IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV 2011-485-789
[2021] NZHC 1968

IN THE MATTER OF	An application by CATHERINE CLARKSON AND OTHERS for a customary marine title pursuant to section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

Hearing:	9-13 and 23 November 2020 (further submissions received 27 May 2021)
Counsel:	C M Clarkson in person J P Ferguson for Ngāti Kahungunu L Watson for Ngāti Kere R A Siciliano for Te Rāngitane G L Melvin and A B Goosen for Attorney-General C F Finlayson QC, A C Dartnall and P R Corish for Landowner's Coalition Inc C B Hirschfeld and C J Tennet for Te Hika o Pāpāuma M Smith for the Smith whānau M G Conway and L E Phillips for Hawke's Bay Regional Council B Scott for seafood industries representatives
Judgment:	30 July 2021
Reissued:	6 August 2021

JUDGMENT OF MALLON J

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Introduction

[1] This is the third application under the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA Act**) for an order recognising customary marine title (**CMT**) to have proceeded to a substantive hearing. The first was *Re Tipene*, in which a CMT over a 200 m radius from a landing rock to the southwest of Rakiura (Stewart Island) was granted to the Supervisors of the islands of Tamaitemioka and Pohowaitai on behalf of Rakiura Māori on those two islands.[1] The second was *Re Edwards*, in which CMTs and protected customary rights (**PCR**) in the eastern Bay of Plenty were granted to several applicant groups, with the specifics yet to be determined.[2] This third application has been brought by a whānau and it relates to a marine and coastal area on the eastern coast of the central North Island.

The applicants

[2] The application (**the Clarkson application**) is made by Ketepunga Matana Clarkson, Ketepunga Kaylene Clarkson and Catherine Clarkson (**the applicants**). Ketepunga Kaylene (Kaylene) and Catherine are sisters. Ketepunga Matana, now deceased, was their mother. The application states that these applicants "wish to be named and known as the customary marine title group **Poronia Hineana Te Rangi**, who are "a Whānau" (**the applicant group**).[3] They have nominated Kaylene to be the holder of the CMT if granted.

[3] The applicants have named their applicant group **Poronia Hineana Te Rangi** in honour of their tīpuna through whom, in part, their customary claim is sourced. Of present relevance to this application is that the applicant group affiliates with the Ngāti Kere hapū and Ngāti Kahungunu and Rangitāne iwi.[4]

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1 *Re Tipene* [2016] NZHC 3199, [2017] NZAR 599 [*Re Tipene No 1*]; and *Re Tipene* [2017] NZHC 2990, [2018] NZAR 150 [*Re Tipene No 2*].

2 *Re Edwards (No 2)* [2021] NZHC 1025.

3 The application is referred to as "the Clarkson application" for convenience. The mandate for the Clarkson application and who it is intended to benefit is discussed later.

4 Ketepunga Matana Clarkson's affidavit stated that through her mother she affiliates to the hapū Ngāti Kere, Ngāti Pihere, Ngāti Manuhuri, Ngāti Rangikoianake, Ngāti Manawakawa, and Ngāti Kiri, and the iwi Ngāti Kahungunu. Through her father she affiliates with Ngāti Pakapaka, Ngāti Pahauwere and the iwi Rangitāne and Ngāti Kahungunu. Kaylene Clarkson's affidavit added affiliations to Ngāti Hinetewai, Tamatea Hinepare o Kahungunu, and Ngāti Makirikiri. Catherine Clarkson referred to Kaylene's evidence for her whakapapa.

[4] The applicants' claim is based on the land holdings and associated authority of their tīpuna, in proximity to the specified area. They say that their whānau was allocated the area (and with it the resources in that area) at Whangaehu. The Clarkson whānau have retained shares in this land (most relevantly, shares in Porangahau 1B4N2) and, through their status as tangata whenua, they have continued to hold the specified area in accordance with tikanga and to use this area as their customary fishing grounds.

[5] Their purpose in seeking a CMT is to preserve the area and to obtain recognition of their place in the community in relation to the area. They say they have a mandate from around 300 people in their wider whānau.

The application area

[6] The application area (also referred to as the specified area) is a marine and coastal area on the east coast of the North Island. Although it is described in the application as the area from "Whangaehu to Poroporo (Cape Turnagain inclusive)", both the map attached to the application (**Appendix One** to this judgment) and the applicants' evidence made it clear that the application area claimed runs from Finlay's Reef (which is to the north of Whangaehu) to the south side of Cape Turnagain (whereas Poroporo is on the north side of the Cape). Whangaehu is 8.5 km south and toward the coast from the settlement of Porangahau and is in Central Hawke's Bay, and Cape Turnagain is in the Tararua District. The application area covers approximately 14.6 km of the coastline and goes out 12 nautical miles. A map of the application area is **Appendix Two** to this judgment.

[7] Catherine Clarkson explained that the application boundaries have been identified with reference to geographical features at either end (Finlay's Reef in the north and the point at Cape Turnagain in the south). She says this is the way that Māori historically identified their area. She says the application area is where her whānau gathered kaimoana or other food sources, where wāhi tapu sites of historical significance are, where pā were, where waka were launched, and where historically whānau owned abutting land.

[8] The coastline from Whangaehu to Cape Turnagain is very rocky and has high cliffs, but at Poroporo the land falls to the coast, as it does in the bay at Whangaehu. Whangaehu is a natural harbour with a reef and a short sandy beach of (Catherine Clarkson estimates) less than half a kilometre. A good deal of the coastline is inaccessible in high tide. Cape Turnagain can be extremely windy. The area is rural, with relatively few inhabitants and visitors.

[9] General land (17 titles) and a small piece of Crown land at the south of the application area abut the coastline of the application area. The owners of the 17 general land titles include Kahungunu Asset Holding Company Ltd (five titles), the Stoddart family (two titles) and the Kibblewhite family (one title).

[10] A historic reserve (the Whangaehu Historic Reserve), of about 7,820 m^2, begins near the coast in the top part of the application area and runs inland along the Whangaehu river from there. The Porangahau 1B4N2 block is about one kilometre inland from the coast and abuts the historic reserve at the inland end.[5] This block also abuts the Kibblewhite title. It does not abut the coast. The historic reserve was created as a result of a subdivision in the 1990s by a landowner at Whangaehu, which was opposed by a number of parties.

[11] Mangamaire B2 is inland (several kilometres from the coast) and to the north of the Porangahau 1B4N2 block. The two blocks are connected by a paper road (Fingerpost Road). Catherine Clarkson says that her whānau regard Whangaehu as their backyard and Mangamaire B2 (in which they have shares) as their front yard, connected by Porangahau 1B4ND1 (another block in which they have shares) and the paper road.[6]

Interested parties (overlapping claims)

[12] Four applications before the Court either partially or completely overlap the application area:

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5 David Armstrong, a historian called by the Attorney-General, said the Porangahau 1B4N2 block is around a kilometre inland, separated from the shoreline by the Whangaehu Historic Reserve. Maps were produced at the hearing that show this.

6 Kaylene Clarkson explained that Porangahau 1B4ND1 runs alongside the road and, although it does not join the blocks, the three blocks flow naturally in terms of access.

(a) Ngāti Kere Working Party (**Ngāti Kere**) (CIV-2017-485-193);

(b) The Trustees of Ngāti Kahungunu ki Wairarapa Tamaki-Nui-ā-Rua Settlement Trust (**Ngāti Kahungunu**) (CIV-2017-485-221);

(c) Rangitāne Tū Mai Rā Trust on behalf of Rangitāne o Wairarapa and Rangitāne o Tamaki Nui-ā-Rua (**Rangitāne**) (CIV-2017-485-224); and

(d) George Matthews on behalf of Te Hika o Pāpāuma Mandated Iwi Authority (**Te Hika o Pāpāuma**) (CIV-2017-404-481).

[13] A map showing the overlapping High Court applications is **Appendix Three** to this judgment.

[14] These groups limited their participation in this proceeding to responding to the Clarkson application. They did not seek to have any part of their claims determined in this proceeding.[7] In the case of Ngāti Kere this was at least in part because their preference is to progress their claims by way of direct Crown engagement, which is an alternative process provided for under the MACA Act.[8] The Crown's engagement strategy for this area, as at the time of the hearing, indicated an expected timeline of 2023-2027 or beyond.

[15] The Ngāti Kere Working Party is a group of persons affiliated to the hapū of Ngāti Kere who say they have the mandate from the hapū to progress the CMT application on its behalf. The Clarkson application area is entirely within the larger area claimed by Ngāti Kere in its application. Ngāti Kere says the Clarkson application is contrary to hapū tikanga. It says that this kind of application should be made by and on behalf of hapū and that it is wrong to divide the coastline into exclusive whānau portions, as the Clarkson application seeks to do. It says that the application area is entirely disproportionate in length to the applicant group's land interests in Porangahau 1B4N2. It says the applicant group does not have an exclusive

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7 Another group, Heretaunga Tamatea Settlement Trust and He Toa Takitini, have elected to engage with the Crown and does not have an application for recognition orders before the Court. This group's application area partially overlaps with the northern part of the Clarkson application.

8 MACA Act, s 94.

right to the area claimed and the customary interests in this area go well beyond the applicant group whānau. It also says that the application is unsupported by the other whānau of Ngāti Kere.

[16] The Clarkson application is also entirely within the area claimed in Rangitāne's application, which runs from the bottom of the North Island to partway through the Ngāti Kere application area. Rangitāne is participating to ensure its interests are protected. It submits that the applicant group cannot discharge its burden of proof to demonstrate that it holds the application area in accordance with tikanga and nor that it currently uses and occupies the area and has done so from 1840 through to the present day. It also says that the applicant group does not have the right to exclude other whānau, hapū and iwi with rights in the application area.

[17] Te Hika o Pāpāuma's application partially overlaps with the Clarkson application on the southern side. It says that historically the northern boundary of their traditional rohe is at Poroporo.[9] Te Hika o Pāpāuma have strong relations with other iwi and hapū on their borders, including Ngāti Kere. It is participating in this proceeding to protect its position in relation to its rohe.

[18] Ngāti Kahungunu's application area is similar to that of Rangitāne and also partially overlaps with the Clarkson application on the southern side.[10] Its CMT application has been filed for the benefit of all Te Kahungunu hapū, marae and whānau interests within the takutai moana of the Wairarapa and Tamaki-Nui-ā-Rua.[11] Its participation in the present hearing is to ensure that Ngāti Kahungunu interests are not prejudiced. Its position in this proceeding is that, in accordance with tikanga, the relevant rights and interests were not held, and should not be recognised, at a whānau level.[12]

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9 It has no interest in the Clarkson application northward from Poroporo.

10 It is the post-settlement governance entity for the confederation of hapū comprising Ngāti Kahungunu ki Wairarapa and Ngāti Kahungunu ki Tamaki-Nui-ā-Rua.

11 It intends to progress its application, to the extent required, primarily in areas of the takutai moana where no other Ngāti Kahungunu-related applications have been filed and in a supportive capacity to other Ngāti Kahungunu-related applications.

12 In due course, and if the overlapping CMT applications proceed through the court rather than Crown engagement, it considers it would be possible for the court to acknowledge the interests of the applicant group whānau while also ensuring that relevant interests are recognised.

Other interested parties

[19] Other interested parties in this proceeding are:[13]

(a) Morehu Smith;

(b) the Attorney-General;

(c) the Central Hawke's Bay District Council, Hawke's Bay Regional Council and Manawatū-Wanganui Regional Council (also known as the Horizons Regional Council);

(d) the Landowners Coalition Inc (a non-profit organisation dedicated to the protection of private property rights and advocating for the retention of these rights on behalf of landowners); and

(e) seafood industry representatives.

[20] Morehu Smith, a member of the Ngāti Kere Working Party, who also appeared on behalf of her whānau (the Smith whānau), considers the Clarkson whānau does not have the authority to bring the application and that it wrongly excludes those who whakapapa to the area (including the Smith whānau and those who are no longer landowners).

[21] The Attorney-General is participating as an interested party in the interests of all the public (including Māori). The Act is one of major importance not only to iwi, hapū and whānau, but to all New Zealanders.[14] The Attorney-General does not advocate for any sectional interest, but rather seeks to assist the Court by ensuring that it has all relevant information before it, testing the evidence where appropriate, and making submissions on the interpretation and application of the MACA Act. The Attorney-General considers that:

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13 The Council of Outdoor Recreation Associations of New Zealand filed a memorandum in response to the public notification of the application but did not participate in the hearing.

14 *Re Rihari* [2019] NZHC 2658 at [7].

(a) there are questions as to whether the applicant group or some other group holds the application area in accordance with tikanga;

(b) there is limited evidence of exclusive use and occupation of the application area by the applicant group in the sense contemplated by the Act;

(c) there is some evidence that points to activities and events which may constitute a substantial interruption of exclusive use and occupation in parts of the area;

(d) there is a lack of detail about the tikanga exercised within the area and whether it continues to be exercised in the area; and

(e) the evidence of activities taking place on or near the shore is insufficient to show exclusive use and occupation of the application area to the outer limit of the territorial sea.

[22] The Landowners Coalition Inc participates on behalf of landowners with substantial links to the area. It says that the applicant's whānau does not hold the area in accordance with tikanga. It also says the area has been used by others, both Māori and Pākehā, for over a century and so the applicant cannot establish exclusivity without substantial interruption.

[23] The Councils are territorial authorities with responsibilities in the application area. These territorial authorities are neutral on the proceeding and did not attend the hearing.

[24] The seafood industry representatives are made up of the New Zealand Rock Lobster Industry Council Ltd, the Pāua Industry Council Ltd, Fisheries Inshore New Zealand Ltd and the New Zealand Federation of Commercial Fishermen Inc. They are entities concerned with commercial fishing rights and activities. They did not participate in the hearing but wish to be heard on the form and nature of any order, if it is to be granted. They say that those they represent have existing rights in the

relevant area, including general rights of access and navigation as well as specific rights to fish and undertake aquaculture activities.

Pūkenga

[25] Walter Ngamane was appointed as pūkenga in these proceedings to assist the Court.[15] Mr Ngamane's pepeha is:

> Moehau te maunga
> Tikapa te moana
> Waihou te awa
> Hauraki te whenua
> Tainui te waka
> Marutūāhu te tangata
> Mātai Whetū, Manaia, Te Pai o Hauraki ōku marae
> He mahuetanga au na Marutūāhu

[26] As Mr Ngamane is not from the application area, he provided his experience and understanding of tikanga as he has observed, learned and been instructed over his lifetime with a view to assisting as to whether the tikanga of his area may be akin to the tikanga of the application area.

Application history

[27] The genesis of the Clarkson application was an application made in 2005 to the Māori Land Court for customary rights orders under the Foreshore and Seabed Act 2004 (the legislation that preceded the MACA Act). A schedule described the applicants as "Ketepunga Kaylene Clarkson" and "Ketepunga Clarkson". The application concerned the customary gathering of karengo (seaweed) from the foreshore for whānau consumption. The Chief Judge of the Māori Land Court issued a minute stating that such an application needed to be made under the Fisheries (Kaimoana Customary Fishing) Regulations 1998.

[28] This led to the filing of an amended application in the Māori Land Court in May 2006. The applicants sought a customary rights order under the Foreshore and Seabed Act for the exercise of kaitiakitanga in the application area, and specifically for the recognition and care of burial sites and "historic camp sites of whānau", and

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15 MACA Act, s 99; *Re Clarkson* HC Wellington CIV-2011-485-789, 14 September 2020.

for the "protection and conservation of designated areas for whānau by hapū for seafood".

[29] The Foreshore and Seabed Act was repealed and replaced with the MACA Act. Pursuant to that new Act, the Māori Land Court application was transferred to the High Court to be determined as a priority application under the MACA Act for orders recognising a PCR.[16]

[30] In the High Court, the Attorney-General raised an issue about whether a PCR for the harvest of karengo was permitted under the MACA Act. This issue was to be determined by the Court at a hearing set for October 2011. Before this was held, the applicants accepted that an application could not be made for the taking or gathering of karengo and the Attorney-General accepted that an application could be made for the conservation of a resource, such as karengo, so long as that did not extend to the taking or gathering of it. This lead to the applicant group (Kaylene Clarkson, Ketepunga Matana Eriha Clarkson and Catherine Marjorie Clarkson) filing an amended PCR application dated 14 October 2011.

[31] The matter lay dormant for a period, predominantly because of the ill health of Catherine Clarkson. However, on 20 May 2013, the applicants filed and served an amended application to seek CMT under the MACA Act instead of an order for a PCR. The applicants publicly notified the amended application in June 2013.[17] Again there was a period of dormancy due to Ms Clarkson's ill health, but in due course it progressed and it is this application (the Clarkson application referred to earlier) that is before me for determination.

The MACA Act

Overview

[32] The purpose of the MACA Act is to establish a durable scheme that protects the legitimate interests of all New Zealanders in the marine and coastal area, while also recognising the mana tuku iho exercised in the marine and coastal area by Māori

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16 Section 125(1).
17 Section 103.

and providing for the exercise of their customary interests in the common marine and coastal area, and acknowledging te Tiriti o Waitangi.[18]

[33] The marine and coastal area begins at the high-water mark that is daily wet by the sea when the tide comes in and ends at the outer limits of the territorial sea. It includes the air space, the water space (but not the water), the subsoil and bedrock in this area. More particularly, the Act relates to the "common marine and coastal area". This is defined as the marine and coastal area which is not "specified freehold land", a conservation area, a national park, a reserve, or the bed of Te Whaanga Lagoon in the Chatham Islands.[19]

[34] The Act gives the common marine and coastal area a special status. Neither the Crown nor any other person owns or is capable of owning the common marine and coastal area. However this special status does not affect customary interests recognised under the Act nor any lawful use or activity of the marine and coastal area.[20] Nor does the Act affect the Crown's ownership of all minerals existing in their natural condition in the land.[21] Any structures on the common marine and coastal area are personal property (not an interest in land) and do not form part of the common marine and coastal area.[22] The Act does not affect resource consents granted before the Act commenced, nor activities that can be lawfully undertaken without a resource consent or other authorisation.[23] Interests under a lease, licence, permit, easement or statutory authorisation granted in respect of any land within the common marine and coastal area continue to have effect.[24]

[35] The Act provides for three types of customary interests that may be recognised in the common marine and coastal area:

(a) participation rights in conservation processes;[25]

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18 Section 4. Mana tuku iho is defined in s 9 as "inherited right or authority derived in accordance with tikanga".
19 Section 9.
20 Section 11.
21 Section 16.
22 Section 18.
23 Section 20.
24 Section 21.
25 Part 3, Subpart 1.

(b) protected customary rights;[26] and

(c) customary marine title.[27]

[36] A PCR recognises non-territorial rights.[28] CMT is an interest in land but the MACA Act stipulates which rights attach to that interest.[29] Both a PCR and CMT can be recognised by an agreement with the Crown or by an order from the High Court.[30]

Application

[37] An order for recognition of a PCR or CMT begins with an application filed in the High Court.[31] The MACA Act defines "applicant group" as meaning "one or more iwi, hapū or whānau groups" that seek recognition of their PCR or CMT.[32] It includes a legal entity or individual "appointed by one or more iwi, hapū, or whānau group to be the representative of" the applicant group.[33] The applicant group has the burden of proof for a PCR or CMT (as per the requirements of ss 51 or 58).[34] It is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.[35]

Customary marine title

[38] The Act defines the scope and effect of CMT as follows:

> **60 Scope and effect of customary marine title**
>
> (1) Customary marine title—
>
> (a) provides an interest in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area; and

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26 Subpart 2.
27 Subpart 3.
28 Sections 51 and 52.
29 Section 60.
30 Section 94.
31 Section 100.
32 Section 9.
33 Section 9.
34 Section 106(1) and (2). See *Re Edwards*, above n 2, at [78]-[99] for a discussion about the applicant's burden of proof.
35 Section 106(3).

(b) provides only for the exercise of the rights listed in section 62 and described in sections 66 to 93; and

(c) has effect on and from the effective date.

(2) A customary marine title group—

(a) may use, benefit from, or develop a customary marine title area (including derive commercial benefit) by exercising the rights conferred by a customary marine title order or agreement, but is not exempt from obtaining any relevant resource consent, permit, or approval that may be required under another enactment for the use and development of that customary marine title area; and

(b) is not liable for payment, in relation to the customary marine title area, of—

(i) coastal occupation charges imposed under section 64A of the Resource Management Act 1991; or

(ii) royalties for sand and shingle imposed by regulations made under the Resource Management Act 1991.

(3) A customary marine title group may—

(a) delegate the rights conferred by a customary marine title order or an agreement in accordance with tikanga; or

(b) transfer a customary marine title order or an agreement in accordance with tikanga.

[39] Section 62 provides:

62 Rights conferred by customary marine title

(1) The following rights are conferred by, and may be exercised under, a customary marine title order or an agreement on and from the effective date:

(a) a Resource Management Act 1991 (RMA) permission right (see sections 66 to 70); and

(b) a conservation permission right (see sections 71 to 75); and

(c) a right to protect wāhi tapu and wāhi tapu areas (see sections 78 to 81); and

(d) rights in relation to—

(i) marine mammal watching permits (see section 76); and

(ii) the process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement (see section 77); and

(e) the prima facie ownership of newly found taonga tūturu (see section 82); and

(f) the ownership of minerals other than—

(i) minerals within the meaning of section 10 of the Crown Minerals Act 1991; or

(ii) pounamu to which section 3 of the Ngai Tahu (Pounamu Vesting) Act 1997 applies (see section 83); and

(g) the right to create a planning document (see sections 85 to 93).

…

[40] In general terms, it provides the holder with what might be described as an elevated influence in the area. Importantly, it also provides what is effectively a form of veto (in the form of a permission right) over activities within the CMT area to be carried out under a resource consent. Section 66(2) provides that a CMT group may give or decline permission, on any grounds, for an activity to which an RMA permission right applies (although this is subject to certain exceptions).

[41] Under s 98, this Court may make an order recognising CMT if the applicant meets the requirements under s 58:

58 Customary marine title

(1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—

(a) holds the specified area in accordance with tikanga; and

(b) has, in relation to the specified area,—

(i) exclusively used and occupied it from 1840 to the present day without substantial interruption;

…

(2) For the purpose of subsection (1)(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—

(a) the commencement of this Act; and

(b) the effective date.

…

(4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

[42] Matters that may be taken into account in determining whether CMT exists are as follows:

59 Matters relevant to whether customary marine title exists

(1) Matters that may be taken into account in determining whether customary marine title exists in a specified area of the common marine and coastal area include—

(a) whether the applicant group or any of its members—

(i) own land abutting all or part of the specified area and have done so, without substantial interruption, from 1840 to the present day:

(ii) exercise non-commercial customary fishing rights in the specified area, and have done so from 1840 to the present day; and

(b) if paragraph (a) applies, the extent to which there has been such ownership or exercise of fishing rights in the specified area.

(2) To avoid doubt, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does not limit subsection (1)(a)(ii).

(3) The use at any time, by persons who are not members of an applicant group, of a specified area of the common marine and coastal area for fishing or navigation does not, of itself, preclude the applicant group from establishing the existence of customary marine title.

(4) For the purpose of subsection (1)(a)(i), land abutting all or part of the specified area means—

(a) land that directly abuts the specified area; or

(b) land that does not directly abut the specified area, but does directly abut any of the following:

…

(iii) a reserve (as defined in section 2(1) of the Reserves Act 1977), but only to the extent that it directly abuts the specified area:

…

Protected customary rights

[43] The Court may make a recognition order for a PCR under s 98 of the Act if it is satisfied that the requirements of s 51 have been met, and the activity claimed to be a protected customary right is not one that is excluded by the Act. Section 51 provides:

> **51 Meaning of protected customary rights**
>
> (1) A protected customary right is a right that—
>
> (a) has been exercised since 1840; and
>
> (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
>
> (c) is not extinguished as a matter of law.
>
> (2) A protected customary right does not include an activity—
>
> (a) that is regulated under the Fisheries Act 1996; or
>
> (b) that is a commercial aquaculture activity (within the meaning of section 4 of the Maori Commercial Aquaculture Claims Settlement Act 2004); or
>
> (c) that involves the exercise of—
>
> (i) any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or
>
> (ii) any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; or
>
> (d) that relates to—
>
> (i) wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act:
>
> (ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978; or
>
> (e) that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource (within

the meaning of section 2(1) of the Resource Management Act 1991).

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

[44] The Act allows for the recognition of PCRs for different groups in the same area.[36] Unlike the test for CMT, the test for PCRs does not involve the requirements of exclusivity or occupation. However, a degree of regularity of the activity, use or practice is required before a recognition order can be made.

Whakapapa[37]

[45] The applicant group's claim relies partly on their whakapapa to, and customary rights from, **Poronia Hineana Te Rangi**, **Rewia Pongi Tutaki** and **Ereatara Te Kuru.**[38]

[46] Ketepunga Matana's relationship, and in turn Kaylene and Catherine Clarkson's relationship to these tīpuna, is as follows:

(a) Kaylene Clarkson (born 1958) and Catherine Clarkson (born 1961) are daughters of Ketepunga Matana Clarkson (born 1934) and James Clarkson (born 1933). Ketepunga Matana and James had two other children, Suzanne and James, Kaylene and Catherine's siblings).

(b) Ketepunga Matana Clarkson was the first child of **Rewia Pongi Tutaki** (1913-1991) and Matana Eriha (1907–1975).

(c) Rewia was the youngest child of Heni Whānau Te Kuru and Wereta Ponatahuri (died 1951). Heni and Wereta had five other children, Whaitere, Rehuka, Matakeno, Honatahuri and Gilbert.

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36 See *Re Edwards*, above n 2, at [397]-[398].

37 See at [301] regarding a tapu element to whakapapa.

38 Catherine Clarkson emphasised in her opening submissions Poronia Hineana Te Rangi and Rewia Pongi Tutaki (both women) but, as was apparent from the evidence of Ketepunga Matana, the application also relies on Ereatara Te Kuru.

(d) Heni was the daughter of **Ereatara Te Kuru** (1819–1883) and Erehina Te Kiritako (1830–1923). Ereatara and Erehina also had two sons, Arapata Te Kuru and Hoani Te Kuru. Hinerapa, a girl, was whangai to Erehina.

(e) Erehina was the daughter of **Poronia Hineana Te Rangi** (died 1889).

[47] Ereatara Te Kuru was a chief of Ngāti Kere.[39] He was the son of Te Kakaho and Ketepunga. Te Kakaho was the son of Kaiuru and Pihere. Ereatara's line went back four generations to Paramount Chief Te Rangiwhakaewa and Purerau.

[48] Poronia Hineana Te Rangi's ancestry is unknown despite the research of Catherine Clarkson and Manahi Paewai (who gave evidence for Rangitāne). **Appendix Four** to this judgment is a Rangitāne genealogy tree, produced by Manahi Paewai, which assists in showing the above ancestors through whom the applicant group makes its claim. Morehu Smith produced a Ngāti Kere (Te Kuru/Tutaki) whakapapa, which is **Appendix Five** to this judgment. This shows Rewia and Ereatara Te Kuru but not Poronia. As is discussed later, it also shows Rawinia (who is not shown on the Rangitāne genealogy tree).

The history of land/whenua ownership

Pre-Native Land Court

[49] David Armstrong, a historian, gave evidence about the application area in pre-contact times. He referred to a 2005 Ngāti Kere report, which said that archaeological records indicated there was intense coastal occupation, evidenced by "the extreme number of pa, pits, middens and deep shell deposits throughout the rohe".[40] The report estimated that at one time there were around 6,000 Māori inhabiting the coastline and as many as 14 Ngāti Kere hapū (now represented by the Ngāti Kere Trustees)

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39 Some of the evidence referred to him as "the last chief of Ngāti Kere". Dr Tipene-Leach, a witness called by Ngāti Kere, says he was not the "last" nor "the" chief of Ngāti Kere, but he was just one of the past chiefs.

40 Alan Tuteporangi and Wakefield *Māori methods and indicators for marine protection: Ngāti Kere interests and expections for the rohe moana* (New Zealand Department of Conservation, Ngāti Kere and the Ministry for the Environment, 2005) [*Ngāti Kere Report*] at 32.

traditionally occupying the coastline.[41] Ketepunga Matana's evidence that there are many wāhi tapu (sacred or significant places) and urupā (burial grounds) along the coast is consistent with this.

[50] Mr Armstrong referred to evidence before the Native Land Court (when determining the Porangahau block, discussed shortly) that in the mid-1830s and around 1847, Ngāti Kere and other southern Hawke's Bay iwi resided at Nukutaurua (Mahia) to escape the depredations of roaming musket-armed taua. The Native Land Court accepted this as a 'strategic withdrawal' from the area.[42] They returned to their lands when it was safe to do so, and the Native Land Court later found that this withdrawal had no bearing on the maintenance of Ngāti Kere land and other rights.

[51] Mr Armstrong referred to the 2005 Ngāti Kere report emphasising the collective rights and responsibilities of hapū in pre-contact times, exercised through rangatira who were kaitiaki rather than owners. Fishing and marine activity, including the collection of karengo seaweed, was done by whānau, but was overseen through an organised, transparent management structure for the well-being and survival of all the people.[43] Mr Armstrong also referred to the research of the historian Angela Ballara, who said the hapū of the region lived and worked together as a community, sharing pā, kāinga, urupā and resources.[44]

[52] Mr Armstrong also referred to a purported purchase of well over a million acres in the area by William Rhodes prior to 1840. After much wrangling with Crown officials, he was ultimately given a land voucher that permitted him to select Crown land elsewhere and his claim had little impact on Ngāti Kere or other Hawke's Bay Māori. Land in the southernmost part of the application area was included in the 1854 Tautane Crown purchase. It was claimed that this had been sold in a clandestine fashion and without appropriate consultation.[45]

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41 At 32.

42 *The Porangahau Native Land Case* Napier Minute Book No 14/15.

43 Ngāti Kere Report, above n 40, at 32.

44 Angela Ballara "Porangahau: The Formation of an Eighteenth Century Community in Southern Hawke's Bay" (1995) New Zealand Journal of History 29(1) at 15–16.

45 Four years later, a transaction was entered into that established a 1,000 acre Tautane Native Reserve, which appears to be just outside the application area. This reserve had been sold by 1934.

The Native Land Court decision

[53] Ngāti Kere land first came before the Native Land Court in 1886. A rehearing took place in 1887. Mr Armstrong said that the Native Land Court minutes and Angela Ballara's research reveal that title was bitterly contested by a number of Ngāti Kere hapū and whānau and a mass of evidence was provided relating to overlapping and conflicting claims based on ancestral connections, pre-1840 gifts, conquests, occupation and resource use.

[54] These hearings resulted in the creation of seven blocks, which were awarded to different Ngāti Kere hapū and whānau groups. These seven blocks included the Porangahau (20,132 acres) and Mangamaire (13,382 acres) blocks. The Porangahau block and another of the seven blocks, the Arataura block (1000 acres), bounded the coastline of the application area. The Porangahau block was awarded to 105 individual Ngāti Kere owners. The Arataura block was awarded to Raina Te Rangi Koinaki and the whānau of Ripeka Pakipaki, of Ngāti Tamatea, Ngāti Tanehimoa and Ngāti Hinepare (hapū of Ngāti Kere).[46]

[55] Mr Armstrong explained:

> … Well I think the first point to appreciate is that any *Māori* individual could make an application to Native Land Court so that immediately took that out of the control of *hapū* and gave that power to individuals. So if a *hapū* decided that it didn't want to go the Land Court, that it was happy with retaining land in the form of customary title, there was nothing that that *hapū* could do if a single person decided to go to the Court then the whole process would start and dragging everybody in. When land went to the Court there would be, especially of *hapū* control insofar as people would represent *hapū* as they did in this case in 1886, I think there were seven *hapū* of *Ngāti Kere* represented by various parties. *Henare Matua* and others. So they appeared in the Court under those groupings, made claims but then that was really the end of *hapū* control. The lists of owners that were handed in were lists of individuals and they were all named as owners with individual shares held in common undefined which would then be partitioned out subsequently by the Court as was the case in these blocks.
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> …

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[46] Morehu Smith gave evidence that the Ngāti Kere hapū consists of Ngāti Kere, Pihere, Manuhiri and Hinetewai, which together became known in the mid-1970s as Ngāti Kere as directed by the elders at that time. Dr Tipene-Leach confirmed the four hapū that became generally known as Ngāti Kere.

> The Native Land Court made its decision based purely on occupation, who was actually occupying the land, occupying in a sense that the judge could, could understand and see. Had no regard to, the judges had no regard to nonterritorial rights, rights exercised in the common marine and coastal area.

[56] Mr Armstrong described the change from hapū rangatira to individual names on titles in the Native Land Court decision as a revolutionary change, giving every individual owner their own source of authority in relation to the land. He described how this quickly led to alienation of the land:

> As soon as land goes into individual title out of the control of the hapū collective then large scale alienation inevitably follows and that's for a number of reasons of course … the vulnerability of some owners, their indebtedness, their inability to pay rates or keep the land clear of weeds. There's a whole range of forces which are moving towards alienation. So it's not easy for many people to retain those lands and also the succession laws that were imposed after 1867 resulted in massive title fragmentation … So multiple owners on titles which rendered the land of hardly any utility. I'm talking about the Papakura judgment where it was decided that the interests of intestate Māori would be divided equally among all of their children and at that time and for a lengthy period in the 19th century most Māori tended to die intestate.

[57] Mr Armstrong said that there were a number of complaints about the Native Land Court's 1887 decision (mainly relating to the size and location of various whānau and hapū interests). A Royal Commission was appointed to investigate and, after carrying out inquiries, it confirmed the 1887 judgment. There were further complaints in 1892, but the matter was not reopened.

Subsequent changes

[58] The Porangahau block was subsequently and progressively partitioned as follows:

(a) In 1893, the Porangahau Block was partitioned into four parts, designated 1A to 1D. 1B was further partitioned later that year, creating blocks 1B1 to 1B4. The 1B4 block (13,831 acres) was awarded to 75 owners.

(b) In 1912, 1B4 was further partitioned into 15 blocks, 1B4A to 1B4P. Porangahau 1B4N (1,088 acres) was awarded to Wereta Tutere,

Morehu Whānau (an individual), Whānau Te Kuru (an individual) and Repeka Tutere. Some of these blocks were sold, but 1B4N remained in Māori ownership.

(c) In May 1948, 1B4N was partitioned into 1B4N1 (465 acres) and 1B4N2 (623 acres). 1B4N1 was apparently sold,[47] and 1B4N2 was leased by its owners to E M Tiffen from November 1950 for ten years. In 1955, this lease was extended another 15 years.

(d) Now, 1B4N2 has 33 owners. Ketepunga Matana Clarkson held 5,605.345 shares from a total of 99,680. Following her death in 2015, these shares were passed down to her children. It remains in Māori ownership according to Māori Land Online.

[59] The Mangamaire block was partitioned as follows:

(a) On 3 September 1895, an application for subdivision of the Mangamaire block (into Block A and Block B) was heard, with no objections, and was carried out.

(b) In 1912, Mangamaire B2 (1,179 acres) was created through a Native Land Court subdivision. It had three owners. It was leased in 1954 for 21 years to R Eriha.

(c) B2 now has 63 owners. Ketepunga Matana Clarkson owned 1,669.083 from a total of 188,785 shares, which have also passed to her children following her death. It remains in Māori ownership according to Māori Land Online.

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47 The Clarkson application states the applicant group succeeded to land in Porangahau 1B4N1D. Mr Armstrong's research indicates that by October 1973, 1B4N1D was 'Europeanised', that is, it was no longer under the jurisdiction of the Māori Land Court. He says it is not clear whether Ketepunga Matana Clarkson or her successors still own all or part of the Europeanised Porangahau 1B4N1D block. Catherine Clarkson's evidence is that they do.

Applicant's evidence of ownership

[60] Ketepunga Matana, who gave an affidavit prior to her death, said:

> My great, great grandmother, Erehina Te Kiritako's mother Poronia was the sole owner of lands from Poroporo to Porangahau. This was an area that went from Poroporo to the Mangamaire Valley across the Porangahau River.

[61] This evidence appears to refer to a time that pre-dated the Native Land Court hearings. It was left unclear as to the area she was referring to (Catherine Clarkson said it did not refer to "land from Cape Turnagain to the Porangahau River") and how or why Poronia was said to be the sole owner of this land. Kaylene Clarkson was asked about this and it was put to her that this may have been an expression of the mana Poronia held. Kaylene said she did not know and could not speak for her mother but it was not her understanding of Poronia's land holdings. Catherine Clarkson said that Poronia, along with her daughter Erehina, and her cousin Rupeka, ran three pieces of land that abutted the foreshore. She noted that Poronia was alive when the Native Land Court hearings commenced but deceased when the allocations were determined. Catherine Clarkson said that Poronia was nevertheless awarded interests in the Mangamaire Block and the Porangahau No 1 Block. That is correct, but the Native Land Court records show that the Porangahau Block was awarded to 105 persons of Ngāti Kere descent.

[62] The applicants say Chief Ereatara continued as chief of Ngāti Kere for 18 years after the hearings and he said that Whangaehu belonged to their whānau because they had continued to go there. They claim this was a customary gift to their whānau.

[63] David Armstrong was asked about this:

> Q. And I'd suggest to you that there's no evidence in the Native Land Court minute books whereby this chief Ereatara Te Kuru gifted or allocated particular blocks to particular whānau, but rather as you've traversed in your outline of the division of land Porangahau actually was divided up with 105 owners all on the title?
>
> A. Yes I've, I've seen no evidence of any tuku such as you mention. I would have to say that accepting that that happened would go against what I know about how hapū exercised rangatiratanga which is it wasn't a question of chiefs giving blocks to various people or giving lands to various people. The, the allocation of lands and the use of land and resources would be under the rubric

> of the hapū. It would not be in the purview of a chief. The chief did not have a manorial right. The chief did not hand out land. It was a matter for the hapū.

[64] Catherine Clarkson's evidence was as follows:

> … the Native Land Court allocated Porangahau No 1 in partitions. Heni Whanau Te Kuru ("Heni Whanau") Wereta Ponatahuri ("Wereta") and Te Rehuka Tutaki ("Te Rehuka") received the partition "N". When Heni Whanau died in 1944, Wereta assumed her interest in the land however at his death in his will Wereta left his entire interests to Rewia Tutaki. Te Rehuka sought the partitioning of Heni Whanau's interest and the court created 2 partitions 1B4N1 and 1B4N2. The first block was then partitioned to create partitions of 1B4N1A-1B4N1D.
>
> This land was transferred into "General title" for the purposes of sale. Rewia Tutaki retained 1B4N2 as Maori Freehold Land and 1B4N1D remained in General title. The siblings or descendants that succeeded to them sold partitions 1B4N1A-1B4N1C. The applicant group has shares in 1B4N2 (Maori Freehold Land) and 1B4N1D (General title). The land is farmed for the benefit of the shareholders.

[65] For clarity, the partition order for Porangahau 1B4N awarded it to four owners: Wereta Tutere, (Heni) Whānau Te Kuru, Rehuka (also known as Repeka) and Morehu Whānau Tutere. Catherine's evidence in the above quote omitted Morehu Whānau for reasons that are unclear. Morehu Whānau held 100 shares in 1B4N, Rehuka held 52 shares and Heni and Wereta held over 500 shares each. By the time of the partition into 1B4N1 and 1B4N2 (sought by Rehuka), Wereta (having been left Heni's shares) and Rehuka were listed as the only owners on that further partition order. They were awarded their respective shareholdings in 1B4N1, and Wereta received 601 shares in 1B4N2, whereas Rehuka received 162.5 shares. Wereta later left all his interests to Rewia. Maori Land Online now records 36 owners of shares in 1B4N2, including Catherine and Kaylene.

[66] Catherine Clarkson said her whānau have owned Mangamaire B2 since 1865.[48] This date appears to refer to when the Native Land Court hearings commenced rather than when they were determined, given Mr Armstrong's evidence. This also omits the fact that the title was awarded to three individuals and ultimately the immediate

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[48] The Clarkson evidence is at times vague when referring to "our whānau". I understand the Clarkson evidence may at times be referring to her wider whānau but Catherine Clarkson has not provided details of who she includes in this.

Clarkson whānau holds only a portion of all the shares in Mangamaire B2, as Mr Armstrong's evidence clarified.

[67] Ketepunga Matana said she succeeded to Māori freehold land shares in Porangahau 1B4N2 through her great, great grandmother Poronia Hineana Te Rangi. The evidence from Mr Armstrong is that Poronia was one of the 75 owners of 1B4. Ketepunga Matana was one of the children who succeeded to shares in Mangamaire B2 through her mother, Rewia Pongi Tutaki (Rewia held 80 per cent of the shares in this block).[49] Ketepunga Matana died on 14 January 2015. Catherine Clarkson, Kaylene Clarkson, and their sister (Suzanne Clarkson) and brother (James Clarkson) succeeded in equal shares to all of Ketepunga Matana's shares in Porangahau IB4N2 and Mangamaire B2.

[68] In short, Rewia became a substantial shareholder in Porangahau 1B4N2 and Mangamaire B2 and her descendants, which include Kaylene and Catherine amongst others, succeeded to Rewia's shares.

Resource management 1900 to 1960

[69] Mr Armstrong undertook research concerning any formal Māori resource management arrangements in the application area. From this research, he said:

(a) The Maori Councils Act 1900 permitted local Māori organisations to make and enforce bylaws, including in relation to natural resources. A Kahungunu Māori Council was set up under the 1900 Act and appears to have operated in some form until around 1940. Mr Armstrong was unable to determine the extent to which the Kahungunu Māori Council undertook an active role in resource management (including the management of sea fisheries and karengo).

(b) The Archives New Zealand files titled "Fishing Rights", covering the period 1935 to 1977, contain many requests from Māori coastal communities throughout New Zealand for fishing, karengo and shell-

[49] Heni Whānau and Wereta each received 500 shares in Mangamaire B2. Rewia succeeded to 80 per cent ownership of Mangamaire B2.

fish reserves. Many of these were made under the Māori Social and Economic Advancement Act 1945. There did not appear to have been any requests for reserves involving the application area.

(c) There was no evidence that edible karengo was exploited commercially within the current application area.

(d) A 1952 booklet showed that in the early-1950s agar seaweed was collected from a number of areas, including at Porangahau.

[70] I regard this information as neutral insofar as the Clarkson application is concerned. It suggests that the Clarkson ancestors may not have sought to assert control over the area through these formal structures (although the Kahungunu Māori Council may have been an attempt to do so) but it does not indicate one way or another whether they asserted control or took other initiatives in the area in other (tikanga-based) ways.

Applicant group's evidence

Introduction

[71] The evidence in support of the applicant's claim came from the affidavit prepared by Ketepunga Matana Clarkson before her death and evidence from Kaylene Clarkson and Catherine Clarkson. They recounted their memories of their association with the area, the activities they have and do carry out in the area, their spiritual connection with the area and the deeply-felt emotional pain they suffer from activities that harm it.

[72] I was left in no doubt that their connection to the land is deeply personal and of utmost importance to them. I was also left in no doubt that their motivation for a CMT reflects the connection they feel with the area and is to help them protect the environment – to "give them a seat at the table" - when activities in the area are sought to be undertaken that may have an impact on the environment.

Association with the area

[73] Heni and Wereta (Ketepunga Matana's grandparents), and in turn Rewia and Matana (Ketepunga Matana's parents) owned a property on Wimbledon Road, Porangahau (the Old House).[50] Catherine Clarkson said this house was built by Heni and Wereta circa 1900. Rewia and Matana also had a house in Waipukurau (called the Green House) but spent most of their life at the Old House. Ketepunga Matana grew up in the Old House and returned to that house many times in her lifetime.

[74] Rewia and Matana leased the land at Whangaehu to Fanny McGregor and her son Bill who farmed it. Over the Christmas and New Year period the whānau would gather and stay in the shearing sheds. These were large whānau gatherings. Ketepunga Matana and Jim's children spent all the time on the beach. Jim walked the coastline between Porangahau and Poroporo many times with the children.

[75] Kaylene Clarkson is 62 years old. If her grandmother (Rewia) was alive, she would be 106 years old. If Ketepunga Matana had still been alive, she would have given evidence of seeing Kaylene's great-grandfather at Whangaehu and he would now be 170 years old. Her family can place themselves in the application area from the time of the Native Land Court hearings until the present day and her family's tīpuna were there for centuries before that.

[76] Kaylene Clarkson's earliest memories and her relationship with her wider whānau came from Christmas spent at Whangaehu. They would also go there in the August school holidays. Kaylene continued to go to Whangaehu every year until about 1983 or 1984. She stayed in the shearing quarters, but when the McGregor family were living in it they camped on the property. The McGregor family moved away in about 1990 and the property was sold to Robert Buchanan.

[77] Kaylene has been walking the coastline for 48 years. She recalled walking the coast many times with her father, Jim. After his death, and for at least 30 years, she

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[50] Ketepunga Matana's affidavit says the Old House is opposite the Longest Place Name in the World sign, which is 5.4 km south of Porangahau, running parallel to the coast. The evidence from Robert McLean is that it is 17 km to get from there to the coast, which Kaylene agreed with in evidence.

and Rue Matiki Eriha (Lou) have been the ones to do this journey annually. She has also walked to Poroporo with other members of her whānau. As she has gotten older, it has meant more to her than just the gathering of seaweed. Lou has brought back the rubbish and debris from the fishing boats that wash up along the coast there. She has seen many changes to the cliffs because of storms and high seas.

[78] Kaylene said the coastline to Poroporo is inaccessible the majority of the time unless you knew what you were doing. In 2009 they got caught on the rocks by both the tide and the setting sun and were forced for the first time to spend a night in the flax on the cliffs. She also recalled an occasion where a local farmer, Gavin Cook, took pity on her and her whānau walking and helped them across the farm with his quad bike. He came back later in the day to give them a ride, a hot shower and tea. He came looking for them to make sure they had got back safely.

[79] Catherine Clarkson described her mother as having actively sought out spiritual and whānau comforts and including her children in her links to Porangahau. Her earliest memory was being on her grandfather's knee at Whangaehu at Christmas. She spent a lot of time exploring the beach and the hilltops with a cousin (Hoera Eriha) who was raised by Catherine's grandparents. She also described memories of those walks and other events, including cousins being swept out to sea and being rescued by the Stoddart family, who had a boat. She said the loss of the shearing quarters through the sale of the McGregor property and the Whangaehu community subdivision impacted the applicant group's ability as a whānau to stay as one at Whangaehu but it did not stop them from going there.

Collecting karaka berries

[80] Ketepunga Matana said that the stand of karaka trees on the coast that still remain at Poroporo today was planted by Poronia and is the site where Poronia lived until she died. This is why karaka trees and Poroporo were very special to Ketepunga Matana and her whānau. Ketepunga Matana said that karaka trees once were everywhere at Whangaehu. She recounted how the berries were prepared by her grandmother (Heni) and eaten.

Kaimoana

[81] Ketepunga Matana said their customary right to gather kaimoana came from Poronia and her succession to coastal lands and from Ereatara Te Kuru. As chief, Ereatara said who from the hapū could go where in the rohe to gather their kaimoana and when. She said this tikanga has remained with them to this day.

[82] Ketepunga Matana said it was not an outright rāhui to go somewhere without permission, but that where and when you went was a sign of respect to the mana of the chief. You did not go into someone else's area without asking and there would be trouble if you did. You respected that others needed to obtain kai. If Ketepunga Matana's whānau wanted pipi or cockles, they would go to Te Paerahi or Blackhead Beach and, as a sign of respect, they would always visit the families who lived near the beach before taking the kai. It was the same when people came to Whangaehu, people would first visit her mother, Rewia, before taking kai. In modern times it became "an excuse for a cup of tea", but you still did it.

[83] Ketepunga Matana said that her grandpa Wereta would bring back pāua, kina, crayfish and sometimes karengo from Whangaehu. He could be gone several hours or days. Her father would go with him many times. Nothing was ever wasted. Wereta was very knowledgeable about the sea and the tides. Heni never went into the sea but would wander around the reef looking for her favourite, "policeman caps" (limpets). She taught Ketepunga Matana that you put things back in the same place and you did not move the rocks and disturb the rock pools. Rewia also passed on her knowledge of gathering kaimoana.

[84] Ketepunga Matana said that all gathering of kaimoana was undertaken with a measure of conservation. You made sure you left some for the next time and did not strip the rocks. Gathering kaimoana supplemented her diet all of her life. Kaimoana was plentiful and easy to get from the "first reef" at Whangaehu.

[85] Kaylene Clarkson said she had been going to Whangaehu for the purposes of recreation and non-commercial customary fishing for as long as she could remember. Her grandfather took her to the tidal pools where you could get crayfish, kina and fish. The reef was like a seafood supermarket. She said that she knew that the right to go

to Whangaehu to get kaimoana came from Ereatara Te Kuru and also because of the lands they have succeeded to that were owned by Poronia. She said whānau areas were for a whānau's exclusive use because it stopped fighting amongst hapū and if you went to the same areas, you would know your kai was there and no one had taken it. If people wanted to collect kaimoana in the area, they asked you first.

[86] Kaylene learnt the tikanga by watching and by doing what she was told to do. Growing up as a child she learnt that there are certain things that were done for some reason. You do not just pull up to a beach and help yourself. She said that they used to go to Te Paerahi across the sand dunes to collect pipi and cockles. When they did so, they would go and see the Hutana family who lived there, before they waded into the mud. She said that she knows instinctively to respect other people's space at the beach. She said of the many times that she has been to Poroporo, she has not seen anyone there except her immediate whānau who are with her at the time.

[87] Catherine Clarkson said that the applicant group still practises tikanga in undertaking activities at Whangaehu but the dominance of European development in the valley and statutory intervention means the coastal marine area is "a free for all". But she says:

> Māori who know the tikanga that you ask first, will look away from you at the beach, put their heads down and avoid you. Others will talk to you seeking acquiescence, but again I say; they know; they all know and it is for that reason we know our presence and interests in the coastal marine area is substantially uninterrupted.

[88] Catherine Clarkson said that she has waded through the rockpools looking for kina, pāua and koura and held her mother's kete while her mother told her stories of her great-grandmother's love of octopus or wheke as she gathered limpets. This is the way she learnt the tikanga of the activities in the coastal marine area. She spent many hours with her grandmother in the kitchen at Whangaehu preparing karengo, pupu, shelling kaimoana – she observed and she learned.

[89] Catherine Clarkson said that a whānau has its own tikanga. She said that some of her whānau tikanga regarding gathering kai is:

(a) gathering certain kaimoana at certain times of the year following indicators like tides and the flowering of trees;

(b) harvesting the karaka berries and processing them so they are edible (which Heni was an expert at);

(c) taking only quantities of kaimoana that you personally could carry;

(d) taking adult shellfish only;

(e) never pulling, tearing, or using a knife on karengo;

(f) if you move something, put it back where you found it;

(g) never take advantage of the stranded or landed eel or fish and only take fish from moving water;

(h) never eat, gut or dispose of kaimoana or shells where you have taken it from;

(i) rinse your kete in running water before leaving the beach;

(j) respect all kaimoana, treat it with dignity at all times, dispose of shells preferably by burying; and

(k) prepare your kaimoana immediately upon returning home, as it is a living creature – leaving it to suffer will harm the taste.

Karengo

[90] Ketepunga Matana said that karengo was important to the diet of her whānau. It was gathered in the winter and stored for times when you could not rely on food being available. When you gathered karengo you did so in a way that ensured its return. She learned this from her grandmother (Heni) and her mother (Rewia) and it

has been passed on to her children. In her lifetime she witnessed many generations of her whānau practising the tikanga of conservation, drying the karengo and eating it.

[91] Kaylene Clarkson said that August is the time that her whānau got together to gather karengo. They pick it in a way that encourages its growth and to protect it. She remembered hearing a story about George Tuhiwai being told off for scraping the rocks with a knife to get the karengo off. This was an example of being disciplined for not following tikanga.

[92] In the school holidays she would go to Poroporo and more often than not stay with her mother's sister, Mere. Mere was her constant companion on many trips around the coast to Poroporo and she was responsible for teaching Kaylene a lot about the coast, the places to go and when karengo is at its best to pick, and how to pick it in a way that conserves its continued growth. Mere is now too old to go over the rocks.

Urupā

[93] Ketepunga Matana said that many of the coastal cliffs and hills adjacent to the application area are pā sites and the burial grounds of her tīpuna. She said "we know where they are and you know they are there, but these are not places where you go". These places are tapu. They are to be respected but not feared. Heni lies in a large unmarked white tomb resting above the ground at the urupā on Beach Road, Porangahau. Her tomb is next to the two marble plinths that mark Heni's father, Ereatara, and Erehina.

Environmental impacts

[94] Kaylene Clarkson described the impact of the subdivision on the coastline resources as "beyond belief". The number of vehicles, boats and people is unbelievable. She said:

> … They drive on it like it's a road, damaging the reef and sand with their vehicles. It's very sad. … the damage is being done and the stripping of resources is obvious.

[95] Kaylene recounted that in about 2006 or 2007 the canal at the first reef changed considerably. It was deepened and they found it impossible to get on the reef at full

tide without wading. She heard that someone had used a front-end loader to remove rocks and sand from the side of the reef so that the bigger boats could be put in the water there more easily. She said:

> The consequence of this has done considerable damage to cliffs above the reef as the coastline is being eroded. In this area it is not uncommon to find fuel spills, fish carcasses and rubbish. All of these things hurt us.

[96] Kaylene said that, as the numbers of people who use the coast has increased, she has witnessed more and more damage and she knows the loss of kaimoana and the damage to the cliffs that has been done.

[97] Catherine Clarkson said:

> … I don't know where my feelings come from for Whangaehu whether it is a learned behaviour or an inner sense but what I do know [is] that the Whangaehu that I knew as [a] child has largely disappeared. I also know that what I feel I saw in my grandmother and my mother and I can see it in my sister.
>
> We have a connection with Whangaehu but it is a painful one. The best way to describe it is an immense hurt like you feel when you have let someone down, your stomach is in knots and you have lumps in your throat that well up. I have done a lot of research and looked at hundreds of photos and books and land court files; it's extremely emotional and sometimes you have to stop and try to put into perspective what you can change, and what you can't change, because the reality hits you that something you truly care about is slipping through your fingers. A customary marine title would recognise our place in the coastal marine area, does not lessen our burden but I hope it makes our journey easier.

Ngāti Kere evidence

[98] Morehu Smith gave evidence about her association with the area. She is one of the six people in the Ngāti Kere MACA Working Party mandated by the Ngāti Kere hapū at a meeting on 20 August 2016.

[99] She is 74 years old now. She was brought up at Te Paerahi Beach Road, Porangahau, not far from Te Paerahi moana. Her pepeha relating to the application area is as follows:

> Ko te Awaputahi te maunga
> Taurekaitae te awa e rere atu ana ki Te Paerahi moana
> Mai i a Ouepoto tae atu ki Te Poroporo te whenua

Ko Ngāti Kere, Ngāti Pihere Ngāti Hinetewai oku Hapū
Ngarangiwhakaupoko te tangata
Kahungunu te Iwi

[100] Morehu's whakapapa as it relates to the area is **Appendix Six** to this judgment. Morehu is the daughter of Te Rehuka Tutaki and Ruihi Tutaki née Takarangi Metekingi. Te Rehuka Tutaki was a son of Heni Whānau and Werata Tutaki and a sibling of Rewia. So Morehu is a cousin of Ketepunga Matana – they share the same grandparents, Heni and Werata. These relationships can be seen in the more detailed Ngāti Kere whakapapa also produced by Morehu referred to earlier as Appendix Five. The whakapapa in these appendices includes Rawinia, whom Morehu describes as the only child of Piata, "a descendant of the illustrious hapū Hinetewai, the landed gentry for my Te Kuru/Tutaki families". Morehu said that Rawinia, as a female child, was rejected by her father Te Kakaho and was raised by Te Kakaho's brother, Te Rewiti (Wairau). Rawinia inherited in excess of 90,000 acres from her mother, Piata. Rawinia's land extended from Mangamaire through Mangareia to Whangaehu Manawaangi through to Ngapaerupu. She said the St Hill family urged her not to sell her land and this is why there now exists the property known as IB4N2.

[101] Appendix Five (the Ngāti Kere Te Kuru/Tutaki whakapapa) indicates that Rawinia did not have children. Morehu provided a copy of the will of Rawinia dated 1897. That referred to interests in the Mangamaire Block, the Porangahau No 1 and Porangahau No 2 blocks, and other blocks. It showed her intention to bequest her interest in those blocks to a number of individuals who are the descendants of Re Rewiti (the brother of Te Kakaho), including Wereta, who was the father of Te Rehuka (Morehu's father) and Rewia (Ketepunga Matana's mother). It was not explained whether these inheritances took place although it is clear that Wereta succeeded to shares in Porangahau 1B4N.

[102] Morehu said that, as a child, she sat at the heels of her elders, who plied her with history, tikanga, kawa and whakapapa. She referred to oral history that Kere came to Porangahau a little earlier than Cook and was given the flax bush as an indication by the hapū of that time that he was welcome to stay.

[103] Morehu said that she was fortunate enough to go to every beach along the coastline. She described the beaches in the area. She described the kaimoana in these areas and how they were caught. This included:

(a) Parikoauau to Whangaehu area – Morehu described this as a rocky area that produced karengo, "a delicacy" that was plentiful, as were pupu and limpets. She described her father, Te Rehuka, climbing Parikoauau in late June or early July and looking toward Ngamahanga (a woman and her child turned into a rock as she did not observe a tapu) further down south to see if the seaweed flowed down her back. If it did, they would continue further down to pick the seaweed by hand. She said that, in later times, people swam across to Takapau rock to gather seaweed but they were told off by Te Rehuka because nothing grew inshore if the breeding ground was tampered with. Morehu also referred to "Finlays" where pāua and crayfish were collected. She said this area was special to Te Rehuka and his cousins. The only form of rāhui she ever recalled seeing performed along this stretch of coastline involved a karakia and a stick placed in the sand. The stick was removed after a period and Te Rehuka told Morehu that its purpose was to regenerate stock.

(b) Whangaehu – Morehu referred to a reef across the sandy beach where karengo, crayfish and pāua were caught. Before her time, muttonbirds burrowed in the cliff-face above the reef.

(c) Whangaehu to Poroporo – Morehu referred to a rocky beach region where pāua, kina, crayfish, pupu and limpets were plentiful "and still are due to access". She said wet fish species in the area were gurnard, lemonfish and butterfish and "although hindered by commercial fishermen these species are still caught today".

[104] Morehu recalled an occasion when her family went to Poroporo and the tide was low upon arrival at about midday. Her parents busied themselves by forming circles of rocks. They all stayed the night, not sleeping because of the rocky terrain.

She and her brother had an astronomy lesson from Te Rehuka in both Te Reo Māori and in English that night. The following morning "once the tide had ebbed the fish required were taken from the circles of rocks, the same returned to where the men had found them". They then set off for Wainui or Herbertville, where one of the aunts was waiting on the truck. She had picked karaka berries while waiting for them. In hindsight, she knows that she witnessed a strategic and practised approach to the gathering of food and it was an "awesome experience".

[105] Morehu referred to there being many beaches to choose from along the coastline and therefore fishing took place at alternative beaches. She understood this to be a form of conservation. She said that other inland hapū enjoyed the hospitality of her people, who gave the manuhiri the privilege of gathering kaimoana. In return, Morehu's people were permitted to go to the bush to gather berries and birds. She concluded her evidence by saying that "[t]he hapū of Ngāti Kere have held fast to the tikanga of our coastal area as left by our tipuna and extensively used and occupied the area prior to 1840 and continue to do so" and she hopes it will continue into the future.

[106] In cross-examination of Morehu, Catherine Clarkson raised the fact that Morehu did not have any shares in Porangahau 1B4N:

> A. – my mother and father had eight children, they didn't cater for my brothers, *Ngā Rangi Whakaupoko* or *Tipene Mātua,* they were already provided for, so my father took four children and my mother took the other four.
>
> Q. But nonetheless your father didn't give you any shares in the *Porangahau* 1B4N block, did he?
>
> A. No, but he gave it to my daughter.
>
> …
>
> Q. Which as I said it's not *tikanga*, that's by-passing your generation, isn't it?
>
> A. Well everything is under the *Pākehā* law isn't it? It doesn't necessarily –
>
> …
>
> Q. And your daughter is an owner today, still, isn't she?
>
> A. Yes.
>
> Q. She's provided no notice of objection to our application, has she?

No. But she knows that I'm – I have.

[107] Catherine Clarkson put to Morehu that she had a pattern of opposing matters taken by the Eriha family before the Court. Morehu said she did so because it was about "our future generations". The cross-examination continued:

> Q. But these are matters where you are not an owner?
>
> A. That doesn't matter. I *whakapapa* to this area.
>
> Q. Well it does matter because you're not an owner?
>
> A. We'll I know I'm not a shareholder but I do *whakapapa* and you can't take that away from me.
>
> Q. I'm not suggesting I'm taking your *whakapapa* away from you. I've never said that we don't come from *Porangahau* and I never said that you don't come from *Porangahau* –
>
> A. Yeah.
>
> …
>
> Q. The point … that we're trying to make in this Court is that we've restricted our involvement in this application to … people who own land.
>
> A. Okay I'll answer that. For me the land is quite different to the seashore and the coastline. We are simply *kaitiaki* of the whole area, the whole 40 kilometres from *Ouepoto* to *Poroporo* that's, that's what I feel and I'm passionate about that.

[108] Ngāti Kere also relied on an affidavit of Piri Sciascia that was filed in support of the Ngāti Kere application under the MACA Act. I was not taken to any particular part of that affidavit. For present purposes, the most relevant parts of the affidavit are the following:

> 1. I am 70 years of age … I was raised in Porangahau … We belong to the Ngati Pihere hapu of Ngati Kere as descendants of Pihere, the taokete of Ngarangiwhakaupoko, and grandson of Kere. As a member of Ngati Kere and Ngati Pihere I am represented by MACA and its spokespersons who are my relatives. …
>
> 2. MACA was mandated by our marae trustees to undertake the current application. They are acting on behalf of Ngati Kere.
>
> …
>
> 4. I grew up in Porangahau. We went regularly to Te Poroporo, Tautane and to Wainui to gather sea kai. My grandfather Rangi Ropiha was reputed to have caught the last titi from Te Poroporo before feral cats decimated

the population. I have taken my own family to Te Poroporo to gather karengo …

…

6. My responsibilities to Ngati Kere primarily rest in the Kaumatua role I have exercised for forty years particularly as a speaker on the paepae of Rongomaraeroa.

…

[109] Dr Tipene-Leach also gave evidence for Ngāti Kere. He is of Ngāti Kere and Ngāti Manuhiri descent. He comes from Porangahau. He is a public health physician and presently works as Professor of Māori and Indigenous Research at the Eastern Institute of Technology in Napier. For the past 12 years he has been the representative for Rongomaraeroa marae on the Heretaunga-Tamatea Settlement Trust. During the period 2012-2017, he was the chairperson of that trust as the settlement of historical claims under Te Tiriti o Waitangi was progressed.

[110] He explained:

> I'm a descendant of *Ngarangiwhakaupoko,* ... the man who, in our area, combined all the various *hapū* who lived there and pulled them together as a single political moiti and we have since that period of time kind of lived as *Ngāti Kere*, being the people, with *Ngāti Manuhiri* coming in, *Ngāti Pihere* coming from inside us, and at the time of the '86 and '87 *Pōrangahau* hearings *Henare Matua* said at those, "We all work as a single community."
>
> ... *Ngarangiwhakaupoko* was the grandson of an *Ariki* of *Ngāti Kahungunu*, who at the time that all the people along the coast in the *Ngati Kahungunu* area were all living independently and fighting each other. This very powerful Chief decided that that wasn't good enough, he married three women and then he married those children into various peoples, and at our end *Ngarangiwhakaupoko* was planted, so to speak, as the southern coast of this net called *Te Kupenga a Te Huki*. That net runs from *Pōrangahau* to *Whāngara* north of Gisborne and it's got three main *pou* and all these *hapū* in between them.
>
> I raise that because … there are appropriate groupings of people to do appropriate things at appropriate times, and that's an example of when the very wide look at what's going on in your society was the appropriate thing to do.

[111] He provided his understanding of the history leading to Ngāti Kere's alienation from its land, referred to by Mr Armstrong and discussed earlier, as follows:

> … There was a period of great instability in our history in the 1820s and, well in the 1820s, when we left lock stock and barrel and went to *Nukutaurua*. We,

as *Ngāti Kere* and *Ngāti Manuhiri*, went up there because there were people with guns around the place, and so we went up there, we were up there for possibly 10, maybe 12 years, before we cut enough flax and bought enough guns to be able to come back and defend our territories and we arrived back just after the signing of the Treaty of Waitangi. Henare Matua said he'd heard that the Treaty had been signed when he arrived home.

So the people came back and they had a new economy. Once upon a time the economy was seasonal and it was about collecting food. It was about trading food with inland people, that sort of economy. By the time we came back we had changed, we were dependent, if you like, on a monetary-based economy that we had met at *Nukutaurua*, that we had engaged with, with the whalers, the sealers and the flax traders. … in 1840 we had had 70 years of rats, dogs, cats and other vermin on our lands so that the food that was once previous gathered was gone. The habits of doing so had also gone. Mass planting of *kūmara* had gone and we were entertaining a very different sort of life.

We were also not happy at the time that invaders with guns were not going to come back, and so we invited *Pākehā* to come, and indeed they did come, but … they didn't come with an honest face, if you like, and the *Tautane Block* which is a block that's just south of *Whangaehu*, but is included – the coastline is included in Ms Clarkson's claim – was a 70,000 acre block that we at *Pōrangahau* discovered had been sold, in 1856 we discovered it, because the people came to *Pōrangahau*. McLean came to *Pōrangahau* looking for the *Pōrangahau* block sale and he said: "Look, you might as well sell this, you've already sold *Tautane*," and we said: "What? Who sold *Tautane*, we didn't sell *Tautane*, we own *Tautane* but we didn't sell it."

And when you look at the deed of sale, indeed you find that almost none of the people on that … deed of sale, came from *Ngāti Kere*. They were other Chiefs from other places, *Te Hāpuku, Hineipakitea, Pūhara*, these are other big Chiefs from around – *Hore Niania* – the only one of our people who signed that deed was *Hereatara Te Kuru*. So Henare Matua took it back to Parliament and forced them to renegotiate this deal and he tried to stop the sale. However, the people were … dependent on the new economy … we didn't have anything to sell, or anyone to sell it to. We didn't live in Auckland. So, we were selling land in order to partake in the new economy.

So the people sold all, except Henare Matua and *Hoera Rautu*. They said: "We don't want any part of this, we don't want any part of the money. We will sign because the people have said en masse that they want to sell, but we want a reserve." So there is a 1,052 acre reserve that sits on the coast between the *Tautane* and the *Wainui* streams that was set aside for *Hoera* and Henare Matua as non-sellers.

That piece of land stayed, certainly in our family for about 30 years after Henare died. His younger brother *Tipene*, who was back in *Pōrangahau* trying to farm the lands in *Pōrangahau*, sold it in order to buy sheep to put on his land because *Māori* couldn't borrow money from anybody in those days. So that land did pass out of our ownership and I'm not sure what happened to *Hoera Rautu's* land. *Hoera* was buried there. *Hoera* and *Henare* were very close, they were cousins, they were the best of friends. They used to travel and stay at each other's houses. In fact between myself and my uncle we live – there's a section in the middle that belongs to the *Rautus* and we think that Henare Matua gave that to his friend so he had somewhere to stay.

> The recent purchase of *Tautane Station* by *Ngati Kahungunu* is seen as the final part, if you like, of that story. So finally something has been coming back and the thing that we're trying to point out here is that there has been a major onslaught of colonisation; that many people have missed out; that there are a lot of us now who are landless across *Ngati Kahungunu*. In the *Heretaunga Tamatea* region negotiation that I chaired, we lost 1,275,000 acres and we own 2% of the remaining area in the *Heretaunga Tamatea* area. So the alienation of land in our area was just huge.

[112] I discuss Dr Tipene-Leach's evidence in more detail later.

Rangitāne evidence

[113] Manahi Paewai, a cultural adviser with significant local Māori and community involvement, and who has previously given evidence before the Waitangi Tribunal and elsewhere, gave evidence on behalf of Rangitāne. His pepeha is:

> Ko Kurahaupō te waka
> Ko Ruahine te maunga
> Ko Manawatū te awa
> Ko Te Rangiwhaka-ewa te tangata
> Ko Rangitāne te iwi.

[114] He said that traditionally, in order to demonstrate exclusive occupation or mana whenua in an area, iwi and hapū would undertake a process of land occupation, which had a number of stages.[51] He said that Rangitāne occupied the Clarkson application area from the early 17th century onwards. In the 1820s to 30s, much of the local Porangahau population migrated to the Mahia Peninsula. When they returned in around 1840-1850 the Rangitāne hapū, Ngāti Hāmua, were in residence in the general Porangahau area. Ngāti Hāmua welcomed the return of the people, explained they had occupied their land as a caretaker, and duly departed south. Ngāti Hāmua's right to occupation would have originated from Hāmua himself, who lived in the latter 15th and early 16th centuries.

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[51] He said that for Rangitāne this would have included: take kitea (discovery and settlement); take ahikā (burning fires to signal continued settlement, use and maintenance); take ahikā-roa (the continuance of burning fires signalling undisturbed periods of settlement, use and maintenance); take tīpuna (settlement and occupation based on ancestral rights with well-defined boundaries); take tuku (refers to land that has been gifted but with well-defined obligations for recipients around use and permanent occupancy); and take raupatu (refers to land that has been acquired by physical force and conquest, followed by occupation).

[115] In the application area, from 1840 onwards, the rangatira of the area would have been Ereatara Te Kuru, who is of Rangitāne descent. He would have had 'take tīpuna' status, with all the responsibilities and obligations of leadership, to ensure the provision of warmth, food, shelter, safety and protection for his people. His duties would have included directing where and when food would be gathered, and by whom, and he would have overseen all matters of cultural practice, including any temporary restriction measures around food gathering, such as rāhui or other restrictions as required. Other leaders from around this time would have included Te Kakaho, Ketepunga, Te Kaiuru and Pihere, who would have resided in a period of 'take tīpuna' and all of these leaders have a Rangitāne lineage.

[116] Today, it is his understanding that the Ngāti Kere Marae Trustees are generally consulted by the local authorities in the Clarkson application area. For the northern reaches of the Clarkson application area, Ngāti Kere generally operate as the "eyes and ears" of Rangitāne, and in the southern part both Rangitāne nui-ā-Rua and Te Hika o Pāpāuma undertake the role.

[117] Mr Paewai said that in his view one cannot occupy an area in accordance with tikanga without practising tikanga in carrying out certain customary practices. For Māori, that is their role as kaitiaki and as mana whenua over their respective takiwā. As an example, he said Rangitāne's basic tikanga around fishing and the collection of kaimoana on the coastline was as follows: they must always return their first catch when fishing out of respect and they continue to reiterate this to their mokopuna; when collecting kaimoana on the rocks, if you move anything including a rock you must always return it to where you found it; and they do not eat their kaimoana on the beach.

[118] He also said that there are particular rights and practices that, since at least 1840, Rangitāne have exercised and continue to exercise generally along its coastal takiwā in accordance with its tikanga. These include:

(a) gathering kaimoana on the coast, such as mussels, pipi, pāua, koura and karengo. Karengo in particular is more abundant after a wet winter. This kaimoana is collected throughout their coastal takiwā with a number of favoured areas for particular species;

(b) fishing off the coast for various fish including snapper, kahawai and baby sharks;

(c) collecting water for ceremonial purposes, as sea water (waitai) is recognised as a cut above fresh water for assisting tapu/noa procedures. Waitai was also collected when returning inland with kaimoana to keep it fresh. They continue to do this today;

(d) collecting specific plants, kai and other resources from the moana for pharmaceutical purposes. The whenua and the moana are both like a pharmacy for their people. The moana has properties that can heal wounds. Ground pāua shell is also used for skin allergies and karengo is used to assist with other allergies;

(e) collecting flax for educational purposes. Since before 1840, the flax plant has been significant for Māori in general. Rangitāne have been no different. They continue to see the significance of this plant and hold wānanga/workshops on learning how to utilise, gather and care for the flax plant today;

(f) over the years since 1840, rāhui have regularly been placed along the coastline covering Tautane, Akitio and Porangahau when drownings have occurred, out of respect for those who have passed and their whānau and also for safety reasons. They are not applied consistently but tend to be placed for a period of one to six months after a drowning. The general procedure for Rangitāne is to call the appropriate hapū in the area and notify them of what has happened, then leave it at their discretion as to how the rāhui is placed and for what period of time.

[119] Mr Paewai was of the view that Ketepunga Matana Clarkson's evidence contained the sort of knowledge that mana whenua would be expected to know as part of occupation of an area. He said he "loved" what she had to say and it was "precious" and "a wonderful piece of work". He remembered Rewia and Eriha and went to Porangahau many times. However, he did not see evidence that the Clarkson whānau

maintained the necessary practices to hold or occupy the application area exclusively and in accordance with tikanga.

[120] Catherine Clarkson's cross-examination accepted the deep connection between her whānau and Rangitāne. She did not challenge any of his evidence about Rangitāne's connection to the area or about tikanga. She put to him that their ownership of land gave them mana and as the last man standing they got the full benefit of this. I refer to this later.

[121] Catherine Clarkson also gave evidence that the rāhui situation had not arisen in the application area. The last person to drown in the area was Maata Te Peeti's brother, who washed off the reef, and whose body was never found. This would have been in the 1930s and he was remembered in a ceremony at the reef every year after that by the applicant group's whānau. Catherine said that plenty of people have drowned at Blackhead and up north, but this is well outside the application area.

Te Hika o Pāpāuma evidence

[122] George Matthews, the applicant on behalf of Te Hika o Pāpāuma in its CMT application, gave evidence for Te Hika o Pāpāuma. He said:

> 5. Te Hika Ō Pāpāuma are an ancient people that predate all European contact with Aotearoa. Our ancestor Papauma from whom our iwi derives its name from is a direct descendant of Kupe and is regarded as Te Aitanga a Kupe (offspring of Kupe). Te Hika O Papauma have exercised and continues to exercise Mana Whenua and Mana Moana over our traditional rohe.
>
> 6. Te Hika Ō Pāpāuma have strong relations with other iwi on our borders including Ngati Kere;
>
> 7. Te Hika Ō Pāpāuma maintain that historically our northern boundary is at Poroporo and holds to this day, an enduring deep belief that we have strong customary rights on the coast at Poroporo.
>
> 8. We also recognise the Ngati Kere interests at Poroporo, and south of Poroporo to Tautane, to the north end of the Wainui River mouth, sometimes call the Tautane Block.
>
> 9. Te Hika Ō Pāpāuma are also aware of the Clarkson whanau, and their land interests at Poroporo and north.

10. In due course when Te Hika Ō Pāpāuma eventually advance their substantive case, we look forward to legal recognition of our protected customary rights that will in part embrace and be delineated by our:

    a. Historical interests at Poroporo; and our

    b. Ancient historical connection to the whenua of Tautane; and provide

    c. Acknowledgement of our waahi tapu between the north end of the Wainui river mouth to Poroporo.

11. Te Hika Ō Pāpāuma therefore – in this context – also acknowledge and understand that the pursuit by Ngati Kere of any customary marine title by them – within the area between Poroporo and the Wainui river mouth – naturally arises from their own interests there founded on tikanga.

12. Te Hika Ō Pāpāuma respectfully acknowledge the Clarkson application and the mana of that application [and] its applicants in bringing that application.

[123] Mr Matthews confirmed that Te Hika o Pāpāuma also had strong relations with Rangitāne and would be open to discussing with Rangitāne and working together regarding their respective applications regarding the takutai moana. He acknowledged the Clarkson application put forward substantial evidence of customary usage-based tikanga. He acknowledged there were complexities of his whakapapa but said "when I stand at Pāpāuma that mud between my toes is Pāpāuma".

Other interests and activities

[124] Other families have long-held associations with the land that abuts or is in proximity to the application area.

[125] One of those is the McLean family. The McLean block at Whangaehu is approximately 1000 acres. It shares a boundary with the "Eriha land" (which I understand to refer to Porangahau 1B4N2 or part of it), and abuts the coastline and runs south to the Stoddart farm.

[126] Robert McLean gave evidence about his family's association with the area. He affiliates with Ngāti Raukawa and Te Ātihaunui-a-Pāpārangi on the Whanganui River. His iwi are linked through his whakapapa to Ngāti Kahungunu. Mr McLean's family have owned and occupied the McLean block since 1918. He was born and raised in

Whangaehu and has spent his life there. He produced photographs of Whangaehu Beach and the shearers' quarters referred to in the Clarkson evidence (discussed earlier).

[127] Mr McLean said that he and his brother have a long and positive relationship with Ngāti Kere and have been involved with Ngāti Kere in monitoring and protecting the environment for many years. He helped turn parts of the area into reserve land or bush walks. He opposed the Whangaehu subdivision (referred to earlier).[52] He has spent most of his life advocating for the valley and he strongly objects to the Clarkson application.

[128] Mr McLean said the Eriha family (Rewia and Matana and children) gave up residing on their Whangaehu land "many, many years ago". The family home (in Wimbledon valley) was about 17 km away from the coast. The Eriha family used to have a block of housing next to the McLean land but it was torn down and unliveable by the 1950s. Catherine's grandparents (Rewia and Matana) and a few of her aunts and uncles would lodge in the Whangaehu shearers' quarters during the summer school holidays and they continued to do this until the mid-1970s. Mr McLean rarely saw the family from the time Rewia and Matana passed away. From about 1980 he saw Kaylene and her husband visit to gather karengo, pāua, crayfish or to picnic but they would be day trips to the beach and they did not stay on the land.

[129] Mr McLean's evidence also discussed fishing. He said that you could still get a feed of pāua and the fishing is great. Most fishers get snapper every time they go looking for them and surfcasters get kahawai at the beach. He said the snapper are back after 50 years. Commercial rock lobster fishing has happened from the beach for over 50 years.

[130] Richard Kibblewhite also gave evidence. Mr Kibblewhite married Robert McLean's sister Janet and through her has been associated with the McLean whānau for over 35 years. He runs a fishing business off the beach. This has been the only commercial fishing business at Whangaehu for about 10 years, but before this there

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[52] At [10] above.

had been up to five boats fishing commercially.[53] His daughter now runs the vessel during the summer. The business employs two crew and a tractor driver. It also employs young people and has trained many of them through to a skipper's ticket. He has a management plan for safe fishing procedures and an emergency plan for most events like fuel spills.

[131] A taiapure committee was set up about 20 or so years ago for local community management. Mr Kibblewhite was on the committee from the outset. He has also been involved in the Crayfish Management Board and Fin Fish Management Board for 20 or so years. He understands boat and fisheries management.

[132] Mr Kibblewhite said that his family are involved in the community and supply kaimoana for marae functions and hui. They have a hut on the beach front where family gatherings and weddings take place. There is a sign on the beach, which they put up 25 years ago, asking people to measure seafood so as to take only legal size and to take only their legal allowance. They also ask people to take away their rubbish.

[133] Mr Kibblewhite said conservation is of importance to the community and many of the community have been involved in conservation issues. In 1974 Mr McLean planted the valley with trees to encourage native birds and had 12 or so customary sites of significance recorded in the Historic Places Trust all over the valley. He also put up a sign at the beach many years ago to help people measure seafood. Mr Kibblewhite and Mr McLean kill cats, ferrets and possums in the valley on a daily basis. Mr McLean sprays thistle, cares for the rātā trees and patrols the beach daily with his team of hunting dogs. Mr McLean arranged for a toilet to be installed so that day-trippers would not have to keep going to the toilet in the bush. Mr Kibblewhite put in a toilet at the beach for the same reason. Mr McLean and Mr Kibblewhite clean up after campers and care for the land every day. They set up a green waste area after the subdivision but there is still a lot of rubbish dumped on the side of the road from the new baches. Mr McLean got the coastal walk on his own land put into a QEII Trust.

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[53] Mr Kibblewhite has been a commercial fisherman all his life. He had been waiting for a gap to set up a fishing business at Whangaehu. The opportunity to do so arose about 10 years ago. The last of these vessels left after it was caught selling pāua and rock lobster illegally.

[134] Mr Kibblewhite met Catherine and Kaylene Clarkson in Napier a number of years ago. It was very amicable and Robert has told Richard stories of the McLeans and Erihas playing together and having good neighbourly relationships. Mr Kibblewhite said that they maintain the area and honour Māori sites. They have kumara pits on their land, a fortress site they protect and a burial site that they have recently fenced off. The protection of the burial site involved some bulldozing that Catherine objected to. Mr Kibblewhite says that Catherine tried to stop the bulldozer and on his request Heritage NZ visited the site and confirmed the work was protecting historical sites. He was surprised that Catherine appeared now to want to stop him fishing from the beach.

[135] Catherine Clarkson provided her views about the McLean and Kibblewhite's use of the land. She is concerned about the commercial nature of the activities (referring to the McLeans having set up a backpackers and to their fishing business). She said "there are concerns across the wider community" about their fishing operation. She said there was no consultation with Māori and the Whangaehu beach community when the venture began; nor was there consideration about the impact to the common coastal marine area and environs of the commercial fishing; there is an absence of a plan for spillages; driving the tractor, trailer and boat across the lower reef is doing damage to it; and the activity involves early morning noise and the dominating presence of a fishing business and equipment.

[136] There was evidence that the Stoddarts have lived in Whangaehu Valley for about 80 years. The Stoddarts filed a notice of appearance and for a period were involved as an interested party during the case management phase of the proceeding but no one from the Stoddart family gave evidence. Catherine Clarkson referred to excavation work undertaken by Mr Stoddart in preparation for a public walking track along the cliff face abutting the application area. She considered the work had caused obvious erosion. Catherine and Kaylene met with the Central Hawke's Bay District Council staff and expressed their concerns. She spoke to Mr Stoddart about the damage to wāhi tapu sites of cultural significance and she believes Mr Stoddart was genuine in his remorse.[54]

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[54] Catherine Clarkson draws a parallel with the excavation of Te Mata Peak walking track, which attracted considerable national media attention for a lack of consultation with Māori.

[137] Dianna Karamaena gave evidence of her association with the area. Her husband and her sister share ownership of a property at [redacted], which is 600 m from the Whangaehu Beach. They are permanent residents at the beach and it is a historically significant place for them. Like Mr McLean, she produced a selection of family photos showing their connection with Whangaehu Beach.

[138] Ms Karamaena's parents' connection with the beach was associated with the McGregor family (referred to earlier), who farmed in the area. Ms Karamaena's father acquired a small commercial licence and, with friends, built a jet boat for crayfishing. Ms Karamaena said that when she and her husband were courting in their twenties they met Mrs Eriha (Rewia) and her son Aly. Mrs Eriha was staying at the McGregor woolshed. Mrs Eriha would tell them some local stories and helped her husband to heal a wounded shoulder after falling off a horse on the beach.

[139] Ms Karamaena and her husband were unsuccessful in a tender for a property when Mr Buchanan subdivided land. However, they continued their association with Whangaehu and they are now in their fifth generation of family at the beach. In 2018 they were successful in purchasing the property they now own and have lived there permanently from that time.

[140] Ms Karamaena said there have been many occasions when they have visited Whangaehu Beach and there has been absolutely no one around. The population at the beach increased dramatically when the holiday homes were built and with a Christian camp that is located in the area. The number of people appeared to be slowly diminishing over the last 10 or so years and, although there has been an increase of permanent residents (seven to 10) at Whangaehu Beach, you could go for days and not see anyone out there.

[141] Spencer Gollan gave evidence that Cape Turnagain is historically significant to the family. He referred to wool going out at the jetty and supplies coming in until about 1930. He referred to people fishing off the jetty and launching their boats beside it. He also referred to the jetty being blown up in World War II because the Home Guard believed the Japanese were going to land there. He said he has personally fished

at Cape Turnagain for the last 72 years. It appears that the jetty Mr Gollan referred to is within the application area.

Other evidence

[142] Evidence was given by Nichola Nicholson, a policy planner at the Hawke's Bay Council. Ms Nicholson acknowledged that if the application was granted, it would provide the applicants with a range of rights that would affect the Council's regulatory responsibilities for the application area. These primarily relate to a CMT holder's ability to give, or decline to give, permission for activities requiring a resource consent; and creating a planning a document, which the Regional Council must take into account when making any decision under the Local Government Act 2002 in relation to the CMT area.

[143] Ms Nicholson also gave evidence about the operational activities the Council carries out in areas of the common marine coastal area throughout Hawke's Bay, including scientific monitoring of the water, physical mitigation works, and activities for maritime safety. The Council considers that a CMT, if granted, would not affect its operational activities.

[144] Monique Andrew, a team manager at Inshore Fisheries Central, Fisheries New Zealand, within the Ministry for Primary Industries, gave evidence about commercial, recreational and customary fishing levels in the application area. The annual commercial take was about 207 tonnes based on the 2018/2019 October and 2019/2020 April fishing years. They estimated fairly heavy recreational fishing, but Ms Andrew acknowledged in cross-examination that this was based on reporting zone 15b, which is a larger area in which the application area falls, so estimates of recreational take cannot be correlated directly with the application area on its own. She provided data as to the customary fishing that had been declared, but acknowledged its limitations — some declarations did not specify exactly which area they referred to, sometimes the units of measure were unclear and kaitiaki did not have to provide copies of the fishing permits they had issued. The data was therefore an indicator of activity only.

Issues with the application

Application area definition

[145] The northern and southern points of the specified area are a little confusingly and inaccurately described in the application but, as mentioned earlier (at [6]), those points are identified in Appendix Two. From those points, the applicant group claims out to 12 nautical miles, the maximum distance that the legislation permits.[55]

[146] There are two potential issues with the claim out to 12 nautical miles. First, there was limited evidence of use of the area by the Clarkson whānau of the area out to that distance. While it can be inferred that some gathering of kaimoana by whānau would have extended some distance into the sea, the evidence largely focussed on the gathering of kaimoana and karengo around the beach and the rocks (and more particularly around Whangaehu and Poroporo).

[147] Secondly, as shown in Appendix Two, because the southern landward boundary is around Cape Turnagain and the seaward boundary is identified only with reference to 12 nautical miles, there is an odd "dogleg" in the specified area at the southern end.

[148] However, it is not necessary to determine the proper boundaries of the specified area because there are more problematic issues that I shall come to.

The applicant group

[149] Under the MACA Act, an application is made by an applicant on behalf of an applicant group. The applicant group can be an iwi, hapū or whānau group, or an entity or individual appointed by an iwi, hapū or whānau to represent them.[56]

[150] The application is a little confusing on this point. The application states that it is made by:

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55 MACA Act, s 9; and Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 3.

56 See [37] above.

> **Ketepunga Kaylene Clarkson, Ketepunga Matana Clarkson**, and **Catherine Marjorie Clarkson** whom wished to be named and known as the customary marine title group **Poronia Hineana Te Rangi Whanau** , whom are "a Whānau"…"

[151] It goes on to say that "Of the customary marine title group Ketepunga Kaylene Clarkson a natural person is to be the holder of the order".

[152] It therefore appears that the applicants and "the applicant group" are now just Kaylene and Catherine (as Ketepunga Matana is deceased) and that, if a CMT is granted, it is to be held in Kaylene's name. In other words, although the applicants have named themselves after Poronia, and derive their present land interests through Rewia, on the words of their application it appears they do not envisage that a CMT would be held for either all those who descend from Poronia or from Rewia.

[153] This was confirmed in relation to the descendants of Poronia in the following exchange in evidence:

> Q. Let's just start with whānau first. Your claim is made on behalf of the descendants of Rewia. Are you saying that your application is being progressed in a representative capacity on behalf of other descendants?
>
> A. No.

[154] It is less clear whether it is intended that the CMT would be held for all the descendants of Rewia. In her affidavit, Ketepunga Matana simply said about this that she was "one of three people named in the application by the Poronia Hineana Te Rangi Whānau "whānau" for a [CMT]". Kaylene's affidavit and Catherine's first affidavit began the same way. However, in a later affidavit Catherine said:

> The actual Whānau that this application refers to is the descendants of Rewia Pongi Tutaki and Tiki Matana Eriha. Both are descendants of chiefs. …
>
> The applicant group is called the Poronia Hineana Whānau "Poronia" for 2 reasons. Firstly, her name appears on the list of owners for the Porangahau 1B Block. ...
>
> Secondly, this Whānau own the land that abuts the Historic Reserve on the coastal marine area. We have limited it to this group of descendants as close kin because we know these people and we know our tikanga practices as a Whānau. ... At present our manifest for mandate is numbered at 250 souls, but there will be more.

[155] As I understand it, the applicant group is confined to Kaylene and Catherine (as close kin), and previously included Ketepunga Matana, and they say they have a mandate from their wider whānau who are descendants of Rewia. As I understand it, the applicants are saying that this wider whānau, as well as all those who whakapapa to the specified area and have customary rights in that area and a spiritual connection with it, would benefit from the applicant group having a CMT, and through that have a stronger position on which to seek to ensure the environment in the specified area is better protected. Catherine Clarkson said:

> We are the vehicle that secures the rights of the many who are kin, in supporting us, they make the task of proving their customary right, incredibly easy.

[156] This was confirmed by Catherine Clarkson when explaining why she felt entitled to bring the application as a whānau applicant group:

> A. I don't deny that Ngāti Kere has a foothold in that area, but what I have said from the start is that this is a statute that enables us as a whānau, there are not many statutes that enable you to use a mechanism, a legal mechanism, to put forward your status and your activities that you undertake, this is one of the rare examples of where government recognises whānau as a unit on its own, and we've made the choice to stand up as a unit on our own for the reasons why we've said, in our case. Now, the hapū of Ngāti Kere has an interest in the area, there's no doubt about that we don't deny that which is why we said we would not oppose applications for customary rights order, but … in our view people who have the title are the people who own the land.

[157] I gather from this that Catherine Clarkson sees it as to the benefit of all those with customary rights (including, for example, Morehu Smith and the Smith whānau) that the applicant group obtain a CMT. In other words, while the applicant group does not intend that the CMT, if granted to them, would be held on behalf of everyone with customary rights, it envisages benefits to everyone with customary rights in the specified area if the applicant group is granted a CMT. This is because the CMT would enable the applicant group to better protect the environment in which those customary rights are exercised.

Mandate of applicant group

[158] In *Re Tipene* there were issues about whether the applicant (Mr Tipene) had the mandate to bring his application and who comprised the applicant group on whose behalf the application was brought.[57] I said:

> [174] The Act does not define "applicant". The applicant is the person who brings the application on behalf of the applicant group. The applicant group is the whānau, hapū or iwi that seeks recognition of the customary marine title. A legal entity or natural person can be "appointed" to be the representative of the applicant group and to apply for and hold an order on behalf of the group.
>
> [175] It is clear that an applicant must have authority to bring the application on behalf of the applicant group. The Act does not, however, specify how that authority must be shown.

[159] Mr Tipene's position was that the applicant group on whose behalf the application was brought, and who would have the benefit of a CMT, was "Rakiura Māori with customary interests in Pohowaitai and Tamaitemioka" (being the two islands in proximity to the claimed area).

[160] I found that he had demonstrated he had the authority of that applicant group in a range of ways:[58]

(a) he had followed the processes under the MACA Act and no party opposed the application;

(b) he had the majority support of the house owners of those two islands who were the kaitiaki of those islands;

(c) in accordance with tikanga he had endeavoured to engage with the wider group of those with customary interests in the two islands and more widely with Rakiura Māori both before and after the hearing and through this gave them an opportunity to present their views to the Court; and

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57 *Re Tipene No 1*, above n 1, at [157]-[176]. See also *Re Tipene No 2*, above n 1.
58 *Re Tipene No 1*, above n 1, at [45]-[56], [175] and [176].

(d) he was a member of the applicant group and had demonstrated a long and close association with the area, as well as knowledge of the area and the tikanga relevant to it.

[161] If the applicant group is comprised of only Ketepunga Matana, Kaylene and Catherine, and it is intended that the CMT would be held by Kaylene on their behalf, then the applicants have the authority of the applicant group because the applicants and applicant group are one and the same.

[162] However, the applicants appear to acknowledge that a wider mandate is appropriate. I understand Catherine Clarkson to contend that, as this is a whānau application, it needs a whānau mandate. She said the Clarkson application has the support of around 300 members of the whānau. This came from evidence given by Kaylene at the hearing. Neither Catherine nor Kaylene identified who comprised this group of 300 (although Catherine said she had a "list") other than that they all descend from Rewia and range from three months to 88 years old, and nor the process by which this support was obtained. Catherine acknowledged that not all the descendants of Rewia supported the application but said that all those who did were descendants of her.

[163] For reasons discussed later, Ngāti Kere says a hapū mandate is necessary. The appropriateness of a wider mandate was partly, and implicitly, acknowledged by Catherine Clarkson's contention that their mandate came from an annual general meeting in July 2005 at Rongomaraeroa Marae, Porangahau.[59] She said she made a presentation about her application at this meeting. There were no objections and instead they received overwhelming support for it. She said the attendees at this meeting were kaumatua, they were the stalwarts of Ngāti Kere at the time and they had lived in Porangahau for most of their lives. She also said she had spoken about the application to many people within the hapū and had never encountered any resistance.

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[59] Catherine Clarkson gave evidence that this meeting was chaired by Turoa Henare Hokianga (deceased). Julie Sciascia took the minutes. In attendance were Raina Hokianga (deceased), Ahi Robertson (deceased), Maleme McGregor (deceased), Pop Wakefield, Marina Sciascia, John Wakefield (deceased), Bubbles Te Kuru, Harriet Te Kuru, Oha Tutaki (deceased) and Nicholas Sciascia.

[164] The problem with this evidence of mandate is that it was at a time when the application was for orders under the Foreshore and Seabed Act 2004 and was concerned with the gathering of karengo from the foreshore for whānau consumption. It was not at that time an application for a CMT over the specified area. When the CMT application was brought, it was advertised and it led to Morehu Smith and others filing notices of appearances. From the outset of Morehu Smith's involvement, she made plain her view that any such application should be brought by Ngāti Kere and not the Clarkson whānau.[60] This led to further meetings at Rongomaraeroa Marae and a mandate was granted to the Ngāti Kere Working Party to progress an application.

[165] Dr Tipene-Leach gave evidence about this. He said that:

(a) A Ngāti Kere MACA application was mandated by members of the Ngāti Kere hapū through a Ngāti Kere hui on 20 August 2016 to discuss the MACA Act. The hui was advertised appropriately and what became the Ngāti Kere Working Party was given the hapū mandate to prepare and lodge the application.[61]

(b) A special general meeting took place at the Rongomaraeroa Marae on 4 March 2017. That hui received a report from the Working Party and received the full support of the Rongomaraeroa Marae trustees.

(c) An invitation was extended to Catherine Clarkson to meet with the Working Party on 22 March 2017. At the meeting it was proposed that she join the hapū claim and that she engage with the Working Party as to the ways that whānau interests within the wider hapū application could be recognised. Ms Clarkson did not agree to the proposal.

(d) Subsequently, the hapū has continued to receive reports from the Working Party and continued to support its mahi and approach.

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60 *Re Clarkson* HC Wellington CIV-2011-485-789, 29 August 2013.

61 It was moved by M Hutcheson and seconded by Ihaia Hutana that Ngāti Kere should proceed to make a claim. The Ngāti Kere Hapū Fisheries and Coastal Plan Development Working Party was given the hapū mandate to prepare and lodge the application. There were no objections. The name of the Working Party was subsequently changed to the Ngāti Kere MACA Working Party.

[166] Dr Tipene-Leach also said that Ngāti Kere has engaged with Te Hika about their overlapping applications. Catherine Clarkson was invited to attend a hui convened with Te Hika on 26 November 2016, but she declined to attend.

[167] In response, Catherine Clarkson said she was surprised when Ngāti Kere objected to her application. She described the Working Party as not having as strong a knowledge of the area as the kaumatua at the 2005 meeting. She also said that the Ngāti Kere hapū application was mandated only by the hapū members who attended the hui and there was no evidence of a mandate from the hapū outside of those meetings. In other words, she challenged the authority for the Ngāti Kere application derived from the marae hui.

[168] Catherine Clarkson did accept that "governance" at Porangahau came in the form of the marae committee up until the 1990s. After this, she said there was the rise of iwi dominance through the management structures put in place in the 1980s and 90s (through treaty settlements that provided funds to set up management infrastructure), and formalised by the Kaimoana Fisheries Regulations 1998. However, this rise in iwi management in some areas is not evidence that other hapū matters were no longer decided by the hapū at marae hui. Catherine Clarkson acknowledged the appropriateness of hui and marae in the following exchange:

> Q. Do you accept that *hui* processes are an integral part of *Tikanga Māori*?
>
> A. Yes. It's not the way that my grandmother's generation did things. They went to the *marae* and they sat down and they talked about it at the *marae*.
>
> Q. Yes and when they do that and they are gathering together and talking about it at a *marae* that's a *hui*?
>
> A. Yes you, you call it a *hui*.
>
> Q. It could be called a *wānanga*?
>
> A. Well it could be in the modern context called a *wānanga,* but in my grandmother's time you went to the *marae*. You went to a meeting on the *marae* and you talked to the elders at the *marae*.

[169] The fact that both Catherine Clarkson and Morehu Smith went to the marae about intended MACA Act applications shows that in practice marae hui continue to provide a mechanism for obtaining a mandate.

[170] The Ngāti Kahungunu MACA approach is consistent with this, in that it defers to existing applications below the level of iwi. It seeks to play a role only to the extent necessary, such as where an area of the coastline is not already the subject of a Ngāti Kahungunu-related application or to support other Ngāti Kahungunu-related applications. It supports the Ngāti Kere hapū approach. It is available to fill any holes (for example, where there are capacity and resourcing issues at the hapū and marae level) and they will be guided by hapū decisions about this.

[171] There may be other ways of obtaining authority to bring a CMT on behalf of a relevant applicant group depending on the circumstances. While it may be that many of Rewia's descendants support the application, as Ngāti Kere submits, it is apparent on the evidence before the Court that the Clarkson application does not have wider support. Ketepunga Matana Clarkson's own brother, Joe Eriha, does not accept or endorse the claim to exclusivity.[62] Rewia was one of six children and Rewia's brother, Te Rehuka, was represented in Court by his daughter Morehu, who gave evidence that her whānau does not accept the Clarkson exclusivity claim. Wereta was himself one of four children. The Sciascia whānau are descendants of Wiremu Kapai, a sibling of Wereta, and do not support the Clarkson application. Heniwhanau was herself one of six children, four of whom had issue. There is no evidence that the Clarkson application represents the descendants of Rakapa and her husband Tutaki Ponatahuri (the marriage that brings the lines together). On the contrary, whānau from the Tutaki and Te Kuru lines do not support the application.[63]

[172] This means that the applicants' claim to a CMT must be considered and determined on the basis that a whānau (beyond the applicant group whānau) or hapū mandate for the application has not been shown, although it is possible (but unproven) that it has the support of the majority of the descendants of Rewia.

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62 Referring to the minutes of a hui on 10 October 2020 where this is recorded.
63 Referring to the minutes of the same hui.

Land ownership

[173] The applicants contend that the applicant group's ownership of land distinguishes them from the other parties before the Court who have customary rights in the area or have a connection with the area. Catherine Clarkson submits that land ownership is crucial because a CMT gives territorial rights.

[174] She says that others who whakapapa to the area may have customary rights but do not have territorial rights. She says this is reflected in the legislation because it provides that ownership of land abutting the area, or land which abuts a historic reserve that abuts the area, is a relevant factor. She says it does not matter that Porangahau 1B4N2 only abuts the historic reserve to a small extent. She says that what is important is that their land does abut the reserve, and it is proximate to the sea such that they can hear, smell and see the sea and sustain themselves from the kaimoana in the area as their forebears did and as Kaylene Clarkson continues to do with the gathering of karengo.

[175] Catherine Clarkson says that those who own land become the guardians of the area. They see the people who come and go and whether their actions have impacts on the area. She says that others wanting to gather kaimoana seek permission from the landowners in accordance with tikanga. She agrees with the evidence of the pūkenga that this is partly for practical reasons – the landowner knows the environment and, if a visitor gets into trouble in that environment, the landowner knows of their presence and can assist. She says that "holds … in accordance with tikanga" and "exclusively used", as required by s 58 of the MACA Act, refer to the people from whom permission to gather kaimoana is sought. While people do not always do that now, that does not detract from the fact that they should and that, in failing to do so, they are not showing respect in accordance with tikanga.

[176] Catherine Clarkson says that once the Native Land Court divided up parcels of land and allocated them to individual owners, the people to whom they were allocated assumed control and that has been the position ever since. She says that, although there has been "an evolution or revolution" of customary fisheries rights for iwi occurring in the mid-1980s, underneath that there remained the whānau with land who

went to the beach and exercised their customary rights. She refers to evidence from Mr Kibblewhite, the one commercial fisherman in the area, that he is sometimes asked to undertake customary fishing for Ngāti Kere – they text him and he goes and gets kaimoana for them. In contrast, she says the Clarkson whānau are the ones who walk the foreshore and gather the kaimoana by hand.

[177] Catherine Clarkson says that retaining land has been a struggle for Māori. Those who have retained their land have mana whenua, by which she means they derive mana from the fact that they do own land and have held on to it despite those struggles. She says this is not to belittle those who whakapapa to the area and only have a spiritual connection with it, but that is insufficient for the purposes of territorial rights, such as CMT. She refers to the pūkenga's comments that it was important to "ask who are the people with the sand between their toes" and says "your Honour, you're looking at them".

[178] My concern is that, in the absence of a demonstrated mandate, I may be looking at only some of them. In the first place, that is because Kaylene and Catherine are not the only landowners in Porangahau 1B4N2. If land ownership in that block is sufficient qualification to be the people with "sand between their toes", then all those with shares in Porangahau 1B4N2 should hold the CMT or appoint the holder of the CMT on their behalf. There is no evidence that the owners of Porangahau 1B4N2 have held any hui to establish a mandate for the Clarkson applicant group. As discussed, it is also unclear precisely who are the whānau that Catherine Clarkson has said support the Clarkson application.

[179] Moreover, Ngāti Kere refers to the fact that Porangahau 1B4N2 is not the only Māori land block in the location. It refers to the evidence of Dr Tipene-Leach, which referred to the "five large whānau" of Ngāti Kere, including the Ropiha whānau. The Ropiha whānau administer and own the other block of Māori freehold land, Porangahau 1A3B1A (in which the Clarkson whānau do not hold shares), which is just south of Porangahau 1B4N2, and which is also in proximity to the application area as shown in the map attached as **Appendix Seven** to this judgment. The Ropiha whānau are not included in the Clarkson application but would be accommodated and included in a hapū approach.

[180] Therefore, if holding land in proximity to the application area is a sufficient distinguishing feature from others who might claim to hold that area, the applicants' shares in Porangahau 1B4N2 do not distinguish them from other shareholders in Porangahau 1B4N2, nor from those who hold shares in other Māori freehold land in proximity to the specified area.[64]

Other connections

[181] In a different context, in *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*, the Māori Land Court said in relation to the word "held" that "there is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Māori".[65] In the present context, the question of whether land ownership in proximity to the claimed area is a necessary and important criterion for a CMT arises. This is because here there are also whānau who whakapapa to the area but who no longer own land. Ngāti Kere submits it is not land ownership that determines who has mana whenua over the area. Ngāti Kere refers to the evidence of Morehu Smith, whose evidence "walked" through the coast and the customary activities exercised in relation to parts of the coast in some detail. She does not hold shares in land in proximity to the area (although her daughter does) but I accept that she has an enduring and deep connection to the coastline in the specified area and fits the "sand between their toes" description as mana whenua.

[182] Ngāti Kere says that the statutory test for a CMT must be interpreted in light of the alienation of Māori from their land. It submits that "holding the area in accordance with tikanga" is not the same as having shares in a Māori land block. Put another way, mana whenua does not require ownership of Māori land. It is about inherited right or authority derived in accordance with tikanga, that is, mana tuku iho.

[183] In Ngāti Kere's view, a CMT granted to an individual landowner or group of landowners that was not held on behalf of all those who whakapapa to the area would be a perpetuation of the injustices that arose from the Native Land Court process.

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64 Porongahau 1A3B1A is smaller than 1B4N2 and is further from the coast, but is still in the general vicinity.

65 *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212 (25 TTK 212) at 217; referred to in *Re Edwards*, above n 2, at [124]-[127].

Ngāti Kere referred to Mr Armstrong's evidence that there was no evidence in any Native Land Court proceeding that the granting of individual land ownership in a certain strip of land in the Porangahau divisions meant those who were not granted shares in that particular strip had waived their customary rights to the takutai moana.

[184] Mr Paewai was asked about the significance of the Clarkson whānau owning land to their authority to make the claim. He agreed with questions put to him on behalf of Ngāti Kere about the enormous implications for Māori when the individualised Western system of land was imposed on Māori and said:

> … because of all of [that] happening you know we're in this room today trying to … pick up the crumbs to try and fix something that should never have been broken in the first place if in fact [there] had been adherence to the Treaty and its aspirations and its articles.

[185] He went on to say that "any Māori families that have land … still in their hands … it's a taonga in itself and we need to celebrate that" because for every Clarkson family that has land, "there is a lot of our people sleeping in cars all over the place because they got no land". However, although accepting land ownership was to be celebrated, his view was that it did not exclude others from their customary rights:

> Q. Now, we also are putting to you, my client, is a proposition that having celebrated that and not detracting from it by one iota, there are *whānau* who have deep cultural connection to *Whangaehu* and to *Poroporo* to *Akitio* who no longer hold land or shares in Māori freehold land and my proposition to you is that they have got in a *tikanga* sense, as much right to come to a court like this and seek recognition of their rights to the coast, as do those *whānau* who do hold their land.
>
> A. Yes, I agree with that, yeah.

[186] Walter Ngamane was of a similar view:

> Q. And others owning perhaps thousands of shares in a particular block. Again one needs to be extremely cautious about drawing assumptions in relation to *mana whenua* or the strength or otherwise of customary rights and interests from those types of records and those types of contemporary land holdings, would you accept that?
>
> A. Yes.
>
> …

> Q. And through a range of processes of the Native Land Court and other reasons, often of pure economics of survival, land was sold and lost by some of those owners and their descendants?
>
> A. Yes. Yeah.
>
> Q. And so if you for example are looking at your, what you would see as the lands with which you have a strong *tikanga* and customary relationship in and around *tikapa moana*, the *Hauraki* Gulf that are associated with the *hapū* that you affiliate within *Marutūahu* then one wouldn't go to the contemporary ownership records of the Māori Land Court to identify who the people with interests in that area are?
>
> A. Not a be all and end all. …[It is sometimes a starting point for people who are trying to reconnect and find where they are from]. …
>
> Q. But even for those that are very strongly connected, and I'm sure people [at] your marae, that their connection and/or association shouldn't be judged on the number of shares they might hold in the adjacent *Māori* land block?
>
> A. No, because – I don't know about here, but I know in *Hauraki* that most *whānau* had that one *whānau* member whose life occupation was to follow the Māori Land Court hearings and somehow, for whatever reason, them and their family seem to have accumulated more shares than their kin, whereas they both have the same *whakapapa* …

[187] He described the concept of mana whenua as being more than just whakapapa to the land, but rather as having the mana through the history of authority and decision-making in your whakapapa to stand up and have an opinion over what happens on the land. He said there were layers and levels of interest and who determines whether someone has the most entitlement was not for him to say.

[188] Catherine Clarkson put forward a view that "when you own a piece of land like we do on the coast you get the benefit of it … if you have a coastal area like this and you are the last man standing, as we are … then you get the full benefit". This was put to Mr Paewai, who responded that there was certainly a benefit but "let's remember those that don't have the benefit but still have a right to have their interests, which can't be land interests any longer but still interests … we have to consider their position as well". Mr Ngamane said he had difficulty with the term "full benefit".

[189] Dr Tipene-Leach regarded the "last man standing" position put forward by Catherine Clarkson as:

> … not an expression of hapū-ness, it's not a Māori expression at all, it's not an expression of compassion. It's not an expression of somebody who's doing

> things for the greater good, and so I think that's why we've gone with the hapū and hapū are sticking firmly with this particular take on this particular case.

[190] He agreed with Ms Clarkson that there was mana in holding land on the coast but disagreed that this gave them all the customary rights to the takutai moana. His evidence continued:

> Q. And so would you comment on whether it's in accordance with *tikanga* for the *hapū* of *Ngāti Kere* to represent all those who affiliate to *Ngāti Kere* and ensure that their *rangatiratanga* and *kaitiakitanga* is maintained and upheld for the benefit of the *hapū*?
>
> A. That is the foundation of the MACA working party claim is looking back and having and trying to gauge the way that the people who we hold in high regard ran things and they continually said we are in here for the wider good. We are in here to work together. We are in here as a – right back to *Te Angiangi* and all those *hapū*s [sic] that were there, eventually they all came together at 18 – you know in 1886-1887 Wi Matua and Henare Matua were saying: "We're in here together. We are a single community."

[191] Ngāti Kere submits that the Clarkson application, in which they claimed to derive all the rights to claim the CMT because they owned land, was inconsistent with the evidence of Mr Paewai and Dr Tipene-Leach. A written question on this point was put to Mr Ngamane as to whether the Clarkson claim to all the benefits to the coast arising from ownership of shares in Māori land was consistent with tikanga. He responded "my direct answer is that, no this position is, on face value, not consistent with tikanga".

[192] I understand that Catherine Clarkson's response to this is, at least in part, that the Clarkson application does not exclude other applicant groups (whether whānau, hapū or iwi) from seeking their own CMT if they are able to establish the basis for a CMT. She discussed why the applicant group feels entitled to bring the application in the following exchange:

> Q. And so I put it to you that the appropriate *tikanga* of assessing a customary rights situation, like this, so Customary Marine Title, the appropriate *tikanga* is that of *hapū*, *rangatiratanga* because within that the interests of the *whānau* can be accommodated.
>
> A. Statutory test is people who hold the specified area, in accordance with tikanga.

> Q. Yes, that's the premise of my question that I'm putting to you that the tikanga that's appropriate there, is *hapū rangatiratanga* within which the interests of the *whānau* can be accommodated.
>
> A. That's a view you're going to have to persuade her Honour with.
>
> …
>
> A. Because you're not going to persuade me.
>
> …
>
> Q. And I think you've made it pretty clear in the course of the last couple of days that your application is a *whānau* application?
>
> A. Yes.
>
> Q. And you have highlighted the fact that you are entitled to do that under the Act, that's correct?
>
> A. Yes.
>
> Q. And really your view is not so much one of wanting to conflict with *Ngāti Kere* or *Ngāti Kahungunu* more generally but rather if they have got interests or rights that they wish to advance those are matters for them?
>
> A. Yes.

[193] However, it seems that she also regards any hapū or iwi claim to be based on hapū or iwi land that abuts the specified area. This is because she said at one point the only application area that Ngāti Kere can claim as a hapū is where they actually own land as a hapū that abuts the foreshore, and that is at Puketauhinu.

[194] I consider that Catherine Clarkson's reliance on land ownership as distinguishing the applicant group from others with customary rights in the specified area is misplaced. Owning land that abuts the application area is no more than a relevant factor to be taken into account when determining whether customary marine title exists in a specified area. It is neither a mandatory consideration nor the only relevant factor in determining whether customary marine title exists. It is also apparent that the legislation envisages that only some of the members of an applicant group may own land abutting the specified area because s 59(1)(a) refers to "whether the applicant group *or any of its members*" own land abutting the specified area.

[195] I therefore consider that land ownership does not, of itself, give rise to mana whenua over the specified area sufficient to support a claim to the application area to

the exclusion of, and without a demonstrated mandate from, others who whakapapa to the area and who, through that, have a deep and enduring connection to it. I note that this view is consistent with *Re Edwards*.[66] Here, it has not been shown that those who no longer own land in proximity to the specified area have lost their connection to the takutai moana. There is a fundamental difference between the relationship of tangata whenua to the land and the coast under tikanga Māori, and the concepts of land ownership and tenure that have developed under the common law.

Disproportionate claim

[196] Ngāti Kere submits that, even if a whānau application had a demonstrated whānau mandate, the specified area is disproportionate to the landholding of the Clarkson applicants.

[197] The expert evidence is that the approximate coastline length of the Clarkson application area is 14.6 km and the approximate coastline length of the Ngāti Kere application area is 54 km.[67] Therefore, the applicant group (being the three Clarkson applicants, possibly supported by a number of the descendants of Rewia Eriha), being one whānau of many different lines who were awarded land in the Porangahau block, are claiming approximately 27 per cent of the hapū-claimed area. Ngāti Kere submits that, even assuming there is some correlation between the area held in individual shares in Māori land (which Ngāti Kere does not accept) and a CMT, the claimed area is entirely disproportionate to the length of the Clarkson land interests in Porangahau 1B4N2.

[198] Dr Tipene-Leach considered a whānau claim to about a quarter of the Ngāti Kere application area was "outrageous". He said:

> …if this was a claim for land closely around the Whangaehu area … in some way contiguous with where the land block comes out to the sea … you'd have to think that that wasn't too unreasonable, but this goes all the way around to

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66 *Re Edwards*, above n 2, at [172]-[174] where Churchman J concluded that ownership of abutting land was of minimal significance in that case. This was because, to the extent that the applicant groups no longer owned abutting land, that was a result of confiscation rather than voluntary sale. And, the loss of the abutting land had not severed the applicants' connection with the takutai moana.

67 Catherine Clarkson had estimated the specified area to be approximately 3.2 miles and less than ten percent of the total Ngāti Kere rohe, but expert evidence was obtained that confirms that this estimate is wrong and Catherine does not seek to debate this.

> the other side of Cape Turnagain … it's really a particularly unreasonable claim … on the basis of the retention of that piece of land …

[199] The submissions for the Attorney-General also made the point that the reserve itself (that the Porangahau 1B4N2 abuts) also abuts the application area to a very limited extent. It submits this would be relevant to the proper size of any CMT awarded to the applicant group if the claim was otherwise made out.

[200] Catherine Clarkson said that the claimed area is the area in which they have exercised their customary rights without substantial interruption. This reflected that it is under tide most of the time and access to gather kaimoana is only at low tide. It also reflected the difficulty of the terrain. The trek from Whangaehu Beach to Poroporo is arduous. It is difficult for anyone to land small craft in the area. There are few inhabitants - other than Whangaehu village (created in 1993), the coastline is flanked by sheep stations, and Cape Turnagain has a paper village, with a jetty (which is now a pole) that has not functioned since the early 1990s, and has never been occupied.

[201] While these matters may all be correct, they provide insufficient justification for the scope of the specified area claimed. I agree with Dr Tipene-Leach that a whānau-based claim would potentially have more merit if the claim was to the area that abuts land held by that whānau. But, as the evidence of Morehu Smith showed, other whānau walk along that coastline and exercise customary rights in the specified area. As the evidence also showed, other whānau have land in proximity to that area. In *Re Tipene* the application area initially claimed was significantly reduced to ensure that it did not extend to areas where others also had customary interests.[68] There has been no suggestion from the Clarkson application group that a considerably reduced area would be appropriate for their claim.

Who "holds" the specified area

[202] The applicants have not shown that they are the only whānau who own land in proximity to the specified area, nor that they are the only whānau who exercise customary rights in the specified area, and nor that they have a demonstrated mandate through a proper process on behalf of all those who may have mana whenua, mana

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[68] *Re Tipene No 1*, above n 1, at [45]-[47].

moana, or "the sand between their toes" in that area. Ultimately, however, the question is whether the applicants have met the statutory test.

[203] The statutory test for a CMT requires that "the applicant group" both (a) "holds" the specified area in accordance with tikanga and (b) that the "applicant group" has exclusively used and occupied the specified area from 1840 to the present day without substantial interruption. The Court can only grant CMT if it is satisfied that it is the applicant group on whose behalf the application has been made that meets those requirements.

[204] As discussed in *Re Edwards*, "holds the specified area in accordance with tikanga" is something different to being the proprietor of the area.[69] It is a factual assessment and one that will be heavily influenced by those who are experts in tikanga.[70]

[205] Ngāti Kere refers to the whakapapa charts and explains that there are two lines that have a derivation to the land:

(a) There is the Te Kuru line (the line that descends from the marriage of Ereatara, the son of Te Kakaho, and Erehina (daughter of Poronia), who had six children, including Heni Whānau Te Kuru (or Heni, who is also referred to as Pikihuia).

(b) Secondly, there is the Tutaki (also referred to as Rakapa) line. Rakapa was the child of Te Reweti (brother of Te Kakaho). Rakapa married Ponatahuri (also known as Ponatahuri Tutaki), who gave birth to four children, Ripeka, Wiremu, Werata (also referred to as Pongi) and Pamoa. Each of these siblings married and had children.

(c) These two Ngāti Kere lines were brought together through the marriage of Wereta and Heni. Werata and Heni had six children, including

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69 *Re Edwards*, above n 2, at [128], [130] and [144].
70 At [131].

Rewia[71] (the mother of Ketepunga Matana Clarkson) and Te Rahuka (the father of Morehu Smith).

[206] Ngāti Kere submits that no one denies the legitimacy and importance of the whakapapa of the applicant group through Rewia to their ancestors. It says the question is whether there is any basis to suggest that, in accordance with tikanga, the applicant group holds the land exclusively given the breadth and range of the whānau and their descendants who have a derivation to the land. It submits that who is entitled to claim some exclusivity to the coast is about where the decision-making authority in accordance with tikanga is located. It says that this is at the hapū level. It says that Ngāti Kere tikanga has provided appropriate and satisfactory support and protection for whānau rights over the course of its history and will continue to do so and there is no mandate to do otherwise.

[207] Dr Tipene-Leach's evidence supports this submission. He said that it is true that some areas in the Ngāti Kere coastline are associated with particular whānau and that they have been looked after by those wider whānau. He also accepted that the Clarkson whānau "are indeed associated with that area, heavily associated in the way that Ms Clarkson describes, heavily associated without any doubt". He said that a Ngāti Kere approach would recognise particular whānau connections to particular areas and Ngāti Kere would "depend on their local knowledge and their local enthusiasm" when making plans about the area. But he went on to say:

> … so the basis of our claim to say that Ms Clarkson's claim should not be entertained by the Court is that the hapū, the wider community of people who have been consulted and who have taken part and who have given mandate say that we should do it as a hapū. This is the way that we have done it for a long period of time. This is the way that we are pushing ahead to do it in the future and that acting as one if you like is a way to fix some of the wrongs of the past.

[208] He said there had never been any hapū recognition of an exclusive whānau to the area claimed and no other whānau have sought to divide the Ngāti Kere coastline into exclusive portions. He explained that a hapū approach to a CMT application reflected Ngāti Kere history:

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[71] Alternatively (but incorrectly) spelt as "Riwia" in Appendix Five.

> Our Ngāti Kere approach is to make [an] application to the tribal area associated with our hapū. This is consistent with our history. Every major coastline initiative since the 19th century (for example, the Taiāpure, the Te Angiangi Marine Reserve, the Whangaehu Reserve, and the jurisdiction and appointment of Tāngata Kaitiaki) has been made on behalf of our wider hapū perspective.

[209] To take the example of the Whangaehu subdivision, Ngāti Kere says this is a tangible example of Ngāti Kere acting on behalf of all whānau in opposition and, alongside Mr McLean, achieving (amongst other things) conditions recognising the importance of the area to Ngāti Kere and the creation of the reserve. Catherine Clarkson was not involved in this.

[210] Dr Tipene-Leach also said:

> Ngāti Kere recognises and affirms the strong whānau interest to parts of the coastline established over the last 300 years of our occupation. Informally, we know which of our areas are primarily associated with which extended whānau and how these rights are practised under tikanga. Ngāti Kere recognises that such associations are still in place and that it would be appropriate to formalise that recognition within the hapū mandate structure. That work is currently in progress.
>
> However, there is no expressed wish by Ngāti Kere or indeed by any other members of the Poronia Hineana (Te Rangi) whānau to formally mandate the separation of rights/interests to the coastline for the Clarkson whānau.
>
> The tikanga of our hapū of Ngāti Kere has properly supported these rights over time, and will continue to do so. Regrettably, the Clarkson application is not consistent with our hapū tikanga.

[211] Catherine Clarkson was critical of the ability of the hapū to do things. She made the point that it was the whānau who cared for the land and had tikanga practices in relation to its kaimoana and so the whānau level was more appropriate. She said that "what we have at the moment is these huge areas where iwi and hapū and other people want to manage, but they have no idea what's going on in those little areas because it's just too big". I understand from the evidence of Dr Tipene-Leach just quoted that Ngāti Kere would look to find a structure that would recognise the Clarkson whānau association to the area and would involve the Clarkson whānau in decisions about the area in which they are closely connected but that this would be under the overall umbrella of the hapū. This is because there are other whānau that need to be taken into account and the idea of carving up the coastline into small and exclusive whānau portions is contrary to hapū tikanga.

[212] Dr Tipene-Leach was asked by Catherine Clarkson whether there is a distinction between the tikanga of holding land and the tikanga around the process of getting CMT. He said:

> Yes indeed and all the *tikanga*, the first form of *tikanga* that you have referred to we have reserved for our negotiation with the Crown and you are right that the *tikanga* that we are talking about today is the *tikanga* of us as *Ngāti Kere* doing things as a *hapū* all together for the common good including those who have missed out and who are sitting by the side of the road as a product of colonisation.

[213] Dr Tipene-Leach responded to further questions about this:

> Q. So, why the Ngāti Kere application as opposed to a whānau, why whānau based?
>
> A. Because everybody had – we have all bought into the idea that actually we act as a hapū, and in fact you know there is –
>
> Q. Right.
>
> A. – there is a history of us acting as a hapū in the past 20 years there's three or four major initiatives that have happened where the hapū have been there even though they have for instance Te Angiangi is right in the area where arguably my family's involved, but it's the hapū who goes there.
>
> Q. The CMT there's a distinction between whose name it's in.
>
> A. Yes.
>
> Q. And whose benefit it is for, so it potentially contemplates that they're in the name of a whānau but for the benefit of a wider grouping.
>
> A. Yes, we struggled with that.

[214] Mr Paewai was also of the view that a whānau claim to the area would not be consistent with tikanga. He said:

> And if we look at the roles that *hapū* and *whānau* had, you know, what was *hapū* made up of? It consisted of many or several *whānau* and no doubt they would've confronted situations like this in their time and in the times before contact, or prior to contract. And so, you know, there was a *hapū* grouping made up of several *whānau* that were varied and at the end of the day the wider collective would've had – the *hapū* grouping would've had to come to a decision, not all of them easy, like this one. But you have to come to a decision and I think in the best interests, this is just my view, in the best interests of this situation I'm saying that, you know, the *hapū* which I sort of – that's how I view *Ngāti Kere* I guess, and it's a collective of other *hapū* groupings as well. You know, I'm just suggesting that that's the role that they should step up and play, like because it worked in old, why can't it work now? I believe it can, and it should if based on *tikanga*.

[215] Mr Ngamane discussed the layers of whānau, hapū or iwi involved in decisions:

> Q. …if you're really trying to get that accountability and representativity in a closer to *tikanga* sense, then one would be looking at *hapū hui* and *hapū* appointment processes would be the way to –
>
> A. And/or whānau –
>
> Q. Depending on the kaupapa?
>
> A. Yeah, depending on – one area in our *kaupapa* that's part of our operating procedure, I suppose … is that if we do get a, for example a resource consent that needs comment on, we have the information or we find the information on the *whānau* – the *hapū* or the *whānau* is involved in that particular piece of land and contact them and let them, you know, tell them what it's all about. Let them know and they can have the opportunity to deal with it themselves, that's the first option, is they deal with it themselves. If they need help, the *rūnanga* will help them, or if they don't feel they have the confidence or they live in Australia or whatever, they – in our times they'll just say, "Can the *rūnanga* handle it for us, just keep us informed."
>
> Q. And that's talking about resource consents that might impact upon particular land blocks?
>
> A. Yes.

[216] And further (with reference to the Hauraki gulf and foreshore):

> …There are, yes, there are different levels of representation and involvement depending on the association and depending on the *kaupapa* if it's something that affects *Ngāti Hape* as a whole, as a *hapū*, then yes they all – they're all entitled to their say.
>
> Q. And the same with those other *hapū* –
>
> A. Yes.
>
> Q. – in terms of those interests?
>
> A. Yeah.
>
> …
>
> **The Court**:
>
> Q. … who speaks for the hapū …
>
> A. …we can look back in our traditions and history each *hapū* had *Rangatiratanga* and they spoke for the *hapū*, they were – and they weren't down to one *Rangatiratanga.* … different *Rangatiratanga* held what's called now more *mana* than other *Rangatiratanga* … in our context we had our *whānau Rangatiratanga*.

…

Q. Because when you talked about for a resource consent issue or something in relation to a particular piece of land, you said you'd go to the *hapū* or the *whānau* how do you know in the *hapū* who to go to, because you know who the *Rangatiratanga* are or?

A. It is down to that.

Q. Yes,

A. It is, within the people in our *rūnanga* we have quite a wide knowledge of you know who used to live there and … by that you get the association and the, you know, well that's such and such a *hapū*, or they used to live there, you know, that'd be your first port of call, would be [to] go and talk to that *whānau*.

Q. So *whānau* first and [then] if there's some sort of wider implication then *hapū* as well?

A. Yes, yeah.

[217] Mr Ngamane discussed the symbiotic relationship of hapū and whānau and his personal view that whānau are at the top of the hierarchy. He agreed that different hapū are structured different ways and some have formal legal entities, while others are based around a particular marae and their committees and "by default a lot of marae committees have become hapū representatives". He accepted that the process and resolutions were not always robust (as people have reasons why they cannot make marae hui) but nevertheless marae hui, wānanga and kōrero were the appropriate way for decision making on issues of importance.

[218] I understand Mr Ngamane's evidence to mean that layers of whānau, hapū or iwi involvement in decisions are a mix of the kind of decision (that is, who is affected by it or has knowledge about it), practicalities (who is present and involved or willing to be involved or has the funding that enables them to take steps), and who holds mana in relation to the matter. Ngāti Kere, as explained by Dr Tipene-Leach, follows a similar approach. It recognises the need for working closely with and involving whānau in the area but that there are wider interests that also need to be considered and accounted for, and the Ngāti Kere way is to do that as a hapū. His evidence was also that a mandate from the hapū to take action on behalf of the hapū is obtained by marae hui.

[219] Catherine Clarkson asked Dr Tipene-Leach about the MACA Act placing significance on land ownership.

> Q. Right. But given that, do you think that as a *whānau*, given your view that you believe that it's about *whakapapa* to the block, or that you can show that you have some connection to the land, do you think then that because the Act is express and we have used that to our advantage because it recognises that we are people who own land next to the coast, do you think that makes our claim less than yours?
>
> A. I think that if we try to get rid of the *hapū*/*whānau* argument, then the difference between your claim and our claim is around mandate and around consultation, and around widespread support. And so I don't have any evidence at all that you have widespread support of any sort, and so that's the difference.

[220] I accept this evidence. As Ngāti Kere submits, this is because there are other whānau in the same position as the Clarkson whānau who have deep cultural connections to the coast in the application area and it has not been shown that the Clarkson applicant group has the mandate to hold the specified area for them. As Ngāti Kere also submits, although Catherine Clarkson questioned Dr Tipene-Leach on the effectiveness or otherwise of hapū initiatives, his evidence was not challenged on the fundamental premise that the initiatives were hapū-based for all of the whānau, not an exclusive approach by one whānau. His evidence was supported by Mr Armstrong's evidence about hapū in this area working together and sharing resources prior to the Native Land Court decisions. His evidence was also supported by Mr Paewai and consistent with the pūkenga's view of how the layers of decision-making work in his rohe. Dr Tipene-Leach's evidence, that they are looking to have structures within the hapū to formally recognise a particular whānau's connection to a particular area, is consistent with a tikanga-based layered approach.

[221] Catherine Clarkson accepts that there are others beyond the immediate applicant group that have interests in the application area. She says that the applicant group have demonstrated that they hold the application area in accordance with tikanga and that, while there may be other whānau, hapū and iwi interests, "their ship has sailed". By this she means that the MACA Act permits a whānau to make an application and this is what she, her sister and her mother did. Their application was properly advertised and it has been before the courts for 16 years. Other whānau or hapū interests could have made an application much earlier than they have. Even now,

they are not ready to advance their applications and have a preference for Crown engagement.

[222] Catherine Clarkson's view is that a CMT granted in favour of the applicant group would not stop others from coming to the beach or from seeking protected customary rights orders. But in her view "their ship has sailed" on a CMT over the application areas held by others. The applicant group would get the full rights a CMT confers. She does not envisage that there would be multiple CMTs by all those who "hold" the application area in accordance with tikanga and have exclusively occupied it without substantial interruption since 1840. Others with interests in the area would have the benefit of the applicant group's history and knowledge of the application area and their kaitiaki role. She says the local authorities would need to come to the applicant group in relation to the rights that a CMT confers, but that would not stop the local authorities from consulting with other whānau, hapū or iwi with interests in the area in accordance with their obligations under the RMA.

[223] The evidence was that where there are overlapping interests, the appropriate way to resolve this is through dialogue and hui. Mr Paewai described this as more kawa than tikanga because it was "necessary". George Matthews was amenable to dialogue with his neighbours. The pūkenga was asked about shared interests between neighbours and said that it "sometimes really requires a really good sit down over a period of time, usually through hui so that these things can be reflected upon and then eventually articulated in the best way possible". Catherine Clarkson was asked in evidence if she would be open to a facilitated hui and she said she would not be. I agree with Ngāti Kere that this is disappointing. Whatever the background to Catherine's decision to go it alone, the evidence at the hearing showed that Ngāti Kere want her to engage with and be part of the hapū initiatives.

[224] Catherine Clarkson does not envisage that other applicant groups (other whānau, the hapū or iwi) could also seek CMTs over the area. In other words, she does not envisage that the Clarkson applicant group have "shared exclusivity" over the area that could be accommodated by multiple CMTs. In *Re Edwards*, Churchman J considered shared exclusivity (that is, the right to exclude others except those with

whom possession is shared) could arise over an area.[72] He considered that it would be necessary to order a jointly-held CMT in that case, rather than for there to be overlapping CMTs that would give rise to practical problems with the exercise of the rights that flow from the grant of a CMT.[73]

[225] Shared exclusivity is not what is envisaged by this applicant group. It might be appropriate where there are overlapping claims, as is the case with Ngāti Kere, Rangitāne, Te Hika o Pāpāuma and Ngāti Kahungunu, if each of these groups met the statutory test for a CMT. Here there are three members of a whānau who say that they meet the statutory test. Given the acknowledgement that there are others who might have applied for a CMT, or indeed have in the case of Ngāti Kere, Rangitāne, Te Hika o Pāpāuma and Ngāti Kahungunu, the question is whether the Clarkson applicant group can say that they "hold" the specified area in accordance with tikanga.

[226] In my view the answer is that the applicant group does not hold the application area in accordance with tikanga. If any applicant group does hold the application area in accordance with tikanga, it is a wider group (encompassing the applicant group) that does so. It would be possible for the applicant group to hold the application area on a representative basis for others if they had a hapū mandate to do so but they have not shown that they have that mandate. To put it another way, if any group holds the area in accordance with tikanga and has exclusively used and occupied it since 1840, I am not satisfied the applicant group advanced here is the group that does so. They may be some of such a group but the evidence is that others would be included in that group. This means that a mandate to represent those others must be shown.

[227] This is because the process under the MACA Act, by which an application is made and advertised, is not itself sufficient to demonstrate that the applicant group has that mandate. As Dr Tipene-Leach said, there are appropriate groupings of people to do appropriate things at appropriate times. Similarly, Mr Paewai said the key part of the word tikanga being "tika", meaning "we do the right thing at the right time in the right circumstances … and if we don't we, we do ourselves and our descendants and our forebearers a disservice". Ngāti Kere has decided that the appropriate way to look

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72 *Re Edwards*, above n 2, at [162]-[168]. See also *Re Tipene No 2*, above n 1, at [29].
73 At [169].

after all of its people is to take a hapū approach. Dr Tipene-Leach's evidence is that this is consistent with both recent history (the last twenty years) and earlier times. Catherine Clarkson may be dismissive of the ability of the hapū to protect the application area, but she has not established that her whānau "hold the specified area in accordance with tikanga" to the exclusion of other whānau that the applicant group does not encompass, yet she seeks for the applicant group the rights conferred exclusively by a CMT.[74] The evidence is that, for Ngāti Kere interests, a hapū approach is tikanga.[75]

[228] In saying this, I do not dismiss the idea that in some circumstances it may be appropriate for a person or group of persons who own land in an area to be the holder of a CMT on behalf of and for the benefit of all those who hold the area in accordance with tikanga. That may be regarded as appropriate because that land ownership may mean that they are present in the area and are the the eyes and ears on behalf of others with customary rights in the area. But the person named as the holder of the CMT would be holding it on behalf of and for the benefit of all those who hold the area in accordance with tikanga and it would need to be demonstrated that they have the mandate to be the holder through a proper process.

[229] For example, in *Re Tipene* the application was brought on behalf of Rakiura Māori with customary interests in the area.[76] The evidence established that, because of the history of the two islands in proximity to the specified area and its remote location, those that went to the islands (the house owners) were the guardians for those that had been there, those who are there, and those that would come after them. The evidence was that they made their decisions on behalf of Rakiura Māori with customary interests in the area and, while it might be wise for them to consult more

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74 Leaving others to obtain benefits through the exercise of the CMT rights by the applicant group. Not all of the rights conferred are about resource management or conservation matters (which, if appropriately exercised, would benefit a group wider than the applicant group). The holder of a CMT has prima facie ownership of newly found taonga tūturu and has ownership of some categories of minerals. See [39] above.

75 Rangitāne also make the point that exclusivity is not a tikanga Māori concept – it is at odds with the essential and core values of tikanga – manaakitanga and whanaungatanga. The Attorney-General submits that in some circumstances it is appropriate to exclude people from an area of the takutai moana, whether or not they have whakapapa connections. It does not, however, assert that the Clarkson application is an appropriate circumstance.

76 *Re Tipene No 1* and *No 2*, above n 1.

widely on some matters, they were not required to.[77] This meant that, when it came to determine who should be the holder of the CMT, those on the islands met and made a unanimous decision about that in accordance with the tikanga that applied to this area. This appointment was accepted at a hui on the marae, which was also an appropriate process for confirming this decision.[78] But the evidence in that case was quite different to that here.

Overlap with other areas

[230] As discussed at the outset, the specified area overlaps with other applications for CMTs. The applicants with these overlapping claims did not want a determination of the Clarkson application to prejudice their claims, which were not being heard with the Clarkson application and given that respectful dialogue is continuing between the overlapping claimants.

[231] Ngāti Kere submits it is prejudiced by the quirk of the legislation whereby applications filed under the Foreshore and Seabed Act 2004 are given priority. It says it is all the more of a quirk because the present application started as an application under the Foreshore and Seabed Act to promote the sustainability of karengo and for the customary exercise of its collection, which under the MACA Act has a parallel with a PCR, but it has since morphed into a CMT application. Ngāti Kere has not adduced all the evidence it would rely on in support of its CMT application. It submits that it would be highly prejudicial to the claims by the other parties if the Court were to reach a determination on the Clarkson application in this evidential vacuum, without the layered and nuanced aspects of customary interests that need to be considered. Ngāti Kere says that this does not mean that the Clarkson whānau will miss out. Their passion for and connection to the coast can be accommodated within the hapū framework and Ngāti Kere is committed to that inclusive approach.[79] The other parties with overlapping applications take a similar view.

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77 *Re Tipene No 1*, above n 1, at [155] and [156].

78 *Re Tipene No 2*, above n 1, at [5] and [7].

79 I note that in *Re Edwards*, the Court expressed hope that the interests of a whānau group (Whakatōhea Rangatira Mokomoko) that did not meet the test for CMT but still clearly had a strong connection to the takutai moana could be accommodated within the "Poutarāwhare" or construct of six hapū who were granted CMT. A similar tikanga-based outcome could be available here for the Clarkson whānau. See *Re Edwards*, above n 2, at [413]-[420].

[232] One answer to this is that the other parties have had the opportunity to adduce whatever evidence they wished to. Morehu Smith was one of the original interested parties who participated in the early case management conferences on the Clarkson application.[80] She was concerned from the outset that the Clarkson application did not have the mandate of the wider group who had interests in the claimed area.[81] In 2016, when Catherine Clarkson was unable to advance her application because of health difficulties, I raised whether a representative of the wider group might make contact with Catherine to see if she was agreeable to having a mandated wider group to take over the application.[82]

[233] This was raised again by Collins J at a case management conference in December 2018.[83] As Catherine Clarkson's health difficulties continued to cause delays, Collins J proposed that those with overlapping applications might take the lead and the Clarkson application could be heard alongside them. At a case management conference in February 2019 (when Ms Clarkson was still unwell) this was also proposed but Ngāti Kere said it would not be ready for the July 2019 fixture that had been allocated for the Clarkson application.[84] The July 2019 fixture was vacated.[85] However, by the time of a February 2020 case management conference before Churchman J, counsel for most of the overlapping claimants advised the Court that they intended to limit their participation to responding to the Clarkson application rather than advancing their own applications, although Ngāti Kere's position was described by the Judge as "unclear".[86] The parties were directed to rely on whatever evidence they intended to rely upon, which in the end was limited to the extent they considered necessary to respond to the Clarkson application.

[234] This procedural history indicates that the overlapping claimants, including Ngāti Kere, could have advanced their applications alongside the Clarkson application if they had wished to do so and if they were able to marshall their evidence together in order to do so. That detracts somewhat from the submission that they are now

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80 *Re Clarkson* HC Wellington CIV-2011-485-789, 9 April 2014.
81 *Re Clarkson* HC Wellington CIV-2011-485-789, 29 August 2013.
82 *Re Clarkson* HC Wellington CIV-2011-485-789, 24 February 2016.
83 *Re Clarkson* Case Management Conference Transcript CIV-2011-485-789, 19 December 2018.
84 *Re Clarkson* Case Management Conference Transcript CIV-2011-485-789, 7 February 2019.
85 *Re Clarkson* HC Wellington CIV-2011-485-789, 12 February 2019.
86 *Re Clarkson* HC Wellington CIV-2011-485-789, 10 February 2020.

prejudiced. On the other hand, there is a suite of overlapping claims and Ngāti Kahungunu submits that, apart from the difficulty of all parties getting their cases ready for this proceeding, they may have been a distraction in that the Clarkson application, which was entitled to be heard with priority, "would have been lost in the sea of other hapū and iwi claims".

[235] Because the hearing has focussed on the (priority) Clarkson application, and because the Clarkson applicant group does not have the mandate to represent all those with relevant interests in the application area, I accept there is the potential for prejudice if I were to determine whether the evidence establishes that there is any group that meets the statutory test for a CMT. The Ngāti Kere Working Party has a mandate for Ngāti Kere interests in the area and its preference is to pursue Crown engagement. This mandated preference should not be prejudiced by the Clarkson application, which has the problems I have discussed above.

[236] This means it is not appropriate to discuss the finer points of what constitutes holding the application area in accordance with tikanga.[87] Nor is it appropriate to form a view on whether the evidence of other landowners and people who live and work in the application area constitutes "substantial interruption".[88] What is clear from the landowners' evidence summarised above,[89] is that in the application area there are others with a longstanding connection to the area and its people, and who endeavour to be respectful of the history of the area, its people and the environment, even though there may be disagreements from time to time about whether and the extent to which activities are harming the environment and even though there may be more to be done to preserve the environment.

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87 For example, the Attorney-General's submission that "proprietary-like" incidents or factors are relevant and considered in *Re Edwards*, above n 2, at [119]-[144]. Nor the Landowners' submission that "holds" requires more than having a spiritual connection to the area and that a CMT is not available to an applicant that has lost control but wishes to regain it.

88 As to this, the Attorney-General submits that breaches of the Crown obligations under the Treaty of Waitangi/te Tiriti o Waitangi, if they have led to substantial interruption, have their own process whereas the interested parties with overlapping applications say that events not in accordance with tikanga should be excluded from what constitutes a substantial interruption. The landowners submit that there is clear evidence of substantial interruption and give the examples of the jetties, the commercial launching operations at Whangaehu, and the public access and use of the area during the last 20 years by others. Some of this is discussed in *Re Edwards*, above n 2, at [188]-[271].

89 See [124]-[141] above.

Alternative outcomes

[237] The interested parties' primary submission was that the application should be dismissed. My hesitation about this arises because no new applications can now be filed under the MACA Act.[90] It is acknowledged by some of the participants that the Clarkson whānau have presented evidence that, at least in general terms, shows that during their lifetimes, and their parents' and grandparents' lifetimes, they as a whānau have exercised customary fishing rights, have spent recreational time in the application area, have learnt tikanga handed down from their ancestors and have conducted their activities in accordance with tikanga.[91] I have found against the applicants because the basis on which their application has been brought has meant that it cannot succeed. Because the deadline for applications has passed, there is now no opportunity for the Clarksons to amend their application, for example, by narrowing the application area and establishing a proper mandate.

[238] I have therefore considered whether the better course might be to stay the application for a period so that it might be further considered as part of the Ngāti Kere application if it remains following the Crown engagement process.[92] Ngāti Kere, Rangitāne and Ngāti Kahungunu were open to a stay if that would allow the Clarkson whānau to come back within the Ngāti Kere framework. Another suggestion was that the Clarkson application be treated as an application for a PCR in relation to karengo but there was the difficulty that there had been no submissions about this.

[239] However, Catherine Clarkson is not in favour of either of these outcomes and it would leave the application in an uncertain state for an extended period. Most importantly, there is room for the Clarkson interests to be accommodated within the Ngāti Kere approach (whether through Crown engagement or through its CMT application). As counsel for Ngāti Kahungunu put it, despite the long history of the Clarkson application before the Court, there has not really been the opportunity for sufficient "pause, reflection and engagement" and many things could happen in the future. He submitted that the Court might consider it appropriate to strive to

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90 MACA Act, s 100(2).
91 For example, the Attorney-General's submissions accepted this in general terms.
92 MACA Act, s 107(5).

accommodate all interests rather than to exclude anyone. Morehu Smith said in closing that the Kahui koia kaumatua had instructed her to ask that:

> … the Clarkson family, no matter what the circumstances are, te hoki mai ki te kāinga, come home. Hoki mai ki te hapū, nga hapū, o te kāinga. Koraratu kia matau, kia koutou, talk to us. That's the message.

[240] I therefore consider that the Clarkson application for a CMT should be dismissed. The claim to the application area has not been established on the evidence before this Court on the basis on which it has been brought. However, I also consider that the dismissal should not take effect for a period of time to enable the Clarkson whānau to decide if they would like to pursue a PCR in relation to karengo. The application started its life in relation to karengo. The evidence established the Clarksons' customary interests and activities in relation to karengo. The application changed into one for a CMT when the Attorney-General raised issues about whether the full scope of that PCR application was available under the MACA Act. An amended PCR application may still be something for the Clarkson whānau to pursue.

Result

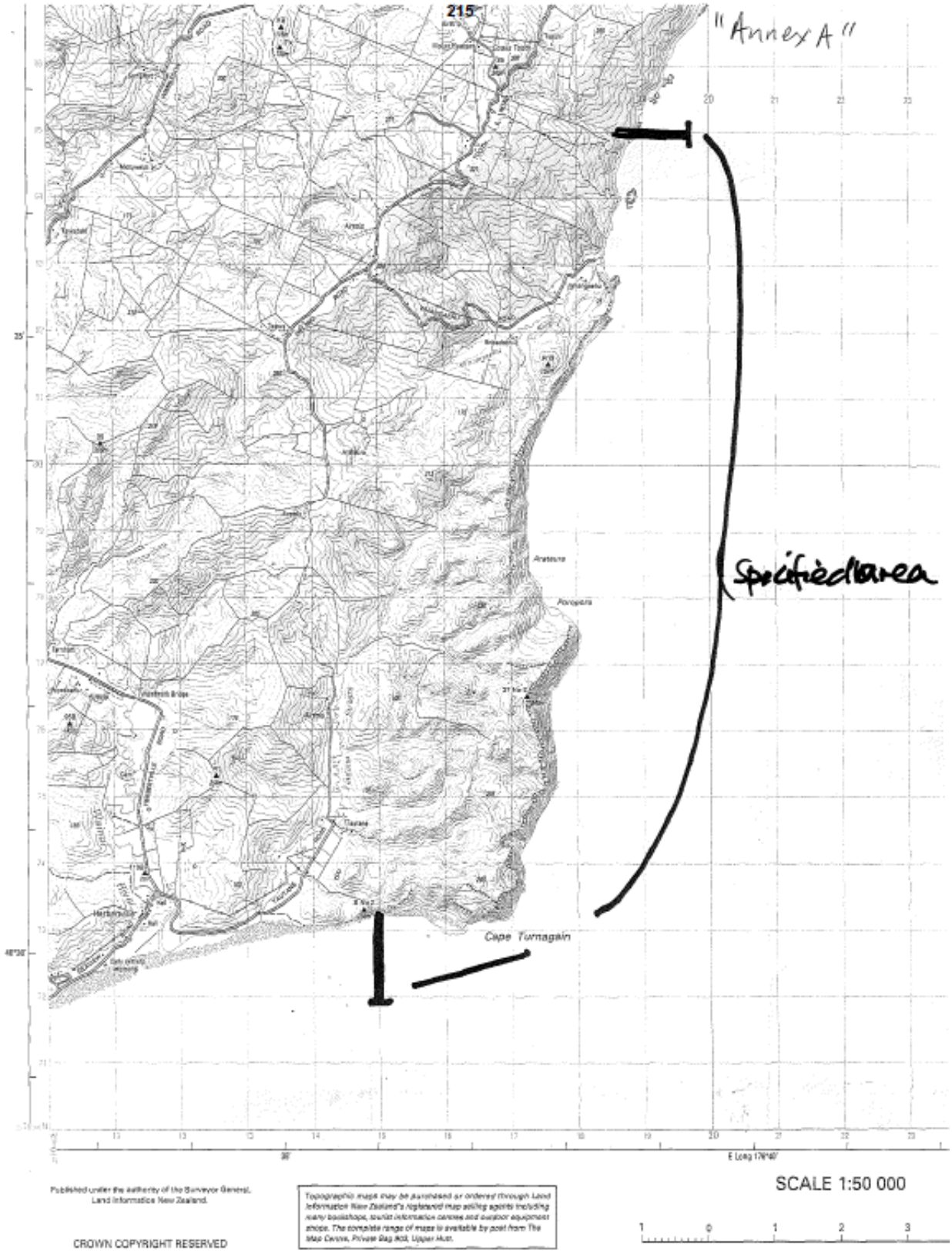
[241] The application for a CMT is dismissed. This result is to take effect within six months of the date of this judgment. The six month period is to enable the Clarkson applicants to have the opportunity to amend their application to a PCR application in relation to karengo activities that are not excluded by s 51(2) of the MACA Act. If they do amend their application, it will still be necessary to determine whether the PCR should be granted and there would be the opportunity for submissions about this.

Postscript

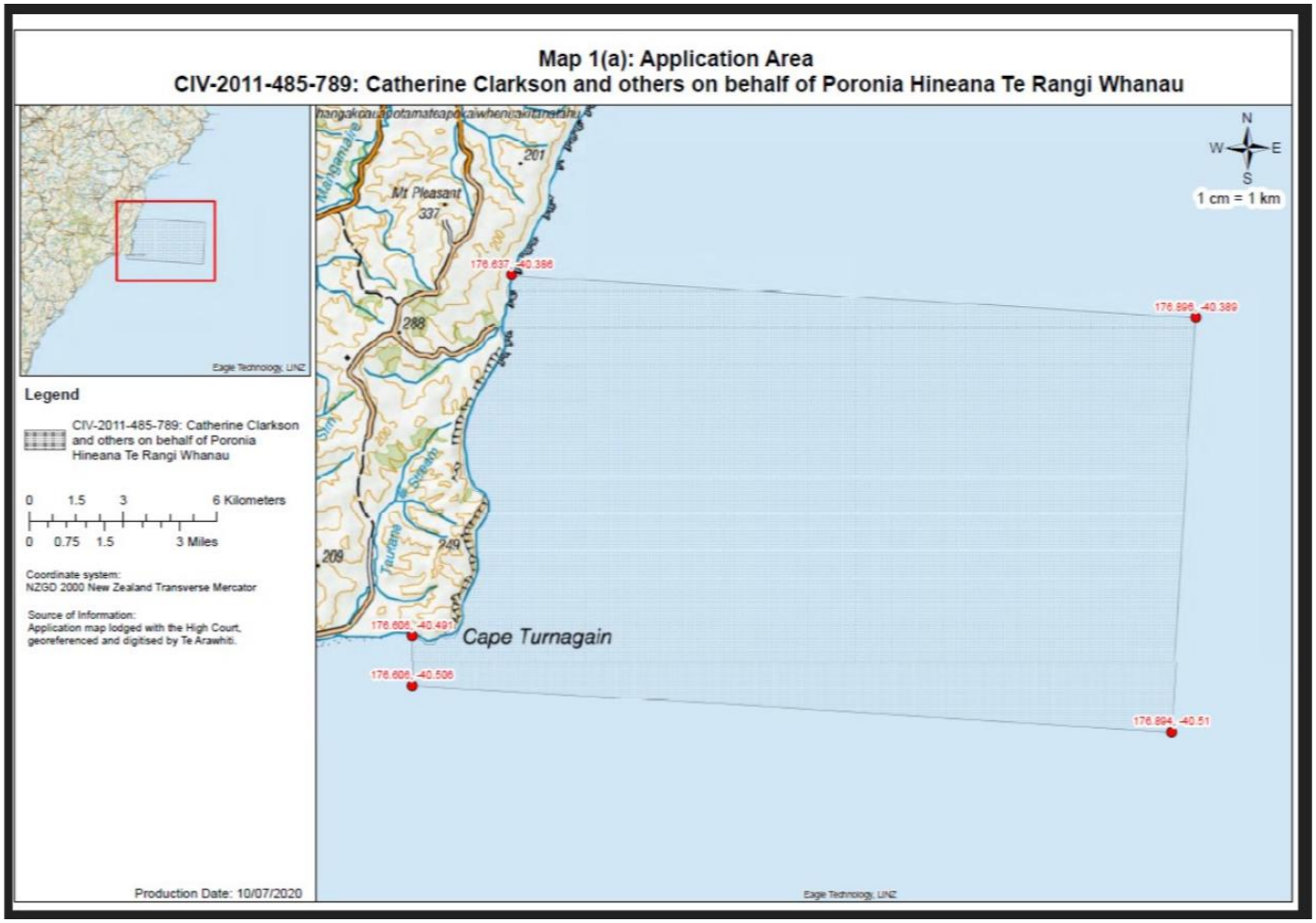
[242] Since issuing this decision, the Court has learnt of the passing of Catherine Clarkson in late May. I wish to acknowledge that and extend my condolences to her whanau: E te kuia Catherine Clarkson moe mai, moe okioki mai rā, te hunga mate ki te hunga mate, tātou te hunga ora ki a tātou.

Mallon J

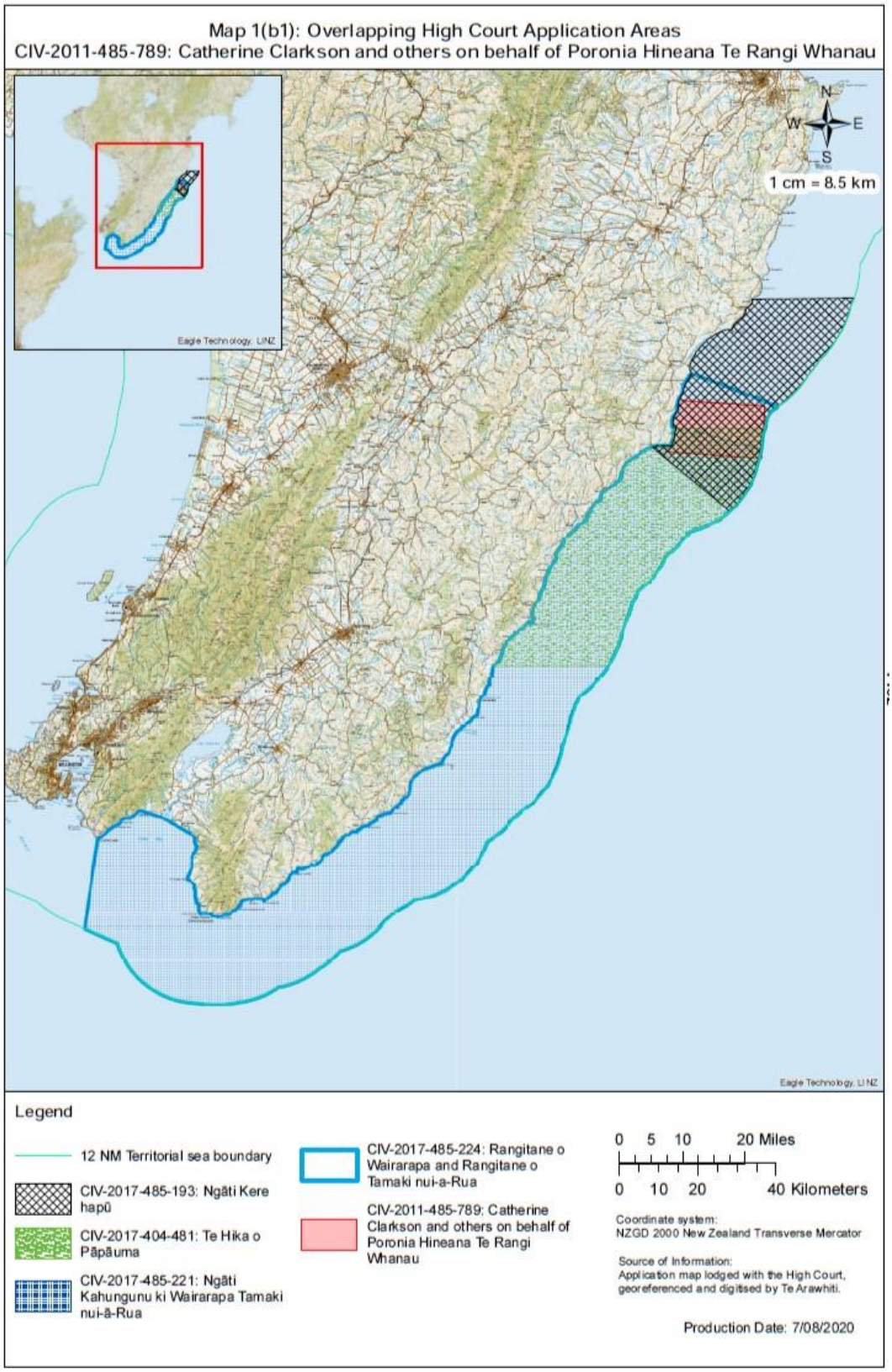
Appendix One



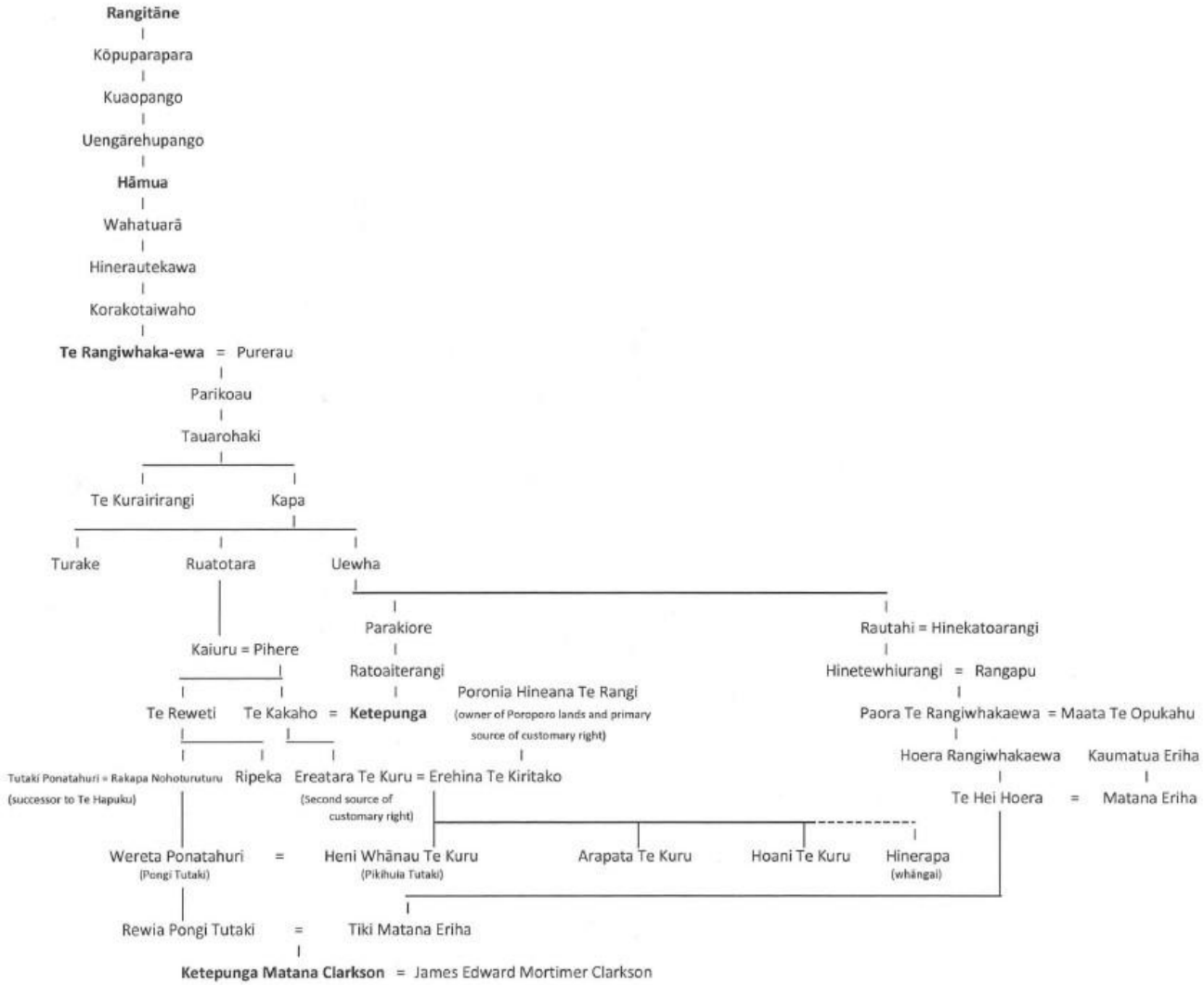
Appendix Two



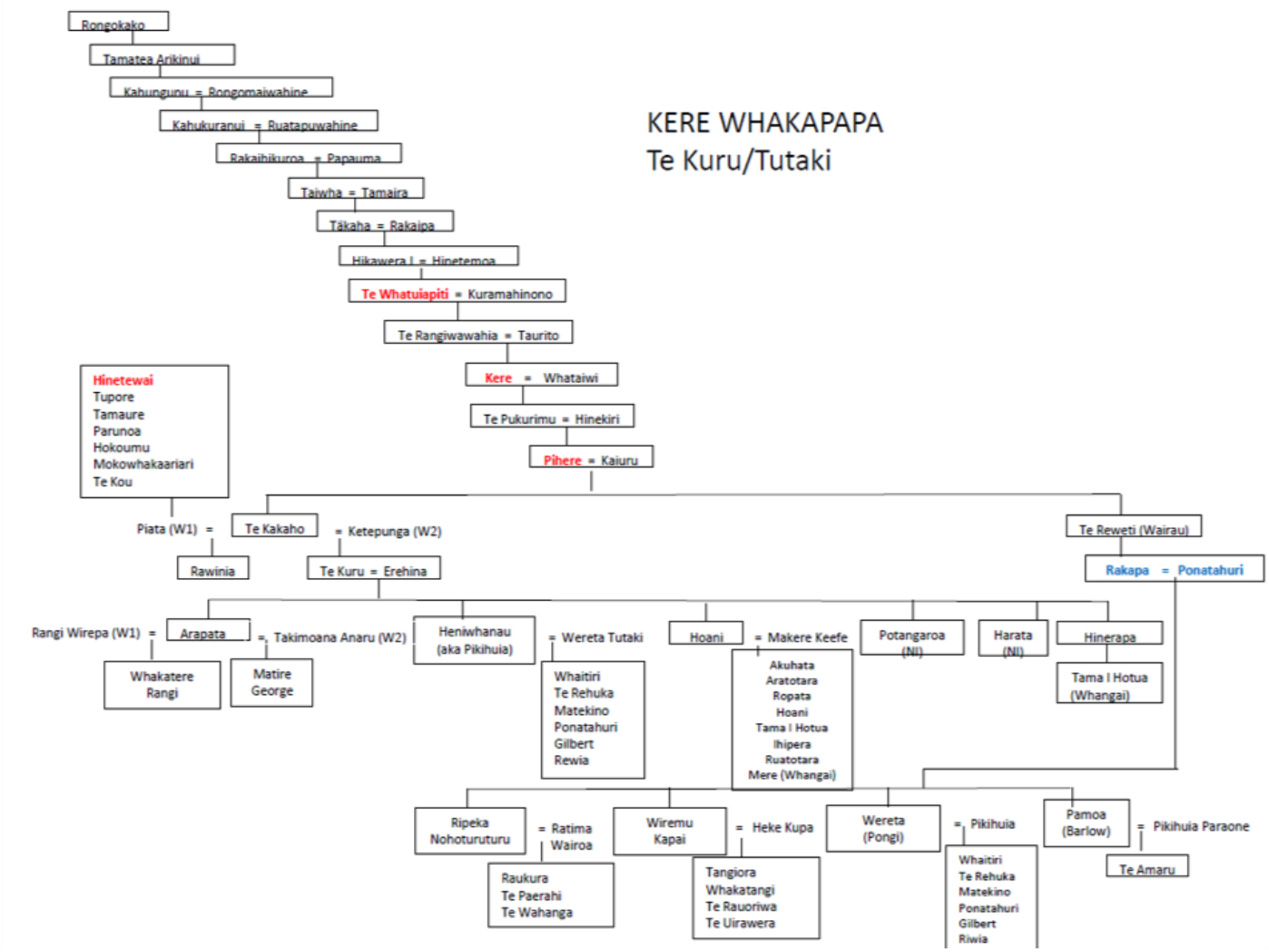
Appendix Three



Appendix Four



Appendix Five



Appendix Six

Appendix Seven