IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-404-481
CIV-2017-485-193
CIV-2017-485-220
CIV-2017-485-221
CIV-2017-485-224
CIV-2017-485-226
CIV-2017-485-232
GROUP M, STAGE 1(b)
[2024] NZHC 1472

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application for orders recognising Customary Marine Title and Protected Customary Rights

On the Papers

Counsel:	L Watson for Ngāti Kere MACA Working Party C Hirschfeld for Te Hika o Pāpāuma Mandated Iwi Authority J Prebble, F Hussain and D Kleinsman for the Attorney-General
Judgment:	5 June 2024

JUDGMENT OF GWYN J
(Ngāti Kere — application to amend CMT area; application to introduce further evidence)

Amended application for recognition orders

[1] Ngāti Kere MACA Working Party (Ngāti Kere) is an applicant in this proceeding. The substantive hearing of the case concluded on 3 May 2024.

[2] In its application of 29 March 2017 for orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act) Ngāti Kere sought recognition

of customary marine title (CMT) in the common marine and coastal area between the southern bank of Te Wainui Stream (Herbertville) and the northern bank of the Ouepoto Stream, from the line of mean high-water springs and out to the territorial sea limit.[1] The CMT application area is attached to this judgment as Appendix A.

[3] Ngāti Kere's application for protected customary rights (PCRs) was for the area from the southern bank of the Ākitio River in the south to the northern bank of the Ouepoto stream in the north.

[4] Ngāti Kere has now filed an amended application, dated 29 April 2024, in which it seeks to amend its CMT application area, so that it encompasses the area from the northern bank of the Ouepoto Stream in the north, to the southern bank of the Ākitio River in the south, and matches the area for which it seeks PCRs. The amended CMT application area is attached to this judgment as Appendix B.

Response to the application to amend

[5] The proposed amendment would increase the overlap between Ngāti Kere's application and those of three other applicants, the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Settlement Trust (Kahungunu), Rangitāne Tū Mai Rā Trust (Rangitāne) and Te Hika o Pāpāuma Mandated Iwi Authority (Te Hika o Pāpāuma).

Te Hika o Pāpāuma

[6] Te Hika o Pāpāuma has responded to the application for amendment by way of memorandum of 3 May 2024 and submissions of 23 May 2024.

[7] Te Hika o Pāpāuma's submission is that an application to amend cannot enlarge the CMT area claimed. Te Hika o Pāpāuma relies on s 100(2) of the Takutai Moana Act which limits the filing of applications after the limitation date prescribed in the Act.

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[1] Application by Ngāti Kere MACA Working Party on behalf of the hapū of Ngāti Kere for recognition orders pursuant to the Marine and Coastal Area (Takutai Moana) Act 2011, dated 29 March 2017 (original application). The customary marine title application area is attached to this judgment as Appendix A.

[8] Te Hika o Pāpāuma also relies on a decision of Churchman J in the following terms:[2]

> [5] Applications for amendments cannot enlarge the area claimed or add new aspects to the application that were not set out in the original claim notified at the time the original application was filed. The reason for that is obvious. Claims for recognition orders were required to be publicly notified. That allowed applicants or interested parties who were potentially affected by a claim, to become aware of how their interests might be affected.
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> [6] There is no prohibition on claims being refined in the sense of the area claimed being reduced or the claim narrowed in scope. It is also possible for claims to be amalgamated with multiple applicants consolidating a number of claims into one joint claim. Again, this must be on the basis that the new claim does not exceed the totality of the scope or substance of the original claims.

[9] Counsel submits that notice of intention to amend the application should have been made before trial, or at trial by interlocutory, so all parties had certainty about the precise parameters of any amendments before cross-examining witnesses. Counsel says that the cross-examination for Te Hika o Pāpāuma would have explored a number of additional matters, which are set out in counsel's submissions.

[10] Section 107 of the Takutai Moana Act, which allows the Court to consider an application for recognition of a PCR as an application for recognition of CMT, or vice versa, is not applicable, because this application seeks to augment the original application area.

[11] Nor should the approach suggested by the Attorney-General, that Ngāti Kere might expand its CMT application area through Ngāti Kahungunu's korowai application (discussed below), be adopted. That possibility and the implications of it was not tested at trial by cross-examination.

[12] As I understand Te Hika o Pāpāuma's position it is that the principal whakapapa in the area of Poroporo to Ākitio is Ngāti Parakiore. Under tikanga Ngāti Parakiore is the tribe that represents the whakapapa of Pāpāuma, Rangitāne and Ngāti Kere and if a CMT were to be granted for the Ākitio to Poroporo area it should include

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2 *Re Ngāti Tamarangi Hapū of Muaūpoko Iwi* HC Wellington CIV-2017-485-160, 31 July 2023 (Minute of Churchman J).

the name Ngāti Parakiore. Pāpāuma would prefer any such CMT to be granted under Rangitāne's korowai application.

Attorney-General

[13] Counsel for the Attorney-General has responded to the application by memorandum of 17 May 2024, helpfully outlining the relevant authorities on amendment of applications under the Takutai Moana Act. The Attorney-General suggests that it may be possible for Ngāti Kere to expand its application area through reliance on Ngāti Kahungunu's korowai application in support of hapū and whānau groups within Ngāti Kahungunu, as Ngāti Kere affiliates to Ngāti Kahungunu and the korowai application applies to Ngāti Kere in respect of CMT in the area from Wainui to Ākitio.

[14] While Ngāti Kere has not expressly sought to do so, in his affidavit of 7February 2024, Dr Tipene-Leach records that there are post-settlement governance entities representing Ngāti Kahungunu and Rangitāne who have applications that relate to Ngāti Kere's rohe. He says those entities filed their applications to ensure there was appropriate coverage and representation of hapū interests in proceedings under the Act and that where hapū such as Ngāti Kere were prosecuting their CMT claims themselves, then those iwi entities would support those hapū claims and not override or conflict with them. Dr Tipene-Leach notes that position was only recently confirmed to him and allowed Ngāti Kere to review its 2017 application boundaries. This suggests that Ngāti Kere proposes to pursue its own application but in the expectation it would be supported by Ngāti Kahungunu and Rangitāne.

Other applicants

[15] No other applicants have taken a formal position on Ngāti Kere's application. I note that in closing submissions for Rangitāne, counsel suggested that Ngāti Kere has not provided a sufficient evidential basis to be included in a joint CMT in the area from Wainui to Ākitio. But that is a question that will go to the merits, if the application is allowed, rather than to jurisdiction to allow the amendment.

When may an application for CMT be amended?

[16] Section 100 of the Takutai Moana Act requires all applications for recognition orders to have been made by 3 April 2017. The jurisdiction to amend applications was considered in *Re Tipene*,[3] *Re Ngāti Pāhauwera Development Trust*[4] and by the Court of Appeal in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board*.[5] The relevant portions of Miller J's judgment in *Whakatōhea* are set out below:[6]

> [215] The jurisdiction to amend must be exercised with s 100 of MACA [the Takutai Moana Act] in mind. It provides that an application "must be filed not later" than six years from MACA's commencement, 1 April 2011, and the Court "must not accept for filing or otherwise consider any application that purports to be filed after that date". This is not a limitation period, to be pleaded or not as a defendant chooses. It is a statutory bar to the exercise of the High Court's procedural and substantive jurisdiction to consider a new application under MACA.
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> [216] There were amendments made, or not made but said by opposing parties to be necessary, in this case. Churchman J followed his own interlocutory judgment on a strike-out application in *Re Ngāti Pāhauwera Development Trust*, in which he held that where (as in this case) the amendment does not raise new matters of law but rather introduces new or additional facts, the Court should apply a high threshold when deciding that the amendment is out of time. In that case, he held, following *ISP Consulting Engineers Ltd v Body Corporate 89408*, that the test is whether the amendment changes the "essential nature" of the application.
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> [220] When considering whether any given amendment changes the essential nature of the application, it is necessary to bear in mind several features of the statutory scheme:
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> > (a) An applicant group may comprise several distinct groups which may rely on the connection which any member group has to the affected area. This suggests that amendments are unlikely to change the essential nature of an application where they introduce member groups, or larger groups of which the applicant group is a member. Indeed, Mr Hodder acknowledged this. Amendments to the specified area are in principle permissible, to incorporate the rohe moana of the applicant group.

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3 *Re Tipene* [2015] NZHC 169.

4 *Re Ngāti Pāhauwera Development Trust* [2020] NZHC 1139.

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

6 At [215]–[222] per Miller J (citations and footnotes omitted). See also [360] per Cooper P and Goddard J where the majority agreed with Miller J's reasoning, including in relation to the jurisdiction to amend.

> (b) An application must contain the details specified in s 101(a)–(i). Any change to these matters will likely require an amendment to the application. Subject to that, the basis of the application may be developed in the affidavit evidence of the applicant and other interested parties.
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> (c) The Court may (but need not) treat an application for CMT as if it were an application for PCR, and vice versa. This modifies the legal nature of the application. Its inclusion in the legislation signals that Parliament contemplated a flexible approach to amendment.
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> (d) As Churchman J recognised, the Court may accommodate tikanga processes in which applicant groups and opposing parties decide whether to seek shared or separate CMT and agree on who is to hold a recognition order. To permit such processes is consistent with MACA's objective of recognising mana tuku iho in the common coastal and marine area. It allows the Court to accommodate applicants' preferences to structure their holdings so that recognition orders are administered in accordance with tikanga (and without need for judicial intervention).
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> (e) Any amendment may affect interested parties who have an interest in the exercise of rights that MACA confers on a successful applicant group. Those rights are substantive, and the class of interested parties is not confined to iwi, hapū and whānau groups. Natural justice must be observed. It is possible that any prejudice to an interested party from late amendment will not be adequately met by an opportunity to respond in the proceeding.
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> …
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> [222] I accept that amendments to the specified area may be problematic, especially where they are out of time. It may also be, as several counsel contended, that amendments detract from the credibility of shared exclusivity claims which were previously premised on use and occupation of different areas by different groups. But that goes to merits, and a need to hear opponents, rather than jurisdiction. …

[17] The Court of Appeal accepted that it would be wrong to take an "unduly strict or narrow approach to amendment."[7]

[18] From the Court of Appeal judgment and Churchman J's judgment in *Re Ngāti Pahāuwera*[8] (discussed by Miller J in *Whakatōhea*) the test to be applied in considering an application for amendment is whether the proposed amendment changes the "essential nature" of the application. By way of example, an application that raises a new question of law may be impermissible;[9] amendments to introduce

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7 At [219] per Miller J.
8 *Re Ngāti Pahāuwera Development Trust*, above n 4.
9 *Whakatōhea*, above n 5, at [216].

member groups or larger groups of which the applicant is a member, are unlikely to change the essential nature of the application;[10] and a Court may (but need not) treat an application for CMT as if it were an application for PCR, and vice versa.[11]

Discussion

[19] What Ngāti Kere seeks to change is the element of the application required by s 101(d) of the Takutai Moana Act, that is "the particular area of the common marine and coastal area to which the application relates". As the Court of Appeal notes, any change to the details set out in s 101 will likely require an amendment to the application.

[20] One of the relevant factors identified by the Court of Appeal is the potential effect of an amendment on interested parties.[12] In the normal course, a proposed change to the CMT application area is very likely to affect other parties, possibly adversely. Here the proposed amendment to the application would increase the overlap with the applications of Ngāti Kahungunu, Rangitāne and Te Hika o Pāpāuma.

[21] However, this is not a case of a proposed late amendment to the application catching other parties by surprise. The extension of the CMT boundary was flagged in Ngāti Kere's original application, which said:

> 15. Ngāti Kere considers that it has a valid claim for 'mana moana' from Ouepoto in the north to Akitio in the south but we acknowledge that we share the area between Te Poroporo and Akitio with our southern neighbours of Te Hika o Papauma hapū and Rangitāne. Ngāti Kere therefore wishes to avoid lodging a claim for a Customary Marine Title that overlaps with our southern neighbours in a fashion that is unlikely to be accepted by the dictates of the Act. Therefore, Ngāti Kere is only applying for a Customary Marine Title from Ouepoto Stream to Te Wainui Stream in the south. If Customary Marine Titles were allowed to overlap, Ngāti Kere would be applying for a Customary Marine Title from Ouepoto to Akitio. If a valid claim is not lodged over the area between Te Wainui and Akitio, Ngāti Kere would like the opportunity to consider amending this application to cover this area.

[22] The southern boundary the subject of the amendment aligns with the southern boundary of the 2017 Ngāti Kere application area for PCRs.

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10 At [220(a)].
11 At [220(c)].
12 See [220](e).

[23] In the opening submissions filed for Ngāti Kere, counsel indicated that Ngāti Kere proposed to apply to amend its CMT boundary in the south, to the southern bank of the Ākitio River.

[24] Ngāti Kere's intention to apply to amend the application area was also covered in the evidence of Dr Tipene-Leach in his affidavit of 7 February 2024, filed prior to the hearing.

[25] At the time Ngāti Kere's original application was filed, there was no case law on the Takutai Moana Act. None of the parties could have known at that stage that the courts would interpret the Act to allow overlapping claims for CMT. While recording its claim to the whole of the area from Te Poroporo to Ākitio,[13] in accordance with tikanga Ngāti Kere refrained from applying for CMT in the overlapping area. The application noted advice that overlapping CMT orders were unlikely to be granted, while specifically reserving the right to do so "[i]f Customary Marine Titles were allowed to overlap".

[26] The evidence called on Ngāti Kere's behalf at the hearing did cover the hapū's claim to CMT in the whole of its extended application area, including the area from Wainui south to the Ākitio River and was consistent with CMT recognition over the whole area. Those witnesses were available at the hearing to be cross-examined by all parties.

[27] Ngāti Kere's original application noted that "we acknowledge we share the area between Te Poroporo and Akitio with our southern neighbours of Te Hika o Pāpāuma hapū and Rangitāne". Dr Tipene-Leach's affidavit also records that there had been confidential, full and frank kōrero between Ngāti Kere and Te Hika o Pāpāuma about the overlap but, as at the time of the hearing, no resolution had been reached.

[28] Dr Tipene-Leach's affidavit of 7 February 2024 states that in applying to the Court for an amendment "… we explicitly acknowledge the interests of Ngāti Parakiore in that area (who are a Rangitāne hapū in Pōrangahau and who intermarried with Ngāti Kere hapū and are our close relations)." This appears consistent with the

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13 See [10] above.

view advanced by Te Hika o Pāpāuma that under tikanga Ngāti Parakiore is the tribe that represents the whakapapa of Pāpāuma, Rangitāne and Ngāti Kere and if a CMT were to be granted for the Ākitio to Poroporo area it should include the name Ngāti Parakiore.

[29] In my view, this case is akin to the situation in *Re Tipene*,[14] where Mallon J found that an application (made before the final filing date) seeking to amend the applicant group and to refine and reduce the application area did not change the essence of the application.

[30] While in this case Ngāti Kere seeks to enlarge its application area and its application is filed long after the statutory final filing date, in the totality of the circumstances as outlined at [21]–[28] above, I do not think the essence of the original application has changed. This application differs from that considered recently by Grice J in *Re Taueki on behalf of Ngāti Tamarangi Hapū*.[15] In that case Muaūpoko Tribal Authority Inc sought to amend its application for CMT, several months before the commencement of an eight-week hearing on the substantive Takutai Moana Act applications. Some of the other parties sought orders to strike out the amendment application. The Court said of the application for amendment:[16]

> Nothing in the tenor of the 2017 application, including the grounds for the CMT and PCR recognition rights, indicates that a CMT recognition order was sought over the whole Group N application area. The 2017 application would not put persons reading it on notice that Muaūpoko was actually applying for CMT over the area for which the application says it applies for PCR.

[31] That is in contrast to paragraph 15 of Ngāti Kere's original application as set out at [21] above.

[32] Te Hika o Pāpāuma suggests that Ngāti Kere's application to amend raises new or additional questions of law, one of the categories of amendment that both Churchman J and the Court of Appeal suggested would mean an application for amendment would be denied. Counsel says those questions of law are:

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14 *Re Tipene* [2015] NZHC 169 at [16].
15 *Re Taueki on behalf of Ngāti Tamarangi Hapū* [2024] NZHC 536.
16 *Re Muaūpoko Tribal Authority* HC Wellington, CIV-2017-485-160, 13 March 2024 (Minute of Grice J) at [40].

(a) what are the procedural parameters on amendments to Takutai Moana Act applications? and

(b) can an applicant amend an application after announcing and intention to so, but after trial?

[33] It seems to me the first question is a necessary incident of considering any application for amendment. It is not in itself a "new" question of law for this purpose. Similarly, the second question is encompassed in the Court's consideration of whether the application seeks to amend the "essential nature" of the original application. Part of that consideration is necessarily having regard to possible prejudice to the other applicants or third parties. That captures counsel's second question.

[34] Te Hika o Pāpāuma says it is prejudiced by the late application. I accept there is a degree of prejudice, but note that the other applicants, including Te Hika o Pāpāuma, were on notice of Ngāti Kere's intention to seek amendment and the precise nature of that amendment, could have called evidence in reply and could have cross-examined the Ngāti Kere witnesses on the issues now raised in counsel's submissions.

[35] The interests of the public and interested parties are also relevant. But, again, Ngāti Kere asserted its right to the whole of the Ākitio River to the Ouepoto Stream area in the original application. It is unlikely that any question of prejudice arises, given that Ngāti Kere was obliged to serve the original application (with its statement regarding the area) on specified local authorities and the Attorney-General,[17] and to give public notice of its application within 20 working days of filing it.[18]

[36] On balance, as in *Re Tipene*[19] and *Whakatōhea*,[20] I do not take an unduly narrow or technical approach to the application and will allow the amendment sought. The merits of Ngāti Kere's application for CMT in the expanded area, from Wainui to Ākitio, will of course be a matter for the substantive judgment.

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17 Marine and Coastal Area (Takutai Moana) Act 2011, s 102.
18 Section 103.
19 *Re Tipene*, above n 3, at [21].
20 *Whakatōhea*, above n 5, at [219].

Application to introduce further evidence

[37] On 20 and 21 March 2024 the Court and the pūkenga were welcomed to the Ngāti Kere rohe, as part of the site visits in the application area. At Rongomaraeroa Marae on 21 March we heard kōrero from mana whenua. I indicated at the time that Ngāti Kere might apply to have the record of that kōrero included in the record of evidence, subject to hearing from the other parties on any such application.

[38] Counsel for Ngāti Kere has now sought leave to have the minutes of the site visit kōrero filed on the record.

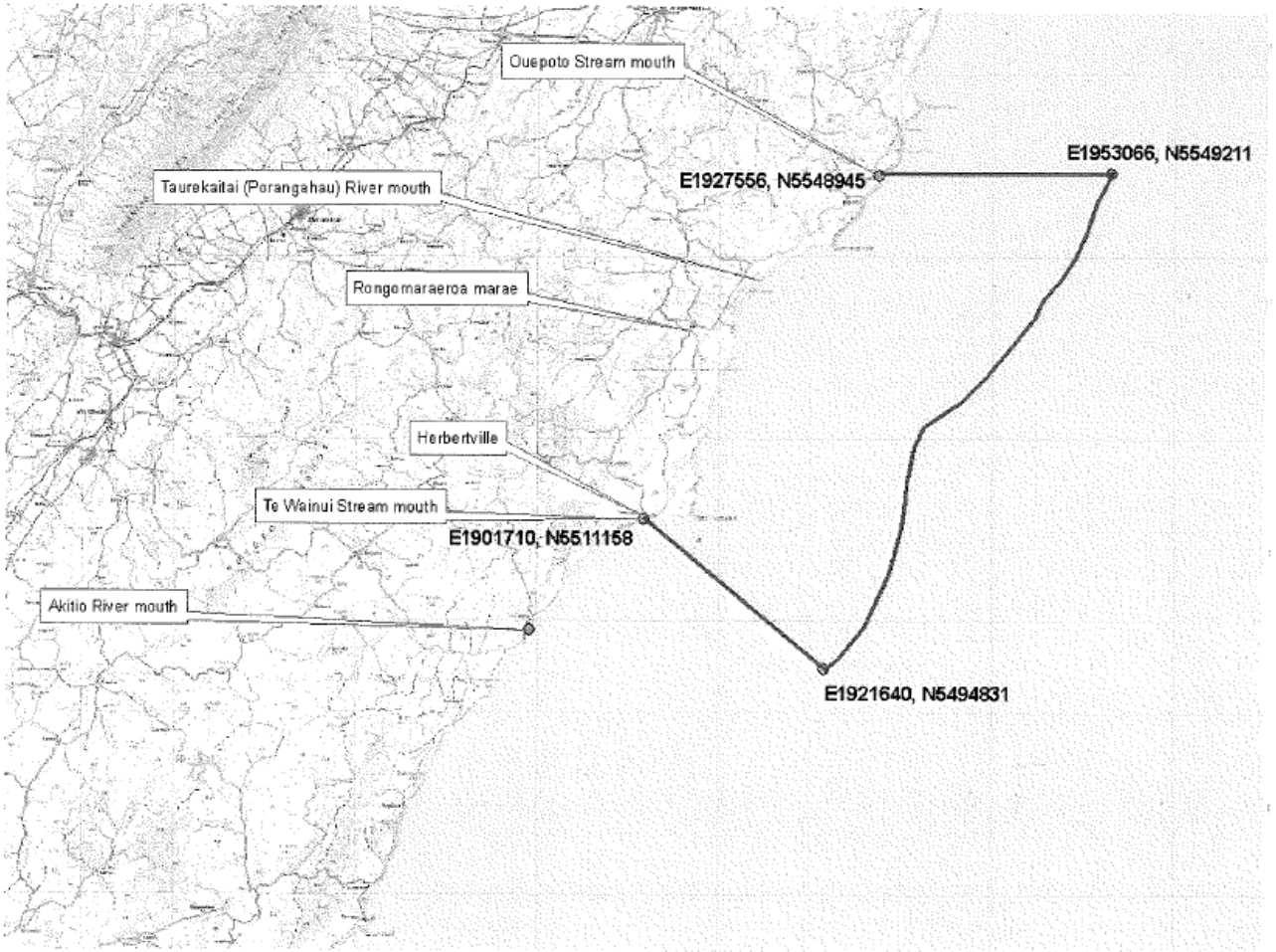
[39] No other applicant has expressed a view on Ngāti Kere's application. Counsel for the Attorney-General does not oppose the admission of this material but submits that it should be given limited weight, given the circumstances in which it arose.

[40] I will allow the kōrero submitted by Ngāti Kere to be included in the record of evidence. However, in light of the fact that not all parties were present to hear the evidence and the witnesses who gave the evidence have not been available for cross-examination, I signal that it will be given limited weight in my consideration.

Gwyn J

APPENDIX A

Map 1: Coast-line for Ngāti Kere Customary Marine Title application (coordinates shown in NZTM)



APPENDIX B

Amended Map 1: Coastline for the Ngāti Kere Customary Marine Title application
(Coordinates shown in NZTM)