IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-232
CIV-2017-485-259
CIV-2017-485-224
CIV-2017-485-221
CIV-2017-485-260
GROUP M, STAGE 1(A)
[2025] NZHC 68

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

Continued…

Hearing: 15—18 April 2024; 7 June 2024; and 29—30 July 2024

Appearances: D C F Naden, M Sreen, S M Yogakumar, H J Fletcher, for Nga Uri O Ngāi Tūmapūhia ā Rangi Hapū
T Bennion for Ngāti Hinewaka
R Siciliano and C Mataira for Rangitāne Tū Mai Rā Trust
M Houra for Te Ātiawa
B Lyall and H Swedlund for Kawakawa 1D2 Ahu Whenua Trust
B A Scott for the Seafood Industry Representatives
J Prebble and D Kleinsman for the Attorney-General
F R Wedde for the Greater Wellington Regional Council

Judgment: 5 February 2025

JUDGMENT OF GWYN J
(Wāhi tapu)

BY	Ngāi Tūmapūhia-a-Rangi Hapū Incorporated, on behalf of Nga Uri O Ngāi Tūmapūhia ā Rangi Hapū (CIV-2017-485-232)
	Ngāti Hinewaka Me Ōna Hapū Karanga Charitable Trust on behalf of Ngāti Hinewaka (CIV-2017-485-259)
	The Rangitāne Tū Mai Rā Trust, on behalf of the hapū of Rangitāne o Wairarapa and Rangitāne o Tamaki nui-ā-Rua (CIV-2017-485-224)
	Trustees of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust on behalf of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua (CIV-2017-485-221)
	Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust on behalf of Te Ātiawa (CIV-2017-485-260)
INTERESTED PARTIES	Sue Taylor for Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Incorporated and Sam Morris, Lynall Morris, and Jason Morris for Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Incorporated
	Kawakawa 1D2 Ahu Whenua Trust
	Seafood Industry Representatives
	Attorney-General
	Greater Wellington Regional Council

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Introduction

[1] In the substantive judgment in this application,[1] I granted customary marine title (CMT) orders in favour of hapū represented by or related to the six applicant groups in this proceeding,[2] under s 98 of the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act), over five discrete coastal rohe within the southern Wairarapa application area. The CMT granted were:[3]

(a) A jointly held CMT for Ngāti Hinewaka, Ngāti Rua, Ngāi Tūkoko, Ngāti Moe, Ngāti Rakaiwhakariri, Ngāti Rākairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira, Ngāti Hāmua and Te Ātiawa hapū over the area between Tūrakirae Head in the west and Mukamukaiti in the east, from the mean high-water springs out to a line parallel to mean high-water springs three km out to sea (CMT 1).

(b) A jointly held CMT for Ngāi Tūkoko and Ngāti Moe, Ngāti Hinewaka hapū, Ngāti Rua, Ngāti Rākaiwhakairi, Ngāti Rākairangi, Ngāti Ngapu o te Rangi, Ngāti Hinetauira and Ngāti Hāmua over the area between Mukamukaiti in the west and Kawakawa Point in the east from the mean high-water springs out to a line parallel to mean high-water springs three km out to sea (CMT 2).

(c) A jointly held CMT for the hapū Ngāti Hinewaka, Ngāti Rangaranga and Ngāi Tuohungia over the area between Kawakawa Point in the west and Āwhea River in the east from the mean high-water springs out to a line parallel to mean high-water springs three km out to sea (CMT 3).

(d) A jointly held CMT for Ngāi Tūmapūhia and Ngāti Rongomaiaia, Ngāti Māhu, Ngāti Kawekairangi, Ngāi Te Ao, Ngāti Te Aokino, Ngāti Pārera, Ngāti Meroiti and Ngāti Hāmua over the area between Āwhea River in the south-west and Te Unuunu in the north-east from the mean

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

2 Ngāi Tūmapūhia-ā-rangi Hapū Incorporated, Ngāi Tūkoko and Ngāti Moe, Ngāti Hinewaka Me Ōna Hapū Karanga Charitable Trust, Rangitāne Tū Mai Rā Trust, Ngāti Kahungunu ki Wairarapa Tāmaki-nui-ā-Rua, and Te Ātiawa ki Te Upoko o Te Ika a Māui Pōtiki Trust.

3 *Ngāi Tūmapūhia*, above n 1, at [815].

high-water springs out to a line parallel to mean high-water springs 10 km out to sea (CMT 4).

(e) An exclusively held CMT for Ngāi Tūmapūhia over the area between Te Unuunu in the south-west and Whareama in the north-east from the mean high-water springs out to a line parallel to mean high-water springs 10 km out to sea (CMT 5).

[2] One of the rights that is conferred and may be exercised under a CMT order made under the Takutai Moana Act is a right to protect wāhi tapu and wāhi tapu areas.[4]

[3] On the basis of the CMT orders made, the following applicants applied for orders protecting wāhi tapu or wāhi tapu areas:

(a) Rangitāne Tū Mai Rā Trust (Rangitāne);

(b) Ngāti Hinewaka Me Ōna Hapū Karanga Charitable Trust (Ngāti Hinewaka);

(c) Ngāi Tūmapūhia-a-Rangi Hapū Inc (Ngāi Tūmapūhia); and

(d) Te Ātiawa ki te Ūpoko o Te Ika a Māui Pōtiki Trust (Te Ātiawa).

[4] Rangitāne took a position of supporting the Ngāti Hinewaka and Ngāi Tūmapūhia applications and filed joint submissions on behalf of the applicants. By the time of closing submissions, Te Ātiawa did not pursue its application for wāhi tapu protection orders and Ms Houra sought leave to maintain a watching brief. Mr Hirschfeld, counsel for Te Hika o Pāpāuma, also sought leave to maintain a watching brief.

[5] In addition to the applicants, the following interested parties appeared:

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4 Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act], s 62(1)(c).

(a) the Attorney-General, who appeared in the interests of the public, to assist the Court in interpreting and applying the legislation;

(b) Seafood Industry Representatives (SIR) which called evidence as to the impact of the areas sought to be recognised as wāhi tapu or wāhi tapu areas on the seafood industry;

(c) Greater Wellington Regional Council (GWRC), which has regulatory responsibilities in the Southern Wairarapa hearing area under the Resource Management Act (RMA) and Local Government Act 2002, as well as its assets and infrastructure within the common marine and coastal area);

(d) Kawakawa 1D2 Ahu Whenua Trust (Kawakawa Trust). The Kawakawa Trust owns and is kaitiaki for the whenua which borders two of the rohe for which CMT orders were made in *Ngāi Tūmapūhia* (listed at [1(b)] and [1(c)] above); and

(e) Ngāi Tūmapūhia-a-Rangi ki Motuwairaka Inc and Ngāi Tūmapūhia-a-Rangi ki Okautete Inc.

Statutory provisions

[6] The definitions of "wāhi tapu" and "wāhi tapu area" in the Takutai Moana Act[5] are taken from s 6 of the Heritage New Zealand Pouhere Taonga Act 2014 (Pouhere Taonga Act). The Pouhere Taonga Act defines those terms as follows:

> **wāhi tapu** means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense
>
> **wāhi tapu** area means land that contains 1 or more wāhi tapu

[7] Section 78 of the Takutai Moana Act provides for the protection of wāhi tapu and wāhi tapu areas as part of CMT. The requirements of s 78 are:

> **78 Protection of wāhi tapu and wāhi tapu areas**

5 Section 9.

(1) A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area—

(a) in a customary marine title order; or

(b) in an agreement.

(2) A wāhi tapu protection right may be recognised if there is evidence to establish—

(a) the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga; and

(b) that the group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area.

(3) If a customary marine title is recognised under subpart 1 or 2 of Part 4, the customary marine title order or agreement must set out the wāhi tapu conditions that apply, as provided for in section 79.

[8] The conditions that must be included in a CMT recognition order agreement are set out in s 79 of the Takutai Moana Act:

79 Wāhi tapu conditions

(1) The wāhi tapu conditions that must be set out in a customary marine title order or an agreement are—

(a) the location of the boundaries of the wāhi tapu or wāhi tapu area that is the subject of the order; and

(b) the prohibitions or restrictions that are to apply, and the reasons for them; and

(c) any exemption for specified individuals to carry out a protected customary right in relation to, or in the vicinity of, the protected wāhi tapu or wāhi tapu area, and any conditions applying to the exercise of the exemption.

…

[9] Once a wāhi tapu or wāhi tapu protection order is made, various compliance and enforcement provisions apply. Under s 80, wardens may be appointed by a CMT group with an interest in a wāhi tapu or wāhi tapu area,[6] to promote compliance with a prohibition or restriction imposed under s 79. Fishery officers and/or honorary

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6 Section 80(1). These wardens may be appointed in accordance with s 118(1)(b)-(e) of the Act, which allows the Governor-General by Order-in-Council to make regulations which give directions relating to the management of wardens by a customary marine title group whose customary marine title order includes prohibitions and restrictions in respect of a wāhi tapu or wāhi tapu area.

fishery officers may enforce wāhi tapu conditions imposed under s 79 if, and to the extent that, any fishing in a wāhi tapu or wāhi tapu area breaches those conditions.[7]

[10] The Takutai Moana Act imposes an obligation on the local authority with jurisdiction where a wāhi tapu protection right exists, in consultation with the relevant CMT group, to take appropriate action reasonably necessary to encourage public compliance with any wāhi tapu conditions.[8]

[11] Every person who intentionally fails to comply with a prohibition or restriction notified for that wāhi tapu or wāhi tapu area commits an offence and is liable on conviction to a fine of up to $5,000, although this provision is superseded by the offence provisions of the Pouhere Taonga Act if a wāhi tapu or wāhi tapu area subject to a wāhi tapu protection right is protected by a heritage covenant under s 39 of that Act.[9]

[12] In addition, under the Resource Management Act 1991 (RMA), when considering an application for a resource consent, the consent authority must not grant a resource consent contrary to wāhi tapu conditions in a CMT order or agreement.[10]

[13] Where protected customary rights (PCRs) have been granted, the CMT must set out any exemption for specified individuals to carry out the PCRs in relation to, or in the vicinity of, the protected wāhi tapu or wāhi tapu area, and any conditions applying to the exercise of the exemption.[11]

[14] Wāhi tapu conditions do not affect the exercise of kaitiakitanga by a CMT group in relation to a wāhi tapu or wāhi tapu area in the CMT area of that group.[12]

[15] Wāhi tapu protections represent the sole limitation on public rights of access and of navigation that the Takutai Moana Act otherwise guarantees.[13]

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7 Section 80(3).
8 Section 81(1).
9 Section 81(2)–(3).
10 Resource Management Act 1991, s 104(3)(c)(iv).
11 Takutai Moana Act, s 79(1)(c).
12 Section 79(2)(b).
13 Section 26(2). See eg *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [72].

[16] Wāhi tapu conditions may affect the exercise of fishing rights, but must not do so to the extent that the conditions prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area.[14]

Procedure to date

[17] The wāhi tapu applicants presented opening submissions and gave evidence to support their applications for wāhi tapu protection rights on 15–17 April 2024, with the interested parties' witnesses giving evidence on 18 April 2024. The Court-appointed pūkenga, Dr Robert Joseph, prepared a wāhi tapu pūkenga report,[15] and cross-examination of Dr Joseph occurred on 7 June 2024. I heard closing submissions on 29 and 30 July 2024.

Principles

[18] Before turning to each of the specific areas for which wāhi tapu protection is sought, I discuss the overarching issues and principles.

[19] Three other cases, *Re Edwards (Whakatōhea Stage Two) No. 7*,[16] *Re Ngāti Pāhauwera*[17] and *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare Ki Tokomaru*,[18] contain discussion of the process and criteria for assessing wāhi tapu claims and I refer to those judgments in the discussion below.

[20] In *Whakatōhea Stage Two* Churchman J set out the following framework for assessing wāhi tapu claims:[19]

> (a) Does the proposed wāhi tapu or wāhi tapu area meet the definition contained in s 6 of the HNZPTA 2014?
>
> (b) Has the CMT group established its connection with the wāhi tapu or wāhi tapu area in accordance with tikanga?

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14 Section 79(2)(a).
15 *Wāhi Tapu Pūkenga Report of Dr Robert Joseph* (27 May 2024).
16 *Re Edwards (Whakatōhea Stage Two) No. 7* [2022] NZHC 2644 [*Whakatōhea Stage Two*] at [104]–[152] (incorporating findings from *Re Ngāti Pāhauwera*, above n 13).
17 *Re Ngāti Pāhauwera*, above n 13.
18 *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare Ki Tokomaru* [2024] NZHC 682 [*Tokomaru*] at [427]–[444].
19 *Whakatōhea Stage Two,* above n 16, at [156].

(c) Does the CMT group require the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area?

(d) Has the CMT group provided sufficient information to allow the Court to identify with certainty the location of the boundaries of the wāhi tapu or wāhi tapu area?

(e) Are the proposed restrictions or prohibitions linked to the protection of the wāhi tapu area, and are they capable of being enforced?

(f) Have any exemptions for specified individuals to carry out PCR in relation to or in the vicinity of, the protected wāhi tapu or wāhi tapu area been set out with sufficient certainty?

(g) Where it is alleged that tapu originating on land extends into the takutai moana:

(i) Does the tikanga evidence show that tapu originating on land extends into the takutai moana?

(ii) Do the circumstances necessitate that this be recognised in order for the wāhi tapu site to be protected?

(iii) What is the distance measured from MHWS that is necessary to protect the wāhi tapu site in accordance with the purposes of the Act?

[21] The discussion below is also informed by the pūkenga's report and his oral evidence, and by the evidence of the tohunga/rangatira Dr Smith, Mr Te Whaiti and Mr Kawana, who gave evidence for Ngāi Tūmapūhia, Ngāti Hinewaka and Rangitāne, respectively.

[22] From the earlier decisions and the evidence and submissions made in this case, a number of issues emerged that require particular focus in the current applications. They are:

(a) The role of the purpose and preamble to the Act;

(b) What does it mean that the wāhi tapu must be within the CMCA;

(c) The need for identifiable boundaries;

(d) Wāhi tapu in cases of shared exclusivity;

(e) How is "sacred" in the definition of wāhi tapu is to be interpreted; what is the relevance of the distinction between tapu and noa;

(f) What is required to demonstrate a "connection" of the CMT group with the wāhi tapu and what is the standard of evidence required;

(g) Whether conditions and restrictions must relate only to access; and

(h) Whether wāhi tapu protection is "required" where protection is already provided by other instruments.

Purpose and preamble of the Takutai Moana Act, Te Tiriti

[23] As the Court of Appeal in *Re Edwards Whakatōhea* noted, the purpose and preamble of the Takutai Moana Act are important in understanding the statutory regime and interpreting the CMT test.[20] Section 7 of the Act is also important, elaborating the ways in which te Tiriti o Waitangi | the Treaty of Waitangi is taken into account in the Act.

[24] The Preamble records:

> 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:

[25] Section 4, the purpose provision, records:

> **4 Purpose**
>
> (1) The purpose of this Act is to—
>
> (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
>
> (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and

[20] *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252. See, for example, [190] and [381].

(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

(b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and

(c) gives legal expression to customary interests; and

(d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and

(e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—

(i) for its intrinsic worth; and

(ii) for the benefit, use, and enjoyment of the public of New Zealand.

[26] Section 7, the "Treaty clause",[21] records:

7 Treaty of Waitangi (te Tiriti o Waitangi)

In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—

(a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and

(b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and

(c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

[27] Although the Supreme Court judgment in *Re Edwards* was not specifically concerned with wāhi tapu protections, the Court did make some observations about the general importance of the Purpose and Preamble to the Takutai Moana Act.[22] The Court discussed the role of those provisions in reconciling potentially competing rights and interests for the benefit of all. That theme is consistent with the evidence of both Mr Kawana and Dr Joseph, that protecting the takutai moana and environment from

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21 *Re Edwards Whakatōhea*, above n 20, at [64].

22 *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira O Waioweka* [2024] NZSC 164 at [102]–[104].

depletion and from the adverse effects of breaching tapu ensures the protection of the legitimate interests of all New Zealanders.

[28] The applicants' joint submission was that the combination of these provisions requires a purposive approach to the Act. Orders made under the Act should assist in:

(a) Recognising the mana tuku iho exercised in the takutai moana by iwi, hapū and whānau as tangata whenua.

(b) Providing for the exercise of customary interests in the takutai moana.

(c) Acknowledging te Tiriti o Waitangi/the Treaty of Waitangi, particularly in protecting the applicant groups' taonga and acknowledging their tino rangatiratanga as hapū.

[29] I accept the applicants' general proposition that protection of wāhi tapu and wāhi tapu areas is a necessary part of ensuring the exercise by the applicants of the CMTs already granted by this Court.

Wāhi tapu must be inside the common marine and coastal area (CMCA)[23]

[30] The Court only has jurisdiction to recognise wāhi tapu and wāhi tapu areas over sites that are within both the CMCA and within the relevant CMT order.[24]

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[23] "Common marine and coastal area" means the marine and coastal area other than—
(a) specified freehold land located in that area; and
(b) any area that is owned by the Crown and has the status of any of the following kinds:
i. a conservation area within the meaning of section 2(1) of the Conservation Act 1987:
ii. a national park within the meaning of section 2 of the National Parks Act 1980:
iii. a reserve within the meaning of section 2(1) of the Reserves Act 1977; and
(c) the bed of Te Whaanga Lagoon in the Chatham Islands.
"Marine and coastal area":
(a) means the area that is bounded,—
(i) on the landward side, by the line of mean high-water springs; and
(ii) on the seaward side, by the outer limits of the territorial sea; and
(b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
(c) includes the airspace above, and the water space (but not the water) above, the areas described in paragraphs (a) and (b); and
(d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b)."
See Takutai Moana Act, s 9.

[24] See, for example, *Whakatōhea Stage Two*, above n 16, at [116].

[31] Where tapu extends into the CMCA from a wāhi tapu site on land that is outside of the CMCA, that part of the CMCA into which the tapu extends is itself a wāhi tapu or wāhi tapu area for the purposes of the Takutai Moana Act. As Churchman J noted in *Whakatōhea Stage Two*, "there may be cases where the tapu inherent in a site outside the takutai moana may also affect the adjacent takutai moana and may justify the imposition of prohibitions and restrictions."[25]

[32] The tapu associated with objects inland is being extended into the sea by natural processes. That is most obvious in the case of eroding coastline urupā above high-water mark (HWM), but Churchman J's concept of tapu "radiating" to areas below HWM may also apply to areas with wāhi tapu values associated with arrival, landing sites of tupuna and/or coastal use sites.

[33] I accept the submission for Ngāti Hinewaka that the evidence required to demonstrate such an extension of the tapu should not be confined to evidence of physical manifestations. As the Court has heard from many witnesses in both the wāhi tapu hearing and the earlier, *Ngāi Tūmapūhia* hearing, the inextricable linking of tangible and intangible matters is at the heart of the Māori world view. As counsel submits, it is illogical to accept the linking of tangible and intangible aspects in the Māori world view when discussing a site next to the sea, but then effectively deny it by insisting on some physical manifestation of that worldview into the area below high water mark.

Wāhi tapu must have identifiable boundaries

[34] As described above,[26] wāhi tapu protections under the Takutai Moana Act can be utilised in limited circumstances to exclude third parties and members of the public from specified locations under a CMT order. The restrictions must be capable of being reasonably understood and complied with.[27]

[35] For that reason it is important that the boundaries of a wāhi tapu or wāhi tapu area are clear. Each site must be able to be accurately represented on the relevant

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25 At [131].
26 Above at [15]–[16].
27 *Whakatōhea Stage Two,* above n 16, at [108].

survey plan and the claimants must establish that the proposed prohibitions can be framed in a way that will permit their effective enforcement.[28]

[36] There is a tension between recognition of wāhi tapu in accordance with tikanga generally and the required precision of boundaries to meet the requirements of a "wāhi tapu" under the Act. I acknowledge that the need for certainty of boundaries will sometimes mean creating what the applicants will consider to be an artificial distinction between landward and sea areas which, as counsel for Ngāti Hinewaka put it, may do violence to the mythology of the site.

Wāhi tapu in cases of shared exclusivity

[37] In *Whakatōhea Stage Two,* the Court held that each of the groups awarded CMT jointly with others could successfully seek protection for their own wāhi tapu, provided they met the test for wāhi tapu protection rights, and provided there was no disagreement from the other joint CMT holders as to the location of the wāhi tapu or the protections required.[29]

[38] In *Whakatōhea Stage Two* the Court also found that, within the umbrella of a successful CMT group, individual groups might identify the same sites or overlapping sites and, depending on the nature of the tapu, may propose different prohibitions and restrictions (and these may be given effect to in the corresponding CMT order).[30]

[39] In *Re Ngai Tūmapūhia*[31] I found that the applicant groups were entitled to jointly-held CMT orders. There are a number of sites within this hearing area which both Ngāti Hinewaka and Ngāi Tūmapūhia seek to have recognised as wāhi tapu.

[40] The Attorney-General's submission is that where similar sites are claimed as wāhi tapu by different groups, discrepancies between them may inform an assessment of the evidence as to whether boundaries are sufficiently identifiable, whether there is a widely held belief of tapu, and the strength of the connection between the groups

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28 At [131].
29 At [139].
30 At [139].
31 *Ngāi Tūmapūhia,* above n 1.

and the sites as wāhi tapu. In summary, where the evidence reflects a disagreement as to the location of the same wāhi tapu site, rather than an overlap between different wāhi tapu sites, the Attorney-General says such evidence may indicate the connection with the claimed wāhi tapu cannot be objectively established, and protection rights cannot be recognised, in respect of that particular site.

[41] Ngāti Hinewaka notes that an overlap in areas claimed as wāhi tapu in itself reinforces the importance of those sites.

[42] Ngāi Tūmapūhia too say that any differences in the boundaries of an area claimed by more than one applicant simply reflects the specific kōrero of hapū in different areas. They rely on Dr Joseph's evidence where he clarified that not all parties need to agree as to the existence, location and extent of a wāhi tapu, and that one group's failure to acknowledge a wāhi tapu does not render that site as incapable of being recognised as such.

[43] I agree with Churchman J's observation that:[32]

> It is not the role of the Court to determine the priority of rights in tikanga relative to wāhi tapu. That is something that needs to be resolved between the parties in accordance with tikanga.

[44] As the applicants submit, context is important and all wāhi tapu are different—in respect of size, the reason why they are tapu and the historical kōrero relating to the particular area. Mr Te Whaiti noted in his evidence that the values associated by Ngāti Hinewaka with the sites was not contested by any other applicants, a fact which in itself reinforces the importance of these sites. The applicants say that, to the extent further clarification is necessary about boundaries, those are relatively minor and can be reconciled to provide sufficient certainty for enforcement purposes.

[45] I agree with the applicants that where more than one applicant seeks wāhi tapu protections for the same site, this may support the alleged "connection" and does not detract from it (unless one applicant disputes the other's connection, which is not the case here), even where the kōrero of each applicant is somewhat different.

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[32] At [141].

Meaning of "wāhi tapu"

[46] As discussed above, the s 6 Pouhere Taonga Act definition is adopted for the purpose of the Takutai Moana Act. The term "wāhi tapu" is used in a number of other pieces of legislation also, but defined differently.

[47] Te Ture Whenua Māori Act 1993 (TTWMA) defines wāhi tapu as land set apart under s 338(1)(b) of that Act. The Māori Land Court or Māori Appellate Court may make an order to set apart as a reservation any Māori freehold land or general land that is a wāhi tapu, "being a place of special significance according to tikanga Māori".

[48] The RMA defines "historic heritage" as including "sites of significance to Māori, including wāhi tapu",[33] while s 6(e) of that Act defines "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga" as a matter of national importance.

[49] In *Re Ngāti Pāhauwera*,[34] Churchman J took the view that the definitions in all three pieces of legislation are relevant to an assessment under the Takutai Moana Act, but said the essential function and the guiding purposes of the Court in considering applications under the Takutai Moana Act differ from those guiding the Māori Heritage Council under the Pouhere Taonga Act. The Judge's view was that "the exercise to be undertaken by the Environment Court and the Māori Land Court, under the RMA and TTWMA respectively, is likely to be more similar in form and substance to what this Court is required to do than the function of the Māori Heritage Council under the Pouhere Taonga Act. I agree that is so, given that, for example, the Māori Heritage Council is not required to balance recognition of wāhi tapu with the public rights preserved under the Takutai Moana Act.

[50] Some of the sites for which Ngāti Hinewaka seeks wāhi tapu protection are Māori Sites of Significance, listed in the Proposed Wairarapa District Plan (District

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33 Resource Management Act, s 2(1).
34 *Re Ngāti Pāhauwera*, above n 13, at [101].

Plan), under the RMA.[35] Some of the sites also have also been included in the New Zealand Heritage List/Rārangi Kōrero, as designated Historic Areas under the Historic Places Act 1993.[36] Some of the Ngāi Tūmapūhia sites are recorded by the New Zealand Archaeological Association.

[51] I accept that those designations are not determinative of the question whether a site is a wāhi tapu under the Takutai Moana Act, but they are relevant in assessing whether a site meets the Takutai Moana Act definition, in that they show the extent to which the site is more broadly regarded as being of significance and they may also support the "connection" of the applicant with the site.

"Sacred"

[52] Other statutory tests concerning wāhi tapu and wāhi tapu areas do not include a requirement for the place to be "sacred".

[53] The definition of "wāhi tapu" in TTWMA, as "a place of special significance according to tikanga Māori", is broader than the definition of wāhi tapu in the Takutai Moana Act and Pouhere Taonga Act, as "a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense".

[54] Both the Attorney-General and SIR say it is significant that the TTWMA definition does not require the area to be sacred and emphasised the centrality of the word "sacred" to the definition of wāhi tapu in the Takutai Moana Act.

[55] "Sacred" is not defined in the Takutai Moana Act nor the Pouhere Taonga Act, but the Attorney-General notes the primary dictionary definition of "sacred" as "connected with God or a god or dedicated to a religious purpose and so deserving

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35 Resource Management Act, s 2 defines "historic heritage" to include "sites of significance to Māori, including wāhi tapu". Section 6(f) requires all persons exercising functions and powers under the Act to recognise and provide for the protection of historic heritage from inappropriate subdivision, use and development as a matter of national importance.

36 Since repealed and replaced by the Heritage New Zealand Pouhere Taonga Act 2014. Heritage New Zealand Pouhere Taonga has the powers necessary to protect, conserve or manage historic areas (s 14). It may also make recommendations to local authorities as to the appropriate measures that should be taken to assist in the conservation and protection of a historic area, to which the local authority must have particular regard (s 74).

veneration".[37] It can also mean "religious rather than secular", and "regarded with great respect and reverence by a particular religion, group or individual".[38]

[56] Counsel for the Attorney-General says that means that a wāhi tapu under the Act is more than just a place of significance to Māori, and there is a need for the wāhi tapu to have associations of a religious, quasi-religious or spiritual dimension in a tikanga Māori context, or for it to otherwise be considered sacrosanct.

[57] SIR also say there is a need for a "sacred" element because of the wider intent of the Takutai Moana Act that, for the most part, public rights of access within the common marine area are not restricted and that identification as a wāhi tapu can lead to restrictions on access. SIR agrees that "wāhi tapu" is properly informed by tikanga, but says it is not driven by it.

[58] The applicants, in their joint submissions, acknowledge the inclusion of the word "sacred" in the definition of wāhi tapu, but say that does not override the true meaning of wāhi tapu in a tikanga sense. The meaning of wāhi tapu (and tapu itself) must be seen through a tikanga lens.

[59] Mr Bennion, counsel for Ngāti Hinewaka submitted that "sacred" was originally a French or Latin term, first noted in England in the late 14th century and acquiring its modern meaning of religious or divine, as opposed to secular or profane, in the 17th century. As Mr Bennion noted, it is an odd way to define a Māori word, which reinforces the need to consider the Māori context. Dr Joseph focuses on that context:

> … the incorporation of this Māori word "wāhi tapu" in legislation as being "sacred" can distort the concept into a mistranslation, redefining, or narrowing of the word and tikanga cultural concept.

[60] Dr Joseph quoted Dame Joan Metge:[39]

> To come to grips with Māori customary law, it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts

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37 *Oxford English of Dictionary (2nd ed (revised), Oxford University Press, Oxford, 2005)* at 1551.
38 At 1551.
39 Joan Metge *Commentary on Judge Durie's Custom Law* (Unpublished Paper for the Law Commission, Wellington, 1996) at 3.

> which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation – the direct reference – is substantially the same, the connotations are significantly different.

[61] The applicants say that tapu should not be limited to something simply being sacred in a Western or Pākehā sense. As the full definition in the Act reflects, a wāhi tapu is a place that is sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense. This context and wider consideration is important to reflect tapu in the traditional sense.

[62] The applicants rely on Dr Joseph's pūkenga report where he said:

> … but there's a lot more to it this word, and this is the difficulty of translating across cultures and languages and also acknowledging too te reo Māori is a lot richer, the kupu, the words in Māori. It depends on the context, but they are a lot more deeper and richer and often there's dual meanings in the words and so these are some of the challenges before us but the word tapu translating it is sacred, sacred is a good start, but it is a lot deeper.

[63] Dr Takirirangi Smith's evidence for Ngāi Tūmapūhia was to similar effect. Dr Smith notes that whakapapa kōrero are intrinsically linked to wāhi tapu. Wāhi tapu, as understood by his tīpuna, varies from the legal description in the Takutai Moana Act, in that wāhi tapu are also places that engage traditional Māori ways of knowing, understanding, perceiving and interpreting the world. Dr Smith says there is a physiological connection that relates to health and well-being and has intergenerational implications.

[64] In Dr Smith's view, English-language versions of tapu and wāhi tapu often exclude the dynamic, transformative and contextual implications that are sometimes understood and taken for granted in the Māori language, particularly when whakapapa kōrero is invoked or is in use at tapu places such as marae, for example. He said: "The spatial and temporal context underpinned by traditional values and ways of knowing is in play".

[65] Mr Kawana's evidence for Rangitāne was:

> It is sometimes hard to explain in words as again, the default thinking is often "sacred" in a Pākehā sense, rather than placing the focus simply on our traditional Māori concept of tapu – that there are different types and levels of

> tapu and the extent of that tapu can depend on a lot of matters including but not limited to the historic kōrero, the circumstances, location and situation.

[66] I accept that a nuanced approach to the definition of "wāhi tapu" is required. The use of the word "sacred" cannot be ignored and must be given some meaning. But nor does the pākehā concept of sacred override other aspects of the definition. What is "sacred *to Māori* in the traditional, spiritual, religious, ritual or mythological sense" (emphasis added) must be interpreted through a tikanga Māori lens. That requires more than simply a rigid adoption of a pākehā/Western meaning of "sacred". The word "sacred" must be understood within a Māori context.

Tapu and noa

[67] One aspect of the difference between the applicants on the one hand, and the Attorney-General and SIR, on the other, concerns whether a wāhi tapu or wāhi tapu area must be tapu at all times and for all purposes.

[68] The Attorney and SIR emphasise that a wāhi tapu is set apart from daily life and the presence of everyday (noa) activities count against a particular site or area being a wāhi tapu.[40]

[69] The Attorney-General relies on *Re Ngāti Pāhāuwera* where the Court cited expert evidence about the historical and cultural meaning of tapu given by Professor Hirini Moko-Mead in a Māori Land Court case, *Taueki v McMillan*.[41] That evidence was also relied on by Cull J in *Tokomaru*.[42]

[70] The Attorney-General also pointed to the expert evidence of Buddy Mikaere in *Serenella Holdings Ltd v Rodney District Council* where Mr Mikaere "was certain in his view that food could not be associated with waahi tapu because food – particularly cooked food – would destroy or pollute the tapu, removing its spiritual efficacy". [43]

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40 *Tokomaru*, above n 18, at [438], citing *Taueki v McMillan – Horowhenua 11 (Lake) Block* (2014) 324 Aotea MB 144 (324 AOT 144) at [85] and [94].

41 *Re Ngāti Pāhauwera*, above n 13, at [105], citing *Taueki v McMillan*.

42 *Tokomaru*, above n 18, at [438].

43 *Serenella Holdings Ltd v Rodney District Council* EnvC Auckland A100/2004, 30 July 2004 at [55] and [56].

[71] The Attorney-General and SIR's position on this question is, in my view, an oversimplification of tikanga, and is inconsistent with the evidence as to the practices of the Wairarapa hapū given in this hearing.

[72] As the applicants note, everything has inherent tapu. There are different levels of tapu and therefore wāhi tapu. Because something that is noa is carried out there, does not mean that the place is not a wāhi tapu, the tapu can remain intact.

[73] Mr Te Whaiti's evidence was instructive on this point. In talking about Matakitaki-a-Kupe, one of the sites specifically considered below, he said:

> Q. Just while we're at that site, there's been questions about fishing as being a perhaps a having tapu elements but also having a noa element.
>
> A. Yeah.
>
> Q. And that happening alongside sites that you're talking about as wāhi tapu.
>
> Have you got any explanation about that?
>
> A. Well if you, if I – and I haven't got it here but it's in the evidence, if you think about, and what, what I said about Kupe had seen all the fish when he was at Mātakitaki, and there's also, he put pet fish in a pool for his daughter as well, there's reference to that at this location. I think in that kōrero, you know, it says to anybody want to come along and take those fish, the sea would get rough. And I mean the issue really is not about, it's the absence of fish really is the issue, because the fish are integral to the kōrero of Kupe integral to why our people set aside in 1890 that area as a fishing reserve. So, you know, there's not a issue – from – we've known all the time and it's repeated in kōrero, it's a wāhi tapu. It's also a fisheries, an important fishery. There's no issue in my mind that they can exist alongside one another. It's probably more the behaviour or how those wāhi tapu, in terms of the rocks and the landing, the tauranga waka, how they're impacted by those, any sort of activity. Not always activity from the sea, of course. ….
>
> A. But, you know, the question of whether wāhi tapu and – the idea that noa and tapu doesn't, can't exist alongside, I can't understand that because that's – I'm not an expert really, on those matters. But it's – that's how it's existed for us. That's our reality that this is a place that is highly spiritual wāhi tapu significance and values and it's also an important fisheries area, and it has been recognised as that so as long ago as 1,000 years when Kupe was here.

[74] Mr Kawana said:

> If something is tapu it can be rendered to be noa, either permanently or temporarily. It is a balance. The relationship between tapu and noa is not like a positive-negative thing for me. Both are needed to ensure everyday activities can take place as needed.

[75] And, as Dr Joseph explained, in response to questions about food in and around wāhi tapu:

> Everything is, has inherent tapu, including water, including food. It's tapu and noa, not just inherently noa, but – and so everything from the outset is tapu and then the intensity decreases where it's used for common purposes.

[76] That view is consistent with the findings of the Law Commission in *He Poutama*:[44]

> Noa refers to a state where strict processes are not required. Noa, which indicates some degree of freedom, is important because it is too difficult to always live in a tapu state. However, the relationship between tapu and noa is complex, and the concepts are not opposites. Rather, tapu and noa work in tandem, each needing to be maintained at appropriate levels for Māori society to function in different situations.

[77] Similarly, as Cull J recorded in *Tokomaru*:[45]

> However, Tā Hirini Moko Mead acknowledged that some things may be wāhi tapu, like wharenui on marae, despite noa activities being carried out there (e.g. being a place of community activity). The important aspect of wāhi tapu is having a clear set of rules for the defined area due to the spiritual connection to that area.

[78] Also, in *Whakatōhea Stage Two*, Churchman J acknowledged that the concept of tapu is flexible in nature and tapu may exist at some times and not as others, and the intensity may decrease the further away one gets from the source of the tapu.[46] In that case Churchman J also accepted that "the real nature of any particular tapu depends on the purpose for which it was identified or placed".[47]

[79] I accept that the tikanga concepts of "tapu" and "noa" are not irreconcilable antonyms, but rather "complementary opposites". Instead of conceiving of areas as necessarily being either tapu or noa, I accept, as Dr Joseph stressed "the starting point is everything is tapu". Having regard to that starting point, the collection and cultivation of food, for example, should not be misconstrued as suggesting a weakened connection or decreased level of tapu in relation to a proposed wāhi tapu.

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44 Law Commission *He Poutama* (NZLC SP24, 2023) at [3.101].
45 *Tokomaru*, above n 18, at [439] (footnotes omitted).
46 *Whakatōhea Stage Two*, above n 16, at [18].
47 At [428].

[80] The evidence and other sources noted above all indicate that certain behaviour or activities may be noa in one wāhi tapu and tapu in another. Similarly, behaviour or activities that are deemed noa may be permitted within a wāhi tapu, depending on the nature of the tapu at that particular site. At tikanga there is no general rule that certain behaviour, such as fishing, cannot take place in a tapu site.

[81] I also accept that areas of temporary tapu exist, as Dr Joseph explained. Accordingly, even areas where the tapu fluctuates dependent on context can still be recognised as wāhi tapu areas. In Dr Joseph's view, continued public access to sites is not inconsistent with them being wāhi tapu.

[82] Overall, I accept there is no hard and fast rule that a site where noa activities occur cannot be a wāhi tapu.

Connection with the wāhi tapu/standard of evidence

[83] A CMT group must establish "the connection of the group" with the wāhi tapu or wāhi tapu area in accordance with tikanga".[48]

[84] "Connection" is not defined in the Takutai Moana Act.

[85] The Attorney-General's submission is that to objectively establish that the site is a wāhi tapu or wāhi tapu area, and that a group has a connection with it as such, requires evidence of a widely-held belief of tapu (rather than merely individual subjective assertions). In the Attorney-General's submission, this will often translate into evidence of widespread observance of restrictions at, or tikanga specific to, the wāhi tapu site. Reference is made to Churchman J's statement in *Whakatōhea Stage Two* that:[49]

> One of the most obvious ways for an applicant to establish the connection between proposed restrictions or prohibitions on access to a wāhi tapu and the protection of the wāhi tapu is to provide evidence that, in accordance with tikanga, the same sorts of restrictions and exclusions are already observed by members of the applicant group.

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48 Takutai Moana Act, s 78(2)(a).

49 *Whakatōhea Stage Two*, above n 16, at [145].

[86] The Attorney-General acknowledges there is no particular prescription of what evidence will be sufficient to establish a widely-held belief or widespread observance of a wāhi tapu site, and this will probably vary according to the particular context. However, she submits that the contemporary evidence of a single witness will not generally be sufficient. External written sources and additional witnesses will generally be required.

[87] The applicants emphasise their shared tikanga in this coastal area. In their submission, their evidence establishes the connection, both collectively with other hapū and in their own right, in accordance with tikanga.

[88] The applicants also emphasise the nature of those connections as being sacred to them in a traditional sense, encompassing the spiritual and mythological connections they have with those wāhi tapu.

[89] Finally, they say the evidence establishes their kaitiakitanga obligations in these areas which tie them to these areas and require them to protect these wāhi tapu. As the applicants put it, the exercise of their customary interests and tikanga obligations requires hapū to protect their wāhi tapu so as to give effect to their tikanga. Protecting the tapu of the specific wāhi tapu sites ensures the mana and sanctity of the areas are maintained, that outsiders are kept safe from breaches of tapu or tikanga, and avoids adverse effects on the mana of the people. Protecting these wāhi tapu is part of the shared tikanga in this southern Wairarapa coastal area and part of the applicants' role as kaitiakitanga.

[90] The only guidance or limitation in s 78(2)(a) as to what may constitute a sufficient "connection" is "in accordance with tikanga"; tikanga must be the "principal guiding determinant in establishing whether or not a particular area is wāhi tapu".[50] I am reluctant to read in other, additional requirements.

[91] This approach was also endorsed by Churchman J in *Re Ngāti Pāhauwera* where he said the legal test under s 78 is:[51]

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50 At [115].

51 *Re Ngāti Pāhauwera*, above n 13, at [125]; and reiterated in *Whakatōhea Stage Two*, above n 17, at [114].

> … ultimately a bijural assessment based on both tikanga and statutory law, as the applicants will have to satisfy the two elements under s 78(2) set out above, but this will be based on the factual evidence given by kaumatua and others as to the tikanga of the wāhi tapu in the area. So the test is based on s 78(2), but will be heavily influenced by the tikanga of the applicants.

[92] In my view, to a large extent the necessary connection of the current applicants has already been recognised in *Re Ngai Tūmapūhia*, the stage 1(a) judgment, where they were granted CMT on the basis they were able to demonstrate that they hold the area in accordance with tikanga and have used and occupied it in accordance with tikanga since 1840. In reaching that conclusion the Court was required to assess extensive evidence of the applicants' connections to the broader CMT areas.

[93] Ngāi Tūmapūhia rely on Tipping J's direction in *Ngāti Apa* that "[t]he incidents and concepts of Māori customary title depend on the customs and usages (tikanga Māori) which gave rise to it".[52] That is, the Court should look to local experts and tohunga to establish the relevant tikanga. Dr Joseph agreed that was the orthodox approach.

[94] The standard (and source) of evidence required to demonstrate that a place is a wāhi tapu in the defined sense was discussed by Churchman J in *Ngāti Pāhauwera*.[53] The Court referred to two decisions of the Environment Court and a decision of the High Court.

[95] The passage cited from *Heta v Whakatane District Council*[54] concerned a situation where iwi were unable to agree as between themselves on the status of a Native Burial Reserve. It is not directly relevant here.

[96] In *Winstone Aggregates Ltd v Franklin District Council*[55] the Court commented that, while as a general principle, identification of wāhi tapu is "a matter for tangata whenua", claims of wāhi tapu "must be objectively established, not merely asserted. There needs to be material of a probative valued which satisfies us on the

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52 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [184].
53 *Re Ngāti Pahauwera*, above n 14, at [108]–[110].
54 *Heta v Whakatane District Council* EnvC Auckland A93/2000, 1 August 2000 at [27].
55 *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A80/02, 17 April 2002 at [251].

balance of probabilities. We as a Court need to feel persuaded that the assertion is correct".

[97] In this case the Attorney-General relied on that passage from *Winstone Aggregates* . But in my view, the third case cited by Churchman J is much more apposite. In *Takamore Trustees v Kāpiti Coast District Council,*[56] Ronald Young J said:

> The Court complains about a lack of "backup history" or "tradition". Again, it is difficult to understand what this means. Those in the iwi entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible and reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence. The Court complained it was bereft of "evidence" and had "assertion" only of the presence of koiwi. The evidence was given by koumatua based on the oral history of the tribe. What more could be done from their perspective. The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence. Nor could the kind of geographical precision apparently sought by the Court be reasonably expected. The claim of burials is within a defined area. To require a precise location of burial in such circumstances before satisfaction with the evidence is to potentially reduce many claims of waahi tapu areas to unproven and reduce s 6(e), (7) and (8) matters accordingly. If the test applied to koiwi presence by the Court was also applied to the presence of taonga, the Court would have logically been required to find their presence not proved. The fact it did not seems difficult to understand.

[98] In this hearing the evidence on which CMT orders were granted was amplified by the evidence of three rangatira, which was specific to the areas for which wāhi tapu protection is sought.[57] In each case the witnesses talked extensively of their hapū's kōrero about the areas; in some cases that is supported by external written sources and built on expert historical evidence given in *Ngai Tūmapūhia*. I am not persuaded that evidence of additional witnesses is also required, as the Attorney submits.

[99] I also agree with counsel for Ngāi Tūmapūhia that the concerns expressed by the interested parties about any proposed prohibitions on the rights preserved by ss 26-28 are engaged only when it comes to assessing the proposed restrictions or conditions in s 78(2)(b), not at the point of establishing whether the applicant group has an adequate connection with the area, under s 78(2)(a).

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56 *Takamore Trustees v Kāpiti Coast District Council* [2003] 3 NZLR 496 (HC) at [68].

57 In addition, Tā Kim Workman gave such evidence for the Kawakawa Trust.

Conditions and restrictions – must they relate only to access?

[100] As discussed above, s 79 specifies the wāhi tapu conditions that must be set out in a CMT order. These include the prohibitions or restrictions that are to apply and the reasons for them.[58]

[101] In this case Ngāti Hinewaka seeks prohibitions and restrictions of four different kinds across the various sites:

(a) Imposition of a rāhui where there is a triggering event such as a drowning, discovery of tūpāpaku, discovery of taonga, or a significant polluting event.

(b) That persons in a wāhi tapu area must not deface, damage, modify, remove or destroy physical features, including reefs, rocks or sand, in the wāhi tapu area.

(c) No erection of structures or infrastructure within the boundaries of the wāhi tapu.

(d) No powerboating and water skiing at all times within the boundaries of the wāhi tapu.

[102] Ngāi Tūmapūhia seek the following prohibitions or restrictions:

(a) prohibition on removal of any natural materials and/or taonga from the wāhi tapu that interferes with the mauri of the site;

(b) prohibition on any physical alteration of the natural environment in which the wāhi tapu exists;

(c) prohibition on the building of any new structures on the wāhi tapu;

(d) prohibition on any wilful damage to the wāhi tapu; and

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58 Takutai Moana Act, s 79(1)(b).

(e) rāhui/closure of the area in event of drowning/death, kōiwi being found or an emergency.

[103] The Attorney-General says the prohibitions or restrictions applied to protect a wāhi tapu or wāhi tapu area are limited to restrictions on access. Wāhi tapu conditions that are focused on regulating the exercise of use rights would be outside the scope of the Takutai Moana Act and ultra vires.

[104] What constitutes a restriction on access, the Attorney says, is informed by s 26(1) of the Act which sets out the following "rights of access":

(a) to enter, stay in or on, and leave the common marine and coastal area:

(b) to pass and repass in, on, over, and across the common marine and coastal area:

(c) to engage in recreational activities in or on the common marine and coastal area.

[105] Sections 26 and 27 enable access and navigation rights, otherwise protected under the Takutai Moana Act, to be subject to restrictions imposed under a wāhi tapu protection right, thus restricting public access rights. Those restrictions must be specified – both the specific locations and the reasons for protection. The prohibitions or restrictions imposed under s 79 of the Act may apply to:[59]

(a) any or all of the rights conferred by this section:

(b) 1 or more ways of exercising those rights:

(c) 1 or more defined periods, or an indefinite period, or recurring periods of a stated kind:

(d) 1 or more specified areas.

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[59] Section 26(3).

[106] Section 79(2) provides that conditions may affect the exercise of fishing rights (but must not do so to the extent the conditions prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area).

[107] In light of those provisions, the Attorney says wāhi tapu conditions could restrict or prohibit the ability to enter into, stay in, pass or repass over an area, or could restrict or prohibit modes of access by which such rights are exercised, which could affect the exercise of fishing rights (without preventing fulfilment of lawful quota entitlement), but no more.

[108] SIR relies on the words of s 78(2)(b) to also say that the nature of the wāhi tapu protection provided by the Takutai Moana Act is limited to controlling or preventing access to a place or area.

[109] Ms Wedde, counsel for the GWRC, also submits that wāhi tapu conditions must be only for the purpose of restricting access. Counsel says that follows from the nature and ordinary meaning of s 78(2)(b) ("the group requires the proposed prohibitions or restrictions on access") and from a wider reading of the Takutai Moana Act. Sections 26 and 27 are the only other provisions which refer to the wāhi tapu protection right. Ms Wedde submits that, on a proper reading, conditions that aim to regulate activities other than access are beyond the scope of s 78.

[110] More generally the GWRC was concerned about the effect of any prohibitions and restrictions on its functions. Section 104(3)(c) of the RMA provides that a consent authority must not grant a resource consent contrary to wāhi tapu conditions included in a CMT order. In his evidence for the GWRC Jack Mace set out relevant activities of the Council which the Council is concerned may be inadvertently prevented or impeded by some of the wāhi tapu protections sought. Those activities include RMA compliance and enforcement, environmental monitoring, environmental restoration, biosecurity, maritime safety, catchment management and flood protection.

[111] As at the date of the hearing the applicant groups had been working with the GWRC to ensure that any orders that may be made relating to wāhi tapu are sufficiently directive to be enforceable and do not impede the GWRC in carrying out

is role. They have provisionally agreed on the form of a "wāhi tapu exclusion clause", as part of any prohibitions and restrictions granted, to provide for the Council to carry out its mandatory statutory and maintenance functions in those areas. They have also agreed to enter into a fuller agreement, outlining more specific details of the exclusion and how this will look in practice.

[112] The agreed text of the clause is attached as Appendix One.

[113] The applicants interpret prohibition and restriction provisions differently from the Interested Parties. They say there is nothing in the Act to suggest that it is only restrictions on access that may be imposed. Counsel for Ngāti Hinewaka notes that in *Whakatōhea Stage Two* the Court had no issue with other restrictions, including the ability to impose a rāhui. Nor did the court have any issue with imposing control over activities. The only question was whether the activity could be adequately described to be certain and enforceable.[60] In that case the Court discussed proposed restrictions on damage to wāhi tapu areas, as sought here.[61]

[114] Mr Bennion notes that the term "access" is not limited in the Act to outright prohibition, but includes "restrictions on access". Nor does the Act limit restrictions simply to times of access. In counsel's submission, the words "restrictions on access" on their own are broad and not limiting. There is nothing in those words to indicate that restricting persons intending to undertake particular activities is outside the term. For example, a rāhui might allow that some activities still occur on the site after drowning, such as navigating but not fishing.

[115] In Ngāti Hinewaka's submission, the way in which access is discussed in s 26 supports this view. Section 26 provides that the right to "engage in recreational activities" in or on the common marine and coastal area is part of the right of access, but that part of the right is subject to "any authorised prohibitions or restrictions that are imposed under section 79". It follows that conditions can restrict recreational behaviour.

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60 *Whakatōhea Stage Two,* above n 16, at [253].
61 At [259]–[260].

[116] Mr Bennion gave examples of why restrictions on use, rather than simply access, may be required. The prohibition sought in relation to the erection of structures relates to markers in the cultural landscape that contradict the separateness of the wāhi tapu space – a place "that you don't go to", "keep away from", "places that are shunned and ought not to be challenged".[62] Counsel referred by analogy to the Proposed Wairarapa Combined District Plan which controls "visual encroachment" on wāhi tapu sites.

[117] Restrictions on physical damage to features in the CMCA are sought because of damage by road construction at Matakitaki-a-Kupe and by blasting of rock channels for aquaculture activities at Te Awaiti. Mr Te Whaiti gave evidence of this damage. Mr Te Whaiti agreed in cross-examination that there was no intention to indirectly prevent commercial fishing by such restrictions and suitable wording could be discussed with the SIR representative, Mr Sykes.

[118] The restrictions on powerboating sought by Ngāti Hinewaka relate to urupā areas and the restriction sought on water skiing in some sites relates to control over frivolous activity inconsistent with the values of the sites. In Mr Te Whaiti's words, there should be only "serious activities around those places".

[119] The general control over powerboating was sought because of a specific concern from time to time when kōiwi were found, but also more generally, large boats causing erosion around tauranga waka. In Mr Te Whaiti's view the areas over which wāhi tapu were sought are limited and any possible impact on fisheries must be balanced against the upholding of mana tuku iho in those limited areas.

[120] Counsel for Ngāi Tūmapūhia reinforced Ngāti Hinewaka's submission that prohibitions and restrictions are not limited only to access. There is nothing in the drafting of s 79 to suggest that the only restrictions are those relating to access. Although the requirement test in s 78(2)(b) is focused on whether the group requires "proposed prohibitions or restrictions on access", this must be read separately to s 79, which makes no reference to access. Section 78 is an acknowledgement of the fact that, in meeting the legal definition of wāhi tapu, these sites will on occasion require

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62 *Whakatōhea Stage Two,* above n 16, at [429].

a prohibition on access (as can be seen in the present case through the condition regarding rāhui).

[121] Counsel notes that although Churchman J only awarded conditions featuring prohibitions in relation to access, he did not indicate he thought this was the only kind of prohibition envisaged by s 79(1)(b). The Judge's reasons for refusing conditions such as restrictions on camping, commercial activity, signage and activities affecting mauri, were for, for example, a lack of connection to the wāhi tapu and uncertainty or vagueness of conditions.

[122] Mr Fletcher referred to the evidence of Dr Smith and Dr Joseph, which demonstrates that wāhi tapu and tikanga in general do not operate in such a black-and-white fashion, as either requiring or prohibiting access at all times. Instead, bespoke conditions reflecting the mauri, whakapapa and kōrero associated with the wāhi tapu are appropriate and necessary in order to protect these areas in a way befitting their tikanga, and ensuring that the rights preserved under ss 26-28 are not inevitably impacted through the recognition of a wāhi tapu. Dr Joseph noted that activities within wāhi tapu areas have historically been regulated.

[123] Ms Mataira for Rangitāne adopted and endorsed the submissions of Ngāti Hinewaka and Ngāi Tūmapūhia.

[124] The question whether prohibitions and restrictions are limited to "access" only is not without difficulty. The Act is not clear on this point. The starting point is s 79 ("**Wāhi tapu conditions**") which specifies the wāhi tapu conditions that must be set out in a CMT. These include "the prohibitions or restrictions that are to apply and the reasons for them".[63] There is no reference to "access" in s 79.

[125] Section 78 ("**Protection of wāhi tapu and wāhi tapu areas**") does refer to "access" in the context of the requirement for evidence to show that the proposed prohibitions or restrictions are "required" to protect the wāhi tapu or wāhi tapu area.[64] This appears to be a reference back to Subpart 2 of the Act which is headed "Subpart

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63 Takutai Moana Act, s 79(1)(b).
64 Section 78(2)(b).

2 – Public rights and powers over common marine and coastal area Rights of access" and s 26 itself, which is headed "**26 Rights of access**". This may be read as a shorthand for rights that are then enumerated, which may be the subject of prohibitions and restrictions. As Mr Bennion says, these give a broad meaning to "rights of access" and include the right "to engage in recreational activities in or on the common marine and coastal area".[65] The Select Committee report on the Bill suggested an amendment, subsequently adopted, which clarified that s 26(1)(a), (b) and (c) are separate rights.[66] This tends to support the argument that, at the very least, prohibitions and restrictions to protect a wāhi tapu or wāhi tapu area may relate to what occurs within a particular area, not just to the right to enter and leave the area.

[126] It might be argued that the omission from s 79(1)(b) of the words "on access" is a drafting error, but on a plain reading of the section there is nothing to suggest Parliament intended to use the same limiting words as in s 78(2)(b). Nor do the other provisions in the Act which refer to wāhi tapu restrictions and prohibitions[67] refer to "on access".

[127] In *Whakatōhea Stage Two* Churchman J did not grant any wāhi tapu protections related to use, but he did not hold that conditions which seek to regulate the behaviour of the public for reasons unconnected with access rights are not permissible. What the Judge did say was:[68]

> There must also be evidence to establish the link between the proposed prohibitions or restrictions on access and the protection of the wāhi tapu. If access restrictions are proposed that are unrelated to any element of protection of the wāhi tapu, the Court would not be entitled to approve them. The test in the Act is not just that the group "require" prohibitions or restrictions on access, it is that they require them to protect the wāhi tapu. Wāhi tapu prohibitions and restrictions are intended to protect areas that are sacred. A number of applicants have proposed conditions which seek to regulate the behaviour of the public *for reasons unconnected with protection of wāhi tapu.* That is not permissible.

[128] Although Churchman J only granted wāhi tapu conditions relating to access, he declined to grant other conditions for reasons other than them being ultra vires the

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65 Section 26(1)(c).
66 Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) (select committee report) at 43.
67 Sections 109 and 118(f).
68 *Whakatōhea Stage Two*, above n 16, at [144] (emphasis added).

Act because they related to usage rights. Those reasons included that the areas were not in the takutai moana,[69] insufficient evidence as to location and boundaries,[70] insufficient detail of the activity sought to be prohibited or restricted,[71] insufficient evidence as to why the prohibition or restriction sought was required to protect the wāhi tapu,[72] or insufficient certainty to enable enforcement.[73] Among the conditions considered by Churchman J was a prohibition on "vandalising" which was refused for insufficient detail and doubt as to whether the site was in the takutai moana.[74] That prohibition is similar to the one sought here which would prohibit wilful damage to wāhi tapu.

[129] The issue was not squarely confronted in an earlier decision of Churchman J in *Re Ngāti Pāhāuwera*,[75] for two reasons:

(a) Ngāti Pāhauwera's proposed prohibition on certain inappropriate behaviours in the application area was also framed as a "restriction on access" to those who behave inappropriately.[76]

(b) This condition was considered difficult to enforce and its mischief already addressed by existing legislation.[77]

[130] The *Tokomaru* case, which post-dated *Whakatōhea Stage Two (No. 7)*, did not address this issue as the applicants had not, at that stage, provided the detail or reasoning for their proposed protections.[78]

[131] Justice Churchman's implicit approach in *Whakatōhea Stage Two (No. 7)* that prohibitions and restrictions are not limited to access was made explicit in a follow-

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69 See, for example, at [237]–[240].
70 See, for example, at [239] and [242]–[247].
71 See, for example, at [251]. Restrictions were sought on the undertaking of "commercial activity" but the protection was declined because what amounted to "commercial activity" was not sufficiently detailed, nor why the prohibition was required to protect the wāhi tapu or wāhi tapu area.
72 See, for example, at [251], [284], [295], [297] and [461]–[462].
73 See, for example, at [252]–[253], [259]–[260] and [461]–[462].
74 At [259].
75 *Re Ngāti Pāhauwera*, above n 13.
76 At [145](b).
77 At [146]–[160].
78 *Tokomaru,* as above n 18, at [462]–[466].

up judgment in the same case, *Re Edwards (Whakatōhea Stage Two) (No. 8)*.[79] That judgment was referred to in the GWRC submissions and in Dr Joseph's report, but not cited by the parties seeking wāhi tapu protections. In the *No. 8* judgment, Churchman J allowed the following restrictions in respect of wāhi tapu and wāhi tapu area:

(a) A prohibition on fishing and whitebaiting in a particular part of a river,[80]

(b) A prohibition on consumption of food in that same part,[81]

(c) A prohibition on burials, scattering of ashes, and dumping of rubbish and other waste,[82]

(d) A prohibition on purging of the bilges,[83] and

(e) A prohibition on the processing of catch (kaimoana) in an area.[84]

[132] These conditions go beyond merely restricting rights of access. I accept the applicants' submission and respectfully agree with Churchman J's approach. Whether a proposed prohibition or restriction is within the terms of the Takutai Moana Act will depend on whether there is a link between the prohibition or restriction sought and the wāhi tapu and whether it is necessary to protect the wāhi tapu or wāhi tapu area (assuming the other statutory criteria are satisfied), rather than whether it relates to access rights. In a case where the tapu inherent in a site outside the takutai moana is found to extend to the takutai moana, the prohibitions and restrictions must be relevant to the wāhi tapu in the takutai moana, rather than regulating activities on the site adjacent to the takutai moana.

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79 *Re Edwards (Whakatōhea Stage Two) (No. 8)* [2023] NZHC 1618.
80 At [57].
81 At [60].
82 At [75].
83 At [90].
84 At [91].

When is wāhi tapu protection under the Takutai Moana Act "required"?

[133] The prohibitions or restrictions on access must be required to *protect* the wāhi tapu – that is, there must be a connection between the proposed prohibitions or restrictions and the protection of the wāhi tapu.[85] In *Whakatōhea Stage Two*, Churchman J declined to grant restrictions that went beyond what was needed to protect wāhi tapu. Included in that category were restrictions the applicant said were needed to "protect and ensure the mauri of the resources that sustain the entire ecosystem of the [Ōhiwa] Harbour".[86] The Judge also declined to grant a prohibition against the introduction of new species;[87] and a prohibition on removal or collection of minerals, as these would be owned by the CMT group when the CMT order was sealed so removal by other parties would then be prohibited.

Is protection under the Act required where protection is already provided by other instruments?

[134] A subset of the question whether a restriction or prohibition is "required" concerns the relevance of whether an activity is already the subject of regulation. The submission for the Attorney-General is that some activities are better dealt with under alternative mechanisms, such as the RMA and the Fisheries Act. The Attorney also notes that, as CMT holders, the applicants can influence activities without the need for designation of a wāhi tapu area.

[135] SIR also made submissions on the restrictions sought relating to defacing, damaging, modifying, removing or destroying physical features and noted that defacing physical features in any material way is likely to create an offence under the Summary Offences Act 1981 (s 11A), as would wilful damage (s 11). Modifying natural features or removing sand or rocks on any large scale would likely require a resource consent under the RMA and relevant Regional Plan, over which the CMT holder already has permission rights and the ability to make planning documents.

[136] The submissions for SIR also note that it is unclear what actions of lesser significance would constitute a breach of the requirements. The example given is

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85 See *Whakatōhea Stage Two*, above n 16, at [144], cited at [127] above.
86 At [317].
87 At [461].

whether a child removing a few stones or a bucketful of sand from the beach would be a breach.

[137] In relation to the restriction sought on the erection of new structures or infrastructure within the boundaries of the wāhi tapu, SIR notes that the erection of any new structure within the CMCA would require a resource consent under the RMA, in respect of which the applicants, as CMT holders, would have permission rights (s 66).

[138] In *Whakatōhea Stage Two* Churchman J refused restrictions as not "necessary" where they were already provided for in other instruments such as local bylaws. For example,[88] the Court concluded controls on the use of vehicles, dogs and horses were not required because local bylaws already covered the matter.[89] In *Ngati Pāhāuwera* the applicant sought restrictions on, for example, "polluting, littering or gutting fish onto the beach or into the water". The Court concluded that activity "can be addressed under existing legislation including regulations made under the Fisheries Act 1996 or the Resource Management (Marine Pollution) Regulations 1998".[90]

[139] I accept the submission made for the applicants that the Court should not adopt the Attorney-General's suggested approach. I agree that the "necessity" test must relate to the Takutai Moana Act and its purposes, including the purpose of recognising the "mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua".[91] There is no suggestion in the Takutai Moana Act that mana in places specifically identified as wāhi tapu should occur via third-party processes that may or may not provide for or recognise it. The bespoke enforcement provisions of ss 80-81, including provision for the appointment of wardens to wāhi tapu sites, strongly suggest otherwise.

[140] Further, as Mr Bennion submitted, other laws, such as bylaws and RMA planning documents, are made for a different purpose and can be altered by processes outside of iwi control. If necessity is tied to a current by-law or planning rule, the

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88 *Whakatōhea Stage Two,* above n 16, at [282]–[297].
89 At [290]–[297].
90 *Ngati Pāhauwera*, above n 13, at [159].
91 Section 4(1)(b).

restriction can be lost if and when the by-law or rule is repealed or replaced after the required consultation with the general public and consideration of matters under statutes other than the Takutai Moana Act. Other laws have a separate enforcement regime, taken by authorities who are not the applicants, who may have no rights in any enforcement process. That can be compared to wardens acting directly under s 80. Different penalties and case law apply and may not include any consideration of Māori and wāhi tapu interests, either directly or indirectly. Further, counsel says, it is not uncommon to have several rules concerning similar general subject matter applying to the same physical area. By way of example, archaeological sites on this coast are regulated under both the Pouhere Taonga Act and the RMA.

[141] Ngāti Hinewaka also addressed the related argument by the Attorney-General and GWRC that restrictions on behaviours or activities are not "required" because the matter can be dealt with in the planning document that may be prepared for the CMT area.[92] Ngāti Hinewaka argued that such planning documents:

(a) may only set out objectives and policies – the holders of CMT may not include rules restricting or prohibiting specific activities;[93]

(b) the regional council has discretion whether to adopt them as a plan change or not;[94]

(c) if they are adopted, are notified within a timeframe determined by the regional council;[95] and

(d) if they are notified, they are open to full public submissions[96] and a decision that may alter any proposed objectives and policies.

[142] Accordingly, the applicants have no ability to propose rules prohibiting certain behaviours within these wāhi tapu sites as part of the regional coastal plan and, even

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92 Takutai Moana Act, ss 85–93.
93 Section 85(2). Compare Resource Management Act, ss 67 and 68.
94 Section 93(6) and (10).
95 Section 93(7).
96 Section 93(9) and Resource Management Act, s 46A.

if they did, the process would be expensive, take many years, and have no certain outcome following public submissions.

[143] Justice Churchman did not reach a general, definitive conclusion that prohibitions and restrictions were not required where other legislative instruments were operative in either *Ngati Pāhāuwera* nor *Whakatōhea Stage Two,* although he did address the issue in relation to specific protections.[97]

[144] In my view, there is no hard and fast rule (whether as a matter of statutory interpretation, or general principle), that any activity already governed by other forms of regulation, or capable of being so, does not "require" protection under the Takutai Moana Act. That other regulation will be a relevant consideration, but it is not the entire consideration. Whether it means that wāhi tapu protection under the Act is not "required" will depend on the particular circumstances.

[145] In *Whakatōhea Stage Two*, Churchman J referred to restrictions sought by Ngāi Tamahaua which they said were for matters which cannot reasonably be protected by any other regulation or law. That was because: [98]

> … the protections which are being sought are matters which are intrinsically Māori concepts regulated by tikanga Māori as law. The preservation of the mauri of the site for example is a matter which only experts in tikanga and tohunga who practice the various rituals are able to perform. The protection of people not only physically, but spiritually and emotionally is also a matter which these restrictions are aimed at protecting where they are entering onto a site which is a wāhi tapu.

[146] I accept that it will sometimes be the case that protections sought will be "intrinsically Māori concepts" as counsel describe it and that, for that reason too, other forms of regulation will not be appropriate or adequate and wāhi tapu protection under the Act will be "required".

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97 For example, *Whakatōhea Stage Two*, above n 16, at [295]; and *Ngāti Pāhauwera*, above n 13, at [157].

98 At [236].

Rangitāne

[147] Rangitāne called evidence from Steven Chrisp and Mike Kawana. Mr Chrisp's evidence identifies six sites which Rangitāne say are wāhi tapu or wāhi tapu areas:

(a) Waikekeno Urupā;

(b) Waikekeno Stonewall Complex;

(c) Pāhaoa Urupā and Kāinga;

(d) Pukaroro;

(e) Archaeological sites from Mātakitaki to Lake Ōnoke; and

(f) Te Wharau-o-Kena.

[148] All but two of those sites are covered by the other applications. In any event, counsel for Rangitāne confirmed that those sites are identified by way of illustration and Rangitāne's position is one of whanaungatanga – supporting the kōrero of Ngāti Hinewaka and Ngāi Tūmapūhia regarding wāhi tapu within the coastal area and ensuring the Rangitāne kōrero in respect of wāhi tapu are shared.

Ngāti Hinewaka

[149] Ngāti Hinewaka seek wāhi tapu protection rights over 18 sites in the following categories:

(a) Tauranga waka sites;

(b) Foreshore and seabed areas adjoining coastal pā and urupā, including known areas of burials and historic papakāinga from which kōiwi have been removed;

(c) Known urupā that are being eroded by the sea (such as Te Kopi and Te Awaiti);

(d) The foreshore and seabed adjoining the Matakitaki-a-Kupe Historic Area, including Ngā Rā a Kupe and Matakitaki-a-Kupe. The rocks in this site are said to be imprinted with the blood, tears and mucus of Kupe as he grieved his daughter's departure (ngā toto, ngā roimata me ngā o Kupe); and

(e) The foreshore and seabed adjoining the Waikekeno Historic Area.

[150] The 18 sites all have adjacent coastal land recognised as having ancient links for tangata whenua under the Pouhere Taonga Act and nine are also sites of significance under the Proposed Wairarapa Combined District Plan (District Plan).

[151] The restrictions and prohibitions sought by Ngāti Hinewaka are set out at [101] above. The restrictions and prohibitions are sought to protect the mauri of the wāhi tapu and the ngakauora (health and wellbeing) of the descendants connected to the wāhi tapu.

[152] Daryl Sykes gave evidence on behalf of SIR, and it is appropriate to set out his evidence about the proposed restrictions at this point.

[153] Mr Sykes acknowledged that given each wāhi tapu area sought by Ngāti Hinewaka is relatively small and in close proximity to the shore, if commercial fishers were unable to harvest within these areas (individually or collectively) due to prohibitions or restrictions, that would be unlikely to have any material impact on their ability to catch their lawful entitlements, including in the commercial rock lobster and pāua fisheries. However, as Mr Sykes explained, one of the areas, Matakitaki a Kupe, is important to commercial fishers and he believes the area could be better defined so as to provide a greater level of protection for the wāhi tapu area and reduce the impact on commercial fishers. Mr Sykes and Mr Te Whaiti were, at the time of the hearing, in discussion on this issue.

[154] In addition, SIR was concerned that some of the prohibitions and restrictions sought may prevent commercial fishers from launching their vessels at several beach

landings/launching points, which would prevent commercial fishers from catching their lawful entitlements.

[155] Mr Sykes also expressed a concern that any prohibition on damaging or modifying physical features including rocks and sand might preclude, for example, the routine practice at Ōhinerua where the beach is routinely used by local bach owners to launch and retrieve small fishing vessels. This restriction might have the potential to prevent commercial fishing vessels from launching in any of the proposed wāhi sites where vessel launching currently occurs. Mr Sykes explained that this occurs at four sites. If commercial fishers were unable to launch their vessels they would be prevented from taking their lawful entitlements.

[156] Mr Sykes also explained that commercial fishers move their vessels constantly up and down the beach, using tractors and sometimes small bulldozers, in order to get them in and out of the water each day they fish. The significant wave action and regular storm surges along the South Wairarapa coast means that the gravel disturbed by the tyre or tread tracks is constantly groomed by the ocean and washed away. The presence of many such tractors and bulldozers at Ngawi beach for over 50 years is testament to this. There are also established protocols to ensure no pollution occurs from any diesel oil leakage.

[157] In relation to the proposed restriction powerboating and waterskiing at all times within the boundaries of the wāhi tapu, SIR says this proposed restriction also has the potential to prevent commercial fishing vessels from launching/retrieving vessels in any of the proposed wāhi tapu sites where this occurs. If commercial fishers were unable to launch their vessels, that would undoubtedly prevent them from being able to take their lawful entitlements.

[158] Mr Sykes questioned whether these restrictions were necessary in areas where the wāhi tapu site is not adjacent to an urupā.

[159] The evidence for Ngāti Hinewaka was given by Haami Te Whaiti. Mr Te Whaiti is one of the applicants for CMT in the application made by Ngāti Hinewaka, represented by Ngāti Hinewaka Me Ōna Hapū Hinewaka Karanga

Charitable Trust, on behalf of the hapū with mana moana within Ngāti Hinewaka Rohe Moana.

[160] Mr Te Whaiti's evidence explains his personal whakapapa which connects him to the rangatira of the nineteenth century, sets out his connection with the Ngāti Hinewaka Rohe Moana and draws on his expertise as a pūkenga to provide the traditional knowledge, whakapapa and history of the hapū tūrangawaewae who hold the mana tuku iho over the Ngāti Hinewaka Rohe Moana.

[161] Mr Te Whaiti gave evidence of his work over the years in wāhi tapu identification and protection above the highwater mean mark. He also spoke of the work he has undertaken for the Wairarapa Combined Councils (supported by iwi and the South Wairarapa Māori Standing Committee) on protection of sites of significance for the District Plan.

[162] Some of the sites for which Ngāti Hinewaka seeks wāhi tapu protection are Māori Sites of Significance, listed in the District Plan, under the RMA. Several of the sites have also been included in the New Zealand Heritage List | Rārangi Kōrero, as designated Historic Areas under the Historic Places Act 1993.[99] The significance of these designations is explained at footnote 36 above.

[163] The details of each area for which Ngāti Hinewaka seeks wāhi tapu protections are set out below. I have reached some global conclusions in respect of those sites, which I discuss here.

[164] First, I am satisfied that each of the sites is a wāhi tapu or wāhi tapu area in the sense of being a "place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense", as required by s 6 of the Pouhere Taonga Act and s 9 of the Takutai Moana Act. As discussed above,[100] I have concluded that the definition must be interpreted from a Māori perspective, rather than with a narrow view of what "sacred" means in pākehā terms.

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99 Since repealed and replaced by the Heritage New Zealand Pouhere Taonga Act 2014.
100 Above at [88].

[165] I am also satisfied that Ngāti Hinewaka has established the group's connection with the wāhi tapu in accordance with tikanga. Section 78(2)(a) of the Takutai Moana Act requires the evidence to show the connection of "the group" with the wāhi tapu or wāhi tapu area. "The group" is a reference to the group which has been awarded CMT.[101] Here, that is Ngāti Hinewaka. Mr Te Whaiti is a Ngāti Hinewaka rangatira and a pūkenga. He gave evidence for the group. His evidence was not disputed by any other applicant; nor was his standing to give that evidence on behalf of the group questioned by any party to the proceeding.

[166] Mr Te Whaiti's evidence addresses how Ngāti Hinewaka is connected to the wāhi tapu sites in accordance with tikanga.

[167] In respect of each area I go on to consider, first, whether it is within the CMCA and whether the boundaries of the area are known and can be sufficiently described so that any prohibitions or restrictions could be enforced.

[168] Only following that assessment of whether the site is within the CMCA, or the tapu can nevertheless be said to extend to the CMCA, and the clarity of the boundaries, have I gone on, where necessary, to consider the particular prohibitions or restrictions sought and whether they are required to protect the wāhi tapu or wāhi tapu area.

[169] Mr Te Whaiti produced annotated maps, with estimated dimensions, showing the areas sought to be designated as wāhi tapu. While generally the areas were small and in close proximity to the shore, the boundaries drawn were, as counsel for the Attorney-General submitted, somewhat arbitrary. Mr Te Whaiti agreed that when marking the boundaries of the wāhi tapu he had, in some of the maps (for example, Waikekeno), allowed a "buffer" to protect the wāhi tapu. As I will come to, the imprecision of and lack of explanation for some boundaries causes difficulties. It does not allow for clear identification of the wāhi tapu site, north to south, or the extent of the seaward boundaries.

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101 Takutai Moana Act, s 78(1).

Ngā Rā a Kupe

[170] Ngā Rā a Kupe is the site where Kupe and his companion Ngake contested to see which of them could make a sail in the shortest time. Kupe completed his sail first; both sails are still visible as the rock formation, which extends underwater into the ocean itself. The site is registered as an Historic Area with Heritage New Zealand and is included as a site of Māori significance in the District Plan (within the Matakitaki-a-Kupe area of Māori significance). Because of the significance of this taonga to tangata whenua the Crown transferred ownership of Ngā Rā a Kupe as cultural redress in its Treaty of Waitangi settlement to Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua.

[171] The restrictions sought by Ngāti Hinewaka are the ability to impose rāhui and a prohibition on damage and new structures.

[172] The Attorney-General says there is a lack of evidence that the boundaries of the site are known and able to be identified. Counsel also questions whether there is enough evidence to justify its extension into the CMCA. The site itself originates outside the CMCA, but I am satisfied from Mr Te Whaiti's evidence that it extends underwater into the ocean, meaning the site is clearly within the CMCA. Assuming that the rock structure forms the boundary of the wāhi tapu, the area is amenable to being clearly identified and boundaries drawn. In those circumstances, the site is capable of being recognised as a wāhi tapu.

[173] However, I agree with the Attorney-General that there is a lack of evidence that rāhui are needed to protect this site as a wāhi tapu, rather than the coastline generally, in response to trigger events.

[174] As to the other prohibitions or restrictions sought, it is not clear how a prohibition on "new structures" could apply to the wāhi tapu within the CMCA, rather than to the rock structure above MHWS.

[175] The applicant must file a revised map showing the extension of the rock formation into the moana and the clearly delineated boundary of the wāhi tapu area and clarifying the restrictions and prohibitions that are sought, including the reasons

for them that are supported by evidence and capable of enforcement. These must relate to the wāhi tapu within the CMCA.

Matakitaki-a-Kupe

[176] Matakitaki-a-Kupe is a site of cultural significance to Ngāti Hinewaka, as it is where Kupe made landfall during his travel along the Wairarapa Coast. Kupe had a prolonged stay at Matakitaki-a-Kupe, which may have been caused by problems with waka. Mr Te Whaiti's evidence is that in one account Kupe is said to have been grieving the departure of his daughter and he climbed to the top of the high ridge so that he could see where she had gone to, gazing at the mountains on the horizon, and so the place became known as Te Matakitakinga o Kupe ki te paenuku te waahi i haere ai tona tamāhine. The rocks were imprinted with "ngā toto me ngā roimata me te wai of te ihu" of Kupe in this moment of grief. Also, near Ngā Rā a Kupe was a bathing spot used by Kupe's daughters, one of whom, Mākaro, was menstruating at the time, which is why the water there remains red to this day.

[177] The restrictions sought are the ability to impose rāhui and a prohibition on damage and new structures.

[178] The site is recognised as an historic area by Heritage NZ and is a site of significance in the District Plan.

[179] I am sympathetic to Ngāti Hinewaka's concern to protect, respect and restore Te Taiao of the area, in light of Mr Te Whaiti's evidence[102] of previous damage to the site by road construction. The specific site is not within the CMCA and nor is it like, for example, Ngā Rā a Kupe where, although the wāhi tapu site is primarily above the CMCA, the rock formation does extend into the moana. However it is a case where the tapu inherent in the site affects the adjacent takutai moana and means the broader site may be a wāhi tapu and may justify the imposition of some prohibitions or restrictions.[103] I conclude that it is a wāhi tapu, subject to the applicant filing a map more clearly defining the seaward boundary.

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102 At [117] above.
103 *Whakatōhea Stage Two*, above n 16, at [131].

[180] Mr Sykes' evidence for SIR was that, at the time of the hearing, he and Mr Te Whaiti were in discussions about how the area might be more tightly defined so as to provide a greater level of protection for the wāhi tapu while reducing the potential impact on commercial fishers. I expect those discussions to inform the revised map to be filed.

[181] I note the same requirements regarding the prohibitions and restrictions sought as in relation to Ngā Rā a Kupe.

Ōhinerua

[182] Ōhinerua is a tauranga waka site on the eastern side of the Matakitaki No. 3 Fishing Reserve. It is a site of historical and cultural significance for Ngāti Hinewaka, with the reserve's significant role as a mahinga kai stretching back to the time of their tīpuna, Kupe.

[183] The site has been registered as an Historic Area with Heritage New Zealand.

[184] The restrictions sought are the ability to impose rāhui and a prohibition on damage and new structures.

[185] I agree with the Attorney-General's submission that there is insufficient evidence of signs or markers to define the site and a lack of evidence that the boundaries are known and able to be identified. Even if the boundaries of the site could be clearly identified, the evidence did not directly address how the prohibitions and restrictions sought are required to protect the wāhi tapu. I conclude that the requirements of the Act are not satisfied.

Titirangi

[186] At Titirangi there is a rock named Te Kakau a Kupe, the handle of Kupe's adze, making it a culturally significant site for Ngāti Hinewaka. It is also the site of a significant coastal papakāinga of Ngāti Hinewaka.

[187] The site is registered as an archaeological site with Heritage New Zealand. The rock formation itself is within the CMCA; the area around it is included as a site of Māori significance in the Proposed Wairarapa Combined District Plan.

[188] The restrictions sought are the ability to impose rāhui and a prohibition on damage and new structures.

[189] I agree with the Attorney-General that there is currently insufficient evidence of signs or markers to define the site and a lack of evidence that boundaries are known and able to be identified. While it appears there is some alignment of the boundary with reef formations, the evidence does not clearly explain that. If the applicant can produce a map that shows the boundaries more precisely it may meet the requirements for a wāhi tapu.

[190] As discussed in relation to Ngā Rā a Kupe and Matakitaki-a-Kupe, further submissions are necessary to clarify how the prohibitions and restrictions sought are required to protect the wāhi tapu.

Te Oroi

[191] Te Oroi is the site of a papakāinga of Ngāti Hinewaka and Ngāti Rangaranga hapū. This site is of both archaeological and cultural significance and includes sites of middens and ovens that are within the CMCA. Some of these sites have also been partially eroded by the ocean. This is also the site of an important traditional tauranga waka.

[192] The site has been registered as an archaeological site with Heritage New Zealand and is included as a site of Māori significance in the District Plan.

[193] The prohibitions and restrictions sought are the ability to impose rāhui and a prohibition on the erection of new structures or infrastructure.

[194] The difficulty with this site too is that there is insufficient evidence before the Court of signs or markers to define the site, or the locations of the middens and ovens that are eroded or submerged by the ocean. There is also a lack of evidence that

boundaries are known and able to be identified, other than by reference to the map provided by the applicant.

[195] The Attorney also points to a lack of evidence as to why the power to issue rāhui is needed to protect the site and *how* rāhui could protect middens and ovens eroded or submerged by the ocean. I agree with that reservation.

[196] This site does not satisfy the statutory criteria for wāhi tapu.

Pararaki

[197] Pararaki is the site of a significant coastal papakāinga of Ngāti Hinewaka. As with many papakāinga sites, there is an urupā nearby which lies near the mouth of the river. Mr Te Whaiti's evidence was that the urupā is directly at the edge of the beach and is an eroding urupā site. This urupā is a wāhi tapu of Ngāti Hinewaka, holding substantial spiritual and cultural significance to the community.

[198] The site is recognised as an archaeological site with the Archaeological Association of New Zealand and is a site of significance in the District Plan.

[199] The restrictions sought are the ability to impose rāhui and a prohibition on damage and new structures.

[200] The Attorney-General points to a lack of evidence of signs or markers to define the site, or the location of urupā that are partially eroded or submerged by the ocean. I note the general evidence of the tapu nature of urupā and I accept that coastal urupā can in some ways be distinguished from other wāhi tapu sites because of historic burial practices. As Mr Te Whaiti explained, while more modern urupā are within clear boundaries, that was not the case historically. Kōiwi were frequently buried in the sand dunes and it is not possible to draw strict lines around historic burial sites. This means there is a real possibility of kōiwi washing into the moana. That creates difficulties in terms of precisely defining the wāhi tapu boundaries.

[201] The applicant should submit a revised proposed wāhi tapu area that more precisely defines the location of the site sought to be protected. The map provided by

the applicant includes NZAA recorded burial/cemetery sites within the takutai moana. It may be that the maps prepared by the NZAA and relied on by the applicant are more detailed and provide more precision as to location.

[202] If the site can be sufficiently defined it would be appropriate to grant the power to impose rāhui. I accept that a rāhui may be necessary to protect the wāhi tapu, for example in the event kōiwi from the burial site were to become exposed.

[203] There was not sufficient evidence to show why the other restrictions sought were required to protect the wāhi tapu.

Te Awaiti

[204] Te Awaiti is the site of a significant coastal papakāinga of Ngāti Hinewaka. A coastal reserve was set aside here for the hapū to preserve their access to the takutai moana.

[205] As with many papakāinga sites, there is an urupā nearby. This urupā is a wāhi tapu of Ngāti Hinewaka, holding substantial spiritual and cultural significance to the community. Similarly to Pararaki, the urupā at Te Awaiti is being eroded by the ocean.

[206] This site is recognised as an urupā under TTWMA and is a site of significance in the District Plan.

[207] The restrictions sought are an ability to impose rāhui, prohibition on damage, prohibition on new structures and a prohibition on powerboating and waterskiing.

[208] This is a known urupā with a direct landward boundary. The Attorney-General says there is a lack of evidence of signs or markers to define the site and a lack of evidence that the boundaries are known and able to be identified. In particular, there is a lack of evidence as to how the larger claimed wāhi tapu area corresponds to the smaller landward boundaries of the known urupā site and a lack of evidence to justify the extension of tapu from the site of the known urupā into the CMCA.

[209] I accept that the nature of historic burials, as described by Mr Te Whaiti, and the proximity of the urupā to the coast, means that the wāhi tapu does extend into the CMCA. However, even allowing for that, the Court and those enforcing any wāhi tapu prohibitions or restrictions requires greater clarity as to the seaward boundary and the basis on which it is proposed. As with Pararaki, the applicant must file an amended map with greater clarity as to boundaries and which restrictions and prohibitions are required to protect the wāhi tapu within the CMCA.

[210] Ngāi Tūmapūhia also seeks wāhi tapu protection at a similar site. The Attorney-General points to a "discrepancy" between the two claims. But Ngāi Tūmapūhia seeks wāhi tapu protection for a site at Te Awaiti and Huariki on the basis there is a pā site there and known battle sites where Ngāi Tūmapūhia fought. I do not accept the submission that that undermines Ngāti Hinewaka's claim. Ngaī Tūmapūhia does not dispute the basis on which Ngāti Hinewaka seeks to have Te Awaiti declared a wāhi tapu, nor vice versa. The nature of the connection to the site and the reasons why it is said to meet the statutory definition are different in each case. That is consistent with different hapū and iwi having different kōrero about the same places.

Kārearea

[211] Kārearea pā is a site of cultural and archaeological significance, including an urupā overlooking the sea. Mr Te Whaiti gave evidence of a burial exposed, close to the stream and coastal area, and said that burials in the sand dunes were likely.

[212] The site is recognised by Heritage NZ.

[213] The prohibitions and restrictions sought are the ability to impose rāhui, a prohibition on damage and the erection of new structures, and a prohibition on powerboating and water skiing.

[214] The Attorney says there is a lack of evidence of signs or markers to define the site and a lack of evidence of the precise location where the burial was exposed. Also, there is a lack of evidence as to how the claimed wāhi tapu area corresponds to the site of the burial exposure and a lack of evidence to support the claims that burials are likely in sand dunes along this particular coastal area.

[215] The applicant should submit a revised proposed wāhi tapu area that more precisely defines the location of the site. Further submissions will also be required on the proposed prohibitions. It is not clear whether this is a site where powerboating could affect the washing out of kōiwi. As with sites referred to earlier, it is not clear how any prohibition on new structures is relevant. Nor is it clear why a restriction on waterskiing is required.

Te Kopi

[216] Te Kopi is the site of a significant coastal papakāinga of Ngāti Hinewaka, specifically Ngāti Rua, Horewai pā. A coastal reserve was set aside here for the hapū to preserve their access to the takutai moana.

[217] As with many papakāinga sites, there is an urupā nearby. At Te Kopi, the urupā site is on the beach, and has been partially eroded by the ocean. This urupā is a wāhi tapu of Ngāti Hinewaka, holding substantial spiritual and cultural significance to the community.

[218] The site is recognised as an archaeological site by Heritage NZ and is a site of significance in the District Plan.

[219] The restrictions sought are the ability to impose rāhui, a prohibition on damage and new structures and restrictions on powerboating and waterskiing.

[220] There is evidence of the landward boundaries of the site corresponding to the adjoining boundaries of the known urupā, but I agree with the Attorney-General that there is a lack of evidence of signs or markers to define the site generally, or the locations of urupā that are partially eroded or submerged by the ocean. There is also a lack of evidence that seaward boundaries are known. The Te Kopi site is different from the other sites of coastal urupā in that the road cuts between the known urupā and the CMCA and an additional intervening area sits between the road and the northern boundary of the known urupā. The applicant should file an amended map and evidence and/or submissions addressing this question.

[221] As to prohibitions and restrictions, it is not clear why rāhui may be required to protect the larger claimed seaward area, noting that the road cuts between the known urupā and the CMCA and that an additional intervening area sits between the road and the northern boundary of the known urupā.

[222] The Attorney-General acknowledges evidence generally that power boating may increase erosion, leading to exposure of kōiwi and thus (depending on clarification of the effect of the road) there is some basis to infer that restrictions on access by powerboating may help protect the tapu of the urupā.

[223] Mr Sykes, in his evidence for SIR, noted that the proposed restriction on powerboating and waterskiing has the potential to prevent commercial fishing vessels from launching/retrieving vessels in any of the proposed wāhi tapu sites where this occurs. If commercial fishers were unable to launch their vessels, that would undoubtedly prevent them from being able to take their lawful entitlements. As I understood his evidence, Mr Te Whaiti accepted that if the urupā was above MHWS a powerboating restriction was not necessary. Ngāti Hinewaka should discuss with SIR the formulation of wording that does not inadvertently adversely impact commercial fishing.

Pāhaoa

[224] Pāhaoa is one of three sites where the same difficulties arise in classifying it as a wāhi tapu under the Act. The other sites are Waikekeno and Puakaroro.

[225] Pāhaoa is the site of a significant coastal papakāinga of Ngāti Hinewaka, Pukekura pā. There is an urupā at Pāhaoa, on the north side of the Pāhaoa river.

[226] The site is recognised as an archaeological site and is a site of significance in the District Plan.

[227] The restrictions sought are the ability to impose rāhui, prohibition on damage and new structures, and a prohibition on powerboating and waterskiing.

[228] The location of the urupā on the map provided is not adjacent to the CMCA.

Waikekeno

[229] Waikekeno is the site of a significant coastal papakāinga of Ngāti Hinewaka, Pukehuiake pā. It is also significant to Ngāti Hinewaka as the place where Ngaokoiterangi was killed in battle.

[230] The urupā at Waikekeno is where many significant rangatira are buried, and where Mr Te Whaiti's whanaunga came to converse with their tīpuna.

[231] The site is recognised as an historic area by Heritage NZ and it is a site of significance in the District Plan.

[232] The restrictions sought are as for Pāhaoa.

Pūkaroro

[233] Pūkaroro is the site of a significant coastal papakāinga of Ngāti Hinewaka, particularly of Ngāti Te Aokino and Ngāti Rongomaiaia, an ūranga waka and a number of pā. A coastal reserve was set aside here for the hapū to preserve their access to the takutai moana.

[234] The site has been registered as an archaeological site with the Archaeological Association of New Zealand.

[235] The prohibitions and restrictions sought are as for Pāhaoa and Waikekeno.

[236] For all three sites there is a lack of evidence of signs or markers to define the sites and a lack of evidence that the boundaries are known and able to be identified. There is also a lack of evidence as to how the larger wāhi tapu area sought corresponds to the smaller area of the known urupā site. Unlike some others, in these three sites the urupā is not directly adjacent to the moana and the evidence does not account for the intervening area of land between the urupā and the CMCA. There is a lack of evidence to justify the extension of the tapu from the site of the known urupā into the CMCA.

[237] For Waikekeno there is also a lack of evidence to justify the extension of the tapu from the site of the known urupā or site of battle into the CMCA. For those reasons the site does not meet the requirements for a wāhi tapu.

[238] On the evidence before the Court, there is no jurisdiction to find that Pāhaoa, Waikekeno and Pūkaroro are wāhi tapu.

Waiwhero river mouth

[239] Waiwhero river mouth is a site of cultural and archaeological significance, as the site of a battle where the taua of Ngāti Hinewaka, Te Hikaopapauma, Ngāi Tūmapūhiaarangi and Ngāti Rongomaiaia attacked Te Aopakurangi's people. Waiwhero was named due to the stream running red with blood following the battle.

[240] Ngāti Kahungunu and Ngāti Hinewaka remained on the land and established the pā at Kārearea.

[241] The site is an archaeological site registered with Heritage New Zealand.

[242] The prohibitions and restrictions sought are the ability to impose rāhui, prohibitions on damage and the erection of new structures and a prohibition on powerboating and waterskiing.

[243] The Attorney acknowledges the evidence that the name Waiwhero refers to the stream running red with blood following battle, but says there is a lack of evidence of signs or markers to define the site of the tapu and a lack of evidence that the boundaries are known and able to be identified, other than by reference to the map provided by the applicant, and says there is some evidence that the boundaries are drawn arbitrarily to provide buffers. There is a lack of evidence to justify the extension of the tapu from the site of battle into the CMCA.

[244] I conclude that, for these reasons, the site does not satisfy the statutory wāhi tapu criteria.

Āwhea river mouth

[245] The Āwhea river mouth is a site of cultural and archaeological significance, as the site of the battle Hāwerawera. It is also the site of a significant coastal papakāinga of Ngāti Hinewaka. A coastal reserve was set aside here for the hapū to preserve their access to the takutai moana.

[246] The site is recognised by Heritage NZ.

[247] The restrictions sought are to the ability to impose rāhui, a prohibition on damage and on the erection of new structures and a prohibition on powerboating and waterskiing.

[248] The evidence before the Court did not clearly define the site of the tapu or explain how the boundaries were drawn. Mr Te Whaiti accepted that in this site and others the boundaries are drawn somewhat arbitrarily to provide buffers. There is a lack of evidence to justify the extension of the tapu from the site of battle into the CMCA. Nor is it clear how the restrictions sought are required to protect the wāhi tapu.

[249] In respect of this site too, the Attorney says there is a lack of evidence to justify the "discrepancy" between the wāhi tapu claimed by Ngāti Hinewaka and that claimed by Ngāi Tūmapūhia at a similar site.

[250] This site does not qualify for recognition as wāhi tapu, under the Act.

Rerewhakaitu river mouth

[251] For Ngāti Hinewaka the Rerewhakaitu river mouth is a site of cultural and archaeological significance, as a site where Kupe made landfall and left his nephews, and as a site of middens and ovens.

[252] The site has been registered as an archaeological site with Heritage New Zealand.

[253] The restrictions sought relate to the imposition of rāhui and a prohibition on damage.

[254] The evidence provide does not support the seaward extent of the claimed wāhi tapu area. There is a lack of signs or markers to define the site, or the location of middens and ovens that are eroded or submerged by the ocean. There is a lack of evidence that the boundaries of the area are known and able to be identified, other than by reference to the map provided by the applicant. Nor is it clear how the restrictions sought are required to protect the wāhi tapu.

[255] This site does not meet the statutory requirements for a wāhi tapu.

Mataoperu river mouth

[256] Mataoperu river mouth is a site of cultural and archaeological significance, as a site where Kupe made landfall. Here, Kupe left his nephew Mataoperu, leading to the name of this stream.

[257] It is also the site of a significant coastal papakāinga of Ngāti Hinewaka. A coastal reserve was set aside here for the hapū to preserve their access to the takutai moana.

[258] The restrictions sought relate to the imposition of rāhui and a prohibition on damage.

[259] However, I conclude there is a lack of evidence to justify the seaward extent of the wāhi tapu area claimed and a lack of evidence that boundaries are known and able to be identified, other than by reference to the map provided by the applicant.

[260] The site does not meet the statutory criteria for wāhi tapu.

Ōkorewa

[261] Ōkorewa is the site of a significant coastal papakāinga of Ngāti Hinewaka, bordering Lake Ōnoke. It was a valuable fishing kāinga for the hapū of Ngāti

Hinewaka. Both Ōkorewa and Kiriwai are associated with the tuna migration that runs beside them.

[262] The evidence of the historian Bruce Stirling in the part 1(a) inquiry set out the testimony of Te Whatahoro, who gave evidence of the hapū and rangatira associated with the area from Kiriwai to Ōkorewa, in 1891. Mr Te Whaiti's evidence referred to the numerous efforts of the community to have a reserve established here.

[263] The site is registered as an archaeological site with Heritage New Zealand.

[264] The protections sought are the ability to impose rāhui and a prohibition on new structures.

[265] The evidence before the Court did not adequately explain the seaward extent of the wāhi tapu area claimed, and there was a lack of evidence that boundaries are known and able to be identified. Nor was there sufficient evidence as why the particular restrictions sought are required to protect the wāhi tapu.

[266] The site does not meet the statutory criteria for wāhi tapu for those reasons.

Kiriwai

[267] Kiriwai is the site of a Ngāti Hinewaka papakāinga bordering Lake Ōnoke. It is located on a headland just behind the spit that separates Wairarapa Moana from the sea. As with Ōkorewa, Mr Stirling's earlier evidence documents the specific hapū and rangatira associated with Kiriwai.

[268] The site was a valuable fishing kāinga for the hapū of Ngāti Hinewaka. Archaeological research at the site has uncovered pits, terraces and walls running down to the edge of the lake.

[269] The site has been registered as an archaeological site with Heritage New Zealand.

[270] Again, I conclude that there is insufficient evidence to justify the seaward extent of the wāhi tapu area claimed and a lack of evidence that boundaries are known and able to be identified (other than by reference to the map provided by the applicant). For those reasons the site does not satisfy the statutory criteria for wāhi tapu.

Conclusion on Ngāti Hinewaka sites

[271] The following Ngāti Hinewaka sites are capable of being recognised as wāhi tapu sites, subject to further evidence at the final hearing of precise locations and boundaries and clarification of what restrictions or prohibitions are required to protect the wāhi tapu:

(a) Ngā Rā a Kupe;

(b) Matakitaki-a-Kupe;

(c) Titirangi;

(d) Pararaki;

(e) Te Awaiti;

(f) Kārearea; and

(g) Te Kopi.

Ngāi Tūmapūhia-a-Rangi Hapū Inc

[272] The restrictions and prohibitions sought by Ngāi Tūmapūhia in relation to all of their wāhi tapu claims are set out at [102] above. The prohibitions proposed are consistent across the various wāhi tapu. Ngāi Tūmapūhia say that the protections are limited in scope, seeking to maintain the mauri of the wāhi tapu in terms of both spiritual and physical integrity.

[273] Ngāi Tūmapūhia submits that these restrictions are required to ensure that the wāhi tapu are protected from being damaged, disrespected or altered in such a way that would interfere with or diminish the mauri and tapu of those sites.

[274] Ngāi Tūmapūhia seeks a wāhi tapu protection right for the whole of Te Ara Moana, from the southern bank of the Whareama River south to Āwhea River, starting at the mean high-water springs mark and 10 kilometres out to sea. If the Court is not minded to make such a determination, Ngāi Tūmapūhia says the legal threshold is satisfied for wāhi tapu recognition of the individual wāhi tapu sites named by Ngāi Tūmapūhia.

[275] Dr Takirirangi Smith gave evidence for Ngāi Tūmapūhia. Dr Smith is a kaumatua representing Ngāi Tūmapūhia-a-Rangi hapū. Dr Smith's personal whakapapa is that he is a descendant of Tio Rongomaiaia Waaka, his great grandfather, who had kainga at Okautete and Ngahape, which is part of the Kaihoata river system. Dr Smith has a PhD from the University of Auckland through the School of Education, concerning indigenous knowledge transformation. In addition, Dr Smith has an honorary doctorate in Literature awarded by Te Herenga Waka Victoria University of Wellington in recognition of his work with Matauranga Māori and Whakairo (Māori Carving).

Te Ara Moana

[276] Dr Smith's evidence was that the hapū hold sacred their relationship with Te Ara Moana, being the coastal passageway and waters off their tribal district. They seek wāhi tapu protection for the whole of their rohe moana. Dr Smith's evidence is that the mana to control the coastal land and sea from Whareama to Te Āwhea took place from Kaihoata. "It was a sacred relationship between the sea and the hapū. The sea and certain currents are our tipuna, and we whakapapa to these".

[277] Dr Smith's evidence was that, in later generations, after the death of Tūmapūhia at Te Unuunu, this right was challenged by the inland Wairarapa tribes. In the lower Kaihoata river valley, where Ngaokoiterangi was living, a request by the inland tribes to provide access to Te Ara Moana was refused. The signal to commence

warfare against Ngāi Tūmapūhia occurred when Te Hiha picked up a handful of sand, held it up to the tattooed spiral on his cheek and let it slip through his fingers.

[278] Dr Smith's evidence is that the subsequent warfare along the Ngāi Tūmapūhia coast, South Wairarapa and Te Whanga-nui-a-Tara, was initially caused over the control and possession of, the coastal passageway that lies off the Ngāi Tūmapūhia tribal rohe from Whareama to Te Āwhea. The consolidation of the mana of Ngāi Tūmapūhia as a result of these battles was also because of Ngāi Tūmapūhia's relationship or control of Te Ara Moana and the relationships that the hapū had developed previously with other hapū and iwi.

[279] This coastal passageway was a wāhi tapu to their tipuna and, in subsequent generations, has become more significant to the hapū as an integral part of Ngāi Tūmapūhia identity and intergenerational well-being.

[280] Dr Smith's evidence is that later generations have protected Te Ara Moana as an ancestrally inherited taonga and wāhi tapu. That protection was demonstrated in the time of Pouhokio, Dr Smith's grandfather's great-grandmother. The women of Ngāi Tūmapūhia observed a war party travelling by canoe out at sea. At the time, the men of the tribe had all gone fishing. It was the custom in those days to leave in the early morning darkness so that the stars could be used as a navigation aid to reach the fishing grounds which might be over the horizon. In response to the threat of the war party, the women donned pare (breast coverings) and gathered weapons. They then presented a haka from a hilltop in order to alert the taua to the potential danger if they diverted inland. This narrative highlights the importance and significance that Te Ara Moana has for Ngāi Tūmapūhia.

[281] Dr Smith's evidence is also that the coastal waters off the traditional tribal district of Ngāi Tūmapūhia is sacred to the hapū and of spiritual significance in that all human beings are conceived from it and spiritually and physiologically connected to it. These waters are Wai Māori and Wai Tai, being freshwater and saltwater respectively.

[282] Water also has a wairua connection in that the iwi's whakapapa states conception occurs in Hawaiiki where these two waters are joined. Hawaiiki is where all Māori come from spiritually in terms of whakapapa. Hawaiiki is also connected to the sunrise on the horizon. Ngāi Tūmapūhia's coastline being on the eastern seaboard has a visible presence of the sun rising on the horizon, which in turn takes on a special significance to the hapū.

[283] Where these waters converge, such as river mouths and coastal estuaries, those areas traditionally have been regarded as tapu week care would normally be taken. The traditional origin according to Ngāi Tūmapūhia whakapapa is that the rivers and valleys were created by taniwha who were the offspring of Urutengangana. It is his offspring (taniwha) sometimes occupy the entrances and other parts of these coastal river valleys.

[284] Dr Smith notes that for Ngāi Tūmapūhia wāhi tapu emphasises a sacred relationship defined through whakapapa and kōrero to a place, location or area. Important relationships can also be tapu, for example peace-making marriages. For Ngāi Tūmapūhia, wāhi tapu are spatial locations and areas that are being understood in this context.

[285] Ngāi Tūmapūhia cites Dr Joseph's pūkenga report, where he acknowledged that "the rohe moana is tapu and it is and could be considered under tikanga Māori as a wāhi tapu as a whole".

[286] The Attorney-General's view is that Dr Joseph's pūkenga evidence, consistent with the evidence of Mr Kawana and Mr Te Whaiti, establishes that Te Ara Moana is not a wāhi tapu for the purposes of the Act and does not require restrictions on access for its protection.

[287] In *Ngāti Pāhāuwera* Churchman J said:[104]

> It is conceivable that the entirety of an application area can be considered wāhi tapu. There may be future cases under the Act where the evidence quite clearly illustrates that an entire application area is wāhi tapu or is a wāhi tapu area in accordance with the tikanga of the local whānau/hapū/iwi.

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104 *Re Ngāti Pāhuwera*, above n 13, at [126].

[288] In *Whakatōhea Stage Two*, Te Ūpokorehe claimed the entire Ōhiwa Harbour as a wāhi tapu. In the alternative, they submitted that the number of individual claims throughout the harbour meant that the practical or pragmatic approach would be to recognise the entire harbour as a wāhi tapu.

[289] The Court appears to have considered that an order in relation to the whole harbour was theoretically possible, but ultimately was not satisfied that the entire Ōhiwa Harbour was appropriately classified as a wāhi tapu for the purposes of the Act[105] for a number of reasons: Te Ūpokorehe's claim that the entire harbour was a wāhi tapu was not supported by the other members of the CMT group;[106] activities like the gathering of kaimoana, fishing, travelling by waka and foot, swimming, and gathering other resources all take place there, and these activities are noa activities. Churchman J said this supports the conclusion that the whole harbour is not a wāhi tapu all of the time;[107] the evidence supported a conclusion that the harbour only becomes tapu in its entirety when specific events occur, such as the Whakaari eruption, a whale stranding, or when resources are polluted or running low and a rāhui is imposed. The Court found the evidence did not establish that the harbour itself has always been sacred and 'set aside'.[108]

[290] As Dr Smith's evidence emphasises, inherent tapu exists throughout Te Ara Moana. Mr Te Whaiti's evidence was to similar effect: Māori conceive of the whole of Aotearoa as wāhi tapu. But Mr Te Whaiti acknowledged that a narrower conceptualisation is available, particularly for purposes such as resource management.

[291] Mr Kawana's view was that, given the origins of wāhi tapu (specific events, locations and purposes that give rise to them) they are unlikely to be large areas and that protections are likely to be necessary and practicable only in respect of smaller, specific sites.

[292] I am guided by the evidence of Dr Joseph and Mr Kawana, both of whom acknowledged that tapu manifests in different ways and who agreed that, while Te Ara

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105 *Whakatōhea Stage* Two, above n 16, at [432].
106 At [431].
107 At [428].
108 At [427].

Moana might be considered tapu, and possibly a wāhi tapu in accordance with tikanga Māori generally, it is not a "wāhi tapu" or "wāhi tapu area" for the purposes of the Takutai Moana Act.

[293] I acknowledge that Te Ara Moana is important to Ngāi Tūmapūhia and the whole area has significance, as explained by Dr Smith. Tapu can subsist in natural features or elements without an area being a "wāhi tapu". But although tapu subsists in Te Ara Moana, and Ngāi Tūmapūhia may have kaitiaki obligations in respect of it, I conclude that it is not a wāhi tapu for the purpose of the Takutai Moana Act.

[294] I turn now to consider the specific areas within Te Ara Moana for which Ngāi Tūmapūhia seeks wāhi tapu protections. The details of each specific area are set out below.

[295] Ngāi Tūmapūhia say that these are prohibitions and restrictions sought for each area are already observed, as they are a manifestation of their kaitiakitanga responsibilities.

[296] As with Ngāti Hinewaka, I have reached some overarching conclusions in respect of the particular sites for which wāhi tapu protection is sought.

[297] First, I am satisfied that each of the sites is a wāhi tapu or wāhi tapu area in the sense of being a "place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense", as required by s 6 of the Pouhere Taonga Act and s 9 of the Takutai Moana Act. As discussed above, I have concluded that "sacred to Māori" must be interpreted from a Māori perspective, rather than a narrow view of what "sacred" means in pākehā terms.

[298] I am also satisfied that Ngāi Tūmapūhia has established the group's connection with the wāhi tapu in accordance with tikanga. Section 78(2)(a) of the Takutai Moana Act requires the evidence to show the connection of "the group" with the wāhi tapu or wāhi tapu area. "The group" is a reference to the group which has been awarded CMT.[109] Here, that is Ngāi Tūmapūhia. The evidence given by Dr Smith was for the

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109 Section 78(1).

group. Dr Smith's evidence addresses how Ngāi Tūmapūhia is connected to the wāhi tapu in accordance with tikanga.

[299] As detailed above, Dr Smith is a kaumatua for Ngāi Tūmapūhia. Both his standing as a rangatira and his formal qualifications mean he can speak authoritatively for Ngāi Tūmapūhia. His evidence was not disputed by any other applicant; nor was his standing to give that evidence on behalf of the group questioned by any party to the proceeding.

[300] In respect of each area I go on to consider, first, whether it is within the CMCA and whether the boundaries of the area are known and can be sufficiently described so that any prohibitions or restrictions could be enforced.

[301] Only following that exercise have I gone on, where necessary, to consider the particular prohibitions or restrictions sought and whether they are required to protect the wāhi tapu or wāhi tapu area.

[302] I note here some general reservations about whether the specific wāhi tapu are, or can be, described and boundaries identified.

[303] Dr Smith filed three affidavits and a number of maps in support of Ngāi Tūmapūhia's application. There was some difficulty with the quality and usefulness of the mapping. Ngāi Tūmapūhia's proposed wāhi tapu sites are identified using only maps with a hand-drawn colour highlighter, with the widths varying from site to site. The scale does not allow for accurate identification of the northern or southern limits, or the extent of the seaward boundary. It is not clear how far out to sea the areas are intended to go.

[304] In addition to the highlighted bands, Ngāi Tūmapūhia provided additional maps for each site, with conical areas marked on the maps and extending out to the 10-mile limit of the CMT granted. These areas are expansive, but imprecise and not charted or mapped in a reliable way. As I will come to, that makes it difficult for the Court to be satisfied of clear boundaries to the wāhi tapu.

[305] Dr Smith confirmed that he personally drew the proposed boundaries and he accepted in cross-examination that they were relatively arbitrary. In addition many of the boundaries on the maps were changed in a material way between those shown in Dr Smith's second and third affidavits.

[306] In general, the intended boundaries of the wāhi tapu are expansive and uncertain.

[307] A fundamental difficulty with the conical areas drawn on the maps is that taken collectively along the length of the coast, they would likely have a significant impact on the ability of commercial fishers to take their lawful entitlements (both in terms of the trawl fleet, as well as the rock lobster and pāua fisheries) and almost inevitably breach the s 79(2)(a) "prevent" test.

[308] I acknowledge the submission made by Mr Fletcher, counsel for Ngāi Tūmapūhia, that it was challenging to depict Ngāi Tūmapūhia's wāhi tapu on a map, as a segmented depiction of the takutai moana is fundamentally inconsistent with Ngāi Tūmapūhia tikanga. Counsel suggests that any concerns regarding the exact mapping of boundaries can be appropriately dealt with at the stage two hearing, with the assistance of a surveyor. In his submission, the areas are capable of being depicted on a map using coordinates or latitude and longitude to express their extent (that is the case whether the entire rohe moana is recognised or the individual sites throughout).

[309] While I accept that is possible to allow for some refinement at the stage two hearing, the basis for the tapu (including, where relevant, the basis for the extension of the tapu into the CMCA) should have been clearly articulated at this stage and the location of boundaries established with some degree of certainty.

[310] I go on to consider the specific sites in respect of which wāhi tapu protection is sought. Those areas are broadly categorised as locations associated with death/kōiwi, sacred currents and places where taniwha reside, areas associated with waka, gardens and cultivation areas.

Whareama River mouth and surrounding common marine and coastal area

[311] Although wāhi tapu protection was initially sought for this part of the rohe, the Whareama River mouth was subsequently shifted to the hearing relating to the northern Wairarapa coast. Accordingly, wāhi tapu protection is not considered in this judgment.

Waipupu

[312] Evidence was given of the general historical and cultural significance of this site. As described above, the general area is known as the area belonging to Pouhokio. This is the place where Pouhokio gathered the women of Ngāi Tūmapūhia to perform a haka when a taua was seen coming down the coast.

[313] Dr Smith referred to Waipupu as a former kāinga area with ūranga waka (an area where canoes were landed) and as an urupā site for important burials. In the 1840s, when Ngāi Tūmapūhia returned from Nukutaurua, Waipupu is where some of the canoes came back in. Evidence was given of the recent discovery of an old waka at the beach, which has since been given to the Aratoi Museum.

[314] Dr Smith's evidence was that the tapu extends out to sea beyond where the inshore currents occur. This is because those currents are considered sacred because of their whakapapa to Hinemoa and Kiwa, the ocean. But the mapping provided is inadequate to clearly define the area of the currents, nor can I have any certainty, based on the limited evidence provided (and the more general evidence of Dr Joseph and Mr Kawana), that the currents constitute discrete and definable wāhi tapu, rather than areas of latent or inactive tapu, as described in Dr Joseph's evidence. That is the case in respect of each of the other sites listed below where the wāhi tapu is said to extend into the takutai moana by reason of the tapu currents, and my conclusion in this respect also applies to the other sites discussed below.

[315] The applicant did not provide evidence to justify extension of the tapu from the site of historical urupā into the CMCA.

[316] The ūranga waka may be a wāhi tapu within the requirements of the Act, but a map with much more precise and confined boundaries than on the maps provided to date will be required before it can be recognised as a wāhi tapu.

[317] The applicant will need to file an updated map clarifying these matters.

[318] On the evidence available it is not clear how the prohibitions and restrictions proposed are linked to the protection of the wāhi tapu in the takutai moana. If an updated map is filed, the applicant should also ensure that the proposed prohibitions and restrictions are clearly liked to the protection of the wāhi tapu.

Te Uriti

[319] Dr Smith's evidence was that this site too is significant as an ūranga waka site, with the return of Ngāi Tūmapūhia from Nukutaurua in the 1840s. There was also evidence of a tapu associated with the historical pā, located at Te Uriti, particularly given the connection between coastal sites and waterways which run into the moana. It is for that reason, Dr Smith says, that the tapu at Te Uriti extends to the currents beyond the inshore.

[320] Dr Smith's evidence was also that Te Uriti's history as the site of a battle between inland tribes and Ngāi Tūmapūhia, imbue it with a high level of tapu. Te Uriti is also the location of taniwha, represented by a large papa kōhatu (rocky outcrop), which is only visible on certain occasions.

[321] While this site is plainly a place sacred to Ngāi Tūmapūhia, there was insufficient evidence to justify an extension of the tapu that relates to the battle site into the CMCA, which was claimed on the basis of the currents being tapu.

[322] There is therefore no statutory jurisdiction to recognise this site as a wāhi tapu.

Waiorongo

[323] At this site there is an urupā called Te Rua Kororara, where the tīpuna Hinehauone was buried. Dr Smith's evidence was that the whole area around the

urupā (including the river mouth) is tapu, as the urupā's presence next to a stream means that the wairua of the deceased returns to the water and travels back to their spiritual homeland.

[324] The urupā itself is a wāhi tapu in a general tikanga Māori sense, and I accept that the stream itself may have inherent tapu for the reasons given by Dr Smith, but the site of the urupā appears to be removed from the CMCA and there was insufficient evidence as to why the tapu should extend into the CMCA, such that the whole area claimed is a wāhi tapu in the sense required by the Act.

[325] As with the other specific areas already considered, there is in any event insufficient detail of whether boundaries exist and can be identified and mapped in a way that would provide certainty for those required to observe any resulting restrictions.

[326] There is therefore no statutory jurisdiction to recognise the site as a wāhi tapu.

Kaihoata

[327] Dr Smith's evidence was that "the mauri of the hapū is located with the Kaihoata river". The particular significance of the area is demonstrated in its intimate connection to Ngāi Tūmapūhia's whakatauki.

[328] The Kaihoata river mouth is said to be wāhi tapu for the following reasons. On the south side, the tomo (entrance) associated with an old pā at Kaihoata river mouth where Tūmapūhia lived was a sacred place and not trespassed on by strangers. On the south side there is an elevated ridge known as Te Rae o Rakaiwhakairi where karakia were recited related to the moana. In the beach area to the south of the river mouth, Ngāi Tūmapūhia tīpuna practised their rituals, which were carried out over the warriors on the area known as the paepae hamuti. To the north of the river mouth, the Ahirara cliff bank is a place of former cultivation and an urupā. The urupā was adjacent to the bank and around the 1900s the area eroded and the remains of some tīpuna were swept into the sea. The beachfront of Ahirara is also tapu because of a number of fossilised tree stumps where the awa meets the moana, which to Ngāi Tūmapūhia are tīpuna. Dr Smith's evidence was that these areas could only be

traversed (for example, for the gathering of rocks) once the tapu had been "mediated through karakia".

[329] The mapping provided by the applicant does not clearly identify the location of the urupā, so I am unable to assess its proximity to the CMCA and whether the risk of kōiwi being washed into the moana might mean that the tapu can be said to extend into a broader area.

[330] If the applicant were to file an updated map that clarifies that question of proximity of the urupā it may be possible to recognise the directly adjacent takutai moana as a wāhi tapu.

[331] Similarly, it may be that the fossilised tree stumps can be recognised as a wāhi tapu if a revised map is filed with precise and confined boundaries.

[332] As with Waipupu, further evidence and/or submissions are required as to how the restrictions and prohibitions sought are relevant to the protection of the wāhi tapu.

Karaka Bay

[333] Karaka Bay is located near Kaihoata. Its particular significance is that the remains of Ngāi Tūmapūhia tīpuna which fell off Ahirara cliff washed up there. Dr Smith's evidence was that, while members of Ngāi Tūmapūhia may gather kaimoana there, it is not tikanga for anyone else to do so, because of the nature of the urupā having extended into the water through the presence of the kōiwi. There will always be "tapu kōrero associated with this area, even if the degree of harmful tapu or patu tapu" were reduced through karakia.

[334] The location of the site of the washing up of kōiwi was not clear from the evidence. Nor was there evidence to establish why the area of tapu should extend beyond that (undefined) area.

[335] As for Kaihoata above, a revised map that clarifies that question of proximity of the urupā is required. In that event, it may be possible to recognise the directly adjacent takutai moana as a wāhi tapu.

Te Unuunu

[336] Dr Smith gave evidence of the tapū nature of the reef systems, toka and rua, which had been given traditional names by the hapū. These are tied to different tīpuna and their associated korero. The kelp varieties that exist there are also tapu and were formerly used in the whare wananga. Dr Smith explained that the wāhi tapu extends to the rocky outcrop south of Flat Point and out to the offshore area in a northeasterly and southeasterly direction.

[337] Dr Smith also gave evidence of the presence of a taniwha occupying the channel in this area and the resulting tapu nature of the currents.

[338] While there was some evidence that the claimed boundaries align with natural reef formations, there was a lack of evidence to justify the seaward extent of the tapu. The applicant will need to file a revised map with precise and confined boundaries before the site can be recognised as a wāhi tapu.

Motuwairaka

[339] Dr Smith's evidence was that the river itself and its bed are wāhi tapu. He also highlighted four specific rocks on the foreshore named after Ngāi Tūmapūhia tīpuna, which are also wāhi tapu.

[340] Motuwairaka is said to be wāhi tapu as a result of its strong history with Ngāi Tūmapūhia kōiwi. Dr Smith indicated the presence of an urupā at Motuwairaka, where the hapū's tīpuna are buried. A tīpuna, Hau, was thrown out of his canoe in the journey from Hawaiiki and washed up at Te Nukutaotaoroa a Haunui (now known as Riversdale), the beach at which the stream mouth meets the moana.

[341] The urupā, while itself a tapu area, does not extend into the CMCA and there was no evidence to justify why the claimed wāhi tapu area should be extended. There was no evidence of signs or markers that would define the site. Generally, there was a lack of evidence of defined and identifiable boundaries.

[342] There is therefore no statutory jurisdiction to recognise this site as a wāhi tapu.

Waikekeno

[343] For Ngāi Tūmapūhia, the tapu of Waikekeno stems from its history as a battle site, making the stream, its bed and beach tapu. Dr Smith also noted the historic use of the area as an ūranga waka for an associated pā site and gardens, for which the sand was used for cultivation through karakia. Ngāi Tūmapūhia says the tapu extends to the ocean currents, beyond the inshore.

[344] There was insufficient evidence to show why the tapu should extend beyond the site of battle into the CMCA. Nor was there sufficient evidence of known and identifiable boundaries.

[345] The Attorney-General also raises a question about the discrepancy between the description of wāhi tapu at this site claimed by Ngāi Tūmapūhia and claimed by Ngāti Hinewaka at a similar site. As I have discussed above, I do not think this is fatal to the application but for the reasons already outlined the statutory test for a wāhi tapu is not satisfied.

Waihingaia

[346] Waihingaia is a pā site and ūranga waka. There was also a kāinga there associated with tohunga. Dr Smith's evidence was that the tohunga would stand on cliffs above the waka, directing them out to sea by reading the stars, wind and currents to ensure the correct path was taken. For that reason, the tapu extends to the ocean currents beyond the inshore.

[347] "Honeycomb Rock" is known by the hapū as Te Kāhu and was named by Kupe or one of his daughters because of the rock's feathered and scalloped appearance, which resembles a bird.

[348] Again, there was insufficient evidence to define the tapu sites and to define and identify the boundaries and as to explain why the wāhi tapu should extend into the CMCA.

[349] The statutory definition of wāhi tapu is not satisfied.

Pāhaoa

[350] Dr Smith spoke of the historical building and launching of waka in the river near the coast. Tōtara trees and stumps were pulled from the river; karakia were carried out while building the waka. The waka were launched from the sheltered beach into the moana by taking advantage of a gap in the reef featuring a current. For that reason the tapu extends to the ocean currents beyond the inshore. Dr Smith also spoke of the presence of shellfish in the area, as well as a taniwha.

[351] There was a lack of evidence of signs or markers by which the site can be defined. Evidence was lacking that boundaries are known and identifiable. As previously discussed, there is insufficient evidence to extend the wāhi tapu into the CMCA by reason of the sacred currents.

[352] For those reasons, there is no statutory jurisdiction to recognise the site as a wāhi tapu within the terms of the Act.

Okoropunga

[353] Evidence was given of mara kumara and korou cultivation areas adjacent to the beach at Okoropunga. Dr Smith confirmed that the act of cultivating is itself tapu, but also that the area is tapu, because the different types of sand brought in to add to the soil for the gardens had different names, and were associated with rituals used in preparing gardening areas, including karakia.

[354] There was insufficient evidence to establish that tapu relating to the cultivation sites should extend into the CMCA. The sites were insufficiently defined and nor was there evidence that the boundaries are known and able to be identified.

[355] The Court therefore has no statutory jurisdiction to recognise the site as a wāhi tapu.

Pūkaroro

[356] There is a coastal pā at the southern end of the Pūkaroro reserve. This was an important waka ūranga where canoes landed. There was extensive cultivation in the

surrounding areas and there is kōrero around Ngāi Tūmapūhia sharing through resources with relatives in Heretaunga or Kaikoura.

[357] There was also said to be a taniwha, named Pāhoa-Porirua, around this area that travelled to Porirua.

[358] In this area too, the wāhi tapu is said to extend into the ocean and beyond where the inshore currents occur, because of the sacred nature of those currents.

[359] As discussed above, the evidence in relation to sacred currents was not sufficient to justify the seaward extension of the tapu. The Court therefore has no statutory jurisdiction to recognise the site as a wāhi tapu.

Te Awaiti and Huariki

[360] There is a pā site at Te Awaiti and Huariki and known battle sites where Ngāi Tūmapūhia fought. Dr Smith's evidence was that he himself is named after one of the tīpuna who fought in battles in this area against Te Ātiawa. There are also extensive garden areas here.

[361] Again, there was a lack of evidence that boundaries exist or are known and able to be identified. It is not clear from the evidence whether and, if so, to what extent, the boundary of the tapu areas extends into the CMCA.

[362] I have concluded that, if Ngāti Hinewaka is able to file an amended map with more clearly defined boundaries for the site at Te Awaiti, it may be capable of recognition. Ngai Tūmapūhia has sought recognition of this site, with different boundaries and for different reasons. It may be that further discussion between the applicants might mean they could agree the boundaries of the site and the reasons why restrictions and prohibitions are required.

Te Āwhea

[363] Te Āwhea also has tapu associated with battles, a pā site and gardens. Dr Smith's evidence was that the site was also an ūranga waka, meaning that the tapu extends to the ocean currents beyond the inshore.

[364] There is a lack of evidence that boundaries exist or are known and able to be identified. There was a lack of evidence to justify the seaward extent of the tapu and, as above, the evidence is not adequate to support an extension of the tapu on the basis of the sacred nature of the currents.

[365] The site does not meet the statutory requirements for recognition as a wāhi tapu.

Conclusion on Ngāi Tūmapūhia sites

[366] The following Ngāi Tūmapūhia sites are capable of being recognised as wāhi tapu sites, subject to further evidence at the final hearing of precise locations and boundaries and clarification of what restrictions or prohibitions are required to protect the wāhi tapu:

(a) Waipupu;

(b) Kaihoata;

(c) Karaka Bay;

(d) Te Unuunu; and

(e) Te Awaiti.

[367] The applicant should also file with their updated maps, submissions on what restrictions and/or prohibitions are sought in respect of each site and, critically, evidence that they are required for the protection of the wāhi tapu and are capable of enforcement.

[368] For both Ngāti Hinewaka and Ngāi Tūmapūhia, their submissions should also indicate how wāhi tapu status is consistent with the exercise of Ngāi Tūmapūhia's PCRs, where that is relevant.

Kawakawa 1D2 Ahu Whenua Trust

[369] The Kawakawa Trust seeks wāhi tapu protection for an additional site, at Punaruku, which falls within the area covered by the CMT referred to at [1(c)] above. Evidence was given on behalf of the Kawakawa Trust by Tā Robert Workman (Tā Kim).

[370] Tā Kim's evidence was that the trustees of the Kawakawa Trust exercise rangatiratanga over the land and abutting foreshore in this area. While acknowledging the overall governance role that the relevant iwi entities exercise in the Wairarapa, the trustees say that in their role as trustees of Māori land, it is their duty to represent the interests of 141 owners and protect the mauri of their tūpuna.

[371] Tā Kim's evidence detailed the Kawakawa Trust's efforts to preserve and protect wāhi tapu within the Kawakawa area, some on land owned by Kawakawa Station.

[372] In particular, Tā Kim referred to one wāhi tapu site that is absent from the current list of sites for which Ngāti Hinewaka seeks wāhi tapu protection. In the view of Tā Kim, this also should be included. That site is at Punaruku, which is a wetland at the northern end of the "KNE [Key Native Ecosystem] wetlands" near Ngawi. The site is significant to the Kawakawa Trust and was historically a freshwater source for early Māori, even as far back as Kupe. In evidence given at the Stage 1(a) hearing, the Court heard of the cosmological narrative of Kupe taking his daughters there to bathe.

[373] This wāhi tapu is described in the *Wairarapa Coastal Strategy Technical Report – Heritage*.[110] The Māori policy advisor for the Greater Wellington Regional

[110] Jason Kerehi *Wairarapa Coastal Strategy Technical Report – Heritage* (revised ed, July 2003).

Council at the time, Jason Kerehi, described the wāhi tapu in that report in the following way:

> **Punaruku Lagoon and Wetlands Area**
>
> **Location** – This wetland is located further south past Ngawihi Township on the coastal side of the road. The wetland is on Kawakawa Station.
>
> **Description** – A small wetland with a natural lagoon fed by a freshwater spring. The lagoon has several rock formations from which birds have nested in the past. The area (approximately ¾ ha) contains mainly coastal native grasses, flax and divaricating shrubs.
>
> **Maori name** – *Punaruku*: which means "the spring from which to dive".
>
> **What's there** – Punaruku Lagoon is a small coastal wetland that is fed by a natural spring emanating from the hills behind Ngawihi Township. This spring is held in legend to be a place regularly frequented by Kupe and his daughters.

[374] As Tā Kim notes, the wetland is in fact on whenua owned by the Kawakawa Trust (Ngawi Station), rather than on Kawakawa Station as referred to in the report.

[375] Tā Kim's evidence includes two maps of the area – the original 1896 Survey Map and a more contemporary map showing the associated wetlands development. Tā Kim proposed that the wāhi tapu area stretch to 50 metres below the MHWS.

[376] It is not clear from the evidence filed whether the site extends into the CMCA so that a wāhi tapu order could be made, if the applicant had standing.

[377] The restrictions sought in relation to this site are rāhui and closure of the area in event of emergency or environmental contamination or death. The Kawakawa Trust says those restrictions are necessary to preserve the mauri of the wāhi tapu. The relevant exemptions would be for wardens and kaumātua to enter the site to monitor the wāhi tapu.

[378] While no applicant opposed the Kawakawa Trust's application, on the face of it, the Kawakawa Trust does not have standing to seek recognition of a wāhi tapu within a CMT.[111]

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111 Takutai Moana Act, s 78(1).

[379] Nor is it clear from the evidence filed whether the site extends into the CMCA so that a wāhi tapu order could be made, if the applicant had standing.

[380] In *Ngāi Tūmapūhia*[112] I urged Ngāti Hinewaka to engage with the Kawakawa Trust about the holder(s) of the CMT orders granted. Tā Kim indicated in his evidence in this hearing that (at least as at the time of the hearing) kōrero between Ngāti Hinewaka and the Trust had not yet occurred. I urge that those discussions include whether this site might be advance by Ngāti Hinewaka as a wāhi tapu site (if it is considered to be in the CMCA).

Result

Recognised as wāhi tapu

[381] The sites which I consider are capable of being recognised as wāhi tapu under the Takutai Moana Act, subject to evidence of precise locations and boundaries and further evidence and/or submissions on what prohibitions and restrictions are necessary to protect the wāhi tapu in the CMCA, are:

<u>For Ngāti Hinewaka</u>

(a) Ngā Rā a Kupe;

(b) Matakitaki-a-Kupe;

(c) Titirangi;

(d) Pararaki;

(e) Te Awaiti;

(f) Kārearea; and

(g) Te Kopi.

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112 Above n 1, at [818].

For Ngāi Tūmapūhia

(h) Waipupu;

(i) Kaihoata;

(j) Karaka Bay;

(k) Te Unuunu; and

(l) Te Awaiti.

Next steps

[382] A timetable is in place for the filing of further material prior to a hearing on 28 – 30 April 2025 to finalise CMT orders.

Gwyn J

Solicitors:
Tamaki Legal, Auckland
Bennion Law, Wellington
McCaw Lewis, Hamilton
Thompson O'Neil & Co, Eltham
Hockly Legal, Auckland
Chapman Tripp, Wellington
Crown Law, Wellington
Buddle Findlay, Wellington

APPENDIX ONE

Exclusions to the wāhi tapu conditions

To avoid doubt, these conditions do not prevent:

a. Greater Wellington Regional Council from carrying out its statutory functions (such as environmental monitoring, compliance and enforcement, flood protection, catchment management, pest management and maritime safety) in accordance with relevant legislation such as the RMA, LGA, Biosecurity Act, Maritime Transport Act, or Soil Water and Conservation Act. Before carrying out any of these functions in a wāhi tapu area or wāhi tapu area, the Council will provide prior notice to [the CMT group] and will subsequent to carrying out the activity provide a report to the [CMT group]. If requested by the CMT group, the Council will also discuss with [the CMT group] whether any cultural support or advice is necessary to support the safe delivery of these functions. To avoid doubt, this exclusion does not limit or otherwise affect the operation of the RMA permission right as provided for under the Takutai Moana Act; or

b. In addition, and without limitation to the above condition, a person from carrying out an activity contrary to the wāhi tapu conditions, if that person has beforehand sought and obtained the permission of the [CMT group].

Advice note: In accordance with section 81(4) of the Takutai Moana Act it is not an offence for a person to do anything inconsistent with these conditions if:

- The person is carrying out an emergency activity as defined by section 63 of the Takutai Moana Act; or

- [Suitable wording for activities carried out by PCR groups.]