IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2017-419-000081
CIV-2017-419-000084
[2024] NZHC 3610

UNDER	Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	An application by STANLEY RAHUI PAPA for and on behalf of NGAA HAPUU ME NGAA MARAE O TE TAKUTAI MOANA O WAIKATO-TAINUI seeking orders recognising customary marine title and protected customary rights Plaintiffs
IN THE MATTER OF	An application by RONALD MIKI APITI, DIANE BRADSHAW and PHILLIP MAHARA on behalf of NGĀTI TE WEHI seeking orders recognising customary marine title and protected customary rights Plaintiffs

Hearing:	17 – 21, 24 – 27 June, 2 – 4 July 2024 and 15 August 2024 Pukenga report received: 24 September 2024
Appearances:	H C Clatworthy and C B Hirschfeld for Ngāti Te Wehi R A Siciliano and C M R Ratapu for Ngāti Whakamarurangi-Tainui J P Ferguson for Waikato-Tainui Interested parties: E A Whiley for Ngāti Apakura (CIV-2017-485-017) G L Melvin and A Goosen for Attorney-General A M B Green and E S Greensmith-West for Waikato District Council C E Bulow for Waikato Regional Council
Judgment:	29 November 2024
Reissued:	11 December 2024

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew on 29 November 2024 at 3pm and re-issued on 11 December 2024 pursuant to r 11.5 of the High Court Rules 2016

Registrar / Deputy Registrar

Date ....

Whakataukī

[1] Ko au te Moana, ko te Moana ko au.

[2] We are the ocean, and the ocean is us.[1]

[3] Kainga te kiko, waiho te wheua ki te tangata nōnā te whenua.

[4] When invited you may enjoy the harvest, in the end you leave the rights of the land to those who own it.[2]

Introduction – Whakatakinga

[5] Aotea is a remote harbour located on the North Island's west coast. It takes its name from the ancestral waka, Aotea, which landed there more than 700 years ago. The waka is said to be buried in the sand dunes of Oioroa, at the northern entrance to the harbour. On the southern shore is Hawaiki-Iti.[3]

[6] Aotea lies between Whāingaroa/Raglan to the north and Kāwhia Harbour to the south. The ancestral waka, Tainui, is said to be buried at Kāwhia. The iwi and hapū of Aotea are coastal peoples. They have maintained strong and unbroken connections with the whenua and the takutai moana, their moana tapu, for hundreds of years.

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1 As recorded in the Ngāti Te Wehi opening submissions of 20 May 2024.

2 Evidence of Ms Taruke Heather Thomson for Ngāti Whakamarurangi, Ngāti Koata, Ngāti Motemote and Ngāti Tahinga (Ngāti Whakamarurangi/Tainui).

3 According to the kōrero of Ngāti Te Wehi, the first taro gardens were planted here when the Aotea waka arrived from Hawaiki. Turi, the captain of the waka, had his ancient pā site here and his wife, Whakaotirangi, had her large superlative garden. This is the only place where taro is still abundant. Hawaiki-Iti is 400 metres from the shoreline. It is a recognised historical site.

[7] Today, Aotea is surrounded by a substantial amount of Māori freehold land. There are four active marae on its shores. There is one, modest sized, mussel spat farm close to the entrance, but otherwise there are no structures of significance in the harbour. Road access to the harbour is limited and there has been no commercial fishing in the harbour for over 70 years. Fishing in the harbour is regulated by and through its taiāpure and mātaitai reserves as provided for by the Fisheries Act 1996.

[8] The harbour has a narrow entrance with a treacherous west coast bar. There is a large body of water extending north and east of the entrance. The tidal currents are strong with a large number of sandbanks and mud flats exposed at low tide. There has never been any significant industrial or urban development at Aotea. The iron sand mining at Taharoa, is some distance away.

The applications - Ngā tono

[9] The two principal applicants, Ngāti Te Wehi and Ngāti Whakamarurangi/Tainui, are the descendants of those who arrived on the Aotea and Tainui waka. They are toi whenua (tangata whenua) at Aotea. The Ngāti Whakamarurangi application is brought under the korowai/mantle of Waikato-Tainui.[4] The two applicants are whanaunga groups, both of whom have strong whakapapa connections and affiliations to the Kīngitanga.

[10] Ngāti Te Wehi and Ngāti Whakamarurangi/Tainui together seek orders for Customary Marine Title (CMT) to the Aotea Harbour and Protected Customary Rights (PCR). Together they seek a finding of shared exclusivity and jointly held CMT under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). Both whanaunga groups recognise each other's interests in Aotea Harbour and throughout the entirety of the hearing application area.

[11] The proceedings are largely uncontested.[5] The interested parties, the Attorney-General, the Waikato Regional Council, and the Waikato District Council, do not

[4] Waikato-Tainui takes the view that any rights under the Act should preferably be recognised and held by hapū, not at an overarching iwi level.

[5] There is an agreed statement of facts, dated 13 June 2024, filed on behalf of Ngāti Te Wehi, Ngāti Whakamarurangi and Waikato-Tainui. None of the interested parties have challenged those facts. I initially appointed two pūkenga to report on issues of tikanga. However, and regrettably, due to

oppose the applications. However, they do raise issues about the nature and scope of the PCR sought. I also need to address, as an issue, the status of Ngāti Patupō, an iwi with close affiliations to Ngāti Te Wehi and the Kīngitanga. Ngāti Patupō is not an applicant but its interests in the harbour are recognised by both Ngāti Te Wehi and Ngāti Whakamarurangi (with some caveats). Another neighbouring iwi and an interested party, Ngāti Apakura, supports both applications. Ngāti Apakura has connections to the Aotea Harbour, but its primary purpose and role in the proceedings has been to support its whanaunga with their applications.

The statutory scheme – Takutai Moana

[12] The preamble to the Act reads:

> This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations.

[13] Section 4, the purpose section of the Act, reads:

> **Purpose**
>
> (1) The purpose of this Act is to—
>
> (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
>
> (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
>
> (c) provide for the exercise of customary interests in the common marine and coastal area; and
>
> (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).
>
> (2) To that end, this Act—
>
> (a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and

unforeseen circumstances, they were unable to complete a formal report. As discussed below, Dr Tom Roa did provide a report of a limited kind on a hui held with Ngāti Uakau and Ngāti Patupō and the applicants.

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

[14] The Court of Appeal in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board*, has held that the preamble and purpose of the Act are critical to the Court's determination of applications under the legislation:[6]

> When read with the preamble and s 7, the purpose statement tells us that Parliament has taken account of the Treaty by establishing a durable scheme which recognises and promotes the exercise of customary interests while reconciling them with other lawful rights and uses. *The courts' carefully circumscribed task is to implement that scheme.*

[15] Customary rights and interests are recognised under the Act in three ways: participation in conservation processes, CMT, and PCR.

[16] Recognition of CMT and PCR requires an "applicant group" to meet the statutory test. "Applicant group" is defined in s 9 of the Act as "one or more iwi, hapū, or whānau groups" that seek recognition of their PCR or CMT by a recognition order or an agreement; and includes a legal entity or natural person appointed to represent that group in its application. A representative must have authority to bring the application on behalf of an applicant group.

[17] The Court may make an order recognising CMT only if satisfied that the requirements of s 58 of the Act have been met and may make an order recognising a PCR only if satisfied that the requirements in s 51(1) of the Act have been met.

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[6] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [*Re Edwards Whakatōhea*] at [190] (emphasis added).

[18] CMT is the most extensive form of statutory right provided for under the Act. It is a territorial right, not merely a usage right.[7] The scope and effect of CMT is set out in s 60 of the Act and the particular rights conferred by a CMT order are set out in s 62 of the Act.

[19] Section 58 of the Act sets out the test for establishing CMTs. It reads:

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

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7 *Re Edwards Whakatōhea*, above n 6, at [4] per Miller J and at [391] per Cooper P and Goddard J citing s 60(1) of the Act.

(i) held the specified area in accordance with tikanga; and

(ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and

(d) the group or some members of the group to whom the transfer was made have—

(i) held the specified area in accordance with tikanga; and

(ii) exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.

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

[20] Section 59 identifies certain (non-exhaustive) matters that may be taken into account in determining whether the CMT exists in a specified area of the common marine and coastal area (CMCA). These matters include whether (and if so, to what extent) the applicant group (or any of its members):[8]

(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.

[21] The Court of Appeal's recent decision in *Re Edwards Whakatōhea* is now the leading case on the interpretation of ss 58 and 51, as well as other important matters under the Act, including the burden of proof under s 106 (addressed below). It has been applied in three recent High Court decisions to date: *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*,[9] *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare Ki Tokomaru*,[10] and *Re Jones (on behalf of Ngāi Tai Iwi)*.[11]

Limb 1 – Holds the specified area in accordance with tikanga

[22] The first limb of s 58(1) of the Act requires an applicant group to hold the specified area in accordance with tikanga.

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8 Section 59(1)(a).

9 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309.

10 *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare Ki Tokomaru* [2024] NZHC 682.

11 *Re Jones (on behalf of Ngāi Tai Iwi)* [2024] NZHC 1373. I note that all three decisions are subject to appeal.

[23] The majority in *Re Edwards Whakatōhea* observed that the holds "in accordance with tikanga" requirement of s 9 of the Act reflects the definition of Māori Customary Land in Te Ture Whenua Māori Act 1993, in respect of which the Māori Land Court has observed that "the important word here is 'held'. There is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Māori".[12]

[24] In interpreting and applying the first limb, the focus is on tikanga, and whether as a matter of tikanga the applicant holds the relevant area.[13] Tikanga is defined in the Act as "Māori customary values and practices".[14] The Court of Appeal in *Re Edwards Whakatōhea* observed that a court must ascertain what tikanga applies to that part of the rohe moana which is the subject of an application for a recognition order.[15]

[25] However, because CMT is concerned with territorial rights (rather than use rights), the Court must be satisfied that the evidence shows some form of control or *authority* by the applicant group over the specified part of the CMCA in accordance with tikanga established in the proceeding.[16] The use by a group and particular resource in an area, coupled with an intention and ability to control the use of that resource by others, is not of itself sufficient to establish the area as *held* by the group in accordance with tikanga.[17]

[26] The majority in *Re Edwards Whakatōhea* elaborated on what such control or "authority" might require. Rather than focusing on a group's ability to exclude from land, the majority considered it more helpful to focus on a group's "intention and

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12 *Re Edwards Whakatōhea*, above n 6, at [397] per Cooper P and Goddard J (footnote omitted).

13 *Re Edwards Whakatōhea*, above n 6, at [401]–[404] per Cooper P and Goddard J.

14 Section 9.

15 *Re Edwards Whakatōhea*, above n 6, at [124] per Miller J, [360] per Cooper P and Goddard J. Miller J observed, relying on the pūkenga's advice in that proceeding, that while there are nuances in tikanga are according to iwi rohe, much is applicable to all (at [125]–[126]), noting "There is no disagreement about the central relational values of tikanga"; whanaungatanga, mana, utu, kaitiakitanga, and tapu, (at [127] – [128]).

16 *Re Edwards Whakatōhea*, above n 6, at [402] per Cooper P and Goddard J ("The applicant group must... have control or authority over the area according to tikanga"); and at [435](a) ("...the group will need to show that as a matter of tikanga it has the authority to use and occupy the area, and to control access to and use of that area by others").

17 *Re Edwards Whakatōhea*, above n 6, at [404] per Cooper and Goddard JJ. See also at [401] "... evidence of activities that show control or authority over the area, as opposed to simply carrying out a particular activity in that area, will be of particular relevance in distinguishing a 'holding' of the area from the use of the area to gather a particular resource".

ability to control access to an area, and the use of resources within it, *as a matter of tikanga*".[18] Further, they held that permitting others to access an area and use resources within it, as an expression of manaakitanga, is not inconsistent with control and can instead demonstrate the exercise of a group's authority in the relevant area.[19]

[27] The Court of Appeal also emphasised the contemporary nature of this inquiry, focused on whether an applicant group *currently* holds an area in accordance with tikanga.[20]

[28] In the recent decision of *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* of this Court, the requirements of the first limb, following *Re Edwards Whakatōhea*, was summarised in the following way:[21]

> [T]he touchstone for the first limb of the test is whether, from a tikanga perspective, the applicant group can be considered the group possessing the requisite mana to determine who may access and use the area, irrespective of whether they possess the practical means of doing so.

[29] This Court in *Re Reeder*, made reference to the following list of activities as a useful guide for assessing whether the evidence demonstrates a group's authority over the takutai moana according to customary rules and interests (and in assessing the evidence in relation to limb 1):[22]

(a) Exercising manaakitanga;

(b) Acting as kaitiaki by protecting and looking after the takutai moana [for] future generations;

(c) The ability to place customary restrictions on access and the taking of resources;

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18 *Re Edwards Whakatōhea*, above n 6, at [403] per Cooper P and Goddard J.

19 *Re Edwards Whakatōhea*, above n 6, at [403] per Cooper P and Goddard J.

20 *Re Edwards Whakatōhea*, above n 6, at [140] per Miller J; at [402] per Cooper P and Goddard J.

21 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*,above n 9, at [81].

22 *Re Reeder (Ngā Pōtiki Stage 1 — Te Tāhuna o Rangataua)* [2021] NZHC 2726, [2022] 3 NZLR 304 at [52]–[53].

(d) Observing the tikanga associated with wāhi tapu as a way of restricting a specific act or use of an area;

(e) knowledge that particular fishing grounds or rocks belong to a particular group by descent;

(f) Exercising mana and rangatiratanga, which encompasses a level of authority over a rohe;

(g) Acknowledgement of a group's customary authority in an area by other groups;

(h) Restricting or regulating access to the common marine and coastal area across abutting land in the ownership of, or under the control of, the applicant group or members of it, where that occurs in accordance with tikanga.

Limb 2 – Exclusive use and occupation from 1840 to the present day without substantial interruption

[30] The second limb of the test in s 58(1)(b)(i) of the Act requires the group to have "exclusively used and occupied [the specified area] from 1840 to the present day without substantial interruption".

[31] The majority in *Re Edwards Whakatōhea* found it difficult to reconcile the text of the second limb with the Act's purposes.[23] They considered a literal reading of this limb would mean that, in many cases, the threshold for recognition would not be met owing to incursions into the area over the last 180 years by third parties.[24]

[32] Taking a purposive approach, the majority concluded that s 58 needs to be read "in a manner that is sensitive to the materially different legal frameworks that applied

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[23] *Re Edwards Whakatōhea*, above n 6, at [416] per Cooper P and Goddard J.

[24] *Re Edwards Whakatōhea*, above n 6, at [416] per Cooper P and Goddard J. They described such an outcome as inconsistent with the Treaty of Waitangi, assurances "given" in a 2010 consultation document issued by the government (referring to the Ministry of Justice *Reviewing the Foreshore and Seabed Act 2004: Consultation Document* (March 2010), and the Act's purposes.

before proclamation of sovereignty in 1840, and from proclamation of British sovereignty onwards."[25] The majority broke down the requirements of the second limb as follows:[26]

> (a) Whether the applicant group currently holds the relevant area as a matter of tikanga.
>
> (b) Whether in 1840, prior to the proclamation of British sovereignty, the group (or its tikanga predecessor(s)) used and occupied the area, and had sufficient control over that area to exclude others if they wished to do so [exclusive use and occupation as at 1840]. This inquiry essentially parallels the inquiry required by common law to establish customary title as at 1840.
>
> (c) Whether post-1840 that use and occupation ceased or was interrupted because the group's connection with the area and control over it was lost as a matter of tikanga, or was substantially interrupted by lawful activities carried on in the area pursuant to statutory authority [continuous use and occupation from 1840 to the present day].

Exclusive use and occupation as at 1840

[33] The majority in *Re Edwards Whakatōhea* held that "customary rights must have existed as at 1840, and the applicant group must be (or be the successor of) the group that exercised those rights at that time."[27]

[34] This part of the test requires applicant groups largely to have met the common law requirements for establishing customary title as explained by the Canadian authorities,[28] that is, in New Zealand law, as at 1840, the applicant group must have had "the intention and ability as a matter of tikanga to control access to the relevant area by other groups", reflecting a holding of the area rather than resource or use rights only.[29] There must have been a "strong presence" in the area, manifested by acts of occupation that demonstrated the area belonged to, was controlled by, or was under the exclusive stewardship of the applicant group.[30]

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25 *Re Edwards Whakatōhea*, above n 6, at [418] per Cooper P and Goddard J.

26 *Re Edwards Whakatōhea*, above n 6, at [434] per Cooper P and Goddard J.

27 *Re Edwards Whakatōhea*, above n 6, at [419] per Cooper P and Goddard J.

28 *Re Edwards Whakatōhea*, above n 6, at [434](b) and [420] per Cooper P and Goddard J.

29 *Re Edwards Whakatōhea*, above n 6, at [421] per Cooper P and Goddard J.

30 *Re Edwards Whakatōhea*, above n 6, at [422] per Cooper P and Goddard J. The majority confirmed that the use of a particular resource in an area will not, without more, amount to exclusive use and occupation of that area: at [422].

[35] Miller J's judgment identified elements of mana over land and its occupants which can be considered historical methods of controlling an area.[31] These include: military action (take raupatu, take ringa kaha, take pakihiwi kaha) to displace "existing occupants", "subsequent occupation, intermarriage with tangata whenua women, the marking out in some way of rohe which the group is capable of defending, the naming of places, the establishment of urupā, tūaha (shrines) and kāinga and placing of wāhi tapu, the adoption of a group name, and the approval and acceptance of neighbouring iwi".[32] The majority held that the ability of a group to meet this requirement would not necessarily be defeated by evidence of access to the area and use of resources in that area by other Māori groups. Full account must be taken of the core tikanga values of whanaungatanga and manaakitanga in order to understand the basis upon which other groups were present in the area.[33] The majority held that such a "strong presence" would be more difficult to demonstrate in "marine areas than in relation to coastal areas, because of their nature and the different ways in which such areas can in practice be used."[34] It also held that it would be more difficult to demonstrate this in offshore areas visited only occasionally than shallower areas close to the shore that could be, and were, observed, controlled from coastal settlements and used on a regular basis.[35]

Use and occupation from 1840 to the present day

[36] The majority in *Re Edwards Whakatōhea* held that the requirement that a group must have exclusively used and occupied the area from the proclamation of British sovereignty to the present day, without substantial interruption, needs to be interpreted "having regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga", and the scheme and purpose of the Act.[36]

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31 *Re Edwards Whakatōhea*, above n 6, at [167] per Miller J, citing Hirini Moko Mead Tikanga Māori: Living by Māori Values (Revised ed, Huia Publishers, Wellington, 2016) at 303. See also *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9, at [84].

32 *Re Edwards Whakatōhea*, above n 6, at [167] per Miller J.

33 *Re Edwards Whakatōhea*, above n 6, at [424] per Cooper P and Goddard J.

34 *Re Edwards Whakatōhea*, above n 6, at [422] per Cooper P and Goddard J.

35 *Re Edwards Whakatōhea*, above n 6, at [422] per Cooper P and Goddard J. The majority held that it may therefore be more difficult to establish CMT in respect of marine areas (other than inlets and shallow coastal waters) because the ways in such areas are used is often more akin to a use/resource right rather than a right of exclusive use and occupation that founds customary title of a territorial nature: at [423].

36 *Re Edwards Whakatōhea*, above n 6, at [426] per Cooper P and Goddard J.

[37] Ultimately, the majority held that an applicant group does not need to demonstrate an intention and ability to exclude others (including non-Māori) from the relevant area from 1840 to the present day.[37] Instead, an applicant group is required to establish *continuous* (not exclusive) use and occupation from 1840 to the present day.[38] Provided the group does so, and the group's use and occupation has not been substantially interrupted post-1840, the Court can infer the second limb is satisfied.[39]

[38] In terms of what may constitute a "substantial interruption" the majority confirmed that this will involve a "factual inquiry into the nature and extent of the interruption to the group's use and occupation."[40] What amounts to a substantial interruption in any particular case will therefore be fact-specific and context will always be important.[41] Nevertheless, the majority indicated that:

(a) substantial interruption will arise where a group has, after 1840, ceased to use and occupy an area for such an extended period that ahi kā roa is no longer maintained by that group as a matter of tikanga;[42]

(b) more generally, the test will not be met where, as a matter of tikanga, a group has ceased to have the relevant degree of control and authority over an area after 1840, for example, because other Māori groups have displaced the original customary holders as the primary occupiers and kaitiaki of the area.[43]

[39] The majority also rejected a submission that substantial third-party access to or fishing in an area can amount to a substantial interruption.[44] The majority instead

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37 *Re Edwards Whakatōhea*, above n 6, at [429] per Cooper P and Goddard J.

38 *Re Edwards Whakatōhea*, above n 6, at [435](b) per Cooper P and Goddard J.

39 *Re Edwards Whakatōhea*, above n 6, at [434](c) and [436] per Cooper P and Goddard J. The majority considered this approach to s 58(1)(b) to be consistent with the limited nature of rights conferred by CMT, especially given CMT is subject to rights of access, navigation, and fishing under ss 26–28. They held that it would be illogical to require an ability to preclude access, navigation, and fishing in order to qualify for statutory rights that do not confer that level of control over the area in the future.

40 *Re Edwards Whakatōhea*, above n 6, at [433] per Cooper P and Goddard J.

41 *Re Edwards Whakatōhea*, above n 6, at [431] per Cooper P and Goddard J.

42 *Re Edwards Whakatōhea*, above n 6, at [432] per Cooper P and Goddard J.

43 *Re Edwards Whakatōhea*, above n 6, at [432] per Cooper P and Goddard J.

44 *Re Edwards Whakatōhea*, above n 6, at [427] per Cooper P and Goddard J. See also at [426](f), where the majority held that activities engaged in by third parties (whether as a result of

held that third-party activities can only amount to a substantial interruption where they are authorised by legislation.[45] The example given was the lawful construction and operation of port facilities (pursuant to a resource consent or some other form of legislative authority) in the manner that physically excludes the applicant group from access.[46]

Burden of proof

[40] For CMT, s 106(2) of the Act requires the applicant to prove that the specified area: is held in accordance with tikanga; and has been used and occupied by the applicant group from 1840 to the present day. Section 106(2)(b) omits reference to the requirement in s 58(1)(b)(i) that the specified area has been "exclusively" used and occupied, and "without substantial interruption".

[41] The majority in *Re Edwards Whakatōhea* held that the applicants must prove the elements of the test for CMT replicated in s 106 only. It overturned previous High Court authority which had held that applicants are required to prove exclusivity in the absence of substantial interruption.

[42] In other words, to discharge the burden of proof, an applicant must call evidence to satisfy the Court that:

(a) the specified area is currently held by the group in accordance with tikanga; and

(b) the use and occupation of the area by the group has been continuous from 1840 to the present day (allowing for tuku, and changes in composition and identities of customary groups).

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manaakitanga or as a result of Anglocentric assumptions by third parties about their rights to do so) should not be seen as relevant interruptions of the customary rights that found CMT.

45 *Re Edwards Whakatōhea*, above n 6, at [428] and [433] per Cooper P and Goddard J.

46 *Re Edwards Whakatōhea*, above n 6, at [433] per Cooper P and Goddard J.

[43] The majority in *Re Edwards Whakatōhea* held that if these matters were established by the applicant, the Court is entitled to infer that the other requirements of the s 58 test are met, unless another party alleges, and establishes, the contrary.[47]

[44] For PCR, s 106(1) requires an applicant to prove that the right has been exercised in the specified area and continues to be exercised by that group in the same area in accordance with tikanga. Section 106(1)(a) omits the words "since 1840" found in s 51(1)(a) of the Act.

[45] *Re Edwards Whakatōhea* did not address the burden of proof in s 106(1) in relation to PCR. However, the parties agree (and I concur) that the majority's reasoning in relation to CMT relies on the express wording in s 106; applicant groups therefore have the burden of proving the elements set out in s 106(2) only. Adopting that reasoning in relation to ss 106(1) and 51(1) for PCR, the applicant groups have the burden of proving that a right:

(a) has been exercised in the specified area; and

(b) continues to be exercised by that group in the same area in accordance with tikanga.

[46] That will be sufficient for the Court to infer that the s 51 test is met, unless another party establishes that the right has not been exercised "since 1840".

[47] The onus for proving extinguishment falls on the party raising it.[48]

47 *Re Edwards Whakatōhea*, above n 6, at [436]–[437] per Cooper P and Goddard J. In other words, the Court may draw an inference that the s 58 test is met unless some other party demonstrates that: the applicant group's customary interests were not sufficient to establish effective control over the relevant area; after 1840, the applicant group's customary interests ceased to have the "necessary character"; or the applicant group's effective control over the relevant area was substantially interrupted after 1840 (see [436]).

48 Section 106(3) provides that "In the absence of proof to the contrary", a customary interest will be presumed not to have been extinguished.

Shared exclusivity

[48] The Court of Appeal in *Re Edwards Whakatōhea* was unanimous that it would be inconsistent with the scheme of the Act to have two or more overlapping CMTs in respect of the same area, as that would be unworkable; instead, the concept of shared exclusivity enables the issue of a single (joint) CMT in favour of two or more groups.[49]

[49] Shared exclusivity allows multiple groups with applications before the Court to combine to form one applicant group and have CMT recognised across the same area on the basis they jointly exercise exclusive use and occupation in relation to that area. The majority in *Re Edwards Whakatōhea* commented that any finding of shared exclusivity is most likely where the group makes a joint application or where, as is the case here, they make separate applications, but each acknowledge the shared rights of use and occupation of the other group.[50]

[50] In part of Miller J's judgment (not dissented from by the majority), he acknowledged that members of an applicant group may enjoy differing degrees or kinds of mana over the area specified in their application, but may "nonetheless share … in a single CMT over that area … [provided that] one or more of the group's member groups has exclusively used and occupied each part of the area since 1840".[51]

[51] If the Court is satisfied on the evidence that the two applicant groups hold the harbour together, in accordance with tikanga, with different levels of interest in different parts of the hearing area, it need not decide the precise internal boundaries between the groups. To the extent it is contested, the precise relationship between the groups' areas of interest in the harbour may then be a matter for debate on the marae and for resolution (if any) through the processes of tikanga.

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[49] *Re Edwards Whakatōhea*, above n 6, at [439] per Cooper P and Goddard J; and [208]–[209] per Miller J. At [209], Miller J says "If CMT could overlap, neither group could unilaterally exercise those rights [which the Act confers on the holder of CMT]". In practical terms, allowing two or more overlapping CMTs could lead to the different CMT holders making conflicting decisions in the exercise of their rights as CMT holders in respect of the same area of CMT.

[50] *Re Edwards Whakatōhea*, above n 6, at [439] per Cooper P and Goddard J.

[51] *Re Edwards Whakatōhea*, above n 6, at [204] per Miller J.

Analysis and decision

CMT applications

[52] As noted, the CMT applications are largely uncontested. The Attorney-General takes the view that there is a sufficient evidential basis to support the making of a joint order for CMT over the entire application area. The Attorney-General further considers there is sufficient evidence to support the granting of PCR to both applicant groups within the application area. However, the Attorney-General does not take a formal position on whether either or both of the applicant groups have met the tests for CMT or PCR.

[53] I will address the two applications separately. However, what both applicants seek is a finding of shared exclusivity. In order for such a finding to be made, I need to treat the two groups as having made a single, collective application in respect of the entire harbour. The "applicant group" for the purposes of the Act then essentially comprises of both groups. The question I then need to address is whether collectively the applicant group can satisfy the statutory test. For such a finding to be made, each constituent group needs to satisfy the s 58 test in at least part of the shared area. The fact that the interests of each constituent group may not be of equal strength through the entirety of the harbour is not fatal to a finding of use and occupation on the basis of shared exclusivity as between them.[52]

[54] As all parties submitted, on the evidence in this case, the applications are relatively straightforward. That is because, as the Attorney-General acknowledges, of the strength of the evidence, but also because of the unity of Ngāti Te Wehi and Ngāti Whakamarurangi arising from their whakapapa and whanaungatanga.

[55] As the Waitangi Tribunal has observed,[53] the notion of whanaungatanga or relatedness lies at the core of being Māori. Williams J has similarly described whanaungatanga as the "glue that held, and still holds, the system together; the idea that makes the whole system make sense – including *legal* sense."[54]

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52 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9, at [276].

53 Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 2.

54 Joseph Williams J *The Harkness Henry Lecture Lex Aotearoa: An Heroic Attempt to Map the Māori New Zealand Law* (2013) 21 WLR 1, at 4.

[56] The whanaungatanga ties and tikanga obligations associated with them, has led to the parties acknowledging one another across the entire Aotea Harbour and notwithstanding the fact that there may be stronger or different associations for each hapū in different parts of the harbour. As Ms Siciliano, for Ngāti Whakamarurangi, submitted, this also reflects the belief that the water is one body which sustains all those at Aotea and who have whakapapa connections and rights there. In the words of Ms Thomson, of Ngāti Whakamarurangi:

> The waters that flow along the coast flow in and out of Aotea, it is seamless just like the narratives in hapū histories that connect us all.

[57] The context therefore for assessing the applications is one where there is unanimity of views about the rights and interests of Māori at Aotea. There may be different historical narratives which sit behind those rights and interests, but that ultimately has little bearing on the legal tests I must apply under the Act, given the tikanga and approach adopted by the groups. This is aptly captured in the evidence of Mr Ronald Miki Apiti, of Ngāti Te Wehi, under cross-examination:

> Kei a Whakamarurangi o rātou kōrero, kei a Ngāti Te Wehi o rātou kōrero.

[58] I also agree with and adopt the following submission of Ms Siciliano:

> The absence of disputes regarding the hapū interests at Aotea is relatively rare and, in itself, reflects the shared tikanga of the groups in continuing to protect and maintain their harbour, their coastline. If anything, the exercise of manaakitanga and whanaungatanga simply supports the claim for joint CMT on the basis of shared exclusivity.

The Ngāti Te Wehi CMT application

[59] Ngāti Te Wehi whakapapa to both the Aotea and Tainui waka. Ngāti Te Wehi was established by the eponymous ancestor Te Wehi, when he conquered and subsequently permanently occupied Aotea Harbour in the 1700s. After the death of Tautinimoke, who killed Te Wehi's father, Pakaue, Ngāti Te Wehi settled at Aotea Harbour and formed an alliance with Waikato tribes to secure the rohe.

[60] The evidence establishes that Ngāti Te Wehi's rohe extends around Aotea Harbour from Pukeatua in the south, around the circumference of the harbour to Oioroa, at the northern mouth of the harbour.

[61] Today, Ngāti Te Wehi have four active marae around the harbour, Ookapu (Ngāti Te Wehi's principal marae), Te Papatupu, Te Tiihi o Moerangi and Makomako. Land blocks associated with Ngāti Te Wehi surround a significant portion of Aotea Harbour. The Native Land Court investigated title to these blocks from the mid-1880s onward. In accordance with the evidence of Ms Apiti de-Silva, today they remain principally in the ownership of Ngāti Te Wehi.

Limb 1 – Holds a specified area in accordance with tikanga

[62] As Gwyn J held in *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* the first limb of the s 58 test is whether the group currently uses and occupies the area, in a manner consistent with the nature of that area; requiring the group to have control or authority over the area according to tikanga.[55]

[63] There is clear, compelling and unchallenged evidence in this case that the Aotea Harbour is held by Ngāti Te Wehi in accordance with tikanga. Each of the relational values identified by Miller J in *Re Edwards Whakatōhea* are applied in the Aotea Harbour (i.e. specific local application) by Ngāti Te Wehi in the exercise of their tikanga.[56] This includes whanaungatanga, mana, manaakitanga, utu, kaitiakitanga, and tapu.

[64] As Miller J also held in *Re Edwards Whakatōhea*, one of the Act's key purposes is to recognise the mana tuku iho – defined as inherited right or authority derived in accordance with tikanga and exercised by tangata whenua in the marine and coastal areas.[57] There is clear and strong evidence in this case of the mana tuku iho of Ngāti Te Wehi in relation to Aotea. This is recognised by all iwi and hapū with interests in the area. This includes their whanaunga, Ngāti Whakamarurangi, who also assert their mana tuku iho over the same area.

[65] As Mr Clatworthy submitted, the tikanga of Ngāti Te Wehi is a dominant force that controls life and activities in Aotea. It clearly has the inherited right or authority to speak for Aotea.

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55 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9, at [82].
56 *Re Edwards Whakatōhea*, above n 6, at [127] and [128].
57 *Re Edwards Whakatōhea*, above n 6, at [129].

[66] The Ngāti Te Wehi witnesses spoke of how Ngāti Te Wehi practices and associated tikanga are long-standing and central to the behaviour of individual members of the iwi. Te Rauangaanga Boss Mahara described growing up at Aotea immersed in Ngāti Te Wehi tikanga. He states:[58]

> Tikanga was central in everything we did. From daily karakia, to our commitment to the marae, to our food gathering practices.

[67] Mr Mahara described in depth the tikanga practices in relation to kaimoana, kaitiakitanga, rāhui and kōiwi re-internment. This is a significant practice at Aotea where, in the shifting sand dunes of Oioroa, and its hostile environs, kōiwi are often exposed. All the Ngāti Te Wehi witnesses spoke of the centrality to the life of the iwi of relationships with the physical world of Aotea and the inter-connectedness, traced through whakapapa links between the iwi, the land surrounding the harbour, the harbour itself and many of its physical features. This includes its many wāhi tapu, some of which are caves below mean high-water springs.[59] Mr Ronald Miki Apiti and Mr Davis Apiti described the tikanga of Ngāti Te Wehi in relation to the moana, the iwi's kaitiakitanga responsibilities, and the tikanga of "Moana Rāhui o Aotea". The witnesses referred to the importance of the protection of Aotea as essential to the exercise of tikanga.

[68] The preamble to the Act refers to the inherited rights of iwi and hapū, derived in accordance with tikanga and based on the connection with the takutai moana and on the principle of manaakitanga. In his evidence, Mr Ronald Miki Apiti of Ngāti Te Wehi, refers to the significance of manaaki as "It is this manaaki at Moana o Aotea that gives us our prestige, mana whenua and manu moana about Aotea Harbour since the 1700's. Including from 1840 to the present day. We the iwi of Ngāti Te Wehi never ever left Aotea Moana."

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58 See also the evidence of Mr Ian Shadrock "Tikanga surrounds everything that we do as Ngāti Te Wehi. From birth and the burial of the placenta, to death, tangi and nehu. From the karakia we say before we go fishing or gathering from the bush, to the rāhui that we place … we exercise our tikanga to protect our wāhi tapu, guide our hui and wananga and dictate what we find middens, taonga or koiwi."

59 Ms Daisy Heta Kahaki and Ms Nancy Awhitu referred to the many wāhi tapu that traversed the entire harbour, the kōrero behind those areas and the tikanga that applies to them.

[69] Present day examples of the exercise of manaakitanga include Ngāti Te Wehi hosting the annual poukai[60] at Ookapu, helping other Kīngitanga marae with their poukai preparations, and allowing other groups and manuhiri to take kai moana from the harbour (in accordance with Moana Rāhui o Aotea).

[70] All of the witnesses for Ngāti Te Wehi spoke of the kaimoana at Aotea and the kaitiakitanga associated with the gathering of kaimoana. Mr Ronald Miki Apiti noted that Ngāti Te Wehi have always been "famous" for the kaimoana that comes from Aotea. This includes in particular the Patiki (flounder) and Māngo Maroke (dried shark). The harbour is also an important food source for pipis, cockles, mussels, eels, and whitebait. Mr Ian Shadrock described how the iwi's knowledge of tikanga and their observation of te taiao and the maramataka informs their kaitiaki practices.

[71] Further examples of the exercise of kaitiakitanga in relation to the takutai moana include:

(a) the establishment of Moana Rāhui o Aotea in 1996 to formalise Ngāti Te Wehi's kaitiaki role and to act as an environmental action group for the harbour. Key initiatives of Moana Rāhui o Aotea include educating others about issues relevant to the harbour and advocating for the protection of the Māui dolphin.

(b) Ngāti Te Wehi was one of the iwi and hapū groups involved in having the Kāwhia Aotea Taiāpure reserve established in 2000. Subsequently, Ngāti Te Wehi and others worked with the Ministry of Fisheries to establish a Mātaitai Reserve at Aotea. The reserve was declared on 22 May 2008. Amongst other matters, it prohibits commercial fishing within the harbour.

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60 In his evidence Mr Ronald Miki Apiti describes the poukai as meaning "to feed the people". When King Tāwhio began this tradition, he said "I have instituted this gathering to feed the widowed, the bereaved and the destitute, te pāni, te pouaru me te rawakore. It is a doorway that has been opened to the multitudes of people and the bounty of food." It is held on the 14th of March at Ookapu marae every year. The Māori king visits.

(c) the Ngāti Te Wehi witnesses referred to both "formal kaitiaki" and "customary kaitiaki". In respect of the Mātaitai Reserve, formal kaitiaki or tangata kaitiaki (as the Fisheries (Kaimoana Customary Fishing) Regulations 1988 refer to them) may authorise the taking of fishery resources to continue for the purpose of sustaining the functions of a marae. As Mr Ian Shadrock described, the role of customary kaitiaki includes monitoring fish stocks, monitoring the environment and any land and soil movement, and ensuring that no commercial fishing is taking place within the harbour.

(d) Mr Ian Shadrock noted that Ngāti Te Wehi has always answered kao when asked by the Council about concrete boat ramps at Aotea. Ngāti Te Wehi knew that such boat ramps would increase recreational fishing pressure.

[72] Expert historian witness, Ms Justine Jenkins, stated that under the Aukati (1866–1883) Aotea Harbour was under Māori control. Dr Green noted the absence of commercial fishing after 1956 and very limited commercial fishing prior to that. Ms Jenkins also stated that from the 1920s onwards, Ngāti Te Wehi exercised its independent mana, forming its own committees "independent of Crown statutory governance or the competing interests within a collective." The committees included the Aotea Beach Committee, the Te Papa o Whatihua Tribal Committee and more recently, Ngā Hapū o Aotea Moana and, as noted, Moana Rāhui o Aotea.

[73] Ms Jenkins also described the Ngāti Te Wehi tikanga of "non-participation and silence". This was a practice that reinforced their mana over their rohe. This was part of the reason why Ngāti Te Wehi had been able to hold on to some of their lands and the moana.

[74] I further note that the Ōtorohanga District Council consults Ngāti Te Wehi on matters relating to the harbour at Aotea and has provided Ngāti Te Wehi with a letter recognising and supporting its present application.

[75] Many of the Ngāti Te Wehi witnesses spoke of there being several taniwha that inhabit the harbour. Mr Ronald Miki Apiti referred to two taniwha, Whaiaroa and Whatihua, who were tupuna (ancestors) of Ngāti Te Wehi. Taniwha warn Ngāti Te Wehi of danger. Mr Davis Apiti said that he was taught to be careful around the taniwha holes in the harbour.

[76] The evidence also establishes that Ngāti Te Wehi continues to hold and exercise its interest over whenua bordering Aotea Harbour that it has occupied historically and continues to do so. Mr Davis Apiti gave the recent example of Ngāti Te Wehi putting up signage at Raoraokauere and Oioroa to address unauthorised access.

[77] In support of their claims generally, Ngāti Te Wehi called extensive evidence about the wāhi tapu in their rohe. This included many locations in and around the harbour. I note, in accordance with my minute of 19 June 2024, that the issue of the specific locations of wāhi tapu and the nature of any protections and restrictions sought in respect of them will be dealt with at a subsequent, stage 2 enquiry. However, the wāhi tapu evidence to date, including the evidence of Ms Nancy Awhitu and Ms Daisy Kahaki, provides further cogent evidence in support of the claim that Aotea is held in accordance with the tikanga of Ngāti Te Wehi. The relational value of tapu continues to be practiced throughout the rohe, including the harbour. Obviously, the issue of wāhi tapu will be canvassed more extensively at stage 2, but I include here reference to some particular examples of wāhi tapu to support my findings. The wāhi tapu include:

(a) Te Tauranga ō Aotea, where Ngāti Te Wehi pay respect to all the tūpuna, who have passed on.

(b) Te Wharenui ō Whatihua, where Whatihua had his wharenui, the birthplace of Uenukutuwhatu and Uenukuwhāngai, and the area in which Ruapūtahanga had an eel weir. It is where the red ochre is found and used for its pigmentation in artworks, clothing and ceremonies.

(c) Hawaiki-iti.

(d) Te Tarata, known today to Ngāti Te Wehi as Titi Maunga or mountain breast because of its appearance.

(e) Maukutea, an ancient kāinga for many of Ngāti Te Wehi's tūpuna after the migration from Oioroa.

(f) Te Puna ō te Korotangi, being the area where the Korotangi was found, a stone bird which came across on the waka from Hawaiki.[61]

(g) Mōkai Kāinga marae (Ngāti Apakura), being the marae that one must pass by before arriving at Ookapu marae.

(h) Ookapu marae which sits on the southern shores of the harbour, as the principal marae and heart of the community of Ngāti Te Wehi. It was a pā site established by Te Wehi.

(i) Orotangi, sheer white cliffs, that look out over Aotea Harbour, being a place where Ngāti Te Wehi would come to gather resources.

(j) Ko te kaitiaki he whai te patiki he patiki te whai. This area is a cave and is known to Ngāti Te Wehi as the "Taniwha Hole". It is home to the kaitiaki/guardian, Whaiaroa. Whaiaroa often appears as a large spotted stingray without a tail or as a flounder with different coloured spots. Whaiaroa's presence is a warning and protection to Ngāti Te Wehi.

(k) Raoraokauere, which was the ancient and main pā site of Ngāti Te Wehi in the 1800's and home of Hone Waitere.[62]

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[61] The Korotangi was returned to Waikato-Tainui as part of its raupatu settlement. The late Māori King, Te Arikinui Kiingi Tūheitia named his second child Korotangi after this taonga.

[62] I note the closing whakataukī in the evidence of Ms Nancy Awhitu and Ms Daisy Kahaki: "whakaoti i a maatau korero ka waiho e au tenei korero" which they say means "every blade of grass, every grain of sand, every droplet of the moana is of spiritual significance to our people".

Limb 2 – Exclusive use and occupation from 1840 to the present day

[78] The applicant groups do not bear the burden of proving "exclusivity". However, there is clear and compelling evidence of Ngāti Te Wehi exclusively using and occupying Aotea Harbour at 1840 (together with other iwi, including Ngāti Whakamarurangi).

[79] The findings of the Waitangi Tribunal in its *Report on Te Rohe Pōtae Claims* of 2018 are a useful starting point. The Tribunal summarised the landscape at Aotea Harbour as at 1840 as follows:[63]

> Ngāti Te Wehi was the largest grouping among several with interests that encircle the Aotea Harbour. Ngāti Te Wehi had pā at Matakōwhai and Manuaitū, and populous settlements at Raoraokauere and Waiteika near the eastern side of the harbour. Claimants also referred to close relationships between Ngāti Te Wehi and Ngāti Hikairo, their neighbours in central Kāwhia.
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> Meanwhile, Ngāti Whawhākia occupied a strip along the southern edge of the Aotea Harbour, and Ngāti Patupō occupied territories straddling the harbour mouth and extending a small way inland. Claimants described how Ngāti Patupō and Ngāti Te Reko operated as specialist fighting forces securing Aotea and northern Kāwhia for the Waikato–Maniapoto coalition. Ngāti Whakamarurangi, with links to both Ngāti Hikairo and Ngāti Māhanga, also had territories north of Aotea extending almost to Karioi.
>
> …
>
> Ngāti Whakamaruruangi are similarly based close to the coast, occupying the area running from Karioi maunga to Raukūmara, at the southern end of Aotea Harbour. They share close relations with Ngāti Mahuta, whose rohe encompasses Kāwhia Harbour, Taumatatōtara maunga, and the Taharoa lakes district. Ngāti Patupō and Ngāti Whawhākia were both based around southern Aotea.

[80] The Court of Appeal has affirmed the right of the courts to make evidential use of Waitangi Tribunal reports; they fall within s 129 of the Evidence Act 2006 (the successor to s 42 of the Evidence Act 1908) as reliable published documents (books of authority) and matters of public history and social science.[64] Findings of the Tribunal following a comprehensive historical inquiry such as Te Rohe Pōtae inquiry (WAI898) are highly persuasive and authoritative and in proceedings of this kind, at least, there would need to be a compelling reason for the Court not to adopt them.

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63 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2023) vol 1 at 113–115 (footnotes omitted).

64 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 653.

[81] There is again clear, compelling, and unchallenged evidence that Ngāti Te Wehi has exclusively used and occupied Aotea Harbour from 1840 to the present day without substantial interruption. This includes clear and unchallenged evidence of a "strong presence" in the area, manifesting itself in acts of occupation that can reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, and was under the exclusive stewardship of Ngāti Te Wehi.

[82] As noted above, the eponymous ancestor of Ngāti Te Wehi, established the iwi, Ngāti Te Wehi at Aotea through conquest and continued occupation of the whole harbour. As noted in the evidence of Ms Justine Jenkins and Mr Ian Shadrock, Ngāti Te Wehi has held, and continues to hold a strong presence in the harbour as tangata whenua. Further, important evidence establishing an enduring strong presence is as follows:

(a) Following the battle of Kāwhia in 1819–1820, Ngāti Te Wehi remained at Aotea, forming an alliance with Waikato.

(b) Ngāti Te Wehi's principal marae, Ookapu, was built in the late 1700s. It remains at the same site today and is currently undergoing restoration.

(c) The Treaty of Waitangi was signed by three Ngāti Te Wehi rangatira: Te Aoturoa Hōne Waitere, Hakiwaka and Te Noke.

(d) Ngāti Te Wehi exercised control over the harbour in the 19th century when they enforced the aukati boundary which ran very close to the harbour. This prevented third parties from entering the harbour.

(e) Members of Ngāti Te Wehi gave evidence from both the Manuaitu-Aotea block Native Land Court hearings in 1887 and the Moerangi-Matakowhai block hearings in 1909 in relation to Ngāti Te Wehi's occupation of Aotea throughout the 19th century. Evidence was provided that, historically, Ngāti Te Wehi controlled access to Aotea and permission was required to gather kai.

[83] Under s 59 of the Act, the Court may take into account, in determining whether CMT exists, whether the applicant group owns land abutting part of the takutai moana and whether it has exercised non-commercial customary fishing rights in the area and has done so from 1840 to the present.

[84] As noted above, there is substantial land abutting the takutai moana at Aotea that is owned by Ngāti Te Wehi, land that has been their ancestral whenua for hundreds of years. The agreed statement of facts dated 13 June 2024 records that the following land abutting the harbour is owned by the applicant groups, i.e. Ngāti Te Wehi and Ngāti Whakamarurangi:

(a) Rauiri block;

(b) Moerangi block;

(c) Raoraokauere block;

(d) Te Pahi block; and

(e) Okapu block.

[85] It is also abundantly clear from the Ngāti Te Wehi witnesses that non-commercial fishing together with general kaimoana gathering has been central to the Ngāti Te Wehi identity and existence as a coastal people and there has been extensive non-commercial customary fishing from 1840 to the present day.

[86] In conclusion on the Ngāti Te Wehi application for CMT, I conclude that both limbs of the s 58(1) inquiry have been made out. Ngāti Te Wehi holds the rohe moana area, namely Aotea, in accordance with tikanga and has established on the evidence exclusive use and occupation from 1840 to the present day without substantial interruption.

[87] Ngāti Te Wehi has established that its use and occupation of the area has been continuous from 1840 to the present day. As noted, the evidence also clearly establishes that the specified area is currently held by Ngāti Te Wehi (and others) in

accordance with tikanga. In this case, no other party has alleged or attempted to establish the contrary. In accordance with the majority decision in *Re Edwards Whakatōhea*, in the circumstances I am entitled to infer that the exclusive use of occupation without substantial interruption (i.e. limb 2) has been met. In this case, however, I do not simply rely on an inference that that requirement has been met. There is substantial direct evidence to support that conclusion.

The Ngāti Whakamarurangi CMT application

[88] Ngāti Whakamarurangi is a hapū of Ngāti Hauā,[65] who descend from the people who arrived on the Tainui waka.

[89] Ngāti Whakamarurangi also descend from Ngāti Tūirirangi. Tūirirangi was thought to have lived during the 1600s and was born 12 generations after the captain of the Tainui waka, Hoturoa.

[90] The Ngāti Whakamarurangi rohe extends beyond Aotea, north along the west coast of Whāingaroa (Raglan). Ngāti Whakamarurangi are a coastal hapū alongside their whanaunga Ngāti Tūirirangi, Tainui o Tainui, Ngāti Māhanga, Ngāti Tamainupō and others.

Limb 1 – Holds a specified area in accordance with tikanga

[91] There is equally clear and compelling evidence that Ngāti Whakamarurangi also holds the Aotea Harbour in accordance with tikanga. Ngāti Whakamarurangi currently uses and occupies the area, and the evidence clearly establishes its intention and ability to control access to the area and use of its resources as a matter of tikanga. There are clear activities showing Ngāti Whakamarurangi control and authority. This includes the implementation of rāhui, observance of wāhi tapu, and the tangible exercise of rangatiratanga, kaitiakitanga, and manaakitanga. These exercises are more than simply carrying out a use or activity in relation to the resource.[66]

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65 The agreed statement of facts of 13 June 2024 records that the key tūpuna from whom Ngāti Whakamarurangi and Ngāti Te Wehi descend are: Tūirirangi, Koata, Te Wehi, Pakaue, Kāwharu, Tapaue, Wharetiipeti, Reko, Whakamarurangi and Hauā.

66 See *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9, at [179]–[180].

[92] The witnesses for both Ngāti Whakamarurangi and Ngāti Te Wehi stressed the adherence to tikanga in respect of their mana at Aotea. The evidence generally emphasised the Māori tāhuhu values (i.e. core values) that underpin tikanga: whanaungatanga, mana, tapu, manaakitanga, and aroha. As Ms Siciliano submitted, these core values are fundamental aspects of being Māori, and in this case, of connecting with both the takutai moana and the surrounding whenua.

[93] In relation to the holding of Aotea by Ngāti Whakamarurangi in accordance with tikanga, it is again important to note (as in itself an exercise of tikanga) the mutual acknowledgements made by the two applicant groups, Ngāti Whakamarurangi and Ngāti Te Wehi, of their interests in Aotea. Ms Taruke Heather Thomson, on behalf of Ngāti Whakamarurangi expressly acknowledged in her evidence the two applicant groups are closely related. She acknowledged "we occupy the entire area together".

[94] Manaakitanga has been defined as "the reciprocal process of showing and receiving care and hospitality".[67] Permitting others to access the area and utilise the resources within it is an expression of manaakitanga, and doing so is a manifestation of control of the area.[68] The manaakitanga of Ngāti Whakamarurangi was demonstrated in Mōtakotako marae at Manuaitu during the site visit on Wednesday, 26 June 2024. There was substantial further evidence of Ngāti Whakamarurangi manifesting control of Aotea from Ms Thomson, as expressed in the whakataukī set out at [3] above.

[95] The Ngāti Whakamarurangi evidence also provided clear examples of the hapū's exercise of kaitiakitanga and tino rangatiratanga in relation to Aotea:

(a) Ms Thomson's whānau – who whakapapa to Ngāti Whakamarurangi – have lived at Aotea for 33 generations on her mother's side and four generations on her father's side, in the Manuaitu area.[69] Ngāti

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67 *Re Edwards Whakatōhea*, above n 6, at [127].

68 *Re Edwards Whakatōhea*, above n 6, at [403].

69 Ms Thomson noted that Manuaitu, from which the block Manuaitu-Aotea takes its name, is a Rarotongan word and also a descriptive word for a tohunga. The summit occupies a central and commanding position overlooking the harbour with views along the coast both north and south and including Te Maunga, Karioi. Oioroa is located within the Manuaitu-Aotea block. Oioroa is today a scientific reserve (Aotea Heads scientific reserve), with its classification reflecting its cultural significance to the toi whenua (tangata whenua) of Aotea.

Whakamarurangi's ancestral customary lands are located "in the western part of the harbour, to the north and south of the harbour mouth, to the coast".

(b) There is substantial evidence of regular use and occupation of sites around the harbour for fishing and gathering of kaimoana within the takutai moana. A number of these fishing sites were identified in evidence before the Native Land Court in 1887 by Te Pouwharetapu. Ms Thomson herself recalls netting in the channels between Te Pahi and Raoraokauere as a child, learning to spear flounder, fishing around the mussel farm at the harbour mouth and at Te Pungapunga near Oioroa.

(c) Ms Thomson, alongside her sister Janeva were involved in setting up the Aotea Mātaitai under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 in 2008. Ms Thomson is also the customary kaitiaki under the 1998 regulations for Mōtakotako marae.

(d) Customary practices and traditions continue to be exercised by Ngāti Whakamarurangi in respect of the harbour, such as performing karakia, the placing of rāhui on the harbour following a death, the launching of waka, the re-internment of kōiwi, and the retrieval of taonga.[70]

(e) Mātauranga Māori is passed on to younger generations and to members of Ngāti Whakamarurangi generally. Ms Thomson noted that Ngāti Whakamarurangi hold wānanga where hapū members are taken around the rohe to familiarise them with their landscape, whakapapa, and history.

(f) Ngāti Whakamarurangi have continued to exercise a traditional control over whether "strangers" can harvest and use the resources within the harbour. Ms Thomson noted that marriage does not provide a right to use the resources at Aotea, because the right is through whakapapa.

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70 The kōiwi of Ngāti Whakamarurangi tūpuna are buried within the sand dunes of Oioroa.

Users of the resource need to be able to show their connection through whakapapa and link it to the source of land at Aotea. This "serves as an important mechanism for resource management."

(g) There has been no commercial eel fishing at Aotea for some 25 years since Ngāti Whakamarurangi prevented a commercial eeler from netting eels at Toreparu. In more recent times, Ngāti Whakamarurangi has prevented film crews, tourists, and unauthorised campers from encroaching on their whenua and takutai moana.

(h) The strong Ngāti Whakamarurangi connection and presence at Aotea is demonstrated through the naming of places, meeting houses, earlier mission churches, rūnanga meetings, and the many mōteatea associated with Aotea.[71]

[96] Like Ngāti Te Wehi, Ngāti Whakamarurangi called important and significant evidence, again of a cogent nature, of wāhi tapu sites in and around the harbour, including numerous urupā. Again, this provides very clear and compelling evidence of the relational value of tapu. Ms Thomson referred to the detailed evidence of Te Pouwharetapu before the Native Land Court in 1887, naming important urupā. Ms Thomson also noted that throughout her lifetime, kōiwi of her tūpuna and whānau had been buried in the sand dunes and over time had been exposed by the movement of sand. When Ngāti Whakamarurangi see or are informed that kōiwi have come to the surface, they collect them up and either convey them to Makaka, an old settlement where the urupā is still in use, or re-inter back beyond the dune back area where they will not be disturbed.[72]

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71 In her evidence Ms Thomson referred to a mōteatea from Muriwhenua, an ancestor of Ngāti Whakamarurangi. Muriwhenua foresaw the fall of the Waikato stronghold Matakitaki to Ngā Puhi in 1822. Muriwhenua was a signatory to Te Tiriti o Waitangi at Manukau.

72 Ms Thomson also noted that with the rising sea levels, the big sand dune banks are collapsing exposing all habitation sites and kōiwi buried in the sand dunes. I also note that the specific sites of many wāhi tapu locations are confidential and Ngāti Whakamarurangi does not wish them to be publicly known. The sites are very sacred. These are, of course, issues to be traversed at stage 2, as I have indicated in my minute.

Limb 2 – Exclusive use and occupation from 1840 to the present day

[97] There is clear evidence that as at 1840 Ngāti Whakamarurangi had a "strong presence" at Aotea, manifesting in acts of occupation which show control or exclusive stewardship over the harbour. That connection or stewardship has not been lost as a matter of tikanga.[73]

[98] The expert opinion of Dr Grant Young in the Waitangi Tribunal for the *Te Rohe Pōtae District Inquiry* is illustrative:[74]

> ... Ngāti Whakamarurangi and Ngāti Tuirirangi locate their turangawaewae at Aotea. Their lands are located in the western part of the harbour, to the north and south of the harbour mouth, to the coast. Their ancestors have lived on these lands for many generations. They continue to maintain their ahi kā to the present. Their marae are located on the land and they also retrieve kōiwi which are exposed along the shoreline, collect the jawbones of whales and the teeth of seals, and protect other taonga which are found in the wetlands in the rohe.

[99] There were numerous examples in the evidence illustrating continuous use and occupation since 1840:

(a) historical occupation by significant tūpuna such as Muriwhenua,[75] Wiremu Tāmihana, Tākerei te Rau, Te Kewene te Haho, Te Aho Wharepū, and Rangipotiki.

(b) in 1830, Ngāti Whakamarurangi sent a contingent of 60 fighters from Aotea to join relatives at Taumatawīwī against Ngāti Maru.

(c) evidence as to Ngāti Whakamarurangi's occupation at Aotea was given to the Native Land Court in 1877 in the claim to the Manuaitu block. That evidence named urupā at Aotea important to Ngāti

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73 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9, at [192](a).

74 Grant Young *Ngāti Whakamarurangi and Ngāti Tuirirangi: Traditional History Report* (Report prepared for Ngāti Whakamarurangi and Ngāti Tuirirangi claimants in Te Tai Hau-ā-uru for the Te Rohe Pōtae District Inquiry, Wai 898 A100(a), September 2012).

75 Muriwhenua was a rangatira of Ngāti Whakamarurangi and Ngāti Hauā. He lived inland at Waipā, but settled with his people at Aotea after the battles of the 1820s. It was from his tūāhu on Te Ngutu o Manuaitu (a small cone-shaped hill just to the east of the main pā), that he foresaw the fall of the Waikato stronghold Mātakitaki to Ngā Puhi in 1822.

Whakamarurangi. As part of the Manuaitu claim, a map surveyed in 1886 identified key Ngāti Whakamarurangi locations.

(d) a number of censuses conducted from 1862 to 1881 demonstrate Ngāti Whakamarurangi's presence and occupation at Aotea Harbour.

(e) Ms Thomson said in evidence that old habitation sites are being exposed owing to the collapse of big sand banks.

(f) Ngāti Whakamarurangi and Ngāti Tūirirangi have three main settlements at Aotea: Te Mākaka, Mōtakotako and Raoraokauere, with Raoraokauere having a population of 1200 in 1841.

(g) George French Angas sketched Ngāti Whakamarurangi tūpuna Muriwhenua at Raoraokauere in 1843.

(h) Ngāti Whakamarurangi reinter kōiwi buried in sand dunes that are exposed over time by the movement of sand. Ms Thomson's evidence was that exposed kōiwi are either conveyed to Te Mākaka, an old settlement with an urupā still in use, or they are reinterred beyond the dune bank area.

(i) members of Ngāti Whakamarurangi are contacted by bodies such as the Department of Conservation, Ministry for Primary Industries, the Waikato Regional Council and Waikato-Tainui about matters pertaining to Aotea Harbour.

[100] There is also clear evidence that Ngāti Whakamarurangi maintain their ahi kā at Aotea today and are kaitiaki for the coastal region. The use of their marae Mōtakutako located just off the coast, shows how Aotea would have been, and remains, extensively used and occupied by their whānau and hapū. The old walking tracks for the rohe – still used today – demonstrate the distances covered traditionally with access to shellfish gathering and fishing sites.

[101] This "strong presence" reflects the mana of Ngāti Whakamarurangi at Aotea. As Ms Thomson noted, to assert authority/mana whakahaere over an area whether land or sea "you are expected to provide your ancestral ties to toi whenua (founding tupuna/original people) and to show how those ties have been maintained through long occupation." As I have noted above, Ms Thomson referred in evidence to 33 generations of direct whānau who have resided at Manuaitu.

[102] The Attorney-General has responsibly acknowledged that she has not identified any circumstances that could amount to substantial interruption of Ngāti Whakamarurangi (or indeed, Ngāti Te Wehi's) use and occupation of Aotea, the subject of the application.

[103] I find that Ngāti Whakamarurangi has established both limbs for the recognition of CMT under s 58 of the Act.

Protected customary rights

[104] Section 51(1) of the Act provides for a PCR to be recognised if the right:[76]

(a) has been exercised since 1840;

(b) continues to be exercised in a particular part of the CMCA 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.

[105] In *Re Edwards Whakatōhea*, the Court of Appeal held that the test for PCR does not require an applicant group to itself have exercised the rights since 1840.[77] Rather, it requires that the right has been exercised since 1840 and that the applicant group continues to exercise it.[78]

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76 "Protected customary right" is defined in s 9 of the Act to be an "activity, use, or practice".
77 *Re Edwards Whakatōhea*, above n 6, at [336], per Miller J.
78 *Re Edwards Whakatōhea*, above n 6, at [336], per Miller J, and [360] per Cooper P and Goddard J.

[106] Section 52 of the Act sets out the scope and effect of a PCR order. In *Re Edwards Whakatōhea*, the Court of Appeal confirmed that there is no inconsistency between a grant of recognition of CMT to one group in respect of a specified area, and the grant of recognition of PCR to another group in that same area.[79]

[107] Section 101(b) and (d) provides that an application for recognition of a PCR must describe that customary right and identify the particular area of the CMCA to which it relates.

[108] Under s 51(2) of the Act, certain activities, uses, and practices are excluded from being recognised as PCR. These include an activity:

(a) that is regulated under the Fisheries Act 1996; or

(b) is a commercial aquaculture activity; or

(c) involves the exercise of any commercial or non-commercial Māori fishing right or interest under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; or

(d) that relates to "wildlife" within the meaning of the Wildlife Act 1953, including some sea birds, and marine mammals within the meaning of the Marine Mammals Protection Act 1978, including whales;[80] 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.[81]

[109] Under the Act, prohibitions or restrictions on access to the CMCA may only be imposed to protect wāhi tapu or wāhi tapu areas under s 79 of the Act, or by any other enactment.[82] This means that placing a rāhui in or over the CMCA cannot be

79 *Re Edwards Whakatōhea*, above n 6, at [445] per Cooper P and Goddard J.
80 Section 51(2)(d) of the Act; *Re Edwards (Whakatōhea)* [2021] NZHC 1025, [2022] 2 NZLR 772.
81 Section 51(2)(e) of the Act; *Re Edwards (Whakatōhea)* [2021], above n 80, at [378]–[379].
82 Section 26(2); see also s 27(3) in respect of restrictions on the public right of navigation.

recognised as a PCR under the Act.[83] As this Court *Re Edwards (Whakatōhea)* and *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* has recognised, the access restrictions associated with a rāhui mean that its recognition as a PCR is inconsistent with the statutory scheme. As Gwyn J put it:[84]

> The practice of placing a rāhui over an area is intended to restrict access to and use of that area. The exclusionary effect of a rāhui would interfere with the right of access of all New Zealanders to the CMCA, as provided in s 26. The Takutai Moana Act makes it clear that the only prohibitions or restrictions capable of interfering with access to the CMCA are those imposed to protect wāhi tapu, or by any other enactment. As Churchman J said in *Re Edwards*, the structure of the Act is more consistent with the imposition of rāhui, and the consequent creation of an area that is subject to tapu, with the holding of CMT, rather than a PCR. It follows that placing rāhui on the CMCA cannot be recognised as a PCR, but may be the subject of a wāhi tapu protection right in certain circumstances.

The Ngāti Te Wehi PCR application

[110] Ngāti Te Wehi seeks PCR in respect of the following:

(a) To utilise and gather shells, stones, kōkōwai, and driftwood;

(b) To utilise, gather and protect whitebait below the mean highwater springs;

(c) To utilise, gather, and protect plants below the mean highwater springs, including harakeke, raupō, tī kōuka, toetoe, and kukuraho;

(d) Launching and use of waka on the harbour by Ngāti Te Wehi;

(e) Navigation and travel around the harbour by Ngāti Te Wehi, including by boat, foot, and horseback;

(f) The gathering and re-interment of kōiwi;

(g) Transfer of mātauranga Māori regarding Aotea Harbour; and

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83 *Re Edwards (Whakatōhea)*, above n 80, at [387]–[390] and [617].

84 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9, at [716], her Honour added that "[r]āhui may of course still be imposed and adhered to through tikanga", at [717] (footnotes omitted); see also *Re Edwards (Whakatōhea)*, above n 80, at [390].

(h) Exercising kaitiakitanga responsibilities over the application area by observing and protecting the marine environment.

[111] There is, of course, substantial overlap with the PCR sought by Ngāti Whakamarurangi. They seek PCR in respect of the following:

(a) Whitebaiting;

(b) Harvesting resources and taonga from the takutai moana as an exercise of kaitiakitanga;

(c) Travelling to Rauiri for wānanga to pass mātauranga to further generations and exercise kaitiakitanga;

(d) Performing ceremonies associated with burial, blessing, and rongoā, such as karakia; and

(e) Launching boats and waka within Aotea to access fishing grounds and sites of cultural significance.

[112] In addressing the issue of whether the requirements for a PCR, as prescribed by s 51, are made out, I repeat a number of key points made above and in relation to CMTs. First, the applications are largely uncontested. Second, there is a wealth and abundance of unchallenged evidence, that Aotea Harbour has for multiple generations been an integral part of the lives of both Ngāti Te Wehi and Ngāti Whakamarurangi as a source of kaimoana (including whitebait), a place of multiple communal activities, including travels with waka, reinterring kōiwi, and gathering driftwood and stones. It has also been integral to the metaphysical and cultural world of the iwi and hapū, where ancestors are buried and honoured, and the natural world is studied.

[113] Against that background, there is a clear and proper basis for this Court to conclude that based on the substance of the PCR sought, the requirements have been made out. The only real issue is the precise terms of those orders and the extent (if any) to which the Court can and should recognise practices of a more metaphysical/intangible nature which are not tied to particular physical activities.

[114] The parties agree, and I concur, that following the general findings of PCR that I make in this judgment, the Court should call for further submissions (following discussions and negotiations between the parties) on the precise terms of the PCR.

[115] The applicants, but particularly Ngāti Whakamarurangi, have sought PCR in somewhat broad terms for activities based on spiritual and/or cultural associations with the harbour. This includes, for example, a PCR for performing ceremonies associated with burial, blessing and rongoā, such as karakia. A further example, from the application of Ngāti Te Wehi, is the PCR sought with respect to exercising kaitiakitanga responsibilities over the harbour by observing, protecting, and managing the marine environment. The aspiration to seek orders of that kind is entirely understandable. It is, of course, consistent with tikanga and practices held with respect to the harbour for generations. However, under the scheme of the legislation, which the Court must apply and is bound by, the recognition of and terms of a PCR require a specific manifestation of the activity/right at issue, whether by a physical activity or by a use or practice related to a natural or physical resource, consistent with s 51(2)(e) of the Act. So, for example, in *Re Edwards (Whakatōhea)*, this Court held that practices relating to the exercise of kaitiakitanga could include "planting resources".[85] Applying that same approach in *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*,[86] Gwyn J recognised PCR for the exercise of kaitiakitanga for the purposes of conservation measures.[87]

Participation of Ngāti Uakau and Ngāti Patupō

[116] Neither Ngāti Uakau nor Ngāti Patupō filed a formal application to the Court for CMT, in advance of the hearing. A critical issue that I must address is whether I can now make a CMT recognition order for shared exclusivity which includes Ngāti Patupō.

[117] The Attorney-General abides the Court's decision on this issue. The Waikato District Council says that it would not support a finding of any CMT or PCR for either

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85 *Re Edwards (Whakatōhea)*, above n 80, at [380].

86 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9.

87 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*, above n 9, at [765]. In that case, Gwyn J considered and rejected an argument that a PCR could be recognised for exercising kaitiakitanga over non-commercial (customary) fisheries (at [753]).

Ngāti Patupō or Ngāti Uakau, including on a collective basis, because they have made no application under the Act and are therefore out of time.

[118] Ngāti Te Wehi acknowledge and recognise the interests of their whanaunga Ngāti Patupō to Aotea Harbour. Ngāti Te Wehi say that they have always "welcomed" the participation of Ngāti Patupō and support Ngāti Patupō being part of any CMT order should it be determined that Ngāti Patupō meets the necessary tests under the legislation. Waikato-Tainui supports a recognition of the interests of Ngāti Patupō under the korowai of its application and by way of a CMT shared exclusivity order.

[119] Ngāti Whakamarurangi are of the view that Ngāti Uakau and Ngāti Patupō fall under the mana of Ngāti Te Wehi in respect of Aotea. Therefore, it is for Ngāti Te Wehi to address this issue.

[120] Ngāti Uakau is generally understood, in contemporary times at least, to be a hapū of Ngāti Patupō.

[121] Ngāti Patupō is recognised as a hapū of, or affiliated to, Waikato-Tainui and has close ties with the Kiingitanga going back to its establishment.[88] Ngāti Patupō is also recognised by Waikato-Tainui, Ngāti Te Wehi, and Ngāti Whakamarurangi/Tainui (on a qualified basis) as having interests at Aotea. Ngāti Patupō is also clearly identified in evidence before the Court has having customary interests at Aotea, both historically and presently.

[122] Ngāti Uakau has a Crown engagement application under the Act. The application was made by Mr Charles Haggie on 3 April 2017.

[123] Ngāti Uakau's Crown engagement application overlaps with the present applications brought by Ngāti Te Wehi and Waikato-Tainui. The area overlap includes Aotea Harbour.

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88 Waikato-Tainui say that the hapū of Waikato-Tainui are not restricted to the 33 hapū named in the Waikato Raupatu Claims Settlement Act 1995 or in the constitution of Te Whakakitenga o Waikato Incorporated.

[124] Ngāti Uakau indicated an indication to participate as an interested party to these proceedings as early as September 2022. Memoranda filed in 2023 indicated discussions were taking place between the applicant groups and Ngāti Uakau. The Court understands that Ngāti Uakau intended, but was not able, to secure legal representation before confirming the nature of its participation in the present proceeding.

[125] On 19 June 2024, Mr Haggie filed the letter with the Court setting out Ngāti Uakau's application to intervene in these proceedings. I subsequently made directions for the Court-appointed pūkenga to convene a hui between the applicant groups and Ngāti Uakau to address the concerns raised by Mr Haggie and Ngāti Uakau in their correspondence with the Court. The hui was held on 27 June 2024. A further meeting was held on 30 June 2024 between Ngāti Uakau and Ngāti Patupō. The Court also received a report from the pūkenga, Dr Tom Roa, filed in September 2024, reporting on the hui. That report records that those in attendance at the hui agreed as follows:

(a) Ngāti Uakau is a bona fide grouping which enjoy a status and was recognised by Ngāti Patupō as having interests in Aotea Harbour as a grouping allied most closely to Ngāti Patupō;

(b) Ngāti Patupō's interests in the harbour were recognised under the banner of Waikato-Tainui;

(c) Waikato-Tainui relied on Ngāti Patupō's consideration for Ngāti Uakau, which was expressed and duly recognised. Further details in the matter were to be explored with Ngāti Uakau, Ngāti Patupō, and Waikato-Tainui; and

(d) Ngāti Te Wehi's representatives, some of whom had not heard of Ngāti Uakau, were also in agreement that Ngāti Uakau's interests could be heard in and under the context of Ngāti Patupō and Waikato-Tainui.

[126] Against that background, the starting point for determining this issue of Ngāti Patupō's status is that, as a matter of tikanga, one of the fundamental principles of the

legislation, it would be plainly wrong to exclude Ngāti Patupō from participation in this hearing and any redress granted. The uncontested evidence provides clear support for the Court to recognise the mana tuku iho exercised by Ngāti Patupō (and others) in Aotea as tangata whenua.

[127] As the Court of Appeal held in *Re Edwards Whakatōhea*, applications under the legislation can undergo significant modification as parties join a proceeding and the evidence comes in, provided the result is not in substance a new application (which would defeat the six-year statutory bar on filing applications under s 100) and amendment is not contrary to the interests of justice vis-à-vis other applicants and interested parties.[89]

[128] There is no risk in this case that the making of a shared exclusivity CMT order which includes Ngāti Patupō would be contrary to the interests of justice vis-à-vis other applicants and interested parties. There is no proposed change to the geographical area of the application; it remains the same and so, too, does the shared exclusivity nature of the order sought. All that is sought is that the orders of recognition are extended to a closely aligned group connected by whakapapa whose status at Aotea has not and cannot properly be denied.

[129] Importantly, the Ngāti Patupō participation falls comfortably and appropriately under the Waikato-Tainui korowai application. As I see it, the whole point of the korowai application, brought on behalf of hapū, is to ensure, and appropriately in tikanga terms, that groups with customary entitlement at Aotea are not excluded.

[130] The clear evidence before me is that Ngāti Patupō and their whanaunga, the applicants (they are most closely aligned with Ngāti Te Wehi) have been an integral part of the cultural and physical landscape of Aotea for hundreds of years.

[131] I find that I can and should make a CMT order (i.e. shared exclusivity order) that includes Ngāti Patupō. That is the appropriate collective/group to include in the shared exclusivity order.

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[89] *Re Edwards Whakatōhea*, above n 6, at [221].

Ngāti Apakura

[132] As noted above, Ngāti Apakura is not an applicant in these proceedings. Rather, its primary purpose has been to support the applications of its whanaunga, Ngāti Te Wehi and Ngāti Whakamarurangi.

[133] I note that the Apakura Rūnunga Trust, has an application for CMT and PCR recognition orders under the Act in relation to the CMCA within the Kāwhia Harbour and outer coast from Kahua Point in the north to Paparoa Point in the south.

[134] There was important, unchallenged evidence given in these proceedings by Ngāti Apakura and in support of its whanaunga. I record here some of the salient points of that evidence:

(a) Sites in the Aotea Harbour of particular importance to Ngāti Apakura include:

  (i) Te Papa ō Whatihua, being an urupā that dates to the time of Whatihua and Ruapūtahanga (circa 1600);

  (ii) Te Whare tupuna ō Whatihua ki Kahotea, where Whatihua had his large wharenui;

  (iii) Pareapiti, an area well known for its rongoā;

  (iv) Manuaitu, where Whatihua was known to have his fortified village and where his father, Tāwhao, is said to be buried; and

  (v) Potoorangi/ Potahi Point where Whatihua is said to be buried.

(b) There are five marae connected to the harbour. This includes Mōkai Kainga marae.

(c) The taniwha Whatihua is depicted in Te Kotahitanga o Ngāti Te Wehi, the wharenui at Ookapu Marae. Whatihua, the tupuna of Ngāti Apakura, retains his presence in that way.

(d) The Dockery whānau who own of the mussel spat farm, "Aotea Marine", are of Ngāti Apakura descent.

[135] In supporting the applicants, Ngāti Apakura note that from the time Ngāti Te Wehi established themselves at Aotea, they formed strategic alliances with Waikato iwi to secure the rohe. These alliances were reinforced during the battle of Kāwhia in 1820. Ngāti Apakura note that these alliances and close whakapapa connections continue today.

Conclusion and result

[136] The applications by Ngāti Te Wehi, Ngāti Whakamarurangi, and Waikato-Tainui for CMT and PCR at Aotea are successful.[90] I will make orders for both customary marine title and protected customary rights on the basis of shared exclusivity (i.e. there will be a single CMT in favour of the applicants). The single CMT will include Ngāti Patupō. The parties are to prepare draft orders for both the CMT and PCR, the terms of which will be addressed at the subsequent stage 2 hearing.

[137] In accordance with my minute of 19 June 2024, the issue of wāhi tapu protections and restrictions will also be addressed at that stage 2 hearing.

[138] I note that the CMT (by agreement) will not include the Pakoka boat ramp, which is beyond the boundary of the applications before me.

[139] The draft orders for the PCR are to take into account the findings I have made in this judgment about the legal requirement for the terms of any PCR to identify a

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90 The hearing area to which the orders are to issue is the common marine and coastal area within Aotea Harbour. The joint memorandum of Ngāti Te Wehi and Waikato-Tainui dated 22 February 2024 confirmed that the harbour mouth boundary lines set out in Ngāti Whakamarurangi's Crown engagement application are where the harbour mouth boundary lie for the proceedings. I understand, subject to confirmation from the parties, that Ngāti Whakamarurangi's Crown engagement application sets out the coordinates.

specific manifestation of the activity/right at issue, whether by a physical activity or by a use or practice related to a natural or physical resource.

[140] I direct the Registrar to arrange for a telephone conference with counsel before the end of 2024 to make arrangements for a further hearing in the new year.

Andrew J