IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 128/2023
SC 129/2023
[2025] NZSC 104

BETWEEN	WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)
	NGĀTI MURIWAI
	KUTARERE MARAE
	TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE UPOKOREHE IWI
	ATTORNEY-GENERAL
	NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA)
	NGĀTI RUATĀKENGA Appellants
AND	NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA)
	TE TĀWHARAU O TE WHAKATŌHEA (FORMERLY WHAKATŌHEA MĀORI TRUST BOARD)
	NGĀI TAI AND RIRIWHENUA

TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE UPOKOREHE IWI

TE RŪNANGA O NGĀTI AWA

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)

NGĀTI RUATĀKENGA

LANDOWNERS COALITION INCORPORATED

NGĀTI MURIWAI

KUTARERE MARAE
Respondents

AND

ATTORNEY-GENERAL

TE WHĀNAU-Ā-APANUI

SEAFOOD INDUSTRY REPRESENTATIVES

CROWN REGIONAL HOLDINGS LIMITED

ŌPŌTIKI DISTRICT COUNCIL

BAY OF PLENTY REGIONAL COUNCIL

LANDOWNERS COALITION INCORPORATED

WHAKATĀNE DISTRICT COUNCIL

TE RŪNANGA O NGĀTI AWA
Interested Parties

Hearing: 4–7 November 2024
12–15 November 2024

Court: Glazebrook, Ellen France, Williams, Kós and French JJ

Counsel: R J B Fowler KC, A J Sinclair and B M Cunningham for Whakatōhea Kotahitanga Waka (Edwards)
M J Sharp for Ngāti Muriwai and Kutarere Marae

J S Cooper KC, B R Lyall and H L B Swedlund for Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi
A J Williams, R L Roff and Y Moinfar-Yong for Attorney-General
A T I Sykes and S W H Fletcher for Ngāti Ira o Waioweka
M S Smith and T H Bennion for Ngāti Patumoana
K S Feint KC and N A T Udy for Ngāti Ruatākenga
C M T Panoho-Navaja for Ngāi Tamahaua
J M Pou for Te Tāwharau o Te Whakatōhea (formerly Whakatōhea Māori Trust Board)
B R Arapere, A E Gordon and E K Rongo for Ngāi Tai and Ririwhenua
D M Salmon KC, H K Irwin-Easthope and R K Douglas for Te Rūnanga o Ngāti Awa
M K Mahuika and N R Coates for Te Whānau-ā-Apanui
T D Smith and R J J Wales for Seafood Industry Representatives
M H Hill and J L Hollis for Crown Regional Holdings Limited and Ōpōtiki District Council
A M Green and E S Greensmith-West for Whakatāne District Council
J E Hodder KC, B E Morten and S O H Coad for Landowners Coalition Inc
M K Mahuika, T N Hauraki and H L P Ammunson for Ngā Hapū o Ngāti Porou as Intervener

Judgment: 15 August 2025

JUDGMENT (NO 2) OF THE COURT

A The Attorney-General's appeals on the navigable rivers issue and challenging the award of PCRs to Ngāti Muriwai are dismissed.

B With the qualification that the part of WKW's appeal regarding the boundaries of CMT Order 1 does not need to be determined, WKW's appeal is dismissed.

C Te Upokorehe's appeals are dismissed.

D Ngāti Muriwai's appeal is allowed on the terms set out below at [258].

E Ngāti Ruatākenga's appeal challenging the award of PCRs to Ngāti Muirwai is dismissed.

F Kuatere Marae's appeal is allowed on the terms set out below at [271].

G **Te Kāhui's appeal in relation to Whakaari and Te Paepae o Aotea is allowed. The question of whether the test for CMT under s 58 of MACA is met in regard to Whakaari and Te Paepae o Aotea is remitted to the High Court for reconsideration.**

H **To the extent it remains live, Te Kahui's appeal in relation to the decision to remit CMT Order 1 to the High Court is dismissed.**

I **CMT Order 2 is formally amended to capture the Ōhiwa Harbour in full.**

J **Whakatāne District Council, and Ngāti Muriwai and Kutarere Marae's applications to adduce further evidence are allowed.**

K **The application by Te Kāhui to adduce further evidence is to be addressed by the High Court.**

L **The applications to file submissions out of time are allowed.**

M **Costs are reserved. If costs cannot be agreed, the parties should file memoranda on costs on or before Friday 10 October 2025.**

REASONS OF THE COURT

Table of Contents

Introduction

[1] This is the second of two judgments relating to recognition of customary rights in the harbours, river mouths, beaches and seascape of the eastern Bay of Plenty.

[2] In our first judgment, we addressed the meaning of s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA), which contains the test that must

be met to obtain an award of customary marine title (CMT).[1] By way of brief recapitulation, we found s 58 is one mechanism by which the Act's overarching purpose of reconciliation is achieved. In practice (by virtue of s 106), the applicant group must prove they *hold* the claim area in accordance with tikanga—where to hold means more than the mere exercise of rights and is informed by tikanga. The applicant group must also prove they have used and occupied the claim area from 1840 to the present day; where use and occupation means making extensive use of the space (in light of its nature and resources), along with an intention and some capacity to exercise control over it (to the extent permitted by law). The burden then shifts to contradictors to prove that use and occupation has not been exclusive or has been substantially interrupted (with mere interference being insufficient).

[3] This second judgment resolves the remaining issues under the seven appeals before this Court. These issues are dealt with under the following headings: navigable rivers; status of the Edwards application; Te Upokorehe—claim to exclusive rights; application by Ngāti Muriwai; status of Kutarere Marae; Whakaari and Te Paepae o Aotea; disposition in the Courts below; and procedural matters. We begin by briefly summarising the background to the present appeals. We then set out the relevant issues and address them in turn.

Background

[4] In discussing the background to the appeals in our first judgment, we began by recording that it was common ground that, as at 1840, Māori held pre-existing rights in what MACA terms the "common marine and coastal area".[2] We noted that it was also common ground that, in 2004 immediately before the enactment of the Foreshore and Seabed Act 2004, at least some of those rights were still held by their descendants. The Foreshore and Seabed Act extinguished those rights and replaced them with a limited system of statutory recognition. Subsequently, MACA formally revived the

---

1 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hāpū o Te Whakatōhea* [2024] NZSC 164, [2024] 1 NZLR 857 (Glazebrook, Ellen France, Williams, Kós and French JJ) [SC judgment].

2 As to the nature and range of these rights, see the discussion in our first judgment, SC judgment, above n 1, at [52]–[54], of the *Kauwaeranga* judgment of Chief Judge Fenton of the Native Land Court: Alex Frame "Kauwaeranga judgment" (1984) 14 VUWLR 227; and that of Chief Judge Morrison in *Te Whaaro Oneroa a Tohe (90 Mile Beach)* (1957) 85 Northern MB 126 (85 NMB 126) 15 November 1957 at 126-127.

rights and replaced them with a limited system of statutory recognition.[3] We also noted the other side of the narrative, namely, the evolution of a complex of other rights and interests in the coastal and marine area including rights of access and navigation recognised in the common law and tikanga.[4] We identified that balance and reconciliation between these various rights and interests as key aims underpinning the enactment of MACA.[5]

[5] Against this background, we turn then to discuss the relevant provisions of MACA but, given the extensive discussion in our first judgment here we only provide a brief summary of MACA and the procedural history. We will go into further detail as required when addressing the particular issues before this Court.

[6] MACA governs the recognition and legal expression of customary rights in the common marine and coastal area. Under MACA, the common marine and coastal area cannot be owned.[6] However, the Act protects specified private property rights and activities, as well as public access, navigation and fishing rights.[7] Importantly, MACA also allows iwi, hapū and whānau groups to apply (to the High Court or through Crown negotiations) for recognition of their extant[8] customary rights in the claim area.[9] The two types of recognition order are for CMT and protected customary rights (PCRs).[10] The former is territorial in nature whereas the latter focuses on discrete activities and uses in an area. Section 58 sets out the test for CMT recognition and s 51 provides the test for PCRs.

[7] Te Whakatōhea is one iwi that seeks recognition of its customary rights under MACA—specifically in the eastern Bay of Plenty around Ōpōtiki. In Appendix B we provide a map showing this area and its relevant features. Originally, an iwi-wide

---

3 At [2].
4 At [3].
5 At [74], [77], and [104]–[106].
6 Section 11(2).
7 See, for example, ss 20–21 and 26–28.
8 While the Foreshore and Seabed Act 2004 extinguished remaining customary rights in the marine and coastal area, they are restored under s 6 of the Marine and Coastal Area (Takutai Moana) Act 2011 [MACA].
9 Section 94. Applicant groups had to apply by 3 April 2017, being within six years of the enactment of MACA: s 100(2).
10 MACA also provides for participation rights but these are not at issue in the present appeals: see s 47.

application (the Edwards application) was made to the Māori Land Court under the Foreshore and Seabed Act 2004,[11] but it was automatically transferred to the High Court once MACA was enacted.[12] In 2017, several groups within Te Whakatōhea brought their own applications, arguing recognition orders should be held at hapū/whānau, rather than iwi, level. Further, other iwi asserted competing interests in the claim area and various third parties (such as the Attorney-General and relevant local authorities) sought to be heard on the applications. In Appendix A, we set out the full list of relevant parties and their involvement in the proceedings.[13] Notably, two umbrella groups have formed within the proceedings: Whakatōhea Kotahitanga Waka (WKW) and Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū (Te Kāhui). WKW is the umbrella group supporting the Edwards application, and Te Kāhui consists of four hapū of Te Whakatōhea who have brought their own applications.[14]

[8] On 7 May 2021, the High Court granted several PCRs as well as three CMT orders.[15] However, on 18 October 2023 the Court of Appeal ordered a rehearing in respect of two of the CMT orders[16]—referred to here as CMT Order 1 and CMT Order 2. CMT Order 1 incorporates the westernmost coastal area from Maraetōtara in the west to Tarakeha in the east, and out to the 12-nautical-mile limit. It would be jointly held by the four hapū within Te Kāhui, Ngāti Ngāhere and Te Upokorehe. CMT Order 2 incorporates the western part of the Ōhiwa Harbour and would be jointly held by the CMT Order 1 groups and Ngāti Awa. WKW was not included in either CMT order.[17] A major focus of the Court of Appeal judgment was the interpretation of s 58. In November 2024, seven appeals were heard in the

11 We note that the late Claude Edwards and other representatives had also made an earlier, iwi-wide application under s 131 of Te Ture Whenua Māori Act 1993 [TWMA] before the enactment of the Foreshore and Seabed Act.

12 MACA, s 125.

13 See also SC judgment, above n 1.

14 While Ngāti Ruatākenga is not formally part of Te Kāhui, as its customary marine title [CMT] application was under the Whakatōhea Māori Trust Board, it now works with and supports Te Kāhui. Te Kāhui also includes Te Whānau a Mokomoko and Te Whānau a Tītoko, who support the appeal but are not parties.

15 *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 (Churchman J) [HC judgment].

16 *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252 (Cooper P, Miller and Goddard JJ) [CA judgment]. The Court of Appeal was unanimous as to the result, but divided as to aspects of the reasons. While Miller J dissented on aspects of s 58, the majority adopted much of his analysis. Where his reasons reflect the unanimous views of the Court, we will refer to the Court as a whole. Where the reasons address a disputed point, we will signal this.

17 HC judgment, above n 15, at [660(a)–(b)].

Supreme Court. On 2 December 2024, this Court issued its first judgment which allowed the appeal by the Attorney-General in relation to the interpretation of s 58. This judgment addresses the remaining issues.

Issues

[9] The appeals raise issues of statutory interpretation and application, as well as procedural matters. The broad issues on appeal are as follows:

(a) Whether recognition orders can be granted in respect of navigable rivers:

(i) Did s 261(2) of the Coal Mines Act 1979 (1979 Act) and its predecessor, s 14(1) of the Coal-mines Act Amendment Act 1903 (1903 Act), extinguish customary title and rights to the beds of navigable rivers?

(ii) If customary title and rights were extinguished, were they resurrected by s 11(3) of MACA?

(b) The present status (and effect) of the iwi-wide Edwards application:

(i) Does the fact that WKW had a mandate[18] for the original iwi-wide application remain relevant despite several hapū subsequently withdrawing support?

(ii) Does s 125 afford priority, substantive or procedural, to the Edwards application?

(c) Whether Te Upokorehe has exclusive rights within the claim area:

[18] Given the common usage of "mandate" in earlier MACA proceedings (and other relevant applications), we continue to use this term. However, as is common ground, we acknowledge "mandate" does not fully encapsulate the concepts of mana and rangatiratanga.

(i) Is it relevant that Te Upokorehe withdrew its opposition to Ngāti Awa being included in CMT Order 2 in the Court of Appeal?

(ii) Is shared exclusivity available where one group does not recognise shared interests in the area?

(iii) It is possible to have separate overlapping CMTs?

(iv) Should the Court of Appeal have remitted CMT Order 2 relating to Ōhiwa Harbour for a rehearing in light of Te Upokorehe's claim that it holds the mana in Ōhiwa Harbour to the exclusion of others?

(v) Should Ngāti Ngāhere have been included in CMT Orders 1 and 2?

(d) Whether the Courts below were correct in dealing with the CMT and PCR application by Ngāti Muriwai:

(i) Was Ngāti Muriwai entitled to be recognised in CMT Orders 1 and 2 under s 58?

(ii) Was Ngāti Muriwai entitled to PCRs under s 51?

(e) Whether the Court of Appeal was correct to conclude that Kutarere Marae is not an "applicant group" under s 9.

(f) Whether any of the applicant groups are entitled to CMT orders with respect to Whakaari and Te Paepae o Aotea.

(g) Disposition in the Courts below:

(i) Was the Court of Appeal correct to remit CMT Order 1 while making its own findings in respect of CMT Order 2?

(ii) Do the boundaries of CMT Order 2 need to be amended?

(h) Procedural matters in this Court:

(i) applications to adduce further evidence;

(ii) application to file submissions out of time; and

(iii) costs.

[10] We will discuss each issue in turn.

Navigable rivers

Background

[11] MACA's definition of "marine and coastal area" includes the beds of rivers that are part of the coastal marine area within the meaning of the Resource Management Act 1991.[19] In this case, the claims for CMT Order 1, as well as several applications for PCRs, include the confluence of the Waiōweka and Ōtara rivers at the mouth of those rivers, which form an estuary known as Pakihikura.

[12] We consider two questions relating to navigable rivers. The first is whether s 261(2) of the Coal Mines Act 1979 (1979 Act),[20] and its predecessor, s 14(1) of the Coal-mines Act Amendment Act 1903 (1903 Act),[21] extinguished customary title and rights to navigable rivers. Recognition orders cannot be granted in respect of

---

19 MACA, s 9 definition of "marine and coastal area", para (b); and see Resource Management Act 1991, s 2 definition of "coastal marine area", para (b).

20 The Coal Mines Act 1979 [1979 Act] has since been repealed, but the effect of s 261 is preserved by s 354(1)(c) of the Resource Management Act. See *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 [*Paki (No 1)*] at [32] per Elias CJ, Blanchard and Tipping JJ.

21 Section 14 of the Coal-mines Act Amendment Act 1903 [1903 Act] was re-enacted several times before it became s 261 of the 1979 Act: without substantive amendment in s 3 of the Coal-mines Act Compilation Act 1905 and s 3 of the Coal-mines Act 1908, and later with an amended definition of "navigable river" in s 206 of the Coal-mines Act 1925 [1925 Act]. Apart from some changes to the punctuation and the order of the subsections, and to the definition of navigable river, s 261 of the 1979 Act was identical to s 14 of the 1903 Act. These developments are outlined in *Paki (No 1)*, above n 20, at [31]–[32] per Elias CJ, Blanchard and Tipping JJ, [113] per McGrath J and [124] per William Young J. The Court said that the amendment to the definition of navigable river was not intended to change its meaning: at [33] per Elias CJ, Blanchard and Tipping JJ, [116] per McGrath J and [127] per William Young J.

customary title or rights that are "extinguished as a matter of law".[22] It is accepted on appeal that the relevant portion of the Waiōweka and Ōtara rivers is navigable.[23]

[13] If customary title and rights had been extinguished, the second question is whether s 11(3) of MACA, which divests the Crown of ownership of any part of the common marine and coastal area, resurrected any customary title and rights.

[14] If customary title and rights in navigable rivers have not been extinguished, or have been resurrected by virtue of s 11(3), recognition orders may be made in relation to the beds of navigable rivers—relevantly, for present purposes, including at the confluence of the Waiōweka and Ōtara rivers.

[15] We start by setting out the relevant legislation and summarising the decisions in the Courts below. We then consider each question in turn.

Legislation

[16] Section 261 of the 1979 Act provided:

> **261 Right of Crown to bed of navigable river—**
>
> (1) For the purpose of this section—
>
> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.
>
> (2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.
>
> (3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

22 MACA, ss 51(1)(c) and 58(4).
23 See the discussion of the evidence of navigability in HC judgment, above n 15, at [361].

[17] Section 51(1)(c) of MACA provides that a protected customary right is a right that "is not extinguished as a matter of law". Section 58(4) similarly provides that "customary marine title does not exist if that title is extinguished as a matter of law".

[18] Section 11(3) of MACA provides:

> (3) On the commencement of this Act, the Crown and every local authority are divested of every title as owner, whether under any enactment or otherwise, of any part of the common marine and coastal area.

The Courts below

High Court

[19] The High Court held that the vesting of the beds of navigable rivers in the 1979 Act extinguished customary rights and title in those beds. It was therefore not able to grant CMT over any area that included the mouth of a navigable river. The Court considered itself bound to follow the decision of this Court in *Paki v Attorney-General* (*Paki (No 1)*), which it said clarified the definition of "navigable" for the purposes of the 1979 Act, and held that, if a river was navigable as at 1903, its bed is deemed to have been vested in the Crown.[24]

[20] The Court found that there was extensive evidence that the Waiōweka River was navigable as at 1903. It therefore held that the boundary of CMT Order 1 ran in a straight line across the mouth of the river as a continuation of the mean high-water springs on either side of the mouth.[25]

[21] There was evidence of customary activities being undertaken in accordance with tikanga in the Waiōweka and Ōtara rivers, including fishing for whitebait,[26] and collecting traditional material for cultural practices.[27] However, the Court considered it was precluded from granting PCRs in respect of those rivers as they were not part of the takutai moana because their beds were vested in the Crown.[28]

---

24 HC judgment, above n 15, at [347] and [361] referring to *Paki (No 1)*, above n 20.
25 HC judgment, above n 15, at [361].
26 At [491], [506], [527], [536] and [592].
27 At [537]–[538].
28 At [491], [527] and [592]. See also statements to that effect in *Re Edwards (Whakatōhea Stage Two) (No 7)* [2022] NZHC 2644 (Churchman J) [HC Stage Two judgment] at [496] and [510].

Court of Appeal

[22] The Court of Appeal set out the High Court's finding on the effect of the 1979 Act, and the appellant's two submissions: that earlier legislation was insufficiently clear to expropriate customary rights and title, and that, if they had been extinguished, then s 11(3) of MACA reinstated them.[29] The Court then accepted the latter submission without commenting on the High Court's findings or the first submission. It held that s 11(3) of MACA reversed any previous vesting of riverbeds in the common coastal and marine area under the 1979 Act.[30]

Submissions on the effect of s 261(2) of the 1979 Act

Attorney-General's submissions

[23] The Attorney-General submitted that s 14 of the 1903 Act, the predecessor to s 261 of the 1979 Act, was enacted to address the uncertainty caused by *Mueller v The Taupiri Coal-Mines Ltd* (*Mueller*).[31] It is submitted that Parliament's clear intention in passing s 14 was to vest the full beneficial ownership—akin to freehold title—in navigable riverbeds in the Crown. The nature of such ownership is, in the Attorney-General's submission, inconsistent with the continuance of any prior rights and interests, including customary rights and interests.

[24] Whakatāne District Council, Crown Regional Holdings Ltd (CRHL) and Ōpōtiki District Council (ODC) endorsed the Attorney-General's submissions on this point.

Crown Regional Holdings Ltd and Ōpōtiki District Council's submissions

[25] CRHL and ODC have, at various times, shared responsibility and held resource consents for the Ōpōtiki Harbour Development Project (the Harbour Project).[32] In its Stage Two judgment on the form of the recognition orders, the High Court found that

29 CA judgment, above n 16, at [240]–[243] per Miller J.
30 At [244] per Miller J. The Court of Appeal's reasoning on that point is described more fully below at [86].
31 *Mueller v The Taupiri Coal-Mines (Ltd)* (1900) 20 NZLR 89 (CA) [*Mueller*].
32 The Ōpōtiki Harbour Development Project, which has been supported by more than $100 million of central and regional government funding, is a scheme to develop the Ōpōtiki Harbour into a fully functional deep-water harbour, capable of supporting a large aquaculture industry.

the parts of the Harbour Project that did not fall within the definition of reclaimed land in s 29(1) of MACA had substantially interrupted the applicants' holding of the relevant area in accordance with tikanga, and that area should be excluded from CMT Order 1.[33] That finding is currently on appeal to the Court of Appeal by Ngāti Patumoana, represented by Te Kāhui in these proceedings, and it is therefore not before this Court.

[26] The question of substantial interruption is related to the navigable rivers issue because the Harbour Project and associated works are partly located in areas which, but for the High Court's finding that s 261 of the 1979 Act extinguished customary title to the beds of navigable rivers, would have been part of the common marine and coastal area. CRHL and ODC raised concerns that, if the Court of Appeal's decision is upheld,[34] CMT Order 1 will cover those areas, which may give rise to uncertainty in relation to future consenting and leasing opportunities.

[27] Whakatāne District Council supported this submission.

Te Kāhui's submissions

[28] Te Kāhui submitted that s 261 of the 1979 Act does not prevent a recognition order for CMT or PCRs extending to navigable rivers. Te Kāhui noted that this issue was not before this Court in *Paki (No 1)*.[35]

[29] In Te Kāhui's submission, the text of s 261 is not sufficiently clear and plain to extinguish customary rights and interests. They submitted that the use of "vested" indicates that only radical title was conferred, with customary title remaining intact. The word "deemed" adds nothing to that. They relied on the fact that the wording in the 1979 Act is very similar to the wording of the statutes at issue in *Attorney-General v Ngāti Apa*.[36] Te Kāhui highlighted that extinguishment of

---

33 HC Stage Two judgment, above n 28, at [23]–[29].

34 CRHL had filed an appeal in this Court raising the Court of Appeal's failure to direct that a further hearing of evidence would be required as a consequence of its finding that the common marine and coastal area included the area one kilometre upstream of navigable rivers. That appeal was abandoned after the High Court confirmed a hearing on the papers would be held in relation to that area and CRHL would be entitled to be heard: *Re Ngāti Patumoana* [2024] NZHC 1435 at [82]–[83].

35 *Paki (No 1)*, above n 20.

36 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

customary rights can be partial, and they contrasted the wording of s 261 of the 1979 Act with the explicit language in s 14(1) of the Native Land Amendment and Native Land Claims Adjustment Act 1926 of "free[ing] and discharg[ing] from … Native customary title".[37]

[30] Te Kāhui noted that the English common law recognises that rights of navigation do not nullify customary rights and interests with respect to activities unrelated to travel,[38] and that there is a longstanding legal policy that Crown ownership of minerals in land is not inconsistent with private ownership of that land.

[31] Te Kāhui further submitted that, from a tikanga perspective, rivers are taonga and cannot be compartmentalised. They highlighted the comment of the Court of Appeal in *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* that the 1979 Act "may not be sufficiently explicit to override or dispose of" the concept of a river as taonga, meaning "a whole and indivisible entity, not separated into bed, banks and waters".[39]

[32] Te Tāwharau supported Te Kāhui's submissions on this point.

Effect of s 261(2)

[33] Neither of the Courts below analysed whether s 261(2) of the 1979 Act extinguished customary title to the beds of navigable rivers. The High Court relied instead on *Paki (No 1)* as authority that it did. We first discuss whether this was correct.[40] We then analyse the wording of s 261(2), before turning to a comparison with the wording at issue in *Ngāti Apa*.[41] After this, we discuss the legislative history of s 14 of the 1903 Act.

---

37 This is now the Māori Land Amendment and Māori Land Claims Adjustment Act 1926.

38 Te Kāhui submitted that this is reflected in ss 14(1), 27 and 59(3) of MACA.

39 *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) [*Te Ika Whenua*] at 26 citing Waitangi Tribunal *Te Ika Whenua – Energy Assets Report* (Wai 212, 1993) and Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992).

40 No party to the present appeal sought to argue that *Paki (No 1)*, above n 20, was authority for the proposition that s 261(2) of the 1979 Act extinguished customary rights and title. We nevertheless address this question, given it was the basis of the High Court decision.

41 *Ngāti Apa*, above n 36.

[34] Because of our conclusions on these issues, we do not need to consider Te Kāhui's submission that any vesting of the beds of navigable rivers in the Crown did not extinguish customary title to those rivers because, as a matter of tikanga, rivers cannot be compartmentalised into discrete parts.

Effect of *Paki (No 1)*

[35] *Paki (No 1)* concerned a representative claim brought in the High Court on behalf of the descendants of owners of five blocks of land adjoining the Waikato River at Pouakani, near Mangakino. The Crown had acquired title to the relevant blocks between 1887 and 1899.[42] The plaintiffs sought a declaration that the Crown ownership of the riverbed was subject to a constructive trust in their favour.[43] The plaintiffs accepted that the Crown had obtained with the riparian lands ownership of the bed of the river to the middle of the stream (*usque ad medium filum aquae*) by virtue of a conveyancing presumption of the English common law (midway presumption).[44] The plaintiffs also accepted that, if the relevant part of the river was navigable, then it had been vested in the Crown under s 14 of the 1903 Act and their claim could not succeed.[45] Because of these concessions, the only issue dealt with by this Court in *Paki (No 1)* was whether the 32 km stretch of the Waikato River adjoining the Pouakani blocks was a "navigable river".[46] This Court held that this stretch of river was not navigable.[47]

---

42 *Paki (No 1)*, above n 20, at [3] per Elias CJ, Blanchard and Tipping JJ.

43 *Paki v Attorney*-General [2009] 1 NZLR 72 (HC) at [3]. Appeals were subsequently heard before the Court of Appeal and this Court: *Paki v Attorney*-General [2009] NZCA 584, [2011] 1 NZLR 125; and *Paki (No 1)*, above n 20. In *Paki (No 1)*, the plaintiffs claimed that a constructive trust arose because the Crown's acquisition of the riverbed had entailed a breach of fiduciary duties owed to Māori on the basis the common law presumption of riparian ownership of the bed of the river to the middle of the stream [midway presumption] was not explained to the Māori owners, meaning the Crown had acquired ownership without their free and informed consent: at [5] per Elias CJ, Blanchard and Tipping JJ.

44 *Paki (No 1)*, above n 20, at [15] per Elias CJ, Blanchard and Tipping JJ.

45 At [6] and [13] per Elias CJ, Blanchard and Tipping JJ.

46 At [1] per Elias CJ, Blanchard and Tipping JJ.

47 At [89] per Elias CJ, Blanchard and Tipping JJ and [118] per McGrath J. In reaching this conclusion, this Court rejected the Court of Appeal's approach to navigability of assessing the navigability of the river as a whole: at [56]–[70] per Elias CJ, Blanchard and Tipping JJ and [118] per McGrath J. William Young J agreed on the approach to be taken, but dissented on the factual issue as to whether the relevant stretch of river was navigable: at [183] and [188]. The substantive issue of whether there was a constructive trust in favour of the Māori owners was later considered by this Court in *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

[36] The High Court in the present case was therefore not correct to treat *Paki (No 1)* as authority on the effect on customary land of s 261(2) of the 1979 Act and its predecessor, s 14(1) of the 1903 Act. Indeed, the Court in *Paki (No 1)* explicitly said that it was not necessary to consider that question:[48]

> Because it is not claimed that the bed of the river is Māori customary land or Māori freehold land, it is not necessary to consider in the present appeal whether the terms of s 14 would apply to such land (an application doubted in relation to customary land by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*).

[37] In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, the Court of Appeal had said:[49]

> … the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is "a whole and indivisible entity, not separated into bed, banks and waters". The vesting of the beds of navigable rivers in the Crown provided for by the [1903 Act] and succeeding legislation may not be sufficiently explicit to override or dispose of that concept …

[38] The majority in *Paki (No 1)* noted that the English common law was applied in New Zealand from 14 January 1840 "so far as applicable to the circumstances of the said Colony of New Zealand".[50] It said, however, that the Treaty of Waitangi prevented any English common law presumptions of Crown ownership arising in relation to land held by Māori under their customs and usages. This meant that the midway presumption did not enter New Zealand law in 1840 and, further, that the midway presumption could not apply unless Māori customary interests had been excluded, for example, by purchase or statute. The majority noted that, because the Crown had to own land before it could grant it, the midway presumption "was therefore first applied in interpretation of Crown grants, as in *Mueller*", and then when there were subsequent alienations of such Crown-granted land.[51]

---

48 *Paki (No 1)*, above n 20, at [13] per Elias CJ, Blanchard and Tipping JJ citing *Te Ika Whenua*, above n 39, at 26. McGrath J likewise said it was "not necessary at this time to determine whether or not the [midway presumption] applies to rivers that could potentially be held by Māori under their customs and usages": at [92]. As noted above at [34], we are also not dealing with the submission that under tikanga a river cannot be divided into constituent parts.

49 *Te Ika Whenua*, above n 39, at 26 citing *Te Ika Whenua – Energy Assets Report*, above n 39, and *The Mohaka River Report*, above n 39.

50 *Paki (No 1)*, above n 20, at [18] per Elias CJ, Blanchard and Tipping JJ citing English Laws Act 1858, s 1.

51 At [18] per Elias CJ, Blanchard and Tipping JJ citing *Mueller*, above n 31.

[39] The majority also noted that the land at issue in *Mueller* had been "freed from Māori customary ownership and granted by the Crown as general land". The question whether Māori customary owners of riparian lands owned the beds of rivers adjoining those lands was not at issue and, the majority explained, had in other cases been treated as a question of custom for Native Land Court investigations. Further, the question whether the midway presumption applies to Māori freehold land was not settled. The parties did not question the application of the midway presumption in New Zealand, "either at all or in relation to alienation of Māori customary land or the freehold title derived from it under the provisions of the Māori land legislation". As the plaintiffs did not claim that the midway presumption did not apply or that it had been rebutted, the majority stated that "[i]t would be wrong for this Court to depart from application of the presumption".[52]

[40] We conclude that the High Court erred by relying on *Paki (No 1)* for the proposition that s 261(2) of the 1979 Act extinguished Māori customary interests in the beds of navigable rivers. The Court of Appeal did not analyse that question. Nor did it examine whether the midway presumption applied to sales of riparian lands by their customary owners. This means that a more detailed analysis of the 1979 Act has yet to be conducted. We therefore turn now to consider the effect of s 261(2).

Wording of s 261(2) of the 1979 Act

[41] The rule that statutory extinguishment of customary property rights can only be achieved through "clear and plain" language is well settled.[53] The issue here is whether the wording in s 261(2) of the 1979 Act is sufficiently clear to meet this standard.

---

52 *Paki (No 1)*, above n 20, at [24] per Elias CJ, Blanchard and Tipping JJ.

53 *Ngāti Apa*, above n 36, at [148]–[149] per Keith and Anderson JJ. Keith and Anderson JJ cited *R v Sparrow* [1990] 1 SCR 1075 at 1099; *Mabo v Queensland* (1988) 166 CLR 186 at 213–214 per Brennan, Toohey and Gaudron JJ; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64 per Brennan J (with whom Mason CJ and McHugh J agreed: at 15), 111 per Deane and Gaudron JJ and 195–196 per Toohey J citing in turn *Central Control Board (Liquor Traffic) v Canon Brewery Co Ltd* [1919] AC 744 (HL) at 752 per Lord Atkinson; *Te Rūnanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (CA) at 655; and *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) at 691–692. See also *Ngāti Apa*, above n 36, at [113] per Gault P and [185] per Tipping J.

[42] For ease of reference, we repeat s 261(2) here:

> Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

[43] There is no wording in s 261(2) that explicitly references customary rights and title, let alone makes it clear that there is extinguishment of such rights and title. Indeed, there is no specific language at all vesting title to the beds of navigable rivers in the Crown. Rather, the word "remain" assumes the Crown already owns such riverbeds.[54] The Crown can only own land beneficially if it has purchased or otherwise acquired it from the customary owners.[55]

[44] In addition, the words "[s]ave where the bed of a navigable river is or has been granted by the Crown" suggest that s 261(2) is concerned with Crown grants. It therefore does not impact upon customary rights or title, which are not granted by the Crown.[56]

[45] We consider that the words "shall remain" are declaratory rather than expropriatory.[57] The wording is not clear or plain enough to extinguish customary rights and title. Section 261(2) merely provides that, except where rights to the riverbed have been or are granted, the beds of navigable rivers remain in Crown ownership when it grants riparian lands. The words "shall remain" indicate that the Crown already owned such riverbeds and therefore presuppose that the Crown had purchased or otherwise acquired the riverbed from the customary owners.

---

54 See *Attorney-General v Leighton* [1955] NZLR 750 (CA) at 791–792 per Adams J. In that case, Adams J (in dissent) considered that the words "shall remain" indicated the provision was intended to have declaratory effect, saying "There are no words purporting to vest or divest anything.": at 792.

55 Customary title continues in existence until it is "extinguished by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation or other lawful authority": *Ngāti Apa*, above n 36, at [47] per Elias CJ.

56 This conclusion is reinforced by the legislative history of s 14 of the 1903 Act: see below at [69] and [84]–[85].

57 But see our discussion below on the extent of the savings in s 261(2) of the 1979 Act for past grants: below n 95.

[46] We note that the issue of whether the midway presumption applies in New Zealand to cases involving the sale of Māori customary land to the Crown or to cases involving Māori freehold land did not arise in this case.[58] We therefore make no comment on this. This Court likewise did not decide that question in *Paki (No 1)* as, in that case, the plaintiffs conceded that the Crown had obtained ownership of the riverbed to the middle line.[59]

[47] The language in the second part of s 261(2) deeming minerals to be the "absolute property" of the Crown is in our view also merely declaratory. It is designed to make it clear that one of the incidents of the Crown's remaining ownership of the riverbed when it grants riparian lands is absolute ownership of the minerals in the bed of the river, this "without limiting in any way the rights of the Crown" in respect of the riverbed.[60]

[48] Even if the words relating to minerals are to be construed as confiscatory,[61] the "absolute property" phrase can be contrasted with the phrase in the first part of the subsection declaring that the beds of navigable rivers "shall remain and shall be deemed to have always been vested in the Crown". Where the Crown has not yet acquired the riverbed from its customary owners, that language could, if applicable to customary rights at all, only signify the Crown's acquisition of radical title over the riverbed as a result of its assertion of sovereignty. As confirmed in *Ngāti Apa*

---

58 Relevantly, in *Re the Bed of the Whanganui River* [1962] NZLR 600 (CA), the Court of Appeal held that the midway presumption applied in respect of Native Land Court investigations of title into riparian lands: at 608–610 per Gresson P, 618–620 per Cleary J and 624–627 per Turner J. That conclusion contradicted the earlier findings of the Royal Commission tasked with inquiring into the Whanganui River, and has since been doubted by the Court of Appeal and the Waitangi Tribunal: see Harold Johnston "Report of Royal Commission Appointed to Inquire Into and Report on Claims Made by Certain Maoris in Respect of the Whanganui River" I [1850] AJHR G2 at 9 and 12; *Te Ika Whenua*, above n 39, at 26–27; and Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 277–279.

59 See above at [35].

60 There is a possibility that the phrase "without limiting the rights of the Crown thereto" refers to rights to minerals, but this seems unlikely given it is difficult to conceive of any rights that would not arise from "absolute ownership".

61 We emphasise that we are not called upon in this case to decide whether, even if the "absolute property" phrase in s 261(2) of the 1979 Act is confiscatory, the language would be explicit enough to deprive Māori of rights or title to minerals in the beds of navigable rivers where the riverbed remains in customary ownership. We note that it is possible for the Crown to own minerals even if land is in private ownership: see Crown Minerals Act 1991, ss 10 and 11.

(discussed in the next section), that did not displace customary rights and interests in land.[62]

[49] We agree with the comments of McGrath J in *Paki (No 1)* on s 14 of the 1903 Act, where he said:[63]

> The words, "*the bed of such [navigable] river shall remain and shall be deemed to have always been vested in the Crown*" are declaratory of Parliament's view of Crown ownership of riverbeds under the law preceding the legislation coming into force. This expression and affirmation of the view that beds of navigable rivers always vested in the Crown indicated that Parliament did not regard the legislation as confiscatory. Only explicit grants of title to the riverbed created "existing rights". It follows that the legislation is not to be read as affecting property rights.

[50] The majority in *Paki (No 1)* did not comment on McGrath J's reasoning in this regard but they did make it clear that they were not dealing with the issue of customary title, as noted above.[64] They also considered the effect of s 14(1) of the Native Land Amendment and Native Land Claims Adjustment Act, which declared the beds of Lake Taupō and of the portion of the Waikato River from Lake Taupō to the Huka Falls "to be the property of the Crown, freed and discharged from the Native customary title (if any) or any other Māori freehold title thereto".[65] The majority said that this specific legislation may suggest that that part of the river was not seen in 1926 as navigable.[66] Importantly, however, the majority considered it equally possible that the 1926 legislation was prompted by "doubts as to the efficacy of s 14 [of the 1903 Act] in relation to Māori customary or freehold land".[67]

---

62 *Ngāti Apa*, above n 36, at [29]–[34] per Elias CJ, [102] per Gault P, [160] per Keith and Anderson JJ and [183] per Tipping J.

63 *Paki (No 1)*, above n 20, at [103(b)] (emphasis in original) citing *Leighton*, above n 54, at 791–792 per Adams J.

64 Above at [36].

65 See *Paki (No 1)*, above n 20, at [42] per Elias CJ, Blanchard and Tipping JJ.

66 At [43] per Elias CJ, Blanchard and Tipping JJ.

67 At [43] per Elias CJ, Blanchard and Tipping JJ. We note however that, given s 14 of the Native Land Amendment and Native Land Claims Adjustment Act 1926 arose as a result of a negotiated settlement following a 1923 application to the Native Land Court for title to the bed of Lake Taupō, it may simply have been that the applicants had claimed the bed of the Lake all the way to the Huka Falls: see Ngāti Tūwharetoa, Te Kotahitanga o Ngāti Tūwharetoa and the Crown *Deed of Settlement of Historical Claims* (8 July 2017) at [2.314]–[2.325].

Comparison with *Ngāti Apa*

[51] In *Ngāti Apa*, the Court of Appeal analysed whether various statutory provisions had extinguished customary rights and interests to the foreshore and seabed. Particularly relevant is s 7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 (1977 TSA) and its predecessor, s 7 of the Territorial Sea and Fishing Zone Act 1965 (1965 TSA) (together, the Territorial Sea Acts).

[52] Section 7 of the 1977 TSA provided:[68]

> **7 Bed of territorial sea and internal waters vested in Crown—**
>
> Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown.

[53] Neither s 7 of the 1977 TSA nor s 261(2) of the 1979 Act contains any indication of intention to expropriate customary rights. The operative phrase in s 261(2), that the beds of navigable rivers "shall remain and shall be deemed to have always been vested in the Crown",[69] is nearly identical to the equivalent component of s 7, that the seabed "shall be deemed to be and always to have been vested in the Crown".[70] The only material difference is the substitution of the phrase "shall remain … vested" in s 261(2) by the phrase "shall be deemed to be … vested" in s 7 of the 1977 TSA. The different placement of the word "deemed" is a function of this change in wording from "shall remain" to "shall be" and is thus of no moment. If anything, the substitution of "shall be" for "shall remain" suggests s 7 could be seen as less likely to be merely declaratory than s 261(2).

---

68 Section 7 of the Territorial Sea and Fishing Zone Act 1965 contained no material differences. Section 7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 was repealed by s 31 of the Foreshore and Seabed Act 2004.

69 Section 14(1) of the 1903 Act is the same in this regard: see above n 43.

70 We note that this Court in *Paki (No 1)*, above n 20, did not analyse the wording of s 261(2) and in particular its application in cases involving customary title: see above at [35]–[36].

[54] Nevertheless, the Court in *Ngāti Apa* unanimously held that the Territorial Sea Acts did not extinguish Māori customary interests in the seabed.[71] This was attributed to various factors, including the language of "deeming" and "vesting",[72] and that the Acts primarily dealt with matters of sovereignty, not property.[73] The Court highlighted the compatibility of Crown radical title and Māori customary property,[74] and the absence of language clearly indicating any expropriatory intention.[75]

[55] Elias CJ considered it significant that the Territorial Sea Acts protected existing property interests.[76] The same is true of s 261 of the 1979 Act, which preserves both Crown grants of the beds of navigable rivers and the rights of riparian owners in respect of the beds of non-navigable rivers.[77] In both the Territorial Sea Acts and s 261 of the 1979 Act, the protection of existing property interests demonstrates a lack of confiscatory intention. Such an intention is likewise apparent from the comments of the Premier in Parliament to that effect during the passage of the 1903 Act.[78]

[56] One of Keith and Anderson JJ's reasons for concluding that the Territorial Sea Acts did not have extinguishing effect was the difference between those Acts and s 206 of the Coal-mines Act 1925 (1925 Act), a prior version of s 261(2) of the 1979 Act which the Solicitor-General in *Ngāti Apa* contended had inspired the

---

71 *Ngāti Apa*, above n 36, at [63] per Elias CJ, [113] per Gault P, [160]–[162] per Keith and Anderson JJ and [203] per Tipping J.

72 At [63] per Elias CJ and [160] per Keith and Anderson JJ. Keith and Anderson JJ highlight, at [160], that the Native Land Acts of 1909 and 1931 and the Māori Affairs Act 1953, among others, defined "customary land" as "land which, being *vested* in the Crown, is held by natives or the descendants of natives under the customs and usages of the Māori people" (emphasis in original): see Native Land Act 1909, s 2; Native Land Act 1931, s 2; and Māori Affairs Act, s 2.

73 At [63] per Elias CJ and [161]–[162] per Keith and Anderson JJ.

74 At [63] per Elias CJ, [113] per Gault P and [160] per Keith and Anderson JJ.

75 At [63] per Elias CJ and [162] per Keith and Anderson JJ. Gault P, relatedly, dismissed counsel's argument that the amendment of s 4 of the Mining Act 1926 effected by s 11 of the Territorial Sea and Fishing Zone Act suggested that s 7 of that Act vested title in the Crown in fee simple, as "express legislative enactment would have been expected": at [113]. Likewise, Tipping J patently thought the language was insufficient to expropriate customary property; he stated that there was "no need to discuss the Territorial Sea legislation" as it "cannot possibly be regarded as having extinguished the status of any Māori customary land": at [203].

76 At [63].

77 The rights of riparian owners in non-navigable rivers might include fishing rights, or rights of ownership acquired by express grant or because of the midway presumption.

78 See below at [65].

wording of s 7 of the 1965 TSA.[79] In Keith and Anderson JJ's view, the exclusion of the phrase "shall be the absolute property of the Crown" from the Territorial Sea Acts was significant. That phrase "recognise[d] the coexistence of the radical title of the Crown and other (beneficial) property", and in the case of the 1903 Act it meant the Crown "had both and was the 'absolute' owner".[80]

[57] We do not agree with Keith and Anderson JJ that the inclusion of the "absolute property" phrase in s 261(2) of the 1979 Act and its predecessors conferred upon the Crown both radical and beneficial title over the beds of navigable rivers.

[58] As noted above, we consider the "absolute property" phrase to be declaratory and not confiscatory. The absolute ownership of minerals in the beds of navigable rivers is an incident of the continuing ownership of the beds of those rivers referred to in the first part of s 261(2). As explained above, this assumes the Crown already owned the riverbed.[81]

[59] Keith and Anderson JJ did not analyse s 206 of the 1925 Act in any detail. In particular, they did not consider the significance of the division of s 261(2) into two distinct parts and the placement of the "absolute property" phrase, which clearly relates not to the beds of navigable rivers but to the minerals within those beds. Even if the words "absolute property" were confiscatory (and we do not consider that they were) they would therefore relate to the minerals only and not the riverbeds themselves.[82]

Conclusion on *Ngāti Apa*

[60] The wording of s 261(2)—excluding the phrase relating to minerals—is essentially the same as the wording of the Territorial Sea Acts, which the Court in *Ngāti Apa* unanimously held did not extinguish customary property title and interests.

---

79 *Ngāti Apa*, above n 36, at [161]. Neither Gault P nor Tipping J considered this point. Elias CJ did not analyse this point herself, although she agreed with Keith and Anderson JJ's reasons relating to the Territorial Sea Acts: at [63]. Section 206 of the 1925 Act was essentially the same as s 261 of the 1979 Act: see above n 21.

80 *Ngāti Apa*, above n 36, at [161].

81 Above at [47]. See also above at [43]–[48].

82 See above at [48].

This reinforces the view already reached from our analysis of the wording of s 261(2) that the 1979 Act did not extinguish Māori customary title and rights.

Legislative history of the 1903 Act and relevant case law

[61] We now turn to the legislative history. We first summarise the parliamentary materials concerning the passage of s 14 of the 1903 Act. We then summarise the decision of the Court of Appeal in *Mueller* and make some comments on that decision, before assessing its relevance to the passage of s 14.[83] Finally, we outline our conclusions on the legislative history.

[62] We discuss *Mueller* because of the Attorney-General's submission that s 14 was enacted in response to that case. This Court in *Paki (No 1)* was also of this view.[84] This Court said that *Mueller* confirmed that the midway presumption applied in New Zealand but that it could be rebutted where the circumstances showed that the grantor had not intended to part with the riverbed.[85] This Court said that the effect of *Mueller* was that "whether the presumption was rebutted in any case was a matter requiring investigation of the facts and, in the case of dispute, court determination".[86] This Court considered that s 14 of the 1903 Act was enacted to eliminate that uncertainty.[87]

(a) Parliamentary materials

[63] The Coal-mines Act Amendment Bill began as a private member's bill, which the Government subsequently adopted. The Bill's initial purposes were to improve miners' participation in medical decisions,[88] and to entitle miners to overtime

83 *Mueller,* above n 31.

84 *Paki (No 1)*, above n 20, at [28], [54] and [67] per Elias CJ, Blanchard and Tipping JJ, [102] per McGrath J and [129] per William Young J. This was common ground between the parties so the Court did not hear argument on it: at [28] per Elias CJ, Blanchard and Tipping JJ.

85 At [22] per Elias CJ, Blanchard and Tipping JJ. See also at [94]–[97] per McGrath J and [131]–[133] per William Young J.

86 At [23] per Elias CJ, Blanchard and Tipping JJ.

87 At [28], [54] and [67] per Elias CJ, Blanchard and Tipping JJ, [96]–[97], and [102] per McGrath J and [129] per William Young J. Argument was not heard on this point in *Paki (No 1)* as the parties accepted this was the case. This Court in *Paki (No 1)* also said that s 14 was motivated by concerns as to securing both Crown ownership of minerals and public navigation rights in respect of navigable rivers: at [28]–[29] per Elias CJ, Blanchard and Tipping JJ, [111] per McGrath J and [161] per William Young J.

88 (12 November 1903) 127 NZPD 509–510.

payments.[89] Several substantive changes were made to the Bill throughout the legislative process expanding its scope.

[64] Relevantly, on 12 November 1903, at the Committee of the Whole House stage, the Minister of Mines moved to add the following clause to the Bill: "It is hereby declared that all coal and lignite under any river exceeding thirty-three feet in width is vested in His Majesty."[90] After the clause was read a second time, the Leader of the Opposition moved to insert the words "subject to existing rights" into the proposed clause after the word "that".[91] The amendment was carried 34 votes to 27, but the clause as amended was subsequently negatived; Hansard does not record why.[92]

[65] On 17 November 1903, the Premier moved that the Bill be recommitted for the sole purpose of inserting the clause that would become s 14 of the 1903 Act. Hansard records that the Premier acknowledged the Opposition's concern that the previous clause did not sufficiently "conserve existing rights" but said that:[93]

> [t]he Government did not wish in the slightest degree to disturb existing rights, but there was a difficulty as to how they should avoid that. A new clause had been drafted which [the Premier] thought would meet the difficulty.

The House then agreed to that clause, after which the Bill was reported and read a third time.[94]

[66] It is worthwhile here to outline the differences between the clause initially proposed and s 14 as enacted. The first proposed clause was solely directed at securing Crown ownership of coal in the beds of navigable rivers, assuming that the 33-foot limit was a proxy for navigability. That clause did not assert Crown ownership of riverbeds. The amendment proposed by the Opposition was that this should be "subject to existing rights". That must have been a reference to existing rights to coal, as at this stage the amendment was only concerned with rights to coal, not to the riverbed.

---

89 Coal-mines Act Amendment Bill (No 2) 1903 (89-1), cl 2.
90 (12 November 1903) 127 NZPD 511.
91 (12 November 1903) 127 NZPD 512.
92 (12 November 1903) 127 NZPD 512. The term "negatived" here indicates that the clause failed to pass its third reading.
93 (17 November 1903) 127 NZPD 681.
94 (17 November 1903) 127 NZPD 681.

[67] In s 14 as enacted the section was extended to all minerals, and definitions of "bed" and "navigable river" were included. The reference to the riverbeds being owned by the Crown was also introduced. Section 14 expressly preserved any rights of riparian owners in the beds of non-navigable rivers. It also excluded cases "where the bed of a navigable river is or has been granted by the Crown".[95]

[68] The purpose of the redrafted s 14, according to the Premier, was to meet the Opposition's concerns about protecting existing rights. It is safe to assume from the fact the clause was passed with no further objection that the Opposition was satisfied the clause as drafted did protect existing rights.[96]

[69] Finally, it is important to stress that there is no mention in the legislative history of any purpose of affecting or appropriating customary rights or title. As we discuss further below, s 14 as enacted concerned Crown grants, which are distinct from customary rights.[97]

(b) *Mueller v The Taupiri Coal-Mines (Ltd)*

[70] *Mueller* concerned an application by the Commissioner of Crown Lands for the Auckland Land District for a declaration that a stretch of the bed of the Waikato River, which the defendant riparian owner was mining for coal, was vested in the Crown.[98]

---

95 There is an issue as to whether this savings clause protected only explicit grants of the beds of navigable rivers or also protected grants arising from the midway presumption. In *Paki (No 1)*, above n 20, this Court considered, in obiter, comments that it only protected explicit grants: at [51] per Elias CJ, Blanchard and Tipping JJ, [103(a)] per McGrath J and [166] per William Young J. The majority (with whom McGrath J agreed) and William Young J referred to the obiter comments of Fair J in *Leighton* in support of the conclusion that the savings clause was limited to express grants: *Leighton*, above n 54, at 770 and 772–773. *Leighton* concerned s 206 of the 1925 Act, but that section was essentially the same as s 261 of the 1979 Act: see above n 21. In dissent in *Leighton*, Adams J took a contrary view. He considered that the savings clause was not limited to express grants. In his view, s 206 was not intended to interfere with past or future grants, especially as that section did not provide for compensation: at 789–792. The other majority judge, Stanton J, did not express a view on the savings clause. We do not need to resolve this issue. In any event, it probably makes no difference given the likely contemporary understanding of the effect of the decision in *Mueller* was that the midway presumption was rebutted in respect of navigable rivers more generally: see below at [76].

96 We note below at [80] that the clause was designed to codify the result in *Mueller*, which had likely been understood at the time as having decided that the midway presumption was rebutted with regard to navigable rivers: see below at [76] and [78].

97 Below at [81]–[82]. See also above at [44].

98 *Mueller*, above n 31, at 104 per Williams J. There is a fuller summary of the facts of *Mueller* in *Paki (No 1)*, above n 20, at [20] per Elias CJ, Blanchard and Tipping JJ.

[71] In *Mueller*, the Court of Appeal affirmed the application in New Zealand of the midway presumption in respect of non-tidal rivers. The presumption could be rebutted if the surrounding circumstances showed that the grantor had not intended to part with the riverbed.[99] The Court held by majority that the midway presumption had been rebutted in the instant case, although for varying reasons.[100]

[72] Williams J (with whom Conolly J concurred) considered that the presumption was displaced due to the circumstances of the grant, in particular that the river was crucial for accessing military settlements:[101] the river was "a highway of necessity, there being in fact no other highway".[102]

[73] Edwards and Martin JJ likewise considered that the fact the river was the "only practicable highway" indicated that the presumption had been rebutted.[103] Edwards J further considered that the Highways and Watercourses Diversion Act 1858, which empowered local authorities to alter or control watercourses, had rebutted the presumption, at least in respect of grants made after it came into operation.[104] Martin J agreed, relying also on the Marine Act 1866.[105]

[74] Relevantly to this appeal, Edwards J said that no public right of navigation to which the grant might have been subject could have been established while the land (including the riverbed) was in customary ownership.[106] Williams J (without concluding on the point) was inclined to agree, and noted that, if that was the case, it supported the view that the Crown did not intend to deprive itself of title to the riverbed of what was "in fact the only practicable highway".[107]

---

99 *Mueller*, above n 31, at 94–96 per Stout CJ, 104–105 per Williams J (with whom Conolly J concurred: at 113), 113–114 per Edwards J and 125 per Martin J, all applying *Lord v The Commissioners for the City of Sydney* (1859) 12 Moore PC 473, 14 ER 991 (PC).

100 Stout CJ dissented. He thought there was "no circumstance external to the grant, save the navigability of the river" that showed the Crown's intention to reserve the bed of the river: *Mueller*, above n 31, at 103.

101 At 108–110.

102 At 113.

103 At 126, and see at 125 per Martin J, and 119–121 per Edwards J.

104 At 114–115. This applied, in Edwards J's opinion, to both navigable and non-navigable rivers, as is clear from his dissenting reasons in *R v Joyce* (1905) 25 NZLR 78 (CA) at 96–101.

105 *Mueller*, above n 31, at 126–127.

106 At 121–124.

107 At 113, and see at 112.

[75] We make some comments on *Mueller*. First, it is important to note that *Mueller* related to coal mining. The objective of the Commissioner of Crown Lands in bringing the proceedings was not to secure navigation rights in the river,[108] but to prevent the defendant from mining coal in the riverbed. The navigability of the river was only relevant insofar as the Commissioner argued (successfully) that this rebutted the midway presumption.

[76] Second, all the Judges in the majority considered that the fact the river was the only practicable highway suggested the presumption had been rebutted. While the requirement for a river to be the only practicable highway seems to the modern eye to be an onerous one, the state of transport at the time suggests otherwise. New Zealand's road network in 1903 was rudimentary and did not provide full coverage. Motorised cars were novel and not at all widespread. The railway network was still being developed.[109] Rivers remained imperative for transport. It therefore appears likely that, at the time the 1903 Act was passed, *Mueller* was interpreted as holding that the midway presumption was rebutted in respect of navigable rivers more generally.[110] As noted above, the Opposition appeared to be satisfied that the final form of s 14 protected existing rights.[111]

[77] Third, and most significantly, *Mueller* related to rebuttal of the midway presumption on the grant or sale of riparian land and did not pertain to situations where the Crown had yet to acquire title to the riverbed from the customary owners.[112] This was recognised by this Court in *Paki (No 1)*.[113]

---

108 Martin J highlighted that there was no evidence that the defendant, or any other person, had attempted to interfere with or to claim a right to interfere with the erection of wharves on the river or the use of the river as a highway: at 125.

109 Carl Walrond "Roads" (1 March 2016) Te Ara | The Encyclopedia of New Zealand <https://teara.govt.nz>; and James Watson "Transport – overview" (10 June 2013) Te Ara | The Encyclopedia of New Zealand <https://teara.govt.nz>.

110 Professor FM Brookfield has likewise considered that s 14 of the 1903 Act accorded with *Mueller* "so far as the majority judgments rest on (in effect) a presumption that the Crown does not intend to grant any part of the bed of navigable rivers when the riparian land is granted": FM Brookfield "Constitutional Law" [1994] NZ Recent Law Review 376 at 381.

111 See above at [68].

112 See the comments of Edwards and Williams JJ outlined above at [74].

113 *Paki (No 1)*, above n 20, at [24] per Elias CJ, Blanchard and Tipping JJ.

(c) Relevance of *Mueller* to the passage of s 14

[78] There is no mention of *Mueller* in the parliamentary history. It is reasonable to assume, however, that the Minister of Mines was aware of the state of the existing law, and therefore aware of *Mueller*, when he proposed the amendment vesting ownership in the Crown of "all coal and lignite under any river exceeding thirty-three feet in width".[114] Section 14 as passed extended the scope to cover all minerals, preserved rights related to non-navigable rivers and included a definition of "navigable river".[115]

[79] The purpose of Parliament in enacting s 14 was to assert Crown ownership of coal (extended to all minerals in the final version) in the beds of navigable rivers.[116] That this was the purpose is apparent from the placement of s 14 in a coal mining statute. It is telling that Crown ownership of coal was the sole purpose of the original amendment proposed by the Minister of Mines. At that stage, there was no mention of Crown ownership of the riverbeds themselves.

[80] The effect of s 14 was to codify the result in *Mueller*: that the midway presumption was rebutted where a river was navigable and therefore that any coal and other minerals in the riverbed remained in Crown ownership when riparian land was the subject of a Crown grant.[117] Section 14 would remove any remaining uncertainty and eliminate the risk of future litigation. As this Court noted in *Paki (No 1)*, the effect of *Mueller* was that the individual facts and circumstances had to be investigated to decide whether or not the presumption had been rebutted.[118]

[81] This Court in *Paki (No 1)* considered that another purpose of s 14 was to secure public navigation rights.[119] Assuming this were the case, there are indications it was

---

114 See above at [64].
115 See above at [67].
116 It can be assumed that the 33-foot river width in the clause originally proposed by the Minister of Mines was intended to be a proxy for navigability.
117 As we note above at [76], *Mueller* was likely interpreted at the time to mean that the midway presumption was rebutted in respect of Crown grants of riparian land of navigable rivers, meaning that any coal in the riverbed remained in Crown ownership.
118 See above at [62].
119 *Paki (No 1)*, above n 20, at [29] per Elias CJ, Blanchard and Tipping JJ, [111] per McGrath J and [161] per William Young J.

a secondary purpose.[120] We do not, however, need to decide whether or not securing public navigation rights was a purpose of s 14. This is because, even if it was, this cannot alter the fact that s 14 was concerned with Crown grants and not with customary land.

[82] We reiterate that there is nothing in the statutory wording or the legislative history to suggest that the purpose of s 14 was to expropriate customary rights and title, whether to secure public navigation rights or otherwise.[121] We again highlight that, due to the concessions made by the appellants in *Paki (No 1)*, this Court did not deal with the issue of whether the midway presumption applies to sales of customary land. Nor did it deal with whether s 14 abrogated customary title and rights to the beds of navigable rivers.[122]

(d) Summary of our conclusions on the legislative history

[83] The primary purpose of s 14 was to assert Crown ownership of coal and other minerals in the beds of navigable rivers. This is clear from its position in a mining statute and from the fact that the clause initially proposed pertained only to coal.[123] Although there is no reference to *Mueller* in Hansard, the most likely explanation for s 14 is that it was intended to reflect and codify *Mueller*, which was likely interpreted as having held the midway presumption to be rebutted in respect of navigable rivers.[124]

[84] It is clear from the legislative history that s 14 was not concerned with rights or title to customary land. The legislative history contains no mention of customary

---

120 There was no mention of protecting navigation rights in the parliamentary materials, and *Mueller* did not concern navigation: see above at [75]. We also note that there were various other pieces of legislation in effect at that time expressly protecting navigation rights or which related more clearly to navigation. For instance, s 212(2) of the Harbours Act 1878 empowered the Governor in Council to make regulations for the safe navigation of rivers. We note too the Land Drainage Act 1893, the River Boards Act 1884 and the Public Works Act 1894. Further, the common law position was that public navigation rights were not inconsistent with private ownership of riverbeds: *Paki (No 1)*, above n 20, at [16] per Elias CJ, Blanchard and Tipping JJ. The common law position is reflected in s 27 of MACA, which preserves navigation rights within the marine and coastal area. Tikanga also recognised rights of passage for navigation (subject to consent): *Re the Bed of the Whanganui River* [1955] NZLR 419 (CA) at 433 per Cooke J, 440 per Adams J and 461 per North J. Hutchison J agreed with Cooke and North JJ: at 424. We recognise, however, that the position according to tikanga may differ between iwi.

121 See above at [69].

122 See above at [35]–[36] and [39].

123 See above at [79].

124 See above at [76].

rights or title.[125] Nor were customary rights at issue in *Mueller*.[126] *Mueller* and s 14 concerned Crown grants, which can only be made once land has been acquired from its customary owners.[127] Accordingly, and regardless of the effect (if any) of s 14 on other existing rights in the beds of navigable rivers,[128] the legislative history does not suggest that s 14 can be construed as having extinguished customary title and rights.

[85] The legislative history therefore conforms with our conclusion on the statutory wording and does not distinguish this case from *Ngāti Apa*.[129]

Does s 11(3) of MACA revive extinguished customary title and rights?

[86] The Court of Appeal concluded that s 11(3) of MACA reversed any previous vesting of the common marine and coastal area in the Crown under the 1979 Act. Its reasons on that point were brief. It said:[130]

> Section 58(4) contemplates that CMT may be extinguished in law, but that provision appears to contemplate extinguishment of CMT by means other than Crown ownership that was subsequently reversed. I observe that, under s 11(5)(c), the special status accorded to the common marine and coastal area does not affect certain powers exercisable by or under an enactment.

Attorney-General's submissions

[87] The Attorney-General submitted that the Court of Appeal wrongly treated s 11(3) of MACA as having the effect of reviving customary interests extinguished prior to MACA coming into force.[131] In the Attorney-General's submission, the purpose of s 11(3) is to divest the Crown and local authorities of every title as owner of any part of the common marine and coastal area, to give effect to subs (2). It is simply a divesting provision which is entirely forward-looking; it does not purport to address extinguishing events that occurred prior to MACA coming into force.

---

125 See above at [69] and [81]–[82].
126 See above at [77].
127 See above at [43]–[45].
128 See above n 95.
129 *Ngāti Apa*, above n 36.
130 CA judgment, above n 16, at [244] (footnote omitted) per Miller J.
131 Whakatāne District Council, Crown Regional Holdings Ltd and Ōpōtiki District Council endorsed the Attorney-General's submissions on this point.

[88] The Attorney-General submitted that the revival of extinguished customary rights requires express legislation. The Attorney-General referred to cases arising under MACA which indicate that specific wording is required to revive customary interests,[132] and stressed that s 6(1) of MACA—which expressly "restore[s] and give[s] legal expression" to customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004—supports this view.

[89] The Attorney-General noted that in the Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill 2010, the Ministry of Justice | Te Tāhū o te Ture explained that the Government's intention was to provide for the recognition of "extant rights" that have existed continually since before 1840, consistently with the doctrine of customary title.[133] The Departmental Report also recorded the Government's intention that grievances arising from the extinguishment of property rights to the takutai moana would continue to be resolved through the Treaty settlement process.[134]

[90] The Attorney-General finally submitted that the fact that s 11(5)(c) ensures powers exercisable by or under any enactment are unaffected does not suggest s 11(3) should be read as reviving customary interests.

Te Kāhui's submissions

[91] Te Kāhui submitted that, if this Court finds that the 1979 Act extinguished customary title to and rights in the beds of navigable rivers, the Court of Appeal was correct to hold that s 11(3) of MACA reinstated those title and rights.[135] Te Kāhui accepted that generally the repeal of an enactment does not revive interests extinguished by that enactment, but they submitted that the legal position in any given case is a matter of construction. They said that in light of Te Tiriti's art 2 guarantee of Māori property rights, and tikanga principles of hara and ea, it is proper to interpret the relevant customary rights as being reinstated. Te Kāhui submitted further that the

---

132 *Ngā Pōtiki Stage 1 — Te Tāhuna o Rangataua* [2021] NZHC 2726, [2022] 3 NZLR 304 at [145]–[147]; and *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [250]–[260].

133 Ministry of Justice | Tāhū o te Ture *Marine and Coastal Area (Takutai Moana) Bill*: *Departmental Report* (4 February 2011) [MACA Departmental Report] at [1436].

134 At [1438].

135 Te Tāwharau endorsed Te Kāhui's submissions on this point.

definitions of “common marine and coastal area” and “marine and coastal area” in s 9(1) support the Court of Appeal’s interpretation of s 11(3).

Discussion

[92] We do not need to deal with this point, given our conclusion on the first question that s 261(2) does not extinguish customary rights and interests.

Summary of our conclusions on navigable rivers

[93] The High Court was incorrect to rely on *Paki (No 1)* in interpreting s 261(2) in the present case. The wording of s 261(2) is not sufficiently clear to extinguish customary rights and title to the beds of navigable rivers. This is consistent with legislative history, in which no reference is made to customary rights and title. Given this conclusion, we do not need to decide whether s 11(3) of MACA resurrected those interests. Accordingly, the beds of navigable rivers form part of the common marine and coastal area as defined in MACA, and recognition orders may extend to them. The impact of these findings on the boundaries of CMT Order 1 and any applications for PCRs, particularly in relation to the confluence of the Waiōweka and Ōtara rivers, can be dealt with by the High Court.[136]

Result

[94] The Attorney-General’s appeal on the navigable rivers issue is dismissed, but for reasons that differ from those of the Court of Appeal.

Status of the Edwards application

Background

[95] Initially, as discussed above at [7], the Edwards application was brought under the Foreshore and Seabed Act on behalf of Te Whakatōhea. The effect of s 125 of MACA was that applications under the Foreshore and Seabed Act were automatically

---

136 See below at [323]. This will also need to be considered in light of the HC Stage Two judgment, above n 28, which at the time of this judgment is on appeal to the Court of Appeal. In any event, as we are dismissing the Attorney-General’s appeal, the position remains the same as it was following the Court of Appeal’s judgment.

transferred for consideration under the new regime and given priority over new applications.[137] The landscape became more complicated when, in 2017, several groups within Te Whakatōhea brought their own applications under MACA.

[96] This part of our judgment addresses the appeal by WKW challenging the decision not to grant its application for CMT orders.[138] The decision was challenged on the basis that the Edwards application, covering the entire rohe moana claimed by Te Whakatōhea, has an iwi-wide mandate which has not been ended in a tikanga-consistent way, and as such the individual applications of the hapū within Te Kāhui should be either effectively absorbed into the Edwards application or removed.[139] WKW also argued that an iwi-wide order is appropriate in this case.[140] Alternatively, WKW said that if this Court determines all applications are valid, the effect of the priority given to the Edwards application via s 125(3) of MACA is that the Edwards application prevails and subsequent applications must give way in cases of overlap. WKW submitted an iwi trust should accordingly take carriage of any CMT granted and that the post-settlement governance entity, Te Tāwharau o Te Whakatōhea (formerly the Whakatōhea Māori Trust Board), is best placed to do that.

[97] In opposing the approach of WKW, Te Kāhui submitted that the focus on "mandates" and formal processes is inappropriate; rather there should be a contextual assessment of who holds customary rights as a matter of tikanga. Counsel said that the hapū applicants have the support of the people and are simply a conduit for the exercise of hapū rangatiratanga. Finally, Te Kāhui argued that s 125(3) only affords WKW temporal priority (and only in relation to PCR applications) and that an iwi-wide approach is inconsistent with tikanga Whakatōhea, with its focus on mana ā hapū.

[98] Counsel for Te Upokorehe argued that it either never supported, or did not sustain its support for, the Edwards application. Also, counsel submitted that WKW

---

137 Section 125(1) and (3)(a).

138 See above at [8].

139 See below at [101].

140 While Ngāti Muriwai's submissions supported an iwi-wide CMT, Ngāti Muriwai also forms part of Whakatōhea Kotahitanga Waka [WKW]. As such, we will only refer to WKW when discussing this issue.

should have challenged Te Upokorehe's mandate in the High Court rather than raise it at the first instance on appeal.

[99] Te Tāwharau submitted that either approach is appropriate so long as there is hapū representation and the title is held collectively.[141]

The Courts below

[100] In the High Court, Churchman J did not explicitly deal with the WKW application. However, in a subsequent related judgment, Churchman J noted that the parties constituting WKW had failed to obtain an order for CMT, although some of the parties were entitled to PCR orders.[142] The Court of Appeal in this case concluded that the High Court implicitly, and correctly, dismissed the application.[143] Miller J noted that s 101 of MACA and the definition of "applicant group" imply that the applicant requires "the mandate of the applicant group"—here, the iwi.[144] While Claude Edwards may have originally had the mandate from most (or even all) of the hapū, by the time of the High Court hearing separate applications were filed and none of the hapū supported the WKW proposal that a trust would ultimately be formed to hold the title for the iwi.[145] Miller J stated:[146]

> [276] It may be that tikanga would call for a process to withdraw Mr Edward's mandate and decide who ought represent the iwi, if only as a matter of etiquette. I express no view about that. It is also apparent that the six hapū do not represent the views of everyone affiliated to the iwi. But MACA treats mandate as a question of fact for the court, and the six hapū appeared for themselves, stating that the Edwards application did not have their support. That having occurred, it could no longer be said that the Edwards application was brought for the iwi.

The issues

[101] We therefore need to consider the relevance of mandate—that is, which applicants have the support of the communities claiming customary rights in the

141 We note Te Tāwharau's objection to the mandate holder for Ngāti Patumoana, but this is subject to a separate appeal: see HC Stage Two judgment, above n 28, at [225]–[226]; and CA judgment, above n 16, at [6].
142 *Re Edwards (No 4)* [2021] NZHC 3180 at [17(e)].
143 CA judgment, above n 16, at [274]–[275] per Miller J.
144 At [275]. Section 101 of MACA sets out the contents of an application for a recognition order.
145 At [275].
146 Footnote omitted.

applications before us. Here that also involves consideration of the extent to which iwi or hapū-level recognition is appropriate in the case of Te Whakatōhea. A further issue is whether the effect of s 125(3) is to grant substantive (or merely temporal) priority to the Edwards application.

Our analysis

The relevance of mandate

[102] Applicants were permitted under s 100(1)(a) of MACA to apply to the court for a recognition order within the specified timeframe.[147] The matters to be covered in an application included a description of "the applicant group"[148] and the name of a person to be the holder of the recognition order "as the representative of the applicant group".[149] An "applicant group":[150]

> (a) means 1 or more iwi, hapū, or whānau groups that seek recognition under Part 4 of their protected customary rights or customary marine title by—
>
> (i) a recognition order; or
>
> (ii) an agreement; and
>
> (b) includes a legal entity (whether corporate or unincorporate) or natural person appointed by 1 or more iwi, hapū, or whānau groups to be the representative of that applicant group and to apply for, and hold, an order or enter into an agreement on behalf of the applicant group.

[103] The applicant group was required under s 103(1) to give public notice of the application. The public notice had to contain specified information which included the applicant group's name "and its description as an iwi, hapū, or whānau" as applicable, along with the name of the proposed holder of the order.[151]

[104] A claim may be struck out if it does not meet the mandatory requirements, as occurred in *Re Paul*.[152] In that case, Cletus Maanu Paul made an application under

---

147 See above n 9.
148 Section 101(c).
149 Section 101(f).
150 Section 9(1) definition of "applicant group".
151 Section 103(2)(a) and (d).
152 *Re Paul* [2020] NZHC 2039.

MACA on behalf of all Māori for the entire coastline. In striking out the application, the High Court relied on the fact it was not advanced on behalf of iwi, hapū or whānau; no specific area of the common marine and coastal area was identified; and there was nothing authorising Mr Paul to commence an application in his role as co-chairperson of the New Zealand Māori Council and chairperson of the Mataatua District Māori Council.[153] The decision was upheld on appeal.[154]

[105] Once the statutory requirements as to the application are met, the first question is whether the court is satisfied that the applicant group has met the statutory test for a CMT order under s 58.[155]

[106] In this context the applicant was the late Claude Edwards and the applicant group was Te Whakatōhea. The question raised by the WKW appeal is whether the Edwards application is supported by Te Whakatōhea assuming that applicant group can satisfy the statutory test. But, if the inquiry focuses on which, if any, applicant group meets the test for CMT, issues of mandate of the type raised by WKW are essentially irrelevant. That test is the primary mechanism for resolving competing applications.[156] The inquiry is directed to the evidence of who holds the rights, not who made the application. The Act provides flexibility in this respect and, as counsel for Ngāti Patumoana put it, MACA "is indifferent in the abstract" as to who might bring an application.

[107] Where an applicant group or groups have met the s 58 test, the next stage of the inquiry is as to who should be the holder of the order. This is a matter that can be referred to pūkenga (experts) or to the Māori Appellate Court under s 99(1) of MACA for an opinion or advice as to tikanga.[157] But the applicant group(s) may resolve this question themselves. The High Court decisions to date have proceeded on the basis that issues as to mandate are usually best resolved out of court using tikanga

153 At [13], [15], [51] and [52].

154 *Paul v Attorney-General* [2022] NZCA 443. Leave to appeal directly to this Court, and a subsequent application to appeal the decision of the Court of Appeal, were both dismissed: *Paul v Attorney-General* [2020] NZSC 132; and *Tamihere v Attorney-General* [2023] NZSC 135.

155 We focus on CMT as that is what is in issue here, but the principles apply equally to protected customary rights [PCRs].

156 See Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at [16.7.2]; and see MACA Departmental Report, above n 133, at [116].

157 See also the TWMA, s 30.

processes.[158] We agree and note that approach is more likely to result in a more durable outcome.[159] Indeed, here, a notable feature of the pūkenga report is the call to Te Whakatōhea to speak with one voice.

[108] Nor is there any basis for us to say that the Courts below got it wrong because the rights are in fact held iwi-wide. We do not consider it is necessary to engage with the evidence in any detail where there have effectively been concurrent findings of fact in the Courts below. But, simply by way of illustration, we take one example relied on by WKW as supporting the submission that the rights are those of the iwi. The example is provided in the evidence of Carlo Hemoana Gage, Ngāti Ira. He talked about communal fishing practices and said this:

> Our tīpuna would cast a 5-mile net and do one catch to be shared with every hapū. They would use a couple of boats to take the net out and groups would wait on the shore to pull the net in. My koroua would do his karakia and our Tohunga would karakia a week before. Our Tohunga would put his hands in the water and the fish would swim around in circles. Based on the behaviour of the fish, he knew the best time to fish, whether it was the next day or in a few days' time. When the time was right, the people would go out in the water and lay the net. Tarakihi and Tamure were the main fish species back then.

[109] As was raised in discussion with counsel for WKW at our hearing, the history of the motu is replete with such examples.[160] They often reflect practical realities such as the need for cooperation in order to physically cast out a net of that size. It does not inevitably follow that the rights are iwi rights but rather suggests that there is/ was cooperation amongst the iwi and hapū. That this is so is apparent from Mr Gage's concluding statements which emphasise that hapū were to the forefront even in these large efforts. Mr Gage said that:

---

158 See, for example, *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1384, [2023] 3 NZLR 501 at [120].

159 At a practical level, if nothing else, durability is important given the difficulties in changing a recognition order: MACA, s 111(4)–(5). We do not rule out the possibility of the courts ultimately being required to determine the matter.

160 For example, in the *Muriwhenua Fishing Report*, the Waitangi Tribunal described how the season for fishing kapeta (dogfish) was restricted to only two days per year in order to preserve the kapeta. The mana over the kopua (the deep) was solely exercised by Popata te Waha, who issued the date of the annual catching, and who fired the signal-gun to notify the camps that sharks would be caught. Popata te Waha's mana, and the restrictions he implemented, were respected by all the surrounding iwi who came to the area for fishing: Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 68–69.

> Ngāti Ira has always had an undeniable relationship with the moana. I have always been of the belief that the primary relationship to and with the moana sits with the hapū. Ngāti Ira is no different. …
>
> Individual tohunga and rangatira from each hapū are the knowledge keepers maintaining the customary practices for the benefit of all hapū members. As generations evolve, these practices I speak about have withstood many challenges and changes presented by Crown rules and government policy. Knowing that Ngāti Ira was actively practising their rights as kaitiaki back in the mid 1800's solidifies our rights over our mana moana. More importantly, the significant role of the moana in our history, waiata mōteatea (songs), whakapapa and stories is undeniable.

[110] The Court of Appeal approached the matter as a question of mandate, presumably reflecting the arguments. WKW was critical of Miller J's reference to the need to utilise a tikanga process to resolve the matter, "if only as a matter of etiquette".[161] The focus however should be on Miller J's statement that "MACA treats mandate as a question of fact for the Court".[162]

[111] We agree with Miller J that, given the Whakatōhea hapū appeared for themselves and said they did not support the Edwards application, "it could no longer be said that the Edwards application was brought for the iwi".[163] It must follow that the iwi no longer speaks for its hapū in the matter of takutai moana rights and the customary right holders, the hapū, have chosen to go their own way. The point is well-illustrated by the observations of Churchman J in *Re Edwards (Whakatōhea Stage Two) (No 7)*.[164] His Honour observed as follows:

> [180] The entity that advanced the claim at the Stage One proceedings on behalf of Te Upokorehe was [Te Upokorehe Treaty Claims Trust]. It was that entity whose evidence was accepted by the pūkenga and by the Court as establishing that Te Upokorehe, jointly with the others named, qualified for orders of CMT.[165]

[112] It is not critical that there was no subsequent formal hui-ā-iwi withdrawing the mandate which was given to the Edwards application via the Whakatōhea hui-ā-iwi held in October 2005 for that purpose. We were not advised of any tikanga requirement that withdrawal of hapū support could only be achieved at a formal hui

---

161 CA judgment, above n 16, at [276].
162 At [276].
163 At [276].
164 HC Stage Two judgment, above n 28.
165 Te Kāhui also relied on the HC judgment, above n 15, at [331] and [465].

called for that purpose.[166] In those circumstances, mandate must be seen as a question of fact.

[113] We observe that, inevitably—reflecting the human condition in all societies—questions about the status of a community, and the level of support its spokespeople have, arise in relation to a wide range of organisations and in different contexts. Courts may accordingly be asked in numerous contexts to address questions of mandate. When these questions surface in the MACA framework, various situations may arise. In some cases, who holds the mandate for a community may be clear and able to be resolved on the basis of tikanga and the evidence. In that situation, the court can, and should, just affirm the mandate. There will, however, be other cases where, as here, judgment from the court as to who is the appropriate spokesperson will not be appropriate or helpful to the resolution of the question.

[114] The facts indicate that the problem is in part the result of the passage of time. Issues as to mandate loomed large over the course of Te Whakatōhea's long pathway to settlement of its Treaty claims. It is plain from that history that there were changes within Te Whakatōhea as to who should have carriage of the negotiations and that issues of mandate have been fraught throughout. The position is exemplified by the decision of the Māori Land Court in 2018 to bring the s 30 order that had been made under Te Ture Whenua Māori Act 1993 in 1994 to an end. The s 30 order had named Mr Claude Edwards and others as the most appropriate representatives to deal with settlement negotiations but, with time, that mandate has eroded.

[115] The Māori Land Court said that Te Whakatōhea appeared to have "moved on", with several Waitangi Tribunal claims existing for hapū, and later mandate processes (such as the formation of Tū Ake Whakatōhea Collective in the context of settlement negotiations).[167] The Court described:[168]

> [76] We also note that circumstances have changed for Whakatōhea. … The point was also well made that throughout the period between 1998 and 2017, there did not appear to be any serious suggestion that the s 30

---

[166] Counsel for WKW submitted hui-ā-iwi were said to be "the normal mechanism used by Te Whakatōhea iwi".
[167] *Edwards – Whakatōhea* (2018) 183 Waiariki MB 169 (183 WAR 169) at [76].
[168] At [76]–[78].

> negotiating group remained as the appropriate representatives for progressing the settlement of various Wai claims.
>
> …
>
> [78] Cumulatively the evidence clearly indicates that for Whakatōhea the s 30 order has not been in effect for some time. The order has not served the purpose for which it was originally sought and importantly it does not serve the needs of Whakatōhea today. The change in circumstances has meant that the s 30 order and its original purpose has been overtaken by subsequent events.

A hapū or iwi-wide approach?

[116] WKW submitted that an iwi-wide approach is both practical and more workable, emphasising matters such as the impact of raupatu (confiscation of lands) on Te Whakatōhea and that an iwi-level approach avoids the need to address shared exclusivity issues whilst enabling inclusivity. It was also submitted that granting orders at hapū level has resulted in a diminution of the rohe because only the Edwards application encompasses all of the rohe moana.

[117] If the evidence is that the hapū are advancing their own claims and such claims are consistent with the nature of the rights contended for, and that the hapū are supported by their constituent members in doing so, that is the end of the matter as far as the court is concerned. Counsel for WKW only faintly challenged the specific mandates and we see nothing in that submission. And both Courts below have said the hapū are the customary rights holders. That means the submission regarding possible diminution of the rohe falls away. The question of which body or bodies represent them is a different one which, as we have said, is not able to be resolved here. There may well be reasons to support an iwi-wide approach. That, in a practical sense, is still a possible outcome. But as matters currently stand, that is for the constituents to resolve rather than the Court to impose from the outside.

[118] In conclusion, at the outset of our discussion of WKW's case, we endorsed Miller J's observation that the mandate issue raised questions of fact. The indications are that here these questions are a matter of deep dispute for Te Whakatōhea and not

ones we should attempt to resolve. Like the pūkenga, we can only encourage resolution according to tikanga.[169]

Effect of s 125

[119] Section 125 of MACA reads as follows:

> **125 Pending proceedings under Foreshore and Seabed Act 2004**
>
> (1) On the commencement of this Act, all applications made under the Foreshore and Seabed Act 2004 to the Māori Land Court for customary rights orders and not finally determined under that Act before the commencement of this Act must, without further authority than this section, be transferred to the High Court.
>
> (2) The High Court must treat applications transferred under subsection (1) as if they were applications made under subpart 2 for orders recognising protected customary rights.
>
> (3) The High Court—
>
> (a) must give priority to applications transferred under this section ahead of any applications made under subpart 2:
>
> (b) may deem any of the steps that are required for a proceeding under the High Court Rules 2016 to have been met by the applications transferred under this section:
>
> (c) may give directions to applicants to take such steps that, in the opinion of the High Court, are necessary to enable the proceedings to be completed.
>
> (4) An application made under section 33 of the Foreshore and Seabed Act 2004 for a finding that a group would have held territorial customary rights is to be treated by the High Court as an application under subpart 2 for an order recognising customary marine title.

[120] We consider it is clear that a transferred application has temporal, not substantive, priority. We agree with Churchman J in the High Court that such an application is given priority "as to the allocation of a hearing" but, otherwise, has "the same status as other applications for recognition orders".[170]

---

169 Workability is an important consideration if for no other reason than the need for some certainty for those third parties with whom the CMT holder will need to deal. We add that we do not see the provisions in the Whakatōhea Claims Settlement Act 2024 relied on by WKW as requiring an iwi-wide solution. Counsel accepted they were not determinative: see s 8(7), (12) and (14) and s 9(24)–(25).

170 HC judgment, above n 15, at [8]. See also *Re Ngāti Pāhauwera Development Trust* [2020] NZHC 1139, at [28], n 11; and CA judgment, above n 16, at [272] per Miller J.

[121] That the section addresses temporal priority is plain on its face. WKW said some meaning must be given to the words "priority … ahead of" the other applications.[171] But, in context, the words "ahead of" must mean prior to or before in time. The other two paragraphs in subs (3)—which are referring to procedural steps and invoke the High Court Rules 2016—support this view. The procedural focus is also supported by the subheading, "Transitional arrangements", especially when read along with the section heading, which reads "Pending proceedings under the Foreshore and Seabed Act 2004". Finally, if the section did affect the substantive tests, it would be expected there would be some reference to that elsewhere in the Act, particularly given that, on WKW's interpretation, filing later in time may deprive a group of its rights.[172]

Result

[122] For these reasons, we have concluded that the Courts below were correct in dismissing the WKW application. Accordingly, WKW's appeal is dismissed.

Te Upokorehe—claim to exclusive rights

Background

[123] Te Upokorehe is represented by Te Upokorehe Treaty Claims Trust—that much is clear—and it describes itself as a small iwi that has maintained continuous occupation or ahi kā in the area surrounding the Ōhiwa Harbour. However, its status is contested, with members of Te Whakatōhea arguing that Te Upokorehe is a hapū of Te Whakatōhea.[173] Whether Te Upokorehe is an iwi in its own right or a hapū of Te Whakatōhea is not a relevant issue under MACA. Relevantly, Te Upokorehe asserts exclusive rights over the common marine and coastal area from Maraetōtara to the Waioweka River (including within Ōhiwa Harbour) and objects to a joint CMT with Te Whakatōhea hapū. This requires the Court to consider to what extent

171 MACA, s 125(3)(a).

172 This is reinforced by an observation in the Departmental Report: "Existing applications, once transferred, will be treated as if they were applications made under the new legislation and will be subject to all the requirements of the Bill." See MACA Departmental Report, above n 133, at [2488].

173 Te Kāhui does not claim any mandate to speak for Te Upokorehe.

Te Upokorehe's claim to exclusive rights impacts the CMT orders made in the Courts below.

The Courts below

High Court

[124] As part of the High Court proceedings, two pūkenga published a report to assist the Court (appended to that Court's judgment).[174] Churchman J noted he was not bound by the report, but recommendations relating to tikanga would likely be "highly influential".[175] The pūkenga proposed "a simple solution" for the area from Maraetōtara to Tarakeha using the metaphor of a "poutarāwhare" (construct).[176] The pūkenga saw the poutarāwhare as comprising Ngāi Tamahaua, Ngāti Ruatākenga, Ngāti Ira, Ngāti Ngāhere, Ngāti Patumoana and Te Upokorehe. The pūkenga suggested recognising a single title to be held at the poutarāwhare level.

[125] Churchman J adopted the pūkenga's proposal. The applicant groups making up the poutarāwhare shared CMT Order 1, and shared CMT Order 2 with Ngāti Awa.[177] Broadly, Churchman J pointed to the pūkenga report, the assertion of shared interests by the other hapū, the inclusion of Te Upokorehe in an earlier application,[178] and the fact that "[Te] Upokorehe did not dispute the fact that the other hapū shared the area, their dispute was the basis upon which this was done."[179] Churchman J concluded:[180]

> It is also possible that [Te] Upokorehe might not accept the Court's adoption of the pūkenga findings and not wish to be part of any CMT which they jointly held with other hapū. That would obviously be a matter for them. However, the Court hopes that, as the pūkenga encouraged, there might be discussions between parties leading to an agreed outcome in accordance with tikanga.

---

174 As provided for in MACA, s 99(1)(b). See HC judgment, above n 15, at 901–916.
175 At [325].
176 At 903.
177 The pūkenga has also recognised the rights of Ngāti Awa in the area covered by CMT Order 2.
178 In 1999, representatives of Te Whakatōhea applied for their rohe to be recognised as Māori customary land under the TWMA. The application was originally signed by Mr Charles Aramoana on behalf of Te Upokorehe but he withdrew his support shortly after.
179 HC judgment, above n 15, at [184].
180 At [187].

[126] Churchman J also considered whether applicant groups could jointly hold a CMT or hold separate CMTs which overlapped. The Judge concluded that it was consistent with the statutory scheme to grant a jointly held CMT but not two separate and overlapping CMTs for the same area. The Judge said that having multiple CMTs for the same area would create practical difficulties in exercising the rights flowing from the grant of CMT. While jointly held CMT would require cooperation and agreement, Churchman J concluded these issues were "not insurmountable".[181] Tikanga had previously "provided for the exercise of a complex web of overlapping rights" and "should be able to assist" in the MACA context.[182]

Court of Appeal

[127] A key finding in the Court of Appeal was that the pūkenga's proposal had merely found a way to accommodate the competing applications without determining which applicant groups actually held the area in accordance with tikanga.[183] While the High Court's findings did not entirely rest on the report, the Judge had heavily relied on it.[184] This did not automatically mean a rehearing was necessary (if the Court reached the same view on the evidence), but the Court noted that counsel had accepted "a rehearing would be necessary" if the Court of Appeal disagreed with the High Court's approach.[185]

[128] On that basis, the Court of Appeal concluded that a rehearing for CMT Order 1 was inevitable. Te Upokorehe was entitled to require the Court to consider its argument that it holds part of the area to the exclusion of other applicant groups.[186] This had not occurred in the High Court, where Te Upokorehe had effectively been treated as part of Te Kāhui's applications. The Court of Appeal could not substitute its own view as:[187]

181 At [170].
182 At [170].
183 CA judgment, above n 16, at [267] per Miller J.
184 At [270] per Miller J.
185 At [270] per Miller J.
186 At [284]–[285] per Miller J.
187 At [286] per Miller J.

> The record does not permit the place-by-place and area-by-area analysis that, as the pūkenga recognised, would be required to distinguish Te Upokorehe from the other hapū and identify any areas where the iwi acted as a collective and so might be granted a jointly held recognition order.

[129] In respect of CMT Order 2, however, the Court of Appeal decided that it could substitute its own decision. This was because there was sufficient evidence as to the successful applicant groups' rights in the area; there were no issues regarding the external boundaries; there was consensus among the successful applicant groups (as only the Landowners Coalition Inc had challenged the order); and the tikanga process followed to achieve this consensus had been appropriate.[188]

[130] With regards to the form of CMTs, the Court unanimously held that separate overlapping titles were not available under MACA.[189] However, the Court was split as to the availability of shared exclusivity where one applicant group claims rights to the exclusion of others. The majority considered that shared CMT could be available in such circumstances as it would be inappropriate for customary rights to be lost due to unresolved differences in tikanga.[190] Conversely, Miller J argued:[191]

> In my view MACA does not envisage that the court will appoint a trustee to hold CMT for separate groups in circumstances where they have not taken the opportunity to agree on shared CMT, and no single group has been able to make out a separate claim.

The parties' submissions

[131] Te Upokorehe challenged the Court of Appeal decision on two main grounds. First, Te Upokorehe appealed the Court of Appeal's decision not to remit CMT Order 2. Counsel submitted that the reasons for remitting CMT Order 1 applied with equal (or greater) force to CMT Order 2, particularly as Ōhiwa Harbour is where Te Upokorehe's asserted rights are strongest. The Court had failed to conduct the required "place-by-place analysis", erroneously found that there was consensus among applicant groups, and misinterpreted evidence that, in fact, shows Te Upokorehe has the exclusive rights in Ōhiwa Harbour.

---

188 At [324] and see [25(b)] per Miller J.
189 At [209] per Miller J and [439] per Cooper P and Goddard J.
190 At [440]–[443] per Cooper P and Goddard J.
191 At [205].

[132] In response to this ground of appeal, WKW, Te Kāhui, Te Tāwharau and Ngāti Awa opposed Te Upokorehe's claim to sole exclusive rights in Ōhiwa Harbour. Counsel for these parties submitted that the evidence clearly shows shared exclusivity in the area. The Court of Appeal, it was submitted, was also correct to find that successful applicant groups had reached consensus as Te Upokorehe had only appealed the possibility of overlapping CMTs. While it had initially also appealed Ngāti Awa's inclusion in CMT Order 2, that appeal was abandoned. Counsel for Ngāti Awa also argued that the Court of Appeal had clearly appreciated the difference between CMT Orders 1 and 2 when deciding to only remit CMT Order 1. As we will discuss below at [322], Te Kāhui accepted that a rehearing would be necessary in relation to the western part of the claimed area (Disputed Area).

[133] Second, counsel for Te Upokorehe submitted that both joint and separate overlapping CMTs are available under MACA. Separate overlapping CMTs are consistent with the statutory purpose, s 58 and tikanga. Further, any practical issues that may arise would also arise with joint CMTs and only allowing joint CMTs may cause more complications than they solve.

[134] In addressing this ground of appeal, counsel for the Attorney-General submitted that separate overlapping CMTs would be fundamentally inconsistent with the scheme of MACA and unworkable in practice. Counsel also disagreed with Te Upokorehe that the same workability issues would arise regardless of the form of CMT order. Te Tāwharau also supported a joint CMT while Te Kāhui abided the decision of the Court. Finally, Landowners Coalition Inc submitted that shared exclusivity can only occur among members of a single applicant group, meaning neither joint CMT nor overlapping CMTs are available.

Our analysis

[135] We deal first with the effect of Te Upokorehe's decisions at the Court of Appeal stage not to challenge Te Kāhui's inclusion in CMT Order 2 and (subsequently) to withdraw its appeal in that Court against Ngāti Awa's inclusion in CMT Order 2. Second, we address the argument that separate overlapping CMTs are available under MACA and briefly consider whether shared exclusivity is possible where one group

denies the rights of others. Finally, we deal with whether the Court of Appeal was wrong not to have ordered a rehearing in relation to CMT Order 2.

Relevance of lack of objection in the Court of Appeal

[136] This issue arises because Te Kāhui submitted that Te Upokorehe was barred by its approach on appeal to the Court of Appeal from seeking to have CMT Order 2 reheard in this Court. Te Kāhui also said that allowing Te Upokorehe to effectively resurrect an argument it had abandoned would be prejudicial given that, if accepted, it would lead to a rehearing in the High Court in relation to CMT Order 2, thereby imposing on Te Kāhui a costs burden which it is not funded to bear.

[137] In support of the submission that its approach in the Court of Appeal is no bar to the relief it seeks, Te Upokorehe said the question of what should happen to CMT Order 2 nonetheless remained open and was ventilated in the Court of Appeal. Te Upokorehe also contended that there is no prejudice to any party because Te Upokorehe's position that it is solely entitled to rights over its rohe was maintained from the outset. This is not a situation where, as a result of a late change in approach, there was evidence another party might otherwise have called.

[138] In our view, Te Upokorehe's approach in the Court of Appeal is not fatal to its case in this Court that CMT Order 2 should be remitted back for rehearing in the High Court. We do not see it as helpful to Te Upokorehe's substantive argument about the appropriateness of remittal back. But it does not prevent the arguments being made. We say that because the issue of the proper treatment of CMT Order 2 was kept live by the argument that separate but overlapping CMT orders should have been made. This argument was pursued by Te Upokorehe in the Court of Appeal. If Te Upokorehe had succeeded in that argument, that would necessarily have required reconsideration of the existing CMT. We add that issues of costs could have been dealt with if and when they arose.

[139] We accordingly proceed to consider the substantive issues arising under Te Upokorehe's appeal to this Court.

Shared exclusivity

[140] In addressing the argument of Te Upokorehe that separate but overlapping CMTs are available under MACA, in our first judgment we said that MACA contemplated shared exclusivity. We left open the questions of the position when one or more applicant groups assert CMT to the exclusion of all others, and the availability of separate overlapping CMTs. The relevant passages are as follows:[192]

> [169] Shared exclusivity arises in the context of the present appeals as various applicant groups acknowledge that other groups also share CMT with respect to the same area. The most obvious example of this is Te Kāhui: a party consisting of multiple individual hapū that assert they all share CMT in the claimed area.
>
> [170] Associate Professor [Andrew] Erueti's description of customary rights (discussed [in the first judgment] at [33]) highlights that shared exclusivity in New Zealand is the rule rather than the exception. In tikanga there is a complex interweaving of rights and interests among iwi, hapū and whānau with respect to the common marine and coastal area. It would be surprising if MACA were intended to apply in a manner that cuts across tikanga in such a fundamental way.
>
> [171] In fact, the legislative history demonstrates that MACA expressly contemplated the finding of shared exclusivity. In the Ministry of Justice's consultation document, it noted the proposed test for CMT was different to [territorial customary rights] under the [Foreshore and Seabed Act] as it "allows for 'shared' exclusivity between coastal hapū/iwi as against other third party interruptions".
>
> [172] This means it is not arguable that the presence of other applicant groups who also express mana within the claimed area precludes a finding of exclusivity. Whether shared exclusivity is possible when one or more of the applicant groups assert CMT to the exclusion of all others, and whether a finding of shared exclusivity should result in a joint CMT or separate overlapping titles will be addressed in our later judgment.

[141] On the question of whether shared exclusivity is possible when one or more of the applicant groups assert CMT to the exclusion of all others, we prefer the conclusion of the majority in the Court of Appeal that mutual recognition by each of the groups is not necessary.[193] As long as the Court is satisfied that, between them, the applicant groups hold all customary rights according to tikanga in the CMT area, to the exclusion of others, it is irrelevant that they do not get along. We agree also with the

192 SC judgment, above n 1 (footnote omitted).

193 We depart in this respect from the Canadian approach which requires recognition/amicability, but see criticism by Professor Kent McNeil of that requirement: Kent McNeil "Exclusive Occupation and Joint Aboriginal Title" (2015) 48 UBC Law Rev 821 at 855.

Court of Appeal majority that "resolution of entitlement as between" the groups "is best achieved through a tikanga process over time".[194] In this case, where we reach the view that, whatever its status, Te Upokorehe's interests are shared interests, the fact Te Upokorehe views its position differently is not determinative.

[142] Turning then to the other issue referred to in the excerpt from our first judgment, referenced above—namely, "whether a finding of shared exclusivity should result in a joint CMT or separate overlapping titles"[195]—we agree with the approach in the Courts below that it would not be consistent with the statutory scheme of MACA to have two or more overlapping CMTs in relation to the same area.

[143] MACA contemplates that multiple groups may come together as a single applicant group thus leading to a single CMT. For this reason, s 9 defines an applicant group as comprising "1 or more iwi, hapū, or whānau groups". The constituent groups together making up the applicant group must then collectively meet the s 58 test. In other words, a finding of shared exclusivity can result in a joint CMT. We agree with the submissions for the Attorney-General that this approach is consistent with the concept of shared exclusivity as it has been described in the American and Canadian jurisprudence.[196]

[144] Parliament's prediction that groups would come together before the hearing in the way the definition of "applicant group" expressly contemplates does not however preclude the post-enactment reality that groups may also come together later in the process.[197] A practical illustration of this is provided by cases where a constituent group has created, during or after the hearing after making their initial application, a

194 CA judgment, above n 16, at [442] per Cooper P and Goddard J.
195 SC judgment, above n 1, at [172].
196 See, by way of example, *United States v Pueblo of San Ildefonso* 513 F 2d 1383 (Ct Cl 1975), although it should be noted that cases in the United States of America tend to deal with claims for compensation rather than declarations of title. For Canadian jurisprudence, see *Delgamuukw v British Colombia* [1997] 3 SCR 1010 at [158] per Lamer CJ, Cory and Major JJ and [196] per La Forest and L'Heureux-Dubé JJ; and *R v Marshall* 2005 SCC 43, [2005] 2 SCR 220 at [57] per McLachlin CJ, Major, Bastarache, Abella and Charron JJ ("[s]hared exclusivity may result in joint title"). See also McNeil, above n 193, at 853 and following; and MACA Departmental Report, above n 133, at [1445] in which the Ministry of Justice | Tāhū o te Ture, in answer to a question seeking clarification as to whether the Bill allowed for shared exclusivity as the Canadian common law did, responded that it did, with reference to the definition of "applicant group".
197 As we have said, the key is that the court must be satisfied that, between them, the applicant groups hold all customary rights according to tikanga in the CMT area.

separate legal entity to hold the CMT order on its behalf and to exercise the rights afforded by the order.[198]

[145] We agree also with the Courts below that there are practical problems with overlapping CMTs. Churchman J put it in this way:[199]

> CMT confers on an applicant group the right to use, benefit from or develop a CMT area including deriving a commercial benefit. CMT rights can also be delegated and transferred. There would also be practical problems if two groups held CMT and wanted to exercise the various rights conferred by s 62.

[146] In the Court of Appeal, Miller J—with whom Cooper P and Goddard J agreed on this point—having referred to the complexity and overlapping nature of resource rights, said this:[200]

> MACA requires that boundaries be precisely defined not because lines on a survey plan correspond precisely to customary boundaries but because it is necessary to know who may exercise, in any given place, the rights which MACA confers on the holder of CMT. If CMT could overlap, neither group could unilaterally exercise those rights. Neither could effectively give permission to the Minister of Conservation to consider a conservation activity under s 71(1), neither would have the sole right to seek inclusion of a wāhi tapu area in the CMT under s 78(1), neither would control the preparation of planning documents relating to the CMT area under s 85(1), and neither could exercise ownership of minerals within the CMT area under s 83(2).

[147] Te Upokorehe argued that the Court of Appeal should have recognised that similar issues as to workability would arise as between joint CMT holders. On this, the High Court stated that:[201]

> [170] Jointly holding CMT avoids some of these problems. There will clearly need to be co-operation and agreement between the holders of joint CMT but these are not insurmountable issues. Tikanga has in the past provided for the exercise of a complex web of overlapping rights. It should be able to assist in parties holding CMT on a joint or shared exclusive basis working out how to jointly exercise the rights conferred by a grant of CMT.

---

198 See, for example, *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare ki Tokomaru* [2024] NZHC 682 at [4] and Part VIII: Findings, CMT findings, direction (1)(iii); and *Ngā Pōtiki Stage 1 — Te Tāhauna o Rangataua* [2021] NZHC 2726, [2022] 3 NZLR 304 at [9] and [151].

199 HC judgment, above n 15, at [169].

200 CA judgment, above n 16, at [209], and see at [439] per Cooper P and Goddard J.

201 HC judgment, above n 15 (footnote omitted).

[148] We agree. The constituent groups will have to work out in accordance with tikanga how they wish to exercise the rights afforded by the CMT.[202] There are benefits in successful applicant groups having a dispute resolution mechanism in place. There are precedents for the inclusion of such mechanisms.[203] There are also timeframes in MACA which assist with this. In this regard, the submissions for the Attorney-General referred to the fact that the Act requires the applicant group to notify its decision in respect of the exercise of the permission right in relation to the Resource Management Act 1991 within 40 working days;[204] and that MACA also contemplates a united approach being adopted by the CMT group. That is, as the Attorney-General submitted, a way in which the durability of the statutory scheme can be upheld.[205]

[149] Te Upokorehe also noted that the High Court subsequently held that if the tests for wāhi tapu protections in s 78 of MACA are met, the protections are to be granted in favour of the "customary marine title group".[206] Churchman J defined that term, "customary marine title group", as meaning "the collective group in whom [CMTs] were jointly vested", not the individual hapū.[207] On this approach, Te Upokorehe submitted, any wāhi tapu meeting the test for recognition under a CMT must be agreed by all the parties jointly awarded CMT, effectively giving any member of the group a veto. We make no comment on this reasoning or on Te Upokorehe's submission as to the outcome, as this issue is being dealt with as a separate appeal from *Re Edwards (Whakatōhea Stage Two) (No 7)*.[208] We do, however, reiterate the desirability of

---

202 Under the Foreshore and Seabed Act, Paul McHugh suggested that, if shared exclusivity was available under the Act, there would need to be "a full charter and dispute resolution mechanisms in place" before a court would award the equivalent of CMT on this basis: Paul McHugh "Setting the Statutory Compass: The Foreshore and Seabed Act 2004" (2005) 3 NZJPIL 255 at 269.

203 See, for example, Central North Island Forests Land Collective Settlement Act 2008, sch 2; and Māori Fisheries Act 2004, Part 5.

204 MACA, s 67(3).

205 Section 109(2)(c) requires a recognition order to specify "the holder" of the order. Where a single joint CMT is issued, the holder of the order may be the applicant group or groups, legal entity or natural person appointed by the constituent groups comprising the applicant group to hold the order on their behalf. See s 9(1)(b) definition of "applicant group". We note that in the present case and in *Re Tipene,* the High Court has contemplated that, if the applicant group is not itself to be the holder, the nominated holder or holders of an order can, indeed must, be a legal entity or entities or a natural person or persons: *Re Edwards (Whakatōhea Stage Two) (No 8)* [2023] NZHC 1618 at [27]; and *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 at [26]–[29].

206 HC Stage Two judgment, above n 28, at [153]. We note that the Waitangi Tribunal has criticised the requirement to first obtain a CMT to protect wāhi tapu before protection of wāhi tapu can be sought as "an unnecessary and unreasonable hurdle": Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) at 183.

207 HC Stage Two judgment, above n 28, at [250].

208 HC Stage Two judgment, above n 28.

groups resolving any such issues in accordance with tikanga. The ability to make wāhi tapu conditions may assist in this process.[209]

[150] In conclusion, we agree with the Courts below that separate overlapping CMTs are not permissible under MACA. Rather a joint CMT, as was made here, to reflect shared exclusivity is available.

Is a rehearing required?

[151] For the reasons which follow we have reached the view that Te Upokorehe has not established a proper basis for a rehearing in the High Court on whether its rights are exclusive. Because there were no clear relevant factual findings in the Courts below on that question, this Court would effectively be acting as a court of first instance. It does not appear that the issues raised in this Court were argued in the Courts below, with the bulk of the argument in this Court on the issues discussed in this part having been drawn out by questions of the panel at the hearing. Although, as the case has developed, these issues are plainly relevant, this Court is not the right forum to decide these issues in that circumstance. But we can say that we heard nothing to convince us that the Court of Appeal was wrong in its conclusion that Te Upokorehe had not shown that it held mana in relation to Ōhiwa exclusively. In part, we have come to that view in light of the effect of raupatu on the historical record and the evidence of ongoing exercise of rights by multiple communities. A joint CMT was therefore the correct outcome on the evidence, and CMT Order 2 did not need to be remitted back to the High Court for a rehearing.

[152] We are also influenced by the fact that questions as to Te Upokorehe's mana at Ōhiwa can be considered by the Waitangi Tribunal in the context of the North-Eastern Bay of Plenty district inquiry (Wai 1750).[210] The Tribunal has the benefit of being able to adopt an inquisitorial approach, and the time to reach a more considered and reflective conclusion. Any further consideration of evidence that might be collaterally relevant to MACA rights is thus best left to that inquiry.

---

209 MACA, s 79.
210 See the discussion below at [204] as to the scope of the Tribunal's inquiry.

[153] Given our view that the Waitangi Tribunal is best placed to consider these issues, we will explain our conclusions by only brief reference to the evidence relied on by Te Upokorehe to substantiate its claim to exclusivity, and that of other parties in rebuttal. We do not intend by our brevity to be disrespectful of the importance of this evidence or of the genuinely held views advanced. The key categories of evidence going to this matter are as follows:

(a) the Upokorehe claims that their rights are derived from non-Whakatōhea descent lines and therefore are not reliant on shared descent with other Te Whakatōhea hapū;

(b) the evidence of which groups held terrestrial rights around the harbour such as to give them access (or control of access) to it; and

(c) the evidence of which groups utilised (and continue to utilise) Ōhiwa.

We discuss each of these aspects in turn.

(a) Whakapapa and waka

[154] Te Upokorehe says it is distinct from other applicants in its whakapapa and waka. It says that it is the only group holding mana in the area from Maraetōtara to the Waioweka River, including within the Ōhiwa Harbour. Te Upokorehe accepts the summary of whakapapa set out in the High Court judgment.[211] Te Upokorehe also accepts that there are connections with Te Whakatōhea. However, the submission before us was that their primary descent line is not from the Mataatua waka, as is the case for Te Whakatōhea. Rather, the primary descent lines are from the Rangimātoru and Ōtūrereao waka, both of which pre-dated the Mataatua waka.

[155] Te Kāhui in response accepted that this case differs from that of, for example, Tūwharetoa, an iwi who descended from an eponymous ancestor where the narrative can as a result be more coherent. That said, Te Kāhui said that the whakapapa shows very clearly the ties that bind, particularly, the closeness between Ngāti Ruatākenga

211 HC judgment, above n 15, at 932–934.

and Te Upokorehe. Counsel emphasised that the area in question is a small one in which all have lived together and are closely intermarried. These factors do not support Te Upokorehe's submission of exclusivity.

[156] There is no doubt that the whakapapa of each group is intertwined. As the High Court said:[212]

> …
>
> (c) although individual hapū may choose to emphasise one line of descent over another, all of the hapū of Whakatōhea share common whakapapa. That whakapapa gives rise to rights and obligations of whanaungatanga; and
>
> (d) the hapū of Whakatōhea also share whakapapa with Ngāti Awa, Te Whānau-ā-Apanui, and Ngāi Tai. One consequence of this is that, at the boundaries of the Whakatōhea rohe, it is not possible to draw straight lines on a map where it could be said that Whakatōhea ceased to hold an area in accordance with tikanga in favour of another iwi or hapū. In practice, this means that at the border areas ([relevantly,] West Ōhiwa Harbour …), there may be more than one applicant entitled to a recognition order.

[157] Against this backdrop, as was put to counsel for Te Upokorehe at the hearing, the question raised by the respective submissions is a factual one. The question is whether the separate and older lines, that Te Upokorehe identify with, are evidence of political and legal separation for the purposes of resource rights. We are not satisfied that is necessarily so. It has to be remembered that this question is being considered in the context of a place, Ōhiwa, which is a highly significant pātaka kai (food basket) in the area. It is logical to consider there are iwi and hapū from different descent lines (Te Whakatōhea, Te Upokorehe, Ngāi Tūhoe and Ngāti Awa) whose interests come together in the area. As counsel for Te Kāhui submitted, the whakapapa threads making up the whāriki[213] are very tightly interwoven across this seascape, making it difficult to disentangle. These ties are also apparent when all of the other evidential material we discuss is brought into the mix. They do not suggest exclusivity in any one of the groups alone.

---

212 At [307].

213 Traditional fine mat.

(b) Mana whenua and ahi kā

[158] Under this heading we address Te Upokorehe's submission that their underlying and contiguous mana whenua was recognised in the allocation to them of reserves in Ōhiwa at Hiwarau and Hokianga[214] by the Compensation Court following the raupatu (confiscation of lands). The location of the two reserves in issue is shown in Appendix B to this judgment. Hiwarau is a block comprising 1073 ha on the southern shore of Ōhiwa Harbour near Kutarere. Hokianga is a small island on the edge of Ōhiwa Harbour comprising some 13 acres.[215]

[159] Te Upokorehe's case is that the allocation of these two reserves to them reflected their pre-existing rights in the area and may indicate correspondingly exclusive rights in the adjacent takutai moana. While it was accepted that the allocation of the reserves was done "in a very imperfect fashion which led to ongoing disputes", Te Upokorehe also said that the fact the reserves were granted "to surrendered rebels and loyal natives" does not undermine that these were originally Te Upokorehe lands long before the Compensation Court awards were made.

[160] Te Kāhui's response was that the reserves in Hiwarau and Hokianga were not awarded on a take tupuna (ancestral land rights) basis, but rather in recognition of support for the government and subsequent surrender.[216] Te Kāhui relied in this respect on use of the description of the grants as being "for surrendered rebels and loyal natives of Upokorehe" by the Special Commissioner, John Wilson, in his June 1867 report to the General Assembly on the reserves.[217]

---

214 Mr Wallace Aramoana said that while people refer to the island as "Hokianga" (or "Okianga"), that is based on a misunderstanding. He said: "Te Kooti, a Rangatira, resided on Te Motu but his final resting place was Oki Okianga, and so people think that this is the name of the island."

215 Ewan Johnston *Ōhiwa Harbour: A Report Commissioned by the Waitangi Tribunal* (March 2003) at 177. See also Appendix B.

216 Citing David A Armstrong *Te Whānau a Mokomoko Application (CIV-2017-485-355) for Customary Marine Title and Protected Customary Rights under the Marine and Coastal Area (Takutai Moana) Act 2011* (January 2020); and Bruce Stirling *Te Mana Moana o Te Kāhui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea – Historical Issues* (January 2020).

217 Civil Commissioner's Office "Return of all Reserves Made for Friendly Natives and for Returned Rebels in the Bay of Plenty, Ngatiawa, Middle Taranaki, and Ngatiruanui Districts" [1867] AJHR A18, sch 2 at [2]. Te Upokorehe relied on the description of the historical account in the Whakatōhea, Te Tāwharau o Te Whakatōhea and the Crown *Deed of Settlement of Historical Claims* (27 May 2023) [Te Whakatōhea Deed of Settlement] at [2.159], [2.174] and [2.178]–[2.179].

[161] Prior to the Compensation Court's Ōpōtiki sitting, out-of-court arrangements in respect of the two blocks were reached, negotiated by Mr Wilson.[218] Mr Wilson was empowered to make settlement arrangements with Māori in relation to confiscated land.[219]

[162] Mr Wilson described the reserves and listed the individuals who were to be trustees and grantees in his 1872 report to the Native Minister.[220] He said that he had "settled the Ōhiwa Natives,[221] who reverted to rebellion and again surrendered, on the land previously given to them at Hiwarau and Hokianga".[222] Hokianga Island was "inalienably assured by a Grant in trust to the Members of the Upokorehe Hapū whose names are included in the Schedule".[223] Four trustees were appointed, and the reserve was granted to 48 individuals. The Hiwarau Block was "inalienably assured by a Grant in trust to the Members of the Upokorehe Tribe whose names are included in the Schedule".[224] Seven trustees were appointed, and the reserve was granted to 66 individuals.

[163] By way of introduction to our discussion of this aspect, we note that the New Zealand Settlements Act 1863 enabled the confiscation of the land of any iwi "engaged in rebellion" against the government.[225] There was also provision for the return to Māori of land not needed for military settlement through the

218 See Johnston, above n 215, at 176 and 179–180; and Anita Miles *Rangahaua Whanui District 4: Te Urewera* (Waitangi Tribunal, March 1999) at 129. The Ōhiwa Harbour was subsequently further contested in the Compensation Court's actual proceedings at Ōpōtiki, and several smaller grants to lands at Ōhiwa were made in those proceedings, including to Mereana Hauauru, who was granted 50 acres at Ōhiwa, claiming through Ngāti Ngāhere; and Hauauru Taipari (of Ngāti Maru) who was granted 100 acres at Ōhiwa: see Johnston, above n 215, at 183; Miles, above n 218, at 138; and Bryan Gilling *Te Raupatu o Te Whakatōhea: The Confiscation of Whakatōhea Land 1865–1866* (Waitangi Tribunal, Wai 894, Doc #A53, 1994) at 139–141.

219 These arrangements were then seemingly required to be affirmed and validated by the Compensation Court: Miles, above n 218, at 135.

220 Johnston, above n 215, at 177. The full list of trustees and grantees is set out below at Appendix C.

221 Buddy Mikaere assumes this is referring to Te Upokorehe: Buddy Mikaere *Exploratory Report to the Waitangi Tribunal being an Historical Account of the confiscation of land in the Ōpōtiki District* (Waitangi Tribunal, Wai 894, Doc #A104, September 1991) at [9.14], n 71.

222 JA Wilson "Reports on Settlement of Confiscated Lands" [1872] I AJHR C4 at 6; and see Mikaere, above n 221, at [9.14].

223 "Reports on Settlement of Confiscated Lands", above n 222, at 13–14. See below at Appendix C.

224 "Reports on Settlement of Confiscated Lands", above n 222, at 13–14. See below at Appendix C.

225 New Zealand Settlements Act 1863, s 2.

Compensation Court.[226] The Court was to decide on "claims for compensation".[227] Land returned was in the form of a Crown grant.

[164] Much has been written about the problems surrounding the confiscation of land and the processes of the Compensation Court.[228] An effect of particular relevance to these appeals is that the confiscation meant the Native Land Court was prevented from investigating customary title to the land surrounding Ōhiwa Harbour prior to the arrival of Pākehā settlers. This left limited contemporary written records of the claims to lands at Ōhiwa and of their determination. As the only record of any kind of official inquiry into hapū rights in the district, allocation decisions of the Compensation Court have taken on rather more importance than may be warranted as evidence of underlying mana. That is, unless it can be shown that the allocations were made in accordance with take tupuna.

[165] There are however several features in relation to the award of the two reserves at Hiwarau and Hokianga which mean their allocation cannot presently be relied on as evidence clarifying Te Upokorehe's position that it has exclusive rights in this area. We address these matters briefly. The issues we discuss in relation to these reserves are a microcosm of the broader concerns about confiscation and the Compensation Court.

[166] The first of these matters relates to the role of Mr Wilson in reaching agreements with Māori in relation to the two reserves. Commentators note that the Compensation Court often simply "rubber stamped" Mr Wilson's previously negotiated agreements.[229] The basis on which he reached agreements is the subject of varying views. Dr Bryan Gilling referred to his "extensive personal knowledge of the people and land being dealt with".[230] Buddy Mikaere, in an explanatory report commissioned for the Waitangi Tribunal, noted that:[231]

---

226 See, for example, Waitangi Tribunal *The Ngāti Awa Raupatu Report* (Wai 46, 1999) at 7.

227 New Zealand Settlements Act, s 8.

228 See, for example, Richard Boast *The Native Land Court 1862–1887: A Historical Study, Cases and Commentary* (Brookers Ltd, Wellington, 2013).

229 Gilling, above n 218, at 138 and see 182; Johnston, above n 215, at 196; and Tony Walzl *Whakatōhea and the Common Marine and Coastal Area 1865-2019* (29 October 2019) at 61.

230 Gilling, above n 218, at 138.

231 Mikaere, above n 221, at [9.6].

> … the impression gained from the [Compensation] Court minutes is that Wilson had an intimate knowledge of claimants and their affairs and seems to have displayed a strong interest in identifying individuals as rebels rather than establishing a case for rebellion on the basis of hapū affiliation.

[167] He continued, describing that:[232]

> 9.7 There is some evidence that Wilson sought and supported favourable witnesses in [the Compensation] Court in return for support for his arrangements, and the Court often appears to have been a vehicle for authorising rather than investigating such arrangements. The allocation of reserves <u>may</u> have been linked to a willingness to appear as Crown witnesses.

[168] Tony Walzl described that the Waitangi Tribunal, in both the Te Urewera[233] and Ngāti Awa[234] inquiries, was:[235]

> … very critical of the extent to which Crown agent, J A Wilson, controlled the compensation process. The Urewera Tribunal remarked that "the Crown secured almost unlimited power to decide where Māori would be placed within the huge districts it had confiscated". Māori had no independent advocate and were subject to the arbitrary power held by Wilson in negotiations. In terms of the Compensation Court's processes, the Urewera Tribunal concluded that they were "deeply flawed". The court lacked a proper venue, its hearings were cursory, with little opportunity to investigate claims.

[169] Guidance given to Mr Wilson in 1867 by the then Chief Judge of the Native Land Court, Francis Fenton, put "particular stress upon the necessity of reserving their own lands to Compensation Claimants".[236] However, commentators made the point that the priorities for the allocation of confiscated land were "military settlers first and Natives, friendly and surrendered, next".[237] There are also suggestions ancestry was not a particular focus in considering the claims. For example, in discussing Ngāi Tūhoe's claims to Ōhiwa, Anita Miles noted that:[238]

---

232 Footnotes omitted, emphasis in original. See also discussion in Walzl, above n 229, at 60–61.
233 See Waitangi Tribunal *Te Urewera* (Wai 894, 2017).
234 See *The Ngāti Awa Raupatu Report*, above n 226.
235 Walzl, above n 229, at 60–61 (footnotes omitted).
236 As cited in Gilling, above n 218, at 143.
237 Mikaere, above n 221, at [10.2] citing "Copy of a Memorandum by His Honor F Whitaker" [1866–1867] Journals of the Auckland Provincial Council A1 at 14. Compare Gilling, above n 218, at 144.
238 Miles, above n 218, at 13.

> The [Compensation Court] had to balance claims based on ancestry, 'toa' claims or those deriving from conquest, claims by marriage or aroha, and occupational claims, and it clearly had a tendency to favour those claimants who could demonstrate recent occupation, unless of course they were otherwise disqualified as rebels.

[170] Ms Miles continued that in this case "and in a more general sense" the Court "can be seen to have considered Māori customary tenure in a limited fashion only".[239]

[171] In terms of the material before us, this background makes it difficult to be certain about why it was the reserves were allocated to Te Upokorehe. Perhaps not surprisingly then in 1898, in the context of a subsequent challenge to the inclusion in the allocations of some individuals it was argued were not "true" members of Te Upokorehe, the Native Land Court said "the name Upokorehe was a general name applied to people of various hapus living in the Ōhiwa/Waiotahē district".[240]

[172] Second, the effect of raupatu also has to be put into the mix. Amongst other matters it resulted in groups, having lost their lands, moving to other areas. For example, following confiscation of the lands at Hiwarau in January 1866, Te Upokorehe moved to Te Waimana to live with Ngāi Tūhoe chief Rakuraku.[241] At the time of confiscation, Rakuraku also had a pā called Whakarae, located within what became the Hiwarau Block.[242]

[173] Over this period, Te Upokorehe were described by Captain John Rushton, who was based in Ōhiwa at the time, as "like sheep without a shepherd. They were scattered about, and did not stay long at any one place".[243] This also reflected the continued unrest in the Ōhiwa region, helpfully summarised by Mr Walzl.[244]

239 At 136.

240 *Hiwarau* (1898) 16 Ōpōtiki MB 332 (16 OPO 332) at 333; and see Richard Boast *The Native Land Court Volume 2, 1888–1909: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2015) at 915–918. Miles offers that by descent, those people living in the Ōhiwa–Waiotahē area might be more accurately described as Ngāi Tūhoe or, perhaps, of other Te Whakatōhea hapū: Miles, above n 218, at 131.

241 Miles, above n 218, at 130; and Tony Walzl *Hiwarau, Turangapikitoi and Ōhiwa of Whakatōhea and the Common Marine and Coastal Area 1865–2019* (7 February 2020) at 23 and 26–27. Evidence given to the Native Land Court in 1867 records that Te Upokorehe was living at Ōhiwa and Waiotahi (Waiotahē) prior to the murder of Carl Völkner in 1865: Miles, above n 218, at 130. Miles also notes the presence of Ngāi Tūhoe communities living in the vicinity of Ōhiwa at the time of confiscation: at 45.

242 Miles, above n 218, at 45.

243 See Walzl, above n 241, at 32–33.

244 At 29–34.

Mr Walzl said that Te Upokorehe, having shown support for both the government and anti-government groups during this period, suffered attacks from both sides of the conflict, contributing to this being a particularly unsettled period for them.[245]

[174] This state of affairs did not provide a good basis for consideration of the claims. Mr Mikaere suggested it would be useful to further investigate whether the absence of other claimants in the Ōpōtiki region at the time of the sitting had an effect on the Compensation Court's rulings.[246] Might different grants have been made if other potential claimants had been present in Ōhiwa in 1866?[247]

[175] The third aspect arises out of the ongoing challenges to the allocation of the reserves. Ms Miles noted that after the grants in the reserves were made, land at Ōhiwa continued to be disputed in the Compensation Court by, among others, Ngāti Awa, Te Whakatōhea, Te Upokorehe, and Rakuraku for Ngāi Tūhoe.[248]

[176] Amongst other matters, these challenges bring to the forefront the status of Hemi Kakitu, a Ngāi Tūhoe rangatira. He was listed as a trustee for both the Hiwarau and Hokianga Island reserves.[249] Members of his whānau and hapū were also included as individual owners of the reserves. The inclusion of Hemi Kakitu in the grants has

245 At 29.
246 Mikaere, above n 221, at [9.9]; and see Miles, above n 218, at 129.
247 As described by Johnston, the Ōhope Reserve (consisting of 1,575 acres of land on the western side of Ōhiwa Harbour) was allocated by Wilson to Ngāti Wharepaia and Ngāti Hokopu—two hapū of Ngāti Awa. Similarly, Johnston records that Ohakana Island (located within the Ōhiwa Harbour) was granted by the Compensation Court to Kepa Toihau of Ngāti Awa: Johnston, above n 215, at 176 and 222; and see Appendix B. It may be that the allocation of these lands at Ōhiwa contemporaneously with Hiwarau and Hokianga Island is relevant to Te Upokorehe's argument that those two allocations reflect its underlying mana at Ōhiwa, but as this counter-argument was not raised before us we say no more about it.
248 For a summary of these subsequent claims to Ōhiwa, see Miles, above n 218, at 135–140.
249 See below at Appendix C.

been the source of ongoing challenge in the Native Land Court,[250] in Parliament,[251] and in the Waitangi Tribunal[252] by members of Te Upokorehe. This is on the basis that he was not Te Upokorehe, and therefore should not have been included in the grants, at least not with an equal interest as members of Te Upokorehe.

[177] We cannot resolve questions about the reason for his inclusion or of those other members of Ngāi Tūhoe linked with him. Ms Miles said that "a cursory analysis of the minutes of the competing claims for Ōhiwa suggests that there was a very complicated relationship between the hapū who asserted rights there".[253] Given the problems more generally attributed to the Compensation Court processes as well as the specific issues we have identified, we cannot presently be confident the allocation of the two reserves to Te Upokorehe was, or indeed was not, made on a take tupuna basis. It follows that we cannot rely on this evidence to support a claim to exclusive rights on the eastern side of the Harbour.

---

250 On 17 March 1898, the Native Land Court heard a claim by Te Warana Mokomoko concerning the relative interests of the grantees for Hiwarau, where Te Warana Mokomoko argued that only 30 out of 56 were "true Upokorehe". The Native Land Court rejected the claim: see above at [171]; and *Hiwarau*, above n 240, at 332–334.

251 In 1935 and 1937, two separate petitions were lodged with Parliament by members of Te Upokorehe challenging the eligibility of some of the grantees for Hiwarau and Hokianga Island. The Native Affairs Committee made no recommendation on the 1935 petition: Native Affairs Committee "Reports of the Ngā Ripoata a te Komiti mō ngā Mea Maori" [1936] AJHR I3 at 23. The 1937 petition was referred to the government for a special inquiry: Native Affairs Committee "Reports of the Ngā Rīpoata a te Komiti mō ngā Mea Māori" [1944] AJHR I3 at 12. The Native Land Court ruled on the petition on 19 July 1939, refusing to reopen the question of root title and concluding that the descriptions of "Upokorehe Hapū" and "Upokorehe Tribe" as used in the original grants could not be applied in derogation of the rights of named grantees. This was on the basis that the identity of "Upokorehe hapū" remained a matter of doubt: Office of the Chief Judge of the Native Land Court "The Native Purposes Act, 1938 Report and Recommendation on Petition No 14 of 1937, of Henare Rako and Others, Praying for a Reopening of The Title to Hiwarau Block" [1944] AJHR G6 at 3–4.

252 In 1992, Tuiringa Mokomoko lodged Waitangi Tribunal claim Wai 339, which related to deterioration of Hiwarau block. In 1995, counsel for the claim made a submission to the Tribunal's Ngāti Awa inquiry identifying a substantive claim against the Crown for "[t]he actions of the Compensation Court in 1874 in vesting traditional Upokorehe lands in persons not entitled to them" and "[t]he inaction by the Māori Land Court in 1898 and 1939 in failing to right the actions of the Compensation Court". No substantive discussion of Wai 339 appears in the Ngāti Awa Raupatu Report. Wai 339 was settled by the Whakatōhea Claims Settlement Act, s 14(3)(a)(iii): See Ewan Johnston *Wai 203 and Wai 339 Research Report* (Wai 894, Doc #A14, June 2002) at 8–9.

253 Miles, above n 218, at 135.

(c) Historical pā and modern marae

[178] We next discuss an aspect which arises from Te Upokorehe's emphasis on the presence of Te Upokorehe marae in the area immediately surrounding Ōhiwa Harbour. Te Upokorehe provided evidence that there were five Te Upokorehe marae in the Ōhiwa Harbour area, namely, Turangapikitoi, Roimata, Kutarere, Rongopopoia and Maromahue.[254]

[179] In discussing their position (below at [260]), we have noted that the Kutarere Marae applicants rejected the submission that its principal affiliation is with Te Upokorehe. Te Kāhui questioned whether the various links of different hapū, for example, Ngāti Ira's links with Roimata, can be severed in the way Te Upokorehe's case would require. Te Kāhui also pointed to evidence of occupation of Ōhiwa by Te Kāhui hapū. We give just two of the examples referred to. The first is that Te Kāhui said Ngāti Ira and Ngāi Tama established a settlement at Ihukatia on the Western Spit of the Harbour some time before the 1840s. In the 1840s, Ngāti Ruatākenga built a pā at Ihukatia, purportedly securing the "Ōhiwa interests of Te Whakatōhea hapū".[255] As a further illustration, reference is made to evidence that Ngāi Tamahaua and Ngāti Patumoana had a pā at Onekawa near the mouth of the Harbour.[256]

[180] Counsel's submission for Te Tāwharau was that the majority of the marae in Ōhiwa are Te Upokorehe, but Onekawa and Te Mawhai were not. Counsel also referred, amongst other matters, to the evidence of Te Ringahuia Hata (on behalf of Ngāti Patumoana) of a Ngāti Patumoana urupā on the eastern side of the Ōpape spit, suggesting it was not correct to say the "cultural markers and identity are solely Upokorehe".

---

254 Reference is made, for example, to the affidavit of Felicity Margaret Kahukore Baker, the then Secretary of Te Upokorehe Treaty Claims Trust; and to Walzl, above n 229.

255 See also Ranginui Walker *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea* (Penguin Books, Auckland, 2007) at 57–58 where he notes that as a result: "Ngāti Awa were so intimidated by Whakatōhea's show of force that they did not dare to mount an attack to contest the ownership of Ōhiwa Harbour."

256 Bruce Stirling notes that: "Onekawa is a pā with a significant history for Whakatōhea's occupation of Ōhiwa, being (as noted) the first spot to which those who had earlier fled the district in the 1820s returned in about 1832." See Stirling, above n 216, at [82] (footnote omitted).

[181] Again, there are complexities that arise because of the various linkages. That is apparent from Mr Walzl's report, relied on by Te Upokorehe, which refers to the various connections. In relation to Roimata, his report said Te Upokorehe is the "primary" hapū; for Maromahue that the "[h]apū is Te Upokorehe"; but he noted that Kutarere Marae connects ancestrally to Mataatua and Nukutere waka; and of Turangapikitoi Hapū he said there is a small wharenui that was erected in the early 1900s for "Tūhoe by Whakatōhea as a resting place for Tūhoe gathering kai from Ōhiwa".[257]

[182] Further, communities may have a number of affiliations and it will be important to know which of those affiliations gives the right to be at a particular place. As matters stand, we see this aspect as reflecting the whakapapa links mentioned above, and the fact a number of groups have rights in the area.

(d) Use of the moana

[183] Finally, we discuss the submission made by Te Upokorehe that, while others may enter the area and use the resources, they do so under the mana of Te Upokorehe. That Te Upokorehe has the mana in relation to Ōhiwa, Te Upokorehe submitted, is apparent from the evidence about the exercise of kaitiakitanga day in day out, both historically and in current times. They said there is very little evidence of the exercise by other groups of kaitiakitanga within Ōhiwa and certainly not on a continuous basis since 1840, in contrast to Te Upokorehe's extensive evidence on these matters. Te Upokorehe also said that a number of witnesses for the other applicants acknowledged the special position of Te Upokorehe within Ōhiwa.

[184] Te Kāhui said that it is not surprising, given the status of Ōhiwa as the most significant source of kaimoana in the area, that multiple hapū have different levels of rights and responsibilities in tikanga in relation to it, making it implausible for Te Upokorehe to claim exclusive rights in this area.[258] Te Kāhui pointed to evidence of the other hapū exercising mana in the area and to the hapū, including Te Upokorehe,

---

257 Walzl, above n 229, at 39–41.

258 Citing *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [75], n 78, in which this Court provided Ōhiwa Harbour as an example where "mana whenua was held by one community and resource rights within the same area were held by another": at [75].

working together (mahi tahi) to protect their interests. Finally, it did not accept that the acknowledgements relied on by Te Upokorehe extend to recognition of exclusive rights.

[185] The evidence is replete with examples of Te Upokorehe exercising rights in the area both historically and currently. Given our views, we refer only briefly to just a few of these important accounts.

[186] Wallace Aramoana, kaumātua of Te Upokorehe, of Hiwarau, said he likes to say he "was born on the boat, because I was always on a boat". His evidence was that his father, Patrick, would talk to the children about the pipi beds and the different locations of food. Mr Wallace Aramoana also talked about the various practices in relation to kaimoana he was taught by his father, such as those to facilitate conservation of the karoro (black-backed gull); and the preservation of the gull, and of fish and shellfish, as food.[259] He referred to the way they used the harbour as a highway because of access issues, and said that they would carry out rāhui over the harbour both historically and more recently. Mr Wallace Aramoana also talked about the Department of Conservation | Te Papa Atawhai (Department of Conservation) ringing him when 40 pilot whales were stranded on the Ōhiwa coast in 2014. The whales did not survive and Mr Wallace Aramoana described the role Te Upokorehe played in the recovery of the whales' heads (upoko) and their burial in the traditional manner.[260] He said that they are the first point of contact for the local councils in Ōhiwa, and that the Regional Council will also speak to Te Upokorehe about the wāhi tapu as part of its strategic plan.

[187] When cross-examined, Mr Wallace Aramoana emphasised that his concern was about the survival of the taonga. He also made the point that it was not about owning the place but rather practising "tino rangatiratanga, tikanga and kaitiakitanga". He continued:

---

[259] A report on traditional and customary practices and sites of significance prepared by Mr Wallace Aramoana and Lance Reha with the support of Te Upokorehe MACA Research Team was exhibited to Mr Wallace Aramoana's affidavit.

[260] Ms Baker in her evidence also discussed the process followed by Te Upokorehe following the stranding of the whales.

A. I've never ever said Upokorehe ever owned one place, but we live there. We live in it, day in and day out. We're only custodians doing what we think is healthy for the moana.

[188] Maude Te Rau Aroha Edwards, Upokorehe Iwi Relationships Manager, Kutarere, said that Ōhiwa was "like our playground", and a source of meals. She also described modern day examples of kaitiakitanga, for example, the various governance boards on which her father, Charles Te Rehe Aramoana Snr, represented Te Upokorehe, including the Ōhiwa Harbour Implementation Forum and the Roimata Marae Trust. She too has represented Te Upokorehe in various governance roles in the area.[261]

[189] Finally, Lance Terence Horopapera Reha, Kaiako, of Kutarere, described the relationship of Te Upokorehe to Ōhiwa as akin to that of the landlord of the area. He said that the relationship was "exclusive in that no other group has a relationship like ours".

[190] In terms of Te Kāhui's submission that the mana of the place was very much shared, it is sufficient to refer to the following illustrations which we have taken from Te Kāhui's submissions:

(a) Events when, in 1873 following the raupatu, Te Arawa forces came back to Ōhiwa to disinter their dead. Te Arawa visitors were greeted by a pōwhiri which was led by rangatira from Ngāti Ira (Hira Te Popo), Te Upokorehe (Te Teira), Ngāti Patumoana (Tiwai Piahana) and Ngāti Ruatākenga (Te Awanui). These rangatira had liaised with Te Arawa to allow them to disinter their dead from the urupā at Ōhiwa, a hangover from battles between Te Arawa, Te Whakatōhea and Te Upokorehe during the raupatu.

(b) Later, in the 1900s, at Tataiāhape Marae, there was a meeting between kaumātua of Te Whakatōhea and kaumātua from Waimana at which Te Whakatōhea's hapū agreed to allow Waimana hapū access to Ōhiwa.

---

261 Trevor Tira Taylor Ransfield, Treasurer of Te Upokorehe Resource Management Team and Kutarere Marae, also discussed the various forums in which he has been involved on behalf of Te Upokorehe and which concern Ōhiwa Harbour.

(c) In 1944 (and there is a similar example later in time), Te Whakatōhea and Te Upokorehe, among others, petitioned the Crown for greater control of Ōhiwa kaimoana to prevent overfishing and depletion by Pākehā.

[191] In supporting its submission that the Court of Appeal was right to uphold the joint CMT Order 2, counsel for Ngāti Awa said Ngāti Awa's position that Ōhiwa Harbour was shared with Te Whakatōhea, Ngāi Tūhoe and Ngāti Awa is well-supported by the historical and other evidence. For example, counsel referred to examples of tatau pounamu (peace-making) over the years (in the 1840s, 1860s and 1990s) reflecting that the various groups' interests coalesce in Ōhiwa Harbour.

[192] In relation to Te Upokorehe's submission that other hapū acknowledged its special status, it is sufficient to discuss four examples from the evidence.

[193] The first example comes from the evidence of Karen Stefanie Mokomoko (of Ngāi Tamahaua, Ngāti Patumoana, and Te Upokorehe, of Te Whakatōhea descent on her father's side). She was asked whether she accepted that today, Te Upokorehe were kaitiaki over the application area and answered "yes". She was then asked whether she would therefore accept an order giving sufficient recognition for the important Te Upokorehe tīpuna she had discussed rather than an order at the whānau level as she sought. She said that was a matter the whānau would need to discuss further.

[194] The second illustration arises from the evidence of Amber Rakuraku-Rosieur (of Ngāti Ira). She said she did not dispute that Te Upokorehe has maintained ahi kā in their application area. However, when asked about whether the rights extended to being able to exclude others from their rohe or whether others could come in and use the resources, she said she thought that:

> … on the balance of consideration none of us has any power. We have whakapapa which links us to whenua which provides us with passage and that's what I tried to highlight in my reply [affidavit].

[195] In that reply affidavit, amongst other matters, Ms Rakuraku-Rosieur said she wanted to draw the Court's attention to various document extracts showing:

> ... clearly that Rakuraku occupied and lived alongside Te Upokorehe in and around the Ōhiwa Harbour and was a staunch advocate for the Crown to return surrounding whenua to Te Upokorehe.

[196] The third example comes from the cross-examination of Hetaraka Biddle by counsel for Te Upokorehe.[262] He had given evidence about fishing and diving and other customary practices in the area. He was asked first about evidence to come from Te Upokorehe witnesses, that it is "Upokorehe that hold mana whenua from Maraetōtara through to the Waioweka in the east". He was asked whether he agreed with that and he said:

> A. I think we had discussions with them and it's part of our history and our whakapapa to that area through quite a few tīpuna known to Whakatōhea and Te Upokorehe. What I mentioned before earlier was that some [of] our tīpuna were warriors and they weren't challenged.

[197] He went on to describe that there was "a lot of history in that area with us in our whakapapa to all the tīpuna around there with Ngāi Tamahaua". He was then asked whether, today, he would "accept that Te Upokorehe are the hapū or the group that primarily exercises kaitiakitanga in that region", to which he answered "[y]es". However, as counsel for Te Kāhui said in this Court, he was not (perhaps unsurprisingly) asked about exclusivity. The following exchange is also relevant:

> Q. … But what I would say is, would you agree that the ties that bind Te Upokorehe to those sites in the west would be stronger than the ties that bind your hapū to those sites?
>
> A. Oh, that's, yes, I mean we're of the same tupuna. How can you judge that when we've all got the same tupuna? We have bloodlines and we have the same tupuna from Tamaikoha where he was never challenged. I am a direct descendant of Tamaikoha and he was of Ngāi Tama[haua], yes. So, when you say how strong can you get, so are those spokespersons they are my cousins speaking for Upokorehe too they also come off Tamaikoha, but we come off the first son of Tamaikoha.

---

262 Mr Biddle described that he can whakapapa through his parents to most of the hapū of Te Whakatōhea; and has affiliations to Tamakaimoana, Ngāi Tūhoe, Te Hapūoneone and Te Whakatāne on his father's side.

[198] Finally, counsel for Ngāti Awa also said it is not right to read the evidence of Leonie Te Aorangi Simpson (of Ngāti Awa) as acceptance Ngāti Awa accesses Ōhiwa through the mana of Te Upokorehe. Rather, the submission was that the exchange shows the witness respecting whakapapa connections. The passage referred to is as follows:

> Q. Well in that case, would you accept that Te Upokorehe are independent of other iwi in the Ōhiwa Harbour?
>
> A. *Kei a Upokorehe o rātou mō Upokorehe*. [Pūkenga: It's up to Upokorehe to state their status as Te Upokorehe.] I know that we enjoy really good working relationships with Upokorehe in the Ōhiwa and we are I think very respectful and admire their commitment and their care, their kaitiakitanga of Ōhiwa.

[199] The witnesses accepted that Te Upokorehe's rights were particularly potent because they live around the Harbour, but we agree with the respondents on this point, namely, that this evidence does not go as far as Te Upokorehe asserted. We see the witnesses as trying to be respectful given the whakapapa links. They are accepting that Te Upokorehe has mana in the area but not exclusively and indeed, as counsel for Te Kāhui submitted, the question of Te Upokorehe having exclusivity alone was not directly put to these witnesses.

[200] Further, to understand what the witnesses were expressing, it is helpful to restate the passages set out in our first judgment from Associate Professor Andrew Erueti as to the nature of tikanga-based land rights held by whānau and hapū prior to the Treaty. Associate Professor Erueti's description is as follows:[263]

> According to Māori land custom, no one individual or kinship group owned land in the sense that they held virtually all rights in land to the exclusion of other levels of kinship or adjacent groups. Rather, different levels of the hapū social order exercised different kinds of rights in the same area of land. The right to traverse a stretch of land could extend to the hapū as a whole, but the right to cultivate particular garden plots within the same area could be exercised by smaller entities: individuals, chiefs, ope [outside groups] of kin, nuclear families (mum, dad, and the kids), and whānau (the extended family).
>
> These rights were transferred by a number of customary means. Major transfers could occur through war or threat of war. However, the rights to specific resources, such as the right to fishing-stands, trees attractive to

263 Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 41 at 42–43 (some footnotes omitted, emphasis in original).

birds, or small garden plots, were commonly transferred from, by, and to individuals, through gifting and inheritance. Specific rights were transferred in this way to other hapū members and also to members of adjacent groups without necessarily conferring with the hapū as a whole or its ruling chief or chiefs. As a result, "the rights of individuals of different hapū came to intersect on the ground", resulting in a crazy patchwork of use-rights.[264] These rights were ordered and prioritised according to well-recognised principles but with a marked emphasis on context so that the solution chosen best suited the demands of the moment.

It was common for an area of land occupied by hapū to be subject to a number of competing claims of right made by groups that had occupied the land in the past. These could be recently defeated peoples forced off the land by the present occupants, or groups that had migrated to new lands. They may no longer occupy the land but in their eyes they retained "mana" (authority, control) in the land, and could advance a variety of "take" (bases) to support their claim.

These competing claims of right coupled with the intricate system of intersecting rights held by the members of different kinship groups makes it difficult to say who "owned" the land, or waters of lakes, lagoons, rivers, and the open seas.

A major hapū occupying a particular territory undisturbed by war and migration for several generations could hold something akin to ownership in the common law sense described above, inviting in migrating hapū, and permitting defeated hapū to remain on the land. However, it was much more common for several different groups to hold interests in the same area of land. Also, time altered all relationships and degrees of right. Māori descent groups in the eighteenth century were in a constant state of mutation, waxing and waning according to the vicissitudes of customary life. If a group asserting authority over a locality waned over time through political misfortune a new group could replace it. It therefore makes more sense to speak of different groups and individuals *owning rights in the land*, rather than owning the land itself.

[201] Overall, we see the evidence as consistent with a number of groups exercising mana in the area. This is very much an illustration of what Associate Professor Erueti had in mind in referring to "a crazy patchwork of use-rights".[265] Further, the evidence discussed suggests a level of complexity. All rights may not be equal. But that may not necessarily mean only the one group has exclusive rights that would meet the test for CMT and that would faithfully reflect the position on the ground in tikanga. There may also be evidence suggesting an apparent priority, for example, that relied on as indicating Te Upokorehe's consent was required. However, at the same time, the rights of others seem to have crystallised into more than mere access by consent.

---

264 Angela Ballara *Iwi: The dynamics of Māori tribal organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998) at 195.

265 Erueti, above n 263, at 43.

These patterns are unsurprising. They reflect both the nature of the seascape and the strong links between the hapū.

Conclusion on remittal of CMT

[202] As we have said, as far as the evidence provides, the Court of Appeal was correct in its conclusion that Te Upokorehe had not shown that it held mana in relation to Ōhiwa exclusively, making a joint CMT the correct outcome.[266] Remittal of CMT Order 2 to the High Court for a rehearing is not required.[267]

[203] The Wai 1750 claim (the North-Eastern Bay of Plenty District Inquiry) currently being considered in the Waitangi Tribunal provides a much more suitable forum to address these issues. Te Upokorehe's amended statement of claim in the Tribunal alleges breaches of the principles of the Treaty of Waitangi in relation to, amongst other matters, Ōhiwa Harbour and land abutting the harbour.

[204] It is also necessary to say a little about the scope of the Tribunal's jurisdiction following the Whakatōhea Claims Settlement Act 2024. The Act has the effect of removing the Tribunal's jurisdiction to make recommendations in relation to historical claims.[268] However, the Act makes it clear the Tribunal has jurisdiction to complete its inquiry and release a report on Wai 1750. While the Tribunal can make findings about the historical claims under the Wai 1750 umbrella, which includes Te Upokorehe's claim, it cannot make recommendations.[269]

[205] Against this background, it may be that, if the Tribunal makes findings in relation to Te Upokorehe which cast real doubt on our conclusions, a legislative response reflecting these findings may be the best remedy.[270] Another, less straightforward, possibility is that with leave the parties could seek a recall of this

---

266 See above at [151].
267 CMT Order 2 has been amended by this Court reflecting the views of the parties: see below at [327].
268 Section 15(6)(a)(ii), and see ss 13 and 14.
269 Section 15(6)(a).
270 For examples of this, see Richard Boast "The Evolution of Māori Land Law 1862–1993" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 65 at 100–101.

judgment if of the view that the Waitangi Tribunal's findings plainly contradict those of this Court.

Inclusion of Ngāti Ngāhere in CMT orders

[206] This ground of appeal concerns whether Ngāti Ngāhere should have been included in CMT Orders 1 and 2. Ngāti Ngāhere did not bring its own application but was part of the application brought by Te Whakatōhea Māori Trust Board.[271]

[207] Te Upokorehe opposed Ngāti Ngāhere's inclusion in the CMT orders, arguing that Ngāti Ngāhere was merely grouped with the other Te Whakatōhea hapū despite there being no direct evidence of Ngāti Ngāhere having rights in the rohe. While the Court of Appeal noted that Ngāti Ngāhere might rely on evidence offered by other applicant groups,[272] Te Upokorehe submitted that the Court failed to analyse whether such evidence actually existed and was sufficient to satisfy s 58.

[208] Te Tāwharau and Te Kāhui supported the inclusion of Ngāti Ngāhere. While Ngāti Ngāhere has not actively participated in the proceeding, counsel reiterated that it was part of the application by Te Whakatōhea Māori Trust Board; its rights are reflected in the evidence; it was included in the pūkenga's proposals; and it was recognised in the findings of the Courts below. In his report for Te Kāhui, Bruce Stirling noted:[273]

> 3. As a collective, Te Kāhui does not include all the hapū of Whakatōhea but the nature of the sources is such that it has proved more practicable to extend the report's coverage to all of the hapū whether or not they are formally part of Te Kāhui. The report is thus relevant not only to Ngāti Ira but also to Ngāi Tamahaua, Ngāti Patumoana, Ngāti Ngāhere, and Ngāti Ruatākena (or Ruatākenga). …

[209] It is worth reproducing in full the Court of Appeal's conclusion on this issue:[274]

> [288] I record that I reject Te Upokorehe's claim that Ngāti Ngāhere failed to apply, or to adduce evidence in their own right. The argument is difficult to understand. Ngāti Ngāhere qualify as an applicant group. They mandated

271 As noted above at [96], Te Tāwharau o Te Whakatōhea subsequently replaced the Whakatōhea Māori Trust Board and became Te Whakatōhea post-settlement governance entity.
272 CA judgment, above n 16, at [288] per Miller J.
273 Stirling, above n 216.
274 CA judgment, above n 16, per Miller J.

the Board to apply on their behalf and might rely on evidence offered by others.

[210] We agree with the Court of Appeal. It is clear that Ngāti Ngāhere is a hapū of Te Whakatōhea. It was represented by the Trust Board in the Courts below and Te Kāhui accepts that they share the area on a shared exclusivity basis. In these circumstances, while there was not a significant amount of evidence specifically in relation to Ngāti Ngāhere, it was sufficient to satisfy the test for their inclusion in the CMT orders.

[211] Te Upokorehe categorised the evidence as historical (and noted that some of this material is contested), general in nature and/or relating to areas outside of Te Upokorehe's rohe.

[212] We do not accept that all of the material characterised by Te Upokorehe as historical can be disregarded. It is sufficient, by way of illustration, to set out the following excerpt from the report of historian Mark Derby on *Customary Interests and Third-Party Use and Occupation*:[275]

> 49. The tribal identity of Whakatōhea appears to be of relatively recent origin, perhaps from the late 17th century. Prior to that time a number of loosely affiliated or unrelated groups, with origin traditions deriving from several migration canoes, occupied the district surrounding the present-day town of Ōpōtiki and extending to the shores of Ōhiwa Harbour.
>
> 50. … According to [Professor Ranginui] Walker, the distinct hapū of Ngāi Tama[haua], Ngāti Rua[tākenga], Ngāti Patu[moana], Ngāti Ira, Ngāti Ngāhere and Te Upokorehe merged around the end of the 17th century under the tribal name Te Whakatōhea, partly for mutual protection against warring neighbours such as the Ngāi Tai and also through inter-marrying, conquering and eventually extinguishing earlier groupings.
>
> …
>
> 52. … Ruamoko was a chief of Ngāti Ngāhere in the 18th century, when the hapū's territory ran from Waioweka to Ōhope, taking in the coastal fisheries of the Waioweka River and Ōhiwa Harbour.

275 Mark Derby *Customary Interests and Third-Party Use and Occupation* (June 2020) at 65–66 (footnotes omitted). We are aware that as a starting point rights and relationships must be demonstrated as at 1840, meaning courts should be cautious before relying on evidence predating that time. However, such evidence (in conjunction with evidence establishing continuity) can be relevant in the assessment of whether the applicant group can demonstrate the required relationship with the claim area.

> Flounder, mullet, herring, kahawai, whitebait and even kingfish ran in season up the rivers. The Waiotahē River was famed for the abundance of pipi harvested there. It is a resource that has never been exhausted by continuous harvesting to the present time. Ōhiwa Harbour was the most valuable resource in Ruamoko's territory. Ōhiwa was known as the abode of the "daughters of Whakatōhea", a local metaphor for the cockles, mussels and pipi found there in abundance.

[213] This situates Ngāti Ngāhere as having had a place, historically, in the relevant area and as being a group using the resources.

[214] In terms of the material Te Upokorehe described as general—that is, not being specific to Ngāti Ngāhere—it is sufficient to note, first, references by Dr Desmond Tatana Kahotea in his report on *Whakatōhea and the Common Marine and Coastal Area* regarding petitions to the Sim Commission in the 1920s and, second, to discuss the evidence of Hemi (James) Jeffrey Wade Pirihi and Tangimoe Clay.

[215] Relevantly, Dr Kahotea recorded a description of part of Te Whakatōhea's ancestral boundaries as far as Te Hoeroa Horokai (of Te Whakatōhea/Ngāti Ngāhere) was concerned when giving evidence in Ōpōtiki. The boundaries included:[276]

> Commencing at Pakihi at the mouth of the river, along sea coast to mouth of Waiotahē stream, to mouth of Ōhiwa stream, to Te Horo (a hill), thence striking inland southwards to Puhikoko (a hill), by straight line to Pukemoremore (a hill), thence to Mapouriki (a hill) (at one time a fighting pā), then descending into Waimana stream Mapouriki being on the bank, following the Waimana stream towards its source at Tautautahi (a hill along the banks), to the mouth of the Parau stream, then following Parau stream to Tangata-e-roha (a hill), to Kaharoa (an old settlement).

[216] The report said that Te Hoeroa Horokai continued, noting that these boundaries were "for the lands of Upokorehe, Ngāti Ngāhere, Ngāti Rua[tākenga] and the other three Hapū".[277]

---

276 Des Tatana Kahotea *Whakatōhea and the Common Marine and Coastal Area* (October 2019) at 95. Heremia Hoera of Ngāti Ruatākenga then described the boundaries from Kaharoa.

277 At 95.

[217] The affidavits of Mr Pirihi and Ms Clay contain specific references to Ngāti Ngāhere as well as illustrate that there is material that supports the conclusion that there is continuity of relationship with the marine environment.[278]

[218] Turning to Mr Pirihi, he explained that he was raised with his mother's whānau of Ngāi Tai. His father was Hone Pirihi, whose parents were John Pirihi from Ngāti Ngāhere; and "his mother's most common name is Makareta Hudson from the Ngāi Tamahaua hapū of Whakatōhea". Te Upokorehe made the point the evidence is not given for Ngāti Ngāhere, and it was prepared in relation to the Edwards application under the Foreshore and Seabed Act. That said, Mr Pirihi talked about Te Whakatōhea gathering kaimoana in whānau or hapū groups. Further, Mr Pirihi also talked about the Whakatōhea waiata Maruhia, referred to in our discussion in relation to Whakaari.[279] He said that it is used by Ngāti Ngāhere at tangihanga. He explained that the waiata refers to the positioning of resources for kai, where place names come from and the stories behind those names. Mr Pirihi described attempts being made to regenerate the spiritual connection of the young people with the awa in the exercise of kaitiakitanga. Finally, he referred to a tohunga called Te Tahi o Te Rangi and explained that:

> For us from Ngāti Ngāhere, if ever we get into trouble on either the ocean or in the river we only need to think of that tīpuna, and the water just pops you out and you are safely on the beach.

[219] Ms Clay described her hapū as Ngāti Ngāhere. She discussed conservation work along the Te Whakatōhea coastline in which she has been involved concerning pīngao (a native plant growing in the sand along the beaches and a traditional material used for weaving). Ms Clay's evidence is not directed towards showing that Ngāti Ngāhere held the area, but we would not discount the relevance of her involvement as Ngāti Ngāhere in relevant conservation efforts.

[220] Finally, in relation to Te Upokorehe's submission that some of the evidence relied on by Ngāti Ngāhere concerns areas outside of Te Upokorehe's rohe, we note that some of this evidence does nonetheless concern areas which are covered by

---

278 There is a further affidavit on the record by Bradie Anne Paul (dated 18 November 2019) which also addresses continuity of use.

279 Below at [298].

CMT Order 1, so that evidence is not irrelevant.[280] Considering the available evidence, we see no reason to depart from the Court of Appeal's conclusion that Ngāti Ngāhere was properly included in the CMT orders.

Summary of conclusions on Te Upokorehe's appeal

[221] The Court of Appeal was correct to conclude that Te Upokorehe has not shown it held mana exclusively in relation to the Ōhiwa Harbour. If the Waitangi Tribunal's findings warrant, a legislative solution may be necessary. As an alternative, if that is not possible, leave to recall this Court's judgment is reserved if contradictory findings emerge from the Waitangi Tribunal. The Court of Appeal was also correct to conclude that two or more separate overlapping CMTs in relation to the same area are not available under MACA.

[222] The Court of Appeal's conclusion that Ngāti Ngāhere was properly included in CMT Orders 1 and 2 was also correct.

[223] Accordingly, Te Upokorehe's appeal is dismissed.

Application by Ngāti Muriwai

Background

[224] Ngāti Muriwai claims to be a hapū of Te Whakatōhea. Nepia James Tipene (chairman of the Ngāti Muriwai Authority Trust at the time of the High Court hearing) said that there are approximately 1,000 registered members of Ngāti Muriwai.[281] Counsel's submission was that this makes it one of the larger groups within the iwi. In 2017, Christina Davis (the daughter of Claude Edwards) applied for recognition orders for both CMT and PCRs on behalf of Ngāti Muriwai.

---

280 See, for example, census information for Te Whakatōhea as at 1874 in Officers in Native Districts "Approximate Census of the Māori Population" [1874] I AJHR G7 at 9; a map showing the hapū subdivision of Ōpape Reserve where Ngāi Tamahaua, Ngāti Ngāhere and Ngāti Ruatākenga have coastal frontage in Kahotea, above n 276, at 118; and reference to Ngāti Ngāhere's association with Te Rere, which is near Ōpōtiki and so within the confiscation line: Armstrong, above n 216, at [44]. The confiscation area is relevant as the land that was subsequently allocated to the hapū of Whakatōhea did not necessarily reflect the area of which the hapū were originally associated.

281 The Waitangi Tribunal stated there are approximately 426 living registered adult numbers. We understand that larger estimation may include children. See Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 46.

However, Ngāti Ruatākenga opposed the application, as it sees Ngāti Muriwai as part of its hapū and unable to hold recognition orders independently. There is therefore a dispute as to the status of Ngāti Muriwai within Te Whakatōhea.

[225] In the Court of Appeal, Ngāti Muriwai failed to satisfy the CMT test in its own right but could "participate in a recognition order granted to an applicant group of which they form part".[282] It was, however, held eligible for PCRs.[283] Before this Court, Ngāti Muriwai appealed the CMT decision, while Ngāti Ruatākenga (and the Attorney-General) appealed the PCRs decision.

[226] We observe that the recognition of a group as a hapū of an iwi is a matter for that hapū and that iwi and is to be determined in accordance with tikanga. As noted by the majority in *R v Ellis (Continuance)*, courts must be careful not to exceed their role when engaging with tikanga.[284] Unless essential to fulfil its appellate responsibility in this appeal, this Court ought not assume the function of iwi and forestall Te Whakatōhea and Ngāti Muriwai from determining the dispute in accordance with tikanga.

[227] The appellate issue for this Court is a different one to the dispute described above at [224]. It requires the Court to instead determine the narrower question of whether Ngāti Muriwai is presently entitled to bring an application and, if so, whether it meets the statutory tests for CMT and PCRs. We canvass the issues in some detail, acknowledging the arguments made. But we preface our discussion by observing that hapū are political as well as kinship communities in which descent-based rights are vested according to tikanga. Like all political communities, hapū evolve and devolve.[285] Putting that to one side, if the group on whose behalf an application is made fits any one of the three kinship categories referred to in s 9 of MACA,[286] the only relevant question is whether that group holds tikanga interests in its own right.

---

282 CA judgment, above n 16, at [281] per Miller J.
283 At [342] per Miller J.
284 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [122]–[123] per Glazebrook J, [181] per Winkelmann CJ and [270]–[271] per Williams J.
285 See Erueti, above n 263; and Ballara, above n 264.
286 See above at [102].

The Courts below

[228] The High Court traversed the evidence relating to Ngāti Muriwai and ultimately concluded that Ngāti Muriwai had not been a hapū of Te Whakatōhea as at 1840 (nor presently was a hapū), and failed to meet the test for CMT.[287]

[229] The Court of Appeal upheld the High Court's decision, concluding that Ngāti Muriwai could not satisfy the statutory test in its own right. The Court noted that Churchman J had found on the facts that there "was no evidence of [Ngāti Muriwai's] presence in the Whakatōhea region between 1840 and 1870" and "[t]here was some evidence that Ngāti Muriwai had become moribund and was revived in the 1990s".[288] Ultimately, it seems that the Court of Appeal affirmed the finding that Ngāti Muriwai has not been a hapū since 1840. However, it found that Ngāti Muriwai is "at least a whānau group" and could "participate in a recognition order granted to an applicant group of which they form part".[289]

[230] In a subsequent minute concerned with the rehearing in the High Court, Churchman J interpreted these observations to mean that Ngāti Muriwai would have to join a successful applicant group and could only participate in the rehearing independently, as an interested party.[290] He stated:

> [46] The resolution of any role Ngāti Muriwai may have under tikanga is a matter to be resolved directly between Ngāti Muriwai and the successful applicant group that they [may be] a part of. That is not an issue that will be determined at the rehearing.

[231] However, both Courts granted Ngāti Muriwai's claim for PCRs in respect of certain activities.[291] The Court of Appeal held that s 51(1) does not require the applicant group itself to have exercised the right since 1840. Instead, s 51(1) requires that the right has been exercised since 1840, by "someone to whom the applicant group

---

287 HC judgment, above n 15, at [439]–[465].

288 CA judgment, above n 16, at [279(b)] per Miller J.

289 At [281] per Miller J.

290 *Re Edwards* HC Wellington CIV-2011-485-817, 8 March 2024 (Minute of Churchman J) at [43]–[47].

291 The High Court considered there was sufficient evidence to grant PCRs in respect of only some (but not all) of the activities for which Ngāti Muriwai sought PCRs: HC judgment, above n 15, at [512]–[513]. The Court of Appeal agreed with the High Court's assessment: CA judgment, above n 16, at [342] per Miller J. See further developments in HC Stage Two judgment, above n 28, at [479].

has a relevant connection", and that the applicant continues to exercise that right.[292] As to the interpretation of "exercised … in accordance with tikanga",[293] the Court of Appeal's approach focused on the specific appeal at hand and the policy decision made by Parliament to recognise post-1840 changes in Māori society. While the Court noted Ngāti Ruatākenga's concern, it concluded:[294]

> … that concern must yield to the scheme of s 51, which contemplates multiple overlapping rights and allows any iwi, hapū or whānau group to obtain a PCR if the right has been exercised since 1840 and the applicant group continues to exercise it in accordance with tikanga. The legislation contemplates that PCRs may be recognised for groups which did not exist in 1840, so long as someone to whom the applicant has a relevant connection has continuously exercised the relevant customary right in the particular area since then and has done so in accordance with tikanga. That policy decision may be taken to reflect post-1840 changes in Māori society which are well illustrated in these appeals. There were once 22 hapū of Whakatōhea and only six (counting Te Upokorehe) of those remain today. At the same time, as Mr Bennion, for Ngāti Patumoana, pointed out, new and apparently substantial whānau groups have established themselves. Ngāti Muriwai are such a group. They say that they affiliate to the area and the iwi, but not to Ngāti Ruatākenga.

The appeals and parties' submissions

[232] Ngāti Muriwai's application led to three separate appeals before this Court.

[233] Ngāti Muriwai did not contend that it was able to hold a CMT order over the area on its own. However, it rejected an interpretation of the Court of Appeal judgment that would mean it would have to join one of the successful hapū groups to be included in a CMT order.[295] Rather, it submitted that it may share in a joint CMT with other applicant groups. Ngāti Muriwai submitted that the evidence demonstrates that it can satisfy the CMT test as a group within Te Whakatōhea. While it denied the Court of Appeal's assumption that Ngāti Muriwai is a post-1840 whānau group, it argued that even if this were correct, that would not preclude Ngāti Muriwai's eligibility to share CMT in this manner.

[234] The Attorney-General sought clarification on what the Court of Appeal meant when finding that post-1840 groups can obtain a PCR if they have a

292 CA judgment, above n 16, at [336] and [341] per Miller J.
293 MACA, s 51(1)(b).
294 CA judgment, above n 16, at [341] per Miller J.
295 This seems to have been the subsequent interpretation of Miller J's comments by the High Court.

"relevant connection" with a group who have exercised the right since 1840.[296] Counsel submitted that Miller J introduced this test but did not explain or apply it to Ngāti Muriwai before concluding it was entitled to PCRs. The Attorney-General suggested that the relevant connection test requires a clear and identifiable connection between the applicant group and the original group as well as the particular activity exercised by both groups.

[235] Ngāti Ruatākenga opposed the granting of independent PCRs (and CMT) orders to Ngāti Muriwai as it does not accept Ngāti Muriwai is an independent applicant group. Counsel submitted that Ngāti Muriwai's claims rely on the rights of Ngāti Ruatākenga but simultaneously undermine the mana of Ngāti Ruatākenga by attempting to forge a new identity. Counsel argued that customary rights cannot be permitted under MACA if customary law would not permit said rights; this would not be "in accordance with tikanga" as required. Counsel warned of MACA being used as a backdoor to achieve an identity and rights that are contrary to tikanga.

Evidence—whakapapa

[236] Evidence demonstrates clearly that Ngāti Muriwai has shared whakapapa with the other groups—to use a neutral expression—within Te Whakatōhea. For example, one tipuna that Ngāti Muriwai descends from is Ranginui-ā-te-Kohu.[297] Churchman J's summary of relevant whakapapa noted that the eponymous ancestor of Ngāti Ruatākenga derived from the union of Ranginui-ā-te-Kohu's daughter and Rēpanga (son of the ancestress, Muriwai).[298] Ngāti Muriwai also acknowledges the tīpuna Tūtāmure and Tuwairua.[299] Professor Walker described Tūtāmure as "the founding ancestor of the Whakatōhea iwi".[300]

[237] Ngāti Muriwai accepted in its submissions that it has whakapapa lines common with Ngāti Ruatākenga. In the High Court hearing, Robert Edwards (supporting Ngāti Muriwai's application) noted that "like many of my whānau" he whakapapas to

---

296 See CA judgment, above n 16, at [341] per Miller J.
297 Des Tatana Kahotea *Ngāti Muriwai Hapū and the Common Marine and Coastal Area Kotahitanga Claims* (January 2020) at 13.
298 HC judgment, above n 15, Appendix B, at [41]. See also Walker, above n 255, at 25.
299 Kahotea, above n 297, at 13.
300 Walker, above n 255, at 19.

every hapū of Te Whakatōhea. It is true that Ngāti Muriwai asserted it has a history of distinguishing itself from Ngāti Ruatākenga by identifying with the older Panenehu hapū,[301] and that it has separate whakapapa through its tipuna Eru Panoho that links Ngāti Muriwai with Ngāi Tai. Be that as it may, Ngāti Muriwai clearly accepts its connection with Te Whakatōhea.

[238] None of the other applicant groups contended that Ngāti Muriwai fell outside Te Whakatōhea. Otherwise, Ngāti Muriwai would not have been involved in initial settlement negotiations (nor recognised by the Waitangi Tribunal). Rather, the argument is whether it is sufficiently distinct from Ngāti Ruatākenga. Notably, Te Kāhui did not take a position regarding Ngāti Muriwai, seeing it as an internal issue to which Ngāti Ruatākenga should respond.

Evidence—status and continuity

[239] In this section of the judgment, we provide an overview of the key themes arising from the evidence as to Ngāti Muriwai's presence within the Whakatōhea rohe. We note the evidence is highly contested. The Waitangi Tribunal is presently considering some of these matters.[302]

[240] The evidence in the High Court as to Ngāti Muriwai's existence before the 1870s was equivocal. It was only during the hearing that an expert for Ngāti Muriwai, Mr Walzl, located potential evidence of Ngāti Muriwai's existence before 1840. The evidence concerned Native Land Court minutes which broadly suggested Ngāti Muriwai lived in Te Kaha, but were driven out by Te Whānau-ā-Apanui and then brought to Waiaua by Te Whakatōhea. Mr Walzl suggested these events would have occurred sometime between 1800 and the 1830s. Professor Walker had relied on one

301 The origins of Te Panenehu are equivocal. Alfred Lyall suggests Te Panenehu may have derived from the Tauira and/or Nukutere waka: AC Lyall *Whakatōhea of Ōpōtiki* (AH & AW Reed, Wellington, 1979) at 26. Professor Walker states that "a number of hapū, including Ngāti Rua[tākenga], Ngāti Ira, Ngāti Ngāhere and Ngāi Tama[haua] evolved out of the base population of Te Panenehu into the iwi of Whakatōhea": Walker, above n 255, at 28. He also suggests that Ngāti Ruatākenga subsumed the Panenehu identity: at 18 and 142. For a more detailed discussion see HC judgment, above n 15, at [33]–[38].

302 Waitangi Tribunal "North-Eastern Bay of Plenty" <www.waitangitribunal.govt.nz>.

of these minutes when stating in his book, *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea*:[303]

> Ngāti Muriwai originally lived at Te Kaha but had been driven out by Toihau of Te Whānau-ā-Apanui. Ngāti Muriwai found refuge with Ngāti Rua[tākenga] through its genealogical connections with that hapū.

[241] However, there was little time for Mr Walzl (or the parties) to analyse the evidence. There was also concern that there was no accompanying whakapapa evidence clearly connecting the Ngāti Muriwai referenced in that early period with the Ngāti Muriwai present in the 1870s. More broadly, both Courts below appeared to conclude Ngāti Muriwai had not proved on the evidence its existence as a distinct identity within Te Whakatōhea rohe during the period 1840 to 1870.[304] As to this, there was some dispute, the details of which it is unnecessary for us to consider here.

[242] What is clear is that following the raupatu, Ngāti Muriwai was allocated land in its own name. In around 1870, the Crown created a 20,000-acre reserve at Ōpape, east of Ōpōtiki. The plan advanced by Commissioner John Wilson was that this land would be divided among the six hapū of Te Whakatōhea. The Ōpape 3 subdivision, comprising 2,979 acres, was allocated to Ngāti Ruatākenga. Any rights belonging to members of Ngāti Muriwai were subsumed within that subdivision. In 1881, Commissioner Herbert Brabant allocated to 22 persons, said to comprise all members of Ngāti Muriwai, the 660-acre Ōpape 3A block, partitioned from the parent Ōpape 3 block.[305] This allocation was not, however, given effect by (by then) Judge John Wilson[306] of the Native Land Court, when that Court subsequently took over jurisdiction from the Compensation Court. Judge Wilson's view was that separate recognition of Ngāti Muriwai was a contravention of his original (out of court) arrangement. Eventually, however, the subdivision was recognised. In 1898,

---

303 Walker, above n 255, at 137 (endnote omitted).

304 HC judgment, above n 15, at [445]; and CA judgment, above n 16, at [279(b)] and [280] per Miller J.

305 Paku Eruera had applied for a subdivision for "Eru Pōnaho's hapū of Ngāti Muriwai": Walker, above n 255, at 137. There is evidence Paku Eruera chose the name Ngāti Muriwai as the interests derived from his Te Whakatōhea—rather than his Panenehu—whakapapa. There is dispute as to the reason Paku Eruera sought a subdivision and to what extent Ngāti Ruatākenga accepted the subdivision proposal. There is some suggestion that the subdivision was agreed to at a hui in 1881 but it is unclear what was discussed at this hui.

306 Judge Wilson was earlier the Special Commissioner for settlement of the Bay of Plenty district, as discussed above at [160].

Magistrate Robert Bush confirmed that Ngāti Muriwai was entitled to the subdivision and concluded "I fail to see how the Ngāti Rua[tākenga] can now upset this arrangement".[307] We understand the exact date of any orders for the subdivision had not been located at the time of the High Court hearing before Churchman J. Since the subdivision, one part of the block has been sold, with the rest remaining in the hands of Ngāti Muriwai descendants.

[243] Throughout the 20th century, Te Whakatōhea sought compensation for the land confiscation. In 1914, Te Whakatōhea petitioned Parliament to appoint a commission of inquiry into the confiscations. This petition talked about Ōpape Reserve "being for the six hapū of Whakatōhea", contradicting the fact seven groups were allocated land.[308] In 1944, Te Whakatōhea nominated a committee of two delegates per hapū to conduct the raupatu negotiations with the Crown. Ngāti Muriwai were not represented. Professor Walker observed:[309]

> The notable feature of this committee is the disappearance of Ngāti Muriwai as a hapū, notwithstanding that it had a designated share in the Ōpape Reserve. There was a long-standing assumption that Ngāti Muriwai was by association a subgroup of Ngāti Rua[tākenga].

In 1952, the Whakatōhea Māori Trust Board was established without independent representation for Ngāti Muriwai.[310] Professor Walker also noted that:[311]

> No one knew why the elders of Whakatōhea established the Trust Board with only six hapū. It is likely that this hapū [Ngāti Muriwai], with only six males and five females when it was granted land in the Ōpape Reserve, was so intermarried with Ngāti Rua[tākenga] that it was no longer considered extant in 1950.

[244] After the failed negotiations with the Crown in the 1990s, a hui-ā-iwi was held in 2003 to establish the Iwi Working Party to take the claim forward. The question became how many hapū made up Te Whakatōhea. Professor Walker noted that the Iwi Working Group accepted Ngāti Muriwai as a hapū:[312]

---

307 *Memorandum of RS Bush (Warden) regarding Ōpape Reserve* (30 March 1898) at 2.
308 Walker, above n 255, at 175.
309 At 192.
310 See Te Whakatōhea Deed of Settlement, above n 217, at [1.14]. Ngāti Muriwai submitted before us that that this was merely a decision by the Crown that does not reflect its status at the time.
311 Walker, above n 255, at 276.
312 At 276.

> … [B]ecause the map of hapū divisions in the Ōpape Reserve included a grant to Ngāti Muriwai and it was clear that this new group would not go away, it was decided to recognise them as the seventh hapū of Whakatōhea. Recognition of Ngāti Muriwai as the seventh hapū of Whakatōhea was essential to the definition of the claimant group for the requirements of the Crown. Otherwise, the Crown would not negotiate with Whakatōhea as long as there was disunity among hapū.

[245] Despite protest by Ngāti Ruatākenga, the Iwi Working Group's report *Te Ara Tono Mo Te Raupatu* listed Ngāti Muriwai as a hapū of Te Whakatōhea.[313] By 2010, two other groups were developing their own mandate strategy for Crown negotiations (namely, Tū Ake and Te Upokorehe Treaty Claims Trust).[314] In 2013, both the Raupatu Working Party (established to implement the Iwi Working Group's report) and Tū Ake submitted mandate strategies that included Ngāti Muriwai.[315] However, in 2014, Tū Ake's third mandate strategy only included six hapū (excluding Ngāti Muriwai). The strategy acknowledged that some would argue there are other hapū and so had created a process for the recognition of additional hapū.[316]

[246] The Crown accepted this mandate strategy, leading to a Waitangi Tribunal inquiry (Wai 2662). With regards to the exclusion of Ngāti Muriwai, the Tribunal said:[317]

> The fact that Ngāti Muriwai had representatives on the Process Working Party that produced 'Te Ara Tono' and were initially included in the first Tū Ake mandate strategy submitted to the Crown gives rise to a question as to why they were ultimately excluded. We think that there is a reasonable prima facie argument that Ngāti Muriwai have been prejudiced by exclusion from the Pre-settlement Trust at the point of its establishment. They now face the burden of proof to establish their identity through the production of historical evidence.

[247] The Tribunal recommended that adults who whakapapa to Te Whakatōhea be able to vote on the mandate strategy in accordance with their primary hapū affiliation, including Ngāti Muriwai.[318] While Ngāti Ruatākenga apparently objected to the recommendation, Ngāti Muriwai was included in the vote. But no other action was

---

313 The Whakatōhea Hapū Raupatu Process Working Party *Te Ara Tono Mo Te Raupatu: Whakatōhea Claims Process Report* (August 2007) at 14.
314 *The Whakatōhea Mandate Inquiry Report*, above n 281, at 13.
315 At 14 and 46.
316 At 15.
317 At 47.
318 At 98.

taken to recognise Ngāti Muriwai as a hapū; it would still need to go through the more onerous recognition process and seemed unable to vote as Ngāti Muriwai in the subsequent hapū ratification vote.

[248] This problem contributed to a second Waitangi Tribunal report. The Tribunal described Ngāti Muriwai as a hapū but acknowledged that there was a difference of views on its status.[319] The Tribunal stated: "The question of whether Ngāti Muriwai is an independent hapū or a part of Ngāti Rua[tākenga] is a matter for Whakatōhea to resolve."[320] Ultimately, the Tribunal was unable to make any specific findings regarding the exclusion of Ngāti Muriwai but noted the findings it had made in the first report.[321]

[249] Te Whakatōhea subsequently settled its claims with the Crown. The Deed of Settlement and the Trust Deed for the post-settlement governance entity do not include Ngāti Muriwai as a hapū.[322] That position is also reflected in the Whakatōhea Claims Settlement Act.[323] It is important to understand, however, that Treaty settlement mandate processes reflect Crown policy while MACA's requirements are legislative.

Ngāti Muriwai as an applicant group

[250] As noted above, s 9(1) of MACA defines applicant group to mean "1 or more iwi, hapū or whānau groups that seek recognition … of their protected customary rights or customary marine title". We consider that Ngāti Muriwai meets this definition. Even if Ngāti Muriwai is not a hapū in its own right, there can be no question that it could be characterised as a whānau or indeed a collection of whānau. We note, as submitted by Ngāti Ruatākenga, that not all groups that have not reached the status of hapū are automatically a whānau. However, Ngāti Muriwai presented cogent evidence of its existence as its own entity (whatever its particular form), based

319 Waitangi Tribunal *The Priority Report on the Whakatōhea Settlement Process* (Wai 1750, 2021) at 3–4.
320 At 171.
321 At 173.
322 Te Whakatōhea Deed of Settlement, above n 217, at [1.9]. At [2.171], the historical account describes the Ōpape Reserve subdivision being granted to Ngāti Muriwai, "a small hapū with close whakapapa connections to Ngāti Rua[takenga]". See also *Deed of Trust of Te Tāwharau o Te Whakatōhea* (3 April 2023), sch 6.
323 Section 13(1)(c).

on shared whakapapa and with around 1,000 members. Based on that evidence, we are satisfied that Ngāti Muriwai is entitled to bring an application as a s 9 applicant group.

[251] For completeness, we do not consider the definition of "applicant group" is dependent—via the words "*their* protected customary rights or customary marine title"—on a conclusive finding that such rights exist in fact and law. That would be to paddle the waka before it is launched. An applicant group need only assert that right. That assertion will then be tested via the negotiation or judicial process, depending on which Part 4 pathway is taken. If the former course is taken, the assertion may be challenged in the course of negotiation. If the latter course is taken and the applicant group seeks a recognition order, then that testing may occur in the hearing process, conceivably, by way of a preliminary question.

[252] We need say no more on this point here.

Ngāti Muriwai's CMT application

[253] It is unnecessary for this Court to reach a conclusion as to whether Ngāti Muriwai was a hapū of Te Whakatōhea in 1840, or whether it is so today. The latter, as we have said, is a matter for Te Whakatōhea and Ngāti Muriwai to determine, in accordance with tikanga, not for this Court. And, as we have noted, the question becomes whether the applicant group, however described, has rights meeting the test for CMT.

[254] As set out in the excerpt above from our first judgment, in tikanga there is a complex interweaving of rights and interests among iwi, hapū and whānau with respect to the common marine and coastal area.[324] As such, shared exclusivity is the rule rather than the exception. If Ngāti Muriwai's application is removed from this context, then—as it accepts—the evidence would not satisfy this Court on the balance of probabilities that it independently meets the test in s 58. However, to view the application in isolation would be artificial and ignore the fundamental role of tikanga in determining CMT applications. This means it is necessary to assess

324 SC judgment, above n 1, at [170], set out above at [140].

Ngāti Muriwai's claim as a part of Te Whakatōhea (whether that be as hapū or whānau). It is clear that the members of Ngāti Muriwai, as (at least) a whānau applicant group, are entitled to be included in a CMT order. They are, today, operating as a distinct community that has a continued connection with the takutai moana that meets the s 58 threshold, as shown by their whakapapa and the present-day evidence. That Ngāti Muriwai may have emerged after 1840 out of a prior hapū community with customary rights (a matter on which we need make no finding) does not invalidate its constant connection with the common marine and coastal area. Nor can the adoption of a new name by a sub-group who clearly whakapapa to a pre-existing, larger, group be sufficient to deny recognition of the customary rights of a sub-group.

[255] As noted above at [233], Ngāti Muriwai did not contend that it was able to hold a CMT order on its own. Instead, it advocated to be able to participate as a group within a Whakatōhea-wide CMT. The issue becomes how to reflect the interests of the people of Ngāti Muriwai in any joint CMT order. We agree with the Court of Appeal that Ngāti Muriwai should be able to participate in a CMT order. However, this Court will not require Ngāti Muriwai to fall under the application of a successful hapū group in order to participate. To do so would be for us to assume responsibility to determine the status of Ngāti Muriwai. That is for Te Whakatōhea, not the Court. Ultimately, the question of how to reflect the rights of Ngāti Muriwai (including by way of hapū or whānau group recognition) must be determined by the iwi in accordance with tikanga. Ideally, this should occur before the High Court hearing is resumed, but we leave that timing issue to the High Court to address.

Ngāti Muriwai's PCR application

[256] This matter follows on from the analysis above, though it raises a simpler contest. It is clear there is nothing in tikanga or MACA requiring the holders of PCRs to be hapū. In tikanga, rights are exercised by individuals (and groups) who claim back through the same descent lines. This includes whānau rights.

[257] It is clear that Ngāti Muriwai is entitled to PCRs. The most conservative reading of Ngāti Muriwai's status—that is, adverse to the position it asserts—is that it is a sub-group of Ngāti Ruatākenga which has adopted the ancestral name Muriwai to

express its independent lineage. Even on that reading, Ngāti Muriwai is entitled to PCRs. Continuity is established: it is not a completely separate and unrelated group. If it were, it would need to establish rights by tuku.[325] Here, Ngāti Muriwai can show that it is exercising resource rights now and that its ancestors were also exercising those rights. Whether or not those ancestors used the name Ngāti Muriwai does not impact this analysis.

Result

[258] We allow Ngāti Muriwai's appeal to clarify that MACA does not require a CMT outcome that ignores Ngāti Muriwai's distinct identity. Rather, it is possible, on a shared exclusivity basis, to provide a role for Ngāti Muriwai within the CMT area. How that should be done is a matter for the hapū of Te Whakatōhea and Ngāti Muriwai to consider and determine according to tikanga. We also find that the Courts below were correct to award PCRs to Ngāti Muriwai. Accordingly, the appeals of Ngāti Ruatākenga and the Attorney-General are dismissed.

Status of Kutarere Marae

[259] Kutarere Marae describes itself as a community that was established in the 1930s by a number of whānau who had been displaced from their traditional lands. Its eponymous marae and surrounding community is situated near the base of Ōhiwa Harbour.[326] It adjoins the Hiwarau Reserve to the east, their joint boundary being the Awawairoa stream.

[260] Kutarere Marae (the community) says it is the largest Whakatōhea marae and, while identifying as part of Te Whakatōhea iwi, does not affiliate with any particular hapū.[327] The kāinga (settlement) was founded in the 1930s and the first wharenui was opened in 1943. Kutarere Marae participated in the High Court as an interested party as it seeks recognition of rights to a CMT agreement by negotiation and agreement with the Crown, rather than a recognition order via judicial process. However, as the

325 MACA, s 9 definition of "mana tuku iho".
326 See Appendix B.
327 Te Upokorehe's position is that Kutarere Marae is one of its own marae.

Courts below have made findings that impact Kutarere Marae's ability to negotiate, it has appealed to this Court.

[261] We note that the more wide-ranging appeal by Kutarere Marae has narrowed into the single issue of whether Kutarere Marae may qualify as an applicant group, contrary to the conclusions reached in the Courts below.[328] In particular, this Court is not called upon to determine whether Kutarere Marae does, or can, meet the statutory test for CMT under s 58.[329]

The Courts below

[262] In the High Court, Churchman J concluded that Kutarere Marae did not qualify as an "applicant group" because "[o]n its own evidence, [it] is not a whānau, hapū or iwi."[330] The evidence in question was given by Barry Ruka Kiwara on behalf of Kutarere Marae, who stated that his grandfather had established a kāinga in Kutarere in the 1930s and that Kutarere Marae "aspires" to become a hapū of Te Whakatōhea.[331]

[263] This finding was upheld in the Court of Appeal, on the basis that the High Court's finding had been open to it.[332]

The parties' submissions

[264] Counsel for Kutarere Marae argued that its evidence clearly demonstrates that Kutarere Marae at least consists of a number of whānau. As such groups can apply under MACA, the Courts below were wrong to conclude that Kutarere Marae did not constitute an applicant group under s 9. Kutarere Marae asked that this Court overturn the finding that it is not an applicant group so that it may proceed with Crown negotiations.

[265] Te Kāhui argued that Kutarere Marae is a marae and that the Courts below were correct to conclude it was not an applicant group for the purposes of s 9. Te Upokorehe

---

328 Counsel for Kutarere Marae confirmed this was the only issue the Court was now seized of.
329 Again, that was a matter confirmed by counsel for Kutarere Marae.
330 HC judgment, above n 15, at [424].
331 See at [423].
332 CA judgment, above n 16, at [283] per Miller J.

also submitted that the Courts below correctly found that Kutarere Marae could not meet the test for CMT.[333] Given this focus, it did not address whether Kutarere Marae could meet the definition of one or more whānau.

Evidence

[266] Professor Walker described Kutarere Marae in the following terms:[334]

> The founders of Kutarere Marae were Hurae [Ihaia], of the Ngāi Tūranga hapū of Tūhoe, and his wife, Mere, who belonged to Ngāti Kahungunu. The refugees living around Kutarere and Ōhiwa made several aborted attempts to build a marae for themselves at different places. Finally Hurae and Mere agreed to have the marae on their land.[335] The Ngāi Tūranga people wanted to name the meeting house after their ancestor Raumoa, but Mere wanted it named Tamaterangi after her Kahungunu ancestor. Mere, being the owner of the land, had her way. Tamaterangi was built circa 1943. However, as a concession to Ngāi Tūranga, the flag for the marae was named Raumoa.
>
> Two sisters, Mira and Te Onewhero of Upokorehe, living on their land at Kutarere adjacent to the meeting house, decided to build a dining hall to complement Tamaterangi. They purchased timber from Rotorua and had the dining hall erected. It was named Ani-i-waho (Ani on the outside). This gift from the outside is incorporated, along with the land on which it stands, in the marae enclosure.
>
> Politically, the marae at Waiotahē and Kutarere are anomalies in the Whakatōhea territory. Although these marae come under the aegis of Upokorehe at Roimata Marae, who share their marae grants from the Whakatōhea Trust Board with them, they are not yet fully integrated into the polity of Whakatōhea.

[267] Kutarere Marae's status is contentious, although we do not understand the first two paragraphs of Professor Walker's account to be contested.

---

333 Te Upokorehe argued it would be contrary to Te Upokorehe tikanga for Kutarere Marae to hold a recognition order independently. It also raised mandate concerns and the fact Kutarere Marae did not exist at as 1840.

334 Walker, above n 255, at 171 (endnote omitted). We note that in the James Takamore proceedings, the Court of Appeal described Kutarere Marae as a "Te Upokorehe marae, governed by the tikanga of Tūhoe": *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [21] per Glazebrook and Wild JJ. The other Courts described Kutarere Marae in like terms: see *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [3], n 1 per Elias CJ; and *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [11].

335 We were told that that Hurae Ihaia bought a section at Kutarere after an argument with his relations at Roimata Marae. Professor Walker refers here to Mere being the owner of the land. We understand that this was privately acquired, but on the evidence before us we have not been able to ascertain precisely what the position was.

Kutarere Marae as an applicant group

[268] The definition of "applicant group" in s 9(1) of MACA is set out above at [102].

[269] Counsel for Kutarere Marae, Mr Sharp, acknowledged that Mr Kiwara's evidence did not claim that Kutarere Marae is an iwi, and that Mr Kiwara was equivocal as to its status as a hapū. However, Mr Kiwara was clear that the community consists of multiple whānau groups. The evidence was that there were 18 whānau affiliated to the marae, with mātāwaka (affiliations) from various hapū and iwi around New Zealand, and with each whānau electing a trustee under the marae's charter. In evidence, Mr Kiwara stated the marae and its whānau had primary tribal connections with Te Whakatōhea, and other tribal connections with Ngāi Tūranga, Ngāi Tūhoe, Ngāti Kahungunu ki Wairoa, Tūranga Pikitoi, Ngāti Porou and Te Upokorehe. He rejected the proposition that the marae's primary affiliation is with Te Upokorehe.

[270] A marae whose wharenui is an ancestor from Ngāti Kahungunu, and a wharekai whose name emphasises the fact that the marae serves a community of outsiders, creates considerable ambiguity in tikanga terms. Yet it appears that the Kutarere community comprises individuals and whānau with Te Whakatōhea whakapapa. Their refusal to adopt a hapū name—and their decision to instead express their identity through the marae itself—reflects that ambiguity. Nonetheless, as noted above, Kutarere Marae does not seek a recognition order from the Court. Rather it seeks any recognition of rights to a CMT agreement by negotiation and agreement with the Crown. As we apprehend matters, we consider the High Court was in no position to effectively disqualify it from that course by finding it was not an applicant group at all. Such a conclusion would be inconsistent with the evidence.

[271] We will therefore allow Kutarere Marae's appeal, finding that for the purposes of negotiation with the Crown, it is an applicant group. That conclusion, we emphasise, does not predetermine whether Kutarere Marae should succeed in establishing either PCRs or CMT.[336]

---

336 See above at [251].

Whakaari and Te Paepae o Aotea

Background

[272] Whakaari is a volcanic island with an area of approximately 238 ha and is located around 48 km north-west of the relevant stretch of the Bay of Plenty coastline. Around the late 1830s/early 1840s Whakaari was purportedly sold by Te Kepa Toihau and Apanui (a person, not the iwi—presumably Apanui Te Hamaiwaho of Ngāti Awa) to Hans Tapsell for two hogsheads of rum.[337] Such a transaction, if it happened, would have been invalid.[338] It does not seem to have been validated by the Old Land Claims Commission since in 1867 Retireti Tapsell, Hans Tapsell's son, applied to the Native Land Court for title to Whakaari for himself and his older sister Kataraina. Such an application could only have been made if the underlying native title had not yet been extinguished. That year, the Court awarded a grant of title in favour of Retireti and Kataraina Tapsell.[339] As we come to, however, there is also evidence of a pre-Treaty tuku or customary transfer of Whakaari to Te Whānau-a-Apanui. In any event, following the Native Land Court award and after a series of private sales, the island came into the ownership of the Buttle family who formed Whakaari Trustee Ltd. The island was declared a private scenic reserve in 1953.

[273] Te Paepae o Aotea is a group of small islands and rocks approximately 5–6 km from Whakaari Island and forms part of the Whakaari volcano. Te Paepae o Aotea is a Māori reservation vested in Toroa (rangatira of the Mātaatua Waka) for the purpose of a wāhi tapu for the benefit of all iwi of Mātaatua. The Department of Conservation manages the reserve.

[274] As Miller J stated in the Court of Appeal:[340]

> [301] Whakaari and Te Paepae o Aotea are uninhabitable islands which are taonga for all the applicant groups in this case. The largest of the islands in the Te Paepae o Aotea group, Paepae Aotea, has spiritual significance as the

---

337 We note that Hans Tapsell was also known as Philip Tapsell. In the 1867 Native Land Court hearing, it seems that Retireti Tapsell said that Whakaari had been gifted to his mother. The motives for this characterisation of the transaction have been questioned: see RP Boast *Whakaari (White Island) and Motuhora (Whale Island): A report to the Waitangi Tribunal* (Waitangi Tribunal, Wai 46 #B3, November 1993) at 29 and 59.

338 *R v Symonds* (1847) 1 NZLRLC 1 (SC).

339 Boast, above n 337, at 27–31.

340 CA judgment, above n 16.

> place where wairua (spirits) of the dead go before they journey back to the spiritual world to join their tūpuna. This connection is common to all of those who trace their whakapapa to the Mātaatua waka, including the iwi of Te Whānau-ā-Apanui, Ngāi Tai, Ngāti Awa and Whakatōhea. The volcanic plume from Whakaari is used as a tohu (sign) to show the direction of the wind, the weather pattern, water safety and the risk of eruption. The island is also a navigational landmark.

[275] In the High Court, the Whakatōhea applicant groups and Ngāi Tai claimed CMT in the area around Whakaari and Te Paepae o Aotea.[341] The pūkenga report identified that Ngāi Tai, Ngāti Awa, Te Whānau-ā-Apanui and the six groups forming the poutarāwhare (including Te Upokorehe) had customary interests in the area.[342] However, the High Court found that several applicants had been too late to amend their claims to include the area;[343] the pūkenga had indicated the applicant groups' rights fell short of CMT;[344] and shared exclusivity would be inappropriate as there was no unanimity as to its existence.[345] The lack of unanimity arose because two interested parties (Te Whānau-ā-Apanui and Ngāti Awa) asserted rights in the area to the exclusion of (at least some of) the applicant groups. Neither Te Whānau-ā-Apanui nor Ngāti Awa sought to have their claims in relation to Whakaari and Te Paepae o Aotea determined in the High Court. Churchman J made clear that his finding did not determine the nature of their rights.[346]

[276] Similarly, the Court of Appeal was not persuaded that the applicant groups could satisfy the tests for CMT orders with regard to Whakaari and Te Paepae o Aotea.[347] The Court noted that it would have allowed the appeal if the only issue had been that the amendments to the applications were too late. However, it emphasised that the High Court had also determined the applicant groups could not

---

341 We understand that in the course of cross-examination in the High Court, the applicant for Ngāi Tai, Muriwai Maggie Jones, clarified that Ngāi Tai only sought PCRs (rather than CMT) over Whakaari. However, in the Court of Appeal Ngāi Tai said the High Court was wrong to find it did not meet the tests for CMT at Whakaari and Te Paepae o Aotea. In the High Court, Te Upokorehe indicated that they were content with joint title in relation to Whakaari, but their position now is unclear. For these purposes we treat them as part of the wider group. The positions of these applicant groups can be clarified in the rehearing.

342 HC judgment, above n 15, at [466], and see above at [124]. While the pūkenga said it was not their role to determine whether a group constituted an iwi, they categorised Te Upokorehe as part of Te Whakatōhea.

343 At [473] citing *Re Ngāti Pāhauwera Development Trust*, above n 170.

344 While they were akin to PCRs, the resource rights in question were excluded from supporting a PCR order under s 51: HC judgment, above n 15, at [474]–[475].

345 At [476].

346 At [478].

347 CA judgment, above n 16, at [314]–[325] per Miller J.

support a recognition order on the evidence.[348] The Court of Appeal agreed with that finding.

The parties' submissions

[277] In this Court, Te Kāhui sought a joint CMT over Whakaari and Te Paepae o Aotea with Ngāti Awa, Ngāi Tai and Te Whānau-ā-Apanui and said the Court of Appeal was wrong not to grant them CMT.[349] Counsel submitted that the uninhabitable and offshore nature of Whakaari is relevant to assessing its relationship with tangata whenua and that the spiritual significance of the area is particularly important. Counsel also argued that that there was no tikanga or evidential basis for finding Te-Whānau-ā-Apanui has mana that would preclude shared CMT. Rather, the Courts below relied on flawed assumptions, misinterpreted evidence and ignored evidence which clearly shows mutual recognition of mana whakahaere (controlling authority) and shared rights and responsibilities in this area sufficient to meet the test in s 58.

[278] Similarly, Te Rūnanga o Ngāti Awa (on behalf of Ngāti Awa) supported a shared CMT between Ngāti Awa, Te Whakatōhea and Te-Whānau-ā-Apanui. However, Ngāti Awa diverged from Te Kāhui as to the inclusion of Ngāi Tai; Te Kāhui supported its inclusion while Ngāti Awa objected.[350] Counsel for Ngāti Awa stated that either this Court could grant the shared CMT in this proceeding or remit the matter to the High Court or Ngāti Awa could continue to pursue negotiations with the Crown.

[279] In response, Te Rūnanga o Te Whānau (on behalf of Te Whānau-ā-Apanui) argued that Te Whakatōhea's and Ngāi Tai's associations with the area do not meet the threshold in s 58. Instead, one of its hapū, Te Whānau a Te Ehutu, holds mana whenua at Whakaari and in the surrounding takutai moana. The primary basis for this assertion of mana was that around the 1820s Whakaari was given to the hapū by a Ngāti Awa rangatira in accordance with tikanga (tuku), at the behest of a Ngāti Awa chief, as utu or compensation for Te Ehutu travelling to Whakatāne to avenge the death of his

348 At [300] per Miller J.
349 Ngāi Tai did not appeal the Court of Appeal decision. We add that the focus has tended to be on Whakaari, with less reference to Te Paepae o Aotea throughout the hearing before us. The exact position around claims to Te Paepae o Aotea is a little unclear.
350 As noted above n 341, it is unclear whether Ngāi Tai seeks CMT in this area.

son.[351] The submission was also made that Te Ehutu alone protested over the next 40 years about the sale of Whakaari to the Tapsell interests. Mana has been retained since then. Te Whānau-ā-Apanui accepted that there is an issue to be resolved as between them and Ngāti Awa arising out of the transfer in the 1820s which is the subject of challenge by Ngāti Awa (and Te Kāhui).

The evidence

[280] The parties rely on a number of aspects of the evidence to show the exercise of mana in relation to, and the use and occupation of, Whakaari. We provide only a brief overview of the evidence, focusing on that relating to tītī (muttonbird) harvesting, fishing and spiritual significance. We are aware that, as Te Kāhui submitted, in separating out these various aspects, there is a risk of losing sight of the overall picture. But, to anticipate our conclusion, because whether the test for CMT is ultimately met will be determined by the High Court, it is appropriate we keep our discussion short and only describe some key points.

[281] To provide some framework for this overview, it is helpful first to restate that in responding to the case for Te Whānau-ā-Apanui we are looking at the evidence only in terms of two aspects of the criteria for CMT in s 58. That is, first, whether the applicant group "holds the specified area in accordance with tikanga" in terms of s 58(1)(a); and, second, the requirement there be "exclusive use and occupation" of the area in s 58(1)(b)(i). To illustrate the scope of the issues as we understand it, the focus here is not on whether use and occupation has been interrupted per se but, rather, on whether there was ever exclusive use. That is the issue because Te Whānau-ā-Apanui maintains that it alone (apart from the need to resolve issues with Ngāti Awa) can show exclusive use and occupation since the customary transfer in the 1820s.

[282] When we subsequently make our assessment of where the evidence takes us, we will discuss in more detail what our first judgment said about how these two aspects of s 58 of MACA, put in issue here, are to be constructed. But, as a means of providing

351 Gilbert Mair *Reminiscences and Māori Stories* (Brett Printing and Publishing, Auckland, 1923) at 60.

some framework for our consideration of the evidence, we note that in discussion about what was meant by holding "in accordance with tikanga", this Court referred to the fact that through:[352]

> … acts of reverence, exploitation, control and memory, relevant places within a seascape were named and located, the ancestors belonging to those places were identified, the whakapapa that conveyed their rights through the generations was remembered, and the rights themselves were exercised.

[283] It is helpful also to set out some of the factors identified in our first judgment as potentially supporting a conclusion that the applicant group had demonstrated sufficient use and control of an area as against third parties. Those factors included control over access points to the takutai moana; the exercise of non-commercial customary fishing rights; the presence of fishing grounds "belonging" to a group and which may be used exclusively and kept confidential by that group; the imposition of rāhui and their observance by third parties; and involvement in resource management and other regulatory processes concerning the takutai moana.[353] This Court, in agreeing that these indicators would be relevant, emphasised that the list was neither exhaustive nor cumulative. It was what they shared in common that would be important. This Court continued:[354]

> Rather than isolated acts or circumstances, they must reflect that the applicant group still uses and relates to the claimed seascape in a way that is integrated or holistic—that is, as part of a continuing order within the applicant group community.

[284] Moreover, this Court indicated that other factors may also be seen as relevant, such as engaging in tikanga-based ceremonies in relation to the area, including, but not solely, the imposition of rāhui; organising or being involved in collective activities reflecting practical kaitiakitanga of the area; and maintaining deep cultural and spiritual connection with the area, for example, through regular performance of karakia, and regular repetition of waiata and so on at hui or other public occasions.

[285] With this in mind, we turn to key areas of evidence that were said to demonstrate the required relationship with the takutai moana in respect of Whakaari

---

352 SC judgment, above n 1, at [140] (footnote omitted).
353 At [162].
354 At [163].

and Te Paepae o Aotea. As we note in the course of this discussion, there were other groups involved in activities in the takutai moana, including Ngāti Awa. Given the argument we are addressing, we are focusing primarily on the evidence that supports Te Whakatōhea rights. In any event, the Courts below did not make a decision in relation to Ngāti Awa.

Tītī

[286] Whakaari was known for its rich tītī population. Tītī lived in burrows, and harvesting of them by both Te Whānau-ā-Apanui and Te Whakatōhea was an annual event in the muttonbirding season until the late 1960s. Boats would take hunting groups to the island and the groups would spend several days encamped there (depending on the weather) despite the fact Whakaari is essentially uninhabitable.

[287] Te Kou Rikirangi Gage, on behalf of Te Whānau-ā-Apanui, said that resource use by others may be permitted within their rohe, but that the permission to be there was "a privilege and does not establish a right". The Court of Appeal drew support for the claim by Te Whānau-ā-Apanui to primary interests in Whakaari from the evidence about the unwritten order for different iwi to harvest tītī. Heremaia Warren, of Te Whakatōhea, put it in this way:

> 46. The tikanga for using White Island used to be (when the season was ready to be opened), that the people who had first claim on White Island was Te Whānau-ā-Apanui. To the Māori around here, that was their island. I do not know why, but it was always known that Te Whānau-ā-Apanui had first rights.
>
> 47. What would happen when the season was open, the boats and launches would be booked to go out from Ōpōtiki. Te Whānau-ā-Apanui would go first, and they'd come back. Whakatōhea went next and when they got back Tūhoe went out. If there were still birds left when they got back then Ngāi Te Rangi were next.
>
> 48. You may have noticed that I missed out Ngāti Awa. The agreement was they had exclusive rights to Whale Island for their mutton birds or tītī. In the old days they had it sorted out like that – We agreed not to touch Whale Island, if they agree to miss the first round of tītī hunting at [White] Island.

[288] If there were still birds remaining, Mr Warren said the cycle began again in the same order. Ngāti Awa could come in on the second round.[355] Robert Tuahuru Edwards (on behalf of Ngāti Muriwai and as the then-chair of the Whakatōhea Māori Trust Board) accepted that the order was as Mr Warren set out and said that this reflected their shared long history on the island. However, he rejected the suggestion put to him in cross-examination that Te Whānau-ā-Apanui was the predominant iwi, saying that "when we share we share evenly". He said he would like to think that all interests out there were even, adding, "whether they are or not" was "another story".

[289] Te Riaki Amoamo, a kaumātua and senior tohunga of the Ringatū church who has connections to the ancestral land of Ngāti Ruatākenga, said in cross-examination that he had heard about the priority order. But he also maintained the interests were shared interests. He stated that there was no one to say "Where's your passport?" when he visited Whakaari and nor, when he went there, did he see any signs saying "You are now entering Whānau-ā-Apanui".

[290] In support of Te Kāhui's claim, there is evidence showing that the particular method of catching tītī had to be taught by kaumātua. Te Kāhui also pointed to the evidence about certain muttonbird areas on the island that only particular hapū would use. As we have mentioned, Te Whakatōhea physically occupied the space (sometimes for days) and obtained food for the survival of its people. Julie Te Urikore Lux (of Te Whakatōhea), in her affidavit, said: "We thought it belonged to all of us. Because of the kai."

[291] It is relevant also to consider the approach of the Crown in relation to the harvesting of tītī. After the enactment of the Wildlife Act 1953, the Grey-faced Petrel (Northern Muttonbird) Notice 1957 authorised the Whakatōhea Tribal Executive Committee and the Horouta Tribal Executive (of Te Whānau-ā-Apanui) to issue

---

355 Muriwai Maggie Jones (applicant on behalf of Ngāi Tai's claim) agreed in cross-examination that Te Whānau-ā-Apanui went first due to its greater interest and Adriana Edwards (applicant on behalf of WKW's claim) also attributed the first place in the order to Te Whānau-ā-Apanui, having kaitiakitanga over Whakaari. Muriel Ngahiwi Smith Kelly (of Ngāti Patumoana) said the order was Te Whānau-ā-Apanui, Te Whakatōhea and then Ngāti Awa. Tuiringa (Manny) Mokomoko said that Te Whakatōhea went first but his view seems something of an outlier.

harvesting permits.[356] David Alexander referred to what he saw as acceptance by the Crown of a Te Whakatōhea harvest right on Whakaari, noting as follows:[357]

> The Crown went out of its way to consult Whakatōhea hapū (and other northern North Island hapū), established a management regime specifically to accommodate the interests and needs of the hapū, and gave the hapū 'space' to manage their own affairs and their relationship with other hapū.

[292] Muttonbirding ceased to be allowed on Whakaari in 1968, but there is no suggestion that this had any impact on takutai moana rights.[358]

Fishing

[293] Turning then to fishing, Te Kāhui relies on evidence as to the significance of Whakaari to Te Whakatōhea's fishing practices. The evidence on this included that Whakaari is an important tohu for fishers and divers as to whether it is safe to go out. Ms Hata described tohu as "a matter of life or death for us".

[294] Further, Te Whakatōhea has identified fishing grounds near Whakaari. Bradie Anne Paul (of Ngāti Ira) described the water around Whakaari as growing their "kai cupboard". Ms Mokomoko also spoke of an old map showing deep sea fishing grounds past Whakaari that has since been lost. For the purposes of the MACA application, Te Whakatōhea has identified the customary fishing grounds within the claimed common marine and coastal area, and we were provided with a map entitled "Nga Taunga Ika o Whakatōhea" showing 14 grounds. Mr Amoamo said that Te Whakatōhea fishing grounds were named and identified by reference to the type of fish available.[359] The ground closest to Whakaari is located by using key landmarks as Donald Ati Kurei (of Ngāti Ira) described. The exact position is passed down through tradition and is important as even slight inaccuracy can mean reaching deep water with no anchorage.[360] As noted by Miller J in the Court of Appeal, the next

---

356 Clause 7 and sch 1.

357 David Alexander *Ngā Take Taio: Environmental Issues Relevant to the Historical Relationship Between Whakatōhea Hapū and the Crown* (Office of Treaty Settlements and Whakatōhea Pre-Settlement Claims Trust, October 2017) at 80.

358 Walzl, above n 229, at 261.

359 We were provided the names of these fishing grounds but the publication of these names is for Te Whakatōhea.

360 Stirling, above n 216, at [158].

closest fishing ground appears to be within the 12-nautical-mile zone around Whakaari.[361]

[295] Anna-Marei Kurei (of Ngāti Ira) stated that oil from bramble sharks fished in the area was used to produce red ochre.

[296] In response on this aspect, Te Whānau-ā-Apanui relied on the following excerpt from the cross-examination of Mr Wallace Aramoana referring to the history about Te Whānau a Te Ehutu being given Whakaari or priority to it:

> Q. So, sorry my translation would have also been slightly different. Did you say, just to clarify, that a lot of people went out to Whakaari to gather kai but Te Ehutu has the mana out there?
>
> A. Well. Who I am to say who has and who hasn't?
>
> Q. Ka pai.
>
> A. But it's written history that somewhere along Ehutu was given or the priority to that land so who am I to dispute that? What I am saying is and I have these fishing grounds here that I do go out fishing out there and around it.
>
> Q. Mmm.
>
> A. But when I do I go out there for the cupboard, for the pot. I don't go out there with the intention of taking mana off anybody. I go out for the resources.
>
> Q. Ka pai.

[297] Te Whakatōhea has been involved in efforts to preserve marine life in the area. In 1998, the Whakaari Marine Protection Steering Committee was formed to develop proposals for protecting the area's marine life.[362] The Committee comprised representatives from Ngāti Awa, Te Whakatōhea, charter boat operators, a representative of the landowners, commercial fishermen, tourist and marine mammal viewing businesses, an underwater dive club, the then Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa and the Department of Conservation.[363]

---

361 CA judgment, above n 16, at [308].
362 Derby, above n 275, at 319.
363 At [372].

Spiritual significance

[298] Te Kāhui emphasised the spiritual significance of Whakaari and Te Paepae o Aotea for Te Whakatōhea. For Te Whakatōhea, Whakaari is tapu and is described as a tipua (a supernatural being). Te Paepae o Aotea is also important for all of Mātaatua (including Te Whakatōhea) because, as Miller J said in the excerpt above, it is where the spirits of the deceased go before returning to the spirit world.[364] Reference was made to the Whakatōhea waiata called Maruhia, which begins with reference to Whakaari.[365]

[299] Te Whānau-ā-Apanui also referred, for example, to traditional narratives around Whakaari linked to them and to Ngāti Awa, Te Arawa, Ngāti Tūwharetoa and Ngāi Tūhoe, but not Te Whakatōhea or Ngāi Tai. They also note that various witnesses accepted they had mana in the area.

[300] Other aspects are discussed in the evidence, but we will now focus on the imposition of rāhui given it is accepted as comprising the assertion of mana and of control over an area, so is relevant to both aspects of s 58 in issue here.

[301] In 2019, there was an eruption on Whakaari which killed 22 people. Subsequently, several groups placed rāhui over their rohe moana. The relevant groups were: Ngāti Awa, Te Whakatōhea, Ngāi Tai, Te Whānau-ā-Apanui and the iwi groups further to the west in Tauranga (following the precedent of the region-wide rāhui laid by the ancestress Muriwai in the 13th or 14th century). It is clear that the rāhui extended over Whakaari and the area around it, though it is difficult to assess the exact boundaries of the various rāhui, and exactly who did what is contested.[366] Mr Amoamo said the rāhui included "the water between the island, White Island and the main land" including the mussel farm, which is some 8.5 km out to sea.

---

364 CA judgment, above n 16, at [301], and see above at [274].

365 Members of Te Whakatōhea also spoke of the tohunga Te Tahi o Te Rangi, discussed above at [218] in the evidence of Hemi (James) Jeffrey Wade Pirihi. Te Tahi o Te Rangi was abandoned at Whakaari but rescued by taniwha.

366 For example, in their written submissions, Te Whānau-ā-Apanui said Te Riaki Amoamo was involved not in placing, but in lifting, the rāhui although this was not a focus of their oral argument. As we discuss below at [314] it is not necessary for us to resolve these issues.

[302] It was agreed that it would not be in accordance with tikanga to place a rāhui over an area within the control of another group. The point is illustrated by the evidence of Mr Amoamo, who said this:

> More recently, the eruption at Whakaari in December 2019 resulted in a rāhui being imposed on the ocean for some weeks afterwards, extending from the tribal areas of Te Whānau ā Apanui and Whakatōhea across to Ngāti Awa. The karakia to lift the tapu were performed on 27 December 2019, and I was asked to lead the karakia for Whakatōhea. We were taken out to sea in a boat. I was asked to say a karakia on the wharf at Whakatāne before we left, and I said no because we were within Ngāti Awa's rohe. I waited until everyone was on the boat and because it was a Whakatōhea boat I was able to commence my karakia. From there we went out to the Whakatōhea mussel farm within our tribal area where I performed further karakia.

[303] It is common ground that there were no objections to the rāhui at the time on the basis that the group placing the rāhui were doing so outside of an area where they had mana whakahaere. As we discuss shortly, Te Whānau-ā-Apanui said that was because, given the nature of the tragedy, it would not have been appropriate at the time to object.

Our analysis

[304] Before making some observations in relation to this evidence, it is helpful to restate the discussion in our first judgment about the requirements in s 58 that an applicant group holds the area in accordance with tikanga and exclusively uses and occupies the area.

[305] We noted first that for PCRs the applicant had to show interests "exercised" in accordance with tikanga.[367] By contrast for CMT, the threshold was a higher one, that is, "holds" (rather than merely "exercises"). This Court drew from this distinction that for CMT the customary interest could not simply be a set of unconnected activities or uses. Rather, "[i]t must instead amount to an integrated or holistic relationship with a seascape."[368] This Court continued:[369]

> [141] … "holds" suggests that, in addition to the claim of a special relationship with a seascape and the carrying out of activities there, *mana* over the relevant area is claimed and exercised. We also agree with the Court of

---

367 SC judgment, above n 1, at [140].
368 At [140].
369 Emphasis in original, footnotes omitted.

> Appeal that the exercise of mana as control and as the practical expression of the claimed take, or source of right, will be a focus. … Mana—a quintessentially Māori principle—also carries with it notions of control. That said, as a guard against the common law's tendency to disaggregate for the purpose of analysis, it is important to understand that maintaining what might, in western terms, be called a spiritual relationship with place, and carrying out activities in that place, are themselves expressions of mana. Mana, being the corollary of kaitiakitanga, is about the *way* these things are remembered, maintained and done.
>
> [142] The second implication follows from "holds" being in the present tense. Demonstrating that the seascape was held in the past (as tikanga generally requires) will not be enough. It must be demonstrated that the tikanga relationship with the claim area is a continuing one. This is consistent with the tikanga principle of ahi kā, as we have discussed. It follows that "holds" must require that the customary interest has not become ahi mātaotao in accordance with tikanga. Relevant to that inquiry will be whether connection with the claim area has been lost, merely impaired (ahi teretere) or even facilitated through the effects of colonisation.

[306] Turning then to exclusive use and occupation, this Court emphasised that the inquiry was a contextual one and, in particular, the context of the place was important. A contrast was drawn between dry land and, as here, the seascape. The seascape, for example, cannot be occupied in the same way as dry land. The nature of the place meant that both the indicia and intensity of use and occupation will be distinctive to the seascape. The relevant passages of the first judgment are as follows:

> [154] … 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". But these general propositions can only take the inquiry so far. Just what those acts of occupation must be and how this intention and capacity to control is expressed will depend on context. That context will include the nature of the place claimed and of the community claiming it, the nature of the customary relationship with the place, including its use, and the prior law—tikanga—regulating both relationship and use.
>
> …
>
> [158] Under MACA, the context of place is particularly significant. Canada and Australia have struggled in applying their tests to the marine and coastal area. Potential inconsistency with rights of navigation, fishing and innocent passage has complicated matters. MACA has avoided these barriers by declaring that customary rights and public rights of access, navigation and fishing may coexist. The acceptability of this kind of coexistence must colour what it meant by "exclusive".
>
> [159] It must also be remembered that the seascape is not dry land. It cannot be fenced off, built up or otherwise occupied in the same way that dry land can be. Nor, until relatively recently, was it possible (or even necessary) to farm areas or resources within the seascape. It follows that the indicia and intensity of use and occupation will be distinctive to the seascape.

…

> [161] Considering all of the above, use and occupation cannot mean actual physical occupation of the seascape is required. Occupation is clearly meant in the sense of control rather than residence. Likewise, as acknowledged by the Attorney-General, exclusive cannot mean literally to the exclusion of all others. The Act's context (seascape) and purpose (reconciliation) are quite inconsistent with that construction. Instead, making extensive use of the space (in light of its nature and resources) coupled with an intention and some capacity to assert control over it, to the extent permitted by law, is what is intended by the test and supported in the cases. This will be consistent with the existence of the holistic or integrated tikanga-based relationship with the area required by the first component of the CMT test. So, where whānau, hapū or iwi have maintained a strong cultural connection with an area, harvested and protected its resources, and asserted mana in a practical way in relation to it, that may be sufficient on the mix of facts in a particular case. That may be so notwithstanding third-party use of the area.

[307] The question we need to address in light of this construction of the required approach is whether the Court of Appeal correctly approached the evidence in reaching the view the High Court was right that the applicant groups did not meet the test for CMT. The Court of Appeal relied on two propositions. First, that the evidence about offshore fishing grounds while "consistent with customary use rights" did not show exclusivity.[370] In this context the Court also saw the evidence of use of the coastal marine area around Whakaari as "closely tied to tītī harvesting, which was strictly seasonal and not in itself a use of the marine and coastal area".[371]

[308] Second, the Court said there was "recognition in the evidence that Te Whānau-ā-Apanui held superior rights to Whakaari".[372] The Court referred in this respect to the customary transfer from Ngāti Awa in the 1820s relied on by Te Whānau-ā-Apanui. While there was some dispute about this, the Court said "all agree that Te Whānau-ā-Apanui took precedence in visiting Whakaari to harvest tītī. They appear to have controlled whether and when other iwi shared in the resource".[373] The Court of Appeal also relied on the pūkenga responses that Te Whānau-ā-Apanui has mana whenua according to tikanga at Whakaari. The Court said that the placement of rāhui after the loss of life in the 2019 eruption at Whakaari "need not show that other iwi speak for Whakaari alongside Te Whānau-ā-Apanui".[374]

---

370 CA judgment, above n 16, at [309] per Miller J.
371 At [308] per Miller J.
372 At [312] per Miller J.
373 At [312] per Miller J.
374 At [313] per Miller J.

[309] In our view, the Court of Appeal in this way asked and answered the wrong questions when considering an offshore area like Whakaari and Te Paepae o Aotea. We say that because it is clear from our review, although brief, of the evidence that there is an area or zone around Whakaari where there is sufficient evidence before the Court of relationships with the seascape maintained by a number of groups and coordinated among them that goes beyond mere resource use. The size of this area or zone is unclear, but it is probably not as extensive as indicated in the applications. Nonetheless, there is sufficient evidence to warrant remittal back for reconsideration. The evidence also shows that these relationships have continued on despite the claimed tuku of Whakaari in the 1820s, its purported sale to Mr Hans Tapsell, the Native Land Court award to Mr Tapsell's children and the subsequent transfers of Whakaari by them.

[310] That evidence needs to be considered in light of the nature of the place. As Professor Richard Boast observed, Whakaari is "a famous landmark and it would be expected that many iwi of the Bay of Plenty coast would be likely to assert some kind of interest in it".[375] The fact that it was not habitable also made it less likely that one group alone could establish itself there in a manner suggestive of exclusive rights as against other groups. Further, as Professor Boast said, it contained valuable resources including tītī, bramble sharks and sulphur.[376]

[311] In relation to the evidence about the fishing grounds, Te Whānau-ā-Apanui noted that only one of the fishing grounds is near Whakaari and submitted that it was merely practical for iwi to fish while on the island harvesting tītī. The Court of Appeal accepted this line of reasoning and saw the evidence about fishing grounds as linked to the tītī gathering. But the fact that it was most practical to exploit multiple resources around Whakaari in a single journey does not logically mean that the relationship with the resource is merely one of occasional use. On the contrary, the evidence of the spiritual significance of Whakaari and Te Paepae-o-Aotea, the naming of fishing grounds and continued maintenance of that mātauranga, and the coordination of use

---

375 Boast, above n 337, at 57.

376 At 57. Tony Walzl describes various attempts to mine sulphur between 1870 and the 1930s but these were frustrated by the deaths of a number of workers and various practical issues arising out of the harsh environment: Tony Walzl *Te Whānau ā Apanui Hapū and the Common Marine and Coastal Area* (14 February 2020) at 27.

among multiple iwi along an extensive mainland coast all tend to suggest that a more holistic relationship exists.[377]

[312] Nor does the Court of Appeal's approach take sufficient account of the nature of the place. The practicalities, such as distance and weather conditions,[378] would also have been relevant, along with the difficulties of staying on the island. There would need to be a reason to go out there but that does not mean, in context, either an absence of mana over the area or that fishing these grounds cannot reflect shared exclusivity. Rather, the indicia and intensity of the use and control can be seen as a reflection of the nature of the seascape here rather than evidence that control is not possible.

[313] Various explanations were advanced as to why Te Whānau-ā-Apanui went first in harvesting tītī. The Court of Appeal considered they controlled access. This aspect may require further testing of the evidence.[379] But priority in and of itself, while important, does not necessarily mean exclusivity. It may do, but that is not axiomatic.[380]

[314] Te Whānau-ā-Apanui said its lack of protest about others placing a rāhui over areas within its rohe is explicable by the scale of the tragedy and the exceptional nature of the circumstances involving, as was the case, the loss of lives. Whether that approach will carry the day is not for us to decide. We would not have to determine who has the right to impose rāhui over particular areas unless the evidence was clear that Te Whakatōhea had no rights in this respect. The evidence is far from clear on that. Indeed, what is clear is that Te Whakatōhea was involved in the latter-day imposition of a seascape-wide rāhui that is reflective of the kind of relationship with the seascape referred to in our first judgment. The evidence was the rāhui were in place for several weeks and were respected, including by third parties. It reflects a

---

377 See Erueti, above n 263, at 42–43; and SC judgment, above n 1, at [40], [170] and [195]. Given the evidence we have referred to from Te Riaki Amoamo above at [289], we are unsure as to the basis on which the Court of Appeal considered the record on this aspect was unclear.

378 Lawrence Tukaki-Millanta *A Report to the Waitangi Tribunal on Behalf of Te Whānau-A-Te-Ēhutu on the Whakaari Claim (WAI-225)* (May 1995) at [6.3].

379 For example, it may be that a possible counter-description was provided by Heremaia Warren in 2020 when he framed the process as iwi working together to determine the location of the birds.

380 See our reference to Associate Professor Erueti's description of tikanga-based land rights above at [200].

strong form of regulatory control. The rest of the details have to be determined by the High Court.

[315] In drawing these threads together, there is a helpful summation of the evidence we have discussed in the Crown submissions in this Court. The relevant passage is as follows:

> There was evidence of the [Whakatōhea] hapū imposing rāhui over the sea out to Whakaari, the existence and use of fishing grounds significantly offshore, mapping evidence which contained precise descriptions of fishing grounds and locations of underwater features (such as rocks, the nature of the sea floor and the particular types of fish caught in these locations), and historical evidence of Whakatōhea being involved in shipping and regular travel across the sea to both Whakaari (for muttonbirding) and Te Paepae o Aotea (which is Māori customary land vested for all of the Mātaatua waka).

[316] As this passage indicates, the end result of the evidence is to make clear there is an overlapping matrix of rights and interests, administration and control with various parties participating in this framework. The question is not whether Te Whakatōhea's rights existed at all, but rather, how to construct the matrix of rights that is clearly present in context. In undertaking that construction, this Court in our first judgment said the exercise was contextual. That contextual aspect is missing from the assessment in the Courts below.

[317] Because the right question has not been addressed, we have determined that the matter should be remitted back to the High Court for rehearing. We do not consider it is possible or appropriate for us to determine whether CMT should be granted. For a start, while Te Whānau-ā-Apanui says its rights are so strong as to exclude all others bar, possibly, Ngāti Awa, their limited involvement in the proceedings makes it difficult to reach a definitive conclusion. We add that the existence of collateral procedures, namely, the prospect of negotiations with the Crown, which are unconnected (or barely connected) with the Court processes under MACA can be awkward. This is the reality of the dual pathways. While we respect Te Whānau-ā-Apanui's decision to negotiate with the Crown, if it seeks to negate the claims of Te Whakatōhea, it may need to consider whether to take a more active role in the court proceedings.

[318] Further, we do not immediately see any bar to Ngāi Tai and Te Upokorehe being included in the rehearing on this aspect. If there are objections to this course, they can be dealt with in the High Court.

[319] Finally, we are conscious in remitting this issue back to the High Court that much time and resources have already been put into the evidence and testing that evidence. It is important the matter not simply start again entirely. As all of the parties participated in the High Court to some degree, the record of the evidence and testing of it would be available for the High Court. If counsel want to recall a witness or call a new witness, they will have to make a case for that in the High Court.

[320] In summary, Te Kāhui's appeal in relation to Whakaari and Te Paepae o Aotea is allowed. We remit the matter to the High Court.

Other matters relating to CMT Orders 1 and 2

Remittal of CMT Order 1

[321] Te Kāhui appealed from the decision of the Court of Appeal to remit CMT Order 1. The Court of Appeal had remitted this order as it concluded the High Court needed to consider Te Upokorehe's claim to sole exclusivity in this area and had failed to consider Ngāti Awa's interests in the Disputed Area.[381]

[322] In support of its appeal, Te Kāhui initially argued that the Court of Appeal was wrong to remit CMT Order 1. Counsel subsequently clarified that Te Kāhui accepted a rehearing would be necessary in relation to the Disputed Area. It is not clear whether Te Kāhui accepted remittal concerning the rest of the area covered by CMT Order 1.

[323] It is appropriate to remit the entire area covered by CMT Order 1. It is plain that there is at least consensus regarding the need to reconsider the Disputed Area. Further, Te Upokorehe also argues exclusive rights and notes that the current CMT Order 1 covers an area over which it does not seek recognition. These matters can be best addressed in the High Court on remittal. The High Court will also be able to address this Court's conclusions on the issue of navigable rivers in relation to the

[381] See CA judgment, above n 16, at [285]–[286] and [293] per Miller J. See also above at [132].

boundaries of CMT Order 1. Accordingly, Te Kāhui's appeal challenging the remittal of CMT Order 1 is dismissed.

[324] WKW appealed the boundaries of CMT Order 1. Given this Order is being remitted to the High Court, there is no need to determine this issue.

Boundaries of CMT Order 2

[325] In the High Court, Churchman J made CMT Order 2 in relation only to the western part of Ōhiwa Harbour.[382] This reflected Ngāti Awa's interest in that part of the harbour. It was unclear what was intended in terms of the eastern part of Ōhiwa Harbour.

[326] The successful applicants in relation to CMT Order 2—the four hapū within Te Kāhui, Ngāti Ngāhere, Te Upokorehe and Ngāti Awa—are agreed that, for simplicity, there should be only one CMT order relating to the Ōhiwa Harbour. This has also been the basis on which the successful applicants have approached subsequent matters.

[327] We agree. Accordingly, we formally amend CMT Order 2 to capture the Ōhiwa Harbour in full.

Procedural matters

Applications to adduce further evidence

[328] Te Kāhui, Whakatāne District Council, and Ngāti Muriwai and Kutarere Marae sought leave to adduce further evidence. Section 105 of MACA allows a 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.

[329] Te Kāhui sought to adduce two affidavits concerning tikanga Māori. The affidavits were by Professor Tā Pou Temara and Dr Moana Jackson. Tā Pou Temara's affidavit was filed as part of the Stage Two High Court hearing and

---

[382] HC judgment, above n 15, at [66(b)], and see above at [8].

Dr Jackson's affidavit has been filed in a different MACA proceeding. Te Kāhui submitted that the Court would be assisted by having access to the affidavits' general expositions of tikanga as law relevant to the takutai moana. Te Whānau-ā-Apanui opposed the application, submitting that the affidavits are not fresh updating evidence as substantial evidence on tikanga has already been heard by experts. While Te Whānau-ā-Apanui acknowledged that the majority of the evidence is not objectionable, it opposed the fact evidence in the affidavit of Tā Pou Temara relating to Whakaari. This is because Tā Pou Temara was only asked to review evidence of experts of Te Whakatōhea and did not review the evidence of Te Whānau-ā-Apanui. It is argued that introducing the evidence at this late stage would prevent Te Whānau-ā-Apanui from testing it through cross-examination.

[330] Given we are remitting CMT Order 1 and the matters relating to Whakaari and Te Paepae o Aotea, we leave it to the High Court to determine whether to allow Te Kāhui's application.

[331] Whakatāne District Council sought leave to file affidavit evidence which had originally been filed as part of the Stage Two High Court hearing as a supplementary bundle. The affidavits set out the relevant structures and assets owned by the Council. There were no objections to the evidence being filed. We grant the application to adduce the four affidavits listed at [3] of the memorandum of counsel on behalf of Whakatāne District Council as an interested party dated 4 October 2024.

[332] Finally, at the hearing counsel for Ngāti Muriwai and Kutarere Marae filed an affidavit by Roger Townshend—who described himself as a proposed expert in Canadian First Nations' Aboriginal title and rights.[383] The affidavit has been previously filed in the Waitangi Tribunal and compares Canadian and New Zealand jurisprudence. We grant the application to adduce this affidavit.

---

383 We note that it is unclear whether counsel for Ngāti Muriwai and Kutarere Marae sought leave to adduce this evidence. However, given it is evidence of foreign law (which concerns a question of fact), leave is required: see Supreme Court Rules 2004, r 40; Evidence Act 2006; *MP v Attorney-General* [2021] NZCA 482, [2022] 2 NZLR 632 at [39]; and *Hawaiki Submarine Cable LP v Tonga Cable Ltd* [2019] NZHC 1595, [2019] NZAR 1775 at [56].

Application to file submissions out of time

[333] Te Kāhui, Ngāti Muriwai and Kutarere Marae all sought leave to file submissions out of time. These submissions were all received shortly after the agreed time and raised important matters for consideration by this Court. The applications to file submissions out of time are granted for all parties.

Costs

[334] Te Kāhui and WKW applied for indemnity costs. Te Upokorehe supported indemnity costs in principle but submitted that the decision should be reserved. The Attorney-General submitted that any decision on costs should await the judgment.

[335] Costs are reserved. If costs cannot be agreed, the parties should file memoranda on costs on or before Friday 10 October 2025.

Summary of conclusions

[336] The following summary outlines our conclusions. It does not provide complete coverage of the reasoning and should be read in the context of the full reasons set out above.

Navigable rivers

[337] The Attorney General's appeal on the navigable rivers issue is dismissed, but for reasons that differ from those of the Court of Appeal.

Effect of s 261(2) of the 1979 Act

[338] The High Court was wrong to rely on *Paki (No 1)* as authority that s 261(2) of the 1979 Act extinguished customary rights and title to the beds of navigable rivers. The effect of s 261(2) was not at issue in *Paki (No 1)* and this Court left open the question whether that section extinguished customary property interests.[384]

---

384 See above at [35]–[36].

[339] Applying settled principles of statutory interpretation, the wording of s 261(2) is not sufficiently clear to extinguish customary rights or title to the beds of navigable rivers. Importantly, there is no language that explicitly references customary rights or title. Indeed, there is no language vesting rights in the Crown: the phrase "shall remain" presupposes that the Crown has already purchased or otherwise acquired the riverbed from its customary owners.[385] The language is merely declaratory and not confiscatory. Further, the phrase "remain vested and … be deemed to have always been vested in the Crown" is essentially the same as the provisions in the Territorial Sea Acts which were unanimously held in *Ngāti Apa* not to have expropriatory effect with regard to customary land.[386]

[340] The phrase deeming minerals to be the "absolute property" of the Crown in s 261(2) is also declaratory. Because s 261(2) applies when the Crown already has full and beneficial ownership of the riverbed, the "absolute property" it has in minerals is simply an incident of that ownership.[387] However, even if the "absolute property" phrase in s 261(2) is confiscatory, the contrasting language of the phrases relating to the Crown's rights to minerals and to the beds of navigable rivers is significant.[388] We emphasise that, even if the "absolute property" phrase is expropriatory, we are not called upon in this case to decide if s 261(2) is sufficiently clear to expropriate customary rights to minerals in the beds of navigable rivers.[389]

[341] The legislative history of s 14 of the 1903 Act supports the above conclusions. The purpose of s 14 was to assert Crown rights to minerals, especially coal, in the beds of navigable rivers.[390] The legislative history suggests that s 14 was intended to reflect what was thought to be the existing state of the law with regard to Crown grants: that *Mueller* was authority for the proposition that the midway presumption was rebutted in respect of navigable rivers.[391] Even assuming that there was a secondary and unexpressed purpose of securing public navigation rights, there is nothing in the legislative history that suggests any purpose of expropriation with regard to customary

385 See above at [43]–[45].
386 *Ngāti Apa*, above n 36, and see above at [60].
387 See above at [47].
388 See above at [48].
389 See above n 61.
390 See above at [79].
391 See above at [76] and [80].

land.[392] *Mueller* was not concerned with customary land.[393] Both that case and s 14 concerned Crown grants, which can only be made once land has been acquired from its customary owners.[394]

[342] Accordingly, as customary title and rights to the beds of navigable rivers have not been extinguished, the beds of navigable rivers meet MACA's definition of "marine and coastal area", and therefore recognition orders may be made in relation to them if the other requirements in MACA are met.

Effect of s 11(3) of MACA

[343] As we have concluded that s 261(2) of the 1979 Act did not extinguish customary title and rights to navigable rivers, we do not need to decide whether s 11(3) of MACA resurrected those interests.[395]

Status of the Edwards Application

[344] WKW's appeal is dismissed.

[345] Given the hapū of Te Whakatōhea appeared for themselves and did not support the Edwards application, it can no longer be said the Edwards application is being brought for the hapū. Where, as here, the takutai moana rights are held at the hapū level, and it is demonstrated that the iwi no longer speaks for the hapū on those rights, the Courts below were correct not to recognise the mandate originally given to the Edwards application.[396]

[346] While it may be that an iwi-wide approach is still preferable, the holder of any CMT is yet to be identified and it will be for the successful groups to determine themselves how to express their rights and at what level.[397] Resolution of this matter

---

392 See above at [69] and [81]–[82].
393 See above at [77].
394 See above at [77] and [69], and see [43].
395 See above at [92].
396 See above at [111].
397 See above at [113] and [117].

out of court in accordance with tikanga processes is encouraged, and is likely to result in a more durable outcome.[398]

[347] We add that the Edwards application does not have substantive priority over other applications by virtue of its having been transferred under s 125 of MACA. Section 125 affords temporal priority only.[399]

Te Upokorehe—claim to exclusive rights

[348] Te Upokorehe's appeal is dismissed.

[349] As a preliminary matter, we found that Te Upokorehe's decisions at the Court of Appeal stage not to object to Te Kāhui's inclusion in CMT Order 2, and to withdraw its opposition to Ngāti Awa's inclusion in CMT Order 2, are not fatal to its argument that CMT Order 2 should be remitted to the High Court.[400] While Te Upokorehe's approach in the Court of Appeal to its present argument is not necessarily helpful, the question of the proper treatment of CMT Order 2 was kept live in the Court of Appeal.

Shared exclusivity

[350] MACA envisages orders being made for CMT over areas where there is shared exclusivity. The court need only be satisfied that the applicant groups hold all customary rights according to tikanga in the relevant area to the exclusion of others. The best means for resolving matters of entitlement as between the applicant groups will be through a tikanga process undertaken over time.[401]

[351] However, separate overlapping CMTs are not permissible under MACA.[402] It is not consistent with the statutory scheme to have two or more separate overlapping CMTs in relation to the same area where, as we have said, MACA contemplates that a joint CMT can be made to reflect shared exclusivity.[403] Further, separate overlapping CMTs create practical problems—in particular, that no one group could exercise the

---

398 See above at [107].
399 See above at [119]–[121].
400 Above at [138].
401 Above at [141].
402 Above at [150].
403 Above at [58]–[143], and see [150].

rights conferred unilaterally. While some similar problems may arise in relation to the exercise of rights under joint CMTs, such issues can be resolved in accordance with tikanga.[404]

Requirement for a rehearing

[352] There is nothing to suggest the Court of Appeal was wrong to conclude Te Upokorehe had not shown it held mana exclusively in relation to the Ōhiwa Harbour. Accordingly, CMT Order 2 does not need to be remitted to the High Court for rehearing on this basis.[405]

[353] A review of the evidence relied on by Te Upokorehe to substantiate its claim to exclusivity confirms that a joint CMT is the correct outcome.[406]

[354] Te Upokorehe claims that its descent lines are distinct from other applicant groups.[407] However, this is not necessarily evidence of political and legal separation for the purposes of resource rights. The nature of the Ōhiwa Harbour as an area in which many interests and whakapapa threads converge does not suggest exclusivity in any one group.[408]

[355] Contrary to Te Upokorehe's submission, beyond general issues as to the Compensation Court's processes, several specific features of the Court's allocations of the Hiwarau and Hokianga Island reserves render the allocations of those reserves unreliable as evidence of Te Upokorehe's exclusive rights. These include uncertainties as to the intentions behind the allocations; the displacement caused by the raupatu and how this affected the ability of potential claimants to access the Compensation Court in Ōpōtiki; and the ongoing challenges to the allocation of the reserves in the Native Land Court, Parliament and the Waitangi Tribunal since 1898.

---

404 Above at [145]–[148], and see [149].
405 Above at [202], and see [151].
406 See above at [153].
407 See above at [154].
408 See above at [156]–[157].

[356] The fact that there are Te Upokorehe marae immediately surrounding the Ōhiwa Harbour was also emphasised in support of its argument as to exclusivity.[409] However, this argument ignores complexities arising from the potential linkages and affiliations of these marae with other groups.[410] This reflects the whakapapa linkages of those residing in the rohe, and the fact that several groups have rights in the area.

[357] Evidence relied on by Te Upokorehe to demonstrate that the use of the resources occurs under the mana of Te Upokorehe is consistent with a number of groups exercising mana in the area. The evidence shows that there is a level of complexity as to the nature of these rights. It may be that the rights are not equal. However, this does not necessarily mean that only one group has exclusive rights in terms of the test for CMT, nor does it reflect the position in tikanga. Rather, these complexities are reflective of the nature of the seascape and the strong links between groups in the rohe.[411]

[358] Te Upokorehe has a claim in the Waitangi Tribunal, as part of Wai 1750, alleging breaches of the principles of the Treaty of Waitangi in relation to the Ōhiwa Harbour and land abutting the Harbour.[412] The evidential issues discussed above can be more suitably addressed, if necessary, by the Tribunal as part of that claim. If any findings cast real doubt on or contradict the conclusions of this Court, a legislative response or, less desirably, a recall of this Court's judgment, may be necessary.[413]

Ngāti Ngāhere

[359] We are satisfied there was sufficient evidence for Ngāti Ngāhere to meet the test for inclusion in CMT Orders 1 and 2.

---

409 See above at [178].
410 See above at [179]–[181].
411 See above at [201].
412 See above at [203]–[204].
413 See above at [205].

[360] While there was not a significant amount of evidence specifically in relation to Ngāti Ngāhere's rights in the rohe, the evidence was sufficient to meet the test for their inclusion in the CMT orders.[414]

Application by Ngāti Muriwai

[361] Ngāti Muriwai's appeal is allowed on the terms set out above at [258].

[362] Ngāti Muriwai is entitled to bring an application as an applicant group under s 9 of MACA (as a hapū or, at least, as a whānau group).[415] We are also satisfied Ngāti Muriwai is entitled to participate in the CMT orders in terms of the statutory test under s 58, assessing Ngāti Muriwai's application for CMT as a part of Te Whakatōhea—as is required to give effect to the fundamental role of tikanga in determining CMT applications.[416]

[363] How these rights are to be given effect is a matter for the hapū of Te Whakatōhea and Ngāti Muriwai to consider and determine in accordance with tikanga. Ideally, this should occur before the High Court hearing is resumed, but timing is a matter for determination by the High Court.[417]

[364] The appeals of Ngāti Ruatākenga and the Attorney-General are dismissed. The Courts below were correct to award PCRs to Ngāti Muriwai.[418]

Status of Kutarere Marae

[365] Kutarere Marae's appeal is allowed.

[366] Kutarere Marae meets the definition of an applicant group in s 9(1) of MACA for the purposes of negotiation for a CMT agreement with the Crown.[419] Despite not categorising itself as a whānau, iwi or hapū, it appears Kutarere Marae consists of individuals and a number of whānau with Te Whakatōhea whakapapa. It should not

414 See above at [210] and [220].
415 See above at [250].
416 See above at [254] .
417 See above at [255].
418 See above at [256]–[258].
419 See above at [271].

be disqualified from negotiation with the Crown for recognition of rights to a CMT on the basis that it is not an applicant group.[420]

Whakaari and Te Paepae o Aotea

[367] Te Kāhui's appeal in relation to Whakaari and Te Paepae o Aotea is allowed. We remit to the High Court for reconsideration the question of whether the test for CMT under s 58 of MACA is met in regard to Whakaari and Te Paepae o Aotea.

[368] By not conducting a contextual analysis, the Court of Appeal asked and answered the wrong questions, and overlooked evidence which could demonstrate a holistic relationship of control with the seascape.[421] This reconsideration must assess how the matrix of rights and interests (including administration and control) demonstrated by the evidence translate into the MACA context and, in accordance with this Court's first judgment, in light of the context and nature of the claimed area.[422] This context includes the status of Whakaari as a landmark; its spiritual significance, the environment's uninhabitability, harshness and offshore nature; and its valuable resources.[423]

Disposition

[369] In our first judgment, we allowed the appeal by the Attorney-General in relation to s 58.[424] We make the following further orders:

(a) The Attorney-General's appeals on the navigable rivers issue and challenging the award of PCRs to Ngāti Muriwai are dismissed.

(b) With the qualification that the part of WKW's appeal regarding the boundaries of CMT Order 1 does not need to be determined,[425] WKW's appeal is dismissed.

---

420 See above at [270].
421 See above at [309].
422 See above at [316]–[317].
423 See above at [310]–[312].
424 SC judgment, above n 1, at [227].
425 See above at [324].

(c) Te Upokorehe's appeals are dismissed.

(d) Ngāti Muriwai's appeal is allowed on the terms set out above at [258].

(e) Ngāti Ruatākenga's appeal challenging the award of PCRs to Ngāti Muirwai is dismissed.

(f) Kuatere Marae's appeal is allowed on the terms set out above at [271].

(g) Te Kāhui's appeal in relation to Whakaari and Te Paepae o Aotea is allowed. The question of whether the test for CMT under s 58 of MACA is met in regard to Whakaari and Te Paepae o Aotea is remitted to the High Court for reconsideration.

(h) To the extent it remains live, Te Kahui's appeal in relation to the decision to remit CMT Order 1 to the High Court is dismissed.

(i) CMT Order 2 is formally amended to capture the Ōhiwa Harbour in full.

(j) Whakatāne District Council, and Ngāti Muriwai and Kutarere Marae's applications to adduce further evidence are allowed.

(k) The application by Te Kāhui to adduce further evidence is to be addressed by the High Court.

(l) The applications to file submissions out of time are allowed.

(m) Costs are reserved. If costs cannot be agreed, the parties should file memoranda on costs on or before Friday 10 October 2025.

Solicitors:
Ngātahi Law, Auckland for Whakatōhea Kotahitanga Waka (Edwards)
Te Haa Legal, Ōtaki for Ngāti Muriwai and Kutarere Marae
Te Aro Law, Wellington for Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Attorney-General
Annette Sykes & Co, Rotorua for Ngāti Ira o Waioweka, Ngāti Patumoana, Ngāti Ruatākenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea), Ngāti Ruatākenga and Te Whānau a Tītoko
Tu Pono Legal Ltd, Rotorua for Te Tāwharau o Te Whakatōhea (formerly Whakatōhea Māori Trust Board)
Oranganui Legal, Paraparaumu for Ngāi Tai and Ririwhenua
Whāia Legal, Wellington for Te Rūnanga o Ngāti Awa
Kāhui Legal, Wellington for Te Whānau-ā-Apanui, and Ngā Hapū o Ngāti Porou as Intervener
Chapman Tripp, Wellington for Seafood Industry Representatives
Cooney Lees Morgan, Tauranga for Crown Regional Holdings Ltd and Ōpōtiki District Council
R M Boyte, Bay of Plenty Regional Council | Toi Moana, Whakatāne for Bay of Plenty Regional Council
Brookfields Lawyers, Auckland for Whakatāne District Council
Franks Ogilvie, Wellington for Landowners Coalition Inc
McCaw Lewis, Hamilton for Te Whānau a Mokomoko

Appendix A: The Parties

In our first judgment, we set out all the parties in the present appeals. The tables below provide a brief summary.[426]

Appellants[427]			
Name	**Description**	**Relevant involvement in Courts below**	
Whakatōhea Kotahitanga Waka (Edwards) (WKW)	Umbrella group that supports the original Edwards application.	HC:	Not included in CMT orders.
		CA:	No change.
Ngāti Muriwai	Applicant group within Te Whakatōhea (and part of WKW). Status as hapū is disputed. Seeks CMT.	HC:	Not eligible for CMT.
		CA:	Could not obtain CMT in own right but may be able to "participate" in an order. Meaning of this is disputed.
Kutarere Marae	Community within Te Whakatōhea (and part of WKW). Status as applicant group is disputed. Seeking Crown negotiation so was initially only interested party.	HC:	Found it is not an applicant group.
		CA:	Agreed with CA.
Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi	Applicant group that says it is an independent iwi. Disputed by Te Whakatōhea. Te Upokorehe objects to joint CMT.	HC:	Included in joint CMT Orders 1 and 2.
		CA:	Remitted CMT Order 1 so Te Upokorehe could argue it is the sole rights holder. Did not remit CMT Order 2.
Attorney-General	Can be interested party in High Court MACA proceedings.	Appealed to this Court on issues of interpretation.	
Ngāti Ira o Waioweka, Ngāti Patumoana, Ngāti Ruatākenga and Ngāi Tamahaua	Umbrella group consisting of several hapū of Te Whakatōhea. Supports CMT Orders (as were successful applicant	HC:	Included in joint CMT Orders 1 and 2. Failed to establish CMT regarding Whakaari and Te Paepae o Aotea.

426 We also note that Ngā Hapū o Ngāti Porou were an intervener in the Supreme Court.

427 We note that parties may be both appellants and respondents/interested parties. For the sake of simplicity, the tables focus on the primary role of each party.

(Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea) (Te Kāhui)[428]	groups).	CA:	CMT Order 1 remitted, but established rights in CMT Order 2. Failed to establish CMT regarding Whakaari and Te Paepae o Aotea.
Ngāti Ruatākenga	Hapū of Te Whakatōhea (and part of Te Kāhui). Challenges status of Ngāti Muriwai and objects to it holding PCRs.	HC:	Ngāti Muriwai eligible for PCRs.
		CA:	Ngāti Muriwai eligible for PCRs.

Respondents			
Name	**Description**	**Relevant involvement in Courts below**	
Te Tāwharau o Te Whakatōhea (Formerly Whakatōhea Māori Trust Board)	The post-settlement governance entity for Te Whakatōhea. Generally supports Te Whakatōhea-related applications.	Not involved in lower Courts. Its predecessor (Whakatōhea Māori Trust Board) had made an application to ensure no hapū would be excluded if they did not individually apply.	
Ngāi Tai and Ririwhenua	Ngāi Tai is an iwi to the east of Te Whakatōhea (with Ririwhenua being a hapū of this iwi). Opposed Attorney-General's interpretation of MACA.	HC:	Granted CMT Order 3.
		CA:	Remitted CMT Order 3. Ngāi Tai and Ririwhenua did not appeal this.[429]
Te Rūnanga o Ngāti Awa	Represents Ngāti Awa, an iwi to the west of Te Whakatōhea. Seeks Crown negotiation but participates to the extent its claim overlaps with other applicant groups.	HC:	Not mentioned regarding CMT Order 1. Included in joint CMT Order 2. Did not need to determine its interests in Whakaari and Te Paepae o Aotea.
		CA:	Remitted CMT Order 1 to consider Ngāti Awa's interest. CMT Order 2 remained. Did not need to determine its

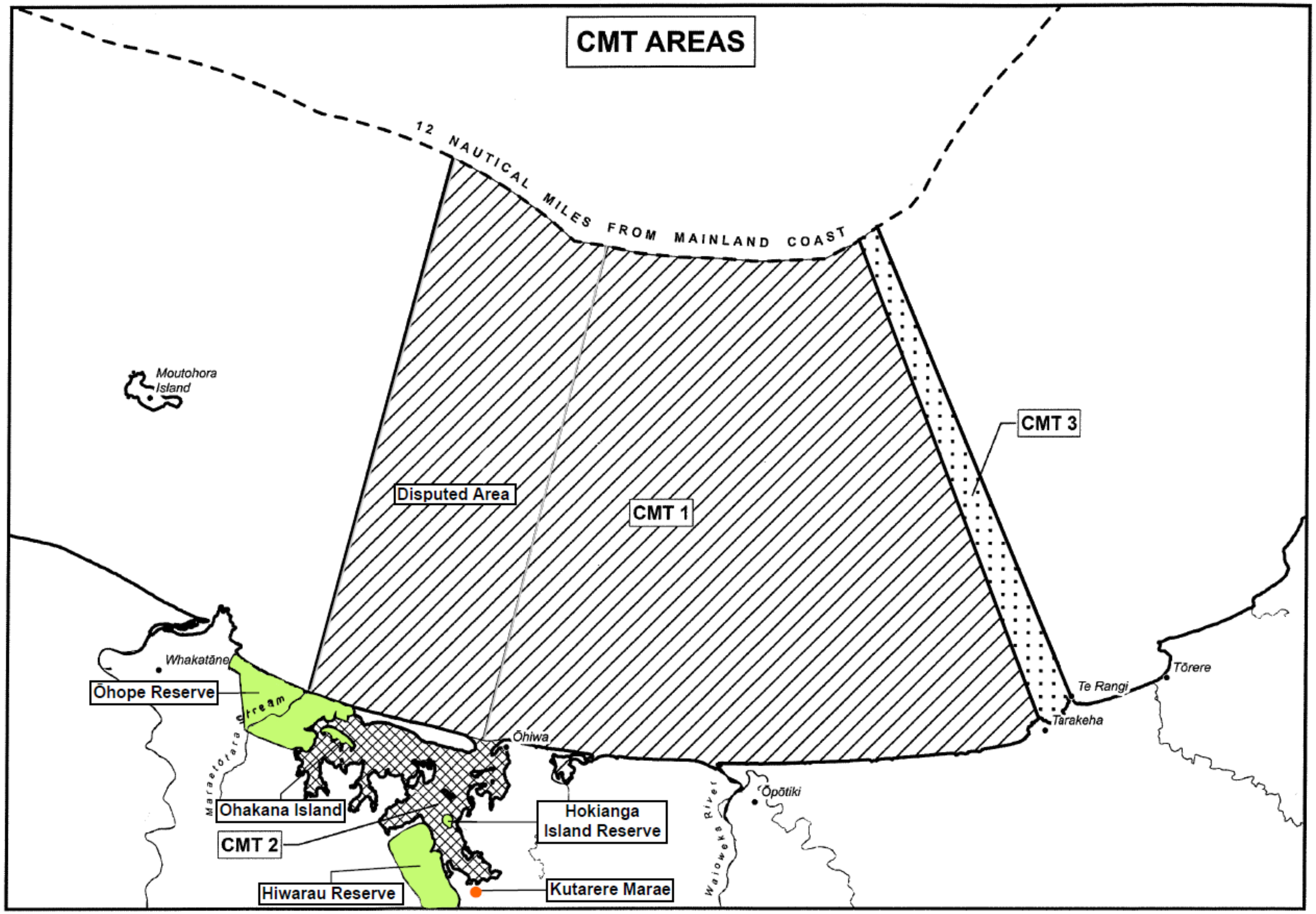
[428] While Ngāti Ruatākenga is not formally part of Te Kāhui, as its CMT application was under the Whakatōhea Māori Trust Board, it now works with and supports Te Kāhui. Te Kāhui also includes Te Whānau a Mokomoko and Te Whānau a Tītoko, who support the appeal but are not parties.

[429] Subsequently, the High Court reheard the application and found Ngāi Tai was entitled to an order for CMT in respect of the area covered by CMT Order 3: *Re Jones on behalf of Ngāi Tai Iwi and the Uri of Ngāi Tai Iwi* [2024] NZHC 1373. We understand that this is subject to a separate appeal in the Court of Appeal.

			interests in Whakaari or Te Paepae o Aotea.
Landowners Coalition Inc	Incorporated society advocating for private property rights.	Focused on issues of interpretation.	

Interested parties	
Name	**Description**
Te Whānau-ā-Apanui	Iwi to the east of Ngāi Tai. Seeks direct engagement with Crown. Claims exclusive mana over Whakaari.
Seafood Industry Representatives	Advocates for commercial fishing industry’s inshore sector.
Crown Regional Holdings Ltd (CRHL)	Holds resource consents for port infrastructure in the claimed area.
Relevant local councils	Bay of Plenty Regional Council | Toi Moana, Ōpōtiki District Council, and Whakatāne District Council.

Appendix B: Key Areas in the Ōhiwa Harbour



Appendix C: Compensation Court Grants for Hiwarau and Hokianga Island[430]

Bay of Plenty District.—SCHEDULE No. 13, 1872.

Lot to be granted under the 4th and 6th clauses of "The Confiscated Lands Act, 1867." The Lot herein specified is to be inalienably assured by a Grant in trust to the Members of the Upokorehe Hapu whose names are included in the Schedule attached.

Name of Hapu for certain of whose Members Grant is made.	Names of Trustees	Sex.	Rank.	Address.	Area.	Number and Description of Lot.	Locality.
Upokorehe …	Peira Haruru … Hemi Kakitu … Tatituha Mokai … Hemi Kuri …	M. M. M. M.	Native chief Ditto … Native … Ditto …	Ohiwa … Ditto Ditto Ditto	A. R. P. 13 2 12	Hokianga Island at	Ohiwa

NAMES of Members of the Upokorehe Hapu, for whom Hokianga Island at Ohiwa is granted.

Men.

1. Tiera Haruru.
2. Hemi Kakitu.
3. Hemi Kuri.
4. Taituha Paora.
5. Horopapera.
6. Hoeroa.
7. Tiopira.
8. Hemi Hama
9. Wahaika.
10. Watene Pureata.
11. Hoani Akeake.
12. Iraria Kaiponi.
13. Mita Tahanoke.
14. Kokere.
15. Ani.
16. Tamati.
17. Turei.
18. Papu.
19. Mohi Taikororareka.

Women.

20. Marara.
21. Maria Watene.
22. Mere Katene.
23. Hiromene Tipa.
24. Moa.
25. Hinerau Kopiha.
26. Anipeka.
27. Maria Mu.
28. Mere Ngutuhore.
29. Wheato.
30. Ruruhira.
31. Ripeka Wahaika.
32. Hiropuku.
33. Mahana.
34. Hohi.
35. Wakaetena.
36. Rea Te Mara.
37. Erana.

Children.

38. Heni.
39. Waru.
40. Riripeti.
41. Timoti.
42. Tawhi.
43. Kararaina.
44. Otutu.
45. Ngakai.
46. Rahi.
47. Ani.
48. Hinehoa.

430 Taken from "Reports on Settlement of Confiscated Lands", above n 222, at 13–14.

Bay of Plenty District.—SCHEDULE No. 14, 1872.

LOT to be granted under the 4th and 6th clauses of "The Confiscated Lands Act, 1867." The Lot herein specified is to be inalienably assured by a Grant in trust to the Members of the Upokorehe Tribe whose names are included in the Schedule attached. The right to take lines of road is reserved.

Name of Tribe for certain of whose Members Grant is made.	Names of Trustees	Sex.	Rank.	Address.	Area.	No. and Description of Lot.	Locality.
Upokorehe …	Peira Haruru …	M.	Native Chief	Ōhiwa	Acres.	Hiwarau Block:—Bounded on the North by high water-mark in Ōhiwa Harbour from the mouth of Nukuhou River to Punawai; on the East by a road surveyed from Punawai to the point where it first strikes Nukuhou River; on the South and West by Nukuhou River.	Ōhiwa
	Hemi Kakitu …	M.	Ditto …	Ditto	1,073		
	Hoeroa …	M.	Native …	Ditto			
	Hemi Hamu …	M.	Ditto …	Ditto			
	Mita Tahanoke …	M.	Ditto …	Ditto			
	Iraia Kaiponi …	M.	Ditto …	Ditto			
	Hoani Akeake …	M.	Ditto …	Ditto			

N.B. — Lots 1 and 2, Hiwarau Sections, Pitcairn's Survey, 25 acres each, are not included in this block.

NAMES of the Members of the Upokorehe Hapū for whom Hiwarau Block is granted.

Men.

1. Tiera Haruru.
2. Hemi Kakitu.
3. Hemi Kuri.
4. Taituha Paora.
5. Horopapera.
6. Hoeroa.
7. Tiopira.
8. Hemi Hama.
9. Wahaika.
10. Watene Pureata.
11. Hoani Akeake.
12. Iraria Kaiponi.
13. Mita Tahanoke.
14. Kokere.
15. Ani.
16. Tamati.
17. Turei.
18. Papu.
19. Mohi Taikororareka.
20. Wiremu Hineahua.
21. Hoani Mokomoko
22. Warena Mokomoko.

Women.

23. Marara.
24. Maria Watene.
25. Mere Katene.
26. Hiromene Tipa.
27. Moa.
28. Rutu
29. Hinerau Kopiha.
30. Ani Peka.
31. Maria Mu.
32. Mere Ngutuhore.
33. Wheato.
34. Ruruhira.
35. Ripeka.
36. Hiropuku.
37. Mahana.
38. Hohi.
39. Whakaetena.
40. Animerata.
41. Rea Te Mara.
42. Erana.
43. Heni Mokau.
44; Huriana.

Children

1. Peta.
2. Heni.
3. Waru.
4. Riripeti.
5. Timoti.
6. Tawhi.
7. Kararaina.
8. Otutu.
9. Ngakai.
10. Rahi.
11. Ani.
12. Hinehou.