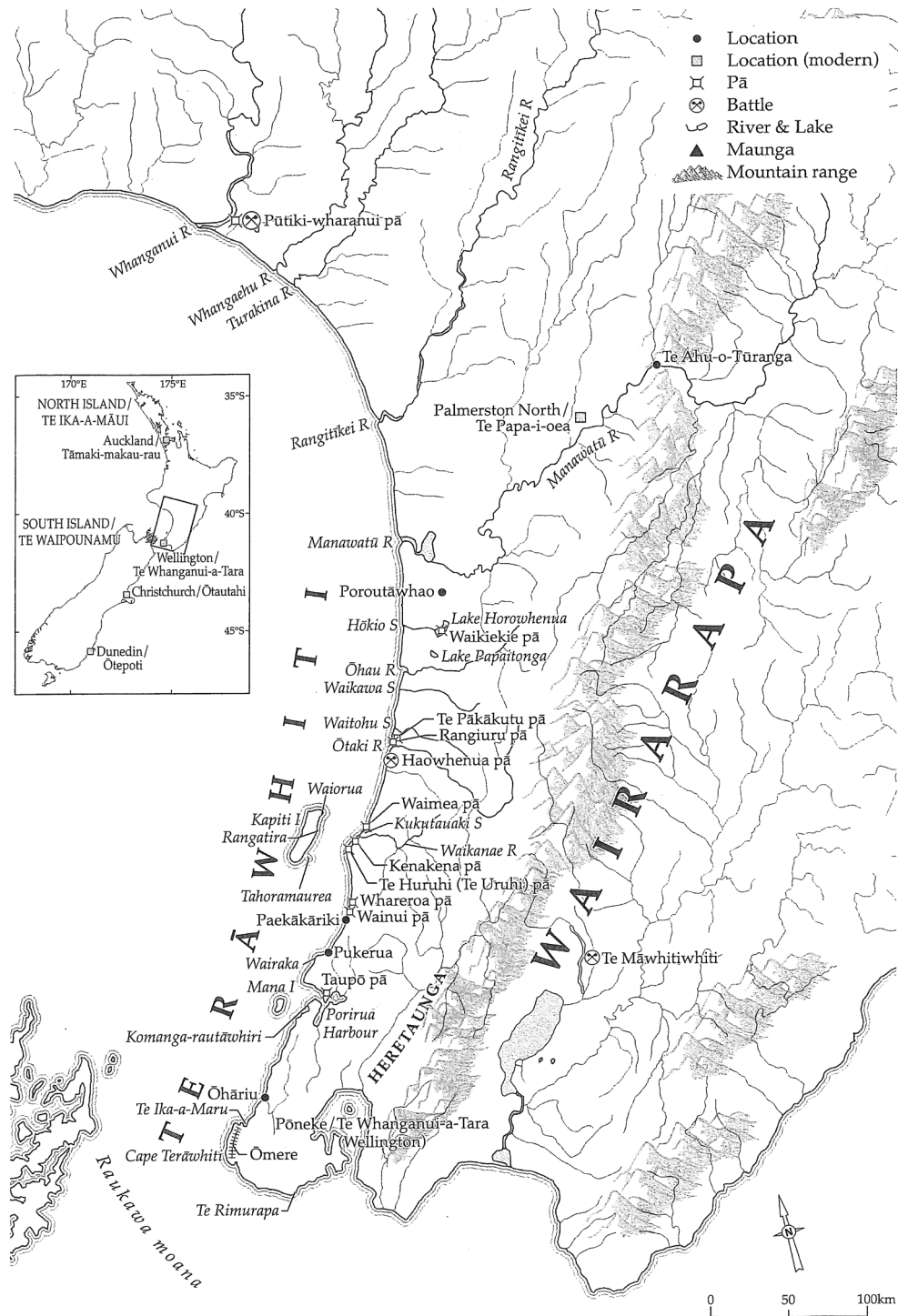


ATTACHMENT 3 — MAP OF KAPITI AND THE MAINLAND FROM
ANGELA BALLARA'S *TAUA*:⁶⁵⁶



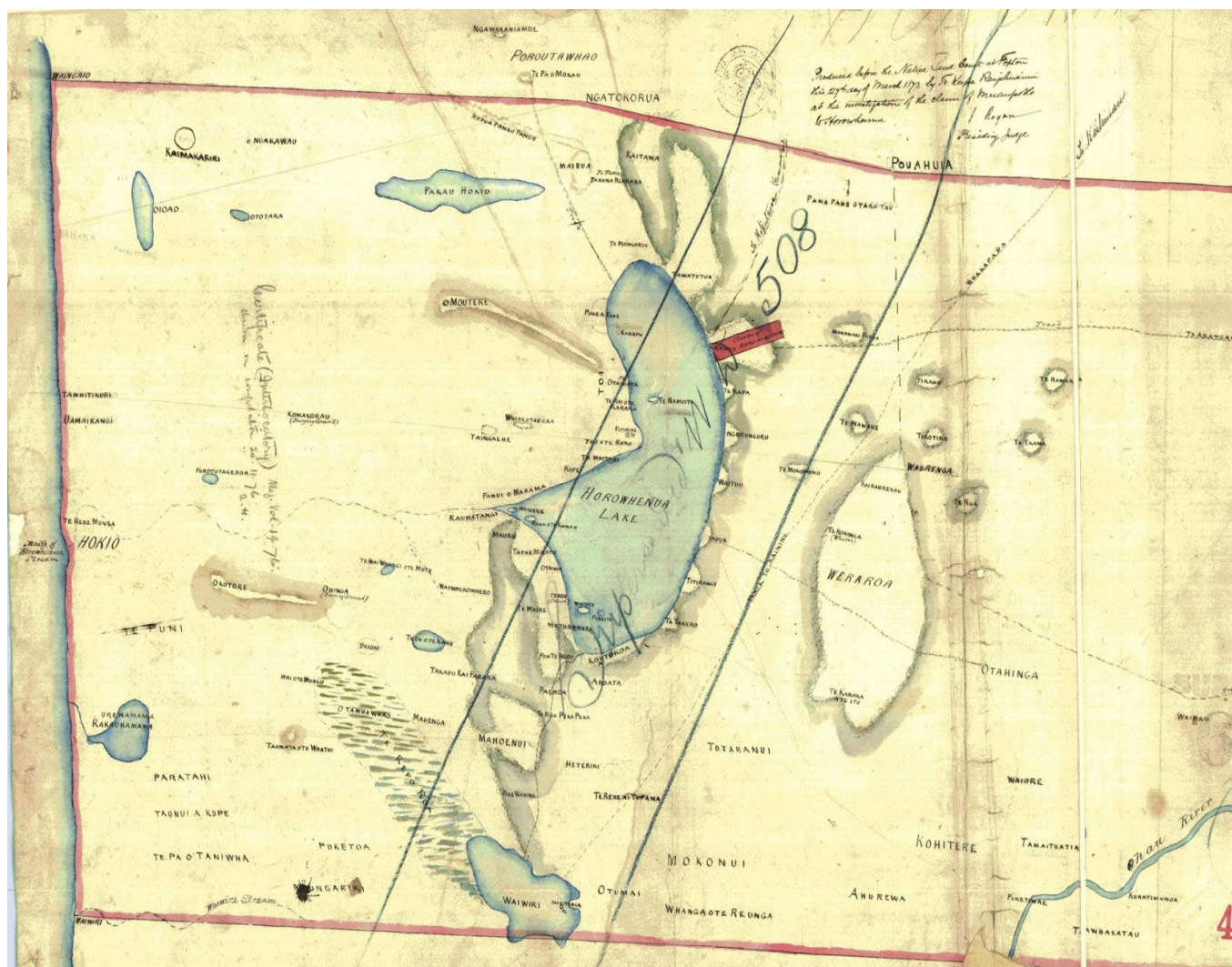
⁶⁵⁶ Ballara, above n 356, at 316.

ATTACHMENT THREE — MAP OF TE RĀWHITI (LOWER NORTH ISLAND, WEST COAST) FROM CALMAN'S *TE RAUPARAHĀ*:⁶⁵⁷



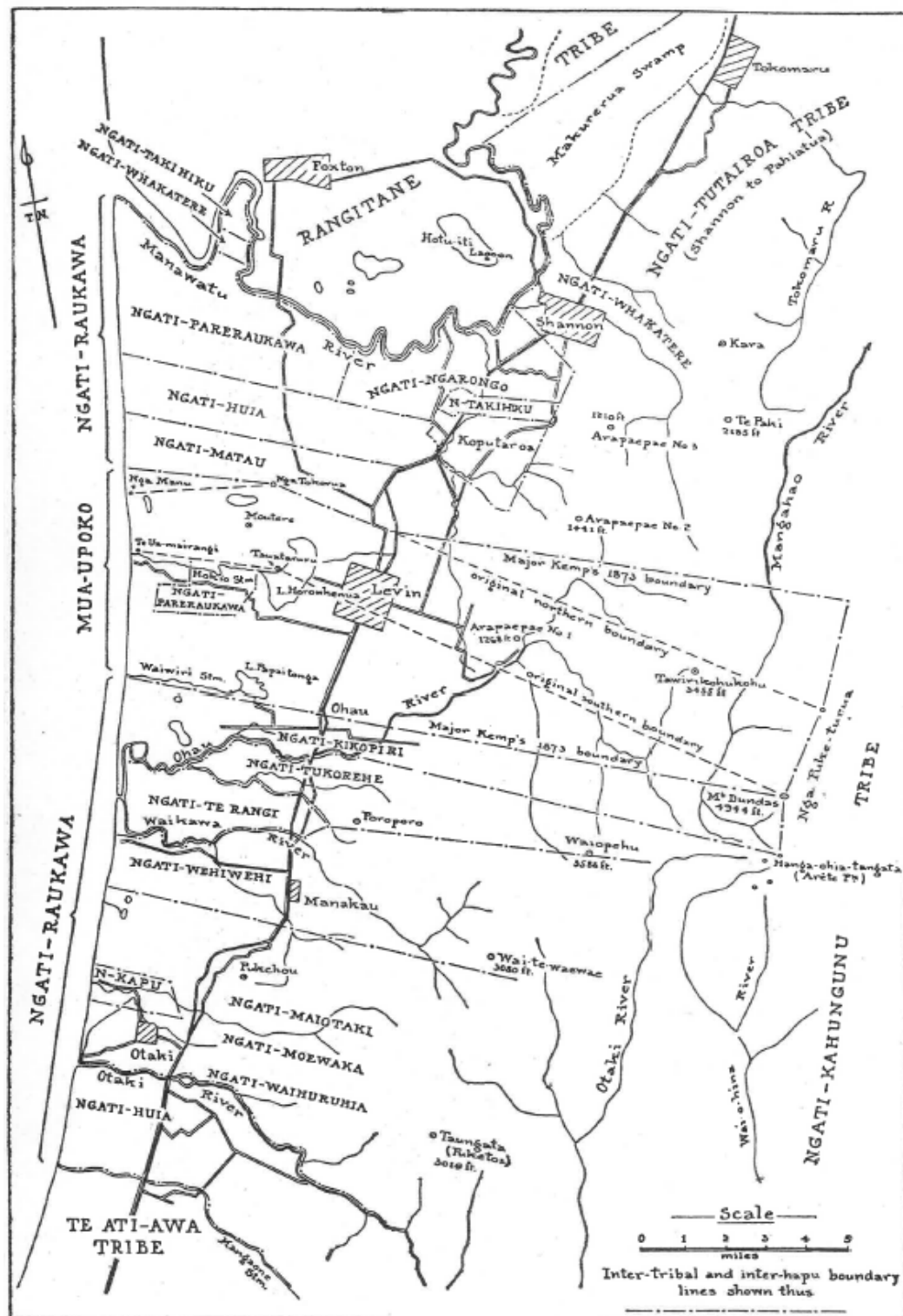
⁶⁵⁷ Calman, above n 399, at 113.

ATTACHMENT 4 — MAP OF OLD HOROWHENUA FROM THE ARMSTRONG REPORT:⁶⁵⁸



⁶⁵⁸ Map ML 4903 was produced by Keepa Te Rangihwinui in his evidence of Muaūpoko's long-standing and ongoing occupation of the whole Horowhenua block (52,000 acres) during the 1873 Horowhenua case.

ATTACHMENT 5 — MAP OF OLD HOROWHENUA SHOWING TRIBAL BOUNDARIES AND HAPŪ AREAS FROM ADKIN'S *HOROWHENUA*:⁶⁵⁹



⁶⁵⁹ Adkin, above n 509, at 128.

ATTACHMENT 6 — PŪKENGĀ REPORT

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2017-485-160

CIV-2017-485-214

CIV-2017-485-229

I TE KŌTI MATUA O AOTEAROA

CIV-2017-485-248

TE WHANGĀNUI-Ā-TARA ROHE

CIV-2017-485-261

CIV-2017-485-273

CIV-2017-485-511

GROUP N, STAGE 1(A)

UNDER THE

**Marine and Coastal Area (Takutai
Moana) Act 2011**

IN THE MATTER OF

**an application by William James Taueki on
behalf of Ngāti Tamarangi on behalf of
tāngatawhenua CIV-2017-485-160)**

AND

**an application by Margaret Morgan-Allen on
behalf of the David Morgan Whānau (CIV-
2017-485-214)**

Cont.

PŪKENGA REPORT 2 OF MS MOE MILNE AND DR ROBERT JOSEPH

DATED 25 October 2024

Judicial Officer: Grice J

AND an application by Rachel Ann Selby on behalf of Ngāti Raukawa ki te Tonga (CIV-2017-485-229)

AND an application by the Trustees of Te Ātiawa ki Whakarongotai Charitable Trust on behalf of Te Ātiawa Ki Whakarongotai (CIV-2017-485-248)

AND an application by Muaūpoko Tribal Authority Incorporated on behalf of Muaūpoko (CIV-2017-485-261)

AND an application by Patrick Seymour on behalf of Te Whānau Tima (Seymour) and Ngā Ahi Kā o Te Mateawa (CIV-2017-485-273)

AND an application by Chris Shenton on behalf of Te Rūnanga o Ngā Wairiki Ngāti Apa (CIV-2017-485-511)

AND Attorney-General
INTERESTED PARTY

AND Edward Penetito of Ngāti Kauwhata
INTERESTED PARTY

AND Greater Wellington Regional Council
INTERESTED PARTY

AND Horizons Regional Council
INTERESTED PARTY

AND Kāpiti Coast District Council
INTERESTED PARTY

AND Landowners Coalition Incorporated
INTERESTED PARTY

AND Seafood Industry Representatives
INTERESTED PARTY

AND

Simon Austin

INTERESTED PARTY

AND

**Te Patutokotoko represented by Christopher
Henare Tahana, Edward (Fred) Clark, Hayden
Tūroa and Novena McGluckin (CIV-2017-485-254)**

INTERESTED PARTY

AND

**Te Rūnanga o Ngāti Toa Rangatira Incorporated on
behalf of Ngāti Toa Rangatira**

INTERESTED PARTY

AND

**Waitārere Beach Progressive and Ratepayers
Association Incorporated**

INTERESTED PARTY

AND

Rangitāne o Manawatū Settlement Trust

INTERESTED PARTY

AND

New Zealand Transport Agency Waka Kotahi

INTERESTED PARTY

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MAY IT PLEASE THE COURT

I MOE MILNE of Matawaia, Ngāti Hine tohunga and tikanga and te reo advocate and DR ROBERT ANDREW JOSEPH of Hamilton, University of Waikato Associate Professor of Law affirm:

Section A): Introduction

1) We have been appointed as a pūkenga by the High Court in this proceeding pursuant to s. 99(1)(b), Marine and Coastal Area (Takutai Moana) Act 2011 (“MACA”) and the High Court Rules 2016.

2) Section 99, MACA, provides:

99 Court may refer to Māori Appellate Court or pūkenga for opinion or advice on tikanga.

1. If an application for a recognition order raises a question of tikanga, the court may –
 - (a) Refer that question in accordance with section 61 of Te Ture Whenua Māori Act 1993 to the Māori Appellate Court for its opinion; or
 - (b) Obtain the advice of a court expert (a pūkenga) appointed in accordance with the High Court Rules 2016 who has knowledge and experience of tikanga.
2. The opinion of the Māori Appellate Court is binding on the Court but the advice of a pūkenga is not.

3) In addition, section 9.43 of the High Court Rules 2016 states:

9.43 Expert witness to comply with code of conduct.

(1) A party to a proceeding who engages an expert witness must give the expert witness a copy of the code of conduct set out in schedule 4.

(2) An expert witness must –

- (a) state in any written statement of the proposed evidence of the witness served under Rule 9.2 or 9.3, or at any time of giving any oral evidence, or in any affidavit containing the evidence of the expert witness, that the expert witness has read the code of conduct and agrees to comply with it;

(b) comply with the code of conduct in preparing any written statement of the proposed evidence of the witness to be served under Rule 9.2 or Rule 9.3 or in giving any oral or affidavit evidence in any proceeding.

(3) The evidence of an expert witness who has not complied with subclause (2)(a) may be offered only with the leave of the court.

4) Schedule 4 of the Code of Conduct for expert witnesses further states:

Code of Conduct for expert witnesses

Duty to the court

- 1 An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
- 2 An expert witness is not an advocate for the party who engages the witness.
- 2A If an expert witness is engaged under a conditional fee agreement, the expert witness must disclose that fact to the court and the basis on which he or she will be paid.
- 2B In subclause 2A, **conditional fee agreement** has the same meaning as in rule 14.2(3), except that the reference to legal professional services must be read as if it were a reference to expert witness services.

Evidence of expert witness

- 3 In any evidence given by an expert witness, the expert witness must –
 - (a) acknowledge that the expert witness has read the code of conduct and agrees to comply with it;
 - (b) state that the expert witness' qualifications as an expert;¹
 - (c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise;
 - (d) state the facts and assumptions on which the opinions of the expert witness are based;
 - (e) state the reasons for the opinions given by the expert witness;
 - (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness;
 - (g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.

¹ Refer to the earlier Pūkenga Report 1 of Ms Moe Milne and Dr Robert Joseph for this High Court MACA hearing dated 18 May 2024.

4. If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.
5. If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or date or for any other reason, this must be stated in his or her evidence.

Duty to confer

6. An expert witness must comply with any direction of the court to –
 - (a) confer with another expert witness:
 - (b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:
 - (c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.
- 5) As pūkenga, we have read and agree to comply with the Code of Conduct in Rules 9.36-9.43 and Schedule 4 above of the High Court Rules 2016.

Pūkenga Questions

- 6) As pūkenga, we have been asked to answer the following challenging questions put forward by the parties to this application:
 - 1) What tikanga does the evidence establish applies in the areas that are the subject of the applications before the Court?
 - 2) What evidence indicates the maintenance of a group's holding of part of the Marine and Coastal Area, as a matter of tikanga?
 - 3) What evidence indicates that a group no longer holds part of the Marine and Coastal Area as a matter of tikanga?
 - 4) How do the concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, tuku and related concepts apply in this hearing area between 1820 and 1840?
 - 5) If those concepts apply, how do they apply after 1840?
 - 6) At 1840, what applicant group or groups used and occupied the application area, or any part of it, on a sole or shared basis, in accordance with tikanga?
 - 7) At 1840, how did groups control access to areas as a matter of tikanga?

- 8) Since 1840, what applicant group or groups have used and occupied the application area, or any part of it, on a sole or shared basis, in accordance with tikanga?
- 9) Having regard to the evidence, what tikanga applies today to the relationships between the iwi in this area?
- 10) Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

Pūkenga Role

- 4) We wish to note from the outset that we do not profess to be experts on the tikanga of the Kāpiti Coast applicants for this hearing. However, and with the deepest respect, it has been a privilege to read the respective affidavits and briefs of evidence, and to listen to the evidence of the respective Kāpiti Coast applicants and expert witnesses which has broadened our appreciation for and understanding of some of the tikanga of the Kāpiti Coast claimants.
- 5) As noted above, our role in these proceedings, however, is not to advocate for any of the Māori applicants' versions of tikanga but to provide an independent report on the relevant general tikanga Māori and where possible, specific localised tikanga-a-iwi for answering the above 10 pūkenga questions.
- 6) We have drawn on some lengthy scholarly and historical research as well as some oral sources and the claimant witness affidavits and briefs of evidence to inform our opinions in answering the above questions.

Report Outline

- 7) This report will answer each of the above 10 challenging pūkenga questions in the following manner: Section B) will provide important context to assist with addressing the 10 pūkenga questions above by first briefly highlighting the important British common law doctrine of aboriginal title, and the history and statutory purposes of the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA or the Act") followed by an in depth analysis on tikanga Māori.
- 8) We then explore the importance of Māori worldviews and tikanga Māori generally. The report then discusses the key tāhuhu – fundamental signpost values and principles of tikanga Māori. Section B) then proceeds to discuss tikanga Māori over the takutai moana to bring it within the context of the Act.
- 9) Section C) then attempts to answer pūkenga Question 1) above by referring to what we consider to be the key aspects of tikanga Māori that applies in the areas that are the subject of the applications before the Court.

- 10) The report then answers the other 9 pūkenga questions in the remaining space in Section C) by providing academic, legal, tikanga, and witness evidence to appropriately address each of the pūkenga questions.
- 11) Section D) finishes with some brief conclusions for the report which is then followed by Section E) our Bibliography of references.
- 12) Accordingly, Section A) will now provide important context for answering all 10 of the pūkenga questions by first discussing the important British common law doctrine of aboriginal title, followed by the history and statutory purposes of MACA and how they relate to Māori worldviews and tikanga Māori.

Section B): Background Context – Aboriginal Title, MACA History and Statutory Purposes, and Tikanga Māori

Doctrine of Aboriginal Title, MACA History and Statutory Purposes

- 13) Before we discuss tikanga Māori and what tikanga the evidence establishes applies in the areas that are the subject of the applications before the Court, it is useful to place our discussion within the context of the history of the related doctrine of aboriginal title and the specific history and statutory purposes of the MACA legislation. We also need to discuss the important place of tikanga Māori in supporting most of the MACA statutory purposes.
- 14) To these ends, the recent 2023 Waitangi Tribunal Report on the Marine and Coastal Area (Takutai Moana) Act 2011 described MACA as the “last link in a chain of recent legal developments relating to Māori customary title² [or aboriginal title] in the marine and coastal area.”³

² Under the ancient historic *Ius Gentium* – the Law of Nations – and the British common law doctrine of aboriginal title, pre-contact Māori customary interests in land, waterways and other natural resources were guaranteed and acknowledged through customary law or tikanga Māori. See McHugh, P ‘Constitutional Theory and Māori Claims’ in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 40-41; Slattery, B, ‘Understanding Aboriginal Rights’ in Isaac, T, (ed) *Readings in Aboriginal Studies* (Vol. 5: Aboriginal People and Canadian Law, Bearpaw Publishing, Manitoba, 1996) at 24-5; Charters, C and Erueti, A (Eds), *Māori Property Rights and the Foreshore and Seabed: The Last Frontier*, (Victoria University Press, Wellington, 2007); Williams, D, *A Simple Nullity? The Wi Parata Case in New Zealand Law and History*, (Auckland University Press, Auckland, 2011); McHugh, P, *Aboriginal Title: The Modern Jurisprudence for Maori Land Rights*, (Oxford University Press, New York, 2011); Boast, R, *The Native Land Court 1862-1887: A Historical Study, Cases and Commentary*, (Brookers Ltd, Wellington, 2013); Borrows, J, ‘Aboriginal Title and Private Property,’ in *Supreme Court Law Review* (2015) at 68; Borrows, J, ‘Challenging Historical Frameworks: Aboriginal Rights, Agency and Originalism’ in *Canadian Historical Review*, (2016); and Jones, C, *New Treaty, New Tradition: Reconciling New Zealand Law and Māori Law*, (UBC Press, Vancouver, 2016).

³ Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report*, (Wai 2660, Wellington 2023) at 2.2.1.

15) The doctrine of aboriginal title is the legal acknowledgement under *Ius Gentium* (the Law of Nations) and English common law that presumes and recognises some continuity of the local aboriginal law subsequent to British annexation.⁴

16) The former 19th century New Zealand Chief Justice, Sir William Martin, acknowledged aboriginal title in 1846 when he observed:

The whole surface of these Islands, or as much of it as is of any value to man, has been appropriated by the Natives, and, with the exception of the part which they have sold, is held by them as property. Nowhere was any piece of land discovered or heard of which was not owned by some person or set of persons.⁵

17) The 19th century scholar John White confirmed Chief Justice Martin's observation when he opined:

I may state without fear of contradiction that there is not one inch of land in the New Zealand Islands which is not claimed by the Maoris; and I may also state that there is not a hill, or valley, stream, river, or forest, which has not a name, the index of some point of Maori history.⁶

18) The anthropologist Raymond Firth added:

Despite the comparatively small population in pre-European times, there was no appreciable area of land anywhere in the country which was without its owners.⁷

19) In 1847, the Supreme Court in *R v Symonds*⁸ referred to aboriginal title and held that 'whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it'⁹ which was the firm judicial recognition of Māori customary title to property at the time. Tikanga Māori customary law was part of the New Zealand common law at that time in the sense that the 'internal' content of property rights protected by the doctrine of aboriginal title were governed by tikanga Māori customary law.¹⁰

20) Speaking extra-judicially, Baragwanath J noted that 'this [aboriginal title] doctrine was part of English common law in its broadest sense to the protection of which Māori as

⁴ *The Case of Tanistry* (1608) Davies 28 (K.B); *Memorandum* (1722) 2 P Wms 75 (P.C); and *Campbell v Hall* (1774) 1 Cowp 204 (K.B). See also McHugh, P, 'The Aboriginal Rights of the New Zealand Māori at Common Law,' (Unpublished PhD. Thesis, Sydney Sussex College, Cambridge, 1987) at 152-8.

⁵ Martin, S. W. 'England and the New Zealanders,' (Part 1: Remarks upon a Despatch from the Right Hon. Earl Grey, to Governor Grey dated December 23, 1846. Auckland, Auckland College Press, 1847) at 3-4 and 'Opinions of Various Authorities on Native Tenure,' in *AJHR* (G1, 1890) at 3.

⁶ John White cited in Firth, R, *Economics of the New Zealand Maori*, (2nd Ed., Government Printer, Wellington, 1972) at 383.

⁷ Firth, R, *Economics of the New Zealand Maori*, (2nd Ed., Government Printer, Wellington, 1972) at 383.

⁸ *R v Symonds* (1847) NZPCC 387.

⁹ Above.

¹⁰ Boast, R, 'Treaty Rights or Aboriginal Rights?' in *New Zealand Law Journal* (1990) 32 at 33.

British subjects became entitled to in 1840, even apart from the provision of Article III of the Treaty of Waitangi.’¹¹

- 21) In 1872, in *Re Lundon and Whitaker Claims Act 1871*, the Court of Appeal reaffirmed that all forms of customary property rights are recognised as a matter of common law when it stated:

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.¹²

- 22) The common law rules governing aboriginal title provided for the continuity of tribal property rights defined by tikanga Māori customary law [aboriginal title].¹³ The tide turned against recognition of aboriginal title and the Treaty of Waitangi however, in the infamous 1877 Supreme Court decision of Prendergast CJ in *Wi Parata v Bishop of Wellington*.¹⁴

- 23) The Ngāti Kahungunu and Rangitāne rangatira Nireaha Tamaki nonetheless, responded in 1901 on behalf of Māori by appealing to the Judicial Committee of the Privy Council in England in *Nireaha Tamaki v Baker*¹⁵ where the Lordships held:

It cannot be too solemnly asserted that [native property over land] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.¹⁶

¹¹ Baragwanath, D ‘The Treaty of Waitangi and the Constitution’ in *Treaty of Waitangi Issues – the Last Decade and the Next Century* (New Zealand Law Society Seminar, April 1997) at 1.

¹² *Re Lundon Whitaker Claims Act 1871* (1872) 2 NZCA 41 at 49.

¹³ A useful definition of ‘customary law,’ that resonates with tikanga Māori, was provided by the 1986 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (2 Vols, 1986, Vol. 1) para. 37 as: ‘both a body of rules backed by sanctions and a set of dispute resolution mechanisms. At a more informal level it was also a series of accepted behaviours which allowed daily social life to proceed ... the stuff of interpersonal relationships, the self-regulating patterns of interaction.’

¹⁴ The Judiciary later rejected claims to common law aboriginal title in *Wi Parata v Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S) S.C 79. Prendergast CJ ruled that the Treaty of Waitangi was a simple nullity and that a phrase in a statute - referring to Māori custom [recognising the doctrine aboriginal title] in the Native Rights Act 1865 - could not bring into being what did not exist. Subsequently in *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 the Court upheld *Wi Parata* reasoning that Native Land Acts may override customary native title. Much later in *Re the Ninety-Mile Beach* [1963] NZLR 461, the Court of Appeal held that Māori could not hold title to the foreshore as a result of s. 147, Harbours Act 1878 and because investigation of title to land adjacent to the sea by the Māori Land Court had assumed it extinguished rights to land below the high-water mark. However, from 1986 the tide turned again when the Judiciary consented to recognise claims to common law aboriginal title over sea fisheries according to tikanga customary law in *Te Weehi v Regional Officer* (1986) 6 NZAR 114 (H.C); and the respect for tikanga Māori values as part of the judicial recognition of Treaty of Waitangi principles and as part of the requirement of the Treaty of Waitangi partnership in *Huakina Development Trust v Waikato River Authority* [1987] 2 NZLR 188.

¹⁵ *Nireaha Tamaki v Baker* [1901] AC 561 (P.C) at 579.

¹⁶ Above.

- 24) Furthermore, Cooper J in the 1908 High Court decision of *Public Trustee v Loasby*,¹⁷ instituted a three-tier customary law test for aboriginal rights when deciding whether to adopt a rule of Māori customary law. The first tier was whether the custom existed as a matter of fact, and whether “such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Māori race.”¹⁸ The next tier was whether the custom was contrary to statute. The last tier was whether the custom was ‘reasonable, taking the whole of the circumstances into consideration.’¹⁹
- 25) Subsequently in the 1986 High Court decision of *Huakina Development Trust v Waikato Valley Authority*²⁰ Chillwell J applied the *Public Trustee v Loasby*²¹ customary title test to find that ‘customs and practices that include spiritual elements are cognisable in a Court of law provided they are properly established by evidence.’
- 26) The doctrine of aboriginal title and the Treaty of Waitangi were, moreover, recognised in 1994 Court of Appeal decision of *Te Rūnanga o Te Ika Whenua Inc. Society v Attorney General*²² which held that aboriginal title concepts continue to apply in New Zealand over land and water and unless special circumstances existed, aboriginal title should not be extinguished without Māori consent.²³
- 27) The more authoritative and direct decision on the doctrine of aboriginal title over the marine and coastal area was the seminal 2003 Court of Appeal decision of *Attorney-General v Ngāti Apa*²⁴ which affirmed the Māori Land Court’s jurisdiction to investigate claims of Māori aboriginal rights in the foreshore and seabed.²⁵ The decision of Elias CJ and the other Justices meant that Māori applicants could apply to the Māori Land Court to seek a declaration that their customary rights in the foreshore and seabed still existed and to have that land declared Māori customary land under the Te Ture Whenua Māori Act 1993.
- 28) But the *Ngāti Apa* decision was hastily overturned by the controversial Foreshore and Seabed Act 2004 which vested the “full legal and beneficial ownership of the public foreshore and seabed in the Crown as ‘its absolute property,’ thus extinguishing all Māori aboriginal title customary rights in it.”²⁶
- 29) In response, a number of reports were subsequently commissioned to inquire into the legitimacy of the Foreshore and Seabed Act 2004 and the associated Crown policy at

¹⁷ (1908) 27 NZLR 801.

¹⁸ Above, at 806.

¹⁹ Above.

²⁰ (1987) 2 NZLR 188 at 215.

²¹ (1908) 27 NZLR 801.

²² [1994] 2 NZLR 20.

²³ Above, at 24.

²⁴ *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

²⁵ Above.

²⁶ Foreshore and Seabed Act 2004, s. 13(1).

the time by the Waitangi Tribunal,²⁷ United Nations²⁸ and a Ministerial Review Panel.²⁹ The latter panel report characterised the Foreshore and Seabed Act 2004 as being discriminatory against Māori and recommended its repeal.³⁰ Consequently in 2011, the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) was enacted.

30) The recent 2023 Waitangi Tribunal Report on MACA characterised the Act as ‘an improvement’ on the Foreshore and Seabed Act 2004 and a ‘step in the right direction.’³¹ However, the Tribunal also found that overall, MACA does not sufficiently support Māori in their rangatiratanga rights and kaitiakitanga duties and, in some respects, even amounts to a breach of the Treaty of Waitangi/Te Tiriti o Waitangi and some Treaty of Waitangi principles.³²

31) Although the Waitangi Tribunal MACA Report and its recommendations are not legally binding on the High Court, they are persuasive and provide important context and relevant background information for the High Court to consider in its MACA proceedings.

32) Furthermore, the Waitangi Tribunal appropriately expressed its deference to the High Court to fulfil its function in terms of interpreting and applying the MACA legislation. The High Court then is the legal forum tasked with determining whether the MACA tests for customary marine title (CMT) and protected customary rights (PCRs) are met according to tikanga – which are discussed in more detail below - rather than the consistency of those tests with the Treaty of Waitangi 1840.

33) Having briefly traversed the case law and Waitangi Tribunal jurisprudence leading up to the enactment of MACA, the next section will now focus on the purposes of the MACA legislation.

MACA Statutory Purposes

34) Before we discuss tikanga Māori, it is also important to place our discussion within the context of the statutory purposes of the Marine and Coastal Area (Takutai Moana) Act

²⁷ Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Act Policy*, (Wai 1071, Waitangi Tribunal, Wellington, 2004).

²⁸ International Convention on the Elimination of all Forms of Racial Discrimination, Decision 1 (66), (New Zealand Foreshore and Seabed Act 2004, CERD/C/66/NZL/Dec.1, Sixty Sixth Session, 21 Feb-11 March 2005).

²⁹ Ministerial Review Panel, ‘Pakia ki Uta, Pakia ki Tai’ (Report of the Ministerial Review Panel, Vol. 1, 30 June 2009).

³⁰ Above at 139-142 and 151.

³¹ Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2001 Inquiry Stage 2 Report*, (Waitangi Tribunal, Wellington, 2023) at xv-xix.

³² Above, at xviii. The latest recent legal development relating to the doctrine of aboriginal title and the Marine and Coastal Area (Takutai Moana) Act 2011 in Aotearoa New Zealand is the controversial proposal by the current Coalition Government - which is made up of the National Party along with the New Zealand First and ACT parties - to amend the Marine and Coastal Area (Takutai Moana) Act 2011 and to overturn the 2023 Court of Appeal’s interpretation of s. 58, MACA in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252. See Geoffrey Melvin, “Memorandum of Counsel for the Attorney-General” to Churchman J (National List Judge for applications under the Marine and Coastal Area (Takutai Moana) Act 2011) (Crown Law Te Tari Ture o Te Karauna, 25 July 2024).

2011 (“MACA” or “the Act”) and the important place of tikanga Māori in supporting most of the MACA statutory purposes.

- 35) The statutory purposes of MACA can be ascertained from its text³³ and the Parliamentary debates when MACA was being enacted in the Legislature. MACA has four statutory purposes none of which are expressed as having priority over the others.
- 36) Section 4(1)(a), MACA states that the first purpose of the statute is ‘to establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand.’ “All New Zealanders” includes Māori iwi, hapū and whānau groups who have customary interests in the common marine area, as well as other New Zealanders who do not have such interests.
- 37) Section 4(1)(b), MACA states the second purpose of the statute which is to ‘recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as tangata whenua. Section 9(1) of the Act defines ‘mana tuku iho’ as ‘inherited right or authority derived in accordance with tikanga,’ while s. 4(2) states that the Act recognises mana tuku iho by giving legal expression to customary interests.
- 38) A further purpose of MACA is consistent with the requirement that an applicant group comprises ‘one or more iwi, hapū and whānau’ and the purpose is achieved through the provision of:
- a. Rights to participate in conservation processes pursuant to Part 3, subpart 1 of the Act.
 - b. Protected customary rights (“PCRs”) pursuant to Part 3, subpart 2 of the Act; and
 - c. Customary marine title (“CMT”) and the rights such title confers pursuant to Part 3, subpart 3 of the Act.³⁴
- 39) The third purpose of the Act is s. 4(1)(c) which is to ‘provide for the exercise of customary interests in the common marine and coastal area which is achieved through the provision of the above noted:
- a. Rights to participate in conservation processes;
 - b. Protected customary rights; and
 - c. Customary marine title and the rights that such title confers.
- 40) The final purpose of MACA is s. 4(1)(d) which is ‘to acknowledge the Treaty of Waitangi (te Tiriti o Waitangi). To this end, s. 7, MACA states:

³³ Section 5(1), Interpretation Act 1999. See also *Commerce Commission v Fisheries Co-Operative Group Ltd* [2007] NZSC 36, 3 NZLR 767 at 22.

³⁴ Namely, permission rights under ss. 2, 87A and 104, Resource Management Act 1991 which repealed the short lived Natural and Built Environments Act 2023, a conservation permission right, a wāhi tapu protection right, rights in relation to marine mammal watching permits, rights in respect of a New Zealand coastal policy statement, prima facie ownership of taonga tuturu, and rights of mineral ownership pursuant to Part 3, subpart 3 of the Act.

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

- (a) In subpart 1 of Part 3, for the participation of affected iwi, hapū and whānau in the specified conservation processes relating to the common marine and coastal area; and
- (b) In subpart 2 of Part 3, for customary rights to be recognised and protected; and
- (c) In subpart 3, Part 3, for the customary marine title to be recognised and exercised.

- 41) In summarising the importance of these purposes, the 2023 decision of the Court of Appeal of *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board*³⁵ stated:

The consistent theme of these provisions is that MACA is intended to restore customary interests in the common marine and coastal area that were extinguished by the 2004 Act. Those interests are to be “given legal expression” in accordance with MACA. Or, as it is put in the preamble, *translate into* legal rights and interests that are alienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations. Section 7 expressly makes the link with the Treaty of Waitangi: MACA recognises and promotes the exercise of customary interests of Māori in the common marine and coastal area “in order to take account of the Treaty of Waitangi.” It does so by providing, among other things, for PCRs to be recognised and protected and for CMT to be recognised and exercised.³⁶

- 42) The Treaty of Waitangi and its principles then will be a relevant interpretative aid where ambiguity or a lack of clarity in MACA exists.³⁷ In *Re Paul*,³⁸ the High Court followed this approach striking out one of two national applications made under MACA. The Supreme Court subsequently held that similar types of Treaty of Waitangi clauses should be given a broad and generous construction.³⁹

- 43) Tikanga Māori also plays a key role in fulfilling the purposes of the MACA statutory framework. The recognition of customary interests provided for in the legislation implies the continued existence and operation of tikanga Māori as a legal system to

³⁵ *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504.

³⁶ Above.

³⁷ *Ngaronoa v Attorney-General* [2017] NZSC 127, *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at para. 146-151; and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at para. 589-596.

³⁸ *Re Manu Paul* [2020] NZHC 2039 at para. 54-60.

³⁹ *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at para. 146-151; and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at para. 589-596.

define the nature and extent of such rights, hence tikanga Māori being defined in s. 9, MACA as: ‘Māori customary values and practices.’

- 44) The next section will discuss tikanga Māori customary values and practices in some depth as it relates the purposes of MACA. We will start with an important section on worldviews that provides crucial context for understanding tikanga Māori to appropriately apply it for the purposes of MACA.

Importance of Worldviews

- 45) As noted above, this section will first briefly discuss the importance of Māori āronga (worldviews) and tikanga Māori generally. The section then discusses the key tāhuhu values and principles of tikanga Māori generally followed by a brief discussion of tikanga Māori within the Marine and Coastal Area (Takutai Moana) Act 2011 context. The section then assesses what tikanga the evidence established or supported in the application area to answer pūkenga question 1).
- 46) The Waitangi Tribunal noted that water bodies are taonga (treasured possessions) which are highly significant to Māori well-being and ways of life.⁴⁰ The Environment Court however, warned that to understand that significance and how it affects Māori conduct, one must step deeply inside Māori thinking. One must see the world through Māori eyes and assess Māori values within a Māori worldview.⁴¹ A culture cannot be understood in terms of the worldview of another.⁴²
- 47) Fundamental to any discussion of tikanga Māori then, is the necessity to appreciate its functioning within te Ao Māori – Māori worldviews. As the New Zealand Law Commission recently opined:

Understanding tikanga requires a journey through the Māori world, one that outlines the knowledge systems, values and beliefs, and that locates tikanga in its natural environment. To try to build an understanding of tikanga outside of that framework runs the risk of it becoming decontextualised and abstract, and where its authentic meaning becomes distorted.⁴³

⁴⁰ Waitangi Tribunal, *He Maungarongo – Report on Central North Island Claims, Stage One*, (Waitangi Tribunal Report 2008. Volume 4) at 1281.

⁴¹ *Ngāti Hokopu ki Hokowhitu v Whakātane District Council* (2002) 9 ELRNZ 111 (NZEnvC). Refer also the 1921 decision of the Judicial Committee of the Privy Council, *Amodu Tijani v Secretary, Southern Nigeria*, (1921), 2 AC 399.

⁴² Understanding a culture in its own terms is difficult when simply writing in English will convey meanings that do not exactly fit with the native comprehension and when the understanding of difference is sought through comparative studies. John Patterson attempted, as an investigative philosopher, to come to grips with personal, embedded limitations that inform any look into one worldview from the perspective of another. See Patterson, J, *Exploring Māori Values* (Dunmore Press, 1992). Another relevant and seminal text is Clifford, J and Marcus, G (eds) *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press, 1986). See also to Smith, L, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, London, University of Otago Press, 1999); Battiste, M, *Reclaiming Indigenous Voice and Vision* (UBC Press, Vancouver, 2000) and Friere, P, *Pedagogy of the Oppressed*, (Penguin, London, 1996).

⁴³ Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023) at 25.

- 48) Worldviews generally orientate the human being and their community to their world so that it is rendered understandable and their experience of it is explainable. The Reverend Māori Marsden, a late 20th century Ngāpuhi tohunga (expert), scholar and philosopher, articulated an economical definition of a culture's worldview when he opined:⁴⁴

Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be, of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'world view' of a culture. The world view is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The worldview lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture.

- 49) Marsden's definition notes that a worldview or āronga grows according to individual and community experiences. As a group experience and perceive their reality, they go about the task of understanding it, of forming views and ideas about the reality they perceive. These perceptions and conceptualisations form a cultural worldview that is something subscribed to, is carried by, and assented to by the group. If you see the world in a certain way, this view will determine what you value in the world or not and how, through behaviour. By understanding the worldview of a culture, we can come to an understanding of its values and behaviour. Worldviews then, are invisible sets of ideas about the world that lie deep within a culture.⁴⁵

- 50) Acknowledgement of the importance of cultural concepts and words in context within their respective cultural worldviews was referred to in a number of important cases such as the 1921 decision of *Amodu Tijani v Secretary Southern Rhodesia*,⁴⁶ where the Judicial Committee of the Privy Council, then the highest Judicial authority for New Zealand, recognised that English legal doctrines might have no application in English colonies where they differed from native laws. The Privy Council warned against "... a tendency operating at times unconsciously, to render (Native title to land) in terms which are appropriate only to systems which have grown up in English law.' The Privy Council pointed out that:

... the notion of individual ownership is quite foreign to native ideas and that "All the members of the community, village or family, have an equal right to the land, but in every case the Chief or headman of the community or village, or the head of the family has charge of the land, and in a loose mode of speech is sometimes called the owner."⁴⁷

⁴⁴ Royal, CT, *The Woven Universe: Selected Writings of Rev. Maori Marsden* (Estate of Rev. Maori Marsden, 2003) at 56.

⁴⁵ Above.

⁴⁶ *Amodu Tijani v Secretary Southern Rhodesia* [1921] 2 AC 199, 403.

⁴⁷ Above.

- 51) A clash of worldviews and legal systems occurred in 1914 when Sir John Salmond, Solicitor General (at the time) was involved in legal proceedings concerning the Treaty of Waitangi and tikanga Māori customary rights over freshwater lakes. Sir John sent a memorandum to the Attorney-General which articulated the following:

The Prime Minister... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery (which would not enable a freehold order to be issued) and not rights of ownership as are now claimed ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, *foreshores*, and *tidal waters* in the Dominion ... I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained ... it may be anticipated that the Court will hold that by native custom the Natives own not merely the land, but the water of this country and freehold titles will be issued accordingly [emphasis added].⁴⁸

- 52) In contrast, the 2002 Environment Court decision of *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council*,⁴⁹ concluded that ‘the meaning and sense of a Māori value, - in this case wāhi tapu under s. 6(e), Resource Management Act 1991 (RMA) - should primarily be given by Māori.’⁵⁰ The Court added that ‘assessments should be made within the Māori worldview from where they came.’⁵¹ The Court reflected on the requirement to consider the relationships of Māori with the natural environment and the need to consider evidence in the form of facts and concluded:

Since section 6(e), RMA does refer to Māori culture and traditions; we have to be careful not to impose inappropriate ‘Western concepts.’ The appellants expressed concerns about that in various ways. Implicit in much of the appellants’ evidence is the idea that each culture can only be explained in its own terms. This depends on the relativistic notion that classifications in any one language or culture are not determined by how the world does not come quietly wrapped up in facts. Facts are the consequences of ways in which we represent the world.⁵²

- 53) In resorting to documentary sources to prove or disprove tikanga facts including the meaning, extent and scope of tikanga Māori words and concepts in a particular area tends towards the academic and away from the determinative spiritual and cultural context of te Ao Māori. In this respect, the revered Aotearoa New Zealand anthropologist and Te Rarawa whāngai, Dame Joan Metge, cautioned:

To come to grips with Māori custom law [tikanga], it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts

⁴⁸ Salmond to Attorney-General, 1 August 1914, *Opinions Relating to Lands Department 1913-15*, cited in Frame, A, *Salmond: Southern Jurist*, (Victoria University Press, Wellington, 1995) at 119.

⁴⁹ (2002) ELRNZ 111 (EnvC) at 46.

⁵⁰ Above, at 46 and 53.

⁵¹ Above.

⁵² Above.

which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation – the direct reference – is substantially the same, the connotations are significantly different.⁵³

- 54) As the above cases and commentary acknowledged, to assist with providing an appropriate context for the interpretation of words and appropriate application of tikanga cultural concepts, one needs to understand traditional Māori cultural āronga - worldviews - that are based on the Māori cosmogony (creation stories) that provided a blueprint for life setting down innumerable precedents by which communities were guided in the governance and regulation of their day-to-day existence.⁵⁴ As Dr Carwyn Jones recently concluded: “Fundamentally, tikanga can only be understood through a Te Ao Māori lens, because it reflects the Māori worldview.”⁵⁵
- 55) Māori tribal worldviews generally acknowledged the natural order of living things and the kaitiakitanga (stewardship) rights, responsibilities and relationships to one another and to the environment. The overarching principle of utu (balance) underpinned all aspects of life. Māori worldviews are ones of holism and physical and metaphysical (spiritual) realities where the past, the present and the future are forever interacting. The maintenance of the worldviews of life — including within a Marine and Coastal Area (Takutai Moana) Act 2011 context — are dependent upon the maintenance of the culture and its many traditions, values, practices and rituals.
- 56) By trying to understand te Ao Māori (culture), āronga (worldviews), te reo (language), whakapapa (rich tribal histories), kōrero (oral traditions), mātauranga Māori (knowledge systems), kawa (rituals) and tikanga Māori (customary law), one may be able to bridge the cultural divide.

Tikanga Māori Normative Framework

- 57) As discussed above, tikanga Māori plays an important role in the MACA statutory framework which is defined in s. 9 as ‘Māori customary values and practices.’ Tikanga Māori was recently even acknowledged as “the first law of Aotearoa New Zealand” in the 2024 Supreme Court decision of *Smith v Fonterra Co-Operative Group Ltd*.⁵⁶
- 58) Previously in the 2022 decision of *Ellis v R*,⁵⁷ the Supreme Court accepted that ‘tikanga was the first law and that it continues to shape and regulate the lives of Māori.’⁵⁸

⁵³ Metge, J *Commentary on Judge Durie’s Custom Law* (Unpublished Paper for the Law Commission, Wellington, 1996) at 3.

⁵⁴ See Buck, P, *The Coming of the Māori* (Whitcoulls 1949, Reprint 1977); and Pei Te Hurinui Jones, *He Tuhi Mārei-kura* (Aka & Associates Ltd, 2013).

⁵⁵ Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 at 23 [CB Tab 33 at 2023 201.00136].

⁵⁶ *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 at 187.

⁵⁷ [2022] NZSC 114.

⁵⁸ Above. Dr Carwyn Jones noted that: ‘tikanga as law distinguishes the legal aspects of tikanga as a subset of the values, principles, and practices which constitute tikanga.’ Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 at 22 [CB Tab 33 at 2023 201.00136].

- 59) The orthodox method for ascertaining tikanga Māori is to establish it as a matter of fact usually by expert evidence.⁵⁹ Such tikanga evidence will usually contain whakapapa (genealogy), kawa (protocols) and tribal histories. Where interests between applicant groups overlap, such evidence may be contested and challenged. In such a situation, the Law Commission recently commented in its seminal 2023 report *He Poutama* on the role of the High Court to weigh up the evidence to determine if the tests for CMT and PCRs are met, but not to act as the “final arbiter defining the whakapapa of the applicants.”⁶⁰
- 60) Yet care must be taken to ensure that the translation and interpretation adopted by the High Court is consistent with the context and nuances of tikanga Māori, āronga and mātauranga Māori, as well as the MACA statutory scheme, and with Parliament’s intent, which it goes without saying is a challenging balancing exercise.
- 61) Still, Māori as a people lay claim to a set of abstract cultural values and ways of organising social life that are distinctively Māori and refer to these ways as Māori customary law or tikanga Māori which is sometimes described as values, principles or norms that determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just, right and correct.
- 62) “Tika” means correct, right or just and the suffix “nga” transforms “tika” into a noun thus denoting the system by which correctness, justice or rightness is maintained.⁶¹ The late and highly respected Te Arawa Anglican Bishop, Manuhia Bennett, in an interview in 2000 by the author and other colleagues defined tikanga as “doing things right, doing things the right way, and doing things for the right reasons.”⁶²
- 63) Professor Hirini Mead, respected Ngāti Awa kaumātua (elder) described tikanga Māori as embodying:⁶³

... a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do.

⁵⁹ Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023) at para. 7.127.

⁶⁰ Above, at para. 7.171-7.172.

⁶¹ Williams, J, “Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law” in *Wai L Rev* (Vol. 21, 2013) at 2 republished recently as “Lex Aotearoa: Mapping the Māori Dimension in Modern New Zealand Law” in Joseph, R and Benton, R (Eds.), *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2001) chapter 9; and Joseph, R, “Re-Creating Space for the First Law of Aotearoa-New Zealand” in *Wai L Rev* (Vol. 17, 2009) at 74.

⁶² Cited in Benton, R Frame, A and Meredith, P, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, Victoria University Press, 2013) at 431. The author was one of the interviewers of Bishop Bennett for this interview in April 2000.

⁶³ Mead, H, “The Nature of Tikanga” (Unpublished Manuscript Paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) at 3–4.

64) Professor Mead added:⁶⁴

Tikanga are tools of thought and understanding. They are packages of ideas which help to organize behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us ... They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed.

65) Sir Edward Taihakurei Durie defined tikanga Māori as:

... values, standards, principles, or norms to which the Māori community generally subscribed for the determination of appropriate conduct.⁶⁵

66) More recently, Te Aka Matua o te Ture – the New Zealand Law Commission referred to tikanga Māori as covering the core beliefs, values and principles broadly shared among Māori and is informed by mātauranga Māori (knowledge systems) broadly shared by all Māori.⁶⁶ The Law Commission distinguished between tikanga Māori – laws that cover the core beliefs, values and principles broadly shared among Māori,

⁶⁴ Above.

⁶⁵ Durie, E, “Will the Settlers Settle? Cultural Conciliation and Law,” in *Otago Law Review*, (Vol. 8, 1996) 449 at 452.

⁶⁶ Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023) at 27. For Kāpiti Coast witness evidence on tikanga Māori generally, see Affidavit of William Bill Taueki, dated November 2023 at para. 6 [CB Tab 24 at 201.00017]; Affidavit of Rupene Morehu Teratiu Waaka, dated 3 April 2017 at para. 7 [CB Tab 28 at 201.00066]; Affidavit of Caleb Sylvanus Royal, dated 13 November 2023 at para. 17, 25, 29 [CB Tab 29 at 201.00069]; Affidavit of Justin Eruiti Tamihana, dated 13 November 2023 at para 16, 17, 25, 29, 53, 59, 63, 87, 88 [CB Tab 31 at 201.00090]; Brief of Evidence of Ani Mikaere, dated 13 November 2023 at para 9, 23, 28, 36; [CB Tab 32 at 201.00116]; Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 at 16 [CB Tab 33 at 201.00136]; Brief of Evidence of Mahina-a-Rangi Joy Baker on behalf of Atiawa ki Whakarongotai and Ngāti Raukawa ki te Tonga, dated 13 November 2023 at para 196 [CB Tab 36 at 201.00200] 1; Brief of Evidence of Philip James Walker, dated 13 November 2023 full brief [CB Tab 38 at 201.00309]; Brief of Evidence of Te Kahu Te Rangi Rōpata, dated 16 April 2024 at para 50 [CB Tab 41 at 2021.00363]; Brief of Evidence of Te Kenehi Teira, dated 13 November 2023 full brief [CB Tab 42 at 201.00377]; Brief of Evidence of Wayne John Kiriona, dated 13 November 2023 at para 19-21 [CB Tab 45 at 201.00427]; Joint Brief of Evidence of Heeni Meretini Collins and Te Kenehi Teira, dated 13 November 2023 full brief [CB Tab 47 at 201.00453]; Brief of Evidence of Rawiri Shane McIntyre Richmond, dated 13 November 2023 at para 30 [CB Tab 40 at 201.00347]; Affidavit of Tutere Paraone Parata on Behalf of Te Ātiawa ki Whakarongotai Charitable Trust, dated 3 April 2017 at para 1-8 [CB Tab 57 at 202.00575]; Second Affidavit of John Webber Barrett, dated Affirmed on 13 October 2023 at para 118 [CB Tab 59 at 202.00598]; Brief of Evidence of Benjamin Rameka Ngaia, dated 13 November 2023 at para 10-25 [CB Tab 63 at 202.00686]; Reply Brief of Evidence of Mark Anthony “Kapuarangi” Moses, dated 3 May 2024 at para 6 [CB Tab 82 at 416.08291]; Reply Brief of Evidence of Dean James Wilson, dated 18 April 2024 at para 52 [CB Tab 85 at 202.00916]; see Affidavit of Robert Paul Warrington, dated 27 March 2017 at para 2 [CB Tab 73 at 202.00841]; Affidavit of Dennis Raymond Morgan in Support of David Morgan Whānau Application for Recognition Orders for Protected Customary Rights, dated March 2017 at para.1-6 [CB Tab 27 at 201.00063]; Brief of Evidence of Dr Taku Parai, dated 13th February 2024 at para 110-171 [CB Tab 93 at 203.01004]; Brief of Evidence of Hohepa Potini, dated 13th February 2024 at para 123, 162 [CB Tab 94 at 203.01048];]; Brief of Evidence of Miria Louise Woodbine Pomare, dated 13th February 2024 [CB Tab 96 at 203.01126]; and Brief of Evidence of Tā Matiu Nohorua Te Rei, dated 13th February 2024 [CB Tab 100 at 203.01229].

and tikanga-ā-iwi – localised expressions of tikanga that are shaped by different Māori groups’ knowledge and experience which varies between different Māori groups.

- 67) It is an adherence to principles and values not necessarily strict legal rules that enable change and variation within tikanga Māori as a legal system while maintaining cultural integrity. At the same time, the tikanga principles and values allow for sufficient consistency and universality across iwi and hapū and even whānau to support a degree of consensus.
- 68) Consistent and universal tikanga values and principles are notable across Māori history and tradition for example, the 1838 House of Lords Select Committee was established to inquire into New Zealand affairs as a prelude to colonisation.
- 69) The Select Committee called a respected surgeon, Mr J. Watkins, who had spent some time in New Zealand among Māori, where the following exchange was recorded by the Committee:

Are the Customs and Laws completely different in different portions of the Island?

The Customs and Laws appear to be very much alike, and they seem to be remarkably tenacious of them, and they initiate their children into them in very early Days. It is very amusing to see them teaching their Children; they will teach their children as if they were old persons and in return hear them patiently as if they were old People speaking, allowing the Child to ask any questions.

They have no Persons there to expound the Law?

No, they appear to have Councils or annual Meetings and Feasts there. Chiefs of various Tribes meet together and speak at great length. ... They reason very acutely indeed; and they have their Assistants to sit with them as Reporters to assist them to remember the speech. In case they would forget something, they would refer to their friends.⁶⁷

- 70) Early Colonial officials even had no difficulty in accepting that tikanga Māori customs and usages had the character and authority of law.⁶⁸

⁶⁷ House of Lords Report from the Select Committee of the House of Lords appointed to Inquire into the present state of the Islands of New Zealand and the expediency of regulating the settlement of British subjects therein in *British Parliamentary Papers 1838* (No. 680, 7 August 1838).

⁶⁸ See for example the instructions of James Stephen to Governor Hobson 9 December 1840, *GBPP*, (1841, No. 311) at 24, cited in McLintock, *AH Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) at 393–394. In addition, in 1832, after a stay in New Zealand, RW Hay reported to the Colonial Office in London: “The property of the soil is well defined, their jurisprudence extensive, and its penalties are submitted to without opposition, even from the stronger party.” “Notices of New Zealand” from Original Documents in the Colonial Office, communicated by RW Hay, Esq., reported in *The Journal of the Royal Geographical Society*, (1832) at 2.

71) Tikanga Māori then, is the traditional body of values and ethics developed by Māori to govern themselves personally and collectively, privately and publicly, and governed decision-making regarding, inter alia:

- a) leadership, governance and management concerning all matters including Māori land and other natural resources including the takutai moana area;⁶⁹
- b) intra- and inter-governance relationships and decision-making with whānau (extended families) hapū (sub-tribes), iwi (tribes/nations) and other groups;⁷⁰
- c) governance relationships with Pākehā⁷¹ missionaries, traders, settlers and politicians;⁷²
- d) determining rights to land and other resources based on take tūpuna (discovery and ancestry), take tuku (gift), take raupatu (confiscation) and ahi kā (occupation);⁷³
- e) the exercise of kaitiakitanga (stewardship) governance practices including the imposition of rāhui (bans on the taking of resources or the entering into zones within a territory) and other similar customs and exercising responsible stewardship governance over the community on all matters;⁷⁴
- f) regulating governance use rights for hunting, fishing and gathering, and sanctioning those who transgressed tikanga Māori or Māori rights and responsibilities (or both);⁷⁵ and
- g) regulating tribal citizenship rights, responsibilities and relationships to resources.⁷⁶

Key Tikanga Māori Values

72) There are several underlying core values and principles⁷⁷ that underpin and inform the broader legal system of tikanga Māori as articulated by such authorities as Justice

⁶⁹ Boast, R and others, *Māori Land Law* (Butterworths, Wellington, 1999) at 30–37.

⁷⁰ Above at 33–41.

⁷¹ Pākehā is the Māori term for newcomer, non-Māori or European. The term is used respectfully throughout this report.

⁷² Above at 28–30.

⁷³ Erueti, A “Māori Customary Law and Land Tenure” in Boast, R and others *Māori Land Law* (Butterworths, Wellington, 1999) at 42–45; Asher, A and Naulls, D, *Māori Land* (New Zealand Planning Council, Wellington, 1987) at 5–6; and Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 55–56.

⁷⁴ Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22, 1988) at 181.

⁷⁵ Above at 58–61.

⁷⁶ Kawharu, H, *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 39; and Durie, E, “Custom Law” (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994) at 5.

⁷⁷ It is important to distinguish here between tikanga Māori as an effective legal system which is values and principles based, not rules based, like the British and New Zealand common law legal systems. Like other Indigenous legal systems, tikanga Māori is non-prescriptive, non-adversarial and non-punitive and is based on what is tika – just, right, correct or appropriate according to the tikanga values within a given situation. See

Joseph Williams,⁷⁸ Professor Hirini Mead,⁷⁹ Sir Taihākurei Eddie Durie,⁸⁰ the late Dr Nin Toomas,⁸¹ Chief Judge Caren Fox,⁸² and more recently, Te Aka Matua o te Ture – the New Zealand Law Commission.⁸³

- 73) Dr Carwyn Jones, moreover, asserted that tikanga was flexible subject to reinterpretation according to circumstances, and decisions were pragmatic, not bound by unbreakable rules.⁸⁴
- 74) Tikanga Māori is largely about what is appropriate human conduct in accordance with the fundamental principles and values of the affiliated groups for their circumstances of the time. Tikanga Māori then must be understood in context within Māori worldviews, and it will draw on precedent to determine appropriate action.
- 75) More recently, the 2021 High Court decision of *Ngāti Whātua Ōrākei Trust v Attorney-General*⁸⁵ referred to the ‘tāhuhu he aratohu – fundamental signposts⁸⁶ - that guide Māori approaches to tikanga Māori and allow for some shared understandings and mutual interactions.
- 76) From these Māori worldviews and shared understandings come the cardinal – albeit non-exhaustive - customary tikanga Māori tāhuhu values, key principles, or fundamental component parts of:

Durie, E, “Custom Law” (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994), Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003); Tomas, N, ‘Key Concepts of Tikanga Maori (Maori Custom Law) and their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau: Past and Present,’ (PhD Thesis Dissertation, Waipapa Taumata Rau, University of Auckland, 2006); Borrows, J, ‘Seven Gifts: Revitalising Living Laws Through Indigenous Legal Practices,’ in *Lakehead University Law Review*, (Vol, 2, 2016) at 1; Borrows, J, *Law’s Indigenous Ethics: The Revitalisation of Canadian Law* (University of Toronto Press, Toronto, Canada, 2019); Fox, C, ‘Ko Te Mana Te Utu. Narratives of Sovereignty, Law and Tribal Citizenship in the Potikirua ki Te Toka-a-Taiau District,’ (PhD Thesis Dissertation, Te Whare Wānanga o Awanuiārangi, 2023) and Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023).

⁷⁸ Williams, J, “Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law” in *Wai L Rev* (Vol. 21, 2013) at 3; republished recently as “Lex Aotearoa: Mapping the Māori Dimension in Modern New Zealand Law” in Joseph, R and Benton, R (Eds.), *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2001) chapter 9.

⁷⁹ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) 29-38. Mead adds tika - right or correct; and pono – true or genuine.

⁸⁰ Durie, E, ‘Will the Settlers Settle? Cultural Conciliation and Law,’ in *Otago Law Review*, (Vol. 8, 1996) at 452 and Durie, E, “Custom Law” (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994).

⁸¹ Tomas, N, ‘Key Concepts of Tikanga Maori (Maori Custom Law) and their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau: Past and Present,’ (PhD Thesis Dissertation, Waipapa Taumata Rau, University of Auckland, 2006).

⁸² Fox, C, ‘Ko Te Mana Te Utu. Narratives of Sovereignty, Law and Tribal Citizenship in the Potikirua ki Te Toka-a-Taiau District,’ (PhD Thesis Dissertation, Te Whare Wānanga o Awanuiārangi, 2023).

⁸³ Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023).

⁸⁴ Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 at 22 [CB Tab 33 at 2023 201.00136].

⁸⁵ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 per Palmer J.

⁸⁶ Above at paras 319-320.

- a) Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world;
- b) Wairuatanga — acknowledging the metaphysical world — spirituality — including placating the departmental Gods’ respective realms;
- c) Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;
- d) Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group;
- e) Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects;
- f) Noa — free from tapu or any other restriction; liberating a person or situation from tapu restrictions, usually ritually through karakia and water;
- g) Utu — maintaining reciprocal relationships and balance with nature and persons;
- h) Ohaoaha – distribution and sharing of prosperity;
- i) Mauri — recognition of the life-force of persons, objects and all life;
- j) Hau — respect for the vital essence of a person, place or object including te hau o te taonga (the vital essence of highly prized resources);
- k) Rangatiratanga — effective leadership; appreciation of the attributes of leadership; an ability to weave people together for a particular purpose
- l) Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires;
- m) Aroha — charity, generosity and hospitality to the fullest extent that mana (honour) requires; and
- n) Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations.

77) Speaking extrajudicially, Williams J listed below what he described as “generally applicable tikanga core values:”

- a) whānaungatanga or the source of the rights and obligations of kinship;
- b) mana or the source of rights and obligations of leadership;
- c) tapu as both a social control on behaviour and evidence of the indivisibility of the divine and profane;
- d) utu or the obligation to give and the right (and sometimes obligation) to receive constant reciprocity; and
- e) kaitiakitanga or the obligation to care for one's own.⁸⁷

78) Of this list, Williams J considered:

... whānaungatanga to be the glue that held, and still holds, the system together; the idea that makes the whole system make sense – including legal sense.⁸⁸

79) Miller J in the most recent 2023 Court of Appeal MACA decision of *Edwards*,⁸⁹ also referred to several relational tikanga values that include:

- a) whānaungatanga,
- b) mana,
- c) manaakitanga,
- d) utu,
- e) kaitiakitanga and
- f) tapu.⁹⁰

80) Miller J added:

⁸⁷ Williams, J, “Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law” *Wai L Rev* (Vol. 21, 2013) at 3, reprinted in Joseph, R and Benton, R (Eds.), *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2001) chapter 9.

⁸⁸ Above at 4.

⁸⁹ *Whakatohea Kotahitanga Waka (Edwards) v Te Kahui and Whakatōhea Maori Trust Board* [2023] NZCA 504 at 127. These tikanga values were explained in Court by Professor Emeritus David Williams of Auckland University.

⁹⁰ Above.

These values may be universal and uncontroversial. The cases decided to date tend to demonstrate that. But it is their specific local application that matters, and that may be closely fought and fact-specific, as these appeals illustrate.⁹¹

Tikanga Māori - Coherent System of Law - in Context

81) Context is also critical for answering each of the pūkenga questions in accordance with tikanga Māori for this report. The importance of context was emphasised by Lord Cooke in the 2001 Court of Appeal decision of *McGuire v Hastings District Council*⁹² (in reviewing House of Lords authorities on interpreting legislation) when Lord Cooke concluded: “In law, he [Lord Steyn] has said elsewhere, context is everything.”⁹³

82) The late esteemed Ngapuhi Law academic, Professor Nin Tomas noted the importance of context when she emphasised that ‘there is a need for a better understanding of how tikanga fits together as a coherent principle-based system of law.’⁹⁴ The Law Commission agreed when it noted in 2023:

Tikanga is sensitive to context and evolves according to circumstance. However, more can be said about how its concepts work together to govern and guide behaviour. Showing how core concepts are connected both explains tikanga as a normative system and safeguards tikanga by recognising that it functions as an integrated, comprehensive whole.⁹⁵

83) Earlier in 2001, the Law Commission commented:

As always in tikanga Māori, the values are closely interwoven. None stands alone. They do not represent a hierarchy of ethics, but rather a koru, or a spiral of ethics. They are all part of a continuum yet contain an identifiable core.⁹⁶

84) Perceiving the above cardinal tikanga Māori tāhuhu values, key principles or component parts as integrated can safeguard tikanga by ensuring that it is not treated as simply a “grab bag” from which to extract isolated values. An appreciation of tikanga Māori values holistically and understanding how these tikanga Māori concepts interlock within the overall structure are critical to their effective application within a contemporary MACA context and much broader.

⁹¹ Above, at 128.

⁹² *McGuire v Hastings District Council* [2001] NZRMA 557, 1 November 2001, per Lord Cooke at 561.

⁹³ Above.

⁹⁴ Tomas, N, ‘Key Concepts of Tikanga Maori (Maori Custom Law) and their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau: Past and Present,’ (PhD Thesis Dissertation, Waipapa Taumata Rau, University of Auckland, 2006) at 34. See also Fox, C, ‘Ko Te Mana Te Utu. Narratives of Sovereignty, Law and Tribal Citizenship in the Potikirua ki Te Toka-a-Taiau District,’ (PhD Thesis Dissertation, Te Whare Wānanga o Awanuiārangī, 2023).

⁹⁵ Te Aka Matua o te Ture, Law Commission, *He Poutama* (Law Commission Purongo Rangahau Study Paper 24, Wellington, September 2023) at 47.

⁹⁶ Te Aka Matua o te Ture, Law Commission, *Māori Custom and Values in New Zealand Society* (Law Commission Study Paper SP9, Wellington, 2001) at 29.

85) Tikanga Māori also includes adherence to proper kawa (rituals, form and process, recognising boundaries of thought and place) in karakia (incantations), waiata (songs), whakapapa (genealogical recitations), whaikōrero (oratory) and debate.⁹⁷ Accordingly, the value system on which tikanga Māori is based is aspirational, idealistic and a just, appropriate, correct, fair kind of jurisprudence, setting desirable standards to be achieved.⁹⁸

86) Compliance was largely self-enforced driven by whakamā (shame), public opinion, or mataku (fear of spiritual retribution). Muru (community stripping of the goods of a whānau) was also practised, as utu (redress or restoration of balance) for some aituā (misfortune) like the careless loss of life or property or some breach of social laws. Muru was usually undertaken with the full acquiescence of the whānau kua hē (the family or community in the wrong).⁹⁹

87) Fundamental to tikanga Māori is a conception of how Māori should relate to land, water, all lifeforms and to each other. Referring to certain sacred creation karakia (incantations), the Ngapuhi tohunga Māori Marsden articulated:

The karakia show an extraordinary depth of understanding of what it is to be human, both in our relationships with each other and in our relationships with the world and the whole cosmos.¹⁰⁰

88) Tikanga Māori as a legal system is a conception based on relationships through:

- i. Whakapapa or the physical descent of everything; and
- ii. Wairuatanga or the spiritual connection of everything.

89) For all Māori iwi, hapū and whānau – the maunga (mountains), whenua (land), rohe moana (ocean), awa (rivers), manga (streams), moana (lakes), and puna (springs)– are integral, defining components of their personal and tribal identity, security and prosperity. The fundamental concept of whakapapa considers Te Ao Turoa - the environment - a whānaunga or relation.

90) Tikanga Māori is a legal system that recognises a legal responsibility to care for people and the world in which we live, and to constrain its exploitation.¹⁰¹

91) Tikanga Māori then is about what is appropriate human conduct in context according to the tāhuhu values and principles noted above of Māori groupings for their circumstances at a particular point in time. Tikanga Māori must be understood in

⁹⁷ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–32.

⁹⁸ See Patterson, J, *Exploring Māori Values* (Dunmore Press, 1992) and Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–32.

⁹⁹ See the topic “Muru” in R Benton, A Frame and P Meredith *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, 2013) at 254.

¹⁰⁰ Cited in Shirres, M, *Te Tangata: The Human Person*, (Accent Publications, Auckland, 1998) at chapter 6 – Karakia – A Means of Being Human.’ Maori Marsden was the main informant for Shirres.

¹⁰¹ See Orbell, M, *The Natural World of the Māori* (William Collins Publishers, Auckland, 1985) at 215–217.

context and will draw on precedents and the right and wrong actions of tūpuna (ancestors) to determine appropriate action today and into the future.

92) From the Kāpiti Coast claimant evidence, the Ngāti Raukawa witness Dr Ani Mikaere asserted:

For Ngāti Raukawa, tikanga is the first law of Aotearoa. ... We had a highly workable and adaptable system of law in operation, and Te Tiriti guaranteed that it would remain as the first law of Aotearoa.¹⁰²

93) The Ngāti Tamarangi witness William Taueki noted:

Ngāti Tamarangi tikanga has come to be much more about the practical, day to day ways that we use the foreshore. Our tikanga isn't something that we need to perform for others – it is more about how we live in this place and how we use the resources.¹⁰³

94) The Ngāti Raukawa witness Wayne Kiriona also recorded:

... tikanga still exists as a framework to guide our actions. ... Our rights and interests in the takutai moana lie deep. Whilst the Crown actions over many years have impacted and, in some instances, threatened the exercise of our customary rights, there are underlying tikanga rights and interests that remain and always will. We have a special relationship with the takutai moana based on our ancestral whakapapa to it and our future obligations to our mokopuna.¹⁰⁴

95) In a similar manner, the Muaūpoko witness Dean Wilson observed:

...for as long as Muaūpoko are here, we will be at Punahau [Lake Horowhenua], we will be its kaitiaki and do all in our power to protect it, in the hope for the restoration that it deserves, which is now long overdue. That is our tikanga, that is our law and our place here.¹⁰⁵

96) The David Morgan Whānau witness Dennis Morgan moreover, opined:

The David Morgan whanau have always had a close connection with the coast in the area of the application. We thought of this as a right we had because of our history and connection to tupuna who lived in the area. We thought we had mana whenua in that region and exercised our customary rights including gathering food and launching waka.¹⁰⁶

¹⁰² Brief of Evidence of Ani Mikaere, dated 13 November 2023 at para 9-10 [CB Tab 32 at 201.00116].

¹⁰³ Affidavit of William Bill Taueki, dated November 2023 at para. 16 [CB Tab 24 at 201.00017].

¹⁰⁴ Brief of Evidence of Wayne John Kiriona, dated 13 November 2023 at para 61 and 84 [CB Tab 45 at 201.00427].

¹⁰⁵ Reply Brief of Evidence of Dean James Wilson, dated 18 April 2024 at para 52 [CB Tab 85 at 202.00916].

¹⁰⁶ Affidavit of Dennis Raymond Morgan in Support of David Morgan Whānau Application for Recognition Orders for Protected Customary Rights, dated March 2017 at para. 6 [CB Tab 27 at 201.00063].

97) Te Āti Awa witness John Barrett similarly discussed further the importance of tikanga when he recorded: “Our tikanga and customary practices are the lived expressions of our rangatiratanga.”¹⁰⁷ The Ngāti Toa Rangatira witness Hohepa Potini similarly asserted:

Under our tikanga, our ancestral connection to Tangaroa gives us the right to enjoy the bounty of the sea, but those rights are conditioned by our responsibility to nurture our ancestor. We must exercise kaitiakitanga as the custodians of our rohe moana.¹⁰⁸

98) The Ngāti Raukawa and Te Āti Awa witness Dr Mahina-a-Rangi Baker also observed:

It is very important in my mind that the rights that we are seeking to be recognised, as best as possible, are authentic to tikanga Māori.¹⁰⁹

99) Dr Taku Parai of Ngāti Toa Rangatira also succinctly stated that tikanga was “like an “unwritten law” that everyone was taught: the rules of respect.”¹¹⁰

100) For the purposes of this report to assist with answering the ten pūkenga questions above, the MACA process must now be accomplished within the combined tikanga Māori and Aotearoa New Zealand common and statutory law contexts.

Tikanga Māori and the Marine and Coastal Area (Takutai Moana) Act 2011

101) Applying an English common law approach over the New Zealand marine and coastal estate is not appropriate for our country that depends on our coastal marine estate. Elias CJ affirmed in the 2003 Court of Appeal decision of *Attorney-General v Ngāti Apa*¹¹¹ that the common law in New Zealand is different to other common law countries when she noted:

But from the beginning of the common law of New Zealand as applied in the Courts, it differed from the common law of England because it reflected local circumstances.¹¹²

102) Chief Justice Elias continued:

Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage [tikanga] recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been

¹⁰⁷ Second Affidavit of John Webber Barrett, dated Affirmed on 13 October 2023 at para 118 [CB Tab 59 at 202.00598].

¹⁰⁸ Brief of Evidence of Hohepa Potini, dated 13th February 2024 at para 162 [CB Tab 94 at 203.01048].

¹⁰⁹ Brief of Evidence of Mahina-a-Rangi Joy Baker on behalf of Atiawa ki Whakarongotai and Ngāti Raukawa ki te Tonga, dated 13 November 2023 at para 197 [CB Tab 36 at 201.00200].

¹¹⁰ Brief of Evidence of Dr Taku Parai, dated 13th February 2024 at para 165 [CB Tab 93 at 203.01004].

¹¹¹ [2003] 3 NZLR 577.

¹¹² Above, at 652, para. 17.

lawfully extinguished. The existence and extent of any such property interest is determined by the application of tikanga.¹¹³

- 103) The Marine and Coastal Area (Takutai Moana) Act 2011 (‘MACA’) was enacted to repeal the controversial Foreshore and Seabed Act 2004¹¹⁴ which was a political response to the *Attorney-General v Ngāti Apa*¹¹⁵ decision that severely limited Māori property rights in the marine foreshore and seabed areas based on pre-existing historic aboriginal title rights. MACA introduced a new framework for recognising customary rights in the marine and coastal area based on tikanga Māori which, as noted earlier, is referred to in s. 9, MACA as: ‘Māori customary values and practices.’

Tikanga Māori Evidence in the Kāpiti Coast Application Area

- 104) With reference to evidence supporting takutai moana claims historically for recognising the doctrine of aboriginal title in the Kauaeranga area (modern day Thames), Chief Judge Francis Fenton of the Native Land Court (as he was then) concluded in the 1870 *Kauaeranga Judgment*:

I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider *how readily they may prove such*, and how impossible it is to contradict them if they only agree amongst themselves.¹¹⁶ [emphasis added]

- 105) The evidence of all the Kāpiti Coast claimants and their respective witnesses has highlighted, as Chief Judge Fenton articulated in 1870, how readily they may prove their claims in the Kāpiti takutai moana area,¹¹⁷ and how impossible it is to contradict them if they only agree amongst themselves. The latter point is one of the major challenges of this MACA High Court hearing which matter is addressed further into the report.

- 106) Having analysed the important context that provided a foundation for understanding the English common law doctrine of aboriginal title and the associated case law, the MACA history and its statutory purposes, and tikanga Māori in context, we are now ready to answer the 10 Pūkenga Questions which are addressed next in Section C).

¹¹³ Above, at 660, para. 49.

¹¹⁴ Marine and Coastal Area (Takutai Moana) Act 2011, s. 5.

¹¹⁵ [2003] 3 NZLR 577.

¹¹⁶ Chief Judge Fenton, *Kauaeranga Judgment*, (1870) reprinted in *VUWLR* (Vol. 14, 1984) 227 at 244.

¹¹⁷ See the witness evidence above, Taueki 1; Armstrong; Taueki 2; Waaka; Royal; Tamihana 1; Mikaere; Jones 1; Twomey; Mahina-a-Rangi Baker 1; Moore; Walker; Selby 1; Richmond; Rōpata; Teira; Hēnare; Karatea 1; Kiriona; Collins and Teira; Moore 2; Karatea; Parata; Barrett 1; Barrett 2; Carter; Andre Baker; Ngaia; Housiaux; Maote-Davis; Mahina-a-Rangi Baker in Reply; Tihema Baker in Reply; Ngaia 2 in Reply; Warrington; Murray; Proctor; Wiremu-Matakātea; Packer; Williams; Rump; Nuetze; Wilson; Reply Brief of Moses; Tukapua; Reply Brief of Wilson; Brief of Evidence of Sillena Wiki McGregor; Affidavit of Wilson for Interested Party of Horowhenua 11 Part Reservation; Seymour; Brief of Evidence of Patrick Seymour; Huwyler; Shenton; Tahana; Harris; Par; Potini; Elkington; Pomare; Faulkner; and Te Rei.

Section C) Answers to Pūkenga Questions

- 107) We explored the doctrine of aboriginal title and the related case law which provides the foundation for understanding the MACA statutory purposes. We also explored tikanga Māori in context including within Te Ao Māori worldviews. We discussed further tikanga as a normative values-based framework, and some of the specific key tikanga values and principles and how some of the Kāpiti Coast claimant witnesses view tikanga. With this backdrop, we are now ready to answer each of the 10 pūkenga questions commencing with Question 1).
- 108) It is crucial to highlight here an important caveat - all of Section B) above on the common law doctrine of aboriginal title, and the history and statutory purposes of MACA, as well as our extensive discussion of tikanga Māori generally on the importance of mātauranga Māori worldviews, tikanga Māori as a normative framework and coherent legal system of law, and on the key tikanga Māori values and principles, provide important context for answering pūkenga Question 1), as well as each of the other pūkenga questions.
- 109) Each of these important background areas provide a crucial foundation for understanding and addressing all of the pūkenga questions for this MACA High Court hearing. However, we will not repeat here in this section these important contextual areas for the sake of brevity. Nonetheless, it is critical that these important areas are acknowledged here given they provide the important foundation for understanding, deciphering, and answering each of the pūkenga questions commencing with Question 1).

Question 1) What tikanga does the evidence establish applies in the Kāpiti Coast areas that are the subject of the applications before the Court?

Appropriate Application of Evidence

- 110) With this caveat in mind, the specific tikanga that the evidence establishes or supports in the Kāpiti Coast application areas includes the specific tikanga Māori values and fundamental signposts noted above.
- 111) Accordingly, the Kāpiti Coast witness evidence throughout the hearing readily established and supported the following specific tikanga Māori values and fundamental signposts:

- a) Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including all of the Kāpiti Coast claimant groups to each other and the respective takutai moana claimant area;¹¹⁸

¹¹⁸ For claimant evidence on whakapapa for Ngāti Tamarangi, see Affidavit of William Bill Taueki, dated November 2023 at para. 2 [CB Tab 24 at 201.00017]; Affidavit of David Anderson Armstrong, dated 13 November 2023 at para. 65 [CB Tab 23 at 201.00015]; and Affidavit of William Bill Taueki, dated 16 April 2024 at para. 2, 6, 7, 18, 19, 29 [CB Tab 26 at 201.00051].

For the David Morgan Whānau whakapapa reference, see Affidavit of Dennis Raymond Morgan in Support of David Morgan Whānau Application for Recognition Orders for Protected Customary Rights, dated March 2017 at para. 5 [CB Tab 27 at 201.00063].

For Ngāti Raukawa ki te Tonga whakapapa references, see Affidavit of Rupene Morehu Teratui Waaka, dated 3 April 2017 at para. 1 [CB Tab 28 at 201.00066]; Affidavit of Caleb Sylvanus Royal, dated 13 November 2023 at para. 3, 4, 5, 7, 15, 87 [CB Tab 29 at 201.00069]; Affidavit of Justin Eruiti Tamihana, dated 13 November 2023 at para 5-7, 17, 22, [CB Tab 31 at 201.00090] 1; Brief of Evidence of Ani Mikaere, dated 13 November 2023 at para 7, 22, 25, 37, 38, 47, 48, 59, 60 [CB Tab 32 at 201.00116]; Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 at 29 [CB Tab 33 at 201.00136] 1; Brief of Evidence of Jerald Twomey, dated 13 November 2023 at para 1-8 [CB Tab 35 at 201.00185]; Brief of Evidence of Mahina-a-Rangi Joy Baker on behalf of Ātiawa ki Whakarongotai and Ngāti Raukawa ki te Tonga, dated 13 November 2023 at para 5-6, 104, 129-130 [CB Tab 36 at 201.00200] 1; Reply Brief of Evidence of Pātaka Jacob Gifford Moore, dated 13 November 2023 at para 2 [CB Tab 37 at 201.00261] 1; Brief of Evidence of Philip James Walker, dated 13 November 2023 at para 3, 14-22 [CB Tab 38 at 201.00309]; Brief of Evidence of Rachael Ann Selby, dated 13 November 2023 at para 4-11, 22 [CB Tab 39 at 201.00332] 1; Brief of Evidence of Rawiri Shane McIntyre Richmond, dated 13 November 2023 at para 14(b) [CB Tab 40 at 201.00347]; Brief of Evidence of Te Kahu Te Rangi Rōpata, dated 16 April 2024 at para 10-25 [CB Tab 41 at 202.00363]; Brief of Evidence of Te Kenehi Teira, dated 13 November 2023 at para 19-22 [CB Tab 42 at 201.00377]; Brief of Evidence of Tewera Mahuta Hēnare, dated 13 November 2023 at para 1 [CB Tab 43 at 201.00398]; Brief of Evidence of Tūroa Andrew Karatea, dated 14 November 2023 at para 1, 5-12, 16-22 [CB Tab 44 at 201.00407]; Brief of Evidence of Wayne John Kiriona, dated 13 November 2023 at para 19-21 [CB Tab 45 at 201.00427] 1; Joint Brief of Evidence of Heeni Meretini Collins and Te Kenehi Teira, dated 13 November 2023 the full brief [CB Tab 47 at 201.00453]; Second Affidavit of Pātaka Jacob Gifford Moore, dated 13 November 2023 at para 1-11 [CB Tab 48 at 201.00480] 1; Brief of Evidence of Tūroa Andrew Karatea, dated 14 November 2023 at para 1-12 [CB Tab 49 at 202.00498]; Brief of Evidence in Reply of Carwyn Hamlyn Jones, dated 16 April 2024 at 1-11 [CB Tab 51 at 202.00522] 2; Reply Brief of Evidence in Reply of Justin Eruiti Tamihana, dated 6 April 2024 at para 1-2 [CB Tab 52 at 202.00529] 2; Reply Brief of Evidence of Pātaka Jacob Gifford Moore, dated 16 April 2024 at para 1-2 [CB Tab 53 at 202.00535] 2; and Reply Brief of Evidence of Rachael Ann Selby, dated 16 April 2024 at para 1 [CB Tab 54 at 202.00544] 2. For a Ngāti Kauwhata whakapapa reference, see Brief of Evidence of Dennis Bruce Emery, dated 13 November 2023 at para 15-24 [CB Tab 34 at 201.00160].

For Te Āti Awa ki Whakarongotai whakapapa references, see Affidavit of Tutere Paraone Parata on Behalf of Te Ātiawa ki Whakarongotai Charitable Trust, dated 3 April 2017 at para 1-8 [CB Tab 57 at 202.00575]; Affidavit of John Webber Barrett on Behalf of Te Ātiawa ki Whakarongotai Charitable Trust, dated 3 April 2017 at para 1-6 [CB Tab 58 at 202.00587] 1; Second Affidavit of John Webber Barrett, dated Affirmed on 13 October 2023 at para 1-12 [CB Tab 59 at 202.00598] 2; Affidavit of William Ernest Carter, dated 13 October 2023 at para 1-3 [CB Tab 60 at 202.00635]; Brief of Evidence of Andrē Peter Baker, dated 13 November 2023 at para 36-69 [CB Tab 62 at 202.00653]; Brief of Evidence of Benjamin Rameka Ngaia, dated 13 November 2023 at para 10-25 [CB Tab 63 at 202.00686] 1; Brief of Evidence of Jordan Aria Housiaux, dated 13 November 2023 at para 1-4 [CB Tab 65 at 202.00714]; Brief of Evidence of Sharlene Francis Maote-Davis, dated 13 November 2023 at para 1-8 [CB Tab 67 at 202.00732]; Brief of Evidence of Mahina-a-Rangi Joy Baker in Reply, dated 16 April 2024 at para 1, 12-13 [CB Tab 69 at 202.00779] 2; Brief of Evidence of Tihema Michael Baker in Reply, dated 16 April 2024 at para 1-2 [CB Tab 71 at 202.00813]; and Brief of Evidence of Benjamin Rameka Ngaia in Reply, dated 16 April 2024 at para 1-25 [CB Tab 72 at 202.00829] 2.

For Muaūpoko whakapapa references, see Affidavit of Robert Paul Warrington, dated 27 March 2017 at para 1-19 [CB Tab 73 at 202.00841]; Evidence of Bruce Murray, dated 13 November 2023 at para 1-5 [CB Tab 74 at 202.00847]; Evidence of Jonathan Proctor, dated 13 November 2023 at para 1-13 [CB Tab 75 at 202.008459] 1; Affidavit of Marokopa Wiremu-Matakātea, dated 13 November 2023 at para 1-8 [CB Tab 76 at 202.00859]; Evidence of Russell George Packer, dated 13 November 2023 at para 1-5 [CB Tab 77 at 202.00865]; Evidence of Sandra Williams, dated 13 November 2023 at para 1-10 [CB Tab 78 at 202.00869];

- b) Wairuatanga - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;¹¹⁹
- c) Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;¹²⁰

Evidence of Dianne Rita Rump, dated 13 November 2023 at para 1-2 [CB Tab 79 at 202.00873]; Evidence of Sian Montgomery Nuetze, dated 14 November 2023 at para 1-5 [CB Tab 80 at 202.00881]; Evidence of Dean James Wilson, dated 14 November 2023 at 1-10 [CB Tab 81 at 202.00901] 1; Reply Brief of Evidence of Mark Anthony “Kapuarangi” Moses, dated 3 May 2024 at para 1-2 [CB Tab 82 at 416.08291]; Evidence of Timothy Te Otimi Tukapua, Dated: 16 November 2023 at para 1, 17-19 [CB Tab 83 at 202.00906]; Reply Brief of Evidence of Dean James Wilson, dated 18 April 2024 at para 3 [CB Tab 85 at 202.00916] 2; and Brief of Evidence of Sillena Wiki McGregor, dated 18 April 2024 at para 1-2 [CB Tab 86 at 202.00921]. See also Affidavit of Dean James Wilson for Interested Party of Horowhenua 11 Part Reservation dated 13 February 2024 at [CB Tab 1-2 at 203.01306] 3.

For Te Whānau a Tima and Te Hapū o Te Mateawa whakapapa claimant references, see above Affidavit of Patrick Seymour, dated 12 April 2017 at para 1-8 [CB Tab 87 at 202.00927]; and Brief of Evidence of Patrick Seymour, dated 14 November 2023 at para 1.0-4.7 [CB Tab 88 at 202.00930].

For Ngā Wairiki Ngāti Apa whakapapa claimant references, see above Affidavit of Francis Joseph Pahia Huwyler, dated 3 April 2017 at para 1-9 [CB Tab 90 at 202.00964]; and Affidavit of Chris Shenton, dated 13 November 2023 at para 1-31 [CB Tab 91 at 202.00967].

For a Te Patutokotoko whakapapa claimant reference, see above Affidavit of Christopher Henare Tahana, dated 9 March 2017 at para 1-31.2 [CB Tab 92 at 202.00995].

For a Rangitāne whakapapa claimant reference, see Affidavit of Danielle Pikihiua Harris in Support of Application by the Rangitāne Settlement Trust to be an Interested Party, dated 12 February 2024 at para 1-3 [CB Tab 106 at 203.01357].

For Ngāti Toa Rangatira whakapapa claimant references, see above Brief of Evidence of Dr Taku Parai, dated 13th February 2024 at para 1-11, 32, 40, 41, 158 [CB Tab 93 at 203.01004]; Brief of Evidence of Hohepa Potini, dated 13th February 2024 at para 1-31, 161 [CB Tab 94 at 203.01048]; Brief of Evidence of Hori Turi Elkington, dated 13th February 2024 at 1-10 [CB Tab 95 at 203.01109]; Brief of Evidence of Miria Louise Woodbine Pomare, dated 13th February 2024 at para 1-8, 40-66 [CB Tab 96 at 203.01126]; Brief of Evidence of Rawiri Faulkner, dated 13th February 2024 at para 1-2, 29 [CB Tab 98 at 203.01176]; and Brief of Evidence of Tā Matiu Nohorua Te Rei, dated 13th February 2024 at para1-4, 14-53 [CB Tab 100 at 203.01229].

¹¹⁹ For claimant witness evidence on wairuatanga, see above Taueki 2 at 2-18, 29; Royal at 52, 58; Tamihana at 18, 22, 29, 37, 57, 77; Mikaere at 22, 47-48; Emery at 46-51; Parata at 10, 23, 37; Barrett 2 at 46; Andre Baker, the whole reference; Parai at 21-22, 35, 55-56, 138-139, 141, 166-171; Potini at 153, 159, 164-165; Elkington at 23-24, 28, 55, 63; O'Malley at 21-22; Proctor 1 at 11-13, 35; Proctor 2 at 19, 62-79, 104, 106-110; Moore at 116-118; Walker, the whole reference; Richmond at 14; Teira, the whole reference; Henare, the whole reference; Wilson 2 at 3 and Seymour at 5.9 and 8.5.

¹²⁰ For claimant witness evidence on whānaungatanga, see above Taueki 2 at 7, 29, 30, 32; Morgan at 5; Waaka at 1; Royal at 3-5, 87-88; Tamihana at 15, 16, 22, 25, 29, 30, 41, 53, 77, 88, 89, 130; Mikaere at 33-37, 38, 43-44, 59-60; Jones 1 at 27; Moore at 100-108; Mahina-a-Rangi Baker 1 at 49-53; Walker at 35; Twomey, the whole reference; Kiriona, the whole reference; Karatea, the whole reference; Selby 1, the whole reference; Richmond at 14(h); Ropata at 44; Teira at 17; Collins & Teira, the whole reference; Emery at 43-44, 55-60; Parata at 37; Andrē Baker, the whole reference; Ngaia 1, the whole reference; Tihema Baker, the whole reference; Parai at 2-27, 127-131, 135-139, 141-142, 147, 155-165; Potini at 1-31, 38-47; 164-168; Pomare at 40-42, 47-49; Elkington, the whole reference; Te Rei, the whole reference; Harris, the whole reference; Tahana at 48-49; Huwyler, the whole reference; Shenton, the whole reference; Seymour, the whole reference; Morgan, the whole reference; Emery, the whole reference; Proctor 1 at 12-13; Tukapua, the whole reference; Moses, the whole reference; and Wilson 2, the whole reference.

- d) Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;¹²¹
- e) Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;¹²²
- f) Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;¹²³
- g) Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;¹²⁴
- h) Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;¹²⁵
- i) Hau — respect for the vital essence of a person, place or object;¹²⁶
- j) Ohaoha – distribution and sharing of prosperity;¹²⁷

¹²¹ For claimant evidence on mana, see above all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei. See especially Taueki 1 at 7; Taueki 2 at 6-9, 18, 30; Morgan at 5; Royal at 3-5, 87; Tamihana 1 at 16, 25, 29, 38, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones 1 at 16; Parata, the whole reference; Barrett 2 at 118; Ngaia 1, the whole reference; Moses at 6; Parai at 110-171; Potini at 123, 162; Rei, the whole reference; Kiriona 1 at 20, Wilson at 52; Morgan at 1-6; Mahinaarangi Baker 1 at 196; Walker, the whole reference; Richmond at 30; Ropata at 50; Kiriona at 62, 84; Jones 2 at 6-11 and Warrington at 2.

¹²² For claimant evidence on tapu, see Taueki 1 at 32; Taueki 2 at 15-18; Armstrong at 41; Royal at 58-59; Tamihana 1 at 20-27, 29; Jones 1 at 41-47; Emery at 47-48; Parata at 37; Ngaia at 76; Parai at 125-129; Potini at 124, 148, 177-179; O'Malley at 21-22; Richmond at 35; Kiriona at 63-65; Nuetze at 54; Seymour at 5.5-5.12, 7.40, 8.2-8.9; and Tamihana 2 at 20, 29.

¹²³ For claimant witness evidence on tapu and noa, see above Taueki at 32; Taueki 2 at 16-18; Armstrong at 41; Royal at 58-59; Tamihana at 20, 27, 29; Jones at 41-47; Emery at 47-48; Parata at 37 and Ngaia at 76.

¹²⁴ For claimant evidence on utu, see above Armstrong at 5, 9, 13; Tamihana 1 at 25, 38, 55; Mikaere at 44, 45, 48-50; Jones 1 at 45; Emery at 43-44, 48-50; Twomey at 39-41; O'Malley at 32-33; Richmond at 28, 37, 45; Ropata at 18; Moore at 75-79; Selby 1 at 17-25; Teira 25-27; Andre Baker at 65-67; Ngaia 1 at 64-66; Rump, the whole reference; Moses at 16, 18; Parai at 17, 73, 95, 100, 143, 147-158; Potini at 142; Elkington at 44; Pomare at 74-75; and Te Rei at 26.

¹²⁵ For claimant witness evidence on mauri, see above Tamihana 1 at 38; Jones 1 at 61; Emery at 47-49; Parata at 37; Barrett; Parai at 125, 141, 143; Karatea at 59; Wilson 1, the whole reference; Moore at 109; Teira at 23, Wilson 2 at 3; and Tahana at 48.

¹²⁶ For claimant evidence on hau, see above Jones 1 at 549(c); Moore at 113-115; Tamihana 1 at 20 and 38, and Moses at 22.

¹²⁷ For witness evidence on ohaoha, see above Taueki 2 at 37, 38; Tamihana 1 at 17, 22, 23, 26, 29, 42, 85, 87, 88, 90; Tamihana 2 at 23; Mahina-a-Rangi Baker 1 at 51, 146; Selby 1 at 24; Richmond at 31, 45; Teira at 44; Parata at 30-33; Proctor 1 at 17; Wilson 1 at 9, 15; McGregor at 13-17; Seymour at 7.32; Parai at 33- 52, 136-139; and Potini at 137-141, 164, 294-305.

- k) Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;¹²⁸
- l) Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, *inter alia*, unfettered access to kai moana from the takutai moana claimant area;¹²⁹
- m) Aroha — charity, generosity;¹³⁰
- n) Kaitiakitanga — stewardship and protection, often used in relation to natural resources including the takutai moana.¹³¹

112) Other important and relevant tikanga concepts that apply in the Kāpiti Coast MACA areas include:

- a) Tika and Pono - being right or correct, true and genuine;¹³²

¹²⁸ For claimant witness evidence on rangatiratanga, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei. See especially Taueki 1 at 37, Taueki 2 at 5, 18, 30; Morgan at 5; Seymour at 3.4; Emery at 33-35, Waaka at 1; Royal at 3-5, 15, 29, 63, 87, 89; Tamihana at 15, 16, 21, 22, 25, 29, 30, 37, 38, 41, 53, 77, 87-90; Mikaere at 24, 39-63, 67-68; Jones, the whole reference; Walker, the whole reference; Selby 1 at 21, 33, 45; Karatea 1 at 51; O'Malley at 21-22; Mahina-a-Rangi Baker 1 at 7; Moore at 67-74; Ropata, the whole reference; Kiriona, the whole reference; Karatea, the whole reference; Teira, the whole reference; Collins & Teira, the whole reference; Harris, the whole reference; Tahana, the whole reference; Huwyler, the whole reference; Shenton, the whole reference; Parata at 12-16, 21-22; Barrett, the whole reference; Andre Baker, the whole reference; Ngaia, the whole reference; Mahina-a-Rangi Baker 2, the whole reference; Tihema Baker, the whole reference; Parai at 18-19, 21, 43-44, 78-85, 88, 155-165; Potini at 1-31, 38-47, 118-161, 164-165; Pomare at 28-66, 83-93; Elkington, the whole reference; Faulkner, the whole reference; and Te Rei, the whole reference.

¹²⁹ For evidence on manaakitanga, see above Taueki 1 at 37; Taueki 2 at 37, 38; Tamihana at 15-17, 25, 26, 29, 38, 53, 55, 90; Jones 1 at 48-49; Karatea at 61-63, 83-84; Mahina-a-Rangi Baker 1 at 51-53, 158; Moore at 100-108; Walker at 33; Selby 1 at 23-24; Kiriona at 25, 41-42; Collins and Teira at 20, 25, 26, 29, 37, 41, 46, 47, 51, 59; Emery at 33-35, 42-44; Barrett 2 at 107; Seymour at 7.26-7.32; Moses at 23; Parai at 2, 136-139, 154-165; Potini at 37, 164-166; Elkington at 63; and Pomare at 48-50.

¹³⁰ For witness evidence on aroha and mercy, see above Collins and Teira at 70; Ropata at 18; Andre Baker at 54-59; Parai at 163; Potini at 142; Pomare at 74-75; and Te Rei at 26.

¹³¹ For witness evidence on kaitiakitanga, see above Taueki 1 at 30; Taueki 2 at 7, 17, 18, 30, 37, 38; Morgan at 5; Royal at 4, 15, 16, 17, 25, 29, 61, 63, 67, 87; Tamihana 1 at 15-19, 22, 25, 27, 29, 30, 36-38, 41, 45, 53, 55, 63, 71-89; Jones 1 at 48-49; Karatea at 49-52, 58-63, 84; Teira at 25-27; Emery at 40-44, 47-49; Parata at 34-36; Barrett 1 at 20; Barrett 2 at 51-66; Mahina-a-Rangi Baker 2 at 12, 156-193; Wilson, the whole reference; Proctor, the whole reference; Huwyler at 8; Carter, the whole reference; Richmond at 37; Moses at 10, 22, 24, 26; Seymour at 4, 8; Shenton at 12; Murray at 20-27; Kiriona at 67-71; Henare at 30-39; Parai at 14, 77-85, 77, 88, 166-171; Potini at 124, 162-180; Elkington at 56-65; Pomare at 114; and Te Rei at 105-124.

¹³² For witness evidence on tika and pono, see above Taueki at 6; Armstrong at 6 and 54; Royal at 17, 25, 29; Tamihana at 16, 25, 29, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones at 16; Barrett at 2, Moses at 6; and the full affidavits of Ngaia and Parata.

- b) Rangatira ki te rangatira – leaders speaking directly to each other, effective diplomacy;¹³³
- c) Te mana o te kupu – the power of one’s word which is binding;¹³⁴
- d) Kawenata – covenant agreements that are binding on the mana of the group;¹³⁵
- e) Tatau pounamu – binding peace agreements to settle conflict and protracted disputes.¹³⁶

113) Each of these tikanga concepts will be discussed in more detail throughout the report.

114) To answer Pūkenga Question 1) then, the evidence from all of the respective Māori claimant groups in the respective Kāpiti Coast areas that are the subject of the MACA applications before this Court established the above tikanga Māori general values and principles of, inter alia, whakapapa, wairuatanga, whanaungatanga, mana, tapu, noa, utu, mauri, hau, ohaoa, rangatiratanga, manaakitanga, aroha, kaitiakitanga, tika, pono, rangatira ki te rangatira, te mana o te kupu, kawenata and tatau pounamu.

115) This section will refer to the specific tikanga Māori laws and institutions we believe should influence the assessment of whether or not the area in question, or any part of it in the Kāpiti Coast MACA areas is held in accordance with tikanga Māori to answer Question 2).

¹³³ For witness evidence on rangatira, see above Taueki at 37-38, above Taueki 2 at 5, 18, 30; above Morgan at 5; above Rupene at 2; above Royal at 3-5, 15, 29, 63, 87; Tamihana at 14-16, 22-25, 27, 29, 30, 37, 53, 77, 85, 87, 89, 90; Mikaere at 24, 38-63, 66-68; Emery, 33-35, 45; Parata at 12-16, 21-22; and the Parai, Rei, Pomare, Potini, Ngaia, Teira, Kiriona, Karatea, Jones, Moore, Twomey, Collins, Selby, Faulkner, Moses, Wilson and Baker affidavits.

¹³⁴ For witness evidence on te mana o te kupu, see above Mikaere at 7, 45-52, 57, 64; Twomey at 24; O’Malley at 21-28; Walker at 21-22; Selby at 25; Ropata at 35, 41; Kiriona at 41-44; Collins and Teira at 23, 44, 50, 85, 86; Moses at 24; Proctor at 23; and Seymour at 7.57-7.59.

¹³⁵ For witness evidence on kawenata, see above Taueki at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10, 17-25; Tamihana at 3, 22, 26; Mikaere at 36, 45-52, 59-60, 63; O’Malley at 20-28; Emery at 27-32; Parata at 16; Ngaia at 75; Ngaia Reply, full reference; Moses at 95, 96; Shenton at 4.0; and Parai at 49, 59.

¹³⁶ For witness evidence on tatau pounamu, see above Taueki 1 at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10; Tamihana at 3, 22, 26; Mikaere at 45-52, 58-60, 63; Twomey at 36-37; Armstrong at 17-27; Walker at 21-22; Ropata at 18-19, 43-47; Kiriona at 25, 29-30, 36, 44, 50—51; Collins and Teira at 18, 23, 24, 39, 70, 81, 85, 86, 87; Moore at 7; O’Malley at 20-28; Emery at 27-32; Shenton 4.0; Proctor 2 at 30, 37; Ngaia at 50, 56; Parata at 16; Moses at 38-40, 72, 95-96; Potini at 149; Pomare at 57-58, 74-76; Boast at 105; and Te Rei at 52.

Question 2): What evidence indicates the maintenance of a group's holding of part of the Marine and Coastal Area, as a matter of tikanga?

116) All of the previous tikanga material in Section B) is also relevant to answer Question 2) which is acknowledged here but we will not repeat the material here. However, the Section B) material needs to be born in mind in addition to the following material:

117) The section will first briefly refer to the relevant MACA statutory tests that, inter alia, mention tikanga Māori in ss. 51, 58, and 78 MACA for–

- a. Protected customary rights (PCR),
- b. Customary marine title (CMT), and
- c. Wāhi tapu protection (WTP):

PCRs, Customary Marine Title & Wāhi Tapu Protection

118) Customary marine title refers to customary interests based on the common law doctrine of aboriginal title established by a Māori applicant group in a specified location of the common marine and coastal area as long as the Māori applicant group can pass the stringent statutory tests¹³⁷ in s. 58, MACA which states:

Protected Customary Rights

119) Protected customary rights (PCRs) refer to any activity, use or practice established by a Māori applicant group. PCRs are recognised by a protected customary rights order or an agreement. A protected customary rights order means an order of the Court granted in recognition of the protected customary rights of a group pursuant to s. 113, MACA. PCRs are established in accordance with s. 51, MACA:

51 Meaning of protected customary rights.

(1) A protected customary right is a right that –

¹³⁷ For an early academic analysis of the aboriginal title tests before the Marine and Coastal Area (Takutai Moana) Act 2011 was enacted, see Joseph, R, 'Frozen Rights? The Right to Develop Māori Treaty and Aboriginal Rights,' in *Waikato Law Review*, (Vol. 19, Issue 2, 2011) at 117-133. For a recent assessment of the MACA tests, see the MACA case law - *Re Tipene* [2016] NZHC 3199, *Re Tipene* [2017] NZHC 2990, *Re Edwards (Whakatōhea (No. 2))* [2021] NZHC 1025, *Re Clarkson & Ors* [2021] NZHC 1968, *Re Reeder (Ngā Potiki Stage 1 – Te Tahuna o Rangataua)* [2021] NZHC 2726; *Re Ngāti Pāhauwera, Ngāti Pārau, Ngāi Tahu o Mōhaka Waikare & Maungaharuru-Tangitū Trust* [2021] NZHC 3599; *Ngā Hapū o Tokomaru Ākau and Te Whānau a Ruataupare ki Tokomaru* [2022] NZHC 682 [25 March 2024]; *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252; and *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 [26 February 2024]. As noted above, the latest recent legal and political development relating to the Marine and Coastal Area (Takutai Moana) Act is the controversial proposal by the current Coalition Government to significantly reduce the funding for MACA claims from Te Arawhiti – the Ministry for Māori Crown Relations, who administers MACA funding. The Coalition Government is also apparently planning to amend the Marine and Coastal Area (Takutai Moana) Act 2011 and to overturn the 2023 Court of Appeal's interpretation of s. 58, MACA in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252. See Geoffrey Melvin, "Memorandum of Counsel for the Attorney-General" to Churchman J (National List Judge for applications under the Marine and Coastal Area (Takutai Moana) Act 2011) (Crown Law Te Tari Ture o Te Karauna, 25 July 2024). Although the decision was about reducing the MACA funding, the latest MACA decision in this respect is the 2024 Supreme Court decision of *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waiōeka, Ngāti Patumoana, Ngāti Ruatakenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea)* [2024] NZSC 119 [20 September 2024].

- (a) has been exercised since 1840 and
- (b) continues to be exercised in a particular part of the common marine and coastal area *in accordance with tikanga* [emphasis added] by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
- (c) is not extinguished as a matter of law.

Customary Marine Title

58 Customary marine title

- (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group –
 - (a) *holds the specified area in accordance with tikanga*; [emphasis added] and
 - (b) has, in relation to the specified area –
 - (i) exclusively used and occupied it from 1840 to the present day without any substantial interruption; or
 - (ii) received it, any time after 1840, through a customary transfer in accordance with subsection (3).
- (2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—
 - (a) the commencement of this Act; and
 - (b) the effective date.
- (3) For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—
 - (a) a customary interest in a specified area of the common marine and coastal area was transferred— and
 - (b) *the transfer was in accordance with tikanga*; [emphasis added] and
 - (c) the group or members of the group making the transfer—
 - (i) *held the specified area in accordance with tikanga*; [emphasis added] and some members of a group who were not part of the applicant group; and
 - (ii) exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
 - (d) the group or some members of the group to whom the transfer was made have — (i) between or among members of the applicant group; or
 - (ii) to the applicant group or some of its members from a group or transfer to the present day without substantial interruption.
- (4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

Wāhi Tapu Protection

120) Establishing wāhi tapu will provide local Māori groups the opportunity to issue legally binding restrictions on public access to specific wāhi tapu areas within a CMT area which is a strong enabling provision for applying tikanga Māori, pursuant, inter alia, to s. 78 MACAs.

78 Protection of wāhi tapu and wāhi tapu areas

(1) A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area –

- a) in a customary marine title order, or
- b) in an agreement.

(2) A wāhi tapu protection right may be recognised if there is evidence to establish –

- (a) the connection of the group with the wāhi tapu or wāhi tapu area *in accordance with tikanga*; [emphasis added] and
- b) that the group requires the proposed prohibitions on access to protect the wāhi tapu or wāhi tapu area.

121) We will now focus on the statutory test pursuant to s. 58, MACA for establishing CMT in the Kāpiti Coast areas that are the subject of the applications before this Court.

CMT MACA Test – “Holds” the Specified Area in Accordance with Tikanga

122) The first limb of the test for CMT under s. 58(1)(a), MACA requires an applicant group to hold the specified area in accordance with tikanga. A recent extensive judicial discussion of tikanga Māori is Palmer J’s 2021 High Court decision of *Ngāti Whātua Ōrākei Trust v Attorney-General*.¹³⁸ In assessing significant tribal tikanga differences, Palmer J identified several salient characteristics of tikanga:

- a. There is a need to understand tikanga holistically as an interlocking set of reinforcing norms where there is a set of principles which reinforce each other in pointing the way.¹³⁹
- b. Tikanga evolves around values and a value system that comprises a spectrum with values and rules but with values informing the whole range.¹⁴⁰
- c. Tikanga is fundamental to constituting iwi and hapū tribal identity in the exercise of their rangatiratanga.¹⁴¹
- d. There are different versions of which principles would be regarded as “core” to tikanga depending on the context of a particular issue that arises.¹⁴²

¹³⁸ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 per Palmer J.

¹³⁹ Above, at 306.

¹⁴⁰ Above, at 307.

¹⁴¹ Above, at 310.

¹⁴² Above, at 311.

- e. As circumstances change over time, tikanga and its practices may also change over time.¹⁴³
- f. Tikanga is a way of life and is performed more than stated.¹⁴⁴

123) Palmer J concluded:

[There] were and are fundamental philosophical underpinnings, tāhuhu he aratohu that guide iwi approaches to tikanga and allow for some shared understandings and mutual interactions. However, the tikanga of an iwi or hapū is shaped by the historical narrative of that iwi or hapū including the impact of colonisation and other events and circumstances over time. As such, the application of tikanga cannot be examined and understood without that context.¹⁴⁵

124) Palmer J added that tikanga varies across iwi and hapū because they face different circumstances which can lead to adjustments in what is required of tikanga custom.¹⁴⁶

125) Still, the first limb of the test for CMT under s. 58(1)(a) requires an applicant group to hold the specified area in accordance with tikanga. The term “held” relates to the nature of CMT which is a territorial right and an interest in land as it relates to the marine and coastal area.

126) In the 2021 High Court MACA decision of *Re Reeder*,¹⁴⁷ the Court endorsed the statements made by the 1998 Māori Land Court decision of *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*¹⁴⁸ concerning the meaning of “held in accordance with tikanga.” The Court considered that the term “held” reflected the continuity of the customary relationship with the land.¹⁴⁹

127) The wording of s. 58(1)(a) MACA is similar to the wording used to define Māori customary land in s. 129(2)(a), Te Ture Whenua Māori Act 1993 which defines such land as being ‘held by Māori in accordance with tikanga Māori,’ hence it being considered in the *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*¹⁵⁰ decision. The Court held that it was not appropriate to:

... make its determination from a Pākehā or Court perspective [worldview] of Māori customs and usages - from the outside looking in but was required to make its determination according to tikanga Māori – from the inside.¹⁵¹

¹⁴³ Above, at 312.

¹⁴⁴ Above, at 322.

¹⁴⁵ Above, at 322.

¹⁴⁶ Above, at 325.

¹⁴⁷ *Re Reeder (Nga Potiki Stage 1 – Te Tahuna o Rangataua)* [2021] NZHC 2726 at [27].

¹⁴⁸ *John da Silva v Aotea Maori Committee and Hauraki Maori Trust Board*, (1998) 25 Tai Tokerau MB 212 at 213.

¹⁴⁹ Above.

¹⁵⁰ Above, at 213.

¹⁵¹ Above, at 215.

- 128) Referring specifically to the word “held” in s. 129(2)(a), Te Ture Whenua Māori Act 1993, the Court stated:

The important word here is “held.” There is no connotation of ownership but rather it is retained or kept in accordance with tikanga Māori.

- 129) In the 1921 decision of *Amodu Tijani v Secretary Southern Rhodesia*,¹⁵² the Judicial Committee of the Privy Council recognised that English legal doctrines might have no application in English colonies where they differed from native laws. The Privy Council warned against “... a tendency operating at times unconsciously, to render (Native title to land) in terms which are appropriate only to systems which have grown up in English law.’ The Privy Council pointed out that “the notion of individual ownership is quite foreign to native ideas” and that:

All the members of the community, village or family, have an equal right to the land, but in every case the Chief or headman of the community or village, or the head of the family has charge of the land, and in a loose mode of speech is sometimes called the owner.¹⁵³

- 130) As noted above, a clash of worldviews and legal systems also occurred in 1914 when Sir John Salmond, Solicitor General (at the time) was involved in legal proceedings concerning the Treaty of Waitangi and tikanga Māori customary rights over water. Sir John sent a memorandum to the Attorney-General at the time which noted:

The Prime Minister... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery (which would not enable a freehold order to be issued) and not rights of ownership as are now claimed ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, foreshores and tidal waters in the Dominion ... I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained ... it may be anticipated that the Court will hold that *by native custom the Natives own not merely the land, but the water of this country* and freehold titles will be issued accordingly [emphasis added].¹⁵⁴

- 131) In contrast, the 2002 Environment Court decision of *Ngāti Hokopu ki Hokowhitu v Whakatāne District Council*,¹⁵⁵ concluded that ‘the meaning and sense of a Māori value should primarily be given by Māori.’¹⁵⁶ The Court added that ‘assessments should be made within the Māori worldview from where they came.’¹⁵⁷ The Court reflected on

¹⁵² *Amodu Tijani v Secretary Southern Rhodesia* [1921] 2 AC 199, 403.

¹⁵³ Above.

¹⁵⁴ Salmond to Attorney-General, 1 August 1914, *Opinions Relating to Lands Department 1913-15*, cited in Alex Frame, *Salmond: Southern Jurist*, (Victoria University Press, Wellington, 1995) at 119.

¹⁵⁵ (2002) ELRNZ 111 (EnvC) at 46.

¹⁵⁶ Above, at 46 and 53.

¹⁵⁷ Above.

the requirement to consider the relationships of Māori with the natural environment and the need to consider evidence in the form of facts and concluded:

Since section 6(e), RMA [now repealed] does refer to Māori culture and traditions; we have to be careful not to impose inappropriate ‘Western concepts.’ The appellants expressed concerns about that in various ways. Implicit in much of the appellants’ evidence is the idea that each culture can only be explained in its own terms. This depends on the relativistic notion that classifications in any one language or culture are not determined by how the world does not come quietly wrapped up in facts. Facts are the consequences of ways in which we represent the world.¹⁵⁸

132) In *Re Edwards*,¹⁵⁹ Churchman J similarly observed:

Holding an area of the takutai moana in accordance with tikanga is something different to being a proprietor of that area. Whether or not an applicant group has established that they held an area in accordance with tikanga is to be determined by focusing on the evidence of tikanga and the lived experience of that applicant group. The exercise involves looking outward from the applicant’s perspective rather than inward from the European perspective and trying to fit the applicant’s entitlements around European legal concepts.¹⁶⁰

133) Churchman J then concluded that the ‘critical focus must be on tikanga and the question of whether or not the specified area was held in accordance with the tikanga that has been established.

134) Earlier in the 1994 Court of Appeal decision of *Te Rūnanga o Te Ika Whenua v Attorney-General*,¹⁶¹ Cooke P (as he was then) stated: ‘The nature and incidents of Aboriginal title are matters of fact dependent on the evidence in any particular case.’¹⁶²

135) Equally, the question of whether the requirements of s. 58(1)(a), MACA have been met is a question of fact with the focus on the factual inquiry being on tikanga Māori. A key question then is what is an appropriate tikanga factual inquiry framework for assessing whether or not the area in question, or any part of it, is held in accordance with tikanga?

136) The most recent and therefore relevant case on s. 58, MACA for CMT is the majority decision in the 2023 Court of Appeal decision of *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board*¹⁶³ (“*Whakatōhea*”). The

¹⁵⁸ Above.

¹⁵⁹ *Re Edwards*, at [130]

¹⁶⁰ At [140].

¹⁶¹ *Te Rūnanga o Te Ika Whenua v Attorney-General*, [1994] 2 NZLR 20 (CA) at 24.

¹⁶² Above.

¹⁶³ *Whakatōhea Kotahitanga Waka (Edwards) & Ores v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 504.

decision discussed the interpretation of s. 58, MACA as set out by Cooper P and Goddard J who first considered how the common law might have developed immediately after the 2003 *Ngāti Apa* decision when they stated:

The inquiry before the [Māori Land Court] would focus on the nature and extent of the group's rights as a matter of tikanga: this would be a largely factual inquiry, potentially assisted by expert evidence on tikanga. That inquiry would generally take as its starting point the position as a matter of tikanga in 1840. It might be necessary to consider whether the identity of the rights holder, or the content of the rights, had been affected by events from 1840 to the present day. This would also be a tikanga-focused inquiry. ... New Zealand common law would then give effect to any rights of a group as at 1840 that were established by the factual inquiry into the group's relationship with the land, absent a clear and plain extinguishment of those rights by legislation.¹⁶⁴

137) The majority then turned to consider the scheme of the MACA legislation and noted its consistent theme of the restoration of customary interests in the takutai moana while also acknowledging that none of the statutory entitlements with CMT and PCRs amount to ownership of any area of the common marine and coastal area.¹⁶⁵

138) The majority of the Court of Appeal then agreed with the High Court that the focus of s. 58(1)(a), MACA should be on tikanga and whether as a matter of tikanga the applicant group currently holds the relevant area. The majority also accepted that the 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 importance in distinguishing a “holding” of the area from the use of the area to gather a particular resource.¹⁶⁶

139) The Court of Appeal then noted that rather than focusing on a group's “intention and ability” to exclude others from land, it is more helpful to focus on the group's “intentions and ability to control access to an area, and the use of resources within it, as a matter of tikanga” as the Court noted:

... in the context of Māori customary relationships with land, and the principles of whānaungatanga and manaakitanga, we consider that it is more helpful to focus on the group's intention to control access to an area, and the use of resources within it, *as a matter of tikanga* [emphasis in the text]. Permitting others to access the area and to use resources within it, as an expression of manaakitanga, is not inconsistent with control: rather, it demonstrates the exercise of authority in respect of the relevant area. 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. The fact that permission is invariably granted, in particular to whānau (relatives) and others with whom

¹⁶⁴ Above at 373-374.

¹⁶⁵ Above at 384-386.

¹⁶⁶ Above at 266 [per Miller J], and 360 [per Cooper P and Goddard J].

there are reciprocal relationships, does not call into question the group's control of the area. Rather, it is a manifestation of that control.¹⁶⁷

- 140) Thus, a group may “hold” an area in accordance with tikanga where tikanga requires the permission of that group to be sought before others access the area or use resources within it which is common usage by permission.¹⁶⁸ Such a permission responsibility, as articulated by the Court Appeal, is a manifestation of certain tikanga Māori indicia such as rangatiratanga, mana tangata, mana whenua, kaitiakitanga and manaakitanga.

Tikanga Māori Test for CMT

- 141) The important question of whether the requirements of s. 58(1)(a), MACA have been met then, is a question of fact with the focus on the factual inquiry being on tikanga Māori. A key question then is what is an appropriate tikanga Māori factual inquiry framework for assessing whether or not the area in question, or any part of it, is “held” in accordance with tikanga including the recent permission responsibility articulated by the Court of Appeal in *Whakatōhea*?

- 142) To be able to establish CMT, wāhi tapu and PCRs under MACA as noted above, general key aspects of tikanga Māori in our opinion to assess whether or not the area in question, or any part of it, is “held” in accordance with tikanga Māori are similar to those articulated by the Waitangi Tribunal in the 2011 WAI 262¹⁶⁹ and the 2012 Water and Geothermal Resources Reports.¹⁷⁰ The Tribunal first noted that the intention and ability to control a resource is more akin to notions of stewardship or kaitiakitanga. The Tribunal added that in their relationships with the coastal land and waters, Māori exercised the authority (mana) of te tino rangatiratanga, under tikanga Māori, which included:

1. A spiritual dimension including karakia, naming of places [referred to as take taunaha] and placement of rāhui;¹⁷¹
2. A physical dimension including enforcing rāhui;¹⁷²

¹⁶⁷ Above at 404.

¹⁶⁸ Above at 403.

¹⁶⁹ Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.

¹⁷⁰ Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

¹⁷¹ For claimant evidence on wairuatanga, see above Taueki 2 at 2-18, 29; Royal at 52, 58; Tamihana at 18, 22, 29, 37, 57, 77; Mikaere at 22, 47-48; Emery at 46-51; Parata at 10, 23, 37; Barrett 2 at 46; Andre Baker, the whole reference; Parai at 21-22, 35, 55-56, 138-139, 141, 166-171; Potini at 153, 159, 164-165; Elkington at 23-24, 28, 55, 63; O'Malley at 21-22; Proctor 1 at 11-13, 35; Proctor 2 at 19, 62-79, 104, 106-110; Moore at 116-118; Walker, the whole reference; Richmond at 14; Teira, the whole reference; Henare, the whole reference; Wilson 2 at 3 and Seymour at 5.9 and 8.5.

¹⁷² For witness evidence on rāhui, see above Royal at 58-59; Tamihana 1 at 29, 56-59; Jones 1 at 76; Emery at 69; Parata at 23, 32; Parai at 122-129; Tamihana 2 at 56-59; Kiriona at 13-14; Mahina-a-Rangi Baker 1 at 80-87; Moore at 90-99; Murray at 16-19; Richmond at 31-32, 43; Kiriona 2 at 35-36, 64; Carter at 39-40; Warrington at 3-12; Potini at 163, 177-180, 280; and Pomare at 111.

3. A dimension of reciprocal guardianship where tangata whenua were kaitiaki of taonga, caring for it in such a way as to ensure its survival for future generations. And in turn, the taonga cared for and nurtured the tangata whenua;¹⁷³
4. A dimension of use, sometimes rendered equivalent to use-rights [mana whenua] in English law and including the exclusion of others from customary practices;¹⁷⁴
5. Manaakitanga;¹⁷⁵ and
6. Manuhiri from across the sea.¹⁷⁶

Taonga Test – Tikanga Indicia

143) Furthermore, the Waitangi Tribunal in the 2011 WAI 262¹⁷⁷ and the 2012 Water and Geothermal Resources Reports referred to certain indicia or signposts of Māori ‘stewardship’ or kaitiakitanga over fresh waterways that we believe also resonate for the takutai moana of the Kāpiti Coast claimants in this hearing.¹⁷⁸

144) Some of these relevant stewardship signposts were noted by the Waitangi Tribunal who commented on what it termed a ‘taonga test’ for, and proofs of, proprietary interests, or more appropriately ‘stewardship’ in our MACA context, over the takutai moana:

In assessing whether a waterway was a taonga [treasured possession] to any particular group, the Waitangi Tribunal took into account the intensity of the Māori association with the waterway including originating ancestral relationship [whakapapa and take tupuna] and an ongoing cultural and spiritual relationship

¹⁷³ For witness evidence on kaitiakitanga, see above Taueki 1 at 30; Taueki 2 at 7, 17, 18, 30, 37, 38; Morgan at 5; Royal at 4, 15, 16, 17, 25, 29, 61, 63, 67, 87; Tamihana 1 at 15-19, 22, 25, 27, 29, 30, 36-38, 41, 45, 53, 55, 63, 71-89; Jones 1 at 48-49; Karatea at 49-52, 58-63, 84; Teira at 25-27; Emery at 40-44, 47-49; Parata at 34-36; Barrett 1 at 20; Barrett 2 at 51-66; Mahina-a-Rangi Baker 2 at 12, 156-193; Wilson, the whole reference; Proctor, the whole reference; Huwylar at 8; Carter, the whole reference; Richmond at 37; Moses at 10, 22, 24, 26; Seymour at 4, 8; Shenton at 12; Murray at 20-27; Kiriona at 67-71; Henare at 30-39; Parai at 14, 77-85, 77, 88, 166-171; Potini at 124, 162-180; Elkington at 56-65; Pomare at 114; and Te Rei at 105-124.

¹⁷⁴ For witness evidence on mana whenua, see above Taueki 1 at 7; Taueki 2 at 2, 6, 7, 9, 30, 37-38; Morgan at 5, 6; Waaka at 1; Royal at 1-5, 16, 29, 59, 63, 67, 115; Jones 1 at 39, 45; Mikaere at 24, 38-63; Tamihana at 6, 15, 16, 22-29, 30, 38, 41, 44, 53, 55, 63-68, 70, 77, 85-90; Richmond at 14(c), 14(h), 14(i), 34, 40, 41, 45-50; Ropata at 43-46, 47-49; Emery at 25-32, 34-35, 79-80; Kiriona at 44, 62, 80; Moore 2, the whole reference; Carter at 45-46; Emery at 1, 25-32, 34-35, 79-80; Parata at 29; Proctor 2 at 17-20, the whole reference; Moses at 12-16; Parai at 158; and Potini at 127, 149, 195-212, 235.

¹⁷⁵ For witness evidence on manaakitanga, see above Taueki 1 at 37; Taueki 2 at 37, 38; Tamihana at 15-17, 25, 26, 29, 38, 53, 55, 90; Jones 1 at 48-49; Karatea at 61-63, 83-84; Mahina-a-Rangi Baker 1 at 51-53, 158; Moore at 100-108; Walker at 33; Selby 1 at 23-24; Kiriona at 25, 41-42; Collins and Teira at 20, 25, 26, 29, 37, 41, 46, 47, 51, 59; Emery at 33-35, 42-44; Barrett 2 at 107; Seymour at 7.26-7.32; Moses at 23; Parai at 2, 136-139, 154-165; Potini at 37, 164-166; Elkington at 63; and Pomare at 48-50.

¹⁷⁶ Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 51 and 269; Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, (Wai 1071, Wellington, 2004) at 24-26.

¹⁷⁷ Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.

¹⁷⁸ Above, at 51 and 269.

with the waterway [ahi kā roa]; the exercising of control and authority over the resources [mana whenua and mana moana], and the fulfilment of obligations to conserve, nurture and protect the waterway [kaitiakitanga].¹⁷⁹

- 145) The Waitangi Tribunal earlier in its 2011 Wai 262 Report also referred to the taonga test when it opined:

Whether a resource or place is a taonga can be tested ... Taonga have mātauranga Māori [inherited knowledge] relating to them, and whakapapa [genealogy] that can be recited by tohunga [experts]. Certain iwi or hapū will say they are kaitiaki [stewards]. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.¹⁸⁰

- 146) Accordingly, Te Whānau Tima and Ngā Ahi Kā o Te Mateawa witness Patrick Seymour discussed the importance of the takutai moana as taonga when he asserted:

Water is a taonga (treasure), and our customary rights to access and protect our water bodies should be respected. We continue to work to protect our taonga. We are still here.¹⁸¹

- 147) Dr Taku Parai of Ngāti Toa Rangatira similarly noted:

To us, the lands, lakes, rivers and harbours within our rohe were taonga. Our history and relationship with these resources is still one of the foundations of our identity, cultural integrity, wairua, tikanga and kawa.¹⁸²

- 148) In a similar manner, the Ngāti Raukawa witness Ani Mikaere cited Professor Whatarangi Winata as asserting Ngāti Raukawa rangatiratanga in the following terms:

Allocations of land and resources ... the lengths that the rangatira would go to, to defend their rights, their rangatiratanga over these taonga. Te Whatanui's protection of Muaūpoko; Ngāti Kapu's defense of their maara kai [gardens] – credited at least in some part, to having sparked the Haowhenua conflict and Kuititanga are all examples of rangatiratanga in action.¹⁸³

- 149) To these ends, the Waitangi Tribunal's specific signposts to test whether an iwi, hapū or even whānau have a taonga relationship with reciprocal 'stewardship'

¹⁷⁹ Above, at 51.

¹⁸⁰ Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.

¹⁸¹ Above, Seymour at para 7.53.

¹⁸² Above, Parai at para 55.

¹⁸³ Above, Mikaere at para 66. For other witness references on taonga, see Tamihana 1 at 34, 51, 72; Moore at 75; Seymour at 7.8; Potini at 161; and Parai at 55, 85.

responsibilities over the waterways and for the takutai moana marine coastal area for the Kāpiti Coast claimants in the current MACA hearing includes the following tikanga indicia:

- a) Whakapapa identifying a cosmological connection with the takutai moana;¹⁸⁴
- b) Exercised mana or rangatiratanga over the takutai moana;¹⁸⁵
- c) Exercised kaitiakitanga;¹⁸⁶
- d) It has a mauri – life force;¹⁸⁷
- e) Performance of rituals [kawa] central to the spiritual life of the hapū and whānau;¹⁸⁸

¹⁸⁴ For claimant evidence on whakapapa, see above, Taueki 1, at para. 2 ; Armstrong, at para. 65; Taueki 2 at para. 2, 6, 7, 18, 19, 29; at para. 5; Waaka, at para. 1; Royal, at para. 3, 4, 5, 7, 15, 87; Tamihana 1, at para 5-7, 17, 22; Mikaere, para 7, 22, 25, 37, 38, 47, 48, 59, 60; Jones 1, at 29; Twomey, at para 1-8; Mahina-a-Rangi Baker 1 at para 5-6, 104, 129-130; Moore, at para 2; Walker, at para 3, 14-22; Selby 1, at para 4-11, 22; Richmond, at para 14(b); Rōpata, at para 10-25; Teira, at para 19-22 [CB Tab 42 at 201.00377]; Hēnare, at para 1; Karatea, at para 1, 5-12, 16-22; Kiriona, at para 19-21; Collins and Teira, full brief; Moore 2, at para 1-11; Karatea, at para 1-12; Parata at para 1-8; Barrett at para 1-61; Barrett 2, at para 1-12; Carter, at para 1-3; Andre Baker, at para 36-69; Ngaia, at para 10-25; Housiaux, at para 1-4; Maote-Davis, at para 1-8; Mahina-a-Rangi Baker in Reply, at para 1, 12-13; Tihema Baker in Reply, at para 1-2; Ngaia 2 in Reply, at para 1-25; Warrington, at para 1-19; Murray, at para 1-5; Proctor, at para 1-13; Wiremu-Matakātea, at para 1-8; Packer, at para 1-5; Williams, at para 1-10; Rump, at para 1-2; Nuetze, at para 1-5; Wilson, at 1-10; Reply Brief of Moses, at para 1-2; Tukapua, at para 1, 17-19; Reply Brief of Wilson, at para 3; Brief of Evidence of Sillena Wiki McGregor, at para 1-2; Affidavit of Wilson for Interested Party of Horowhenua 11 Part Reservation, at 3; Seymour, at para 1-8; Brief of Evidence of Patrick Seymour, at para 1.0-4.7; Huwyler, at para 1-9; Shenton, at para 1-31; Tahana, at para 1-31.2; Harris at para 1-3; Parai, at para 1-11, 32, 40, 41, 158; Potini, at para 1-31, 161; Elkington, at 1-10; Pomare, at para 1-8, 40-66; Faulkner, at para 1-2, 29; and Te Rei, at para 1-4, 14-53.

¹⁸⁵ For claimant evidence on rangatiratanga, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei.

¹⁸⁶ For claimant evidence on kaitiakitanga, see above Taueki 1 at 30; Taueki 2 at 7, 17, 18, 30, 37, 38; Morgan at 5; Royal at 4, 15, 16, 17, 25, 29, 61, 63, 67, 87; Tamihana 1 at 15-19, 22, 25, 27, 29, 30, 36-38, 41, 45, 53, 55, 63, 71-89; Jones 1 at 48-49; Karatea at 49-52, 58-63, 84; Teira at 25-27; Emery at 40-44, 47-49; Parata at 34-36; Barrett 1 at 20; Barrett 2 at 51-66; Mahina-a-Rangi Baker 2 at 12, 156-193; Wilson, the full reference; Proctor, the whole reference; Huwyler at 8; Carter, the whole reference; Richmond at 37; Moses at 10, 22, 24, 26; Seymour at 4, 8; Shenton at 12; Murray at 20-27; Kiriona at 67-71; Henare at 30-39; Parai at 14, 77-85, 77, 88, 166-171; Potini at 124, 162- Jones at 61; 180; Elkington at 56-65; Pomare at 114; and Te Rei at 105-124.

¹⁸⁷ For claimant evidence on mauri, see above Tamihana 1 at 38; Jones 1 at 61; Emery at 47-49; Parata at 37; Barrett; Parai at 125, 141, 143; Karatea at 59; Wilson 1, the whole reference; Moore at 109; Teira at 23, Wilson 2 at 3; and Tahana at 48.

¹⁸⁸ For claimant evidence on kawa, see above at Taueki 2 at 27, 29-31; Morgan at 5; Moses at 22; Royal at 52, 87; Tamihana 1 at 20, 29, 38, 88; Waaka at 7, Moore at 80-81, 113-115, 134-137; Selby 1 at 5, 23; Richmond at 14(a), 34, 35; Kiriona at 63; Emery at 57; Parata at 22, 33; Barrett 2 at 112; Seymour at 7.4-7.8; McGregor at 14; Proctor at 22; Tukapua at 10; Wilson at 9; Parai at 37-40, 122-124, 144; Potini at 51-55, 169-180; and Pomare at 111.

- f) Identified taniwha [guardians] residing in the takutai moana;¹⁸⁹
- g) Is celebrated or referred to in waiata [songs];¹⁹⁰
- h) Is celebrated or referred to in whakatauki [proverbs];¹⁹¹
- i) The takutai moana was relied on as a source of food;¹⁹²
- j) A source of textiles or other materials;¹⁹³
- k) For travel or trade;¹⁹⁴ and
- l) There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to ‘some, if not all of the takutai moana area.¹⁹⁵

150) Other relevant tikanga concepts that may apply in the Kāpiti Coast MACA areas include:

¹⁸⁹ For claimant evidence on taniwha, see above at Mikaere at 19; Twomey at 31; Mahina-a-Rangi Baker 1 at 98-100; Moore at 85-89; Teira at 23-42, 54-56; Moore 2, the full reference; Seymour at 8; Seymour 2 at 6.7, 9.3; Tamihana 2 at 19, 23, 25; Parata at 37; Barrett 2 at 44-45; Moses at 31; Proctor at 17; Parai at 40; and Potini at 227, 302, 306-307.

¹⁹⁰ For claimant evidence on waiata, see above at Mikaere at 21, 28, 49; Emery at 37; Mahina-a-Rangi Baker 1 at 100, 135, 136, 188; Selby 1 at 30; Ropata at 19, 30, 45; Teira at 21; Collins and Teira at 27, 32, 49; Proctor at 11; Nuetze, the full reference; McGregor at 21; Seymour at 7.49, 7.5, 7.61; Tahana at 13, 17; Parai at 21-22; Parata at 11, 31, 39, 41; Andre Baker at 1, 59, 75, 95, 105; Ngaia 1 at 5, 61; Moses at 35; Potini at 118; and Te Rei at 156.

¹⁹¹ For claimant evidence on whakatauki, see above.

¹⁹² For claimant evidence on kai, refer among numerous other references above to Royal at 37-57; Tamihana at 15-18, 29-55, 62; Mikaere at 39-40; Mahina-a-Rangi Baker 1 at 10, 116-122, 137-144; Moore at 36-66; Selby 1 at 12-35; Richmond at 21(d), 20-36, 23; Teira at 57-59, 66-81; Kiriona at 58-62, 73-77; Emery at 61-68; Parata at 30-32; Barrett 1 at 108; Morgan at 29-55; Seymour at 7.10-7.48; Tukapua at 6-19; Packer, the whole reference; Williams, the whole reference; Wilson at 6-10; Shenton at 33-40; Proctor at 7-12; Parai at 140-165; and Wiremu-Matakatea, the whole reference.

¹⁹³ For claimant evidence on textiles and other materials, see above Taueki 2 at 18, 30; Tamihana at 25-33; Mikaere at 39-40, Twomey at 29 and Barrett 2 at 67-78.

¹⁹⁴ For claimant evidence on travel and trade, see Taueki 2 at 18, 30; Tamihana 1 at 25, 33; Mikaere at 39-40; Twomey at 29; Collins and Teira at 20-24, 28, 52, 74, 79, 85-90; Teira at 49, 82-84; Walker at 23; Henare, the whole reference; Mahina-a-Rangi Baker 1 at 24-30; Tahana at 25; Richmond at 21(b); Kiriona at 26-29; Shenton at 39; Proctor 1 at 11-16; Proctor 2 at 40; Barrett 2 at 67-78; Parai at 18, 28-30, 35, 42, 43, 69, 161-165; Potini at 118-161, 218, 250-293; Elkington, the whole reference; Pomare at 29-29; and Te Rei at 61-64.

¹⁹⁵ For claimant evidence on continued recognition, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakatea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei.

- a) Tika and Pono - being right or correct, true and genuine;¹⁹⁶
- b) Rangatira ki te rangatira – leaders speaking directly to each other to address pressing matters;¹⁹⁷
- c) Te mana o te kupu – the power of one’s word which is binding;¹⁹⁸
- d) Kawenata – covenant agreements that are binding on the mana of the group;¹⁹⁹
- e) Tatau pounamu – binding peace agreements to settle conflict and protracted disputes.²⁰⁰

151) Each of these tikanga concepts will be discussed in more detail in other sections of the report.

152) It is important to also acknowledge that the above tikanga Māori indicia and tikanga Māori questions are not exhaustive but are at least appropriate as starting points for answering what evidence indicates the maintenance of a group’s holding of part of the Marine and Coastal Area as a matter of tikanga.

153) A further aspect that should be taken into account to answering Question 2) is whether the claimants are actively practicing tikanga on the common marine coastal area (CMCA) through, inter alia, kawa.

¹⁹⁶ For claimant evidence on tika and pono, see above Taueki at 6; Armstrong at 6 and 54; Royal at 17, 25, 29; Tamihana at 16, 25, 29, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones at 16; Barrett at 2, Moses at 6; and the whole affidavits of Ngaia and Parata.

¹⁹⁷ For claimant evidence on rangatira, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei.

¹⁹⁸ For witness evidence on te mana o te kupu, see above see Mikaere at 7, 45-48, 49-50, 57, 64; Twomey at 24; O’Malley at 21-28; Walker at 21-22; Selby at 25; Ropata at 35, 41; Kiriona at 41-44; Collins and Teira at 23, 44, 50, 85, 86; Moses at 24; Proctor at 23; and Seymour at 7.57-7.59.

¹⁹⁹ For witness evidence on kawenata, see above Taueki at 8, 10; Taueki 2 at 2-9; O’Malley at 20-28; Armstrong at 5, 8, 10, 17-25; Tamihana at 3, 22, 26; Mikaere at 36, 45-52, 59-60, 63; Emery at 27-32; Parata at 16; Ngaia at 75; Ngaia Reply, full reference; Moses at 95, 96; Shenton at 4.0; and Parai at 49, 59.

²⁰⁰ For witness evidence on tatau pounamu, see Taueki 1 at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10; Tamihana at 3, 22, 26; Mikaere at 45-52, 58-60, 63; Twomey at 36-37; Armstrong at 17-27; Walker at 21-22; Ropata at 18-19, 43-47; Kiriona at 25, 29-30, 36, 44, 50—51; Collins and Teira at 18, 23, 24, 39, 70, 81, 85, 86, 87; Moore at 7; O’Malley at 20-28; Shenton 4.0; Proctor 2 at 30, 37; Ngaia at 50, 56; Emery at 27-32; Parata at 16; Moses at 38-40, 72, 95-96; Potini at 149; Pomare at 57-58, 74-76; Boast at 105; and Te Rei at 52.

Importance of Kawa

- 154) We wish to briefly mention here the importance of kawa as another important aspect for presently holding an application area in accordance with tikanga. Professor Hirini Mead noted that tikanga Māori includes adherence to proper kawa (rituals, form, and process) in karakia (incantations), waiata (songs), whakapapa (genealogical recitations), whaikōrero (oratory) and debate.²⁰¹ Whaea Moe Milne added that kawa is about recognising boundaries of thought that are associated with a specific place. Kawa are procedural protocols and ritual practices that are governed by the tikanga values mentioned above such as whakapapa, wairuatanga, mana, tapu, noa, mauri, mana tangata, and mana whenua.
- 155) Rangatira and tohunga used to traditionally monitor the kawa of the whenua and rohe moana of a specific rohe (area). Kaumātua and kaitiaki now assume that responsibility today.
- 156) Under tikanga Māori, process and protocols are very important. We believe that getting the process tika (right and correct) is as important, if not more important, than getting sought after outcomes such a bounteous catch of kaimoana, or actively seeking a legitimate mandate to represent a whānau, hapū or iwi grouping in a Treaty of Waitangi settlement, RMA processes with Local Government, and MACA hearings. Proper tika processes and kawa are key for achieving tika and pono outcomes.
- 157) Depending on the context and the situation at hand, some fundamental tikanga principles referred to earlier in this report for governing kawa protocols and proper processes on the takutai moana and elsewhere should include:
- a) Wairuatanga – acknowledging the divine through appropriate whaikōrero and mihi whakatau, karakia and whakanoa ceremony;²⁰²
 - b) Whakapapa – relationships and leadership vested in the whenua and rohe moana;²⁰³

²⁰¹ Mead, M, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–32.

²⁰² For witness evidence on wairuatanga, see above Taueki 2 at 2-18, 29; Royal at 52, 58; Tamihana at 18, 22, 29, 37, 57, 77; Mikaere at 22, 47-48; Emery at 46-51; Parata at 10, 23, 37; Barrett 2 at 46; Andre Baker, the whole reference; Parai at 21-22, 35, 55-56, 138-139, 141, 166-171; Potini at 153, 159, 164-165; Elkington at 23-24, 28, 55, 63; O'Malley at 21-22; Proctor 1 at 11-13, 35; Proctor 2 at 19, 62-79, 104, 106-110; Moore at 116-118; Walker, the whole reference; Richmond at 14; Teira, the whole reference; Henare, the whole reference; Wilson 2 at 3 and Seymour at 5.9 and 8.5.

²⁰³ For witness evidence on whakapapa, see above Taueki 1, at para. 2 ; Armstrong, at para. 65; Taueki 2 at para. 2, 6, 7, 18, 19, 29; at para. 5; Waaka, at para. 1; Royal, at para. 3, 4, 5, 7, 15, 87; Tamihana 1, at para 5-7, 17, 22; Mikaere, para 7, 22, 25, 37, 38, 47, 48, 59, 60; Jones 1, at 29; Twomey, at para 1-8; Mahina-a-Rangi Baker 1 at para 5-6, 104, 129-130; Moore, at para 2; Walker, at para 3, 14-22; Selby 1, at para 4-11, 22; Richmond, at para 14(b); Rōpata, at para 10-25; Teira, at para 19-22 [CB Tab 42 at 201.00377]; Hēnare, at para 1; Karatea, at para 1, 5-12, 16-22; Kiriona, at para 19-21; Collins and Teira, full brief; Moore 2, at para 1-11; Karatea, at para 1-12; Parata at para 1-8; Barrett at para 1-61; Barrett 2, at para 1-12; Carter, at para 1-3; Andre Baker, at para 36-69; Ngaia, at para 10-25; Housiaux, at para 1-4; Maote-Davis, at para 1-8; Mahina-a-Rangi Baker in Reply, at para 1, 12-13; Tihema Baker in Reply, at para 1-2; Ngaia 2 in Reply, at para 1-25; Warrington, at para 1-19; Murray, at para 1-5; Proctor, at para 1-13; Wiremu-Matakātea, at para 1-8; Packer, at para 1-5; Williams, at para 1-10; Rump, at para 1-2; Nuetze, at para 1-5; Wilson, at 1-10; Reply Brief of Moses, at para 1-2;

- c) Whanaungatanga – whakawhanaungatanga – inclusion and acknowledgement;²⁰⁴
- d) Mana – respect for people, the whenua and the takutai moana and other natural resources;²⁰⁵
- e) Tapu – acknowledging the intrinsic sanctity of people and the natural resources;²⁰⁶
- f) Manaakitanga – safety and honesty;²⁰⁷
- g) Utu – reciprocity;²⁰⁸

Tukapua, at para 1, 17-19; Reply Brief of Wilson, at para 3; Brief of Evidence of Sillena Wiki McGregor, at para 1-2; Affidavit of Wilson for Interested Party of Horowhenua 11 Part Reservation, at 3; Seymour, at para 1-8; Brief of Evidence of Patrick Seymour, at para 1.0-4.7; Huwyler, at para 1-9; Shenton, at para 1-31; Tahana, at para 1-31.2; Harris at para 1-3; Parai, at para 1-11, 32, 40, 41, 158; Potini, at para 1-31, 161; Elkington, at 1-10; Pomare, at para 1-8, 40-66; Faulkner, at para 1-2, 29; Te Rei, dated 13th February 2024 at para 1-4, 14-53.

²⁰⁴ For witness evidence on whanaungatanga, see above Taueki 2 at 7, 29, 30, 32; Morgan at 5; Waaka at 1; Royal at 3-5, 87-88; Tamihana at 15, 16, 22, 25, 29, 30, 41, 53, 77, 88, 89, 130; Mikaere at 33-37, 38, 43-44, 59-60; Jones 1 at 27; Moore at 100-108; Mahina-a-Rangi Baker 1 at 49-53; Walker at 35; Twomey, the whole reference; Kiriona, the whole reference; Karatea, the whole reference; Selby 1, the whole reference; Richmond at 14(h); Ropata at 44; Teira at 17; Collins & Teira, the whole reference; Emery at 43-44, 55-60; Parata at 37; Andr  Baker, the whole reference; Ngaia 1, the whole reference; Tihema Baker, the whole reference; Parai at 2-27, 127-131, 135-139, 141-142, 147, 155-165; Potini at 1-31, 38-47; 164-168; Pomare at 40-42, 47-49; Elkington, the whole reference; Te Rei, the whole reference; Harris, the whole reference; Tahana at 48-49; Huwyler, the whole reference; Shenton, the whole reference; Seymour, the whole reference; Morgan, the whole reference; Emery, the whole reference; Proctor 1 at 12-13; Tukapua, the whole reference; Moses, the whole reference; and Wilson 2, the whole reference.

²⁰⁵ For witness evidence on mana, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakatea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei.

²⁰⁶ For witness evidence on tapu, see above Taueki 1 at 32; Taueki 2 at 15-18; Armstrong at 41; Royal at 58-59; Tamihana 1 at 20-27, 29; Jones 1 at 41-47; Emery at 47-48; Parata at 37; Ngaia at 76; Parai at 125-129; Potini at 124, 148, 177-179; O'Malley at 21-22; Richmond at 35; Kiriona at 63-65; Nuetze at 54; Seymour at 5.5-5.12, 7.40, 8.2-8.9; and Tamihana 2 at 20, 29.

²⁰⁷ For witness evidence on manaakitanga, see above Taueki 1 at 37; Taueki 2 at 37, 38; Tamihana at 15-17, 25, 26, 29, 38, 53, 55, 90; Jones 1 at 48-49; Karatea at 61-63, 83-84; Mahina-a-Rangi Baker 1 at 51-53, 158; Moore at 100-108; Walker at 33; Selby 1 at 23-24; Kiriona at 25, 41-42; Collins and Teira at 20, 25, 26, 29, 37, 41, 46, 47, 51, 59; Emery at 33-35, 42-44; Barrett 2 at 107; Seymour at 7.26-7.32; Moses at 23; Parai at 2, 136-139, 154-165; Potini at 37, 164-166; Elkington at 63; and Pomare at 48-50.

²⁰⁸ For witness evidence on utu, see above Armstrong at 5, 9, 13; Tamihana 1 at 25, 38, 55; Mikaere at 44, 45, 48-50; Jones 1 at 45; Emery at 43-44, 48-50; Twomey at 39-41; O'Malley at 32-33; Richmond at 28, 37, 45; Ropata at 18; Moore at 75-79; Selby 1 at 17-25; Teira 25-27; Andre Baker at 65-67; Ngaia 1 at 64-66; Rump, the whole reference; Moses at 16, 18; Parai at 17, 73, 95, 100, 143, 147-158; Potini at 142; Elkington at 44; Pomare at 74-75; and Te Rei at 26.

h) Ohaoaha – distribution and sharing of prosperity;²⁰⁹

i) Rangatiratanga – effective leadership;²¹⁰

j) Mahitahi – unity and collaboration;²¹¹ and

k) Kaitiakitanga – effective stewardship.²¹²

158) The Ngāti Raukawa witness Pataka Moore referred to some of the above tikanga principles and tied them into kawa protocols on the rohe moana when he noted:

... all of the above tikanga principles (such as rangatiratanga, kaitiakitanga, manaakitanga, whanaungatanga, mauri, and wairuatanga) inform our relationship with and the way that we act in relation to the takutai moana. From these come some very clear do's and don'ts [or kawa on the CMCA].²¹³

159) We mention kawa here briefly to highlight that tangata whenua should be actively performing specific kawa protocols and practices naturally as part of their kaitiaki and tangata whenua responsibilities to the whenua and rohe moana. Many of the claimant witnesses referred to specific tikanga or what we term kawa practices and protocols they perform when their whānau visit their respective tribal marine and coastal rohe which we believe is another relevant aspect for determining whether they currently “hold” their application area as noted by the Patutokotoko interested party claimant Chris Tahana:

²⁰⁹ For witness evidence on ohaoaha, see above Taueki 2 at 37, 38; Tamihana 1 at 17, 22, 23, 26, 29, 42, 85, 87, 88, 90; Tamihana 2 at 23; Mahina-a-Rangi Baker 1 at 51, 146; Selby 1 at 24; Richmond at 31, 45; Teira at 44; Parata at 30-33; Proctor 1 at 17; Wilson 1 at 9, 15; McGregor at 13-17; Seymour at 7.32; Parai at 33- 52, 136-139; and Potini at 137-141, 164, 294-305.

²¹⁰ For witness evidence on rangatiratanga, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei.

²¹¹ For witness evidence on mahitahi, see above Taueki 2 at 37, 38; Tamihana 1 at 17, 22, 23, 26, 29, 42, 85, 87, 88, 90; Tamihana 2 at 23; Mahina-a-Rangi Baker 1 at 51, 146; Selby 1 at 24; Richmond at 31, 45; Teira at 44; Parata at 30-33; Proctor 1 at 17; Wilson 1 at 9, 15; McGregor at 13-17; Seymour at 7.32; Parai at 33- 52, 136-139; and Potini at 137-141, 164, 294-305.

²¹² For witness evidence on kaitiakitanga, see above Taueki 1 at 30; Taueki 2 at 7, 17, 18, 30, 37, 38; Morgan at 5; Royal at 4, 15, 16, 17, 25, 29, 61, 63, 67, 87; Tamihana 1 at 15-19, 22, 25, 27, 29, 30, 36-38, 41, 45, 53, 55, 63, 71-89; Jones 1 at 48-49; Karatea at 49-52, 58-63, 84; Teira at 25-27; Emery at 40-44, 47-49; Parata at 34-36; Barrett 1 at 20; Barrett 2 at 51-66; Mahina-a-Rangi Baker 2 at 12, 156-193; Wilson, the whole reference; Proctor, the whole reference; Huwyler at 8; Carter, the whole reference; Richmond at 37; Moses at 10, 22, 24, 26; Seymour at 4, 8; Shenton at 12; Murray at 20-27; Kiriona at 67-71; Henare at 30-39; Parai at 14, 77-85, 77, 88, 166-171; Potini at 124, 162-180; Elkington at 56-65; Pomare at 114; and Te Rei at 105-124.

²¹³ Above, Moore at para 133.

We say karakia when fishing, we sometimes impose rāhui and we do all of the things [kawa] that kaitiaki and people with mana do in the area. The karakia show respect for the mauri and the wairua of the moana and its taonga. They also help to manifest the blessings of our ancestors and ancient gods.²¹⁴

160) In a similar manner, the Ngāti Raukawa witness Justin Tamihana recorded:

We consider the moana as sacred. Every practice that I know relating to use of the moana requires karakia first. To use fishing as an example, we always act in accordance with our tikanga. That includes doing karakia and a mihi to Tangaroa. We have also been taught to put the first fish you catch back as well as not fishing at certain times and in certain areas. This is all related to acknowledging your tipuna and your connection to the moana.²¹⁵

161) For Ngāti Tamarangi, Bill Taueki recorded other examples of kawa – gifting and sharing kaimoana:

When I was a child, we didn't go to the beach to play. We were a family of eight so gathering food was a serious business. ... My father was very strict about how we used any kai we harvested. He put in place an unbreakable rule that none of our whanau sold any of the kai that we got from the lake or the sea. Our father saw kai as a taonga tuku iho which was gifted to us by atua. Quite often, I remember my father distributing seafood to other families in the area as we drove home from the beach. But we were not allowed to sell our gifts. This was the tikanga.²¹⁶

162) Muaūpoko witness Dean Wilson also briefly referred to ohaoha – sharing out the catch when he opined: “There would be [fish and whitebait] runs that came down in the summer – we would get a carload of fish and take them back to Palmerston North and dish them out to friends and family.”²¹⁷

163) Te Āti Awa witness Tutere Parata recorded:

... fishing has always been carried out in accordance with our tikanga, that is to ensure that everything that was gathered was to sustain our families living here. That was the purpose of it. The tikanga is that you are always fishing for someone else, so when someone comes off their boat, they know straight away who that was going to. Kaumātua are given priority for receiving kai moana. It is then shared and exchanged across families. Those who dived for kina might exchange part of their catch with those who hauled whitebait, or those who gathered pipi

²¹⁴ Affidavit of Christopher Henare Tahana, dated 9 March 2017 at para 48 [CB Tab 92 at 202.00995].

²¹⁵ Above, Tamihana 1 at para 20.

²¹⁶ Above Taueki 1 at para 26-27.

²¹⁷ Above, Wilson at para 8-9.

and tuatua. This tikanga is referred to as ‘tohatoha’ [ohaoha].²¹⁸ Another important tikanga that is used to manage customary fishing of kaimoana is that kaimoana which is caught as customary fishing can never be sold. Our elders have always been very strict on that.²¹⁹

164) Consequently, many of the claimant witnesses listed a number of basic kawa customary protocols their respective whānau, hapū and iwi practice when visiting the rohe moana that includes the following:

- a) Always return the first fish caught out of respect to Tangaroa;
- b) Do not eat kaimoana on the beach;
- c) Always karakia before you travel out to sea, again when you get to sea, and once again before you dive in the sea;
- d) Always thank Tangaroa in your karakia;
- e) Always respect the sea, never turn your back to the sea;
- f) Do not swear by the sea;
- g) If you pick up a rock, make sure you turn it back the way you found it;
- h) Only take what you need and no more;
- i) Fish according to the tide and only catch certain kaimoana at particular times;
- j) Don’t take the breeders – if you pick up kaimoana that are female and reproducing, you should always put it back in the sea;
- k) Only take paua that are the size of your hands
- l) If the fish is too small, throw it back in the water;
- m) Always make sure your moko are protected before yourself;
- n) No playing or running on the shore;
- o) Don’t dive alone – always have someone with you;
- p) If you are not well, don’t get in the water;
- q) Menstruating or pregnant women are not allowed out at sea;
- r) Always provide kai moana for the Marae;
- s) Don’t deshell or clean the kaimoana on the beach – go back to the marae to do that.²²⁰

165) The Ngāti Raukawa witness Pataka Moore further provided his kawa list of do’s and don’ts on the rohe moana when he recorded:

²¹⁸ For witness references on ohaoha - distributing and sharing prosperity, see Taueki 2 at 37, 38; Tamihana 1 at 17, 22, 23, 26, 29, 42, 85, 87, 88, 90; Tamihana 2 at 23; Mahina-a-Rangi Baker 1 at 51, 146; Selby 1 at 24; Richmond at 31, 45; Teira at 44; Parata at 30-33; Proctor 1 at 17; Wilson 1 at 9, 15; McGregor at 13-17; Seymour at 7.32; Parai at 33- 52, 136-139; and Potini at 137-141, 164, 294-305.

²¹⁹ Above Parata at para 33. Hohepa Potini added: “Another practice which is maintained to this day is bringing back enough kaimoana for those who are unable to go out and get their own like whānau with many tamariki or kaumātua/kuia.” Above, Potini at para 175.

²²⁰ For witness references on these specific kawa and other kawa protocols on the rohe moana, see Taueki 2 at 27, 29-31; Morgan at 5; Moses at 22; Royal at 52, 87; Tamihana 1 at 20, 29, 38, 88; Waaka at 7, Moore at 80-81, 113-115, 134-137; Selby 1 at 5, 23; Richmond at 14(a), 34, 35; Kiriona at 63; Emery at 57; Parata at 22, 33; Barrett 2 at 112; Seymour at 7.4-7.8; McGregor at 14; Proctor at 22; Tukapua at 10; Wilson at 9; Parai at 37-40, 122-124, 144; Potini at 51-55, 169-180; and Pomare at 111.

From [tikanga principles] come some very clear do's and don'ts. This is not an exhaustive [kawa] list ... but it illustrates how we keep ourselves safe from a tikanga perspective when we interact with our moana.

For example, some of the do's include:

- a) Gather kai first (before playing);
- b) Always give attention to the ocean including facing the ocean and keeping your kids landward of you;
- c) Karakia as appropriate;
- d) Tahī ki maru/Tangaroa (offer the first fish back to Tangaroa);
- e) Acknowledge the ocean for its bounty; and
- f) Return shells to the beach.

Examples of some of the don'ts on the beach;

- a) Do not eat on the beach front;
- b) Do not cook-caught food on the beach;
- c) Do not curse Tangaroa;
- d) Do not eat while people from your party are still in the water;
- e) Females who are hapu or are in their monthly cycle should not be in the water or on a boat;
- f) Do not take more than you need; and
- g) Do not place caught food within the tidal area.

166) Moore stated of these kawa do's and don'ts:

... That could be considered tikanga 101 for the ocean and so we live by these tikanga. These tikanga-tuku-iho have been handed down to us from our tupuna. We embed them in our kids and they will hand them on to their kids.²²¹

167) Accordingly, another important aspect for presently “holding” an application area in accordance with tikanga is for the tangata whenua to be tika (true) to and actively abiding by the respective rohe moana tikanga and kawa protocols listed above which most of the claimants acknowledged. Tikanga Māori is not an abstract condition that shifts and fluctuates in different circumstances and contexts, but is a way of life and the above-mentioned specific tikanga criteria and kawa protocol lists are but manifestations of assessing a person's and a group's mana and integrity within a specific whenua and rohe moana.

²²¹ Above Moore at 133-137.

Question 3 - What evidence indicates that a group no longer holds a part of the Marine and Coastal Area as a matter of tikanga?

- 168) As noted in the previous questions, all of the previous tikanga material in Section B) and material in Questions 1) and 2) are also relevant to answer Question 3) which is acknowledged here but we need not repeat all of the material in this section. However, the Section B) and Questions 1) and 2) material needs to be born in mind in addition to the following material.
- 169) Having discussed tikanga Māori and whether an area in question is held in accordance with tikanga extensively already, this section will focus briefly on distinguishing between “holding” and no longer “holding” an area in accordance with tikanga.
- 170) There is a distinction between holding or not holding an area in accordance with tikanga. In order to answer this question, the key tikanga values and concepts of whakapapa, whānaungatanga, rangatiratanga, mana, mana tangata, mana whenua, mana moana, manaakitanga and kaitiakitanga as noted above are relevant. Each tikanga concept provides important context to answer the question of distinguishing between holding or not holding an area and its resources in accordance with tikanga.
- 171) The obvious and brief answer to Question 3) however, is whether the claimant group can or cannot pass the taonga test noted above by the 2011 Wai 262 Waitangi Tribunal Report who concluded:

Whether a resource or place is a taonga can be tested ... Taonga have mātauranga Māori [inherited knowledge] relating to them, and whakapapa [genealogy] that can be recited by tohunga [experts]. Certain iwi or hapū will say they are kaitiaki [stewards]. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have korero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.²²²

- 172) In addition, the Waitangi Tribunal’s specific taonga signposts are relevant to test whether a group has a taonga relationship with reciprocal ‘stewardship’ responsibilities over the Kāpiti takutai moana areas in the current MACA hearing. If the claimant group cannot pass the taonga relationship test, then the failure may be indicative that the group may no longer hold parts of the marine and coastal areas as a matter of tikanga. As noted above, the taonga relationship test includes the following tikanga indicia:

- a) Whakapapa identifying a cosmological connection with the takutai moana;²²³

²²² Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, (Wai 262, Vol. 1, 2011) at 269.

²²³ For claimant evidence on whakapapa, see above, Taueki 1, at para. 2 ; Armstrong, at para. 65; Taueki 2 at para. 2, 6, 7, 18, 19, 29; at para. 5; Waaka, at para. 1; Royal, at para. 3, 4, 5, 7, 15, 87; Tamihana 1, at para 5-7, 17, 22; Mikaere, para 7, 22, 25, 37, 38, 47, 48, 59, 60; Jones 1, at 29; Twomey, at para 1-8; Mahina-a-Rangi Baker 1 at para 5-6, 104, 129-130; Moore, at para 2; Walker, at para 3, 14-22; Selby 1, at para 4-11, 22; Richmond, at para 14(b); Rōpata, at para 10-25; Teira, at para 19-22 [CB Tab 42 at 201.00377]; Hēnare, at para

- b) Exercised mana or rangatiratanga over the takutai moana;²²⁴
- c) Exercised kaitiakitanga;²²⁵
- d) It has a mauri – life force;²²⁶
- e) Performance of rituals [kawa] central to the spiritual life of the hapū and whānau;²²⁷
- f) Identified taniwha [guardians] residing in the takutai moana;²²⁸
- g) Is celebrated or referred to in waiata [songs];²²⁹
- h) Is celebrated or referred to in whakatauki [proverbs];²³⁰
- i) The takutai moana was relied on as a source of food;²³¹

1; Karatea, at para 1, 5-12, 16-22; Kiriona, at para 19-21; Collins and Teira, full brief; Moore 2, at para 1-11; Karatea, at para 1-12; Parata at para 1-8; Barrett at para 1-61; Barrett 2, at para 1-12; Carter, at para 1-3; Andre Baker, at para 36-69; Ngaia, at para 10-25; Housiaux, at para 1-4; Maote-Davis, at para 1-8; Mahina-a-Rangi Baker in Reply, at para 1, 12-13; Tihema Baker in Reply, at para 1-2; Ngaia 2 in Reply, at para 1-25; Warrington, at para 1-19; Murray, at para 1-5; Proctor, at para 1-13; Wiremu-Matakātea, at para 1-8; Packer, at para 1-5; Williams, at para 1-10; Rump, at para 1-2; Nuetze, at para 1-5; Wilson, at 1-10; Reply Brief of Moses, at para 1-2; Tukapua, at para 1, 17-19; Reply Brief of Wilson, at para 3; Brief of Evidence of Sillena Wiki McGregor, at para 1-2; Affidavit of Wilson for Interested Party of Horowhenua 11 Part Reservation, at 3; Seymour, at para 1-8; Brief of Evidence of Patrick Seymour, at para 1.0-4.7; Huwyler, at para 1-9; Shenton, at para 1-31; Tahana, at para 1-31.2; Harris at para 1-3; Parai, at para 1-11, 32, 40, 41, 158; Potini, at para 1-31, 161; Elkington, at 1-10; Pomare, at para 1-8, 40-66; Faulkner, at para 1-2, 29; Te Rei, dated 13th February 2024 at para 1-4, 14-53.

²²⁴ For claimant evidence on rangatiratanga, see above Taueki at 37-38, above Taueki 2 at 5, 18, 30; above Morgan at 5; above Rupene at 2; above Royal at 3-5, 15, 29, 63, 87; Tamihana at 14-16, 22-25, 27, 29, 30, 37, 53, 77, 85, 87, 89, 90; Mikaere at 24, 38-63, 66-68; Emery, 33-35, 45; Parata at 12-16, 21-22; and the Parai, Rei, Pomare, Potini, Ngaia, Teira, Kiriona, Karatea, Jones, Moore, Twomey, Collins, Selby, Faulkner, Moses, Wilson and Baker affidavits.

²²⁵ For claimant evidence on kaitiakitanga, see above Taueki at 30; Taueki 2 at 7, 17, 18, 20, 30, 37-38; Morgan at 5; Royal at 4, 15-17, 25, 29, 61, 63, 67, 87; Tamihana at 15-17, 22-25, 27, 29, 30, 36-37, 40, 41, 53, 55, 57, 63, 70, 77, 88-90; Jones at 48-49; Emery at 40-41, 47-49; Parata at 34-36; Barret at 20; Barret 2 at 2-51; and Moses at 10, 22, 24, 26; and the full Carter Affidavit..

²²⁶ For claimant evidence on mauri, see above Tamihana at 38; Emery at 47-489; Jones at 61; Parata at 37 and Barrett.

²²⁷ For claimant evidence on kawa, see above at Taueki at 2, 27, 29, 31; Morgan at 5; Royal at 52, 87; Tamihana at 20, 29, 38, 88; Emery at 57; Parata at 22, 33; and Barrett at 112.

²²⁸ For claimant evidence on taniwha, see above at Mikaere at 19; Twomey at 21; Parata at 37; Barrett at 44-45; and Moses at 31.

²²⁹ For claimant evidence on waiata, see above at Mikaere at 21, 49 and footnote 28; Emery at 37; Parai at 21-22; Parata at 11; Andre Baker at 1, 59, 75, 95, 105; Ngaia at 5 and 61' and Moses at 35.

²³⁰ For whakatauki, see above at Mikaere at 21, 49 and footnote 28; Emery at 37; Parai at 21-22; Parata at 11; Andre Baker at 1, 59, 75, 95, 105; Ngaia at 5 and 61' and Moses at 35.

²³¹ For claimant evidence on kai, refer among numerous others above to Tamihana at 41-42, 62; Mikaere at 39-40' Emery at 61-66; Parata at 30-32 and Barrett at 108.

j) A source of textiles or other materials;²³²

k) For travel or trade;²³³ and

l) There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to 'some, if not all of the takutai moana area.²³⁴

173) Moreover, another important test for holding or not holding an area in accordance with tikanga is if the claimant group continues to proactively uphold and abide by the kawa protocols noted above. If the people are not actively adhering to the kawa protocols,²³⁵ then they may no longer hold the marine and coastal area in accordance with tikanga.

174) Furthermore, Professor Hirini Mead provided an additional (although similar) useful tikanga question list for assisting with determining some aspects of tikanga that could influence whether or not any claimant takutai moana area is held or not in accordance with tikanga which includes the following mana whenua²³⁶ questions:²³⁷

i. How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand],²³⁸ take kite [discovery], other?²³⁹

Mana whenua is achieved by military action (take raupatu, take ringa kaha, take pakihiwi kaha) that displaces the people and their leaders who occupied

²³² For claimant evidence on textiles and other material, see Taueki 2 at 18, 30; Tamihana at 25-33; Mikaere at 39-40, Twomey at 29.

²³³ For claimant evidence on travel and trade, see Taueki 2 at 18, 30; Tamihana at 25-33; Mikaere at 39-40, Twomey at 29 and Barrett 2 at 67-78.-30, 56.

²³⁴ For claimant evidence on continued recognition, see above in the affidavits and briefs of evidence of Taueki, Wilson, Moses, Nuetze, Tukapua, Emery, Faulkner, Pomare, Parai, Rei, Faulkner, Parata, Maote-Davis, Housiaux, Carter, Barrett, Baker, Shenton, Seymour, Huwylar, Tahana, Collins, Teira, Karatea, Jones, Kiriona, Mikaere, Moore, Selby, and Tamihana.

²³⁵ For witness references on kawa, see Taueki 2 at 27, 29-31; Morgan at 5; Moses at 22; Royal at 52, 87; Tamihana 1 at 20, 29, 38, 88; Waaka at 7, Moore at 80-81, 113-115, 134-137; Selby 1 at 5, 23; Richmond at 14(a), 34, 35; Kiriona at 63; Emery at 57; Parata at 22, 33; Barrett 2 at 112; Seymour at 7.4-7.8; McGregor at 14; Proctor at 22; Tukapua at 10; Wilson at 9; Parai at 37-40, 122-124, 144; Potini at 51-55, 169-180; and Pomare at 111.

²³⁶ For witness evidence on mana whenua and mana moana, see above Taueki 1 at 7; Taueki 2 at 2, 6, 7, 9, 30, 37-38; Morgan at 5, 6; Waaka at 1; Royal at 1-5, 16, 29, 59, 63, 67, 115; Jones 1 at 39, 49; Mikaere at 24, 38-63; Tamihana at 15, 16, 22-29, 30, 38, 41, 44, 53, 55, 63-68, 70, 77, 85-90; Richmond at 14(c), 14(h), 14(i), 34, 40, 41, 45-50; Ropata at 43-46, 47-49; Kiriona at 44, 62, 80; Moore 2, the whole reference; Carter at 45-46; Emery at 1, 25-32, 34-35, 79-80; Parata at 29; Proctor 2 at 17-20, the whole reference; Moses at 12-16; Parai at 158; and Potini at 127, 149, 195-212, 235.

²³⁷ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 314.

²³⁸ For witness evidence on ringa kaha, see Mikaere at 30, 44, 60-66; Jones at 54; Parata at 19-21; Andre Baker at 57-64; and Ngaia at 57-83.

²³⁹ For witness evidence on take kitea, see Jones at 41, 53, Whaea Moe noted that mana whenua must be accompanied by occupation for perhaps 5 generations before the new group acquires mana whenua status.

that estate, extinguishes their rights of occupation and use of the land and establishes a new group of occupiers... Mana whenua is based on occupation by a group of people over an area of land they settled on for several generations (take ahikāroa). Ultimately, this land becomes the rohe, or the tribal estate, of the new group. Rapata Wahawaha is of the opinion that ahikāroa by itself is insufficient to clinch a claim; it needs to be supported by take tupuna (ancestral right).²⁴⁰

- ii. If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?²⁴¹

Military action by itself is usually insufficient to extinguish all rights to the land. Usually, the new leaders marry women of the land to ritually secure the land and bring it under the control of the new leadership ... take moe whenua. It is based on the notion that the hau (spiritual essence) of the land rests with the women of the land. ... This land is home. The claim to the land based on take tupuna (ancestral claim) is more highly valued than other take and this is an important point. ... if the new leaders do not marry into the land, the conquering iwi goes to extraordinary lengths to try to extinguish tangata whenua rights totally.²⁴²

- iii. The land [and takutai moana] are actually occupied [ahi kā] by people and kāinga are established.²⁴³

The new group sets in place systems such as a leadership structure, kainga arrangements, organisations to carry out collective tasks, training schools and arrangements that allow each whānau to look after itself.

- iv. A rohe is marked out in some way. How? Provide a map.²⁴⁴

²⁴⁰ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 306.

²⁴¹ Above, Mead at 314. For other take, see above, Mikaere at 36, 38, 55-57, 59-63; Jones at 63, Armstrong; Andre Baker at 49-53; Ngaia Reply at 4-7; and Moses at 12-16.

²⁴² Above, Mead at 306.

²⁴³ Above, Mead at 314. For references on ahi kā, see Mikaere at 58, 63, 64, 68; Tamihana at 15, 25; Jones 1 at 57; Jones 2 at 12-19; Tamihana 2 at 22-24, 90; Kiriona at 31; Mahina-a-Rangi Baker at 103, 198; Collins and Teira at 83, 89, 90; O'Malley at 34-38; Emery at 25, 26, 79-80; Wiremu-Matakātea at 37; Barrett 1 at 30; Andre Baker at 52-53, 108; Ngaia at 30, 34, 84-86; Moses at 9, 12, 14-16; Seymour at 3.6, 11.1; Shenton at 8; Tahana at 5; Wilson at 14; Proctor at 43; Proctor 2 at 7, 33, 44; Richmond at 16, 44; Parai at 43-44; Boast at 156-157; Potini at 120-121; and Pomare at 38-39.

²⁴⁴ Above, Mead at 314. For claimant references on rohe boundaries, see Royal at 16, 17, 25, 26, 31, 35; Tamihana 1 at 22, 23, 24, 53, 63, 77, 85, 87; Mikaere at 24, 38, 44, 57-60; Jones 1 at 33, 65; Emery at 29, 35; Tihema Baker at 11-15; Parata at 7, 25-26; Barrett 1 at 6; Barrett 2 at 104-107; Ngaia at 31-33; Parai at 14, 15, 46-51, 110-116, 130-132; Potini at 33-37, 127; Faulkner, full reference; Te Rei at 17; Harris at 3; Wilson at 5; Proctor 1 at 10-11; Proctor 2 at 40; Boast at 20-21, 123-130; Mahina-a-Rangi Baker 1 at 32-55, 199 especially 48; and Jones 2 at 21-23.

- v. Over time urupā are established over land, tūahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.²⁴⁵
- vi. The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?²⁴⁶
- vii. The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].²⁴⁷
- viii. The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.²⁴⁸
- ix. The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.²⁴⁹
- x. The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.²⁵⁰

The estate should be able to meet the basic needs of the new group of occupiers as well as those former citizens who were allowed to remain, usually because of the skills they possessed and sometimes through family connections – whanaungatanga.²⁵¹

²⁴⁵ Above, Mead at 314. For witness references on wāhi tapu and urupā, see Taueki 2 at 7, 18, 32; Armstrong at 30; Royal at 59; Jones at 44, 76; Mahina-a-Rangi Baker 1 at 67; Moore 1 at 99; Moore 2, the whole reference; Teira at 53; Emery at 52-54; Barrett 2 at 46, 50; Moses at 25; Williams, the whole reference; McGregor at 9-20; Seymour 1 at 3.22, 4, 8; Seymour 2 at 5.6, 5.11; Parai at 61, 69, 139; Potini at 125-130, 274; and Te Rei at 164-171.

²⁴⁶ Above, Mead at 314.

²⁴⁷ Above, Mead at 314. Whaea Moe stated that often the names that already existed are maintained. It appears such is the case in the Kāpiti Coast. Notwithstanding the turbulent Musket Wars period, many of the original names were maintained, for example, Te Whanganui-a-Tara, Kāpiti and Horowhenua. For claimant witness evidence on some of the original names being maintained after the heke, see Proctor 1 at 13, 17 28, 43; Proctor 2 at 2-4, 10, 15, 16; Barrett at 32; Moses 33; Parai at 37-38, 43-44; and Potini at 120-121.

²⁴⁸ Above, Mead at 314.

²⁴⁹ Above, Mead at 314.

²⁵⁰ Above, Mead at 314.

²⁵¹ Above, Mead at 307.

- xi. The new iwi is able to defend its rohe (ringa kaha) and can call on allies to help to defend the estate.²⁵²

The new iwi/hapu needs to establish alliances that will help validate its occupation, increase its military strength and at the same time set up trade relationships for resources and taonga that the local people need from others.²⁵³

- xii. The new iwi is approved by the neighbours and its presence is validated by the experience.²⁵⁴

Acknowledgement by neighbouring iwi is required to validate the new political reality that now controls the estate. This is an important part of the validating process so that occupation is seen to be accomplished through complying with the tikanga relating to land acquisition.²⁵⁵

- xiii. In 1840, when the Treaty of Waitangi was signed, this iwi is part of the Māori nation and is a Māori partner of the Treaty with the Queen of England.²⁵⁶

- xiv. The name of the iwi enters the historical record though the Native (later Māori) Land Court and other institutions of Aotearoa. There is proof of this.²⁵⁷

- xv. The iwi is here today and has a credible number of members.²⁵⁸

²⁵² Above, Mead at 314. For claimant evidence on ringa kaha, see Mikaere at 30, 44, 60-66; Jones at 54; Parata at 19-21; Andre Baker at 57-64; and Ngaia at 57-83.

²⁵³ Above, Mead at 307. For witness references on tribal alliances and trade, see Tamihana 1 at 25, 33; Mikaere at 39-40; Twomey at 29; Collins and Teira at 20- 24, 28, 52, 74, 79, 85-90; Teira at 49, 82-84; Walker at 23; Henare, the full reference; Mahina-a-Rangi Baker 1,. The full reference; Tahana at 25; Richmond at 21(b); Kiriona at 26-29; Shenton at 39; Proctor 1 at 11-16; Proctor 2 at 40; Barrett 2 at 67-78; Parai at 18, 28-30, 35, 42, 43, 69, 161-165; Potini at 118-161, 218, 250-293; Elkington, the whole reference; Pomare at 29-29; and Te Rei at 61-64.

²⁵⁴ Above, Mead at 314. Idem.

²⁵⁵ Above, Mead at 307. Idem.

²⁵⁶ Above, Mead at 315. For witness evidence on tupuna who signed the Treaty of Waitangi throughout the Kāpiti Coast region, see Royal at 2; Mikaere at 10, 65; Proctor at 20; Tahana at 9; Shenton at 9; Parai at 78-85; Pomare at 51-64; and Te Rei at 19, 57-58.

²⁵⁷ Above, Mead at 315. For witness evidence on tūpuna involvement in the Native Land Court, see Armstrong at 41, 54, 58 and 62; Taueki 2 at 11, 19, 23; Royal at 59; Mikaere at 31, 54-63; Moses at 53; O'Malley at 29-39; Proctor at 2-19, 38; Walker at 52; Kiriona at 41-42, 50, 61-62; and Shenton at 32.

²⁵⁸ Above, Mead at 315. For witness evidence on iwi and hapū groupings in existence today with credible membership numbers, see Taueki 1, full reference; Waaka at 1-3; Walker, full reference; Richmond, full reference; Mahina-a-Rangi Baker 1, full reference; Barrett 1 at 3-5, 32; Andre Baker at 22-23, 91-96; Wilson 3, full reference; Rump, full reference; Proctor 3, full reference; Seymour at 5.0; Harris, full reference; Shenton at 1.0; Parai at 106-110; and Faulkner, the full reference.

- 175) In addition to the above relevant taonga relationship indicia and tikanga questions, the tikanga concepts of manaakitanga and kaitiakitanga are also pertinent which we will now address.

Manaakitanga

- 176) The cultural significance of manaakitanga, kaitiakitanga, rangatiratanga, and mana of iwi, hapū and whānau with an interest in the Kāpiti marine and coastal area cannot be underestimated. Indeed, the ancestral, customary relationships and usage of the rohe moana prior to the arrival of Europeans was one of taonga that existed beyond mere use, or collective possession to one of personal and tribal identity, rangatiratanga, manaakitanga and kaitiakitanga.
- 177) Mana confers a larger capacity than manaakitanga and kaitiakitanga, which are the basic concepts in giving expression to Māori rights and responsibilities. Mana covers both the right to use against all others, and the over-riding political authority to control the use including for others to access the marine and coastal area.
- 178) Manaakitanga as a fundamental tikanga concept was referred to above as enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires. Accompanying manaakitanga is aroha which is sometimes referred to as charity, generosity and hospitality to the fullest extent that mana (honour) requires.
- 179) Manaakitanga is the process of showing and receiving care, respect, kindness and hospitality that bestows mana on both the host and the guest through giving and acceptance of kindness and hospitality.²⁵⁹
- 180) In 1923, the Māori newspaper *Te Toa Takitini* recorded an earlier article on ‘Te Manaaki o te Tangata’ by the 19th century Ngāti Kahungunu tohunga and scholar Moihī Te Matorohanga which recorded:

E ta! taku kupu ki a koe, kia manaaki i te tangata rahi, i te tangata iti. ... Sir, may I say these words to you, All people great or small should be cared for. When the rangatira’s nose twitches, respond to it; he has the power to oppress you. When you are insulted by a slave don’t respond, because if you do you may miss something. ... Even though someone is protecting you, stand on your own feet, your word will resound among your people. When a group of leaderless visitors arrives at your doorstep, give them the good food, through this your name will be heard by the people wherever they may go. However, in the case of a chief, his mana requires that he sustain himself because he has those resources. He won’t raise the topic of food or hospitality [te manaaki a te tangata] if you see a group of common people join them in a meal. Do not belittle people because of the food laid out, instead, make them feel important.²⁶⁰

²⁵⁹ Benton, R, Frame, A & Meredith, P, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 205.

²⁶⁰ Te Matorohanga, M, ‘Te Manaaki o te Tangata,’ in *Te Toa Takitini*, (No. 6, 1 September 1923) at 1.

- 181) The Danish researcher J. Prytz Johansen recorded from his observations of Māori communities in 1954 his understanding of manaakitanga:

... kinsfolk are to honour (manaaki) each other because in this way they are attached to each other and realize the kinship unity. Manaaki is a derivative of mana but as the ending *-aki* is no more productive in Māori, this information interests us only because the Māori himself feels the connexion [sic]: 'By honouring (manaaki) people, the mana endures (ma te manaaki i te tangata e tu ai te mana).' Thus manaaki means 'to create mana, fellowship; to manaaki is to give out of one's life.' Hence it is evident that the kinship group must honour (manaaki) its chief in order that his mana may endure.²⁶¹

- 182) Interestingly, Johansen also provided kōrero about the tupuna Toikairakau who decided to give his name to a girl who had been taken prisoner from a tribal battle to honour her. Johansen recorded:

When the girl's father, Pohokura, heard this, he went to Toikairakau and asked that she might be released so that she might return with him. Toikairakau answered: 'She has my leave. When you take her to your home, let her be named Kairakau ...' When giving his name, he gives something of himself; he creates mana, exactly what is called manaaki, to honor. At the time he becomes greater himself, as the girl gets part of his life. Therefore it is quite natural that the father should offer her as Toikairakau's wife. Indeed, she did get married, although not to Toikairakau, as the latter intended for her his grandson.²⁶²

- 183) Professor Hirini Mead provided a further useful example of manaakitanga by discussing muru (compensatory raids for the ritual distribution of property) by citing earlier accounts by Frederick Weld and Te Rangi Hiroa to illustrate how the underlying principles of manaakitanga and whānaungatanga worked in the past. Tā Hirini recorded:

All tikanga are underpinned by the high value placed upon manaakitanga – nurturing relationships, looking after people, and being very careful about how others are treated. Thus, in the tikanga of muru ... for the groups of people who come to take away the heirlooms, goods, products of the land, sea and forest, the animals and, in fact, anything moveable, the value of manaakitanga still holds: that is, the principle or standard of behaviour must remain in place. These people are given a meal and are allowed to leave in peace. ... Aroha is an essential part of manaakitanga and is an expected dimension of whānaungatanga. It cannot be

²⁶¹ Johansen, J.P, *The Maori and His Religion in its Non-Ritualistic Aspects*, (Munksgaard, Copenhagen, 1954) at 91-92.

²⁶² Above, Johansen at 124.

stressed enough that manaakitanga is always important no matter what the circumstances might be.²⁶³

184) The degree of generous manaakitanga that a claimant group displays to others is a further factor for testing whether a claimant group continues to hold or not a part of the Kāpiti coastal areas as a matter of tikanga.

185) A number of Kāpiti Coast claimants referred to the importance of manaakitanga in their evidence such as Dennis Emery of Ngāti Kauwhata who stated:

Manaakitanga is the principle of enhancing the mana of the hapū and iwi, and seeking to support the aspirations of each other through the ethic and practice of reciprocity. This is about expressing acknowledgement of each other's mana, respecting another's point of view, perspective and behaviour. Each whānau, hapū and iwi should endeavour to enhance the mana of the other.²⁶⁴

186) The Ngāti Tamarangi kaumātua William Taueki also expressed his understanding of the tikanga around manaakitanga in contrast to exclusivity when he recorded:

Exclusivity is not a part of Ngāti Tamarangi tikanga. Our tikanga is tātou, tātou – its about sharing, not excluding. ... No one's tribal affiliation prevented them from using the beach. People knew this area was Ngāti Tamarangi but as long as they used it responsibly and respectfully, there was no problem. I often went fishing with my Raukawa friends.

I am involved in this process because I do not want Ngāti Tamarangi's ancient rights in this area to be lost. However, that does not mean that I want to exclude anyone from using this beautiful coast. For Ngāti Tamarangi, exercising our manaakitanga by sharing is a central part of our tikanga and rangatiratanga. I want to see Ngāti Tamarangi's interests in the takutai moana acknowledged, but not the exclusion of others.²⁶⁵

187) The Ngāti Raukawa witness Pataka Moore also referred to the importance of manaakitanga:

Manaakitanga can be defined as behaving in ways that elevate others; showing respect and consideration toward others; generosity and fulfilling reciprocal obligations.²⁶⁶

188) The Ngāti Toa Rangatira witness Dr Taku Parai commented further on manaakitanga:

²⁶³ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 29.

²⁶⁴ Above Emery at para 42.

²⁶⁵ Above, Taueki 1 at para 36-37.

²⁶⁶ Above, Moore at para 100.

Gathering kaimoana is normal occurrence for tangihanga or events at our marae. Ngāti Toa iwi members go diving and fishing. It still remains normal practice today and it is common to see tuna and pāua on every marae table. ... In fact during the recent Kīngitanga hui a motu [2024], Ngāti Toa sent up boxes of 400 pāua for our Tainui whānau.²⁶⁷

- 189) The Ngāti Raukawa rangatira Turoa Karatea shared his view of manaakitanga when he noted:

It was my adaptation of the tikanga of kaitiakitanga over resources that I learned as a child and applied to all fishing grounds I hunted. ... This meant also that the first fish was thrown back to the waters in gratitude to Maru, our protector while at sea, for the gifts that were given. These gifts are given as they have always been given mai ra ano (from long ago) to give life to people. It was the task of the fisherman from the tribe to bring home the gifts of and for life, in accordance with the tikanga of manaakitanga.²⁶⁸

- 190) In a similar manner to manaakitanga, effective kaitiakitanga is a further factor for testing whether a claimant group continues to hold or not a part of the Kāpiti marine and coastal areas as a matter of tikanga.

Kaitiakitanga

- 191) Embedded in tikanga Māori is the concept of kaitiakitanga that transcends the right to use. It is the responsibility to use and to maintain to the fullest practicable extent, pure, clean coastal marine resources. Kaitiakitanga is a concept that is an incident of mana that requires a balancing of the benefits of use rights with the responsibilities of use rights. It is an intergenerational responsibility that is owed to one's tūpuna (forebears) and one's mokopuna (descendants).
- 192) The concept, based upon the natural world as a divine inheritance, is about sustaining and developing a way of life. The identity and well-being of the Kāpiti Coast Māori claimant communities are inextricably linked to the land, the waterways and the coastal and marine areas. The kaitiaki responsibilities over the marine and coastal areas are where the Kapiti claimant groups' view themselves as not only beneficiaries of the resources but also as kaitiaki – stewards - which acknowledges the mana and tapu of the environment.

²⁶⁷ Above, Parai at para 163.

²⁶⁸ Above Karatea at para 60-61.

193) Kaitiakitanga traditionally refers to a watcher or guard. The modern usage of the term encapsulates an emerging ethic of stewardship, guardianship or trusteeship especially over natural resources such as lands and the marine and coastal areas.²⁶⁹

194) According to Dr Charles Royal of Ngāti Raukawa, kaitiakitanga is the most important concept for environmental management.²⁷⁰ Kaitiakitanga is often translated as guardianship, and in the context of the environment, it is a way of managing the environment based on traditional Māori worldviews.²⁷¹ The kaitiaki (guardians) are those that exercise kaitiakitanga.²⁷² Kaitiakitanga encompasses ideas of mana responsibilities that are inherent in the term guardianship.²⁷³ The kaitiaki must manage the environment for the benefit of future generations which obligation is considered mandatory, and an inability to fulfil this mana obligation results in a diminution of mana²⁷⁴ and a possible loss of holding the marine and coastal area according to tikanga.

195) Kaitiakitanga moreover, entails rights and responsibilities that are obligatory according to tikanga Māori.²⁷⁵ If a person cannot exercise kaitiakitanga, then that person is not fulfilling their legal tikanga duty to the wider collective.²⁷⁶ Kaitiakitanga in this sense is more than simply guardianship; it entails a positive duty to act in a way that benefits the wider collective including in the sustainable governance of the marine and coastal area.

196) A number of illustrative historic tikanga examples of kaitiakitanga include the following: In the Native Land Court hearing into the Pukekura Block in 1867, Wiremu Whitu of Ngāti Kahukura at Maungatautari stated:

We there are the sole owners. Te Raihi, Te Hakiniwhi; also the persons called "Hawe kuihi you mentioned yesterday are the owners. The whole of Ngatikaukura [sic] were left as kaitiaki of the land. I am their putake [progenitor].²⁷⁷

197) In an 1878 Māori newspaper, several Māori individuals published a notice reporting a meeting held at Te Hauke concerning the taking of eels from Lake Roto-a-Kiwa despite a rāhui (prohibition). The meeting appointed kaitiaki for the lake's future protection:²⁷⁸

²⁶⁹ Benton, R, Frame, A & Meredith, P, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 105.

²⁷⁰ Royal, C, 'Kaitiakitanga – Guardianship and Conservation - Understanding Kaitiakitanga,' (22 September 2012) Te Ara – The Encyclopedia of New Zealand online at www.teara.govt.nz (Accessed January 2020).

²⁷¹ Above, at 14.

²⁷² Above.

²⁷³ Jones, C, 'Tino Rangatiratanga and Sustainable Development: Principles for Developing a Just and Effective Resource Management Regime in Aotearoa/New Zealand,' (Masters Dissertation, York University, Toronto, Ontario, 2003) at 42 and 44.

²⁷⁴ Jackson, M, 'Tipuna title as a Tikanga Construct re the Foreshore and Seabed,' (March 2010) Online at: <http://www.converge.org.nz/pma/mjtipuna.htm> (Accessed December 2019); and Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988) at 18.

²⁷⁵ Jackson, M, 'Tipuna title as a Tikanga Construct re the Foreshore and Seabed,' (March 2010) Online at: <http://www.converge.org.nz/pma/mjtipuna.htm> (Accessed December 2019); and Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988) at 18.

²⁷⁶ Above.

²⁷⁷ 'Enclosure A, Proceedings of Native Land Court', *AJHR*, (1873. Vol 3, G-3) at 14.

²⁷⁸ *Te Wananga*, (Vol. 5, No. 44, 2 November 1878) at 550.

Whakataua ana e taua whakawa ko Renata Kawepo, Arihi Teinahu, Watene Hapuku, Renata Pukututu i nga kai-tiaki mo taua Roto kei haere pokanoa tetahi tangata ki taua Roto mahi ai, maua tangata e mau enei o ratou ingoa e whakarite kia mahia, ka haere ai te katoa ki te mahi, ki te whakahe tetahi i muri iho o tenei whakaotinga, ka hinga te ture kia a ia. RENATA KAWEPO, ARIHI TEINAHU, WATENE HAPUKU, RENATA PUKUTUTU

Te Hauke, October 23 1878.

We have appointed Renata Kawepo, Arihi Teinahu, Watene Hapuku, and Renata Pukututu as guardians of that lake. Let not any one take fish out of that lake unless authorised by the above named persons.

RENATA KAWEPO, ARIHI TEINAHU, WATENE HAPUKU, RENATA PUKUTUTU,

Te Hauke, October 23, 1878.

- 198) Under the Native Land Act 1865, titles to land blocks were limited to ten owners. Parliament intended that the ten named owners would be trustees for the rest of their tribe. The issue of trustees and how this might be understood by Māori was raised during the Commission of Inquiry into the Horowhenua Block in 1896. Tamehana Te Hoia was asked whether he understood what kaitiaki meant in the context of trusteeship in the following dialogue:

At that time you perfectly understood what kaitiaki meant? – I understand it means that when ten men are into an order of the Court that they are to take care of the land for the rest of the people.

It was the custom of the Court to put in an explanatory word to the ten names? - Yes but they were caretakers and the Court used to tell them that they were caretakers for the land.

You and Hunia at that time quite clearly understood what kaitiaki meant in regard to the land?-Yes; we heard it and understood it because the Court explained it to us.

And have you since heard the Pakeha word 'trustee'?-Yes

And do you quite understand that it means the same as kaitiaki? - Now I know it.²⁷⁹

- 199) The Ngāpuhi tohunga and philosopher Māori Marsden described his understanding of kaitiakitanga when he opined:

The ancient ones (tawhito), the spiritual sons and daughters of Rangi and Papa were the Kaitiaki or guardians. Tane was the Kaitiaki of the forest, Tangaroa of the sea, Rongo of herbs and root crops; Hine Nui Te Po of the portals of death and so on. Different tawhito had oversight of the various departments of nature. And whilst man could harvest those resources they were duty bound to thank and

²⁷⁹ Horowhenua Commission Report and Evidence, *AJHR* (1896, Vol 3, G-2) at 165.

propitiate the guardians of those resources. Thus the Māori made ritual acts of propitiation before embarking upon hunting, fishing, digging root crops, cutting down trees and other pursuits of a similar nature.²⁸⁰

- 200) George Graham, an Auckland lawyer, wrote newspaper and journal articles on Māori subjects in 1948. Writing on the succession rights of adopted children, he noted the mana associated with the obligation of 'care and management' (kaitiakitanga) of such property as patuna or eel weirs.

Patuna: Because of the perennial value as a sure source of food supply these patuna were of great economic importance. Hence the bestowal of the care and management (manaaki--tanga) by virtue of an ohaki gave the donee much prestige with his adopted tribe. Only he could exercise the fishing rights to such a pa-tuna or give assent to others to so do, and only to those within the tribal group.²⁸¹

- 201) Anthropologist and author Dr Merata Kawharu of Ngāti Whatua argued that while the term kaitiakitanga is commonly used in legal and environmental contexts, particularly since the RMA, there are other dimensions and applications of the concept, especially in the social and wairua realm:

Māori philosophy emphasises that kaitiakitanga is a socio-environmental ethic. While policy-makers have commonly given attention to its relevance in bio-physical resource management, its application is primarily concerned with social relations. ... The customary framework for giving relevance to kaitiakitanga is whakapapa, a structural principle which weaves together a triadic relationship between human beings, their environment and the spiritual realm.²⁸²

- 202) Dr Kawharu asserted that kaitiakitanga cannot be understood without regard to other key tikanga concepts including mana, rangatiratanga, mauri, tapu, rāhui, manaaki and tuku.²⁸³

- 203) The Ngāti Toa Rangatira witness Hohepa Potini expressed his view of kaitiakitanga when he noted:

Under our tikanga, our ancestral connection to Tangaroa gives us the right to enjoy the bounty of the sea, but those rights are conditioned by our responsibility to nurture our ancestor. We must exercise kaitiakitanga as the custodians of our rohe moana.²⁸⁴

- 204) The Muaūpoko witness Dean Wilson similarly stated:

²⁸⁰ Te Ahukaramū Charles Royal (ed.) *The Woven Universe: Selected Writings of Re Māori Marsden*, (Otaki, Estate of Rev. Māori Marsden, 2003) at 67.

²⁸¹ Graham, G, 'Whangai Tamariki,' in *Journal of the Polynesian Society (JPS)* (Vol 57, No. 276, 1948) note 10.

²⁸² Kawharu, M, 'Kaitiakitanga: A Māori Anthropological Perspective of the Māori Socio- Environmental Ethic of Resource Management,' *Journal of the Polynesian Society (JPS)* (Vol 109, 2000) at 366-367.

²⁸³ Above.

²⁸⁴ Above Potini at para 162.

...for as long as Muaūpoko are here, we will be at Punahau, we will be its kaitiaki and do all in our power to protect it, in the hope for the restoration that it deserves, and which is now long overdue. That is our tikanga, that is our law and our place here.²⁸⁵

205) Pataka Moore from Ngāti Raukawa also recorded of kaitiakitanga:

We live in an interconnected system and our mana and associated kaitiakitanga obligations extends across this entire area. In terms of how far out our mana and kaitiakitanga obligations extend, it blankets the moana and goes out beyond the 12 nautical mile limit under Pakeha law.²⁸⁶

... [The] tikanga principles of ... rangatiratanga, kaitiakitanga, manaakitanga, whanaungatanga, mauri, and wairuatanga inform our relationship with and the way that we act in relation to the takutai moana.²⁸⁷

206) The Patutokotoko witness Chirs Tahana shared his views on kaitiakitanga:

We say karakia when fishing, we sometimes impose rāhui and we do all of the things that kaitiaki and people with mana do in the area. The karakia show respect for the mauri and the wairua of the moana and its taonga. They also help to manifest the blessings of our ancestors and ancient gods.²⁸⁸

207) The Muaūpoko witness Mark Moses also issued an important wero regarding being kaitiaki when he noted:

It is difficult to work with someone [the tribes of the ART Confederation] if they do not recognise your mana and role as kaitiakitanga. It is hard to have a tikanga based discussion with people who only see themselves as being “tika” and having to adhere to their version of “tikanga.”²⁸⁹

Manaakitanga and Kaitiakitanga Today

208) The above analyses of the tikanga concepts of manaakitanga and kaitiakitanga provided an insight into how tikanga Māori generally and manaakitanga and kaitiakitanga specifically are important for assessing whether a group continues to hold or not hold the marine and coastal areas as a matter of tikanga today.

209) Kaitiakitanga is probably most recognised today in ss. 2 and 7, Resource Management Act 1991, which is referred to as:

²⁸⁵ Above Wilsom at para 52.

²⁸⁶ Above Moore at para 16-17.

²⁸⁷ Above at para 133.

²⁸⁸ Above Tahana at para 48.

²⁸⁹ Above, Moses at para 93.

The exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship

- 210) In an appeal from a decision of the Regional Council to grant consents for an oyster farm on the foreshore at Paritata Bay, Raglan Harbour, Judge Treadwell commented on s.7, RMA directing the Tribunal to have regard to kaitiakitanga:

... The definition is an all embracing definition ... the general concept of Kaitiakitanga ... embraces a Māori conceptual approach now has a different meaning ascribed to it by statute, a meaning which we as the Tribunal are bound by law to and a meaning which we gather does not find favour with the [Māori] appellants. Further ... the concept of guardianship is now applicable to anybody exercising any form of jurisdiction under this Act. Thus, it would be competent for the Tribunal to inquire whether a consent authority other than tangata whenua was in fact exercising Kaitiakitanga in the manner envisaged by the Act.²⁹⁰

- 211) Selwyn Hayes of Ngāi Tai and Whakatōhea offered a critique of this type of statutory recognition of kaitiakitanga. Viewing kaitiakitanga within a traditional tikanga Māori context, Hayes stated:

The kaitiaki ... acts as both benefactor and beneficiary, in the sense that they protect the resource from harm while still reaping the benefits of the resource. An intrinsic part of this concept is the recognition that each generation has an inherited responsibility to protect and care for the natural world. Kaitiakitanga carried with it an obligation not only to care for the natural world, but also for each successive generation, by ensuring that a viable livelihood is passed on... Concern remains however, in regard to the use of the words 'guardianship' and 'stewardship' to define kaitiakitanga. Both terms tend to cloak the concept of kaitiakitanga in Pākehā terms of lesser importance and entirely different origins. The role of kaitiaki is considerably more significant than simply that of a guardian or steward. It is a vital component in the spiritual and cultural relationship of tangata whenua with their land.²⁹¹

- 212) Be that as it may, in a specific MACA context, it appears that the Court of Appeal also acknowledged the importance of claimant groups exercising kaitiakitanga as well as manaakitanga over the marine and coastal areas today. In the 2023 Court of Appeal decision of *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board*,²⁹² the Court reiterated these important tikanga concepts of kaitiakitanga and manaakitanga today when analysing the s. 58(1)(a), MACA test for CMT when the Court held that the focus should be on tikanga and whether an applicant group currently holds the relevant area. The majority also accepted that the evidence of activities that show control or authority over the area, as opposed to simply carrying

²⁹⁰ *Greensil v Waikato Regional Council* (W17/95, 6 March 1995).

²⁹¹ Hayes, S, 'Defining Kaitiakitanga and the Resource Management Act 1991,' in *Auckland University Law Review* (Vol 8 1996-1999 No 3) at 893, at 894 and 898.

²⁹² *Whakatōhea Kotahitanga Waka (Edwards) & Ores v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 504.

out a particular activity in that area, will be of particular importance in distinguishing a “holding” of the area from the use of the area to gather a particular resource.²⁹³

- 213) The Court of Appeal then noted that rather than focusing on a group’s “intention and ability” to exclude others from land, it is more helpful to focus on the group’s “intentions and ability to control access to an area, and the use of resources within it, as a matter of tikanga” including through manaakitanga when the Court held:

... in the context of Māori customary relationships with land, and the principles of whānaungatanga and manaakitanga, we consider that it is more helpful to focus on the group’s intention to control access to an area, and the use of resources within it, *as a matter of tikanga* [emphasis in the text]. Permitting others to access the area and to use resources within it, as an expression of manaakitanga, is not inconsistent with control: rather, it demonstrates the exercise of authority in respect of the relevant area. 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. The fact that permission is invariably granted, in particular to whānau (relatives) and others with whom there are reciprocal relationships, does not call into question the group’s control of the area. Rather, it is a manifestation of that control.²⁹⁴

- 214) Thus, according to the Court of Appeal, a group may “hold” an area in accordance with tikanga where tikanga such as manaakitanga obliges the group to share the resources, but it requires the permission of that group to be sought before others access the area or use resources within it.²⁹⁵ Such a permission responsibility, as articulated by the Court Appeal, is a manifestation of certain tikanga Māori indicia such as rangatiratanga, mana tangata, mana whenua, manaakitanga and kaitiakitanga.

- 215) It is also important to acknowledge again that the above tikanga Māori indicia, concepts and questions are not exhaustive but are at least appropriate as starting points for answering what specific tikanga should influence that a group the area in question, or any part of it, is held or not held in accordance with tikanga Māori.

- 216) Finally for this section, the tikanga concepts of whakapapa, mana, manaakitanga and kaitiakitanga entail rights and responsibilities that are obligatory.²⁹⁶ If a claimant group cannot exercise these responsibilities, then that group is not fulfilling their tikanga duties to the wider collective.²⁹⁷ These tikanga concepts in this sense are more than simply guardianship and chieftainship; they entail positive duties to act in ways that benefit the wider collectives and the marine and coastal area itself as Dr Carwyn Jones asserted:

Mana and kaitiakitanga go together as right and responsibility. Each whānau or hapū is kaitiaki for the area in which they hold mana whenua, that is, the ancestral

²⁹³ Above at 266 [per Miller J], and 360 [per Cooper P and Goddard J].

²⁹⁴ Above at 404.

²⁹⁵ Above at 403.

²⁹⁶ Above.

²⁹⁷ Above.

lands and seas. Should they fail to carry out their kaitiakitanga duties adequately, not only will they lose mana, but spiritual harm will befall the members of the whānau and hapū.²⁹⁸

217) The rangatira and kaitiaki then must also effectively co-govern and co-manage their respective marine and coastal areas for the benefit of future generations which obligation is considered mandatory, and an inability to fulfil this mana obligation results in a diminution of mana²⁹⁹ and a possible loss of holding the marine and coastal area according to tikanga.

218) What also assists with understanding Question 3) is how Māori groups originally legitimated their mana over the whenua and the marine and coastal areas which is what Question 4) will now address.

Question 4 – How do the concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, tuku and related concepts apply in this hearing between 1820 and 1840?

219) The authors acknowledge that this section is another challenging question to address. Given the adversarial nature of litigation and the highly contested nature of some of the legal and cultural issues that arose in the evidence, it is a challenge for the authors to answer with some certainty how the concepts of ahi kā, ringa kaha, tatau pounamu, tuku and related tikanga concepts apply in this hearing between 1820 and 1840.

220) However, the task at hand is to provide a useful discussion on how these tikanga concepts applied historically which we will attempt to do now in this section of the report.

221) Some of the material in Sections B) and Questions 1) - 3) above are obviously relevant for answering Question 4). We do elaborate further on the noted tikanga concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, and tuku as well as the other important related concepts of take whenua, utu, muru and ea in this section. Other key tikanga values of whakapapa, whānaungatanga, rangatiratanga, mana tangata, manaakitanga and kaitiakitanga are relevant but have been explored in detail elsewhere and will not be repeated in this section in any degree of detail.

222) But each tikanga concept is relevant and provides important context to answer this question of identifying how the concepts of ahi kā, ringa kaha, tatau pounamu, tuku and related concepts apply in this hearing between 1820 and 1840.

223) The authors are aware and even witnessed in the High Court that there have been and continues to be numerous tense battles and legal, cultural and political disputes

²⁹⁸ Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 at para 49 [CB Tab 33 at 201.00136].

²⁹⁹ Jackson, M, 'Tipuna title as a Tikanga Construct re the Foreshore and Seabed,' (March 2010) Online at: <http://www.converge.org.nz/pma/mjtipuna.htm> (Accessed December 2019); and Henare, M, 'Ngā Tikanga me ngā Ritenga o Te Ao Māori,' (Report of the Royal Commission on Social Policy, Wellington, 1988) at 18.

between the various Kāpiti Coast claimant groups that go back to the turbulent Musket Wars period from 1820-1840. We will now briefly explore the Musket Wars period of circa. 1820-1840 to provide more important context for addressing Question 4).

Musket Wars

- 224) The late 18th and early 19th centuries were a period of inter-tribal conflicts and cultural disruption that were triggered by the arrival of Europeans who introduced access to muskets, new foods and technology, commerce and trade, Christianity, and introduced diseases that decimated tribal populations.³⁰⁰ During the Musket Wars period (circa. 1805-1845), numerous battles were fought between warring tribes for decades which resulted in much loss of lives, lands and resources. The period severely disrupted the balance of power among tribes where those with the muskets held the power and used it ruthlessly to seek utu (revenge) and settle the ledger by annihilating rival tribes.³⁰¹
- 225) Ngā Puhi was the first tribe with muskets, and they led bloody retaliatory raids around the country. In the Waikato-Te Nehenehenui regions, Ngāti Maniapoto and the Waikato tribes fought battles against their Tainui tribal kin - Ngāti Toa Rangatira and Ngāti Raukawa that culminated in the Battle of Hingakākā or Te Mangeo near present day Ngaroto in circa. 1790. The invading Ngā Puhi also fought battles in the Waikato at the Battle of Mātakitaki near present day Pirongia and Huiputea near Otorohanga in 1822, and Waikato invaded and fought battles with Ngāti Tama and other tribes in Taranaki and in Takitimu (Hawkes Bay).
- 226) During this turbulent period, Te Rauparaha and his Ngāti Toa Rangatira people were expelled from the Waikato by a Waikato-Ngāti Maniapoto confederation led by Te Rauangaanga, father of Potatau Te Wherowhero. In 1820, thousands of Waikato and Ngāti Maniapoto warriors attacked Kāwhia and defeated Ngāti Toarangatira during a major battle near Lake Taharoa. As he fought his way down the west coast of the North Island at the head of his people on their heke, Te Rauparaha defeated the Ngāti Apa, Muaūpoko, Rangitāne and Ngāti Ira tribes as he led his people to Te Moana o Raukawa (Cook Strait) where they settled, among other places on Kāpiti Island.³⁰² Later, Te Rauparaha invaded Ngāi Tahu winning costly victories at Kaikoura, Kaiapoi, Onawe and Banks Peninsula, among other places.

³⁰⁰ For an extensive discussion of the Musket Wars and the social upheaval of the period, see Crosby, D, *The Musket Wars* (Reed Publishers, Auckland, 1999); Ballara, A, *Taua: 'Musket Wars', Land Wars' or Tikanga?: Warfare in Māori Society in the Early Nineteenth Century*, (Penguin, Auckland, 2003); and Wright, M, *Guns and Utu: A Short History of the Musket Wars* (Penguin, Auckland, 2011). For a Māori perspective, see Jones, P T & Biggs, B, *Nga Iwi o Tainui: The Traditional History of the Tainui People* (Auckland University Press, Auckland, 1995); Collins, H, *Kamate Ka Ora! The Spirit of Te Rauparaha*, (Steele Roberts, Wellington, 2010); and Calman, R (Editor and Translator), Te Rauparaha, T, *He Pukapuka Tataku i Nga Mahi a Te Rauparaha: A Record of the Life of the Great Te Rauparaha* (Translated and Edited by Calman, R, Auckland University Press, Auckland, 2021).

³⁰¹ For witness references on warfare generally and the pakanga fought during the turbulent Musket Wars period, see Collins and Teira, the full reference; Waaka at 1-3; Mahina-a-Rangi Baker 1 at 90; Parata at 19-20; Moses, the full reference; Parai at 14-19; Potini at 140-141; Ropata, the full reference; and Kiriona, the full reference.

³⁰² Above.

227) Other subsequent battles were fought around Maungatautari between Waikato and Ngāti Maniapoto against Ngāti Raukawa which contributed to the heke of Ngāti Raukawa under Te Ahu Karamu south along the Nehenehenui coast, through Taranaki and eventually to Kāpiti and Horowhenua; and under Te Whatanui through Heretaunga on the East Coast and then on to Horowhenua.³⁰³

228) Consequently, the Musket Wars period was one of unprecedented disruptive and turbulent change, including with tikanga Māori as a legal system.

229) In reference to the massive changes caused by the Musket Wars period, Tā Eddie concluded:

The character of warfare appears to have changed dramatically towards the end of the 1800s through pressure on resources in more densely populated areas. It was most marked by larger migrations [heke], usually north to south, and an increase in non-kin warfare. Domestic warfare changed to regional warfare.

... Shortly after, musket warfare spread also, again, generally north to south, causing considerable alteration through indiscriminate and more extensive slayings. This taxed the custom of utu that compelled the pursuit of an equivalence in rejoinder. Musket warfare was not a new kind of war but introduced a new technology which in turn had consequences with which custom [tikanga] could not cope.

Although the initial musket warfare comprised raids only, it led to a spiral of unprecedented dislocation. Hapu or hapu combinations shifted to less densely populated areas away from military pressure or relocated for better access to muskets at places where Europeans had settled or were likely to reside. These movements were in themselves a further cause of friction.³⁰⁴

Conflict and Resolution

230) History and whakapapa teach us that it is common for all people to disagree, dispute and conflict inter alia, over whenua and rohe moana resources and territorial boundaries. In fact, it is asserted that most, if not all, wars fought around the world historically and today are battles over two key areas – sovereignty (mana) and control of property (mana whenua, mana moana).

231) What was obvious from the evidence in this High Court hearing was that much of the pāhuatanga (atrocities) and hara (crimes) that were committed in the Kāpiti region during this turbulent Musket Wars period - 200 years ago – and the associated anguish, mamae (pain), whakamā (shame), and trauma caused by these historic murky acts remain to be resolved which have spilled over into this MACA hearing.

³⁰³ For witness evidence on the heke from the Waikato region down to the Horowhenua, Kāpiti and Te Whanganui a Tara regions, see above Taueki 1 at 8-9; Taueki 2 at 6; Armstrong at 3; Royal at 5; Mikaere at 30-38, 54; Walker at 17, 18; Ropata, the full reference; Collins and Teira, the full reference; Andre Baker, the full reference; Parata at 12-23; Ngaia at 36; Parai at 18-34; Pomare, the full reference; and Te Rei the full reference.

³⁰⁴ Above at 47.

232) Where there are unyielding claimant disagreements, conflict and disputes over, inter alia, historic narratives, whakapapa, whānaungatanga, kaitiakitanga, mana whenua and mana moana for orders under MACA, resolution appears unattainable. However, differences can be reconciled within a tikanga Māori context. Reconciliation is fully dependent upon the political will of the applicant groups' disposition to settle such protracted and outstanding take by agreeing to abide by shared tikanga Māori concepts - such as utu and manaakitanga - and tikanga institutions - such as muru and tatau pounamu (peace agreements). Having the mana rangatira with capacity to make peace to achieve the tikanga state of ea (reconciliation) is also recommended.

233) More on this matter of tikanga reconciliation will be addressed later in Question 9) of the report. The key point here is that the Musket Wars period for the hearing area – circa. 1820-1840 - was one of turbulent, unprecedented disruptive change which also impacted on the tikanga.

234) With this caveat in mind and for the purposes of answering Question 4), to understand how the tikanga concepts of take raupatu, ringa kaha, take tuku, take ahi kā, and tatau pounamu, an appropriate starting place is how a particular group became connected with the Kāpiti whenua and rohe moana through what Māori refer to as take whenua and ahi kā roa. The next section then will briefly examine the tikanga on how Māori groups became connected with the whenua and rohe moana through these tikanga concepts beginning with take whenua.

Take Whenua

235) Under tikanga Māori, proprietary interests over the whenua and rohe moana were determined according to specific *take* as Dr Carwyn Jones noted in his evidence:

To determine who has mana in relation to a resource or an area you must look at the source or “take” by which mana was acquired and how it has been maintained.³⁰⁵

236) There are different types of *take* which describe more about how a particular group came to be connected to the land and marine and coastal area. *Take* means the basis of a right to land or water.³⁰⁶

237) The Native Land Court was directed to determine the title to Māori land in accordance with the Native custom – tikanga - and erroneously concluded that the Native custom had a clear view on the right to land, by one group as against another, finding that there were four kinds of take or rights arising from Māori tradition:³⁰⁷ inter alia, take kitenga (discovery)³⁰⁸ and the related take taunaha (claiming by

³⁰⁵ Above, Jones 1 at para 40. For other references on take whenua, see Jones 1 at 40-41, 53; Mahina-a-Rangi Baker 1 at 91-93; Parai at 44, 118; and Potini at 120.

³⁰⁶ Benton, R, Frame, A, and Meredith, P, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, Victoria University Press, 2013) at 370.

³⁰⁷ Above, at 370-375.

³⁰⁸ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2016) at 305-306.

naming), take tupuna (ancestry), take ahi kā (occupation), take tuku (gift) and in certain instances, take raupatu (conquest).³⁰⁹

238) In the Compensation Court at New Plymouth in 1866, Chief Judge Francis Fenton of the Native Land Court attempted to explain the nature of Māori land tenure when he noted:

I must premise that when I use the words ‘owner’ or ‘ownership,’ or other terms of art as applied to the Maori title to land (‘tenure’ would be an objectionable word for the same reason) I use the term in a non-technical sense, simply because our language supplies no words which fitly express the idea of Maori holding. From what I have myself seen during a series of Courts now extending over a period of eighteen months, and from what I have gathered of the views of the other Judges, I am impressed with the belief between each other of proprietary rights to land. Each individual had a right as against the rest of his tribe to a pretty well defined piece of land, part of the tribal estate, which he could hold and cultivate as against any member of the tribe, and if he abandoned it another could take possession. The tribal estate belonged to the tribe, and no man could weaken the tribe by alienating any part of it to another tribe, or person out of the tribe or to any outsider. Such alienation must be the act of the tribe, or of the more powerful part of it, for force is the true foundation of Maori ownership. This idea will be more easily realised by conceiving each tribe to be a distinct nation, as in truth it was. The laws of civilized States forbidding aliens to hold land, will then assist the imagination, and show that the rule was found on notions of sound polity.³¹⁰

239) An 1878 editorial in the Māori newspaper *Te Wananga* similarly discussed the various *take* rights over land which noted:

The Maori not only claims land by right of discovery and occupation as... only three tribes of New Zealand can do now, viz: Te Arawa, Ngatiporou [sic], and Taranaki, but he also claims by right of conquest, gift in marriage, gift for help in obtaining food for feasts, help in time of sickness (or payment to priests for supposed protection from the power of witchcraft), for the dead being carried over the land, for relations murdered on the land, and a thousand other claims of such nature. But there are other claims to land by the offspring (male line of descendants) of daughters (to land of their grandfathers) who have married chiefs of other tribes.³¹¹

240) The Native Land Court Judge Alexander Mackay similarly reported to the Native Minister in 1890 on the nature of Māori customary rights to land concluding that ‘the general consensus of opinion’ was:

³⁰⁹ Above, at 306 and Meredith, P, ‘Take Whenua – Māori Land tenure – Discovery, Ancestral Right and Conquest,’ *Te Ara – The Encyclopedia of New Zealand*, online at: <https://teara.govt.nz/en/take-whenua-maori-land-tenure/page-3> (Accessed 5 October 2024).

³¹⁰ ‘Papers Relating to Sitting of Compensation Court at New Plymouth, in Further Papers relating to Native Affairs,’ in *AJHR*, (1866, A-13, No. 1) at 3.

³¹¹ Editorial, *Te Wananga*, (Napier, 5 January 1878) at 1-2.

...that each Native had a right in common with the whole tribe over the disposal of the land of the tribe, and an individual right, subject to the tribal rights, to land used for cultivation or for bird, rat or pig hunting. But to obtain a specific title to land held in common there must be some additional circumstance to support the pretension, and the claimants must be able to substantiate some sort of title to give them the preference over such land.³¹²

241) Much later but reflecting on past tikanga practices, the Waitangi Tribunal referred to the various *take* for establishing rights to land and resources in the 1993 Pouākani Report when it noted:

The land (and its resources) was not ‘owned’ by Māori in the sense that it was property, a disposable commodity that can be bought and sold. Māori people occupied land in extended kin groups, whānau and hapū under a system of interlocking and overlapping rights of use (usufructuary rights). These rights, take, were derived as follows:

Take whenua kite hou: a right of discovery, such as one related journeys of occupants of an ancestral canoe.

Take tupuna: an ancestral right derived from continuous occupation, particularly one which would be traced from an ancestral canoe.

Take raupatu: a right obtained by conquest, with displacement or servitude of the original occupants, followed by occupation of the land by the conquering group.

Take tuku: a right by virtue of a gift or exchange awarded in special circumstances such as a marriage or settlement of a dispute.³¹³

242) While these four *take*, when coupled with the necessary element of occupation, are organising principles of Māori land tenure and for marine and coastal areas, an 1890s letter by Major Rapata Wahawaha of Ngāti Porou to the anthropologist Elsdon Best outlined some 28 variations of *take whenua* which suggests that Māori had more complex systems of traditional property rights and responsibilities under tikanga.³¹⁴

243) Take tupuna was generally considered a more secure form of right than take raupatu. Take tupuna manifested itself through whakapapa (genealogies) that identified the relevant line of descent and succession, it determined kinship groupings, rank and status, and revealed whānaungatanga relationships and connections to each other.

244) To recite the descent of names was often to make a claim to land, marine and coastal areas, and natural resources. The earlier the ancestor, the stronger the claim to the land,

³¹² ‘Opinions of Various Authorities on Native Tenure,’ in *AJHR* (1890, G-1) at 1. Interestingly, the statement was quoted with approval by Elias CJ in her judgment for the Court of Appeal in *Attorney-General v Ngāti Apa* [2003] NZLR 643 at para 88.

³¹³ Waitangi Tribunal, *Pouākani Report*, (Wai 33, Wellington, 1993) at 14.

³¹⁴ ‘War narrative of Rapata Wahawaha, MS including stories of Uenuku, Ruatapu and Paikea, introduction of Christianity on East Coast, etc, Mana and Take-whenua, (ATL, MS Papers-0072-39E).

marine and coastal areas, and resources. However, just because a person has whakapapa interests and connections, that does not necessarily translate into rights and interests like mana whenua and mana moana. Māori descent groups and individuals must constantly pay attention to their take tupuna connection with the land, marine and coastal areas, and other natural resources, as well as other relevant *take*. But achieving a higher level of interest like mana whenua and mana moana involves other factors such as ahi kā.

Take Ahi Kā

245) Any discussion around the nature of territorial rights in accordance with tikanga Māori must not lose sight of the importance of ahi kā. Every right to land and the marine estate, whether it rested upon take tupuna – ancestry, take raupatu – conquest, or take tuku – gift, was required to be kept alive by occupation or the exercise of some act signifying mana and use. This tikanga demands that in order to maintain rights and claims to land and marine and coastal areas, whānau, hapū and iwi need to show continuous occupation of an area generally referred to as ahi kā (lit fire) or ahi kā roa (long burning fire). Tā Hirini Mead described ahi kā is “keeping one’s claims warm by being seen ... and by maintaining contact with the extended family and the hapū.”³¹⁵

246) The principle of ahi kā keeping fires burning on the land symbolically served as such a signifier of long-standing occupation.³¹⁶ The following whakatauki (proverb) captures this principle:

Ka wera hoki i te ahi, e mana ana ano – While the fire burns, the mana is effective.³¹⁷

247) In the Native Land Court hearings, claimants often cited take tupuna (ancestry) and ahi kā matters as the *take* or matters establishing title to the land under investigation as was recorded in the Assessors Minute Book in 1889:

Oku take ki tenei whenua, he Tipuna, he ahika, he mana i runga i te whenua, he ringa kaha, ka mutu aku take.

My rights to this land are ancestry, occupation [ahi kā], mana over the land, and power to hold, that completes my rights.³¹⁸

248) The Native Land Court itself showed a preference for claimants who could illustrate that they had continuously occupied through ahi kā and cultivated the land they claimed. The Court also developed an opinion that if Māori left to live elsewhere, and

³¹⁵ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2016) at 41.

³¹⁶ For witness evidence on ahi kā, see Mikaere at 58, 63, 64, 68; Tamihana at 15, 25; Jones 1 at 57; Jones 2 at 12-19; Tamihana 2 at 22-24, 90; Kiriona at 31; Mahina-a-Rangi Baker at 103, 198; Collins and Teira at 83, 89, 90; O’Malley at 34-38; Emery at 25, 26, 79-80; Wiremu-Matakātea at 37; Barrett 1 at 30; Andre Baker at 52-53, 108; Ngaia at 30, 34, 84-86; Moses at 9, 12, 14-16; Seymour at 3.6, 11.1; Shenton at 8; Tahana at 5; Wilson at 14; Proctor at 43; Proctor 2 at 7, 33, 44; Richmond at 16, 44; Parai at 43-44; Boast at 156-157; Potini at 120-121; and Pomare at 38-39.

³¹⁷ ‘He Whakatauki,’ in *Te Pipiwharauora: He Kupu Whakamarama*, (No. 130, January 1909) at 56.

³¹⁸ *Assessor’s Minute Book 1889* (ATL, MS-Papers-85-173-3/1).

if they remained away for three generations, then they would forfeit all rights to the land they abandoned as Judge Mackay opined:

Absence for one generation would not materially affect the rights of the absent parties. Absence for two generations would diminish their claim, and absence for three generations would entirely obliterate it.³¹⁹

249) In a letter to Elsdon Best, the Ngāti Porou rangatira Major Ropata Wahawaha described the various forms of take whenua or rights to land where he also articulated his understanding of ahi kā roa as one such take when he recorded

Right to land through long occupation [ahi kā roa].

There are many protocols concerning the title according to long occupation [ahi kā roa]. One title of occupation is through an ancestor [take tupuna] which is directly related to the above, in so far as it is a generally accepted rule that it wasn't through the length of time that the land was occupied that gave title to the land, but through their own ancestry lines ... Another title of occupation is if someone sees the bounty of the land and wants to utilise it to grow food in his knowledge too that it belongs to someone else. Despite the length of time, he spends there he is unable to establish title for himself ... he merely uses it and upon completion he will abandon it ... Hence there are two types of title – 1. Occupation through ancestry [take tupuna and ahi kā roa]. 2. Occupation through a title that is groundless.³²⁰

250) The early twentieth century Māori scholar Hare Hongi also referred to several original rights or *take* to land when he recorded:

The right to long and continual use and occupation, and of successfully holding lands against opposition and attack, gives good title of ownership. ... A few families combined and occupied vacant lands [take kitea]. They built a Pa, a proceeding which constitutes the first important act of ownership ... Cultivation went on, fisheries and bird woods were resorted to and marked off, eel weirs were made, boundary posts set up, a generation passed and another, the sub-tribe became established. If this sub-tribe was asked to prove its rights it would first point to its Pa ... It would next point to its cultivations, eel-weirs, bird and fish preserves, boundary posts and burial grounds. These boundary posts have not been removed, neither has the Pa been attacked, the cultivation and the burial grounds remain as proofs of the continuous burning of domestic fires, 'ahi-ka-roa,' the proof is complete as also is the right.³²¹

³¹⁹ Judge Mackay quoted in Smith, N, *Custom and Law Affecting Native Land*, (Maori Purposes Fund Board, Wellington, 1942) at 82.

³²⁰ 'War narrative of Rapata Wahawaha, MS including stories of Uenuku, Ruatapu and Paikea, introduction of Christianity on East Coast, etc, Mana and Take-whenua, (ATL, MS Papers-0072-39E).

³²¹ Hongi, H, *Maori Land Rights, Marriage Customs, Kinship*, ' (n.d)(ATL, MS-Papers-5717) at 19.

251) Subsequently, the Māori Appellate Court and the Waitangi Tribunal appear to have adopted the three-generation ahi kā roa rule of the Native Land Court as illustrated in the 1990 Māori Appellate Court decision from the South Island and the 1991 Waitangi Tribunal *Ngāi Tahu Report* in dealing with post-1840 Treaty of Waitangi occupation and ahi kā when they both noted:³²²

We are mindful that where an iwi have proven one of the customary take supported by occupation but were absent in 1840 they could revive their ahi kaa as long as the reoccupation was peaceful and within three generations of their leaving the area.³²²

252) The Waitangi Tribunal a year later in its 1993 Pouākani Report³²³ also discussed ahi kā occupation when it asserted:

... ahi ka or ahi ka roa, the principle of keeping the fires burning on the land as a symbol of long-standing occupation. This did not necessarily mean continuous settlement, but it did mean continued use, such as seasonal visits for fishing or birding in which temporary encampments might be made. If occupation rights were to be maintained, the fires grew cold after three or more generations, the fires may be regarded as being extinguished, ahi mataotao.³²⁴

253) Furthermore, hapū and iwi demonstrated their ahi kā and connection to land and the rohe moana through their association with, and knowledge of, the landscape, seascape, flora, fauna and tohu sites of cultural and historical significance such as urupā where their koiwi (bones of whānau) were buried.

254) Related to ahi kā is the tikanga of take taunaha or tapatapa whenua which is about claiming by naming.³²⁵ Every hill, valley, stream, river, lake, mountain, forest, estuary, harbour, and coastal estate was named by Māori and those names have meaning and importance to associated whānau, hapū and iwi that were often transmitted through purākau (story telling).³²⁶

³²² Cited in the Waitangi Tribunal, *Ngāi Tahu Report 1991* (Wai 27, Wellington, 1991) Appendix 4 at 1126. The Tribunal quoted the Māori Appellate Court decision of *South Island Appellate Court MB*, (Vol. 4) at 672.

³²³ Waitangi Tribunal, *Pouākani Report*, (Wai 33, Wellington, 1993) at 14.

³²⁴ Above.

³²⁵ For claimant evidence on take taunaha, see Moses at 32, 33; Jones 2 at 16-19; Seymour at 3.14-3.16, 3.30; Proctor 1 at 13, 17 28, 43; Proctor 2 at 2-4, 10, 15, 16; Barrett at 32; Parai at 37-38, 43-44; and Potini at 120-121.

³²⁶ The former 19th century New Zealand Chief Justice, Sir William Martin, acknowledged Māori interests in the land, marine and coastal areas, and other natural resources when he recorded in 1846: 'The whole surface of these Islands, or as much of it as is of any value to man, has been appropriated by the Natives, and, with the exception of the part which they have sold, is held by them as property. Nowhere was any piece of land discovered or heard of which was not owned by some person or set of persons.' See Martin, S. W. 'England and the New Zealanders,' (Part 1: Remarks upon a Despatch from the Right Hon. Earl Grey, to Governor Grey dated December 23 1846. Auckland, Auckland College Press, 1847) at 3-4 and 'Opinions of Various Authorities on Native Tenure,' in *AJHR* (G1, 1890) at 3.

255) Interestingly, the Ngāti Toa Rangatira witness Ms Miria Pomare referred to the revered Ngāti Raukawa luminary, the late Matua Iwikatea Nicholson, and his understanding of proprietary interests in accordance with tikanga:

Some customary and descriptive examples of the way in which our people identified their rights as follows:

Take tūpuna	=	Ancestral right, by reason of ancestry
Take taunaha	=	Bespeak, right through oral claim
Take tuku	=	Ceded, given, right given
Take noho	=	Occupation, occupation right or reason of
Take rahui	=	Reservation by reason of reservation
Ahi ka	=	Describes occupation fires
Ahi ka roa	=	Describes occupation fires over a long period

Notwithstanding the above, the following examples do not of course indicate any right:

He ahi pākaurere	=	Describes the evidence of fires by fugitives. Pakaurere a species of locust always at risk of predation.
He ahi mawhitiwhiti	=	Describes the evidence of fires left by fugitives. Mawhitiwhiti = escape, mawhitiwhiti a species of grasshopper always at risk of predation.
He ahi māueue	=	Describes the evidence of fires left by fugitives. Maueue = tremble. Describes the remains of very small fires ... to avoid detection by those in pursuit.

The relevance of these examples is that some of those who claim “Ahi Ka” or “Ahi Ka roa” might more correctly be described as Ahi Pakaurere, Ahi Mawhitiwhiti or Ahi Maueue. These are the terms used by our elders of Ngāti Toa and Ngāti Raukawa when orally recounting the history of their occupation and settlement as a consequence of their Raupatu.³²⁷

256) The Te Āti Awa witness Benjamin Ngaia also provided a similar although more brief analysis of tikanga proprietary interests and ahi kā when he recorded:

The tikanga concepts relevant to the establishment of Te Āti Awa ki Whakarongotai’s mana whenua and mana moana in the application area are:

- a. **Take Raupatu** – the acquisition of land and environs along the Kāpiti coast from Kūkūtauaki to Whareroa, and Waiorua Island by conquest on the north-eastern shore of Kāpiti Island;

³²⁷ Above, Pomare, at para 101. Pomare referred to: “Further Statement of Evidence of Ngarongo Iwikatea Nicholson, dated 15 September 1998,” (Wai 145, #L14) at 18-21.

- b. **Ahi kā** – ongoing physical occupation of land, often interpreted as “fires of occupation” or “keeping the home fires burning.” Ahi kā status was secured following various pakanga (battles) that occurred, including the battle of Haowhenua and Kuititanga, and the permanent settlement of tipuna in our rohe (for example at various pā sites and settlements); and
- c. **Ahi kā roa** – physical occupation of land over generations or a long period of time. Ahi ā roa stems from permanent settled populations of Te Āti Awa who exercised mana and kaitiakitanga in our rohe over successive generations.³²⁸

257) The Muaūpoko witness Mark Moses on the other hand asserted:

Take tupuna or ancestral connection works in combination with ahi kā roa or long occupation. ... I describe “take Ahi Kā” as having Occupation and or Access and Use to resources of an area.³²⁹

258) Moses then questioned the ART (Ātiawa, Raukawa and Toa Rangitira) confederation ahi kā interests in the Kāpiti area when he continued:

... As at 1840, the ART confederation was still developing their ahi kā, and local coastal mātauranga, particularly for Ngāti Raukawa and Ngāti Kauwhata who came from an inland context.³³⁰

259) Referring to the Whanganui-a-Tara area (Wellington), the Muaūpoko witness Marokopa Wiremu-Matakātea referred to Muaūpoko enduring and current ahi kā responsibilities there when he noted:

My grandmother would go down there and do karanga and karakia, things like that with an ope of people. I used to go there and do karakia and waiata as well. I would do this often. We would go there to keep our ahi kā alive, to keep the kōrero alive.³³¹

260) Muaūpoko witness Sandra Williams also alluded to current Muaūpoko ahi kā throughout the Kāpiti coast area when she recorded:

In terms of the sea, our main fishing is at Hokio. ... We can feed ourselves off the beach. ... When I was younger, a few times a year we would go to Pukerua Bay as a group. ... we also went to Paekākāriki. It was during the full moon in the summer – once a month. ... we went there in part because fish species on the rocky coast are different. We got kina, paua, mussels, crayfish. What we got we

³²⁸ Above, Ngaia 1 at 34.

³²⁹ Above Moses at para 9 and 12.

³³⁰ Above, Moses at para 9.

³³¹ Above, Wiremu-Matakātea at para 37.

brought back and distributed among the whānau – people too old to get it themselves.³³²

261) Ngāti Raukawa witness Ani Mikaere, on the other hand, reiterated:

Ngāti Pareraukawa have continued to maintain our tikanga and our ahi kā, with our tūpuna continuing to live in their homes and cultivations on the land which they occupied along the southern banks of the Hōkio stream since the 1830s.³³³

262) Ngāti Raukawa witness Justine Tamihana also affirmed:

The mana of Ngāti Raukawa ki te Tonga along the coastline is unbroken and we are the ahi kā roa (long standing occupants). We are the mana whenua and maintain that still today.³³⁴

263) Heeni Collins and Te Kenehi Teira added further:

Since the 1820s and 1830s Ngāti Raukawa leaders and hapū have exercised occupation rights [ahi kā roa] along the coast – building pā, harvesting resource for kai and trade, establishing kainga and marrying some of the earlier occupant peoples. Occupation of the hapū areas began with settlements near the coast and river mouths ... and then as time passed and their numbers grew, they extended inland along the rivers and to more inland pā and kainga near wetlands, lakes and streams. This continues today.³³⁵

264) Ngāti Raukawa and Te Āti Awa witness Dr Mahina-a-Rangi Baker also vehemently asserted further:

Ngāti Raukawa exercise mana whenua and mana moana from Kūkūtauaki to Rangitīkei. They are ahi kā, who have been there undisturbed since 1840 and uphold their obligations on their whenua and moana every day. Whilst there are obligations to others, including Ngāti Toa and Ātiawa, these are an overlay on the ahi kā status and authority of Ngāti Raukawa.

The same is true for Ātiawa. Ātiawa hold and exercise mana whenua and mana moana from Kūkūtauaki to Whareroa exclusively since before 1840 and to this day.³³⁶

265) Te Whānau Tima and Mateawa witness Patrick Seymour on the other hand also referred to his whānau ahi kā interests when he noted:

³³² Above, Williams at para 3, 11, 12.

³³³ Above, Mikaere at para 64.

³³⁴ Above, Tamihana at para 25.

³³⁵ Above, Collins and Teira at para 90.

³³⁶ Above, Mahina-a-Rangi Baker 1 at para 196-199.

As we have not moved off the original Te Mateawa lands, we still practice the same cultural practices and Tikanga as observed and handed down by our forefathers. We also retain these Tikanga as part of Ngā Ahi Kā o Te Mateawa.³³⁷

266) The David Morgan Whānau witness Dennis Morgan similarly asserted:

The David Morgan whanau have always had a close connection with the coast in the area of the application. We thought of this as a right we had because of our history and connection to tupuna who lived in the area [ahi kā]. We thought we had mana whenua in that region and exercised our customary rights including gathering food and launching waka.³³⁸

267) Dr Taku Parai of Ngāti Toa Rangatira moreover, observed:

At 1840, Ngāti Toa exercised tino rangatiratanga as tangata whenua over the lands and moana we occupied. We have maintained noho tuturu/ahi-kā-roa (long occupation) established take whenua (rights to the land), and other customary rights that have formed the basis of the iwi tino rangatiratanga over the lands.³³⁹

268) Hohepa Potini of Ngāti Toa added:

Under our tikanga, we belong to our customary land and sea through a combination of our whakapapa to the land, the occupation of our ancestors, keeping the home fires burning over generations (ahi kā roa, literally the long burned fires) and conquest over the other tribes in battle.³⁴⁰

Take Tuku Whenua

269) A further relevant tikanga concept that has been commonly misunderstood as demonstrating ahi kā is when visitors or neighbours have been allocated temporary usage rights on another group's land and resources. Dr Angela Ballara asserted that it was possible for groups to live on lands of other people with permission as guests for shorter or longer periods.³⁴¹

270) Tuku whenua is the tikanga notion of land allocation that permits occupation and use rights while the mana whenua of the donor tribe continues over the land and resources. Such an arrangement should not be understood as conveying mana over the land and resources to the visiting group. Such a situation might be a temporary tuku whenua.

³³⁷ Above, Seymour at para 11.1.

³³⁸ Affidavit of Dennis Raymond Morgan in Support of David Morgan Whānau Application for Recognition Orders for Protected Customary Rights, dated March 2017 at para. 6 [CB Tab 27 at 201.00063].

³³⁹ Above, Parai at para 44.

³⁴⁰ Above, Potini at para 120.

³⁴¹ Ballara, A, *Iwi: The Dynamics of Māori Tribal Organisation from c. 1769-1945* (Victoria University Press, Wellington, 1998) at 199.

271) In discussing such tikanga concepts, the Ngāti Porou rangatira and Native Land Court assessor Major Rapata Wahawaha described his understanding of ahi kā by distinguishing an occupation right by way of ancestry from that of a mere user right – tuku whenua - when he asserted:

Take ahi ka roa – Right to land through long occupation. There are many protocols concerning the title according to occupation. One title of occupation is through an ancestor which is directly related to the above, in so far as it is a generally accepted rule that it wasn't through the length of time that the land was occupied that gave title to that land, but through their own ancestry lines. ... Another title of occupation is if someone sees the bounty of the land and wants to utilise it to grow food in his knowledge too that it belongs to someone else. Despite the length of time, he spends there he is unable to establish title for himself. He merely uses it and upon completion he will abandon it. ... Hence there are two major types of title – 1. [Ahi ka roa i runga i te take tupuna] - Occupation through ancestry. 2. [Ahi ka roa i runga i te take kore] - Occupation through a title that is groundless.³⁴²

272) Some Māori complained that Native Land Court Judges had simplified and misconstrued the tikanga of ahi kā with tuku whenua. The complaint was that the Court was wrongly awarding land to groups who had only been allocated temporary sites for cultivation and usage by tangata whenua through tuku whenua. The Ngāti Kahungunu rangatira Te Whatahoro Jury and others wrote a letter to the editor of the Māori newspaper *Te Wananga* in 1877 making such a complaint when they recorded:

Some land which is being awarded according to long standing and undisturbed occupation [ahi ka roa] is not being carefully examined by the Court as to whether that claim is right. There are many facets of this concept te ahi ka roa or permanent residence. One aspect of occupation is when a person happens upon the residence of somebody else, and for a period of time is looked after by that person. Coming to the present time, the descendants of the traveller will then prepare to discuss the issues of that land according to their knowledge. Soon, the person entitled to that land could be defeated by the supposed long occupation and knowledge of that traveller, if the Court is not careful in its inquiry.³⁴³

273) On the other hand, a tuku whenua might also be more permanent depending on the context. The anthropologist Raymond Firth recorded that 'the cession of land to another tribe seems to have been regarded as one of the most valuable gifts to be made only on occasions of great significance.'³⁴⁴ The late Ngāti Porou ki Harataunga rangatira and tohunga whakairo (carver) Paki Harrison recorded how Ngāti Porou were granted land – through take tuku whenua - at Kennedy Bay (Harataunga) on the Coromandel Peninsula by the Hauraki rangatira Paora Te Putu, who they sheltered and protected while Ngapuhi were pursuing him during the turbulent Musket Wars period of the 1820s.

³⁴² War narrative of Rapata Wahawaha. MNS including stories of Uenuku, Ruatapu and Paikea, introduction of Christianity in the East Coast, etc, Mana and Take-Whenua, ATL, MS-Papers-0072-39E.

³⁴³ Te Whatahoro Jury and others, *Te Wananga* (Vol. 4, No. 278, 14 July 1877) at 26.

³⁴⁴ Firth, R, *Economics of the New Zealand Maori*, (2nd Ed., Government Printer, Wellington, 1972) at 390.

274) Tā Paki stated that when Te Putu died, a mere known as Whaita and a cloak were presented to Ngāti Porou as a tapae toto – a gift given in connection with the chief’s death. Harrison contended that the taonga presentation along with inter-marriages served to confirm the tribe’s occupancy and made the land transfer [tuku whenua] permanent.³⁴⁵ Gifting of land through tuku whenua confirmed rights and cemented relationships.³⁴⁶ But the tuku whenua had to be followed up by continuous occupation – ahi kā – to perpetuate permanency.

275) The Ngāti Raukawa witness Ani Mikaere stated of take tuku:

Ngāti Raukawa’s mana and tino rangatiratanga “was derived from the Māori customary law of tuku whenua and the fulfilment of the expectation of that law.”³⁴⁷

Take Raupatu and Ringa Kaha

276) A further important *take* for legitimating a group’s claims to the whenua and marine and coastal areas is take raupatu and the associated practice of ringa kaha.

³⁴⁵ Cited in Benton R, & Frame, A, Meredith, P, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Maori Customary Law*, (University of Victoria Press, Wellington, 2013) at 400-401.

³⁴⁶ For witness references on take tuku whenua, see Mikaere at 36, 55-60; Jones 1 at 63; Armstrong at 54; Kiriona at 26-37, 48-50; Mahina-a-Rangi Baker at 29, 30, 101-103; Teira at 43-45; Richmond at 14(c), 44-50; Collins and Teira at 56; Ropata at 18-19, Boast at 123-130; 26-27, 43-47; Parata at 10; Andre Baker at 49-53; Ngaia 2 at 4-7; Seymour at 3.10-3.20; Moses at 67-71; Parai at 110-118; Potini at 37; and Pomare at 73, 119-127.

³⁴⁷ Above, Mikaere at para 36. For an analysis of take tuku whenua within the Kāpiti Coast district, refer to the highly contested and often contradictory historical and contemporary narratives in Brief of Evidence of David Anderson Armstrong in Reply, dated 16 April 2024 [CB Tab 25 201.00029]; Armstrong, D, *Historical Research Report in Support of Ngāti Tamarangi Application CIV-2017-485-160 for Customary Marine Title and Protected Customary Rights Under the Marine and Coastal Area (Takutai Moana) Act 2011*, (Commissioned MACA Report, HistoryWorks, November 2023) [CB Tab 118 at 301.00004]; Husbands, P, *Te Mateawa and Ōmarupāpako: A Report on Customary Interests*, (Gap Filling Research Project for the Porirua ki Manawatu Inquiry, Crown Forestry Rental Trust, 28 November 2022); McBurney, P, *Te Ahika o Te Mateawa and Te Whānau Tima Customary Interests in the CMCA at Kuku Beach, Horowhenua MACA Report*, (Commissioned MACA Report, Ardmore History Research Ltd, 8 December 2023); O’Malley, V, *Ngāti Raukawa ki te Tonga: Customary Interests and Marine and Coastal Usage* (Commissioned MACA Report, November 2021) [CB Tab 124 at 302.00570]; Teria, TK & Collins, H, *Ōtaki – Ngāti Raukawa Customary Interests* (CFRT 3446 Report Commissioned by the Crown Forestry Rental Trust for the Porirua ki Manawatu Inquiry, Wai 2200, August 2023); Walzl, T, *Te Ātiawa ki Whakarongotai and the Takutai Moana*, (Commissioned MACA Report, 13 October 2023) [CB Tab 160 at 305.02771]; Rigby, B & Walker, K, *Te Ātiawa/Ngati Awa ki Kapiti: Twentieth Century Land and Local Issues Report*, (Waitangi Tribunal Commissioned Report for the Porirua ki Manawatu Inquiry Wai 2200, December 2018); Waitangi Tribunal, *Waikanae: Report on Te Ātiawa/Ngati Awa Claims*, (Waitangi Tribunal, Porirua ki Manawatu Inquiry, Wai 2200, 2022); Armstrong, D and Stirling, B, *A History of Muaūpoko*, (HistoryWorks Ltd, 2023); Belgrave, M, *Unravelling Historical Narratives and Customary Disputes: The Himatangi Hearings*, (Commissioned MACA Report, April 2024); Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report Pre-Publication Version*, (Wai 2200, Waitangi Tribunal, Wellington, 2017); Luiten, J and Walker, K, *Muaūpoko Land Alienation and Political Engagement Report*, (Waitangi Tribunal Commissioned Report for the Porirua ki Manawatu Inquiry, Wai 22090, August 2015); Boast, R, *Ngāti Toa Rangitira Takutai Moana: Rangitikei to Whareroa* (Commissioned MACA Report, 13 February 2024); Ward, A, *Maori Customary Interests in the Port Nicholson District, 1820s to 1840s: An Overview*, (Waitangi Tribunal Commissioned Report, October 1998); and Hearn, T, *One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century*, (Waitangi Tribunal Commissioned Report, Wai 2200, Porirua ki Manawatu Inquiry District, June 2015).

277) Take raupatu was about claiming land through conquest having conquered and subjugated or displaced the original inhabitants. Referring to take raupatu, Tā Eddie Durie opined:

The traditional systems of Oceania, including that of Māori, regarded the use of force for the acquisition of the territory of another as improper unless backed by rights claimed by some legitimate principle or cause (take). ‘Raupatu’ or ‘ringakaha,’ both used by settlers as equivalents for conquest, was not a source of land rights by itself. ... Warfare was rarely pursued with the overt purpose of acquiring land, but changes in hapu structure and allegiances and thus the acquisition of a wider influence by dominant groups, was a common consequence of warfare.³⁴⁸

278) Professor Hirini Mead on the other hand, referred to the terms take raupatu, take ringa kaha and take pakihiwi kaha as essentially the same thing - conquest by military action that displaced the people and their leaders who occupied the estate, extinguished their rights of occupation and use of the land, and established a new group of occupiers.³⁴⁹ Professor Mead noted however, that take raupatu or conquest was not a source of title if it was not followed up by occupation.³⁵⁰

279) Tā Eddie added:

Warfare was a course of last recourse if mana could be restored to the aggrieved party (utu) without further diminution of the mana of the offenders.³⁵¹

280) Tā Eddie continued:

At least five types of ‘conquest’ [raupatu] are described by Native Land Court witnesses:

- (1) by defeating opponents in battle;
- (2) by protecting another hapu, or throwing a cloak over them to warn off potential invaders;
- (3) by causing a hapu to vacate a resource by threatening war;
- (4) by forcing a marriage upon a hapu;
- (5) by forcing a marriage alliance in return for a promise of protection.³⁵²

In each case, the vanquished hapu might continue to occupy the area, it being mana, or the use of a particular resource and not land rights generally that the stronger group thus obtained.

³⁴⁸ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 41-42.

³⁴⁹ Mead, H. *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2016) at 306.

³⁵⁰ Above.

³⁵¹ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 45.

³⁵² Above, at 45.

‘Ringakaha’ and ‘raupatu’ were used interchangeably for conquest, but some witnesses used ringakaha³⁵³ for the retention or capture of mana by success in battle, while raupatu was used for all five forms of conquest.

Conquest gave mana over people but mana over land derived from ancestral associations and was acquired by conquerors from the tangata whenua women whom the conquering rangatira or their sons took as wives.³⁵⁴

281) Meredith concurred when he asserted that sometimes the victors intermarried with the conquered group with children of those unions being able to claim the right of take raupatu and take tupuna. At other times, the subjugated group might return or reassert themselves over their former land.³⁵⁵

282) Ringa kaha was about maintaining rights over conquered land through the strength of arm which was the ability of the victors to defend the land against challenges. As recorded above already by Tā Eddie Durie:

‘Raupatu’ or ‘ringakaha,’ both used by settlers as equivalents for conquest, was not a source of land rights by itself. Ringakaha, in reference to land rights, sometimes described a defensive position, or the ability to maintain land holdings. Warfare was rarely pursued with the overt purpose of acquiring land, but changes in hapu structure and allegiances and thus the acquisition of a wider influence by dominant groups, was a common consequence of warfare.³⁵⁶

283) Although the following tikanga question list by Professor Hirini Mead³⁵⁷ for establishing mana whenua and mana moana³⁵⁸ is noted above, it is worth repeating the questions here with answering Question 4) to assist with determining how the tikanga concepts of take raupatu, ringa kaha, ahi kā, take tuku and tatau pounamu applied in this hearing between 1829-1840 before the Treaty of Waitangi.

³⁵³ For witness evidence on ringa kaha, see Mikaere at 30, 44, 59-60, 66; Jones 1 at 54(h); Mahina-a-Rangi Baker 1 at 29; Parata at 19-21; Andre Baker, the whole reference; Ngaia at 57-83; Parai at 28-34, 45; O’Malley at 32-33; Boast at 105-107, 139-142; Proctor 2 at 18-44; Richmond at 21(c); Potini at 120; and Pomare at 63, 75, 81-103.

³⁵⁴ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 45.

³⁵⁵ Refer to Meredith, P, ‘Take Whenua – Māori Land tenure – Discovery, Ancestral Right and Conquest,’ Te Ara – The Encyclopedia of New Zealand, online at: <https://teara.govt.nz/en/take-whenua-maori-land-tenure/page-3> (Accessed 5 October 2024).

³⁵⁶ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 41-42.

³⁵⁷ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 314.

³⁵⁸ For witness evidence on mana whenua and mana moana, see above Taueki 1 at 7; Taueki 2 at 2, 6, 7, 9, 30, 37-38; Morgan at 5, 6; Waaka at 1; Royal at 1-5, 16, 29, 59, 63, 67, 115; Jones 1 at 39, 49; Mikaere at 24, 38-63; Tamihana at 15, 16, 22-29, 30, 38, 41, 44, 53, 55, 63-68, 70, 77, 85-90; Richmond at 14(c), 14(h), 14(i), 34, 40, 41, 45-50; Ropata at 43-46, 47-49; Kiriona at 44, 62, 80; Moore 2, the whole reference; Carter at 45-46; Emery at 1, 25-32, 34-35, 79-80; Parata at 29; Proctor 2 at 17-20, the whole reference; Moses at 12-16; Parai at 158; and Potini at 127, 149, 195-212, 235.

284) To this end, the following tikanga Māori question framework by Tā Hirini can assist with determining how the tikanga concepts of take raupatu, ringa kaha, ahi kā, take tuku and tatau pounamu applied in this hearing between 1829-1840

a) How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand],³⁵⁹ take kite [discovery], other?³⁶⁰

Mana whenua is achieved by military action (take raupatu, take ringa kaha, take pakihiwi kaha) that displaces the people and their leaders who occupied that estate, extinguishes their rights of occupation and use of the land and establishes a new group of occupiers... Mana whenua is based on occupation by a group of people over an area of land they settled on for several generations (take ahikāroa). Ultimately, this land becomes the rohe, or the tribal estate, of the new group. Rapata Wahawaha is of the opinion that ahikāroa by itself is insufficient to clinch a claim; it needs to be supported by take tupuna (ancestral right).³⁶¹

a) If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?³⁶²

Military action by itself is usually insufficient to extinguish all rights to the land. Usually, the new leaders marry women of the land to ritually secure the land and bring it under the control of the new leadership ... take moe whenua. It is based on the notion that the hau (spiritual essence) of the land rests with the women of the land. ... This land is home. The claim to the land based on take tupuna (ancestral claim) is more highly valued than other take and this is an important point. ... if the new leaders do not marry into the land, the conquering iwi goes to extraordinary lengths to try to extinguish tangata whenua rights totally.³⁶³

b) The land [and takutai moana] are actually occupied [ahi kā] by people and kāinga are established.³⁶⁴

The new group sets in place systems such as a leadership structure, kainga arrangements, organisations to carry out collective tasks, training schools and arrangements that allow each whānau to look after itself.

³⁵⁹ For witness evidence on ringa kaha, see Mikaere at 30, 44, 60-66; Jones at 54; Parata at 19-21; Andre Baker at 57-64; and Ngaia at 57-83.

³⁶⁰ For witness evidence on take kitea, see Jones at 41, 53, Whaea Moe noted that mana whenua must be accompanied by occupation for perhaps 5 generations before the new group acquires mana whenua status.

³⁶¹ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 306.

³⁶² Above, Mead at 314. For other take, see above, Mikaere at 36, 38, 55-57, 59-63; Jones at 63, Armstrong; Andre Baker at 49-53; Ngaia Reply at 4-7; and Moses at 12-16.

³⁶³ Above, Mead at 306.

³⁶⁴ Above, Mead at 314. For references on ahi kā, see Mikaere at 58, 63, 64, 68; Tamihana at 15, 25; Jones 1 at 57; Jones 2 at 12-19; Tamihana 2 at 22-24, 90; Kiriona at 31; Mahina-a-Rangi Baker at 103, 198; Collins and Teira at 83, 89, 90; O'Malley at 34-38; Emery at 25, 26, 79-80; Wiremu-Matakātea at 37; Barrett 1 at 30; Andre Baker at 52-53, 108; Ngaia at 30, 34, 84-86; Moses at 9, 12, 14-16; Seymour at 3.6, 11.1; Shenton at 8; Tahana at 5; Wilson at 14; Proctor at 43; Proctor 2 at 7, 33, 44; Richmond at 16, 44; Parai at 43-44; Boast at 156-157; Potini at 120-121; and Pomare at 38-39.

- c) A rohe is marked out in some way. How? Provide a map.³⁶⁵
- d) Over time urupā are established over land, tūahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.³⁶⁶
- e) The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?³⁶⁷
- f) The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].³⁶⁸
- g) The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.³⁶⁹
- h) The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.³⁷⁰
- i) The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.³⁷¹

³⁶⁵ Above, Mead at 314. For claimant references on rohe boundaries, see Royal at 16, 17, 25, 26, 31, 35; Tamihana 1 at 22, 23, 24, 53, 63, 77, 85, 87; Mikaere at 24, 38, 44, 57-60; Jones 1 at 33, 65; Emery at 29, 35; Tihema Baker at 11-15; Parata at 7, 25-26; Barrett 1 at 6; Barrett 2 at 104-107; Ngaia at 31-33; Parai at 14, 15, 46-51, 110-116, 130-132; Potini at 33-37, 127; Faulkner, full reference; Te Rei at 17; Harris at 3; Wilson at 5; Proctor 1 at 10-11; Proctor 2 at 40; Boast at 20-21, 123-130; Mahina-a-Rangi Baker 1 at 32-55, 199 especially 48; and Jones 2 at 21-23.

³⁶⁶ Above, Mead at 314. For witness references on wāhi tapu and urupā, see Taueki 2 at 7, 18, 32; Armstrong at 30; Royal at 59; Jones at 44, 76; Mahina-a-Rangi Baker 1 at 67; Moore 1 at 99; Moore 2, the whole reference; Teira at 53; Emery at 52-54; Barrett 2 at 46, 50; Moses at 25; Williams, the whole reference; McGregor at 9-20; Seymour 1 at 3.22, 4, 8; Seymour 2 at 5.6, 5.11; Parai at 61, 69, 139; Potini at 125-130, 274; and Te Rei at 164-171.

³⁶⁷ Above, Mead at 314.

³⁶⁸ Above, Mead at 314. Whaea Moe stated that often the names that already existed are maintained. It appears such is the case in the Kāpiti Coast. Notwithstanding the turbulent Musket Wars period, many of the original names were maintained, for example, Te Whanganui-a-Tara, Kāpiti and Horowhenua. For claimant witness evidence on some of the original names being maintained after the heke, see Proctor 1 at 13, 17, 28, 43; Proctor 2 at 2-4, 10, 15, 16; Barrett at 32; Moses 33; Parai at 37-38, 43-44; and Potini at 120-121.

³⁶⁹ Above, Mead at 314.

³⁷⁰ Above, Mead at 314.

³⁷¹ Above, Mead at 314.

The estate should be able to meet the basic needs of the new group of occupiers as well as those former citizens who were allowed to remain, usually because of the skills they possessed and sometimes through family connections – whanaungatanga.³⁷²

- j) The new iwi is able to defend its rohe (ringa kaha) and can call on allies to help to defend the estate.³⁷³

The new iwi/hapu needs to establish alliances that will help validate its occupation, increase its military strength and at the same time set up trade relationships for resources and taonga that the local people need from others.³⁷⁴

- k) The new iwi is approved by the neighbours and its presence is validated by the experience.³⁷⁵

Acknowledgement by neighbouring iwi is required to validate the new political reality that now controls the estate. This is an important part of the validating process so that occupation is seen to be accomplished through complying with the tikanga relating to land acquisition.³⁷⁶

- l) In 1840, when the Treaty of Waitangi was signed, this iwi is part of the Māori nation and is a Māori partner of the Treaty with the Queen of England.³⁷⁷
- m) The name of the iwi enters the historical record through the Native (later Māori) Land Court and other institutions of Aotearoa. There is proof of this.³⁷⁸
- n) The iwi is here today and has a credible number of members.³⁷⁹

³⁷² Above, Mead at 307.

³⁷³ Above, Mead at 314. For claimant evidence on ringa kaha, see Mikaere at 30, 44, 60-66; Jones at 54; Parata at 19-21; Andre Baker at 57-64; and Ngaia at 57-83.

³⁷⁴ Above, Mead at 307. For witness references on tribal alliances and trade, see Tamihana 1 at 25, 33; Mikaere at 39-40; Twomey at 29; Collins and Teira at 20- 24, 28, 52, 74, 79, 85-90; Teira at 49, 82-84; Walker at 23; Henare, the full reference; Mahina-a-Rangi Baker 1,. The full reference; Tahana at 25; Richmond at 21(b); Kiriona at 26-29; Shenton at 39; Proctor 1 at 11-16; Proctor 2 at 40; Barrett 2 at 67-78; Parai at 18, 28-30, 35, 42, 43, 69, 161-165; Potini at 118-161, 218, 250-293; Elkington, the whole reference; Pomare at 29-29; and Te Rei at 61-64.

³⁷⁵ Above, Mead at 314. Idem.

³⁷⁶ Above, Mead at 307. Idem.

³⁷⁷ Above, Mead at 315. For witness evidence on tupuna who signed the Treaty of Waitangi throughout the Kāpiti Coast region, see Royal at 2; Mikaere at 10, 65; Proctor at 20; Tahana at 9; Shenton at 9; Parai at 78-85; Pomare at 51-64; and Te Rei at 19, 57-58.

³⁷⁸ Above, Mead at 315. For witness evidence on tūpuna involvement in the Native Land Court, see Armstrong at 41, 54, 58 and 62; Taueki 2 at 11, 19, 23; Royal at 59; Mikaere at 31, 54-63; Moses at 53; O'Malley at 29-39; Proctor at 2-19, 38; Walker at 52; Kiriona at 41-42, 50, 61-62; and Shenton at 32.

³⁷⁹ Above, Mead at 315. For witness evidence on iwi and hapū groupings in existence today with credible membership numbers, see Taueki 1, full reference; Waaka at 1-3; Walker, full reference; Richmond, full

285) Much of the evidence from the various witnesses for this hearing have been very challenging, intense, confronting and contradictory of many, if not most, of the key historic events and the interpretation and application of the tikanga concepts for key events, and the interpretation and application of the specific tikanga of take whenua for key events such as the battles that were fought in the region between the Kurahaupō iwi and the Hekenga iwi – inter alia – Waiorua 1824, Haowhenua 1834, Kuititanga 1839; the assertions of take raupatu conquest and ringa kaha, the various tuku whenua of lands following the battles, the tatau pounamu peace agreements, and the polarised assertions of ahi kā and ahi kā roa by both sets of groups.

286) In the interests of space and time, the report does now allow for all of the witness evidence to be discussed here in detail, but we will compare eight tribal accounts of take raupatu, ringa kaha, take tuku and ahi kā roa in the Kāpiti region from Ngāti Toa Rangatira, Ngāti Raukawa ki te Tonga, Ngāti Kauwhata, Te Ati Awa ki Whakarongotai, Te Whānau Tima, Patutokotoko, Ngāti Tamarangi and Muaūpoko commencing with Ngāti Toa Rangatira.

Hekenga Iwi

Ngāti Toa Rangatira

287) From a Ngāti Toa Rangatira perspective, Dr Taku Parai recorded of take raupatu during the Musket Wars period in the Kāpiti coast:

After the difficult migration from their homeland in Kāwhia to the Kāpiti region, the fortunes of Ngāti Toa rose. Kāpiti Island was taken from its inhabitants by Te Peehi Kupe. Later in 1824, Ngāti Toa and its Ngāti Mango allies won an important victory over a coalition of southern North Island tribes and northern South Island tribes. This was the battle known as Umupakaroa, Whakapaetai or Waiorua. Of this battle, we say, “kua mimiti te tai” (“all resistance was dissipated”).

With Kāpiti Island safely under our mana, we were able to establish our influence over the extended Cook Strait region based on further battles with other iwi, invasions of key sites on both sides of the Cook Strait, and on our relationships with other related iwi.

The victory at Waiorua also enabled us and our allied tribes to undertake further migrations from the Kāpiti Coast to settle in Te Whanganui a Tara (Wellington), Te Tau Ihu (northern South Island) and Te Waipounamu. ... Kāpiti Island ... was used to extend our raids and conquests [take raupatu] and acquire more influence and tribal wealth.³⁸⁰

reference; Mahina-a-Rangi Baker 1, full reference; Barrett 1 at 3-5, 32; Andre Baker at 22-23, 91-96; Wilson 3, full reference; Rump, full reference; Proctor 3, full reference; Seymour at 5.0; Harris, full reference; Shenton at 1.0; Parai at 106-110; and Faulkner, the full reference.

³⁸⁰ Above, Parai at para 28-30.

288) Dr Parai continued:

Rights under raupatu or conquest arise from a number of key incidents that clearly show we subdued the iwi who were present in the rohe including, as mentioned earlier, the Battle of Waiorua on Kāpiti Island in 1824, as well as subsequent battles throughout our rohe.³⁸¹

289) Dr Parai recorded of Muaūpoko during this turbulent Musket Wars period:

With regards to Muaūpoko, they were living in the Kāpiti region when our tūpuna arrived. After killing several members of Te Rauparaha's family at Papaitonga the bitter enmity between our tupuna and Muaūpoko intensified. As we subsequently established power at Te Whanganui a Tara and in the Kāpiti region, including the battle of Waiorua, what little was left of the Muaūpoko population became concentrated in Horowhenua.³⁸²

290) Hohepa Potini of Ngāti Toa Rangatira added:

... the bulk of Manawhenua/Mana Moana Hapu and Iwi residing from Rangitikei to Wellington across to the top of the South Island are closely connected through whakapapa, inter-marriage, and shared history through the tikanga of Mururaupatu [take raupatu] and Ahi Kaa.³⁸³

... Under our tikanga, we belong to our customary land and sea through a combination of our whakapapa to the land [take tupuna], the occupation of our ancestors keeping the home fires burning over generations (or ahi ka roa, literally the long burning fires), and conquest over other tribes in battle [take raupatu]. That is, you obtain and maintain your customary title through whakapapa and occupation, and before colonisation you needed to defend your territorial boundary through battles as well [ringa kaha].

Maintaining your ahi ka roa means that you are there permanently, and you maintain your customary title. So long as the home fires are kept burning at your marae, whether it's a big or little hui, or tangihanga or whatever, there is somewhere for people to come back to.³⁸⁴

291) Ngāti Toa Rangatira witness Miria Pomare further provided her analysis of take raupatu and ringa kaha in the Kāpiti coast by first citing the Waitangi Tribunal expert Professor Alan Ward as follows:

Professor Ward in particular talks about the importance of take raupatu to occupation or ahi ka. He says that mana did not depend wholly on physical

³⁸¹ Above at para 45.

³⁸² Above at para 53.

³⁸³ Above Potini at para 118.

³⁸⁴ Above Potini at para 118-121.

occupation by the holders of mana over the whole territory, but upon their authority by victory and battle and the consequent power to control the occupation of the territory concerned.³⁸⁵

292) Ms Pomare then determined:

Take raupatu is therefore the foundational or underpinning right. And the historical record is very clear that Ngāti Toa are acknowledged as being the primary force behind the raupatu in the lower North Island and the Upper South Island. This is also acknowledged by the Rangitira of other iwi who were present for the raupatu and who can also claim raupatu as the basis of their presence.³⁸⁶

293) Ms Pomare added:

Professor Ward made the point that “occupation” does not appear to have necessarily required actual physical occupation and cultivation of defined areas. The concepts of “occupation: and “ahi ka” appear to have taken a number of different forms. The most important factor appears to have been that the land remained under the influence and mana of the conquering group. In the case of Ngāti Toa, this influence and mana was demonstrated by the respect shown for the mana of the chiefs who led the conquest and deference shown to Ngāti Toa by other allied and tributary tribes. Additionally, Ngāti Toa’s control and influence extended over the moana and sea lanes from the Rangitikei right down through the Cook Strait to Te Tau Ihu.³⁸⁷

294) Ms Pomare continued:

The key point here is there is a complex layering and overlapping of rights in the Kāpiti Coast area. I think this is reflective in the way in which rights and interests were allocated [take tuku whenua] to the allied iwi who came with Ngāti Toa on the heke and assisted with the raupatu primarily as a result of Te Rauparaha’s leadership. That interest then interacts with, and provides the basis for, all of the other layers of interest – like occupation. But those other layers don’t replace the underlying raupatu interest – they flow from it. So in my view, there is always a foundational, underlying Ngāti Toa interest present in the Kāpiti Coast region.³⁸⁸

295) Ms Pomare continued by citing Matua Iwikatea Nicholson:

Ngāti Toa and the Taranaki tribes did suppress all forceful resistance many years ago [take ringa kaha], and have established Ancestral Rights (Take Tupuna) Tangata whenua status, Ahi Ka, Ahi Karoa etc, and have maintained those customary rights by the customs (tikanga) described. They had support from Ngāti Raukawa in later engagements towards the maintenance of these traditional

³⁸⁵ Above, Pomare at para 78. Pomare cited ‘Brief of Evidence of Professor Alana Ward, dated 9 June 2003 (Wai 785#P9) at 27.

³⁸⁶ Above, Pomare at para 79.

³⁸⁷ Above Pomare at para 82.

³⁸⁸ Above Pomare at para 87.

customary practices. Ngāti Toa and the Taranaki tribes who occupied Te Whanganui a Tara and surrounding area can rightly claim they have never been displaced by anyone.³⁸⁹

296) Ms Pomare then concluded again by citing Iwikatea Nicholson:

The customs (tikanga) or right of Raupatu was established completely by Ngāti Toa and their kinsmen of Ngāti Koata and Ngāti Rarua, Ngāti Raukawa (there were some present with the initial arrivals) and their Taranaki whānau (relations), forcefully suppressing any resistance [ringa kaha]. Later arrivals of their Raukawa and Taranaki whānau (relations) helped to support, to fight and maintain the Raupatu custom (tikanga) [ringa kaha]. They all have [a] Raupatu right it is for that collective to reach consensus as to the extent each of them should be entitled and what the entitlement is to be [tuku whenua]. They must as a matter of custom (tikanga) recognise one another's contribution in having achieved the goal.³⁹⁰

297) Tā Matiu Te Rei briefly added to the Ngāti Toa narrative on take raupatu in his evidence when he recorded:

Following their migrations south from Kawhia in the 1820s Ngāti Toa Rangatira had established a powerful position in the Cook Strait region. Their position was based on military victories [take raupatu] and relationships with other tribal groups, and also on trade with Europeans.

... Ngāti Toa Rangatira consider that by the mid-1830s they held a powerful and unique strategic position in the Cook Strait region, which was largely founded on their occupation of key locations on both sides of Cook Strait (particularly Kāpiti Island); the tremendous mana of Te Rauparaha; a complex network of customary relationships with other iwi, and the virtual monopoly Ngāti Toa Rangatira held over access to European goods and coastal trade in the Cook Strait district.³⁹¹

Ngāti Raukawa ki te Tonga

298) From a Ngāti Raukawa perspective, Ani Mikaere recorded of take raupatu:

During the early 1820s, Te Rauparaha led a Ngāti Toa Rangatira migration from Kāwhia, Waikato to the southwest of Te Ika a Māui. They established themselves here, overcoming resistance from the iwi who had formerly occupied the region.³⁹²

³⁸⁹ Above Pomare at para 94. Ms Pomare cited Nicholson, I, "Further Statement of Ngarongo Iwikatea Nicholson, dated 15 September 1998, (Wai 145, #L14) at 27.

³⁹⁰ Above Pomare at para 95. See also Nicholson, I, "Further Statement of Ngarongo Iwikatea Nicholson, dated 15 September 1998, (Wai 145, #L14) at 25.

³⁹¹ Above, Te Rei at para 126 at 2.146 and para 131 at 1.20.

³⁹² Above, Mikaere at para 30, 31.

299) Ms Mikaere added:

Following the murder of his children by Muaūpoko at Te Wī (near Ōhau), Te Rauparaha had determined to exterminate the iwi, thereafter engaging in a relentless campaign against them. A number of battles were fought, culminating in the battle of Waiorua [1824]. Ngāti Toa defeated all opposition. Uncle Iwikatea Nicholson would describe to us how the mana of all of the coast from Whangāehu right down to Wellington passed [through take raupatu] over to Ngāti Toa.³⁹³

300) Te Kahu o te Rangi Rōpata noted what happened after the battle of Waiorua in 1824:

A Ngāti Toa tauā was led up the coast and attacked a pā at Awamate on the Rangitīkei river, killing some ten leading Ngāti Apa chiefs. The same tauā recommenced the widespread killing of Rangitāne and Ngāti Apa inland killing about another 40 as they returned to the coast. Numerous tauā now scoured the Rangitīkei, Manawatū, Horowhenua and Porirua areas, killing all the Ngāti Apa, Rangitāne, Ngāti Ira, and Muaūpoko they encountered. It should be mentioned here that all resistance of these tribes was eventually non-existent from Whangāehu to the top of the South Island.³⁹⁴

301) Dr Mahina-a-Rangi Baker added:

Whilst all of the ART [Āti Awa, Raukawa and Toa Rangatira] Confederation played a role in ensuring that we settled and then maintained our mana whenua and mana moana as ahi kā, Te Umupakaroa [the battle of Waiorua 1824] can be described as a definitive moment in the “take raupatu” by Ngāti Toa, whose rangatira conquered Muaūpoko and their allies who previously held those rights. After the take raupatu, Ngāti Toa proceeded to allocate land along the coast to rangatira and hapū of both Ngāti Raukawa and Ātiawa through “take tuku.”

The hapū of Ngāti Raukawa initially obtained mana whenua and mana moana in our rohe through this allocation and take tuku. That was affirmed over time through our continued defence of the territory [ringa kaha], our establishment and settlement of the area and rights established through being ahi kā (continuous occupants). We have a long established relationship with the mana whenua and mana moana that predates the signing of Te Tiriti o Waitangi.³⁹⁵

302) Ms Mikaere continued:

In 1871, giving evidence before commissioner WTL Travers, Wī Tako Ngātata of Te Āti Awa explained that Te Whatanui’s decision to allow Muaūpoko to return and live at Horowhenua merely granted them a permission to reside, clearly

³⁹³ Above, Mikaere at para 44.

³⁹⁴ Above, Ropata at para 36.

³⁹⁵ Above, Mahina-a-Rangi Baker 1 at para 28, 29.

distinguishable from a formal cession (of interest is the fact that he contrasted this with an instance where formerly conquered lands in Wairarapa had been formally returned). In answer to the Commissioner's question: "Do I understand that the conquest [take raupatu] of Muaūpoko was complete, and that the mana of the land was not returned to them?", Wī Tako replied: "They were completely defeated, the mana or right over the land, was not given back to them," adding "[t]hey were there entirely [by] the grace of Te Whatanui."³⁹⁶

303) Ms Mikaere finished her evidence by citing Professor Whatarangi Winiata:

Whatarangi Winiata has described expressions of Ngāti Raukawa rangatiratanga in the following terms:

Allocations of land and resources [tuku whenua] by Te Rauparaha, Waitohi and Te Whatanui ... the lengths that the rangatira would go to, to defend their rights, their rangatiratanga over these taonga. Te Whatanui's protection of Muaūpoko; Ngāti Kapu's defense of their maara kai – credited at least in some part, to having sparked the Haowhenua [1834] conflict and Kuititanga [1839] are all examples of rangatiratanga in action.³⁹⁷

304) The Ngāti Raukawa witness Te Kahu Rōpata concluded:

We all have a shared history based on traditional Māori customs now lost in time immemorial – mana inherited, mana bestowed, mana lost and mana regained through muru raupatu or conquest.³⁹⁸

Ngāti Kauwhata

305) From a Ngāti Kauwhata perspective, Dennis Emery stated:

Ngāti Kauwhata tūpuna (ancestors) first came from Maungatautari-Waikato into the Manawatū-Rangitīkei area in 1822 (200 years ago) before the signing of the Treaty of Waitangi. Ngāti Kauwhata came down in support of the major migration of Ngāti Raukawa called Te Hekenga, when we were asked by Ngāti Toa Rangatira. The Ngāti Toa rangatira of the time, Te Rauparaha, was involved in conflict near Kāpiti Island so he sent for his mother's people of Ngāti Raukawa and asked for his second-cousins of Ngāti Kauwhata as well, which is how my tūpuna ended up coming down to the area that we now occupy [via take raupatu].

Ngāti Kauwhata travelled down the centre of the island following the Rangitīkei River. We arrived at Kākāriki in the Manawatū-Whanganui Region, more commonly known today by Ngāti Raukawa as "Miria Te Kakara." We were a

³⁹⁶ Above, Mikaere at para 56. Mikaere cited William Travers, reading the evidence of Wī Tako Ngātata from the 1871 Commission to the Native Affairs Committee of the Legislative Council, 1896 AJLC 29.

³⁹⁷ Above, Mikaere at para 66.

³⁹⁸ Above, Rōpata at para 48.

fierce fighting force at the time. We were called “Kauwhata of a thousand warriors.” What we found when we arrived was that Te Rauparaha was still in fact alive, out on Kāpiti Island, but he was still under the threat of attack. Our people arrived in force and were able to turn the tide in battle.³⁹⁹

306) Emery added:

Anybody we found, Ngāti Kauwhata were told to push them up against the Ruahine Ranges [take raupatu]. This was our instruction from our tupuna, Tapa Te Whata, and so we came inland through a stream called Rangataua out to Whakamai Takapu, and came down through Mangaone at Te Pito, finally to Te Awahui where we are now. ... Ngāti Raukawa went from there down, and that’s why you see Ngāti Raukawa marae down the coastline, and you don’t see Ngāti Apa, Rangitāne or Muaūpoko marae down the coastal area.

... Other iwi such as Muaūpoko always challenge where Ngāti Kauwhata are and their relationship to the coastline because we are inland, but that’s irrelevant to Ngāti Kauwhata. This isn’t new to us, we have this Application, along with a major battle with Rangitāne and Muaūpoko who are claiming the same coastline, in the same area that we, through Ngāti Raukawa, have taken by muru raupatu.⁴⁰⁰

307) Emery continued:

We can confirm that we were here in this region in 1822, before Te Tiriti o Waitangi. We can confirm that our tupuna, Tapa Te Whata, came through and helped make the Te Miria Te Kakara tripartite agreement and brought our people inland. Tapa Te Whata was at Kāpiti Island for the battle of Waiorua 1824, and some of our Ngāti Kauwhata people’s bones are still on Kāpiti Island at the northern ridge. Then we came back across by Ōtaki and set ourselves there before we moved up to Oroua. ... most of our people were settled here by 1826.

... Ngāti Kauwhata firmly established themselves in the Oroua River basin and catchment area. ... When we came across Ngāti Apa and Rangitāne there were skirmishes, and we made it clear that as far as Ngāti Kauwhata were concerned, we weren’t going anywhere. We ended up and still hold ahi kā to the area.

... We have met with Ngāti Apa representatives many times over the years in a convivial way. Ngāti Apa generally raise their spiritual connection to the area that they once had before our people drove them back out [through take raupatu].⁴⁰¹

Te Āti Awa ki Whakarongotai

308) From a Te Āti Awa ki Whakarongotai perspective, John Barrett stated:

The battle of Waiorua in 1824 is well documented. There are inevitably many perspectives on the battle itself and the roles played by particular rangatira.

³⁹⁹ Above, Emery at para 16-17.

⁴⁰⁰ Above Emery at para 19 and 23.

⁴⁰¹ Above Emery at 24, 26 and 30.

However, it is clear that Te Ātiawa rangatira were present and Te Ātiawa played a vital role in holding the island. Ātiawa also established customary interests on and around Kāpiti Island.

What happened after the battle was important for cementing customary rights and interests at a period of time where mana was being contested. Firstly, the result of the battle established the settlement pattern for Ngāti Toa Rangatira, Te Ātiawa and Ngāti Raukawa in the lower North Island and Te Tau Ihu. The battle pushed back the previous occupiers to Wairarapa and Manawatū. In my opinion, that was the start of extinguishing [take raupatu] of the previous occupiers' mana, being principally Muaūpoko, Rangitāne, Ngāti Apa and Ngāi Tara, both over whenua (land) and moana (sea) and te motu (the island).⁴⁰²

309) Te Āti Awa witness Benjamin Ngaia added:

The subsequent migrations of significant numbers of Taranaki peoples throughout the Kāpiti area saw pressures on land and resources from as far north as Ōtaki through to Porirua and beyond. Relationships between Ngāti Toa, Ngāti Raukawa and Te Āti Awa (and other Taranaki tribes) were deteriorating particularly rapidly on the Kāpiti Coast, where competition for space and resources was most fierce. In Dr Angela Ballara's words, "Rights were not clearly defined, mana over the land and people had been recently acquired through conquest and was open to challenge. Although mana whenua had been obtained by take raupatu, the pressures on resources led to a number of pakanga between Ngāti Toa, Ngāti Raukawa ki te Tonga, and Te Āti Awa. ... Although there has been clear demonstration of sites of significance that reside within the territories of Ngāti Raukawa and Ngāti Toa over the course of our occupation, the actions of our tipuna confirmed our rights of our people, who have maintained continuous occupation [ahi kā roa] over successive generations that cannot be denied."⁴⁰³

310) When he was referring to the Heretaunga (Upper Hutt) pakanga in 1846 when Te Rangihaeata and Ngāti Rangatahi attacked and killed European settlers, Te Puni of Te Āti Awa offered Governor Grey his support and was subsequently successful in assisting to expel Te Rangihaeata and his warriors from the area. Ngaia recorded of this pakanga:

It was here that the final act of inter-tribal hostility between Ngāti Raukawa, Ngāti Toa and Te Āti Awa was concluded. The ahi kā rights of Te Āti Awa were now moving into an enduring phase of occupation. This phase of ahi kā roa or continuous occupation of Te Āti Awa lands and environs, continues to this very day.⁴⁰⁴

⁴⁰² Above, Barrett 1 at para 27-28.

⁴⁰³ Above, Ngaia 1 at para 56.

⁴⁰⁴ Above, Ngaia 1 at para 83.

Te Whānau Tima and Ngā Ahi Kā o Te Mateawa

311) For a Te Whānau Tima perspective, Patrick Seymour simply recorded:

Our tūpuna claimed this land at Kuku beach in and around the early 1830s. The hapu of Ngāti Tukorehe, Te Mateawa, Ngāti Parewahawaha, and, with connections through Te Pou o Tainui, Ngāti Kapumanawawhiti came out to that whenua. We are the only whanau that has remained living here at the beach since.

The area around Kuku beach, now referred to as Ōhau, was given over by Te Rauparaha [tuku whenua] to those chiefs and their hapu. This included Nepia Taratoa, Rangiwhakaripa and Piahana Potaua. ... The hapū were Ngāti Parewahawaha, Ngāti Tukorehe, Te Mateawa and Te Pou O Tainui – Ngāti Kapumanawawhiti.

... The heke crossed over the Waikawa awa and shortly afterwards arrived at an area by a lagoon called Te Hakiri. ... Rangiwhakaripa suggested they camp the first night at Te Hakiri. And the following morning after resting they would proceed northwards and appropriate [via an earlier take raupatu] the whenua that Te Rauparaha had given over [tuku whenua].

... After crossing the [Ohau] river, five of the chiefs continued heading in a southerly direction, appropriating the land as they went. Our own tupuna, Te Wharekaramu, travelled inland in an easterly direction alongside the Ohau awa to appropriate [via an earlier take raupatu] the whenua.⁴⁰⁵

Kurahaupō Iwi

Te Patutokotoko

312) From a Te Patutokotoko perspective, Christopher Tahana asserted:

Te Patutokotoko hold mana whenua over our rohe around Whanganui. Our area of application stretches from the Kaiwi Stream in the north to the takutai moana off Lake Papaitonga in the south. We have maintained our traditional relationship with the land, river and surrounds, including the sea and land under the sea with continuous and unbroken occupation since 1840.

... Te Pēhi Tūroa had influence and rights as far down as Papaitonga. He was a strategist for Muaūpoko on the attack on Te Rauparaha and also led fighting groups for Rangitāne in the Wairarapa.⁴⁰⁶

⁴⁰⁵ Above, Seymour at para 3.4, 3.10, 3.11, 3.12, 3.15.

⁴⁰⁶ Above, Tahana at para 5, 15.

Ngāti Tamarangi

313) From a Ngāti Tamarangi perspective, Bill Taueki asserted:

We [Ngāti Tamarangi] have held mana whenua and mana moana over this area [Horowhenua] since the time of the arrival of Toikairakau in Aotearoa. We have defended our lands whenever we have been challenged and we have never lost. No-one has shifted us off our land; we remain here today.

... In the 1820s and 1830s, the Horowhenua region came under attack from northern iwi that sought to gain mana over our land [take raupatu]. One of Potangotango's sons was named Tapuwae. Tapuwae was killed during one of the attacks made by the northern iwi on Horowhenua. While Tapuwae was killed during this battle, Muaūpoko succeeded in defending their homeland and protecting the Horowhenua.

314) Taueki continued

Tapuwae had a son named Taueki. Taueki lived his entire life at Lake Horowhenua. He was a fighting chief. When Te Rauparaha raided the Horowhenua region in 1823, he withstood the raid and remained at Horowhenua in spite of the superior weaponry that Te Rauparaha and his raiding group had. He remained at Horowhenua and kept the ahi kaa, and thus the mana moana and mana whenua, of Muaūpoko alight.⁴⁰⁷

315) Taueki added:

Unfortunately, the abundant resources in the area [around Lake Horowhenua] have often required us to defend it against others. A well-known example was the raid [ope tauā] that Te Rauparaha mounted against us in 1823. Te Rauparaha and his raiding group had superior weapons, but my tupuna Taueki was a fighting chief, and his people successfully withstood the attack. Taueki remained on his Horowhenua lands. In 1830 Taueki entered into the whakaaetanga (a peace arrangement) with Te Whatanui. On 26 May 1840, Taueki signed Te Tiriti o Waitangi in the Manawatū. By signing Te Tiriti, Taueki affirmed that Ngāti Tamarangi had mana motuhake, that is they were a sovereign people in 1840, and that their tino rangatiratanga over their traditional lands and fisheries was to remain.⁴⁰⁸

316) Taueki concluded:

Since 1840, Muaūpoko have continued to be ahi kaa in Horowhenua. We have not given our land away; we have retained our mana over the land as well as the specified area that adjoins the land.

⁴⁰⁷ Evidence of William James Taueki, dated 10 March 2017 at para 20-24 [CB Tab 22 at 201.00001].

⁴⁰⁸ Affidavit of William (Bill) Taueki, dated November 2023 at 8 [CB Tab 24 at 201.00017].

... No other iwi or hapū has ever taken possession of this land; it has always been Muaūpoko whenua and moana. It is for this reason that we seek a customary title over this area of the coastline.⁴⁰⁹

Muaūpoko

317) From another Muaūpoko perspective, Professor Jonathan Proctor simply stated:

Throughout the nineteenth and twentieth centuries, Ngāti Raukawa statements about conquest and mana through conquest [take raupatu] have repeatedly never been accepted as being based on any substance by courts and inquiries. The fact is that Ngāti Raukawa was a migratory iwi that was forced out of its homelands, and over time ended up in the Horowhenua and Manawatū. It was by invite that they established themselves in the region aligned to pākehā trade, agriculture and Christian establishments.

While their Byzantine journey occurred over decades post the 1830s, from a Kurahaupō perspective, they never participated in any battle with our uri to secure a recognisable (customary) mana pre-1840. They simply moved into the region, becoming settled during the latter half of the 1800s, helping themselves to resources, and where necessary marrying into Kurahaupō whānau.⁴¹⁰

318) Professor Proctor added:

With the arrival of many people, marae became established late into the nineteenth and twentieth centuries. The idea that Ngāti Raukawa had customary interests and rights that existed prior to 1840 was never accepted by Kurahaupō iwi. This is because they simply had not been here long enough or participated in any action to acquire the land and resources. Nor had they been connected through whakapapa to the land longer than five generations.⁴¹¹

319) Professor Proctor continued:

To achieve this mana [whenua], many Ngāti Raukawa focus on the act of conquest [take raupatu] or the allocation of leadership responsibilities after conquest [take tuku]. This is a rather narrow view. In Kurahaupō tradition, while leadership and victory are important, the Ngāti Raukawa concepts show a complete disregard for connections and whakapapa to land and sea. Conquest over people on land does not then automatically ascribe customary interests with an in-depth mātauranga over an environmental system such as the moana.

... mana cannot simply be lost after a single battle or ruling of the court. And it simply cannot be supplemented by narrative or statement “that we now have mana or more mana.” It requires motivation and action to show how you contribute to

⁴⁰⁹ Evidence of William James Taueki, dated 10 March 2017 at para 24 and 56 [CB Tab 22 at 201.00001].

⁴¹⁰ Reply Brief of Jonathan Proctor, dated 17 April 2024 at para 5-7 [CB Tab 108 at 203.01373].

⁴¹¹ Above, Proctor, at para 5-7.

and enhance connections across people and the land/sea, and how you act to strengthen the mauri and wairua of those connections.⁴¹²

320) The other key witness for Muaūpoko was Mark Moses who vigorously asserted:

The ART alliance/Heke iwi stories are theirs to embellish. Their take whenua entry to the area was through purported “take raupatu” over the tangata whenua Kurahaupo iwi and “take tuku” between members of the ART alliance. To make a tuku whenua you must have ahi kā, the occupation, use and access to the area and its resources and over generations establish take tupuna or rights through ancestry to the whenua.

A raid and defeating an opponent, then retreating and not occupying and securing the land to the exclusion of the original inhabitants is not raupatu. Purported raupatu have been made by the hekenga iwi.⁴¹³

321) Moses added:

... While Hekenga iwi may have occupied Kāpiti and the coastline, they did not control movements and use of the moana.⁴¹⁴

322) Moses continued:

... Tuku whenua is one type of the take whenua used to acquire interests in whenua. The tuku or gifting of interests in a resource or areas was used many times between 1820 and 1840 between Kurahaupō iwi of Ngāti Apa, Ngāti Kuia, Muaūpoko, and Rangitāne with the Hekenga iwi of Ngāti Koata, Ngāti Raukawa and Ngāti Kauwhata; and between the hekenga iwi themselves.⁴¹⁵

... Hoani Meihana Rangiotu of Rangitāne names some of the tuku whenua made between Muaūpoko, Ngāti Apa and Rangitāne with Ngāti Raukawa:

Raumatangi was given to Tauwheki [sic] of Muaūpoko to Te Whatanui; Tawhai [should be Tawhati] of Muaūpoko gave Porou tawhao to Ngāti Huia;

Te Hiaro of Rangitāne gave Tokomaru to Ngāti Whakaterere;

Te Aweawe of Rangitāne gave Manawapou to Rangiheuwea, and

Te Mahuri of Rangitāne gave Taonui to [Te] Whetu of Ngāti Raukawa.

In addition to this, other lands were given to Ngāti Raukawa at Oroua and Rangitīkei.⁴¹⁶

⁴¹² Above, Proctor at para 18-19.

⁴¹³ Above, Moses at para 44-45.

⁴¹⁴ Above Moses at 55.

⁴¹⁵ Above Moses at 68.

⁴¹⁶ Above Moses at para 69.

... The important thing to note is that the relationships between iwi and hapū leaders, and their peaceful inclusion into areas for occupation.⁴¹⁷

323) Moses continued by challenging the Ngāti Toa Rangatira and Ngāti Raukawa hegemonic narratives of take raupatu and Muaūpoko being a conquered people when he vigorously asserted:

Muaūpoko were not in a subservient position. They had their own mana motu hake and they had not been conquered. This Whatanui and the 'Muaūpoko sanctuary' is a myth created by Ngāti Raukawa.

... Muaūpoko do not accept or recognise Ngāti Raukawa claims of take whenua through raupatu. There were a raiding tauā from Kāpiti which retreated back to Kāpiti, or raids as hekenga iwi passed through an area to Kāpiti. This was not conquest of an iwi or securing and occupying an area immediately after attacking the local tangata whenua.⁴¹⁸

Take Raupatu, Ringa Kaha and Tuku Whenua Summary

324) Referring to take tupuna, take raupatu and ringa kaha, the anthropologist Te Rangihiroa - Sir Peter Buck - of Ngāti Mutunga provided an interesting analysis when he articulated:

The title (take) to the ownership of land was based on two main claims: right to inheritance through ancestors (take tupuna) and right of inheritance through conquest (take raupatu). The right of prior discovery became historically merged in ancestral right. Conquest (raupatu) alone did not confer right of ownership unless it was followed by occupation. If the invading party retired, the survivors of the defeated tribe could return and still own their land. Occupation to establish a title had to be continuous, as idiomatically expressed by the term ahi ka or lit fire. So long as a people occupied the land, they kept the fires going to cook their food. Conversely, the absence of fires showed that the land had been vacated. Even if a conquering tribe did not leave a holding party, they might claim land subsequently if it remained unoccupied.⁴¹⁹

325) Te Rangihiroa continued:

However, if some of the conquered people evaded the invaders and remained on the land to keep their fires a light, the right of ownership of the defeated people was not extinguished. ... When conquered territory was occupied for some generations, the title by conquest became a historical event and the functioning title became that of ancestral inheritance (take tupuna). A third and rarer title,

⁴¹⁷ Above Moses at para 70.

⁴¹⁸ Above Moses at para 93-93.

⁴¹⁹ Te Rangi Hiroa, *The Coming of the Maori*, (Whitcombe and Tombs, 1949) at 380-381.

termed *tuku* (to cede), included lands which were ceded in compliance with some custom, such as that of paying a raiding party (*taua wahine*) as recompense for the infidelity of a tribal woman to her husband. However, no matter what the title, the length of tenure of the land depended on the military strength of the people to hold it [*ringa kaha*].⁴²⁰

326) Te Rangihiroa's analysis sheds light on the *tikanga* surrounding *take whenua*, *take raupatu*, *take ringa kaha*, *take tuku* and *ahi kā*, which appeared in the first instance to favour the latter witnesses' narratives and commentary.

327) With such heated *take raupatu*, *take ringa kaha*, *take tuku whenua* and *take ahi kā* disputes that have been burning for over 200 years, one suggestion for amicably resolving such heated disputes is the traditional *tikanga* institution of *houhou te rongo* and *tatau pounamu* peace agreements.

Hohou i te Rongo, Rongomau and Tatau Pounamu

328) The key traditional *tikanga* Māori concepts and institutions for resolving disputes and peace-making historically included *houhou i te rongo* – peace processes, and *tatau pounamu* – literally a greenstone door, which is a metaphor of enduring peace. *Hohou rongo* is the process to make peace.⁴²¹ *Hohou* means to bind or lash parties together which should be the aim of any binding peace agreement so that each group accepts responsibility to uphold the agreement or *kawenata* (covenant). Such a peace agreement is referred to as a *rongomau* – a peace accord that is properly bound and lashed together.⁴²²

329) *Tatau pounamu* was often used in reference to both an event such as a marriage between high-ranking people from each side of a conflict and a precious object symbolising the event which brought about *houhou i te rongo* – the state of peace.

330) *Pounamu* or nephrite jade was highly valued traditionally and in contemporary times because it was durable, rare and beautiful to behold. *Pounamu* is found only on the West Coast of the South Island and was used historically, *inter alia*, as a means of exchange.

⁴²⁰ Above, at 381.

⁴²¹ For witness evidence on *tatau pounamu* peace agreements, see Taueki 1 at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10; Tamihana at 3, 22, 26; Mikaere at 45-52, 58-60, 63; Twomey at 36-37; Armstrong at 17-27; Walker at 21-22; Ropata at 18-19, 43-47; Kiriona at 25, 29-30, 36, 44, 50—51; Collins and Teira at 18, 23, 24, 39, 70, 81, 85, 86, 87; Moore at 7; O'Malley at 20-28; Shenton 4.0; Proctor 2 at 30, 37; Ngaia at 50, 56; Emery at 27-32; Parata at 16; Moses at 38-40, 72, 95-96; Potini at 149; Pomare at 57-58, 74-76; Boast at 105; and Te Rei at 52.

⁴²² Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 177.

- 331) Tatau pounamu or a greenstone door then would be an indestructible force barring the way for further conflict as Professor Mead opined: ‘A tatau pounamu agreement is binding and holds for all time.’⁴²³
- 332) In warfare, the desired outcome is revenge or the restoration of mana. The emphasis of the process of hohou rongo on the other hand, is to stop further hostilities and to secure a state of peace that endures.
- 333) Traditionally, the hohou rongo process was aimed at binding the parties to a peace agreement or kawenata (covenant). Three ways to accomplish this binding peace symbolically under tikanga was to exchange highly valued taonga such as pounamu, to arrange special takawaenga rangatira marriages between the former foes, and to acknowledge features of the landscape – hills or maunga – which were all identified as symbols of peace.⁴²⁴ A tapu is then placed on the hohou rongo process and settlement reached ritualising the achievement of the state of ea (satisfactory resolution) and imbuing the kawenata with mana.
- 334) A tatau pounamu then is a powerful metaphor for reaching a state of ea (resolution) and achieving a binding peace kawenata. Each side to the kawenata then selects a local hill (maungārongo) to symbolise the tatau pounamu greenstone door as a constant reminder that the group is duty bound to the rongomau kawenata.⁴²⁵
- 335) The hohou rongo process then, involves sacrifice by both parties of lands, resources, taonga and ambitions. The pounamu exchange, selection of a maunga (hill) and marriage of children between the former foes then verifies and memorialises the peace kawenata with these signs and symbols. The new takawaenga marriage also forges a wielding link between the former foes especially when children are born to the union connecting tupuna with mokopuna of both sides in an unbroken whakapapa chain signalling new kinship, new identity and new allegiance of peace.
- 336) The phrase tatau pounamu occurs in a number of whakatauki which refer to the desirability of such peaceful arrangements and the danger of disrupting them for example:
- Kei whati nga rākau o te tatau pounamu i muri nei, kei pōhēhē koutou ki ngā ara kōrero a ō koutou tūpuna. - Take care not to break the supports of the greenstone door, lest you stray from the precepts of your ancestors.⁴²⁶
- 337) Mead and Grove commented that the whakatauki warned Māori not to break the enduring peace lest trouble should result.

⁴²³ Above, at 178.

⁴²⁴ Above.

⁴²⁵ Above.

⁴²⁶ Mead, H and Grove, N, *Ngā Pēpeha a ngā Tipuna: The Sayings of the Ancestors* (Victoria University Press, Wellington, 2001) No. 1271 at 208.

338) A similar tatau pounamu whakatauki is:

Me tatau pounamu, ki kore ai e pakaru, ake, ake. - Lets have a greenstone door that will not be broken, ever, ever.⁴²⁷

339) Hohou i te rongo, rongomau and tatau pounamu institutions were all accompanied by mana tangata (strong leadership), te mana o te kupu – the power of giving ones word which is binding, awhina (assistance, help), aroha (affection, charity, generosity and hospitality to the fullest extent that mana requires), manaakitanga (hospitality, respect), utu (reciprocity, including through gift exchange), mana wahine (the authority of women) and the institution of hākari (large political feasts).

340) When discussing the mana of rangatira and the importance of te mana o te kupu – the power and integrity of one’s word - Tā Eddie Durie opined:

The possession of mana was deemed to be revealed through the possession of such mana enhancing traits as bravery, hospitality, eloquence, generosity, honesty, integrity, fearlessness, honourableness and scrupulous adherence to promises.⁴²⁸

341) The following witness accounts provide a number of specific examples of tatau pounamu peace agreements in the Kāpiti Coast during this turbulent Musket Wars period - circa. 1820-1840.

Hekenga Iwi

Ngāti Raukawa

342) Ani Mikaere referred to the mana of rangatira to make war and peace when she emphasised:

... rangatira were not simply skilled at warfare; they also understood the value of peace. It takes strong and unquestioned leadership to maintain political stability, peace and prosperity within one’s sphere of influence, even more so when faced with fiercely opposing views on the part of your close relatives and allies.⁴²⁹

343) Pataka Moore further discussed tatau pounamu peace agreements for Ngāti Raukawa when he noted:

During settlement in the Horowhenua, Te Whatanui encountered Muaūpoko, an iwi that Ngāti Toa Rangatira had conquered. Te Rauparaha, of Ngāti Toa

⁴²⁷ Above, No. 1871, at 302.

⁴²⁸ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 37

⁴²⁹ Above, Mikaere at para 50.

Rangatira and Ngāti Huia, was determined to exterminate Muaūpoko as, in the early Ngāti Toa settlement process in the region, they had murdered two of Te Rauparaha's children. However, Te Whatanui on arriving in the area sheltered the surviving Muaūpoko and allowed them to live at Horowhenua under his mana and rangatiratanga. Without Te Whatanui's permission and protection, Muaūpoko would not have any presence in Horowhenua.

The area where Te Whatanui allowed Muaūpoko to live and use – now referred to as Te Whatanui's sanctuary [tatau pounamu] – was clearly marked out and agreed to by Muaūpoko. ... Muaūpoko have two marae that are located within this area ...

Te Whatanui did not give Muaūpoko the land and resources – it was not a take-tuku as Ngāti Toa Rangatira had given land to Ngāti Raukawa ki te Tonga. Instead, Te Whatanui allowed Muaūpoko to live there and use the resources under his mana. ... This was an arrangement [tatau pounamu] according to tikanga and was traditionally honoured by both sides [te mana o te kupu].⁴³⁰

- 344) Jerald Twomey of Ngāti Raukawa also referred to Te Whatanui as being a man who was known for his consideration for others, and as a person who aided those who others wanted to exterminate such as Te Rauparaha to Muaūpoko for the murder of his children. Twomey stated:

[Te Whatanui] followed the tikanga of tatau pounamu, marrying his daughter to a chief from another iwi to seal the peace. Within the iwi there were other arranged marriages, moenga rangatira, between the hapu of the confederation but also between the iwi and others in an attempt to maintain a peaceful balance. We have many uri that are the product of those marriages. Other chiefs of the confederation were also known for their exercise in consideration, or exercise of tikanga that were designed to hold the peace. Rongo-a-whare, rongo-a-marae, where discussions were held and arrangements agreed upon to provide a peace and understanding that did not require outside assistance or intervention.⁴³¹

- 345) Referring to such takawaenga marriages for peace, Dr Mahina-a-Rangi Baker added:

It is key to recognise our complex history, and the deliberate intermarriage across the three iwi, that was encouraged or even required, in order to create stability among our Confederation.⁴³²

Ngāti Kauwhata

- 346) Ngāti Kauwhata Dennis Emery referred to the importance of tatau pounamu peace agreements when he recorded:

⁴³⁰ Above, Moore at para 24-26.

⁴³¹ Above, Twomey at para 36.

⁴³² Above, Mahina-a-Rangi Baker at para 42.

With Rangitāne, even though we had a major battle with them on the Manawatū River, peace was established through our tupuna Te Whatanui of Ngāti Raukawa, in a process called “Whatiwhati Taiaha.” Te Whatanui broke his taiaha and called out to Rangitāne on the other side of the Manawatū River near Puketotara (some 600 warriors, compared to 60 of ours) and said, “Ko te manawaroatanga o Ngāti Raukawa kei te pupuri i roto i te whakapono me te aroha.” (The stout-heartedness of Ngāti Raukawa will be maintained through faith and peace).

It was at this stage that three wahine of Rangitāne were betrothed by a process called “Moenga Rangatira” (Marriages of Chiefs), to three Ngāti Kauwhata tāne rangatira. One of these kuia was barren, she had no issue. The other two produced the Te Awe Awe line and the Durie line (which is where Eddie Durie, and Sir Mason Durie descend from). Their primary role was peacemakers between Ngāti Kauwhata, Ngāti Raukawa, and Rangitāne. We were not to fight with each other going forward because we shared tamariki and mokopuna. That was how a form of peace came about.⁴³³

Te Āti Awa

347) Andre Baker of Te Ati Awa referred to a number of battles during the hekenga including the battle of Motunui near Waitara in 1821. It was during this battle when the Waikato tribes were completely routed suffering significant losses including the death of the rangatira Te Hiakai. Tautara of Te Ati Awa out of aroha however, advocated on behalf of the Waikato chiefs a peace agreement [tatau pounamu] where the Waikato rangatira were permitted to safely retreat.⁴³⁴

348) Benjamin Ngaia referred to another peace agreement between Te Rauparaha and Ngāti Apa which was unfortunately broken by Te Peehi Kupe as Ngaia recorded:

Te Peehi was also of higher birth than Te Rauparaha and was the senior hereditary chief of Ngāti Toa. Te Peehi Kupe had gone to England in 1824 to acquire guns after his children were killed by the Whatonga-descent people. ... [He] became incensed on his return from England to find that Te Rauparaha had made peace with Ngāti Apa whom he blamed for the death of his children. Te Peehi attacked Ngāti Apa, angering both Te Rauparaha and Te Rangihaeata, who was married to Te Pikinga of Ngāti Apa. As a result, Te Peehi and his hapu, Ngāti Te Maunu, came into conflict with the Ngāti Kimihia hapu of Te Rauparaha and Te Rangihaeata.⁴³⁵

⁴³³ Above, Emery at para 27-28.

⁴³⁴ Above, Andre Baker at para 58.

⁴³⁵ Above, Ngaia at para 50.

Ngāti Toa Rangatira

- 349) Hohepa Potini for Ngāti Toa Rangatira referred to this same peace agreement between Ngāti Toa and Ngāti Apa following the battle of Awamate during one of the early heke to the Kapiti region where he noted:

Ngāti Toa made peace with Ngāti Apa after the battle of Awamate. Te Rangihaeata married Pikinga and stayed on at Awamate for several days. ... [Subsequently] Ngāti Toa returned here during the migration and stayed with Ngāti Kauae and Ngāti Taurira for between one and three months.⁴³⁶

- 350) Miria Pomare also referred to a Ngāti Toa peace agreement during this period including with Ngāti Mutunga following the tragic yearlong Haowhenua battle in 1834.

During this time Pomare Ngatata's brother Te Waka Tiwai was killed and his grave was desecrated by some Ngāti Toa relatives of Pomare's wife. The breach between Pomare Ngatata and Ngāti Toa was eventually healed by a peace agreement [tatau pounamu] and marriage [moenga rangatira] of Kahe's daughter, Mere Te Rau, to Pomare's taurima (adopted nephew) Wiremu Naera Pomare who were the parents of the famous Māori doctor and politician Sir Maui Pomare.⁴³⁷

Kurahaupō Iwi

Ngāti Tamarangi

- 351) Ngāti Tamarangi witness Bill Taueki referred to the famous peace agreement between Ngāti Tamarangi and the wider Muaūpoko tribe, and Ngāti Raukawa when he recorded:

Unfortunately, the abundant resources in the area [around Lake Horowhenua] have often required us to defend it against others. ... In 1830 Taueki entered into he whakaaetanga (a peace arrangement) with Te Whatanui.⁴³⁸

Muaūpoko

- 352) The Muaūpoko witness Mark Moses asked the poignant question on how to resolve the tense protracted disputes between Muaūpoko and the Hekenga tribes that originated during the Musket Wars period over 200 years ago when he noted:

Historically this would have been resolved through violence. So why was it not resolved through violence before 1840? Because there had been agreements, tuku and intermarriages between Hekenga and Kurahaupō iwi.⁴³⁹

⁴³⁶ Above Potini at 149.

⁴³⁷ Above, Pomare at para 73-75.

⁴³⁸ Affidavit of William (Bill) Taueki, dated November 2023 at 8 [CB Tab 24 at 201.00017].

⁴³⁹ Above, Moses at para 48.

353) Moses continued:

However, there are a few comments about the peace agreements, alliances, and intermarriages made between the Kurahaupō and the hekenga iwi. Certain take whenua or customary rights to land tenure such as take raupatu and take tuku have misleadingly been over emphasised as being the paramount “take” or rights to whenua that overtake ahi kā and take tupuna. There seems to be some confusion between invasion and the occupation of an area equating to the conquests of an iwi. Hekenga iwi invaded and occupied part of the rohe of Kurahaupō iwi, at Kāpiti and Ōtaki. Occupying an area by forcing the original inhabitants to move down the coast is not a conquest of the iwi. However, they did not settle at other areas they had raided or passed through on their way to Kāpiti – such as Horowhenua, Manawatū and Rangitīkei. They had not put the Kurahaupō iwi into subjection or “slavery.”⁴⁴⁰

354) Moses then referred to the historic peace agreement at Karekare between Ngāti Raukawa and Muaūpoko when he noted:

... The Ngāti Raukawa hekenga and the tauā met at Karekare on the Manawatū River near Foxton where peace was made between the iwi. Further peace and tuku whenua agreements would be made by Muaūpoko, Ngāti Apa, and Rangitāne with Ngāti Raukawa.

The captive women were returned. ... A marriage was arranged with Koriri's daughter Pirihiara Arahura to Pita Te Pukeroa of Ngāti Raukawa. Pirihiara later married Manihera Te Rau, brother of Pukeroa. They lived with Muaūpoko.⁴⁴¹

355) Moses continued:

A Namuiti Peace Agreement was [subsequently] reached between Te Whatanui, Ngāti Raukawa and Taueke of Muaūpoko. Taueke made a tuku whenua of land called Raumatangi to Te Whatanui as his personal estate so he could come and reside with Muaūpoko. Muaūpoko rangatira present when peace was made were Tawhati-a-Tai, Te Atua and Tawhati a Tumata.⁴⁴²

356) Moses added:

After the Peace at Namuiti, Te Rangihaeata went and made peace with Taiuweherua of Muaūpoko. Te Rangihaeata and Taiuweherua each took a spear and broke them in the presence of all the people as a sign that there was no more fighting. Ngāti Toa returned to Kāpiti and Ngāti Raukawa to Ōtaki.⁴⁴³

357) Moses concluded by asking the question:

⁴⁴⁰ Above Moses at 50.

⁴⁴¹ Above Moses at para 73-75.

⁴⁴² Above Moses at para 76.

⁴⁴³ Above Moses at para 78.

Why is there no acknowledgement of the peace agreements and the *tuku whenua* made between Hekenga iwi and Kurahaupō iwi?

... Te Whatanui initiated the peace making at Karekare with the Kurahaupō iwi, and the peace making with Taueke of Muaūpoko at Horowhenua. Te Whatanui came from Ōtaki to Horowhenua to make peace with Taueke, who made a *tuku whenua* at Raumatangi as a personal estate to Te Whatanui. Other agreements and *tuku whenua* were made between Kurahaupō iwi and Ngāti Raukawa/Ngāti Kauwhata hapū. This is how they received *whenua*.⁴⁴⁴

Summary - Major Changes and Social Upheaval to Tikanga

358) Accordingly, the ancient tikanga concepts of *take whenua*, *take tupuna*, *take kitea*, *take raupatu*, *take ringa kaha*, *take tuku whenua*, and *take ahi kā*, and the tikanga institutions of *tatau pounamu*, *rongomau*, *kawenata*, and *takawaenga moenga rangatira* continued to apply in the Kāpiti coast hearing area between 1820 and 1840 as illustrated by the historic research and the claimant evidence but they were inevitably altered during this turbulent period by the political, economic and social upheaval stifling Te Ao Māori at the time.

359) Tā Eddie referred to the unprecedented changes of this period when he opined:

The picture of continual conquest and an unbridled struggle for power was largely a colonial perception, probably based on the aberrational Māori warfare of the first few decades of the 19th century, and probably perceived in light of the European Napoleonic wars of the same time and other European historical experience. Te Rauparaha became ‘the Napoleon of the south.’ This colonial picture was entrenched within officialdom when the Claims Court, Compensation Court and Native Land Court assumed a similar position.⁴⁴⁵

360) Tā Eddie then concluded:

There was, however, a marked change in the nature and extent of war in the early 19th century which had a marked impact on custom [tikanga], social organisation [hapū and iwi] and boundary formation [rohe].

It also had another unexpected consequence. The Native Land Court perception of conquest as a source of title influenced and distorted the popular understanding of custom and created long term enmities and anomalies.⁴⁴⁶

361) In summary, European contact thrust the Māori world into a state of perilous imbalance. Introduced diseases decimated tribal populations and upset tikanga belief

⁴⁴⁴ Above Moses at para 89-92.

⁴⁴⁵ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 42.

⁴⁴⁶ Above.

systems, and introduced addictive substances – alcohol, tobacco, coffee, tea and sugar – undermined Māori health and wellbeing.

- 362) Furthermore, new technology such as muskets, and new foods such as potatoes assisted with increasing the scale, frequency and intensity of tauā (raiding war parties) during the Musket Wars period to fighting more often, and for longer periods. Māori tribes also had to invest heavily in trade and commerce in flax, sealing, whaling, prostitution, moko mokai (Māori heads) and other unsavoury trade commodities and services to acquire muskets to re-balance the arms race.
- 363) In addition, the individualistic and economic assumptions underlying European capitalism, Western liberalism and Eurocentric notions of property destroyed traditional tribal reciprocity economies based on mana and utu, the equilibrium between kin, the physical and metaphysical world, the environment, and the fundamental reciprocal obligations to past, present and future generations.
- 364) The turbulent Musket Wars period also set off unprecedented disruption to local kainga sparking an unprecedented number and increased scale of hekenga – both temporary and permanent – around the country.
- 365) Consequently, during the Musket Wars period from circa. 1820-1840, the ancient tikanga laws of take whenua, take tupuna, take raupatu, take ringa kaha, take tuku whenua, take ahi kā and the tikanga institutions of tatau pounamu, hohou te rongu, rongomau, kawenata and takawaenga moenga rangatira had to respond to the inevitable significant changes in Māori society. The tikanga concepts and institutions still applied but caution is needed in interpreting how they applied given such significant Māori societal shifts and changes which is an appropriate segway into Pūkenga Question 5).

Question 5 – If those concepts apply, how do they apply after 1840?

- 366) Much of the information for this question again is contained in the former question with some duplication in this section. The short answer to the question is the tikanga concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, and tuku continued to apply after 1840 when the Treaty of Waitangi was signed but as noted previously, tikanga Māori was changing and adapting with the times and these tikanga concepts also adapted and changed.
- 367) Still, the section will answer this question by first discussing the power of words and how they are utilised and adapted for political purposes. We then explore how tikanga Māori generally and how these specific tikanga concepts inevitably adapted and changed after 1840 through the process of tikanga cultural adaptation. We then briefly analyse the Treaty of Waitangi 1840 and how tikanga Māori was protected under the Treaty, followed by an analysis on how these important tikanga concepts, especially take raupatu and ringa kaha evolved after 1840 particularly through the influence of the Native Land Court. We maintain that take raupatu and ringa kaha adapted and were

distorted to fit Native Land Court purposes, policies and processes for political, legal and economic expediency.

368) But first we will analyse te mana o te kupu - the power of words.

Power of the Word

369) To provide important context to assist with understanding the tikanga concepts of ahi kā, raupatu, ringa kaha, tatau pounamu, and tuku after 1840, the section will commence with a brief philosophical discussion on the importance of words. To this end, Vygotsky discussed the importance of consciousness and words when he opined:

Consciousness is reflected in a word as the sun in a drop of water. A word relates to consciousness as a living cell relates to a whole organism, as an atom relates to the universe. A word is a microcosm of human consciousness.⁴⁴⁷

370) In his commentary on the work of the Chinese philosopher Chuang Tzu, Kuang-Ming Wu also discussed the importance of words when he noted:

Words are the tools and trails of our discernment of life. They are an abstractive sieve which captures not only general themes but clues to the pulsations of the real. They are useful because they constantly refer us back to the thick 'mud' of existence where the dynamic of ambiguity persists in its own renewal.⁴⁴⁸

371) Wu then added the connection between words and what the reader discovers:

A writer works on things between the words, not directly on what is said explicitly; the reader discovers it only when he thinks it for himself.⁴⁴⁹

372) Friel similarly linked history to language and images in his play *Translations* commenting:

... it is not the literal past, the 'facts' of history, that shape us, but images of the past, embodied in language. ... we must never cease renewing those images; because once we do, we fossilize.⁴⁵⁰

373) The fossilisation of tikanga words occurred within a Treaty of Waitangi settlement context with the incorporation of tikanga Māori kupu (words) in legislation such as

⁴⁴⁷ Vygotsky, L.S 'Thought and Word' in Baker, M (ed) *Routledge Encyclopaedia of Translation Studies* (Routledge, London and New York, 2001) at 126.

⁴⁴⁸ 'Chuang Tzu: World Philosopher at Play Chuang Tzu,' see Arrington, R, *The World's Great Philosophers at Play* (Blackwell, Malden, MA, 2003) at 22.

⁴⁴⁹ Above. at 34.

⁴⁵⁰ Friel, B, *Translations* (Faber & Faber, London, 1981). For witness evidence on the power of words, see above, Jones at 37; Mikaere at 11; and Moses at 25. For witness evidence on the translation of words, see above, Mikaere at 11; and Parai at 43, 44, 93.

“mana whenua,” “kaitiakitanga” and “wāhi tapu.” When Māori words and tikanga Māori concepts are incorporated into policy and legislation, they often require defining and unpacking for certainty and efficacy.

374) What often results from codifying Māori words and tikanga concepts in policy and legislation is a mistranslation, redefining, or narrowing of those words and cultural concepts – a hiatus in that microcosm of human consciousness, the pulsations of the real, and a hiatus in that subjective discernment of life regarding the word.

375) The late Professor Bruce Biggs of Auckland University identified the ‘Humpty-Dumpty principle’⁴⁵¹ when translating words across cultures which he defined as ‘assigning new meanings from the source language (English) to an existing word in the target language (Māori).’⁴⁵² Biggs referred to a passage in *Alice in Wonderland* by Lewis Carroll:

When I use a word,’ said Humpty-Dumpty, ‘it means exactly what I choose it to mean. Neither more nor less.’⁴⁵³

376) Professor Biggs continued:

The objective in this context appears to be that by re-defining a tikanga Māori word by fiat, as it were, it will mean what it has been chosen to mean.⁴⁵⁴

377) It is important to mention these points here because we suspect a mistranslation, redefining, or narrowing of the tikanga words and cultural concepts raupatu and ringa kaha occurred after 1840.

378) Such a situation occurred in the 1990s Māori commercial fisheries litigation in the High Court,⁴⁵⁵ Court of Appeal,⁴⁵⁶ and the Judicial Committee of the Privy Council⁴⁵⁷ over the meaning of the word “Iwi” in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.⁴⁵⁸

379) A similar situation occurred in the 2024 Ngāi Tūmapūhia-ā-Rangi Hapū Inc. Stage 1(A) Wāhi Tapu High Court hearing in Wellington, where the Tūmapūhia-ā-Rangi tohunga Dr Takirirangi Smith provided a similar warning with his understanding of the concepts tapu and wāhi tapu when he asserted:

⁴⁵¹ Biggs, B, ‘Humpty-Dumpty and the Treaty of Waitangi’ in Kawharu, I.H (ed), *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 304.

⁴⁵² Above.

⁴⁵³ Above.

⁴⁵⁴ Above.

⁴⁵⁵ *Te Runanga o Muriwhenua v Te Rūnanganui o Te Upoko o Te Ika* [1996] 3 NZLR 10.

⁴⁵⁶ *Te Waka Hi Ika o Te Arawa and others v Treaty of Waitangi Fisheries Commission* (4 August 1998)(Unreported, High Court, Auckland Registry, CP 395/93 (Wgtn) Anderson J.

⁴⁵⁷ *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513, 517 (PC).

⁴⁵⁸ Refer to the Māori Fisheries Act 1989, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; and the Māori Fisheries Act 2004.

English language versions of tapu and waahi tapu often exclude the dynamic, transformative and contextual implications that are sometimes understood and taken for granted in the Māori language particularly when whakapapa kōrero is invoked or is in use at tapu places such as marae for example. The spatial and temporal context underpinned by traditional values and ways of knowing is in play.⁴⁵⁹

380) The tikanga concepts of mana and kaitiakitanga provide other compelling examples. To fully appreciate and even understand the tikanga concepts mana and kaitiakitanga and how they apply to the rohe moana, one cannot simply refer to a sterile account in a dictionary that provides a meaning and derivation of words and concepts. In this respect Bentham,⁴⁶⁰ Hart⁴⁶¹ and Harris all concluded: ‘Legal concepts cannot be defined, but only described by reference to illustrative cases.’⁴⁶²

381) To that end, Dr Carwyn Jones stated of mana:

There is no English equivalent to the term ‘mana,’ but it is used to describe the personal and political dimensions of Māori authority and power. The following words convey the concept of mana: power, presence, authority, prestige, reputation, influence, and control.⁴⁶³

382) The Ngāti Raukawa witness Ani Mikaere added:

It is also my experience that trying to translate our concepts [such as mana and kaitiakitanga] into Pākehā legal concepts is impossible.⁴⁶⁴

383) For kaitiakitanga as another example, in an appeal from a decision of the Regional Council to grant consents for an oyster farm on the foreshore at Paritata Bay, Raglan Harbour, Judge Treadwell commented on s.7, RMA, directing the Tribunal to have regard to kaitiakitanga with the result that non-Māori could potentially exercise kaitiakitanga. Judge Treadwell noted:

Unfortunately this expression is now defined in the Act. The definition is an all embracing definition in that it does not use the word ‘includes’: Had that word been used, then the general concept of Kaitiakitanga would have been relevant. However, this word which embraces a Māori conceptual approach now has a different meaning ascribed to it by statute, a meaning which we as the Tribunal are bound by law to and a meaning which we gather does not find favour with the [Māori] appellants. Further, use of the word in the way it has been used, brings it within the statute itself as a general application causing us to comment as we did in the *Rural Management Ltd v Banks Peninsula District* (W34/94) that the

⁴⁵⁹ Affidavit of Dr Takirirangi Clarence Smith Regarding Wāhi Tapu in Respect of Stage 1(A) Hearing dated 26 March 2024 (Tamaki Legal, Auckland) at para 7.

⁴⁶⁰ Bentham, J, *Deontology Together with A Table of the Springs of Action and Article on Utilitarianism* (Vol. 1, Athlone Press, 1983) at 99.

⁴⁶¹ Hart H, ‘Definition and Theory of Jurisprudence,’ in *LQR* (Vol. 70, 1954) at 37.

⁴⁶² Harris D, ‘*The Concept of Possession in English Law*,’ (Oxford Essays in Jurisprudence, 1968) at 69.

⁴⁶³ Above, Jones at para 37.

⁴⁶⁴ Above Mikaere at 11.

concept of guardianship is now applicable to any body exercising any form of jurisdiction under this Act. Thus it would be competent for the Tribunal to inquire whether a consent authority other than tangata whenua was in fact exercising Kaitiakitanga in the manner envisaged by the Act.⁴⁶⁵

384) Selwyn Hayes of Ngāi Tai and Whakatōhea offered a critique of the statutory recognition of the word and tikanga concept kaitiakitanga. Viewing the traditional Māori system of environmental management as holistic, Hayes stated:

The kaitiaki ... acts as both benefactor and beneficiary, in the sense that they protect the resource from harm while still reaping the benefits of the resource. An intrinsic part of this concept is the recognition that each generation has an inherited responsibility to protect and care for the natural world. Kaitiakitanga carried with it an obligation not only to care for the natural world, but also for each successive generation, by ensuring that a viable livelihood is passed on... Concern remains however, in regard to the use of the words 'guardianship' and 'stewardship' to define kaitiakitanga. Both terms tend to cloak the concept of kaitiakitanga in Pākehā terms of lesser importance and entirely different origins. The role of kaitiaki is considerably more significant than simply that of a guardian or steward. It is a vital component in the spiritual and cultural relationship of tangata whenua with their land.⁴⁶⁶

385) For the purposes of this report, it appears that a similar linguistic challenge of a war of interpretation and redefining of words, a mistranslation, or narrowing of cultural concepts may have occurred with the interpretation of the tikanga concepts take raupatu, take ringa kaha, take tuku whenua, take ahi kā and tatau pounamu after 1840. Perhaps this process is more pronounced with the legal evolution of raupatu and ringa kaha which we will address shortly.

386) We will first discuss next the Treaty of Waitangi and the mistranslation and redefining of the Māori words and tikanga concepts tino rangatiratanga and taonga. The section also purports that tikanga Māori as a legal system was guaranteed in the Treaty hence its inclusion immediately following the Treaty. We then explore the notion of tikanga adaptation and evolution.

387) But for now, we will analyse the power of words and tikanga in the Treaty of Waitangi.

Treaty of Waitangi 1840 and Tikanga

388) Tikanga Māori as a legal system was implicitly and explicitly guaranteed protection in the text – the words - of the Treaty of Waitangi 1840. Paul McHugh suggested that Article II of the Treaty and its promise of “te tino rangatiratanga” implied the continued viability of tikanga customary law where Māori ‘offenders’ were concerned.⁴⁶⁷ He

⁴⁶⁵ *Greensil v Waikato Regional Council* (W17/95, 6 March 1995).

⁴⁶⁶ Hayes, S, ‘Defining Kaitiakitanga and the Resource Management Act 1991,’ in *Auckland University Law Review* (Vol 8 1996-1999 No 3) at 893, at 894 and 898.

⁴⁶⁷ McHugh, P, *The Māori Magna Carta*, (Oxford University Press, Auckland, 1991) at 287.

added: ‘the chiefs thought simply that they were to retain their customary authority over and amongst their own people.’⁴⁶⁸

389) On the 5th February during the debates preceding the signing of the Treaty, the Nga Puhi rangatira Tamati Waka Nene warned:

O Governor ... You must preserve our customs, and never permit our lands to be wrested from us ... Stay thou here, dwell in our midst.⁴⁶⁹

390) Waka Nene’s view was generally accepted as being influential if not decisive in persuading those present to sign the Treaty. After the official proceedings at Waitangi, copies of the Treaty were also taken around the country by Crown agents to secure more rangatira signatures to further legitimate the kawenata.⁴⁷⁰

391) Tikanga was also acknowledged explicitly in Article II: “... te tino rangatiratanga ... o ratou *taonga* katoa” [emphasis added]. The Waitangi Tribunal translated the words “taonga katoa” as “all their valued customs and possessions.”⁴⁷¹ Professor Hugh Kawharu of Ngāti Whatua translated “taonga” as “treasures” but added that taonga referred to:

... all dimensions of a tribal group’s estate, material and non-material heirlooms and tapu (sacred places), *ancestral lore* [tikanga] and whakapapa (genealogies) [emphasis added].⁴⁷²

392) Earlier, official instructions after the Treaty of Waitangi were also forwarded from the Colonial Office in London directing the Governor to respect and uphold tikanga Māori within the new New Zealand legal system. In 1842 for example, Lord Stanley of the Colonial Office in London suggested that certain tikanga Māori institutions such as tapu be incorporated into the legal system.⁴⁷³ Lord Stanley also directed that legislation be framed in some measure to meet tikanga Māori practices including punishment for the desecration of wāhi tapu.⁴⁷⁴

⁴⁶⁸ Above. For a good discussion of the differences in translation of the *Treaty of Waitangi* and its implications see Biggs in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).

⁴⁶⁹ Buick, L, *The Treaty of Waitangi*, (3rd ed, Avery Press, Auckland, 1936) at 143.

⁴⁷⁰ See Orange, C, *The Treaty of Waitangi* (Allen Unwin Press, Auckland, 1987). Rangatira signed the Treaty of Waitangi throughout the Kāpiti Coast region. For witness evidence on rangatira who signed the Treaty of Waitangi, see Royal at 2; Mikaere at 10, 65; Proctor at 20; Tahana at 9; Shenton at 9; Parai at 78-85; Pomare at 51-64; and Te Rei at 19, 57-58.

⁴⁷¹ Waitangi Tribunal *Report Findings of the Waitangi Tribunal. Relating to Te Reo Māori* (WAI-11, Wellington, 29 April 1986) para. 4.2.4; 4.2.8, 4.2.3, at 20.

⁴⁷² Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).

⁴⁷³ Lord Stanley, Secretary of State for the Colonies, Memorandum, 23 August 1842.

⁴⁷⁴ Stanley Minute, 23 August 1842, Colonial Office Records 209/14, at 202.

- 393) The historian Alan Ward further described how official messages recognising tikanga Māori customary rights were then conveyed throughout the country⁴⁷⁵ including a circular from Governor Hobson and a message from him through Willoughby Shortland that ‘the Queen will not interfere with your [Māori] native laws and customs.’⁴⁷⁶
- 394) Accordingly, early legislation recognised tikanga concepts such as in the Native Exemption Ordinance 1844⁴⁷⁷ that recognised when Māori committed crimes among themselves, European interference depended on Māori request [rangatiratanga and mana motuhake], and Māori convicted of theft could pay up to four times the value of goods stolen in lieu of other punishment which could be used to compensate the victim of theft and was an adaptation of the tikanga institution of muru.
- 395) Other significant legislation included the Unsworn Testimony Ordinance 1844⁴⁷⁸ that allowed the evidence of non-Christian Māori to be received in a court of law, the Jurors Ordinance 1844⁴⁷⁹ that authorised the Governor to exempt ‘capable’ Māori from the property qualification for jury duty, and the Cattle Trespass Ordinance 1844⁴⁸⁰ that allowed claims for damages in respect of fenced cultivations and to permit payment for damages (utu) to unfenced cultivations.
- 396) Furthermore in 1845, Governor George Grey asked the Secretary of State for the Colonies how far he had to abide by the Treaty of Waitangi. Lord Stanley replied: ‘In the name of the Queen ... you will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi.’⁴⁸¹
- 397) Thus, both the earlier mentioned common law doctrine of aboriginal title – that is determined in accordance with tikanga - and the Treaty of Waitangi 1840 accentuate that tikanga Māori was to be officially recognised and perpetuated within the Aotearoa New Zealand legal system after 1840.
- 398) Subsequently during Governor Grey’s first term as Governor of New Zealand, the Constitution Act 1852 was enacted granting the settlers Westminster self-government. Section 71, Constitution Act 1852, however recognised tikanga Māori as the legal system for Māori within specific ‘Native’ districts where they were the majority population – which was still the majority of the country at the time. Section 71 read:

LXXI. And whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the

⁴⁷⁵ Ward, A, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Reprinted with Corrections, Auckland University Press, 1995) at 45.

⁴⁷⁶ The source of Shortland’s statement in Kaitaia is John Johnson’s Journal, (23 April 1840, Auckland Public Library).

⁴⁷⁷ ‘An Ordinance to exempt in certain cases Aboriginal Native Population of the Colony from the ordinary process and operation of the law.’ Legislative Council, Ordinances, Session III, No. XVIII, 16 July 1844.

⁴⁷⁸ Above, no. II.

⁴⁷⁹ Above, no. XIV

⁴⁸⁰ Above, no. XVI

⁴⁸¹ Stanley / Grey, 12 March 1845, C.O No.1, G1 at 13, as cited in McIntyre, W.D, & Gardiner, W.J (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Auckland, 1971) at 120.

government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:

It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.⁴⁸²

399) It was left to the Governor to portion out these native districts exempting Māori as it were from the common law of the settled portions of New Zealand at the time. However, it appears the section was never implemented.⁴⁸³

400) In more recent times and in the middle of the Foreshore and Seabed deliberation, the 2004 Foreshore and Seabed Waitangi Tribunal referred to the Crown's duty of 'active protection' of Māori rangatiratanga over the marine and coastal area and concluded that Māori rangatiratanga included a duty:

... [to] actively protect and give effect to property rights, management rights, Māori self-regulation, *tikanga Māori*, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga [emphasis added].⁴⁸⁴

401) The Tribunal elaborated further on the application of tikanga Māori under the Treaty of Waitangi over the marine and coastal area in terms of specific forms of rangatiratanga over the foreshore and seabed that included:

A spiritual dimension. By ... karakia, ... rāhui, ... naming of places ... and their rituals, tangata whenua created and maintained whakapapa and spiritual links with the foreshore and territorial waters;

A physical dimension. Rāhui would be enforced by the community. Also, other tribal groups would have to obtain permission to cross inshore waters or to use fishing grounds or take certain species. Failure to respect the authority of the tribe could be held by tribes, and the failure to respect the authority of the tribe could lead to punishment in the case of both tribal members and outsiders;

A dimension of reciprocal guardianship. The tangata whenua were the kaitiaki of the taonga, and care for it in such a way as to ensure its survival for future generations. In its turn, the taonga cared for and nurtured the tangata whenua ...;

A dimension of use, ... The rangatira and the community had rights to fish, to take sea-weed, to hunt sea birds, to use sand, stones, and bitumen (mimiha), to travel by waka, and to exclude others from these practices as they saw fit;

⁴⁸² New Zealand Constitution Act 1852, section 71. The sub-heading describes this section, 'Her Majesty may cause Laws of Aboriginal Native Inhabitants to be maintained.'

⁴⁸³ See Joseph, R, *The Government of Themselves: Case Law, Policy and Section 71, Constitution Act 1852* (Te Mātāhauariki Research Institute Monograph, Waikato Print, University of Waikato, Hamilton, 2003).

⁴⁸⁴ Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, (Wai 1071, Legislation Direct, Wellington, 2004) at 28.

Manaakitanga, ... sharing (through manaaki) and authority (mana) are applied concurrently. Other tribes shared the bounty of the sea by invitation, as the host tribe saw fit. ...;

Manuhiri from across the seas: The Muriwhenua fishing Tribunal cites instances of Māori agreements to allow certain whalers to fish and to exclude others, and of their levying harbour 'dues' from Pākehā shipping in both islands, prior to the signing of the Treaty.⁴⁸⁵

402) What this history portrays is that tikanga Māori was an effective legal system prior to and following the Treaty of Waitangi in 1840. However, during this period after the Treaty of tikanga recognition legally, the hybridising process of recognising tikanga Māori words and concepts with British legislation and common law inevitably altered and changed tikanga to fit the new world order.

403) Tikanga Māori was and is open to adaptation and change. The key questions were who changed the tikanga, what is an appropriate tika process for adapting tikanga, what role did rangatira play in this process, how did it adapt, the pace of adaptation, and whether the changes were tika?

404) As noted earlier, the tikanga concepts of take whenua, take raupatu, take ringa kaha, take tuku whenua, take ahi kā, and tatau pounamu continued to apply after 1840 but they were subject to adaptation and change as was the rest of Te Ao Māori which is what the next section will now address.

Tikanga Adaptation and Change

405) The Foreshore and Seabed Waitangi Tribunal boldly asserted in 2004:

The Māori worldview, though accommodating new ideas, was still fundamentally intact in 1840.⁴⁸⁶

406) With respect, Te Ao Māori changed considerably by 1840. It is important to acknowledge however, that traditional Te Ao Māori worldviews and tikanga Māori are neither static nor unchanging, and they can, did, and need to change and be updated in the 19th, 20th and now the 21st centuries.

407) All cultures adapt and evolve in time and with new knowledge and technology. Tikanga Māori was and is capable of being updated for contemporary times. While the traditional tikanga Māori values such as mana, whakapapa and wairuatanga are deeply embedded and enduring, they are however, always interpreted, differentially weighted

⁴⁸⁵ Above, at 25-26, 130.

⁴⁸⁶ Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, (Wai 1071, Legislation Direct, Wellington, 2004) at 24. The Tribunal cited Waitangi Tribunal, *Muriwhenua Land Report*, (GP Publications, Wellington, 1997) at 2-5, 11-108.

and applied in practice in relation to particular contexts, giving ample scope for choice, flexibility and innovation.

408) If anything can be identified as originating in and handed down from the pre-European Māori tūpuna (ancestors) unchanged, it is not any particular social form such as iwi (tribes) and hapū (sub-tribes), or particular practices such as kaitiakitanga (stewardship), mana whenua (authority over land) and raupatu (conquest), but the principle of creative adaptation itself.

409) Specific compelling examples of tikanga Māori adaptation and change were the mass conversions of Māori to the sectarian Churches in the 19th century⁴⁸⁷ and the impressive expansion of national and international Māori trade prior to the turbulent New Zealand Wars period by 1860.⁴⁸⁸ Following European contact, Māori tribes adapted to European trade and business in a remarkable way while balancing tikanga Māori at the same time as James Belich, the military historian, commented:

Māori did not passively receive Europe, but actively engaged with it. They chose, adjusted and repackaged the new, in many respects into a less culturally damaging form. They did so with courage and perceptiveness.⁴⁸⁹

410) The late distinguished New Zealand historian Professor Michael King similarly concluded:

Māori were capable and competitive entrepreneurs, who could grow, produce and harvest commodities such as flax and timber on a large scale. In this context, the co-operative structure of internal tribal organisation and the system of mutual obligation implied by the custom of utu were distinct assets.⁴⁹⁰

411) We assert that the fundamental tikanga values and principles such as wairuatanga, whakapapa, mana and tapu do not fundamentally change for they are distinct, independent, no respecter of persons, and timeless. What adapts, develops and changes is how tikanga values and principles are practiced — the customs, institutions, practices and rituals — such as kaitiakitanga, take raupatu and muru— but not the values and

⁴⁸⁷ For references, see Middleton, A, *Pēwhairangi: Bay of Islands Missions and Māori, 1814 to 1845* (Otago University Press Dunedin, New Zealand, 2014); Adas, M, *Prophets of Rebellion. Millennium Protest Movements against the European Colonial Order* (2nd ed, Cambridge University Press, Cambridge, 1987); and Elsmore, B *Mana from Heaven: A Century of Māori Prophets in New Zealand* (Tauranga Moana Press, Otumoetai, Tauranga, 1989).

⁴⁸⁸ For references, see Governor Grey to Earl Grey, 18 June 1849 (and enclosure), *GBPP*, (1849 [1120]) at 166–168; Cowan, J, “Chapter III — Plough and Flour-Mill” in *The Old Frontier: Te Awamutu, the story of the Waipa Valley: the Missionary, the Soldier, the Pioneer Farmer, Early Colonization, the War in Waikato, Life on the Maori Border and Later-day Settlement* (The Waipa Post Printing and Publishing Company, Te Awamutu, 1922) 16; Hargreaves, R.P, “The Maori Agriculture of the Auckland Province in the mid-nineteenth Century” in *Journal of the Polynesian Society* (Vol. 68, No. 2, 1959) at 73; and Petrie, H, *Chiefs of Industry: Maori Tribal Enterprise in Early Colonial New Zealand*, (Auckland University Press, Auckland, 2006).

⁴⁸⁹ Belich, J, *Making People: A History of New Zealanders: From Polynesian Settlement to the End of the Nineteenth Century* (Penguin Press, Auckland, 1996) at 154.

⁴⁹⁰ King, M, *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003) at 127.

principles underpinning tikanga Māori such as whakapapa, whanaungatanga, wairuatanga, mana and tapu.

- 412) Renowned New Zealand anthropologist Dame Joan Metge asserted that one of the main differences between Western law (including mainstream New Zealand law) and tikanga Māori originates in their respective sources and in their ability to adapt and change when she concluded:

Tikanga arise out of on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift. Western laws are formulated and codified by a formal law-making body and are published in print; their amendment, while possible, is a complex and lengthy process. As a result laws often lag behind community opinion and practice; at times, however, they can be ahead and formative of it.⁴⁹¹

- 413) In a contemporary tikanga context, the Law Commission in 2006 noted:

The culture of the people is not limited to historic conceptions. A credible [Māori] structure is one that conforms to the peoples' current understanding of themselves as a tribe or general Māori community, of where they have been as a people, of who they are now and where they seek to be.⁴⁹²

- 414) A dynamic society will evolve as it encounters other societies and other knowledge systems and there will be ongoing maintenance of the traditional tikanga Māori customs and practices, and their relevance. Da Cunha's observations are germane in this respect when he opined:

Culture is production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production.⁴⁹³

- 415) Justice Eddie Durie (as he was then) referred to traditional Māori society and cultural adaptability when he opined:

Māori tikanga or law was precise but essentially pragmatic and receptive to change. Major changes were initiated in response to changing circumstances but with consistent adherence to principles of whānaungatanga, other norms and

⁴⁹¹ Metge, J "Commentary on Judge Durie's Custom Law" (Unpublished Custom Law Guidelines Project Paper, 1997) at 5. See also R Mulgan "Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pākehā Political Scientist" (Unpublished Paper, Law Commission, 1997) at 2.

⁴⁹² New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at 69.

⁴⁹³ Da Cunha, MC "The Case of Brazilian Indians" in Stephens, S (ed) *Children and the Politics of Culture* (Princeton University Press, 1995) at 282–291.

basic values. What was ‘tika’ was not ‘rules’ but that which was fair or was likely to succeed and was consistent with broad principles or ideology.⁴⁹⁴

416) In a Māori governance context, his brother Professor Mason Durie added:

Governance at local or national levels requires a level of organisation which incorporates both customary Māori practices and the application of democratic principles. The two are not incompatible, nor should their juxtaposition be discounted. Māori can be strengthened by the past and can learn from it. But the challenges of tomorrow will require a canopy of skills and wisdoms many of which will come from other cultures and nations.⁴⁹⁵

417) Dr Carwyn Jones, moreover, asserted that tikanga was flexible subject to reinterpretation according to circumstances, and decisions were pragmatic, not bound by unbreakable rules.⁴⁹⁶

418) Furthermore, the late Dame Evelyn Stokes provided valuable insight on the dynamic nature of tikanga Māori and cultural change when she recorded:

All cultures change, especially in the face of massive contact and conflicts with alien cultures. Culture is a dynamic concept and culture change is not itself a bad thing. The real issue is the rate and direction of change, and who is directing or imposing change. A basic assumption must be that a distinctive indigenous language and culture labelled Māori will continue to exist in this country because Māori people want to preserve this heritage. It must also be assumed that Māori people want to control the direction and management of their own distinctive cultural identity.⁴⁹⁷

419) As Professor Stokes concluded and the authors fully agree, what is critical with cultural adaptation and tikanga change is that Māori should be controlling the process, direction and rate of cultural change and tikanga adaptation rather than being controlled by government policy, legislation, secularisation, legalisation, globalisation, and corporatisation pressures and priorities.

420) As in the past, Māori have survived dramatic changes of colonisation, Christianisation, commercialisation, civilisation, urbanisation and now globalisation, and more latterly corporatisation, individually and collectively, by deploying their capacity for adaptation; on the one hand modifying traditional forms to serve new

⁴⁹⁴ Durie, E “Custom Law” (Unpublished Draft Paper, Address to the New Zealand Society for Legal and Social Philosophy, January 1994) at 105.

⁴⁹⁵ Durie, M, *Te Mana Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 238.

⁴⁹⁶ Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 at 22 [CB Tab 33 at 2023 201.00136].

⁴⁹⁷ Stokes, E “Bicultural Methodology and Consultative Processes in Research: A Discussion Paper” (Department of Geography, University of Waikato, 1998) at 48–49.

functions, and on the other, creatively adapting introduced forms to their own ends, transforming both in the process.⁴⁹⁸

421) The ability to adapt and adjust while maintaining the group's cultural uniqueness, and fundamental tikanga values and customary norms — are crucial for appropriately recognising Marine and Coastal Area (Takutai Moana) Act 2011 claims and interests in accordance with tikanga Māori in the 21st century.

422) From the claimant witnesses, Ani Mikaere of Ngāti Raukawa noted:

Mātauranga and tikanga are rooted in the relationship between people and their world – land, water, sky and all life that exists within and between them. In turn, the language of a people evolves to articulate, develop and transmit both the tikanga and the mātauranga that underpins it. We all understand that the mātauranga, tikanga and reo of every hapu is shaped by its unique circumstances: its physical environment, its history, the deeds of key tupuna and so on.⁴⁹⁹

423) Bill Taueki from Ngāti Tamarangi on the other hand boldly asserted:

I do not think there is much point pretending that our tikanga is the same as it was before Europeans came here. We still have our tikanga, but it has changed because the world that it relates to has changed.⁵⁰⁰

424) Justin Tamihana from Ngāti Raukawa added:

Although we have adapted and now use some modern tools, we try to uphold our traditions where we can and, in fact, are continuing to revive and share this mātauranga with our rangatahi to maintain the knowledge.⁵⁰¹

425) Wayne Kiriona also from Ngāti Raukawa recorded:

Mana whenua is a construct of tikanga Māori, not legislation. Tikanga Māori has continued to evolve since 1840 until the present day. The only place tikanga Māori concepts exist in their true form is within a tikanga Māori framework, not a legislative one. While legislation regulates the use of the coastline, it does not always allow for the full expression of tikanga Māori.⁵⁰²

⁴⁹⁸ For witness evidence on tikanga adapting and changing, see Taueki 2 at 14-17; Tamihana at 40, 60, 70; Mikaere at 23, 47; Jones 1 at 22, 78; Jones 2 at 7, 9; Mahina-a-Rangi 1 at 136(d); Walker at 25; Henare at 28; Waaka at 23-24; Collins and Teira at 18, 23-24, 70, 81, 85-87; Barrett 2 at 112; Ngaia at 66; Proctor at 17; McGregor at 7; Moses at 10; Potini at 318; Elkington at 41-42; Pomare at 80, 93; and Te Rei at 126 (2.7).

⁴⁹⁹ Above Mikaere at para 23.

⁵⁰⁰ Above Taueki 1 at para 14.

⁵⁰¹ Above Tamihana at para 40.

⁵⁰² Above Kiriona at para 20.

426) While tikanga evolves and adapts, we need to be careful that we do not stray so far that our tikanga customary practices are no longer premised on those underlying Te Ao Māori values and principles – the tāhuhu he aratohu fundamental signposts - described above. It is an adherence to these tikanga principles and values not necessarily strict legal rules that enable change and variation while maintaining cultural integrity, consistency and universality. As the Ngāti Raukawa academic Ani Mikaere referred to:

... examining tikanga as the practical expression of a philosophical view of the world that was unique to our tupuna and refraining from recreating the colonised in the image of the coloniser.⁵⁰³

427) Having discussed how tikanga Māori as a legal system, as well as tikanga Māori words and concepts can adapt and change, the next section will discuss how the Native Land Court purposes, policies and processes influenced changes, adaptations and distortions to tikanga Māori.

Native Land Court Processes Distort Tikanga

428) The Native Land Court had a crippling impact on Māori communities and on tikanga Māori as a legal system. Sir Hugh Kawharu of Ngāti Whatua referred to the Native Land Court as an ‘engine of destruction for any tribe’s tenure of land, anywhere.’⁵⁰⁴

429) The Native Land Court was established under the Native Lands Act 1862 and 1865 which swept away tikanga Māori laws and institutions that protected the communal use and rangatira authority of tribal whenua.⁵⁰⁵ The Land Court recognised Māori land rights but only if they were specified in a certificate of title. Many believed that the Native Land Court was designed to achieve what could not be accomplished on the battlefield – alienating Māori from the land.⁵⁰⁶

⁵⁰³ Mikaere, A, ‘Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Maori,’ in *New Zealand Yearbook of New Zealand Jurisprudence*, (Vol. 18, 2005) at 8.2.

⁵⁰⁴ Kawharu, H, *Maori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977) at 15.

⁵⁰⁵ For references on the Native Land Court, see Fenton F. D. (Ed.) *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866–1879* (Henry Brett Printers, Auckland, 1879); Kawharu, H, *Maori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977); Boast, R, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island of New Zealand 1865–1921* (Victoria University Press, Wellington, 2008); Boast, R, *The Native Court 1862–1887: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2013); Boast, R, *The Native Land Court: Volume 2, 1888–1909: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2015); and Williams, D, *Te Kooti Tango Whenua’: The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999).

⁵⁰⁶ Above. For a summary of oppressive laws that discriminated against Māori, see Kelsey, J ‘Legal Imperialism and the Colonisation of Aotearoa’ in Spoonley, P *Tauīwi: Racism and Ethnicity* (Dunmore Press, Palmerston North, 1984) at 32-43; Sorrenson, M.P.K ‘Land Purchase Methods and Their Effect on Maori Population, 1865-1901’ in *Journal of the Polynesian Society* (Vol. 14, No. 3, 1956) at 183-199; Williams, D ‘The Use of Law in the Process of Colonisation – A Historical and Comparative Study with Particular Reference to Tanzania (Mainland) and New Zealand’ (Ph.D Thesis, University of Dar-es-Salaam, 1983); and Williams, D *Te Kooti Tango Whenua: The Native Land Court 1864 – 1909* (Huia, Wellington, 1999).

- 430) The former New Zealand Premier Henry Sewell captured the purposes of the Native Land Court in the 1877 Parliamentary debates when he opined:

The object of the Native Lands Act was twofold: to bring the great bulk of the lands of the northern island which belonged to the natives ... within the reach of colonisation. The other main object was the detribalisation of the natives; to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based and which stood as a barrier in the way of all attempts to amalgamate the native race into our own social and political system. It was hoped by the individualisation of titles to land, giving them the same individual ownership that we ourselves possessed, they would lose their communistic character and their social status would become assimilated into our own.⁵⁰⁷

- 431) Accordingly, Native Land Courts were established around the country to decide which Māori individuals or Māori communities should be recognised as owners and given certificates of title bringing Māori land interests into absolute ownership which processes were the antithesis of tikanga Māori. Titles were to be determined based on alleged tikanga evidence presented in Court. All Māori claimants had to attend hearings whether they wanted to or not, whether they could afford to or not. Land Court hearings were held in urban centres and were adversarial, expensive, divisive, drawn out and even detrimental to claimant health and well-being.

- 432) As the Ngāti Raukawa witness Ani Mikaere recorded:

... In Ngāti Pareraukawa's experience, the Court processes brought out the worst in people, pitting iwi against iwi, hapū against hapū, whānau against whānau and individuals against their whanaunga.⁵⁰⁸ In so doing, it destroyed relationships that had been established and regulated within the framework of tikanga. Te Whatanui's promise to Muaūpoko had resulted in four decades of stability before the operation of the Native Land Court in the Manawatū persuaded Kemp that it could be nullified, fifty years of history rewritten in the process.⁵⁰⁹

- 433) Many Māori claimants also racked up large bills for food, accommodation, surveys and lawyers that were given on credit while attending Native Land Court hearings for weeks and even longer. Many Māori were then forced to sell the land they had claimed in Court to settle debts. Similar results occurred all around the country within Māori communities. As a result, Māori alienated over 2 million hectares of land to non-Māori ownership between 1870 and 1892.

1840 Rule

- 434) One of the core doctrines of the Native Land Court was the '1840 rule' which was first articulated by Chief Judge Fenton in the *Oakura*⁵¹⁰ decision of the Compensation

⁵⁰⁷ Henry Sewell, *NZPD* (Vol 24, 1877) at 254.

⁵⁰⁸ As Hugh Kawharu famously observed: "The ... operation of the Court makes grim reading. Fraud, cupidity, hypocrisy, the list of human frailty and its attendant cost is endless." In Foreword to William, D, *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, (Huia Publishers, Wellington, 1999) at xvi.

⁵⁰⁹ Above, Mikaere at para 63.

⁵¹⁰ Fenton F. D. (Ed.) *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866-1879* (Henry Brett Printers, Auckland, 1879) at 9-12.

Court in 1866. The ‘1840 rule’ enunciated that the starting point for the investigation of customary titles in the Native Land Court was the acquisition of British sovereignty in 1840.⁵¹¹

435) The year 1840 was necessary as a starting point and as a cut-off date⁵¹² as Chief Judge Fenton noted in *Oakura*⁵¹³ decision concerning Māori who had moved away from their ancestral lands in Taranaki before 1840 and had never since returned to their home region.⁵¹⁴ The issue was could these people advance a claim to their lands in the Compensation Court at the time of the title investigation?

436) Fenton held that they could not be permitted to do so although they could advance claims in the areas to which they had moved. Furthermore, the 1840 rule did not prevent persons who had moved back to Taranaki after 1840 from making a claim.

437) His Honour Chief Judge Fenton subsequently explained the rationale for the 1840 Rule more in the 1868 *Orakei* Native Land Court decision⁵¹⁵ when he opined:

... to allow claims to be made on the basis of settlements after 1840 would penalise other Māori groups who had failed to take action to expel the intruders. It would be ‘very dangerous’ to accept that ‘a title to native lands can be created ... since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be deprived “pro tanto” of their rights.’⁵¹⁶

438) Judge Norman Smith also referred to the purpose of the 1840 rule:

... a conquest relied on must necessarily have arisen prior to British sovereignty (1840), as it would be invidious to recognise titles of this nature based on events happening subsequently to that date.⁵¹⁷

439) The 1840 rule was never applied in a hard and fast way and was not relevant in many cases because the groups in possession at the time of the hearing and in 1840 were the same.

440) This was not the case however, for the Kāpiti Coast. One of the key challenges of the 1840 rule for the Kāpiti Coast claimants was the appalling timing. 1840 was a

⁵¹¹ ‘Narrative of the Events of the Sitzings of the Compensation Courts at New Plymouth’ in *AJHR* (A13, 4; Vol 1, 1866) at 291-292.

⁵¹² Above.

⁵¹³ Fenton F. D. (Ed.) *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866–1879* (Henry Brett Printers, Auckland, 1879) at 9-12.

⁵¹⁴ Above.

⁵¹⁵ Fenton F. D. (Ed.) *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866–1879* (Henry Brett Printers, Auckland, 1879) at 94.

⁵¹⁶ Above.

⁵¹⁷ Smith, N, ‘Conquest or Take Rau-Patu,’ in Smith, N, *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 102.

terrible year for the Kāpiti claimants due to the turbulent Musket Wars period and the associated disruption and turmoil that preceded and even continued in 1840 – the various heke and invasions, incessant wars and associated atrocities, dislocation and destruction.

441) Furthermore, in relation to the tikanga concepts take raupatu and ringa kaha, the 1840 rule meant that the concept theoretically applied to claims prior to 1840 but the tikanga practices of take raupatu and ringa kaha did not apply as legitimate *take* for claims after the Treaty of Waitangi.

442) In addition, placing a cut off timeframe on tikanga was antithetical to tikanga which therefore also changed and distorted the tikanga.

443) From the outset then, the *raison d'être* of the Native Land Court was significant changes to Māori society by not recognising the authenticity and legitimacy of tikanga Māori as a vibrant legal system but its destruction, *inter alia*, through assimilation. Consequently, the tikanga concepts presented in Court hearings would inevitably be subjected to some adaptation, change and even distortion if required to meet the Court's inimical objectives.

444) Furthermore, the additional purposes of the Native Land Court, as noted by Sewell, were to alienate Māori from their culture, tikanga, and worldviews. Whakapapa, whānaungatanga, kaitiakitanga, manaakitanga, mana whenua and even take whenua were some of the tikanga principles of alleged 'communism' that ran through the whole of tikanga Māori laws and institutions and were therefore anathema to the colonial project.

445) In such a foreign, hostile, culturally unsafe and destructive legal forum, the adaptation, evolution and even distortion of tikanga concepts, institutions and tikanga processes were inevitable. The questions for the purposes of our report are how did tikanga Māori generally change and adapt by being utilised within the Native Land Court and other Court processes, and how were the specific tikanga concepts take raupatu and ringa kaha changed within the Native Land Court and other Court processes over the years?

446) To answer these sub-questions, we will first deal with how tikanga Māori generally changed and adapted within the Native Land Court and other Court processes.

Tikanga Changes Distorted in Court

447) To cite a number of examples, James Mackay, civil commissioner for Hauraki and Judge of the Compensation and Native Land Court referred to the Thames Sea Beach Bill in 1869 where he erred in his interpretation on the tikanga of mana whenua when he asserted:

I believe the general custom with the Native Lands Purchase Department respecting lands between high and low water mark, has been to consider that when the Native Title is extinguished over the main land, then any rights which

the Natives had over the tidal lands have ceased. As long as the Native title is not extinguished over the main land, the Natives consider – or, at least the Natives have enjoyed all rights over the tidal flats. I am not aware of any cases having arisen in which the Government have required to make use of tidal lands previous to the extinguishment of the Native title over the main land.⁵¹⁸

448) Similarly, even Donald McLean, the Native Minister asserted in Parliament in 1874:

For the information of the House, that land below high water mark was granted to the Superintendent under the Public Reserves Act of 1854 and was also leased under the authority of the Act. In regard to all territories ceded by Maoris to the Crown, it has been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams and whatever was on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect, and all of the conditions of the deeds had been adhered to strictly by the colony. There had been no breach of the Treaty of Waitangi and every Government of New Zealand has carefully preserved the rights of the Natives.⁵¹⁹

449) However, Crown officials then assumed that when a block of land was purchased by the Crown, Māori also alienated all rights and responsibilities to freshwater as well as marine and coastal areas with the sale.

450) In contrast, when the Thames Sea Beach Bill was proposed as a solution to problems that arose at the Thames goldfields with the rush of miners and the ensuing challenges over title to the foreshore and seabed lands, Tanameha Te Moananui and rangatira from Pukerahu sent a petition to the Government regarding mana whenua where they asserted:

You, the Government, have asked for the gold of Hauraki; we consented. You asked for a site for a town; you asked also that the flats of the sea off Kauaeranga should be let; and those requests were acceded to. And now you have said that the places of the sea which remain to us will be taken. O friends, it is wrong, it is evil. Our voice, the voice of Hauraki, has agreed that we shall retain the parts of the sea from high water mark outwards. These places were in possession from time immemorial; these are the places from which food was obtained from the time of our ancestors even down to us their descendants ... O friend, our hands, our feet, our bodies are always on our places of the sea ... The men, the women, the children are united in this, that they alone are to have the control of all the places of the sea.⁵²⁰

451) A second Kohimarama Conference was convened by Paora Tuhaere of Ngāti Whatua at Ōrākei, Auckland, in 1879 where it was reported:

The Queen in the Treaty of Waitangi promised that the Maoris should retain their mana. That word is correct because the Queen accepted us as her subjects, and

⁵¹⁸ *AJHR* (1869 F-7) at 6.

⁵¹⁹ *New Zealand Parliamentary Debates*, (16, 1874) at 853.

⁵²⁰ 'Report of the Select Committee on the Thames Sea beach Bill,' in *AJHR*, (Vol. 2, 1869, F-7) at 18.

she said to the Maori belonged the mana over his pipi grounds. ... The Queen also said that the Maori should retain their mana over the sea.⁵²¹

- 452) That same year, the rangatira, Apihai Te Kawau, also of Ngāti Whatua discussed a sale of coastal land he was involved in when he informed the Governor at Ōrākei in 1879:

It was only the land that I gave over to the Pakehas. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods.⁵²²

- 453) Hori Tauroa added:

I was not aware of the Government taking all my large pipi-banks and shoals in the Manakau (Manukau harbour). Those large banks have all gone to the Government. I was not told why these were taken. I wish to know now whether they belong to the Queen or remain my property.⁵²³

- 454) The tikanga of mana whenua was that a water resource and a land resource were conceptually the same and were capable of being under the mana of a community which view is supported by several 19th and 20th century observers. Thus, the 1921 Native Land Claims Commission reported with reference to Napier Inner Harbour that in Native custom, Māori rights were not confined to the mainland but extended as well to the sea where 'deep-sea fishing grounds were recognised by boundaries fixed by the Māoris in their own way; they were well known, and woe betide any alien who attempted to trespass upon them.'⁵²⁴

- 455) Other significant changes that distorted and even denied tikanga occurred in the case law regarding the doctrine of aboriginal title and the Treaty of Waitangi such as the 1870 *Kauaeranga Decision*⁵²⁵ of Native Land Court. Chief Judge Fenton first acknowledged but then rejected the rights of Māori under the common law doctrine of aboriginal title in the foreshore and seabed when he commented:

I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such [under tikanga], and how impossible it is to contradict them if they only agree amongst themselves.⁵²⁶

- 456) Chief Judge Fenton was unwilling however, to allow property rights in the foreshore and seabed even though this was the case under tikanga. Chief Judge Fenton refused to recognise the tikanga due to the wider public interests of the Colony. Chief Judge

⁵²¹ 'Paora Tuhaere's Parliament at Orakei,' in *AJHR*, (1879, Sess. II, G-8) at 20.

⁵²² Cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 2nd ed. Wellington, 1989) at 113.

⁵²³ Above.

⁵²⁴ 'Whanganui-o-Rotu' in 'Report of the Native Land Claims Commission', *AJHR*, (1921, Vol.2, G-5) at 13.

⁵²⁵ (1870) reprinted in *VUWLR* (Vol. 14, 1984) at 227.

⁵²⁶ Chief Judge Fenton, *Kauaeranga Judgment*, (1870) reprinted in *VUWLR* (Vol. 14, 1984) 227 at 244.

Fenton then disregarded and rejected the tikanga of mana whenua and mana moana in the foreshore and seabed in Hauraki because of public interest thus denying and perhaps in the process distorting tikanga.

- 457) Around the same time, some Māori even complained that Native Land Court Judges had simplified, distorted and misconstrued the tikanga of ahi kā with tuku whenua. The complaint was that the Court was wrongly awarding land to groups who had only been allocated temporary sites for cultivation and usage by tangata whenua through tuku whenua. To this end, the Ngāti Kahungunu rangatira Te Whatahoro Jury and others wrote a letter to the editor of the Māori newspaper *Te Wananga* in 1877 making such a complaint when they recorded:

Some land which is being awarded according to long standing and undisturbed occupation [ahi ka roa] is not being carefully examined by the Court as to whether that claim is right. There are many facets of this concept te ahi ka roa or permanent residence. One aspect of occupation is when a person happens upon the residence of somebody else, and for a period of time is looked after by that person. Coming to the present time, the descendants of the traveller will then prepare to discuss the issues of that land according to their knowledge. Soon, the person entitled to that land could be defeated by the supposed long occupation and knowledge of that traveller, if the Court is not careful in its inquiry.⁵²⁷

- 458) However, in the infamous 1877 *Wi Parata v Bishop of Wellington*⁵²⁸ decision, Prendergast C.J denied that Māori had ‘any kind of civil government’ or even any settled system of tikanga law. Prendergast C.J also ruled that the Treaty of Waitangi was a ‘simple nullity’ when he held:

The existence of the pact known as the Treaty of Waitangi entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated: So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.⁵²⁹

- 459) In addition, Prendergast C.J ruled that the Courts had no jurisdiction to entertain any claims based on a supposed common law doctrine of aboriginal title. Referring to traditional Māori custom and usage in s. 4, Native Rights Act 1865, which is based on tikanga Māori, he concluded:

⁵²⁷ Te Whatahoro Jury and others, *Te Wananga* (Vol. 4, No. 278, 14 July 1877) at 26.

⁵²⁸ *Wi Parata v Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S) S.C 79. See Williams, DV., ‘Te Tiriti o Waitangi – Unique Relationship Between the Crown and Tangata Whenua?’ in Kawharu, IH, (Ed), *Waitangi: Māori and Pākehā Perspectives*, (Oxford University Press, Auckland, 1990).

⁵²⁹ *Wi Parata v Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S) S.C 78.

Had any body of law or custom capable of the ‘Ancient Custom and Usage of the Māori people’, as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. ... no such body of law existed.⁵³⁰

460) Prendergast C.J thus advanced the circular proposition that tikanga Māori did not exist because it was not recognised by the legal system in statutes while any statutory recognition of tikanga Māori custom could be disregarded because tikanga Māori custom did not exist!⁵³¹

461) Prendergast C.J added, ‘in the case of primitive barbarians, the Supreme executive Government must acquit itself, as best it may, of its obligations to respect native proprietary rights, and of necessity must be sole arbiter of its own justice.’⁵³² Consequently, any Treaty of Waitangi rights, and traditional Māori aboriginal property rights based on tikanga Māori were changed, distorted or were marginalised within the New Zealand legal system at the time.

462) Chief Judge Macdonald and Judge Puckey of the Native Land Court subsequently followed *Kauaeranga*⁵³³ in the 1883 *Parumoana* decision⁵³⁴ dealing with certain areas of mudflats in Porirua that Ngāti Toarangatira had rights over according to tikanga Māori. The Court held that ‘the present applicants are entitled not to the land but to a right of fishery.’⁵³⁵ Ironically, this right continued to be exercised by Ngāti Toa Rangatira until 1860 when following the decision of the Supreme Court, Ngāti Toa Rangatira received legal advice that the original grant had been made without jurisdiction and was deemed to have lapsed.⁵³⁶

463) Prendergast C.J additionally refused to accept that Māori marriage according to tikanga Māori had any legal validity in the eyes of the New Zealand Courts in *Rira Peti v Ngaraihi Te Paku*⁵³⁷ which was a further example of tikanga distortion through law.

464) Other Courts later challenged Prendergast CJ’s approach such as the Judicial Committee of the Privy Council in 1901 who rejected Prendergast’s denial of tikanga Māori custom in *Nireaha Tamaki v Baker*⁵³⁸ when their Lordships held:

It was said ... that there is no customary law of the Māoris of which the Courts of law can take cognisance. Their Lordships think that this argument goes too far,

⁵³⁰ Above, at 79.

⁵³¹ For an excellent brief article tracing the demise of Māori custom, see Frame, A ‘Colonising Attitudes Towards Māori Custom’ in *New Zealand Law Journal* (17 March 1981) at 109.

⁵³² *Wi Parata v Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S) S.C 77-80. For a contemporary analysis of this case and how history repeated itself with the now repealed Foreshore and Seabed Act 2004, see Williams, D, ‘Wi Parata is Dead, Long Live Wi Parata,’ in Erueti, A and Charters, C (eds.) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) at 31-58.

⁵³³ (1870) reprinted in *VUWLR* (Vol. 14, 1984) at 227.

⁵³⁴ (1883) 1 Wellington MB.

⁵³⁵ Above.

⁵³⁶ Boast, R, *The Foreshore and Seabed*, (Lexis Nexis 2005) at 63.

⁵³⁷ (1889) 7 NZLR 235.

⁵³⁸ (1901) NZPCC 371.

and that it is rather late in the day for such an argument to be addressed to a New Zealand Court.⁵³⁹

465) In the 1902 *Hohepa Wi Neera v Bishop of Wellington*⁵⁴⁰ decision however, the Court upheld *Wi Parata* reasoning that Native Land Acts enacted by the Crown may override customary native title based on tikanga.

466) Furthermore, the response to the Privy Council's *Nireaha Tamaki v Baker* decision, was a protest of Bench and Bar in New Zealand. The New Zealand Prime Minister, Sir Joseph Ward, subsequently defended the New Zealand position at the 1911 Imperial Conference in London by highlighting their Lordships' ignorance of local circumstances when he opined:

Our people in New Zealand ... consider that in matters relating to native land [and custom] which come before the Privy Council ... here what is a custom, as far as the native law [tikanga] in New Zealand is concerned, may not in the ordinary sense be fully recognised by the Privy Council when dealing with those laws.⁵⁴¹

467) Still, subsequent case law and other attempts since 1901 accepted the Privy Council's views rather than those of Prendergast CJ. For example, Chief Justice Robert Stout in 1905 proposed to codify Māori customary law in relation to land tenure which was noted in the *New Zealand Times* newspaper:

What his Honour presumed, the Native Court had to do, was to incorporate English law and Māori custom together, and from this conglomerated law find succession, and call it according to Māori custom. It seemed to his Honour that the time had come when there should be some authoritative definition of what Māori custom or usage was. It should not be left to Native Land Court judges to declare what they think Native custom is.⁵⁴²

468) With respect, declaring, adapting and modifying tribal tikanga is the mana rangatira of the respective whānau, hapū and iwi concerned, not the judiciary or the Government.

469) Having spoken with the Chief Justice at the time, Attorney-General John Salmond (later Sir John) in a memo to Cabinet dated 1 September 1905 proposed the idea of the codification of Māori custom in principle.:

His Honor, in an interview with myself upon the matter, expressed the opinion that steps should be taken by the government to have what constituted Māori custom and usage codified and enacted by the legislature.⁵⁴³

⁵³⁹ *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382.

⁵⁴⁰ (1902) 21 NZLR 655.

⁵⁴¹ Sir Joseph Ward *Précis of Proceeding of the Houses of Parliament of Great Britain, Imperial Ministers Conference* (Minutes of Proceedings, London, June 1911).

⁵⁴² 'On Māori Customs being Codified' in *New Zealand Times*, (30 August 1905) at 6.

⁵⁴³ National Archives, (MA 1, 1906/285).

470) Cabinet was not too interested however, in codifying Māori custom, the response being a memo to Justice and Native Affairs that ‘where land was clothed in European title, Native Custom was to be abolished.’⁵⁴⁴

471) However, in the 1908 decision of the High Court in *Public Trustee v Loasby*,⁵⁴⁵ Cooper J instituted a three tier tikanga Māori customary law test when deciding whether to adopt a rule of Māori customary law. The first tier was whether the custom existed as a matter of fact, whether ‘such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Māori race.’⁵⁴⁶ The next tier was whether the custom was contrary to statute. The last tier was whether the custom was ‘reasonable, taking the whole of the circumstances into consideration.’⁵⁴⁷

472) Following this precedent, the continued vitality of tikanga Māori customary law was affirmed in s. 91, Native Land Act 1909 which was drafted by Salmond with the assistance of Apirana Ngata which declared:

Every title to and interest in customary land shall be determined according to the ancient custom and usage of the Māori people so far as the same can be ascertained.⁵⁴⁸

473) The recognition of tikanga Māori custom in relation to succession to land titles was recognised further in *Willoughby v Panapa Waihopai*.⁵⁴⁹ Referring to the ascertainment of ownership according to tikanga Māori custom by the Native Land Court, Chapman J remarked:

Its Judges have acted on the assumption that they might invoke Native custom to determine the succession to the freehold lands of Māoris. ... A body of custom has been recognised and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court must have been founded with but slight regard for the ideas which prevailed in savage times.⁵⁵⁰

474) The application of tikanga Māori custom then, was not always applied appropriately by the Native Land Court Judges as Chapman J mentioned. Nor was it always applied appropriately by other Judges.⁵⁵¹

475) Furthermore, in 1914 Sir John Salmond, Solicitor General (at the time), was involved in legal proceedings concerning the Treaty of Waitangi and tikanga Māori customary

⁵⁴⁴ Above.

⁵⁴⁵ (1908) 27 NZLR 801.

⁵⁴⁶ Above, at 806.

⁵⁴⁷ Above.

⁵⁴⁸ Native Land Act 1909, s. 91.

⁵⁴⁹ (1910) 29 NZLR 1123.

⁵⁵⁰ Above.

⁵⁵¹ For witness evidence on the Native Land Court distorting tikanga concepts including take raupatu, see above, Armstrong at 41, 54, 58 and 62; Taueki 2 at 11, 19, 23; Royal at 59; Mikaere at 31, 54-63; Moses at 53; O’Malley at 29-39; Proctor at 2-19, 38; Walker at 52; Kiriona at 41-42, 50, 61-62; and Shenton at 32.

rights over freshwater lakes. Sir John sent a memorandum to the Attorney-General at the time which stated:

The Prime Minister... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery (which would not enable a freehold order to be issued) and not rights of ownership as are now claimed ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, *foreshores*, and *tidal waters* in the Dominion ... I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained ... it may be anticipated that the Court will hold that by native custom the Natives own not merely the land, but the water of this country and freehold titles will be issued accordingly [emphasis added].⁵⁵²

- 476) In such foreign, hostile, culturally unsafe and destructive legal fora, the adaptation, evolution, denial and even distortion of tikanga concepts and processes were inevitable.
- 477) The key questions for the purposes of our report now are how the specific tikanga concepts take raupatu, ringa kaha, tuku whenua, take ahi kā, and tatau pounamu changed after 1840 within the Native Land Court and other Court processes over the years?
- 478) The next section will focus on these tikanga concepts, especially take raupatu and ringa kaha, after 1840 when the Treaty of Waitangi was signed.

Take Raupatu and Ringa Kaha Influenced by Native Land Court

- 479) As noted in Question 4), a further important *take* for legitimating a group's claims to the whenua and the rohe moana is take raupatu and the associated concepts of ahi kā, ringa kaha, tatau pounamu and tuku.
- 480) An exploration of these tikanga concepts, especially take raupatu and ringa kaha, is critical here because they provide the basis for legitimating the mana whenua of the hekenga iwi - Ngāti Toa, Ngāti Raukawa, Te Ātiawa and associated hapū and whānau - against the Kurahaupō iwi – Muaūpoko, Ngāti Apa, Rangitāne and associated hapū and whānau, allegedly in accordance with tikanga as prescribed by MACA.
- 481) The cases for the hekenga iwi and the Kurahaupō iwi appear to stand or fall based on take raupatu and ringa kaha, as well as ahi kā, take tuku and tatau pounamu, among other tikanga concepts. For this reason, we will explore take raupatu and ringa kaha, along with some of the other related concepts, in some depth. We will first review what these tikanga concepts mean and how they developed and adapted after 1840, in particular, how these concepts may have been influenced by the Native Land Court policies and processes.

⁵⁵² Salmond to Attorney-General, 1 August 1914, *Opinions Relating to Lands Department 1913-15*, cited in Frame, A, *Salmond: Southern Jurist*, (Victoria University Press, Wellington, 1995) at 119.

482) Take raupatu was about claiming land through conquest having conquered and subjugated or displaced the original inhabitants.

483) As noted above, a further important *take* for legitimating a group's claims to the whenua and marine and coastal areas is take raupatu⁵⁵³ and the associated practice of ringa kaha.

484) The anthropologist Raymond Firth recorded his understanding of take raupatu:

In days of old, wars were frequent, and large areas of land changed hands as the result of conquest of the original owners, accompanied in many cases by a literal absorption of them by the victorious tribe. Such land was termed whenua raupatu, and the nature of the original title would be forgotten.⁵⁵⁴

485) Professor Hirini Mead of Ngāti Awa added his view of take raupatu when he noted:

This is the land conquered from another group of occupants. The basis of a claim before the Native Land Court was to argue a take raupatu, that is, to claim conquest through the blade of a patu. That means of taking land overrode all other tikanga and introduced a new political order into the region.⁵⁵⁵

486) Professor Manuka Henare of Nga Puhi provided his understanding of take tupuna and take raupatu in a Nga Puhi context when he asserted:

Claims based on ancestry were the strongest, but a claim on the basis of raupatu, or 'conquest,' was legitimate, as long as it had been followed up by a continuous occupation. As Wiremu Wi Hongi explained, the battles associated with the conquest of Waimate were concluded by killing all or most of the inhabitants of an area, followed by a symbolic act to mark the victory:

Ka titia he mere pounamu hei tohu kua riro tērā pā i a raua. Kā huaina tērā pā, ko Whakataha. Ko Te Whakahatanga o taua tangata.

A greenstone club was stuck into [the ground] as a sign that they had taken possession of that pā. The pā was named Whakataha [move aside], the moving aside of that person.⁵⁵⁶

487) Professor Henare continued:

⁵⁵³ For witness evidence on take raupatu, see Pomare at 61-103; Mikaere at 44, 61-62; Mahina-a-Rangi Baker 1 at 24-30, 91-93; Emery at 27, 37; Parata at 19-21; Moses at 26, 44, 50-59, 67-96; Tahana at 25; Shenton at 9; Parai at 16, 17, 25-27, 45, 53, 70, 93, 98, 117-121; and Potini at 118-123, 127, 229.

⁵⁵⁴ Firth, R, *Economics of the New Zealand Maori*, (A.R Shearer, Government Printer, 1972) at 383-384.

⁵⁵⁵ Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2003) at 280.

⁵⁵⁶ Henare, M, Petrie, H and Puckey, A, 'He Whenua Rangatira' Northern Tribal Landscape Overview,' (Hokianga, Whangaroa, Bay of Islands, Whangarei, Mahurangi and Gulf Islands)(Crown Forestry Rental Trust, Mira Szaszy Center for Maori and Economic Development, University of Auckland, 2009) at 341.

He [Wiremu Wi Hongi] then described how the victors, Auha and Whakaaria, moved from place to place to maintain their status as conquerors.⁵⁵⁷

488) Interestingly, former Chief Judge of the Māori Land Court Tā Eddie Durie provided more detail describing five types of take raupatu when he recorded:

At least five types of ‘conquest’ [raupatu] are described by Native Land Court witnesses:

- by defeating opponents in battle;
- by protecting another hapu, or throwing a cloak over them to warn off potential invaders;
- by causing a hapu to vacate a resource by threatening war;
- by forcing a marriage upon a hapu;
- by forcing a marriage alliance in return for a promise of protection.⁵⁵⁸

489) Tā Eddie added:

Warfare was a course of last recourse if mana could be restored to the aggrieved party (utu) without further diminution of the mana of the offenders.⁵⁵⁹

Ringa Kaha

490) Ringa kaha, on the other hand, was about maintaining rights over conquered land through ringa kaha - the strength of arm – which is the ability of the victors to defend the land against challenges. Professor Mead referred to the terms take raupatu, take ringa kaha and take pakihwi kaha as essentially being the same thing – conquest by military action that displaced the people and their leaders who occupied the estate, extinguishing their rights of occupation and use of the land, and established a new group of occupiers.⁵⁶⁰

491) Tā Eddie Durie stated of ringa kaha:

‘Raupatu’ or ‘ringakaha,’ both used by settlers as equivalents for conquest, was not a source of land rights by itself. Ringakaha, in reference to land rights, sometimes described a defensive position, or the ability to maintain land holdings. Warfare was rarely pursued with the overt purpose of acquiring land, but changes in hapu structure and allegiances and thus the acquisition of a wider influence by dominant groups, was a common consequence of warfare.⁵⁶¹

⁵⁵⁷ Above.

⁵⁵⁸ Above, at 45.

⁵⁵⁹ Above, at 45.

⁵⁶⁰ Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2016) at 306.

⁵⁶¹ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 41-42.

492) Former Māori Land Court Judge, Norman Smith, also referred to ringa kaha:

As the right to land taken by conquest rested upon the conquering tribe occupying the land to the exclusion of the former owners, it followed that the rights of the conquerors would enure only for the length of time their desire to hold the land could be sustained by their power to resist onslaughts from the defeated or other tribes [ringa kaha].⁵⁶²

493) Take raupatu and ringa kaha then as traditional tikanga concepts were about conquest by military action to protecting land and resources and mana, maintaining balance, and the restoration of relationships.

Ahi Kā Critical

494) However, victory in a military battle through take raupatu was not enough. More was required including ahi kā occupation. Judge Norman Smith provided in his analysis of take raupatu the important requirement of ahi kā when he opined:

A title by conquest usually became complete upon the material subjection and driving off of the conquered tribe. Mere raids, even though a raiding party were successful, were insufficient to support a title by conquest. As in the case of the other *takes* to land, so in the case of a take-raupatu, the conquest must be shown to have been followed up by occupation of the conquered land to the exclusion of the vanquished. Often in the course of battles, chiefs would bespeak certain portions for themselves or for their family.⁵⁶³

495) Raymond Firth added:

For a title to land obtained by conquest or discovery to be valid, occupation had to be effective. If one tribe were defeated by another and their lands occupied, the original owners, if thoroughly dispossessed or enslaved, had no further claim to the land, unless in future years they could win back their territory again by intermarriage or force of arms. But invasion and driving out the inhabitants was not sufficient to establish a title if the land were not permanently occupied.⁵⁶⁴

496) Professor Mead concurred that take raupatu was not a source of title if it was not followed up by occupation.⁵⁶⁵ Ngāti Mutunga anthropologist Te Rangi Hiroa also agreed when he stated:

The title (take) to the ownership of land was based on two main claims: right to inheritance through ancestors (take tupuna) and right of inheritance through conquest (take raupatu). The right of prior discovery became historically merged

⁵⁶² Smith, N, 'Conquest or Take Rau-Patu,' in Smith, N, *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 101-102.

⁵⁶³ Above, at 101.

⁵⁶⁴ Firth, R, *Economics of the New Zealand Maori* (A.R Shearer, Government Printer, 1972) at 383-384.

⁵⁶⁵ Above.

in ancestral right. Conquest (raupatu) alone did not confer rights of ownership unless it was followed by occupation.⁵⁶⁶

497) Professor Mead however, conceded:

It was not necessary for the conquering group to establish fires on all parts of the new land. The new group could exert their mana over a large area of land from one part of the estate. Challenges to their mana could occur later and successful challenges would lead eventually to the break-up of the estate.⁵⁶⁷

498) Once a raupatu battle of conquest had been affected under tikanga, what happened to the defeated tribal groups?

Plight of Conquered – Taurekareka?

499) Judge Norman Smith referred to the plight of some conquered groups if they survived battles when he noted:

In the case of an absolute conquest, many of the survivors of the vanquished tribe would be treated by the conquerors as slaves. They would become taurekareka and might be permitted to occupy portions of their former lands but only as serfs of their task-masters, and their occupancy would be at the will of their masters, or for just as long as they might be allowed to live there. ... If slaves escaped, or were released from captivity they might, of course, return and resume occupation of their unconquered lands. Sometimes, at the request or invitation of the resident owners, the erstwhile slaves would be restored to their former rights, but still the taint of slavery was not always wholly removed from them.⁵⁶⁸

500) Professor Henare of Nga Puhi similarly recorded.

Survivors might be allowed to remain on their lands, sometimes group members might be sent a distance away in advance or in anticipation, to live with relatives for a period to ensure the survival of the blood line.

Other options included the vanquished remaining on their ancestral lands as vassals of the conquerors or moving elsewhere to live under the sufferance of another tribe as refugees. It was also possible for defeated peoples to maintain a presence on the land, and/or to rise up against the victors, regain their lands and

⁵⁶⁶ Te Rangi Hiroa, *The Coming of the Maori*, (Whitcombe and Tombs, 1949) at 381.

⁵⁶⁷ Mead, H, *Tikanga Maori: Living by Maori Values* (Huia, Wellington, 2016) at 280.

⁵⁶⁸ Smith, N, 'Conquest or Take Rau-Patu,' in Smith, N, *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 101.

have their mana restored, if they could muster the military strength themselves or to co-opt allies to support them.⁵⁶⁹

- 501) The plight of the conquered tribes being vassals or refugees fleeing elsewhere for safety undermined the mana of these groups which had a traumatic and often inter-generational impact as is the case in the present hearing.

Mana of Conquered Tribes

- 502) However, could conquered groups maintain and regain mana whenua over conquered lands and resources including marine and coastal areas? Renown Treaty of Waitangi historian Dr Angela Ballara furnished an interesting analysis of take raupatu in a section entitled ‘rights of defeated but still occupant peoples’ when she recorded:

According to Māori custom when one tribe conquered another tribe, the conquered people have a right only to the portion of their land that they occupied from the time of the conquest to the present.’ This remark by Paraone Te Awa demonstrates well the initial status after conquest of the reduced rights to land of most of the conquered early tangata whenua people of the northern South Island. In Māori customary land tenure, however much tenure was ‘normalized’ after conquest, there remained an essential difference between conquered and ancestral land ... Rights to conquered land were held on a different basis from those of ancestral land, and the descent groups holding the land, whether they were of the conquering or the conquered party, were of a different status when compared to holders of ancestral mana on lands never occupied, or compared to client peoples who might be refugees from conflicts elsewhere. The difference would persist until intermarriage between conqueror and conquered had made their children and grandchildren the descendants of both groups, able to claim mana through inherited ancestral rights rather than conquest.⁵⁷⁰

- 503) Dr Ballara then asked a very important question that is relevant for this hearing:

... to what extent could a defeated people live on their own land with mana after having lost a battle or a series of battles, and when did these defeats become a mana-removing conquest? One answer is that it was necessary to obtain satisfaction (utu) for the killing of people of mana and for defeats; in this way mana was restored; it was as if the defeat had not taken place. Matene Te Whiwhi gave an account of the early campaigns in the Kāpiti coast in 1872, contending that Ngāti Apa, Muaūpoko and Rangitane had never sought satisfaction for

⁵⁶⁹ Henare, M, Petrie, H and Puckey, A, ‘He Whenua Rangatira’ Northern Tribal Landscape Overview,’ (Hokianga, Whangaroa, Bay of Islands, Whangarei, Mahurangi and Gulf Islands)(Crown Forestry Rental Trust, Mira Szaszy Center for Maori and Economic Development, University of Auckland, 2009) at 341.

⁵⁷⁰ Ballara, A, *Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island 1820-1860: An Overview Report on Te Tau Ihu* (Wai 785, Waitangi Tribunal, Wellington, 2001) at 52.

various defeats (a contention hotly disputed in this case by these peoples, who gave many instances of utu taken). What is the important here as a demonstration of the general rule is his conclusion: 'The fact of the Tribes not having taken satisfaction shows they were beaten and had no mana.'⁵⁷¹

504) Dr Ballara added:

Another answer was that the defeated groups could retain their mana in various ways without taking utu: these ways included the ceremonial return of their mana and land by their conquerors perhaps through the making of peace in such a way that the groups became kin through a 'rangatira' marriage alliance (as opposed to the forcible taking of women as slaves and concubines) such as that made by Te Rangihacata with Te Pikinga of the northern Ngāti Apa. Other ways of remaining on the land with mana occurred if their conquerors passed on after battle, making no claim, leaving people alive in possession of their lands, or if they treated their captives as guests rather than slaves. Tamihana Te Rauparaha made all these claims on behalf of various groups conquered, or at least by his father north of Cook Strait about 1819 or 1820:

Ngāti Apa, Muaūpoko and Ngāti Rangitane were 'mate i a Ngāti Toa [defeated by Ngāti Toa] and Ngapuhi. There were no slaves – they were patu'd [killed or wounded] and waiho [left] – some were saved and left alive on their own place ... It is true Te Rauparaha left Ngāti Apa – Muaūpoko – Rangitane quietly in possession of their lands when he returned [north to Kawhia] – don't know that the tribes ran away to the bush: did not hear it through my father – they were left with 'mana' – those who were taken away went as 'manuhiri' [guests] and came back and went to their own lands at Moutoa.⁵⁷²

505) Ballara continued:

Most Ngāti Raukawa witnesses agreed that Ngāti Apa were living on their lands with mana, and even Muaūpoko, so heavily attacked over a number of years by different Ngāti Toa forces, were considered to be living under the protection of Te Whatanui at Horowhenua, but with rights to land.

Defeated peoples then, could retain rights to their former lands, or at least to the parts of them they occupied, if this was permitted by their conquerors, but always the question was raised: had they been conquered and were they slaves without mana, or were they temporarily subordinated, but living on the land with mana? The question was fiercely debated throughout the Himatangi case (Himatangi was a block north of Ōtaki between the Rangitīkei and Manawatū Rivers), and the answers often depended very much on the contemporary point of view and

⁵⁷¹ Above, at 75.

⁵⁷² Above, at 76.

interests of the witnesses responding to 30 to 40 years after these events, in cases in which large material interests were at stake.⁵⁷³

506) Dr Ballara then referred to peace marriages when she continued:

But three generations of recovery from events of the 1820s and 1830s [in Kapiti] meant that most of the descendants of formerly conquered people felt, in the 1890s, that their mana had been restored through long occupation [ahi kā roa], whatever may have been the original circumstances of that occupation. For three generations they had lived with the original conquerors; they had intermarried with them; they had built communities in which some individuals could not easily select one descent group as their; through intermarriage their identity had become 'taha rua' or multiple. Yet when land was sold or when land rights were debated in the Native Land Court, the old distinctions tended to be revived: 'You did not pay me any money because you said I was a slave,' said Meihana Kereopa of Ngāti Apa/Kuia/Rangitāne in response to cross examination. But he also said that: 'After the conquest we were allowed to remain.'⁵⁷⁴

507) The anthropologist Raymond Firth referred to the rights of conquered groups when he asserted:

Again, even if the land were settled for a time by the invaders but the dispossessed tribe still managed to maintain itself in freedom within its own borders, scattered in the forest or in hiding in the mountains, their title to the whole of the land still held good. '*I ka tonu taku ahi i runga i toku whenua* – my fire has ever been kept alight upon my land' was the saying, indicating that their rights had not been extinguished. The proof of this continuity was sufficient to establish ownership in later years.⁵⁷⁵

508) The Ngāti Mutunga anthropologist Te Rangi Hiroa agreed when he articulated:

If the invading party retired, the survivors of the defeated tribe could return and still own their land. Occupation to establish a title had to be continuous, as idiomatically expressed by the term ahi ka or lit fire. So long as a people occupied the land, they kept the fires going to cook their food. Conversely, the absence of fires showed that the land had been vacated. Even if a conquering tribe did not leave a holding party, they might claim land subsequently if it remained unoccupied.⁵⁷⁶

509) Te Rangi Hiroa continued:

⁵⁷³ Above, at 76-77.

⁵⁷⁴ Above, at 77.

⁵⁷⁵ Firth, R, *Economics of the New Zealand Maori* (A.R Shearer, Government Printer, 1972) at 383-384.

⁵⁷⁶ Above, at 383-384.

However, if some of the conquered people evaded the invaders and remained on the land to keep their fires a light, the right of ownership of the defeated people was not extinguished. ... When conquered territory was occupied for some generations, the title by conquest became a historical event and the functioning title became that of ancestral inheritance (take tupuna). A third and rarer title, termed *tuku* (to cede), included lands which were ceded in compliance with some custom, such as that of paying a raiding party (*taua wahine*) as recompense for the infidelity of a tribal woman to her husband. However, no matter what the title, the length of tenure of the land depended on the military strength of the people to hold it [*ringa kaha*].⁵⁷⁷

510) Judge Norman Smith also acknowledged:

It followed also, that if a portion of the conquered tribe could so elude the attacking tribe by evasions in the fastnesses of the bush, or by other means, and thereby continue to live and roam in their tribal territory, they must say successfully that they had not been wholly subjugated, and that they had retained a portion of their rights by keeping their fires burning on the land.⁵⁷⁸

511) Under the take of *raupatu* and *ringa kaha* then, conquered groups such as *Muaūpoko*, *Ngāti Apa* and *Rangitāne* could and did retain some of their *mana* over their people, *whenua* and marine and coastal areas even after the Treaty of Waitangi in 1840.

512) The next section will briefly explore the notion of take *raupatu* and legitimacy to support our view that take *raupatu* and *ringa kaha* were less prominent for determining *mana whenua* interest than some claimed in the Native Land Court hearings, and in contemporary times.

Take Raupatu and Legitimacy

513) Dr Angela Ballara provided an interesting analysis of take *raupatu* based on legitimacy when she asserted:

Māori traditions and history are full of conquests ... conquest was a legitimate tool of [Māori] political relations between its independent groups, and a legitimate means of exchange of land. Warfare between descent groups was a common response to offences, whether the offence was committed by an individual member or a group. As Paramena Haereiti said: 'According to Māori custom, although only one person commits the offence, all his tribe are attacked.' There were many different kinds of wars Although there always had to be a *take* (in this case take means a legitimate cause) if the war was to be considered *tika*

⁵⁷⁷ Te Rangi Hiroa, *The Coming of the Maori*, (Whitcombe and Tombs, 1949) at 381.

⁵⁷⁸ Smith, N, 'Conquest or Take Rau-Patu,' in Smith, N, *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 101-102.

(proper) rather than a kōhuru or murder); other wars which developed into land conquests began as ‘take take mate’ (wars undertaken because of deaths) and were intended to restore the essential mana of the group after it had been damaged following the deaths of persons of chiefly rank. One of the *take* of the great invasions of the late 1820s was to seek utu for the deaths of Te Rauparaha’s children at Papaitonga.⁵⁷⁹

514) Professor Manuka Henare of Nga Puhi also discussed take tupuna, take raupatu and legitimacy when he affirmed:

Claims based on ancestry were the strongest, but a claim on the basis of raupatu, or ‘conquest,’ was legitimate, as long as it had been followed up by a continuous occupation.⁵⁸⁰

515) Rangitāne and Ngāti Raukawa rangatira and former Chief Judge of the Māori Land Court, Sir Eddie Durie, provided his thoughtful analysis of take raupatu which also included legitimacy when he concluded:

The traditional systems of Oceania, including that of Maori, regarded the use of force for the acquisition of the territory of another as improper unless backed by rights claimed by some legitimate principle or cause (take). ‘Raupatu’ or ‘ringakaha,’ both used by settlers as equivalents for conquest, was not a source of land rights by itself. ... Warfare was rarely pursued with the overt purpose of acquiring land, but changes in hapu structure and allegiances and thus the acquisition of a wider influence by dominant groups, was a common consequence of warfare.⁵⁸¹

516) Interestingly, as noted earlier, Tā Eddie also referred to five specific types of take raupatu with one type not even involving war or force:

At least five types of ‘conquest’ [raupatu] are described by Native Land Court witnesses:

- by defeating opponents in battle;
- by protecting another hapu, or throwing a cloak over them to warn off potential invaders;
- by causing a hapu to vacate a resource by threatening war;
- by forcing a marriage upon a hapu;
- by forcing a marriage alliance in return for a promise of protection.⁵⁸²

⁵⁷⁹ Ballara, A, *Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island 1820-1860: An Overview Report on Te Tau Ihu* (Wai 785, Waitangi Tribunal, Wellington, 2001) at 74.

⁵⁸⁰ Henare, M, Petrie, H and Puckey, A, ‘He Whenua Rangatira’ Northern Tribal Landscape Overview,’ (Hokianga, Whangaroa, Bay of Islands, Whangarei, Mahurangi and Gulf Islands)(Crown Forestry Rental Trust, Mira Szaszy Center for Maori and Economic Development, University of Auckland, 2009) at 341.

⁵⁸¹ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 41-42.

⁵⁸² Above, at 45.

517) Tā Eddie added:

Warfare was a course of last recourse if mana could be restored to the aggrieved party (utu) without further diminution of the mana of the offenders.⁵⁸³

518) As Ballara and others noted, there were many different kinds of wars of conquest but there had to be some *take* – legitimate cause – for the war to be tika such as the treacherous killing of rangatira and whānau as utu for diminishing the mana of the whanau and to restore the imbalance.

519) Numerous shared ethics and ‘rules’ also existed under tikanga Māori for warfare some of which Tā Eddie Durie listed:

... that fighting should end at sunset, that fighting should not be commenced during a karanga, and that fighting should cease for discussions. Arrangements included decisions that the battle would be decided by the first to be slain, that some would drop out to provide parity of numbers, or that the issue would be decided by personal or limited combat amongst selected toa. There were also informal constraints on killing such persons of rank as would lead to an escalation of hostilities by inviting retribution from other kin groups.⁵⁸⁴

520) The question for our report then is did these tikanga concepts of raupatu and ringa kaha change in substance and application after 1840?

Take Raupatu Distorted in Native Land Court

521) As articulated above, the individualistic, economic and assimilationist assumptions in the purposes, practices and processes of the Native Land Court had profound impacts on tikanga generally let alone on these concepts of raupatu and ringa kaha.

522) In this respect, Professor Mead asserted how tikanga Māori was distorted in the Native Land Court when he noted:

The basis of a claim before the Native Land Court was to argue a take raupatu, that is, to claim conquest through the blade of a patu. That means of taking land overrode all other tikanga and introduced a new political order into the region.⁵⁸⁵

523) Judge Norman Smith of the Māori Land Court referred to the adversarial nature of Court processes for making claims based on conquest when he stated:

⁵⁸³ Above, at 45.

⁵⁸⁴ Above, at 44.

⁵⁸⁵ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 280.

An allegation that papatipu [customary land] has been acquired by conquest invariably raises questions of degree of the relative conquest. Whether there had been a complete conquest, and whether it had been followed up in such a manner as to justify a finding in favour of persons who allege it, are questions of fact which, in addition to occupation, the Court has to determine according to the evidence and the particular circumstances.⁵⁸⁶

- 524) While referring to the Musket Wars, Tā Eddie Durie expressed how they impacted in the Native Land Court hearings including on distorting the tikanga concept take raupatu and implicitly ringa kaha. Ta Eddie stated:

There was however, a marked change in the nature and extent of war in the early 19th century which had a marked impact on custom, social organisation and boundary formation. It also had another unexpected consequence. The Native Land Court perception of conquest as a source of title influenced and distorted the popular understanding of custom and created long term enmities and anomalies.⁵⁸⁷

- 525) Historian Ron Crosby also referred to the ‘deep’ and enduring legacy of the Musket Wars which included:

The fluid or disputed land boundaries of the various iwi were sometimes abused by Crown agents ... when they made acquisitions of land under the pre-emptive Crown right to buy Māori land in the years after the Treaty. ... If one iwi would not agree to sell for a cheap price the Crown agents would threaten to buy land from the other iwi which claimed ownership rights.⁵⁸⁸

- 526) Similar strategies were employed by Crown agents in the Native Land Court of favouring willing Māori sellers over non-sellers which impacted on tikanga.

- 527) Crosby referred to another contemporary impact of the Musket Wars being the process and division of compensation for Treaty breaches which have implicit parallels of seeking recognition of interests in the Native Land Court. Crosby stated:

Most important and complex, however, are the effects of the Musket Wars on the process of, and division of, compensation to be made to or divided among iwi for the breaches of the Treaty of Waitangi, some 150 years after the Treaty and the conclusion of the Musket Wars. In dividing compensation settlements Māoridom faces the task of dealing directly with the results of the Musket Wars as though they had ended only yesterday.⁵⁸⁹

⁵⁸⁶ Smith, N, ‘Conquest or Take Rau-Patu,’ in Smith, N, *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 102.

⁵⁸⁷ Durie, E, ‘Custom Law,’ (Draft Paper for the Law Commission, January 1994) at 42.

⁵⁸⁸ Crosby, R, *The Musket Wars: A History of Inter-Iwi Conflict 1806-1845*, (Reed Books, Auckland, 1999) at 22.

⁵⁸⁹ Above, at 22.

528) In reference to the turbulent changes caused by the Musket Wars period, Tā Eddie concluded:

The character of warfare appears to have changed dramatically towards the end of the 1800s through pressure on resources in more densely populated areas. It was most marked by larger migrations [heke], usually north to south, and an increase in non-kin warfare. Domestic warfare changed to regional warfare.

... Shortly after, musket warfare spread also, again, generally north to south, causing considerable alteration through indiscriminate and more extensive slayings. This taxed the custom of utu that compelled the pursuit of an equivalence in rejoinder. Musket warfare was not a new kind of war but introduced a new technology which in turn had consequences with which custom [tikanga] could not cope.

Although the initial musket warfare comprised raids only, it led to a spiral of unprecedented dislocation. Hapu or hapu combinations shifted to less densely populated areas away from military pressure or relocated for better access to muskets at places where Europeans had settled or were likely to reside. These movements were in themselves a further cause of friction.⁵⁹⁰

529) Tā Eddie Durie then specifically stated of ringa kaha:

The traditional systems of Oceania, including that of Māori, regarded the use of force for the acquisition of the territory of another as improper unless backed by rights claimed by some legitimate principle or cause (take).

530) ‘Raupatu’ or ‘ringakaha,’ both used by settlers as equivalents for conquest, was not a source of land rights by itself. Ringakaha, in reference to land rights, sometimes described a defensive position, or the ability to maintain land holdings. Warfare was rarely pursued with the overt purpose of acquiring land, but changes in hapū structure and allegiances and thus the acquisition of a wider influence by dominant groups, was a common consequence of warfare.⁵⁹¹

531) Tā Eddie then stated explicitly how the tikanga of take raupatu was distorted in the Native Land Court when he concluded:

Generally, the Claims courts and the Native Land Court did not distinguish the warfare of the pre-contact and the contact periods. Early officials were more familiar with the warfare of 1810-1840 which they perceived as having been traditional.

From 1841 the Land Claims Court declared conquest as a primary source of title. This finding was repeated in the Compensation Court and later in the Native Land

⁵⁹⁰ Durie, E, ‘Custom Law,’ (Draft Paper for the Law Commission, January 1994) at 47.

⁵⁹¹ Above, at 41-42.

Court. It is apparent that many Māori witnesses thereafter shaped their testimony accordingly, most especially in the 1870's when greater use was made of lawyers, agents and native representatives. Māori testimony of the 1860s appears more reliable though that too many have been influenced by the court's weighting to conquest.⁵⁹²

532) Tā Eddie also discussed how conquest was highly contested in the Native Land Court when he opined:

The model of conquest with the total subjugation, expulsion or annihilation of the locals was advanced by some witnesses but was rarely claimed and was usually hotly contested when an opposing party was present. Nor was it always sustainable on the evidence. The more regular model, corroborated by whakapapa, was that of a series of on-going battles with inconclusive ascendancy, or a conclusive ascendancy that focused on a particular rangatira coupled with fusion, joinder, co-existence or coalition.⁵⁹³

533) Dr Angela Ballara also commented on a specific hearing that highlighted the contentious and challenging adversarial processes of the Native Land Court that inevitably distorted the tikanga of take raupatu. To this end, Dr Ballara briefly commenting on the 1868 Himatangi Block hearing in the Kāpiti Coast when she noted:

Most Ngāti Raukawa witnesses agreed that Ngāti Apa were living on their lands with mana, and even Muaūpoko, so heavily attacked over a number of years by different Ngāti Toa forces, were considered to be living under the protection of Te Whānau at Horowhenua, but with rights to land.

Defeated peoples then, could retain rights to their former lands, or at least to the parts of them they occupied, if this was permitted by their conquerors, but always the question was raised: had they been conquered and were they slaves without mana, or were they temporarily subordinated, but living on the land with mana?

The question was fiercely debated throughout the Himatangi case (Himatangi was a block north of Ōtaki between the Rangitīkei and Manawatū Rivers), and the answers often depended very much on the contemporary point of view and interests of the witnesses responding to 30 to 40 years after these events, in cases in which large material interests were at stake.⁵⁹⁴

⁵⁹² Above, at 48-49.

⁵⁹³ Above, at 50.

⁵⁹⁴ Ballara, A, *Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island 1820-1860: An Overview Report on Te Tau Ihu* (Wai 785, Waitangi Tribunal, Wellington, 2001) at 76-77. For a thorough analysis of the Himatangi Hearings, see Belgrave, M, 'Unveiling Historical Narratives and Customary Disputes: The Himatangi Hearings,' (MACA Expert Report, April 2024).

534) Tā Eddie discussed moreover, the Kāpiti Coast heke and take raupatu during this Musket Wars period when he noted:

Migration to escape warfare has been overly simplified in some cases as having led to distant conquests and mass slaughter. The migrators intentions were in fact often peaceful and were sometimes preceded by an arranged marriage to justify subsequent residence. The ‘invasion’ of Te Rauparaha appears to have been in that category.

535) Warfare often developed later, despite marriages, between migrators and tangata whenua, and between section of the migrating group, usually over issues of authority and resource demarcations. Local people were not necessarily exterminated or forced out. Where the migrant groups comprised several hapu, and the tangata whenua remained, pockets of one descent group in an area mainly occupied by another became common, in addition to the division of territory between them.⁵⁹⁵

536) What this evidence highlights are that the tikanga concepts of ahi kā, take raupatu, ringa kaha, tuku, and to a lesser extent tatau pounamu, changed and adapted with the times and societal pressures after 1840 which was inevitable. However, these tikanga concepts were also significantly distorted in the highly adversarial and hotly contested processes of the Native Land Court. It appears that after 1871, take raupatu was elevated as a primary source of title, and, it appears, ‘conquest’ was Europeanised to being like the European Napoleonic Wars of distant conquests, subjugation, expulsion, annihilation, mass slaughter and ‘winner takes all.’

537) One poignant example of the distortion of tikanga and the inadequate processes in the Native Land Court was the Horowhenua hearing in 1873. Ani Mikaere recorded the Ngāti Raukawa ki te Tonga experience of the Horowhenua hearing in the Native Land Court when she noted:

Following the death of Te Whatanui Tūtaki (Te Whatanui’s son) in 1869, Muaūpoko began reasserting their claim to Horowhenua. After several years of escalating disruption and violence, and a lengthy but ultimately unsuccessful campaign to have the matter settled by arbitration, the case went before the Native Land Court in 1873.

Ngāti Pareraukawa anticipated that the court would acknowledge the mana of Te Whatanui over the entire 52,000 acre Horowhenua block: affirming his promise to Taueki by issuing a certificate of title to Muaūpoko over the 20,000 acre sanctuary. That he had established for their protection; and confirming Ngāti Pareraukawa title to the remaining 32,000 acres.⁵⁹⁶

⁵⁹⁵ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 50.

⁵⁹⁶ Brief of Evidence of Ani Mikaere, dated 13 November 2023 at para 55 [CB Tab 32 at 201.00116]; .

538) Ms Mikaere continued:

In a decision that stunned Ngāti Pareraukawa and contemporary observers alike, Judges Rogan and Smith awarded almost all of the 52,000 acre block to Muaūpoko. The court found that while they had been glad to avail themselves of the protection of a powerful Ngatiraukawa chief against Te Rauparaha” and had “looked up to [Te Whatanui] as their chief”, Muaūpoko had never surrendered their lands to him.” Rather, Te Whatanui had acquired “by gift” from Muaūpoko some land at Raumatangi and this gift was recognised by the grant of just 100 acres to his representatives.

Unsurprisingly, the judgment did nothing to resolve conflict between Ngāti Pareraukawa and Muaūpoko, which threatened to spiral out of control in the following months. According to Iwikatea Nicholson:

Things became very tense, with the successful claimants preparing to forcibly remove Te Whatanui’s people if necessary. Te Whatanui’s people, with many sympathisers prepared to vigorously resist. Shots were actually fired and eventually the aged chief Matene Te Whiwhi came out and expressed his concern. ... He said that he would not like the young people of Ngāti Raukawa and Ngāti Toa to trample the words of their elder lest they be reduced to the words of a slave: “Koutou aku tamariki o Ngāti Raukawa, otira o Ngāti Toa, whakarongo mai. Kaore au i pirangi kia takatakahi i nga kupu o to koutou koroua, kia taurekarekatia”. Matene’s concern demonstrates that even 50 years later, an original promise and commitments that followed should not be forgotten.⁵⁹⁷

539) Ms Mikaere added:

... While warfare was averted, however, things were far from settled and eventually, Native Minister Donald McLean was called in to try and resolve matters and broker agreements to resolve issues. This resulted in a long period of disputes between all sides. While our tupuna were unavoidably being drawn into disputes about the implementation of agreements brokered by McLean in 1874, we have never been under any illusion that it is the Native Land Court finding of 1873 that lies at the root of the gross injustices that we have suffered.

The Horowhenua judgment represented a complete denial of Te Rauparaha’s conquest of the area, and of Te Whatanui’s mana – which was all that had stood between Muaūpoko and their certain extermination at the hands of Te Rauparaha. The judgment is one of the key grievances by Ngāti Pareraukawa in its claim to the Waitangi Tribunal (Wai 113).⁵⁹⁸

540) Ms Mikaere concluded:

⁵⁹⁷ Above Mikaere at para 58-59. See also Nicholson, I, “Maori customs and traditional practices some examples: Hohou rongo, Takawaenga,” in *Whakatupu Mātauranga* (Vol. 1, 2016) at 77.

⁵⁹⁸ Above Mikaere at para 61-62.

... In Ngāti Pareraukawa's experience, the Court processes brought out the worst in people, pitting iwi against iwi, hapu against hapu, whanau against whanau and individuals against their whanaunga.⁵⁹⁹ In so doing, it destroyed relationships that had been established and regulated within the framework of tikanga. Te Whatanui's promise to Muaūpoko had resulted in four decades of stability before the operation of the Native Land Court in the Manawatu persuaded Kemp that it could be nullified, fifty years of history rewritten in the process.⁶⁰⁰

541) In such a foreign, hostile, adversarial, culturally unsafe and destructive legal forum, the adaptation, evolution and even distortion of tikanga concepts and institutions were inevitable.

542) In conclusion, tikanga Māori was guaranteed explicitly and implicitly in the Treaty of Waitangi, it was recognised after the Treaty for many years, and it was acknowledged as an effective legal system, inter alia, for maintaining law and order, the dispensation of justice, for social control, and for regulating commerce and collective tribal proprietary interests and responsibilities in the whenua and rohe moana.

543) But tikanga Māori inevitably changed after 1840 following the British assumption of sovereignty, the imposition of British common law and hegemonic policies such as assimilation.

544) In a similar manner, the key tikanga concepts of take whenua, take raupatu, take ringa kaha, take tuku whenua, take ahi ka, were inevitably evolving and adapting in the new world order with the new technology, ideologies, weaponry and state policies and institutions such as the Native Land Court.

545) The Native Land Court however, had a crippling impact on the health and well-being of Māori communities and on the efficacy of tikanga Māori as a legal system to meet its pernicious purposes of individualising land titles for ease of alienation and by facilitating assimilation. The Native Land Court then aided and abetted in evolving and adapting tikanga by deliberately distorting the tikanga concepts of take raupatu, take ringa kaha, take tuku whenua, and take ahi kā. The Land Court especially distorted take raupatu by Europeanising it as conquest by total subjugation, expulsion, and annihilation, and by overemphasising take raupatu as the primary source of land rights on its own without needing any legitimacy through take tupuna and take ahi kā.

⁵⁹⁹ As Hugh Kawharu famously observed: "The ... operation of the Court makes grim reading. Fraud, cupidity, hypocrisy, the list of human frailty and its attendant cost is endless." In Foreword to William, D, *Te Kooti Tango Whenua: The Native Land Court 1864-1909*, (Huia Publishers, Wellington, 1999) at xvi.

⁶⁰⁰ Above, Mikaere at para 63.

Question 6 – At 1840, what applicant group or groups used and occupied the application area, or any part of it, on a sole or shared basis, in accordance with tikanga?

546) Given the traumatic adversarial and deeply divisive experiences that Māori groups were subjected to in the Native Land Court, is it any wonder they experience extreme difficulties in ascertaining proprietary interests with precise boundaries in the whenua and rohe moana continue today?

547) This section will attempt to answer which applicant groups used and occupied the application areas on a sole or shared basis. From the outset however, it is important to acknowledge the complex layered interests of whānau, hapū, iwi and at least one group confederation over the rohe moana that were at play historically and today when trying to analyse mana whenua and mana moana proprietary interests under tikanga Māori.

548) Accordingly, we will start here by analysing the notion of resource rights and responsibilities with property boundaries, followed by a discussion of whenua tautohetohe – debateable lands.

Resource Rights and Responsibilities with Precise Boundaries?

549) Before the Treaty of Waitangi, there existed a complex and pervasive network of customary rights and interests based on tikanga Māori. But unlike British common law, these customary rights did not have tidy straight lines and clean territorial boundaries. Hapu and iwi were not like modern day nation states with clear territorial boundaries, passports for citizens, and permanent borders, fences and divisions between them. Notions of land ownership as individual freehold title was also foreign to Māori. Control, access and management of resources was essentially a community affair.

550) The control, governance and management (rangatiratanga) of a group's rohe (mana whenua) was expressed through the distribution of finely differentiated rights of access to resources rather than through "ownership" under English law. Through its rangatira, the kin group exercised a right and responsibility of trusteeship or kaitiakitanga.

551) And rights and responsibilities in land (whenua) and other resources such as the common marine coastal area (rohe moana) were sourced in a number of ways including ancestral inheritance – take tupuna; discovery and naming – take kitea and take taunaha; by victory in battle – take raupatu – which was commonly followed by marriage into the defeated group – takawaenga moenga rangatira; and inter-group transfers – take tuku whenua.

552) But all *take* had to be consummated by the regular exercise of rights and responsibilities held i.e. occupation or take ahi kā. All *take* had associated rights and

responsibilities based on relationships including with kin groups and the land and resources themselves – whakapapa, take tupuna, take ahi kā, take tuku whenua and even take raupatu.

553) The rights and responsibilities to resources then, were held against the collective kin groups – whānau, hapū, iwi, confederations - based on community consent granted in accordance with tikanga Māori.

554) Major difficulties arise today when people – Māori and Pākehā - try to translate this customary tikanga network of rights and responsibilities, as well as connections – mana whenua and mana moana - into an environment of ‘straight line’ boundaries as the Waitangi Tribunal acknowledged in the 2004 *Turanga Tangata Report*:

Resource rights were complex, convoluted, and overlapping. They almost never phased cleanly from hapū to hapū as one panned across the customary landscape. Instead, most resource complexes had primary, secondary, and tertiary rights holders from different hapū communities, all with individual or whānau 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.⁶⁰¹

555) The Tribunal continued:

The complexity of rights is both compounded and distorted by over 100 years of statutorily mandated tampering by the Native Land Court. Also, people were mobile. Following the rules of whakapapa, an individual could move between groups, using different sets of resources. When marriage took place between members of different hapu, one person would move to live with the other person’s kin. While the children of such a union normally remain living with the kin-group where they were brought up, it was no uncommon for them to shift for a time to the rohe of the other parent, or grand-parent, renewing whakapapa connections and gaining access to a different resource complex.⁶⁰²

556) The Tribunal then concluded:

Thus, the idea of a permanent, individual, separate, and freely exercisable rights to resources, without obligation or even reference to the kin group, was completely un-Māori. In a society such as traditional Māori society and in an environment such as ours, that simply could not have worked.⁶⁰³

557) Sir Edward Durie provided an additional interesting commentary on the nature and complexity of boundaries and networks in relation to land and tikanga in a paper he prepared for the Law Commission in 1994 where he stated:

In Māori law, land rights pertained not to blocks but resources, the individual right being that of access and user subject to the interests of the hapū of the territory.

⁶⁰¹ Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 18.

⁶⁰² Above, at 18.

⁶⁰³ Above, at 19.

Resource ‘boundaries’ were described by reference to the location and size of the resource, use rights by the places of habitual exploitation and territoriality by the extent of which territoriality was claimed.

To the extent that political or hapū boundaries existed, they should be distinguished from resource boundaries, resource boundaries being capable of definition by physical markers, political boundaries varying according to the shifting structures and allegiances of hapū.

Resource boundaries were conceived of lineally, and radially with rights or authority radiating from a central heart to uncertain fringes.

The authority of a hapū in an area was not necessarily exclusive. Hapū claimed the resources of territories exclusively or conjointly with others. Many resources were shared by several hapū. Not all hapū areas were contiguous but were intersected by the use rights of others.

It was also common that from a variety of historical causes discrete and autonomous communities of one descent group resided in a district generally populated by another.⁶⁰⁴

558) Commenting specifically on the turbulent Musket Wars period, Tā Eddie Durie asserted:

There was, however, a marked change in the nature and extent of war in the early 19th century which had a marked impact on custom, social organisation and boundary formation.⁶⁰⁵

559) The next section will briefly review the Kāpiti Coast claimant evidence on the assumed group whenua and rohe moana territories including alleged tribal boundaries.

Kurahaupō Iwi Whenua and Rohe Moana

Ngāti Tamarangi

560) For a Ngāti Tamarangi perspective on their rohe boundaries, Bill Taueki stated:

Ngāti Tamarangi’s core lands are at Horowhenua. We have been here for many, many generations. We were here well before 1840. We have always been here since. My parents and grandparents lived here. All my life I have lived here. ... While we may have interests elsewhere, I want my application and evidence to focus on Ngāti Tamarangi’s core lands and core takutai moana at Hokio Beach.⁶⁰⁶

⁶⁰⁴ Durie, E, ‘Custom Law,’ (Draft Paper for the Law Commission, January 1994) at 84-85.

⁶⁰⁵ Above, Durie, at 42.

⁶⁰⁶ Above, Taueki 1, at 4.

561) Mr Taueki continued:

Ngāti Tamarangi's core lands, and its unique catchment, are at Horowhenua, from the maunga Tararua to the lake to the sea. The mountain, the lake and the sea are all connected ... We have been here for many, many generations, we were here before 1840. We have always been here since.⁶⁰⁷

Muaūpoko

562) For a Muaūpoko worldview on their respective whenua and rohe moana, the witness Robert Warrington asserted:

I would define our shared rohe moana as stretching from Turakirae (Sinclair Head) in the south to the northern side of the Rangitikei River mouth. Our more exclusive rohe moana stretches from Kukutauaki block (just south of Pekapeka) in the south to the northern side of the Manawatu River mouth in the North. This includes Kapiti Island. It is within this area that we are able to issue permits to catch kaimoana for customary use.⁶⁰⁸

563) Bill Taueki also referred to the vast extent of the traditional Muaūpoko rohe in an earlier affidavit in 2017 when he asserted:

The southern boundary of the Muaūpoko rohe includes the northern reaches of the South Island. It extends from Matau at the very top of the west coast of the South Island ...[and] then moves across the top of the South Island. .. From Te Matau in the South Island, the Muaūpoko rohe continues in a northern direction through Te Upoko o Te Ika and Te Whanganui a Tara. It includes all of the area in and around Wellington. The tribal boundary then runs along the west coast of the North Island to the Horowhenua area.⁶⁰⁹

564) The Muaūpoko witness Bruce Murray added:

We were brought up to understand that while Muaūpoko is based at Horowhenua, the Muaūpoko rohe stretches to Te Whanganui a Tara and to the South Island and most place names in this part of Aotearoa stem from early events associated with Kupe and Ngāi Tara.⁶¹⁰

565) Professor Johnathan Proctor for Muaūpoko provided his understanding of the Muaūpoko rohe when he asserted:

I was brought up with the understanding that [the] Muaūpoko traditional coastal area was contiguous extending from north of the Manawatū all the way to Owhiro Bay and recognising our whānau Ngāi Tara heritage includes the south coast of Wellington including Tapu te Ranga, Te Tangihanga o Kupe and Turakirae. The

⁶⁰⁷ Above, Taueki 2 at 6.

⁶⁰⁸ Above, Warrington at para 2, 15-18.

⁶⁰⁹ Above, Taueki 2017 at para 8-10.

⁶¹⁰ Above, Murray at para 3.

sites associated with Kupe throughout Raukawakawa (Cook Strait) were all places our whānau occupied in the past and still currently visit.⁶¹¹

566) Another Muaūpoko witness, Sandra Williams, also elaborated on the Muaūpoko rohe boundaries when she recorded:

In terms of the sea, our main fishing is at Hokio. ... We can feed ourselves off the beach. ... When I was younger, a few times a year we would go to Pukerua Bay as a group. ... we also went to Paekākāriki. It was during the full moon in the summer – once a month. ... we went there in part because fish species on the rocky coast are different. We got kina, paua, mussels, crayfish. What we got we brought back and distributed among the whānau – people too old to get it themselves.⁶¹²

Te Patutokotoko

4) For Te Patutokotoko, Christopher Tahana proclaimed:

Te Patutokotoko hold mana whenua over our rohe around Whanganui. Our area of application stretches from the Kaiwi Stream in the north to the takutai moana off Lake Papaitonga in the south. We have maintained our traditional relationship with the land, river and surrounds, including the sea and land under the sea with continuous and unbroken occupation since 1840.

... Te Pēhi Tūroa had influence and rights as far down as Papaitonga. He was a strategist for Muaūpoko on the attack on Te Rauparaha and also led fighting groups for Rangitāne in the Wairarapa.⁶¹³

Rangitāne

567) From a Rangitāne perspective, Danielle Harris declared:

The particular areas of interests for Rangitāne are from the Rangitīkei River down to the mouth of the Manawatū River.⁶¹⁴

Ngāti Apa

568) For a Ngāti Apa perspective of their rohe, Joseph Huwyler asserted that their interests are along the coast from Motu Karaka to Omarupapako.⁶¹⁵ The Ngāti Apa witness Chirs Shenton agreed that the boundaries for Ngāti Apa extend some 52 kilometres from Motukaraka in the north to Omarupapako in the south which coastline was traditionally used as a highway for Ngāti Apa and other tribes.⁶¹⁶

⁶¹¹ Above, Proctor at para 4.

⁶¹² Above, Williams at para 3, 11, 12.

⁶¹³ Above, Tahana at para 5, 15.

⁶¹⁴ Above, Harris at para 3.

⁶¹⁵ Above, Huwyler at para 9.

⁶¹⁶ Above, Shenton at para 48-49.

Hekenga Iwi Whenua and Rohe Moana

Te Whānau Tima and Te Hapū o Te Mateawa

569) The Mateawa witness Patrick Seymour claimed that their rohe interests:

I was born and raised at Kuku Beach, where my family resides in continual occupation, based on traditional Māori custom since before 1840.

I request an order be granted in recognition of Customary marine title and Protected customary rights for the marine and coastal area between the Oahau River in the north and the Waikawa river in the south.

I make this request on behalf of my Tima (Seymour) family, and Hapū (Subtribes) of Te Mateawa and Ngāti Tukorehe based on traditional Māori custom of Ahi Kā (permanent settlement) and continued occupation since before 1840.⁶¹⁷

570) Mr Seymour added:

As we have not moved off the original Te Mateawa lands, we still practice the same cultural practices and Tikanga as observed and handed down by our forefathers. We also retain these Tikanga as part of Ngā Ahi Kā o Te Mateawa.⁶¹⁸

Morgan Whānau

571) Thee witness Dennis Morgan provided his Morgan whānau perspective on their rohe when he affirmed:

My father often took our whānau to the beach between Hokio and Waiwiri stream to gather [kaimoana]. ... The David Morgan whānau have always had a close connection with the coast in the area of the application. We thought of this as a right we had because of our history and connection to tupuna who lived in the area. We thought we had mana whenua in that region, and exercised our customary rights including gathering food and launching waka.⁶¹⁹

Ngāti Kauwhata

572) According to Dennis Emery, the Ngāti Kauwhata rohe includes the inland areas of Kākāriki in the Manawatū-Whanganui region more commonly known by Ngāti Raukawa as Miria Te Kakara and in the Oroua River basin and catchment area.⁶²⁰ Emery however also noted that Ngāti Kauwhata also had rights and interests in the coast that were declared by Dennis Emery to include the area around the southern side of the mouth of the Rangitīkei River. Mr Emery affirmed:

⁶¹⁷ Above Seymour at para 1-3.

⁶¹⁸ Above, Seymour at para 11.1.

⁶¹⁹ Affidavit of Dennis Raymond Morgan in Support of David Morgan Whānau Application for Recognition Orders for Protected Customary Rights, dated March 2017 at para. 4-6 [CB Tab 27 at 201.00063].

⁶²⁰ Above Emery at para 17 and 20.

Our people of Te Reureu ... came down to hold the line on the southern side of the Rangitikei River to make sure that Ngāti Apa never came back over.⁶²¹

Te Āti Awa

573) From a Te Āti Awa perspective, Tutere Parata declared of their rohe:

Te Ātiawa ki Whakarongotai hold mana whenua and mana moana from Kūkūtauaki to Whareroa seaward, with overlapping interests with Ngāti Toarangatira to Paripari, inland to Pukemore and to Maunganui northward to Kapakapanui and Pukeatua to Ngāwhakangutu then westward to Kūkūtauaki.⁶²²

574) John Barrett mentioned the contested Te Āti Awa southern boundary and the more secure northern one when he noted:

The southern boundary point is a matter of discussion between my Ātiawa whānau. I have always known our southern boundary to be Kapukapuariki, located south of Whareroa and shared with Ngāti Toa Rangatira. ... In terms of our northern boundary, I have always known it to be Kūkūtauaki. Our old people were and are steadfast in the fact that Kūkūtauaki reflects the boundary between Ātiawa and Raukawa.⁶²³

575) Te Āti Awa witness Andre Baker discussed how Te Āti Awa left the area to return to northern Taranaki for a time, but they maintained ahi kā when he declared:

For those who returned to Taranaki, the decision was made to leave their mana to Metapere Waipunahau to ensure that Te Āti Awa ki Whakarongotai was looked after, and ahi kā, mana whenua and mana moana was maintained from Kūkūtauaki to Whareroa.

Metapere Waipunahau looked after Te Āti Awa ki Whakarongotai, particularly in relation to setting boundaries for land. There are accounts of a debate between her and Tamihana Te Rauparaha (Te Rauparaha's son) and Matene Te Whiwhi over the Kūkūtauaki boundary. Metapere took a very strong view on these issues and advocated for the northern boundary being at Te Hapua rather than Te Maire, a point slightly further south that was argued for by Tamihana Te Rauparaha and Matene Te Whiwhi.⁶²⁴

⁶²¹ Above Emery at para 29.

⁶²² Above Parata at para 7.

⁶²³ Above Barrett at para 105-106.

⁶²⁴ Above, Andre Baker at para 52-53.

Ngāti Raukawa ki te Tonga

576) For a Ngāti Raukawa perspective on their rohe boundaries, Justin Tamihana declared:

The Ngāti Raukawa rohe is often referred to in the following saying:

Mai i Waitapu ki Rangataua, mai i Miria-te-Kakara ki Kūkūtauaki.

This means from Waitapu to Rangataua (which are two streams that flow into the Rangitīkei River) and from Miria-te-Kakara (a location in the Rangitīkei River) to Kūkūtauaki. Our area is well gazetted and recorded since our arrival here in the District.⁶²⁵

577) Ani Mikaere referred to Waitohi, Te Rauparaha's sister, as having the mana to decide on the whenua boundaries for the heke tribes:

Waitohi is credited with allocating land to those who answered her call and with establishing the boundary between Ngāti Toa allies, Te Āti Awa and Ngāti Raukawa.⁶²⁶

578) The Ngāti Toa witness Miria Pomare provided her perspective on the Ngāti Raukawa, Ngāti Toa and Te Āti Awa rohe division by Waitohi following the battle of Haowhenua in 1834 when she noted:

Immediately following this battle, there was a rearrangement of tribal boundaries from Manawatū to Pukerua Bay which required Waitohi's intervention to settle the disputes and stipulate the boundaries. She had considerable influence due to her whakapapa links and personal connections to the chiefly lines of both Ngāti Toa and Ngāti Raukawa, and she was a formidable leader in her own right. It was at her request, and with the agreement of Te Rangihiroa and the other rangatira that the Taranaki iwi moved south of the Kūkūtauaki stream to Waikanae. Ngāti Raukawa agreed to occupy the land south of the northern bank of the Kūkūtauaki stream as far as the Manawatū River. Ngāti Toa remained mainly on Kāpiti Island and also later occupied Mana Island, Pukerua Bay, Porirua, and Waikanae (through the continuous presence of Ngāti Maunu). It is my understanding that Ngāti Raukawa and the Taranaki Iwi all accepted the new terms of the tuku whenua as stipulated by Waitohi. These tribal boundaries were still in place at the time of the signing of Te Tiriti o Waitangi in 1840.⁶²⁷

579) Wayne Kiriona from Ngāti Raukawa added:

The battles [Haowhenua 1834 and Kuititanga 1839] would confirm the boundary between Te Ātiawa and Ngāti Raukawa at Kūkūtauaki, and an end to the inter-iwi wars in the district ... The boundary between Te Ātiawa and Ngāti Raukawa at Kūkūtauaki was therefore settled prior to the signing of Te Tiriti o Waitangi

⁶²⁵ Above, Tamihana at para 23.

⁶²⁶ Above Mikaere at para 33-38.

⁶²⁷ Above Pomare at para 73.

and would continue to be recognised post-Tiriti. This boundary is still recognised today by Ngāti Raukawa and Te Atiawa.⁶²⁸

580) Caleb Royal summed up the extent of the Ngāti Raukawa rohe in the area when he asserted:

I have grown up always knowing that Ngāti Raukawa ki te Tonga are mana whenua from Kūkūtauaki in the South to the Rangitīkei river in the north. That mana extends from the maunga, down to the whenua, through the awa and out to the moana. We live in an interconnected system and our mana and associated kaitiakitanga obligations extend across this entire area.

... Within the rohe of Ngāti Raukawa, hapū generally know where their rohe moana and particular fishing spots are. There tends not to be hard boundaries in the moana was that it was generally open for others to use subject to our exercise of kaitiakitanga, mana and rangatiratanga.⁶²⁹

581) Referring to extent of the Ngāti Raukawa rohe moana, Tamihana elaborated:

The Ngāti Raukawa rohe moana extends along our entire coastline. In relation to how far out it goes, we do not restrict ourselves to 12 nautical miles. We have always gone as far as we needed to provide for our people. There is no boundary line that exists in the moana under tikanga Māori. Our tikanga relationship with the moana, in terms of how we see it (as Tangaroa's domain) and how we interact and engage with it, is all done in accordance with our tikanga and customs.⁶³⁰

582) Royal added:

In terms of how far out our mana and kaitiakitanga obligations extend, it blankets the moana and goes out beyond the 12 nautical mile limit under Pākehā law.⁶³¹

Ngāti Toa Rangatira

583) Dr Taku Parai reviewed the vast extent of the Ngāti Toa Rangatira rohe in his evidence when he stated:

According to our oral traditions, the northern most point of the Ngāti Toa rohe is Whangaehu; in the North Island it extends to Turakirae Heads and encompasses Te Moana o Raukawa. In the South Island, the Ngāti Toa rohe includes all of Te Tau Ihu; its southernmost point on the West Coast is the outlet of the Arahura River and Kaikoura on the Eastern Coast.

... Ngāti Toa have always claimed the area that we are claiming under the Marine and Coastal Area (Takutai Moana) Act. Te Ati Awa were allocated whenua from

⁶²⁸ Above, Kiriona at para 34-35.

⁶²⁹ Above Royal at para 25.

⁶³⁰ Above Tamihana at para 27.

⁶³¹ Above Royal at para 16-17.

Kūkūtauaki to Waikanae [tuku whenua] and Ngāti Toa exclusively retained mana whenua and mana moana around Kāpiti Island and on the mainland from Te Uruhi south. The rohe moana extends out to the sea far beyond the 12 nautical mile limit set by the Marine and Coastal Area Act.⁶³²

584) Dr Parai also mentioned the overlapping claims of Te Āti Awa and Muaūpoko:

... I am aware that Te Ati Awa ki Whakarongotai and the Muaūpoko Tribal Authority challenge Ngāti Toa mana whenua and mana moana and are making overlapping claims to the takutai moana for Customary Marine Title.⁶³³

585) Dr Parai also discussed the importance of whanaungatanga when dealing with boundaries, the challenges of drawing boundaries and he even mentioned how amorphous boundaries were perceived when he opined:

We acknowledge the whanaungatanga we have with Te Āti Awa. I would also add that this whole concept of drawing lines is a foreign and modern one that does not reflect tikanga Māori.⁶³⁴

... If you lived in a particular place at a particular time and space, you knew your surroundings. You knew from the landscape the boundary of your hapū. For example, one would say north of that kauri tree, inland to that maunga, south to this creek was basically the boundary to your hapu. But that never took away your ability to share.⁶³⁵

Summary

586) What all of the above evidence on tribal boundaries in the Kāpiti Coast illustrates is, inter alia, that most if not all of the tribal rohe areas have overlapping, intersecting claims with various groups claiming the same areas based on tikanga and take whenua, the amorphous nature of boundaries under tikanga, the holistic, ecosystemic and multi-dimensional nature of rohe interests including out to the deep sea beyond 12 nautical miles, and how the groups have complex shared, layered, negotiated but debateable interests in certain areas of their respective claimed rohe.

587) The Waitangi Tribunal commented on rohe boundaries in the 2022 *Tino Rangatiratanga me te Kawanatanga Report* when it recorded :

Hapū territories therefore cannot be understood as lines on a map; rather they were zones of influence that intersected and overlapped, and had boundaries that were precisely defined but were also ‘multi-levelled and fluid.’ These zones were defined by reference to the deeds of the ancestors, the places associated with them (such as settlements, cultivations, fishing grounds, fortifications and urupā (burial

⁶³² Above Parai at para 46, 49.

⁶³³ Above Parai at para 48.

⁶³⁴ Above Parai at para 50.

⁶³⁵ Above Parai at para 51.

grounds) and the place names and the stories they left. Rights were subject to ongoing negotiations, and could be transferred by agreement (such as gifting of land in return for military or other assistance [tuku]) or by raupatu (conquest) followed by occupation [ahi kā]). Where that occurred, the victors generally married into the hapū of the defeated peoples as a means of securing and sustaining peace [moenga rangatira]. ... the underlying rationale was the creation of kinship bonds especially through the birth of children with ties to each of the contenders.⁶³⁶

588) Tikanga Māori natural resource law and proprietary interests then, were not a neat tidy taxonomy guaranteeing certainty and indefeasibility of titles with clear boundaries in part due to the contestability of boundaries and amorphous borders which were shared lands.

Whenua Tautohetohe: Debatable Lands

589) Professor Hirini Mead, in a paper prepared a report to the Waitangi Tribunal in support of Ngāti Awa's Wai 46 claim, outlined the basic idea of contested land or what he termed "whenua tautohetohe."⁶³⁷ Mead argued that there were zones of contested land lying between iwi and hapū groups, that were characteristically rich in resources and exploited by both sides and that it was difficult to fix a boundary within the zone where he opined: "As military strength fluctuates, so did the boundary, so there was always the element of contestability in land zones regarded as whenua tautohetohe."⁶³⁸

590) Contested whenua tautohetohe lands appear to have been the norm between tribal groups on their alleged tribal boundary zones on the whenua and on the rohe moana⁶³⁹ given the rohe moana was an extension of the tribal whenua. The amorphous nature of these tribal whenua and rohe moana boundaries under tikanga Māori meant that the whenua tautohetohe zones would have been disputed and at times even contested militarily under ringa kaha.

591) Mead discussed this tikanga concept of whenua tautohetohe further which:

... embraces the idea that the boundary between tribal territories is not so much like a surveyed line, although a line may exist, but rather is like a band of land, which may be likened to a zone of no-man's-land.⁶⁴⁰

592) In 1890 a collection of papers offering various opinions on native tenure was published in the Appendices to the House of Representatives which included the

⁶³⁶ Waitangi Tribunal, *Tino Rangatiratanga me te Kawanatanga: The Report on Stage 2 of Te Paparahi o Te Raki Inquiry Pre-Publication Version* (Wai 1040, Waitangi Tribunal Report, Part 1, Wellington, 2022) at 115-116.

⁶³⁷ The paper was reproduced in his collection of essays: Mead, H, *Landmarks, Bridges and Visions: Aspects of Maori Culture: Essays*, (Victoria University Press, Wellington, 1997) at 238.

⁶³⁸ Above.

⁶³⁹ Above.

⁶⁴⁰ Above.

opinion of Chief Justice Sir William Martin who described the term kāinga tautohe which he translated as debated lands:

But between territories of different tribes there are often tracts of land, which are called “kainga tautohe” or (literally) debatable lands.⁶⁴¹

593) Firth similarly described whenua tautohe when he recorded:

Certain areas lying on the borders between two tribes were whenua tautohe, debatable lands, claimed by both sides, and were often hotly contested, each party endeavouring to establish ownership, though not actually occupying the land.⁶⁴²

594) Mead concluded that Martin’s notion of ‘kāinga tautohe’ is the same idea as ‘whenua tautohetohe’. The early Māori scholar Hari Hongi also supported the notion of ‘debatable lands.’ Commenting on tikanga Māori custom as it relates to land boundaries, Hongi conceded: ‘There were, it is true, debatable lands lying contiguous to certain boundaries.’⁶⁴³ Mead also observed that some parts of the boundary are likely to be more ‘debatable’ than others.⁶⁴⁴

595) Commenting on ‘kainga tautohe,’ Dr Angela Ballara similarly recorded:

There were kainga tautohe or ‘debateable lands’ between the main settlements of different descent groups – areas which could not have been occupied by either side to a dispute without fighting - but these lands were not unclaimed; the problem was that they were claimed by more than one set of owners. The problem arose precisely because of the intersecting rights, not definable by hapū.⁶⁴⁵

596) Whenua tautohetohe or kainga tautohe lands although contested and debated were shared interests in the whenua and rohe moana involving one or more groups which situation resonates with some of the claimant groups in the current Kāpiti Coast High Court MACA hearings. Let us examine other historic examples to hopefully illuminate a way forward.

597) What much of the historical accounts indicate is that resource interests under tikanga Māori were not certain but were amorphous, they were not individualised but were shared, collective, debated and negotiated as will be illustrated further in a number of other historical accounts.

⁶⁴¹ ‘Opinions of Various Authorities on Native Tenure’ in, *AJHR*, (G.-1, 1890) at 3, 6 and 12.

⁶⁴² Firth, R, *Economics of the New Zealand Maori* (A.R Shearer, Government Printer, 1972) at 385. Firth cited Edward Shortland who referred to these areas as kainga tautohe. See Shortland, E, *Traditions and Superstitions of the New Zealanders: With Illustrations of their Manners and Customs* (Longman and Roberts, London, 1856) at 280.

⁶⁴³ Hongi, Hari (n.d) *Maori Land Rights, Marriage Customs, Kinship*, Alexander Turnbull Library, MS-Papers-5717.

⁶⁴⁴ Mead, S. M., *Landmarks, Bridges and Visions: Aspects of Maori Culture: Essays*, (Victoria University Press, Wellington, 1997) at 236.

⁶⁴⁵ Ballara, A, *Iwi: The Dynamics of Maori Tribal Organisation from c. 1769-c. 1945*, (Victoria University Press, Wellington, 1998) at 200.

598) Tikanga Māori historically and today acknowledges shared interests in whenua, rohe moana and other resources. The tikanga concept of *tuku whenua* is an example of sharing the whenua, rohe moana and other resources. Indeed, the Ngāti Kahungunu rangatira Ihaia Hutana noted in a 1902 newspaper article:

With requests for residence, or for gardens, whether it is a claim from within the sub-tribe or from an outside relative, a piece of land or a place of abode and cultivations will be given from within the community. ... they will not be admitted into the *pare kainga*, and this type of gift [*tuku*] will also not include the greater part of the land. But it will instead include the area that has been arranged for settlement and gardening within the village; it will not include the ocean and the fishing beds, nor the eel lakes, the forest and the bird snares ... there is continuing authority [*mana tuturu*] overarching all of this, including in the areas of residence and areas of gardening ... Gardens are a major issue in Maori custom over which authority [*mana*] is maintained, and the embodiment of that authority [*mana*] can be seen, heard and expressed through *rahui* at the appropriate time. However, the refugees share in the largesse of the lakes, produce and fishing grounds under the communal authority [*mana huihui*] under the licence from the benefactor, that is from the chief of chiefs [*te rangatira o nga rangatira ranei*].⁶⁴⁶

599) In the context of the marine and coastal estate, Sir Eddie Durie opined that “coastal reefs and fishing grounds were as much restricted, apportioned and defined as the land.”⁶⁴⁷

600) Many *iwi* and *hapū* also had shared *mana* authority over the coastal areas at the time of the Treaty of Waitangi – and for some time afterwards. For example, fresh water was sold for drinking as some early sailors found out in the Hokianga Harbour when they sought to provision their ships with water from local streams. British Resident, James Busby, referred to this in 1835 in a dispatch to the Colonial Secretary when he noted:

A payment has been pretty regularly exacted in this harbour for permission to water and I have heard of a demand for harbour dues having been made by one of the chiefs of the Hokianga River.⁶⁴⁸

601) In terms of private but shared interests over the marine and coastal area, the *Te Karere o Nu Tirenī* newspaper reported in 1843 where the editor attempted a fishing trip in the Northland area and a meeting of some wary Māori residents who opposed the ‘incursion.’

A Māori fellow once set off (Ngapo is his name, he is from the sub-tribe of Ngāti Korokoro) with a tomahawk in his hand, his boat approaching another and saying,

⁶⁴⁶ Ihaia Hutana, *Te Puke ki Hikurangi*, (Vol. 5, No. 1, 30 August 1902) at 3. See also Smith, T, *Tukuwhenua and Maori Land Tenure in Wairarapa*, (A Report to the Waitangi Tribunal commissioned by the Wai 429 Claims Committee, October 2001).

⁶⁴⁷ Durie, E, ‘Custom Law,’ (Draft Paper for the Law Commission, January 1994) at 87.

⁶⁴⁸ Despatch from British Resident,’ (ATL, qMS-0344, No. 65/2).

‘weigh anchor and row on, you’d be angry if someone came to steal from your store.’ Then one of us said, ‘is this your store, the sea?’ He replied, ‘yes indeed, the sea belongs to me, no one is allowed to fish, it has already been set aside for us.’⁶⁴⁹

602) Following the New Zealand Wars of the 1860s, the Government began to regulate fisheries. The Thames Sea Beach Bill was proposed as a solution to problems that arose at the Thames goldfields with the rush of miners and the ensuing challenges over title to the foreshore and seabed lands. Tanameha Te Moananui and others from Pukerahu sent a petition to the Government regarding mana during this time:

You, the Government, have asked for the gold of Hauraki; we consented. You asked for a site for a town; you asked also that the flats of the sea off Kauaeranga should be let; and those requests were acceded to. And now you have said that the places of the sea which remain to us will be taken. O friends, it is wrong, it is evil. Our voice, the voice of Hauraki, has agreed that we shall retain the parts of the sea from high water mark outwards. These places were in possession from time immemorial; these are the places from which food was obtained from the time of our ancestors even down to us their descendants ... O friend, our hands, our feet, our bodies are always on our places of the sea ... The men, the women, the children are united in this, that they alone are to have the control of all the places of the sea.⁶⁵⁰

603) A second Kohimarama Conference was convened by Paora Tuhaere of Ngāti Whatua at Ōrākei, Tāmaki (Auckland), in 1879 where it was reported:

The Queen in the Treaty of Waitangi promised that the Māoris should retain their mana. That word is correct because the Queen accepted us as her subjects, and she said to the Māori belonged the mana over his pipi grounds. ... The Queen also said that the Māori should retain their mana over the sea.⁶⁵¹

604) That same year, the rangatira, Apihai Te Kawau, of Ngāti Whatua discussed a sale of coastal land he was involved in when he informed the Governor at Ōrākei in 1879:

It was only the land that I gave over to the Pakehas. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods.⁶⁵²

605) Hori Tauroa added:

⁶⁴⁹ ‘He Ritenga Māori’ in *Ko Te Karere o Nu Tireni*, (Vol. 2, No. 6, 1 June 1843) at 23.

⁶⁵⁰ ‘Report of the Select Committee on the Thames Sea beach Bill,’ in *AJHR*, (Vol. 2, 1869, F-7) at 18.

⁶⁵¹ ‘Paora Tuhaere’s Parliament at Orakei,’ in *AJHR*, (1879, Sess. II, G-8) at 20.

⁶⁵² Cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 2nd ed. Wellington, 1989) at 113.

I was not aware of the Government taking all my large pipi-banks and shoals in the Manakau (Manukau harbour). Those large banks have all gone to the Government. I was not told why these were taken. I wish to know now whether they belong to the Queen or remain my property.⁶⁵³

606) The Māori view that a water resource and a land resource were conceptually the same and were capable of being under the mana of a community or shared among a number of communities is supported by several 19th and 20th century observers. Thus, the 1921 Native Land Claims Commission reported with reference to Napier Inner Harbour that in Native custom, Māori rights were not confined to the mainland but extended as well to the sea where 'deep-sea fishing grounds were recognised by boundaries fixed by the Māoris in their own way; they were well known, and woe betide any alien who attempted to trespass upon them.'⁶⁵⁴

607) In 1918, Captain Gilbert Mair advised the Native Land Court on some of the Te Arawa lakes:

...no land in New Zealand has been more absolutely, more completely and more thoroughly under Māori owners' customs and rights than these two lakes, nor do I know of any piece of land in New Zealand in all my experiences that has been used or that can show more marks of ownership, individual or tribal than those lakes, and the surrounding lands.⁶⁵⁵

608) During the Native land Court hearing, Mair was cross-examined by the Crown over fishing beds at sea:

Q. Did the Arawas go to the Bay of Plenty sea fishing?

A. Yes, the Arawas had fishing grounds off Maketu.

Q. Did they claim fishing grounds several miles out?

A. Yes, quite in accordance with their Māori custom.

Q. Would those fishing grounds be staked out at all, or marked off or located from the shore?

A. Yes, they had marks on the land which were only disclosed to the favoured few, and even those miles off Maketu were the property of tribes and not common grounds. They caught hapuku and other fish there.⁶⁵⁶

⁶⁵³ Above.

⁶⁵⁴ 'Whanganui-o-Rotu' in *Report of the Native Land Claims Commission*, *AJHR*, (1921, Vol.2, G-5) at 13.

⁶⁵⁵ 'Evidence of Captain Gilbert Mair,' (National Archives, Wellington, Crown Law Office, File CLO 174, Part I) at 184.

⁶⁵⁶ Above, at 270.

609) Māori then were kaitiaki stewards over territory, or areas over which they had authority or mana, and the territory was not just land but included the whole of the territorial resources of land, lakes, rivers, springs, swamps, estuaries, lagoons, inland seas, coastal marine areas and even the deep sea. In fact, in 1955 some Ngapuhi leaders lodged an application with the Māori Land Court for title to Te Moana-nui-a-Kiwa – the Pacific Ocean. The claim was based on rights from Tangaroa, as a descendant of Rangi and Papatuanuku; the act of Maui-tikitiki-a-Taranga in fishing up the North Island from the sea, Kupe through his voyage to the island across this ocean, and his naming of points on land alongside it; and through human blood which Maui smeared on his face when fishing the island from the sea. The Newspaper reported:

The Māoris said they had a duty to their ancestors to have the waters vested in the Māoris as a mark of respect to the wisdom of the moana, the personification of the ocean, in making this part of the world so extensive that Maui could fish New Zealand from the sea, ‘far from land involved in trouble.’ ... Mr Hohepa Heperi ... spoke on the last grounds of the claim. This was the Great Ocean of Kiwa [Te Moananui-a-Kiwa] was the Māoris’ marae. ‘By the time Europeans discovered the oceans,’ he said, ‘it had already been crossed many times by the Māori people. Therefore, it was the main *marae* of our ancestors.’⁶⁵⁷

610) For the Kāpiti Coast claimants, a similar example of coastal control of the rohe moana, emphasised by Ngāti Toa Rangatira, was the development of Te Rauparaha’s maritime empire from the hekenga which Miria Pomare discussed in her evidence:

The strategic importance of Raukawa Moana (Cook Strait) became apparent to Te Rauparaha during the Amiowhenua expedition in 1819 when he saw a trading ship pass through Cook Strait from Omere, a prominent ridge located on Wellington’s south coast. He immediately recognised the opportunities that Te Moana o Raukawa provided as a place where Ngāti Toa could potentially secure a new home for themselves and restore their mana by taking advantage of opportunities to trade with pakeha.

For Ngāti Toa (and their Taranaki Allies), Te Moana o Raukawa was a highway, not a barrier, which enabled access to key resources and unprecedented opportunities for trade resulting in a hive of commercial activity and the establishment of whaling stations and other outposts into a prosperous maritime empire, with Te Rauparaha at the centre. He established a virtual monopoly throughout Cook Strait by taking control of key harbours and passages. That way he was able to dominate the trade in Te Tau Ihu and in the southern North Island from Ngāti Toa’s coastal settlements in Porirua, Kāpiti, Mana, Cloudy Bay, the Marlborough Sounds and points further west.⁶⁵⁸

611) Ms Pomare continued:

Te Moana o Raukawa is at the heart of Ngāti Toa’s rohe and has always been central to the cultural identity and wellbeing of the tribe. ... For Ngāti Toa the

⁶⁵⁷ ‘Claim to the Pacific,’ in *New Zealand Herald*, (24 February 1955). See also ‘Claim to the Pacific,’ in *Journal of the Polynesian Society*, (Vol. 64, 1955) at 162.

⁶⁵⁸ Above, Pomare at para 29-30.

Cook Strait - Raukawa Moana – is vitally important. It is referred to in our traditional history as ‘Te Awa o Te Rauparaha’ or the lake of Te Rauparaha [take taunaha]. Ngāti Toa were traditionally a seafaring people and trading people whose worldview prioritised the sea over the land. In this sense, Raukawa moana is literally at the heart of Ngāti Toa’s rohe, and the strategic location of Kapiti Island at the entrance of the Cook Strait, places it at the epicentre of Ngāti Toa’s world. Kapiti was Ngāti Toa’s stronghold but it also had other natural advantages providing safe anchorage and supplies for ships sailing through Cook Strait ... Te Rauparaha exerted [political and economic] dominance ... from his base on Kapiti Island.⁶⁵⁹

612) Dr Taku Parai moreover recorded in his evidence:

We certainly have an interest at Kapiti Island and from Whareroa up to Te Uruhi and beyond through whakapapa and through interaction with the space. ... There was a captain’s diary that said that every time ships dropped anchor along here, they had to pay a levy to Te Rauparaha.⁶⁶⁰

613) Māori iwi, hapū and even whānau then often had shared mana, rangatiratanga and kaitiakitanga relationships with other groups over lands and the coastal and marine estate including the ocean itself. Shared mana with shared boundaries occurred especially at the tribal peripheries, and they continue to do so today, hence these High Court hearings pursuant to the Marine and Coastal Area (Takutai Moana) Act 2011.

Shared Interests – Shared Exclusivity

614) In the 1997 Canadian Supreme Court decision of *Delgamuukw v British Columbia*,⁶⁶¹ the Court raised the possibility of several First Nations groups holding an area on the basis of shared exclusivity.⁶⁶² MACA provides for shared exclusivity through the definition of ‘applicant group’ which means 1 or more iwi, hapū or whānau groups’ that seek recognition of their customary interests under the Act. Shared exclusivity was also acknowledged by Churchman J in *Re Edwards*.⁶⁶³ However, shared exclusivity requires groups to acknowledge the rights and interests of others to the shared areas which is where many of the historic and current challenges emerge in the Kāpiti Coast MACA hearing.

615) Still, many of the claimant witnesses acknowledged the shared whenua and whakapapa interests with their kin neighbours.⁶⁶⁴

616) What the above examples highlight is that the boundary lines between the applicant groups are not certain and clear ‘straight-line boundaries’ but are complex, convoluted,

⁶⁵⁹ Above Pomare at para 31, 33.

⁶⁶⁰ Above, Parai at para 132.

⁶⁶¹ *Delgamuukw v British Columbia* [1997] SCR 1010 at [158]. The Supreme Court’s discussion of shared exclusivity is obiter.

⁶⁶² Above.

⁶⁶³ *Re Edwards (Whakatohea (No. 2))* [2021] NZHC 1025 at [145-168].

⁶⁶⁴ For claimant evidence on shared interests, see inter alia, above, Tamihana at 57(b) & 87; Pomare at 41; Andre Baker at 58, 67-68; Dean Wilson at 15-17; Emery at 45; and Ropata at 48-50.

and overlapping, amorphous boundaries with primary, secondary, and tertiary rights holders from different iwi, hapū and even whānau communities, all with individual or whānau interests held in accordance with tikanga. Hence the impetus for shared exclusivity which requires the applicant groups to acknowledge the rights and interests of each other to the shared areas which is where some of the convoluted and protracted challenges emerge.

617) The rich, although highly contested history, whakapapa and tikanga challenges within this Kāpiti Coast MACA hearing between Ngāti Raukawa ki te Tonga, Te Ātiawa ki Whakarongotai, Muaūpoko, Ngāti Tamarangi, Ngāti Apa, Rangitāne, Ngāti Kauwhata, Ngāti Toa Rangatira, Te Patutokotoko, Te Whānau a Tima and the David Morgan Whānau, teaches us that it is common for people to disagree, dispute and conflict over whenua and rohe moana territorial boundaries, mana whenua, mana moana, rangatiratanga and other tikanga responsibilities.

618) What all of the discussion above and evidence shows is that at 1840, it is very difficult to ascertain with precision which applicant group or groups used and occupied the application area, or any part of it, in accordance with tikanga. Each of the applicant group asserted their rohe whenua and rohe moana interests within certain boundaries which overlapped and intersected into other group's alleged rohe areas of interest or spheres of influence.

619) To summarise our answer to Question 6) then, it appears on the evidence presented in the High Court by the claimants and expert witnesses that Ngāti Raukawa ki te Tonga, Te Ātiawa ki Whakarongotai, Muaūpoko, Ngāti Tamarangi, Ngāti Apa, Rangitāne, Ngāti Kauwhata, Ngāti Toa Rangatira, Te Patutokotoko, Te Whānau a Tima and the David Morgan Whānau applicant groups, among others, used and occupied the Kāpiti Coast application area, or parts of it, within their respective - but often amorphous and overlapping- rohe boundaries in accordance with tikanga Māori.

Question 7 – At 1840, how did groups control access to areas as a matter of tikanga?

620) To answer Question 7), a lot of the research and evidence from all of the previous sections is relevant, especially from Question 6) so answering this question will be relatively brief.

621) First, the relevant tikanga for controlling access to the common marine coastal area (CMCA) was the following common tikanga values and principles:

- a) Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including all of the Kāpiti Coast claimant groups to each other and the respective takutai moana claimant area;⁶⁶⁵

⁶⁶⁵ For claimant evidence on whakapapa, see above, Taueki 1, at para. 2 ; Armstrong, at para. 65; Taueki 2 at para. 2, 6, 7, 18, 19, 29; at para. 5; Waaka, at para. 1; Royal, at para. 3, 4, 5, 7, 15, 87; Tamihana 1, at para 5-7, 17, 22; Mikaere, para 7, 22, 25, 37, 38, 47, 48, 59, 60; Jones 1, at 29; Twomey, at para 1-8; Mahina-a-Rangi Baker 1 at para 5-6, 104, 129-130; Moore, at para 2; Walker, at para 3, 14-22; Selby 1, at para 4-11, 22;

- b) Wairuatanga - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;⁶⁶⁶
- c) Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;⁶⁶⁷
- d) Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;⁶⁶⁸
- e) Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for

Richmond, at para 14(b); Rōpata, at para 10-25; Teira, at para 19-22 [CB Tab 42 at 201.00377]; Hēnare, at para 1; Karatea, at para 1, 5-12, 16-22; Kiriona, at para 19-21; Collins and Teira, full brief; Moore 2, at para 1-11; Karatea, at para 1-12; Parata at para 1-8; Barrett at para 1-61; Barrett 2, at para 1-12; Carter, at para 1-3; Andre Baker, at para 36-69; Ngaia, at para 10-25; Housiaux, at para 1-4; Maote-Davis, at para 1-8; Mahina-a-Rangi Baker in Reply, at para 1, 12-13; Tihema Baker in Reply, at para 1-2; Ngaia 2 in Reply, at para 1-25; Warrington, at para 1-19; Murray, at para 1-5; Proctor, at para 1-13; Wiremu-Matakātea, at para 1-8; Packer, at para 1-5; Williams, at para 1-10; Rump, at para 1-2; Nuetze, at para 1-5; Wilson, at 1-10; Reply Brief of Moses, at para 1-2; Tukapua, at para 1, 17-19; Reply Brief of Wilson, at para 3; Brief of Evidence of Sillena Wiki McGregor, at para 1-2; Affidavit of Wilson for Interested Party of Horowhenua 11 Part Reservation, at 3; Seymour, at para 1-8; Brief of Evidence of Patrick Seymour, at para 1.0-4.7; Huwyler, at para 1-9; Shenton, at para 1-31; Tahana, at para 1-31.2; Harris at para 1-3; Parai, at para 1-11, 32, 40, 41, 158; Potini, at para 1-31, 161; Elkington, at 1-10; Pomare, at para 1-8, 40-66; Faulkner, at para 1-2, 29; Te Rei, dated 13th February 2024 at para1-4, 14-53.

⁶⁶⁶ For claimant witness evidence on wairuatanga, see above Taueki 2 at 2-18, 29; Royal at 52, 58; Tamihana at 18, 22, 29, 37, 57, 77; Mikaere at 22, 47-48; Emery at 46-51; Parata at 10, 23, 37; Barrett 2 at 46; Andre Baker, the whole reference; Parai at 21-22, 35, 55-56, 138-139, 141, 166-171; Potini at 153, 159, 164-165; Elkington at 23-24, 28, 55, 63; O'Malley at 21-22; Proctor 1 at 11-13, 35; Proctor 2 at 19, 62-79, 104, 106-110; Moore at 116-118; Walker, the whole reference; Richmond at 14; Teira, the whole reference; Henare, the whole reference; Wilson 2 at 3 and Seymour at 5.9 and 8.5.

⁶⁶⁷ For claimant witness evidence on whānaungatanga, see above Taueki 2 at 7, 29, 30, 32; Morgan at 5; Waaka at 1; Royal at 3-5, 87-88; Tamihana at 15, 16, 22, 25, 29, 30, 41, 53, 77, 88, 89, 130; Mikaere at 33-37, 38, 43-44, 59-60; Jones 1 at 27; Moore at 100-108; Mahina-a-Rangi Baker 1 at 49-53; Walker at 35; Twomey, the whole reference; Kiriona, the whole reference; Karatea, the whole reference; Selby 1, the whole reference; Richmond at 14(h); Ropata at 44; Teira at 17; Collins & Teira, the whole reference; Emery at 43-44, 55-60; Parata at 37; Andrē Baker, the whole reference; Ngaia 1, the whole reference; Tihema Baker, the whole reference; Parai at 2-27, 127-131, 135-139, 141-142, 147, 155-165; Potini at 1-31, 38-47; 164-168; Pomare at 40-42, 47-49; Elkington, the whole reference; Te Rei, the whole reference; Harris, the whole reference; Tahana at 48-49; Huwyler, the whole reference; Shenton, the whole reference; Seymour, the whole reference; Morgan, the whole reference; Emery, the whole reference; Proctor 1 at 12-13; Tukapua, the whole reference; Moses, the whole reference; and Wilson 2, the whole reference.

⁶⁶⁸ For claimant evidence on mana, see above all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei. See especially Taueki 1 at 7; Taueki 2 at 6-9, 18, 30; Morgan at 5; Royal at 3-5, 87; Tamihana 1 at 16, 25, 29, 38, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones 1 at 16; Parata, the whole reference; Barrett 2 at 118; Ngaia 1, the whole reference; Moses at 6; Parai at 110-171; Potini at 123, 162; Rei, the whole reference; Kiriona 1 at 20, Wilson at 52; Morgan at 1-6; Mahinaarangi Baker 1 at 196; Walker, the whole reference; Richmond at 30; Ropata at 50; Kiriona at 62, 84; Jones 2 at 6-11 and Warrington at 2.

social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;⁶⁶⁹

- f) Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;⁶⁷⁰
- g) Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;⁶⁷¹
- h) Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;⁶⁷²
- i) Hau — respect for the vital essence of a person, place or object;⁶⁷³
- j) Ohaoha – distribution and sharing of prosperity;⁶⁷⁴
- k) Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;⁶⁷⁵

⁶⁶⁹ For claimant evidence on tapu, see Taueki 1 at 32; Taueki 2 at 15-18; Armstrong at 41; Royal at 58-59; Tamihana 1 at 20-27, 29; Jones 1 at 41-47; Emery at 47-48; Parata at 37; Ngaia at 76; Parai at 125-129; Potini at 124, 148, 177-179; O'Malley at 21-22; Richmond at 35; Kiriona at 63-65; Nuetze at 54; Seymour at 5.5-5.12, 7.40, 8.2-8.9; and Tamihana 2 at 20, 29.

⁶⁷⁰ For claimant witness evidence on tapu and noa, see above Taueki at 32; Taueki 2 at 16-18; Armstrong at 41; Royal at 58-59; Tamihana at 20, 27, 29; Jones at 41-47; Emery at 47-48; Parata at 37 and Ngaia at 76.

⁶⁷¹ For claimant evidence on utu, see above Armstrong at 5, 9, 13; Tamihana 1 at 25, 38, 55; Mikaere at 44, 45, 48-50; Jones 1 at 45; Emery at 43-44, 48-50; Twomey at 39-41; O'Malley at 32-33; Richmond at 28, 37, 45; Ropata at 18; Moore at 75-79; Selby 1 at 17-25; Teira 25-27; Andre Baker at 65-67; Ngaia 1 at 64-66; Rump, the whole reference; Moses at 16, 18; Parai at 17, 73, 95, 100, 143, 147-158; Potini at 142; Elkington at 44; Pomare at 74-75; and Te Rei at 26.

⁶⁷² For claimant witness evidence on mauri, see above Tamihana 1 at 38; Jones 1 at 61; Emery at 47-49; Parata at 37; Barrett; Parai at 125, 141, 143; Karatea at 59; Wilson 1, the whole reference; Moore at 109; Teira at 23; Wilson 2 at 3; and Tahana at 48.

⁶⁷³ For claimant evidence on hau, see above Jones 1 at 549(c); Moore at 113-115; Tamihana 1 at 20 and 38, and Moses at 22.

⁶⁷⁴ For witness evidence on ohaoha, see above Taueki 2 at 37, 38; Tamihana 1 at 17, 22, 23, 26, 29, 42, 85, 87, 88, 90; Tamihana 2 at 23; Mahina-a-Rangi Baker 1 at 51, 146; Selby 1 at 24; Richmond at 31, 45; Teira at 44; Parata at 30-33; Proctor 1 at 17; Wilson 1 at 9, 15; McGregor at 13-17; Seymour at 7.32; Parai at 33- 52, 136-139; and Potini at 137-141, 164, 294-305.

⁶⁷⁵ For claimant witness evidence on rangatiratanga, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei. See especially Taueki 1 at 37, Taueki 2 at 5, 18, 30; Morgan at 5; Seymour at 3.4; Emery at 33-35, Waaka at 1; Royal at 3-5, 15, 29, 63, 87, 89; Tamihana at 15, 16, 21, 22, 25, 29, 30, 37, 38, 41, 53, 77, 87-90; Mikaere at 24, 39-63, 67-68; Jones, the whole reference; Walker, the whole reference; Selby 1 at 21, 33; 45; Karatea 1 at 51; O'Malley at 21-22; Mahina-a-Rangi Baker 1 at 7; Moore at 67-74; Ropata, the whole reference; Kiriona, the whole reference; Karatea, the whole reference; Teira, the whole reference; Collins & Teira, the whole reference; Harris, the whole reference; Tahana, the whole reference; Huwyler, the whole reference; Shenton, the whole reference; Parata at 12-16, 21-22; Barrett, the whole reference; Andre Baker, the

- l) Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;⁶⁷⁶
- m) Aroha — charity, generosity;⁶⁷⁷
- n) Kaitiakitanga — stewardship and protection, often used in relation to natural resources including the takutai moana.⁶⁷⁸
- o) Tika and Pono - being right or correct, true and genuine;⁶⁷⁹
- p) Rangatira ki te rangatira – leaders speaking directly to each other;⁶⁸⁰
- q) Te mana o te kupu – the power of one’s word which is binding;⁶⁸¹
- r) Kawenata – covenant agreements that are binding on the mana of the group;⁶⁸²

whole reference; Ngaia, the whole reference; Mahina-a-Rangi Baker 2, the whole reference; Tihema Baker, the whole reference; Parai at 18-19, 21, 43-44, 78-85, 88, 155-165; Potini at 1-31, 38-47, 118-161, 164-165; Pomare at 28-66, 83-93; Elkington, the whole reference; Faulkner, the whole reference; and Te Rei, the whole reference.
⁶⁷⁶ For evidence on manaakitanga, see above Taueki 1 at 37; Taueki 2 at 37, 38; Tamihana at 15-17, 25, 26, 29, 38, 53, 55, 90; Jones 1 at 48-49; Karatea at 61-63, 83-84; Mahina-a-Rangi Baker 1 at 51-53, 158; Moore at 100-108; Walker at 33; Selby 1 at 23-24; Kiriona at 25, 41-42; Collins and Teira at 20, 25, 26, 29, 37, 41, 46, 47, 51, 59; Emery at 33-35, 42-44; Barrett 2 at 107; Seymour at 7.26-7.32; Moses at 23; Parai at 2, 136-139, 154-165; Potini at 37, 164-166; Elkington at 63; and Pomare at 48-50.

⁶⁷⁷ For witness evidence on aroha and mercy, see above Collins and Teira at 70; Ropata at 18; Andre Baker at 54-59; Parai at 163; Potini at 142; Pomare at 74-75; and Te Rei at 26.

⁶⁷⁸ For witness evidence on kaitiakitanga, see above Taueki 1 at 30; Taueki 2 at 7, 17, 18, 30, 37, 38; Morgan at 5; Royal at 4, 15, 16, 17, 25, 29, 61, 63, 67, 87; Tamihana 1 at 15-19, 22, 25, 27, 29, 30, 36-38, 41, 45, 53, 55, 63, 71-89; Jones 1 at 48-49; Karatea at 49-52, 58-63, 84; Teira at 25-27; Emery at 40-44, 47-49; Parata at 34-36; Barrett 1 at 20; Barrett 2 at 51-66; Mahina-a-Rangi Baker 2 at 12, 156-193; Wilson, the whole reference; Proctor, the whole reference; Huwyler at 8; Carter, the whole reference; Richmond at 37; Moses at 10, 22, 24, 26; Seymour at 4, 8; Shenton at 12; Murray at 20-27; Kiriona at 67-71; Henare at 30-39; Parai at 14, 77-85, 77, 88, 166-171; Potini at 124, 162-180; Elkington at 56-65; Pomare at 114; and Te Rei at 105-124.

⁶⁷⁹ For witness evidence on tika and pono, see above Taueki at 6; Armstrong at 6 and 54; Royal at 17, 25, 29; Tamihana at 16, 25, 29, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones at 16; Barrett at 2, Moses at 6; and the full affidavits of Ngaia and Parata.

⁶⁸⁰ For witness evidence on rangatira, see above Taueki at 37-38, above Taueki 2 at 5, 18, 30; above Morgan at 5; above Rupene at 2; above Royal at 3-5, 15, 29, 63, 87; Tamihana at 14-16, 22-25, 27, 29, 30, 37, 53, 77, 85, 87, 89, 90; Mikaere at 24, 38-63, 66-68; Emery, 33-35, 45; Parata at 12-16, 21-22; and the Parai, Rei, Pomare, Potini, Ngaia, Teira, Kiriona, Karatea, Jones, Moore, Twomey, Collins, Selby, Faulkner, Moses, Wilson and Baker affidavits.

⁶⁸¹ For witness evidence on te mana o te kupu, see above Mikaere at 7, 45-52, 57, 64; Twomey at 24; O’Malley at 21-28; Walker at 21-22; Selby at 25; Ropata at 35, 41; Kiriona at 41-44; Collins and Teira at 23, 44, 50, 85, 86; Moses at 24; Proctor at 23; and Seymour at 7.57-7.59.

⁶⁸² For witness evidence on kawenata, see above Taueki at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8 10, 17-25; Tamihana at 3, 22, 26; Mikaere at 36, 45-52, 59-60, 63; O’Malley at 20-28; Emery at 27-32; Parata at 16; Ngaia at 75; Ngaia Reply, full reference; Moses at 95, 96; Shenton at 4.0; and Parai at 49, 59.

- s) Tatau pounamu – binding peace agreements to settle conflict and protracted disputes.⁶⁸³

Ringa Kaha and Kaitiakitanga

622) Second, specific ways that groups used to control access to the rohe would have included ringa kaha – the group’s ability to restrict access to the territory by force of arms if required to exclude unwanted intruders or to restrict access to the rohe moana. Other ways would have been by exercising kaitiakitanga responsibilities for protection of resources, or through mana tangata and tapu where rangatira were revered and instilled ihi, wehi and wana – personal awe and fear into people which assisted with restricting access under tikanga.⁶⁸⁴

623) The kaitiaki responsibilities of Māori over lands and the coastal and marine areas were very important. Māori had intimate knowledge of their environment. They not only viewed themselves as beneficiaries of the resources but also as kaitiaki – stewards - which acknowledges the mana and tapu of the environment. Kaitiakitanga traditionally refers to a watcher or guard. The modern usage of the term encapsulates an emerging ethic of stewardship, guardianship or trusteeship especially over natural resources such as lands and the rohe moana but also people - whānau (family), tamariki (children), mokopuna (grandchildren), and for those appointed to leadership positions and in other distinguished positions of authority.⁶⁸⁵

624) In former times, rāhui, tapu and even aukati (enforced political borders) were the kaitiaki forms of stewardship governance and management of lands and coastal marine areas. Māori iwi and hapū continue to exercise their tangata whenua responsibilities as kaitiaki of land, lakes, rivers, springs, swamps, estuaries, lagoons, inland seas, coastal and marine areas, and the rest of the environment.

Aukati

625) Aukati was another tikanga institution used to control access to specific areas. Aukati means to dam up or to prevent or restrict the passage of people by imposing a notional boundary line or frontier across which unauthorised movement is prohibited.⁶⁸⁶ The authors were unable to locate research examples on any local aukati in the Kāpiti Coast region – although Te Whatanui’s sanctuary in the Horowhenua may have been an aukati. Still, the following research on traditional aukati is confined to historic aukati in the Waikato region to provide a useful traditional tikanga example of aukati for controlling access to an area in practice.

⁶⁸³ For witness evidence on tatau pounamu, see above Taueki 1 at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10; Tamihana at 3, 22, 26; Mikaere at 45-52, 58-60, 63; Twomey at 36-37; Armstrong at 17-27; Walker at 21-22; Ropata at 18-19, 43-47; Kiriona at 25, 29-30, 36, 44, 50—51; Collins and Teira at 18, 23, 24, 39, 70, 81, 85, 86, 87; Moore at 7; O’Malley at 20-28; Emery at 27-32; Shenton 4.0; Proctor 2 at 30, 37; Ngaia at 50, 56; Parata at 16; Moses at 38-40, 72, 95-96; Potini at 149; Pomare at 57-58, 74-76; Boast at 105; and Te Rei at 52.

⁶⁸⁴ For witness references on wāhi tapu, see Taueki 2 at 7, 18, 32; Armstrong at 30; Royal at 59; Jones at 44, 76; Mahina-a-Rangi Baker 1 at 67; Moore 1 at 99; Moore 2, the whole reference; Teira at 53; Emery at 52-54; Barrett 2 at 46, 50; Moses at 25; Williams, the whole reference; McGregor at 9-20; Seymour 1 at 3.22, 4, 8; Seymour 2 at 5.6, 5.11; Parai at 61, 69, 139; Potini at 125-130, 274; and Te Rei at 164-171.

⁶⁸⁵ Benton, R, Frame, A & Meredith, P, *Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 105.

⁶⁸⁶ Above, at 51.

- 626) At the outset of the Waikato War campaign in 1863, King Tawhiao declared an aukati or 'boundary' at the Mangatawhiri Stream near present day Mercer. Tawhiao issued an ultimatum that if the British Imperial troops crossed the Mangatawhiri Stream, it was an act of war. These aukati or puru were essentially tikanga declarations by Tawhiao and Ngāti Maniapoto to preserve their rangatiratanga by imposing a notional boundary line or frontier across which unauthorised passage was restricted or prohibited. General Cameron subsequently crossed the Mangatawhiri Stream on 12 July 1863 which was the official commencement of the Waikato War campaign.
- 627) Following the final battle of the Waikato War campaign, the Battle of Ōrākau in April 1864, the Kīngitanga forces withdrew south of the Puniu River into the King Country and their lands north of the Puniu River were confiscated as raupatu. The chiefs then declared an aukati along the Puniu River.
- 628) The confiscation lines, were important symbols of the new aukati to halt and defend against any further advance of the Colonial and Imperial forces but also to preserve Māori autonomy. Subsequently, the aukati declared around Te Rohe Pōtae were to halt the encroachment of Pākehā settlement, roads and railway lines, the Native Land Court, and 'nga kaihoru whenua' - land swallows - land purchase agents. In 1868, Hare Reweti was advised by Manuwhiri, the King's father-in-law and 'Prime Minister:' 'The aukatis are to remain as heretofore, strictly guarded and kept tapu.'⁶⁸⁷
- 629) Speaking to the Native Minister, John Bryce, in December 1883 at Kihikihi, Rewi Maniapoto recorded that he fixed the boundaries of the aukati and Wahanui Huatare erected posts (pou) marking off that district to be tapu against Pākehā.⁶⁸⁸ Pou were frequently erected to mark the boundary zones between groups and were generally declared tapu. Taonui Hikaka described the aukati at that same meeting as 'a great policy of ours,'⁶⁸⁹ and as late as 1883, was re-erecting the aukati posts.⁶⁹⁰ A consequence of the aukati declaration sealed by the erection of tapu pou was no Pākehā were permitted to enter Te Rohe Pōtae by penalty of death.
- 630) Consequently, Ngāti Maniapoto sentinels guarded the aukati in the northern boundary of Te Rohe Pōtae. Professor Tom Roa recalled a conversation between his kaumātua Reti Roa and Henare Tauaitirangi on the sentinels:
- ... they would walk the line from the Pūniu to Whatiwhatihoe, from Whatiwhatihoe to the Pūniu, back and forth and other families would guard parts of the line, and they would permit some people to go to Alexandra, to Te Awamutu and to other places, but Pākehā and kūpapa were not allowed to come into Te Rohe Pōtae.⁶⁹¹
- 631) Pākehā who breached the aukati tikanga were generally warned well ahead of time before sanctions were enforced. One of the more well-known incidents was the

⁶⁸⁷ *Daily Southern Cross*, (25 January 1868) at 5.

⁶⁸⁸ *AJHR* (1886 Session I, G-08) at 1-2.

⁶⁸⁹ Above.

⁶⁹⁰ Wilkinson telegram to Bryce 15 March 1883 in (MA 23/5 ANZ Wellington).

⁶⁹¹ Ngā Kōrero Tuku Iho, (Hui 6, 2010) at 247.

execution of the Wesleyan Methodist missionary John Whitely. Tohe Rauputu recorded the following account:

That was Reverend Whitely shot at Pukearuhe and it was stated that it was Te Rerenga who shot him on their horses. ... Te Rerenga told him “Return, go back,” but they did not heed the warning. They told him “Return, go back.” He did not heed the warning but Whitely; wanted to come into the Aukati to assist some of the people within the Aukati areas ... In the end he was shot.⁶⁹²

632) Another incident was the execution of William Moffatt, in 1880 by Ngatai. The late Sir Archie Taiaroa recorded:

As far distant as the Whanganui districts to the south, chiefs enforced the boundaries of Te Rohe Pōtae. Pākehā were forbidden to enter; that was the case in Taumarunui. Our ancestor Ngātai ... said “Don’t bring Pākehā here,” but they came anyway. He said “Go. Go away and don’t come back.” The Pākehā were sent [away] but they came back, and the Pākehā ... was killed. That is what an aukati means; no one allowed to come in. That was the mana, that was the strength of the word of the chiefs. They said, “Do not enter. If you do there is price, you come in and you pay the price.”⁶⁹³

633) For the Kīngitanga and Ngāti Maniapoto, the aukati was not an isolationist policy but a rangatiratanga policy - highlighting the mana and tapu of tikanga Māori, the assertion of Māori autonomy over an area, who could cross their borders, and whose law predominated. Some Pākehā visitors were permitted into the Rohe Pōtae but under the mana of an influential chief. William Searancke, the Waikato Resident Magistrate, was one example who was permitted to attend a hui at Hangatiki in 1869 after Rewi Maniapoto intervened for him.⁶⁹⁴

634) By the late 1860s, the various aukati around the Rohe Pōtae territory were referred to by Wahanui and Rewi as a ‘porotaka’ - an encircling boundary where mana Māori dominated under the auspices of King Tawhiao. Many Pākehā even viewed the area as King Tawhiao’s territory, hence the King Country.⁶⁹⁵ The aukati was as much about ensuring that the territory remained tapu, restricted and secure to Māori as an area where tikanga Māori was law, where Māori exercised mana motuhake. Beyond the raupatu confiscation line behind the aukati then, the Rohe Pōtae area remained a largely autonomous territory until it was interrupted and undermined by the main trunk line railway in 1889.⁶⁹⁶

Wāhi Tapu and Rāhui

635) Perhaps two other specific tikanga examples utilised to control and actually restrict access to the rohe moana, at least for a set period of time, were through exercising

⁶⁹² Ngā Kōrero Tuku Iho, (Hui 5, 2010) at 168-169.

⁶⁹³ Above, at 267.

⁶⁹⁴ *Nelson Examiner and New Zealand Chronicle*, (5 May 1869) at 3.

⁶⁹⁵ See *New Zealand Herald*, (5 September 1866) at 3.

⁶⁹⁶ For the boundaries of the ‘Rohe Pōtae,’ see the petition of the Maniapoto, Raukawa, Tuwharetoa, and Whanganui Tribes,’ *AJHR* (1883, J-1) at 1-4.

responsible kaitiakitanga, and by establishing wāhi tapu through rāhui which acknowledged many of the tikanga principles noted above such as:

- a) Wairuatanga – acknowledging the metaphysical world and the need to placate the Atua with the placing of a rāhui for specific kaitiaki purposes such as a death in the moana, a place being deemed tapu due to hāparu – pollution, or for the regeneration of exhausted resources in the rohe moana;
- b) Rangatiratanga – effective leadership to organise, negotiate and direct the community on the appropriate kaitiaki conditions for instituting a wāhi tapu and placing of a rāhui over the rohe moana;
- c) Mana tangata – having the kaitiaki authority to place and enforce a rāhui and to create a wāhi tapu;
- d) Tapu – appropriate conduct for protecting the intrinsic sanctity of persons, places, activities and objects such as when people die in the rohe moana, there is a need to keep people safe and avoiding risk by placing a rāhui on the area until the body is recovered;
- e) Noa – to free from tapu, to lift the tapu restrictions from the rāhui at the appropriate time thereby liberating the situation;
- f) Mauri – recognition of the divine life force of people, places and objects including in the rohe moana;
- g) Manaakitanga – enhancing the mana of others by placing a rāhui over the moana as kaitiaki to protect people from an unsafe physical and spiritual situation ;
- h) Kaitiakitanga – stewardship protection of the rohe moana and people through rāhui and wāhi tapu.

636) “Wāhi tapu” are defined in s. 9 Interpretation section, MACA as “a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense.” One of the rights conferred by customary marine title (CMT) is a right to protect wāhi tapu and wāhi tapu areas and restrict access pursuant to s. 62(1)(c), MACA.

637) Professor Hirini Mead referred to wāhi tapu specifically over waterbodies when he declared:

So now we are looking at the notion of water becoming tapu and we’re beginning to examine the question of whether a body of water can be called a wāhi tapu. Now a wāhi tapu has a mantle of tapu upon it that lasts almost permanently until sometime well into the future when knowledge of the existence of the wāhi tapu has been forgotten or when special ceremonies are held to deconsecrate the wāhi tapu.⁶⁹⁷

⁶⁹⁷ Above at 88.

638) Professor Mead also discussed rāhui:

A rāhui is established over a body of water and actually over a locality. For example, ... the river where a relative drowned. That part of the river becomes a prohibited zone for any activity but the prohibition is especially aimed at halting the food quest in that area. A rāhui is often used to conserve a food supply and when this is instituted ritually, a whole lake can become tapu for that one purpose, to conserve the bird life. It could be applied to a bay where a specific kaimoana such as oysters or mussels grow and the stocks are depleted. The crucial point is that the prohibition is for a specified time period that is known to the members of the tangata whenua group.⁶⁹⁸

639) A specific early wāhi tapu and rāhui example occurred in the Kāpiti Coast area near the Rangitikei River in 1840. Edward J. Wakefield, New Zealand Company land agent, referred to the wāhi tapu incident when he observed:

A trading boat from Cloudy Bay to Whanganui had been wrecked near Rangitikei; and the crew had been drowned, including a Ngatiraukawa chief, named Koraria, who was a passenger. ... [Ngāti Raukawa] had moreover tapued the beach between Otaki and Rangitikei, thus preventing the passage of native or white man in either direction for a considerable space of time. ... Many other parties, bound thither or to Taranaki had been grievously detained, to their serious inconvenience in many ways, by this stringent application of one of the old Māori [sic] customs. Koraria had been a brother of Watanui [Te Whatanui] and the observance of the tapu was therefore most rigidly enforced.⁶⁹⁹

640) Wakefield continued:

On the 1st of July [1840], the aggrieved travellers had made a formal application to the Police Magistrate [Mr Murphy] at Wellington for his official interference; thinking that, after the proclamation of sovereignty of the Queen of England over New Zealand, the officers of the Queen would feel themselves bound to forbid the obstruction of the natural highway by any class of Her Majesty's subjects.

But Mr. Murphy had met the question in a very easy and diplomatic style. His official answer "deeply regretted the inconvenience to which the applicants were subjected; but he had no power to interfere with what was an immemorial and recognised usage among the natives."

He hinted at the probability that "this and similar customs might become the subject of acts by the Legislative Council of the Colony;" until then, he could "discover" no grounds which would justify his interference." He added that he understood the tapu had been laid on the beach "simply in consequence of the death of a chief, and not for any desire to injure the English settlers in the country."

"To attempt violently to break through it, therefore," he concluded, "would probably excite feelings of hostility to the settlers, which would involve greater

⁶⁹⁸ Above at 88.

⁶⁹⁹ Wakefield, E.J, *Adventures in New Zealand*, (Vol. 11, John Murray, Albermarle Street, London, 1846) at 24-25. The incident was also acknowledged in "News and Notes," in *Manawatu Herald*, (Vol. LV, Issue 4464, 7 March 1935) at 24.

eventual inconvenience than any that can be experienced from a temporary interruption of communication, and might therefore be inexpedient, even if it were strictly legal.”

And so they had to wait until the natives took off the tapu [whakanoa] of their own accord, or accepted heavy payment for a permission to pass. The beach had only just been made free, when I came from Wanganui.⁷⁰⁰

641) Early official instructions after the Treaty of Waitangi were also forwarded from the Colonial Office in London directing the Governor to respect and uphold tikanga Māori within the Aotearoa New Zealand legal system. In 1842, Lord Stanley even suggested that certain Māori institutions such as tapu be incorporated into the legal system.⁷⁰¹ Lord Stanley also directed that legislation be framed in some measure to meet tikanga Māori practices including punishment for the desecration of wāhi tapu.⁷⁰²

642) The group who placed the rāhui and instituted the wāhi tapu thereby restricting access to the rohe moana near the Rangitikei River at the time was Ngāti Raukawa ki te Tonga.

643) The Ngāti Toa witness Hohepa Potini also referred to rāhui in his evidence when he noted:

Acting as the kaitiaki includes a responsibility to maintain the spiritual connection and respect for Tangaroa. Spiritual protocols need to be conducted when there are events at sea, whether they be people or taonga species such as whales, and karakia performed to whakawātea te tapu (clear the tapu). It may be necessary to impose a rāhui for a period.⁷⁰³

644) The Ngāti Raukawa witness Rawiri Richmond wisely counselled:

[H]apū always retained the right to exercise their mana to exclude access [to non-hapū members] or place a rāhui if necessary.⁷⁰⁴

645) The Te Ati Awa witness Tutere Parata referred to a decline in the Toheroa population at Raumati and Kowhai when he noted:

Due to the decline in the national population we have had a rāhui on them for about 20 years now. The rāhui is respected by the whole community as well.⁷⁰⁵

646) Ngāti Tamarangi witness William Taueki recalled asking his father about history, whakapapa and wāhi tapu to which his father replied:

⁷⁰⁰ Above, at 24-25.

⁷⁰¹ Lord Stanley, Secretary of State for the Colonies, Memorandum, 23 August 1842.

⁷⁰² Stanley Minute, 23 August 1842, Colonial Office Records 209/14, at 202.

⁷⁰³ Above Potini at para 163.

⁷⁰⁴ Above Richardson at para 34.

⁷⁰⁵ Above Parata at para 32.

“Leave it.” When I got older and started to learn some of this, I was told to be careful [due to tapu].⁷⁰⁶

647) Muaūpoko witness Mark Moses also referred to wāhi tapu when he noted:

Taonga tuturu (artefacts) and Koīwi tūpuna (ancestral remains) may be found at wāhi tapu (places of significance). Taunaha and wāhi tapu have their own kōrero.⁷⁰⁷

Summary

648) In summary, Māori claimant groups historically controlled access to the whenua and the rohe moana as a matter of tikanga through, inter alia, rangatiratanga, mana whenua, mana moana, ringa kaha, kaitiakitanga, aukati, wāhi tapu and rāhui.

Question 8 – Since 1840, what applicant group or groups have used and occupied the application area, or any part of it, on a sole or shared basis in accordance with tikanga?

649) Given that we have analysed tikanga and what applicant groups used and occupied the application area in Question 6) and the material in Question 7) in a lot of depth already, this section will be brief. Accordingly, which applicant groups used and occupied the application areas or any part of it on a sole or shared basis since 1840 in accordance with tikanga, are the groups outlined already in Question 6).

650) We have experienced all the passionate conviction and deep emotion expressed by all of the claimant groups in seeking to establish their rights to the Kapiti coast areas for MACA orders. The challenge is the highly contested historic tribal narratives on who conquered who under *take raupatu* and *take ringa kaha*, who maintained mana whenua and *take tupuna*, what impact did *ope taua* raids have on mana whenua, who entered into and what effect did *rongo mau* and *tatau pounamu* peace agreements have on tribal relations, and who gifted whenua to whom under *take tuku whenua*, and what were the associated tikanga obligations?

651) With such contested and diametrically opposed tribal kōrero and narratives by the respective claimant groups that have been backed up by their respective expert historian reports, we are left with the unenviable task of trying to make sense of all of the ‘facts’ and what tikanga applies to assist Justice Grice to ascertain MACA group interests in the Kāpiti coast areas.

652) The short answer is the key tikanga principles that apply in assessing use and occupation interests are the following:

⁷⁰⁶ Above, Taueki 2 at para 18.

⁷⁰⁷ Above Moses at para 25.

- a) Whakapapa – genealogy and the intergenerational rights and responsibilities to the past, present and future generations over the whenua and rohe moana;
- b) Wairuatanga – acknowledging the metaphysical world and the need to placate the Atua over the whenua and rohe moana;
- c) Rangatiratanga – effective leadership over the whenua and rohe moana;
- d) Mana tangata – authority and responsibility over the over the whenua and rohe moana;
- e) Tapu– appropriate conduct for protecting the intrinsic sanctity of persons, places (the whenua and rohe moana), activities and objects, keeping people safe and avoiding risk;
- f) Noa – to free from tapu, to lift the tapu restrictions thereby liberating a situation;
- g) Mauri – recognition of the divine life force of people, places and objects including in the whenua and rohe moana;
- h) Manaakitanga – enhancing the mana of others;
- i) Kaitiakitanga – stewardship protection of the whenua and rohe moana for future generations.
- j) Take whenua - basis for proprietary interests over the whenua and rohe moana;
- k) Take kitea – basis for proprietary interests over the whenua and rohe moana through discovery;
- l) Take tupuna – basis for proprietary interests over the whenua and rohe moana through ancestry;
- m) Take raupatu - basis for proprietary interests over the whenua and rohe moana through conquest;
- n) Take ringa kaha - basis for proprietary interests over the whenua and rohe moana through effective defence;
- o) Take ahi kā roa - basis for proprietary interests over the whenua and rohe moana through effective and intergenerational occupation.

653) Question 6) above outlined the alleged traditional rohe of the various applicant groups for the Kāpiti Coast MACA hearing who have maintained rangatiratanga, manaakitanga, kaitiakitanga and other vital tikanga rights, responsibilities and relationships among themselves and with their respective whenua and rohe moana.

654) Given the complex overlapping and intersecting layers of proprietary interests and kaitiaki and manaakitanga responsibilities among the respective claimant groups, it is difficult to decide with any precision the boundaries and interests of the tribal group whakapapa, let alone the tribal group whenua and rohe moana interests on a sole or shared basis in the application areas.

655) However, what is more certain is that the following Māori claimant groups have used and occupied the Kāpiti Coast application area to differing degrees on a sole and more likely shared basis since 1840:

- 1) The David Morgan Whānau;
- 2) Te Whānau a Tima and Te Hapū o Te Mateawa;
- 3) Te Patutokotoko,
- 4) Ngāti Apa,
- 5) Rangitāne,
- 6) Ngāti Tamarangi,
- 7) Muaūpoko,
- 8) Ngāti Kauwhata,
- 9) Te Ātiawa ki Whakarongotai,
- 10) Ngāti Raukawa ki te Tonga, and
- 11) Ngāti Toa Rangatira.

Question 9 – Having regard to the evidence, what tikanga applies today to the relationships between the iwi in this area?

656) To answer Question 9), all the research and evidence from the previous sections is relevant, so answering this question will be relatively brief.

657) The tikanga that applies today to the relationships between the iwi, hapū and whānau groups in the Kapiti Coast area is all of the fundamental tikanga values and principles that were explored in detail in the earlier sections of this report, including:

- a) Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including all of the Kāpiti Coast claimant groups to each other and the respective takutai moana claimant areas;⁷⁰⁸

⁷⁰⁸ For claimant evidence on whakapapa, see above, Taueki 1, at para. 2 ; Armstrong, at para. 65; Taueki 2 at para. 2, 6, 7, 18, 19, 29; at para. 5; Waaka, at para. 1; Royal, at para. 3, 4, 5, 7, 15, 87; Tamihana 1, at para 5-7, 17, 22; Mikaere, para 7, 22, 25, 37, 38, 47, 48, 59, 60; Jones 1, at 29; Twomey, at para 1-8; Mahina-a-Rangi Baker 1 at para 5-6, 104, 129-130; Moore, at para 2; Walker, at para 3, 14-22; Selby 1, at para 4-11, 22; Richmond, at para 14(b); Rōpata, at para 10-25; Teira, at para 19-22 [CB Tab 42 at 201.00377]; Hēnare, at para 1; Karatea, at para 1, 5-12, 16-22; Kiriona, at para 19-21; Collins and Teira, full brief; Moore 2, at para 1-11; Karatea, at para 1-12; Parata at para 1-8; Barrett at para 1-61; Barrett 2, at para 1-12; Carter, at para 1-3; Andre Baker, at para 36-69; Ngaia, at para 10-25; Housiaux, at para 1-4; Maote-Davis, at para 1-8; Mahina-a-Rangi Baker in Reply, at para 1, 12-13; Tihema Baker in Reply, at para 1-2; Ngaia 2 in Reply, at para 1-25; Warrington, at para 1-19; Murray, at para 1-5; Proctor, at para 1-13; Wiremu-Matakātea, at para 1-8; Packer, at para 1-5; Williams, at para 1-10; Rump, at para 1-2; Nuetze, at para 1-5; Wilson, at 1-10; Reply Brief of Moses, at para

- b) Wairuatanga - spirituality including placating the departmental Gods' respective realms such as Tangaroa over the takutai moana realm;⁷⁰⁹
- c) Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights, responsibilities and obligations that follow from the individuals place in the collective group;⁷¹⁰
- d) Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group within the takutai moana area;⁷¹¹
- e) Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example, a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;⁷¹²

1-2; Tukapua, at para 1, 17-19; Reply Brief of Wilson, at para 3; Brief of Evidence of Sillena Wiki McGregor, at para 1-2; Affidavit of Wilson for Interested Party of Horowhenua 11 Part Reservation, at 3; Seymour, at para 1-8; Brief of Evidence of Patrick Seymour, at para 1.0-4.7; Huwyler, at para 1-9; Shenton, at para 1-31; Tahana, at para 1-31.2; Harris at para 1-3; Parai, at para 1-11, 32, 40, 41, 158; Potini, at para 1-31, 161; Elkington, at 1-10; Pomare, at para 1-8, 40-66; Faulkner, at para 1-2, 29; Te Rei, dated 13th February 2024 at para 1-4, 14-53.

⁷⁰⁹ For claimant witness evidence on wairuatanga, see above Taueki 2 at 2-18, 29; Royal at 52, 58; Tamihana at 18, 22, 29, 37, 57, 77; Mikaere at 22, 47-48; Emery at 46-51; Parata at 10, 23, 37; Barrett 2 at 46; Andre Baker, the whole reference; Parai at 21-22, 35, 55-56, 138-139, 141, 166-171; Potini at 153, 159, 164-165; Elkington at 23-24, 28, 55, 63; O'Malley at 21-22; Proctor 1 at 11-13, 35; Proctor 2 at 19, 62-79, 104, 106-110; Moore at 116-118; Walker, the whole reference; Richmond at 14; Teira, the whole reference; Henare, the whole reference; Wilson 2 at 3 and Seymour at 5.9 and 8.5.

⁷¹⁰ For claimant witness evidence on whānaungatanga, see above Taueki 2 at 7, 29, 30, 32; Morgan at 5; Waaka at 1; Royal at 3-5, 87-88; Tamihana at 15, 16, 22, 25, 29, 30, 41, 53, 77, 88, 89, 130; Mikaere at 33-37, 38, 43-44, 59-60; Jones 1 at 27; Moore at 100-108; Mahina-a-Rangi Baker 1 at 49-53; Walker at 35; Twomey, the whole reference; Kiriona, the whole reference; Karatea, the whole reference; Selby 1, the whole reference; Richmond at 14(h); Ropata at 44; Teira at 17; Collins & Teira, the whole reference; Emery at 43-44, 55-60; Parata at 37; Andrē Baker, the whole reference; Ngaia 1, the whole reference; Tihema Baker, the whole reference; Parai at 2-27, 127-131, 135-139, 141-142, 147, 155-165; Potini at 1-31, 38-47; 164-168; Pomare at 40-42, 47-49; Elkington, the whole reference; Te Rei, the whole reference; Harris, the whole reference; Tahana at 48-49; Huwyler, the whole reference; Shenton, the whole reference; Seymour, the whole reference; Morgan, the whole reference; Emery, the whole reference; Proctor 1 at 12-13; Tukapua, the whole reference; Moses, the whole reference; and Wilson 2, the whole reference.

⁷¹¹ For claimant evidence on mana, see above all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei. See especially Taueki 1 at 7; Taueki 2 at 6-9, 18, 30; Morgan at 5; Royal at 3-5, 87; Tamihana 1 at 16, 25, 29, 38, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones 1 at 16; Parata, the whole reference; Barrett 2 at 118; Ngaia 1, the whole reference; Moses at 6; Parai at 110-171; Potini at 123, 162; Rei, the whole reference; Kiriona 1 at 20, Wilson at 52; Morgan at 1-6; Mahinaarangi Baker 1 at 196; Walker, the whole reference; Richmond at 30; Ropata at 50; Kiriona at 62, 84; Jones 2 at 6-11 and Warrington at 2.

⁷¹² For claimant evidence on tapu, see Taueki 1 at 32; Taueki 2 at 15-18; Armstrong at 41; Royal at 58-59; Tamihana 1 at 20-27, 29; Jones 1 at 41-47; Emery at 47-48; Parata at 37; Ngaia at 76; Parai at 125-129; Potini

- f) Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;⁷¹³
- g) Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;⁷¹⁴
- h) Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;⁷¹⁵
- i) Hau — respect for the vital essence of a person, place or object;⁷¹⁶
- j) Ohaoha – distribution and sharing of prosperity;⁷¹⁷
- k) Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;⁷¹⁸

at 124, 148, 177-179; O'Malley at 21-22; Richmond at 35; Kiriona at 63-65; Nuetze at 54; Seymour at 5.5-5.12, 7.40, 8.2-8.9; and Tamihana 2 at 20, 29.

⁷¹³ For claimant witness evidence on tapu and noa, see above Taueki at 32; Taueki 2 at 16-18; Armstrong at 41; Royal at 58-59; Tamihana at 20, 27, 29; Jones at 41-47; Emery at 47-48; Parata at 37 and Ngaia at 76.

⁷¹⁴ For claimant evidence on utu, see above Armstrong at 5, 9, 13; Tamihana 1 at 25, 38, 55; Mikaere at 44, 45, 48-50; Jones 1 at 45; Emery at 43-44, 48-50; Twomey at 39-41; O'Malley at 32-33; Richmond at 28, 37, 45; Ropata at 18; Moore at 75-79; Selby 1 at 17-25; Teira 25-27; Andre Baker at 65-67; Ngaia 1 at 64-66; Rump, the whole reference; Moses at 16, 18; Parai at 17, 73, 95, 100, 143, 147-158; Potini at 142; Elkington at 44; Pomare at 74-75; and Te Rei at 26.

⁷¹⁵ For claimant witness evidence on mauri, see above Tamihana 1 at 38; Jones 1 at 61; Emery at 47-49; Parata at 37; Barrett; Parai at 125, 141, 143; Karatea at 59; Wilson 1, the whole reference; Moore at 109; Teira at 23, Wilson 2 at 3; and Tahana at 48.

⁷¹⁶ For claimant evidence on hau, see above Jones 1 at 549(c); Moore at 113-115; Tamihana 1 at 20 and 38, and Moses at 22.

⁷¹⁷ For witness evidence on ohaoha, see above Taueki 2 at 37, 38; Tamihana 1 at 17, 22, 23, 26, 29, 42, 85, 87, 88, 90; Tamihana 2 at 23; Mahina-a-Rangi Baker 1 at 51, 146; Selby 1 at 24; Richmond at 31, 45; Teira at 44; Parata at 30-33; Proctor 1 at 17; Wilson 1 at 9, 15; McGregor at 13-17; Seymour at 7.32; Parai at 33- 52, 136-139; and Potini at 137-141, 164, 294-305.

⁷¹⁸ For claimant witness evidence on rangatiratanga, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei. See especially Taueki 1 at 37, Taueki 2 at 5, 18, 30; Morgan at 5; Seymour at 3.4; Emery at 33-35, Waaka at 1; Royal at 3-5, 15, 29, 63, 87, 89; Tamihana at 15, 16, 21, 22, 25, 29, 30, 37, 38, 41, 53, 77, 87-90; Mikaere at 24, 39-63, 67-68; Jones, the whole reference; Walker, the whole reference; Selby 1 at 21, 33, 45; Karatea 1 at 51; O'Malley at 21-22; Mahina-a-Rangi Baker 1 at 7; Moore at 67-74; Ropata, the whole reference; Kirona, the whole reference; Karatea, the whole reference; Teira, the whole reference; Collins & Teira, the whole reference; Harris, the whole reference; Tahana, the whole reference; Huwyler, the whole reference; Shenton, the whole reference; Parata at 12-16, 21-22; Barrett, the whole reference; Andre Baker, the whole reference; Ngaia, the whole reference; Mahina-a-Rangi Baker 2, the whole reference; Tihema Baker, the whole reference; Parai at 18-19, 21, 43-44, 78-85, 88, 155-165; Potini at 1-31, 38-47, 118-161, 164-165; Pomare at 28-66, 83-93; Elkington, the whole reference; Faulkner, the whole reference; and Te Rei, the whole reference.

- l) Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;⁷¹⁹
- m) Aroha — charity, generosity;⁷²⁰
- n) Kaitiakitanga — stewardship and protection, often used in relation to natural resources including the takutai moana.⁷²¹
- o) Tika and Pono - being right or correct, true and genuine;⁷²²
- p) Rangatira ki te rangatira – leaders speaking directly to each other;⁷²³
- q) Te mana o te kupu – the power of one’s word which is binding;⁷²⁴
- r) Kawenata – covenant agreements that are binding on the mana of the group;⁷²⁵
- s) Tatau pounamu – binding peace agreements to settle conflict and protracted disputes.⁷²⁶

⁷¹⁹ For evidence on manaakitanga, see above Taueki 1 at 37; Taueki 2 at 37, 38; Tamihana at 15-17, 25, 26, 29, 38, 53, 55, 90; Jones 1 at 48-49; Karatea at 61-63, 83-84; Mahina-a-Rangi Baker 1 at 51-53, 158; Moore at 100-108; Walker at 33; Selby 1 at 23-24; Kiriona at 25, 41-42; Collins and Teira at 20, 25, 26, 29, 37, 41, 46, 47, 51, 59; Emery at 33-35, 42-44; Barrett 2 at 107; Seymour at 7.26-7.32; Moses at 23; Parai at 2, 136-139, 154-165; Potini at 37, 164-166; Elkington at 63; and Pomare at 48-50.

⁷²⁰ For witness evidence on aroha and mercy, see above Collins and Teira at 70; Ropata at 18; Andre Baker at 54-59; Parai at 163; Potini at 142; Pomare at 74-75; and Te Rei at 26.

⁷²¹ For witness evidence on kaitiakitanga, see above Taueki 1 at 30; Taueki 2 at 7, 17, 18, 30, 37, 38; Morgan at 5; Royal at 4, 15, 16, 17, 25, 29, 61, 63, 67, 87; Tamihana 1 at 15-19, 22, 25, 27, 29, 30, 36-38, 41, 45, 53, 55, 63, 71-89; Jones 1 at 48-49; Karatea at 49-52, 58-63, 84; Teira at 25-27; Emery at 40-44, 47-49; Parata at 34-36; Barrett 1 at 20; Barrett 2 at 51-66; Mahina-a-Rangi Baker 2 at 12, 156-193; Wilson, the whole reference; Proctor, the whole reference; Huwyler at 8; Carter, the whole reference; Richmond at 37; Moses at 10, 22, 24, 26; Seymour at 4, 8; Shenton at 12; Murray at 20-27; Kiriona at 67-71; Henare at 30-39; Parai at 14, 77-85, 77, 88, 166-171; Potini at 124, 162-180; Elkington at 56-65; Pomare at 114; and Te Rei at 105-124.

⁷²² For witness evidence on tika and pono, see above Taueki at 6; Armstrong at 6 and 54; Royal at 17, 25, 29; Tamihana at 16, 25, 29, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones at 16; Barrett at 2, Moses at 6; and the full affidavits of Ngaia and Parata.

⁷²³ For witness evidence on rangatira, see above Taueki at 37-38, above Taueki 2 at 5, 18, 30; above Morgan at 5; above Rupene at 2; above Royal at 3-5, 15, 29, 63, 87; Tamihana at 14-16, 22-25, 27, 29, 30, 37, 53, 77, 85, 87, 89, 90; Mikaere at 24, 38-63, 66-68; Emery, 33-35, 45; Parata at 12-16, 21-22; and the Parai, Rei, Pomare, Potini, Ngaia, Teira, Kiriona, Karatea, Jones, Moore, Twomey, Collins, Selby, Faulkner, Moses, Wilson and Baker affidavits.

⁷²⁴ For witness evidence on te mana o te kupu, see above Mikaere at 7, 45-52, 57, 64; Twomey at 24; O’Malley at 21-28; Walker at 21-22; Selby at 25; Ropata at 35, 41; Kiriona at 41-44; Collins and Teira at 23, 44, 50, 85, 86; Moses at 24; Proctor at 23; and Seymour at 7.57-7.59.

⁷²⁵ For witness evidence on kawenata, see above Taueki at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10, 17-25; Tamihana at 3, 22, 26; Mikaere at 36, 45-52, 59-60, 63; O’Malley at 20-28; Emery at 27-32; Parata at 16; Ngaia at 75; Ngaia Reply, full reference; Moses at 95, 96; Shenton at 4.0; and Parai at 49, 59.

⁷²⁶ For witness evidence on tatau pounamu, see above Taueki 1 at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10; Tamihana at 3, 22, 26; Mikaere at 45-52, 58-60, 63; Twomey at 36-37; Armstrong at 17-27; Walker at 21-22; Ropata at 18-19, 43-47; Kiriona at 25, 29-30, 36, 44, 50—51; Collins and Teira at 18, 23, 24, 39, 70, 81, 85, 86, 87; Moore at 7; O’Malley at 20-28; Emery at 27-32; Shenton 4.0; Proctor 2 at 30, 37; Ngaia at 50, 56; Parata at 16; Moses at 38-40, 72, 95-96; Potini at 149; Pomare at 57-58, 74-76; Boast at 105; and Te Rei at 52.

658) What the above sections of the report have highlighted is that the boundary lines between the applicant groups are not certain and clear ‘straight-line boundaries’ but are complex, convoluted, and overlapping, amorphous boundaries with primary, secondary, and tertiary rights holders from different iwi, hapū and even whānau communities, all with individual or whānau interests held in accordance with tikanga. Hence the impetus for shared exclusivity which requires the applicant groups to acknowledge the rights and interests of each other to the shared areas which is where some of the convoluted and protracted challenges emerge.

659) The rich, although highly contested, history, whakapapa and tikanga challenges within this Kāpiti Coast MACA hearing between Ngāti Raukawa ki te Tonga, Te Ātiawa ki Whakarongotai, Muaūpoko, Ngāti Tamarangi, Ngāti Apa, Rangitāne, Ngāti Kauwhata, Ngāti Toa Rangatira, Te Patutokotoko, Te Whānau a Tima and the David Morgan Whānau, teaches us that it is common for people to disagree, dispute and conflict over whenua and rohe moana territorial boundaries, mana whenua, mana moana, rangatiratanga and other tikanga rights, interests and responsibilities.

660) What all of the discussion and evidence above also shows is that at 1840 when the Treaty of Waitangi was signed, it is very difficult to ascertain with precision which applicant group or groups used and occupied the Kāpiti Coast application area, or any part of it, in accordance with tikanga. Each of the applicant groups asserted their rohe whenua and rohe moana interests within certain boundaries which overlapped and intersected into other group’s alleged rohe areas of interest or spheres of influence.

661) To summarise our report so far, it appears on the evidence presented in the High Court by the claimants and expert witnesses that Ngāti Raukawa ki te Tonga, Te Ātiawa ki Whakarongotai, Muaūpoko, Ngāti Tamarangi, Ngāti Apa, Rangitāne, Ngāti Kauwhata, Ngāti Toa Rangatira, Te Patutokotoko, Te Whānau a Tima and the David Morgan Whānau applicant groups, among others, used and occupied the Kāpiti Coast application area, or parts of it, within their respective - but often amorphous and overlapping- rohe boundaries in accordance with tikanga Māori.

662) Going forward from here is the key question.

663) Having discussed tikanga and mātauranga Māori in much detail already in our report, to answer Question 9) on what tikanga is relevant today to the relationships between the iwi, hapū and whānau in the Kāpiti Coast, the tikanga concepts noted above are obviously relevant and apply going forward.

664) It is, moreover, important to remember that tikanga Māori as a legal system is built, sustained, and maintained on strong relationships with the Atua, whenua, rohe moana, tūpuna, tamariki, mokopuna, whānau, hapū and iwi groupings, as well as other alliances. These tikanga relationships include fundamental associated rights, responsibilities, inherent respect and intrinsic reciprocity. Consequently, some other recommended key tikanga Māori concepts to assist with strengthening what appear to be inter- and intra-iwi, hapū and whānau relationships that appear to be strained, stressed and sceptical from the protracted and raw wounds that hark back to the

turbulent Musket Wars period, followed by the pernicious experiences of groups in the Native Land Court and other legal fora.

- 665) To these ends, the other recommended tikanga concepts to assist with reconciling otherwise broken relationships in the Kāpiti Coast going forward include utu, muru and ea, mana rangatira, tatau pounamu, takawaenga whānau and mana huihui.

Utu, Muru and the Elusive State of Ea

Utu

- 666) Utu and muru are two other relevant tikanga concepts for assisting with answering Question 4) on ahi kā, raupatu, ringa kaha, tatau pounamu and take tuku. Utu as a tikanga principle is about maintaining reciprocal relationships and balance with nature and persons. The object of utu is to restore mana where it has been diminished and to maintain balance and harmony in relationships between individuals and groups. If those relationships are disturbed by, inter alia, insult, injury, war, or other unresolved trauma, utu is a means of restoring the balance and the relationship. Traditionally battles were often fought in retribution for particular actions in order to restore that balance. The restoration can take the form of talionic justice through war, or other more peaceful means such as compensation, recompense or reparation. Marriage between contesting groups could also function in this way to seal the state of ea.

- 667) The main purpose of utu, according to Professor Hirini Mead, is for maintaining relationships when he opined:

Utu is a response to a take (purpose) and that once the take is admitted the aim is to reach a state of ea, which might be translated as restoring balance and thereby maintaining whānaungatanga.⁷²⁷

- 668) Durie agreed when he noted that utu concerned the maintenance of harmony and balance:

It was fundamental to most Māori tikanga and thinking, governing social relationships, the creation and maintenance of reciprocal obligations, the conceptual avenging of death, the appeasement of killings, the punishment of wrongdoing, the maintenance of the cycles of nature, gift exchange, the formation of controls, the maintenance of alliances, the performance of fiduciary obligations and the like. Utu underpinned the essential 'give and take' nature of the Māori social and legal order.⁷²⁸

- 669) Durie added:

Utu was often achieved by other than open warfare, by sorcery, secret slayings or trickery, to avoid large-scale battles and permanent kin group enmities. Utu

⁷²⁷ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 35.

⁷²⁸ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 6.

was sometimes appeased through gifts including the gift of land resources [takekū], the gift of land and people or the transfer of mana.⁷²⁹

670) Durie continued:

Utu concerned the maintenance or balancing of mana through reciprocity between individuals, between descent groups, and between the living and departed. It prompted wars of revenge, gift exchange, the keeping of promises, the repayment of debts for military assistance or hospitality, the maintenance of natural cycles and the like. Numerous acts that caused changes of circumstances, including those of either kindness or aggression, constituted a capture of mana that had to be restored.⁷³⁰

Muru

671) Furthermore, the tikanga institution of muru (plunder) was a further device for avoiding war. Muru was the community stripping of the goods of a whānau for some aituā (misfortune) like the careless loss of life or property or some breach of social laws. Muru was practised as utu for redress or restoration of balance. Interestingly, muru was usually undertaken with the full acquiescence of the whānau kua hē (the family or community in the wrong) who voluntarily accepted the plundering raids to appease misdemeanours.⁷³¹

672) The early settler Frederick Maning lived in the Hokianga among Ngāpuhi from 1833. Maning published his observations of Māori life in 1863 where he recorded his understanding of muru:

Pakehas who knew no better called the muru simply ‘robbery,’ because the word muru, in its common signification means to plunder. But I speak of the regular legalised and established system of plundering as penalty for offences, which in a rough way resembled our law by which a man is obliged to pay ‘damages.’⁷³²

673) A further example of muru occurred at Parawera in the Waikato in the 1860s for the hara (crime) of mahi puremu (adultery) which was a very serious crime under tikanga. The muru included Ngāti Raukawa, Ngāti Haua and Ngāti Koroki being the relations of the claimant. The muru highlighted the ritualised and ordered nature when carrying out a muru compensatory raid.⁷³³

⁷²⁹ Above at 43.

⁷³⁰ Above at 54.

⁷³¹ See the topic “Muru” in Benton, R, Frame, A, and Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, 2013) at 254 and Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 44.

⁷³² Maning, F, *Old New Zealand: Being Incidents of Native Customs and Character in the Old Times by a Pakeha Maori*, (Smith, Elder and Co, London, 1863) at 103.

⁷³³ See Benton, R, Frame, A, and Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, 2013) at 259.

- 674) These points are illustrated better by the early 20th century Ngāti Mutunga anthropologist and expert on Māori culture Te Rangi Hiroa who recalled his participation in a muru raid for mahi puremu (adultery):

I once enlisted in a war party from Rotorua which raided a village near Te Teko in the Whakatane district. We stripped down to loin cloths outside the village, armed ourselves with manuka poles from the native fence as spears and marched in close column of fours on to the village plaza, where we executed a ferocious war dance before the assembled villagers. Our leaders made fiery speeches accusing the local tribe of guilt in sexual matters, punctuating their remarks with libidinous songs appropriate to the particular occasion. The village chiefs admitted their fault and then proceeded to lay various articles before us in payment. ... Each individual, as he or she advanced to the pile, called out the nature of their contribution ... We then rubbed noses with our hosts, engaged in amicable conversation, partook of the feast provided for us, and returned to army headquarters at Te Teko ... As one of our chiefs said in his speech, 'The clouds of heaven settle only on the peaks of the lofty mountains and the clouds of trouble settle only on the heads of high chiefs.' The statement signifies that if the family of the offender were of poor status, a war party would not deign to visit them.⁷³⁴

- 675) When recording his understanding of muru, Tā Eddie Durie noted:

There are many instances where wrong was admitted and muru was allowed. Muru rarely involved a killing. It seems never to have involved the offer of hostages. The purpose was to prevent warfare not to provide a cause for war. Muru enabled utu without further loss of mana. Hapu acceding to muru were sometimes claimed to have gained mana. Native Land Court witnesses claimed land rights on the basis that they acceded to a muru, the muru party taking only that which could be carried away and thus effectively affirming the subject group's land entitlements.⁷³⁵

- 676) Professor Hirini Mead provided an additional example of muru compensatory raids for the ritual distribution of property by citing earlier accounts by Frederick Weld and Te Rangi Hiroa to illustrate manaakitanga in the past when he recorded:

All tikanga are underpinned by the high value placed upon manaakitanga – nurturing relationships, looking after people, and being very careful about how others are treated. Thus in the tikanga of muru ... for the groups of people who come to take away the heirlooms, goods, products of the land, sea and forest, the animals and, in fact, anything moveable, the value of manaakitanga still holds: that is, the principle or standard of behaviour must remain in place. These people are given a meal and are allowed to leave in peace. ... It cannot be stressed enough

⁷³⁴ Te Rangi Hiroa, *The Coming of the Maori*, (Whitcombe and Tombs, Wellington, 1949) at 371.

⁷³⁵ Durie, E. *Custom Law*, (Address to the New Zealand Society for Legal and Social Philosophy, Wellington. Unpublished Manuscript, January 1994) at 44-45.

that manaakitanga is always important no matter what the circumstances might be.⁷³⁶

Ea

677) In addition, the traditional tikanga notion of ea is also important which is to indicate the successful closing of a sequence, the appropriate settlement of a dispute or damage caused by a hara (crime), and the restoration of relationships. Ea is a value that underpins most tikanga which is about restoring the balance as Mead noted:

In war, the notion of ea refers specifically to either achieving revenge, which is a limited and one-sided aim, or towards securing peace between both parties, which is more difficult to achieve. ... In the context of infringements upon tapu, the response selected reduces the level of tapu to a state of noa, thereby restoring the balance and so reaching the deserved state of ea.⁷³⁷

678) Ea is a very important socio-legal concept for bringing a process or series of transactions to completion, to avenge, requite, pay for or satisfy, with the implication of a full and final settlement of an outstanding debt or grievance.⁷³⁸

679) The tikanga concept of ea denotes that the cycle of utu – in the sense of a required response whether malevolent or benign - has been completed or a resolution has been reached. Ea denotes the restoration of the status quo by acknowledging and making compensation for a misdemeanour.⁷³⁹

680) Under the tikanga concepts of utu, muru and ea then, the balance must be restored, the dispute resolved, and the hara repaid either through a formal or informal muru (compensatory raid) or some other appropriate form of compensation to reach a state of ea to restore relationships or for securing peaceful interrelationships.

681) The process for achieving a state of ea for such prolonged and even bloody battles and litigation as is the situation in the Kāpiti Coast was through hohou te rongo or rongomau (peace treaties) which included tikanga concepts of kōrero tahi (talking and negotiating together), rangatira ki te rangatira (diplomacy), manaakitanga (generosity), kaitiakitanga (stewardship), kawenata (reaching a binding peaceful agreement) and moenga rangatira (marriage alliances).

682) Still, where strong claimant disagreements exist, conflict and disputes continue to emerge over contested tribal narratives, whakapapa, mana whenua and mana moana for orders under MACA, among other matters. Those differences can be reconciled within a tikanga Māori context, but they are fully dependent upon the political will of

⁷³⁶ Mead, H, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 29.

⁷³⁷ Above, at 35-36.

⁷³⁸ Benton, R, Frame, A, and Meredith, P, *Te Mātāpunenga. A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, 2013) at 58.

⁷³⁹ Above.

the applicant groups agreeing to abide by tikanga Māori, such as the tikanga institutions of hohou i te rongo, rongamau and he tatau pounamu, to achieve the elusive tikanga state of ea (reconciliation).

Mana Rangatira

683) A further key element for resolving protracted disputes and conflict is mana rangatira. One key element that is required to assist Kāpiti Coast claimant groups to reconcile their differences to move together to process and then govern their MACA claims is effective rangatira leadership that can weave the claimants together by blending the mana of these respective whānau, hapū and even iwi groupings.

684) There is much literature on traditional rangatiratanga for effective leadership. Professor Hirini Mead, for example, provided a thorough analysis of traditional Māori rangatira criteria based on tikanga Māori by examining the rangatiratanga of two prominent 19th century rangatira — Te Rangikaheke of Te Arawa and Himiona of Ngāti Awa.⁷⁴⁰ Dr Mead listed the following criteria for the mandate and legitimacy of a traditional Māori rangatira that included:

- a) whakapapa (genealogy);
- b) ngā pumanawa — talents;
- c) acceptance and confirmation by the people;
- d) identity being known by other iwi (tribes);
- e) tūrangawaewae (having a place to stand on the traditional tribal homeland);
- f) gender;
- g) mana (inherited and achieved spiritual authority, influence, status); and
- h) tapu (spiritual sanctity, avoiding risk, intrinsic sacredness, setting apart from the unclean).⁷⁴¹

685) Illustrious whakapapa ancestry, although important, was not enough for being an effective rangatira. Felix Keesing, the New Zealand anthropologist, commented on Ngāti Porou leadership in 1928 and stressed the distinction between descent (ascription) and meritocracy (achievement) or what he termed the mana of dignity and the mana of business when he opined:

But in Ngāti Porou, from some eight generations back the “mana” of dignity has been quite severed from the “mana” of business. In all matters of ceremonial, the leadership of the hereditary chiefs of highest lineage is unquestioned; but in all matters of wisdom and business, those most competent to do so direct the tribal affairs.⁷⁴²

⁷⁴⁰ Mead, H.M, *The Mandate of Leadership and the Decision-Making Process* (Te Puni Kokiri, Wellington, 1992).

⁷⁴¹ Above.

⁷⁴² Keesing, F, *The Changing Maori*, (New Zealand Board of Maori Ethnological Research, Thomas Avery & Sons, New Plymouth, 1928, Vol. 1, No. 2).

686) While whakapapa continues to be a practical reality for ascriptive Māori leadership, rangatira are also expected to possess a range of relevant skills for achieved Māori leadership in accordance with tikanga Māori and the respective tasks at hand. Mana rangatira are those leaders who can weave the people together and who acknowledge and can blend the mana of the respective groups.

687) Dr Wi Repa of Ngāti Porou provided an interesting synopsis of a rangatira in 1926 in an obituary to his wife as a wahine rangatira:

... The chief is someone who can bind the people at both hapū and iwi level in their endeavours. S/he is a leader. S/he starts and finishes tasks and is followed by people. S/he is described as a chief whose chiefly lines are held in regard, increased and distinguished, by other tribes.⁷⁴³

688) Professor Mead also listed the required ngā pumanawa (talents) of a mana rangatira, namely:

- a) knowledge and industriousness;
- b) *mediation and dispute resolution abilities*; [emphasis added]
- c) having courage and being a good strategist in war;
- d) knowledge of the arts of carving;
- e) knowledge of looking after the people;
- f) command of the knowledge and the technology to build large canoes or houses; and
- g) a sound knowledge of the boundaries of tribal lands.⁷⁴⁴

689) The military historian Neil Grove on the other hand documented the life of the Ngāti Raukawa rangatira Te Whatanui who led his people on a heke (migration) from the Waikato to settle on the Kāpiti Coast during the tempestuous 19th century Musket Wars period.⁷⁴⁵ The heke was perilous from the outset but the iwi was eventually successful in founding a secure and productive stronghold along the Kāpiti Coast. Leading and effectively mobilising this branch of Ngāti Raukawa to the safe haven of the Kāpiti Coast would have tested any rangatira hence Grove's analysis of Te Whatanui's rangatira qualities which included:

- a) an ability in resource management, especially food production;
- b) courage and military leadership;
- c) expertise in construction matters;
- d) *hospitality, kindness and liberality*; [emphasis added]
- e) artistic talents;
- f) *astuteness in mediation*, [emphasis added] and
- g) oratorical skill and expertise at conducting various discussions at meetings.⁷⁴⁶

⁷⁴³ *Te Toa Takitini*, (No. 57, 1 May 1926) at 400.

⁷⁴⁴ Mead, H.M, *The Mandate of Leadership and the Decision-Making Process* (Te Puni Kokiri, Wellington, 1992).

⁷⁴⁵ Grove, RN "Te Whatanui: Traditional Māori Leader" (Master of Arts Thesis, University of Victoria, Wellington, 1985).

⁷⁴⁶ Above.

- 690) In a similar manner, Mahuika,⁷⁴⁷ and Te Ua⁷⁴⁸ analysed some of the credentials for traditional Māori rangatira selection and effectiveness based on ascription and achievement. Mahuika and Te Ua analysed rangatiratanga in a specific Ngāti Porou, East Coast context. Bowden in contrast, attempted to delineate the different types of Māori leadership based on the principle of tapu for spiritual leadership and mana for secular leadership.⁷⁴⁹
- 691) Professor Ranginui Walker on the other hand, traced the changing model of Māori leadership from ascription and achievement to state and self-appointment.⁷⁵⁰ After the turn of the 20th century, achievement became more influential than ascription in the assumption of mana rangatira leadership roles.
- 692) Traditional leaders – mana rangatira - under tikanga Māori then had ascribed mana leadership through whakapapa but also achieved mana by developing numerous ngā pumanawa (skills) and ngā huanga (attributes) for the tasks before them that required, inter alia, self-discipline, self-mastery and visionary inter-generational leadership.
- 693) The 2022 *Te Paparahi o Te Raki Inquiry* Waitangi Tribunal Report also commented on mana rangatira weaving the people together when it recorded:

Rangatira (literally ‘weavers of people’) were responsible for coordinating and guiding hapū activity. ... they were kaitiaki (guardians) for their people. Patu Hohepa said that ‘rangatira’ could best be translated as ‘unifier’ and certainly not as ‘chief.’ They were required to be skilled warriors and experts at military strategy but equally diplomats, capable of negotiating peace agreements and securing alliances – either temporary or permanent – by means such as intermarriage, gift giving, their oratorical skills, and offers of mutual protection. They were also economic leaders, managing and coordinating large-scale activities such as pā and waka construction, major cultivations, and long-distance fishing expeditions. And they were *mediators* and guides for their people, securing decisions about important matters by consensus among whānau leaders.⁷⁵¹ [emphasis added].

⁷⁴⁷ Mahuika, A, “Leadership: Inherited and Achieved,” in M King (ed) *Te Ao Hurihuri: Aspects of Māoritanga* (Reed Books, Auckland, 1992) at 42.

⁷⁴⁸ Te Kani Kerekere Te Ua, H, “Notes on Māori Chieftainship” (1955) 64(4) *Journal of the Polynesian Society* 488.

⁷⁴⁹ Bowden, R, “Tapu and Mana: Ritual Authority and Political Power in Traditional Māori Society” in *The Journal of Pacific History* (Vol. 14, Nos 1–2, 1979) at 50.

⁷⁵⁰ Walker, R, “Changes to the Traditional Model of Māori Leadership” (Unpublished, Auckland, 1992).

⁷⁵¹ Waitangi Tribunal, *Tino Rangatiratanga me te Kawanatanga: The Report on Stage 2 of Te Paparahi o Te Raki Inquiry Pre-Publication Version* (Wai 1040, Waitangi Tribunal Report, Part 1, Wellington, 2022) at 115-116.

Mana Huihui

694) The Kāpiti Coast claimant groups today need the types of mana rangatira mentioned above who were governed by tikanga Māori to process the current MACA claims more efficiently and effectively by blending the mana of the respective whānau, hapū and iwi groupings to lead them effectively into the future.

695) One other important specific tikanga Māori leadership skill that mana rangatira need is to weave or blend the mana of the various claimant groups going forward which is a very challenging wero in and of itself.

696) With reference to evidence supporting early 19th century takutai moana claims for recognising the doctrine of aboriginal title in the Kauaeranga area (modern day Thames), Chief Judge Francis Fenton concluded in the 1870 *Kauaeranga Judgment*:

I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider *how readily they may prove such*, and how impossible it is to contradict them if they only agree amongst themselves.⁷⁵² [emphasis added]

697) The evidence of all of the Kāpiti Coast witnesses has highlighted, as Chief Judge Fenton articulated in 1870, how readily they may prove their claims in the Kāpiti takutai moana area, and how impossible it is to contradict them *if they only agree amongst themselves*. In the current Kāpiti Coast MACA hearing, the challenge is for the Kāpiti Coast Māori claimant groups to negotiate a 21st century modern day rongomau to come to some form of modern day tatau pounamu kawenata among themselves based on tikanga Māori and tikanga-a-iwi, hapū and whānau.

698) Tikanga Māori historically and today acknowledges shared interests in whenua, rohe moana and other resources. The tikanga concept of tuku whenua mentioned above is an example of sharing the whenua, rohe moana and other resources. Indeed, the Ngāti Kahungunu rangatira Ihaia Hutana noted in a 1902 newspaper article:

With requests for residence, or for gardens, whether it is a claim from within the sub-tribe or from an outside relative, a piece of land or a place of abode and cultivations will be given from within the community. ... they will not be admitted into the pare kainga, and this type of gift [tuku] will also not include the greater part of the land. But it will instead include the area that has been arranged for settlement and gardening within the village; it will not include the ocean and the fishing beds, nor the eel lakes, the forest and the bird snares ... there is continuing authority [mana tuturu] overarching all of this, including in the areas of residence and areas of gardening ... Gardens are a major issue in Māori custom over which authority [mana] is maintained, and the embodiment of that authority [mana] can be seen, heard and expressed through rahui at the appropriate time. However, the

⁷⁵² Chief Judge Fenton, *Kauaeranga Judgment*, (1870) reprinted in *VUWLR* (Vol. 14, 1984) 227 at 244.

refugees share in the largesse of the lakes, produce and fishing grounds under the communal authority [mana huihui] under the licence from the benefactor, that is from the chief of chiefs [te rangatira o nga rangatira ranei].⁷⁵³

699) Depending on the context, mana can be considered inclusive as well as all-encompassing and not necessarily confer exclusivity or predominant rights. But it depends on the kind of mana at issue. An interesting and relevant tikanga concept is mana huihui – gathering of mana.

700) Mana huihui describes instances where hapu and iwi came together and shared the mana over land and resources, particularly those lands lying contiguous to tribal boundaries – whenua tautohetohe or rohe tautohe [debated lands] as noted above – where interests were more fluid, layered, convoluted and complex, than patrolled and delineated.⁷⁵⁴

701) There are numerous historic examples where hapū and iwi came together and shared land and resources such as the Kīngitanga Movement within Tainui,⁷⁵⁵ and the Paremata Māori Kotahitanga Movement which was situated at Pāpāwai at the end of the 19th century.⁷⁵⁶ Not enough attention has been given to the complex relationships between kinship groups with shared whakapapa (genealogy), history and occupation of kainga or settlements; where members from multiple hapū and iwi could be found in common occupation.

⁷⁵³ Ihaia Hutana, *Te Puke ki Hikurangi*, (Vol. 5, No. 1, 30 August 1902) at 3.

⁷⁵⁴ For witness evidence on mana huihui – blending the mana of the people together – see Mikaere at 47-52, 59-60; Walker at 21; Karatea at 23; Selby at 18-19, 25; O'Malley at 21-28; Kiriona at 13-14; Mahina-a-Rangi Baker 1 at 42-44, 52, 53, 87; Ropata at 46-49; Kiriona at 44, 62, 80; Moore 2, full reference; Carter at 45-46; Tamihana at 57, 75, 77, 87, 88; Emery at 31-32, 43-44; Barrett at 35, 107; Carter at 33-47; Andre Baker at 58-59; Ngaia at 66-67; Moses at 10, 18, 19, 26, 27, 95-97; Proctor 2 at 23, 43; Richmond at 14(c), 14(h), 14(i), 34, 40-41, 45, 46; Potini at 313-319; Pomare at 40-42, 72-76; Te Rei at 17, 175.

⁷⁵⁵ For references on the Kīngitanga, see John Gorst Resident Magistrate, *AJHR*, (E no 9 sec iii, 1862) at 8; *Te Paki o Matariki*, (17 May 1881); Cowan, J, *The Māori Yesterday and Today* (Whitcombe and Tombs Ltd, Christchurch, 1930); Jones, P, *King Potatau: An Account of the Life of Potatau Te Wherowhero the First Māori King* (Polynesian Society, Wellington, 1959); King, M, *Te Puea: A Biography*, (Hodder & Stoughton, Auckland, 1977); Mahuta, R, 'The Kingitanga,' in King, M, *Te Ao Hurihuri: Aspects of Maoritanga*, (Reed, Auckland, 1992); Ballara, A, *The King Movements First One Hundred Years*, (Auckland University Press, Auckland, 1996); Mahuta, R 'Waikato: A Case Study of Tribal Settlement' (Address given at the Conference, 'Indigenous Peoples: Land, Resources, Autonomy,' Vancouver, 19-24 March, 1996); Kirkwood, C, *Tawhiao – King or Prophet* (Turongo House, Hamilton, 2000) and Calman, R, (Editor and Translator), *He Pukapuka Tātaku i Ngā Mahi a Te Rauparaha Nui: A Record of the Life of the Great Te Rauparaha*, (Auckland University Press, Auckland, 2020). It is important to acknowledge the key role that the Ngāti Toa Rangatira and Ngāti Raukawa rangatira Matene Te Whiwhi and Tamihana Te Rauparaha played in helping to establish the Kīngitanga in the mid-19th century.

⁷⁵⁶ For references on Paremata Māori, see Cox, L, *Kotahitanga: The Search for Maori Political Unity*, (Oxford University Press, 1993); Orange, C, *The Treaty of Waitangi*, (Bridgett Williams Books, Wellington, 2011); Kawharu, I.H (Ed.), *Waitangi: Māori and Pākehā Perspectives* (Oxford University Press, Auckland, 1989); and Ward, A, *A Show of Justice: Racial 'Amalgamation' in 19th Century New Zealand*, (Auckland University Press, 1995).

702) An amazing historic example of mana huihui in the Kāpiti Coast region was the initial hekenga iwi alliances who supported Te Rauparaha and Ngāti Toa Rangatira in their settlement of Te Whanganui a Tara, Porirua, Kāpiti, Te Tau Ihu and elsewhere during the turbulent Musket Wars period. It is also important to acknowledge that there were tensions at times in the alliance such as the Battles of Haowhenua in 1834 and Kuititanga in 1839.

703) But the strength of the ART (Āti Awa, Raukawa and Toa Rangatira) Confederation historically and today is in mana huihui – unity not division. The ART Confederation today has accomplished some amazing results in catalysing te reo, tikanga, mātauranga and cultural renaissance and pride in the region, not to mention establishing Te Wānanga o Raukawa, and other significant accomplishments.⁷⁵⁷

704) The Ngāti Raukawa witness Justin Tamihana mentioned the importance of unity – or perhaps mana huihui – when he stated:

In regards to the ART confederation, I support the inter connections and shared whakapapa and that together as three iwi, we have maintained our custodial rights and kaitiakitanga both collectively and individually to our entire tribal areas of interest. Our ways of operating ensures that we continue to band together and share in this important mahi to continue to express our tino rangatiratanga, as we ensure our tikanga and kawa are applied as required and to ensure this knowledge is continued to be transferred to future generations.⁷⁵⁸

705) The Ngāti Toa witness Miria Pomare also referred to mana huihui between Ngāti Toa and the Taranaki iwi when she noted:

Ngāti Toa blends into Ngāti Tama and Ngāti Mutunga who then blend into Te Ātiawa. In my view, this confirms and highlights the nature of the inextricably close connections and inter-relationships between Ngāti Toa and the northern Taranaki Iwi, particularly Ngāti Mutunga.⁷⁵⁹

706) The Te Āti Awa witness Andre Baker also alluded to mana huihui when he referred to whānau takawaenga when he stated:

‘Whānau takawaenga’ refers to those whanau who have shared ancestral whakapapa to all three iwi of the ART Confederation and continue to uphold the responsibilities inherent in that whakapapa. For example, our whakapapa from Te Maunu and notably Te Rangihiroa, Te Akamapuhia and Te Haunga requires us to observe the significance of those marriages. Similarly, through Te Kākākura’s wife Unaiki we are obligated to uphold our rangatiratanga and kaitiakitanga responsibilities to Ngāti Huia ki Katihiku. This has not been ignored by our whānau generationally.⁷⁶⁰

⁷⁵⁷ Refer to the fascinating evidence of Piripi Walker in Brief of Evidence of Philip James Walker, Dated 13 November 2023, [CB Tab 38 at 201.00309].

⁷⁵⁸ Above Tamihana at para 87.

⁷⁵⁹ Above Pomare at para 41.

⁷⁶⁰ Above, Andre Baker at para 67.

Shared whakapapa means it is entirely appropriate for whānau takawaenga to undertake certain roles and responsibilities, and to ensure that rangatiratanga and kaitiakitanga is maintained. For example, Te Kākākura exercised his authority in 1896 because he was worried about Pakeha learning where we fished at Kapukapuariki near Paekakariki, would commercialise kutai (mussels) and diminish our traditional harvesting of kaimoana. Te Kākākura met Tā James Carroll in Wellington to ask for a close season. My great-great grandfather was exercising his authority as a Ngāti Toa Rangatira but also as a Te Āti Awa rangatira.⁷⁶¹

707) Dennis Emery from Ngāti Kauwhata also alluded to mana huihui when he asserted:

Rangatiratanga reflects a commitment to collaborate on customary issues in the exercise of collective iwi mana and rangatiratanga. Formalising relationships and alliance partnerships and working together enhances the ability to have greater use of available resources. The right to self-determine how waterways and rivers are managed will help to fulfil the responsibility of kaitiakitanga for our current and future generations. This is also about expressing the attributes of rangatira (chiefs), including humility, leadership by example, generosity, diplomacy and professionalism.⁷⁶²

708) What appears to be a difficult challenge for the ART Confederation and the Hekenga Iwi rangatira to implement mana huihui in the Kāpiti Coast is to reach out, extend and include the Kurahaupō iwi into the Confederation. Neither group is leaving the rohe, neither group are backing down in progressing and processing their inherent rangatiratanga and kaitiakitanga responsibilities in the whenua and rohe moana; neither group solely carries out kaitiakitanga responsibilities over the whenua and rohe moana for such matters as rāhui and dealing with stranded whales, issuing customary fishing permits, and dealing with Local Government.

709) Furthermore, we heard in some of the witness evidence that both groups have inter-married into each other in some respects – which is the Te Peeti and Durie Takawaenga whānau. We also heard in evidence that many of the claimants are both Ngāti Toa Rangatira and Muaūpoko, Ngāti Raukawa and Rangitāne, Ngāti Kauwhata and Te Āti Awa in places so there already exists a tikanga whakapapa connection and precedent to provide some impetus for mana huihui – working effectively together on shared interests and priorities.

710) In this respect Justin Tamihana stated:

Last year (January 2022), a body went missing in the Manawatū River around Palmerston North. Rangitāne put a rāhui up at their end of the Manawatū River. However, because the body was not found, Hemi Te Peeti (a local Ngāti Raukawa tohunga) also put a rāhui on in the lower catchment down at our end of the

⁷⁶¹ Above, Andre Baker at para 67-68.

⁷⁶² Above Emery at para 45.

Manawatū River (all the way out to the sea) to cover off that area. This is an example of iwi working together trying their best to implement tikanga Māori.⁷⁶³

711) The Muaūpoko witness Dean Wilson also asserted:

Because Muaūpoko have been here for over 600 years, we simply have to be present for some things that can happen along this coast, such as finding ancient tūpāpaku/koiwi or taonga tuturu. We have to be a part of the equation to resolve those things and keep everyone safe.

In terms of contemporary incidents, different groups are responsible for rāhui at different parts of the coast. However, if a large incident happened, like an oil spill, we would all be involved since all are affected and live close together on this coast.⁷⁶⁴

712) The enmity and animosity between the Hekenga Iwi and the Kurahaupō Iwi dates back to the pāhuatanga (atrocities) that occurred during the turbulent Musket Wars period over 200 years ago, such as the kohuru murder of Te Rauparaha's children by Muaūpoko at Ohau, and the talionic kohuru slaying of Muaūpoko by Te Ati Awa at the Feast of the Pumpkins.

713) In addition to mana huihui (the gathering together of authority), other expressions exist such as kai huihui (the gathering together of food) and noho huihui (common occupation). Importantly, mana huihui was and should not be about subsuming one identity over another or assimilation. Mana huihui was about mutually beneficial alliances for their very day to day existence and partly expressed through the concept of whānaungatanga emphasised relationships rather than demarcation of interests.

714) Rather than a rigid pyramid of whānau, hapū and iwi, there were instead overlapping and interconnected networks of interests that selected genealogical whakapapa lines to confirm those kinship ties.⁷⁶⁵ Such ties also extended to land and marine and coastal interests where boundaries between groups were more blurred and fluid than patrolled and delineated.

715) Shared lands and resources could also be the result of conflict resolution processes such as hohou i te rongo, tatau pounamu or maungārongo kawenata as noted above which included the Remutaka ranges for the maungārongo kawenata between Nukupewapewa initially, and then Tūtepākihirangi of Wairarapa Moana and Te Wharepouri of Te Ātiawa in 1841. Such tikanga Māori processes and institutions highlight that protracted violent conflict and disputes as well as overlapping claims and challenges can be negotiated and settled where, inter alia, political will, mana rangatira, mana huihui, and mana wahine as takawaenga are present.

⁷⁶³ Above Tamihana at para 57(b).

⁷⁶⁴ Above Wilson at para 15-17.

⁷⁶⁵ For a useful discussion of this issue, see Ballara, A, *Iwi: The Dynamics of Maori Tribal Organisation from c. 1769-c. 1945*, (Victoria University Press, Wellington, 1998).

716) The crucial element of mana huihui is that it required consent and acquiescence by all parties in the kawenata sharing arrangement. Unless parties agreed to share mana, there was no mana huihui. Mana huihui is contrasted with sharing resources or use rights which is not the same as sharing mana over an area or resource.

717) Furthermore, in the 1997 Canadian Supreme Court decision of *Delgamuukw v British Columbia*,⁷⁶⁶ the Court raised the possibility of several First Nations groups holding an area on the basis of shared exclusivity.⁷⁶⁷ The Marine and Coastal Area (Takutai Moana) Act 2011 provides for shared exclusivity or mana huihui through the definition of ‘applicant group’ which means 1 or more iwi, hapū or whānau groups’ that seek recognition of their customary interests under the Act. Shared exclusivity was also acknowledged by Churchman J in *Re Edwards*.⁷⁶⁸ However, shared exclusivity or mana huihui requires groups, as noted above, to acknowledge the rights and interests of others to the shared areas – to share.

718) The Ngāti Raukawa rangatira Te Kahu o Te Rangi Rōpata provided some sage mana huihui advice in his evidence when he wisely recommended:

We all have shared history on traditional customs now lost in time immemorial – mana inherited, mana bestowed, mana lost and mana regained ... Unfortunately, the divisive nature of this [MACA High Court] process and a propensity for iwi to be reactional to Crown policies and legislation that continually seek as to undermine our tikanga and the shared nature of iwi relationships, is always challenging. Unless we make sure we are proactive within the parameters of these Crown policies and legislations to enhance the relationships of iwi to iwi then we are doing our whānau, hapū and iwi a disservice.

719) The Ngāti Raukawa rangatira Te Kahu o Te Rangi Rōpata then concluded:

No matter what the result, we are stronger working things out in accordance with our own tikanga.

Question 10) Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

720) Having discussed tikanga Māori extensively already earlier, this section will be brief.

721) The specific tikanga that is relevant to the protected customary rights claimed by the Kāpiti Coast applicants should include the taonga test mentioned earlier in Questions 2) and 3) which includes the following tikanga matters:

⁷⁶⁶ *Delgamuukw v British Columbia* [1997] SCR 1010 at [158]. The Supreme Court’s discussion of shared exclusivity is obiter.

⁷⁶⁷ Above.

⁷⁶⁸ *Re Edwards (Whakatōhea (No. 2))* [2021] NZHC 1025 at [145-168].

- a) Whakapapa identifying a cosmological connection with the takutai moana;⁷⁶⁹
- b) Exercised mana or rangatiratanga over the takutai moana;⁷⁷⁰
- c) Exercised kaitiakitanga over the takutai moana;⁷⁷¹
- d) It has a mauri – life force that is acknowledged in the takutai moana;⁷⁷²

⁷⁶⁹ For claimant evidence, see above, Taueki 1, at para. 2 ; Armstrong, at para. 65; Taueki 2 at para. 2, 6, 7, 18, 19, 29; at para. 5; Waaka, at para. 1; Royal, at para. 3, 4, 5, 7, 15, 87; Tamihana 1, at para 5-7, 17, 22; Mikaere, para 7, 22, 25, 37, 38, 47, 48, 59, 60; Jones 1, at 29; Twomey, at para 1-8; Mahina-a-Rangi Baker 1 at para 5-6, 104, 129-130; Moore, at para 2; Walker, at para 3, 14-22; Selby 1, at para 4-11, 22; Richmond, at para 14(b); Rōpata, at para 10-25; Teira, at para 19-22 [CB Tab 42 at 201.00377]; Hēnare, at para 1; Karatea, at para 1, 5-12, 16-22; Kiriona, at para 19-21; Collins and Teira, full brief; Moore 2, at para 1-11; Karatea, at para 1-12; Parata at para 1-8; Barrett at para 1-61; Barrett 2, at para 1-12; Carter, at para 1-3; Andre Baker, at para 36-69; Ngaia, at para 10-25; Housiaux, at para 1-4; Maote-Davis, at para 1-8; Mahina-a-Rangi Baker in Reply, at para 1, 12-13; Tihema Baker in Reply, at para 1-2; Ngaia 2 in Reply, at para 1-25; Warrington, at para 1-19; Murray, at para 1-5; Proctor, at para 1-13; Wiremu-Matakātea, at para 1-8; Packer, at para 1-5; Williams, at para 1-10; Rump, at para 1-2; Nuetze, at para 1-5; Wilson, at 1-10; Reply Brief of Moses, at para 1-2; Tukapua, at para 1, 17-19; Reply Brief of Wilson, at para 3; Brief of Evidence of Sillena Wiki McGregor, at para 1-2; Affidavit of Wilson for Interested Party of Horowhenua 11 Part Reservation, at 3; Seymour, at para 1-8; Brief of Evidence of Patrick Seymour, at para 1.0-4.7; Huwyler, at para 1-9; Shenton, at para 1-31; Tahana, at para 1-31.2; Harris at para 1-3; Parai, at para 1-11, 32, 40, 41, 158; Potini, at para 1-31, 161; Elkington, at 1-10; Pomare, at para 1-8, 40-66; Faulkner, at para 1-2, 29; Te Rei, dated 13th February 2024 at para1-4, 14-53.

⁷⁷⁰ For claimant witness evidence on rangatiratanga, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei. See especially Taueki 1 at 37, Taueki 2 at 5, 18, 30; Morgan at 5; Seymour at 3.4; Emery at 33-35, Waaka at 1; Royal at 3-5, 15, 29, 63, 87, 89; Tamihana at 15, 16, 21, 22, 25, 29, 30, 37, 38, 41, 53, 77, 87-90; Mikaere at 24, 39-63, 67-68; Jones, the whole reference; Walker, the whole reference; Selby 1 at 21, 33, 45; Karatea 1 at 51; O'Malley at 21-22; Mahina-a-Rangi Baker 1 at 7; Moore at 67-74; Ropata, the whole reference; Kiriona, the whole reference; Karatea, the whole reference; Teira, the whole reference; Collins & Teira, the whole reference; Harris, the whole reference; Tahana, the whole reference; Huwyler, the whole reference; Shenton, the whole reference; Parata at 12-16, 21-22; Barrett, the whole reference; Andre Baker, the whole reference; Ngaia, the whole reference; Mahina-a-Rangi Baker 2, the whole reference; Tihema Baker, the whole reference; Parai at 18-19, 21, 43-44, 78-85, 88, 155-165; Potini at 1-31, 38-47, 118-161, 164-165; Pomare at 28-66, 83-93; Elkington, the whole reference; Faulkner, the whole reference; and Te Rei, the whole reference.

⁷⁷¹ For witness evidence on kaitiakitanga, see above Taueki 1 at 30; Taueki 2 at 7, 17, 18, 30, 37, 38; Morgan at 5; Royal at 4, 15, 16, 17, 25, 29, 61, 63, 67, 87; Tamihana 1 at 15-19, 22, 25, 27, 29, 30, 36-38, 41, 45, 53, 55, 63, 71-89; Jones 1 at 48-49; Karatea at 49-52, 58-63, 84; Teira at 25-27; Emery at 40-44, 47-49; Parata at 34-36; Barrett 1 at 20; Barrett 2 at 51-66; Mahina-a-Rangi Baker 2 at 12, 156-193; Wilson, the whole reference; Proctor, the whole reference; Huwyler at 8; Carter, the whole reference; Richmond at 37; Moses at 10, 22, 24, 26; Seymour at 4, 8; Shenton at 12; Murray at 20-27; Kiriona at 67-71; Henare at 30-39; Parai at 14, 77-85, 77, 88, 166-171; Potini at 124, 162-180; Elkington at 56-65; Pomare at 114; and Te Rei at 105-124.

⁷⁷² For claimant witness evidence on mauri, see above Tamihana 1 at 38; Jones 1 at 61; Emery at 47-49; Parata at 37; Barrett; Parai at 125, 141, 143; Karatea at 59; Wilson 1, the whole reference; Moore at 109; Teira at 23, Wilson 2 at 3; and Tahana at 48.

- e) Performance of rituals [kawa] central to the spiritual life of the hapū and whānau within the takutai moana;⁷⁷³
- f) Identified taniwha [guardians] residing in the takutai moana;⁷⁷⁴
- g) Is celebrated or referred to in waiata [songs] based in the takutai moana;⁷⁷⁵
- h) Is celebrated or referred to in whakatauki [proverbs] about the takutai moana;⁷⁷⁶
- i) The takutai moana was relied on as a source of food;⁷⁷⁷
- j) A source of textiles or other materials;⁷⁷⁸
- k) For travel or trade;⁷⁷⁹ and
- l) There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to ‘some, if not all of the takutai moana area.’⁷⁸⁰

⁷⁷³ For claimant witness evidence on wairuatanga, see above Taueki 2 at 2-18, 29; Royal at 52, 58; Tamihana at 18, 22, 29, 37, 57, 77; Mikaere at 22, 47-48; Emery at 46-51; Parata at 10, 23, 37; Barrett 2 at 46; Andre Baker, the whole reference; Parai at 21-22, 35, 55-56, 138-139, 141, 166-171; Potini at 153, 159, 164-165; Elkington at 23-24, 28, 55, 63; O’Malley at 21-22; Proctor 1 at 11-13, 35; Proctor 2 at 19, 62-79, 104, 106-110; Moore at 116-118; Walker, the whole reference; Richmond at 14; Teira, the whole reference; Henare, the whole reference; Wilson 2 at 3 and Seymour at 5.9 and 8.5.

⁷⁷⁴ For claimant evidence on taniwha, see above at Mikaere at 19; Twomey at 31; Mahina-a-Rangi Baker 1 at 98-100; Moore at 85-89; Teira at 23-42, 54-56; Moore 2, the full reference; Seymour at 8; Seymour 2 at 6.7, 9.3; Tamihana 2 at 19, 23, 25; Parata at 37; Barrett 2 at 44-45; Moses at 31; Proctor at 17; Parai at 40; and Potini at 227, 302, 306-307.

⁷⁷⁵ For claimant evidence on waiata, see above at Mikaere at 21, 28, 49; Emery at 37; Mahina-a-Rangi Baker 1 at 100, 135, 136, 188; Selby 1 at 30; Ropata at 19, 30, 45; Teira at 21; Collins and Teira at 27, 32, 49; Proctor at 11; Nuetze, the full reference; McGregor at 21; Seymour at 7.49, 7.5, 7.61; Tahana at 13, 17; Parai at 21-22; Parata at 11, 31, 39, 41; Andre Baker at 1, 59, 75, 95, 105; Ngaia 1 at 5, 61; Moses at 35; Potini at 118; and Te Rei at 156.

⁷⁷⁶ For claimant evidence on whakatauki, see above.

⁷⁷⁷ For claimant evidence on kai, refer among numerous other references above to Royal at 37-57; Tamihana at 15-18, 29-55, 62; Mikaere at 39-40; Mahina-a-Rangi Baker 1 at 10, 116-122, 137-144; Moore at 36-66; Selby 1 at 12-35; Richmond at 21(d), 20-36, 23; Teira at 57-59, 66-81; Kiriona at 58-62, 73-77; Emery at 61-68; Parata at 30-32; Barrett 1 at 108; Morgan at 29-55; Seymour at 7.10-7.48; Tukapua at 6-19; Packer, the whole reference; Williams, the whole reference; Wilson at 6-10; Shenton at 33-40; Proctor at 7-12; Parai at 140-165; and Wiremu-Matakatea, the whole reference.

⁷⁷⁸ For claimant evidence on textiles and other materials, see above Taueki 2 at 18, 30; Tamihana at 25-33; Mikaere at 39-40, Twomey at 29 and Barrett 2 at 67-78.

⁷⁷⁹ For claimant evidence on travel and trade, see Taueki 2 at 18, 30; Tamihana 1 at 25, 33; Mikaere at 39-40; Twomey at 29; Collins and Teira at 20-24, 28, 52, 74, 79, 85-90; Teira at 49, 82-84; Walker at 23; Henare, the whole reference; Mahina-a-Rangi Baker 1 at 24-30; Tahana at 25; Richmond at 21(b); Kiriona at 26-29; Shenton at 39; Proctor 1 at 11-16; Proctor 2 at 40; Barrett 2 at 67-78; Parai at 18, 28-30, 35, 42, 43, 69, 161-165; Potini at 118-161, 218, 250-293; Elkington, the whole reference; Pomare at 29-29; and Te Rei at 61-64.

⁷⁸⁰ For claimant evidence on continued recognition, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakatea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei.

722) Other relevant tikanga concepts that may apply for PCRs in the Kāpiti Coast MACA areas include:

- a) Tika and Pono - being right or correct, true and genuine;⁷⁸¹
- b) Rangatira ki te rangatira – leaders speaking directly to each other to address pressing matters;⁷⁸²
- c) Te mana o te kupu – the power of one’s word which is binding;⁷⁸³
- d) Kawenata – covenant agreements that are binding on the mana of the group;⁷⁸⁴
- e) Tatau pounamu – binding peace agreements to settle conflict and protracted disputes.⁷⁸⁵

Section D: Some Formative Conclusions

723) The witness evidence throughout the hearing readily and easily established and supported over the Kāpiti Coast takutai moana area the tikanga Māori and local tikanga Kāpiti Coast values and concepts of:

- a) Wairuatanga - spirituality including placating the departmental Gods’ respective realms such as Tangaroa over the takutai moana realm;
- b) Whakapapa — genealogy and the intergenerational and interconnectivity of all humans and the natural world including all of the Kāpiti Coast claimants’ groups to each other and the takutai moana claimant area;
- c) Whānaungatanga — maintaining kin relationships with humans and the natural world, including through protocols of respect, and the rights,

⁷⁸¹ For claimant evidence on tika and pono, see above Taueki at 6; Armstrong at 6 and 54; Royal at 17, 25, 29; Tamihana at 16, 25, 29, 53, 63, 87, 88; Mikaere at 9, 23, 28, 36; Jones at 16; Barrett at 2, Moses at 6; and the whole affidavits of Ngaia and Parata.

⁷⁸² For claimant evidence on rangatira, see all of the above affidavits and briefs of evidence of Taueki, Morgan, Waaka, Royal, Tamihana, Mikaere, Jones, Twomey, Mahina-a-Rangi Baker, Moore, Walker, Selby, Richmond, Ropata, Henare, Teira, Collins and Teira, Kiriona, Karatea, Emery, Harris, Seymour, Shenton, Huwyler, Tahana, Parata, Maote-Davis, Housiaux, Carter, Barrett, Andre Baker, Tihema Baker, Ngaia, Wiremu-Matakātea, Wilson, Moses, Proctor, Rump, Nuetze, Tukapua, Faulkner, Parai, Potini, Elkington, Pomare, Faulkner and Te Rei.

⁷⁸³ For witness evidence on te mana o te kupu, see above see Mikaere at 7, 45-48, 49-50, 57, 64; Twomey at 24; O’Malley at 21-28; Walker at 21-22; Selby at 25; Ropata at 35, 41; Kiriona at 41-44; Collins and Teira at 23, 44, 50, 85, 86; Moses at 24; Proctor at 23; and Seymour at 7.57-7.59.

⁷⁸⁴ For witness evidence on kawenata, see above Taueki at 8, 10; Taueki 2 at 2-9; O’Malley at 20-28; Armstrong at 5, 8 10, 17-25; Tamihana at 3, 22, 26; Mikaere at 36, 45-52, 59-60, 63; Emery at 27-32; Parata at 16; Ngaia at 75; Ngaia Reply, full reference; Moses at 95, 96; Shenton at 4.0; and Parai at 49, 59.

⁷⁸⁵ For witness evidence on tatau pounamu, see Taueki 1 at 8, 10; Taueki 2 at 2-9; Armstrong at 5, 8, 10; Tamihana at 3, 22, 26; Mikaere at 45-52, 58-60, 63; Twomey at 36-37; Armstrong at 17-27; Walker at 21-22; Ropata at 18-19, 43-47; Kiriona at 25, 29-30, 36, 44, 50—51; Collins and Teira at 18, 23, 24, 39, 70, 81, 85, 86, 87; Moore at 7; O’Malley at 20-28; Shenton 4.0; Proctor 2 at 30, 37; Ngaia at 50, 56; Emery at 27-32; Parata at 16; Moses at 38-40, 72, 95-96; Potini at 149; Pomare at 57-58, 74-76; Boast at 105; and Te Rei at 52.

responsibilities and obligations that follow from the individuals place in the collective group;

- d) Mana — encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group with the takutai moana area;
- e) Tapu — restriction laws; the recognition of an inherent sanctity or a sanctity established for a purpose — to maintain a standard for example; a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area;
- f) Noa — free from tapu or any other restriction such as rāhui and wāhi tapu; liberating a person or situation from tapu restrictions, usually through karakia and water;
- g) Utu — maintaining reciprocal relationships and balance with persons and nature including the takutai moana area;
- h) Mauri — recognition of the life-force of persons and objects in the takutai moana claimant area;
- i) Hau — respect for the vital essence of a person, place or object;
- j) Rangatiratanga — effective leadership; appreciation of the attributes of leadership including effective leadership in the takutai moana claimant area;
- k) Manaakitanga — enhancing the mana of others especially through sharing, caring, generosity and hospitality to the fullest extent that honour requires highlighting, inter alia, unfettered access to kai moana from the takutai moana claimant area;
- l) Aroha — charity, generosity;
- m) Kaitiakitanga — stewardship and protection, often used in relation to natural resources but also community and governance responsibilities and obligations including in the takutai moana claimant area.

724) The specific tikanga Māori laws and institutions that should influence the assessment of whether or not the areas in question, or any parts of it for these MACA hearings, is held in accordance with tikanga Māori includes the following indicia:

- a) Whakapapa identifying a cosmological connection with the takutai moana;
- b) Exercised mana or rangatiratanga over the takutai moana;
- c) Exercised kaitiakitanga;
- d) It has a mauri – life force;
- e) Performance of rituals central to the spiritual life of the hapū and whānau;
- f) Identified taniwha residing in the takutai moana;
- g) Is celebrated or referred to in waiata;
- h) Is celebrated or referred to in whakatauki;
- i) The takutai moana was relied on as a source of food;
- j) A source of textiles or other materials;
- k) For travel or trade; and
- l) There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to ‘some, if not all of the takutai moana area.

725) An additional useful list of tikanga questions for assisting with determining some aspects of tikanga Māori that should influence whether any takutai moana area is held in accordance with tikanga Māori includes:

- a) How was mana whenua [and mana moana] acquired? Ringa kaha [a strong hand], take kite [discovery], other?
- b) If by ringa kaha, did the military leaders marry tangata whenua women of the land to maintain the hau (essence) of the land?
- c) The land [and takutai moana] are actually occupied by people and kāinga are established;
- d) A rohe is marked out in some way. How? Provide a map.
- e) Over time urupa are established over land, tuahu (shrines) are placed in appropriate places, and kāinga are built usually near a source of water, and wāhi tapu are identified and named.
- f) The new group adopts a name and becomes known among the neighbours as an identified iwi/hapū?
- g) The iwi proceeds to embrace their new environment, take charge of it, and place their cultural imprint on it. One way is to rename or give names to significant features of the land [and takutai moana].
- h) The rivers and swamps [and takutai moana] may be polluted with Taniwha (monsters) who often act as kaitiaki of the people to warn the children of dangers in the environment.
- i) The iwi establishes alliances with neighbours and distant iwi. The mana whenua iwi can provide examples of joining with other iwi on military ventures outside their rohe.
- j) The rohe provides sufficient sustenance for the people over time and other necessities are obtained through trade.
- k) The new iwi is able to defend its rohe and can call on allies to help to defend the estate.
- l) The new iwi is approved by the neighbours and its presence is validated by the experience.

726) It is important to also acknowledge that the above tikanga Māori indicia and tikanga Māori question lists are not exhaustive but are at least appropriate as starting points for answering what specific tikanga Māori laws and institutions should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga Māori, as well as for assessing PCRs.

727) While tikanga Māori inevitably adapts and evolves in time and space, we need to ensure that we do not stray so far that our contemporary tikanga Māori customary institutions and practices are no longer premised on those underlying fundamental tāhuhu –Te Ao Māori values and principles outlined earlier such as, inter alia, whānaungatanga, whakapapa, wairuatanga, mana, and manaakitanga.

728) Furthermore, when Māori signed the Treaty of Waitangi in 1840, rangatira (chiefs) expected the Crown to protect their rangatiratanga (chieftainship) over the taonga (valued natural resources), and that the taonga would be sustained for future generations in perpetuity. In return, Māori were prepared to share with the British, and

subsequently, the New Zealand Crown thus acknowledging a respectful kawenata relationship for sharing the resources of the nation.

729) We believe Māori are still prepared to enter into respectful tikanga relationships with landowners, fishers and others where they are prepared to extend manaakitanga and whanaungatanga to share the responsibility of the sustainable well-being of the takutai moana for all New Zealanders.

730) Whatever the outcomes of the current MACA hearing, maintaining the mana of the Kāpiti Coast claimants and the integrity of tikanga Māori are imperative. As outlined throughout this report, tikanga Māori is about “doing things right, doing things the right way, and doing things for the right reasons” within a mātauranga and tikanga Māori worldview underpinned by wairuatanga and whānaungatanga relationships.

731) In conclusion and with utmost respect, it is our modest opinion that the Kāpiti Coast claimant groups to this hearing have shown that their tikanga customary laws and institutions are flourishing, vibrant and that they are still relevant, and it appears that they may have delivered on the statutory tests, inter alia, in ss. 51 and 58, Marine and Coastal Area (Takutai Moana) Act 2011, for PCRs and CMT in accordance with their contemporary tikanga.

DATED this 25 day of October 2024

Whaea Moe Milne and Dr Robert Joseph

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3. Joint Brief of Evidence of Heeni Meretini Collins and Te Kenehi Teira, dated 13 November 2023 [CB Tab 47 at 201.00453];
4. Brief of Evidence of Tewera Mahuta Hēnare, dated 13 November 2023 [CB Tab 43 at 201.00398];
5. Brief of Evidence of Carwyn Hamlyn Jones, dated 13 November 2023 [CB Tab 33 at 201.00136];
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7. Brief of Evidence of Tūroa Andrew Karatea, dated 14 November 2023 [CB Tab 44 at 201.00407];
8. Brief of Evidence of Tūroa Andrew Karatea, dated 14 November 2023 [CB Tab 49 at 202.00498];
9. Brief of Evidence of Wayne John Kiriona, dated 13 November 2023 [CB Tab 45 at 201.00427];
10. Brief of Evidence of Ani Mikaere, dated 13 November 2023 [CB Tab 32 at 201.00116];
11. Reply Brief of Evidence of Pātaka Jacob Gifford Moore, dated 16 April 2024 [CB Tab 53 at 202.00535];
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15. Brief of Evidence of Te Kahu Te Rangi Rōpata, dated 16 April 2024 [CB Tab 41 at 202.00363];
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23. Affidavit of Rupene Morehu Teratui Waaka, dated 3 April 2017 [CB Tab 28 at 201.00066];
24. Brief of Evidence of Philip James Walker, dated 13 November 2023 [CB Tab 38 at 201.00309];

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1. Brief of Evidence of Dennis Bruce Emery, dated 13 November 2023 at para 15-24 [CB Tab 34 at 201.00160].

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2. Brief of Evidence of Mahina-a-Rangi Joy Baker in Reply, dated 16 April 2024 [CB Tab 69 at 202.00779];
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6. Brief of Evidence of Andrē Peter Baker, dated 13 November 2023 [CB Tab 62 at 202.00653];
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7. Evidence of Dianne Rita Rump, dated 13 November 2023 [CB Tab 79 at 202.00873];

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